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4 record.

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

Case No.: 1517/11/7/22 (UM)  
and 1266/7/7/16

7  
8 Salisbury Square House  
9 8 Salisbury Square  
10 London EC4Y 8AP  
11 (Remote Hearing)

12 Monday 7<sup>th</sup> November 2022

13  
14 Before:

15 The Honourable Mr Justice Marcus Smith  
16 The Honourable Mr Justice Peter Roth  
17 Ben Tidswell  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 BETWEEN:

22  
23  
24 **THE MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS AND**  
25 **THE MERRICKS COLLECTIVE PROCEEDINGS**

26  
27  
28  
29 **A P P E A R A N C E S**

30  
31 Tristan Jones (Instructed by Hausfeld)

32  
33 Kassie Smith KC, Mehdi Baiou & Alexandra Littlewood (Instructed by Humphries Kerstetter  
34 & Scott+Scott)

35  
36 Matthew Cook KC & Ben Lewy (For Mastercard)

37  
38 Michael Bowsher KC & Derek Spitz (Instructed by Marcus Parker)

39  
40 Philip Woolfe (Instructed by Stephenson Harwood)

41  
42 Brian Kennelly KC, Jason Pobjoy & Isabel Buchanan (For Visa)

43  
44 Victoria Wakefield KC & Crawford Jamieson (Instructed by Willkie Farr & Gallagher)

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Monday, 7 November 2022

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(10.30 am)

(Proceedings delayed)

(11.05 am)

**Case Management Conference**

**MR JUSTICE MARCUS SMITH:** Good morning. I do apologise for the delay, that was an IT issue at this end. We couldn't see you and we thought you could see us, but we probably ought to have mutual visibility.

I will begin with the standard warning and a little bit of housekeeping. These proceedings are being livestreamed and are being heard remotely, but they are, as you will all know, as much court proceedings as if everyone were here physically present in Salisbury Square House. There will be a transcript prepared, but it is an offence and a contempt for anyone to make an unauthorised recording, whether audio or visual, of these proceedings or to take photos of what is going on. I know you all know that but I nevertheless say it.

Can I just check that we have good audio. Could I ask counsel to see whether they can say whether they can hear and see the Tribunal satisfactorily. Ms Smith?

**MS SMITH:** Sir, yes, we can see and hear you. I hope that you can see and hear me.

**MR JUSTICE MARCUS SMITH:** Good, and thank you very much.

Then Mr Woolfe? He is not with us at the moment, right. It seems not.

Then we have Mr Cook.

**MR COOK:** I apologise, Sir, we are in the process -- I think we can certainly hear you well. I just need to rearrange my screen so I can see you well but I think that shouldn't be a problem.

**MR JUSTICE MARCUS SMITH:** Very good. Well, we will try and proceed for the moment with that but there is definitely feedback when you are on the line.

1 Then, Mr Kennelly, I can see you. Can you see and hear us?

2 **MR KENNELLY:** Yes, Sir, we see and hear you very well.

3 **MR JUSTICE MARCUS SMITH:** I am very grateful. Thank you.

4 The purpose of this morning's hearing is to deal with the narrow issue arising out of  
5 the list of issues and any disputes that continue to exist.

6 Can I say that, although we have received and looked at the additions to column four,  
7 we are looking at the version that contains simply the synthesised column three  
8 proposals and that is what we will be looking at in the course of this morning.

9 We also are conscious that there has been a good deal of recent inter partes  
10 communications regarding a number of issues that we will be dealing with today and  
11 tomorrow. We have looked at those but do please bear with us if we forget something  
12 has been resolved that looks to us not to have been because we have read through  
13 that correspondence at some pace.

14 So the proposal then is simply to move over to the issues in the list of issues that need  
15 to be resolved. We are minded to do that on a controversial issue-by-issue basis and,  
16 Ms Smith, we'd be grateful I think if you could take the lead on that and then others  
17 can chip in to identify areas of disagreement as appropriate.

18 **MS SMITH:** I am very happy to do that and perhaps I can do so. I might most easily  
19 do so by reference to my skeleton, which I hope you have. If I could ask you to have  
20 my skeleton open and also the list of issues. I am also working from the synthesised  
21 version including up to column three. So the issue agenda item 1, which is the  
22 outstanding areas of disagreement in relation to column three, starts on page 2 of my  
23 skeleton and is addressed, just for the record, in paragraphs 2 through to 31 of my  
24 skeleton, paragraphs 36 to 64 of Mastercard's skeleton and I will cross refer to  
25 Mastercard's and Visa's skeletons as necessary and those issues are addressed in  
26 Visa's skeleton in paragraph 2 to 26.

1 As you say, Sir, there has been correspondence over the weekend and this morning  
2 further narrowing the issues so I will try to give you, Sir, the most up-to-date situation  
3 on all of the issues and if I am not completely up-to-date, my juniors will make sure  
4 that I give you the most up-to-date situation.

5 So if I can start. There is one outstanding area of disagreement on column two, which  
6 I don't know if, Sir, you and your colleagues have picked up, which is issue 22.

7 **MR JUSTICE MARCUS SMITH:** Yes, indeed.

8 **MS SMITH:** Quantifying overcharge. There are two competing drafts. I can take you  
9 through those but Visa's skeleton addresses this in paragraphs 2 to 4. Our position is  
10 set out in our written submissions back in June. I can give you the reference to that.  
11 It's our written submissions in June. It's paragraphs 2 to 3, which are in --

12 **MR JUSTICE MARCUS SMITH:** Is the suggestion, and we would be perfectly  
13 amenable to it if it were, that we deal with that first because it's a column two point  
14 before we move on to the column three points or do you want to deal with them, as it  
15 were, in sequence, we are in your hands?

16 **MS SMITH:** I was going to deal with the column two points first.

17 **MR JUSTICE MARCUS SMITH:** Very good.

18 **MS SMITH:** Single column two point first. Then I was going to deal with, if that assists,  
19 the way in which they are set out in our skeleton there are three general issues of  
20 dispute, three general areas of dispute that affect a number of items, a number of the  
21 issues on the list of issues. If we could deal with each of those by sort of topic: they  
22 are industry expert evidence, quantum analytics expert evidence and factual and  
23 documentary evidence on objective necessity. The disagreement between the parties  
24 has narrowed substantially on those three general areas but those three general areas  
25 impact on a number of different issues so it may be sensible to deal with those first  
26 before we then go on to the outstanding particular issues that are still not agreed.

1 **MR JUSTICE MARCUS SMITH:** Ms Smith, that sounds very sensible, if I may say  
2 so. What we'll do in that case is we will hear the parties on one particular issue,  
3 beginning with alternate drafts on issue 22. We'll then as necessary retire for a couple  
4 of minutes to resolve the matter so the parties have clarity as to where we are going,  
5 what we are ordering before we move on to the next point and that way we can avoid  
6 having a less clear composite judgment but a series of short resolutions of the issues.

7 Does that meet with the parties' approval?

8 **MS SMITH:** Yes, certainly.

9 **MR JUSTICE MARCUS SMITH:** I am very grateful.

10 **MS SMITH:** I will try and deal with the -- (audio distortion).

11 **MR JUSTICE MARCUS SMITH:** Ms Smith, you just faded out there, I don't know what  
12 has happened to your microphone.

13 **MS SMITH:** Can you hear me now?

14 **MR JUSTICE MARCUS SMITH:** Yes, we can, I think it's quite directional, your  
15 microphone.

16 **MS SMITH:** It might be I will try to speak forward the whole time. So the column two  
17 issue is limited. If I can ask you to turn to it, it's issue 22 in the list of issues. I'm afraid  
18 the list of issues is not page numbered but it's issue 22.

19 **(The stenographer requested Ms Smith increase her volume).**

20 If I move it a little closer, sorry if you are looking up my nose, but it might be a bit  
21 easier. How is the microphone now?

22 **MR JUSTICE MARCUS SMITH:** From our point of view, loud and clear. Could the  
23 stenographer confirm that it's better for her. Perhaps if you carry on and if it's  
24 a problem it will be raised again.

25 **MS SMITH:** Fine. Well, if I could ask you to look at issue 22 in the list of issues, you  
26 will see in column two there are two competing drafts: claimants' proposed formulation,

1 that's our proposed formulation in green which is the first draft. The card schemes'  
2 proposed formulation follows, that is in blue. This issue is the extent of the overcharge  
3 paid by claimants and it's the formulation of sub-issues. There's agreement as to  
4 sub-issue A, which is the appropriate counterfactual, quantum counterfactual,  
5 overcharge counterfactual and then there are two different formulations of the relevant  
6 sub-issues.

7 If I could ask you to have that open, our submissions, the claimants' submissions on  
8 this are made in the written submissions made to the Tribunal back in June, which do  
9 not appear, I'm afraid, in our skeleton argument for today. There has been number of,  
10 a series of written submissions but the written submissions of June, which are in  
11 bundle 2, tab 14, page 16 of the bundle, you will see there at paragraph 2, issue 22.

12 There are two rival drafts.

13 I am not going to go through them in detail but we explain there in some detail and  
14 I won't read it out but just by way of introduction to explain where we are coming from  
15 and then I would ask you, Sir, to read those written submissions to yourselves but  
16 where we are coming from is that our draft of the issues formulates the issues by  
17 reference to the relevant amounts paid by the claimants when analysing quantum. We  
18 say that formulation is to be preferred because the CAT, the Tribunal when looking at  
19 quantum will be assessing information and data held by the claimants in order to  
20 establish loss. So our focus is on the amounts paid and it then sets out our detailed  
21 draft.

22 Visa's submissions on this point, for your note, are in its -- and Mr Kennelly will no  
23 doubt develop these as necessary but it's in paragraphs 2 to 4 of his skeleton  
24 argument. He says that his formulation is more accurate because it focuses on the  
25 key issue relevant to the quantum analysis, the degree to which acquirers would have  
26 passed on a reduction in the MIFs. Therefore, he says it's less repetitive. It's really

1 a question of drafting for the Tribunal and I am not sure I can do much more than refer  
2 you to our written submissions and give you the time to look at those written  
3 submissions.

4 **MR JUSTICE MARCUS SMITH:** Thank you, Ms Smith.

5 **MS SMITH:** Give you time to look at the competing drafts. We had prepared this for  
6 the Tribunal to look at on the papers and it really is I think an issue that needs to be  
7 taken away, looked at and then determined perhaps in the more quiet of another room  
8 rather than in the Tribunal hearing.

9 **MR JUSTICE MARCUS SMITH:** What we'll do, Ms Smith, is we'll read your very  
10 helpful paragraphs 2 and 3 in your written submissions and then we'll hear from the  
11 scheme operators. So we'll just read those again now. **(Pause)**.

12 Thank you, Ms Smith. We've read that. Do you want to say anything more before we  
13 move over to the scheme operators' submissions?

14 **MS SMITH:** No.

15 **MR JUSTICE MARCUS SMITH:** No. Thank you very much, Ms Smith.

16 Is it Mr Kennelly or Mr Cook who goes next?

17 **MR KENNELLY:** I am happy to go first on this issue if Mr Cook is content.

18 **MR JUSTICE MARCUS SMITH:** Very good, over to you.

19 **MR KENNELLY:** As you have seen, the question here on issue 22 is the overcharge,  
20 charge to claimants by acquirers. The question is the difference between what  
21 acquirers charge claimants in the factual and what lower MSCs would have been  
22 charged to the claimants in the counterfactual. The focus is acquirer pass-on. So  
23 I would ask the Tribunal to read, with that in mind, our formulation, which is in blue  
24 beginning on page 1.66 in volume 1. So, I am in the list of issues. Issue 22. Does  
25 the Tribunal have that text in front of you?

26 **MR JUSTICE MARCUS SMITH:** Yes, I have it separately but that I think varies

1 according to Tribunal member.

2 **MR KENNELLY:** I am obliged. So you see what our formulation is: (b) "what is the  
3 total amount of MIFs paid by the Claimants' acquirers for relevant Visa transactions  
4 and relevant Mastercard transactions?" So acquirers pay, that's logically the first  
5 question, because the claimants don't pay MIFs directly, so you start with the  
6 acquirers. Then (c): "to what extent (if any) would the MIFs and/or scheme fees paid  
7 by the Claimants' acquirers have been lower in the counterfactual?" Again that's the  
8 logical order, starting with acquirers. Skipping over the Mastercard-only part. That's  
9 no longer an issue. Then (d): "how much of the counterfactual reduction (if any) would  
10 they have passed on to the claimants in the form of lower MSCs?"

11 That's the logical next step and that covers, we say, all of the issue. It allows for the  
12 possibility that anything above zero may be unlawful, so contrary to what might have  
13 been suggested by the claimants in the submissions you've just read. The claimants  
14 don't suggest that by this formulation we've left anything out. So we say it's to be  
15 preferred. It's clearer and more logical.

16 If you look at the claimants' formulation on the previous page, perhaps the Tribunal  
17 could just read that, it starts at 1.64 and goes down to 1.66. Our basic submission on  
18 this is it's trying to do the same thing but it's unnecessarily convoluted and in parts  
19 confusing.

20 Perhaps the Tribunal could read to yourselves the text in green.

21 **MR JUSTICE MARCUS SMITH:** Yes. **(Pause).**

22 Yes, thank you.

23 **MR KENNELLY:** And my final point on this is it's potentially confusing, certainly  
24 unnecessarily complicated by the way it breaks out a different acquirer pass-on issue  
25 for scheme fees, the challenge rules and so forth because we certainly understand  
26 and our experts understand that to be part of the same analysis when one looks at



1 acquirer pass-on, there's not a separate analysis, freestanding analysis for scheme  
2 fees and for the cross-border acquirer rule. It's either part of the same analysis or it  
3 can easily be accommodated within the formulation that we've put forward for the  
4 Tribunal. I think that's really all we have to say on the point. I will hand over to Mr Cook  
5 now.

6 **MR JUSTICE MARCUS SMITH:** Thank you Mr Kennelly.

7 Mr Cook.

8 **MR COOK:** I gratefully adopt Mr Kennelly's submissions on this point. Just a very  
9 brief additional point to make. Paragraph 3 of Ms Smith's submissions, which are in  
10 tab 14 of bundle 2, the points that are made back against the schemes in relation to  
11 our formulation repeatedly refer to the possibility of MIF plus plus tariffs and obviously  
12 MIF plus plus is a situation where the MSC is mechanically defined by reference to the  
13 MIF. So it's simply whatever the MIF is plus whatever the scheme fees are and plus  
14 an agreed margin.

15 Now, in the case like that there is no acquirer pass-on issue because it's 100 per cent  
16 pass-on mechanically. If the MIF goes down by X, then the MSC must go down by X  
17 because it's contractually defined in that way.

18 This issue arises in a meaningful way, the acquirer pass-on issue, and we understand  
19 this is applicable to a large proportion of claimants, where you are talking about  
20 blended MSCs where they've simply agreed an MSC of 1.5 per cent for all  
21 transactions, say.

22 So, with respect, all of the points that are made about MIF plus plus, those are  
23 irrelevant because where a claimant is able to show they were on MIF plus plus  
24 throughout the claim period, effectively this point just falls away.

25 So what we are looking at is blended MIFs and the reasoning that suggests what about  
26 MIF plus plus is, with respect, a red herring because it's addressing something where

1 this issue doesn't arise. I do respectfully say Mr Kennelly is quite right to say what we  
2 are looking at is acquirer pass-on so it should be what did they do in the factual, what  
3 would they have done in the counterfactual, however that ends up being formulated in  
4 due course. Thank you, Sir.

5 **MR JUSTICE MARCUS SMITH:** Thank you very much, Mr Cook.

6 Ms Smith, anything by way of reply? And it would assist I think, it's not the case that  
7 you are saying that anything is left out that you would want to have further determined  
8 in the blue wording. It's just that you prefer the green wording over the blue?

9 **MS SMITH:** I think the main point -- (audio distortion).

10 **MR JUSTICE MARCUS SMITH:** Sorry, you are fading out again, Ms Smith.

11 **MS SMITH:** Issue 22, as you'll see from the introductory words in black that are  
12 agreed, issue 22 is about quantifying the overcharge paid by the claimants and so in  
13 our submission the sub-issues need to focus on, should most usefully or can most  
14 usefully focus on what was actually paid by the claimants and how much of the MSC  
15 paid by the claimants was accounted for by MIFs and how those MIFs changed in the  
16 counterfactual. That is what we have sought to do in the green formulation.

17 You will see our (b) is what MSCs did each of the claimants pay and then (c) what's  
18 the total value of the default MIF element of the MSCs paid by each claimant, because  
19 this is quantifying over charges paid by the claimants.

20 Then we break it down in more detail, yes, because we think it's important to assess  
21 that all these details are considered. So whether the MIF would have been lower in  
22 the counterfactual, whether the scheme fees would have been lower in the  
23 counterfactual, that's (e), and whether there was any overcharge arising from the  
24 imposition of the central acquiring cross-border acquirers rule.

25 The problem with the cards schemes' proposed formulation you'll see in blue (b) is  
26 they focus solely on the MIFs paid by the acquirers, which is of course not the loss

1 | claimed in this case and not the loss, the quantum, the overcharge that the Tribunal is  
2 | being asked to assess.

3 | So that explains why we've formulated the sub-issues in green as we've set them out.

4 | **MR JUSTICE MARCUS SMITH:** Thank you very much, Ms Smith. I am very grateful.

5 | What we'll do is we will rise, by which I mean shut off our feed for a couple of minutes,

6 | and see if we can determine this. So if we can do that, we will be back within

7 | 5 minutes. Thank you very much.

8 | **(11.30 am)**

9 | **(A short break)**

10 | **(11.33 am)**

11 | **MR JUSTICE MARCUS SMITH:** Thank you very much. Can I just check, I will check

12 | with Ms Smith, can you hear us again?

13 | **MS SMITH:** Yes, I can. I hope you can hear me.

14 | **MR JUSTICE MARCUS SMITH:** Thank you very much. We will assume that

15 | everyone else is hearing us all loud and clear.

16 | We have before us a dispute as to the definition of an issue in the list of issues in

17 | column two, issue 22, regarding the extent of the overcharge in terms of acquirers.

18 | There are two formulations before us. One in green from the claimants and one in blue

19 | from the scheme operators.

20 | We want to make clear that we regard this as purely a question of wording and there

21 | is absolutely no question of an issue that the claimants wish to advance or indeed the

22 | defendants wish to advance being excluded by the form of wording. The question is

23 | simply which form of wording captures best the issue that needs to be decided under

24 | the rubric of issue 22.

25 | In that regard we have no doubt that the blue wording, that put forward by the card

26 | scheme operators, is to be preferred. It seems to us to track more logically the thinking

1 by way of which these issues arise and that is the form of wording that we will direct  
2 be used as the framing of issue 22 going forward.

3 But we are very grateful to all parties for their helpful submissions on this point.

4 **MS SMITH:** Sir, can we then move on to the outstanding column three issues. As  
5 I said, there are three general areas of dispute, each of which affects several issues.  
6 It might be easiest to make these submissions by reference to my skeleton argument.  
7 But if I could ask you to open the skeleton argument, page 2, paragraph 3.

8 **MR JUSTICE MARCUS SMITH:** Yes.

9 **MS SMITH:** Paragraph 3 onwards addresses the issue of industry expert evidence.  
10 This point goes to issues 14.2 and issue 28. Each of which concern merchant  
11 pass-on.

12 The claimants have asked for, as well as factual evidence, to be able to adduce factual  
13 evidence on these issues, that they be able to adduce industry expert evidence. You  
14 will see that from the green wording on issue 14.2 and issue 28.

15 Now, over the weekend there has been correspondence on this point and the  
16 claimants explained in correspondence with the card schemes on Friday that they  
17 primarily expect to rely on factual evidence as well as economic evidence, which is  
18 agreed, both sides agree there should be economic evidence and disclosure on this  
19 issue. But as regards the factual evidence, the claimants primarily expect to rely on  
20 witness evidence and you will have seen that from the column four documents that  
21 were put into the Tribunal on Friday.

22 But the claimants would like to reserve their position to adduce industry expert  
23 evidence if necessary. For example, in circumstances where it would be more efficient  
24 to adduce evidence from one industry expert, one industry witness on a particular  
25 issue, rather than from a large number of factual witnesses who all operate in the same  
26 industry. On that basis, which we explained in correspondence on Friday, Visa and

1 Mastercard have agreed over the weekend that the claimants should be able to  
2 adduce industry expert evidence as this fallback subject to also reserving their position  
3 to put in equivalent industry expert evidence in response if the claimants do choose to  
4 rely on that type of evidence.

5 So I think that's a long-winded way of saying I hope we've reached agreement on that  
6 particular point, which addresses issues 14.2 and 28.

7 **MR JUSTICE MARCUS SMITH:** Thank you, Ms Smith. Just one question. It may be  
8 because we've all read the populated claimants' column four in some haste but just  
9 looking at that, and it's page 121 of the claimants' populated column four, I could only  
10 see reference there to expert evidence being adduced and there was no reference  
11 that I saw to the factual evidence that you've just mentioned which though  
12 is mentioned as something you would want to rely on in your skeleton argument.

13 That was a mismatch that I thought I had better raise with you because it puzzled me  
14 a little.

15 **MS SMITH:** (Audio distortion). I am sorry, I am just having a look at that -- (Audio  
16 distortion) -- issue. Sorry, Sir, you referred I think to page 121?

17 **MR JUSTICE MARCUS SMITH:** Yes.

18 **MS SMITH:** Issue 8.9.

19 **MR JUSTICE MARCUS SMITH:** Well, I may just have it in a different way. I'm looking  
20 under issue 28, pass-on mitigation, which is where I picked up the reference to expert  
21 economic evidence but nothing else. I suspect there is only misleading magic in the  
22 page numbers because I think my printer printed it out in a landscape format, which  
23 may not be the same as yours, but I am looking at issue 28.

24 **MS SMITH:** Sorry, yes, I think it's under heading expert economic evidence but if you  
25 scroll through to the end of that entry in the column four, you'll see a paragraph headed  
26 documentary disclosure.

1 **MR JUSTICE MARCUS SMITH:** I see.

2 **MS SMITH:** And our proposal, as I understand it but I will be corrected if I am wrong,  
3 is that there should be factual documentary disclosure on this issue but that  
4 before -- and it's always been our proposal that before disclosure is ordered there  
5 should be witness statements from the claimants, in our case we say sample  
6 witnesses, sample companies, describing what they do as regards this pricing, for  
7 example, and describing what material might be available and then there will be, as  
8 we've always I think proposed, specific disclosure requests on the back of those  
9 witness statements.

