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

Case No: 1266/7/7/16 (T)

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

12 Tuesday 20th September 2022, Thursday 22nd September 2022

13
14 Before:
15 The Honourable Mr Justice Roth
16 Jane Burgess
17 Professor Michael Waterson
18 (Sitting as a Tribunal in England and Wales)

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21 **BETWEEN:**

22
23 Walter Hugh Merricks CBE

Applicant

24
25
26 v

27
28 Mastercard Incorporation and Others

Respondent

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

32 Marie Demetriou KC, Victoria Wakefield KC, Anneliese Blackwood (On behalf of Walter
33 Hugh Merricks CBE)

34
35
36 Mark Hoskins KC, Mathew Cook KC, Jon Lawrence, Sophie Bird (On behalf of Mastercard
37 incorporation and Others)

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(10.30 am)

Housekeeping

MR JUSTICE ROTH: Good morning.

These proceedings, like all proceedings in this Tribunal, are being livestreamed. An official transcript is being prepared of the proceedings in the usual way, but I must warn everyone who is watching on the livestream that it is strictly prohibited to make any recording or visual image of the proceedings and to do so would be punishable as a contempt of court.

We have seen the skeleton arguments and material that we have been given. Can I just clarify at the outset, I think there is a pending appeal to the Court of Appeal on the domicile date question; is that right?

MR COOK: Yes, my Lord, that's correct.

MR JUSTICE ROTH: It is correct.

MR HOSKINS: I have been stuck in a trial for the last ten --

MR JUSTICE ROTH: Yes, that's no surprise to me. But that presumably means that no notice has yet been given to the class.

MS DEMETRIOU: That's correct, yes.

MR JUSTICE ROTH: Do we know when the appeal might be heard?

MS DEMETRIOU: I am being told it's 2 November.

MR JUSTICE ROTH: Right. Thank you. So fairly soon. Presumably it's, what, two days or something, is it?

MS DEMETRIOU: I am told it's listed for one day, floating over two days.

MR JUSTICE ROTH: Yes. So there will be a judgment fairly soon. So yet again no notice has gone out to the class members.

Right. It seems sensible to deal with the matters on the agenda, first dealing with

1 amendments, then dealing with preliminary issues or split trial and then disclosure.
2 We may be able to make a start on disclosure today but if not, as you know, we have
3 Thursday morning in reserve. We absolutely have to finish at 1 pm on Thursday
4 because members of the Tribunal have other commitments in the afternoon.

5 So if we turn to the amendments and go to the draft re-amended claim form first
6 which is, I think, bundle A at tab 5, page A17, and there are what have been referred
7 to as correction amendments which I understand are agreed. So just to clarify that,
8 is that in A25, paragraph 23(iii) --

9 **MS WAKEFIELD:** Sir, my understanding is that was agreed in correspondence
10 some time ago, so it wasn't even included in any of the materials to this hearing.

11 **MR JUSTICE ROTH:** Yes, so that is agreed and the list is going to be provided.

12 **MS WAKEFIELD:** It is.

13 **MR JUSTICE ROTH:** That's understood.

14 **MS WAKEFIELD:** It was provided.

15 **MR JUSTICE ROTH:** Excellent. So that is agreed. Then is it paragraph 113 on
16 A65?

17 **MS WAKEFIELD:** Yes, sir.

18 **MR JUSTICE ROTH:** So instead of Mastercard UK domestic MIFs, it's intra-EEA
19 fallback MIFs and that's also agreed; is that right?

20 **MS WAKEFIELD:** That is agreed. In fact, it was Mastercard who pointed out our
21 slip to us.

22 **MR JUSTICE ROTH:** Yes, and that follows through into the reply --

23 **MS WAKEFIELD:** It does, sir.

24 **MR JUSTICE ROTH:** -- which is at the next tab, page A88, paragraph 48. Is that
25 right?

26 **MS WAKEFIELD:** Absolutely.

1 **MR JUSTICE ROTH:** And those amendments, that's right, Mr Hoskins, is it, those
2 are agreed?

3 **MR HOSKINS:** Yes.

4 **MR JUSTICE ROTH:** So we give permission to make those amendments.

5 **MS WAKEFIELD:** Thank you, sir.

6 **MR JUSTICE ROTH:** So we can turn to the contested amendments which are at
7 105A and consequential on A57.

8 **MS WAKEFIELD:** They are, sir.

9 **MR JUSTICE ROTH:** Yes. They are two quite different amendments in A and B.
10 So, Ms Wakefield, would you like to address us on those.

11

12 **Submissions by MS WAKEFIELD**

13 **MS WAKEFIELD:** I will, sir. Starting by taking you through the pleading. In
14 paragraph 105A(a), we have the MSC run-off overcharge, as we term it, so that
15 flows, of course, from our succeeding on our argument that the infringement caused
16 MSCs to be inflated and the MSC run-off concerns loss which is subsequently
17 suffered when, even though the intra-EEA MIFs and the domestic IFs which the
18 acquiring banks were paying did reduce, the MSCs which the acquiring banks
19 charge to the merchants did not reduce. So the causal argument there is the MSCs
20 remained at an inflated level compared to the level at which they would have been
21 set, absent the infringements. So that is run-off type one, the MSC run-off
22 overcharge. Then we see in (b) the other type of run-off overcharge which we've
23 termed domestic IFs run-off overcharge. So that flows from our succeeding on our
24 argument that the infringement caused domestic interchange fees to be inflated and
25 their run-off concerns loss which is subsequently suffered when, even though the
26 intra-EEA MIFs did reduce, the domestic interchange fees did not reduce and there,

1 the causal argument is that the domestic IFs remained at the inflated level,
2 compared to the level at which they would have been set, absent the infringement.

3 So those are the two different types of run-off overcharge. I will turn shortly to the
4 factual basis for those two pleadings but will just take you now, if I may, to the other
5 paragraphs in our claim form so that you have them. In paragraph 105B we have
6 a duration point so we aver no loss will be claimed after 6 September 2016. That's
7 the long stop. But we say we can't plead any further to the precise duration of either
8 type of run-off with any precision at present. I will come back --

9 **MR JUSTICE ROTH:** The choice of 6 September 2016 is simply because that's
10 when the proceedings were issued, is it?

11 **MS WAKEFIELD:** It is. It's a pragmatic one, sir. It makes things easier from a data
12 and methodological perspective. So it may well be that the loss continues
13 subsequently but it makes sense to cut it on 6 September 2016.

14 Of course, one of the reasons to have a fixed duration for the run-off is to make sure
15 everyone knows the scope of disclosure, of what's proportionate and what will be
16 required and for that reason, we thought we needed to plead a date. 6 September
17 makes sense.

18 We also make the point in 105B that there is obviously and to say the obvious,
19 a need to make the two different types of overcharge internally consistent. And you
20 will doubtless have picked up when I was setting out the two different types of
21 overcharge that for one of them, domestic IFs remain high and for the other one,
22 they go low. So we have to make sure it's one or the other in that case.

23 Paragraph 106, we deal with pass-on of the domestic IFs from overcharge because
24 that's an interchange fee overcharge. We need to show pass-on the acquiring bank
25 to merchant level, in the same way as the principal overcharge. 106A is the
26 incurring of the MSC run-off overcharge by the merchants. That's not pass-on

1 because, of course, the MSCs charged by the acquiring banks to the merchant, so
2 they are incurred in the first instance by the merchants. In an earlier iteration, in fact,
3 of this pleading, there was a mistake in how we addressed that point. Mastercard
4 pointed it out and we plead it differently now. So that's why we have differential
5 pleadings for the extent to which we show pass-on or not.

6 Then we have at paragraph 107, pass-on to consumers via higher prices, so that's
7 merchants to consumers and everything is totally normal at that point, it's
8 a conventional analysis.

9 Then at paragraph 11A, we make clear that we are applying for an aggregate award
10 of damages and 112 --

11 **MR JUSTICE ROTH:** 111A.

12 **MS WAKEFIELD:** 111A. I apologise, sir. 111A we make that clear.

13 At 112, we distinguish between overcharge and their run-off overcharge at 112,
14 addressing principal overcharge.

15 112A, we reserve the right plead further as to the loss suffered as a result of the
16 run-off overcharge, following the disclosure and evidence.

17 113 we've addressed already, of course, that's the corrective amendment and then
18 120 just changes the relief sought. So those are really consequential amendments.

19 Our application, sir, which is made pursuant to rule 32(1)(b) of the rules, is for
20 permission to make those amendments. We say that they are plainly arguable and,
21 indeed, we don't understand Mastercard to contend the contrary. I am going to take
22 you through now, relatively quickly, I hope, the factual premise for the amendments
23 now or the trigger for them being brought now. First of all, if I start with the MSC
24 run-off overcharge.

25 **MR JUSTICE ROTH:** Or we should deal with them separately because they are
26 rather different, aren't they?

1 **MS WAKEFIELD:** I am going to deal with them separately yes, sir, that does make
2 sense. So the MSC run-off overcharge, if I start with that one. As set out in
3 paragraphs 5 and 6 of our application, the current basis for that type of run-off is the
4 Payment Systems Regulator report for market review and card acquiring services
5 which was dated November 2021, so it's relatively recent that it came out. It's relied
6 upon in Mastercard's defence in paragraph 105.

7 If I take you there, sir. That's in volume 2 of the A bundles at tab 25 at page 1350. If
8 we look at the preceding page, just so we situate ourselves correctly in the
9 pleadings, so A1349, you'll see the subheading "Acquirer pass-on." Sorry, sir, you
10 are still turning it up.

11 I don't know if all members of the Tribunal have that now. So at 1349, you see
12 above paragraph 103 the subheading, "Acquirer pass-on." Then if we go to
13 paragraph 105, it says:

14 "Mastercard will refer to the Payment Systems Regulator's ("PSR") November 2021
15 report on the UK acquiring market which concluded that there was little or no
16 pass-through of reductions in interchange fees as a result of the interchange fee
17 regulation into lower MSCs for both small and medium merchants and large
18 merchants with an annual card turnover below £50 million."

19 So I will take you to the PSR report in due course but shortly put, that's exactly the
20 causal case for which we contend in respect of those particular merchants. Namely,
21 there was no pass-through of the cost savings when interchange fees were reduced.

22 The second sentence relates to the differing position according to the PSR report in
23 respect of those very large merchants which operated on a certain kind of contract
24 called an interchange plus plus contract. So that's the point about different
25 contractual arrangements which we refer to in our draft amendments. In 105A(a),
26 we say it may well be the case that pass-on is different for different kinds of contracts

1 and, indeed, for IC plus plus contracts in particular it may well be the case that the
2 cost savings were passed through.

3 On the other hand, we have not carved it out definitively at this stage because we
4 need disclosure of the documents to understand exactly who was on which
5 contracts, how they worked in practice.

6 **MR JUSTICE ROTH:** You say disclosure. Mastercard won't have those contracts,
7 will they? These are contracts between the acquiring banks and merchants.

8 **MS WAKEFIELD:** It is, sir, and I will come on to how we are going to address all of
9 this methodologically and by reference to which data sources in due course but we
10 say --

11 **MR JUSTICE ROTH:** Where is that set out? How are you going to address it
12 methodologically, in your skeleton or Mr Coombs' report?

13 **MS WAKEFIELD:** So, sir, in our skeleton argument I set out the methodology and
14 our position is it will be determined at the same time as acquirer pass-on. It's part of
15 acquirer pass-on, it's the same analysis. No one is suggesting, I think, at present
16 that acquirer pass-on be heard in what I am referring to as trial one but --

17 **MR JUSTICE ROTH:** No acquirer pass-on was addressed in your expert report for
18 certification --

19 **MS WAKEFIELD:** Yes, sir.

20 **MR JUSTICE ROTH:** -- and was treated as a straightforward question. Now you
21 are saying it's very complicated, it will differ between merchants, it will differ
22 according to the contractual arrangements between merchants and banks.

23 **MS WAKEFIELD:** Sir, Mastercard is saying it will differ between different
24 merchants, that's their pleaded defence, so that narrows how acquirer pass-on will
25 be determined in respect of the principal overcharge.

26 **MR JUSTICE ROTH:** Are they saying -- I thought they were saying there's no direct

1 connection and isn't that the point they make in their defence? They are saying it
2 doesn't -- the MSC doesn't actually track interchange fees.

3 **MS WAKEFIELD:** Yes.

4 **MR JUSTICE ROTH:** Generally.

5 **MS WAKEFIELD:** One of the pieces of evidence which they will be relying on for
6 that is what happened in the subsequent period in respect of the pass-on of cost
7 savings. So we saw that plea and we said: well, if you are running that, the trigger
8 for you running that, I have seen you run that, we would want to take the benefit of
9 that argument because if we are right on our premise that MSCs were inflated but if
10 that's factually true or is found in the PSR report, there continued to be an unlawful,
11 elevated MSC. But, sir, our submission is very much that this will in no sense
12 increase the complexity of what has to be determined at the acquirer pass-on point.

13 **MR JUSTICE ROTH:** No, but what I am trying to understand is what is the method
14 by which you are going to get an aggregate damage calculation if there is this
15 diversity of pass-on? We've had a method, a very detailed method explained by
16 your experts, of how you are going to deal with diversity of pass-on from retailers to
17 consumers because they recognise there is a diversity and they explained how they
18 are going to deal with it and we looked at it all at the certification stage, as we have
19 to, and indeed, required some explanation because we weren't satisfied on the
20 written reports. But having heard from the experts, the Tribunal was satisfied that it
21 was a plausible method and credible and could be approved.

22 But where is the method for dealing with this diversity?

23 **MS WAKEFIELD:** The diversity, sir, if the answer to our case is there's different for
24 different merchants, then there would have to be some form of disclosure, whether
25 it's sampling or across all of the merchants, and then there would have to be
26 a treatment of the different kinds of VOC differently for the different kinds of

1 merchants but as I understand it --

2 **MR JUSTICE ROTH:** (Overspeaking) commerce for different merchants -- how
3 many merchants, how different is it and so, where is the method explained -- it's not
4 very satisfactory to get it sort of on the hoof, in answer to questions.

5 **MS WAKEFIELD:** Sir, the point here is that it flows from Mastercard's defence, so
6 we have pleaded there was acquirer pass-on. We have pleaded presumptively, the
7 rate of 100 per cent because that was the rate assumed in Sainsbury's and in those
8 big retailer actions. It's been said in the defence and I think in other hearings by
9 Mastercard, that the reason it was 100 per cent in those cases is because of IC plus
10 plus contracts -- actually, there were also blended rate contracts. That's come from
11 their side of the courtroom, if I put it that way. I have never understood it to be
12 suggested that that means we have to re-attack the certification requirements and
13 propose a fresh methodology which would allow that to be determined collectively.
14 I have never understood that point to be made in respect of the principal overcharge
15 and nor do we have to, for that same determination, the principal overcharge, to be
16 rolled out to this very closely allied question of MSC level in the subsequent period.
17 To that I would add, sir, and I know this is a difficult issue for us today but, of course,
18 we have the prospect of an application for a UPO with the merchant proceedings.
19 Definitely in respect of merchant pass-on but quite possibly as well in respect of
20 acquirer pass-on. What's always said against us in respect of merchant proceedings
21 is: the data there relates to the wrong period and it's all extrapolating back. But, of
22 course, all the information we get in the merchant proceedings will be the right period
23 for this claim, so will be even stronger than for the principal claim, in relation to which
24 we have the extrapolation arguments.

25 So I say, sir, that on the basis that acquirer pass-on remains certified and that there
26 is no obligation on us to refile a fresh expert report in light of Mastercard's defence,

1 | so too do we have an adequate methodology for that exact same issue in respect of
2 | the run-off MSC levels and the different contracts.

3 | **MR JUSTICE ROTH:** You put forward a methodology on the basis that there is
4 | 100 per cent pass-on. That was the method you put forward.

5 | **MS WAKEFIELD:** Yes, sir.

6 | **MR JUSTICE ROTH:** Mastercard are saying that's not right.

7 | **MS WAKEFIELD:** But it's --

8 | **MR JUSTICE ROTH:** It's not 100 per cent pass-on. That's all they are saying,
9 | I think.

10 | **MS WAKEFIELD:** They are saying it differed depending on the different contracts.

11 | **MR JUSTICE ROTH:** Yes, so they are saying you can't rely on 100 per cent
12 | pass-on for all cases. That's what they are saying.

13 | **MS WAKEFIELD:** That is what they are saying. Sir, I hope you don't think it an
14 | impolite question for me ask of you -- it's not normal for counsel to ask a question of
15 | the judge in this way but is the point you are putting to me that we should have to
16 | meet certification requirements again, in order to maintain our CPO in the face of
17 | their defence, for the principal overcharge?

18 | **MR JUSTICE ROTH:** You are wanting to amend it to add this additional, potentially
19 | long period of claims now.

20 | **MS WAKEFIELD:** Sir, we are. My point is simply that because it should be
21 | determined in the same way as the principal overcharge, they stand or fall together.
22 | And if I am not obliged, each time Mastercard positively assert a defence or take
23 | a point, to have my experts re-instructed to propose a new way of addressing it
24 | collectively, if that isn't the obligation -- and it won't surprise you to hear I say that's
25 | not the obligation and that would absolutely run counter to the effective working of
26 | the regime and all of the statutory purposes that we know developed from Merricks

1 in the Supreme Court -- if that isn't the obligation in respect of the principal
2 overcharge, then nor can it be the obligation here because they would be determined
3 as part of the same proceedings by reference to the same evidence. Most critically,
4 what we're discussing presently is the availability of different contracts.

5 **MR JUSTICE ROTH:** Are you saying that this work has to be done for the existing
6 claim anyway?

7 **MS WAKEFIELD:** Absolutely it has to be done.

8 **MR JUSTICE ROTH:** Because of Mastercard's defence.

9 **MS WAKEFIELD:** Because of their positive defence.

10 **MR JUSTICE ROTH:** Or they will have to make that argument.

11 **MS WAKEFIELD:** That's it, they will have to make their argument. They will.

12 **MR JUSTICE ROTH:** Yes. If they are to succeed on it.

13 **MS WAKEFIELD:** If they are to succeed on it.

14 **MR JUSTICE ROTH:** Yes.

15 **MS WAKEFIELD:** That's right.

16 **MR JUSTICE ROTH:** If they don't succeed on it and there is 100 per cent
17 pass-through, then there would be, would you say, no MSC run-off overcharge?

18 **MS WAKEFIELD:** Yes.

19 **MR JUSTICE ROTH:** So it depends on the extent of acquirer pass-through --

20 **MS WAKEFIELD:** It does, sir.

21 **MR JUSTICE ROTH:** -- in the claim period?

22 **MS WAKEFIELD:** It does, sir. It does and because of the UPO issue, that point, if
23 UPO is granted, is liable to be determined by reference to the contractual position in
24 the run-off period but extrapolated back. We see that, in any event, from the fact
25 that Mastercard rely on the contracts in the subsequent period.

26 **MR JUSTICE ROTH:** So is it -- because it does not read that way. Is it in that

1 sense, a contingent plea? In other words, you are saying if, which you dispute, the
2 domestic MIF was not passed on in full in the MSC, then by the same token, you say
3 reductions in the domestic MIF were not carried through into reductions in the MSC?

4 **MS WAKEFIELD:** It's, in a sense, contingent but we do say the treatment of costs is
5 different from treatment of savings.

6 If I take you to our reply which is in the next tab. It's not the amended version -- it
7 does not matter for present purposes. At paragraph 53 which is on page A1387, at
8 the top of the page -- it's (c)(ii), the last sentence of that and we say that:

9 "the acquiring banks pass on cost increases, but retain cost savings for their own
10 benefit."

11 So that's our pleaded case, so I should not say to you today there's an absolute
12 mirror but, of course, it --

13 **MR JUSTICE ROTH:** Your first plea there, 53(a), you say:

14 "acquirer pass-on, via the MSC, is inherent in the Infringement, and constitutes a
15 binding aspect thereof."

16 In other words, it's not open to Mastercard as a matter of law because of the
17 previous decisions, to say that there was less than 100 per cent pass-on. Is that
18 right?

19 **MS WAKEFIELD:** Or at least some pass-on.

20 **MR JUSTICE ROTH:** Well, the whole of the MSC would be -- sorry, no, that's
21 different.

22 **MS WAKEFIELD:** So in the face of an argument there's no pass-on, we say well
23 that plainly can't be right because of the nature of the infringement itself.

24 **MR JUSTICE ROTH:** But are you saying that it is, in fact, that Mastercard are
25 bound, by reason of the previous judgments, to a position that there was
26 100 per cent pass-on in the MIF in the MSC for the infringement period?

1 **MS WAKEFIELD:** May I just take instructions on that?

2 **MR JUSTICE ROTH:** Yes.

3 **MS WAKEFIELD:** Sir, we say it's not binding as a matter of law, there was
4 100 per cent pass-on across all merchants.
5 It plainly is binding that there was pass-on, some pass-on.

6 **MR JUSTICE ROTH:** I mean I don't want to, as it were, force you into a concession
7 that you may not want to make.

8 **MS WAKEFIELD:** Sir, at present, our pleadings, like Mastercard's pleadings, have
9 various alternative cases in them and you'll know the binding effect and scope of the
10 various recitals is an issue between us --

11 **MR JUSTICE ROTH:** Yes.

12 **MS WAKEFIELD:** -- and is something we come back to repeatedly in the reply.

13 **MR JUSTICE ROTH:** Yes, I think you plead 100 per cent --

14 **MS WAKEFIELD:** We do plead 100 per cent.

15 **MR JUSTICE ROTH:** -- pass-on, don't you? Where is that?

16 **MS WAKEFIELD:** It's not in our reply.

17 **MR JUSTICE ROTH:** It's in your claim.

18 **MS WAKEFIELD:** It's in our claim and it's to that that Mastercard responded,
19 saying: yes --

20 **MR JUSTICE ROTH:** Where is it in the claim?

21 **MS WAKEFIELD:** 106, where we say:
22 "The Overcharge was passed on in total (or near total) via the MSC."
23 So already, I suppose, "near total" shifts from a binding position of 100 per cent in
24 any event.

25 **MR JUSTICE ROTH:** You rely on bits of the decision.

26 **MS WAKEFIELD:** We do rely on parts of the decision.

1 **MR JUSTICE ROTH:** But you are not saying that statement is binding by reason of
2 those recitals?

3 **MS WAKEFIELD:** We are not saying that Mastercard is legally precluded from
4 arguing that for some of the merchants, they were on different kinds of contracts
5 which meant that there wasn't 100 per cent pass-on.

6 **MR JUSTICE ROTH:** Right. I see. Thank you.

7 **MS WAKEFIELD:** Sir, we have been through the pleadings. It might make sense
8 for me to open up the PSR report now, sir, just so you have it, which is in --

9 **MR JUSTICE ROTH:** You did say more than the summary in the -- is that the key
10 point?

11 **MS WAKEFIELD:** That's the key point, yes, but there are a couple of passages
12 which I would like to take you to, if I may, in respect of duration.

13 **MR JUSTICE ROTH:** Yes.

14 **MS WAKEFIELD:** So we have the report at tab 170 in volume 4 of bundle A. It's
15 one of the updates over the weekend so I hope you have it, sir, and other members
16 of the Tribunal.

17 **MR JUSTICE ROTH:** A4?

18 **MS WAKEFIELD:** Yes. Tab 170, hopefully. If we look at the executive summary
19 which is at page A2306, and in the words between the bold lines at the top, we see
20 three paragraphs down, "the largest merchants" and "did not find any evidence that
21 the supply of services does not work". I will come back shortly to what that means.

22 In the next paragraph:

23 "Merchants under £50 million. These merchants could make savings by shopping
24 around or negotiating with their current supplier - but many don't."

25 If we turn a few pages over to A2309, we have paragraph 1.9 which explains the
26 coming into force of the interchange fee regulation, capping IF fees, but not capping

1 MSCs and relying on competition between providers to ensure that cost savings
2 were passed through.

3 1.11 "We investigated the extent to which the IFR savings were passed through
4 merchants, and used this as an indicator of how well the supply of card-acquiring
5 services is working." That's what they mean when they talk about how things are
6 working.

7 At 1.13 you see reference to the different types of merchants in their analysis.

8 If we turn over two pages to A2311, we have at the top the pass-on findings which
9 we've covered already this morning.

10 Then we see lower down the page, three bullet points up:

11 that they'd "examined a range of factors and conclude that the following features ...
12 restrict small and medium-sized merchants' ability and willingness to search and
13 switch."

14 Of course, that's relevant to duration, essentially. So we have acquirers (inaudible)
15 publishing their prices.

16 Then the bullet point at the bottom of the page:

17 "The indefinite duration of acquirer and payment facilitator contracts for card-
18 acquiring services."

