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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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1
2 **Thursday, 22 September 2022**

3 **(10.30 am)**

4 **Case Management Conference**

5 **MR JUSTICE ROTH:** Thank you for sending a draft preliminary issues and we are
6 grateful for the work that has gone into producing those and we are content with one
7 to five. As regards six, causation, where there are two alternatives that have been
8 put forward, we prefer the first because we thought there is a risk that the second
9 formulation potentially takes one into questions of the counterfactual.

10 That would be clearly undesirable and raise a lot of factual issues. The only
11 question we did have about the first is -- well two questions, one: causal link, I think
12 we all understand this, we mean causal link in a legally relevant sense. So if we
13 could say a "relevant causal link", just to make that clear.

14 The other question, more substantively, is, are we dealing with all interchange fees
15 in the UK or is it only the domestic interchange fees? In other words, does
16 Mastercard accept that the cross-border interchange fee was affected by the EEA
17 MIF because it's a cross-border MIF?

18 **MR HOSKINS:** That's quite right, it's the EEA MIF, sorry.

19 **MR JUSTICE ROTH:** Sorry?

20 **MR HOSKINS:** The cross-border one is the EEA MIF. There were other categories
21 of international MIFs but the intention here, I think, and I'll be corrected if I am wrong,
22 is was there a positive link between the levels of EEA MIFs and the levels of, you
23 could say, domestic interchange fees in the United Kingdom. That's what we're trying
24 to encapsulate here.

25 **MR JUSTICE ROTH:** That's what I thought but there is a plea that the EEA MIF
26 affected cross-border transactions in the UK and domestic transactions and I think

1 they are dealt with separately in the claim form.

2 **MS DEMETRIOU:** Sir, yes, but the international transactions were subject to the EE
3 MIF which are the subject of the Commission decision of the infringement, so
4 Mr Hoskins is right that we share the same understanding as to what this catches.

5 **MR JUSTICE ROTH:** Yes. Well I think we can say domestic interchange fees.

6 **MS DEMETRIOU:** That's fine.

7 **MR JUSTICE ROTH:** Yes. Well that is then agreed on that basis. Thank you.

8 Dates for that, we are a little puzzled by what is said in the letters. Mastercard has
9 the luxury, as indeed does Mr Merricks, of having two King's Counsel, we now must
10 say, for this hearing, but I wouldn't have thought you need two KCs for the
11 preliminary issues and it's quite reasonable for them to be done by one KC,
12 supported, as you ably are, by very talented junior counsel.

13 Are you both in the AAM trial?

14 **MR HOSKINS:** I am not in AAM but I am in Trucks which is a 6-month trial starting
15 in March, so from when I am on brief and given then, a 6-month trial in March, my
16 availability is sort of zero on this. This is based on Mr Cook and anyone else who
17 could do it and assumes I am not available in any of this period.

18 **MR JUSTICE ROTH:** Right, but that trial is in March. This is just a three to four day
19 hearing at the beginning of term. Would you not be available to do that?

20 **MR HOSKINS:** I am under brief for my client in Trucks on the basis that it's an
21 exclusive brief and I will be working on Trucks and there's a lot to do.

22 **MR JUSTICE ROTH:** Yes, but it was in Mastercard's skeleton for today that you
23 proposed that the preliminary issues be heard in early 2023. That was the skeleton
24 argument you put in.

25 **MR HOSKINS:** And that was based on me not being available so ...

26 **MR JUSTICE ROTH:** Right.

1 **MR HOSKINS:** At this stage I'd sit down and get Mr Cook to stand up because he's
2 all over the AAM side of it --

3 **MR JUSTICE ROTH:** When this was put in as a skeleton to be heard in early 2023,
4 who were you proposing would do it?

5 **MR HOSKINS:** I know it wasn't me. Can I ... sir, I really have to pass over to
6 Mr Cook, who has better knowledge.

7 **MR JUSTICE ROTH:** That's called passing the buck.

8 **MR HOSKINS:** It is passing the buck but hopefully it's a more meaningful and
9 helpful buck than this one.

10 **MR JUSTICE ROTH:** Yes, Mr Cook.

11 **MR COOK:** Sir, I am not sure I have much of a better answer. I am in the AAM trial
12 which obviously starts in mid-January, so certainly to some extent the hearing is now
13 four days. We certainly thought it would be somewhat shorter than it is now, so four
14 days becomes the better part of two weeks of commitment in terms of preparation
15 and hearing which is why it becomes more of a problem to try and accommodate
16 that.

17 **MR JUSTICE ROTH:** You estimated three days in -- and you said --

18 **MR COOK:** It may be --

19 **MR JUSTICE ROTH:** Why were we told early 2023, with a time estimate of three
20 days, if you say you are not available in early 2023?

21 **MR COOK:** That may be something we should have thought -- you know,
22 recognised availability at an earlier stage, sir, but as matters presently stand, having
23 looked at the practicalities, we do suggest towards the end of March.

24 **MR JUSTICE ROTH:** I would have thought one looks at practicalities before
25 producing a skeleton that Freshfields and four counsel sign because I am still
26 puzzled because AAM is due to last quite some time, isn't it?

1 **MR COOK:** It is sir, yes.

2 **MR JUSTICE ROTH:** Doesn't it run until late March?

3 **MR COOK:** I think that timetable has been on the basis -- I am not sure how long
4 AAM does last but it's based on availability after the end of AAM, to prepare and be
5 ready to do that hearing. I think AA is set down for eight weeks which may include
6 one week's pre-reading, sir.

7 **MR JUSTICE ROTH:** Yes.

8 **MR COOK:** But that timetable was based on that availability, sir.

9 **MR JUSTICE ROTH:** Yes. I mean I was shown something that it ends on
10 14 March.

11 **MR COOK:** That's correct, sir.

12 **MR JUSTICE ROTH:** Or thereabouts. I mean it's very unsatisfactory for this to be
13 pushed back that far. The other possibility is then, whether it can be done at the end
14 of December and there's no factual investigation. You said there might be an agreed
15 statement of facts but we are not even in October and to do four days at the very end
16 of the coming term --

17 **MS DEMETRIOU:** Sir, we say our position is that it should be listed in January and
18 that Mastercard should, if their two counsel here can't do it, instruct alternative
19 counsel because they are points of law, they are instructing an alternative KC for the
20 Court of Appeal on the domicile date and these are points of law which anybody,
21 frankly, could present that's conversant with the area. They are not factual points
22 that require a detailed background knowledge and discussion with the client.
23 Furthermore, the law firm Freshfields, who are instructed, who are acting in these
24 proceedings, are -- it's a different law firm that acts in the AAM trial and so there's no
25 duplication of effort there.

26 **MR JUSTICE ROTH:** I don't think it's about the solicitors, it's about counsel.

1 **MS DEMETRIOU:** Yes, we say -- for example, Mr Lawrence is here. He's extremely
2 experienced, he could do it. So there hasn't been an adequate explanation and we
3 think it should be in January. It's very unsatisfactory if it's pushed back to the end of
4 March. As things stand, the week suggested by Mastercard at the end of March is
5 one which I can't do, even though I have plenty of availability before then. So this is
6 all very unsatisfactory.

7 **MR JUSTICE ROTH:** What about the end of December, before Christmas?

8 **MS DEMETRIOU:** Sir, I know I can't do that, I will have to see whether
9 Ms Wakefield's available. But we are in a position where the proposal was to instruct
10 me to do these preliminary issues. I appreciate what you say about --

11 **MR JUSTICE ROTH:** The proposal was to instruct either Mr Hoskins or Mr Cook.

12 **MS DEMETRIOU:** That's right.

13 **MR JUSTICE ROTH:** So we try as hard as we can, as you know, to accommodate
14 the parties' wish for their chosen counsel. Where there are large teams in two
15 cases, then we think one can look at the availability of either, and I am fully take your
16 point that it should not be pushed back that late, that's why I am asking, indeed,
17 about bringing it even earlier.

18 **MS DEMETRIOU:** Yes.

19 **MR JUSTICE ROTH:** I think Ms Wakefield has something to tell you.

20 **MS WAKEFIELD:** I have availability in December, sir, but the concern is that there
21 is already so much going on in December, with disclosure and everything else, that
22 having both limitation and exemptability together then, may be too much for the
23 broader team. The proposal in our skeleton argument was to have them separately,
24 so to have limitation in December and exemptability in January and that remains our
25 preference, if that can be accommodated.

26 **MR JUSTICE ROTH:** It's just -- I mean that's one -- I am not sure that helps hugely

1 | but sort of two days and two days.

2 | **MS WAKEFIELD:** That's true, sir.

3 | **MR JUSTICE ROTH:** Effectively. If that makes things any easier. Well let me ask
4 | Mr -- well both of you, I think. I don't know who it would be. But if it were the end of
5 | December, the last week of term, would you be able to do that, one of you?

6 | **MR HOSKINS:** Currently it wouldn't be me because of the terms of my brief in
7 | Trucks.

8 | **MR JUSTICE ROTH:** Right. Mr Cook?

9 | **MR COOK:** Sir, if possible, I'd like to take the opportunity to take instructions briefly,
10 | sir, but to some extent the similar issues do arise. It's four days hearing, four days
11 | preparation or preparation for a four days hearing and splitting it helps a little bit but
12 | still, fundamentally, means that work needs to be done and the skeleton arguments
13 | for AAM are due, I think, on about 16 December, so that hits into that bracket.

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

15 | **MR COOK:** Just briefly to mention the reference to the other KC instructed, which is
16 | Ms Tolaney, King's Counsel, she's also doing AAM, so it was an opportunity to get
17 | her also involved in Merricks but she also suffers the same problem.

18 | **MR JUSTICE ROTH:** So you are not the only KC in AAM.

19 | **MR COOK:** That's correct, sir.

20 | **MR JUSTICE ROTH:** Yes. Well, I would have thought on that basis, frankly -- you
21 | say the skeletons in Trucks are due on 16 December; is that right? Skeletons in
22 | AAM are due on 16 December?

23 | **MR COOK:** If you just give me a moment, sir, to check. Yes, I think ours is due on
24 | 14 December, sir.

25 | **MR JUSTICE ROTH:** Yes. So I mean if you were to get that out of the way, you
26 | would be better off, I would have thought, having this at the beginning of January

1 and we can indeed start on 12 January, the second day of term, have two days, the
2 12th and 13th, and then the 16th and 17th.

3 I think the start of the AAM trial is not -- is that right -- just a moment. **(Pause)**

4 Well I think the start date, as I am told, of the AAM, has not been confirmed because
5 there is going to be a PTR in December and it's not clear at the moment whether
6 what is said to be the start date is in fact a judicial pre-reading week. So that's
7 something you are going to consider at the PTR but it does seem then, that if you, as
8 it were, finish this on the 17th and you have other senior counsel in AAM and you
9 have already put in your skeleton -- of course you have to prepare the case, read the
10 other side's skeleton and so on -- but I think it's not oppressive to fix this for those
11 dates. But if you find that it really is too much, then I think we have to say that -- and
12 I will consult my colleagues -- Mastercard, as it has done for the Court of Appeal, can
13 instruct other leading counsel to do this argument which is a pure legal argument.
14 But I don't think it's satisfactory to put this back to the end of March.

15 We bear in mind that because these are pure legal issues and while they are
16 a relatively short argument perhaps, the impact of these issues is significant, very
17 significant. There is the potential of an appeal so we really think we ought to get on
18 with it, otherwise if there were to be an appeal and, of course, I can't pre-judge
19 whether there will or not, it could threaten the whole timetable down the line.

20 So Ms Wakefield or Ms Demetriou, in fact, I think that frees you up, doesn't it?

21 **MS DEMETRIOU:** Yes.

22 **MR JUSTICE ROTH:** But I think we'd start two days earlier.

23 **MS DEMETRIOU:** That's okay.

24 **MR JUSTICE ROTH:** Indeed, as there are two issues, it may be one is before the
25 weekend and the other is after.

26 **MS DEMETRIOU:** We are very grateful. That works for us.

1 **MR JUSTICE ROTH:** Yes, so that's what we will do.

2 **MR HOSKINS:** Can I just clarify, is that a four day hearing or two 2 day hearings, if
3 you understand what I mean?

4 **MR JUSTICE ROTH:** I think we've said three days, with the fourth in reserve, so it's
5 three to four days.

6 **MR HOSKINS:** But both issues dealt with together?