10 **MR JUSTICE MARCUS SMITH:** Yes, I see.

11 **MS SMITH:** I apologise it isn't spelt out there that there will be statements as well as  
12 disclosure.

13 **MR JUSTICE MARCUS SMITH:** No, it isn't nor is it spelt out exactly which claimant  
14 groups or claimants will be approached for witness evidence.

15 **MS SMITH:** No, but that is the point about sampling on which we make submissions  
16 under I think issue 4 of the --

17 **MR JUSTICE MARCUS SMITH:** Yes, we've certainly seen --

18 **MS SMITH:** Issue 4 I think it is.

19 **MR JUSTICE MARCUS SMITH:** Yes, I see. Thank you.

20 **MR JUSTICE ROTH:** Ms Smith, isn't the President's point that if you look at column  
21 three under issue 28 in the version we were working off, list various categories, and  
22 the first in the column is economist and/or industry expert evidence. Then you go  
23 down and you deal with documentary disclosure and factual evidence and so on. But  
24 in your column four you do indeed cover the documentary disclosure (audio distortion)  
25 and the economic economist expert evidence, but you don't refer to industry expert  
26 evidence.

1 **MS SMITH:** That appears to be the case.

2 **MR JUSTICE ROTH:** I think that is what you were asked about.

3 **MR JUSTICE MARCUS SMITH:** Mr Justice Roth has that exactly right.

4 **MS SMITH:** Sorry, in correspondence it was made clear, and this is the letter I referred  
5 to of 4 November on Friday, that the claimants have not yet identified any particular  
6 industry experts but reserve their position to put in an industry expert evidence in the  
7 circumstances I have just outlined where, for example, it would be more efficient to do  
8 so if there were issues arising rather than putting in a number of witness statements  
9 from -- and again this depends a little bit on how we approach witness evidence, which  
10 is agenda item 4 I think. I might have that wrong but agenda item 4. If, for example,  
11 it would be more efficient to obtain evidence from an industry witness rather than  
12 a number of different factual witnesses, then we are simply reserving our position in  
13 that regard.

14 I think Visa and Mastercard have indicated that they are happy with that reservation  
15 of position on the basis that they do the same thing.

16 **MR JUSTICE MARCUS SMITH:** Yes, I see, Ms Smith. I mean, the reason I am  
17 picking you up on this is I felt that there was something of a mismatch in emphasis  
18 between what your written submissions said about sampling and factual evidence and  
19 what our judgment on pass-on of 6 July said.

20 I have in mind paragraph 61, particularly subparagraphs 3 to 5, which were certainly  
21 intended to express a degree of scepticism about how far factual evidence would  
22 assist on the pass-through question and your written submissions really went out of  
23 their way to say we had almost directed and certainly haven't closed out the possibility  
24 of factual evidence.

25 Now, the latter is true, we have not closed it out, but we did express a degree of lack  
26 of confidence that claimant-specific evidence would take matters any further. That's

1 why I looked at your populated column four with a degree of relief because it seemed  
2 to me that you were actually agreeing with what we'd said in our judgment at  
3 paragraph 61 because there was simply no fleshed-out detail, as column four  
4 envisages, as to how these factual issues would be determined by reference to  
5 statements of fact from a sample or otherwise of the claimants.

6 But I understand that's a misreading of your schedule, is that fair?

7 **MS SMITH:** Just dealing with those points in order, Sir. As you indicated,  
8 paragraph 61.5 of your judgment on pass-on said in terms that you are not going to  
9 preclude the interchange fee claimants from adducing any evidence they might wish  
10 to adduce in support of their claim that the overcharge was not passed on. As I recall,  
11 although I will double-check the Court of Appeal's order, the fact that no evidence was  
12 excluded by the pass-on judgment formed part of the Court of Appeal's reasoning in  
13 rejecting the application for permission to appeal. It's Court of Appeal's order in  
14 volume 2 page 221.

15 So it was on the basis that no decision had been taken by the Tribunal at the stage of  
16 the pass-on judgment as to exclude any evidence at all that the Court of Appeal, one  
17 of the reasons why it refused permission to appeal.

18 So we are relying upon paragraph 61.5, as you rightly say, Sir, that no evidence is  
19 precluded and we do propose, as well as the expert evidence that we've set out in  
20 some detail in column four on the question of merchant pass-on, to also, as we  
21 indicated at the last hearing, we do propose to rely upon factual evidence in that regard  
22 as well. I apologise if, and again I have not been through the column four 131 pages  
23 in minute detail but I apologise -- or certainly probably not as much detail as it sounds  
24 like you have, Sir, but I apologise if under issue 28 we've not made it absolutely clear  
25 what factual evidence we want to put in but we've indicated that we do want to put in  
26 factual evidence and I believe we've indicated who the witnesses would be by way of



1 an annex to column four by name.

2 Issue 28 is one of the issues, the merchant pass-on issue is certainly one of the issues  
3 that we would want to put factual evidence in on. That is specifically set out in column  
4 three, item 3 and item 4. Sorry, item 3, factual evidence volunteered by the claimants  
5 and then the documentary disclosure sought by the defendants or volunteered by the  
6 claimants. So that's all agreed, the nature of the evidence in column three. As to the  
7 precise articulation in column four, our column four draft is obviously a work in  
8 progress and we'll take on board what you say about it needing more detail on the  
9 factual evidence in that column.

10 There is I think still an issue to be determined by the Tribunal as to how we approach  
11 the question of factual evidence given the number of claimants involved in this case  
12 and we maintain our position on sampling being the best approach to that.

13 **MR JUSTICE MARCUS SMITH:** So what you say is we really do need to read the  
14 entry in issue 28 as incorporating by implicit reference the list of witnesses that we see  
15 in annex A1 and annex A2?

16 **MS SMITH:** Yes.

17 **MR JUSTICE MARCUS SMITH:** And the question of whether it is each and every  
18 one of those witnesses or a sample of those is left over to another day?

19 **MS SMITH:** Well or is actually I think --

20 **MR JUSTICE MARCUS SMITH:** Yes, indeed. Okay. Thank you, Ms Smith, that is  
21 very clear.

22 Are we taking the same order, Mr Kennelly, you first and then Mr Cook?

23 **MR KENNELLY:** I am happy to do that for this one. There will be other issues, pure  
24 Mastercard issues where Mastercard takes the lead but for this one I am happy to go  
25 first.

26 Two points. The first, it's with real concern that we hear what Ms Smith says about

1 their approach to column four. The purpose of column four is to set out the evidence  
2 they want to put in. It's not good enough to have to imply it by reference to  
3 correspondence. It's no answer to say that witnesses have not been identified. It's  
4 perfectly appropriate to say where evidence needs to go in by category, identify by  
5 category but not necessarily identify the witnesses by name, but what we can't have  
6 is a process where we are inferring into column four what the claimants intend to do  
7 by reference to correspondence that is not cross-referred in column four itself.  
8 Still less is it helpful to expect us to look at the list of witnesses and infer from that list  
9 which industry witnesses they have in mind. There are 506 proposed witnesses of  
10 fact in the claimants' list and there's no attempt to link those to issues or to the  
11 particular issue here. That's my first the point. So that just isn't going to work.

12 The second point is this. When we pressed the claimants on this issue, they said they  
13 had not yet identified the specific industry experts they had in mind, they wanted to  
14 reserve their position and to ensure they weren't prohibited from doing so. We said in  
15 our letter that we were content to allow them to reserve their position subject to us  
16 reserving our position so that we could object when we see the further particulars they  
17 provide. So there's been agreement only to that extent and we do reserve the right to  
18 see what they actually want when it comes to industry experts to ensure that it's not  
19 disproportionate.

20 I will hand over to Mr Cook now.

21 **MR JUSTICE MARCUS SMITH:** Thank you, Mr Kennelly.

22 Yes, Mr Cook.

23 **MR COOK:** I suppose I might be stepping on Ms Smith's toes but it's her footnote 3  
24 to page 1.85 to the claimants' list of -- the claimants' version of the table column four  
25 list which sets out the position which is then indicated it should be read through in  
26 relation to all the other bits. So that's the first time factual witnesses --

1 **MR JUSTICE MARCUS SMITH:** Which footnote number, Mr Cook, I am sorry?

2 **MR COOK:** Sorry, it should be bundle 1, page 1.85, which is the claimants' column  
3 four submissions and it's footnote 3 at the bottom of that page, which I think is the first  
4 time factual witnesses come up and in essence that footnote says: this is what our  
5 position is, every time factual evidence comes up this remains the position.

6 **MR JUSTICE MARCUS SMITH:** I see.

7 **MR COOK:** So we certainly understood, we'd understood from that footnote, and the  
8 degree of repetition in this table is quite substantial in any event so at least some  
9 aspect of repetition it's good that that was avoided, but obviously 500 witnesses is  
10 going to be prohibitive so we agree some kind of sampling process will be necessary  
11 but that's for later.

12 In terms of industry experts, I'm afraid there does appear to be a disagreement here  
13 between the two sides that ultimately permission is required to call expert evidence.  
14 We understand the claimants want to reserve their position, which we understood  
15 means they should not be locked out at this stage from the possibility of seeking that  
16 permission in due course. What Ms Smith seemed to be describing is an idea where  
17 they'd been given blanket permission to call whatever industry expert evidence they  
18 might seek, which given the number of industries here might be 10, 20, 30 industry  
19 experts, which we would say would be absolutely unacceptable and that is the reason  
20 why we said if you want to reserve your position, i.e. you are not locked out from  
21 making that application later, that's fine but we reserve our ability to object to it as and  
22 when you formulate a proposal. So we do say just normal practice. Until there is  
23 a proposal for an application for permission, there is no permission and they are not  
24 seeking permission today.

25 But we are not saying as a result of not asking today if in six months' time it becomes  
26 apparent they want to ask, fine, they can make that application then but they are not

1 being given permission today as we understood it or they are not seeking permission  
2 today as we understood it. So essentially, it's left to that level of they may apply or  
3 they may not apply in due course.

4 **MR JUSTICE MARCUS SMITH:** Thank you, Mr Cook. That's very helpful.

5 Ms Smith.

6 **MS SMITH:** Yes, thank you. Again, Mr Cook, that was very helpful. If I could just  
7 make it clear that on Mr Cook's second point we are happy with that approach and  
8 I should have made that clear.

9 As regards the first point as to how our column three has been filled in for issue 28, if  
10 I could just -- and thank you again for referring to footnote 3 but if I could just please  
11 ask the Tribunal to go back to your order of March of this year under which columns  
12 three and four have been produced.

13 **MR JUSTICE MARCUS SMITH:** Yes.

14 **MS SMITH:** Your order is in bundle 2, tab 24, as to what the parties were actually  
15 asked or ordered to do as regards columns three and four, which may explain a little  
16 the approach which we've taken.

17 If you look at tab 24, the Tribunal's order, page 63, paragraph 2(f), if you have that,  
18 sets out what is required as regards column three.

19 **MR JUSTICE MARCUS SMITH:** Yes.

20 **MS SMITH:** So we have in column three -- let's just look at item 28 alongside the  
21 order. Column three is each party is populating its own version of column three setting  
22 out the manner in which it's proposed each issue in column two shall be determined,  
23 the Tribunal doesn't expect, require or want a detailed statement of methodology  
24 rather you have to identify each method of determination: legal argument, expert  
25 evidence, factual witness evidence or documentary evidence. Factual witness  
26 evidence being subparagraph 3, stating how it's envisaged the relevant witnesses are

1 proposed to be identified. So you'll see if you look at our column three for paragraph  
2 2(f) or issue 28 we have the identification of factual evidence and it's to be identified  
3 and volunteered by the claimants. What we're then required to do as regards column  
4 four is set out on page 64 of the order at paragraph 2(h)(iii).

5 What we are required to do is where the method of determination, that's the column  
6 three method of determination, "includes the adduction of factual witness evidence,  
7 each party must identify the witness or witnesses it would be minded to call". That's  
8 what we were required to do and that's what we did in our column four. Rather than  
9 repeating the annexes or the cross-reference to the annex every time under every  
10 item, as Mr Cook indicated, it was in the footnote 3 to be read subsequently wherever  
11 witness evidence, factual witness evidence is referred to it incorporates a reference to  
12 the annexes.

13 So we are required to identify the witness or witnesses we would be minded to call  
14 and we've done that and that explains perhaps the imbalance between what is in  
15 column four as regards witness evidence and what is in column four as regards expert  
16 evidence because you'll see from your previous order on page 64 of the bundle (iv)  
17 where the method of determination includes the adduction of expert evidence, we have  
18 to identify not only the expert in question, which is all we have to do for witnesses, but  
19 we also have to give "a statement from that expert as to how that expert proposes to  
20 resolve the issue in question". So that might explain why there's an imbalance in the  
21 amount of detail in column four between the expert evidence and the witness evidence  
22 because of the terms of the order.

23 So, yes, that's all I wanted to add on that point on item 28.

24 **MR JUSTICE MARCUS SMITH:** Thank you very much, Ms Smith. We are not going  
25 to rise to discuss this because my sense is that this question, the evidence that needs  
26 to be adduced for purposes of pass-on by the retailer to the consumer is something

1 that is likely to trouble us in the course of this afternoon and tomorrow.

2 So we will leave both the question of adduction of industry expertise and the question  
3 of sampling and who it is that is sampled for further discussion this afternoon and  
4 tomorrow.

5 But I think I should, purely for myself here, put you on notice that I am a little troubled  
6 by the response that you have just given. The point of column four is to crystallise that  
7 which will be called at trial and the reason the order at 2(f)(iii) on page 63 of the bundle  
8 is framed the way that it is, "factual witness evidence (stating how it is envisaged the  
9 relevant witnesses are proposed to be identified)", is to require the column three stage  
10 for the process of sampling to be identified and articulated with specificity and that's  
11 why the column four approach is that you must identify the witnesses you would be  
12 minded to call because that would represent the outcome of the sampling process and  
13 that has not happened here. Now, I appreciate that issue 4 may well be a work in  
14 progress but -- sorry, column four, but column four, as we envisage it to operate, was  
15 a defined template as to that which would and that which would not be called with a far  
16 higher degree of precision than exists at the moment.

17 Now, I won't say anything more than that because, as we will float this afternoon when  
18 the other parties have joined us and I don't think it's appropriate to raise it now, we  
19 have provisionally thought of a way forward which may mean that these issues can be  
20 parked to a later date, but if there is no such later date then I think you could be  
21 expecting in extremely short order an obligation on the claimants represented by you  
22 to state exactly which industry experts you wanted and exactly how you are going to  
23 sample your factual witnesses so that we aren't buying a pig in a poke and the fact is  
24 at the moment the proposal is for an un-triable trial and we are not in the business of  
25 ordering un-triable trials.

26 I am going to just check across the room to see if there is anything I need to add before

1 we move on. So I put that down as a sort of personal marker and it may be that we  
2 have to address it in greater detail the incoming day and a half but we'll leave it as  
3 a marker for now.

4 So you don't have any form of permission for industry expertise. So, speaking for  
5 myself again, I am quite sympathetic to that, nor do you have any kind of endorsement  
6 of the sampling process that you are keen on.

7 Now, that is said entirely without prejudice to the point we made in our last judgment,  
8 namely that what is called and what isn't called is entirely up for grabs but I think all of  
9 the parties need to appreciate that given the volume of potential factual witnesses, we  
10 will be engaging our case management powers pretty aggressively to ensure that we  
11 have not only a fair trial but also a manageable trial at the end of the process.

12 **MS SMITH:** Sir, if I can just --

13 **MR JUSTICE MARCUS SMITH:** Thank you, Ms Smith, that was very helpful. So we'll  
14 park the industry expert question and move on to the next general issue in your written  
15 submissions, which I have -- yes, quantum analytics.

16 **MS SMITH:** Sir, thank you. Before we move on to the specific point on quantum  
17 analytics, that was a very useful clarification as to what the Tribunal envisaged in not  
18 only column four but in column three and it may be that we don't need to go back to  
19 this depending on what you say this afternoon about the general way forward, we may  
20 not need to go back to it for merchant pass-on, but you said on column three that  
21 column three should not just specify the nature of the evidence, for example factual  
22 evidence, but also should specify the sampling process proposed, et cetera, et cetera.  
23 Now, you will see that the column three that has been agreed between the claimants  
24 and the schemes does not go into that sort of level of detail. I am not sure it was  
25 envisaged either by the claimants or the schemes, I may be wrong, that it should go  
26 into that sort of detail but it certainly hasn't. So it may be that if that is the approach,

1 we need to look back not just at column four but at column three.

2 But in any event it may be that this doesn't become an issue particularly as regards  
3 merchant pass-on in light of what you indicated you might be doing this afternoon but  
4 it definitely was useful guidance, which I think we were hoping from the Tribunal today  
5 anyway, as to how to develop column four and what the Tribunal wanted to see in  
6 column four because that's very much a work in progress both from the schemes and  
7 from the claimants.

8 **MR JUSTICE MARCUS SMITH:** Thank you very much, Ms Smith.

9 **MS SMITH:** Shall I then move on to quantum analytics expert evidence, paragraph 6  
10 onwards of our skeleton?

11 **MR JUSTICE MARCUS SMITH:** Yes, please do.

12 **MS SMITH:** That relates to the issues set out in paragraph 6. Issues 22 and 29, which  
13 relate to the extent of the overcharge and quantum of damages, we ask to deal with  
14 those together first and then issues 30, 31 and 32, which are financing costs, interest  
15 and tax.

16 As regards calculating the extent of the overcharge and quantum of damages,  
17 issue 22 and 29, we've asked for, in column three, permission to put in economist  
18 and/or quantum analytics expert evidence. And to clarify what that is, the first  
19 objection, as we understood it to be, from Visa and Mastercard is that issues 22 and  
20 29, that is the extent of the overcharge and quantum, this could be done by economist  
21 experts. So we don't need provision for quantum analytics experts. Just to explain  
22 what quantum analytics is, that's effectively another way of describing forensic  
23 accountancy, as I understand it.

24 But we explained in our correspondence that the quantification of the overcharge, the  
25 MSCs already paid by the claimants, which goes to issues 22 and 29, have already  
26 been done by the claimants by their accountancy or quantum analytics experts.



1 Each of the particulars of claim and a number of the particulars of claim produced by  
2 my claimants, my clients have been accompanied by quantum schedules. Those  
3 quantum schedules identify the overcharge or the MSCs and the MIFs paid by the  
4 claimants. Those quantum schedules have been produced by forensic accountants,  
5 quantum analytics experts: namely for the SSU claimants, Adrian Martin of Ankura,  
6 who is a forensic accountant; for the Humphries Kerstetter claimants, David Rankin of  
7 Punter Southall, who describes himself as a quantum analytics expert.

8 Our point is simply that because many tens of thousands of pounds have already been  
9 spent on these individuals producing the quantum schedules that accompanied our  
10 particulars of claim, this work, which is quantifying the MIFs paid by the claimants, has  
11 already been done by these individuals and should not be done again by economists,  
12 it could be done again by economists but it seems pointless and wasteful for it to be  
13 done again by economists, so it would be unnecessarily duplicative, and that's simply  
14 why the reference to economist and/or quantum analytics expert evidence appears in  
15 this column. We've explained this to Visa and Mastercard.

16 We've also explained that although there's some difference in nomenclature between  
17 Mr Martin, who describes himself as a forensic accountant, and Mr Rankin, who  
18 describes himself as a quantum analytics expert, don't ask me why but that's how they  
19 each describe themselves, we only propose evidence from one individual for each  
20 claimant group, the one individual I have just named, we are not proposing a forensic  
21 accountant and a quantum analytics expert. We are simply proposing there's one  
22 individual for each claimant group and there won't be overlap or duplication on that in  
23 that regard.

24 So that's the basis for asking for a reference to and/or quantum analytics in issues 22  
25 and 29.

26 On the basis of that explanation which was given in correspondence and further this

1 morning I hope and think that this has been agreed by Visa and Mastercard but they  
2 can confirm that.

3 So that deals with extent of overcharge and the quantum of damages. Similarly for  
4 financing costs, interest and tax, issues 30, 31 and 32, again these are issues that we  
5 propose be addressed by the individuals I have already identified, Mr Martin and  
6 Mr Rankin, the forensic accountancy/quantum analytics experts, again because this is  
7 work they've already started to do and they can do properly, financing costs, interest  
8 and tax are properly matters that can be addressed by what I would normally call a  
9 forensic accountancy expert, they will not also be addressed by the economist, there  
10 will only be one expert who addresses those issues on our proposal. So again I hope  
11 we have clarified to the other side, to the schemes we are not proposing a duplication  
12 in that regard, again it's only a single expert who will be giving evidence for the  
13 claimants on those issues but that explains the green drafting in column three for  
14 issues 22, 29, 30, 31 and 32.

15 Again on that basis and that explanation and clarification, I hope the green wording  
16 can be agreed.

17 **MR JUSTICE MARCUS SMITH:** Thank you very much, Ms Smith. It seems to me  
18 it's very much a question of a rose by any other name would smell as sweet when it  
19 comes to accountancy and quantum analytics. I wonder before we hear from  
20 Mr Kennelly and Mr Cook whether we could just turn up issues 29 and 30, which I think  
21 capture the debate which you have articulated and sought to clarify.

22 Starting with the green in column three of issue 30, if it were made clear that  
23 accountancy includes the discipline of quantum analytics to the extent that there is  
24 a difference between the two, does one need the and/or? Can one simply say that  
25 accountancy generally speaking across the wording in these issues includes as  
26 appropriate quantum analytics?

1 **MS SMITH:** We would certainly be happy with that, yes.

2 **MR JUSTICE MARCUS SMITH:** Okay. Mr Kennelly and Mr Cook, we'll hear from  
3 you in due course but I just want to nail any potential ambiguities because quantum  
4 analytics was a new one on me and one really needs to know exactly what one is  
5 talking about.

6 So moving back then to issue 29, if the drafting were economist or accountancy expert  
7 evidence, with quantum analytics being understood to be part of accountancy, does  
8 that again resolve the problem as far as you are concerned, Ms Smith?

9 **MS SMITH:** If I could just have a moment.

10 **MR JUSTICE MARCUS SMITH:** As I understand it, you were dealing with matters  
11 not through an economist but through what I am calling accountancy evidence but the  
12 defendants may well want to adduce an economist rather than an accountancy expert.  
13 Have I got that right?