19 At the top of the next page, "POS terminals", so that's literally the terminal at the
20 point of sale and how the long length of those contracts as well, I think you have to
21 change both at the same time normally, are a further impediment to moving away
22 from the contract which you are on.

23 This is expanded on, just for completeness, in paragraph 6.98 which is at page 2422.

24 It explains here we are in a section dealing with the acquirer contracts. It says:

25 "Although there are initial terms [this is 6.98], they either continue automatically or
26 renew for successive fixed terms."

1 That's what they are referring to when they say "indefinite duration". If I turn back --
2 sorry I am dashing around so much, sir.

3 **MR JUSTICE ROTH:** Which was the paragraph --

4 **MS WAKEFIELD:** 6.98. It explains what they mean by indefinite duration. So it's
5 not that you sign up from the outset for an indefinite, non-terminable contract, but an
6 initial term but it expires and it just rolls on.

7 Going back to the introductory section, the executive summary -- I am sorry for
8 taking you out of order here. At page A2313 -- sorry, that's the wrong reference. It's
9 2397.

10 **MR JUSTICE ROTH:** 2397.

11 **MS WAKEFIELD:** 2397.

12 **MR JUSTICE ROTH:** Just a moment.

13 **MS WAKEFIELD:** This section of the report deals with frequency of searching and
14 switching and on the next page, 2398, we have paragraph 6.20 and there we see
15 that:

16 "The merchant survey [which is the survey they did before this report], also shows
17 that over 70% of small and medium-sized merchants have been with their provider
18 for over two years... Merchants with annual card turnover between £1 million and
19 £10 million have the longest relationships with their providers, with over half of them
20 having been with them for more than five years."

21 Then 65 per cent of the smallest merchants have been with them for less than
22 five years, so 35 per cent more than five years. So that gives you a feel, I hope, sir
23 and members of the Tribunal, of the sorts of durations of these contracts, just going
24 by the PSR report. So that's Mastercard's pleading in the PSR report for the MSC
25 run-off.

26 We then have domestic run-off overcharge for which the --

1 **MR JUSTICE ROTH:** Before you turn to that --

2 **MS WAKEFIELD:** Yes.

3 **MR JUSTICE ROTH:** -- and on this basis, are you saying that if there's a higher -- in

4 any way unlawfully caused higher MSC in the year 2000, it has an effect indefinitely?

5 **MS WAKEFIELD:** It has an effect for as long as the same contractual arrangements

6 exist with the MSC at the same level.

7 **MR JUSTICE ROTH:** Which for small merchants --

8 **MS WAKEFIELD:** Seems to be the case.

9 **MR JUSTICE ROTH:** The short answer, it could go on for ever.

10 **MS WAKEFIELD:** It could, sir.

11 **MR JUSTICE ROTH:** It could be a 50-year claim.

12 **MS WAKEFIELD:** It could, sir, save we have the longstop date of 6 September.

13 **MR JUSTICE ROTH:** That's just for convenience --

14 **MS WAKEFIELD:** That's for convenience.

15

16 **MR JUSTICE ROTH:** -- because you can't claim for the future. But is that -- yes.

17 **MS WAKEFIELD:** Yes, sir. So the domestic run-off overcharge is pleaded in

18 Mastercard's defence. So we are in bundle 2, tab 25, page 1347.

19 **MR JUSTICE ROTH:** Sorry, what page?

20 **MS WAKEFIELD:** 1347. Again, just to situate where we are in their defence, if we

21 turn to above paragraph 53 which is on page A1336, we're under "Domestic

22 Transactions."

23 In this part of their pleading, Mastercard is seeking to show that the infringement did

24 not have an impact on domestic interchange fees. So if we go back to page 1347,

25 the paragraph reference in total is paragraph 100(f)(iv).

26 "Mastercard will also refer to and rely upon the fact that UK domestic interchange

1 fees did not fall after June 2008 despite the EEA MIFs being reduced to zero
2 between 12 June 2008 and July 2009 and then they were set at a substantially
3 reduced level from July 2009 to date."

4 So that is their positive plea. They assert that the domestic IFs didn't reduce --

5 **MR JUSTICE ROTH:** Yes, they are not correlated, in other words?

6 **MS WAKEFIELD:** Exactly. They are relying on it to go to the premise. So is their
7 causation in the claim period, the full infringement period, between the EEA MIFs
8 and the domestic IFs? But we say, well, imagine we win on that first premise, we
9 show that there is causation between the two of them, but you, Mastercard, are right
10 in your factual assertion in that particular subparagraph, namely, that even though
11 the domestic IFs were inflated because of the infringement, they subsequently didn't
12 go down when the intra EEA MIFs did go down. The UK domestic IFs, after that
13 point, their inflated level was caused by the infringement, thus continuing harm.
14 They were pushed up by it and they didn't come down.

15 **MR JUSTICE ROTH:** That's a one-way causation.

16 **MS WAKEFIELD:** It's one-way causation, exactly.

17 **PROFESSOR WATERSON:** So your argument is that they were high and remained
18 high; presumably their argument is that they were low and remained low?

19 **MS WAKEFIELD:** Absolutely. Absolutely. So that is the basis, sir, members of the
20 Tribunal, that's the basis for the domestic run-off overcharge, it's to meet that factual
21 case in the world that we win on causation; if that's factually true, we say then that
22 the inflated level is caused by the infringement in the same way. We say that's, in
23 my submission, plainly arguable, sufficiently so for amendment purposes.

24 **MR JUSTICE ROTH:** I mean there was periodic re-evaluation of the domestic MIFs,
25 wasn't there, by Mastercard? They adjusted them and they changed them at various
26 points, and they explain the process and you haven't had disclosure yet.

1 **MS WAKEFIELD:** We haven't had disclosure yet.

2 **MR JUSTICE ROTH:** But we can see from the table attached that they changed.

3 **MS WAKEFIELD:** Yes, sir.

4 **MR JUSTICE ROTH:** And I think it's table 2 in annex A1366.

5 **MS WAKEFIELD:** Yes, sir, but those are weighted averages.

6 **MR JUSTICE ROTH:** Averages. So it's an average, as you say, so the constituents
7 must have changed.

8 **MS WAKEFIELD:** Yes, sir.

9 **MR JUSTICE ROTH:** So somebody was taking a decision, whether it was annual or
10 6-monthly -- I don't think it was daily, it wasn't like share price. They would
11 periodically review and change the domestic -- the various domestic MIFs, resulting
12 in a change to the average.

13 **MS WAKEFIELD:** Sir, the way in which the domestic interchange fees were set is
14 obviously, I think, a vexed question and something that will be determined at trial
15 one, the autumn 2023 trial, if you make that order. But, sir, you are right that they
16 moved and you are also right, of course, that they are going to be in issue, of course,
17 for the principal claim period, the full infringement period but also, they are already
18 going to be in issue for the subsequent period and we see that because Mastercard
19 have raised it.

20 **MR JUSTICE ROTH:** All I am saying is there clearly were decisions taken, whether
21 it was regularly but periodically, as to what the level of the domestic MIFs should be.

22 **MS WAKEFIELD:** Yes, sir, there was plainly some further movement, otherwise the
23 averages wouldn't change.

24 **MR JUSTICE ROTH:** Yes, and there must have been a decision-making process
25 that led to those changes.

26 **MS WAKEFIELD:** Yes.

1 **MR JUSTICE ROTH:** Otherwise they wouldn't have happened because it's a MIF
2 that is set. Or MIFs that were set.

3 **MS WAKEFIELD:** Ms Demetriou will be addressing disclosure subsequently.

4 **MR JUSTICE ROTH:** Yes.

5 **MS WAKEFIELD:** But you will have seen the disclosure request we make in respect
6 of the different levels of MIFs and IFs. They include documents and if I succeed in
7 my application in respect of amendments, they will include documents for the later
8 period as well.

9 **MR JUSTICE ROTH:** So there would have been, after the end of the infringement
10 period, a decision what to do, whether -- I don't know if it was 6-monthly or 3-monthly
11 but no doubt regularly they considered what do we do about the domestic MIF and
12 that led to these changes.

13 So that would have gone on after the end of the period, when the EEA MIF went
14 down in, I think June, was it, of --

15 **MS WAKEFIELD:** So in June 2008 it was zero.

16 **MR JUSTICE ROTH:** It went to zero.

17 **MS WAKEFIELD:** A year later, it went to the undertakings level, the MIF level.

18 **MR JUSTICE ROTH:** Yes, but you are basing yourself on what it was in June 2008,
19 that's the infringement --

20 **MS WAKEFIELD:** That's the infringement.

21 **MR JUSTICE ROTH:** -- what it was before that reduction.

22 **MS WAKEFIELD:** Yes.

23 **MR JUSTICE ROTH:** So they would have conceded successive domestic MIF
24 setting meetings, if it was done by meeting or committee or whatever, what to do
25 about the domestic MIF. And the question is, was that correlated in any way to what
26 was happening with the EEA MIF. And you say it was. You say it was --

1 **MS WAKEFIELD:** Caused by the infringement.

2 **MR JUSTICE ROTH:** Yes, and it was the level of the EEA MIF that affected the
3 domestic MIF.

4 **MS WAKEFIELD:** Yes, sir.

5 **MR JUSTICE ROTH:** One can see that it might have done for a -- first of all, after
6 June 2008, there may not immediately have been a meeting of the domestic MIF
7 setting committee, they might have next met in December. So they wouldn't have
8 taken account of the fall of the EEA MIF to zero until December, so you would have
9 then six months of continuing high domestic MIF and you would have that run-off.
10 Maybe it had some continuing effect for another six months. But you are saying it
11 had a continuing effect for eight years. That's what I am struggling with.

12 **MS WAKEFIELD:** Sir, the pleaded case is that their domestic interchange fees did
13 not fall.

14 **MR JUSTICE ROTH:** Yes, their pleaded case is there is no correlation. They are
15 not related. That's their pleaded case. Right through the period, they have nothing
16 to do with each other. They are set independently. That's their case. That's quite
17 different from saying that after the EEA MIF fell, the higher level continued to
18 influence -- not the current level of the EEA MIF influencing the domestic MIF but
19 that the old EEA MIF continued to influence the domestic MIF after 5 years.

20 **MS WAKEFIELD:** Absolutely, sir, so it's a world in which we succeed on our primary
21 case, that the EEA MIF caused the domestic IF to be higher than it otherwise would
22 be.

23 **MR JUSTICE ROTH:** But your primary case is there is a correlation, that the one
24 influences the other.

25 **MS WAKEFIELD:** Yes, in that it made it go higher. Not that there is a correlation up
26 and down but that it made it go higher than it would have been otherwise, absent the

1 infringement. Mastercard say and they know the fees and what happened because
2 subsequently, the intra-EEA MIF went lower and the domestic IF did not fall.

3 **MR JUSTICE ROTH:** I thought they were saying that it didn't act as a floor or
4 guidance at all and --

5 **MS WAKEFIELD:** That's their case in response.

6 **MR JUSTICE ROTH:** (Overspeaking) one can see that from various bits of evidence
7 and one is what happened when it fell. But it's just an evidential point to say there's
8 no correlation. When it goes up, the other one doesn't go up; when it comes down,
9 the other one doesn't come down. They are independent. That's their case. Your
10 case is they are correlated and I understand that and, therefore, it caused the
11 domestic MIF to be higher.

12 But to say that when it went down, nonetheless the five-year rolled EEA MIF caused
13 the level of the domestic MIF. Not the current level of the EEA MIF but one from
14 5 years previously.

15 **MS WAKEFIELD:** But, sir, if it's set the tenor -- yes, if it's set the tenor for where the
16 domestic MIF should be because, after all, the infringement continued for 18 years or
17 however long, it set the tenor for that level, it's, in my submission, perfectly
18 conceivable that it would carry on having an impact subsequently.

19 Also, sir, there could have been a conscious decision to exploit that higher level and
20 say: we are going to keep on with these higher domestic interchange fees because
21 although we've been stopped for the intra-EEA MIFs, we haven't been stopped for --

22 **MR JUSTICE ROTH:** Domestic MIFs did go down at various periods during the
23 infringement, didn't it, presumably because the EEA MIF went down?

24 **MS WAKEFIELD:** Sir, I can't make submissions on that.

25 **MR JUSTICE ROTH:** Just looking at the table.

26 **MS WAKEFIELD:** That's Mastercard's table, I haven't had any of the evidence, I

1 haven't spoken to --

2 **MR JUSTICE ROTH:** Okay, you'll get the evidence. Unless they have completely
3 messed this up and don't know what they are talking about, we can see that at
4 certain points, indeed progressively, the domestic MIF went down and presumably
5 that will be in some way, on your case, related to the EEA MIF going down because
6 you say the one fed through or influenced the other.

7 **PROFESSOR WATERSON:** Could I just raise a point that in part, this may be
8 answered by extending table 2 on 1366 to later years. The table is, in that sense,
9 not terribly informative because it stops at the point at which the EEA decision was
10 made.

11 **MS WAKEFIELD:** Thank you, sir, that's a very good point. It does not cover the
12 relevant period anyway.

13 **PROFESSOR WATERSON:** Yes.

14 **MS WAKEFIELD:** Also I feel I come ill equipped today to make submissions on
15 what the actual levels were. At the moment I am sketching out what I hope is
16 a plausible arguable case, sufficiently arguable to make the amendments. And we
17 have our case on the domestic IF being pushed up during the course of the
18 infringements and then we have Mastercard's positive plea that it didn't go down
19 afterwards. And I say that it's sufficiently arguable for me to have my primary case
20 and also the factual case which they are advancing for the run-off period.

21 **MR JUSTICE ROTH:** Well we have to have a plausible case that the run-off goes
22 eight years. That's what concerns me.

23 **MS WAKEFIELD:** Sir, I see that and the basis for that period --

24 **MR JUSTICE ROTH:** Which hugely concerns me because it hugely complicates the
25 expense -- the duration of these whole proceedings and ultimate trial. On the one
26 hand, you are putting in statements or your solicitor is saying Mr Merricks is keen to

1 get on as quickly as possible but here we have amendments that are going to cause
2 additional expense, additional disclosure and delay. And that's why one is
3 concerned about them because we have to have some regard to the interests of the
4 class who want this case which has been so long delayed for all sorts of reasons that
5 we know and really get moving and not to get mired down again because yet
6 additional matters are being introduced.

7 **MS WAKEFIELD:** Sir, of course the interests of the class are paramount in all our
8 minds, not least Mr Merricks', who's in court today.

9 **MR JUSTICE ROTH:** Well I hope so.

10 **MS WAKEFIELD:** Of course, sir. Of course. But equally, in a sense this point is so
11 obvious, it scarcely needs stating but the interests of the class lie in having full
12 vindication for the loss they've suffered, as well as speedy justice, as speedy as
13 possible. We are well aware there's already been a six-year delay in getting the
14 CPO for which we applied in 2016. Nevertheless, we do say that these are
15 significant, substantial additional heads of loss and that they can be accommodated
16 and wrapped into the current timetable.

17 Now Mastercard positively asserts this point. They say they are going to look -- after
18 the period, after the full infringement period, they are going to look at the levels of the
19 domestic IFs, look at the levels of the EEA MIFs then and they are going to rely on
20 that as part of their causal case in the main claim and if they are doing that, all I say
21 is I should be able to take the benefit of that argument.

22 I also say, sir, that on the premise that the MSC run-off runs reliably up to 2016 -- so
23 that is the correct date for duration of that kind of run-off -- we would already, in any
24 event, need to know the actual levels of EEA MIF and domestic IFs for the period
25 and that needs to be in there anyway.

26 We have chosen -- and I have said this already -- we've chosen the

1 6 September 2016 date because, of course, it extends the period of proceedings but
2 it does so, hopefully, in a way that's proportionate. We all know the end, we know
3 when disclosure is needed up to. It gives us that useful overlap with the merchant
4 proceedings and we were going to be using a lot of their data and information in any
5 event. It's all going to be available and we can feed it back into this claim. So for all
6 those reasons, my respectful submission is that the balance plainly points in favour
7 of permitting these amendments. Otherwise, frankly, much of the work will be done
8 anyway, for Mastercard to run their positive defence but the class won't be able to be
9 compensated for the loss which they will have suffered, if Mastercard's contentions
10 are right.

11 **MR JUSTICE ROTH:** But their primary contention is there's no correlation.

12 **MS WAKEFIELD:** Yes, sir, but one of the facts they are relying on, one of the
13 evidential matters setting out their stall of the various different factors which may
14 persuade you to find in their favour, one of the matters they are going to be relying
15 upon is what happened subsequently to date, up until the present day. That's what
16 they say.

17 **MR HOSKINS:** I don't think that's correct.

18 **MR JUSTICE ROTH:** It's not how I understood their plea but Mr Hoskins will explain
19 it. Yes, anything else on the amendment?

20 **MS WAKEFIELD:** Sir, I was intending to address Mastercard's reasons for opposing
21 the amendment, as set out in their skeleton argument and then Mr Hoskins knows
22 what to aim at, if I can put it that way or I can take those points in reply.

23 **MR JUSTICE ROTH:** Why don't you do that in reply because some of them may
24 have more force than others.

25 **MS WAKEFIELD:** I am grateful.

26 **MR JUSTICE ROTH:** Thank you. Yes, Mr Hoskins.

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Submissions by MR HOSKINS

MR HOSKINS: Thank you, sir. Good morning, members of the Tribunal. I should, before I launch into this topic, just explain I am going to deal with this amendment issue and the preliminary issue split trial issues and Mr Cook is going to deal with disclosure and any granular, detailed stuff, I'll almost certainly look panicked at him, he may pop up and help me out on that sort of stuff, he knows it better than I do. Focusing on the run-off amendment, let me start with three introductory points. One is the glaringly obvious. This is a significant amendment. It will extend the claim period for eight years. It would, as you have pointed out, hugely complicate the resolution of this matter. It would make it much more expensive. It would make it take more time and there is, as you have pointed out, an inconsistency in Mr Merricks' position of saying: we want this dealt with as soon as possible and we want to keep adding points which will have the countervailing effect.

There is an issue about the class. Mr Merricks, I am sure, is acting with the best intentions but that does not mean the Tribunal has to simply say: yes, Mr Merricks has said that's best for the class, so we accept it.

The second point. It cannot reasonably be suggested that the Class Representative's ability to claim run-off damages only arose as a result of the content of Mastercard's defence. It may well be that when the Class Representative's lawyers read our defence, a light bulb moment went off in their head and they thought: oh, we can claim run-off damages. But pleading a run-off claim is not novel, it's commonplace now in competition cases and so the Class Representative could have put this sort of claim in their original claim form if they wanted. We might still be having arguments about certification but it cannot be said that this only arose because of our defence. If it was a decent point, it could

1 and should have been taken at the outset.

2 The third introductory point is it's common ground that any proposed amendment
3 must meet the certification requirements and that is reflected in the
4 Class Representative's skeleton at paragraph 11. We don't need to look it up. You
5 will find it there.

6 Now we oppose this amendment on a number of grounds. The first two objections
7 arise from the Tribunals certification judgment in the Trucks proceedings. I would
8 like to show you that judgment. We need to go to B, tab 15, page 378. So you will
9 see B, tab 15, the front page. It's the Trucks certification judgment. But I want to
10 pick it up -- I am sorry, it should be page 378. B378 at paragraph 205.

11 **MR JUSTICE ROTH:** Tab?

12 **MR HOSKINS:** So tab 15.

13 **MR JUSTICE ROTH:** Yes.

14 **MR HOSKINS:** Page 378.

15 **MR JUSTICE ROTH:** Yes, in the judgment, the run-off period.

16 **MR HOSKINS:** That's right. Let me just tease out two principles I want to take from
17 this judgment which I will then develop in my arguments in my submission.

18 Paragraph 205:

19 "It is generally recognised there is often a time after the end of a cartel infringement
20 before normal market dynamics return prices to competitive levels. In consequence,
21 damages claims often cover such a run-off period and both the UKTC and RHA
22 actions do so here."

23 So that confirms one of the introductory remarks I am making: there's no novelty in a
24 run-off claim in these sorts of cases. It could and should have been thought about at
25 the outset.

26 206. Now this deals with a facet of the UKTC claim and what happened there was

1 there was a disjunct between the definition of the class and the claim period. So:
2 "The UKTC class is confined to persons who purchased trucks during the
3 infringement period but the expert seeks to include in his quantification of damages
4 also trucks purchased by those operators up to 31 December 2011. This means that
5 the UKTC action does not cover operators who purchased trucks only in the run-off
6 period, ie if they had not purchased trucks before, they are not within their proposed
7 class."

8 So a disjunct between members of the class and the duration of the claim period.
9 That's the first point I am going to rely upon.

10 The second point is in paragraph 207:

11 "The RHA application adopts a radically different approach. The RHA amended
12 claim form expressly includes a claim for loss caused by the delay in the availability
13 of successive emissions technologies, as well as loss due to the alleged overcharge
14 and states."

15 And you'll see the quote, if you can quickly glance at that. I'll pick it up three lines in:

16 "The Proposed Class Representative contends that the impact of the infringement
17 extended for a period beyond the infringement period, in that Relevant Truck prices
18 did not return to competitive levels immediately following the infringement period,
19 (the "Run-Off Period") ..."

20 Over the page:

21 "... Relevant Truck prices and delayed access to more fuel-efficient engines, both
22 during the infringement period and during any applicable run-off period."

23 The proposed class is then defined as covering:

24 "... a person who purchased or leased a truck for road haulage operations up until
25 17 May 2019. That, accordingly, amounts in effect to a run-off period of over
26 eight years."

1 So the RHA approach was different. They didn't have a disjunct between the class
2 and the claim period but what they had was a very long claim period, including a
3 run-off, they said, of up to eight years.

4 Then what did the Tribunal say about those two different approaches? 208:

5 "In our view, neither approach is satisfactory. If, as both applications contend, there
6 was a run-off period, then it seems to us fair that the class should include those who
7 acquired trucks in that period, irrespective of whether they had purchased trucks
8 previously. UKTC's approach, in our view, arbitrarily excludes potential claimants."

9 So the UKTC approach which had a disjunct between the class definition and the
10 duration of the claim, was not acceptable.

11 Then:

12 "In relation to the RHA on the other hand, we regard a run-off period of eight years
13 as remarkably long."

14 So that's the RHA approach, eight-year run-off period. Then at paragraph 209:

15 "The RHA responded to criticism of its approach by contending that it was not
16 positively asserting that there was a run-off period of over eight years. Its reply
17 states, 'Whether there was or was not a run-off period and, if so, for how long and in
18 respect of which aspects of the collusion, is a matter that will need to be determined
19 during the course of the proposed collective proceedings'."

20 So they defaulted to a position of: we'll have eight years as the absolute cut off and
21 we'll see what we are going to claim in relation to run-off, as and when the case
22 progresses, we get disclosure, et cetera. And you'll see that's exactly the position
23 that the Class Representative here is seeking to adopt.

24 Paragraph 210:

25 "When asked about this at the hearing, Dr Davis, who was the RHA expert, who has
26 considerable experience in studying the effects of cartels, acknowledged that he had

1 not encountered a case where a cartel did an eight-year run-off period."

2 Then you'll see some further description of his evidence and the final sentence:

3 "Accordingly, the end date of May 2019 put forward by the RHA is not based on any
4 economic assessment."

5 Then paragraph 211:

6 "In our view, it's not satisfactory in the case of collective proceedings to leave the
7 duration of the run-off period effectively 'open' to be considered as the proceedings
8 unfold. Even in individual cases, claimants generally cannot 'sit on the fence' but
9 have to assert the run-off for which they claim. Not only is that essential to
10 determine the boundaries of proportionate disclosure but the defendants are entitled
11 to know the extent of their potential exposure. In collective proceedings the
12 imperative is all the greater."

13 Then the Tribunal went on to consider evidence it had before it and its conclusion at
14 paragraph 213 -- you need to go up -- eight lines down, right at the end of the eighth
15 line:

16 "On the basis of the material we have seen and in the circumstances of this case, we
17 consider that a reasonable run-off for the RHA action is 31 January 2014 and one
18 year later for used trucks."

19 So the Tribunal did not accept the RHA approach, but it did feel able, on the
20 evidence it had before it, to come up with a shorter period and that's what it allowed.

21 So that's how the Tribunal approached these two aspects of run-off period in the
22 Trucks judgment. Now in our submission, the proposed amendment suffers from
23 both the defects identified by the Tribunal in the Trucks judgment. Let me deal first
24 of all with the duration point. This is the sort of RHA equivalent.

25 Just like the RHA, the Class Representative in this case has proposed an eight-year
26 run-off period which is not based on any economic assessment which he accepts

1 might need to be shortened at a later date. Now, as I have shown you, the Tribunal
2 in Trucks considered that such a claim was unacceptable. In our submission, the
3 Tribunal in this case should come to the same conclusion. In particular, the
4 proposed amendment should be rejected because the Class Representative has
5 failed to put forward any economic assessment to justify any end date for the run-off
6 claim. It simply has not put the evidence necessary for you to reach a decision.

