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5 **IN THE COMPETITION**

Case No:1266/7/7/16

6 **APPEAL**

7 **TRIBUNAL**

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

12 Tuesday 6<sup>th</sup> June 2023

13  
14 Before:

15  
16 **The Honorable Mr Justice Roth**

17  
18 (Sitting as a Tribunal in England and Wales)

19  
20  
21 BETWEEN:

22  
23 **Class Representative**

24 **Walter Hugh Merricks CBE**

25  
26 V

27  
28 **Defendants**

29 **Mastercard Incorporated and Others**

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31  
32  
33 **A P P E A R A N C E S**

34  
35  
36 Marie Demetriou KC, Paul Luckhurst, & Crawford Jamieson (On behalf of Walter  
37 Hugh Merricks CBE) Instructed by Willkie Farr & Gallagher (UK) LLP

38  
39 Matthew Cook KC, Hugo Leith & Stephen Donnelly (On behalf of Mastercard  
40 Incorporated and Others) Instructed by Freshfields Bruckhaus Deringer LLP

41  
42  
43 Digital Transcription by Epiq Europe Ltd  
44 Lower Ground 20 Furnival Street London EC4A 1JS  
45 Tel No: 020 7404 1400 Fax No: 020 7404 1424  
46 Email: [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)

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48  
49 **Tuesday, 6 June 2023**

1 (10.30 am)

2 **Housekeeping**

3 **MR JUSTICE ROTH:** Good morning. I start as always with a warning, familiar to  
4 many, namely that these proceedings, as all proceedings in this Tribunal, are being  
5 livestreamed. An official recording and transcript of the proceedings is being made.  
6 It is strictly prohibited for anyone to make any unauthorised recording or take any  
7 visual image of the proceedings.

8 I thank the parties not only as usual for their skeleton arguments but also for the  
9 suggested agenda which seems to me very sensible. So we start with the application  
10 by the Class Representative Mr Merricks to adduce new evidence and expert  
11 evidence. Ms Demetriou.

12 **MS DEMETRIOU:** May it please the tribunal, I appear with Mr Luckhurst and  
13 Mr Jamieson for Mastercard and Mr Cook and Mr Leith and Mr Donnelly for  
14 MasterCard --

15 **MR JUSTICE ROTH:** I think you appear for the Class Representative.

16 **MS DEMETRIOU:** I am so sorry. That is a very good start. Hopefully it will be  
17 an upward trajectory from now on.

18  
19 **Application by MS DEMETRIOU**

20 **MS DEMETRIOU:** Mr Merricks seeks permission from the tribunal to rely on the  
21 statement of Mr Dhaene, as you have seen. The application is at core bundle  
22 volume 1, behind tab 4.

23 **MR JUSTICE ROTH:** Yes. Yes, I have seen that.

24 **MS DEMETRIOU:** You will have seen I think, sir, as well that the application is  
25 supported by a statement from Mr Bronfentrinker, my instructing solicitor.

26 **MR JUSTICE ROTH:** Yes.

1 **MS DEMETRIOU:** The statement of Mr Dhaene itself in draft, because it's not yet  
2 sworn, is behind tab 7.

3 **MR JUSTICE ROTH:** Yes.

4 **MS DEMETRIOU:** As to the relevant test, we say that the tribunal should act in  
5 accordance with its overriding objective under rule 4.1 to 4.2 to deal with cases justly  
6 and at proportionate cost. The tribunal will have seen from our skeleton argument that  
7 that was the test applied by the tribunal in *Generics (UK) Limited v. Competition and*  
8 *Markets Authority* [2017] Comp AR 74 when it was determining whether to admit to  
9 further expert reports. We contend that in applying the overriding objective the proper  
10 course is to allow Mr Merricks' applications and to admit Mr Dhaene's evidence in full.  
11 Sir, you will have seen that MasterCard doesn't object to the admission of Mr Dhaene's  
12 factual evidence.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** So it's not saying that the lateness of this evidence -- because of  
15 course we accept it is late. They are not saying that the lateness of this evidence  
16 causes it irreparable prejudice.

17 **MR JUSTICE ROTH:** It is as an expert but not as a witness of fact.

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

19 **MR JUSTICE ROTH:** That's on the condition that it can file factual evidence in  
20 response.

21 **MS DEMETRIOU:** Yes.

22 **MR JUSTICE ROTH:** You don't oppose that presumably.

23 **MS DEMETRIOU:** We don't oppose that.

24 **MR JUSTICE ROTH:** And they should do so I think by 19 June; is that right?

25 **MS DEMETRIOU:** We'll come on to timetable, sir. We do think that's a little late in  
26 circumstances where our skeleton argument is due on the 21st.

27 **MR JUSTICE ROTH:** It may be a little late but that's because your factual evidence

1 is extremely late.

2 **MS DEMETRIOU:** Sir, yes, we see that. Of course if the tribunal is with them on the  
3 need for that amount of time then of course we are not going to object to that.

4 **MR JUSTICE ROTH:** It may be that I will ask Mr Cook if they can do it by  
5 Friday -- I think the 19th is a Monday -- 16 June, but I think you will have to accept  
6 whatever I decide in that regard.

7 **MS DEMETRIOU:** Sir, yes.

8 **MR JUSTICE ROTH:** You are not going to resist that strongly.

9 **MS DEMETRIOU:** No, of course we will accept whatever you decide in that regard.

10 **MR JUSTICE ROTH:** Yes.

11 **MS DEMETRIOU:** Now MasterCard does of course object to the admission of those  
12 parts of the statement that constitute expert rather than factual evidence, and I am  
13 going to come on to respond to that particular objection, but it does so in part on the  
14 basis that if admitted, MasterCard would be put to the burden of instructing its own  
15 expert to respond to the statement. Really the short answer to that is that that  
16 misunderstands the nature of the expert evidence Mr Dhaene is giving, because his  
17 evidence all relates to matters that MasterCard's factual witnesses can and indeed do  
18 address.

19 **MR JUSTICE ROTH:** Sorry to interrupt you. There is a difference between a factual  
20 witness from a party and an expert, an independent expert albeit retained by the party,  
21 particularly if it's evidence about how things worked in an industry because  
22 MasterCard's own witnesses will no doubt be -- I won't say criticised, but it will be put  
23 to them that of course you are very partisan to MasterCard which one would expect  
24 them to be.

25 So it's not unreasonable if you have an expert on industry to say well they want an  
26 independent expert unconnected to MasterCard.

1 **MS DEMETRIOU:** Sir, I think that it's important to understand first of all why it is  
2 that -- the nature of Mr Dhaene's evidence, which I am going to take you to. Really  
3 it's hard to draw a firm distinction between those elements of his statement where he  
4 gives first-hand factual evidence and those elements where he is giving evidence as  
5 to the facts but where he doesn't have first-hand knowledge, but he's doing so on the  
6 basis of his industry knowledge and experience.

7 Obviously the starting point is that in collective proceedings and in a case like this  
8 where MasterCard -- there's a huge information asymmetry. So MasterCard has all  
9 the documents. It is its conduct which is under scrutiny and it has access obviously to  
10 as many witnesses as it wants. It has filed, as you have seen, substantial factual  
11 witness evidence dealing with how in fact these interchange fees were set and cost  
12 studies and so on and so forth.

13 **MR JUSTICE ROTH:** I should say, for the benefit of all parties, I haven't looked at the  
14 factual evidence at all. I have looked at obviously the evidence for these proceedings  
15 but the matters in the factual evidence that has been served, I am not familiar with it.

16 **MS DEMETRIOU:** Sir, that's understandable. I think suffice it to say for present  
17 purposes that there are five -- there's a separate sixth statement dealing with volume  
18 of commerce, but there are five lengthy and detailed factual statements from  
19 MasterCard dealing with matters such as how the MIFs were set, the relevance of cost  
20 studies, how those were compiled and how they were taken into account, and  
21 competitive conditions in the market and the relevance of those conditions.

22 As I say, there are five very detailed substantial statements that they've adduced. The  
23 starting point really is that a Class Representative who is representing consumers has  
24 access to none of that. They don't have access to witnesses or documents and so  
25 there is, as I say, a profound asymmetry of information and resource. The way in  
26 which Mr Merricks is able to address the substantial evidence that has been put in by

1 MasterCard is via, will be via, Mr Dhaene who as it happens worked for MasterCard  
2 for part of the claim period and for that period is able to give first-hand factual evidence.  
3 But also he has substantial experience both then and subsequently in the payment  
4 cards industry.

5 **MR JUSTICE ROTH:** Can we just break that down. First of all, the factual evidence  
6 about how MIFs were set, how cost studies were done in MasterCard, what was taken  
7 into account in MasterCard, those are matters of fact. Mr Dhaene can give factual  
8 evidence and does on that. That is admitted.

9 **MS DEMETRIOU:** Well --

10 **MR JUSTICE ROTH:** Just pause a moment.

11 **MS DEMETRIOU:** Of course.

12 **MR JUSTICE ROTH:** It's very late, but even if MasterCard had opposed it I would  
13 have been sympathetic to admitting it because of the information asymmetry you refer  
14 to.

15 The industry expert insofar, and we'll look at his statement, as he goes beyond that,  
16 in other words beyond what MasterCard did -- which he can speak to because he  
17 worked there and was involved. Yes, if you had asked in September or January that  
18 you would like to call an industry expert, I can see there might be good reasons why  
19 the tribunal would have said yes, it's fair that you should. But we are not in January.  
20 The question is whether it is so relevant, so important, and given that there is no way,  
21 it seems to me, that MasterCard can then produce an industry expert now and they  
22 can meet and have a statement of agreed/disagreed and all the rest of it, at this point  
23 it's fair and just that it should come in. That's the question.

24 You have all the benefit of Mr Dhaene on the matters that are, as it were, specific to  
25 MasterCard, no doubt addressed at length by the MasterCard factual witnesses.

26 **MS DEMETRIOU:** Yes. Sir, I understand the point. Can I just foreshadow my

1 submissions very briefly in relation to both of the points that you put to me but then  
2 I am going to develop them, especially the second point.

3 The first point in terms of why we haven't sought permission sooner, I hope that's  
4 obvious from Mr Bronfentrinker's statement. So great efforts were made to locate an  
5 industry expert.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** But they came to nothing and so we weren't in a position to apply  
8 for the admission of industry expert evidence in circumstances where we simply didn't  
9 have access to any.

10 **MR JUSTICE ROTH:** You had one for quite a while. You've known apparently -- so  
11 Mr Bronfentrinker -- right from the beginning, going back many years now, you wanted  
12 to have an industry expert. You have had one since 2016. He then withdrew or  
13 dealings with him came to an end in late August 2022. You continued to consider that  
14 you wanted an industry expert, but you didn't say to MasterCard that that is what you  
15 are planning to do if you can find one.

16 **MS DEMETRIOU:** Sir, no we didn't because --

17 **MR JUSTICE ROTH:** Why not?

18 **MS DEMETRIOU:** Well because we had -- we never had one that we could use for  
19 the proceedings.