14 **MR JUSTICE ROTH:** Ms Smith?

15 **MS SMITH:** Yes, I believe, just picking up, Sir, the President said economist or  
16 quantum analytics or accountancy evidence, I believe that there are issues of principle  
17 under quantum and the loss suffered that we will want to address by way of economist  
18 evidence. However, the numbers, if I can put it crudely like that, the number crunching  
19 will be done by the accountant or quantum analytics, however you want to call it.

20 **MR JUSTICE MARCUS SMITH:** I see.

21 **MS SMITH:** The evidence will not overlap but it may be that we need economist and/or  
22 accountancy expert evidence.

23 **MR JUSTICE MARCUS SMITH:** I understand. So the and/or is necessary but you  
24 are happy with the redesignation of quantum analytics into accountancy?

25 **MS SMITH:** Yes.

26 **MR JUSTICE MARCUS SMITH:** You wouldn't have a problem if we made clear that

1 in (ii) in issue 29 it's to be made clear that there shouldn't be duplicative evidence from  
2 experts called by the same party on the same issue?

3 **MS SMITH:** We would be very happy with that, yes. No problem at all.

4 **MR JUSTICE MARCUS SMITH:** Ms Smith, thank you. That was very helpful.

5 Mr Kennelly, is it you first or Mr Cook?

6 **MR KENNELLY:** I will be very quick because we are happy, Sir, with your  
7 redesignation of quantum analytics as part of accountancy. We understand what  
8 Ms Smith says about the and/or and we would be very grateful and we respectfully  
9 adopt the express language in relation to no duplicative evidence. It was upon the  
10 promise there would be no duplicative evidence that we agreed to these  
11 reformulations.

12 **MR JUSTICE MARCUS SMITH:** Very grateful, Mr Kennelly.

13 Mr Cook.

14 **MR COOK:** I can be even more brief, my Lord: if there's no duplication, we have no  
15 problem.

16 **MR JUSTICE MARCUS SMITH:** Ms Smith, I don't know if there is anything you need  
17 say by way of reply?

18 **MS SMITH:** No.

19 **MR JUSTICE MARCUS SMITH:** I will just check across the room that we've not  
20 missed anything out. No, I think we are all happy with the issues framed in that way,  
21 so the third column can be amended at those various points in those various ways.

22 **MS SMITH:** Thank you. I am grateful. If I could then move on to the third general  
23 issue or general point which is addressed from paragraphs 10 onwards in our skeleton  
24 under the heading "Factual and documentary evidence in relation to objective  
25 necessity".

26 This point arises on a number of issues. For example, 4.5, 5.4, 6.5, 8.9, 9.5. But what

1 | it effectively is for each of the MIFs or rules which is it's alleged are in breach of  
2 | Article 101(1), the schemes want to make an argument of objective necessity/ ancillary  
3 | restraint.

4 | The question is what evidence they put in or should be allowed to put in as regards  
5 | that question of objective necessity. So this is the objective necessity ancillary  
6 | restraint question that arises as part of the assessment under Article 101(1) rather  
7 | than questions of justification or exemption under 101(3), so it's the ancillary restraint  
8 | objective necessity point.

9 | We make the point in paragraph 11 of our skeleton argument that the Court of Appeal  
10 | has already told us how one should approach the ancillary restraint issue, the objective  
11 | necessity ancillary restriction issue and you may recall, we've cited it there, the Court  
12 | of Appeal making it clear that the question of ancillary restraint or objective necessity,  
13 | the simple question under 101(1) to be answered is whether it is impossible to operate  
14 | a four-party scheme without a MIF or the other rules that are at issue here.

15 | We've quoted it there:

16 | "The ancillary restriction must be essential to the survival of the type of main operation  
17 | without regard to whether the particular operation in question [so the Visa operation  
18 | or the Mastercard operation] needs the restriction to compete with other such  
19 | operations. All questions of the effect of the absence of the restriction on the  
20 | competitive position of the specific main operation and its commercial success fall  
21 | outside the ancillary restraint doctrine."

22 | So what the Court of Appeal was saying, as you may recall, is that for questions of  
23 | objective necessity it is simply a question of asking oneself whether a MIF or the other  
24 | rules are necessary for the survival of a four-party scheme of the type in issue, so  
25 | a four-party scheme such as the Visa scheme or the Mastercard scheme.

26 | Questions as to what the effect of the lack of a MIF, what effect that would have on

1 the competitive position in particular of the Mastercard scheme or the Visa scheme,  
2 those questions on the effect of the competitive position of the Visa or Mastercard are  
3 questions to be determined under Article 101(3).

4 So you may recall the distinction in the Court of Appeal between those issues. So we  
5 say that needs to inform the evidence that should be put before the Tribunal on the  
6 ancillary restraint, the Article 101(1) issue.

7 We have said that effectively this is primarily, if you look, for example, at issue 4.5, so  
8 that's the first point at which ancillary restraint or objective necessity comes up, so let's  
9 take the example of issue 4.5, which is about whether interregional MIFs are  
10 "otherwise objectively necessary and proportionate for the operation of a four-party  
11 payment card scheme such as the Visa or Mastercard scheme", so that's an ancillary  
12 restraint objective necessity question, are these types of MIFs objectively necessary  
13 for the operation of a card scheme like this? That reflects the wording of the Court of  
14 Appeal's judgment. That's the question that the Tribunal will be asking itself under  
15 ancillary restraint.

16 It is agreed that in that regard the parties should be able to put in and have reference  
17 to economist expert evidence, it should be (i), I think it's (ii), but, they should also be  
18 able to put in payment systems expert evidence, so when we are dealing with the  
19 question whether this is objectively necessary for the operation of this type of scheme,  
20 we have those two types of expert evidence.

21 The question that is in dispute is whether the schemes should also be able to put in  
22 factual witness evidence from appropriate individuals at Mastercard about the viability  
23 of four-party payment card schemes and the relevant counterfactual and the relevant  
24 economic context and whether they should also be able to put in, in this case it's just  
25 Mastercard, documentary disclosure.

26 Now, we clarified in correspondence over the weekend that we are happy for the

1 schemes putting in factual evidence that is limited to addressing at this abstract level  
2 whether four-party payment schemes could operate without the MIFs and the rules in  
3 question. That is the question that is relevant under the Court of Appeal's judgment  
4 to the questions about ancillary restraint and objective necessity.

5 However, we are not prepared to agree to evidence which goes to the question of  
6 whether the absence of MIFs and rules would affect Visa's and Mastercard's particular  
7 competitive positions. Because that's an issue which goes to 101(3) not to this prior  
8 ancillary restraint/ objective necessity question. The particular competitive position of  
9 Visa and Mastercard is an issue to be addressed under 101(3). This is important  
10 because we may be dealing with these issues in separate trials, so what evidence is  
11 required is quite important, it can't bleed into different issues.

12 Visa and Mastercard, as I understand the correspondence, said, yes, we want to put  
13 in factual evidence addressing this abstract question whether four-party card payment  
14 schemes could operate without the MIFs and rules but we want to address the impact  
15 of three-party schemes such as Amex. We said: fine, as long as this again addresses  
16 the correct question, the Court of Appeal's abstract level of whether four-party card  
17 schemes can operate without the MIFs and rules when you look at, for example, the  
18 existence of Amex.

19 But we are concerned that the evidence does not bleed into the particular competitive  
20 position of Visa and Mastercard which we say is properly an issue that needs to be  
21 addressed under 101(3) only as a result of the Court of Appeal's judgment.

22 In correspondence Visa and Mastercard said they wanted to put in evidence "on the  
23 defendants' competitive position as regards three-party offerings like Amex". It's  
24 slightly unclear but it seems to be that that is bleeding into the 101(3) issues rather  
25 than the 101(1) issues. So that's our concern and why we say the factual witness  
26 evidence, insofar as there should be any, from the schemes on these ancillary

1 restraint/ objective necessity issues should be circumscribed, should be limited to the  
2 issue set out in column two, whether they are necessary for the operation of four-party  
3 payment card schemes at the abstract level.

4 **MR JUSTICE MARCUS SMITH:** Yes, I see. Thank you very much, Ms Smith. This  
5 issue 4.5 example is a Mastercard one. Does that mean we should hear from Mr Cook  
6 first or, Mr Kennelly, shall we maintain the usual order?

7 **MR KENNELLY:** I am happy for Mr Cook to go first.

8 **MR JUSTICE MARCUS SMITH:** I am grateful. Mr Cook.

9 **MR COOK:** Thank you, Sir. Sir, in relation to this, firstly we are well aware of what  
10 the Court of Appeal said in the Sainsbury's v Mastercard case and we have that fully  
11 in mind, that the legal test is whether a -- I say generic, a four-party card scheme  
12 generically could survive in the relevant product geographic market and there will be  
13 different questions depending on which products we are talking about and which  
14 geographic markets we are talking about. It seems to be common ground that given  
15 essentially at least within this jurisdiction there only are two four-party schemes,  
16 Mastercard and Visa, at least certainly in recent years, that the obvious people who  
17 have relevant evidence to give because they are people who have operated  
18 a four-party card scheme are factual witnesses who are entitled to give evidence in  
19 relation to that slightly generic question but clearly relevant evidence will come from  
20 their experience of operating a four-party card scheme that happens to be called  
21 Mastercard or happens to be called Visa.

22 So that seems to be common ground. It also seems to be common ground that one  
23 of the key factors in objective necessity is threats from things which are not the main  
24 operation in question, which is a four-party card scheme, such as different payment  
25 methods and whether that is Amex, whether that's PayPal, whether that's three-party  
26 and three-and-a-half party, whatever it is, it's different competitors who are not



1 essentially the same type of main operation and to that extent I don't think there is  
2 anything between the parties that we are not going to put evidence in saying this  
3 objectively necessary because otherwise Mastercard will fail but Visa will be fine. That  
4 wouldn't get us close to getting over the hurdle in question.

5 However, again it seems to be common ground that we can point to non-four-party  
6 competitors of whatever stamp and kind they are and that might include things like  
7 cash or whatever it is.

8 So I am not sure there is in fact a disagreement here. If some of the correspondence  
9 was poorly worded, it does not alter the fact that we are clear on what the Court of  
10 Appeal has told us we have to do but equally it doesn't appear to be in dispute that we  
11 can point to non-four-party competitors and certainly we intend to do so.

12 **MR JUSTICE MARCUS SMITH:** Mr Cook, speaking again entirely for myself, and we  
13 may need to retire after we've heard from all the parties, speaking for myself I would  
14 be quite reluctant to be unduly prescriptive as to precisely what factual evidence you  
15 adduce by reference to a particularly defined issue because we never know exactly  
16 where the factual evidence will lead and the purpose of column three is not to be as  
17 granular as that.

18 But presumably you wouldn't have a problem in adjusting the drafting of -- well, we are  
19 looking at issue 4.5 but it will apply generally -- in adjusting the drafting to incorporate  
20 an explicit reference to the Court of Appeal's holding as encapsulated in paragraph 11  
21 of Ms Smith's written submissions so that it's absolutely clear what this issue is going  
22 to?

23 **MR COOK:** Sir, I certainly have no objection to a footnote to the relevant law on the  
24 basis that that is relevant law. I think we had thought we'd captured it in the language  
25 of issue 4.5 itself, which is whether the MIFs are "objectively necessary and  
26 proportionate for the operation of a four-party payment card scheme such as the Visa

1 or Mastercard Scheme", so it had been intended the issue itself to be by reference to  
2 the Court of Appeal test. If it's thought to be a bit clearer to footnote paragraph 72 of  
3 the Court of Appeal, then again I can have no objection because that is the relevant  
4 legal test, Sir.

5 **MR JUSTICE MARCUS SMITH:** No Mr Cook, I was simply thinking of something for  
6 avoidance of any doubt given that this has been the subject of correspondence, given  
7 the way Ms Smith puts her case, but that's very helpful. I am very grateful.

8 Mr Kennelly.

9 **MR KENNELLY:** Sir, yes. Well, I adopt what Mr Cook said. It seems from what my  
10 learned friend Ms Smith said there's actually really nothing between us because they  
11 accept that we can put in factual evidence, they accept that they can deal with that  
12 evidence, but it's not good enough for us simply to say that we would be less  
13 successful, we need to, as Mr Cook said, engage with paragraph 72 of the Court of  
14 Appeal and show that the ancillary restriction is essential to the survival of the  
15 four-party scheme and for that reason we'd be happy to have a footnote or text in the  
16 column reflecting the paragraph or cross-referring to paragraph 72 of the Court of  
17 Appeal.

18 If the Tribunal is minded to go to paragraph 11 of Ms Smith's skeleton, again I have  
19 no problem with that. It sets out, as far as I can see, paragraph 72 of the Court of  
20 Appeal judgment that I have just quoted. So I think we would be content with that.

21 **MR JUSTICE MARCUS SMITH:** We are very grateful, Mr Kennelly.

22 Ms Smith, anything by way of reply?

23 **MS SMITH:** No. Thank you, Sir.

24 **MR JUSTICE MARCUS SMITH:** What we'll do is we will rise for 5 minutes, just to  
25 make sure that we are all ad idem, I think we will be, but we will make sure that we've  
26 got a common position on this. So we will suspend the cameras and the recording

1 and the microphones for a couple of minutes.

2 **(12.30 pm)**

3 **(A short break)**

4 **(12.32 pm)**

5 **MR JUSTICE MARCUS SMITH:** Mr Cook has not appeared yet. Can I use you as  
6 the guinea pig? Can you hear us?

7 **MR KENNELLY:** Yes, Sir.

8 **MR JUSTICE MARCUS SMITH:** I am very grateful. Thank you very much.

9 We are happy with the wording as it stands in issue 4.5. We think that for the  
10 avoidance of doubt a footnote reference to the Court of Appeal would be helpful but  
11 the fact is the parties have put their position clearly on the record and, Ms Smith, you  
12 will be able to rely on what has been said in the course of these proceedings if the  
13 limits of appropriate factual evidence is overstepped.

14 One point Mr Justice Roth raised which I will raise now with you is that it occurred to  
15 us that it's conceivable, we are not inviting inevitable factual evidence but it's  
16 conceivable that the claimants may themselves have factual evidence on this point  
17 themselves. We don't want to anticipate but we would be receptive if, in light of what  
18 the card operators adduce by way of evidence, there needed to be some factual  
19 evidence on this point, well I think we would be receptive to that coming in if  
20 appropriate. We thought we had better put that on the record ourselves.

21 **MS SMITH:** Thank you, Sir. Shall we move on then to the specific issues that are  
22 addressed at paragraphs 14 onwards of my skeleton?

23 **MR JUSTICE MARCUS SMITH:** Yes, please.

24 **MS SMITH:** I hope to deal with those relatively swiftly because they are small issues  
25 which I think a number of them have been agreed.

26 The first is issue 8.4. If I could ask you to open that in the list of issues. This is regards

1 Mastercard only and issue 8.4 you'll see is whether the essential factual basis of the  
2 Commission's Mastercard II decision dated 22 January 2019 about Mastercard's  
3 Central acquiring the rules related to a specific period, whether that decision applies  
4 to the periods prior to and after the period actually specifically addressed in the  
5 Commission decision.

6 The method of determination you'll see in column three, legal argument is in green.  
7 The claimants submitted that the question about essential factual basis may involve  
8 legal argument. Initially that was resisted by the schemes but I believe is now agreed  
9 that the claimants can if they want put in legal argument on that point.

10 Then there is the question about documentary disclosure. You'll see that economist  
11 expert evidence and factual witness evidence is agreed, the question is whether the  
12 claimants should be required to give documentary disclosure on this issue of the  
13 essential factual basis of the Commission's decision applying outside the period  
14 specifically considered by the Commission.

15 Obviously Mastercard wants to put in disclosure and may have relevant disclosure.  
16 The question is whether the claimants may have relevant disclosure. In paragraph 42  
17 of Mastercard's skeleton clarification has now been given as to the type of material  
18 that Mastercard had in mind. We previously weren't clear as to what material the  
19 claimants themselves could have on this issue but Mastercard in paragraph 42 of their  
20 skeleton argues that some of the claimants, particularly those with large cross-border  
21 operations, may have documentary evidence of their negotiations with or their  
22 contracts with central acquirers which may in turn be relevant to how the cross-border  
23 acquiring market works and thus relevant to the question of the essential factual basis  
24 of the Commission's decision.

25 Now that clarification has been given, we are content to provide disclosure limited to  
26 those issues insofar as any of my clients hold such material. So I think the position is

1 | agreed to that extent.

2 | **MR COOK:** Yes, Sir. It's me? In which case, we are ad idem on this.

3 | **MR JUSTICE MARCUS SMITH:** Well, thank you. I mean, just to make one point, it's  
4 | in one sense obvious, but one perhaps ought to make it clear. Column three is  
5 | principally directed at how each party is minded to prove each particular issue and it's  
6 | obviously helpful for the parties to understand and agree in advance in the drafting of  
7 | this just what disclosure may or may not be required or is implicit in any particular  
8 | issue.

9 | But we wouldn't want it thought that the mere fact that the words "and the claimants"  
10 | were removed from issue 8.4 would preclude Mastercard from seeking disclosure as  
11 | appropriate itself from materials held by the other side, as it were. So, it's very helpful  
12 | to have this discussed between the parties but we don't want to send a signal to  
13 | anyone that we are completely closing out further articulation of a disclosure process  
14 | piggybacking on the listed issues as so agreed.

15 | I will just check across the room whether there is anything any of my colleagues want  
16 | to add and I think not. So thank you very much. We can move on to the next issue.

17 | **MS SMITH:** Thank you, Sir. The next issue is issue 10.1, if I could ask you to turn  
18 | that up. Again this is an issue that arises as regards vis-a-vis Mastercard only. This  
19 | relates to the operation of Mastercard's non-discrimination rule, the question being  
20 | how did Mastercard's non-discrimination rule operate during the claim periods in the  
21 | relevant markets?

22 | The dispute here I think there is no longer. First of all, for the avoidance of doubt you'll  
23 | see from footnote 8 of our skeleton the claimants no longer seek to rely on economist  
24 | expert evidence on issue 10.1, so that's the first green words. That point was made  
25 | clear in our June list of issue submissions.

26 | **MR JUSTICE MARCUS SMITH:** Yes.

1 **MS SMITH:** So that point is no longer live. September list of issues submissions,  
2 sorry. There's been a lot.

3 The second green language in column three of issue 10.1 is the word "including" and  
4 this is about documentary disclosure provided by Mastercard including copies of the  
5 relevant rules. Mastercard have said: no, should not have "including" because the  
6 rules "speak for themselves" and that is all we should be required to disclose; and our  
7 position is simply well, we cannot be confident that that is the case, it may very well  
8 be once we've seen the rules it may be necessary for disclosure of internal explanatory  
9 material, as we've said in paragraph 16 of our skeleton. We say it would be wrong for  
10 the claimants to be prohibited from seeking that relevant material, explanatory material  
11 through appropriate expert-led disclosure from Mastercard if the rules in fact do not  
12 speak for themselves.

13 So that is simply the explanation for the wording "including" which Mastercard seek to  
14 plead.

15 **MR JUSTICE MARCUS SMITH:** Is that still contentious?

16 **MR COOK:** Sir, I think it stops being contentious in the light of the guidance you gave  
17 us a few minutes ago, Sir, which is on the basis that nothing on disclosure is effectively  
18 at this stage being ruled in or ruled out, it sounds like this is something Ms Smith is  
19 saying it might be something they'll seek in due course and effectively that will be the  
20 point we look at their justification at that stage and the Tribunal has made clear that  
21 they are not blocking people out at this point. So it sounds like the exact wording of  
22 this is a point that's not going to take us any further, Sir.

23 **MR JUSTICE MARCUS SMITH:** Well indeed. I mean, I just want to be quite clear,  
24 this is a very helpful process and perhaps a helpful dialogue. In one sense obviously  
25 the list of issues is going to inform and in some cases inform quite precisely the  
26 disclosure that will be ordered later on. But we are very conscious that there is

1 a reason for ordering the process, pleadings then disclosure then witness statements,  
2 and that's because what is required on disclosure is informed by the pleadings and we  
3 have the list of issues here which are sitting much more closely to pleadings than they  
4 are to questions of disclosure.

5 So whilst we will give appropriate weight to what is said and agreed by the parties in  
6 this list of issues, we are not going to be playing the game of gotcha where we hear  
7 submissions from one party saying, yes, disclosure has exclusively been limited or  
8 indeed expanded to this particular issue without reference to the question as it arises  
9 on disclosure in due course.

10 So I hope that gives comfort to all parties that the hard work on the list of issues  
11 is worthwhile but this not intended as a trap to unduly limit disclosure which later  
12 events show is appropriate.

13 So it's probably appropriate to have that on the record and I hope that assists you,  
14 Mr Cook, and indeed you, Ms Smith, in how you frame any future drafting questions  
15 in terms of the list of issues. I am just going to look across the room to see if I have  
16 not misspoken. No, I have not been kicked, so all is well.

17 Mr Cook, is there anything you want to add in light of that?

18 **MR COOK:** No, Sir.

19 **MR JUSTICE MARCUS SMITH:** Mr Kennelly, this doesn't really concern you except  
20 in the general abstract principle that I have just articulated.

21 **MR KENNELLY:** Indeed, and we are grateful for your indications.

22 **MR JUSTICE MARCUS SMITH:** Ms Smith, nothing more to say?

23 **MS SMITH:** No, Sir.

24 **MR JUSTICE MARCUS SMITH:** Very grateful. Well, we will proceed in that way.

25 **MS SMITH:** Sir, it may be that the next issue is also addressed by the indications you  
26 have just given. It's issue 23 on the list of issues, which is addressed in paragraph 17

1 of our skeleton argument.

2 This issue 23 you'll see is about how the Mastercard rules would have changed in the  
3 quantum counterfactual. This is Mastercard's argument that had there been, if the  
4 relevant counterfactual, for example, is no MIF pre-IFR, at least, if the relevant  
5 counterfactual is no MIF, how would the scheme rules have been different?

6 That is subparagraph (a) and then (b) of issue 23, would any changes have led to  
7 higher costs of the claimants during the claim period and, if so, what. Subparagraph  
8 (c) in light of above what loss (if any) have the claimants suffered?