7 Two points in relation to what Ms Wakefield has said in opening. In relation to the
8 domestic interchange fees, they were periodically reset and we say there is no
9 justification, therefore, for pleading an eight-year run-off period. Now it's not for us to
10 convince the Tribunal of what the run-off period should be, it's for the
11 Class Representative to justify its proposed amendment which is eight years. And
12 my point is they simply can't do that against a factual backdrop where the domestic
13 interchange fees are periodically changing.

14 The second point, when I rose to my feet, is that Mastercard are not suggesting that
15 the full run-off period will have to be considered in any event. If I can take you back
16 to our defence, bundle A2, tab 25, page 1347. This is a short moment in time. What
17 we are saying is the EEA MIFs reduced to zero between 12 June 2008 and
18 July 2009 and then went back up to a substantially reduced level from July 2009 to
19 date. What we are saying is when you look at what was happening to the EEA MIF
20 and what was happening to the domestic MIF at around the same time and shortly
21 thereafter, you'll see there isn't a correlation. We are certainly not suggesting to
22 make good that point, you have to look at the evolution of the domestic interchange
23 MIF to the present day or even for eight years. So I am afraid that's not our case
24 and the Class Representative is wrong to suggest it was so.

25 **MR JUSTICE ROTH:** When you said the domestic MIFs were periodically reset --
26 a point I put to Ms Wakefield -- from June 2008 onwards, what was the period

1 when --

2 **MR HOSKINS:** It wasn't a fixed, "We will look at it every year", they were
3 periodically looked at and --

4 **MR JUSTICE ROTH:** It wasn't a daily review?

5 **MR HOSKINS:** No, absolutely not.

6 **MR JUSTICE ROTH:** So was it a matter of months or --

7 **MR HOSKINS:** There wasn't a fixed time period -- I am relying on Mr Cook's
8 knowledge -- he said roughly but don't hold us to it, it's about every year they might
9 have looked at it and changed it but there's different rates.

10 **MR JUSTICE ROTH:** Some more frequently, some a bit later.

11 **MR HOSKINS:** Yes, there was no fixed system but there was a periodic review and
12 we are talking about that sort of timescale. But that's a sort of subjective -- we've
13 looked at the figures --

14 **MR JUSTICE ROTH:** One has to take a sort of general, reasonable view at this
15 point for the purpose of setting boundaries to the proceedings. I mean it might be
16 that if the EEA MIF fell in June 2008 and Mr Merricks is right that it had an effect on
17 domestic MIFs, that for about a year, give or take, the domestic MIFs would not have
18 been readjusted, so there might be --

19 **MR HOSKINS:** Yes.

20 **MR JUSTICE ROTH:** -- a reasonable run-off period and a much shorter one than
21 they claim but even on what you've said, it should be accounted for separate from
22 the disjunct point but it wouldn't immediately fall on June 2008, if Mr Merricks is right.

23 **MR HOSKINS:** That's true.

24 **MR JUSTICE ROTH:** But it could go on a year or a year and a half longer.

25 **MR HOSKINS:** That's right but the point I would make is what the Tribunal had the
26 benefit of in Trucks was other evidence going to what was a reasonable run-off

1 period, including the answers of Dr Davis, when he was asked questions. You have
2 not had that benefit here. It's for the Class Representative to justify the amendment
3 he proposes and his proposal is eight years and you've actually had nothing from
4 them, even for one year.

5 Can I just make a point. I have been dealing with duration because it's most
6 important in relation to the RHA but there is a duration point in relation to the MSC
7 run-off amendment as well because it's also claimed to be an eight-year period. The
8 reliance for that duration was the PSR report. Can show I you that does not, again,
9 justify an eight-year run-off period for the MSC run-off claim. It's A4, tab 170.

10 **MR JUSTICE ROTH:** Yes, that doesn't relate, of course, to the domestic MIF
11 period?

12 **MR HOSKINS:** No, I have moved, so while I am on duration, I am going to switch
13 and look at the MSC because, of course, it's got an eight-year run-off period claim as
14 well.

15 **MR JUSTICE ROTH:** Yes. One can see that to cut it off, as it was separately set,
16 on any view, the domestic MIF in June 2008 may be excluding a certain effect of the
17 EEA MIF, if indeed there was a correlation.

18 **MR HOSKINS:** Yes, even if there had been correlation during the infringement
19 period --

20 **MR JUSTICE ROTH:** Yes.

21 **MR HOSKINS:** -- it could be broken after the infringement period ceased.

22 **MR JUSTICE ROTH:** Yes.

23 **MR HOSKINS:** We're comparing apples and pears here in a sense because we are
24 talking about correlation in the infringement period but what the run-off claim requires
25 one to do, of course, is to see whether any effect of such correlation in the
26 infringement period cast a shadow after the infringement period ceased.

1 **MR JUSTICE ROTH:** What I am saying is the domestic MIFs may not have been
2 reviewed immediately after the end of the infringement.

3 **MR HOSKINS:** I don't know the answer to that, sir.

4 **MR JUSTICE ROTH:** And it could well be that it took eight, 12, 14 months till they
5 were reviewed or some of them were reviewed because there are a series of them,
6 so that the effect would continue until the next review.

7 **MR HOSKINS:** I understand the point, I just can't answer -- the answer will be easy
8 enough to discover but it's not in the evidence before the Tribunal today, not in my
9 memory.

10 **MR JUSTICE ROTH:** Yes. So you are turning to --

11 **MR HOSKINS:** I am looking at the MSC run-off claim and talking about the duration
12 of that. There was nothing -- again, you have not been given any expert material on
13 this or anything, you've simply had Ms Wakefield on her feet, pointing you to the
14 PSR report. A4, tab 170, 2398. She took you to paragraph 6.20 which said that
15 over 70 per cent of SMEs had been over two years but the relationship varies across
16 card turnover groups. Merchants' turnover between £1 million and £10 million for
17 more than five years, but by contrast 65 per cent of the smallest merchants have
18 been with their provider for less than five years.

19 **MR JUSTICE ROTH:** Which page are you on?

20 **MR HOSKINS:** So sorry, A2398, paragraph 6.20. The point I am making is in the
21 report, it shows there is a chequered pattern, depending to a certain extent on the
22 size of the merchant but none of them are eight years.

23 **MR JUSTICE ROTH:** Well we don't know because it says "more than five."

24 **MR HOSKINS:** That's right but some are less than five.

25 **MR JUSTICE ROTH:** Yes.

26 **MR HOSKINS:** Some are over two but you imagine if they are saying over two,

1 there's also more than five. There is a pattern there but nothing to justify a blanket
2 eight-year period is my point.

3 And that's the best that's been put to you for any run-off period for the MSC
4 amendment, let alone an eight-year claim. That's the best you've been given.

5 Can I deal with the second point arising out of the Trucks judgment which is the
6 disjunct point because just like for the UKTC and Trucks, the amendment proposed
7 in this case would create a disjunct between the scope of the class which would
8 cover persons who made purchases before 21 June 2008 and the scope of the claim
9 which, if the amendment were allowed, would cover purchases made before
10 6 September 2016. So it's the same disjunct in definition of class and scope of the
11 claim.

12 The first point we make is, well, one must look at this first of all as what would have
13 happened if this had been put forward, if the claim had been put this way at the time
14 of certification? The original certification and in our submission, it's obvious, given
15 the ruling in Trucks, that if the claim had been put forward in this way at the time of
16 certification, it would have been rejected, for the reasons given in Trucks. And we
17 say the Class Representative shouldn't be permitted to amend his claim now, in
18 a manner that would not have been approved of at the time of the original
19 certification. You can't gain an advantage by thinking of a point later.

20 **MR JUSTICE ROTH:** Surely the reality is, if it had been put forward, it wouldn't have
21 been put forward that way --

22 **MR HOSKINS:** This is the point I am coming to.

23 **MR JUSTICE ROTH:** If they had said that there was a run-off to 2016, the class
24 would have comprised everyone purchasing until 2016 but then you would have
25 faced a much bigger claim.

26 **MR HOSKINS:** Absolutely, and that's the point I am coming to now. Because what

1 the Class Representative says -- we make that point and the Class Representative
2 says: ah, well, the disjunct between the class and the claim period should be allowed
3 now because the addition of new parties to the class is now impossible, due to
4 limitation. And so you are absolutely right that prior to the expiry of limitation, the
5 original claim could have claimed for run-off damages and adopted a larger class
6 definition so as to ensure consistency between class and damages. But that's not
7 what was done and our submission is the Class Representative should not be
8 permitted to rely on his own failure to do so, to ensure consistency in the original
9 claim prior to the expiry of limitation.

10 **MR JUSTICE ROTH:** But is that a reason for denying the class members? The fact
11 you can't add new ones because of limitation is a limiting factor, as the word
12 "limitation" suggests. Is that a reason for denying those who can claim recovery for
13 their full loss?

14 **MR HOSKINS:** It's not a knock-out blow, it is a factor for the Tribunal to take into
15 account, amongst the number of factors I am now going to put to you and this is one
16 of them. The way I would put it in terms of what you should consider is that to allow
17 such an amendment after the expiry of the limitation period would be unfair to
18 Mastercard. Limitation periods are there for a purpose and what has happened
19 through the Class Representative's failure to plead this case originally is that they
20 are now seeking to put themselves in a position which they should not have the
21 benefit of because limitation prevents them now doing it. They could and should
22 have done it originally. They didn't. Limitation prevents them doing it now. It would
23 be unfair to Mastercard to take away that effect of the limitation period. It's a factor.

24 I have dealt with two points in relation to this claim, the duration point and the
25 disjunct point and now I want to deal with the methodology point. Can we just look at
26 the Class Representative's skeleton. That's bundle A, tab 1. I am told my page

1 references may be slightly out by a page. It's paragraph 11 which I have on page 4.
2 Sorry, A1.4. You will see the point I referred to earlier, paragraph 11:
3 "Thirdly, it is said that any proposed amendment must meet the certification
4 requirements. This is not disputed."
5 So that means that in relation to the amendment, the Class Representative accepts
6 that he must satisfy the Tribunal that there is a sufficiently credible or plausible
7 expert methodology for determining the proposed claim. Obviously, we need to look
8 at the domestic run-off claim separately from the MSC run-off claim because they
9 are different in nature.
10 Now in relation to the domestic IFs run-off claim, if you look at paragraph 11(a), it's
11 said:
12 "No new methodology for calculating the Run-off loss is required beyond that which
13 has already been held to be sufficient for certification of the principal Overcharge."
14 Then, the domestic IFs are dealt with in (i), MSC in (ii)."
15 So they are saying for both heads of amendment, nothing new required. That's the
16 position that's put to you. Let me deal first of all with the domestic IFs run-off
17 overcharge.
18 Let's just remind ourselves what that claim is. Can we please go to the proposed
19 re-amended claim form. So this is bundle A1, tab 5, page 57. You were shown this
20 by Ms Wakefield this morning, 105A(a). This proposed claim effectively alleges that
21 the reductions in the EEA MIFs, following the Commission Decision, were not
22 reflected subsequently in domestic MIFs. I am sorry, it's B, 105B for the run-off.
23 105B. It's alleging the reductions in the EEA MIFs, following the Commission
24 Decision, were not reflected subsequently in domestic MIFs.
25 If I can go back to their skeleton -- sorry to jump about. So that's this bundle, tab 1A,
26 page A1.4.

1 **MR JUSTICE ROTH:** Which?

2 **MR HOSKINS:** Page A1.4 of the Class Representative's skeleton argument.

3 **MR JUSTICE ROTH:** Yes, if you can give me a --

4 **MR HOSKINS:** A1, tab --

5 **MR JUSTICE ROTH:** Just a page number within the skeleton.

6 **MR HOSKINS:** It's 1.4. So the earlier ones have a 1.4.

7 **MR JUSTICE ROTH:** No, I have --

8 **MR HOSKINS:** Sorry, of the skeleton, it's page 5 on mine, sorry, internal page 5.

9 So what they say about the methodology for domestic IFs is this:

10 "Calculation of the Domestic IFs Overcharge will be methodologically identical to

11 calculation of the principal Overcharge, with the core exercise being the

12 determination of the actual level of the IFs compared to the determination of the

13 counterfactual levels of the domestic IFs."

14 Then they say:

15 "Further, this is exactly the exercise which Mastercard says that it will undertake, see

16 paragraph 100(f)(iv) of its defence."

17 So absolutely identical to calculation of the principal overcharge. Compare the

18 actual level of the IFs with the counterfactual level of the IFs. That's what they have

19 said is the proposed methodology. Now that's not an exercise which Mastercard

20 says it will undertake. Can we go to our defence which is cited there. Our defence

21 you'll find at bundle A2, tab 25, page 1347. It's our old friend (iv):

22 "Mastercard will also refer to and rely upon the fact that UK domestic interchange

23 fees did not fall after the EEA MIFs fell."

24 That's not an expert methodology, quite plainly. That's an observation from fact,

25 based on a comparison of actual MIF levels. What we are saying is: look at the EEA

26 MIF, look at it going down, look at the level of domestic MIF. Does it go down?

1 That's it. It's an observation from fact. It's absolutely not an expert methodology in
2 any way, shape or form. So the Class Representative can't rely on our defence to
3 say: ah, there's the methodology.

4 What we need to identify, they say that the methodology for the run-off for domestic
5 IFs will be exactly the same as that proposed for the principal overcharge and they
6 have not put before you in the bundles the original expert report which you had
7 before the chairman way back when, but I have notified my learned friends. I will
8 show you their original certification judgment because that summarises what the
9 methodology proposed for principal overcharge is. We need to hand up hard copies
10 because we could not get them into the bundles. If you'll give me a second. How
11 many would the Tribunal like?

12 **MR JUSTICE ROTH:** Yes, while that is being done, we do have to take a short
13 break for our transcribers, so would that be a suitable moment?

14 **MR HOSKINS:** Absolutely.

15 **MR JUSTICE ROTH:** And that can be provided in that time. So we'll come back at
16 just before 12.10.

17 **MR HOSKINS:** Thank you, sir.

18 **(11.58 am)**

19 **(A short break)**

20 **(12.10 pm)**

21 **MR HOSKINS:** Sir, I was addressing the methodology in relation to domestic IFs.

22 **MR JUSTICE ROTH:** Yes.

23 **MR HOSKINS:** I wanted to show you the original CAT certification judgment
24 because the Class Representative says the methodology for the amendment is
25 identical to this. If I could ask you to turn to page 15. Perhaps you could read to
26 yourselves, please, paragraphs 31 and 34. I don't need to get into the nitty-gritty,

1 I just need to show you the basic approach. 31 and 34, please.

2 **(Pause)**

3 **MR JUSTICE ROTH:** Yes.

4 **MR HOSKINS:** In short, the proposed method to calculate the overcharge put
5 forward at the outset to the Tribunal was to calculate the lawful level of the relevant
6 MIFs and to subtract that from the actual level of the MIFs. Of course, there may be
7 a debate about what the lawful level should be, whether it should be zero, whether it
8 should be at the commitments level, whether it should be 101(3) level but that's the
9 essence. You are identifying the lawful level of the MIF and subtracting it from the
10 actual level of the MIF and the difference of those two is said to be the overcharge.

11 Now let me explain why you don't need to be an economist to see that that
12 methodology is not appropriate to calculate run-off damages. As this is a follow-on
13 claim which is limited to the infringement period, there is no allegation, nor can there
14 been an allegation, that the MIFs in the run-off period were themselves unlawful.
15 Therefore, the MIFs in the run-off period must be assumed to be lawful.

16 A methodology which subtracts the lawful level of the run-off MIFs from the actual
17 level of the run-off MIFs, will just be subtracting one thing from the same thing
18 because the actual level is lawful. Therefore, that methodology will not determine
19 whether the level of the run-off MIFs in the run-off period were inflated as a result of
20 the infringing MIFs in the prior infringement period. And no methodology has been
21 proposed to identify the counterfactual level of the MIFs in the run-off period.
22 Nothing. That absence of methodology applies regardless of whether the proposed
23 run-off claim is eight years or one year. There is simply no methodology for any
24 period of time.

25 We say the amendment for the domestic IFs should fail on that basis. That's
26 a knock-out blow, we would say. We have all the other points we make but that

1 really is fundamental. No methodology whatsoever put forward. It looks like the
2 point has not even been spotted by those acting for the Class Representative.

3 Then in relation to the MSC run-off overcharge, again this is quite complicated stuff,
4 so let's remind ourselves --

5 **MR JUSTICE ROTH:** I am just trying to understand the point you make.

6 **MR HOSKINS:** Of course, I moved on too quickly.

7 **MR JUSTICE ROTH:** If, as at June 2008, the lawful level of domestic MIF is
8 1.2 per cent, then when you get to December 2008, if the actual level is 1.8 per cent,
9 wouldn't one be entitled to say, absent any special consideration: well, the lawful
10 level remains the level it was at in June?

11 **MR HOSKINS:** Sir, on this analysis, because the legality of the domestic MIFs in the
12 run-off period cannot be challenged, because it's a follow-on claim based on the
13 infringement found in the Commission Decision, all the domestic MIF levels are
14 lawful, regardless of whether they change, regardless of whether they go up or
15 down. By definition, we have to assume they are all lawful in the run-off period.

16 **MR JUSTICE ROTH:** Do we have to assume they are all lawful? There has been
17 no determination that they are lawful and if, to the extent they are influenced by what
18 was an unlawful level of MIF, why is that not damages that can be recovered?
19 I mean nobody has said just because the decision stopped then, it doesn't decide
20 anything about what happened thereafter.

21 **MR HOSKINS:** At the time the claim was made, it had to be a follow-on claim.

22 **MR JUSTICE ROTH:** Yes.

23 **MR HOSKINS:** So the class was limited to that allegation and they could not, at the
24 time, allege that anything outwith the infringement period was unlawful, nor can they
25 do so now. You remember that was the way the system worked when this claim was
26 lodged and that's what they were stuck with. So you are always going to be dealing

1 with a situation in which the domestic MIFs in the run-off period have to be presumed
2 to be lawful. But otherwise, sir, it's not been alleged they are unlawful, that's not
3 before the Tribunal. The reason why they are not alleged to be unlawful is because
4 it wasn't legally possible for the Class Representative to do so, then or now. So
5 there's no allegation, put it that way, that the domestic MIFs in the run-off period are
6 unlawful. What the allegation is, is that due to the infringements in relation to the
7 intra-EEA MIFs, some sort of shadow was cast, so that even if the domestic MIFs
8 were lawful, they would have been lower but still lawful, absent the previous
9 infringement.

10 **MR JUSTICE ROTH:** Yes.

11 **MR HOSKINS:** But the methodology that's proposed for overcharge doesn't give
12 you that answer. That's what they have to show, that the domestic MIFs would have
13 been at a lower, also lawful, level but they have proposed no methodology to tell you
14 that, ie what's the difference between the actual lawful level of the domestic MIF and
15 what's the level in the counterfactual, if the EEA MIF had been lawful and the
16 domestic MIF had been lower, albeit still lawful. No methodology to deal with that.

17 **MR JUSTICE ROTH:** But as I say, to take the example of the June and December --

18 **MR HOSKINS:** Mm-hmm.

19 **MR JUSTICE ROTH:** -- if the lawful level, non-infringing level, would have been
20 1.2 per cent in June and if it continued, the domestic MIF, to be at 1.8 per cent
21 between June and December, I accept they can't say that 1.8 per cent was
22 unlawful --

23 **MR HOSKINS:** Mm-hmm.

24 **MR JUSTICE ROTH:** -- but can they not say: well, the extent to which it was in
25 excess of 1.2 per cent was caused by a previous unlawful MIF?

26 **MR HOSKINS:** To get there, they'd have to -- because we are talking about findings

1 in relation to the EEA MIF --

2 **MR JUSTICE ROTH:** Yes.

3 **MR HOSKINS:** -- so you've got a situation where we know the EEA MIFs were
4 unlawful in the relevant period. You would have to identify what the lawful level of
5 the EEA MIF would have been in the infringement period. You'd then have to ask
6 yourself to what extent did that have an effect on the domestic MIFs in the run-off
7 period and the mere fact there was a difference of 0.6 per cent, you would have to
8 ask to what extent was that due to the EEA MIF being set at a certain level in the
9 infringement period or to what extent was that due to other extraneous factors, for
10 example, competition with Visa, et cetera.

11 **MR JUSTICE ROTH:** You would have to first ask -- there's an intermediate step --
12 you would have to ask what would the lawful EEA MIF have been in the infringement
13 period and then have to say what effect would that have had on the domestic MIF in
14 the infringement period.

15 **MR HOSKINS:** Correct.

16 **MR JUSTICE ROTH:** They have to do that anyway.

17 **MR HOSKINS:** That's right.

18 **MR JUSTICE ROTH:** If they say the domestic MIF would have been 1.2 per cent in
19 June and it was at 1.8 per cent, if it remains at 1.8 per cent for another six months,
20 can they not reasonably say on the balance of probabilities, if it had been, as it
21 should have been, at 1.2 per cent in June, it would have continued at that level until
22 the next time MIFs were reassessed?

23 **MR HOSKINS:** No, because in order to get to the damages, the run-off damages,
24 you have to ask to what extent, in your example, is the 0.6 per cent due to the
25 previously unlawful level of EEA MIF.

26 **MR JUSTICE ROTH:** Yes.

1 **MR HOSKINS:** If, in December 2008, there is a meeting --

2 **MR JUSTICE ROTH:** Yes.

3 **MR HOSKINS:** -- and the meeting says, "Because of the need to compete with Visa,
4 we need to put up the interchange fees to 1.8 per cent to keep our issuing banks
5 happy", then clearly there is a possibility of a number of factors leading to the
6 increase in 1.8 per cent. Part of it might be due to the shadow, part of it might be
7 due to factors that arise in December 2008 and my point is there is no methodology,
8 economic or otherwise, that's been put before the Tribunal which even attempts to
9 get to that answer.

10 Obviously, if the answer is it's all due to the shadow of the intra-EEA MIF, you are
11 right.

12 **MR JUSTICE ROTH:** But we are going to have to do that exercise anyway, right
13 through the infringement periods, the same exercise. You are always going to have
14 to ask: to what extent is the setting of the domestic MIF due to the EEA MIF or was it
15 due to Visa UK? You say it's not due to the EEA MIF, that's the argument. How is it
16 any different, that's what I don't understand, in the run-off period?

17 **MR HOSKINS:** Because during the infringement period you are looking at the
18 effects of the EEA on the domestic MIF in the infringement period, whereas in the
19 period afterwards, you are comparing two periods. You are looking at the EEA in the
20 first period, with domestic in the second. So in the first example which we'll have to
21 do, they are coterminous. In the run-off claim, they are different, in the sense that
22 you are comparing a prior period with a later period.

23 **MR JUSTICE ROTH:** Yes, it's more complicated, I see that --

24 **MR HOSKINS:** Yes.

25 **MR JUSTICE ROTH:** -- but we've never got into the methodology of calculating the
26 causative effect. It's just it's not really a methodology, it's looking at causation.

1 **MR HOSKINS:** My point is that the run-off claim is different in the way I've described
2 from the original claim.

3 **MR JUSTICE ROTH:** Yes.

4 **MR HOSKINS:** The burden is on the Class Representative to satisfy you there's
5 a possible methodology to deal with that issue and all they've said is, "We rely on the
6 methodology that was proposed for overcharge originally." And I've submitted to you
7 that that is not fit to deal with the extra complexities. Whether it be a factual
8 exercise, whether it be an economic exercise, whether it be a mixture of both, the
9 Class Representative simply hasn't addressed his mind to how that might be dealt
10 with. That's the submission. You have nothing beyond compare lawful level of MIF
11 with actual level of MIF.

12 **PROFESSOR WATERSON:** You said they might have raised it to 1.8 in order to
13 compete with Visa. That seems a very strange form of competition.

14 **MR HOSKINS:** We've been all through that for years, Professor. That's
15 absolutely -- the Commission Decision is replete with the fact that Visa and
16 Mastercard competed with each other to attract issuing banks to issue their cards
17 and one of the ways they did that was to offer higher interchange fees because then
18 the issuing banks could offer greater rewards to their customers. And then, as I say,
19 that's well trampled and the point you have made has been made, indeed, by the
20 Commission and others on a number of occasions, you are absolutely right. But
21 I don't think there's any dispute about the fact that interchange fees were set with an
22 eye on the need to compete with Visa and attract issuing banks.