7 **MR JUSTICE ROTH:** Both issues dealt with, yes. I think to do one issue before
8 Christmas, if Mr Cook is involved and he's having to complete the skeleton, all one's
9 experience tells one --

10 **MR HOSKINS:** I wasn't trying to say --

11 **MR JUSTICE ROTH:** That makes life even harder.

12 **MR HOSKINS:** 12th, 13th, 16th January, and the 17th in reserve.

13 **MR JUSTICE ROTH:** Yes, and we should think about timetable for skeletons for
14 that. I think I won't rule on that now. I would ask you to go away and think about
15 that. It may be that there is something to be said for sequential skeletons, with
16 Mastercard doing the first skeleton on limitation, as you are taking the limitation point
17 and Mr Merricks with the first skeleton on exemptability, as you are taking that point
18 and then a response from both of you.

19 But that is something you can think about, I am not deciding that.

20 **MS DEMETRIOU:** That seems logical but we will liaise and revert.

21 **MR JUSTICE ROTH:** And think about dates that both suit your obligations but give
22 the tribunal the skeletons by -- we would certainly want them to be lodged by -- the
23 final ones, if it's a response, by 4 pm on 6 January.

24 **MS DEMETRIOU:** Thank you.

25 **MR COOK:** Sir, the only point I'd say in relation to limitation is it's not really
26 Mastercard taking the point, in the sense that the limitation period under -- English

1 law which it is predominantly, is clear. What is said against us is then a section 32
2 point, so it's really the claimant making the running on saying "Section 32 applies
3 here, to remove the ordinary limitation period." So we say it is the claimant who is
4 making the running there on that point and we would certainly like to see what they
5 say.

6 **MR JUSTICE ROTH:** We have the agreed statement of facts. We know what
7 section 32 says. You will be saying: well in the light of that, you don't get through
8 section 32. So I think it does make sense to do it that way round. It may not, in the
9 end, hugely matter, as it generally doesn't at the end of the day but it also breaks
10 up -- that's the other advantage of breaking up the work a bit.

11 Right. Shall we then move on? Is there anything else on preliminary issues to be
12 said?

13 **MS DEMETRIOU:** No.

14 **MR JUSTICE ROTH:** Do you want a date for the statement of facts? Would that be
15 sensible?

16 **MS DEMETRIOU:** So Freshfields sent a letter last night with a proposed timetable
17 that includes this. Do you have that?

18 **MR JUSTICE ROTH:** I have various letters.

19 **MS DEMETRIOU:** It's the longest of the letters, it has five pages.

20 **MR JUSTICE ROTH:** Ah. Last night?

21 **MS DEMETRIOU:** Yes, yesterday evening.

22 **MR JUSTICE ROTH:** I have one about the availability. That's a page and a half.

23 **MS DEMETRIOU:** I don't know if my learned friend has any spare copies.

24 **MS WAKEFIELD:** I've got a single clean copy if that would help. **(Handed)**

25 **MR COOK:** Sir, we do have copies, if that would help.

26 **MR JUSTICE ROTH:** No, it's not sent to the tribunal so we have not seen it.

1 **MS DEMETRIOU:** Ah, okay.

2 **MR JUSTICE ROTH:** But we've just been given copies.

3 **MS DEMETRIOU:** Just to take you to the relevant paragraph, it's paragraph 6.

4 **MR JUSTICE ROTH:** Yes.

5 **MS DEMETRIOU:** So what's proposed there is an agreed statement of facts by
6 30 November. Of course that's on the basis of a March proposal. We would suggest
7 that's brought forward a little to give us some more time because we are then into
8 December and the Christmas period. So we would propose by no later than 4 pm on
9 11 November.

10 **MR JUSTICE ROTH:** Yes.

11 **MS DEMETRIOU:** And then it's said:
12 "Four weeks before the hearing, the parties shall file a joint memorandum setting out
13 the following ..."
14 And there's the principles of applicable law that apply to these proceedings and the
15 principles of Scottish and or Northern Irish law applicable to the determination of
16 limitation. So that's said to be four weeks before the hearing. Again, we say, given
17 the Christmas period, it would be helpful if that were brought forward a little. In
18 relation to (i), we have in our reply, set out the principles of applicable law, so we are
19 anticipating, I think this is what must be intended, that Mastercard will indicate
20 whether they agree or disagree with that but we accept that in relation to (ii), we do
21 need to state what the principles are and we think it would be helpful to have this
22 joint memorandum indicating any areas of disagreement. But, again, if we could
23 bring that forward a little, I think that would be helpful.

24 **MR JUSTICE ROTH:** Yes. Well 11 November seems quite a long time from now.

25 **MS DEMETRIOU:** Yes.

26 **MR JUSTICE ROTH:** Is that reasonable? Yes?

1 **MR COOK:** Yes, sir, we are comfortable with that.

2 **MR JUSTICE ROTH:** Thank you. 11 November.

3 **MS DEMETRIOU:** Maybe we could say the same date for the joint memorandum.

4 **MR COOK:** That does seem a little tight, sir --

5 **MR JUSTICE ROTH:** I would suggest you allow another week because it might be
6 affected by the statement of facts.

7 **MS DEMETRIOU:** That seems sensible, sir, so let's say the 18th.

8 **MR JUSTICE ROTH:** 18 November.

9 **MR COOK:** If we could push it back a little bit, what's intended here is there's going
10 to be a process that, obviously, we're not defining in the order, of both parties setting
11 out what they think the rules are, trying to sort of reach agreement so the tribunal
12 gets something that's not just they say something, we say something. We'd like to
13 try and smooth as many corners off as possible. So we have not got into the detail
14 of all of that but there will need to be back and forth on this for a period, so we think
15 more time to try and reduce the areas of disagreement as much as possible would
16 assist the tribunal and the reality is, if everyone has it in good time before Christmas,
17 ie several weeks before Christmas, that should be sufficient.

18 **MR JUSTICE ROTH:** Yes, it will be time enough for the tribunal, that's not
19 a problem. It may be in the nature of things, the later one puts it, the later some of
20 the final work gets done and it might suit you, in fact, to have it done earlier because
21 I mean, you can get on with that pretty much straight away, a lot of that, about the
22 limitation period under Scottish and Irish law and the principles of the governing law
23 that would apply. These are matters that you can start on straight away, frankly.
24 And then it's just a question of amending it, if appropriate, because of what is said in
25 the agreed statement of facts. So I think 18 November is sensible.
26 Some of it will be Rome II and things like that which will be common ground. I think

1 | there is a judgment of the tribunal on governing law in, is it, the Dune Group?

2 | **MR COOK:** It's a judgment of the High Court of Mr Justice Barling in Mastercard v

3 | Deutsche Bahn in relation to choice of law. There is a government of the Court of

4 | Appeal in DSG v Mastercard in relation to the section -- the tribunal rules point.

5 | **MR JUSTICE ROTH:** That's the limitation, isn't it?

6 | **MR COOK:** That's the limitation but the effect of --

7 | **MR JUSTICE ROTH:** There's another choice of law judgment of this tribunal, I think.

8 | **MR COOK:** There is, yes. Oddly enough, it is also a Mastercard case, but it's also,

9 | I think, the Peugeot and Citroen judgment as well.

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

11 | **MR COOK:** Those are the three --

12 | **MR JUSTICE ROTH:** That you will be looking at.

13 | **MR COOK:** Yes.

14 | **MR JUSTICE ROTH:** Right. Let's move on. I think that's all on preliminary issues.

15 | **MS DEMETRIOU:** Sir, yes, it is, thank you.

16 | **MR JUSTICE ROTH:** Do we then go to disclosure?

17 | **MS DEMETRIOU:** Sir, yes, and I would like to take you --

18 | **MR JUSTICE ROTH:** Just before that, there is one point raised about the disclosure

19 | that we ordered the day before yesterday in MMF which is raised by a letter of

20 | Freshfields which we do have of 19 September about whether there's any order

21 | needed in respect of the AAM proceedings.

22 | But I have looked at the order which in fact, as it happens, I made in those

23 | proceedings on 14 September of last year, so 2021, and I think that covers the point

24 | because that expressly gave permission for those documents to be used in these

25 | proceedings.

26 | **MR COOK:** Sir, I think this may be a different point. So the MMF documents were

1 disclosure provided by MMF in those proceedings and you are absolutely right, sir,
2 you gave an order giving us permission to use those in these proceedings and we
3 don't seek an order on this. I think the letter you are referring to deals with a different
4 document which is the settlement agreement between MMF and AAM and the
5 relevance of that document is the settlement agreement included provision for the
6 disclosure which is the AAM documents.

7 So the settlement was, "We shall settle but you shall provide general disclosure",
8 and the claimants would like to see it in order to understand what the parameters are
9 of the disclosure exercise which led to the MMF documents.

10 So it's that settlement agreement which we don't think is covered by the previous
11 order and it was a confidential document.

12 **MR JUSTICE ROTH:** But the MMF settlement agreement was not something you
13 got by way of disclosure in the AAM proceedings, it's something that you jointly
14 agreed.

15 **MR COOK:** No, because we are not MMF. MMF is -- and it was an entity owned by
16 the banks.

17 **MR JUSTICE ROTH:** You were given a copy of it?

18 **MR COOK:** I believe we received a copy of it as a confidential schedule to
19 a confidential witness statement that was put before the court, in order to have the
20 court approve the terms of the stay of the claim against MMF on the terms of that.
21 So we saw it but in the context of something which was covered by a confidentiality
22 order. It would probably have been the confidentiality ring which is -- and so we've
23 contacted -- I mean MMF is now dissolved, so they don't have a dog in this fight
24 anymore. We contacted AAM, who are happy that that document should now be
25 disclosed but it's formally subject to a confidentiality order, so we wanted that simply
26 recorded.

1 **MR JUSTICE ROTH:** A confidentiality order or just a term of agreement?

2 **MR COOK:** The term of agreement wouldn't bind us because we weren't a party to
3 it but we saw it, I understand, as a confidential schedule to a witness statement, so
4 that would have been part of the confidentiality ring in those proceedings, as we
5 understand it which is the reason why we feel an order of this tribunal or rather, an
6 order of the AAM tribunal, would be necessary or at least desirable.

7 **MR JUSTICE ROTH:** But it's not opposed by AAM?

8 **MR COOK:** They have consented so ...

9 **MR JUSTICE ROTH:** Yes. Well, I am not sitting as the AAM tribunal and it now has
10 a judge, who, as you know, is chairing that tribunal. But I think on that basis, if you
11 write to the tribunal for the attention of the chair of the AAM tribunal, who has been
12 alerted to this point, and say that "We seek the protection of that disclosure order", or
13 "permission to disclose this specific document", informing her that AAM do not
14 object, I am sure that order will be made.

15 **MR COOK:** Yes, I think that letter was intended to be that, sir.

16 **MR JUSTICE ROTH:** Yes, so I think that is, in fact, already in hand.

17 **MR COOK:** Yes.

18 **MR JUSTICE ROTH:** So you will then receive the document so it's really going
19 through the formal mechanism.

20 **MS DEMETRIOU:** Thank you very much.

21 **MR JUSTICE ROTH:** Right.

22 **MS DEMETRIOU:** So, sir, broadly, what we have left to deal with is disclosure and
23 then timetabling in relation to Solo and causation and I think the latter timetabling
24 issues probably flow from disclosure to some extent.

25 So perhaps deal with disclosure first. In relation to that, there has been some more
26 correspondence overnight. I don't know if you have the letter now -- you have the

1 longer letter. There's been another letter from Freshfields about the high level
2 aggregated data. Sir, members of the tribunal, just to make a preliminary point, you'll
3 recall from the discussion we had on Tuesday that there was general agreement
4 from the tribunal that the very high level aggregated data in the annexe to
5 Mastercard's defence would be inadequate to enable our expert to carry out his
6 proposed analysis.

7 Then, of course, Mr Hoskins responded to that concern by offering further data. Can
8 I just show you the transcript. Do you have the transcript of ...

9 **MR JUSTICE ROTH:** Yes.

10 **MS DEMETRIOU:** Sir, if you could turn, please, to page 97, and there's a question
11 at line 5 from Professor Waterson to Mr Hoskins, asking what level of aggregation
12 he's talking about.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** And then you see Mr Hoskins say:

15 "So just to clear one thing out, there's absolutely no problem with us providing the
16 different levels at which the IFs were set and then there is information that relates to
17 the volume of transactions that took place at a certain IF. That's if material is
18 available."