20 **MR JUSTICE ROTH:** No, but you could have told MasterCard, "We are hoping to call  
21 an industry expert. We can't guarantee it. It's not easy to find." But at least they are  
22 on notice. Presumably if it's hard to find an independent industry expert, it's hard for  
23 you -- and I fully accept it's hard and I don't criticise the efforts you or those instructing  
24 you have made, but it's equally hard for MasterCard. They could have then at least  
25 gone about finding one themselves who is lined up in case you do produce one.

26 **MS DEMETRIOU:** Sir, I understand the point you are putting to me but the answer to

1 it is tied up with the second point that you put to me which relates to the substance of  
2 the evidence that is being given here.

3 Really the key point is that this isn't industry expertise that MasterCard needs to  
4 respond to in kind, because at the outset, for example, sir, you put to me: well  
5 Mr Dhaene can talk about cost studies and things like that. But I apprehend -- and of  
6 course what we don't have from MasterCard is any indication of what it thinks are the  
7 impermissible bits of expert evidence. It's just said you've got to go away and do the  
8 task itself. But I apprehend that one of the sections of the report which they will object  
9 to, on the basis it's expert evidence, is precisely that relating to cost studies. We'll  
10 hear from Mr Cook to see whether that's right, but I think I can probably best make my  
11 submission by taking you through the draft statement itself.

12 **MR JUSTICE ROTH:** Could you just tell me -- because I would like to know, as  
13 regards the industry expert evidence, what issue it actually goes to. Does Mr Dhaene  
14 go to volume of commerce at all?

15 **MS DEMETRIOU:** He goes to volume of commerce in two respects. So if you turn  
16 up his draft statement behind tab 7 at page 72, do you see there there is a heading  
17 "MIF Category Mapping"?

18 **MR JUSTICE ROTH:** Yes.

19 **MS DEMETRIOU:** And that section, MIF category mapping, relates to the extent to  
20 which one can map the EEA MIF categories on to the domestic MIF categories and  
21 that's something which Mr Coombs has done in his expert reports.

22 **MR JUSTICE ROTH:** Yes.

23 **MS DEMETRIOU:** And so that is relevant to causation but potentially relevant to VOC  
24 also.

25 **MR JUSTICE ROTH:** I see.

26 **MS DEMETRIOU:** Then, over the page, on-us transactions. That's also



1 a section -- so there is a dispute between the parties as regards the status of ON-US  
2 transactions, in other words where the issuer and the acquirer are one and the same  
3 bank.

4 **MR JUSTICE ROTH:** Yes.

5 **MS DEMETRIOU:** He also gives some evidence in relation to that.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** Otherwise, sir, if we could just go through some of the earlier parts  
8 of the statement.

9 **MR JUSTICE ROTH:** Yes.

10 **MS DEMETRIOU:** If we take it from -- and, sir, the earlier parts explain Mr Dhaene's  
11 experience and so if you have read it I don't need to take you back through those.  
12 But if we turn to paragraph 19 --

13 **MR JUSTICE ROTH:** Well should we start at 14 I think.

14 **MS DEMETRIOU:** Let's start with 14, yes. So here he is explaining his understanding  
15 of an interchange fee.

16 **MR JUSTICE ROTH:** Well paragraph 14 is I think noncontroversial. It's just  
17 explaining what it is, which I think we all know but there's no harm I suspect in it being  
18 said. But he then goes on to give an opinion --

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE ROTH:** -- about what the function of an interchange fee was and is and  
21 what the purpose of it is. Well that's an expert opinion, isn't it? That's his view of what  
22 he thinks the commercial purpose is. He's not saying: this is what we believed when  
23 I was at MasterCard. He is giving an expert opinion.

24 **MS DEMETRIOU:** Well, sir, this really comes back to the type of expert evidence we  
25 are dealing with. I don't like jumping around very much, but can I just take you to an  
26 authority -- I know it's one that you saw very recently in the pass-on hearing.

1 **MR JUSTICE ROTH:** It doesn't mean I remember it.

2 **MS DEMETRIOU:** Sorry, if you can just bear with me for a moment.

3 **MR JUSTICE ROTH:** You say it is referred to in your skeleton.

4 **MS DEMETRIOU:** It's in our skeleton. If you turn to our skeleton.

5 **MR JUSTICE ROTH:** It's probably in a footnote, is it?

6 **MS DEMETRIOU:** Yes, it's at footnote 9, Declan Colgan.

7 **MR JUSTICE ROTH:** Declan, yes. It's not in the bundle then.

8 **MS DEMETRIOU:** No, (inaudible). If you could turn to -- so this was an authority  
9 I think Mr Moser referred to at the pass-on hearing.

10 **MR JUSTICE ROTH:** Yes, he did, that's right.

11 **MS DEMETRIOU:** If you turn to page 15 and paragraph 93, that is a helpful, in my  
12 respectful submission, distillation of the types of evidence that can be given by an  
13 expert witness but which on a more or less detailed analysis is evidence of fact. If we  
14 go over the page to 93.2, you see there this category:

15 "Cases where the expert draws on the general body of his knowledge and  
16 understanding in which he is an expert to give evidence as to a matter of observable  
17 fact. In the course of his submissions I put to Mr Howells the examples of cases where  
18 expert evidence is evidence as to historical facts or circumstances which pre-date  
19 living memory. His answer to this example was consistent with his thesis that evidence  
20 of fact would not be expert evidence. I don't agree this would always be the case.  
21 Where an expert relies on his own knowledge or experience but has no  
22 first-hand knowledge of facts in question his evidence as to the facts may be  
23 admissible evidence of those facts within CPR 35. Expert evidence in those  
24 circumstances could be classified as expert opinion evidence as to matters of fact."  
25 So we say that the expert elements of Mr Dhaene's statements clearly fall into that  
26 category, which is why I do say that they all go to matters that are dealt with in detail

1 by MasterCard's factual witnesses.

2 **MR JUSTICE ROTH:** But suppose MasterCard's factual -- as I say I have not read it.  
3 Suppose MasterCard's factual witnesses say: no, the purpose of an interchange fee  
4 in our view was something else and this is opinion evidence of purpose. It's clearly  
5 expert evidence, isn't it? Indeed you've just taken me, on your own case, to  
6 a classification of it as expert evidence.

7 I don't know if it's in dispute. It may well not be. But if it's not in dispute you don't need  
8 it.

9 **MS DEMETRIOU:** It is in dispute. The reason it's in dispute is that MasterCard's case,  
10 as explained in great detail in their factual witness statements, is that the purpose of  
11 the interchange fee was to cover costs and so they say that the level of the -- so it's  
12 very firmly, centrally, in dispute.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** So, yes, it's expert evidence but only in the sense that  
15 Mr Dhaene -- he's not here relying on his first-hand knowledge: so at the time  
16 I reached the view that or I was told that or I have a document that indicates that. But  
17 he is squarely within this category, in the authority of 93.2, where although he does  
18 not have first-hand knowledge, in the sense of being able to point to a document he  
19 was aware of at the time or talk about a meeting where this was discussed, it is his  
20 view of the facts.

21 **MR JUSTICE ROTH:** It's his view of the facts across the industry.

22 **MS DEMETRIOU:** It's his view of the facts across the industry.

23 **MR JUSTICE ROTH:** Yes, it's industry expert evidence.

24 **MS DEMETRIOU:** But the relevance of that is that it's his view of the facts which  
25 underpins -- it goes to counter MasterCard's evidence which is that the purpose of  
26 an interchange fee and the manner in which they were set was to cover costs.

1 **MR JUSTICE ROTH:** Precisely why MasterCard might want an industry expert  
2 saying: no, it's well known that in the industry this was not the purpose. And that's true  
3 of Visa and -- I don't know if Diners Club charged an interchange fee, and true in other  
4 countries as well.

5 **MS DEMETRIOU:** Sir --

6 **MR JUSTICE ROTH:** That's the problem.

7 **MS DEMETRIOU:** The question is whether they require that in circumstances where  
8 they have a multiplicity of witnesses who do talk to that very issue.

9 **MR JUSTICE ROTH:** Yes, but you say they are wrong.

10 **MS DEMETRIOU:** We say they are wrong, but it's ultimately a question of fact whether  
11 they are right or wrong. It's a question of fact and so it can be dealt with by way of  
12 factual evidence.

13 **MR JUSTICE ROTH:** Yes, but you will be putting to them that's not the purpose but  
14 you want to rely on someone saying that in his opinion this is how the industry worked.

15 **MS DEMETRIOU:** Sir, yes, because we don't have any of the factual witnesses that  
16 MasterCard have to deal with that point. So this is our only way of countering the  
17 point.

18 **MR JUSTICE ROTH:** I understand why you want to use it. But, as I say, if you'd  
19 asked long ago, and even if you'd told MasterCard long ago you were hoping to do  
20 this, you'd be in a rather better position. He does say, at the end of 15, something that  
21 I think is fact:

22 "It was common knowledge within MasterCard that blended acceptance contracts  
23 were included."

24 I mean that seems to me factual evidence, the last sentence.

25 **MS DEMETRIOU:** Sir, yes.

26 **MR JUSTICE ROTH:** But the rest of it seems to me clearly opinion evidence.

1 **MS DEMETRIOU:** Well, sir, as I say, and I am repeating myself, it's opinion evidence  
2 as to fact. We are only having to rely on opinion evidence as to fact because we don't  
3 have factual witnesses. So when one is looking at how do we counter the very detailed  
4 factual evidence that MasterCard has put forward, the basis for interchange fees and  
5 their calculation was costs, this is our only means of addressing that evidence.  
6 Now we don't, in our respectful submissions, think it's at all necessary for MasterCard  
7 to then go to an industry expert to rebut this because their own witnesses do deal with  
8 this in a huge amount of detail. Now if I were to put to them, "Well you are biased,  
9 aren't you, you don't have anyone independent", there would obviously be a very  
10 simple answer to that forensic point. Ultimately the question for the tribunal is what  
11 were the facts, it's fact-finding.

12 **MR JUSTICE ROTH:** Yes, but he's not giving evidence about what actually was the  
13 purpose within MasterCard. He is giving evidence about how, in his view, interchange  
14 fees function in four party systems.

15 **MS DEMETRIOU:** Sir, based on --

16 **MR JUSTICE ROTH:** It may be to some extent, I don't know, your economist may be  
17 able to consider the incentives, but --

18 **MS DEMETRIOU:** This is based on, at least in part, his experience working at  
19 MasterCard.

20 **MR JUSTICE ROTH:** Yes.

21 **MS DEMETRIOU:** So that is, at least in part, the basis for his --

22 **MR JUSTICE ROTH:** Well experts usually or often give evidence based on their  
23 experience. Certainly they do when you have medical experts in negligence, personal  
24 injury cases, medical malpractice cases, experts in patent cases; they are always  
25 relying on their experience.

26 **MS DEMETRIOU:** Sir, yes, but really can I just take you to MasterCard's statement

1 so you can see how they address these matters. You'll find them in the second core  
2 bundle.

3 **MR JUSTICE ROTH:** What I want to understand -- if it's said to him: well, you say  
4 that, how do you know that that was our purpose, what is he going to say?