23 Those are the points I wanted to make on methodology. I have one more
24 methodology point.

25 I have looked at methodology of calculating the alleged run-off overcharge. What
26 I want to look at now in terms of methodology is the accepted inherent inconsistency

1 between the two heads of claims. You've seen that's reflected in the pleading and
2 Ms Wakefield acknowledged it this morning. The reason why there's an
3 inconsistency is that under the domestic IFs run-off claim, that assumes that
4 domestic interchange fees remained high in the run-off period after EEA MIFs
5 reduced, whereas in the MSC run-off claim, it's assumed that domestic IFs reduced
6 but that did not feed through into the level of MSCs. So that's the tension that the
7 Class Representative has recognised in these two proposed amendments.

8 If we can look at what's said in the proposed re-amended claim form. So that's
9 bundle A, tab 5, page 58. The final sentence of paragraph 105B:

10 "The Class Representative further avers that it will be necessary to ensure that there
11 is consistency and in particular, no double counting between the two types of
12 Run-Off Overcharge."

13 The short point is this: whilst the Class Representative has identified this as
14 a necessary issue, he has not proposed any methodology, factual and/or economic,
15 by which to address that issue. There's an inherent inconsistency in the two claims.
16 There's a need to deal with it and there's no suggestion of how that might be dealt
17 with.

18 **MR JUSTICE ROTH:** How can he tell they know from factual investigation and
19 disclosure what happened? I mean if the domestic MIF remained high to a certain
20 extent but in some cases, the merchants got -- if the domestic MIF reduced, some
21 merchants got a reduction and others didn't, to that extent there may be an MSC
22 run-off but there could be a combination of the two, couldn't there?

23 **MR HOSKINS:** My point is --

24 **MR JUSTICE ROTH:** They wouldn't know until it's been investigated.

25 **MR HOSKINS:** My point is, the point is it's not surprising they're not suggesting it
26 because the point is obviously so complex. It's going to be almost impossible to do

1 that in any effective way. But my point is that it's for the Class Representative to
2 satisfy you that they can deal with this as and when it arises. What they've done is
3 recognise the problem. What they've not done is turn their mind to the sorts of ways
4 in which it might arise and the ways in which they can deal with it. We are just left
5 with, "We'll deal with it as and when." And our submission is, as one of the factors
6 you must take into account in deciding whether to grant the amendment, that's
7 a factor you should take into account.

8 I do have one last short methodology point which relates to extracting loss. So
9 under these proposals, as we've seen before, the scope of the class covers persons
10 who made purchases before 21 June 2008. The scope of the amended claim would
11 cover purchases made before 6 September 2016. Therefore, it would be necessary,
12 if the amendment were allowed, to ensure that all the purchases made between
13 June 2008 and September 2016, ie in the run-off period, by non-class members, are
14 excluded from the calculation of quantum.

15 That's partially recognised by the Class Representative in relation to deceased
16 persons. Can we go to the Class Representative's skeleton. That's bundle A1,
17 tab 1, page 1.4, internal page 5. It's (iii). So paragraph 11(a)(iii). You see there's
18 a recognition of the need to extract deceased persons.

19 But my point is that whilst it's clearly necessary to have a process of extraction to
20 take out purchases from non-class members, it's not enough just to deal with
21 deceased persons because there are clearly other persons who would have to be
22 extracted.

23 Can we look at the class definition. We'll look at it in the re-amended claim form,
24 bundle A1, tab 5, page 24. You are well aware now of what the class definition is:

25 "Individuals who, between 1992 and 2008, purchased goods and/or services from
26 businesses selling in the United Kingdom that accepted Mastercard cards, at a time

1 at which those individuals were both resident in the United Kingdom for a continuous
2 period of at least three months and aged 16 years or over."

3 So it would be necessary to exclude from the run-off quantum, from all the
4 purchases that were made in the run-off period, purchases made by persons who
5 were not resident in the UK for a continuous period of at least three months, between
6 May 1992 and June 2008, and it will also be necessary to exclude purchases that
7 were made in the run-off period by those who were not 16 years of age or above in
8 the infringement period, ie those who grew up.

9 Again, the point is there's no suggested methodology for extracting either of those
10 sets of purchases. Another factor that should go into whether to allow this, clearly,
11 very complex amendment.

12 The final point I want to make in my submissions on the amendment relates to the
13 effect on the proceedings. Whether one increases the claim by eight years or
14 a lesser period, the proceedings will inevitably be more complex, there will be more
15 disclosure, there will be more work to resolve the issues. The issues are more
16 complex than the overcharge ones we have currently. So you get an increase in
17 complexity, time to resolve, cost and there's also, obviously, going to be a specific
18 increase in costs, as a result of the need for third-party disclosure for the contractual
19 arrangements between particular merchants and acquiring banks. And the need for
20 that disclosure has been recognised by the Class Representative.

21 Now, again, all you have from the Class Representative, paragraph 11 of their
22 skeleton says:

23 "Mr Merrick's legal representatives are satisfied that there's no funding difficulty in
24 relation to the proper litigation of the run-off overcharge."

25 But what the Class Representative has not done is to make any attempt to provide
26 the Tribunal with an estimate of the additional cost that the run-off amendments

1 | might entail, you are just asked to take it: don't worry, it will be fine. All we are
2 | saying is --

3 | **MR JUSTICE ROTH:** Sorry, in terms of disclosure, third party, you are now taking
4 | the point which was not taken, I think, at the original certification hearing, that there
5 | isn't 100 per cent pass-through --

6 | **MR HOSKINS:** Mm-hmm.

7 | **MR JUSTICE ROTH:** -- between the domestic MIF and the MSC and that it varies
8 | according to contractual arrangements and the size of the retail and so on. That's
9 | a point you have raised.

10 | **MR HOSKINS:** The burden -- remember we've raised that point because the way
11 | it's pleaded is Class Representative pleads there's 100 per cent acquired pass-on.

12 | **MR JUSTICE ROTH:** Yes.

13 | **MR HOSKINS:** We say no, there's not. Then the matter goes back to them.

14 | **MR JUSTICE ROTH:** Yes. To determine that, you are going to produce some
15 | evidence of rates of pass-through and some disclosure. There's going to have to
16 | be --

17 | **MR HOSKINS:** There will be some but not necessarily the same that the
18 | Class Representative might propose.

19 | **MR JUSTICE ROTH:** They will want to meet that, so there's going to be now --

20 | **MR HOSKINS:** Understood. On that issue.

21 | **MR JUSTICE ROTH:** Yes, so that's been opened up.

22 | **MR HOSKINS:** There will be some disclosure from us but my submission is there
23 | will be extra disclosure costs, there will be extra costs of factual witnesses because I
24 | will have to deal with a different period and we may need people who have
25 | knowledge of different periods. The experts will have to look at extra questions. So
26 | there will be extra costs.

1 But the requirement for that is just this, that a Class Representative coming with
2 amendments of this type, particularly asking for eight years, should, at the very least,
3 say to the Tribunal: well we think roughly it might involve this and this and this and
4 that will cost this much and don't worry. It's not enough to just come and say: don't
5 worry.

6 My final point in concluding is the point, sir, you made to Ms Wakefield this morning.
7 The Tribunal's role is to actually protect the class interest and in our submission the
8 proposed amendment of eight years does not do that, precisely for the reason that,
9 while it might get a few more pounds to be distributed, at the end of the day it will
10 inevitably make the proceedings more complex, more costly and will delay the
11 resolution of the proceedings and that's actually what the most important point is
12 here.

13 **MR JUSTICE ROTH:** Thank you.

14 Yes, Ms Wakefield.

15

16 **Reply Submissions by MS WAKEFIELD**

17 **MS WAKEFIELD:** Thank you, sir. I will start with the disjunct point, the disjunct
18 between the claim period, we include run-off and class definition. If I could just take
19 you quickly back to UKTC which is in bundle B, tab 15 and to paragraph 197 which is
20 on B375. The heading above this paragraph is "The choice". What's happened thus
21 far in your judgments, sir, is that you've considered the certification requirements and
22 in paragraph 197, you note that both claims, in principle, meet the certification
23 requirements and so you are confronted with the choice as to which to allow to go
24 forward. It's in this context that we see your judgment in respect of the run-off period
25 arises, that's (3), within the various factors you take into account when considering
26 the choice. So my short point there, I suppose, is just by way of correction, that this

1 is not a certification point in UKTC, it's a carriage point.

2 Turning to --

3 **MR JUSTICE ROTH:** But just to explain that because in that case which I am
4 familiar with --

5 **MS WAKEFIELD:** Yes.

6 **MR JUSTICE ROTH:** -- but my colleagues may not be, there were two potential
7 Class Representatives and when you say a carriage point, you mean going to the
8 question of which of the two should be certified.

9 **MS WAKEFIELD:** Absolutely, sir. And where I've opened the judgement -- I
10 apologise, I should perhaps have done that again -- I would have taken you to
11 paragraph 9 on page 301 and for the other members of the Tribunal, they may want
12 to go there and that's where you summarise the two different applications and in
13 particular, subparagraph (5) under paragraph 9 on page 302, you note the different
14 class definitions, with UKTC pleading a shorter run-off period but in the body of the
15 claim, not reflected in the class definition, and RHA pleading no run-off period in the
16 body of the claim but having a class definition which extends for eight years after the
17 end of the infringement. So differences between the two claims which you note in
18 that summary section.

19 You don't address that in the body of your consideration of certification, sir. Instead,
20 you address it when you are confronted with the choice between the two. You are
21 considering those differences between them.

22 Sorry if I did not make that clear. It's the "both eligible and suitable." So the one
23 including the disjunct is equally eligible and suitable, otherwise you would not have
24 been confronted with a choice, of course.

25 Mr Hoskins took you to paragraph 208, in which you make your observations about
26 the UKTC disjunct. You say:

1 "It seems to us fair that the class should include all those who acquired trucks in the
2 run-off period, irrespective of whether they previously purchased trucks in the
3 principal period

4 "UKTC's approach, in our view, arbitrarily excludes potential claimants."

5 So my first point, of course, is that the disjunct in our case isn't arbitrary, it's because
6 there's no other option. There's a limitation bar, as you discussed in the course of
7 Mr Hoskins' submissions, sir. So at this stage, there's simply no other choice than
8 for us to define the class in the way it's presently defined and to sue for the run-off
9 losses suffered only by that class.

10 The second point I would make is that the results for which Mr Hoskins contends is
11 unfair, to use the language of UKTC of fairness, and further that it flies in the face of
12 the overarching statutory purpose of facilitating access to justice. Now that's
13 because the consequence of Mr Hoskins' argument if he succeeds would be to
14 prevent the current class members from suing for loss which they have suffered on
15 my case on the basis that there are people outside the class who also suffered loss
16 and cannot sue for it, and I would say that would be a remarkable and, with respect,
17 I would say objectionable consequence.

18 I do say that paragraphs 45 and 47 of Lord Briggs' judgment in Merricks is squarely
19 in point here, and that's of course where he set out that collective proceedings are
20 a special form of vindication for private rights; it is not likely to be assumed that more
21 restrictions are to be imposed here than in individual cases; and in an individual case
22 once you have a triable issue you have an entitlement *ex debito justitiae* to go to
23 trial.

24 Thirdly, I say that Mastercard misunderstands in fact your judgment in UKTC, since
25 you were, as I understand it, seeking to maximise access to justice. That's the core
26 thrust of the concern: that you want to include all affected persons within the class.

1 It's therefore not only contrary to the broader principle of the regime but contrary in
2 fact, as I read it, to your finding in UKTC to rely upon it to exclude extant class
3 members from suing for loss which they've suffered.

4 Fourthly, I come to the points -- the particular way that Mastercard is driven to put
5 this point, which is by reference to what we could have pleaded at the time and
6 whether it's our fault that we've ended up in this position and what the consequence
7 would be.

8 I say this. As a matter of principle, it's not the right test to transport the assessment
9 back in time in that way. The amendment needs to be assessed today against the
10 actual and real world factual and legal position and the choices which actually
11 confront the Tribunal today. I also endorse the observation which you made, sir, that
12 it's slightly cloud cuckoo perhaps, because were we to have sought to include run-off
13 loss at the time we obviously would have sued for that whole class rather than
14 a subset.

15 Lest it be said against me that there may in fact have been some nefarious and
16 cunning plan by which we deliberately let some claims go time-barred just so we
17 could not include them now --

18 **MR HOSKINS:** That's not the suggestion.

19 **MS WAKEFIELD:** I am grateful to hear that that's not the suggestion, but I would
20 just observe, by way of chronology of course, that your judgment in UKTC, sir, is
21 a recent one and until that point there was not such a thing, at least to my
22 knowledge, as this disjunct argument, nor, sir, until your Lordship, until your
23 judgment, sir, in respect of deceased persons in this class was it revealed that one
24 could not apply to add class members where its claims had gone time-barred.

25 You will recall that Mr Hoskins and I were on opposing sides of an argument in that
26 case where I was seeking to expand the class to include the claims of deceased

1 people under rule 32 and your judgment in that case was the one that said: no, you
2 can't expand the class to include claims after a limitation period has expired. So
3 that's just the chronology of how it's arisen in this case.

4 The final point I would make in respect of the disjunct is that Mr Hoskins put this by
5 reference to the importance of preserving limitation defences and how important they
6 are to defendants. Of course they are, but my position preserves the limitation
7 defence so that point goes nowhere.

8 That's disjunct. On duration, I would like to take you to the UKTC judgment, if
9 I could. So we've got -- in paragraph 208 I took you up to "excludes potential
10 claimants". This is in B379, if you need to get it out again.

11 "Mr Burnett observes a significant number of new O licence holders are incorporated
12 each year."

13 That's fine. That goes to the disjunct point.

14 "On the other hand, we regard a run-off period of eight years as remarkably long."

15 Then in *Hollick* you cite from the judgment of Chief Justice McLachlin and by
16 reference to the breadth of the class: the class should not be unnecessarily broad;
17 the class should not be defined -- you have to be sure that the class could not be
18 defined more narrowly.

19 So my point here is that we are linking the strength or robustness of the run-off
20 period with the consequence of having the wrong run-off period on class
21 membership. It ties the two. But for the reasons which I've just set out in this case
22 there's no link between the length of the run-off --

23 **MR JUSTICE ROTH:** Yes, but I don't think that applies to what you are seeking to
24 do here.

25 **MS WAKEFIELD:** It doesn't apply, exactly, sir, exactly.

26 Mr Hoskins took you to 209 and 210. But if I go to 211, the first two sentences, it is

1 | unsatisfactory to keep duration of run-off effectively open, and the reason there is by
2 | reference to individual cases, which we would agree with that, that we have to keep
3 | the boundaries of disclosure proportionate and the defendants need to know the
4 | extent of their potential exposure. We say 6 September 2016 does that.

5 | In terms of the rest of the reasoning of 2011 and indeed 2012, in my submission
6 | again we see it's particularly influenced by the fact that the robustness of class
7 | definition and class membership turns on the robustness of the run-off period. So if
8 | you leave it totally open, if you think, gosh, it's very weak towards the end but it
9 | doesn't really matter, but your class is constituted on that basis, and then
10 | subsequently you replead to exclude the last four years, then you have to kick
11 | people out of the class.

12 | **MR JUSTICE ROTH:** But your eight years, there's no basis for saying it's
13 | eight years, you have just cut it off because that's a pragmatic point to cut it off.
14 | From what you were saying, the influence could have continued for two years,
15 | three years, five years, six years, six months. It's just speculative, isn't it?

16 | **MS WAKEFIELD:** Sir, the MSC, you will have seen the paragraphs in the PSR
17 | report which I took you to about the indefinite nature of the contracts and that could
18 | well have gone longer than 6 September 2016, but we've cut it down to keep it as
19 | proportionate as possible and to stop the impact on the proceedings which
20 | Mr Hoskins adverted to of some rolling entitlement when one doesn't know where
21 | disclosure should end and when the experts should cease their methodology.

22 | The basis for the duration for the domestic interchange fees, as I submitted to you
23 | earlier this morning, sir, is Mastercard's pleaded case. It knows the facts of the IFs,
24 | that the intra-EEA MIF went to zero and then went to a much lower level than it had
25 | previously been in the period from the end of the infringement to date, and that the
26 | domestic IFs hadn't fallen at the same time.

1 Again we could have relied on --

2 **MR JUSTICE ROTH:** It's relying on the immediate aftermath, isn't it?

3 **MS WAKEFIELD:** Sorry, sir, I didn't catch that.

4 **MR JUSTICE ROTH:** Isn't Mastercard relying on the immediate aftermath before?

5 **MS WAKEFIELD:** No, sir. If I take you to paragraph 100(f).

6 **MR JUSTICE ROTH:** (iv).

7 **MS WAKEFIELD:** (iv) again, which is in tab 25 of bundle 2, page 1347, you will see

8 that they rely on it dropping to zero between 12 June 2008 and July 2009 -- it, sorry,

9 being the EEA MIFs -- and then after July 2009 being set at a substantially reduced

10 level from July 2009 to date.

11 So their defence pleads up to the present day. That opened the door for us to plead

12 run-off of the same length, but again mindful of the need to control proceedings

13 properly we've averred that no loss will be sought for the period after

14 6 September 2016.

15 **MR JUSTICE ROTH:** But are you saying that you think it is plausible that it applies

16 forever and you have just taken a pragmatic cut off?

17 **MS WAKEFIELD:** The pleaded case is to date. That's their case. So it is --

18 **MR JUSTICE ROTH:** They are just saying --

19 **MS WAKEFIELD:** -- (inaudible due to overspeaking) if they are right.

20 **MR JUSTICE ROTH:** They are just saying there's no connection. That's all they are

21 saying.

22 **MS WAKEFIELD:** Sir, it plainly is plausible that it continues. It continues in the

23 various respects that I set out this morning, either because the tenor at which the

24 domestic IFs were set was set over the very long period of infringement, an 18-year

25 infringement period.

26 **MR JUSTICE ROTH:** Yes, but they changed over that period. So what you are

1 saying is that the people who set the UK domestic MIF in 2015 were affected by
2 what the EEA MIF was in 2008. That's what you have to say, isn't it?

3 **MS WAKEFIELD:** Yes, absolutely, sir. They could have made a decision not to
4 reduce it by more than 0.2 or something. I don't know. I don't know what the levels
5 were. But they absolutely --

6 **MR JUSTICE ROTH:** But not looking at being determined by competitive conditions
7 in 2016.

8 **MS WAKEFIELD:** I really am not in a position --

9 **MR JUSTICE ROTH:** It just seems contrary to common sense --

10 **MS WAKEFIELD:** Sir, I am not in a position to make --

11 **MR JUSTICE ROTH:** -- that businesses are taking decisions based on a market
12 almost a decade ago when setting their prices.

13 **MS WAKEFIELD:** Sir, the competitive conditions which exist in this particular
14 market are, as adverted to earlier in Mr Hoskins' response to the Professor's
15 questions, not quite the same competitive conditions that one has in many markets,
16 and these are rates which are agreed collectively.

17 **MR JUSTICE ROTH:** It's the other payment cards and credit cards that is the main
18 competition, Visa, Amex.

19 **MS WAKEFIELD:** Yes, sir, but it can push you up as well as down. That was the
20 point which the Professor made.

21 **MR JUSTICE ROTH:** Yes, but that competition is ongoing.

22 **MS WAKEFIELD:** Absolutely.

23 **MR JUSTICE ROTH:** And the idea that in 2015 it's not the current competition but
24 it's an historic rate from 2008 that is going to be materially affecting the decision.

25 **MS WAKEFIELD:** Sir, I am in difficulty because of course essentially I am
26 speculating here, but it's entirely conceivable that a decision be taken to maintain the

1 domestic IFs at essentially the same rate that they always were at. Even though
2 competition lawyers have come in and stopped the EEA MIF from being charged at
3 the level it was, they haven't done that for the domestic ones.

4 So the inflated rate caused by the infringement remained at the level the inflation
5 remains present in the domestic IFs, still charged, that still will be charged. I say that
6 that is sufficiently arguable for me to plead the length of run-off which I seek to plead.
7 I also say that if I am wrong and if ultimately in the wash it's a shorter period -- this is
8 my UKTC point -- the consequences are much less severe than they would have
9 been in the RHA action, because in the RHA action if that was robust and if it had
10 gone wrong your class membership is wrong.

11 **MR JUSTICE ROTH:** No, I understand.

12 **MS WAKEFIELD:** I know you have the point, sir. Of course you have the point.

13 I turn now to methodology. Mastercard of course objects, as you heard from
14 Mr Hoskins. They say no attempt has been made to demonstrate that there is
15 a sufficiently credible or plausible expert methodology for the various limbs of the
16 run-off overcharges, I think, most particularly, that overcharge element of the
17 domestic IFs.

18 Just by way of initial observation, I would say this. Although we do accept, of course
19 we have to accept, that the claims need to be certified, we are here, bringing
20 collective proceedings, and we accepted in our skeleton argument the conditions of
21 certification need to be satisfied, however it's critical that when a claim moves
22 forward, as these proceedings are now moving forward and have been moving
23 forward, and one sees issues develop, different expert reports be put in, different
24 requests for disclosure which Ms Demetriou will address you on later this afternoon,
25 one isn't perenially forced back into a position of early lack of knowledge and have to
26 put in the sort of expert report one would put in if we were applying for certification

1 the first time round.

2 It's also very important that you, sir, and members of the Tribunal, aren't asked to put
3 from your minds things you know about how issues have developed.

4 By way of example, on the causation question, the relationship between the EEA
5 MIFs and the domestic IFs, you will have seen in your pre-reading for the hearing
6 today, the expert report of Mr Justin Coombs in relation to how causation was going
7 to be proved, there's an argument. Is it just on the documents? Is it by way of
8 a regression analysis? There are arguments about the kind of data you need or
9 don't need.

10 Against that backdrop, for Mr Hoskins to say: well, there's no indication at all of how
11 causation might be proven in this case and that we needed to presumably put in
12 another expert report explaining how causation might be approached if this claim
13 were at its very outset and where we were filing our claim form for the first time, is to
14 load those requirements with a degree of artificiality and burdensomeness and
15 actually to stop you, sir, and members of the Tribunal, asking yourselves the right
16 questions for certification, which are essentially do you think that there is a plausible
17 methodology by which these questions can sensibly be answered. I say that there
18 plainly is, sir.

19 **MR JUSTICE ROTH:** Ms Wakefield, speaking for myself, I don't think that the way in
20 which the domestic MIFs were related or not to the EEA MIF and how one might
21 cause the other is something that is peculiar necessarily to a collective action. It
22 would have applied in an individual action if it were a follow-on action, most of them
23 are not. So I am not sure it's something that would really come into the certification
24 problem which is more about looking at aggregate damages and whether it can be
25 done collectively.

26 **MS WAKEFIELD:** I agree.

1 **MR JUSTICE ROTH:** So I don't see that as an objection.

2 **MS WAKEFIELD:** I entirely agree, sir. I am grateful for that.

3 Mr Hoskins also made a point about lawfulness or not. I am not proposing to
4 address that in any detail, but we respectfully agree with your observations, sir, that
5 plainly we are not alleging a fresh infringement after the end of the infringement. We
6 can't. This is a follow-on claim. But, equally, we are looking for the loss caused by
7 the infringement and it's not the case that one can simply identify certain things as
8 lawful because it's irrelevant essentially to the causation analysis at that point.

9 **MR JUSTICE ROTH:** It is going to get more and more difficult as time goes on
10 because there are so many other factors that are taken account of in setting a MIF to
11 start identifying to what extent an historic EEA MIF is still playing a part.

12 **MS WAKEFIELD:** It will become more difficult, I can see that, and --

13 **MR JUSTICE ROTH:** It is a matter of common sense. If you were, or I were, sitting
14 on the domestic MIF setting body, whatever it was, that someone took these
15 decisions, what should the domestic MIF be for chip and pin in 2015, with all the
16 factors they'd take account of to say to what extent is it the historic position.

17 **MS WAKEFIELD:** I do see that, sir, and of course Ms Demetriou will be setting out
18 the disclosure application.

19 **MR JUSTICE ROTH:** Yes.

20 **MS WAKEFIELD:** It may well be that the minutes of that meeting, were you to have
21 been on it, sir, would say: well, we are now taking into account X and then that would
22 be factored into --

23 **MR JUSTICE ROTH:** Well, they obviously take account of a lot of things --

24 **MS WAKEFIELD:** Of course.

25 **MR JUSTICE ROTH:** -- to say that it's still material as time goes on.

26 **MS WAKEFIELD:** Yes, sir.

1 **MR JUSTICE ROTH:** Yes.

2 **MS WAKEFIELD:** You already have my submissions on the MSC run-off
3 overcharge. Of course the levels themselves can be determined in trial one, and the
4 premise of the MSC run-off is that they have all reduced, and then we are looking to
5 see the extent to which the MSC goes down. I addressed you earlier this morning
6 on the near identity between that question and all the questions that need to be
7 ventilated in any event when we are considering acquirer pass-on. That's the same
8 methodology.