19 So that's the important caveat --

20 **MR HOSKINS:** I wonder if that's, "That IF material is available."

21 **MS DEMETRIOU:** I am so sorry.

22 **MR HOSKINS:** I just wonder if that's, "That IF material is available", or "That's if
23 material is available --"

24 **MS DEMETRIOU:** I think the more natural reading is "That is if material is
25 available" -- I don't know but, anyway, there seems to be some sort of caveat.

26 Then:

1 "Where we are drawing the line is at transaction data as defined by Mr Coombs
2 which is detail relating to every individual purchase."

3 Then you, sir, say:

4 "So you can get the valid transactions in aggregate at the different interchange fees."

5 Mr Hoskins says:

6 "I can't say it's going to be complete across the piece but absolutely that sort of data
7 is available ..."

8 So it's on that basis that we proceeded, in principle, to say a trial on causation was
9 possible in the summer.

10 **MR JUSTICE ROTH:** Yes.

11 **MS DEMETRIOU:** So my solicitors then wrote to Freshfields after the hearing on
12 Tuesday, to seek to ascertain what they are in a position to provide and we received
13 the response on that late yesterday evening and that's a different letter, so I don't
14 know if you have that. It's a --

15 **MR JUSTICE ROTH:** No.

16 **MS DEMETRIOU:** I have one spare copy here. Do you have it? It starts:

17 "We would --"

18 **MR JUSTICE ROTH:** If letters are not copied to the tribunal, we won't have them.

19 **MS DEMETRIOU:** I should have realised.

20 **MR COOK:** Sir, we do have copies.

21 **MS DEMETRIOU:** We have three copies here. **(Handed)**

22 So there is a heading above paragraph 2, "The level of the EEA MIFs, UK MIFs and
23 UK IFs." There's then a series of points that are made. It's difficult to discern just
24 from reading those points in paragraph 2 what this actually amounts to in practice
25 because it's cross-referring to other material. But we've taken instructions overnight
26 from our experts and we've done our best and briefly the position is as follows.

1 So paragraphs 2(a) and 2(b) and 2(d) correspond to information already provided by
2 Mastercard which doesn't contain the basic information that we need that we were
3 talking about.

4 Paragraph 2(c) refers to UK bilaterally agreed IFs as at 23 June 1994, but it doesn't
5 offer any information in relation to bilaterally agreed IFs at any other date. So that
6 relates to 1994. Then when we move on to paragraph 3, you see that we also refer
7 to. So 3(a) and 3(b) relate to the lifting of some of the redactions in information that
8 we already have and, again, we don't anticipate and Mastercard are notably not
9 saying that this will provide us with all the IFs and the volume of transactions at
10 those IFs.

11 You see in relation to -- even on that basis, in relation to 3(b), you see that the time
12 period is stated to be 2000 to 2004. So, again, that's a limited period.

13 3(c) has already been provided. Again, this is average IFs, not individual IFs. Then
14 you have finally at 4, paragraph 4 holds out the prospect of, they say, "further
15 documents setting out the levels of the EEA MIFs, UK MIFs and UK IFs during the
16 claim period which will be provided as part of the disclosure Mastercard has offered."
17 But, again, that's wholly vague and it doesn't contain any information, no
18 reassurance at all that the data Mr Hoskins held out as hopefully being available, is
19 actually available. So drawing this together, sir, the position that we are in is this.

20 We started off before Tuesday with both parties aligned on the fact that there should
21 be at least a causation trial in Michaelmas term of next year. Of course, the tribunal
22 indicated that it could be done earlier and Mastercard agreed with that, and
23 Mastercard is now pressing for an early determination of causation in the summer of
24 next year.

25 Now in order to properly put forward its case at the causation trial, and of course, the
26 tribunal, I know, does appreciate that causation is an extremely significant matter in

1 this case, Mr Merricks' experts require, as the tribunal has accepted, the individual
2 IFs and volumes of purchases at each IF over time.

3 Now Professor Waterson was quite right that we don't need the disaggregated data
4 per se, so it's not that we want disaggregated data for the sake of it, but we do need
5 this basic granular information and at the moment, there is absolutely no information
6 from Mastercard which reassures us we are going to get it. Quite the opposite.

7 What they are saying is --

8 **MR JUSTICE ROTH:** May I interrupt you. I mean whatever is being said in letters,
9 isn't the position that this tribunal will make an order for disclosure. We need to
10 consider what we should order. Whether it has been one party saying it's been given
11 and other party saying: well, it hasn't quite been given in the way you describe it, is
12 to some extent irrelevant. We shall decide what's appropriate and we shall order it.

13 Of course, it can only be provided if Mastercard has it.

14 **MS DEMETRIOU:** Of course.

15 **MR JUSTICE ROTH:** If they haven't got it, they can't provide it and insofar as
16 purchase are concerned, particularly when they are IFs set by third party banks, they
17 only have to carry out a proportionate search. But the real question is what is
18 relevant, we define that, and we shall determine that listening to what you say and
19 what Mastercard says and then they will be ordered to produce it. Then it's just a
20 question of by when.

21 **MS DEMETRIOU:** Sir, yes. Of course, that is correct and so the tribunal is going to
22 want to know, well, what, practically, do we do now? So we say they should be
23 ordered to produce that data. So the minimum that we require are the individual IFs
24 and the volume of transactions over time in relation to each IF.

25 Because this is also unsatisfactory in terms of explanations being provided both on
26 the eve of the CMC and during the CMC. What we would propose as a practical

1 matter going forward is that Mastercard is proposing to provide this data by
2 14 October and so you are right to say, well, they can only provide what they've got.
3 There will then be a question, of course, for us as to whether that is sufficient or
4 whether we need to proceed to press our application for the disaggregated
5 transaction data.

6 What we would propose is that two weeks after 14 October, the tribunal direct that
7 the experts meet because we think that would be useful because there are points of
8 clarification which I think the experts could grapple with directly, rather than us
9 coming back straight away to the tribunal. And I think if they are directed to have
10 a meeting, then it will be easier for Mr Coombs to discern what is there and what
11 else he needs and will be able to come back to the tribunal, if necessary, depending
12 on what has been disclosed, with a reformulated request for further disclosure.

13 So we do say there needs to be some mechanism like that in place for taking this
14 forward for the reason I give which is --

15 **MR JUSTICE ROTH:** Yes, I mean, clearly, what we indicated is that Mastercard
16 should disclose all individual MIFs throughout the claim period which now includes
17 an additional year.

18 Sorry, the additional two years, isn't it, because -- yes, additional two years and for
19 all their MIFs right through that period and should disclose the domestic IFs insofar
20 as available to them.

21 **MS DEMETRIOU:** Sir, yes, and the other --

22 **MR JUSTICE ROTH:** So that's the first part and that seems to us clear.

23 The second part is the transaction data. That's where the experts come in because
24 the MIFs is just -- it is what it is, isn't it?

25 **MS DEMETRIOU:** Yes.

26 **MR JUSTICE ROTH:** And if it's not clear what it covers, that's not an expert

1 question, it's just something your lawyers will ask their lawyers. The
2 disaggregated -- well, it's a level of disaggregated transaction data but not down to
3 the level of individual transactions. It's not quite clear what that is going to look like,
4 so that is where the experts can look at it and seek clarification and you may want to
5 come back.

6 **MS DEMETRIOU:** Yes.

7 **MR JUSTICE ROTH:** Isn't that the position? They are two quite different things.

8 **MS DEMETRIOU:** They are two different things. We need -- as you say, the first
9 thing is the level of the MIFs and the IFs, so each one of them rather than the
10 weighted averages and the second is the volume of transactions that are attributed
11 to each IF over time.

12 **MR JUSTICE ROTH:** Yes.

13 **MS DEMETRIOU:** So those are the two key things.

14 **MR JUSTICE ROTH:** So as far as the first, that should not be such a problem, as
15 I say. They can only do it insofar as they have them. But I can't see any -- whether
16 you have them already or not, I mean that's a separate issue you can argue about
17 elsewhere.

18 But is there any problem from Mastercard's side with our ordering that that is what
19 you must disclose?

20 **MR COOK:** No, there's no problem with an order that says we have to carry out
21 a reasonable search for it.

22 **MR JUSTICE ROTH:** Yes.

23 **MR COOK:** In relation to MIFs, ie the multi-lateral defaults, we either have provided
24 all of them or there may be one or two changes, particularly with the addition of --
25 I think it's just one year that's relevant for these purposes because the causation
26 argument was limited to one year, it's the pass-on argument that was limited to

1 two years. But in any event, providing that additional year, we need to do so but
2 that's not going to represent any problems at all.

3 **MR JUSTICE ROTH:** Both the EEA MIF and the domestic MIF?

4 **MR COOK:** Yes, and there's absolutely no problem with -- as long as they are MIFs,
5 there's absolutely no problem with that at all and -- yes, I mean you don't want to go
6 into whether we provide them or not.

7 **MR JUSTICE ROTH:** Can you do that by 4 October?

8 **MS DEMETRIOU:** Sir, while Mr Cook is taking --

9 **MR JUSTICE ROTH:** Just wait.

10 **MR COOK:** Sir, a lot of this is going to drop out of the disclosure exercises that we
11 are already being ordered to do by the tribunal. So things like the OFT file, for
12 example, will have a lot of this kind of material in it. So we'd suggest that is when
13 a lot of this material will come in and, you know, trying to pull forward a separate
14 exercise that says: go through the file earlier and try and see if it's there ...

15 **MR JUSTICE ROTH:** The OFT file, we said, was -- what was it? The 4th or 14th?

16 **MR COOK:** The file itself was 28 October. The decision was the 14th.

17 **MR JUSTICE ROTH:** Yes.

18 **MR COOK:** But, sir, to some extent and our position on MIFs is, in terms of the
19 MIFs, they've had 95 per cent of them --

20 **MR JUSTICE ROTH:** Yes.

21 **MR COOK:** -- at the moment, so I mean essentially, all we have to do is add on an
22 extra couple of years. It may be that when we go through and track, there's the odd
23 one or two years, we need to find in the middle, but they basically had all of this, sir,
24 at the moment, on the MIFs.

25 **MR JUSTICE ROTH:** It would be very helpful to have a schedule, rather than having
26 to pick them out of documents here and there, just a schedule setting out what the

1 different MIFs were and then chronologically through the period.

2 **MR COOK:** Sir, I am going to show you one document in due course which is
3 A2279 which is right at the end of the bundle --

4 **MR JUSTICE ROTH:** If it's there, fine.

5 **MR COOK:** Yes, which is to give you an example of the kind of data that's available
6 but that's a schedule for the EEA MIFs, that one, which actually shows it -- I mean
7 that one is from 1992 to 2004 and then the Commission decision covers another
8 3 years. So that kind of document is there. I appreciate at the moment it's in several
9 documents but turning it into one document in due course certainly will be sensible,
10 sir.

11 **PROFESSOR WATERSON:** Can I just raise the point that in Merricks 1,
12 paragraph 36, the expert's report further states as follows:

13 "We understand that there were 225 different IFs during the full infringement period."
14 So presumably that information is available, to say such a precise number?

15 **MR COOK:** I mean in fact, sir, I'm afraid I think that might be a wrong number.
16 I suspect that was taken from the Commission decision but the Commission decision
17 largely in relation to the EEA MIFs, sets it all out. That's one of the points we've
18 made. As it happens, a lot of the information there covers commercial cards which
19 are not part of these proceedings.

20 **PROFESSOR WATERSON:** Yes.

21 **MR COOK:** So the 225 figure is actually counting up things that aren't part of the
22 claim but, nonetheless, they have that number because the information is all largely
23 there. Some of it, I accept, is redacted at the moment, so they haven't seen the
24 specific numbers but we are slightly surprised because a lot of this information is
25 readily available on the face of documents.

26 **MR JUSTICE ROTH:** Right. Now that's MIFs. What about IFs?