5 **MS DEMETRIOU:** Sir, the short answer to that point is that can be put to him in  
6 cross-examination --

7 **MR JUSTICE ROTH:** I want to understand, you see, what this is. Is he going to say:  
8 well, I've studied, as in his bibliography, and worked on this expert group and I know  
9 it from that, I have gained -- or is he going to say -- I don't know what he's going to  
10 say. But he's not saying that when we approached the setting of interchange fees, or  
11 my colleagues in MasterCard, this is what we had in mind.

12 **MS DEMETRIOU:** Sir, no. It may be that he could say that. Of course --

13 **MR JUSTICE ROTH:** If he can say that, he should say it and that's evidence of fact.

14 **MS DEMETRIOU:** Yes.

15 **MR JUSTICE ROTH:** Given how long he worked in MasterCard and the positions he  
16 held, you'd think he might know. But at the moment it's put as his opinion.

17 **MS DEMETRIOU:** Well, sir, before going to their statement shall we carry on going  
18 through the statement.

19 **MR JUSTICE ROTH:** I think so because I can appreciate that ...

20 **MS DEMETRIOU:** So we then see, over the page, the heading "Processing  
21 interchange fees in Europe including the UK".

22 **MR JUSTICE ROTH:** Yes.

23 **MS DEMETRIOU:** I think that this next section is indisputably factual evidence.

24 **MR JUSTICE ROTH:** Yes. There is a sort of view in paragraph 18 but I think that's  
25 self-evident.

26 **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** I don't think anyone would challenge that because it's obvious.  
2 So, I agree, 18 to 20 we don't have to worry about.

3 **MS DEMETRIOU:** And then the heading "Introduction of domestic interchange fees  
4 by MasterCard in the UK", he's talking directly about his experience. So this is factual  
5 evidence.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** Just so I can pick this up, if you look at paragraph 23, MasterCard  
8 in its draft order seems to be objecting to anything where he doesn't have  
9 first-hand knowledge. But that's a ridiculous submission.

10 **MR JUSTICE ROTH:** As I understood it, I think that's a different objection.

11 **MS DEMETRIOU:** It is.

12 **MR JUSTICE ROTH:** They are not saying it's expert evidence, they are saying he  
13 should state the basis of that evidence as a matter of factual evidence; and they say  
14 that is required under rule -- we can look at it in due course, under the Practice  
15 Direction.

16 But I don't think it's said that this is expert evidence. It seems to me it clearly isn't --

17 **MS DEMETRIOU:** No, I think they've got a separate point. I think they have two  
18 separate points there, the one you've just mentioned, but I think they also say and we  
19 see this from their draft order that any factual evidence of which Mr Dhaene didn't have  
20 first-hand knowledge should be excluded and we simply don't understand that at all.

21 **MR JUSTICE ROTH:** I will hear Mr Cook on that. Let's concentrate on the expert  
22 point.

23 **MS DEMETRIOU:** Okay. I think that takes us through to paragraph 27. This is all  
24 direct factual evidence. Then we see the heading "Decision making and the technical  
25 implementation of interchange fees within Eurocard and MasterCard". Again that's all  
26 factual evidence, I don't think there can be any debate about that.

1 **MR JUSTICE ROTH:** That's quite a long section.

2 **MS DEMETRIOU:** That's quite a long section.

3 **MR JUSTICE ROTH:** He explains how things worked and the Eurocard board and so  
4 on, and all based on his knowledge as someone who worked for all that period within  
5 MasterCard or Europay.

6 **MS DEMETRIOU:** Yes, and then if we come to page 55 you see the heading  
7 "Intra-EEA Default".

8 **MR JUSTICE ROTH:** Yes.

9 **MS DEMETRIOU:** That relates to the dispute -- there is a dispute, obviously a central  
10 dispute, between the parties as to what was the default rate during the infringement  
11 period, because MasterCard deny that it was as a matter of fact the EEA MIF and we  
12 say it was.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** And again we see that that is factual evidence because he's  
15 recalling from his time at MasterCard.

16 **MR JUSTICE ROTH:** Yes.

17 **MS DEMETRIOU:** Then that takes us --

18 **MR JUSTICE ROTH:** He talks about a conversation with his boss.

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE ROTH:** And so on and what they did.

21 **MS DEMETRIOU:** He talks about the technical --

22 **MR JUSTICE ROTH:** Yes.

23 **MS DEMETRIOU:** He talks, at 50 and 51, about how it worked in terms of inputting  
24 these rates into the technical system.

25 **MR JUSTICE ROTH:** Yes.

26 **MS DEMETRIOU:** Then he deals with arbitration and again we would say this is



1 factual evidence. You see, from 53:  
2 "From my recollection the arbitration procedure came into existence in 1992."  
3 **MR JUSTICE ROTH:** A few arbitrations.  
4 **MS DEMETRIOU:** Then he says why it was commercially unpalatable to invoke the  
5 arbitration procedure. So that's all factual evidence in our submission.  
6 **MR JUSTICE ROTH:** Yes.  
7 **MS DEMETRIOU:** Then we have factors relevant to MIF setting and he says that he  
8 has studied interchange fees including those of MasterCard, but here his knowledge  
9 is based not only on his time at MasterCard. You then have a section where he is  
10 explaining that he doesn't believe that cost considerations were important when it  
11 came to setting interchange fees. Again, that's a central dispute between the parties.  
12 **MR JUSTICE ROTH:** Well this again is opinion evidence, isn't it, 56? My opinion:  
13 "No interchange fee in any payment scheme related to costs on the issue ..."  
14 So he's indeed giving evidence about his view about not just MasterCard but generally.  
15 **MS DEMETRIOU:** He is.  
16 **MR JUSTICE ROTH:** You can well see that MasterCard might want an expert who  
17 also can give evidence on the broader experience, not just what MasterCard does  
18 because he says no one did it.  
19 **MS DEMETRIOU:** Well, sir, let's come back to that because I want to show you their  
20 statements.  
21 **MR JUSTICE ROTH:** Yes, but this does seem to me not dissimilar from the earlier  
22 section.  
23 **MS DEMETRIOU:** No, I agree it's not dissimilar to the earlier section.  
24 **MR JUSTICE ROTH:** So this is 55 to 57, I think, because 58 --  
25 **MS DEMETRIOU:** He talks about his direct experience.  
26 **MR JUSTICE ROTH:** Higher fee, prepaid cards -- yes, that's a different point I think

1 and that seems to me factual evidence.

2 **MS DEMETRIOU:** Factual evidence.

3 **MR JUSTICE ROTH:** Yes.

4 **MS DEMETRIOU:** Sir, the difficulty, if I may say so, is that of course this statement  
5 was drafted -- he was proofed at very great speed. He's a professional man who has  
6 other obligations. We've obviously acted as quickly as we can to do this. I'm afraid  
7 that this particular distinction, it wasn't drafted with a view to this particular distinction.  
8 So it may be that there are areas -- some of these areas he could actually give direct  
9 factual evidence of. So what I would not want to see is that, because of happenstance  
10 of drafting, material evidence is kept out which is going to prejudice our case.

11 **MR JUSTICE ROTH:** We'll come back to that. I may give you some indulgence on  
12 that if I am against you on the expert evidence, but it will have to be in very short order.

13 **MS DEMETRIOU:** Sir, yes.

14 **MR JUSTICE ROTH:** As you will appreciate, because MasterCard will want to start  
15 preparing its response and it has short time to do that. But, as I said on the earlier  
16 section, if he is able to say, "I know that our purpose when I was within MasterCard  
17 was to do this, and we were not so concerned about costs", and he may even refer  
18 back to some instance he relies on as a basis for that, he can certainly be asked about  
19 that if he gives such evidence; that would be factual evidence.

20 Yes, so that's 55 to 57.

21 **MS DEMETRIOU:** Then we have 59, the EDC cost studies. This is a major plank of  
22 MasterCard's case because they say that EDC cost studies were carried out and they  
23 gave rise to a reference rate which was the basis on which domestic interchange fees  
24 were set.

25 **MR JUSTICE ROTH:** Yes.

26 **MS DEMETRIOU:** It's not clear to me whether -- because we have not been

1 told -- MasterCard consider that this is factual or expert evidence. But we see that  
2 Mr Dhaene is here referring directly to events that he was familiar with. We see that  
3 at 61 and 62.

4 **MR JUSTICE ROTH:** Yes, who is Henning in 62 by the way?

5 **MS DEMETRIOU:** I am so sorry?

6 **MR JUSTICE ROTH:** In 62, the first sentence of paragraph 62:

7 "Fairly soon after the European Commission letter in 1990 a letter arrived on Henning's  
8 desk.

9 **MS DEMETRIOU:** I am not sure. Henning Johnson, I am told.

10 **MR JUSTICE ROTH:** Is he --

11 **MS DEMETRIOU:** Paragraph 43 -- sorry, page 43. Yes, there we go, (ii).

12 **MR JUSTICE ROTH:** This is --

13 **MS DEMETRIOU:** Henning Jensen.

14 **MR JUSTICE ROTH:** I see. Yes.

15 **MS DEMETRIOU:** So you see, at the end of paragraph 62, he says that it was  
16 determined that the best way to justify the MIFs was by saying they reflected costs  
17 incurred by issuers. Then he says, at 63, "It's my opinion ..." But that's obviously  
18 based on -- one might say opinion, that's therefore expert evidence. But it's obviously  
19 based on the facts that he has recounted in the previous paragraphs.

20 So I simply don't know whether this is an example, whether this section is going to be  
21 objected to. MasterCard just haven't said.

22 **MR JUSTICE ROTH:** What is 63, subparagraph (c)?

23 **MS DEMETRIOU:** I think he is referring -- so he says specific examples that  
24 demonstrate a lack of correlation between costs. And then we see, at 66, "The EDC  
25 cost studies didn't reflect individual bank cost structures", for example, and he gives  
26 some examples, and then at 68 and 69. So he deals with all of that from 66 onwards.

1 **MR JUSTICE ROTH:** Yes, so we don't need (c) because he does it. So (c) is just  
2 a summary.

3 **MS DEMETRIOU:** It's a summary.

4 **MR JUSTICE ROTH:** Yes. I mean he goes on, so we can delete (c) because I think  
5 he goes on to give that evidence.

6 **MS DEMETRIOU:** Yes.

7 **MR JUSTICE ROTH:** Response to justify ... I am looking at -- well, (a) is, in a sense,  
8 a summary of what has gone before.

9 **MS DEMETRIOU:** Yes.

10 **MR JUSTICE ROTH:** But (b), 63(b), is that explained?

11 **MS DEMETRIOU:** Well I think it's just --

12 **MR JUSTICE ROTH:** Costs which were borne by the issuer.

13 **MS DEMETRIOU:** Yes, paragraph 68.

14 **MR JUSTICE ROTH:** Yes.

15 **MS DEMETRIOU:** And 69.

16 **MR JUSTICE ROTH:** Look, we don't need 63 because he explains -- we don't need  
17 his opinion, he gives his evidence. 63(a) is really a summary of what he has said.

18 **MS DEMETRIOU:** Yes.