9 No, my Lord, the position simply here is that as regards changes to the Mastercard  
10 rules in the quantum counterfactual, it is still unclear to us, the claimants,  
11 precisely -- part of column three, as you'll see, that's in dispute is whether there should  
12 be documentary disclosure on these issues not only from Mastercard but also the  
13 claimants.

14 Again we simply have not been able to agree this on our part because Mastercard has  
15 not made clear, and I quote, "precisely what disclosure it will be seeking from the other  
16 party or parties" as it is required to do under paragraph 2(h)(ii) of your March 16 order.  
17 So at the moment as this is a question about what changes there would have been to  
18 the Mastercard rules in the quantum counterfactual, still it's unclear what disclosure  
19 could be required in that regard from the claimants.

20 **MR JUSTICE MARCUS SMITH:** I see. Thank you.

21 Mr Cook, again I think it's over to you.

22 **MR COOK:** Sir, and again just your guidance on this may be the answer to whether  
23 we need to deal with anything today at all insofar as we are getting into points of detail  
24 about disclosure orders in due course, I have set out at paragraph 44 of my skeleton  
25 argument for this hearing what it is we seek under these categories, what we are  
26 looking at here is issue 25 and that includes a number of different aspects. One, how



1 Mastercard --

2 **MR JUSTICE ROTH:** Issue 23.

3 **MR COOK:** 23, sorry, I misspoke. Yes, issue 23. Firstly, it's how the rules might have  
4 changed and one example would be fraud. Rather than issuers being responsible for  
5 paying for fraudulent transactions, which after all are not by their cardholders by  
6 definition, you simply have a rule that said they are not required to pay for fraudulent  
7 transactions, which would put the loss on to acquirers and perhaps in turn the  
8 merchants, then the first step is undoubtedly what would Mastercard have done, which  
9 is for Mastercard to show by reference to its own evidence.

10 There's then a second stage and this is subparagraphs (b) and (c), which is (b) is  
11 "would any such changes have led to higher costs for the Claimants... and if so, what?"  
12 And in relation to fraud being an example, we establish for the sake of argument that  
13 we would have changed the fraud rules. The question of how much that would have  
14 increased costs at particular claimants is something that ultimately is going to depend  
15 on evidence from the claimants about what proportion of transactions were fraudulent,  
16 those matters like that.

17 So we just say that those are points that clearly the evidence is going to be in the  
18 hands of the claimants but the detail of that is a matter for another day it sounds, Sir.

19 **MR JUSTICE MARCUS SMITH:** I think we are heading towards a resolution of this  
20 but I will hear, if he has anything to say, from Mr Kennelly and then Ms Smith very  
21 briefly but I won't detain the parties any longer from their submissions.

22 Mr Kennelly.

23 **MR KENNELLY:** I have nothing to add, Sir.

24 **MR JUSTICE MARCUS SMITH:** Ms Smith?

25 **MS SMITH:** Nothing further to say in that regard, Sir.

26 **MR JUSTICE MARCUS SMITH:** What I am going to do is provide an indication and

1 see if I get kicked from either of my colleagues from going too far. It seems to me at  
2 least this is a point that lies at the cusp of column three versus column four. So column  
3 three required an articulation of what documentary evidence would be relied upon  
4 stating how it is proposed that the relevant documents are going to be identified and  
5 then column four was to set out with sufficient specificity to enable the Tribunal to deal  
6 with the point what disclosure order was required.

7 Now, we are not yet at the column four stage. We are at the column three stage and  
8 it seems to me, subject to what my colleagues think, that provided the words "and the  
9 Claimants" are understood as not foreclosing an argument from Ms Smith there should  
10 be no such disclosure but equally making clear that Mastercard can seek such  
11 disclosure and if there is a dispute it will be resolved by the Tribunal, we can leave  
12 those words in on that basis.

13 So Mastercard's position is clear. They consider that disclosure from the claimants  
14 may be required. Ms Smith's position is clear, subject to further articulation they don't  
15 understand such disclosure to be necessary. Well, for column three purposes that  
16 seems to us to be clear enough. We may have to deal with a more articulated dispute  
17 in due course.

18 **MS SMITH:** Thank you.

19 **MR JUSTICE MARCUS SMITH:** Does that help?

20 **MS SMITH:** Yes, Sir. On that basis I think we can deal with issue 25, which is  
21 addressed in paragraph 18 of our skeleton and paragraph 45 of Mr Cook's skeleton  
22 for Mastercard, very quickly.

23 Issue 25 is about how -- this is the challenged rules, what we've called the  
24 non-steering rules but what the schemes have called the challenged rules, how would  
25 the claimants have operated, in the absence of those rules how would the claimants  
26 have operated their businesses differently, would they have operated their businesses

1 differently in the counterfactual and then there are various ways in which they assert  
2 that they may have operated their businesses differently, refusing to accept certain  
3 categories of cards, and imposing surcharges.

4 In paragraph 45 of his skeleton argument, counsel for Mastercard has identified that  
5 Mastercard -- the dispute, sorry, the dispute was whether any useful factual witness  
6 evidence could be produced by Mastercard as well as the claimants. Mr Cook has  
7 clarified that Mastercard has relevant evidence to give about the scale of acceptance  
8 of payment cards and the prevalence of surcharging. In light of that clarification, we  
9 have confirmed that we agree to them putting in factual witness evidence in that  
10 regard. So we agree to the inclusion of the blue words "and Mastercard" in column  
11 three of issue 25.

12 **MR JUSTICE MARCUS SMITH:** Thank you very much, Ms Smith.

13 Mr Cook, in those circumstances I won't hear from you. Thank you.

14 **MS SMITH:** The next issue is issue 26.

15 **MR KENNELLY:** May I just cut in briefly because I am not sure that my learned friend  
16 is aware that we've agreed this on the Visa side, that may assist my learned friend in  
17 the sense that we've agreed that sampling is appropriate. How that will be done will  
18 be addressed as part of the column four process but I think to that extent we now have  
19 agreement with the claimants.

20 **MR JUSTICE MARCUS SMITH:** Ms Smith, is that fair?

21 **MS SMITH:** 26?

22 **MR JUSTICE MARCUS SMITH:** Yes, 26.

23 **MS SMITH:** Fine, that's a very useful indication. Yes, those words "appropriately  
24 decided sample thereof" appear a number of times in correspondence, but we are  
25 grateful for that indication.

26 **MR JUSTICE MARCUS SMITH:** Thank you, Mr Kennelly. Much obliged.

1 **MS SMITH:** Then I think there are only two issues that remain before lunch  
2 which -- well, there will be other issues but two issues in column three. Issues 31 and  
3 34.

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MR KENNELLY:** Again just cutting in, issue 27 from the Visa side, I think that's  
6 agreed but that's on the list.

7 **MS SMITH:** Thank you.

8 Issue 31, sorry, I don't think is agreed unless there is anything else before we get to --

9 **MR JUSTICE MARCUS SMITH:** My issue 27 actually does not have any green or  
10 blue at all so I am very glad it's been agreed because I can't actually see the extent of  
11 the --

12 **MR JUSTICE ROTH:** The economic evidence.

13 **MR KENNELLY:** We need permission to adduce economic evidence on that point,  
14 and I don't think there's any opposition to our adducing economic evidence. That's  
15 why we've put in the amendment.

16 **MR JUSTICE MARCUS SMITH:** The next issue, Ms Smith, was issue 31, did you  
17 say?

18 **MS SMITH:** Yes, you'll see on 31 this is about interest.

19 **MR JUSTICE MARCUS SMITH:** Yes.

20 **MS SMITH:** Visa, issue 31 is about interest. Their point about quantum analytics  
21 we've addressed, which is the green. The point about documentary disclosure from  
22 the claimants is an issue that's sought to be included by the schemes. We have not  
23 addressed that.

24 Interest is issue 31.

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MS SMITH:** I understand from paragraph 15 of Visa's skeleton argument that they no

1 longer seek disclosure from the claimants on the issue of interest. Mastercard's  
2 position is set out in paragraph 46 of their skeleton argument where they say -- you'll  
3 see in paragraph 46:

4 "The Tribunal's settled practice is to award a rate of simple interest that is to some  
5 extent compensatory."

6 So they may need disclosure in that regard. Our position is set out in paragraph 21 of  
7 our skeleton.

8 Sorry, it's issue 31. Not addressed in our skeleton and I can't now recall whether that's  
9 been addressed in correspondence or not.

10 **MR JUSTICE MARCUS SMITH:** Just take us through your submissions as they stand  
11 now and we won't worry about where it's written down.

12 **MS SMITH:** This is where the problem lies. I am not sure we've actually specifically  
13 addressed that point in our submissions. Perhaps if I could come back to issue 31.

14 **MR JUSTICE MARCUS SMITH:** Yes, of course.

15 **MR COOK:** If I could cut in, I think I could probably short-circuit this, Sir. I think it's  
16 one of those areas whereby teasing out the issues in the way we have, sometimes it  
17 creates more problems than -- it's very useful, but on this issue at least it may have  
18 created more problems than it solved. Because issue 30 is about compound interest  
19 and it's common ground there that where the claimants are saying they incurred  
20 additional financing costs or lost return on capital, they will need to give disclosure of  
21 documents on those issues.

22 Then issue 31 is simple interest, which to some extent is a heavily related question  
23 and in practical terms it's difficult to see the documentary disclosure that one could  
24 seek on that would be any different; if anything, it's probably likely to be narrower, so  
25 I think as a practical matter the question of interest, which is issues 30 and 31, it's  
26 common ground there will be some disclosure and I don't think I am suggesting that

1 subparagraph (iv) in column three of 31 is going to take us any wider than what it's  
2 agreed we will already get on issue 30. So I think it's something of a storm in a teacup  
3 perhaps, Sir.

4 **MR JUSTICE MARCUS SMITH:** Yes, can I suggest, again I am looking across the  
5 room, that (iv) as probably should not be but (iv) in issue 31 simply refers to  
6 documentary disclosure that's no wider than that that arises in relation to issue 30.

7 **MR COOK:** Sir, I can't see how that could present a problem.

8 **MR JUSTICE MARCUS SMITH:** That makes things clear, Ms Smith, doesn't it?

9 **MS SMITH:** We are happy with that Sir, yes.

10 **MR JUSTICE MARCUS SMITH:** Yes, I am seeing nods. We'll make that change then  
11 to issue 31. So issue 34, is that the next one?

12 **MS SMITH:** I'll move on from that storm in a teacup to possibly another storm in  
13 a teacup, which is issue 34. This is about relevant limitation periods claims in respect  
14 of non-UK domestic MIFs. The position here is that everyone agrees there should be  
15 expert evidence on foreign law as to the limitation periods. Mastercard alone now  
16 I understand also seek to put in the ability to get factual witness evidence on the basis  
17 that it might, I think this is their position but Mr Cook will correct me if I am wrong, the  
18 claimants do not currently plead knowledge as regards limitation periods, non-UK  
19 limitation periods but if we do in future amend to plead a knowledge issue as regards  
20 non-UK limitation periods, then there may need to be factual witness evidence at that  
21 stage.

22 I think that is the point. Our answer to that has always been: well, if and when that  
23 becomes an issue then this might be an appropriate point at which to say that witness  
24 evidence is necessary but it's not an issue at the moment.

25 **MR COOK:** Sir, this arises from the fact that Mastercard knows that there are  
26 a number of other claims that are due to be served over the next few weeks where the

1 claim forms at least have not yet been served on us, they may be being sent to us for  
2 information purposes, if not they are otherwise available, do indicate that they are  
3 going to raise issues in relation to multiple foreign jurisdictions. I would say in the past  
4 that's happened and when people come to actually plead their claims they drop some  
5 of the foreign jurisdictions because Liechtenstein, for sake of argument, is not  
6 something that's going to be a particularly valuable one and people choose not to  
7 pursue it for that reason.

8 But at the moment at least it appears there will be claims that raise a lot more  
9 jurisdictions and we were concerned about having a list of issues that might be rapidly  
10 superseded by events. So it was simply identifying the fact that if this does become  
11 an issue, it will be sensible for there to be provision. Clearly if no one raises  
12 a section 32 analogue or under the relevant foreign law the test is not  
13 knowledge-driven in the same kind of way, we are not going to put evidence in on it  
14 because there will be nothing to put evidence in on but that, Sir, is the reason why it's  
15 there. It does not arise at the moment. There's at least a realistic possibility it might  
16 do over the next few weeks or months.

17 **MR JUSTICE MARCUS SMITH:** These additional claims, are they  
18 Humphries Kerstetter and Scott+Scott claims or are they other solicitors?

19 **MR COOK:** They are Scott+Scott and Stephenson Harwood, Sir.

20 **MR JUSTICE MARCUS SMITH:** Right.

21 **MR JUSTICE ROTH:** Can I just interject. If it's a separate category in column three,  
22 and if the purpose or the potential purpose of evidence is about what is, as  
23 I understand, if I am right from the summary, public knowledge of facts relevant to the  
24 cause of action, i.e. people should have known about the claim because of what was  
25 in the public domain, that might be documentary evidence, not just factual witness  
26 evidence, might it not?

1 **MR COOK:** Sir, I think that's almost certainly a fair point on the basis that it's going to  
2 need to be public domain material of one kind or another for us to be able to say they  
3 should have picked it up. In most cases we can probably find that public domain  
4 material. I don't imagine there are going to be many examples where somebody  
5 says: I remember there being an article but I can't now produce a copy of it. So, yes,  
6 the witness evidence at least will simply be marshalling documents that are in the  
7 public domain, and you are probably right to say, Sir, that we are at fault for not having  
8 separately identified our own disclosure as being the primary source of this, Sir.

9 **MR JUSTICE ROTH:** It's not a criticism, but just if we are distinguishing factual  
10 witness and documentary evidence you mind want to amend it to say documentary  
11 and maybe factual evidence.

12 **MR COOK:** Thank you, Sir. That's indeed a fair clarification point that we should  
13 make.

14 **MS SMITH:** Just to make it clear, my instructions are there are no further claims  
15 coming from the Scott+Scott claimants. It may be that there are (audio distortion) from  
16 Stephenson Harwood.

17 **MR JUSTICE ROTH:** You are cutting out, Ms Smith.

18 **MR JUSTICE MARCUS SMITH:** Could you repeat that, I'm so sorry.

19 **MS SMITH:** No, I understand. My instructions, just off camera, were that there should  
20 not be any further claims coming from Scott+Scott claimants. It may very well be that  
21 there are further claims coming from the Stephenson Harwood claimants.

22 **MR JUSTICE MARCUS SMITH:** You faded out again, Ms Smith.

23 **MR COOK:** I think Ms Smith was saying that there are no more Scott+Scott claims  
24 coming, and I think that is right. It's Stephenson Harwood are coming. In relation to  
25 the other ones, we have had some Scott+Scott claims very recently, and obviously  
26 this document predates that and we are in the process of reviewing some of the new



1 | claims that have come in.

2 | **MR JUSTICE MARCUS SMITH:** What we are going to say -- and again I will look  
3 | across the room to make sure I am not cutting across disagreement -- is that the words  
4 | in (iii) should go out because they are not triggered by anything that is in, as it were,  
5 | the jurisdiction of the issues at the moment.

6 | But, to be clear, though we regard the list of issues as being something that is set  
7 | pretty firmly in terms of the issues defined, we don't want the parties going back and  
8 | revisiting them, where there is a new claim or claim that has not been considered in  
9 | these documents that raises a different issues it will be sensible to incorporate it in the  
10 | structure of these list of issues and to have a document that is a useful ambulatory  
11 | document going forward.

12 | So on that basis, that it isn't triggered by what is going on at the moment in terms of  
13 | claims that are before the court but may be in the future, we think that we can safely  
14 | take out those words for the present, but they may be making a resurrection, albeit  
15 | perhaps in a slightly different form, in a future version of this document.

16 | Very good. Was that the last of the issues on the list of issues?

17 | **MS SMITH:** Looking, Sir, at the agenda for today's case management conference,  
18 | I think that is the last point under agenda item 1.

19 | Agenda item 2 and agenda item 3 are about consequential directions as regards  
20 | expert evidence and consequential directions as regards witnesses of fact. Given  
21 | what, Sir, you said about sampling, issue 3 certainly may be an issue we need to revisit  
22 | when other claimants are represented. It's probably -- and also will need to be  
23 | revisited I think in light of whatever the Tribunal may indicate is its approach to the  
24 | future conduct of the proceedings, agenda item six. I think it's probably likely that  
25 | agenda item 2, consequential directions for expert evidence, can most usefully be  
26 | revisited at that stage as well, unless anyone disagrees.

1 What I was going to propose to deal with, tick off -- I think we can tick off agenda  
2 item 1. We can probably with the present counsel representation also tick off agenda  
3 item 4, which is the impact of the Court of Appeal's recent judgment in the June  
4 proceedings on the list of issues.

5 You will have seen from the parties' skeletons that my clients and Visa and Mastercard  
6 have amended the list of issues to reflect the fact that the Humphries Kerstetter  
7 claimants' appeal to the Court of Appeal on summary judgment failed and it is not  
8 going to be renewing its application for permission to appeal to the Supreme Court.  
9 So we've reached the end of the road on the summary judgment issues. In light of  
10 that, the parties have agreed the necessary amendments to the list of issues to reflect  
11 that.

12 The only outstanding dispute in that regard on the amended list of issues is issue 4.1.  
13 If I could ask you to turn back to issue 4.1.

14 **MR JUSTICE MARCUS SMITH:** Yes.

15 **MS SMITH:** This is whether there should be -- this point relates to whether the facts  
16 of the claimants' claims in relation to inter regional MIFs can be distinguished from the  
17 essential factual basis of the Court of Justice Mastercard decision.

18 The question there, what's in dispute in column three is whether there should be  
19 documentary disclosure from not only the defendants but the claimants of their  
20 merchant service agreements and related data. Our point simply in our skeleton, at  
21 paragraph 27 of our skeleton, is that it's not clear to us how that disclosure by  
22 claimants of their merchant service agreements may be relevant to issue 4.1, that is  
23 the factual differences between domestic MIFs and inter regional MIFs, it's not clear  
24 to us how the merchant service agreements may be relevant and also related data  
25 has not been adequately identified by the schemes in this regard.

26 So it's simply a lack of clarity as to how the claimants' disclosure of these MSAs could

1 be relevant to this particular issue.

2 **MR JUSTICE MARCUS SMITH:** Well, Mr Kennelly, Mr Cook, the question is really  
3 how far the indications that we've given during the course of this morning assist in  
4 removing this as a bone of contention in column three. So perhaps you could address  
5 that, as well as any other points that you have in relation to this final question.

6 I don't know who is going first? Is it Mr Cook, to stick with the last one, or Mr Kennelly?  
7 Mr Cook.

8 **MR KENNELLY:** I am going to quickly take instructions based on what you've just  
9 said. Maybe Mr Cook wants to do the same thing.

10 **MR COOK:** I am probably very happy, given the time, Sir, just to set out the position.  
11 I think from our perspective again this is one of those areas where breaking it down  
12 has perhaps had some issues, which is there is much more common ground in relation  
13 to something like effect, which is issue 4.3, whether inter regional MIFs have an effect  
14 of appreciably restricting competition and there seems to be far less disagreement in  
15 relation to that. There's an acknowledgment that the claimants will have to provide  
16 data for the experts to acknowledge and also documentary disclosure.

17 On that basis, and given the guidance the Tribunal has given that essentially you are  
18 not closing out or confirming anything is particularly disclosable at this stage, I am not  
19 sure there is a need to take this any further for present purposes. I am not sure this  
20 is going to end up being a disagreement about more than which box the same  
21 documents need to be disclosed into or under perhaps.

22 **MR JUSTICE MARCUS SMITH:** I am grateful, Mr Cook.  
23 Mr Kennelly.

24 **MR KENNELLY:** Indeed, and for the very same reason I am not going to press this  
25 point, because it may be that there is no dispute between us at all and if there is it's  
26 something that can be resolved I think at a later stage, based on the indications given

1 by you, Sir, earlier.

2 **MR JUSTICE MARCUS SMITH:** Ms Smith, on that basis possibly we might be minded  
3 to keep these words in, but that is very much on the basis that the matter will be  
4 revisited with greater clarity, either when column four is being populated with greater  
5 detail or then it must be a specific application for disclosure, but we are not in the  
6 business of irrevocably closing out or including in points which have yet to be fully  
7 fleshed out.

8 On that basis, is there anything you need to say in reply?

9 **MS SMITH:** I'm obliged. No, Sir.

10 **MR JUSTICE MARCUS SMITH:** Thank you very much. I think that concludes  
11 everything that we can helpfully deal with between the parties that are before us now.  
12 Ms Smith, as you have quite rightly indicated there are going to be a number of  
13 questions about sampling, factual witnesses, expert witnesses, but given that we are  
14 going to be articulating what we hear next and when and, most significantly, who in  
15 addition to the parties represented before us now will be in, it seems to us that those  
16 are issues that will have to be addressed in the round and it would be not only pointless  
17 but also pretty unfair for us to be dealing with them without these additional parties  
18 being present.

19 So, unless there is anything more, we will rise until 2 o'clock.

20 **MS SMITH:** Sir, that's extremely useful. That sweeps up -- we were instructed to  
21 address items 1 through to 5 of the agenda. I have already explicitly referred to items  
22 2 and 3, that we'll come back to those once you've given your indication on the future  
23 conduct of the proceedings.

24 I anticipate that also item 5, which is the approach to column four of the list of issues,  
25 could again most usefully be addressed once we have a clearer view of the structure  
26 of the future conduct of the proceedings.

1 I am taking it that items 2, 3 and 5 can be revisited once we've in effect addressed  
2 issue 6.

3 **MR JUSTICE MARCUS SMITH:** I think that's fair enough. Yes, we will proceed on  
4 that basis and resume then at 2 o'clock. Thank you very much. We are all very obliged  
5 to all of you for your assistance, but we'll rise until then.

6 **MR KENNELLY:** Thank you.

7 **(1.14 pm)**

8 **(The luncheon adjournment)**

9 **(2.00 pm)**

10 **MR JUSTICE MARCUS SMITH:** Before I say anything more, can I check we have  
11 good communications. Mr Bowsher, I will pick on you at random. Can you hear me  
12 and see me clearly.

13 **MR BOWSHER:** I can hear you but I can't see you. I don't know if that's my problem  
14 or yours. Yes, I can see you now.

15 **MR JUSTICE MARCUS SMITH:** Very good. Everyone else is looking reasonably  
16 calm and happy so I am going to assume that you can also hear us. Good. I am very  
17 grateful.