1 **MR COOK:** The IFs are the problem. We provided one document we have found
2 which is a snapshot in 1994. Obviously, the review, the MMF documents may
3 include some more information on that and what we've also provided is information
4 that was submitted by MEPAC, as it was then called, but that's the predecessor to
5 MMF, to the OFT in 2002 which shows the average interchange fees. I accept that's
6 slightly distinct but it's at a point where, for most of the 90s, there were only two
7 MIFs. There was a standard and an electronic. So there is quite a lot of data which
8 goes to that and, ultimately, Mastercard will search to see if it does have records of
9 bilaterals. That's going to be a difficult exercise in the sense we are going back to
10 the early 90s for that. If we find more, of course it will be disclosed. But at the
11 moment we have no reason to think -- there's no obvious repository where we can
12 say it must be in there, that we will have a record of bilaterals on a continuous basis.

13 **MR JUSTICE ROTH:** Yes. If they went through at any point, the arbitration
14 proceedings, to settle the bilateral interchange fee, is that something you would have
15 been notified of the result?

16 **MR COOK:** Sir, I think to some extent I am in danger of giving evidence here.

17 **MR JUSTICE ROTH:** Yes.

18 **MR COOK:** My understanding, however, is I don't think there was actually an
19 arbitration, certainly not an arbitration for UK MIFs. There was one, I understand, in
20 relation to Eurocheque. I've no idea, I can't even remember now what Eurocheque
21 was but --

22 **MR JUSTICE ROTH:** I am just trying to get a sense of what might happen.

23 **MR COOK:** I don't think there were arbitration awards, sir. If there were, then
24 I believe Mastercard would actually have been the arbitrator.

25 **MR JUSTICE ROTH:** So you would have those.

26 **MR COOK:** So we would have that but (Overspeaking).

1 **MR JUSTICE ROTH:** On that then, you can only carry out a reasonable
2 proportionate search for the IFs and it may be that there has to be some third party
3 disclosure request in due course to some of the banks.

4 **MS DEMETRIOU:** Sir, it's a fundamental point, I know it can't be resolved now but
5 I just want to flag what the nature of the point is. So a large part of Mastercard's'
6 defence -- we don't need to turn it up but it's all set out at paragraph 98 -- relies as
7 a defence to our causation allegation on the IFs and the way that the IFs were set.
8 For that reason and also because Mr Coombs needs the individual IFs and the
9 volumes of transactions, in order to even begin to carry out his econometric analysis,
10 it's critical we get this information. Now I accept Mastercard can only give us what it
11 has after it's done reasonable searches but the key point is if it doesn't have this
12 information, we are going to have to come by and seek the transaction data which
13 we think will contain the information that we need. So we are not seeking
14 transaction data for the sake of it, but we do need that information in order to carry
15 out the analysis that we want to carry out to prove our case.

16 **MR JUSTICE ROTH:** Yes, well to some extent, the relevance will be, to some
17 extent, affected by what happens on limitation because I think there was a UK MIF
18 from 1999. So if the very early years, if there is a limitation bar on the early years,
19 then some of that information --

20 **MS DEMETRIOU:** To some extent it will be affected by that, to some extent and, of
21 course, we don't know which way that point is going to go.

22 **MR JUSTICE ROTH:** But one of the advantages of preliminary issues is that it does
23 reduce the scope of disclosure if they are decided one way.

24 So as regards the IFs, it's then a question of -- you say 28 October to produce
25 a comprehensive schedule of the EEA MIFs. That's what you are suggesting?

26 **MR COOK:** Sir, the EEA MIFs, to be quite honest, we could do a comprehensive

1 | schedule for the EEA MIFs much more rapidly because I can point you to two
2 | documents that are effectively for the EEA MIFs and just combining them.

3 | **MR JUSTICE ROTH:** Up to the end of what's now the claim period. If you produce
4 | that by 4 October, if you produce by 28 October for the UK MIFs and then there's
5 | a question of by what date to do your reasonable and proportionate search for UK
6 | IFs.

7 | **MR COOK:** Just clarifying, we do in fact have the data and I am confident we do,
8 | sir.

9 | **MR JUSTICE ROTH:** You have the data --

10 | **MR COOK:** The question was being asked behind me in relation to the EEA MIFs
11 | but I am confident we do have that data.

12 | **MR JUSTICE ROTH:** But for the UK interchange fees, to do a search of your
13 | records, by when can you do that? You have obviously done some searching
14 | because you've found that document that is referred to in Freshfields' letter. You
15 | found the document with 23 June 1994 so some searching has been done.

16 | **MR COOK:** Sir, I believe that may have been one of the MMF documents, it may
17 | have dropped out of that, sir. But at the moment we are suggesting, sir, generally,
18 | we would carry out our searches to be done by 11 January and that's -- to the extent
19 | we find this kind of material earlier, I am very happy to say we will provide it earlier
20 | but, effectively, we are doing sort of general searches. Once we move from the easy
21 | category to documents where they may be big, like the OFT file, but we know it,
22 | we've got it, once we start carrying out searches that are going to be essentially
23 | trying to find emails from the 1990s, to find who has boxes of documents in a corner
24 | of a warehouse somewhere, you will appreciate, sir, those are completely different
25 | categories of exercise from the ones that we are going to be doing over the next
26 | couple of months which is the reason we say 11 January is our deadline or our

1 proposed deadline for our wider general searches which will be looking, in part, for
2 documents like bilateral interchange fees, to the extent we have them.

3 **MR JUSTICE ROTH:** Yes.

4 **MS DEMETRIOU:** Sir, this is not really consistent with what they've said in their
5 letter. If we go to the longer letter, which is the first one you looked at, what we see
6 is -- so just to map out what they are proposing here. Under the heading "Solo debit
7 cards", at paragraph 8, they are referring to certain categories of disclosure which
8 include basic things like the scheme rules.

9 **MR JUSTICE ROTH:** Just a moment. The longer letter of --

10 **MS DEMETRIOU:** Yesterday. So the 21st. It's the first one that was handed up
11 today.

12 **MR JUSTICE ROTH:** Yes. I am drowning in letters. Yes.

13 **MS DEMETRIOU:** So there are broadly, if I can put it this way, three categories of
14 disclosure in terms of the timing of all of this, that they propose. If you look at
15 paragraph 8 -- we can in due course map this on to the disclosure schedule but just
16 for present purposes, even though it's under the heading "Solo debit cards", they
17 accept -- they say, if you look in the middle of that paragraph:

18 "These documents are primarily relevant to causation."

19 That includes very basic things like the scheme rules which we obviously don't have.

20 **MR JUSTICE ROTH:** Yes.

21 **MS DEMETRIOU:** And they say in relation to that disclosure, that that is going to be
22 provided by 20 December. Do you see that at 10(a)?

23 **MR JUSTICE ROTH:** Yes.

24 **MS DEMETRIOU:** Right. Then we have, under the heading "Causation and volume
25 of commerce", at 13, two categories of -- two different dates. We have 14 October,
26 they are going to provide us with what they call aggregated data, as per the other

1 letter I showed you and that's purporting to make good on Mr Hoskins' offer of
2 yesterday, when we talked about the individual IFs and the volumes of the
3 transaction volumes per IF. Here they seem to be saying that's by 14 October and
4 that's why we say we have no confidence it's going to be complete, so we want an
5 expert meeting thereafter to try and iron it out.

6 Then at (c) over the page, they say by 20 January which I apprehend from Mr Cook's
7 submissions just now they've brought forward to 11 January, there is a whole bunch
8 of other, if I can put it this way, contemporaneous documents discussing things like
9 how the MIFs and IFs were set.

10 **MR JUSTICE ROTH:** Yes.

11 **MS DEMETRIOU:** Sir, the position, the general position -- we'll deal with the
12 categories in a moment but in terms of dates, this is all too late for us because what
13 is being proposed is disclosure which we don't know yet if it's going to be adequate
14 by 11 January and then expert reports within three months after that.

15 Now the difficulty with that is that even though they are proposing to give some
16 disclosure earlier, Mr Coombs actually needs to see all of the disclosure before he
17 can really design his report. Because, for example, just by way of example, what if
18 the contemporaneous documents explain that changes in the EEA MIF affected
19 some domestic IFs but not others? Well that's something he'd have to account for in
20 the design of his model. What if they say, on the other side of the equation, the
21 documents might say that a particular change in a domestic IF has nothing to do with
22 the EEA MIFs but is because of some extraneous economic factor like a new
23 regulation which has increased merchant costs? Well that would have to be
24 controlled for in his model.

25 So he can't actually make meaningful work until they've completed this important
26 disclosure exercise. So we say, sir, I made the point yesterday, it's alarming, if I can

1 put it that way, that despite this case having been certified, they haven't actually
2 made any progress with any of this. But we also say that it puts us in a very difficult
3 position because they are pressing for this summer trial on causation which is
4 obviously a hugely important issue for our side and their proposals on disclosure are
5 wholly opaque at the moment and also too late.

6 So they are saying: we need from now until the middle of January to complete all of
7 this and then they are expecting our side to review it all and for our experts to digest
8 it, construct their model and produce their report within three months. We say that's
9 not possible. We've taken instructions from our expert, who says that's insufficient
10 time.

11 Sir, we would urge you to impose greater strictures on Mastercard in terms of the
12 disclosure timetable. If it requires more resource, it requires more resource.

13 **MR JUSTICE ROTH:** The particular concern you have is not about the October
14 dates that we've just considered and it really doesn't particularly matter whether it's
15 the 28th or the 14th?

16 **MS DEMETRIOU:** No.

17 **MR JUSTICE ROTH:** It's with the January 2023 date in 13(c).

18 **MS DEMETRIOU:** That's the particular concern. There are two concerns, in
19 summary. One is the January date and I've made my submissions on that. The
20 other concern is although you're right that whether it's the 14th or 28 October
21 actually doesn't make very much difference in the scheme of things, we are
22 concerned to get the basic data we need and I am not going to reiterate the point as
23 to what that is and at the moment, we don't know whether we are going to get that
24 and we may need to come back and seek further disclosure, whether it be the
25 transaction data or something else.

26 **MR JUSTICE ROTH:** But I think 28 October gives you time to do that.

1 **MS DEMETRIOU:** I think it does.

2 **MR JUSTICE ROTH:** It's not a very complicated --

3 **MS DEMETRIOU:** That's fine. We would like an expert meeting to be directed just
4 to facilitate the process of actually getting to grips with what's there and what's
5 missing.

6 **MR JUSTICE ROTH:** That's to look at the aggregated data and to see what it looks
7 like which is the 13(a) --

8 **MS DEMETRIOU:** Yes.

9 **MR JUSTICE ROTH:** -- which suggests an expert meeting might be sensible.

10 **MS DEMETRIOU:** Exactly.

11 **MR JUSTICE ROTH:** Yes. We will just take a moment. In fact, yes, just give us
12 a moment.

13 **MS DEMETRIOU:** Of course. **(Pause)**

14 **MR JUSTICE ROTH:** Well, Mr Cook, I think you are taking the lead on this. Is that
15 right? I am addressing you. We think that you should be able -- we appreciate that
16 this involves, in part, going back into history and looking at warehouse records and
17 that is always time-consuming, but we do think that doing that by 16 December
18 rather than 11 January should be possible, it's virtually three months and that you
19 must make your best efforts to do that if we are going to have a trial in July and so
20 that is what we are minded to order.

21 **MR COOK:** Sir.

22 **MR JUSTICE ROTH:** If it turns out that there is a certain period --

23 **MR COOK:** Sir, as one always does with disclosure, we will do what we can by that
24 deadline, on the basis the tribunal has imposed it. If there is a problem --

25 **MR JUSTICE ROTH:** You have to come back and say: well we've done it from 1996
26 but the first four years have these particular problems because, and you will explain

1 why and then either you'll agree an extension for that period or you'll have to come
2 back and ask for a variation of the order. But I think the parties would be sensible
3 about it and there's clearly a lot you can do in that period for a large part of the claim
4 period.

5 **MR COOK:** Sir.

6 **MR JUSTICE ROTH:** But we all recognise the longer you go back, the harder it is to
7 find things.

8 **MR COOK:** Sir.

9 **MR JUSTICE ROTH:** So we will say that those documents are to be produced by
10 16 December and we do think that gives Mr Coombs that extra couple of weeks, we
11 allow for Christmas, in which he can produce his report. So that deals with part of it.
12 As regards the two other points, one is that what is to be quite clear, that the
13 schedule of MIFs, both EEA MIFs and domestic MIFs, must make clear what the
14 individual MIFs are and at what date, over what period, what time period, so it's quite
15 clear when each MIF changed and what it changed to. I think that goes without
16 saying but I want to make it extremely clear that is what's required.