19 **MR JUSTICE ROTH:** And the discussions. But ... there could almost be a sentence  
20 at the end of 62 just saying therefore the EDC cost studies were a response. And then  
21 we don't need his opinion at (b) and (c). He goes on, he gives ... he makes the point  
22 again at 64; 65 is fact, 66 is I think fact; 67 is fact.

23 **MS DEMETRIOU:** Sir, 68 in a sense is an illustration of why this exercise is a little  
24 artificial, if I may respectfully say so, because if one is adopting -- if one is going down  
25 the MasterCard road of trying to chop out opinion evidence, then you look at  
26 a sentence saying, "From my knowledge of the market that is incorrect", and you say:

1 aha, that is not direct factual evidence. But, as I say, it really is artificial to distinguish  
2 or to delineate sections of Mr Dhaene's evidence in that way because when he was  
3 being proofed and when this was being drafted, when he was drafting this, he wasn't  
4 asked to make this distinction. So he wasn't pressed on: well, do you know this only  
5 from your time at MasterCard? You need to exclude anything that you've learnt  
6 subsequently from your brain before giving us an answer to this question. So that  
7 exercise wasn't done.

8 **MR JUSTICE ROTH:** Yes.

9 **MS DEMETRIOU:** Sir, we say, with respect, it would be artificial to require us to do it  
10 now because really this is all -- ultimately, sir, if the tribunal had to make a decision on  
11 what happened in the industry generally, then MasterCard would have a point. But  
12 the point that the tribunal has to decide is what MasterCard did.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** So his evidence, even if it is drawn from his wider experience, will  
15 only ever go to: in fact what did MasterCard do? Of course that is a question, those  
16 are questions, on which MasterCard's factual witnesses are quintessentially well  
17 equipped to provide evidence and they have done so at very great length. Should  
18 MasterCard wish to cross-examine Mr Dhaene to say, "Where do you get this  
19 knowledge from or why do you think this", then of course they can do that. But what,  
20 with respect, we say is unnecessary is for them to adduce industry expertise in relation  
21 to a matter which is essentially a factual matter that the tribunal will have to decide; it's  
22 just unnecessary. The reason we are having to resort to it is because we don't have  
23 the factual evidence.

24 **MR JUSTICE ROTH:** I think 68 is in a slightly different category from the earlier  
25 passages.

26 **MS DEMETRIOU:** Sir, you will have seen, for example, that Mr Dhaene acted as an

1 expert for the European Commission when it was adopting the interchange fee  
2 regulation. In our respectful submission it would be highly artificial to say to him: can  
3 you answer this question divorced from what you learnt subsequently when you acted  
4 as an independent expert for the European Commission.

5 Really the key question is: is this exercise necessary, would it be unfairly prejudicial  
6 to MasterCard to allow all of this evidence in in circumstances where, as I say, the  
7 dividing line is not clear? We say it wouldn't be prejudicial and the reason it wouldn't  
8 be prejudicial to MasterCard is because these are all matters -- so the EDC cost  
9 studies, which are what are being dealt with here, they are dealt with at huge length  
10 by MasterCard in its witness statement and ultimately the question for the tribunal is:  
11 what, as a matter of fact, was the case?

12 Of course we don't object to them adducing responsive factual evidence, but what they  
13 don't need to do is adduce expert evidence in relation to these matters.

14 **MR JUSTICE ROTH:** If all he's saying is that these are not costs associated with the  
15 relationship between issuers and acquirers and instead related to the relationship  
16 between issuing bank and customers, I mean that's obviously something you can  
17 explore with MasterCard's witnesses. You don't need Mr Dhaene to deal with that.  
18 But he is giving evidence based on general market knowledge.

19 **MS DEMETRIOU:** Sir, the problem with that, if I may respectfully say so, is that  
20 obviously we are in a much worse position, and this is why we would be severely  
21 prejudiced, if making out our case is dependent on the extent to which I can make  
22 headway in cross-examination in circumstances where we don't have our own positive  
23 evidence for the tribunal to consider. That really is a very key question and we would  
24 be prejudiced, we say severely prejudiced, if we can't put forward our evidence  
25 because one can see how cross-examination is going to go. I put these points, they  
26 deny them and we have nothing positive of our own to put before the tribunal. So

1 there clearly would be a big inequality of arms in terms of these key questions the  
2 tribunal is going to have to grapple with.

3 **MR JUSTICE ROTH:** When he says they usually were recovered from the customer  
4 by issuers, what would be his basis of saying that? His knowledge of the market and  
5 the industry?

6 **MS DEMETRIOU:** Sir, I don't know because, as I say, he has not been asked to make  
7 that clear.

8 **MR JUSTICE ROTH:** He does say -- sorry, Ms Demetriou -- from his knowledge of  
9 the market.

10 **MS DEMETRIOU:** Sir, yes, but his knowledge of the market includes at the time he  
11 was working at MasterCard. So I think there are two points really to make. One is  
12 that he hasn't been asked here to identify whether he gets this knowledge only from  
13 his employment with MasterCard or also because of his other experience; and the  
14 second point is that it would be artificial to ask him to make that clear. It's obviously  
15 a matter that can be probed in cross-examination.

16 **MR JUSTICE ROTH:** Why is it artificial to ask him to make that clear?

17 **MS DEMETRIOU:** Because he left MasterCard 20 years ago.

18 **MR JUSTICE ROTH:** Yes.

19 **MS DEMETRIOU:** He's since then had a great deal of other experience in the  
20 industry, including working for the European Commission, and what he is being asked  
21 to do -- I certainly couldn't do this, if I was told about some legal principle and I am  
22 asked: did you know it 20 years ago or is it because of more recent events that your  
23 opinion on it has been firmed up? It's a very difficult exercise to do.

24 Obviously there are some things he'll remember as being, yes -- and you can see that  
25 in his statement: I remember that letter coming across so and so's desk; I remember  
26 MasterCard did this and I inputted the data into the computers; and so on.

1 But in relation to these matters which are more general, if I can put it that way, it is  
2 highly artificial. We can go back and ask him if that's what's required.

3 **MR JUSTICE ROTH:** Looking at paragraph 72, which is a classic question of expert  
4 evidence about the difference in fraud ratios ...

5 **MS DEMETRIOU:** Sir, yes. So again the same points arise, which are that we haven't  
6 asked him whether he knows that -- whether he can give factual evidence of that based  
7 on his time at MasterCard, because it seemed like an artificial question to ask him in  
8 circumstances where he has since then had 20 more years' experience in the industry.

9 **MR JUSTICE ROTH:** I am not quite clear what he is challenging because  
10 MasterCard -- if they say the levels of fraud were higher, they will either give evidence  
11 on MasterCard's cards on what the level of fraud was in different countries. If he is  
12 disagreeing with the explanation of why, or whether he is -- he seems to be  
13 disagreeing with not the explanation but just saying a fraud ratio wasn't different.

14 **MS DEMETRIOU:** Sir, from memory, he is responding to a generalised assertion or  
15 sentence in one of the MasterCard's witness statements. But I am going to try and  
16 see if I can find where that derives from.

17 **MR JUSTICE ROTH:** If the fraud ratio is the same, the level of fraud in the UK will be  
18 higher because there are more cards.

19 **MS DEMETRIOU:** Yes, and then it's --

20 **MR JUSTICE ROTH:** So that is clearly correct. But if MasterCard are saying the fraud  
21 ratio was higher, that's a different point.

22 **MS DEMETRIOU:** And there will then be a question as to whether that matters. There  
23 will then --

24 **MR JUSTICE ROTH:** And certainly the fact ... but that seems to me ... very much  
25 a question of expert opinion of why levels of fraud might be different.

26 **MS DEMETRIOU:** Sir, can we just turn up -- so you can see, just because we are on



1 | this point. If you go to the second core bundle, behind tab 25, we have Mr Peacop's  
2 | witness statement. If you look at paragraph 58.

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

4 | **MS DEMETRIOU:** Page 1160, we see there he says:

5 | "The UK market had the highest levels of credit card fraud across Europe."

6 | So the difficulty for us is that they are not just making factual statements about  
7 | MasterCard.

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

9 | **MS DEMETRIOU:** Because they've worked for a long time in the industry for  
10 | MasterCard they are making -- indeed some of them worked for multiple people in the  
11 | industry. So we have Mr --

12 | **MR JUSTICE ROTH:** But the problem is he's not giving factual evidence about the  
13 | levels of fraud. He is just saying he believes the fraud ratio was about the same.

14 | **MS DEMETRIOU:** Yes, sir, then there will be a question for the tribunal as to how this  
15 | impacts on interchange fee rates and whether it's relevant to look at total fraud or fraud  
16 | ratio, and that will be a question. So he is making a factual point, based on his  
17 | experience, which is capable of -- which grapples with the point being made at  
18 | paragraph 58 here, because in a sense what is being said is it doesn't matter about  
19 | total levels it's the fraud ratio that matters. There will obviously then be a question of  
20 | submission before the tribunal as to whether that is right or wrong. But it's obviously  
21 | important we are able to deal with it.

22 | So just looking at Mr Peacop's statement, if you still have that open, we see going  
23 | down -- you can just see, by scanning 59 and onwards, that what is being said is levels  
24 | of fraud in the UK. He's not just talking about MasterCard. Their witnesses -- for  
25 | example, one of their witnesses is currently chief executive of -- I will make sure I have  
26 | the right witness. One of them is currently at EDC, was at MasterCard for a long time.

1 So they are able to give evidence, because of their factual position, about what is  
2 going on in the industry.

3 One might equally say -- the criticism being levelled at Mr Dhaene, one might equally  
4 say, well, Mr Peacop is guilty of the same thing because he is not saying there, "Well  
5 I know from my time at MasterCard, here is a document, that fraud levels at  
6 MasterCard were higher." He is saying fraud levels in the UK were higher. So he's  
7 making a generalised assertion. Well that looks like opinion evidence rather than  
8 factual evidence.

9 So really the key point is equality of arms, sir, and this rather granular approach that  
10 MasterCard are trying to press on the tribunal is simply not one that they've followed.  
11 That's also why we say it's just not relevant or necessary for them to go to an industry  
12 expert because they are purporting to give evidence in relation to the industry,  
13 including evidence that looks very much like opinion evidence, via their own factual  
14 witnesses.

15 **MR JUSTICE ROTH:** The problem is: how is this going to be substantiated? This is  
16 a factual question: was the fraud ratio different? He is going to say: in my experience  
17 I think it was. There are no figures, there's no data. He's just going to say: that's my  
18 experience.

19 **MS DEMETRIOU:** Sir, we will --

20 **MR JUSTICE ROTH:** That's my belief. I mean ... and someone else saying: no, my  
21 belief is otherwise. What is the tribunal going to do?

22 **MS DEMETRIOU:** Sir, the tribunal, with respect -- yes, that is always a problem in  
23 trials like this. But with respect it's less of a problem if there is actually a witness who  
24 can be cross-examined saying it. If it all falls on me to cross-examine MasterCard's  
25 witnesses --

26 **MR JUSTICE ROTH:** Either there is some actual factual information or -- on what

1 basis it's done. I don't know. If you say that it's not the case, isn't it right that there  
2 should be a request for further information or disclosure from MasterCard of actually  
3 what were the rates of fraud in different countries. It's not something that should come,  
4 someone saying: in my opinion they are the same; and: no, in my opinion they were  
5 different. It's hopeless.