18 I am going to reread the standard form of wording because we have additional parties  
19 joining us. These proceedings are being livestreamed and are being heard and dealt  
20 with remotely but they are proceedings as if they were being conducted physically in  
21 Salisbury Square House. A transcript will be prepared but no one else is to record or  
22 transmit or photograph these proceedings and a breach of that rule would have  
23 serious consequences. I am sure no one will do that.

24 So thank you very much. We have spent this morning dealing with various issues  
25 arising out of the list of issues and although on one level that only concerns the parties  
26 to the claims that were before us, we do consider that it is quite likely that other parties

1 who have not contributed to the list of issues will have an interest in them in due  
2 course. That is because we see these list of issues as operating in the manner of an  
3 articulation of points in issue for whatever stage of the trial we are dealing with and  
4 may constitute an appropriate ersatz form of pleading that so one can define what is  
5 in issue by reference to this list and supplement it if necessary by saying these are the  
6 issues that are in play but you should also look at the following points, to minimise the  
7 reliance by both the parties and the Tribunal on the pleadings in the full sense.

8 We would very much want to refer to those only when absolutely necessary and that's  
9 because simply there is so much going on by way of additional pleadings that we don't  
10 really want to have to go through them all for each and every issue that may be  
11 common across the parties.

12 So we'd ask the parties to bear that in mind. That does mean of course that we would  
13 be open to expanding and varying and adding to the list of issues according to need.  
14 We are obviously not going to shoehorn other parties to what has been discussed  
15 without them this morning.

16 So that is the first general point. There is another general point which I will raise before  
17 we come to some thoughts we've had about how we deal with future issues in general  
18 and it's this. We've had submissions regarding what we do with the contingent CPO  
19 applicants, if I can, Mr Bowsher, label your clients in that way. We have heard what  
20 is there said. We understand that there is a quite understandable reluctance to make  
21 any significant orders in relation to the conduct of applications for collective  
22 proceedings orders that have yet to be heard and we understand that.

23 What I am minded to do, we won't make orders about this, but we are minded to ensure  
24 that there is a case management conference in the applications for CPOs in these  
25 interchange fee proceedings heard before Mr Tidswell in the course of December,  
26 dates to be sorted out, but that is our aspiration. We will obviously hear from the

1 parties on this. Nothing I am saying is intended as an order, it's intended as a guide  
2 to what we are thinking but that would be one way of ensuring that we are funnelling  
3 the CPOs towards an outcome in the applications as quickly as we possibly can. So  
4 that's a date I'd ask the parties to those proceedings or to those applications to bear  
5 in mind.

6 That brings us to the question of broadly speaking where we go forward and with whom  
7 we go forward. We understand there is already in the diary three Merricks hearings  
8 next year, two of which are not massive but one of which is really quite large which is  
9 taking place just before the summer is what I understand. I see Ms Wakefield  
10 nodding. Again, please correct me in due course if I am wrong on any of this.

11 What we have provisionally thought might be a good idea is to have two trials in these  
12 proceedings in the course of 2024. Trial one scheduled for as early as possible in  
13 2024 would essentially be Chapter I prohibition.

14 Now, we are very open to discussing what else goes in that, whether that be limitation  
15 questions or the question of acquirer pass-on. But the one thing that our provisional  
16 thinking leads us towards is that it would not include the other bigger pass-on, which  
17 would be the subject of trial two.

18 Trial two, which we would have in mind for listing towards the end of 2024, October,  
19 November, not I think ideally December but October or November, would be the  
20 retailer pass-on and would take place, as I say, late in that year for reasons that I am  
21 going to come to.

22 Before I come to those reasons though, there is a question on which we'd be very  
23 grateful to hear from all of the parties, which is who apart from the parties to these  
24 claims ought to come into trial one and ought to come into trial two.

25 Now, I already know the answer I think on the Merricks claimants, that they would very  
26 much want to come into trial two. A harder question is who would come into trial one

1 and it might be that the applicant CPOs would want to consider their position on that.  
2 I don't know enough about the claims to work it out but we would want to have some  
3 sort of mechanism for ensuring that the trial one, and also trial two but trial one raises  
4 the difficult questions, was appropriately populated with appropriate parties. In other  
5 words, we'd want the parties all to think about what ubiquitous matters arise in respect  
6 of trials so configured so that we can have common issues dealt with commonly.  
7 Now, the question is why have we considered that pass-on, provisionally speaking,  
8 ought to be at the back end of 2024 when the indication last time was that we were  
9 considering it for the front end of 2024. The reason as we see it at the moment is  
10 this: although we had heard something about the evidence that is going to be adduced  
11 in the pass-on by the claimants in the proceedings that are before us at the moment,  
12 it is quite clear that there is going to be a significant set of case management issues  
13 about selection of witnesses and expert evidence.  
14 So to be clear, because although Ms Smith and Mr Cook and Mr Kennelly know all  
15 this, the other parties won't, we've been given a fleshed-out column four list of issues.  
16 Now, that sounds like one for the aficionado of list of issues but what is clear is that  
17 there is a significant set of evidential questions as to who comes to the pass-on trial  
18 to give evidence.  
19 What Ms Smith has done in the articulation of the evidence that she would want to  
20 adduce is to provide essentially a list of a person from each and every claimant who  
21 is on her list of claimants, which results in a list of some 500-odd people as far as  
22 I could tell.  
23 Now, to be fair to Ms Smith, she is not saying that each and every such person should  
24 be called. What she is saying is that there will in due course be a process of sampling  
25 so that one cuts down the number of claimants from let's say 500-odd to some other  
26 figure.



1 Additionally, there may be expert evidence going to industry practice so that the  
2 question of pass-on can be addressed from the angle of industry experts either in  
3 addition to or possibly in substitution for the factual witnesses.

4 We don't know, because the parties are still working out who will be called, how many  
5 experts that would entail and that will be on top of the economists.

6 Now, I articulate all this not to say anything about the answer to these questions.  
7 I articulate these points because we clearly have at the moment an unmanageable set  
8 of propositions for a pass-on trial. On any view what is being listed, recognising fully  
9 that those lists will be cut down, on any view a trial with those dimensions is un-triable.  
10 It underlines the determination expressed by this Tribunal on a number of other  
11 occasions that these pass-on claims will need to be case managed within an inch of  
12 their lives. But that involved significant questions of a fair trial and a fair process.

13 What we had in mind was a process which was, as it were, expert-led. In other words,  
14 one would have economists and industry experts nailed down in terms of number,  
15 speaking to these questions and articulating what they would need by way of  
16 disclosure and factual evidence in order to make good their respective cases.

17 That is, to be clear, a controversial matter and not something that we are minded or  
18 indeed in a position to decide today. It does seem to us however quite clear that there  
19 is going to be something of a row about this because we think that the parties  
20 approached this from a spectrum of different views. It may be that at one extreme  
21 Merricks and Ms Wakefield sit, at other end of the extreme Ms Smith sits and then  
22 I think we can have Mastercard sitting adjacent to Ms Smith and Mr Kennelly sitting  
23 between Ms Wakefield and Mr Cook. I may have got that wrong but that's how it  
24 seems at the moment.

25 In any event we are going to have to sort out how this thing is tried and what we had  
26 in mind was a three-day hearing, if three days is appropriate, listed sometime next

1 year. My sense is before the summer but I understand that would give difficulties to  
2 Merricks. Possibly after the summer in 2023. But to resolve how exactly one is going  
3 to try the very difficult issues in terms of what evidence we are prepared to hear and  
4 what evidence we are not prepared to hear.

5 The reason we have a gap of hopefully 12 plus months is this: first of all, it will be  
6 necessary to do the hard yards after this hearing rather than before because it will be  
7 necessary for the parties to adduce evidence that is in line with what we have ordered.  
8 Equally it's going to take some time to work out exactly what each party is proposing  
9 by way of the evidence that they want to call.

10 Finally, which is why we thought of the middle of 2023 as the appropriate date for this,  
11 there's the prospect of an appeal. Let's imagine the most extreme situation where we  
12 say to Ms Smith: I am sorry, we are only going to hear from people of fact to the extent  
13 that the experts want to hear from them, we are not going to entertain factual evidence  
14 apart from that. Well, that may be an outcome that we reach. I am not saying we will.  
15 But that could quite possibly want to be challenged on appeal and one can see why  
16 that would be an appropriate course.

17 So it seems to us there needs also to be enough of a gap between this hearing and  
18 the trial of the pass-on issues, which is why we've put it at the end of 2024, October,  
19 November, as I said.

20 Now, these are very much preliminary thoughts and what we thought would be  
21 appropriate, me having now spoken for 20 minutes, would me for me to shut up, give  
22 the parties an opportunity to think about these things and see how hard they want to  
23 push back on the in-principle configuration of this and also to think about if they are in  
24 agreement with the in principle configuration how the many detailed questions which  
25 arise out of it need to be addressed.

26 So without more, I will hear from any parties on objection to this course. I see

1 Ms Smith raised a hand. I will hear from anyone on that front but otherwise we'll rise  
2 for I think 20 minutes to enable the parties to think things through. But I don't want to  
3 cut anyone off. Ms Smith, over to you first.

4 **MS SMITH:** Sir, it is simply one point of clarification. I hope you can hear me a bit  
5 better, I have changed my laptop, so my microphone is better I hope.

6 **MR JUSTICE MARCUS SMITH:** Yes, indeed.

7 **MS SMITH:** One point of clarification, which is where exemption issues under  
8 Article 101(3) fit into this proposal, whether they are going to be kicked off for a trial  
9 three or whether they are anticipated to be included in trial one, Chapter I prohibition.  
10 That is simply that before I take instructions that would be helpful to have clarified.

11 **MR JUSTICE MARCUS SMITH:** No, Ms Smith, that's an excellent question. I have  
12 a squiggle here which I failed to read out, which is our provisional thinking is that the  
13 101(3) points and the dominance points would be kicked off to further matters. What  
14 we've focused on is 101(1) and pass-on as being the two areas that will make a big  
15 difference in terms of who drops out and, if appropriate, providing a platform for  
16 settlement.

17 So, provisionally speaking, 101(3) is not covered by the 2024 trials, and I think I said  
18 we are up for debate about the fringes of these things, but I think we've given you the  
19 sense of where the tectonic plates are situated in our proposal but everyone should  
20 feel absolutely free to push back on either the tectonic plates or their individual shape  
21 and size.

22 Was there anyone else I failed to see having their hand raised? Silence all round.

23 Mr Justice Roth has a point. I hope it's not an objection.

24 **MR JUSTICE ROTH:** It's certainly not an objection. It's just a point that when you are  
25 taking instructions you might helpfully want to consider, with regard to the Article 101  
26 trial that the President has referred to, is what to do about this rather bewildering array

1 of non-UK/non-Irish domestic MIFs in our list of issues, they are at issue 6 but I have  
2 not counted the number of countries involved, but whether it's appropriate, effective  
3 and efficient to include any of those in the trial one that the President has referred to  
4 and, if so, which. Are there any countries which are really significant or should they  
5 all be, as it were, put back to after we deal with the UK/Irish MIFs?

6 **MR JUSTICE MARCUS SMITH:** Again, I'm very grateful for that. That's an extremely  
7 helpful clarification.

8 So we will rise until 2.40. If anyone needs more time, then we will be inclined to give  
9 it because we think these discussions outside court do assist in getting better  
10 outcomes in court.

11 So we will rise for 20 minutes and we will switch off our cameras now. Thank you all  
12 very much.

13 **(2.22 pm)**

14 **(A short break)**

15 **(2.50 pm)**

16 **MR JUSTICE MARCUS SMITH:** Good afternoon everybody. Just checking that  
17 everybody can hear us. Mr Bowsher, that's excellent. What I am going to do is I am  
18 going to invite responses first in the order that we heard this morning, that's to say  
19 Ms Smith and then everyone else can pitch in in the order that I hope they have  
20 a vague idea as to when they should come in but I will sort any car crashes as we go  
21 but Ms Smith first.

22 **MS SMITH:** Thank you very much, Sir. Your feed was breaking up a little, I hope you  
23 can hear me clearly.

24 **MR JUSTICE MARCUS SMITH:** Yes, thank you, I can. Do let me know if we do break  
25 up because I am anxious we all have good communications.

26 **MS SMITH:** I will do that. So if I can kick off in light of the indication from the Tribunal

1 as to the suggestions for a trial one and a trial two.

2 We agree that there should be a trial one in early 2024 and that the Tribunal can hear  
3 and should hear in that trial one the Article 101(1) restriction points that relate -- the  
4 Article 101(1) restriction points, I will develop that point, but also we think it would be  
5 useful to hear in that trial we agree there should be Volvo limitation issues and acquirer  
6 pass-on.

7 As regards Article 101(1) and the Volvo limitation issues at the very least, I think it's  
8 agreed by all parties that these are common ubiquitous issues. I think it has also been  
9 agreed from the face of the skeletons that it would be efficient case management to  
10 hear these issues first, at least maybe Visa does not agree with that and we'll hear  
11 what they have to say nor does Merricks but I think everyone else agrees that at least  
12 as regards 101(1) and Volvo these are common ubiquitous issues that can efficiently  
13 be heard before the other issues.

14 Just in summary, the reasons why we say that is particularly after the Dune claimants'  
15 application for summary judgment as regards the post-IFR counterfactuals and  
16 interregional MIFs failed before the Court of Appeal, this Tribunal will need to establish  
17 at a full trial whether there's a restriction under Article 101(1) after the introduction of  
18 the interchange fee regulation and as regards other types of MIFs.

19 I will come back to the non-UK domestic MIFs but as regards interregional MIFs.

20 If, contrary to our case, the schemes succeed in establishing there is no restriction  
21 under 101(1) in these regards, that is as regards the position after the introduction of  
22 interchange fee regulation and as regards interregional MIFs, then the claims are  
23 substantially reduced, our claims are substantially reduced. For example, there will  
24 be no claims for MIFs paid after December 2021 if there is no 101 restriction after the  
25 introduction of the interchange fee regulation and there will be no claims as regards  
26 interregional MIFs if there is no restriction under 101(1) in that regard.

1 So the 101(1) issues from the point of view of efficient case management we think  
2 should be dealt with at an early stage in trial one. They tell you when, up to when in  
3 effect the claims will subsist.

4 Similarly, we think that the Volvo issue, the determination issue should be heard as  
5 a preliminary issue because it will determine how far back in time the claims can go.  
6 It will determine the question of limitation. Mr Woolfe for the Stephenson Harwood  
7 claimants I think will, if necessary, explain further a little how the Volvo issue arises  
8 because it has been fully pleaded in his claimants' particulars. It has been pleaded in  
9 at least two of the particulars for my Scott+Scott clients. The Humphries Kerstetter  
10 claimants and some of the Scott+Scott claimants put in particulars before judgment  
11 was handed down in Volvo and so it's not been pleaded in those cases. We will need  
12 permission to amend to plead the Volvo limitation point in those cases. I think we have  
13 indicated that we will be seeking to plead that point effectively in the same way as has  
14 now been pleaded in the two Scott+Scott cases that have been recently lodged.  
15 Mr Cook referred to them this morning.

16 The amendments should not take long because they have already been done for at  
17 least two of the Scott+Scott claimants, so we will if necessary apply for permission to  
18 amend and can activate those amendments, can make those amendments very  
19 quickly.

20 But that's a side issue. So we say that we agree that trial one in early 2024 should  
21 address the Article 101(1) prohibition issues and the Volvo limitation issues. For the  
22 reasons set out in our skeleton we say the acquirer pass-on issues can be dealt with  
23 at that stage as well.

24 We do not think in light of what Mr Roth indicated, we do not think that it would be  
25 possible or proportionate or efficient or in fact probably possible to address the other  
26 non-UK MIFs at this trial one hearing. I think there are about 28 other jurisdictions that

1 have been pleaded at the moment. It's unclear at the moment to me how these  
2 schemes will address those but my experience, at the very least as regards Italian  
3 domestic MIFs which were canvassed in front of the Tribunal on the summary  
4 judgment application, this was not just a question of different limitation periods in  
5 different jurisdictions, it was a question of whether the market conditions in these  
6 different jurisdictions are different so that the non-UK domestic MIFs are not  
7 restrictions at all.

8 So I anticipate there may be extensive evidence for each of these non-UK domestic  
9 MIFs as to market conditions in those other jurisdictions, so at the moment we do not  
10 consider that those issues can efficiently or reasonably be addressed in the trial one  
11 in early 2024. But we will wait to hear what others have to say on that issue.

12 So at the moment we agree with the Tribunal that there should be a trial one in early  
13 2024 on the Article 101(1) issues that are still live. On domestic MIFs post-IFR, that's  
14 UK and Irish MIFs post-IFR, inter-regionals, commercial cards but not non-UK MIFs,  
15 Volvo limitation and acquirer pass-on because that bookends the claims. It determines  
16 then the extent of evidence that will need to be adduced subsequently for issues such  
17 as pass-on, quantum, Article 101(3), because evidence as to issues such as market  
18 conditions, the existence of merchant pass-on, that can reasonably be expected to  
19 change over time and also I anticipate can reasonably be expected to be different as  
20 regards different types of MIFs. So we need to know, in my submission, one, the time  
21 periods; two, the types of MIF that are at issue or that are actually restrictions under  
22 101(1) before we go on to produce the evidence and disclosure on quantum pass-on  
23 or 101(3) issues.

24 So we agree that it's both efficient to have a trial one hearing of these issues in early  
25 2024 and we also agree that they are ubiquitous matters. It would be wholly inefficient  
26 and disproportionate to adduce evidence and disclosure on quantum 101(3), pass-on,

1 before we know the temporal and substantive limits of the claims.  
2 So we need to establish the temporal and substantive limits of the claims, which we  
3 can do by having a first trial in early 2024 on Article 101(1) and Volvo limitation.  
4 Now, as I have already said, it was only Visa, and leaving to one side at the moment  
5 the position of Merricks, but it was only Visa that previously disagreed with this  
6 proposal that there be this initial trial of 101(1) and limitation. It not clear yet what  
7 Visa's position is. I will come back if I need to develop the points further on that. But  
8 at the moment those are my submissions on the trial one.  
9 As regards what we then do next -- sorry, before I leave 101(1) and trial one, we should  
10 put on the record, and again this reflects what's in our skeleton, that Visa's suggestion  
11 was that the 101(2) (sic) issue should be dealt with at the same time as 101(1). We  
12 agree I think with Mastercard and all other claimants who have expressed an opinion  
13 on this matter that we should not address Article 102 at all at this stage, definitely not  
14 in trial one. Article 102 is only pleaded as an alternative to Article 101(1). Importantly,  
15 it's not pleaded by all claimants. It's not a ubiquitous issue.  
16 It would involve extensive evidence in particular on dominance and market definition  
17 which are not necessary under Article 101(1) and which may never become  
18 necessary.  
19 So we say that Article 102 should not be dealt with in trial one or even trial two at this  
20 stage. It should be left to one side for the moment on that basis.  
21 As to what happens after trial one, in our submission, and again we maintain the  
22 position set out in our skeleton after having had the opportunity to discuss it, we do  
23 submit that the order of issues to be tried should then be the Article 101(3) exemption  
24 before we deal with merchant pass-on.  
25 I will just outline why we say that. We should address Article 101(3) before merchant  
26 pass-on for the following reasons. First, and I emphasise that I am addressing this



1 from the point of view of the claimants in the merchant umbrella proceedings, I will  
2 come to the position of Merricks and the consumer Class action which I submit strongly  
3 has to be kept distinct from the submissions I am making at the moment. It has to be  
4 kept distinct as well from the Tribunal's thinking, in my submission. I will explain why  
5 I make this point but the Tribunal needs to be careful not to let its inclination to deal  
6 with the Merricks Class action issues together with the umbrella proceedings issues,  
7 the Merricks Class action issues to some way drive how it deals with the umbrella  
8 proceedings, the merchant umbrella proceedings. I will explain why in a moment.

9 **MR JUSTICE MARCUS SMITH:** Sorry, let me try to assist you. We will obviously be  
10 hearing from Ms Wakefield on the Merricks side. What I would be grateful you could  
11 do is tell us what you think we should do. We will then give you an opportunity to tell  
12 us why we shouldn't do certain things. At the moment I have no idea what  
13 Ms Wakefield will be saying by way of what she contends goes into trial two. It may  
14 be that she has ideas that are consistent with yours but if she doesn't then we'll  
15 obviously ensure that everyone has an ability to push back on ubiquitous matters that  
16 derail their proceedings. We are very conscious that we have three streams of the  
17 (audio distortion) party here.

18 **MS SMITH:** Yes, our submission is that following the initial trial one on the  
19 Chapter I prohibition, Article 101(1) and Volvo issues, it would be sensible for the  
20 Tribunal to address 101(3) exemption before merchant pass-on for the following  
21 reasons.

22 First, merchant pass-on only becomes relevant at the quantum stage of proceedings.  
23 It only becomes relevant at the quantum stage of enquiry in the event that liability is  
24 established and any exemption case fails. So, the logical and standard approach is  
25 one has to establish a case and a restriction under 101(1) that is not exempted under  
26 101(3) and if there is no exemption under 101(3) then we move to the question of

1 damages and loss and quantum. Merchant pass-on is relevant to the question of  
2 damages, loss and quantum.

3 If the defendants are successful, if the defendant schemes are successful under  
4 Article 101(3) of arguing, which they do, that MIFs set at the level which they set them  
5 can be exempted under 101(3) because they give rise to these benefits to merchants,  
6 if the defendants are successful in establishing their case under 101(3), then it will no  
7 longer be necessary for the parties to seek any determination of quantum issues which  
8 include merchant pass-on issues.

9 Now, Visa's case on this is: well, we are going to have to look at the same issues  
10 under merchant pass-on as we are going to look at under 101(3) because the  
11 quantification of costs is relevant to the quantification of benefits under 101(3).

12 My points as regards that argument, and this is Mr Holt's sixth expert report, is first of  
13 all I agree with what is said in the Harcus Parker skeleton paragraph 13, that despite  
14 what Mr Holt says in his sixth report, there is no authority at all which suggests that  
15 merchant pass-on is relevant to the fair share condition in Article 101(3).

16 The Supreme Court made it clear in Sainsbury's that merchant pass-on is an aspect  
17 of quantification of loss. It's not an aspect of the 101(3) fair share condition.

18 More importantly perhaps, we are not dealing with the same questions. The  
19 Article 101(3) fair share condition considers whether the benefits to merchants as  
20 a whole arising from MIFs outweigh the costs to merchants as a whole arising from  
21 MIFs.