17 **MS DEMETRIOU:** Sir, sorry to interrupt, do you mean to include IFs so far as they
18 have that information?

19 **MR JUSTICE ROTH:** Yes, the IFs schedule will come on 16 December, going right
20 through the period. Anything they have earlier can be produced earlier, but there
21 may be a certain amount, we are told, in the MMF disclosure but you will see.

22 The next point is the aggregated data. That is to be provided by 14 October. Again,
23 to be clear, what is meant by aggregated data, as we understand it, it's aggregated
24 by reference to each MIF or IF.

25 **MR COOK:** Sir, that's set out in Freshfields' letter of yesterday evening, the shorter
26 letter and, again, people talking to some extent at cross-purposes about exactly what

1 that is. So there is, essentially, VOC data which is at an aggregated level and we've
2 explained exactly what that is. That's something that could be provided relatively
3 rapidly. Breakdowns in relation to what part of that took place at different levels is
4 more difficult. Some of that's there in the documents already and quite a lot of that
5 material, particularly for the EEA MIFs, is there in the documents. Beyond that,
6 essentially, unless contemporaneous documents include data and quite a lot of
7 contemporaneous documents do exist and have been disclosed already, showing
8 those kind of splits or allowing those splits to either be calculated or inferred,
9 particularly for the 90s, beyond that, we, Mastercard, doesn't have the data to
10 produce it now. But, sir, it is a question of seeing what was produced
11 contemporaneously but at the moment, we think, actually, quite a lot of that material,
12 despite what the other side keep on saying, a lot of that material has already been
13 disclosed.

14 Frankly, the experts actually need to look at it rather than saying they want different
15 data than what has actually been provided at the moment.

16 **MR JUSTICE ROTH:** We are not going to specify what you have to do in terms of
17 aggregated data by 14 October, but I think everyone has in mind that that is the
18 goal: it's to try and get data, not at the individual transaction level which is many
19 millions, if not billions of purchases, but an aggregation by each MIF or IF.

20 Now that may or may not be possible or it may be partially possible. So that is the
21 objective. You will disclose such as you have, meeting that objective by 14 October,
22 with I think, an explanation of what is available. I think that would be helpful to
23 include that --

24 **MR COOK:** Sir.

25 **MR JUSTICE ROTH:** -- what is available and I think Ms Demetriou's suggestion
26 seems to me sensible, that a couple of weeks after that, the experts should meet to

1 consider that data and what progress might be made and in the light of that, whether
2 you can consider whether you want to make any further application.

3 **MS DEMETRIOU:** Sir, thank you. We can no doubt liaise about the precise date,
4 depending on expert availability. Can I just indicate it would be helpful if
5 Mastercard's experts for the merchant actions, Oxera, who are also their experts for
6 the purposes of the investigations, are also participating because they will be much
7 closer to that data, given that what's being said is well some of this comes out of the
8 Commission file, et cetera. So I think it would help proceedings if both of the
9 defendant's sets of experts were at that meeting to assist, if possible.

10 **MR JUSTICE ROTH:** I don't think we can order an expert who is not instructed in
11 this litigation. Mastercard have heard what you say.

12 **MS DEMETRIOU:** Yes.

13 **MR JUSTICE ROTH:** If their expert says: well I don't know anything about this, and
14 you say: well go and talk to whoever it is from Oxera, no doubt that will be followed
15 up. But I mean, people will, I hope, be grown up and sensible about this. I don't
16 know which experts are used for this litigation or other litigation or for Mastercard.

17 **MS DEMETRIOU:** Sir, that's fine.

18 **MR JUSTICE ROTH:** We have a galaxy of experts.

19 **MR COOK:** I would just clarify, sir, I am working with Oxera in relation to the AAM
20 case and my understanding is they haven't had a reason to look at anything
21 pre-2006 in relation to this.

22 **MR JUSTICE ROTH:** Yes, I'm not surprised.

23 **MR COOK:** It may be that 12 years ago, somebody looked at something for the
24 purposes of the Commission investigation. The idea that that person is helpful -- to
25 say: come to a meeting based on what you might remember from what happened
26 12 years ago, is very unlikely to be helpful, sir, compared to the experts that are

1 actually instructed and involved in this.

2 **MR JUSTICE ROTH:** I think Ms Demetriou is right that we have to be careful about
3 fixing a date by which experts should meet, when we are talking about a month or so
4 away because we don't know what other commitments they have.

5 But, equally, if we just leave it open ended, there's no obligation. What would you
6 suggest, Ms Demetriou?

7 **MS DEMETRIOU:** Can we say within three weeks of the disclosure?

8 **MR JUSTICE ROTH:** You can always --

9 **MR COOK:** I was going to suggest as soon as practical after two weeks, after the
10 data comes through because that way, it just allows the experts to --

11 **MS DEMETRIOU:** That's even better, so let's say that.

12 **MR JUSTICE ROTH:** As soon as practicable within two weeks thereafter.

13 **MS DEMETRIOU:** Yes, that's --

14 **MR COOK:** I was going to say as soon as practical after two weeks. Because the
15 reason, sir, if we do it that way, we have two weeks to actually work on the data and
16 understand it and then -- after two weeks.

17 **MR JUSTICE ROTH:** As soon as practical from two weeks thereafter.

18 **MS DEMETRIOU:** No, sir, we'd like an end date, because otherwise it's open
19 ended, so we would like to say as soon as practical within three weeks so there's
20 a long stop and if that proves impossible, no doubt we can come back. If we say as
21 soon as practical after two weeks, there's just no guarantee there's an end in sight
22 and we need to be pressing on with this.

23 **MR JUSTICE ROTH:** Well ... well, we'll say as soon as practicable within four weeks
24 thereafter.

25 **MS DEMETRIOU:** Thank you. Sir, I think this is what you intended but can I just
26 clarify when this disclosure is made, it will be produced. So the disclosure of the

1 MIFs and IFs, such as they are available, it will be in the form of a schedule, so we
2 don't have to then spend weeks wading through the different documents.

3 **MR JUSTICE ROTH:** Yes.

4 **MS DEMETRIOU:** Thank you.

5 **MR JUSTICE ROTH:** Yes, and we've said 4 October for EEA MIFs and 28 October
6 for domestic MIFs.

7 **MS DEMETRIOU:** And IFs.

8 **MR COOK:** Just to clarify, sir, because certainly at the moment every time we
9 produce a number they say they demand the underlying data, which one can
10 understand perhaps. We will produce a schedule, but the intention would be to
11 produce a schedule and say: here is the clip of documents which --

12 **MS DEMETRIOU:** Yes.

13 **MR COOK:** From which we've derived the numbers.

14 **MS DEMETRIOU:** Yes, perfect, thank you.

15 Sir, that's very helpful. I think we can actually now trot through the disclosure
16 schedule quite quickly.

17 **MR JUSTICE ROTH:** Most of it seems now to be covered by --

18 **MS DEMETRIOU:** Most of it is. So -- do you need a break?

19 **MR JUSTICE ROTH:** Would that be a sensible time to take a short break?

20 **MS DEMETRIOU:** Yes. Before we rise, I was going to do it -- and I anticipate you
21 won't have this -- Freshfields helpfully produced a revised version of the disclosure
22 schedule alongside one of their letters. Can I hand it up before we break?

23 **MR JUSTICE ROTH:** While we have our break, we only have the one that's at A98
24 in the bundle.

25 **MS DEMETRIOU:** Sir, things have moved on a little and they've moved on even
26 further because we've reflected on it overnight.

1 **MR JUSTICE ROTH:** If you could hand that up while we rise. We'll come back at
2 five to 12.

3 **MS DEMETRIOU:** Thank you.

4 **(11.44 am)**

5 **(A short break)**

6 **(11.58 am)**

7 **MR JUSTICE ROTH:** Yes, so we have this schedule dated yesterday.

8 **MS DEMETRIOU:** Thank you. I think I can go through it relatively swiftly. Request
9 one is not pursued for the moment. That's the disaggregated data, transaction data.
10 Request two we've addressed already, that's what we've been talking about.
11 I should say, before I proceed to go through the remaining requests, there were
12 various disputes about dates but I apprehend those have also been resolved
13 because we've set the dates for all of the disclosure by reference to a discussion
14 before the short break.

15 Then three, four and five were already addressed on Tuesday because they relate to
16 the Commission decision and their requests relating to the Commission and the OFT
17 file. So they are all bound up in what's already been ordered.

18 **MR JUSTICE ROTH:** Yes.

19 **MS DEMETRIOU:** Request six is agreed in principle. The only issue relates to the
20 date, so Mastercard say that it's not necessary to search for documents post 2008
21 and we say that we want till July 2009. The reason for that is that this is relevant,
22 these are the rules.

23 **MR COOK:** That's simply a bit of the schedule that's not been updated. Obviously,
24 the effect of the tribunal's approval of amendment is, yes, of course we have to
25 search until July 2009.

26 **MS DEMETRIOU:** I am really grateful to Mr Cook, so there's no dispute on that.

1 Seven is also agreed in principle. Just a point of clarification. So these are the
2 minutes or amended rules and/or any documents relating to Mastercard's Europay
3 UK Limited's decision to adopt UK rates as a temporary default at a particular point
4 in time in 1997. Mastercard accepts that they are relevant. You see this in the
5 fourth column down.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** So they accept they are relevant to causation. But then over the
8 page they say:

9 "It's agreed to disclose the MMF documents which are likely to contain all available
10 material relevant to this issue."

11 Our problem is that we don't know whether it will and we don't know what searches
12 were done in relation to the MMF documents. So we would like Mastercard to
13 conduct reasonable searches in relation to that category of documents.

14 That point arises in relation to some other categories too.

15 **MR JUSTICE ROTH:** When are we getting the MMF documents, can you remind
16 us?

17 **MR COOK:** 4 October, sir.

18 **MR JUSTICE ROTH:** Yes. Well I mean isn't it sensible for you to look at the MMF
19 documents and see if they provide you with what you need?

20 **MS DEMETRIOU:** I think what would be helpful is if we could have the search
21 terms, the custodians. So the searches carried out for the purposes of the MMF
22 documents because, sir, whilst your suggestion is a practical one, once we've looked
23 at the documents, we may discover that some of the stuff is in there but we don't
24 know what else there might be. So if we could look at the documents, plus know
25 what the extent of the searches were, then we'd be able to reach a slightly more --

26 **MR JUSTICE ROTH:** So what you are saying is that Mastercard should explain

1 | what searches were made to produce the MMF documents?

2 | **MS DEMETRIOU:** Yes, and that shouldn't be difficult --

3 | **MR JUSTICE ROTH:** The MMF documents were not searched for by Mastercard,
4 | were they?

5 | **MR COOK:** They were.

6 | **MR JUSTICE ROTH:** They were searched for by MMF and disclosed to Mastercard,
7 | so Mastercard won't know what MMF did.

8 | **MS DEMETRIOU:** I was assuming they might know that but if they don't, then we'd
9 | ask them to conduct proportionate searches.

10 | **MR COOK:** We'll see what the provision was in the settlement agreement: MMF to
11 | carry out those searches. It's fairly uninformative. I think it's an order for general
12 | disclosure but we will see that and then certainly, as far as I am aware, we do not
13 | have something that says "search particular custodians", or anything else or
14 | keywords.

15 | **MR JUSTICE ROTH:** Yes, but I mean to start saying that before you see what you
16 | are getting in a couple of weeks, that Mastercard is under an obligation to start the
17 | whole search exercise itself, seems quite disproportionate.

18 | **MS DEMETRIOU:** Sir, I take that point, so we are content to proceed on that basis.
19 | So request eight.

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

21 | **MS DEMETRIOU:** This is still in dispute. It's an extremely narrow request for two
22 | letters and some minutes --

23 | **MR JUSTICE ROTH:** Yes, Mr Cook, it may not be necessary -- to decide that, we'd
24 | have to look at the letter of 9 June, get acquainted with the background to exactly
25 | what was going on at the time. But it's only two letters and minutes if they exist, all
26 | with specific dates. You will know where such records as you have of those dates

1 are. Is it really disproportionate to go and see whether you have those two letters or
2 not?

3 **MR COOK:** Sir, with respect, the problem is we are looking back -- and this is 1992
4 so we are going back 30 years.

5 **MR JUSTICE ROTH:** Okay.