6 **MS DEMETRIOU:** One would assume, given that MasterCard has made assertions  
7 in their witness evidence in relation to that fact, that they would have disclosed the  
8 relevant material.

9 **MR JUSTICE ROTH:** Why don't you ask them for further information on that and that's  
10 the way it's dealt with, rather than expert evidence? It's a very odd thing to do by way  
11 of experience.

12 **MS DEMETRIOU:** Sir, can I just show you -- just to make the point that (inaudible). If  
13 we go to Mr Douglas' statement, that's in core bundle 2 behind tab 27, and if we go to  
14 page 1198. Here you've got a section:

15 "The characteristics of the UK credit card market. In this section I set out my  
16 understanding of the key differences between the UK credit card market and the  
17 European credit card market."

18 **MR JUSTICE ROTH:** Yes.

19 **MS DEMETRIOU:** Then you see a number of paragraphs dealing with the industry.  
20 So look at, for example, 18(b):

21 "As the internet developed, the UK had much higher rates of internet based  
22 e-commerce transactions."

23 **MR JUSTICE ROTH:** Yes.

24 **MS DEMETRIOU:** They really are replete, their witness statements, not only with what  
25 one would say is factual evidence based on documents but with assertions about the  
26 industry. So we say it would be manifestly unfair for us not to be able to respond and

1 to be able to adduce evidence from Mr Dhaene as to his own understanding of the  
2 industry.

3 These are just examples.

4 **MR JUSTICE ROTH:** Yes.

5 **MS DEMETRIOU:** So look at, if you go over the page, 1201 at (f):

6 "In the late 1990s and afterwards, the intense competition in the UK credit card market  
7 [again not just MasterCard] also incentivised issuers to add rewards to cards."

8 We have no idea. There are no documents that are being cited here. He's not saying:  
9 well, I was involved in this.

10 We haven't said: none of this is admissible because you are not referring to documents  
11 and because it's not clear it's within your own personal knowledge.

12 **MR JUSTICE ROTH:** Yes.

13 **MS DEMETRIOU:** We know, for example, that Mr Peacop is an industry consultant  
14 and has given expert evidence. So no doubt when he is giving evidence here as to  
15 what's going on in the market he's not closing his mind to matters that he knows  
16 through his work as an independent expert or industry consultant, he'll have taken that  
17 into account.

18 **MR JUSTICE ROTH:** Yes.

19 **MS DEMETRIOU:** So, sir, this really goes to the point about equality of arms and also  
20 the point about the so-called prejudice to MasterCard. They simply aren't prejudiced,  
21 they won't require an industry expert because they've chosen to deal with all of these  
22 matters and they've dealt with them very amply and in great detail via their factual  
23 witnesses.

24 **MR JUSTICE ROTH:** Yes.

25 **MS DEMETRIOU:** Sir, I don't know if you want to go back to the statement and carry  
26 on looking.

1 **MR JUSTICE ROTH:** Yes, I think so.

2 **MS DEMETRIOU:** If we go back to Mr Dhaene's statement and I think -- in a sense,  
3 if you go to paragraph 76, you see the difficulty with the distinction that MasterCard is  
4 pressing on the tribunal. So new technologies were introduced over the full  
5 infringement period. Well he would have known that.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** You can see, at 77, MasterCard made a similar commercial  
8 decision and acquired Cirrus in 1992. Again he would have known that. He says,  
9 "I recall I saw an opportunity." So we do say, in the same way that MasterCard's own  
10 witnesses haven't distinguished between what they know from working at the time -- or  
11 their knowledge at the time of MasterCard events, they haven't distinguished between  
12 that and what they've learnt subsequently, but they've made much broader assertions  
13 about the industry. So, too, would it be highly artificial to ask Mr Dhaene to close his  
14 mind to things that he's learnt subsequently, even if that's possible. As I say, it's not  
15 always possible.

16 Then we have the section on Visa and that is a key area of dispute between the parties  
17 because MasterCard's case is that the interchange fees were set, at least in part, by  
18 reference to competition in the market predominantly from Visa.

19 **MR JUSTICE ROTH:** Yes.

20 **MS DEMETRIOU:** And Mr Dhaene here explains why he thinks that's wrong. He says  
21 that does appear to be grounded in facts at the time. We see from 81, "from my  
22 experience it was rare in those days". Then at 82, "from my experience at the time".  
23 Then at 83, "It was not a key consideration when MasterCard was making decisions."  
24 So I am not sure if that's being objected to, but that does seem to be, for what it's  
25 worth, grounded in his factual experience at the time.

26 **MR JUSTICE ROTH:** Yes. Just pause a moment. Paragraph 80, that's not

1 something that your expert has dealt with, your existing expert, about price elasticity?  
2 It's the kind of thing they normally would address.

3 **MS DEMETRIOU:** I can't remember offhand, sir. Let me come back to you.

4 **MR JUSTICE ROTH:** Yes. Your expert is Mr Coombs, is it?

5 **MS DEMETRIOU:** Yes.

6 **MR JUSTICE ROTH:** Has he looked at competition in the industry?

7 **MS DEMETRIOU:** Not for this purpose, no, sir. He addresses incentives but he  
8 doesn't look at this point.

9 **MR JUSTICE ROTH:** Well paragraph 83, which is in a way the critical paragraph for  
10 you, is factual --

11 **MS DEMETRIOU:** Yes.

12 **MR JUSTICE ROTH:** -- evidence, isn't it? He is talking about what was considered  
13 by MasterCard when making decisions from his knowledge being there.

14 **MS DEMETRIOU:** Yes.

15 **MR JUSTICE ROTH:** So paragraph 82 is how he understood Visa's commercial  
16 strategy.

17 **MS DEMETRIOU:** Yes.

18 **MR JUSTICE ROTH:** Yes. That's 79 to 84.

19 **MS DEMETRIOU:** Yes. Then you have impact of the MIF on the merchant service  
20 charge.

21 **MR JUSTICE ROTH:** This is experience of what happened with merchants.

22 **MS DEMETRIOU:** Sir, yes. I think this is relevant to whether or not there would be  
23 a constraint. It goes to the competitive conditions and whether those are relevant to  
24 the setting of the interchange fee. So here it's fair to say he says "from my experience  
25 over the years" and then at 87 he says, "I know from conversations I had in later years  
26 in my consulting practice", so he's drawing on more than --

1 **MR JUSTICE ROTH:** Yes.

2 **MS DEMETRIOU:** But then, sir, just to again show you another example in  
3 MasterCard's own evidence, if you go back to core bundle 2 behind tab 28.  
4 Core bundle 2, tab 28, page 1216, this is Mr Sideris' witness statement. You see the  
5 heading "Overview of interchange fees":

6 "In this section of my witness statement I address how interchange fees worked, why  
7 they were used by card schemes. This evidence is based on my experience working  
8 in interchange related roles at Mastercard and in roles at Visa and EDC that have  
9 included consideration of use of interchange fees in payment card schemes."

10 So that's not --

11 **MR JUSTICE ROTH:** Yes.

12 **MS DEMETRIOU:** -- just factual evidence which relates to what he knew at the time.  
13 You then see similarly an interchange fee is a fee paid when a card holder uses  
14 a payment card, and that is similar to what Mr Dhaene is saying. So it would be, we  
15 say, wholly unfair to characterise Mr Dhaene's evidence as inadmissible opinion  
16 evidence, expert evidence, when this is the very exercise that MasterCard's own  
17 witnesses are doing in spades.

18 **MR JUSTICE ROTH:** Yes.

19 **MS DEMETRIOU:** No doubt because, for the reasons I have given, it's difficult to ask  
20 Mr Sideris to expunge from his mind knowledge that he's gained in other capacities.  
21 Now if the tribunal is happier for us to label all of Mr Dhaene's evidence as factual  
22 evidence, on the same basis that MasterCard's evidence is factual evidence, then of  
23 course that's something that we can do. But we didn't think that was the right  
24 approach.

25 **MR JUSTICE ROTH:** I don't think it is all factual evidence, that's why.

26 **MS DEMETRIOU:** No, but then by the same token neither is MasterCard's in large

1 part.

2 **MR JUSTICE ROTH:** That's why this exercise, although laborious, I think is important,  
3 to look at exactly what he is saying, what issue it goes to and how it's addressed by  
4 MasterCard.

5 **MS DEMETRIOU:** Sir, yes, but you have my key point which is that it would be unfair,  
6 in our respectful submission, for a different approach to be applied to Mr Dhaene's  
7 evidence than MasterCard itself has applied. But it also goes to the submission I made  
8 as to the necessity or otherwise of MasterCard adducing responsive expert when. It  
9 obviously doesn't need to because these are all matters dealt with already by its factual  
10 witnesses.

11 **MR JUSTICE ROTH:** Yes. Let's go on to -- that's 85 to 87 about merchants.

12 **MS DEMETRIOU:** Yes. So here this does seem to be factual evidence because you  
13 can see, at paragraph 90, he is drawing on his time spent working for Europay.

14 **MR JUSTICE ROTH:** Yes.

15 **MS DEMETRIOU:** So I am not sure there is any objection to this.

16 **MR JUSTICE ROTH:** And then in 93 it's the ON-US.

17 **MS DEMETRIOU:** He says from his recollection. He draws back on the evidence he  
18 has spoken about previously which relates to his time at MasterCard.

19 **MR JUSTICE ROTH:** Yes. I think that 96 --

20 **MS DEMETRIOU:** Yes, he talks about --

21 **MR JUSTICE ROTH:** -- he says what he had in ... 2022.

22 **MS DEMETRIOU:** Sir, that's right, but you have my point about Mr Peacop, Mr Sideris  
23 and indeed Mr Douglas who all work for substantial periods of time across the industry  
24 and some of whom have acted as consultants and experts and who don't distinguish  
25 in their own evidence, when they give generalised evidence about the industry,  
26 between what they knew at the time and what they know now.



1 **MR JUSTICE ROTH:** But the rather unsatisfactory hearsay evidence in the last part  
2 of 96:  
3 "I heard that a lot of acquirers claim ..."  
4 **MS DEMETRIOU:** Sir, no doubt that's a point that can be made in cross-examination  
5 or submission.  
6 **MR JUSTICE ROTH:** It goes to how relevant it's going to be and therefore whether it  
7 should be admitted. If it's not going to assist, then that's one reason not to let it in so  
8 late. But I don't think you are concerned with the post IFR period, are you, in this?  
9 **MS DEMETRIOU:** I am so sorry?  
10 **MR JUSTICE ROTH:** You are not concerned with the post IFR period in this case  
11 anyway, are you?  
12 **MS DEMETRIOU:** No, we are not.  
13 **MR JUSTICE ROTH:** I don't think that's frankly necessary or relevant.  
14 **MS DEMETRIOU:** Sir --  
15 **MR JUSTICE ROTH:** Because what was going on in 2022, yes, one might try and  
16 infer something back, but it's a very different regime. So I don't think we need -- if  
17 I may say so, I don't think that prejudices you if that last part goes out.  
18 **MS DEMETRIOU:** No, I see that.  
19 **MR JUSTICE ROTH:** Yes. So I understand your points and I think it has been  
20 important to look at it carefully and I appreciate what you say about MasterCard's  
21 witnesses.  
22 **MS DEMETRIOU:** Sir, yes. I think there's only one further point for me to deal with  
23 that I haven't dealt with during the course of --  
24 **MR JUSTICE ROTH:** Yes.  
25 **MS DEMETRIOU:** -- the discussion we've been having, which is MasterCard also  
26 object to Mr Dhaene's expert evidence on the basis that he has a conflict of interest.