22 However, merchant pass-on is a claimant-specific matter. By that I mean it's a matter  
23 of determining each claimant's individual loss. Now, this may be established by taking  
24 a broad axe approach by reference to sector-specific evidence but it remains a matter  
25 of quantifying individual loss for particular claimants who are making particular claims.

26 As part of that quantification you ask whether those particular claimants making the

1 particular claims have passed on any of their loss. That's a different question from the  
2 fair share condition under 101(3), which is whether benefits to merchants as a whole  
3 across the economy arising from MIFs outweigh costs to merchants as a whole across  
4 the economy arising from MIFs.

5 So we do not agree that there is an overlap on the issues to be considered between  
6 101(3) and merchant pass-on.

7 **MR TIDSWELL:** Can I stop you and just understand what you are saying there. Are  
8 you saying that in order to determine the cost to merchants across the economy you  
9 don't have any regard to whether or not those merchants passed on some of the MIF.  
10 Are you saying it's not relevant to the question?

11 **MS SMITH:** No, this is again perhaps where I was -- the President said we don't want  
12 to worry about the UPO and the Merricks UPO at the moment, but this is where the  
13 fundamental difference between what we are trying to do in the umbrella proceedings  
14 is important because in the umbrella proceedings what we are doing is -- let's look at  
15 a position where the Class action, consumer Class action doesn't exist. What are we  
16 doing in the umbrella proceedings for the merchants? What we are doing in the  
17 umbrella proceedings for the merchants is we are establishing a restriction under  
18 101(1). We then need to see if there is an exemption under 101(3) and the evidence  
19 we get for an exemption under 101(3) will be looking at the four conditions that are set  
20 out in issue 14.3 in the list of issues.

21 Yes, there are four conditions, you are familiar with this, and those conditions, just to  
22 make sure I get it absolutely right, are: did/do the MIFs contribute to technical and/or  
23 economic progress, did they actually give rise to benefits to merchants as a matter of  
24 fact? That's the first condition. Second, the fair share condition: did/do they allow  
25 consumers to receive a fair share of resulting benefit versus the costs? Third: did/do  
26 they contain restrictions which are not indispensable to the attainment of those

1 objectives? Fourth: did/do the MIFs and/or rules afford the defendants a possibility of  
2 eliminating competition in respect of a substantial part of the products or services in  
3 question?

4 Now, if we were looking at just an Article 101(3) case, there are the four conditions  
5 that need to be fulfilled. Condition one: do the MIFs actually give rise to benefits to  
6 merchants such as cost savings to merchants? We see them set out in 14.3 (a) to (f)  
7 are the benefits that the schemes say arise from MIFs.

8 The schemes first have to establish whether there is a causal link or whether as  
9 a matter of causation the MIFs give rise to these sorts of benefits at all. That's  
10 condition one. We argue that they don't. The MIFs this is, not just cards use or card  
11 usage or card schemes generally, the MIFs have to give rise to particular benefits to  
12 merchants. So that's the first question where there is no overlap at all with the question  
13 of quantum or pass-on.

14 Condition three: are the MIFs restrictions that are not indispensable to the attainment  
15 of these objectives, these benefits? That's a question that is again not a point that  
16 Mr Holt says is in any way to do with pass-on. It's not a quantification issue.

17 (d): do the MIFs and rules afford the defendants a possibility of eliminating competition  
18 in respect of a substantial part of the products or services in question? Again, no  
19 possible overlap with the question of pass-on. Mr Holt says that (b), the fair share  
20 condition, there is an overlap between Article 101(3) and the merchant pass-on issue  
21 because when you are looking at fair share you need to balance the benefits to  
22 merchants versus the costs to merchants and he says in establishing the costs to  
23 merchants one needs to take into account pass-on.

24 We say, yes, but only insofar as it goes. For the purposes of 101(3), you look at  
25 benefits versus costs across the board. So you could see that the evidence you might  
26 put in for that issue might be very different from the evidence that you will put in for

1 the issue of determining whether the claimants in the umbrella proceedings, who are  
2 specified individual claimants even though there are many of them, this is not a Class  
3 action, it's a group of individual claims, 500 individual claims or 1,000 individual claims,  
4 still a tiny proportion of the market as a whole, but did those individual claimants pass  
5 on the MIFs?

6 The evidence you put into determining the question of whether those individual  
7 claimants passed on the MIFs may be quite different from the evidence you put in for  
8 the purposes of establishing the fair share condition for the purposes of Article 101(3).  
9 So we say our position is, our primary position is you can and should deal with 101(3)  
10 before you even get on to the question of quantum for the following three reasons. It's  
11 the logical order of the legislation, number 1.

12 Two, you will not be looking at the same evidence when you are addressing 101(3)  
13 even if you are looking at all three or four of the conditions including the fair share  
14 issue, you will be looking at different evidence at the 101(3) stage because you will be  
15 looking at the quantum and pass-on stage but in any event as an alternative fallback  
16 position and I think Mr Woolfe will develop this point but as a fallback position if you  
17 do believe that there will be an overlap between condition (b), the fair share condition  
18 aspect of 101(3), and merchant pass-on for the purposes of quantum, then what you  
19 should do as a fallback position is not jump immediately to a trial of merchant pass-on  
20 on quantum. You should have a trial of the other three elements of the 101(3) case.  
21 Because we argue that under the first element of the 101(3) case, the first condition,  
22 do MIFs actually give rise to any of these benefits to merchants, our argument is that  
23 they do not. There is no causal link between MIFs and the innovations pleaded.  
24 There's no causal link between MIFs and the cost savings to merchants. So you can  
25 address that point without having to quantify benefits or costs at all.

26 In fact, you can also consider the third and fourth conditions under 101(3) without

1 having to engage in any quantification exercise. If we are successful in establishing  
2 our case under any of those three conditions under 101(3), then there is no 101(3)  
3 case available to the merchants. We then can knock out their exemption case. We  
4 then are in a position where we have established restrictions under 101(1), we've  
5 established there are no exemptions under 101(3) and we then go on logically to the  
6 next stage of the enquiry, which is quantum and pass-on to the merchants under  
7 umbrella proceedings.

8 **MR TIDSWELL:** I think I was perhaps also thinking of issue 14.2, which is before you  
9 get into issue 14.3. But I think, as I understand what you are saying, I think  
10 I understand you are saying they are separate exercises where for the purposes of  
11 exemption you may well be looking at the question of pass-on but you are going to be  
12 doing it at a more generic level, a whole market level. I suppose the answer to that  
13 might in part be that the exercise we are talking about carrying out in relation to  
14 pass-on is going to be what we discussed at the hearing in May, starting from the point  
15 of the generic view of the market and breaking it down into further levels.

16 So I guess the point might be made that it is convenient because we will actually  
17 happen to have material which fits quite well for the 101(3) analysis from having done  
18 the pass-on. So I think that's probably, I don't know, how Mr Kennelly would put it but  
19 I think that's what is being said.

20 **MS SMITH:** First, if I can push back very strongly on the indication that the Tribunal  
21 in May made any determination as to how it's going to approach the evidence on  
22 pass-on because our understanding of the pass-on judgment -- well, as we read the  
23 pass-on judgment, paragraph 61 of the pass-on judgment is that no determination had  
24 yet been made by the Tribunal as to what evidence it was going to allow in on the  
25 question of pass-on or any pre-judgment at all on the question of evidence as to  
26 pass-on.

1 **MR TIDSWELL:** (Over speaking).

2 **MS SMITH:** That's the basis on which -- sorry, this a really important point that causes  
3 great concern to my clients and I do need to make this point.

4 **MR TIDSWELL:** Yes, of course.

5 **MS SMITH:** It's this. This is the basis upon which the Court of Appeal rejected,  
6 dismissed the application for permission to appeal. If I could ask you to turn to tab 42  
7 in bundle 2 of the Tribunal's bundles, page 221, at the bottom of page 221 the Court  
8 of Appeal says:

9 "Ground 2 alleges [this was ground two of the permission to appeal the pass-on  
10 judgment] that the CAT erred in law in adopting an approach which casts the burden  
11 of proof on the applicants to disprove pass-on and/or to prove a loss of profits. This  
12 argument is misconceived. The CAT correctly identified at paragraph 40 that the  
13 burden of proof to prove pass-on rests on the defendant as the party which alleges it  
14 and nothing in the remainder of the judgment contradicts that fundamental principle.  
15 On the contrary, paragraph 61 of the judgment, particularly at three and five, preserves  
16 the right of the applicants to produce claimant-specific evidence to dispute the  
17 defendants' expert and factual case on pass-on. This does not involve a reversal of  
18 the burden of proof."

19 So, Sir, it's on that basis that the Court of Appeal refused permission to appeal and it's  
20 on that basis that my clients are proceeding --

21 **MR JUSTICE MARCUS SMITH:** Ms Smith, I understand but sub-paragraph 5 of  
22 paragraph 61 is absolutely clear. We are not going to preclude the umbrella  
23 interchange claimants from adducing any evidence that they might wish to produce in  
24 support of their claims. So that's that. Now, do I take it though from your submissions  
25 that you are in opposition to the three-day hearing that we mooted for next year at  
26 which this question will be addressed?

1 **MS SMITH:** No, my Lord, of course not. But what I am saying is that in deciding the  
2 timetable for or the order in which the issues should be addressed, we say that 101(3)  
3 can be addressed and should be addressed before the question of pass-on. The  
4 question I was addressing that was put to me by Mr Tidswell was: well, won't there be  
5 an overlap of those issues because we have already indicated that we are going to  
6 approach the question of merchant pass-on in the umbrella proceedings by starting  
7 with industry-wide evidence and effectively moving on from there.

8 We say that, and my concern was that obviously, and I take it absolutely on board, Sir,  
9 that you have indicated in your pass-on judgment that you will not exclude the  
10 claimants from putting in claimant-specific evidence but we are also concerned if there  
11 were any starting point or presumption that you started at industry level for the  
12 purposes of the umbrella merchant proceedings pass-on issues and work from there.  
13 We are saying no, that's getting things completely the wrong way round, these are  
14 quantum quantification of individual claims.

15 **MR JUSTICE MARCUS SMITH:** Indeed but aren't you saying therefore that actually  
16 one needs to resolve how one proves and determines the pass-on question before  
17 one can actually work out the shape of trial two?

18 **MS SMITH:** Well, we had understood that that question as to what evidence is to be  
19 put in for the purposes of merchant pass-on had already been addressed at the  
20 pass-on hearing back in May and that it was that the parties would be able to put in  
21 claimant-specific evidence.

22 I believe that Mastercard are still seeking to appeal the aspect of the pass-on judgment  
23 which prevents them from putting in --

24 **MR JUSTICE MARCUS SMITH:** All right, Ms Smith, I think it's better that we have  
25 absolute clarity here. The point of mooted a hearing next year on the question of what  
26 evidence is to be adduced is to work out what evidence is to be adduced.



1 We quite accept that 61(5) leaves the position open, though it's fair to say that if one  
2 reads 61(5) we are somewhat less persuaded about the merits of individual evidence,  
3 we say that in terms, than your clients would like us to be. That's why we see this as  
4 something that needs to be resolved.

5 Now, you must not take it that we are putting in the diary a three-day hearing at which  
6 we say: oh, yes, it's absolutely clear that the claimants can adduce what they want.

7 **MS SMITH:** No.

8 **MR JUSTICE MARCUS SMITH:** That's not going to happen. We are going to be  
9 determining --

10 **MS SMITH:** Of course not.

11 **MR JUSTICE MARCUS SMITH:** -- the shape of the pass-on trial. Whenever that  
12 takes place. Now, the point I am putting to you is it seems to me that your point about  
13 ordering trial two when the pass-on trial is heard, whether it's after that or at the same  
14 time or before, is actually going to turn in some measure on how we resolve the way  
15 in which pass-on is proved, in other words whether you are right or not that a sampling  
16 approach of individual parties is the way to go, which, to be clear, you have at the  
17 moment not been precluded from doing it.

18 **MS SMITH:** No.

19 **MR JUSTICE MARCUS SMITH:** But there is going to be, as I indicated at the  
20 beginning of this afternoon, some fairly aggressive case management on how pass-on  
21 is tried.

22 Now, what that entails we don't know because that's to be decided.

23 **MS SMITH:** Yes, Sir. My suggestion, I am sorry if I have not made this clear, is that  
24 before we go on to address the question of merchant pass-on, that instead of a trial  
25 two on merchant pass-on in October or November 2024, it would be more efficient and  
26 more proportionate to address the question of 101(3).

1 **MR JUSTICE MARCUS SMITH:** Yes, no, I understand that.

2 **MS SMITH:** And that could be done in two ways. Either it could be done on the basis  
3 that my proposed trial two on 101(3) issues addresses all four of --

4 **MR JUSTICE MARCUS SMITH:** Yes, or you take a pick and choose, yes,  
5 I understand that.

6 **MS SMITH:** -- or you address conditions (a), (c) and (d) without addressing the fair  
7 share condition and that alternative proposal, that one has a trial two that addresses  
8 101(3) conditions (a), (c) and (d), does not require a determination of how merchant  
9 pass-on is going to be proved because there is then no overlap between the fair share  
10 element of 101(3) and the quantum element of the claims.

11 We say that you should proceed and should and can have a trial two of the 101(3)  
12 issues, limited if necessary to the conditions other than the fair share condition, so  
13 whether the MIFs led to these benefits at all, whether there was a causal link between  
14 the MIFs and that asserted benefits and whether the other two conditions about  
15 indispensability and elimination of a substantial part of competition, all of those three  
16 elements could be tried as a trial two and if --

17 **MR JUSTICE MARCUS SMITH:** Yes, then we go on to --

18 **MS SMITH:** Then we go on to quantum as, in effect, a trial three. We go on to  
19 quantum and pass-on issues as trial three issues. Because if we do it that way not  
20 only is it a logical way of doing it but we can also cut out a number of issues at each  
21 stage and we may never even need to get on to the merchants pass-on issues if we  
22 lose on the 101(3) points.

23 **MR JUSTICE MARCUS SMITH:** Yes. Thank you very much, Ms Smith. I am greatly  
24 obliged.

25 **MS SMITH:** I don't know if, Sir, you wish me to make submissions on Merricks and  
26 merchant pass-on for the purposes of the Merricks Class action and the merchant

1 proceedings at this stage?

2 **MR JUSTICE MARCUS SMITH:** Not at this stage, Ms Smith. I think it would be  
3 helpful if we heard from you after we know the broad shape of what other parties  
4 interested are involved. Thank you very much.

5 **MS SMITH:** I am not sure also whether you want at this stage, Sir, to hear  
6 submissions on the contingent inclusion of -- I have not mentioned this at all -- the  
7 merchant Class actions with the umbrella proceedings because that also is an issue  
8 I anticipate that Visa and Mastercard will have more than me to say on that but I do  
9 have one or two points to make on that.

10 **MR JUSTICE MARCUS SMITH:** Ms Smith, it seems to us that on those questions  
11 we'd rather hear from the people who are wanting to be here because if they don't  
12 want to be in then the question may not really arise at all. So we'll hear on that from  
13 Mr Bowsher first and then sweep up objections, if there are any, going forward.

14 At the moment I am just trying to get a sense of where the parties are and you are trial  
15 one: 101(1), Volvo, acquirer pass-on, nothing else. Trial two: 101(3) or bits of it. And  
16 then trial three: pass-on and quantum. So that broadly speaking I think is your thrust.

17 **MS SMITH:** Yes, and that it should be limited to the UK domestic MIFs and  
18 interregionals at the moment.

19 **MR JUSTICE MARCUS SMITH:** Yes. Thank you very much. I think I said it would  
20 be next Mr Cook, so Mr Cook we'll hear from you next.

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

22 **MR JUSTICE MARCUS SMITH:** Mr Woolfe, I have not forgotten you.

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

24 So, Sir, from Mastercard's perspective, we endorse the idea of a 101(1) trial in early  
25 2024. We also see the sense of limitation being dealt with as part of that trial to that  
26 extent. In terms of acquirer pass-on, we are rather more doubtful about whether that

1 should be part of that first trial. I say that for a couple of reasons which partly firstly go  
2 towards the question of whether or not Merricks should be part of that trial or not on  
3 the basis that obviously the 101(1) and the limitation issues that are put in in that trial,  
4 or currently planned, that's nothing to do with Merricks, so some substantial part of  
5 that trial is going to be nothing do with Merricks. Bringing in acquirer pass-on begs  
6 the question of whether Merricks should be there for some part of it.

7 We are certainly concerned in relation to that, that today is far too early to decide  
8 whether Merricks should be involved in any part of what is being talked about here  
9 and the reason we say that is the extent to which there are ubiquitous issues, and  
10 I think Ms Smith at various times talked about ubiquitous issues but that was in context  
11 of what she really means as common issues in relation to the merchant proceedings,  
12 ubiquitous issues we're talking about whether or not there are issues in Merricks or  
13 potentially in the proposed collective proceedings which should also be heard  
14 alongside the merchant interchange fee proceedings.

15 So I do have a number of submissions about the extent to which issues in Merricks  
16 are going to be ubiquitous to either the pass-on issues in the merchant proceedings,  
17 but what I would suggest is that in large measure those submissions and the weight  
18 of those submissions are likely to be driven by the rulings that the Merricks Tribunal  
19 will make in the first six months or the trials they have in the first six months, we  
20 recognise we won't get a judgment from the Tribunal on causation quite as rapidly as  
21 that but that those three sets of rulings that we are going to have from Merricks will  
22 have a significant impact on the extent to which there's an argument that any of these  
23 issues are ubiquitous at all.

24 Because potentially the effect of those, and, you know, I know it will be said against  
25 me by Ms Wakefield that she's going to win all of them and her client's claim will  
26 maintain at its current, we would say, preposterously over-pleaded level but anyway

1 nonetheless the potential effect of those rulings and the reason why the Tribunal in  
2 Merricks decided it was appropriate to proceed with preliminary issues is it could knock  
3 out essentially the whole domestic debit card claim, it could knock out the first  
4 five years but that's probably less relevant for these purposes, it could also knock out  
5 the domestic claim in its entirety.

6 There are very different questions about ubiquity if Mastercard does succeed on those  
7 issues and one ends up with a claim which is limited to cross-border, almost  
8 exclusively cross-border on credit cards, Mastercard only, in relation to 1992 to 2008  
9 and that's going to be a very different kind of pass-on issue because cross-border  
10 particularly in that era was a very small percentage of transactions and whether a tiny  
11 percentage of transactions on Mastercard, essentially credit cards alone, whether that  
12 made any difference to MSCs might be a very different question from whether or not  
13 all interchange fees by both Mastercard and Visa for debit, for credit, for commercial  
14 cards, for (inaudible) and everything else will make a difference.

15 **MR JUSTICE MARCUS SMITH:** I understand. Mr Cook, just to assist you and indeed  
16 all of the other parties, I appreciate we have got tomorrow but I am quite keen that we  
17 have at least a skeletal understanding of where everyone is coming from before we  
18 rise today because that will I think assist in working out where there are common  
19 themes as to how we manage these things and where there are divergent themes that  
20 we need to unpack further.

21 As I understand it, you say trial one early 2024, in agreement essentially with  
22 Ms Smith, but you are augmenting her submissions about ubiquitous matters and  
23 suggesting that there are insufficient ubiquitous matters to warrant the presence of  
24 Ms Wakefield and if we were to have acquirer pass-on included in trial one, it ought to  
25 be on the basis that that was not a ubiquitous matter because it would make for too  
26 messy a trial one. Do I have your broad thrust right?

1 **MR COOK:** Not quite, Sir. My submission was going to be slightly different. My  
2 submission is trial one should be limited to 101(1) and limitation on the basis that  
3 acquirer pass-on, essentially it's too early to determine whether there are any  
4 ubiquitous matters or not. I appreciate there is going to be disagreement between me  
5 and Ms Wakefield about that but circumstances might significantly change.  
6 So rather than bringing acquirer pass-on into that trial one, which is going to force the  
7 Tribunal to make a ruling on the inclusion of Merricks before there's actually clarity  
8 about the full extent of Merricks, we are going to be suggesting that acquirer pass-on  
9 should be pushed off and not part of that first trial.  
10 In terms of other countries, which is of course also relevant to trial one, our position is  
11 that certainly it would be a lot easier hearing if it was UK alone.  
12 In relation now we are not sort of completely opposed to the idea that if there are  
13 claimants, and we think it should be claimant-driven initially at least, who identify there  
14 are other countries where there are substantial value associated with it, that there  
15 could be the inclusion of one or two other countries in that. At the moment it could be  
16 up to 28 other countries, which is obviously impossible as a practical matter for that  
17 hearing. So our starting point is the UK.  
18 If somebody identifies and says actually the claim in relation to Italy is worth  
19 150 million, then that might be a reason to include Italy in it for sake of argument. But  
20 that is something to be pushed off until we can see some value and see if anything is  
21 worth including. That's the first point.  
22 Then in relation to trial two, we are rather more ambivalent about exactly what is in  
23 trial two, whether that's 101(3) or pass-on issues. We did set out in our skeleton some  
24 concerns about whether or not it's sensible to try and do pass-on before we know what  
25 actually is the extent of the overcharge. In particular, it can be lost sometimes in these  
26 cases because we talk about the MIFs so much but actually the merchants are

1 claiming in relation to a whole bunch of other rules that Mastercard and Visa have and  
2 those go to how competition would operate in the counterfactual world. Would there,  
3 for example, be scope to surcharge? Would there be the opportunity to use central  
4 acquirers? All those kinds of how competition would operate in that alternative world  
5 does, we think, feed into the question of whether or not there is pass-on at both levels,  
6 both acquirer pass-on and merchant pass-on.

7 So we do, Sir, have some concerns about how far the Tribunal can really address  
8 those questions before we know actually which rules are lawful and which rates and  
9 what the overcharge is and how it's to be analysed. That being said, our suggestion  
10 originally was 101(3), but we certainly are not going to go to the stake in trying to fight  
11 the Tribunal if the general view is there's a different structure that's sensible in relation  
12 to trial two on that one.

13 **MR JUSTICE MARCUS SMITH:** Thank you. So again let me articulate what I am  
14 getting from your submissions so you can tell me how far I am wrong. You say you  
15 are ambivalent but have a preference I think for 101(3) with pass-on following after  
16 that. Do I have that correct?