6 **MR COOK:** The idea there's some kind of convenient repository -- we wish there
7 was -- where we would be able to say: we are just going to the 1992 box and it's
8 either there or it's not, that is just not, sir, how, sadly, companies tend to organise
9 their data, certainly not when one is going back, you know, half a dozen computer
10 changes ago. So the situation is where, essentially, those letters -- and we know
11 about the existence of those letters only because we have the response that says,
12 "We refer to your letters to these dates, here is the answer to the question", the
13 answer is the important bit. I mean the register -- if we stumble across them, sir, as
14 part of our general searches, we are not going to hold them back but the idea we
15 should try and carry out specific searches for documents of no relevance and no
16 identified relevance 30 years ago, we just think that serves no purpose at all.

17 The answer is the critical bit that explains the hierarchy of rules and how it works.

18 **MR JUSTICE ROTH:** Where was the 1992 letter of 5 June found?

19 **MR COOK:** That's in the MMF documents.

20 **MR JUSTICE ROTH:** Right.

21 **MR COOK:** Obviously, sir, if two documents earlier were those letters, we wouldn't
22 be taking this point. We are not fighting about points where we obviously have the
23 documents to hand, trying to hold them back it's just -- they are not in the MMF
24 documents. At one time they would have been somewhere in Mastercard, 30 years
25 ago.

26 **MR JUSTICE ROTH:** Yes, so it's not that you've found the 5 June letter in

1 Mastercard. It came through the MMF documents. Yes, just a moment. **(Pause)**
2 Mr Cook, Ms Burgess makes the point to me that if you are going to go back to
3 1992/3 to look for the documents about the IFs, you can, at the same time, see if you
4 have these documents there. So if it's by 16 December, you will be looking over the
5 1992 period.

6 **MR COOK:** Well, I suspect, sir, the practical reality is the place we are likely to have
7 records of bilateral interchange fees is going to be somewhere very different from
8 where correspondence would have gone at the time because one is -- would have
9 been given to us for the purpose of it being input into Mastercard's systems to
10 process transactions, to the extent we did, which would be a team engaged in
11 processing transactions, as opposed to this which would have been Mastercard
12 management.

13 So it is a different category of search. It's just going back 30 years becomes very,
14 very difficult, sir.

15 **MR JUSTICE ROTH:** Ms Demetriou, if we don't know and we are obviously not
16 pre-judging the matter but if Mastercard were to succeed on limitation, would these
17 be relevant, 1992?

18 **MS DEMETRIOU:** Sir, yes, in relation to limitation, it's true that if they are successful
19 on limitation, we would not be able to claim in respect of that period but we do --
20 Mr Coombs' view is he'd have to model in respect of that period so we'd still need the
21 data. That's his position. Because he's looking at what the effect was, the causative
22 effect of the EEA MIFs on the domestic MIFs over time, so he would actually have to
23 model that period, so we'd still be seeking that disclosure.

24 **MR JUSTICE ROTH:** Why?

25 **MS DEMETRIOU:** Well, I don't --

26 **MR JUSTICE ROTH:** Does he want to go back to 1980?

1 **MS DEMETRIOU:** He wants to go back to a short period before the infringement
2 period, before the infringement started. **(Pause)**

3 **MR COOK:** If I can come back on that very briefly, sir. This is a slightly different
4 case. This is not a cartel case where everyone agrees a cartel started on 1 January
5 and so it's useful to look at the pre-period as a non-cartel case.

6 **MR JUSTICE ROTH:** No, we've got that.

7 **MR COOK:** We've had the EEA MIFs in place for many, many decades.

8 **MR JUSTICE ROTH:** We've got that point. Anyway, this already is pretty much the
9 infringement period, it just may not be the claim period because of limitation.

10 **MR COOK:** Yes, but bear in mind we've had EEA MIFs at the same level a year
11 beforehand. The relevance of the 92 date is simply that's the date when we made
12 an exemption application. It's not that conduct changed, it's just the oddity of having
13 made an exemption application or negative clearance application is the
14 Commission's investigation and hence decision, covers this period. There's no
15 change in conduct that looking at the earlier period, is likely to show we didn't have
16 an EEA MIF before, for example. That's not the case.

17 **MR JUSTICE ROTH:** Yes.

18 **MS DEMETRIOU:** Sir.

19 **MR JUSTICE ROTH:** Just a moment. **(Pause)** I mean we are not quite clear,
20 Mr Cook, why it's not within the category of what -- if we look at the Freshfields letter
21 and I am not sure which one it is, the longer one, where we've said 16 December,
22 paragraph 13(c), that you will be looking for communications between Mastercard's
23 entities, member forums, member banks, regarding the setting of UK interchange
24 fees, is this not within that category?

25 **MR COOK:** Well, it's not particularly dealing with the setting of UK interchange fees
26 or the EEA MIFs, certainly.

1 **MR JUSTICE ROTH:** I don't know, is this about setting of UK interchange --
2 regarding the setting of UK interchange fees, if it's --

3 **MR COOK:** No, it's not, sir.

4 **MS DEMETRIOU:** It is.

5 **MR JUSTICE ROTH:** The rules which interchange fees disputes are resolved. Is
6 that -- I mean --

7 **MR COOK:** The reality, sir, is we are going to carry out reviews, trying to look for
8 documents in the 1990s certainly. If we some stumble across these, of course they
9 will be provided. What we are concerned about is the idea they are seen as so
10 important we have to specifically try and find these separately from what we find as
11 being relevant for the general process.

12 **MR JUSTICE ROTH:** Yes.

13 **MS DEMETRIOU:** Sir, with respect to Mr Cook, the test for disclosure is not whether
14 a document is stumbled across, it's whether it's relevant and we say it is. As
15 a general point, this is a case in which we are taking a proportionate approach, we
16 are not seeking standard disclosure. We don't have any disclosure reports indicating
17 what Mastercard do and don't have. There's a vast asymmetry of information. This
18 is, plainly on its face, material which is specific and relevant to the setting of the UK
19 MIF and it has to conduct these searches going back to that time anyway.

20 **MR JUSTICE ROTH:** The position is this: the order covers communications within
21 and between Mastercard entities, member forums, member banks and someone
22 else, regarding the setting of UK interchange fees and/or EEA MIFs. Right. That's
23 what been ordered. Either this does relate to that, in which case it's covered by the
24 order. If it doesn't relate to that, I don't think it's relevant. So I think there's no basis
25 for a specific order about these letters.

26 You will see what you get on 16 December. If it seems, having got the letter of

1 5 June, there's some gaping hole in your understanding, you can come back but
2 I think it's covered by the search they are going to undertake. I don't think it merits
3 a separate order.

4 **MS DEMETRIOU:** Sir.

5 **MR JUSTICE ROTH:** Right. Next.

6 **MS DEMETRIOU:** Very well. Category nine is the next one. That is agreed subject
7 to the exclusion that Mastercard refers to. So this is documents regarding
8 Mastercard's rules relating to UK MIFs for debit Mastercard from July 2006 to the
9 end of the full infringement period and I apprehend there's no longer a debate as to
10 that moving forward to July 2009.

11 With the exclusion -- they want to exclude documents regarding the rules and I think
12 they want to give us only the IFs and we want to understand how the rules
13 themselves were set and we say that is relevant to disclosure. So --

14 **MR JUSTICE ROTH:** These are debit cards?

15 **MS DEMETRIOU:** Yes.

16 **MR JUSTICE ROTH:** The Maestro cards are not part of the claim?

17 **MS DEMETRIOU:** No.

18 **MR JUSTICE ROTH:** So why do you need to know how the rules were set for cards
19 that are not part of the claim?

20 **MS DEMETRIOU:** Well, because I think Mastercard -- I think there's no dispute that
21 they agree that that is relevant.

22 **MR JUSTICE ROTH:** Well they will give you the rules, but ... "documents regarding"
23 is a very broad category because no doubt a whole lot of consideration went into
24 setting debit MIFs and analysis and costings and so on. But if debit MIFs are out of
25 the case --

26 **MS DEMETRIOU:** Subject to the Solo proceeding.

1 **MR JUSTICE ROTH:** Yes, subject to the Solo point but this isn't even about Solo,
2 as I understand it. I would have thought you should be content with what you are
3 getting for the moment.

4 **MS DEMETRIOU:** Sir, okay.

5 **MR JUSTICE ROTH:** But keep an eye on the time, Ms Demetriou.

6 **MS DEMETRIOU:** Yes.

7 **MR JUSTICE ROTH:** Ten?

8 **MS DEMETRIOU:** So ten and 11 is agreed.

9 **MR JUSTICE ROTH:** Yes.

10 **MS DEMETRIOU:** 12 is agreed -- sorry, 12 is --

11 **MR JUSTICE ROTH:** Not agreed, I think.

12 **MS DEMETRIOU:** Is not agreed. I think that comes down to the MMF point and so
13 I apprehend your answer, sir, is going to be the same, that we wait to see what we
14 get.

15 **MR JUSTICE ROTH:** Yes. I mean you will want to know whether it was revoked;
16 whether if it was revoked, it was revoked, yes.

17 **MS DEMETRIOU:** Then 13, subject to the point which I think is no longer in dispute,
18 about July 2009, that's agreed.

19 14 is agreed in principle but, again, we reserve the right to come back after we've
20 received the MMF disclosure.

21 **MR JUSTICE ROTH:** Yes.

22 **MS DEMETRIOU:** 15 to 17 has already been addressed by the tribunal. It relates to
23 the OFT and Commission matters.

24 **MR JUSTICE ROTH:** Yes.

25 **MS DEMETRIOU:** 18 is still in dispute. So, sir, this represents -- so we are asking
26 here for the lists of documents disclosed in the merchant proceedings and, sir, this

1 was intended to be a helpful and pragmatic request, in circumstances where there is
2 an asymmetry of information between the parties. So in a sense we don't know
3 exactly what Mastercard has that might be relevant. There have not been disclosure
4 reports which is what you'd normally have in a big commercial trial which would tell
5 us what Mastercard has or electronic disclosure questionnaires and so on.

6 So what we pragmatically suggested is that they provide us with the list of
7 documents disclosed in the merchant proceedings which is obviously not
8 burdensome because they will just be there --

9 **MR JUSTICE ROTH:** What we are dealing with, if I can interrupt you because it
10 covers some of the later requests now, is, apart from the early preliminary issues
11 which don't need disclosure, leading up to a trial on causation --

12 **MS DEMETRIOU:** Yes.

13 **MR JUSTICE ROTH:** -- and causation being the link between the EEA MIF and the
14 domestic MIF. Well that wasn't an issue in the merchant proceedings at all.

15 **MS DEMETRIOU:** We understand that it may have been an issue or is an issue in
16 some of the merchant proceedings, that the causation point has arisen in some of
17 the merchant proceedings.

18 **MR JUSTICE ROTH:** Causation point whether the EEA MIF caused the -- I thought
19 they are all based on saying that the domestic MIF is an infringement?

20 **MS DEMETRIOU:** I think some of them are follow-on claims, as far as we
21 understand it.

22 **MR JUSTICE ROTH:** Well --

23 **MR COOK:** Sir, I can clarify, sir. This is based, obviously, on my knowledge of the
24 cases, that there were some follow-on claims commenced, none of them reached
25 the stage of substantive disclosure. There may have been disclosure on limitation
26 issues or something like that --

1 **MR JUSTICE ROTH:** But the ongoing ones, are they follow-on?

2 **MR COOK:** No, this is the only follow-on action presently live and that reached
3 a stage of disclosure.

4 **MR JUSTICE ROTH:** I can't see that documents -- whether a list of documents in
5 cases that are not follow-on are going to be relevant to causation.

6 **MS DEMETRIOU:** The thinking is, if I can just explain, that those cases concern --
7 so even if they are not follow-on claims, they concern the domestic MIFs and IFs and
8 of obvious relevance to the causation point is how those MIFs and IFs were set and
9 what sort of factors were taken into account.

10 We've done our best to identify categories of documents which are relevant to that
11 issue. We can't be sure that we've picked everything up because of the asymmetry
12 of information and because we don't have disclosure reports, et cetera, and because
13 we are not seeking standard disclose. So this is our attempt to come up with
14 something proportionate which, nonetheless, provides us with reassurance we've
15 given proper thought to what Mastercard might have that's relevant and the idea then
16 being that if we spot that there is some very specific thing that has been disclosed
17 that's of relevance to causation that we've not thought of, we can make a very
18 targeted application for disclosure.