1 Can we pick it up from their skeleton argument, please, so MasterCard's skeleton at  
2 paragraph 17.

3 **MR JUSTICE ROTH:** This is about what happened -- the circumstances in which he  
4 left.

5 **MS DEMETRIOU:** Yes. Freshfields wrote to us about that on Sunday and in the time  
6 available my instructing solicitors have been investigating this and taking instructions.

7 **MR JUSTICE ROTH:** Yes.

8 **MS DEMETRIOU:** We wrote to Freshfields last night explaining our current state of  
9 knowledge, having discussed this with Mr Dhaene and having tried to obtain further  
10 contemporaneous documents. Can I show you the letter?

11 **MR JUSTICE ROTH:** Yes.

12 **MS DEMETRIOU:** So that's in bundle 4, tab 169, page 2463.

13 **MR JUSTICE ROTH:** 24?

14 **MS DEMETRIOU:** 2463, it may be that it has not reached you. It's here.

15 **MR JUSTICE ROTH:** No, it's not there.

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

17 **MR JUSTICE ROTH:** I think it is arriving now. In fact just in case it becomes relevant,  
18 my last page in bundle 4 is 2456. So there seems to be some other things that may  
19 have arrived in the meantime. I see this is the fourth letter of yesterday from your  
20 solicitors. So no doubt there are others. I won't ask what time it was sent.

21 Right. You want to --

22 **MS DEMETRIOU:** Shall I just highlight the key points and then perhaps you can cast  
23 your eye over the letter?

24 **MR JUSTICE ROTH:** Yes.

25 **MS DEMETRIOU:** The key points are that we do not accept MasterCard's  
26 characterisation of events in their skeleton. In fact, as we understand it, MasterCard

1 | paid Mr Dhaene a very significant sum when he left which is inconsistent with him  
2 | being dismissed summarily for misconduct.

3 | The official form which was signed by MasterCard, and which wasn't produced by  
4 | Freshfields when they wrote to us on Sunday, made no mention of misconduct. On  
5 | the contrary, the official form says Mr Dhaene left voluntarily. That's  
6 | a contemporaneous document signed by MasterCard.

7 | The contract that MasterCard says Mr Dhaene signed without authority which is what  
8 | they characterise as being the act of misconduct --

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

10 | **MS DEMETRIOU:** -- appears to have been a contract that was embraced by  
11 | MasterCard. We've seen a photograph of senior MasterCard executives at a signing  
12 | ceremony. It's correct that Mr Dhaene did bring a claim against MasterCard, that was  
13 | dismissed, seeking I think various documents for tax purposes but also more  
14 | compensation. That was dismissed, but it was dismissed a very long time ago, and  
15 | MasterCard --

16 | **MR JUSTICE ROTH:** The claim was in Belgium, was it, or where?

17 | **MS DEMETRIOU:** I am so sorry -- in Belgium.

18 | **MR JUSTICE ROTH:** Yes, it was in Belgium?

19 | **MS DEMETRIOU:** It was in Belgium.

20 | **MR JUSTICE ROTH:** What was the basis of the claim?

21 | **MS DEMETRIOU:** The basis for the claim, we see at 2465 -- and this is all a slightly  
22 | moving feast. We understand that this litigation was initiated in the face of MasterCard  
23 | refusing to provide information requested regarding his final compensation. He was  
24 | obviously represented by an employment lawyer throughout. It did seek further  
25 | compensation, that was rejected, and the litigation resulted in Mr Dhaene obtaining  
26 | the information he needed. So that's our understanding of the litigation.

1 Since all of this, MasterCard has engaged Mr Dhaene, or the company of which he is  
2 chief executive, as a consultant on two occasions which again is inconsistent with the  
3 picture MasterCard now seeks to paint. Mr Dhaene completely refutes the suggestion  
4 he's not independent or that he has a conflict of interest.

5 **MR JUSTICE ROTH:** Yes.

6 **MS DEMETRIOU:** Sir, in our submission, in light of this material, the tribunal certainly  
7 cannot form the view now that Mr Dhaene has any conflict of interest and that his  
8 evidence should be excluded on that basis. The proper course is to admit the evidence  
9 and if, despite these further documents that we've been able to unearth in the time  
10 available, MasterCard seeks to pursue these allegations, then it can do so at trial.

11 But, sir, we do lay down a marker now that it would be unfair, in light of the  
12 contemporaneous documents -- including the form which was not sent to us by  
13 MasterCard, which they signed, which said that he left voluntarily. It would be unfair  
14 for Mastercard to cross-examine Mr Dhaene on these matters at trial without giving  
15 full disclosure of what they've got in relation to the circumstances of his dismissal and  
16 without also putting up for cross-examination the person in MasterCard who they say  
17 took the decision to dismiss him, because it's only by looking at all of those events and  
18 looking at all the documents that the tribunal is going to be in any position to reach  
19 a view as to whether or not he has a conflict of interest at trial.

20 So it's for them to consider whether they want to pursue that line and, if they do, we  
21 say it's a matter for trial, not now, and they will have to provide disclosure and put in  
22 evidence explaining the circumstances.

23 **MR JUSTICE ROTH:** You have put down your marker. Obviously I have not heard  
24 from Mr Cook, but given that it's now common ground that Mr Dhaene is going to give  
25 evidence, I am not going to base any decision on the scope of his evidence arising out  
26 of these matters. It's not said he should be excluded from giving evidence altogether.

1 **MS DEMETRIOU:** No.

2 **MR JUSTICE ROTH:** So what we are really considering is the scope of the evidence  
3 that he should be permitted to give.

4 **MS DEMETRIOU:** Sir, yes. I think we have basically covered my key submissions  
5 now and, unless there is anything further by way of question, then those are my  
6 submissions in opening on the application.

7 **MR JUSTICE ROTH:** Yes.

8 **MS DEMETRIOU:** Thank you.

9 **MR JUSTICE ROTH:** Yes, Mr Cook. Looking at the time, as you know we always  
10 take a short break and it's probably a sensible time to do it, I would have thought, and  
11 we'll come back in -- clearly this is, I suspect, the most time-consuming part of the  
12 agenda and it's obviously important. I realise it's taking up a fair bit of time but it was  
13 important to go through the statement in some detail and I assume we can speed up  
14 as a result.

15 **(11.56 am)**

16 **(A short break)**

17 **(12.11 pm)**

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

19 **MR COOK:** Yes, sir. Sir, if I could start by just making an apology on behalf of  
20 Mr Smouha, King's Counsel, who is MasterCard's lead counsel for the trial. I hope  
21 you received an email from us.

22 **MR JUSTICE ROTH:** Who is that?

23 **MR COOK:** Mr Joe Smouha, King's Counsel. He is MasterCard's lead counsel for  
24 the trial. The intention was he would appear today. Unfortunately he's had a family  
25 bereavement at the end of last week.

26 **MR JUSTICE ROTH:** Sorry about that, but you are well familiar.

1 **MR COOK:** I am well familiar, sir, but it was more just to be aware when Mr Smouha  
2 does appear at trial he is involved, has been involved, and he has been involved  
3 particularly in our proposals in relation to the structure and running of the trial.

4 **MR JUSTICE ROTH:** Yes, right.

5 **MR COOK:** The trial counsel has been involved in that.

6 **MR JUSTICE ROTH:** It's probably more important when it gets to trial timetable.

7 **MR COOK:** It does, but this has become something of a PTR and it would ordinarily  
8 be a time trial counsel appears. That's the reason why he's not here today, which I am  
9 glad I did specifically mention then, sir.

10

11 **Submissions by MR COOK**

12 **MR COOK:** Turning then to the evidence of Mr Dhaene, whose name I am no doubt  
13 butchering horribly, but no doubt we are all doing the same, sir, this application could  
14 in certain respects hardly be later. We would say there are good grounds for the  
15 tribunal to refuse it in its entirety, but we've taken a more balanced approach than that.  
16 We have, I say, no objection, we do not take issue with it. We don't object to  
17 Mr Dhaene giving factual evidence provided that's done in accordance with the  
18 tribunal's Practice Directions on witness statements. That states at paragraph 3.2 that  
19 a factual witness statement must be limited to matters of fact of which the witness has  
20 personal knowledge.

21 **MR JUSTICE ROTH:** Yes.

22 **MR COOK:** So to that extent and we say: well it's common ground, it goes significantly  
23 beyond that, there's no objection. I should say, and to be clear this is not an objection  
24 to him giving evidence, that we don't accept that Mr Dhaene has any relevant evidence  
25 actually to give. I just didn't want the tribunal to think we were accepting in any way  
26 that he is somebody who has significant knowledge of the relevant events on the basis

1 that he seems to have started his career on the central European portfolio. He had  
2 a variety of roles worldwide, including in the US. He never had a UK role specifically.  
3 To the extent he mentions the UK, it was in the context of banks that had operations  
4 in multiple countries. I think he mentions one, ABN AMRO, that had operations in  
5 70 countries worldwide. He had little or frankly no involvement with the UK.  
6 He left MasterCard and I will come to explain was dismissed from MasterCard in 2004.  
7 Up until that point all the UK interchange fees were set by the UK banks, either  
8 bilaterally or, from 1997, by way of a UK MIF. There's no suggestion Mr Dhaene had  
9 any knowledge or involvement of that process. MasterCard took over setting UK  
10 interchange fees late in 2004, but that was after Mr Dhaene had left. So, again, he  
11 had no knowledge or involvement in MasterCard setting the UK MIFs when it came to  
12 do so.

13 Sir, those are points that will obviously go to the extent to which he can say anything  
14 helpful and be matters for cross-examination in due course. I did not want the  
15 impression to be given that we thought Mr Dhaene had anything particularly relevant  
16 or helpful to say.

17 **MR JUSTICE ROTH:** Yes.

18 **MR COOK:** Nonetheless we can accommodate where he is giving factual evidence  
19 of matters that he says are within his personal knowledge. That puts us under  
20 pressure because the trial is now very close.

21 **MR JUSTICE ROTH:** Yes.

22 **MR COOK:** But we have factual witnesses who can address that evidence and  
23 respond to it. There is a certain measure of equality that both sides have factual  
24 evidence on a point, there will be cross-examination and the tribunal will decide.

25 **MR JUSTICE ROTH:** So far there's no factual evidence from Mr Merricks, is that  
26 right?

1 **MR COOK:** That's correct.

2 **MR JUSTICE ROTH:** So this would be their only factual evidence.