9 Then as soon as we get to the really tricky stuff for the purposes of certification,
10 namely does this all work when you are bundling all the claims together, most
11 obviously merchant to consumer pass-on, exactly the same for the run-off as it is for
12 anything else.

13 The extraction of loss point which Mr Hoskins made, again the same here as it is for
14 anything else. You may have seen that in our reply we acknowledge this. It's
15 paragraph 10 of the reply at A, tab 6, page 76. I don't think I need take you there.

16 But we essentially agree with Mastercard that there are various categories of
17 consumer which need to be taken out of the aggregate loss assessment. It's been
18 proposed I think that in the immediate term, after we've had notification to the class
19 and opting in and opting out, there will be a process by which we address opt-in and
20 opt-out and dead people with the experts and we put in an expert report at this
21 stage. You will have seen Mr Coombs also addresses the extraction of deceased
22 persons' loss in his report for this hearing. So we say nothing unusual here. It's
23 what we have to do for the aggregate damages award in any event.

24 I am very near the end so I think I will continue, even though I see the time, if that's
25 acceptable, sir.

26 **MR JUSTICE ROTH:** I mean it's definitely a further complication of the extraction

1 process that you have to start extracting people who were not 16 in 2008 or their
2 purchases when you are looking at 2014.

3 **MS WAKEFIELD:** That's true, sir, but one of the benefits of the 6 September date is
4 of course that the class holds steady throughout the whole period, because anyone
5 who deceased before 2016 is already out of the class.

6 **MR JUSTICE ROTH:** Yes.

7 **MS WAKEFIELD:** So, although the assessment of new consumers is a bit different
8 in the run-off, if we can accurately work out a class, the represented persons I should
9 say, which we need to do, that body will hold through --

10 **MR JUSTICE ROTH:** Yes, but you will have to know what proportion it is.

11 **MS WAKEFIELD:** We will. So we'll need to use the data that we use in any event to
12 extract the deceased persons and in fact to come up with our class numbers for the
13 infringement period to have the big number from which we take out our represented
14 persons.

15 In terms of the money, if I can put it that way, a point made against us in the skeleton
16 argument and repeated perhaps slightly more softly today is in respect of the third
17 party disclosure of the merchant contracts. As I said this morning, sir, if that goes as
18 a UPO, then of course it won't be third party disclosure in any event and we will have
19 current merchant contracts in the umbrella proceedings. If acquirer pass-on is not
20 determined under a UPO, we will need third party disclosure. That's already allowed
21 for in our costs budget, which is at volume 3, tab 37, page 1880, which allows
22 £1.5 million, and the note says it reflects:

23 "... costs of obtaining and analysing economic data from third party merchants and
24 retailers".

25 And so we could make third party disclosure applications out of that.

26 Further, and in any event, you will have seen in my skeleton argument that, in terms

1 of funding more broadly, we have the additional amount of £12.6 million. That's in
2 the LFA. It's not in the bundles, I'm afraid. But the funder has made that available
3 as a contingent amount, to which Mr Merricks can seek to access if necessary. So
4 there really is no funding problem in bringing these additional heads of loss for which
5 significant elements can in any event be rolled into what has to be determined in any
6 event.

7 **MR JUSTICE ROTH:** When was that agreed? I don't think -- we saw the reference
8 in your skeleton, but I don't think we've seen any documents.

9 **MS WAKEFIELD:** I will just check.

10 **MR JUSTICE ROTH:** Or you can tell us after lunch, if you'd prefer.

11 **MS WAKEFIELD:** It came in as part of the new funding agreement for the remittal.
12 I am not sure whether it was in front of the remittal hearing or not, sir. It should have
13 been. It was, I am told, before you.

14 **MR JUSTICE ROTH:** It's not related to this --

15 **MS WAKEFIELD:** It's not related to this.

16 **MR JUSTICE ROTH:** -- amendment at all.

17 **MS WAKEFIELD:** It's not, but these are proceedings in relation to which obviously
18 sometimes issues fall away and it becomes smaller and sometimes things go to
19 appeal and it becomes more expensive, so there is that extra amount of money.

20 In terms of the speedy resolution, the last point -- I have addressed you on this
21 already this morning so I will be very quick -- we are confident that, although this will
22 necessarily add something to the proceedings, much of it can be wrapped into what
23 has already been determined. Mr Merricks, as I said, sits behind me. He is fervently
24 of the view that allowing the class members to sue for the totality of the loss which
25 they have suffered obviously outweighs the benefit of a marginally speedier process.

26 Those are, unless I have forgotten anything, all of my submissions in reply to

1 Mr Hoskins. Thank you for giving me an extra 5 minutes.

2 **MR JUSTICE ROTH:** Thank you. We'll come back at 2.05.

3 **(1.04 pm)**

4 **(The luncheon adjournment)**

5 **(2.05 pm)**

6 **Ruling (Extracted)**

7 **MR JUSTICE ROTH:** So I think we now go to the question of preliminary issues for
8 a split trial or a combination of the two. We have seen that you have -- if I can
9 somewhere find my note -- agreed some agreement. One is on limitation, I think,
10 Ms Demetriou and I think we've got a formulation of a preliminary issue in -- is it in
11 Mr --

12

13 **Submissions by MS DEMETRIOU**

14 **MS DEMETRIOU:** My Lord, yes, it's at A1, tab 11, Mastercard's application. A1,
15 tab 11, page -- I think it's around 619. Yes. So that is their --

16 **MR JUSTICE ROTH:** Paragraph --

17 **MS DEMETRIOU:** The formulation is at 621 on paragraph 16.

18 **MR JUSTICE ROTH:** Thank you very much. Yes. Well, I was puzzled by that
19 because I thought that Mastercard says in its defence that it is prepared to assume
20 that all the claims are in regard to UK transactions governed by English law. Of
21 course, English law has more generous limitation than Scots law.

22 On that basis, is there an issue now about that? Or are you content to proceed on
23 the basis they are all governed by English law? Because --

24 **MS DEMETRIOU:** Yes, my Lord, it follows from the fact that -- it's really the logical
25 extension of the position we take in relation to other Member States so can I show
26 you the pleading?

1 **MR JUSTICE ROTH:** Yes. Well, I am looking at Mastercard's defence,
2 paragraph 9, which is where they plead limitation which is A, 1300.

3 **MS DEMETRIOU:** Yes.

4 **MR JUSTICE ROTH:** Are you content to proceed on that basis? Because it would
5 somewhat surprise me if you are not.

6 **MS DEMETRIOU:** Yes, so my Lord, can I just explain how this all arose. If you go
7 to tab 26, to our reply. So A1371.

8 **MR JUSTICE ROTH:** A1. 371?

9 **MS DEMETRIOU:** Yes. My Lord, this arises because what we say -- if you look at --

10 **MR JUSTICE ROTH:** I have different pagination. Is it A371?

11 **MS DEMETRIOU:** A1371. So it's behind tab 26. This is our reply.

12 **MR JUSTICE ROTH:** The second bundle?

13 **MS DEMETRIOU:** I am so sorry, the second bundle, yes.

14 **MR JUSTICE ROTH:** I have your amended reply here which will have it in as well.
15 What's the paragraph?

16 **MS DEMETRIOU:** I am so sorry, yes.

17 **MR JUSTICE ROTH:** If it is in this bundle, it makes it easier. Tab 6.

18 **MS DEMETRIOU:** So it's paragraph 8, so it's page A74 -- A74.

19 **MR JUSTICE ROTH:** Yes.

20 **MS DEMETRIOU:** So essentially you will see that our pleaded case -- this is in
21 relation to transactions at merchants which were based outside the United Kingdom
22 and so what we say is that -- you will see how we've pleaded it in relation to the two
23 time periods which reflect the different legislation in place during those time periods.
24 So we say that:
25 "The most significant element of the tort occurred where the loss [I'm looking at
26 paragraph 8 a(i)] was suffered by the consumers, namely England and Wales,

1 Scotland and Northern Ireland. Accordingly, the law of that country applies."
2 So that's how we deal with transactions at merchants which were based outside the
3 UK.
4 **MR JUSTICE ROTH:** Yes.
5 **MS DEMETRIOU:** So we are saying it's where the consumer was located.
6 **MR JUSTICE ROTH:** What about merchants in the UK?
7 **MS DEMETRIOU:** Well if Mastercard are content -- can I just take instructions?
8 **MR JUSTICE ROTH:** Before you take instructions, so Mr Hoskins can also take
9 instructions, would it not also be sensible to have a preliminary issue of this question
10 raised by your paragraph 8, namely that for transactions at merchants based outside
11 the UK, what is the proper law, what is the law governing the claim? So that we deal
12 with all of this at once. That affects, obviously, Mastercard as well. **(Pause)**
13 **MS DEMETRIOU:** Sir, no, the answer to the first question is no, we are not content,
14 so we want to maintain our position.
15 **MR JUSTICE ROTH:** You want to say if it's in Scotland, it's a five-year limitation
16 period?
17 **MS DEMETRIOU:** Yes, because even though it's a five-year limitation period, there
18 is another aspect of the rule which we think is more beneficial to us.
19 **MR JUSTICE ROTH:** I see. Right. So you want to have the Scottish aspect
20 determined separately. So you contend that -- you don't agree with the proposal in
21 paragraph nine of the defence?
22 **MS DEMETRIOU:** No. Then --
23 **MR JUSTICE ROTH:** It will mean you are going to have to get a separate, possibly,
24 volume of commerce for Scotland and Northern Ireland of course. It's going to
25 complicate your claim considerably, if there is a good limitation defence. But it's your
26 choice --

1 **MS DEMETRIOU:** It may do, yes.

2 **MR JUSTICE ROTH:** -- if you want to add that complication.

3 **MS DEMETRIOU:** Yes.

4 **MR JUSTICE ROTH:** Yes. Then the second question is -- it's really the point raised
5 in the defence which you disagree with in paragraph 24 of Mastercard's defence
6 about what the proper law is for determining limitation.

7 **MS DEMETRIOU:** Yes.

8 **MR JUSTICE ROTH:** And that's a pure question of law, isn't it?

9 **MS DEMETRIOU:** Yes, I think that we could wrap that up in the preliminary issue.

10 **MR JUSTICE ROTH:** Yes, let's get that sorted out as well. You agree with that;
11 yes?

12 **MR HOSKINS:** Yes.

13 **MR JUSTICE ROTH:** We are also of the view that it's very sensible to pursue that
14 by way of preliminary issue. The exact wording, perhaps, now can be looked at by
15 both of you, in the light of what we've said.

16 **MS DEMETRIOU:** Yes, of course.

17 **MR JUSTICE ROTH:** Will that involve any factual evidence at all? Is there a point
18 under section 32 of the Limitation Act which will involve some factual evidence or
19 not?

20 **MS DEMETRIOU:** So I think that it can be dealt with by an agreed statement of
21 facts because I think the question will be what was in the public domain --

22 **MR JUSTICE ROTH:** Yes.

23 **MS DEMETRIOU:** -- rather than what could reasonably have been discovered by
24 the class members. So I think it's capable of determination on the basis of an
25 agreed statement of facts and then how the law applies to those facts, so it does
26 come down to legal submissions.

1 **MR HOSKINS:** Sir, I don't disagree with that but in our draft order we've proposed a
2 mechanism to see if we can agree a statement of facts.

3 **MR JUSTICE ROTH:** Yes.

4 **MR HOSKINS:** And that will be primary facts and the facts of what the foreign law is
5 and insofar as there can't be agreement, then we'd need to have some factual
6 evidence, so it depends whether you want to tune it to that way at this stage.

7 **MR JUSTICE ROTH:** I am thinking about dealing with this. It will probably be two
8 days, will it, or perhaps with the additional point, two to three days?

9 **MS DEMETRIOU:** I think probably two days should be --

10 **MR HOSKINS:** You need a reading day.

11 **MR JUSTICE ROTH:** Yes. I am looking at hearing days.

12 **MR HOSKINS:** So that I think two to three days is safe because we don't know
13 precisely what issues we are going to have.

14 **MR JUSTICE ROTH:** Yes.

15 **MR HOSKINS:** But I think three will be safer.

16 **MR JUSTICE ROTH:** Three days. We'll come back to when in a moment. That's
17 then determined.

18 The next one is, again, what has been called "exemptibility." A somewhat
19 cumbersome word but we know what it means. In other words, it's going to be the
20 question of law of, whether it's open to Mastercard as a matter of law, to contend that
21 the MIFs would qualify for exemption under Article 81 of 101, paragraph 3.

22 **MS DEMETRIOU:** Three.

23 **MR JUSTICE ROTH:** Not the second question --

24 **MS DEMETRIOU:** My Lord, quite.

25 **MR JUSTICE ROTH:** -- which depends upon the answer to the first, namely then,
26 what would be the exemptible level which is a very complicated question.

1 **MS DEMETRIOU:** Exactly and it's now agreed that should also be determined
2 upfront, alongside the limitation applicable law point, so it may be safe to allocate
3 a four-day sitting for both issues.

4 **MR JUSTICE ROTH:** Yes, I think, sensibly, they should be heard together.

5 **MS DEMETRIOU:** Yes.

6 **MR JUSTICE ROTH:** I saw there was some suggestion of doing one before
7 Christmas and one after, but that doesn't make sense.

8

9 **MS DEMETRIOU:** No, that doesn't seem efficient.

10 **MR JUSTICE ROTH:** In one hearing, four days, and if we said that would be done in
11 January, at the start -- we'll look at dates --

12 **MS DEMETRIOU:** I think that sounds very sensible.

13 **MR JUSTICE ROTH:** -- out of the Tribunal but at the start of the following term, yes.
14 Start of the 2023 term.

15 **MS DEMETRIOU:** Thank you.

16 **MR JUSTICE ROTH:** Yes, I think that's agreed.

17 Then there's the question of Solo cards which we are not clear what Mr Merricks'
18 position is on that because it's pleaded in the defence. I don't think you've
19 addressed it in the reply, have you, that paragraph of the defence? It's
20 paragraph 150 of the defence.

21 **MS DEMETRIOU:** No, I think we haven't addressed it in the reply.

22 **MR JUSTICE ROTH:** What's your position on that?

23 **MS DEMETRIOU:** Our position is we are content for that to be part and parcel of
24 this early trial in trial one. We will need to see -- the problem is there's an
25 information asymmetry so we've pleaded a case. Nobody has struck that case out.
26 The case is there on the pleadings and we need disclosure in relation to it in order to

1 assess it. So if, once having had disclosure, we agree with Mastercard, obviously
2 we'll say but for present purposes it's not been struck out and we are content for it to
3 be dealt with at the first trial, if I can call it that.

4 **MR JUSTICE ROTH:** I don't think it can be in the four days.

5 **MS DEMETRIOU:** No.

6 **MR JUSTICE ROTH:** But equally, there's no reason -- the disclosure will be fairly
7 discrete on that, how Solo cards -- who was in charge of them, effectively, whether
8 what is said in paragraph 150 of the Mastercard defence, and which I appreciate
9 you've not been able to test, whether it was part of UK Switch and whether it
10 operated on the Mastercard's interchange network rules, et cetera. So we can set
11 a timetable for disclosure which would be entirely from Mastercard on that and we
12 could set that down for a separate trial which I imagine would also be no more than
13 two days and if you, on receiving disclosure, decide you are not pursuing that, it can
14 be vacated but that could be done in the spring, presumably.

15 **MS DEMETRIOU:** My Lord, can you bear with me just for a moment because I think
16 it may be a little more complicated but if you can bear with me.

17 **MR JUSTICE ROTH:** What I was saying, I don't know if you heard --

18 **MS DEMETRIOU:** I did hear, thank you. **(Pause)**

19 Sir, I think the issue, broadly, is as follows but I am just in the process of taking
20 instructions. So the point made by Mastercard is that our claim did not embrace
21 Maestro cards and they say: well, Solo is exactly the same and so if you are going to
22 accept that Maestro are out of the claim, then you ought to, by parity of reasoning,
23 accept that Solo is. But that rather hinges on the reasons why Maestro were not
24 included and as I understand it, there was a hefty dose of pragmatism in deciding not
25 to include Maestro cards, so it does not necessarily follow that if they are in
26 a factually similar position, there is nonetheless, not a claim.

1 So for that reason, we think that it would be better, instead of having a discrete trial
2 relating to Solo cards, for the Solo issue to be in the first trial which is what
3 Mastercard proposed and which we agree.

4 **MR JUSTICE ROTH:** I am just looking at what you said about Maestro in your reply.

5 **MS DEMETRIOU:** We did not address it -- sorry, Maestro?

6 **MR JUSTICE ROTH:** Maestro.

7 **MS DEMETRIOU:** So ... that's at A88, behind tab 6.

8 **MR JUSTICE ROTH:** Yes.

9 **MS DEMETRIOU:** So we don't -- so ... here we are dealing with --

10 **MR JUSTICE ROTH:** You excluded it. Sorry, it's in the claim form, not in the reply --

11 **MS DEMETRIOU:** It's in the claim form, exactly.

12 **MR JUSTICE ROTH:** -- that they are excluded because you understand the
13 interchange fees for Maestro were set by Switch card services and/or S2 card
14 services.

15 **MS DEMETRIOU:** Yes, at a level below the intra-EEA fallback MIFs.

16 **MR JUSTICE ROTH:** Yes, and what I think Mastercard are saying, well the same is
17 true of Solo cards.

18 **MS DEMETRIOU:** Well --

19 **MR JUSTICE ROTH:** Now you may say you don't know but if that is correct, then on
20 what basis -- it's not clear to me on what basis you seek to include them.

21 **MS DEMETRIOU:** Sir, currently the way Solo is included is we plead the same
22 causal mechanism that the inflation of the EEA MIF, the infringement caused the MIF
23 to be inflated and so --

24 **MR JUSTICE ROTH:** Yes, but if it's not set by Mastercard, then how can it be part
25 of this claim?

26 **MS DEMETRIOU:** Well because, nonetheless, even if it's not set by Mastercard, it's

1 conceivable that the EEA intra-EEA MIF set a floor and so --

2 **MR JUSTICE ROTH:** You ought to have pleaded to it in your reply in that case, if
3 that's what you are saying. I mean this is just there as a -- not -- that's a separate
4 allegation if you are saying, even though it's a third party, it's a sort of umbrella claim
5 of some kind.

6 **MS DEMETRIOU:** Sir, I think the difficulty is there's nothing really to add in our
7 reply, so we've got our original claim which pleads the causal link. We say that the
8 causal link, we plead that it applies to Solo. Nobody has applied to strike that out so
9 there will have to be a factual assessment.

10 **MR JUSTICE ROTH:** Do you say it applies to Solo in the claim form?

11 **MS DEMETRIOU:** In the sense that Solo cards are included in the claim?

12 **MR JUSTICE ROTH:** Yes, but only because they are part of debit cards and there is
13 here a statement about how Solo -- if you are saying it's because even though they
14 weren't being set by Mastercard because the claim form is all about Mastercard
15 interchange fees. You are not claiming, for example, about Visa domestic
16 interchange fees, saying that's a result of Mastercard. It's limited to Mastercard's --

17 **MS DEMETRIOU:** Yes.

18 **MR JUSTICE ROTH:** -- credit and debit cards.

19 **MS DEMETRIOU:** Yes, but the causal link in -- so the causation allegation in the
20 pleading is not limited to positive acts of Mastercard. So we are saying the
21 infringement caused an inflated rate and we --

22 **MR JUSTICE ROTH:** Of which cards?

23 **MS DEMETRIOU:** Well of the cards included within the scope of the claim. So it's
24 correct that we haven't, as it were, dealt separately with Solo cards in the claim. It's
25 Mastercard that came back and said: well, they are in a different position and we are
26 just not, at the moment, in a position to test that.

1 **MR JUSTICE ROTH:** No, but that's why I am suggesting there should be a trial
2 where you can test it.

3 **MR HOSKINS:** Sir, it might help. Our understanding of the pleadings is because if
4 you look at the particulars of claim, as I am going to look at it, bundle A1, tab 5,
5 page 55, the way in which the general causation case is put depends upon the EEA
6 MIF being the default rule for domestic transactions, i.e. the Mastercard scheme
7 dictates that the EEA MIF is the default, in the absence of any other agreed MIF for
8 domestic transactions.

9 Then you have at page 64-paragraph 113, so we're still in the particulars of claim, so
10 this is:

11 "The Class Representative makes no claim in respect of any schemes that were not
12 operated under the defendant's interchange network rules."

13 And the reason why no claim is made is because the causation case doesn't work.
14 Unless they are all part of the Mastercard scheme, there's no causation case in any
15 event.

16 **MR JUSTICE ROTH:** Thank you, that was the paragraph I was looking for. It's that
17 statement, Ms Demetriou, the first sentence of paragraph 113:

18 "The Class Representative makes no claim in respect of any schemes that were not
19 operated under the defendant's interchange network rules."

20 **MS DEMETRIOU:** Yes.

21 **MR JUSTICE ROTH:** So the question is, was Solo operated under their interchange
22 network rules or not? You say you don't know.

23 **MS DEMETRIOU:** Sir, yes, and I am grateful to Mr Hoskins for reminding me of that,
24 that's correct.

25 **MR JUSTICE ROTH:** That's the issue.

26 **MS DEMETRIOU:** Yes, that's the issue, it seems.

1 **MR JUSTICE ROTH:** It's a discrete issue, it's a factual issue but it's not a very
2 complicated one and it could be determined, I would imagine, at a trial of two days
3 and, again, one wants to make progress with this case and that could be heard in the
4 spring.

5 **MS DEMETRIOU:** Sir, so in relation to that, I think that then there's an efficiency
6 question as to whether -- because there's agreement, you will have seen in the
7 skeleton arguments on both sides, that subject to the question about transaction
8 data which we'll come to, there should be a trial determining most of the
9 pre-consumer pass-on issues in Michaelmas 2023.

10 **MR JUSTICE ROTH:** I am not sure there is agreement on all of that and anyway,
11 that's Michaelmas 2023. I want to get a move on with this case and I am suggesting
12 the spring of 2023.

13 **MS DEMETRIOU:** Sir, I understand that but obviously -- I am not making a positive
14 submission we shouldn't do it but I want to say that in the balance, when deciding
15 whether this is a good idea, we should weigh the fact that 2023 is already an
16 ambitious timetable and it may be more efficient, given that it's a narrow issue, just to
17 wrap up the Solo issue in that trial.

18 **MR JUSTICE ROTH:** It's not that complicated.

19 **MS DEMETRIOU:** I mean for the other -- sir, I think you might be misunderstanding
20 me. I am not saying the Solo issue is that complicated, I am saying there's
21 agreement, subject to the transaction data point which -- there's now agreement, it
22 seems, that in Michaelmas 2023, there should, in principle, be a trial one which
23 encompasses VOC, overcharge --

24 **MR HOSKINS:** No, no.

25 **MR JUSTICE ROTH:** I don't think there is agreement on my reading of the
26 skeletons. There's an agreement there might be a trial of something but what it

1 | would contain is, I think, not common ground but we'll come to that in a minute. But
2 | whatever might happen in Michaelmas 2023, this is a wholly discrete question. It
3 | could be sorted out long before any trial on causation which is more complicated --
4 | **MS DEMETRIOU:** Yes.
5 | **MR JUSTICE ROTH:** -- in a couple of days and why don't we get on with it. Surely
6 | your client keeps saying he wants to get on with this case?
7 | **MS DEMETRIOU:** Sir, I think that's fine. I am not going to object to that, so long as
8 | it's not then --
9 | **MR JUSTICE ROTH:** It's not going to prejudice anything else.
10 | **MS DEMETRIOU:** Good, okay. Well in that case, I think that sounds reasonable --
11 | **MR JUSTICE ROTH:** Yes.
12 | **MS DEMETRIOU:** -- to us.
13 | **MR JUSTICE ROTH:** I mean as you say, when you get disclosure, you may review
14 | your position.
15 | **MS DEMETRIOU:** So I am just wondering whether -- I am looking at Mastercard's
16 | proposal. So we are looking at -- I am looking at the first witness statement of
17 | Mr Sansom behind --
18 | **MR JUSTICE ROTH:** If we look -- you took me, helpfully, to the application at
19 | tab 11.
20 | **MS DEMETRIOU:** Yes.
21 | **MR JUSTICE ROTH:** This one's A623.
22 | **MS DEMETRIOU:** Yes.
23 | **MR JUSTICE ROTH:** Paragraph 24.
24 | **MS DEMETRIOU:** That's the formulation of the issue.
25 | **MR JUSTICE ROTH:** Yes.
26 | **MS DEMETRIOU:** I was just going to add that Mr Sansom says at page A638, just

1 | so you have it in mind, sir, that following disclosure, Mastercard would adduce
2 | evidence from one factual witness and no expert evidence is required but I just point
3 | you to that so you have it in mind.