19 It would be different if Mastercard were saying: right, we are going to give you
20 standard disclosure of everything relevant to causation but that's not the basis on
21 which we are proceeding. So we say it's a proportionate means of ensuring we have
22 what we need.

23 **MR JUSTICE ROTH:** But you are getting everything to do with how domestic MIFs
24 are set, under paragraph 13(c).

25 **MS DEMETRIOU:** Paragraph 13(c) of the letter?

26 **MR JUSTICE ROTH:** Yes.

1 **MS DEMETRIOU:** Well, sir, I am not sure because that seems to be interpreted, for
2 example, by Mastercard as excluding the two letters that we think are, in principle,
3 relevant and so --

4 **MR JUSTICE ROTH:** That's certainly not part of the merchant claims because they
5 are all for a later period.

6 **MS DEMETRIOU:** No, sir, that's right.

7 **MR JUSTICE ROTH:** But you are getting everything regarding the setting of UK
8 interchange fees and/or the EEA MIF. I mean when you get to pass-through, I can
9 see that this becomes relevant because that's, of course, a major issue in the
10 merchant cases.

11 **MS DEMETRIOU:** Sir, we say that the cost benefit is in our favour on this category,
12 given there's absolutely no burden on Mastercard in disclosing this.

13 **MR JUSTICE ROTH:** Well it still has to be relevant.

14 **MS DEMETRIOU:** Well, sir, you've heard my submissions. We say it's a practical
15 way of identifying other possible disclosure, given the asymmetry of information.

16 **MR JUSTICE ROTH:** You keep saying "asymmetry of information", that's why you
17 are getting 13(c) but it does not mean that Mastercard has to give you every
18 document of the many, many millions that it has. Just a moment. **(Pause)**

19 No, Ms Demetriou, we don't think they are relevant.

20 **MS DEMETRIOU:** My Lord, okay, moving on. 19 and 20 are agreed.

21 21 is agreed, subject to a disagreement about the limitation identified by Mastercard,
22 so we are asking for disclosure of minutes of board and committee meetings for the
23 following entities and we list them in the first column. Mastercard says some of them
24 had no involvement with setting the fees and that the request should be limited to
25 minutes for those entities directly involved with UK interchange fees. And so in
26 relation to that, we say that it's possible that, for example, the board of Mastercard

1 Incorporated may have considered how the IFs of each region influenced the IFs of
2 other regions, for example, so even if they weren't directly setting it, there may have
3 been wider consideration, so we would like that material.

4 That's the point on that category.

5 **MR JUSTICE ROTH:** Yes, I mean you only want them to search those board
6 minutes --

7 **MS DEMETRIOU:** Yes.

8 **MR JUSTICE ROTH:** -- and to produce those that relate to this, obviously. If there
9 is a board minute about who is going to be next chairman of Mastercard Inc, you are
10 not interested in that.

11 **MS DEMETRIOU:** Of course, yes.

12 **MR JUSTICE ROTH:** So it's for them to search all the board minutes to see if they
13 have anything that's relevant. Not just, necessarily, those that set the fee, but others
14 that might have considered the fee.

15 **MR COOK:** Well, sir, this is about a reasonable and proportionate search. We know
16 which boards had responsibility for particular categories of interchange fees at
17 particular times, and the problem that arises, when you have boards that meet many
18 times a year and particularly when we are going back such a long period, 30 years,
19 to actually feel confident that we have found and searched every single copy of
20 MCI's board minutes from the 1990s, in circumstances where we know MCI had no
21 involvement in UK interchange fees or in the EEA MIFs, sir, I mean the idea -- it's
22 basically just a massive potential exercise if we are going to review all of those. Of
23 course, as you say, a huge amount of it is going to be completely irrelevant. We only
24 find that once somebody has actually gone through and read through every single
25 page of these documents, in order to confirm that. That's the reason, sir, we say we
26 should search those we know are likely to be relevant and not search those that we

1 know absolutely don't have responsibility for these interchange fees, on the off
2 chance that somebody who didn't have responsibility considered the hypothetical
3 causation question that was of no commercial significance to Mastercard at the time
4 but only of legal significance in this case, 30 years later.

5 We say it's fanciful to suggest that there is going to be relevant material considered
6 by boards that had nothing to do with the relevant interchange fees and reviewing it
7 is simply substantial cost, in circumstances where, sir, you have ordered us to do
8 a great deal over the next three months, much faster than we thought was credible.
9 So it's trying to keep it in sensible parameters, sir, and this, with respect, goes well
10 beyond that, given the practical realities of going back as far as we are.

11 **MR JUSTICE ROTH:** The reality is that 21 really has to be thought about together
12 with 22 because often the board minute is rather summary or opaque. It's the
13 background board papers --

14 **MR COOK:** Yes.

15 **MR JUSTICE ROTH:** -- that are going to give you the detail.

16 **MS DEMETRIOU:** Yes.

17 **MR JUSTICE ROTH:** And --

18 **MR COOK:** And that's the problem, sir, it could be for each board meeting, quite
19 a lot of material and then if we are covering -- Mastercard International's minutes
20 covering an 18 year period, that is going to be a substantial amount of material, in
21 circumstances where we know at the moment, that seems fanciful.

22 If it's the case at some point somebody sees a reference that says "This is too
23 important, it should be considered by Mastercard International", that's the kind of
24 point where one would follow up and try and do a search. I don't think that will
25 happen but if it happens, that's the kind of point where it would be reasonable to say
26 "We should look at that board meeting", but otherwise it's just a lot of material which

1 is inherently irrelevant.

2 **MR JUSTICE ROTH:** Ms Demetriou, this is not a cartel case where you are looking
3 for a sort of smoking gun and, therefore, one casts the net wide. This is an exercise
4 that was gone through in detail by certain committees, not considering there is
5 anything they need to hide, and I think 21 and 22, when applied to the bodies that
6 were involved in setting and I think one might extend that, Mr Cook, to say setting
7 and/or approving, in case they set it and it had to be approved by another body --

8 **MR COOK:** Yes. I mean, sir, I think we probably accept setting, if there was
9 a necessary rubber stamp step, then that would be part of the setting process.

10 **MR JUSTICE ROTH:** This is what they consider but it needs approval at group
11 level -- it may be at group level, all you get is a one line minute saying "We approve",
12 but we don't know. But beyond that, I think, Ms Demetriou, it really becomes
13 disproportionate for an organisation which operates throughout the world.

14 **MS DEMETRIOU:** Sir, very well.

15 Moving on, just looking at the time, 23 to 25, we no longer pursue at this stage
16 because it's for a later stage in proceedings.

17 **MR JUSTICE ROTH:** Yes.

18 **MS DEMETRIOU:** 26 is agreed. I think we want until July 2009 but I think that's
19 now agreed.

20 27 is agreed, subject to the point about drafts, drafts versions of reports. We'd like
21 those as well as the final version because one knows in drafts, you sometimes have
22 comments and discussion which doesn't appear in the final version of the report, so
23 it's not onerous. I don't think this is an issue on which Mr Cook is going to be able to
24 stand up and say, "We know that drafts aren't relevant", so we think drafts should be
25 included. That's the only issue on 27.

26 **MR JUSTICE ROTH:** Yes, Mr Cook.

1 **MR COOK:** Sir, the problem with drafts is one gets a massive proliferation of
2 documents for no real reason and it's the final report is the one that's then put before
3 the relevant body to actually make the decisions and so that's the relevant
4 document.

5 **MR JUSTICE ROTH:** There might be information in drafts which is helpful for this
6 case, although not so important for the deciding --

7 **MR COOK:** Bear in mind, sir, these are simply cost studies. What we're talking
8 about is an external cost consultant that goes out and gets a lot of data from the
9 banks and says "The cost of fraud was 0.3 per cent on average", for example.
10 That's their remit. They are not deciding what the interchange fee should be. They
11 are not taking in other factors. They are simply a cost study and it's difficult to see,
12 sir, why any aspect beyond that is going to go to the causation issue with which we
13 are concerned. Obviously, the report itself is important because that's then a feed
14 into the decision making process, but earlier drafts seems -- it's very difficult to see
15 how it could possibly be relevant.

16 **MR JUSTICE ROTH:** What period did EDC do this? Were they involved
17 throughout?

18 **MR COOK:** Yes, sir and certainly in the early period they did it annually, then it
19 moved to every two years or so. So there are multiple iterations of these reports
20 over the course of the 17 year claim period.

21 **MR JUSTICE ROTH:** Yes. I mean the fact that there might have been toing and
22 froing on a draft of what costs were, I mean these were not artificially manipulated
23 reports to try and produce some version of costs that wasn't the true version on
24 which they acted, to afford some defence 25 years later.

25 When you are looking at what influenced the setting of the domestic MIF, it will be
26 the final report, won't it?

1 **MS DEMETRIOU:** Sir, if the final report is relevant, there may well be a discussion
2 in a draft which is also relevant. The fact --

3 **MR JUSTICE ROTH:** The discussion will be about what the cost is. It won't be
4 about what the MIF should be but what the cost of processing or what the cost of
5 fraud or what the cost of the guarantee and I mean that's --

6 **MS DEMETRIOU:** But that goes into how the MIF is set.

7 **MR JUSTICE ROTH:** No, what goes into the MIF is set is the file report because
8 that's the one that was relied on.

9 **MS DEMETRIOU:** Yes, but it's relevant to the considerations that were carried out in
10 determining how to set the MIF and at what level to set the MIF.

11 Sir, in relation to this, Mr Cook keeps saying there's a long claim period and lots of
12 these documents but, frankly, that's a consequence of the length of the infringement.

13 **MR JUSTICE ROTH:** Why is it relevant if there was some internal discussion of
14 what the cost of the guarantee is?

15 **MS DEMETRIOU:** If it's not relevant, they won't disclose it --

16 **MR JUSTICE ROTH:** You are asking specifically for the draft reports so that you
17 can look at them and the specific order that they disclose the drafts. The actual
18 setting of the MIF, the cost that they took account of will be the one in the final
19 report.

20 **MS DEMETRIOU:** Yes, and we say insofar as there was a debate about it, then that
21 may be relevant for our expert to understand.

22 **MR JUSTICE ROTH:** But why is it relevant for your expert to understand the internal
23 discussion of what is the cost of fraud?

24 **MS DEMETRIOU:** Because there may have been a disagreement, for example,
25 about it --

26 **MR JUSTICE ROTH:** Yes, but the MIF was set on -- the MIF setting body, such as it

1 was, acted on the final report. That's what they took account of, was the conclusion
2 that this is the cost of fraud. Your expert isn't concerned with whether they got the
3 cost of fraud right or not.

4 **MS DEMETRIOU:** Sir, I think the overall point is that, in their defence, Mastercard
5 rely really heavily on these EDC reports, so we really want to interrogate them when
6 determining whether or not the points they raised by way of defence are well
7 founded. So it's not a disproportionate request because the drafts will exist or they
8 won't.

9 **MR JUSTICE ROTH:** No, well they do exist. We've been told that. **(Pause)**

10 **MS DEMETRIOU:** Sir, just in case it assists -- sorry. Sir, can I just add one point?

11 **MR JUSTICE ROTH:** Yes.

12 **MS DEMETRIOU:** So one of the questions may be to what extent were the EDC
13 truly independent and to what extent were they essentially working in conjunction
14 with Mastercard and Mastercard were leaning on them to achieve a particular MIF
15 and that may well come out of the drafts but we don't know. But in circumstances
16 where Mastercard are relying heavily on these reports --

17 **MR JUSTICE ROTH:** You're getting the letters of instructions.

18 **MS DEMETRIOU:** Yes, but sir, with respect it's not disproportionate, the drafts are
19 there, they just disclose them, so it's not disproportionate and --

20 **MR JUSTICE ROTH:** It appears Mastercard are leaning on them to get a particular
21 result. I mean Mastercard wants to get an understanding of what the warranty for
22 undelivered goods that banks offer or what the fraud guarantee is costing. This idea
23 anyone is not acting openly about this seems fanciful. The answer is no. I think you
24 will get the reports. You'll see what they say. If you want to come back and say: this
25 is all a bit suspicious because it doesn't make sense, after that you can do so but not
26 for now.

1 **MS DEMETRIOU:** Very well. 28 and 29 we are not pressing at this stage.