3 **MR COOK:** Sir, that's right, but to the extent he is giving factual evidence then clearly  
4 we don't object to that. What we do say, sir, is it's absolutely far too late to  
5 accommodate evidence from an entirely new category of expert never previously  
6 raised in these proceedings. To some extent, sir, you've set out the crux of what my  
7 submissions are going to be in some of your questions to my learned friend.

8 If they had asked in good time for permission to adduce industry expert evidence on  
9 identified specific issues, it would have probably been very difficult for us to object.

10 That process would have resulted in a clear identification of the issues for expert  
11 evidence, but more significantly it would have given us an extended period to find an  
12 independent expert of our own. Even if they'd told us on the basis they weren't sure if  
13 they were going to find somebody and adduce that evidence, we'd have been in  
14 a position to prepare to respond to it and we'd have taken a view whether we wanted  
15 to do that on risk or wait until we actually saw whether they were going to find an  
16 expert. Again, that would have been matter for our choice. But we'd then be ready to  
17 respond with somebody who is independent.

18 But, sir, they didn't do that and it's clear from the evidence filed in support they've  
19 known since 2016 that they wanted to use an industry expert. They appear to have  
20 known since the September 2022 CMC that they wanted to use industry expert  
21 evidence, but they kept quiet about it. Essentially what has happened is they've  
22 ambushed us with one at the last minute, in circumstances where it's far too late for  
23 us to instruct someone to respond.

24 Sir, you did say in argument, and I would say it's absolutely right, there is a difference  
25 in kind between instructing somebody who -- we've already seen my learned friend is  
26 going to be saying they are MasterCard people. Factually, sir, that's not right. Many



1 of them work for banks, not MasterCard. But nonetheless she will say if they are  
2 MasterCard people their evidence is tainted in that respect. That's different from  
3 somebody who is independent who speaks to sort of matters of general -- general  
4 industry matters.

5 So if we'd known there was going to be the possibility of an independent expert we  
6 would have been in the position to decide if we needed our own independent expert  
7 to respond. The reality, sir, is it's simply far too late in the day for us to now try and  
8 find somebody, go through the whole process of reports and everything else.

9 **MR JUSTICE ROTH:** Can I ask you, Mr Sideris -- not Sideris, Sidenius, I am sorry,  
10 Sidenius, he's a consultant. He's a consultant on payment analysis in the financial  
11 sector. He has worked for you for a long time but he has also then worked for Visa,  
12 he has worked for EDC. Why could he not respond to these matters?

13 **MR COOK:** The reality is, sir, it's possibly the case that our factual witnesses can  
14 respond but that is different from producing somebody who will be demonstrably  
15 independent to deal with these matters; and that's the choice that we would have had.

16 **MR JUSTICE ROTH:** Well he is now independent. He's completely independent,  
17 works for an independent consultancy. He left MasterCard quite a long time ago. Yes,  
18 he was involved with MasterCard at the time but so was of course Mr Dhaene. I think  
19 the sort of questions that are being addressed is the kind of thing that he would be well  
20 able to do. Indeed if you ... and do you really need then anyone beyond that?

21 I think, in the circumstances here, if it's said, oh, he's partial and not wholly  
22 independent, that's not going to carry a lot of weight in the circumstances where we  
23 know that you've -- through no fault of your own, MasterCard has not been given time  
24 to engage in what is obviously a difficult exercise of finding someone who could be  
25 said to be independent. Indeed it turns out I think even Mr Dhaene has now done  
26 consultancy for MasterCard, according to that letter.

1 So the question is would you be able, in what I fully accept is a very short time, just as  
2 you can respond to the factual parts dealing with what happened at MasterCard -- and  
3 the parts that can be said to be industry expert evidence are limited. They may be  
4 important, but they are limited sections, whether that's not something your existing  
5 witnesses can't deal with. I look at that one in particular. In fact -- sorry, I did mean  
6 Mr Sideris. Although I notice that Mr Sidenius -- I got confused because the names  
7 are slightly similar -- is at the same company as it happens, the same consultancy.  
8 If you look at Mr Sidenius' witness statement at tab 28, page 1216 of bundle 2, and  
9 you look on page 1216 "Overview of interchange fees", he says:  
10 "In this section of my witness statement I address how interchange fees work and why  
11 they are used by card schemes. This evidence is based on my experience working in  
12 interchange related roles at MasterCard and in roles at Visa and EDC."  
13 He then gives evidence, at paragraph 18, about in general why interchange fees are  
14 important, and in paragraph 19 about how things appear from the issuer's perspective.  
15 So he has exactly the sort of experience of the industry that you'd seek and he is no  
16 longer a MasterCard employee. If it's said, if he gives evidence about the industry,  
17 "Oh, well you are trying to help MasterCard", I don't think that is going to get  
18 Mr Merricks very far.

19 **MR COOK:** Well what I'd say in response to that, sir, is we will obviously have to try  
20 and respond. If the points go in, we'll have to do the best we can with the witnesses  
21 we have. Clearly we have witnesses with a certain level of expertise in these areas.  
22 But that doesn't alter the reality, sir, that had they suggested they were going to call  
23 an independent industry expert at an appropriate stage we would have had the option  
24 of trying to find somebody who would be demonstrably independent of MasterCard.  
25 Whereas what we have are people selected not because they are industry experts,  
26 they are selected -- and, sir, you've just asked me in relation to Mr Sideris, yes, he has

1 a consultancy role now. But the reason why he is called to give evidence is  
2 paragraph 8 of his statement, is that he held roles within MasterCard Europe where  
3 he was the one involved in setting the EEA MIF and then subsequently involved in  
4 setting the UK MIF.

5 So, yes, he explains what he was doing and why he was doing it but fundamentally  
6 he's doing so from the perspective of somebody saying: this is my evidence of what  
7 we did at the time. So that is quite different from bringing somebody along with an  
8 external viewpoint who says: this is how it happens, this is the industry-wide position.  
9 Because of course what Mr Sideris then is doing is justifying what he in fact did at the  
10 time and it will be attacked on that basis.

11 **MR JUSTICE ROTH:** A lot of what he says is that, but I am looking at that particular  
12 section of his witness statement which I think is based, as he says, on his experience  
13 in the industry well beyond MasterCard. That's what he says in paragraph 12.

14 **MR COOK:** Well --

15 **MR JUSTICE ROTH:** It's a limited part of his statement, but I think that part and in  
16 particular 18 and 19 are his view based on his industry experience.

17 **MR COOK:** Sir, what that's leading into is what he then says at paragraph 20, the  
18 principle applied by Mastercard Europe in setting MIFs. The crux of it is this is how he  
19 viewed it at the time, and this is what was done with that on that basis and that  
20 understanding. So it's not some abstract bit of: this is what the general perspective of  
21 the industry was. It leads into him then saying: this is how MasterCard Europe in fact  
22 set MIFs which is the heading "Principles applied by MasterCard Europe in setting  
23 MIFs".

24 So, sir, that we say is the crux of it, which, yes, we have witnesses who address these  
25 matters based on essentially what they thought at the time and what they did with that  
26 knowledge and that's quite different from an industry expert saying: that was the

1 industry perspective, that was how the industry accepted it, this is what happens at  
2 Visa or anything else.

3 One is factual evidence of his own personal knowledge and involvement and what that  
4 led to versus industry expertise.

5 **MR JUSTICE ROTH:** Yes.

6 **MR COOK:** With respect, sir, that is something quite different and we would  
7 have -- had we known we were going to be faced with somebody who is alleged to be  
8 an independent expert, we would have wanted to consider the possibility of fighting it  
9 on equal terms.

10 Of course, sir, what you are also suggesting now is giving some sort of quasi expert  
11 evidence within sort of a period of about ten days or so.

12 **MR JUSTICE ROTH:** What I am really saying is -- given his breadth of experience,  
13 he's already your witness, a part of his existing statement, it seems to me, is drawing  
14 on his broader experience, because that's what he says, and he gives some  
15 conclusions in that section. He seems very well placed to respond to those parts that  
16 we might identify in Mr Dhaene's statement that can be classified as expert evidence.  
17 If you say to me, well, that's perhaps not how you would have sought to do it if you  
18 had known in good time, I understand that. But what I have to do is consider to what  
19 extent really you are being prejudiced if this was now introduced. That seems to me  
20 the key point.

21 **MR COOK:** The point I make in relation to that, sir, there was a question mark about  
22 whether we could have until the 16th, which would essentially be 10 days, or the 19<sup>th</sup>  
23 and have 13 days, weekends involved in that. We are talking about people who are  
24 not MasterCard employees. They are largely -- some of them are retired, but largely  
25 Mr Sideris, for example, you are talking about people who are professional men. They  
26 do not have the next two weeks carved out to respond to witness evidence in the way

1 that one would do, again with industry expert, if it was done in good time, to basically  
2 go through the process of looking for publicly available material, to consider it and  
3 respond in detail.

4 **MR JUSTICE ROTH:** Yes.

5 **MR COOK:** And that again, sir, is a rather different matter of actually having  
6 somebody who can devote proper amounts of time that you would with an expert, you  
7 book him out for a satisfactory extended period to consider and develop these issues  
8 in the way that one would if this was an expert evidence process; and that is completely  
9 different from trying to get somebody who is a professional, who can see if he has  
10 couple of hours to fit us in around all his other professional engagements, to respond  
11 to matters.

12 So we do say that is a significant difference. But ultimately, sir, it comes back  
13 to -- essentially what the legal test here is, we would say, is absolutely critical. We say  
14 this is equivalent to application for relief from sanctions. So it is a Dentons case and  
15 the reason we say that is because it's an application being made long after it should  
16 have been. So essentially it is a Denton case.

17 If I can take you to paragraph 7 of my skeleton argument which sets out the quotation  
18 most conveniently, it's a decision of Mrs Justice Rose who I think -- I don't know if she  
19 still is Mrs Justice Rose or not. I apologise for not checking that. But  
20 paragraph 7 -- sorry, I've got the wrong .. What she explained in her decision in Warner  
21 Retail v NatWest 2014 is that situations where effectively a party applies very late for  
22 permission to do something -- in that case, again an expert evidence case -- which it  
23 should have done in good time is essentially a Denton case, even though there is no  
24 deadline for the party to actually produce expert evidence already. What she says is  
25 essentially you shouldn't benefit from being able to sort of apply late and then be  
26 treated differently from if you'd actually got the order in the first place and then were

1 | trying to get permission to do it out of time.

2 | She says, at paragraph 32:

3 | "I do not consider that any good reason has been put forward as to why this matter  
4 | could not have been dealt with very shortly after that directions CMC. It is  
5 | counter-intuitive to regard the claimant as being in a stronger position in asking for the  
6 | court's indulgence having delayed bringing their application to the last minute than  
7 | they would have done if they had brought the application in good time but failed for  
8 | some reason to comply with an order setting a reasonable deadline."

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

10 | **MR COOK:** Paragraph 34 of that judgment, which is set out on the next page of the  
11 | skeleton, the claimant clearly had in mind a need for expert evidence right from the  
12 | start.