4 | **MR JUSTICE ROTH:** One factual witness and it's not an expert question at all.

5 | **MS DEMETRIOU:** No, it's not.

6 | **MR JUSTICE ROTH:** Pure fact. Subject to when they could do disclosure and we'll
7 | come to that because you need that, obviously, in good time. This could be heard,
8 | I would have thought, some point in the spring of next year.

9 | **MS DEMETRIOU:** Sir, yes.

10 | **MR JUSTICE ROTH:** I would have thought two days. Is that reasonable? You
11 | know the evidence, Mr Hoskins, or you've had instructions?

12 | **MR HOSKINS:** It's slightly odd, the evidence. Of course, we say we don't have any
13 | relevant evidence because we didn't set it but we'll have to do some sort of search
14 | and say we've found nothing or very little but certainly two days would be more than
15 | enough, if we are anywhere near correct. If we are not correct on the documents,
16 | this issue will probably go away anyway because if it's part of the scheme, it's part of
17 | the scheme.

18 | **MR JUSTICE ROTH:** Well somebody might seek a statement from someone who
19 | knows about the operation of Solo, even if they are not your employee.

20 | **MR HOSKINS:** Which is what we are planning to do. So we are very happy with
21 | this coming on in spring 2023 but I would need to take some more detailed
22 | instructions about that discrete disclosure exercise if we are going to get a date now
23 | but obviously, we are happy to do that.

24 | **MR JUSTICE ROTH:** Perhaps over the break, take instructions about the disclosure
25 | needed for that.

26 | **MR HOSKINS:** Certainly.

1 **MR JUSTICE ROTH:** So that is Solo. Then one gets to causation. That's raised
2 in -- well quite a lot of places. There are various ways that can be approached. But
3 in the defence, the basic position I think, as I understand it, as regards Mastercard's
4 defence, is that the EEA MIFs did not influence, whether as a floor or a guidance, the
5 domestic MIF and therefore, as this claim is largely but not entirely based on
6 domestic MIFs, that part of the claim fails on causation.

7 That is a somewhat different formulation than the one set out in paragraph 33 of
8 Mastercard's application. But it seems to me that that is the basic point that
9 Mastercard is taking, that the setting of the domestic MIF was not influenced or
10 affected by the EEA MIF.

11 **MS DEMETRIOU:** Yes.

12 **MR JUSTICE ROTH:** If that can be resolved at trial, whether it needs transaction
13 data or not is a separate question, but that issue would be really helpful to have that
14 determined. If Mastercard succeeds on that, the larger part of the claim falls away; if
15 you succeed on it, then your position on any negotiations is hugely strengthened.

16 **MS DEMETRIOU:** Sir, yes, so we agree it should be determined.

17 **MR JUSTICE ROTH:** Yes.

18 **MS DEMETRIOU:** But we make a further point which is that it shouldn't be
19 determined in isolation but it should be determined at the same time as VOC and
20 overcharge. We make that point for two essential reasons which we set out in our
21 skeleton argument. The first is that there is overlap in the analysis that will have to
22 be conducted by the experts. That's explained in Mr Coombs' reports.

23 **MR JUSTICE ROTH:** That's based on needing transaction data --

24 **MS DEMETRIOU:** Whether one has aggregated or disaggregated data, one is
25 looking at the same data in order to assess VOC and overcharge and causation. So
26 Mastercard's original application that causation should be determined upfront was

1 | premised on the idea that there would just be a qualitative exercise of looking at the
2 | contemporaneous documents. We came back and said: no, no, we are going to do
3 | that, but our experts are also proposing to conduct a quantitative analysis. So it's not
4 | as easily hived off from the other issues. In fact, there's overlap. I can take you to
5 | the parts of Mr Coombs' report that say that.

6 | **MR JUSTICE ROTH:** We've seen that. That's on your application for transaction
7 | data --

8 | **MS DEMETRIOU:** Yes, but --

9 | **MR JUSTICE ROTH:** -- to determine this causation point.

10 | **MS DEMETRIOU:** Yes, but he is going to be looking -- whether we get the -- it may
11 | be that this overlaps with the disclosure application for data.

12 | **MR JUSTICE ROTH:** Yes.

13 | **MS DEMETRIOU:** The other point we make is that there is, as you know, going to
14 | be or has been provisionally listed, an umbrella proceedings consumer pass-on trial
15 | in the merchant actions and as you know, we are proposing to make an application
16 | that consumer pass-on in these proceedings be decided at that trial. The savings
17 | are, I hope, obvious. We'll have to see where that ends up but we are going to make
18 | that application.

19 | Mastercard's position, at least, is that in order for that to happen, then before that
20 | stage, there will need to be a determination of VOC and overcharge.

21 | **MR JUSTICE ROTH:** That consumer pass-on trial is provisionally envisaged for?

22 | **MS DEMETRIOU:** The spring of 2024.

23 | **MR HOSKINS:** We don't accept that's our position, we think that's
24 | a misrepresentation but I can address you if needs be.

25 | **MR JUSTICE ROTH:** You can address me in a moment. Yes, so that's spring 2024,
26 | yes.

1 **MS DEMETRIOU:** It may be, sir there's not so much between us because if, in fact,
2 Mastercard are going to say they won't object to our application for a UPO on the
3 basis that we won't know the VOC or overcharge -- I mean it's not our position that
4 that necessarily has to be determined before the pass-on trial. But certainly Mr Cook
5 had submitted that at the hearing, the pass-on hearing that was heard before
6 Mr Justice Marcus Smith.

7 But if their position is: we are not going to actually take that type of objection to your
8 application for an umbrella proceedings order in relation to consumer pass-on, then
9 obviously that's something which is helpful and which we will gratefully accept.

10 Sorry, it's January, February 2024, so saying spring is perhaps a little bit optimistic.

11 So we do think that it's conceivable that we could be part of that pass-on trial without
12 a determination on VOC and overcharge but we do accept it would be helpful to
13 have that. And turning to just to explain why I said what I said before Mr Hoskins
14 stood up, if you turn to Mastercard's skeleton argument behind tab 2, and
15 paragraph 39 on page A2.12.

16 **MR JUSTICE ROTH:** Paragraph?

17 **MS DEMETRIOU:** 39A. So their position is that the precise architecture of the trials
18 is dependent on whether transaction data is ordered, disclosure of transaction data
19 is ordered. So they say at 39A:

20 "If the Tribunal decides that transaction data is not necessary to determine the
21 causation, overcharge and VOC issues, then a first trial could take place of the
22 causation, counterfactual, Solo, overcharge and VOC issues at the end of 2023."

23 That's what I was referring to when I said there's provisional agreement that there be
24 a trial encompassing all of those issues at the end of 2023 but that's, of course,
25 subject to the important question as to disclosure of the transaction data. So that's
26 what I meant.

1 **MR JUSTICE ROTH:** Mm-hmm.

2 **MS DEMETRIOU:** So I am not quite sure why Mr Hoskins was objecting to that.

3 **MR HOSKINS:** Because of the importance of the transaction data point.

4 **MS DEMETRIOU:** I did make that clear. Anyway, so this issue, the architecture of
5 the proceedings, is rather bound up with the issue of the transaction data. But we do
6 say that this makes it clear that they accept in principle, subject to that point which is
7 a practical point about the time disclosure would take, subject to that point, they
8 agree in principle that these matters can be heard together. We say it would
9 obviously be more efficient to hear them together, otherwise what one has is a series
10 of rolling trials, where pretty much the same teams are preparing for trials, while at
11 the same time attending other trials. It makes it very difficult. So if there is going to
12 be a hearing on exemptibility and limitation in January and then a hearing on Solo in
13 spring, then we say what we should be aiming for is a first trial encompassing all of
14 these other issues, prior to the issue of consumer pass-on.

15 **MR JUSTICE ROTH:** Except for this, that if causation is decided in favour of
16 Mastercard, then a lot of VOC and overcharge falls away and that's a huge amount
17 of work and expert analysis. I mean the overcharge is going to be hotly contested,
18 no doubt, between the experts because it involves considering the counterfactual
19 and one of the reasons for having it as a split issue to be heard earlier is that it may
20 produce a lot of saving in terms of Tribunal time, party time, expert time and,
21 therefore, cost.

22 **MS DEMETRIOU:** Well, sir, obviously, if Mastercard win, then there are potential
23 savings. But, of course, Mastercard might lose and one has to look at that side of
24 the equation, in which case there's a lot of inefficiency.

25 **MR JUSTICE ROTH:** If Mastercard lose on that which is a main plank, I think, or
26 one of the main planks of their defence, the commercial reality of the case rather

1 changes.

2 **MS DEMETRIOU:** Sir, that is certainly true. But that rather assumes that that will
3 provoke some sort of immediate settlement.

4 **MR JUSTICE ROTH:** Not necessarily immediate but one knows that, from
5 experience elsewhere, a lot of class actions settle and if you can resolve certain big
6 stumbling blocks, that's a big help.

7 **MS DEMETRIOU:** Sir, I think that we still think that weighing everything in the
8 balance, so taking account of the fact that Mastercard of course, we say they will
9 lose because our case is they are wrong on that but, of course, the Tribunal doesn't
10 know one way or the other now, so taking into account the prospect they might lose
11 and so you wouldn't have the savings if they did lose and taking account of the fact
12 our expert says there's overlap in the analysis that he would be carrying out for VOC,
13 overcharge and causation, and also taking account of the desirability if, as
14 I understand it, it's agreed, not necessity, of having these things determined before
15 the pass-on trial in the umbrella proceedings, then we say that it would be preferable
16 to have a single trial of these matters.

17 The difficulty if we go for just a causation trial and Mastercard loses, is not just that
18 would it be inefficient in terms of duplicative efforts by economists and so on but also
19 there would be attendant significant delay. And, again, it would not be clear, if I can
20 put it that way, that -- the case for joining the umbrella proceedings pass-on trial is
21 not as clear.

22 So we say for all those reasons, better to have a trial dealing with all of those matters
23 at once.

24 **MR JUSTICE ROTH:** Yes, I think it might be helpful to consider that with, as you
25 say, the question of disclosure for causation.

26 **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** Because the point you make about overlap in the expert
2 analysis rather depends on that.

3 **MS DEMETRIOU:** That's correct, yes.

4 **MR JUSTICE ROTH:** Mastercard say you should get disclosure and you say they've
5 got to give considerably more than they have done, we'll come to that, but of the
6 whole way in which domestic MIFs were set over this period, now going on for one
7 year beyond 2008 and you will look at that and it will support -- indeed not support
8 but establish their position.
9 You say that you need transaction data to consider this.

10 **MS DEMETRIOU:** Can I show you how Mr Coombs addresses this in his report.

11 **MR JUSTICE ROTH:** Yes?

12 **MS DEMETRIOU:** Can we look at his third report first, so that's at the first bundle,
13 tab 10.

14 **MR JUSTICE ROTH:** Yes.

15 **MS DEMETRIOU:** Page 601.

16 **MR JUSTICE ROTH:** Yes.

17 **MS DEMETRIOU:** At paragraph 2.2 he explains what is meant by transaction data,
18 so if I could just ask the Tribunal quickly to read 2.2. Then at 2.3 he explains what
19 data fields the experts need and why. So I am not going to --

20 **MR JUSTICE ROTH:** This is data transactions, this is consumer purchases
21 basically?

22 **MS DEMETRIOU:** Yes.

23 **MR JUSTICE ROTH:** And ...

24 **MS DEMETRIOU:** And then --

25 **MR JUSTICE ROTH:** And so we fully understand this because we were slightly
26 puzzled, what is the transaction data? Full details of all consumer purchases made

1 by UK consumers each year through the claim period.

2 **MS DEMETRIOU:** Yes, using a Mastercard debit or credit card. Then you see the
3 fields --

4 **MR JUSTICE ROTH:** That's vast, isn't it?

5 **MS DEMETRIOU:** It is vast, yes. Sir, this is all data which Mastercard keeps.

6 **MR JUSTICE ROTH:** Yes, I am just trying to understand what it is. All consumer
7 purchases using ... well the debit card may depend on the outcome of the Solo issue
8 but ...

9 **MS DEMETRIOU:** Then we explain or Mr Coombs explains the fields that he would
10 like to see and why. Then if you turn over the page to paragraph 2.5, he says that:
11 "The purpose of requesting transaction data is to determine the VOC, the MIF
12 overcharge, as well as the causal relationship between intra-EEA MIFs and UK
13 domestic interchange fees in a more robust manner than would be possible with
14 either public data alone or with aggregated data from Mastercard."

15 Then he explains in relation to -- if you turn over to paragraph 2.10 to 2.21, it deals
16 with determination of the VOC. What he explains here is that certain transactions --

17 **MR JUSTICE ROTH:** Sorry to interrupt you, but I think we fully understand why you
18 need transaction data to calculate the VOC.

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE ROTH:** I mean that's clear.

21 **MS DEMETRIOU:** I am grateful.

22 **MR JUSTICE ROTH:** It's the need for transaction data for the causation point.

23 **MS DEMETRIOU:** Okay. Well that's dealt with at 2.25 onwards. If you look at
24 2.26 -- so could I just ask you to read 2.26. **(Pause)**

25 Then the point is expanded upon in 2.28. In a nutshell, Mr Coombs expects to carry
26 out a regression analysis and the disaggregated data is obviously much more

1 granular than the aggregated data which is essentially the data that Mastercard has
2 included in the table to annex 1 to the defence.

3 **MR JUSTICE ROTH:** You clearly need disaggregated interchange fee, domestic
4 interchange fees.

5 **MS DEMETRIOU:** Yes.

6 **MR JUSTICE ROTH:** That's not transaction data. That's details of the specific
7 interchange fees for specific different kinds of cards.

8 **MS DEMETRIOU:** Sir, at the moment, all that --

9 **MR JUSTICE ROTH:** I know that's all you've got at the moment but we are
10 completely with you, that you need disaggregated interchange fees but that's quite
11 different from transaction data as you have clarified before me, namely details of all
12 consumer purchases.

13 **MS DEMETRIOU:** Yes, so that point is addressed in Mr Coombs's fifth report which
14 we served with our skeleton argument which is behind tab 1 and that starts -- it's
15 a short additional report at A1.21. Essentially, the point that he makes is if you look
16 at -- so it's a short report but, essentially, the point being made is that he needs to
17 understand, or he can produce a more robust report if he understands, the
18 dispersion of purchases, how they are disbursed across the different interchange
19 fees.

20 **PROFESSOR WATERSON:** Just so I understand this, are you talking about
21 disaggregation in the sense of categories of transactions or disaggregation in the
22 sense of individual people's transactions?

23 **MS DEMETRIOU:** I mean I think that the way we understood the data was held was
24 in relation to individual transactions. We now understand that there was some issue
25 that arose where certain data were destroyed and so what Mastercard are saying is
26 there is a practical issue about recovering that. But we understood that this data is

1 held at the level of individual purchases and our expert's view is the more granular
2 the data, the better. But, obviously, if we can't get that data, then we want the most
3 granular data we can get. So if it's according to categories and how that's disbursed,
4 then that would be much better than what's currently on offer.

5 **PROFESSOR WATERSON:** Right. Yes, I see that. But in the papers that were
6 handed up this morning --

7 **MS DEMETRIOU:** Yes.

8 **PROFESSOR WATERSON:** This is at paragraph 36 on page 16.

9 **MS DEMETRIOU:** Is this the skeleton argument or?

10 **PROFESSOR WATERSON:** No, the paper that was handed up.

11 **MR HOSKINS:** It's the previous judgment.

12 **MS DEMETRIOU:** Paragraph 86.

13 **PROFESSOR WATERSON:** Yes.

14 **MS DEMETRIOU:** Thank you.

15 **PROFESSOR WATERSON:** However, we note that the expert's report further
16 states as follows: "and we understand that there were 225 different IFs during the full
17 infringement period."

18 So that suggests that most of the individual transaction data will be dependent on
19 which of these interchange fees was used in that and, therefore, aggregating to that
20 level might give you all the information you need.

21 **MS DEMETRIOU:** Professor, can I show you -- so I am not trying to avoid your
22 question but it's difficult for us because we don't have this data, so can I show you at
23 the moment what Mastercard is proposing?

24 **PROFESSOR WATERSON:** Yes.

25 **MS DEMETRIOU:** So if you look at their defence which is behind tab 25 and go to
26 annex 1 which is on page A1365, they set out their three tables which purport, for

1 example, you can see at table two, "to set out the weighted average interchange
2 fees."

3 **PROFESSOR WATERSON:** Yes.

4 **MS DEMETRIOU:** So just by way of example, we have been asking -- and this is
5 not a gripe about how things have arisen because I know you are not very interested
6 in that -- we've been asking for further information as to how this was compiled and
7 overnight they've provided us -- so last night, so very belatedly, they provided us with
8 a schedule with some more information and our experts have, in the time available,
9 looked at it and have quite a large number of queries. There are lots of
10 inconsistencies and so on.

11 So we are in a position where we are being told: look, these aggregated figures, this
12 data is absolutely fine for your purpose. Our expert wants to conduct a regression.
13 No doubt it will be said at trial: this regression isn't very robust. And the answer will
14 be: well that's because we didn't have granular information. But our difficulty, just
15 responding, I hope, to your question, Professor, is that there is a significant
16 asymmetry of information. So we understood that all of this data, transaction data,
17 was held on a purchase by purchase basis by Mastercard which I understand is what
18 they did do, absent this data loss and so we made a request for that to be handed
19 over and then that can be utilised by our expert, who will analyse it and ask whatever
20 questions to clarify it and carry out the regression.

21 We are being going told: well, no, that's too difficult and so you should make do with
22 this. The problem is that we haven't even been provided -- we asked for a sample of
23 data, of the disaggregated data. It might be helpful to have a sample of the data
24 which they do hold, post the disaster that seems to have happened in relation to the
25 pre-2013 data, so that our experts can have a look at it and reach a view as to well,
26 what's actually -- what, realistically, can we make do with? But we haven't even

1 | been given that, so we are rather shooting in the dark.

2 | **PROFESSOR WATERSON:** Yes, I see that point. The point I would make is that
3 | what a regression analysis will be essentially looking at is variation in the data --

4 | **MS DEMETRIOU:** Yes.

5 | **PROFESSOR WATERSON:** -- and, therefore, if we see large numbers of
6 | transactions taking place at the same fee, then that doesn't provide any extra
7 | information and so that is why I say is there some intermediate level which will
8 | provide as much information but be less burdensome on Mastercard?

9 | **MS DEMETRIOU:** Professor, I take that point and if there were an intermediate
10 | level, then we'd like to hear about it.

11 | **PROFESSOR WATERSON:** The table as it stands is useless, I agree with that.

12 | **MS DEMETRIOU:** Yes, Professor, so we would be very keen to hear if there is
13 | intermediate because what we are being met with is: well this should do and the
14 | reason I think they're saying that is because their starting point was: oh, this should
15 | all be done qualitatively by looking at the contemporaneous documents. We say no,
16 | no, that isn't how we are going to prove our case, at least not only that way. And so
17 | this isn't enough and yet at the same time, we are not being put in a position where
18 | we can make sensible proposals about some intermediate position. We are
19 | definitely willing to listen and reach some sort of pragmatic landing but we've not
20 | been supplied with any of the disaggregated data, so we don't know what form it
21 | takes and whether there's something else we could suggest.

22 | **MR JUSTICE ROTH:** The other thing is this. Mr Coombs says in his third report,
23 | I think, or is it his fourth? Maybe it's the fourth. The fourth report which is --

24 | **MS DEMETRIOU:** That's at tab 17.

25 | **MR JUSTICE ROTH:** Tab 17. Starts at A851.

26 | **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** Tab 17 and then at the second page of it, A852.

2 **MS DEMETRIOU:** Yes.

3 **MR JUSTICE ROTH:** Paragraph 2.6, he says:

4 "A review of contemporaneous documents is not sufficient. I envisage that a review
5 of contemporaneous documents might, in principle, lead to one of three possible
6 outcomes: (a) the documents might demonstrate unequivocally the existence of
7 a causal link between the MIFs and the UK interchange fees between the EEA MIFs
8 and the domestic MIFs, (b) they might prove inconclusive, (c) they might suggest
9 prima facie no explicit consideration has been given to the EEA MIFs."

10 He goes on:

11 "In the first scenario, it might be argued there would be no need for any further
12 analysis to establish causation and Mr Merricks could assert he's met his burden on
13 causation. However, in my opinion, a quantitative analysis should be used to
14 corroborate -- "

15 Well with all respect to Mr Coombs, I mean if the documents demonstrate
16 unequivocally a causal link, you have proved it and it's for Mastercard to come up
17 and say: oh no, no, they might say that but actually, that's not what -- you don't
18 need --

19 **MS DEMETRIOU:** Sir, I agree with you.

20 **MR JUSTICE ROTH:** So there is a possibility that it will give you what you need;
21 there is a possibility that it won't. So one possible way forward is to order the
22 qualitative disclosure, the contemporaneous documents and we'll see exactly what
23 you say you want, but we are inclined to give you what you say you need in terms of
24 contemporary documents, but certainly you need all the interchange fees, all the
25 specific ones. Not any sort of weighted average, what specific interchange fee for
26 what, set at what date, and also equivalent EEA interchange fees and to see where

1 that takes you.

2 If you look at that and you come back, having analysed it, saying:

3 "No, no" -- well, you may say, "We think 2.6A, we are happy." You may say, "No, we
4 are in B and we do need, therefore, to carry out this analysis." It will be a much more
5 informed discussion.

6 **MS DEMETRIOU:** Sir, I think with respect, the difficulty with that is that although --
7 the way it's expressed by Mr Coombs in 2.7 is he says -- so he says if -- his
8 category A at 2.6 is unequivocal demonstration and it's true, if we are in that world,
9 then I agree with you that we wouldn't need to go any further but experience shows
10 that well-resourced legal teams find plenty to argue about and we're unlikely to be in
11 the world of unequivocal proof on the contemporaneous documents. And so then
12 the issue is --

13 **MR JUSTICE ROTH:** I am not so sure here because you are setting a domestic
14 MIF. You know the EEA MIF. There's presumably some discussion of how they are
15 going to get to the figure of the domestic MIF. You don't know how detailed it is. But
16 it's not like a cartel price, it's a very focused exercise.

17 **MS DEMETRIOU:** Well, sir, I think that -- two points. One is that of course it could
18 be that there is discussion, explicit discussion on the face of the documents that
19 say: well we are bearing the EEA MIF into account and that we are treating that as
20 a floor and so we can therefore set the domestic MIF at this. Now, I would assume
21 that's not the case because Mastercard know the documents and they are very keen
22 for this to be conducted as a documentary exercise only.

23 But, of course, we are entitled to -- we can prove our case on causation, even if
24 there's not such an explicit link. But if in fact, just as a matter of economics and the
25 way the market operates, in fact even though nobody was explicitly saying that or
26 even consciously thinking it, as a matter of reality, as a matter of economic fact,

1 that's what happened. So what we see is a correlation between the two.
2 So it does not matter if the documents aren't with us, we've got this other way that
3 we want to -- this other method of proving our claim and so we do say that it's liable
4 to be inefficient to say: all right, well you've got to approach proving your claim on
5 causation in this bifurcated way. Because we think it's likely that -- well we are
6 intending to pursue both routes. It's not really, with respect, very usual in litigation to
7 say: well you've got these routes of proving your case --

8 **MR JUSTICE ROTH:** Sorry if I didn't make myself clear, Ms Demetriou, it's not
9 about proving your case in a bifurcated way, it's carrying out disclosure in a staged
10 way which is not unusual at all, of you saying you need this huge quantity of
11 documents; the other side say: you need only these documents. Well, the court will
12 say: well let's give you first, this amount of documentation, see if that is satisfactory
13 for you. When you've analysed it, you can come back and say: no, we need some
14 more and that way, one is managing the cost of the exercise.

15 **MS DEMETRIOU:** I see, I misunderstood.

16 **MR JUSTICE ROTH:** That's what I am saying.

17 **MS DEMETRIOU:** I understand. I misunderstood.

18 **MR JUSTICE ROTH:** You analyse that and then you say: actually, for various
19 reasons, that's clearly not adequate.

20 **MS DEMETRIOU:** Sir, I misunderstood. I do think, with respect, that's sensible,
21 subject to this tweak which is that, as I said, we are in this world at the moment
22 where we don't really know what is available and so it's difficult for us to come back
23 and say: this is not enough, we'd like this because we are shooting in the dark. So
24 what we would like, I think the way to make your proposal, if I may suggest it, more
25 effective for our part, is to set directions, for example, saying that our experts and
26 Mastercard's experts should, over the next two weeks, three weeks, months, liaise in

1 relation to the explanations which they gave us last night, to see if further
2 clarifications can be given to our experts, so as to improve their understanding of the
3 data that has already been offered and at the same time, Mastercard should give us
4 a sample of the disaggregated data so our experts can look at that and then make
5 a comparison.