17 **MR COOK:** I mean, that is the position we've taken at the moment but that was partly  
18 a concern about the viability of pass-on being dealt with more quickly. So it's fair to  
19 say we are broadly ambivalent about which one exactly is dealt with first.

20 **MR JUSTICE MARCUS SMITH:** Just two other questions to unpack that. I think I am  
21 getting from that that pass-on you are submitting would best be dealt with as a whole,  
22 acquirer and merchant pass-on, retailer pass-on, in one go.

23 **MR COOK:** Sir, I don't think I can make that submission on the basis that they are  
24 logically quite distinct kind of issues. There may be some overlap and this again is  
25 partly going to be driven by the three-day hearing that the Tribunal suggested should  
26 be listed and we absolutely accept the desirability of a clear ruling on how pass-on

1 issues are going to be addressed. But until one knows the scope of the evidence on  
2 that point, it's difficult to know exactly the extent of the overlap.

3 Conceptually they are completely different questions; one is what acquiring banks did,  
4 one is what a whole load of retailers did, and those are conceptually and evidentially  
5 separate. If it's the case that the claimants end up putting in evidence in relation to  
6 them both, one could end up with an overlap of the same witnesses, if that's indeed  
7 how it turns out, then that might be a reason to have them heard together but that's  
8 going to be very much driven by how the Tribunal decides it will be appropriate to deal  
9 with that and the weight and extent of the claimant evidence that will be there.

10 But conceptually there's no reason to do so, Sir.

11 **MR JUSTICE MARCUS SMITH:** No, that's very helpful. The last question, I know the  
12 answer to this I think but I will ask it nonetheless. If we were to say 101(3) plus pass-on  
13 in a single trial, I am inferring you would say that would just be unmanageably large?

14 **MR COOK:** It would be enormous. I mean, there are various estimates around the  
15 duration of pass-on we certainly thought and that obviously is going to be heavily  
16 influenced by the rulings the Tribunal makes but certainly we thought a pass-on trial  
17 would be six to eight weeks in relation to the UK alone. Exemption is going to be  
18 a multi-week case. So there is going to be a lot of that.

19 One thing I would say, Sir, I did detect from Ms Smith's submissions is that there  
20 appears to be a point of principle there, a point of law perhaps in relation to the extent  
21 to which pass-on is relevant to 101(3) and if there is such a point of law, that would  
22 make sense if that's resolved at an earlier stage because otherwise there's a danger  
23 of people putting evidence in on an issue that's not actually relevant to a particular  
24 point.

25 But it must be said the point of law has not been entirely clearly formulated but there  
26 appears to be one emerging there, certainly on the face of the submissions, Sir.



1 **MR JUSTICE MARCUS SMITH:** That's very helpful, Mr Cook. Thank you very much.  
2 Sorry?

3 **MR COOK:** I suppose proposed collective proceedings I will await to see. If they want  
4 to participate in this process, at least for now my position is going to be again that's  
5 a judgment for another day, Sir.

6 **MR JUSTICE MARCUS SMITH:** Well, it may be that you are singing in glorious  
7 harmony with Mr Jones and Mr Bowsher on that, we'll see where we go, but don't  
8 worry, we haven't forgotten that's a point on which we will need to hear from others.  
9 Thank you very much, Mr Cook.

10 Mr Kennelly.

11 **MR KENNELLY:** Thank you, Sir. Again, bearing in mind your indication, I will keep it  
12 very high level. Visa respectfully agrees with the Tribunal's proposal, save for the  
13 following. In the first trial, which we agree should be in early 2024, we propose that  
14 the other contested rules, challenged rules, the scheme rules should be included in  
15 that trial. To get the full benefit of the efficiencies that the Tribunal has in mind, you  
16 should determine all of the Article 101(1) issues, including the scheme rules.

17 We respectfully agree with what Ms Smith said about not including the non-UK,  
18 non-Irish MIFs. I think as Mr Justice Roth indicated, they do add complexity. It's not  
19 just they have other limitation issues, they give rise to the question of different  
20 competitive conditions and so our proposal is they be excluded from that first trial.

21 We propose that in that first trial, alongside the 101(1) issues, the Tribunal should  
22 resolve the abuse issues, the Article 102 dominance and abuse issues, as we  
23 suggested. There is a real mirroring of the abuse questions with the restriction  
24 questions, as you saw in our skeleton and the list of issues, and there would be real  
25 efficiency in resolving those also.

26 It would be a shame if, having got to the end of the 101(1) process and the claimants

1 having failed to provide the whole 102 claim -- when we think it can be resolved  
2 relatively speedily as part of the first trial.

3 On acquirer pass-on, we agree I think with what Mr Cook was suggesting, my learned  
4 friend Mr Cook, that that should be part of the merchant pass-on trial. That should not  
5 be in that first trial for two main reasons. First of all, that first trial is already quite large  
6 and there will be efficiency, we think, in having that acquirer pass-on part resolved in  
7 one go, as the President said, with merchant pass-on. So for that reason we propose  
8 it not be included in the first trial. I am not going to take you to Mr Holt's evidence on  
9 the complexity involved in resolving an acquirer pass-on. It's not half as complex as  
10 101(3) but it's sufficiently weighty to generate additional and perhaps inefficient  
11 complexity in that first trial. So we propose it be resolved as part of a single pass-on  
12 trial alongside merchant pass-on.

13 Finally on this first trial, the question of the limitation and the implications of the Volvo  
14 judgment. To be absolutely clear, that is not a ubiquitous issue. It's not even  
15 a common issue. It's been pleaded against Visa by one group, that's the  
16 Stephenson Harwood claimants. It's not been pleaded against us by the others. And  
17 they will need to seek permission to amend to plead that and we will be resisting those  
18 amendments. That Volvo limitation point is a major point of principle and that will have  
19 to be resolved and resolved properly and so it can't be treated as Ms Smith sought to  
20 sweep it up as a ubiquitous issue which can just be added into that first trial.

21 There may well indeed be arguments in favour of resolving the Volvo limitation point  
22 earlier than that first trial because of its implications.

23 **MR JUSTICE MARCUS SMITH:** Yes, I see.

24 **MR KENNELLY:** That's the first trial.

25 On the structure between the second trial and then a separate 101(3) trial. Sorry.

26 **MR JUSTICE MARCUS SMITH:** Just to get an indication of how many of these

1 matters you would say ought to just involve the present parties, without anyone else  
2 coming in, in a sentence do you see much by way of ubiquitous matters in trial one as  
3 opposed to, for instance, trial two as we have framed it?

4 **MR KENNELLY:** I will be corrected but I can see that if acquirer pass-on is not  
5 included in the first trial, one can see, as Mr Cook said I think, a reason for not  
6 including Merricks in that first trial. So that seems to me to be an appropriate  
7 approach.

8 Perhaps an additional reason for not including acquirer pass-on in that first trial is if  
9 one wanted to resolve the first trial more speedily.

10 **MR JUSTICE MARCUS SMITH:** I am very grateful, thank you. Sorry, you were about  
11 to say something about trial two.

12 **MR KENNELLY:** Yes, very briefly. On trial two and the proposed trial three on 101(3),  
13 we strongly, with respect, agree with the proposal from the Tribunal. The Tribunal has  
14 the evidence from Mr Holt as to the very considerable complexity and difficulty in  
15 a 101(3) trial. We estimate that to be eight-week trial requiring about 18 months of  
16 preparation. It's a whole different order of complexity from the other matters that we  
17 have been discussing. I am happy to address the Tribunal on the points made by my  
18 learned friend Ms Smith about her points about resolving 101(3) earlier.

19 I appreciate the Tribunal wants a skeletal view from everyone so I really won't take  
20 time on this except to say that the proposed Class Representative, Ms Smith is quite  
21 wrong to suggest there's no authority for the point that we are making. The  
22 Supreme Court in Sainsbury's addressed this directly when they addressed what the  
23 fair share condition included and they said in terms that addressing the fair share  
24 means weighing the adverse effects of the MIFs against the benefits. The adverse  
25 effects of the MIFs for merchants, and that's the Class person we are looking at, that's  
26 the overcharge to the extent it's not been passed on. One can't work out the adverse

1 effect of the MIFs without having done the acquirer and merchant pass-on exercise  
2 because it's only having done that exercise one understands the alleged harm the  
3 merchants have suffered and then one asks whether that harm is compensated for by  
4 the benefits which we say are generated by MIFs.

5 That weighing exercise cannot be done without both acquirer and merchant pass-on  
6 having being undertaken. So for that reason in summary we strongly disagree with  
7 what Ms Smith said and in fact I think it's paragraphs 173 and 174 of the  
8 Supreme Court in Sainsbury's.

9 The final point on this is that I think Ms Smith also said that we could just carve out the  
10 fair share condition of 101(3) to effectively split 101(3) into different parts. Our answer  
11 to that is it's simply inefficient.

12 We get to end of 101(3) trial without answer, without having resolved the 101(3)  
13 question, which I think is of no use to anyone. So I think for that reason we strongly  
14 endorse, respectfully, the Tribunal's proposal. I will pause there. I appreciate I could  
15 give you more, Sir, but I think you want to hear from the other parties.

16 **MR JUSTICE MARCUS SMITH:** No, indeed. I appreciate all the parties have a great  
17 deal to say about this and these are important matters but I am anxious to use  
18 tomorrow as efficiently as we can and one of the factors that go towards that is that  
19 we know roughly where the tectonic plates lie even if we haven't worked out which  
20 ones we are going to hear first.

21 We are now out of the parties from this morning. Mr Woolfe, I still have not forgotten  
22 about you but next I think we'll hear from Merricks and Ms Wakefield.

23 **MS WAKEFIELD:** I am grateful, Sir. Good afternoon. From our perspective, and  
24 I will take this as quickly as I can, mindful of your indication and in the hope I will be  
25 allowed to expand on some of these points tomorrow in the context of my UPO  
26 application, but from our perspective the most important concern really is delay. Of

1 course when we issued our claim back in September 2016, there was long delay  
2 before certification and at the most recent CMC various hearings were put in the  
3 calendar for 2023. I don't agree with Mr Cook's characterisation that we then need to  
4 wait and freeze everything else in the interim. Instead we should be making as much  
5 progress as we sensibly can in parallel to those three hearings.

6 From our perspective in terms of the two trials which have been suggested, Sir, as to  
7 trial one, in a sense I have no skin in the game. It's not a matter for me if one can  
8 sensibly list a trial one on matters that arise in the merchants umbrella proceedings  
9 with no consequential negative effect. That's of course subject to the acquirer pass-on  
10 point and where that falls. Of course you know, Sir, that that's something I intend to  
11 address you on, if I may, tomorrow, the degree to which that's ubiquitous or not. So  
12 one has the acquirer pass-on issue.

13 Otherwise we have trial two and merchant pass-on and from our perspective we would  
14 respectfully endorse the suggested listing at the end of 2024. We would hope that it  
15 could have come on earlier and of course that was our preferred course, even earlier  
16 in 2023 and following on from the Tribunal's tentative indication in one of the letters.

17 But from our part we can live with end of 2024, hopefully not the very end, but were it  
18 to slip any further I am afraid that would be a cause of really serious concern for us  
19 because we are doing our best to get a move on, if I can put it that way, and  
20 Mr Justice Roth and the Tribunal in our case has listed hearings accordingly.

21 So that's my big concern. As part of getting a move on, if I put it that way, we do  
22 wonder if the three-day hearing which you've indicated on the way in which merchant  
23 pass-on should be resolved could be brought on earlier and I realise that I am not  
24 thank goodness privy to all the wranglings about column four and column three and  
25 so on but for my part my impression from the May hearing, which of course I attended  
26 and made submissions at, was that we were all in a pretty good position to make those

1 sorts of submissions then. Obviously things have moved on with the columns and so  
2 on but we've had the hearing today and I would however, although of course I don't  
3 know, that one could in fact have that three-day hearing in December or January,  
4 I don't really understand why it has to be April or May but I know that doubtless other  
5 people understand more what's going on, where the tectonic plates lie.

6 One further -- sorry.

7 **MR JUSTICE ROTH:** Sorry to interrupt you, I think one of our considerations is that  
8 we won't know whether the merchant collective proceedings are certified in December  
9 or January. One can't --

10 **MS WAKEFIELD:** I see that.

11 **MR JUSTICE ROTH:** So if they are certified, which I don't know and probably won't  
12 be involved in, then there comes the question whether they might be involved in the  
13 pass-on matter which arises in the merchant case and therefore they would need to  
14 participate. So that's the reason why it has to be a bit later.

15 **MS WAKEFIELD:** That's very helpful, thank you, Sir. It would of course be a great  
16 shame I think if the continued desire to sweep further claimants and further parties in,  
17 which of course in general I endorse, being one such party, but if that were to lead to  
18 a significant delay and equally at the very beginning of the hearing this afternoon you,  
19 Sir, and the President indicated that the list of issues, for example, might function in  
20 a way in which people can subsequently bolt on and perhaps it may also be the case  
21 that Mr Bowsher and those whom he represents may be able to bolt on and fit in in  
22 some contingent sense just to allow progress to be made, which really is, as I have  
23 said already, a paramount concern to us.

24 **MR JUSTICE MARCUS SMITH:** Ms Wakefield, don't get us wrong, we are very  
25 conscious that trying to sweep in as many issues into one hearing, achieving a very  
26 desirable consistency is at times achieved at the price of timing. That's why we put

1 the two hearings you are most concerned with, the three-day evidential hearing and  
2 trial two, at the dates they were at.

3 I will just put down a marker for Mr Jones and Mr Bowsher that we will want them to  
4 be giving careful thought, as they have already indicated they will, into the extent to  
5 which feelings from their clients can pass back so as to generate as much light and/or  
6 heat and waste as few trees as possible. I appreciate that there's not much we can  
7 do by way of order in that regard and nor would we want to but we do see the work  
8 done by the parties through the list of issues as extremely helpful in creating an  
9 effective tool for the ongoing management of all these cases.

10 So I don't say that to you as an indicator but I flag it up for Mr Jones and Mr Bowsher.  
11 One of the questions will be how quickly we can get the questions of certification up  
12 because that then affects the three-day evidential hearing.

13 **MS WAKEFIELD:** It does, Sir. I am grateful. One final point, and again this really  
14 may be something on which I don't have skin in the game, but in terms of limitation  
15 and the Volvo point, again I would have thought that it could come on quite quickly.  
16 The reason why that's of interest to me of course is that a point which is live in the  
17 UPO application context and actually just in the general virtues of us being case  
18 managed together or heard together is extent of overlap. That's a point that's made  
19 against me quite frequently by Mr Cook. If Volvo is a good point, my understanding is  
20 that it would mean that the merchants, or some of them, can claim right back to 1992,  
21 as I do. So there would be total overlap.

22 Again it's a pure point of law so again I would have thought, but I am not one of the  
23 parties involved, that it could come on pretty quickly but that's all I wanted to say for  
24 the end of the day at least. You will hear me again tomorrow I hope.

25 **MR JUSTICE MARCUS SMITH:** Thank you, Ms Wakefield. Just so that I have it  
26 absolutely clear, your interest arises in the trial two and the evidential hearing. Your

1 position is you have no skin in the game on trial one, you are not really interested.

2 **MS WAKEFIELD:** Save for acquirer pass-on, Sir.

3 **MR JUSTICE MARCUS SMITH:** Assuming acquirer pass-on is out and comes later --

4 **MS WAKEFIELD:** Yes.

5 **MR JUSTICE MARCUS SMITH:** -- you are gloriously indifferent?

6 **MS WAKEFIELD:** Well, I am but it may also come earlier, I don't know, but so long  
7 as it's out, so long as it's extracted I'm gloriously indifferent; if it's part of that trial, that  
8 works as well so long as I know when I have to be there. But it is a discrete issue,  
9 I agree with that. There is a virtue to dealing with it upfront just because it's pretty  
10 short and neat I hope, or comparatively so, and so I would hope it could be heard  
11 sooner rather than later.

12 **MR JUSTICE MARCUS SMITH:** Thank you very much, Ms Wakefield, I am very much  
13 obliged.

14 **MS WAKEFIELD:** Thank you.

15 **MR JUSTICE MARCUS SMITH:** Mr Jones.

16 **MR JONES:** Sir, I am very grateful. One of the questions you asked at the outset  
17 was who would be participating on trials one and two. So could I just kick off with that  
18 from my client's point of view very quickly. I represent two groups of claimants. The  
19 first is Primark. They've been called the Hausfeld claimants in the round. But Primark  
20 has a claim against Mastercard and a claim against Visa and Primark would wish to  
21 participate in both trial one and trial two, Sir, that you have suggested. I understand  
22 that the manner of participation and the evidence that they may be able to call and so  
23 on and so forth is for a later date so I shan't address you on that, save to say that  
24 Primark will want to be in the fray in those discussions when the time comes.

25 **MR JUSTICE MARCUS SMITH:** That's very helpful, Mr Jones. Just so I am  
26 absolutely clear, we've had multiple variants on the trial one and trial two themes. Can



1 I take it that your buy in is along the lines of the Tribunal's original proposal rather than  
2 various -- I am not nailing you down to commit absolutely, but just so that I know what  
3 we are talking about, you are talking about a 101(1) and a pass-on trial two?

4 **MR JONES:** That's right, Sir. I will come to make some suggestions about trial one  
5 and trial two in a moment but, yes, that's what I meant when I referred to trial one and  
6 trial two.

7 My other claimants are Fortnum & Mason and Heal's, who are grouped together on  
8 one claim form against Mastercard and one against Visa. They, Sir, on further  
9 reflection before today have decided that they would like if possible to take advantage  
10 of the stay that you had suggested at an earlier stage of these proceedings and  
11 therefore on the normal terms, I understand similar stays have been made in other  
12 cases, would be bound but wouldn't participate.

13 So that is the broad framework from my clients' point of view.

14 Sir, on the particular suggestions regarding trial one and trial two, there are two topics  
15 that I would like to address you on very briefly if I may. The first is the question of  
16 limitation and the suggestion which has been made that that could be dealt with in trial  
17 one. That, in my submission, would be a very good idea to have it dealt with as early  
18 as possible. It's a very significant issue in these proceedings and certainly in my  
19 clients' claims because, even just looking at the United Kingdom, it raises the question  
20 of whether we can go back six years from issue, my clients issued in 2013, so six years  
21 from issue will take us back to 2007 or on the other hand many decades if the Volvo  
22 point is right.

23 To Mr Kennelly's point I should make clear that we had anticipated the Volvo judgment  
24 all those years ago when we issued and our Visa claims actually go back to 1977 on  
25 the claim form and the Mastercard ones to 1992, which is roughly what would be the  
26 result if the Volvo judgment is correct. So we have, as it were, skin in that game

1 already, we won't need to amend, we will be pleading that out and it will obviously be  
2 a very important issue.

3 It's a reasonably straightforward issue if trial one is limited to the UK because my  
4 understanding is then the only limitation issue will be essentially this Volvo issue. We  
5 would submit that that's a very good reason to limit trial one to the United Kingdom  
6 because if one wants to deal with limitation but one starts to include other jurisdictions  
7 then that potentially becomes far more complicated just on the limitation arguments  
8 even before one gets to looking at those other markets and so on.

9 Finally on this limitation piece, Mr Kennelly made a suggestion which we were also  
10 minded to make, which is it would be possible to have the limitation hearing actually  
11 before trial one, essentially if it's quite a narrow and focused point, let's say if it's just  
12 the Volvo point. That, it seems to us, if the Tribunal had capacity, could be dealt with  
13 reasonably straightforwardly in 2023, which might then have the benefit of making trial  
14 one itself more manageable because of course if I am right about Volvo, that could  
15 very significantly expand the scope of what you are looking at in trial one.

16 Sir, those are my submissions on limitation.

17 Then my second heading is the 101(3) issue which you have also been addressed on.  
18 This is also clearly a very important issue from the perspective of trying to resolve the  
19 key common issues in these claims and therefore prompt settlement of other  
20 outstanding issues and resolve the claims. For that reason it seems to us to be clear  
21 that if possible, if practicable it would be desirable to have that dealt with early on  
22 rather than kicking it off.

23 Sir, just in terms of the practicalities, we see the debate which has raged, is raging  
24 about the overlap between this and pass-on and it strikes us, Sir, that this is a point  
25 which could helpfully be revisited in the three-day hearing if that's May next year  
26 because that hearing could consider not only how pass-on is going to be decided but

1 also how 101(3) is going to be decided and of course picking up the overlap between  
2 them.

3 If one looks at those in the round then the outcome might be that there could be one  
4 trial dealing with pass-on and 101(3). To put my cards on the table, we of course  
5 would very much hope that that could happen but I have heard what Mr Kennelly has  
6 said about that. Perhaps it can't. At the very least it seems to us that that issue could  
7 hopefully be decided, as I say, at the three-day hearing and it could be left open as  
8 a possibility.

9 **MR JUSTICE MARCUS SMITH:** I am very grateful. Sorry.

10 **MR JONES:** No, Sir, all I was going to say was unless I can help any further, those  
11 are the only submissions I wanted to make.

12 **MR JUSTICE MARCUS SMITH:** I just want to gauge the extent to which the three-day  
13 evidential hearing is a matter -- clearly your clients would need to be heard but what  
14 I want a sense of is just how important you regard that hearing in terms of sculpting  
15 the evidence that would go into a trial one as we are talking about it now. I say that  
16 because it's a timing question. We are very keen to ensure that any certification  
17 questions are resolved as quickly as possible but we do know that diaries are  
18 problematic. Whilst I am confident we can get a CMC up in the case of Primark and  
19 also in the case of Mr Bowsher's clients, there is an open question in my mind as to  
20 when we can actually get the question of certification resolved, which is why we were  
21 thinking about a three-day hearing towards the middle of 2023 rather than right at the  
22 beginning.

23 **MR JONES:** Sir, could I just clarify, we'd understood it would be a three-day hearing  
24 to set the evidential parameters for trial two rather than for trial one.

25 **MR JUSTICE MARCUS SMITH:** Yes, that's right.

26 **MR JONES:** Yes, precisely. No, absolutely. Well, so we see that that is important

1 because of the discussion which we understand happened this morning, of course  
2 I wasn't present but you have helpfully summarised some of the debate. We would  
3 want, to be clear, to call factual witness evidence from Primark. Primark considers  
4 that it has a very good, as it were, story to tell on pass-on. Of course we've read what  
5 the Tribunal has to say about that but we will be wanting to bring factual evidence as  
6 well as expert evidence on those topics.