2 **MR JUSTICE ROTH:** Bear in mind my approach to this, not only is there the general
3 criteria of proportionality for all disclosure but there is a specific Practice Direction on
4 competition law disclosure because we are still operating under the parameters set
5 by the disclosure restrictions in the Damages Directive which have now been
6 incorporated into UK law, albeit that we are no longer part of the EU.
7 So there's quite a strong imperative on the tribunal to restrict disclosure to what is
8 proportionate.

9 **MS DEMETRIOU:** Sir, yes, although of course, on the other side of the equation, in
10 the High Court the disclosure pilot doesn't apply because --

11 **MR JUSTICE ROTH:** That's a specific Practice Direction.

12 **MS DEMETRIOU:** Yes, so 28 to 29 we are not pursuing at this stage because it
13 relates to later.
14 30 we are not pursuing because it's wrapped up in -- I think we are going to get that
15 material through the OFT. It's likely to be in the OFT --

16 **MR JUSTICE ROTH:** It's covered by what's already been ordered.

17 **MS DEMETRIOU:** 31 is not agreed. It relates to settlement agreements and to the
18 extent that there are settlements in relation to follow-on actions, we say that that is
19 relevant.

20 **MR JUSTICE ROTH:** Yes. So if that's limited to the follow-on cases, Mr Cook,
21 which you said are a rather limited number, is that opposed, if it's only for the
22 follow-on cases?

23 **MR COOK:** It's opposed, sir, on the grounds of the relevance and I establish that in
24 two ways.

25 **MR JUSTICE ROTH:** Yes.

26 **MR COOK:** One, the most that can be said there is the argument is this is relevant

1 to pass-on and, essentially, for the moment, that means we shouldn't be doing this at
2 all is my first submission.

3 Secondly, the idea there is going to be any utility at any point in these proceedings,
4 to this tribunal seeing something that says: Mastercard agreed to pay £10 million to
5 this company, without then going through their pleadings and their quantum of what
6 that was, to see what percentage that was and, you know, the underlying -- it's just
7 going to end up this Pandora's box of what: does this 10 million figure mean?

8 **MR JUSTICE ROTH:** How many -- you said there were hardly any follow-on cases.

9 **MR COOK:** How many are there? I would have to check how many -- because the
10 point of distinction I made is between ones that were issued and the number that got
11 to disclosure because a lot settled before disclosure. There are certainly -- there are
12 probably going to be at least four or five, I would think follow-on actions. I think,
13 strictly, there may be a lot more than that because there were a number of --
14 actually, there were a number -- or the Deutsche Bahn ones, actually, probably had
15 hundreds of individual claimants but, again, they didn't get to substantive disclosure,
16 from a whole series of groups and I think those were also follow-on actions.

17 The problem is of course, sir, they were both follow-on actions and also included
18 claims up until the time they were issued and ongoing. So there will be a single
19 number in a settlement agreement. Whether that's £10 million, 50 million or
20 whatever it is, you won't get any breakdown from the settlement agreement as to
21 which period that relates to, which interchange fees, limitation arguments or anything
22 else. It's just data, sir, that's completely useless and without an immense amount of
23 other material about what went into it on both sides because we will have reached
24 a settlement because we thought particular arguments about the merits and the
25 other side will have had different views about the merits and a variety of arguments
26 of limitation, exemption, passing on, switching, card holder benefits, card holder

1 merchant changes.

2 **MR JUSTICE ROTH:** Yes.

3 **MR COOK:** So, sir, it's just information we would say is highly confidential. It is
4 highly confidential, not least, frankly, because I am rather concerned my learned
5 friend wants to find out what amounts we've been willing to pay to get rid of cases,
6 no doubt to inform her own negotiating strategy here. So it is sensitive material for
7 no conceivable reason, sir.

8 **MR JUSTICE ROTH:** Yes. Ms Demetriou, what do you say about it?

9 **MS DEMETRIOU:** Sir, they're plainly relevant. It's not right that there's no
10 conceivable reason. That's just assertion from Mr Cook. To the extent there are
11 follow-on cases in which this causation defence was raised, then it is material to
12 know at what level they were settled because if Mastercard paid a very large amount
13 to settle those claims, that's relevant to the credibility of its causation defence.
14 Now as to whether or not we can make that submission -- so relevance is
15 established, it's plainly proportionate --

16 **MR JUSTICE ROTH:** If it's pure follow-on.

17 **MS DEMETRIOU:** If it's a pure follow-on. So we think there's wider relevance of this
18 category, so we may pursue the non follow-on settlement agreements at a later
19 stage because they will be relevant to pass-on there but for present purposes, if they
20 are follow-on claims, then we say they are likely to be relevant, they are relevant. It's
21 clearly proportionate to disclose them. There's no burden at all on Mastercard and,
22 frankly, all of Mr Cook's assertions about: well you won't be able to make anything of
23 them without further information, it's a matter for us. We can make the submission
24 and he can argue against it but there's no proportionality issue here.

25 **MR JUSTICE ROTH:** Yes.

26 **MR COOK:** If I could just make one point, sir. My understanding is there is no

1 claim, with the exception of this one, that was follow-on only. In a number of cases
2 people issued follow-on actions and also a High Court action at the same time, but
3 the end result was there's no stand-alone follow-on action that would have been
4 settled as a stand-alone follow-on action, there would have been a single settlement
5 of all claims which would cover both.

6 **MR JUSTICE ROTH:** Are you saying there was no stand-alone follow-on action?

7 They were all -- the settlements all covered both follow-on and --

8 **MR COOK:** I am not aware of any claim that just the follow-on section was settled
9 separately from a High Court claim in relation to the post follow-on period, and
10 a number of those claims issued both and they were always settled at the same
11 time, is my recollection of it, sir.

12 **MR JUSTICE ROTH:** Well, it may be, given the number of cases Mastercard is
13 facing and has faced, it's something that should be checked, although -- particularly
14 if different solicitors were acting in different cases for Mastercard.

15 **MR COOK:** I am in the unfortunate position of being involved in every piece of
16 litigation Mastercard was involved in in this jurisdiction, sir, so at least I can speak
17 with some knowledge.

18 **MR JUSTICE ROTH:** Yes, well, I am not suggesting --

19 **MR COOK:** But I appreciate I am at the level of giving evidence, sir, which I am not
20 meant to do.

21 **MR JUSTICE ROTH:** I am not suggesting that you don't have a lot of knowledge.
22 But if, and insofar as, there are any pure follow-on cases -- and you say there
23 aren't -- which settled, then the settlement can be disclosed. You say that's nothing
24 but we can put an order in those terms.

25 But insofar as they are a hybrid of follow-on and post this period claim, knowing
26 a global settlement sum is not going to tell you anything without you then looking at

1 the pleadings, the values and so on.

2 **MS DEMETRIOU:** Sir, we say we are entitled to do that, so it's relevant. Whether or
3 not we have to do extra work and apply to --

4 **MR JUSTICE ROTH:** You are going to ask for more disclosure of those
5 proceedings.

6 **MS DEMETRIOU:** Sir, if we do need to, those applications can be addressed at that
7 time.

8 **MR JUSTICE ROTH:** To start disinterring what part of the value of the settlement is
9 attributable to what part of the case, which you won't know from seeing the
10 settlement sum and how it's been made up.

11 **MS DEMETRIOU:** Sir, we don't --

12 **MR JUSTICE ROTH:** That won't be apparent, and then you will say: well, we need
13 to see all the internal considerations about the settlement and --

14 **MS DEMETRIOU:** Sir, we can say now that we are not going to apply for internal
15 considerations. The pleadings are public and so we are entitled to see the hybrid
16 settlements and look at the pleadings and make whatever submissions we think
17 appropriate. But they are relevant because, in circumstances where there was
18 a follow-on element to the claim and the causation defence was run, it's plainly of
19 relevance. It's up to us what we make of it. We are not going to be asking for
20 internal documents about how the settlement was reached but we may well look at
21 the pleadings, as we are entitled to do.

22 **(Pause)**

23 **MR JUSTICE ROTH:** Ms Demetriou, the tribunal is agreed that we don't think that's
24 necessary or proportionate for this case.

25 **MS DEMETRIOU:** Sir, okay. Moving on, 32 is not pursued at this stage.

26 **MR JUSTICE ROTH:** Yes.

1 **MS DEMETRIOU:** 33 has already been addressed. Sorry, if you just bear with me,
2 I have lost myself in the document.

3 **MR JUSTICE ROTH:** That's the MMF documents.

4 **MS DEMETRIOU:** Yes. And 34 is agreed, so that's agreed.

5 **MR JUSTICE ROTH:** Right.

6 **MS DEMETRIOU:** Sir, that's it in terms of disclosure.

7 **MR JUSTICE ROTH:** Right.

8 **MS DEMETRIOU:** There is then the question of timetable. I wonder if we should do
9 that quickly. It may be easiest to do this by reference to the Freshfields letter which
10 proposes a timetable that would have to be adjusted to reflect the earlier --

11 **MR JUSTICE ROTH:** The timetable for the --

12 **MS DEMETRIOU:** For the causation and for Solo, in fact. I wonder, in view of the
13 time, because I know the tribunal has a hard stop, whether it's sensible for the
14 parties to liaise and try and agree a timetable and come back.

15 **MR JUSTICE ROTH:** Yes. We have not, in fact, fixed the date of the causation trial
16 at all.

17 **MS DEMETRIOU:** No.

18 **MR JUSTICE ROTH:** But we've indicated it should be at the end of the Trinity term.

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE ROTH:** And how long do you think the causation trial -- and it includes
21 VOC but that may be a small part of it -- should be? Have you discussed that
22 between you? Because -- yes --

23 **MS DEMETRIOU:** I think the best thing is for us to discuss it between us.

24 **MR JUSTICE ROTH:** I think you ought to discuss that, and then that gives you
25 a start date for the trial and then you work back to get the timetable.

26 Secondly, as regards Solo, I think one could be a bit more flexible about that. That's

1 not something that's going to appeal, it seems to me. It's very far-fetched to think
2 any decision on Solo cards would go on appeal. It is a factual question.

3 It can be, as it were, fitted in, subject to the tribunal's availability and subject to
4 counsels' availability, at some point in the late spring. Again, I think that's something
5 you should confer, think how long that is going to take. It's a few days but I don't
6 know how many witnesses. There was a suggestion there might be one witness or
7 perhaps two. And how long the case would take. So I think it's better that you
8 discuss that between yourselves and through solicitors and come back with some
9 proposals.

10 **MS DEMETRIOU:** Sir, yes. I think that that just leaves the other matter that you
11 flagged at the end of Tuesday which is whether there are any other issues which
12 might be dealt with in a preliminary way. You raised two.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** We have discussed that. We both think that, although of course
15 those are, in principle, issues that could be determined in a preliminary way, we don't
16 think it would be efficient to do so in the circumstances of this case. That's
17 something we are agreed on. I am very happy to explain why.

18 **MR JUSTICE ROTH:** No, well, I threw them out, as it were, because you know more
19 about the detail of how the case will unfold. And if that is so, then we won't do that.
20 That doesn't preclude it being revisited --

21 **MS DEMETRIOU:** No.

22 **MR JUSTICE ROTH:** -- in the umbrella CMC.

23 **MS DEMETRIOU:** Of course.

24 **MR JUSTICE ROTH:** I think you have been given permission to take part in the
25 umbrella proceedings so it might be looked at again there.

26 **MS DEMETRIOU:** Okay. Sir, thank you.

1 **MR JUSTICE ROTH:** Can I just thank, on behalf of the tribunal, those who prepared
2 this schedule. A lot of work has gone into it and no doubt many hours were spent
3 putting it together, and it does greatly assist us in getting through this quickly.

4 Could the parties prepare a draft order that can be submitted to the tribunal. An
5 order covering this much, I think it's not fair to expect the tribunal to do it.

6 **MS DEMETRIOU:** Sir, we will certainly do that. Just one thought, would you like it
7 to include the directions for trial which we need to discuss between us or would you
8 like an order reflecting everything so far and then we can deal with that separately?

9 **MR JUSTICE ROTH:** An order reflecting everything so far, so the preliminary
10 issues, the timetables, the disclosure, and the matters held over for discussion will
11 be done separately.

12 **MS DEMETRIOU:** We'll do that.

13 **MR JUSTICE ROTH:** Very well. That concludes this hearing CMC. Thank you all.

14 **(12.54 pm)**

15 **(The hearing concluded)**

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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?