6 Because it's not, with respect, very easy on our side, to come back with targeted
7 requests for disclosure. I think subject to that tweak, we think that's a sensible way
8 to proceed because I am not really in a position, at the moment, given the fast-
9 moving nature of this and developments overnight, to make very fast --

10 **MR JUSTICE ROTH:** No, I understand that. What I would have in mind but it may
11 not be possible, is that rather than a much longer trial in the autumn in a year's time,
12 covering all these other aspects which will be quite burdensome for preparation,
13 particularly if you are also working towards a trial in January on pass-through which
14 is also very burdensome, whether one could have a trial on causation next summer
15 in June, July, so that we'd know where we were on that.

16 Now that may depend on how much disclosure is needed and so we can't, I think,
17 necessarily fix that now. But if it were possible to do that, that would be highly
18 desirable.

19 **MS DEMETRIOU:** Sir, I think there's an issue of principle and a pragmatic issue.
20 I think the issue of principle is that whatever the quality of data we get, so whether it
21 is aggregated or disaggregated or something in the middle, then what our experts
22 are proposing to do is conduct an econometric assessment or analysis with that
23 which will determine both the causation point, so whether the EEA MIFs caused
24 elevated domestic MIFs and also by how much and so the overcharge element is
25 part and parcel of the same analysis.

26 So that deals with both causation and overcharge. So that's the kind of principal

1 point, there's overlap between these points.

2 Sir, the pragmatic point is that that's -- we are all for getting things on quickly, you
3 can see from our skeleton argument that we are very keen on that but that requires
4 adequate disclosure and expert reports to be done and it's not an easy analysis. So
5 we think that that is quite tight. So our preference would be to have a single trial in
6 the autumn, so there's proper time for disclosure and, importantly, to come back with
7 further queries and further requests for disclosure if what we get isn't adequate and
8 then proper time for our experts to analyse that data.

9 We say that would then cover overcharge as well and the sensible thing is not to
10 hive off the VOC separately but to look at that at the same time and that should all
11 be done in autumn. There is, in my respectful submission, diminishing returns in
12 having multiple short trials because then, even with large teams and our team is not
13 very large, with the best will in the world --

14 **MR JUSTICE ROTH:** It's not that small.

15 **MS DEMETRIOU:** It's all relative, sir, but with the best will in the word, if you have
16 members of the team dealing with interim trials, then obviously they are not -- at the
17 same time, they're going to be less able to prepare for the next trial which
18 immediately follows. So I do think that it would be more efficient to have a single trial
19 in the Michaelmas term of these issues and that avoids the difficulty of there -- it
20 gives proper time for disclosure, as I say.

21 **MR JUSTICE ROTH:** Yes. Well we'll hear from -- I don't know if it's Mr Hoskins or
22 Mr Cook but I think we'll take a short break of 10 minutes. It's obviously very
23 important to get this aspect right, otherwise we will all regret it in due course.

24 **(3.13 pm)**

25 **(A short break)**

26 **(3.32 pm)**

1 **MR HOSKINS:** I think Ms Demetriou wants to add something before I set off.

2 **MS DEMETRIOU:** Yes, thank you, something I forgot. I was saying just before the
3 short break that there wouldn't be any saving in hiving off overcharge because the
4 analysis would determine the overcharge. And I just wanted to say something about
5 VOC because in a sense – if I just go back to a point you put to me, sir, which is if
6 we decide causation first and we decide it against you, doesn't that help on VOC?
7 And we say well, theoretically, but not actually materially because VOC doesn't
8 require the same type of analysis, it's really a figure and you don't need a regression
9 analysis or anything like that to determine the VOC. And, ultimately, the VOC will
10 have to be determined on the basis of the data, the best data we can get. And if
11 Mastercard are right to say: well we just can't retrieve this disaggregated data, and
12 this is the best you can get, then the VOC will have to work with the aggregated
13 data. But there isn't really a saving in saying: well VOC should be decided later and
14 certainly not a saving when one is looking at a trial in the summer of 2023 and
15 comparing it to the autumn. We are looking at three months.

16 The final point I'd make is that if we were to determine causation and overcharge first
17 and leave VOC, then that may cause difficulty when it comes to, first of all, the
18 pass-on trial but secondly, in relation to appeals. And so if there's an appeal from
19 any determination on causation, what happens to VOC then? Is it held over? We
20 say it would be much more efficient for those three essential issues to be determined
21 at the same time, altogether, in the autumn and that there won't be any material
22 saving by having two of them, one or two of them decided in the summer.

23 Sir, that's all I wanted to add.

24 **MR JUSTICE ROTH:** Yes, thank you. Yes, Mr Hoskins.

25

26 **Submissions by MR HOSKINS**

1 **MR HOSKINS:** Sir, there's lots of stuff I could say but I am not going to at 3.35. We
2 are in favour of a causation only trial in June, July 2023. If I can just sort of pack that
3 out a bit. Say causation only because as we've said throughout, there are significant
4 savings if Mastercard wins on causation that wipes out 94 per cent of the claim and
5 who knows how it ends up, whether it's settlement or funder withdraws, et cetera.
6 But clearly, knocking out 94 per cent of the claim is a very different ballpark from
7 where we are now. It's clearly desirable causation should be assessed as quickly as
8 possible.

9 It should be done without VOC and OC, I can use those terms because there will be
10 extra work. I mean, yes, you might be looking at some of the same data, et cetera,
11 for VOC and overcharge but there's still extra work because you are looking at them
12 for a different purpose. So there will be savings if we do causation on its own. Until
13 the comment from Ms Demetriou now, the Class Representative's position is they
14 want transaction data for VOC and OC. You've seen Mr Sansom's second witness
15 statement, where he explains the difficulties, not just even if it was off-the-shelf, it
16 would be enormous but it isn't off-the-shelf, there is no shelf. I mean the position
17 would be Mastercard would have to employ extra people as it stands to even have
18 a chance of working out what was there, let alone preparing it for disclosure.

19 So if transaction data is still on the table for VOC and OC, it's going to make a June,
20 July 2023 trial not possible. So we submit there should be a causation only trial in
21 June, July 2023.

22 Just in terms of assumptions, I mean that assumes no transaction data to determine
23 causation. Obviously, very happy to have -- we'll disclose what we've said, we'll
24 disclose on causation and obviously very happy to engage with the
25 Class Representative once they've seen that, about what else they may want and
26 what's available. The only caveat I put down, but it's obvious: in order to keep the

1 trial date of June/July 2023, the Class Representative will have to understand the
2 implications of its request. If they genuinely want this determined early, they should
3 also take account of that.

4 But the truth is, if we can't agree on particular bits of disclosure, we'll be before you
5 and you'll decide for us and you'll hold our feet to the fire, whether it's my feet or
6 Ms Demetriou's feet.

7 **MR JUSTICE ROTH:** You accept, do you, that Mr Merricks needs transaction data
8 for VOC and overcharge?

9 **MR HOSKINS:** I am not sure we do accept that but they are asking for it.

10 **MR JUSTICE ROTH:** Yes.

11 **MR HOSKINS:** There's not agreement on it so my submission is on the basis if they
12 are asking for it on both those things, then it just can't be done by June/July 2023.

13 **MR JUSTICE ROTH:** I think they acknowledge that and they are suggesting the
14 autumn for that reason and suggesting it can be done for the autumn --

15 **MR HOSKINS:** The difficulty I have is -- I took instructions on where we'd got to. In
16 all fairness to the team behind me, I need to take instructions on that --

17 **MR JUSTICE ROTH:** Yes.

18 **MR HOSKINS:** -- before I -- I am just not in a position to commit Mastercard one
19 way or the other on that without taking further instructions.

20 **MR JUSTICE ROTH:** I mean one would have thought for volume of commerce,
21 transaction data would normally be the starting point, unless you have aggregated
22 data of some kind. At least I appreciate that's only Mastercard's commerce, not UK
23 commerce which is what the claim is based on, so there may be a difference there.

24 But I mean I think it would be helpful to us to know what the position is for disclosure
25 of transaction data if it were to be required and when that -- given the complications
26 and the difficulties -- Mr Sansom talks about how long that would take.

1 **MR HOSKINS:** We already have that, we've given you our position on that. So it's
2 second Sansom, paragraphs 57 to 60. It's bundle A, tab 20. It's at A895 to 897.

3 **MR JUSTICE ROTH:** A, tab 20?

4 **MR HOSKINS:** A, tab 20. It begins at paragraph 57. Sorry, it begins at
5 paragraph 56. It's best to pick it up at 56 on 895. I just want to quickly refresh your
6 memory on those paragraphs. It does set out a timescale.

7 **PROFESSOR WATERSON:** When you talk about aggregated data in 56B at the top
8 of the page, 896, what level of aggregation are you talking about there?

9 **MR HOSKINS:** So just to clear one thing out, there's absolutely no problem with us
10 providing the different levels at which the IFs were set and then there is information
11 that relates to the volume of transactions that took place at a certain IF. That's if
12 material is available. Where we are drawing the line is at transaction data as defined
13 by Mr Coombs which is detail relating to every individual purchase.

14 **MR JUSTICE ROTH:** So you can get the valid transactions in aggregate at the
15 different interchange fees.

16 **MR HOSKINS:** I can't say it's going to be complete across the piece but absolutely
17 that sort of data is available and, indeed, some of it has already been disclosed. The
18 Class Representative doesn't just have --

19 **MR JUSTICE ROTH:** That's already been disclosed, we won't get into that. That's
20 something you can do but it may not be complete.

21 **MR HOSKINS:** Yes, sir.

22 **MR JUSTICE ROTH:** But that can be provided.

23 **MR HOSKINS:** That's something we could do for the trial.

24 **MR JUSTICE ROTH:** In the summer?

25 **MR HOSKINS:** In June/July, that's right.

26 **PROFESSOR WATERSON:** Does this relate also to EEA transactions?

1 **MR HOSKINS:** I think so but let me just see if people nod or -- yes.

2 **PROFESSOR WATERSON:** It does?

3 **MR HOSKINS:** Yes.

4 **MR JUSTICE ROTH:** Thank you. Ms Demetriou is taking instructions. Just pause

5 a moment.

6 **MR HOSKINS:** Certainly.

7 **MR JUSTICE ROTH:** Ms Demetriou, if I can cut this short, we had a discussion

8 about this, as you might expect, over the short break. We think that if that

9 aggregated data is provided, plus the contemporaneous documents and, of course,

10 the individual interchange fees right through the claim period, that should be

11 sufficient and we are struggling to see why Mr Coombs, for the purpose of causation,

12 needs individual purchases transaction data. We just don't understand what he is

13 saying.

14 **MS DEMETRIOU:** Sir, if this data -- so this is, I think, the first we've been told that

15 this is available -- so if this data is available and it shows how, over time, the

16 dispersion over time of purchases as against different IF levels, then that may be

17 what Mr Coombs needs but we have to take instructions from him.

18 **MR JUSTICE ROTH:** Maybe you do but we don't -- and I have the great benefit of

19 sitting with a distinguished economist -- do not understand how anything beyond that

20 is going to help on causation.

21 **MS DEMETRIOU:** So, sir, maybe it won't but we weren't being faced with that offer.

22 **MR JUSTICE ROTH:** It does say it in 56B.

23 **MS DEMETRIOU:** Yes, but the aggregated data we were being offered was what

24 was in the tables at the end of the defence.

25 **MR JUSTICE ROTH:** Well we know where we are now. I mean our view is that we

26 should, first of all, order disclosure on this basis, as now clarified and contemporary

1 documents -- we'll run through the specific ones you want -- and resolve any
2 disputes on that and that on that basis, it should be possible to have a trial on
3 causation in the summer of next year and for all you saying that there is not much
4 difference with the autumn, if one did overcharge which overcharge involves the
5 counterfactual which is a very difficult question in these cases, as we all know, that
6 will be a long and complex trial, while you are also preparing for what's likely to be
7 a long, complex trial on pass-through in January of the following year. That, actually,
8 is going to be a significant burden on everyone and we think it's actually going to
9 assist the parties if we did that before the summer break and then you came back in
10 the autumn and concentrated on pass-through.

11 **MS DEMETRIOU:** Well, sir, I think we need to take instructions from Mr Coombs.

12 **MR JUSTICE ROTH:** Yes.

13 **MS DEMETRIOU:** Because, unfortunately, it's the first time we've had this offer.
14 I want to know, for example, whether the data as to the number of transactions, how
15 that will be organised. So will we get that over time, how aggregated or
16 disaggregated will it be, how granular will it be? Or if the interchange fees, to the
17 extent that they change once a year, do we just get yearly volumes or will we know
18 over time what --

19 **MR HOSKINS:** This is a debate for another day, with all due respect. We'll provide
20 what we have. I am not saying it's complete and I have no doubt that whatever we
21 give will not be enough and we'll have to have that debate.

22 **MR JUSTICE ROTH:** I think the sensible thing is we'll deal with disclosure. We can
23 say that -- we can pencil in a trial for the summer on causation and we can indicate
24 that we think that's appropriate and that that may involve some evidence but it
25 should be, I would have thought, no more than 12 to 15 days, and we can look for
26 dates for that and it can be reviewed if, once you've analysed disclosure, you come

1 back in January and say: no, this is hopeless, with an explanation and a report from
2 Mr Coombs, explaining exactly what he wants the detailed transaction data for.
3 Because none of us can understand it.

4 **MS DEMETRIOU:** Sir, I know I have made this point but the difficulty we are in is
5 that we don't know what Mastercard have, so that's the problem.

6 **MR JUSTICE ROTH:** That's what I am saying. You'll get what Mastercard have and
7 you can analyse it and then you can come back and make submissions based on
8 that.

9 **MS DEMETRIOU:** Sir, yes. Two further points. One is that Mr Hoskins says: well,
10 okay, but the Class Representative will have to live with what we give them in order
11 to fit in with the trial date.

12 **MR JUSTICE ROTH:** He didn't quite say that. We can have further debate before
13 the Tribunal and we all know there's correspondence --

14 **MS DEMETRIOU:** Yes.

15 **MR JUSTICE ROTH:** -- and complaints and then more documents are given and
16 then you come back and say: but we need this and this for this reason. We can
17 always have a half day CMC on a disclosure request.

18 **MS DEMETRIOU:** That's right. Our concern is that this is obviously an important
19 issue, as Mr Hoskins has emphasised and as the Tribunal is aware and we say that
20 we need to be in a position to advance our case on this issue in as robust a way as
21 possible. So if setting a trial date in the summer means that Mr Coombs is going to
22 be inhibited from doing that, then that wouldn't be right.

23 **MR JUSTICE ROTH:** We have to understand what he's inhibited from doing and at
24 the moment we don't.

25 **MS DEMETRIOU:** Yes.

26 **MR JUSTICE ROTH:** He will be able to explain it if he is.

1 **MS DEMETRIOU:** Yes, okay.

2 Sir, just the other point we make is Mr Hoskins seeks to draw a distinction between
3 causation and VOC on the basis we are still seeking the transactional data for VOC
4 but if what they say is correct, that it's unlikely this can be retrieved, then obviously
5 we are going to be using exactly the same data to analyse VOC. So whatever level
6 of aggregation or disaggregation it is, it's the same data that's going to be used, so
7 we don't say it's really realistic to think there are going to be two different disclosure
8 tracks, one of aggregated data for causation and one of disaggregated data for VOC.

9 **MR JUSTICE ROTH:** The VOC is going to look at the total value of transactions --

10 **MS DEMETRIOU:** Yes.

11 **MR JUSTICE ROTH:** -- in the UK by the class, including the exclusion of excluded
12 persons.

13 **MS DEMETRIOU:** No, that's the later issue that I think we've all agreed should be
14 down the line, so this is the volume of commerce on Mastercard transactions --

15 **MR JUSTICE ROTH:** Ah.

16 **MS DEMETRIOU:** -- which is then passed on to the class. So at some later stage
17 we'll need to look at the entire VOC and the economy and the exclusions made but
18 I think we are all agreeing that should be done later on. This is VOC, the VOC of
19 Mastercard transactions and so that's why I say whether one is using aggregated or
20 disaggregated data, it's the same data as will be used for the causation point and
21 that's why it's inefficient to have the two things, to separate the two things.

22 **MR JUSTICE ROTH:** But what is then the VOC? If that's the case, what is the VOC
23 exercise?

24 **MS DEMETRIOU:** It's very simple.

25 **MR JUSTICE ROTH:** It's mathematical.

26 **MS DEMETRIOU:** Yes, exactly, that's the point I was trying to make.

1 **MR JUSTICE ROTH:** What's the use of it for the case?

2 **MS DEMETRIOU:** Because you need to know -- you are establishing the
3 overcharge multiplied by -- so it's to establish that the size of the total overcharge
4 that is then subject to the pass-on analysis, passed on to everyone that makes
5 purchases in the UK, whether they use Mastercard or not.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** So it's really a mathematical exercise. That's why we say it does
8 not make sense to hive it off. It's the same data, whether aggregated or
9 disaggregated. What we need is sensible data we can work with.

10 I take your point about Mr Coombs. It may be what they are offering is fine. But we
11 say, with respect, it doesn't make sense to hive off VOC and overcharge.

12 **MR JUSTICE ROTH:** Overcharge is different because the overcharge involves
13 a counterfactual, doesn't it?

14 **MS DEMETRIOU:** Well, I suppose --

15 **MR JUSTICE ROTH:** Isn't that what the overcharge is? It's what would the
16 interchange fee have been if it had not been the one at which it was set?

17 **MS DEMETRIOU:** Yes.

18 **MR JUSTICE ROTH:** That's a very different exercise.

19 **MS DEMETRIOU:** Sir, that's correct. If we lose -- of course, if we win on our legal
20 point on exemptibility, it's a very straightforward exercise, but if we lose on that --

21 **MR JUSTICE ROTH:** Yes.

22 **MS DEMETRIOU:** So if we lose on that, that's a more complicated exercise. There
23 are lots of spinning plates.

24 **MR JUSTICE ROTH:** And exemptibility might appeal, that sort of thing would --

25 **MS DEMETRIOU:** Yes.

26 **MR JUSTICE ROTH:** So I would think overcharge is definitely something that

1 should be treated separately. But what you say about VOC, I had not appreciated
2 that's all you are talking about.

3 **MS DEMETRIOU:** Yes, that's all we are talking about. Sorry if that wasn't clear.

4 **MR JUSTICE ROTH:** Well, Mr Hoskins, if that is it, I don't know how much that's
5 going to be in dispute.

6 **MR HOSKINS:** I just need to take instructions. I might be destroying someone's
7 weekend for the next six months. I am not saying no. I am just saying if you give me
8 two minutes, I will happily take instructions.

9 **MR JUSTICE ROTH:** Yes, it seems sensible to do that, if it can be dealt with at the
10 same time and if it's not complicated.

11 **MR HOSKINS:** I understand that, sir.

12 **MR JUSTICE ROTH:** That's obviously desirable. Shall we give you -- I don't think
13 we are in danger of running out of time on this, given that we've got Thursday
14 morning. So is it sensible to give --

15 **MR HOSKINS:** I think we are --

16 **MR JUSTICE ROTH:** Yes. We'll rise and give you 5 minutes.

17 **MR HOSKINS:** That's very kind, thank you.

18 **MS DEMETRIOU:** Just before Mr Hoskins takes instructions, I am looking at the
19 way they've formulated the causation point.

20 **MR HOSKINS:** Do we have to re-phrase that?

21 **MS DEMETRIOU:** That the causation point says that the -- I am behind tab 11 on
22 page A624, "Had the EEA MIFs --"

23 **MR JUSTICE ROTH:** No, that's not the formulation we are looking at. We have in
24 mind, as I think I said at the outset, because that involves a far greater exploration,
25 including the counterfactual.

26 **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** So we are looking at whether the levels of domestic MIFs
2 were caused by, in a legal sense, the levels of the EEA MIF.

3 **MS DEMETRIOU:** Understood. I just wanted to draw that to your attention. Thank
4 you.

5 **MR JUSTICE ROTH:** Yes.

6 **(3.52 pm)**

7 **(A short break)**

8 **(3.59 pm)**

9 **MR JUSTICE ROTH:** Yes, Mr Hoskins.

10 **MR HOSKINS:** Sir, my instructions are at a push, we could do VOC in June/July, as
11 long as there's no transaction data, so I think that's a yes.

12 **MR JUSTICE ROTH:** There is the data referred to by Mr Sansom --

13 **MR HOSKINS:** That's right.

14 **MR JUSTICE ROTH:** -- that paragraph.

15 **MR HOSKINS:** By transaction data I mean the Mr Coombs overall transaction data.

16 **MR JUSTICE ROTH:** Yes, well in that case it seems sensible to try for that, but it's
17 open to Mr Merricks' lawyers to come back and say: well, having seen what we've
18 seen, this is not going to enable him to analyse causation as he wishes and
19 explaining why.

20 So we will work on that basis. We'll look at actual dates, I think, more carefully on
21 Thursday, when people have had time to digest what we've said and look at their
22 calendars but I just point out that I know there is the AAM v Mastercard trial listed to
23 start on 18 January.

24 **MR HOSKINS:** There's also the Trucks litigation --

25 **MR JUSTICE ROTH:** Oh.

26 **MR HOSKINS:** -- which runs for six months.

1 **MR JUSTICE ROTH:** Yes, I am happily aware of that.

2 **MR HOSKINS:** We are all going to have to --

3 **MR JUSTICE ROTH:** So there will be a question in terms of even the exemptibility
4 and limitation issue, when those four days can be accommodated but we want to do
5 it as early as possible.

6 **MR HOSKINS:** Thank you.

7 **MR JUSTICE ROTH:** So that deals with that aspect. Before we turn to other
8 disclosure points, can I just mention when reading the pleadings, and I am not
9 expecting you to give a full response to this at this stage, it did occur to me whether
10 there are other possible issues that could be taken first. One is what is the essential
11 basis or findings in the Commission Decision which are binding on Mastercard?
12 Because the claimant in his or Class Representative in his pleading, says that these
13 various things are binding and I think Mastercard takes a different position and that is
14 something that may be helpful to determine early.

15 But that may be a generic issue across the MIF claims and for consideration in the
16 umbrella proceedings because it seems to me that's something that is going to apply
17 in all the claims.

18 So you might want to consider whether that is something --

19 **MR COOK:** If I may add on that, I am involved in that more than Mr Hoskins is. This
20 is the only follow-on claim.

21 **MR JUSTICE ROTH:** Yes.

22 **MR COOK:** At least formally, I think, strictly (a) and may have been but we've lost in
23 any event on liability there. So all of the other things covered by the umbrella claims
24 postdate the period covered by the Commission Decision.

25 **MR JUSTICE ROTH:** They are relying on the Commission Decision.

26 **MR COOK:** They rely upon it by analogy but not on the point that's actually legally

1 binding for these purposes because we are dealing with different time periods and,
2 generally, different interchange fees, so at the moment at least, there's no -- and we
3 have this mammoth 80 plus page of issues in the merchant proceedings. There's
4 not a single issue in there that says is any part of the Commission Decision binding
5 for these proceedings because it's not been suggested by any of the merchants it is
6 binding on us.

7 **MR JUSTICE ROTH:** Thank you, that's helpful. So I throw that out for consideration
8 as to whether that's something that could be taken early.

9 **MR HOSKINS:** Do you want an answer by Thursday?

10 **MR JUSTICE ROTH:** If you can come back on that by Thursday.

11 **MR HOSKINS:** You would like it.

12 **MR JUSTICE ROTH:** It's not an issue in the umbrella proceedings.

13 The other question which will be familiar to Mr Cook is what assumption is to be
14 made for the purpose of the trial and the counterfactual about the Visa MIF, because
15 I see that Mastercard in its defence says: well, it wouldn't have done these various
16 things because of the Visa MIF and competition from Visa.

17 I don't know and it wasn't quite clear to me from the reply, what Mr Merricks' position
18 is on the application of Visa MIF over this period.

19 **MR HOSKINS:** Sir, I understand -- my initial reaction is, simply shooting from the
20 hip, is that might be difficult because the relevance of the Visa MIF will arise in
21 different contexts and that a legal test might be different in each one, so there might
22 be a different answer in each one. So my initial reaction is it's probably better for
23 that to come up as it comes up. If it's relevant to the counterfactual, we deal with it
24 then. If it's relevant to exemptibility or exemptible level, we deal with it then. I think
25 trying to split that one out, my initial reaction is it might be difficult.

26 **MR JUSTICE ROTH:** I don't know if that's generic in the other cases. I know the

1 periods are different but the conceptual point may be much the same.