7 Sir, I also on the other hand entirely see the difficulty that then arises if you have 500  
8 other people in the same position. So from that point of view those are issues that  
9 clearly need to be resolved and we, for those reasons, had thought that a three-day  
10 hearing seems very sensible. We could do earlier, Sir, if that's also part of the  
11 question. We could do earlier than May 2023 even though we've not yet pleaded out  
12 because we think we have quite a good view of where we think our claim will be going,  
13 we will be pleading out before the end of this year. We don't think that it's going to be  
14 materially different from the claims that have already been pleaded and so from our  
15 point of view it does not need to be left until May 2023, we could do before that.

16 **MR JUSTICE MARCUS SMITH:** That's a very helpful indication, Mr Jones. Do I take  
17 it from that, that to the extent you can, you will be cherry-picking like a magpie from  
18 what has been said before and the list of issues? In other words, you won't be adding  
19 to the Tribunal's burdens of too much by way of additional pleading unless it's  
20 necessary to make a fresh point or a fresh articulation of an old point?

21 **MR JONES:** Sir, we are very much in your hands on that particular point. So the  
22 team, if I can put it this way, the team at my end have experience of these claims, so  
23 we have other pleadings which we could draw on without incurring too much cost. So  
24 picking up on other people's pleadings isn't a cost-saving method for us but on the  
25 other hand we totally see that it might be sensible from a case management  
26 perspective.

1 So, Sir, if you as the Tribunal were to indicate that it would be helpful for us to simply  
2 either cross-refer or adopt in some other way what has been said in the existing  
3 pleadings, I can't commit that we definitely will do that because we have not yet  
4 reached a final landing but we will certainly try to if that would be helpful, Sir.

5 **MR JUSTICE MARCUS SMITH:** That's very helpful, Mr Jones. Thank you.

6 Mr Cook, I see you have your hand up. You've been very patient.

7 **MR COOK:** Thank you for noticing me, Sir. It's just the question you put to Mr Jones  
8 I think involved possibly a misunderstanding. His claims are simply claims, they are  
9 not collective proceedings.

10 **MR JUSTICE MARCUS SMITH:** I am sorry.

11 **MR COOK:** There's no question of certification in relation --

12 **MR JUSTICE MARCUS SMITH:** I should have realised because he said it's just  
13 Primark, you are absolutely right. I was misled by the label Hausfeld claims and I  
14 hadn't clocked the greater granularity that I got from Mr Jones in his oral submissions.  
15 So thank you for that, I am very grateful.

16 Mr Bowsher, you have been very patient, you are on next.

17 **MR BOWSHER:** I am much obliged. Good afternoon or early evening. I will try and  
18 keep this very short as a headline of where we would be going on the various points  
19 and we'll come back as the Tribunal wishes.

20 One, as you know, we are not asking to be admitted to the collective proceedings at  
21 this stage, we've set out our position on that in writing but in due course as and when  
22 it's convenient we will explain why we say that the Tribunal can and we say also should  
23 make directions now having regard to our position and the existence of our  
24 applications for CPOs so that the directions contemplate our claims being  
25 accommodated within a framework going forward.

26 Now, of course, the extent to which that is practical will depend hugely upon the timing

1 of any outcome of the CPO proceedings. But we then do say that if the CPO  
2 applications were resolved swiftly in our favour, it would be highly desirable and we  
3 would wish to be involved in the hearing of the ubiquitous issues along a timetable  
4 which matches fairly closely that which has been set out by others. Broadly speaking,  
5 I adopt the timetable set out by Ms Smith.

6 Just to be clear, because there may be some points of detail, I think the way we would  
7 look at it would be, yes, if we were live claimants we would want to be at the three-day  
8 hearing because we would want to be involved in the planning of evidence on  
9 merchant pass-on in particular. We would contemplate being in a position -- sitting  
10 here today, we anticipate that we could participate in a first trial dealing with 101(1)  
11 issues, acquirer pass-on and, it may not directly affect us but we'll park that,  
12 Volvo/limitation issues. Others have talked about early 2024. I think that may be  
13 a little bit tight for us. I think I would probably express it simply more loosely as  
14 mid-2024 and we'd then anticipate being ready for a trial two in late 2024 to deal with  
15 broadly speaking -- again in its broadest sense, 101(3) and merchant pass-on.

16 I would make two observations about 101(3). It seems to us from the experience of  
17 the team that to the extent that this scheduling is being done with a view to making  
18 claims settleable, it's probably right that you are not going to get to a settleable position  
19 until you've grappled with 101(3). I had not contemplated until hearing Ms Smith's  
20 elaboration, and we have not discussed it in the team, the idea of, as it were, breaking  
21 out the components of 101(3) and having bits of it dealt with at different times.

22 I park that. I can see some attraction to it. On the other hand it may be that maybe  
23 the answer is to deal with, as it were, the point -- if I can call it the emerging point of  
24 law, which, as you know, we contest, about the crossover between the fair share  
25 component of 101(3) and pass-on and whether one can deal with that as point of law  
26 at an earlier stage might be another way of dealing with it. But those are more

1 questions for the future.

2 That would then leave over other issues. I should have said at the outset all of this,  
3 we've suggested this assuming that we are dealing with UK and Irish claimants, what  
4 I've loosely call the foreign element goes into a separate hearing to be dealt with  
5 separately. I mean, I suppose it does not exclude the possibility if one particular  
6 country that needs to be brought forward then that may be right but broadly speaking  
7 that would be dealt with separately as would -- there may be other issues which I have  
8 not immediately addressed.

9 That very swiftly, given the time, I hope at least highlights the way we are travelling.  
10 I can come back, as it were, on any aspect of that as required tomorrow or now,  
11 whichever the Tribunal prefers.

12 **MR JUSTICE MARCUS SMITH:** We are very grateful to you, Mr Bowsher. Just to  
13 get a feel for what might or might not be live at the CPO application, as time passes  
14 and as we decide more of these applications so too the foundations of the jurisdiction  
15 and how they are likely to be decided become clear.

16 Can you assist us, you may not be able to, on what are likely to be the highlights of  
17 dispute in terms of the CPO application and, assuming a free diary on the part of  
18 Tribunal, which is not a safe assumption but assuming that, how quickly we could get  
19 the application itself on if we held all of the parties' feet to the fire and made fairly brutal  
20 directions? I am not suggesting we will make direction today but I am just trying to get  
21 a feel for the geometry of the timing.

22 **MR BOWSHER:** On the first point, I am going to slightly duck that question and say  
23 that's for Visa and Mastercard to identify in the first instance.

24 There is chatter in the jungle about something to do with the status of the SPVs but  
25 I don't think that has yet been formulated in a way that would yet constitute an issue  
26 but there seems to be something emerging there.

1 Other than that, I don't think we've had anything really put back us to that would  
2 constitute an emerging issue for the hearing. We obviously would say no issues at all  
3 but that may be an unduly flippant response, at least not helpful to your consideration.  
4 On the sort of timetable, I am just going back to what we said in writing all those hours  
5 ago at lunchtime on Friday in paragraph 6 of our note, I think that's probably just about  
6 right. I think we thought that whether you need a CMC to do this or can do it today,  
7 we will be asking for a hearing to determine the CPO some time after middle of  
8 February 2023 with an estimate of two to three days. I think some of us in our team  
9 thought two, some thought three. It probably depends how many issues there are to  
10 be dealt with and how complex they are.

11 Those directions I think we would contemplate would involve -- sorry,  
12 assuming -- sorry. We would suggest that there should be a date by which the  
13 objections of Visa and Mastercard should be identified in some formal manner, a date  
14 by which we would be invited to put in any further expert evidence to respond to the  
15 points raised to the extent that the appropriate response involved some further  
16 elaboration by our experts, particularly in light of the evolution of the thought in the  
17 Tribunal's decisions since we issued on 6 June.

18 In that regard I am thinking not just of the pass-on judgment but also the judgment in  
19 the Trucks certification case which was handed down I think two days after we issued  
20 I think on 8 June. So there may be points that we need to come back and elaborate  
21 on that. If there were then a date for exchange of skeletons, we would have thought  
22 that we could ready, as I say, for a hearing in February/March next year but that is  
23 ignoring the calendar of the Tribunal. That's simply just what we think we could do.

24 **MR JUSTICE MARCUS SMITH:** I understand.

25 Mr Kennelly, Mr Cook, you may not be able to assist on this but it would be of  
26 considerable assistance in our planning if overnight you could give some thought to



1 the most aggressive but fair way in which certification could be dealt with in respect of  
2 Mr Bowsher clients. If you can't say anything, then of course we understand. But if  
3 there was the ability to articulate a timetable to the hearing of such matters that the  
4 parties could agree, that would certainly assist us in working out how to align the  
5 tectonic plates over the course of the next year or so.

6 I say that as a request. If the answer is you can't do it tomorrow morning, then we will  
7 completely understand. But it does seem to us that it would be helpful if any problems  
8 that might arise to push off into the middle distance are articulated in a non-binding  
9 way tomorrow morning so that we can think a little bit further about case management.

10 I will leave that with you. There's no need to respond.

11 That I hope brings us to Mr Woolfe, who I understand is aligned with Ms Smith's  
12 position but you have more to say about the unpacking or dealing with Article 101(3).

13 But, Mr Woolfe, I left you last for a reason. You can also take up, by way of  
14 anticipatory reply, any particular problems that the claimants' side have with what has  
15 been floated by the parties who have advocated various configurations of trial one,  
16 trial two and indeed trial three. That's a bit of a tall order but if there are any points of  
17 importance that you want to flag up as having the last word tonight, now is your time.

18 **MR WOOLFE:** Thank you, Sir.

19 First of all, we do endorse the overall structure the Tribunal is proposing. With respect,  
20 it's quite an inventive way of balancing the respective needs of assuring efficiency, on  
21 the one hand, in resolving common issues and on fairness to all parties, on the other,  
22 and also some degree of expedition so we do support a trial -- the structure you've  
23 proposed, with Article 101(1), infringement, coming first.

24 The points I am going to address you on, and on which I may slightly differ in some  
25 minor respects from Ms Smith but I am broadly aligned with her, are Volvo limitation,  
26 Article 101(3) and the timing of issues with respect of that, where I think I may have

1 a slightly different position from Ms Smith; then other markets or jurisdictions; acquirer  
2 pass-on and Article 102. I will get quicker as we go through. I have more to say about  
3 Volvo perhaps than the others.

4 As regards Volvo and limitation, as I think seems to be common ground across most  
5 of the parties here, we do see a benefit of resolving that at an early stage. Obviously  
6 it makes a very big difference to the quantum of the claim but also as to the periods  
7 for which all the other issues are being looked at. Therefore, there's a real efficiency  
8 benefit in having that resolved at an early stage.

9 The one point, although this does pick up a bit on what other people have said, where  
10 we have something else to add is that there are slightly different levels of issues  
11 concerned with Volvo. One is a pure point of law: what are the principles coming out  
12 of Volvo, and I would say they are simply two different strands to that, and then there's  
13 the application of that to the facts.

14 We do say that the pure points of principle could be resolved as to whether or not  
15 Volvo does establish them at a very early stage in early next year. Obviously the  
16 application of those to the facts of the case will need to be left -- could be done in  
17 tandem with the Article 101(1) trial, but there would be an advantage in having that  
18 point of principle resolved at an early stage for several reasons. If we are simply  
19 barking up the wrong tree, it would save everybody a lot of time and cost and bother  
20 if that was identified earlier.

21 In particular, because it makes such a difference to the disclosure and so forth that's  
22 required for pass-on, or the lengthy period for which those difficult and fact-intensive  
23 issues are going to be considered, if the Tribunal grasped the nettle and gets on with  
24 resolving that point of principle at an early stage that could be resolved conclusively,  
25 even with any appeals, before that pass-on trial actually comes to be heard, and that  
26 would have a real benefit of rendering that process more efficient or indeed some of it

1 | may not be necessary at all.

2 | If I can just briefly explain the point of principles that arise in Volvo so you can see  
3 | what I mean, to see whether or not that's a viable option. Volvo is at tab 1 of the  
4 | authorities bundle. I realise it's late in the day to be opening authority but I can be  
5 | really fairly short on it.

6 | I think you can pick it up at paragraph 30 on page -- well, it's page 7 in the numbering  
7 | of my authorities bundle at the bottom right-hand corner. In paragraph 30, the court  
8 | was setting out what essentially were the issues that it saw it was, which was where  
9 | you had an infringement which ceased before the entering into force of the damages  
10 | directive with the cases brought after it.

11 | Then, after sort of setting out 31 and 32, the substantive and procedural principles, it  
12 | enunciates quite an important part of the judgment at paragraphs 33 and 34, which is  
13 | that -- 33, only legal situations existing after the expiry of the time limit for the  
14 | transposition of the directive may be brought within its scope, so basically if the facts  
15 | come after 27 December 2016.

16 | But then, importantly, at 34, "that applies a fortiori to a legal situation which arose  
17 | under the old rule and which continue[d] to produce effects after the entry into force of  
18 | the national measures take to transpose it. So it's saying that that same rule applies  
19 | where you have something which bridges that time period.

20 | Then, jumping rather ahead, the court at paragraphs 39 through to 42 is essentially  
21 | setting up a two-stage analysis. First of all, is Article 10 of Directive 2014/104  
22 | substantive as a procedural rule?

23 | But then, secondly, after having done that first step, at paragraph 42, once it's been  
24 | determined whether the provision concerned is substantive or not, you have to assert,  
25 | in the second place, in these kind of situations, whether the situation at issue, insofar  
26 | as it cannot be described as new, arose before the expiry of the time limit for the

1 transposition of that directive or whether it continued to produce effects after the expiry  
2 of that time limit.

3 So that's the second stage of the enquiry. The Tribunal answers stage one at  
4 paragraphs 40 through to 47, where it says it's substantive and then -- I am coming to  
5 the meat of it now -- at paragraph 48, in order to determine the temporal applicability  
6 of Article 10 of that directive, one needs to assert -- in the last few lines of that  
7 paragraph -- "whether the situation at issue in the main proceedings arose before the  
8 expiry of the time limit for the transposition of the directive or whether it continued to  
9 produce effects after the expiry of that time limit".

10 Therefore, it interprets that point as being, in paragraph 49, at the end of that  
11 paragraph, whether the limitation period applicable to the situation at issue in the main  
12 proceedings had elapsed as of the date of transposition.

13 So that's the first principle. They are effectively saying that if the limitation was still  
14 running, and had not elapsed at the time of the damages directive coming into force,  
15 Article 10 applies.

16 Now the second principle is the one stated at paragraphs 56 and 61 which is -- and in  
17 this context it's very much discussing the running of time under the time limits that  
18 were in place before the damages directive, as a matter of general EU law. At  
19 paragraphs 56 and 61, it articulates the second principle, that the limitation periods  
20 applicable cannot begin to run before the infringement has ceased and the injured  
21 party has knowledge or constructive knowledge.

22 So those are the two points of principle that arise from Volvo. We would say that,  
23 whether or not we are correct in reading the case in that way, it's a pure point of law  
24 that can be addressed in relatively short order. Given the number of parties you have  
25 in this hearing today, one can anticipate maybe two days would be required simply  
26 because people have to have their say but it's not a long point.

1 Now you saw in paragraph 56 one of the elements of 56 was has the infringement  
2 ceased. There may be arguments from the schemes that the infringement did cease  
3 in time. That is a second type of issue. That's a factual issue as to the application of  
4 that principle, assuming it exists, which can be picked up in the Article 101(1) trial.

5 What I would submit, it would be worth getting the point of principle resolved early next  
6 year, rather than waiting until 2024 to even grapple with whether we are right that  
7 Volvo establishes those principles, because if we are wrong then a lot of time and cost  
8 will have been spent in the meantime.

9 Obviously one has to allow for the possibility of appeal of a pure point of law that is  
10 obviously novel. But even taking all that into account, one can get moving on resolving  
11 that important point at a fairly early stage. We would say that would be a good  
12 approach to take but with the balance of limitation issues being held over for that first  
13 trial, as you, Sir, I think suggested.

14 Sir, my submission on Volvo and limitation. Is my position reasonably clear, Sir?

15 **MR JUSTICE MARCUS SMITH:** That's very clear. Thank you very much, Mr Woolfe.

16 **MR WOOLFE:** Then I can be shorter on other points.

17 On Article 101(3) our position is, like Ms Smith's, that the Tribunal should seek to  
18 grapple with 101(3) to some extent before pass-on. Our primary position is the  
19 Tribunal should seek to accommodate a trial of I'd say conditions one and three,  
20 possibly one, three and four of exemption, so that's what are the benefits that are said  
21 to arise from the restriction; to what extent is the restriction indispensable to those  
22 benefits; and then is there a complete (audio distortion) competition. I am going to say  
23 those sit very nicely alongside the 101(1) questions for a number of reasons.

24 First of all, objective justification, objective necessity, is, I understand on reading the  
25 list of issues, already raised in respect of a number of respects by the card schemes.

26 There's also an overlap of evidence between that and indispensability, albeit the legal

1 tests are different, but there is a clear commonality of the sort of factual matrix to those  
2 kind of issues. Those are relatively discrete factual issues. Whilst I imagine they will  
3 be heavily fought and it will involve adding some time to the trial of 101(1), they are  
4 not the kind of issues which Mr Holt says will be incredibly difficult and complex.

5 There also would be a real benefit to resolving those issues before turning to dealing  
6 with pass-on in either sense. We entirely endorse what Ms Smith said about fair share,  
7 the position on the economy-wide pass-on versus claimant specific pass-on for  
8 quantum. If one has -- exemption has to be established -- fair share has to be  
9 established, as I understand it, in respect of both card holders and merchants and  
10 therefore any fair share for consumers has to grapple with both elements of that.

11 Now if we have a sense of what the benefits are that are genuinely said to arise and  
12 for which the MIF is necessary, one could have a much better and more focused trial  
13 of fair share for either or both of those groups further down the line. We would say  
14 that that could and should be accommodated in trial one. But if it can't be  
15 accommodated in trial one for capacity reasons, then it could be dealt with before  
16 a trial of the pass-on issues.

17 Then, turning to other markets and jurisdictions, Sir, it's simply to raise this as  
18 a possibility, and this can't be done I think today. The defendants may have a view  
19 that competition is significantly different in certain markets from others. If they are able  
20 to plead out that view and then a view can be taken that the pleaded case is arguable,  
21 a sample of three or four or five different markets where something is said to be  
22 concretely different from others as regards domestic MIFs, like I think was suggested  
23 in respect of Italy, then it could be possible to accommodate a small subset of markets.

24 Clearly we are not advocating that all 28 be included. I entirely endorse what has been  
25 said by others that that is impossible. Nor am I suggesting now that we know which  
26 ones should be included. But it may be that it's possible to identify markets that

1 indicate a certain set of facts, such as having a central clearing hub, as I understand  
2 was the case in Italy, but that may be something the defendants have to bring forward  
3 based on their argument as to what markets are different.

4 Turning to Article 102, we resist this coming into trial one simply because it was not  
5 raised in any of our cases. It would add time to the trial. If it's brought in, we would  
6 submit it should be done in a way that does not drive up costs for the other clients who  
7 haven't raised it in some modular way. But our primary position is Article 102 should  
8 be kept out of trial one.

9 Then, finally, on acquirer pass-on we would support it coming into trial one. It is an  
10 important part of the story of competitive harm to merchants. I understand what  
11 Mr Cook was saying about it may affect the determination of the issue as between him  
12 and Merricks as to whether or not there's a ubiquitous matter, but one should not let  
13 a procedural tail wag a substantive dog. Naturally speaking, acquirer pass-on I think  
14 would come into trial one and that's our position, Sir.

15 Can I just check with those around me that I haven't left off anything. Sir, those are  
16 my submissions. I hope they will be of assistance.

17 **MR JUSTICE MARCUS SMITH:** I am very grateful. Thank you all very much. We  
18 will -- sorry, Peter.

19 **MR JUSTICE ROTH:** Sorry, can I just ask one thing for clarification. The Volvo point  
20 which Mr Woolfe has just explained, have I understood it correctly, not having read the  
21 pleadings in these cases, it's taken clearly by Mr Woolfe's clients and that's now  
22 effectively Primark, as I understand it?

23 **MR WOOLFE:** In that respect, I act for Hillside, which bundle 5, tab 70. Bet365 is the  
24 actual more better known name of the business, but they are the ones who have  
25 pleaded it.

26 **MR JUSTICE MARCUS SMITH:** And Primark have it as well, so there are two cases

1 | where it's in. Ms Smith would like to have it in and will amend accordingly. That's as  
2 | I understand the position at the moment.

3 | **MR JUSTICE ROTH:** Ms Smith, is that right?

4 | **MS SMITH:** No, it has been pleaded on behalf of Vodafone Limited and  
5 | Others v Mastercard and Grove F&B Limited and Others v Mastercard. They were  
6 | stayed cases against Mastercard and we put in the particulars on those a couple of  
7 | weeks ago. So it has been pleaded in those most recent particulars put in by those  
8 | particular Scott+Scott claimants.

9 | **MR JUSTICE ROTH:** Are the others seeking to amend to introduce it?

10 | **MS SMITH:** We will be, yes. And in light of the indication given by Mr Kennelly earlier  
11 | that Visa would be opposing that amendment, even though it has been pleaded in  
12 | these other cases that are live and are part of the umbrella proceedings, he has not  
13 | indicated on what basis he would, but it does appear that we will need to have, I would  
14 | say, a day for a hearing of any amendment applications if they are going to be opposed  
15 | by Visa, on what basis we don't yet know.

16 | **MR JUSTICE ROTH:** Yes, thank you very much.

17 | **MR JUSTICE MARCUS SMITH:** That's very helpful, thank you.

18 | **MR WOOLFE:** One further matter, the Stephenson Harwood claimants, one of those  
19 | claimants, that's Bet365, Hillside, has been served with particulars. The other  
20 | Stephenson Harwood claims are going to be served by the end of November. We are  
21 | intending to plead the same point. That's not subject to any objection on the grounds  
22 | of amendment in the same way.

23 | **MR JUSTICE MARCUS SMITH:** Very good. Thank you all very much. We will  
24 | resume at 10.30 am tomorrow and we look forward to hearing from you all then, so  
25 | thank you very much. Until tomorrow morning.

26 | **(4.36 pm)**



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**(The hearing adjourned until Tuesday, 8 November 2022 at 10.30 am)**