2 **MR COOK:** Sir, there is a fundamental distinction, we say, which of course Visa was
3 exempt for a key period of this claim. Visa received an exemption decision for its
4 EEA MIF in 2002 that applied until the end of 2007. So unlike other cases where the
5 point's arisen, this is not a case where Visa has been found to be acting unlawfully,
6 this is a case where Visa has been found in a way which is legally binding to be
7 acting lawfully, at least for some of the period. So that's why the time period does
8 matter significantly because in this case, at least part of it is lawful, undoubtedly
9 lawful in relation to the merchant proceedings, all of which, bar a tiny little rump, are
10 very much after this period. There isn't any uncertainty in relation to that point.

11 **MR JUSTICE ROTH:** Yes, so it may be that purely relates to this case, in which
12 case it should probably be dealt with in the main trial.

13 **MR HOSKINS:** I think it's better if it comes up where it's relevant to each issue.

14 **MR JUSTICE ROTH:** We are not ruling on any of this. Ms Wakefield is bobbing up
15 and down. Yes, Ms Wakefield.

16 **MS WAKEFIELD:** Can we address that on Thursday?

17 **MR JUSTICE ROTH:** As I say, I just raise these because they occasionally -- on
18 reading the pleadings and seeing how we can structure this case. I also should say
19 that I omitted to make clear on exemptibility and I think it would be helpful if, between
20 you, you can draft the formulation of the issues on limitation and exemptibility
21 between now and Thursday and produce, I hope, an agreed draft but if not,
22 alternative drafts for the Tribunal, take advantage of the fact we are not sitting
23 tomorrow, but on exemptibility, there is I think, two points that are taken by
24 Mr Merricks in the reply.

25 One is -- if I can just turn to the reply --

26 **MS WAKEFIELD:** Bundle --

1 **MR JUSTICE ROTH:** I am in the amended one because that's in the first bundle
2 where you respond to it.

3 **MS WAKEFIELD:** Paragraph 32 to 35.

4 **MR JUSTICE ROTH:** Yes. Thank you. Yes, 32 says "binding effect of the
5 determination of the other cases." Paragraph 33 says:

6 "It's an abuse of process to be treated as those who in fact sought an exemption."

7 So you get to the same result but by a slightly different route. I would have thought
8 we ought to include both in the preliminary issue and make it clear.

9 **MR HOSKINS:** I think that was certainly the intention but we can make that express.

10 **MR JUSTICE ROTH:** Otherwise ... we don't get what we want to get.

11 Right.

12 **MS DEMETRIOU:** 34 and 35 are also objections we raise that are slightly different.

13 So 34 is really a point about the pleading which is that they don't plead as a fact that
14 they would have sought exemption at any of the alternative levels that they plead in
15 their defence and so we say that there is just a failure in the pleading.

16 Then 35 is we say there they can't seek to have exempted the same level of MIF or
17 higher level of MIF than it would have sought to --

18 **MR JUSTICE ROTH:** I think we can include all of those. Certainly 35 seems to go
19 with 32. 34 ... it's a legal objection, isn't it, 34?

20 **PROFESSOR WATERSON:** I think we should deal with them all here.

21 **MR HOSKINS:** It may well be you get an amended pleading and it takes the issue
22 away, as sometimes happens.

23 **MR JUSTICE ROTH:** Yes, but I think we should deal with all of those.

24 **MR HOSKINS:** We should wrap it all up, I do agree.

25 **MR JUSTICE ROTH:** Right. So I think that takes us to disclosure, does it not?

26 **MR HOSKINS:** It does and that's where I sit down, you'll be glad to hear.

1 **MR JUSTICE ROTH:** Yes. I think there is a question whether one needs
2 a confidentiality ring, but it can be helpful to establish one. It's quite separate from
3 the question of what documents are confidential but to have a confidentiality ring
4 order in place can be useful in a case, particularly if later documents --

5 **MS DEMETRIOU:** I think we need one.

6 **MR JUSTICE ROTH:** It's agreed, is it? Yes, good. So we have one. Excellent.
7 Then I think that there is a certain -- we deal first with what has been agreed by way
8 of disclosure because we may be able to incorporate that in the orders.
9 I think if one goes -- I am looking at Mastercard's skeleton at page 17. Well, the
10 Commission Decision. I know there was some argument whether it should be
11 29 December or 4 October.

12 **MS DEMETRIOU:** No, we agree 4 October.

13 **MR JUSTICE ROTH:** Yes, and that is going to be the confidential version of the
14 Commission Decision?

15 **MS DEMETRIOU:** Yes.

16 **MR JUSTICE ROTH:** We should probably put that in an order, I think. MMF
17 documents which, as I understand it, means the disclosure from the Asda claim, is
18 that right, also by 4 October?

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE ROTH:** OFT decision. Is that the redacted -- well the decision as held
21 by Mastercard which is all they can disclose, of course, which has some redactions
22 in it.

23 **MS DEMETRIOU:** Yes.

24 **MR JUSTICE ROTH:** But it's what they've got. Why can't that also be 4 October?

25 **MR COOK:** The rationale, sir, is obviously we have the document straightaway
26 which concerns have been expressed by the CMA about preserving confidentiality in

1 relation to third party information in particular.

2 Now from our point of view, we recognise that relates to a period which is 18 years
3 ago and ultimately, it's a matter for the Tribunal as to -- so simply we'd anticipated
4 the CMA would raise these concerns, that it would be necessary for us to go through
5 the decision which as a starting point, did redact certain information from Mastercard
6 for just those concerns at the time, so some things that were seen as being truly third
7 party, incredibly sensitive information, we didn't get at all.

8 **MR JUSTICE ROTH:** Yes.

9 **MR COOK:** That's existing redactions but if there's material which it was felt was
10 necessary for us to have, otherwise we couldn't understand a decision against us
11 and that does involve third party material, simply so that we can notify the relevant
12 parties to see if they do have any concern and, obviously, we are only going to do
13 that if it's obviously something that's going to business practices which might still
14 apply but it's simply for that process.

15 Sir, if you tell me we don't have to go down that route, then --

16 **MR JUSTICE ROTH:** The CMA wrote a letter on this, didn't they, which I haven't
17 seen?

18 **MS DEMETRIOU:** It's A4, tab 160.

19 **MR JUSTICE ROTH:** A4-tab?

20 **MS DEMETRIOU:** 160.

21 **MR JUSTICE ROTH:** Thank you. **(Pause)**

22 Well, I think I've read that quickly. In the first instance, you can disclose the decision
23 into the confidentiality ring by 4 October so that the lawyers acting for Mr Merricks
24 get it and if they say, "Well, it's important that we discuss aspects of this with
25 Mr Merricks", and so on, you can then -- I have not read the decision, I don't know
26 what the information is, we have not been able to assess it and so on. One can go

1 through this process but I am keen you should get it as quickly as possible.

2 **MS DEMETRIOU:** Sir, we would like to get it as quickly as possible. Our position on
3 what the CMA has proposed, so we say that before we got the CMA letter,
4 Mastercard were, in principle, willing to disclose the OFT decision and file on the
5 same basis as the EC decision and file which is not in a ring, subject to particularly
6 sensitive things which go into the ring and we'd have liberty to apply which is
7 obviously more sensible. We say the CMA's proposal, this is a very convoluted
8 mechanism which is unnecessary. It's going to take a lot of time and perhaps
9 necessitate further hearings before the Tribunal. We say it's unnecessary and really
10 what should happen is that Mastercard should exercise the same judgment in
11 relation to the OFT decision and file as it is in relation to the EC decision and file.
12 There's no material distinction. And that should be adequate. So that means
13 disclosing outside the ring, save for if it takes the view that there's particularly
14 sensitive data, then that can be redacted and the unredacted version served into the
15 ring and we have a liberty to apply.

16 The problem, if it's all just in the ring, is the burden is then on us which is unfair
17 because we do want to discuss it both with Mr Merricks and the funder and will need
18 to take instructions and it places the burden on us in relation to very, very old
19 material which is highly unlikely to be confidential to come and lift the redactions. So
20 we think the original proposal agreed between the parties makes sense in relation to
21 both --

22 **MR JUSTICE ROTH:** And that was that Mastercard would review it for?

23 **MS DEMETRIOU:** So that was that Mastercard should review the decision and the
24 file. There is a misunderstanding, by the way, I should say parenthetically. So in
25 their skeleton argument, they think our position is that the whole file should be
26 disclosed, regardless of whether it's relevant to the issues in the case or not and

1 that's not our position, if I just make that clear.

2 So the reason that misunderstanding arose is because they were proposing only to
3 disclose documents relevant to the preliminary issues they were seeking and we
4 said that would be inefficient.

5 **MR JUSTICE ROTH:** Let's deal first with the decision itself.

6 **MS DEMETRIOU:** Yes, so the decision itself, they were going to just provide
7 disclosure of -- the EC decision, they are just providing disclosure of that on
8 4 October with limited redactions. Then the EC file, it was agreed that this --

9 **MR JUSTICE ROTH:** Sorry, can we -- let's come back to the EC file. The OFT
10 decision itself.

11 **MS DEMETRIOU:** So the reason I was going on to the file is because arrangements
12 for the EC file may represent a halfway house, given the CMA's stance.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** So the arrangements for the EC file, it's agreed this should be
15 disclosed outside of a confidentiality ring, save that certain documents may be
16 disclosed into a ring, provided that Mastercard give us specific reason for doing so
17 and then that permits us to challenge that, if so advised.

18 And we say that perhaps, given the CMA's stance, the same approach could be
19 taken for the OFT decision and OFT file. So ideally, we'd like the OFT decision just
20 to be disclosed to us in the same way the EC decision is and the OFT file to be dealt
21 with in the same way as the EC file without this convoluted mechanism by CMA
22 which allows third parties the right to intervene which we say is convoluted and
23 unnecessary in the circumstances.

24 **MR JUSTICE ROTH:** Yes, but in which case they will need more time than
25 4 October, I suspect, and the suggestion was 14 October, I think.

26 **MS DEMETRIOU:** So then if that's -- I mean if that's how it's going to be dealt with,

1 both in relation to the file and the decision, then we can live with 14 October.

2 **MR JUSTICE ROTH:** Let me then ask Mr Cook. First of all, the decision.

3
4 **Submissions by MR COOK**

5 **MR COOK:** So, firstly, sir, the non-confidential version of the decision is already in
6 the bundles.

7 **MR JUSTICE ROTH:** Sure.

8 **MR COOK:** So they have that and, just glancing at it, the redactions aren't dramatic,
9 they are rather less substantial than the Commission Decision. It has a lot less
10 blacked out or cut out, so they have the non-confidential version.

11 Then what we've suggested, we'd review the confidential version, such as we have
12 it. Obviously, there are redactions. There are certain things in there that were
13 redacted at the time and clearly aren't relevant now. For example, the MIF rates in
14 2004 were redacted. Clearly that's not the kind of information that's sensitive any
15 more. So we would review it, give them as much of it as we possibly could. To the
16 extent, on that review, we see that there is information that says "The Royal Bank of
17 Scotland said as follows", and was redacted at the time because the Royal Bank of
18 Scotland said so, for example, there may be points like that where we would
19 essentially give them a much less redacted version openly and then an even less
20 redacted version going into the confidentiality ring that would just have, "Here are
21 a few lines of this which we can see as being potentially problematic but we will now
22 ask the Royal Bank of Scotland, in that example, do they actually think that material
23 from this long ago is a problem."

24 One would hope they'd realise that might be a difficult uphill struggle to justify but
25 nonetheless, to give them that chance which is what the CMA has asked for. So for
26 present purposes, the Class Representative would have almost all of the decision

1 | openly, possibly a bit more of it simply in a confidentiality ring but that's really going
2 | to be, we think, fairly limited, if at all and then those last little bits can be ironed out
3 | subsequently.

4 | **MR JUSTICE ROTH:** The time when you'd give them, that's the 14th.

5 | **MR COOK:** The 14th is when we'd give them two versions, one open and one into
6 | a confidentiality ring.

7 | **MS DEMETRIOU:** Well perhaps the confidentiality, is there any reason why the
8 | confidentiality ring version couldn't just be disclosed on the 4th because that's going
9 | into the ring so ...

10 | **MR JUSTICE ROTH:** It's not going to make much difference to anyone, is it?

11 | **MS DEMETRIOU:** Maybe not.

12 | **MR JUSTICE ROTH:** I think we'll keep them on the same date so that's the
13 | decision. Now the files, Commission and OFT files, can the same approach be
14 | taken?

15 | **MR COOK:** Well I mean the approach is agreed between the parties --

16 | **MR JUSTICE ROTH:** Mm-hmm.

17 | **MR COOK:** -- so it's only a question of date and the approach is we are going to
18 | review them for relevance. We also suggest as well that it would be sensible simply
19 | to disclose those documents which are relevant to the issues that are immediately
20 | being addressed in the first couple of trials but having done that review, we will
21 | disclose -- we anticipate almost all of it that's relevant openly and to the extent there
22 | are documents that are either obviously third party information of potentially some
23 | significance still, possibly -- we recognise it will be difficult but possibly Mastercard
24 | material, that that will go into the confidentiality ring to be fought over in due course.

25 | But the critical difference between us and as I say, that mechanism is agreed
26 | between the parties, the critical difference between us is about when we can actually

1 do this exercise and that's where we do differ significantly. We say that particularly
2 in relation to the EC file, and I will say we could do the OFT file because the OFT file
3 is 500 documents, faster, but ultimately, if we did that, that does mean to some
4 extent we are prioritising doing that first and then doing the EC file second.

5 So it's not a question where they can say "snap" in relation to that and expect us to
6 sort of have the resources to do both.

7 **MR JUSTICE ROTH:** The OFT file you can do by when?

8 **MR COOK:** The OFT file we can certainly do that more quickly, by the end of
9 October. But in relation -- it's the EC file which is both huge and also we face this
10 technical problem that we got sent it as essentially one or, rather, many sort of
11 contiguous PDFs which means actually we have to go through and split it all out into
12 all separate documents in order to allow the review process anyway, which is
13 something that's going to take a number of weeks before lawyers actually get their
14 hands on it or the legal -- the fee earners get their hands on it in order to start the
15 process of review.

16 Again, the disagreement between us is the fact there's going to need to be, as there
17 always is with this, yes, there is a first-tier review but then there will need to be more
18 senior lawyers involved in: are these documents relevant or not? Is there some
19 sensitivity or not, et cetera? So our best guesstimate is 20 December is a realistic
20 date for the --

21 **MR JUSTICE ROTH:** The OFT file, I mean you could do that, you say, end of
22 October. 28 October is the Friday.

23 **MR COOK:** Yes, sir.

24 **MR JUSTICE ROTH:** You could do that by then. I would have thought it sensible
25 that otherwise, you may have to go through it all over again as regards those
26 documents relevant to the issues in the case, not just the first tranche of issues but

1 all issues. I think that's --

2 **MR COOK:** Sir, the goal has simply been to avoid a situation and until we see the
3 material, it's difficult to know where we dump a huge number of documents on the
4 Class Representative which go to all sorts of other issues, when inevitably, as part of
5 that process, we will have identified the causation documents which, particularly on
6 the EC file, might be particularly significant because there probably aren't going to be
7 very many because the EC file is not about -- or not in general, about effect upon the
8 UK MIF. The OFT file is probably going to be a lot more relevant, so we'd give them,
9 essentially, the causation documents so they don't have to read through 2,000
10 documents without pass-on or all these other issues which actually, if we win on
11 causation, we may never get to, sir.

12 **MR JUSTICE ROTH:** You have to go through the Commission file to check for the
13 causation documents, so in going through it, you'll see what's relevant to
14 pass-through. Again, there may not be a huge amount. So otherwise, if you lose on
15 causation, you have to go through it again. Why can't you just, in going through it at
16 that point, give them everything that's relevant to this claim?

17 **MR COOK:** As you say, we can, sir, it's about --

18 **MR JUSTICE ROTH:** But you say that because of the technical problem and then
19 the much greater volume, you say the end of December. Before we get back to that
20 and I ask -- I don't know, I think it's Ms Wakefield, maybe Ms Demetriou, I don't
21 know -- the OFT documents, that includes your submissions to the OFT or your
22 response to questions?

23 **MR COOK:** What I think has been characterised and actually, there's the OFT file
24 and the OFT documents. So the OFT file is effectively the regulatory file we get
25 given which will include within it some of our own submissions and then the OFT
26 decision just related to the period to November 2004 which is while the banks were

1 setting the UK MIF. In relation to the period after 2004 Mastercard started setting,
2 the OFT didn't investigate that as part of that decision but while there was an appeal
3 process before the CAT in relation to that decision, it carried on investigating,
4 separately, Mastercard's setting of the MIFs.

5 So there are a whole series of data requests over the next four years about UK MIFs
6 from 2004 to 2008 onwards and that's what has been described there as, I think, the
7 OFT documents. So those are going to be documents that Mastercard submitted to
8 the OFT and in relation to that period now, as it is in relation to the period up until
9 June 2009, we would need to -- yes, we are agreeing to review those for relevance
10 and disclose them.

11 **MR JUSTICE ROTH:** Again by 28 October?

12 **MR COOK:** Yes, on the basis that that's a discrete block of material we already
13 have.

14 **MR JUSTICE ROTH:** Right. So that seems entirely reasonable to me. And I expect
15 my colleagues, as regards the OFT files and documents but what about the
16 Commission file?

17 **MS DEMETRIOU:** Yes, sir, we say that should be done sooner than 20 December,
18 especially when we're all working towards now, potentially a trial in the summer of
19 2023. Really, without meaning to sound disrespectful, it rather beggars belief that
20 this process has not been started already because since the claim was certified and
21 really before the claim was certified, Mastercard have been on notice that they would
22 have to disclose the EC file. It's fundamental, it's a follow-on claim. We are entitled
23 to the relevant file documents and it's staggering really, that the process has not
24 been started. So we say they should devote further resources to it and do it more
25 quickly. It does not really lie in their mouth to say: well we want to get on with
26 deciding causation very, very quickly and then not give us the disclosure we need.

1 So I think they need to get their skates on and provide it much sooner than
2 20 December.

3 **MR JUSTICE ROTH:** It does seem, Mr Cook, a very long time.

4 **MR COOK:** Well, sir, if I can point you to what Mr Sansom says in his first witness
5 statement. It's bundle A, page 646, where he explains and we are talking about
6 28,000 pages, so this is not a small amount of material which is, he said, contained
7 in 251 PDFs, of which there's no original metadata available, we need to split it all
8 out and that --

9 **MR JUSTICE ROTH:** None of this has been started?

10 **MR COOK:** I think Mastercard has engaged with -- it's started, sir, but it's not
11 something we've made a great deal of progress with at the moment, in terms of that
12 process not being completed. That process is ongoing, we have an E-disclosure
13 doing it, but the estimate is that could take up to 40 working days to do, sir, and then
14 we have 28,000 documents to review for relevance at the various stages of the
15 team.

16 So, sir, that's our best estimate.

17 **MR JUSTICE ROTH:** Why wasn't this started once the claim was certified?

18 **MR COOK:** Well, with respect, sir, until we knew what all of the issues were --
19 understanding what the problems are, one can see with the benefit of hindsight, it
20 would be better if we had, but in terms of where we are today, we are where we are,
21 as they say sir, and where we are now is we have to do this process of turning it into
22 a reviewable set of material and then we have to review 28,000 pages.

23 **MR JUSTICE ROTH:** I can see that you wanted to know the issues before you
24 conduct the review. But turning it into a reviewable form was blindingly obvious, if
25 I may say so, that would have to be done and I am somewhat surprised that has not
26 been started and, indeed, completed pretty much, given the date when you knew

1 that this action is proceeding or certainly the date when it was certified, although that
2 would have been fairly obvious after the Supreme Court judgment.

3 **MR COOK:** I think the problem is now we know there is a problem, we can see with
4 hindsight. We wished we'd known there is a problem earlier in order to start the work
5 earlier. The realisation there was a problem is one that hit until relatively recently,
6 just because nobody had gone back to the Commission file, particularly to try and
7 identify what state that was in. It was the state we had been given it.

8 **MR JUSTICE ROTH:** You say "may take up to 40 working days" which is a rather
9 loose way of saying if you've got any discovery provider already that's looked at it,
10 they can't tell you how long it's going to take.

11 **MR COOK:** Sir, that is their estimate we are passing on. Ultimately, all they are
12 doing with an estimate is saying: until somebody essentially does the work, at the
13 end of that process we'll know whether it took them 28 days or 40 days but their
14 estimate, passed on in good faith, is up to 40 working days to do that process of
15 unitisation before we can start reviewing it.

16 As I say, there's no advantage to us in slowing this down, we are trying to give them
17 things like the MMF documents which we can have and provide straightaway but this
18 is just a practical question of where we are now, sir.

19 **MR JUSTICE ROTH:** It's important it's provided in time for the
20 Class Representative's lawyers and advisers to be able to work on it to prepare for
21 the causation trial.

22 **MR COOK:** One thing I would say, of course, is what we are providing much more
23 quickly is all of the documents in relation to the UK MIFs here. So one would say
24 that those are the critical documents in relation to seeing whether or not the EEA
25 MIF had an effect upon the UK MIFs. This is material sent to the OFT about the
26 EEA MIFs. So it's material of, I would say, secondary importance. It needs to be

1 disclosed but that's where we are, sir.

2 **MR JUSTICE ROTH:** Yes. Just a moment. **(Pause)**

3 Mr Cook, it's pointed out that the 40 days takes you to 21 October because the
4 statement is dated 5 September, if you have 35 days --

5 **MR COOK:** Sir, it's 40 working days.

6 **MR JUSTICE ROTH:** Yes, 40 working days from 5 September.

7 **MR COOK:** 21 October. That would be about 40 days, sir, rather than 40 working
8 days. It would need to be eight weeks to be 40 working days.

9 **MS BURGESS:** 12 September is ten, 19 September is 15, 26 September is 20,
10 3 October is 25, 10 October is 30, 17 October is 35, 24 October is 40.

11 **MR JUSTICE ROTH:** So we are not including the weekends and we assume that
12 the work was started when Mr Sansom made his witness statement or should have
13 been if it wasn't.

14 **MR COOK:** Yes, very close around that.

15 **MR JUSTICE ROTH:** So if we add a further five weeks, I think it is, to give you until
16 9 December for review, that should be adequate.

17 **MR COOK:** Yes, sir, that's --

18 **MR JUSTICE ROTH:** There's no point making an order that can't be kept with, so
19 we'll say 9 December. What we consider is there is significant other disclosure
20 unrelated to the Commission file, concerning causation, the contemporary
21 documents, the disaggregated MIFs and so on which we expect to take place in the
22 meantime, so that important documents for causation are being provided to
23 Mr Merricks' team so they can work on that, even though they don't get the
24 Commission file until 9 December.

25 It's now 20 to five, so what we would like you to do between now and Thursday
26 morning is to think about timetable, when those other documents, now that we know

1 what's going to be involved in causation, can be provided and we hope there will be
2 yet further agreement. We note there is still more agreement reached over the
3 weekend about those documents and we can review that on Thursday morning.

4 **MS DEMETRIOU:** Sir, yes. Just in relation to the file, the review process
5 presumably could be sped up further if more resource were allocated to it and it's --

6 **MR JUSTICE ROTH:** Well I think you will have enough to work on, Ms Demetriou.
7 If you are going to get all the contemporary Mastercard documents on causation, you
8 are going to get the disaggregated MIFs. I don't think you will be lacking material to
9 work on and I don't think having an argument that if we have some more lawyers
10 working on it, you'll get another week of the Commission file --

11 **MS DEMETRIOU:** Can I check separately. I think the intention is the review should
12 be for relevance to all issues in the case.

13 **MR JUSTICE ROTH:** Yes, I said that it's for all issues.

14 **MS DEMETRIOU:** Thank you.

15 **MR JUSTICE ROTH:** So it's done in one go and, no, it doesn't help to be
16 over-combative about how many lawyers should work on this in the meantime.

17 Very well, we shall adjourn until Thursday and, as I say, if you can, between you,
18 draft the preliminary issues for a January hearing and consider when in January
19 there might be availability on the side of the parties for four days and communicate
20 that, the dates, if you can communicate that to the Tribunal in the course of tomorrow
21 and if you can send us a draft preliminary issue by the end of tomorrow, then we
22 can, I hope, wrap that up on Thursday morning.

23 I think if we sit at 10.30 on Thursday. I explained that we have an absolute deadline
24 of 1 o'clock but I would have thought that gives us ample time. Unless you tell me
25 we really need a lot more time, I would have thought we need less than half a day.

26 **MR COOK:** Sir, I think it's going to be quite rapid fire once we go through the

1 categories.

2 **MR JUSTICE ROTH:** Yes, that would be helpful to everyone here. So 10.30 on
3 Thursday.

4 **(4.40 pm)**

5 **(The hearing adjourned until Thursday, 22 September 2022 at 10.30 am)**

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?