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

14 | **MR COOK:** So, sir, we do say this is a Denton case, not a sort of general case  
15 | management decision of the tribunal. Obviously had they applied in September last  
16 | year, or if they had applied in January, it would have been just a general case  
17 | management decision. But where we are now it's a Denton case and they need to  
18 | satisfy the Denton criteria. With respect, they simply haven't done so at all because  
19 | the entire process is now radically different from what would have been the case if it  
20 | had been done in good time. There has not been identification of the issues, there still  
21 | really isn't.

22 | **MR JUSTICE ROTH:** With respect, I think the issues being addressed are pretty  
23 | clear. The other point is they have explained what has happened in some detail as  
24 | regards the various experts they have consulted when they found this one and the  
25 | difficulties they've had. Taking the Denton stages, saying it's a serious and significant  
26 | breach, they've explained why it's come so late and so one gets to stage three.

1 **MR COOK:** Well, with respect, sir, I wouldn't say there is a good explanation for  
2 a breach. The reason why I'd say that is there is a complete difference between  
3 applying in good time -- given they knew they wanted this evidence, applying in good  
4 time, potentially saying they weren't sure if they were going to get it or need it, but  
5 getting permission in principle and an agreed set of deadlines in principle for it,  
6 because that would have been the point when we could have looked for somebody  
7 who we would have said would be demonstrably independent of MasterCard, hired  
8 specifically to address these issues as an expert as opposed to simply being the  
9 witness of fact dealing with it, and we would have had somebody standing by with  
10 three, four weeks carved out of their diary. It would have been our choice of expert  
11 with satisfactory time available to deal with it properly.

12 So we say, sir, that is the difference between, yes, there are reasons perhaps why  
13 they've brought Mr Dhaene's evidence forward now -- there is no explanation for why  
14 that came as an ambush. We do say the ambush point is what stops this being a good  
15 explanation case, because if what had happened was they'd applied for it, got  
16 permission and then ended up being a couple of weeks late, that would have put us in  
17 a completely different position from where we are which is it comes as a complete  
18 surprise.

19 We do say, sir, with all of that, the conduct over the last month or last three weeks  
20 does matter in relation to that as well because again they told us on 11 May that there  
21 was the potential for expert evidence. We then wrote saying: on what issues? Answer  
22 had we none. They didn't tell us that. Even in relation to the application --

23 **MR JUSTICE ROTH:** I think it's referred to in Mr Sansom's witness statement. But if  
24 you could just show me the letter.

25 **MR COOK:** I think it's page 2361, which will probably be in bundle 4 I believe. So it's  
26 tab 142, sir.

1 **MR JUSTICE ROTH:** Yes. Sorry, and ... which paragraph in that? He makes the  
2 point you've made in paragraph 12: please confirm you won't seek permission to  
3 adduce expert evidence. Ask why you didn't get the evidence earlier.  
4 What is it in that letter that ...

5 **MR COOK:** I think it's probably a point that came up more in the subsequent  
6 correspondence on 18 May, paragraph 11 saying: still hasn't communicated with  
7 MasterCard or the tribunal the substance of what the proposed evidence will cover.

8 **MR JUSTICE ROTH:** 18 May. That's what, tab 149, is it?

9 **MR COOK:** 149. It's a complaint, haven't been told the substance of the evidence.

10 **MR JUSTICE ROTH:** This is a letter to the tribunal bSut obviously copied to  
11 Mr Merricks.

12 **MR COOK:** Then tab 155 (inaudible) please specify the issue, that was on 26 May.  
13 When we got the application it still didn't identify it. So I think --

14 **MR JUSTICE ROTH:** So that's where that request is made.

15 **MR COOK:** Yes.

16 **MR JUSTICE ROTH:** On 26 May, yes.

17 **MR COOK:** I probably need to recharacterise that submission.

18 **MR JUSTICE ROTH:** Yes, I don't think they did in the first letter ask that question but  
19 ...

20 **MR COOK:** Forgive me a moment, sir, I'm afraid I've managed to spill a jug of water.

21 **MR JUSTICE ROTH:** Just take your time for a moment. **(Pause)**  
22 Yes, I think it's suggested perhaps I should rise for 5 minutes --

23 **MR COOK:** That's very kind.

24 **MR JUSTICE ROTH:** -- while you sort that out.

25 **(12.41 pm)**

26 **(A short break)**



1 (12.47 pm)

2 **MR COOK:** Thank you very much, sir. Before I had a water disaster I was addressing  
3 you on the second condition in Denton or the second limb of the Denton test.

4 **MR JUSTICE ROTH:** Yes.

5 **MR COOK:** I'm essentially making two points under that. The first is that this is  
6 an indication of industry expert evidence and the kind of categories and issues on  
7 which industry expert evidence were required, that application could and should have  
8 been made at the September CMC or in good time after that and we'd have then been  
9 on notice, would have prepared somebody who was actually a specific independent  
10 expert for these purposes.

11 I do say the position was made worse by the position from 11 May to 30 May. The  
12 letters I rely upon, sir, are tab 1 -- we get the 11 May letter saying that they've  
13 potentially identified somebody who can give expert evidence, no indication on what.  
14 The 14 May letter, sir, which is at tab 142 I have showed you. The complaint we make  
15 immediately is that the contents of any new evidence has not been communicated or  
16 the substance summarised. That's paragraph 8, sir. So at that point we complain they  
17 haven't told us what potentially this might cover.

18 Then paragraph 12 and particularly paragraph 12(d) which makes the point I've made  
19 that if this had been done as it should have been there would have been a definition  
20 of the issues, MasterCard could have sought its own expert evidence and the classic  
21 timetable for experts.

22 **MR JUSTICE ROTH:** Yes.

23 **MR COOK:** Then tab 149, which is Freshfields letter to the tribunal of 18 May,  
24 paragraph 11 repeats the complaint which is:

25 "Mr Merricks has still not communicated to MasterCard or to the tribunal the substance  
26 of what the proposed evidence will cover."

1 That's paragraph 11, sir, on page 2384. So it's the same complaint: what is this  
2 evidence potentially going to cover?

3 Then you come to tab 155. So we get the application on 25 May. The application,  
4 again, gave us absolutely no indication of the type of issues that might be covered by  
5 what turned out to be Mr Dhaene. It even kept out Mr Dhaene's name. The letter is  
6 written the next day, paragraph 4(a):

7 "As to this please specify the issue --

8 **MR JUSTICE ROTH:** Sorry, the letter, the one you've gone to now, is?

9 **MR COOK:** 155, sir. 26 --

10 **MR JUSTICE ROTH:** 155.

11 **MR COOK:** Tab 155.

12 **MR JUSTICE ROTH:** 26 May.

13 **MR COOK:** 26 May.

14 **MR JUSTICE ROTH:** Yes.

15 **MR COOK:** That's when it's put in terms of "please specify the issue", but in  
16 circumstances where we'd complained repeatedly they'd given us no indication of it.  
17 We get no indication at all until we get Mr Dhaene's evidence very, very late on the  
18 evening of 30 May.

19 So again, sir, all of this has made it even more difficult at a point essentially where this  
20 amounts to half, give or take, of the time available to us to think about finding  
21 a replacement, they kept back anything about what this industry expert might be doing.  
22 We complained about it repeatedly. They kept back, even when we specifically asked  
23 it --

24 **MR JUSTICE ROTH:** I've got the point.

25 **MR COOK:** Sir.

26 **MR JUSTICE ROTH:** I am sorry to rush you on but --

1 **MR COOK:** No, absolutely.

2 **MR JUSTICE ROTH:** What I think is important is to look at the statement.

3 **MR COOK:** Yes.

4 **MR JUSTICE ROTH:** And -- I've got your point upon Denton -- look at now which are  
5 the particular passages, given that it's accepted, despite the inconvenience it causes  
6 you and the extreme lateness, it can come in as a witness of fact, which are the bits  
7 that are now objected to. I did that exercise of course with Ms Demetriou but I think  
8 it's important I do it with you.

9 **MS BURGESS:** Yes, sir. I mean to some extent, in the absence of any better test,  
10 where he says something like "in my opinion", "in my view", unless he is saying "at  
11 a particular time while I was at MasterCard this was the following", so where he says  
12 at paragraph 15, start there:

13 "In my opinion the basic function of an interchange fee was and still is today the  
14 transfer of revenue."

15 **MR JUSTICE ROTH:** I can see that 15 to 17 are in that category.

16 **MR COOK:** Yes, and that's completely different, sir, just to be clear, from one of our  
17 witnesses saying, "This is what I understood at the time and this is how I implemented  
18 that understanding in setting the interchange fee." That's the evidence of their own  
19 personal views and how they dealt with it.

20 **MR JUSTICE ROTH:** Yes. The reason I took you to that part in Mr Sideris was that  
21 I think the evidence in that section is not based on only his time at MasterCard, it's  
22 based on his general industry experience. And that's what he says and I take it he  
23 means what he says.

24 **MR COOK:** Yes.

25 **MR JUSTICE ROTH:** There's a bit of that in there as well.

26 **MR COOK:** Yes. There is a bit of that, but that is fundamentally a witness giving

1 evidence that leads to this is what he in fact did at the time.

2 Then we go to paragraph 55, the next area where we run into particular issues.

3 **MR JUSTICE ROTH:** Just a moment. 55?

4 **MR COOK:** 55, yes. I mean these are just -- basically it's just classic expert evidence.

5 This is his general experience in all sorts of areas. Middle of paragraph 56:

6 "It's my opinion that no interchange system in any payment system was related to

7 costs on the issuer's side, nor on the acquirer's side."

8 **MR JUSTICE ROTH:** Then he talks about other systems.

9 **MR COOK:** Yes.

10 **MR JUSTICE ROTH:** That's 55 to 57.

11 **MR COOK:** Yes, sir.

12 **MR JUSTICE ROTH:** 58.

13 **MR COOK:** It appears that --

14 **MR JUSTICE ROTH:** That does appear to be factual, doesn't it?

15 **MR COOK:** Yes, if he says, "I was at MasterCard one day and somebody said

16 something to me", then I don't object as a matter of principle with that evidence. I don't

17 accept the evidence but that --

18 **MR JUSTICE ROTH:** He's not going to be able to say, "I remember Mr X on this date

19 said something", clearly not. If he says, as he does here, "It became clear that

20 merchants were prepared to pay a higher fee for business and corporate cards", that's

21 what he remembers from the time and you can't object to that and indeed you probably

22 don't dispute it on that particular point. But as a general characterisation there's going

23 to be that sort of evidence from all the witnesses I think.

24 **MR COOK:** It leads into the question that was typically asked and that is him saying

25 something that was an internal consideration.

26 **MR JUSTICE ROTH:** Yes. So 55, 57.

1 **MR COOK:** Yes.

2 **MR JUSTICE ROTH:** And then I said about paragraph 63.

3 **MR COOK:** Yes.

4 **MR JUSTICE ROTH:** I said, and I think Ms Demetriou accepted, although it starts "in  
5 my opinion", you can delete (b) and (c).

6 **MR COOK:** Before we come to that, sir, paragraph 59 in relation to the EDC cost  
7 studies, I would flag the last sentence of paragraph 59:  
8 "My view however is it's wrong to suggest costs were a key consideration for  
9 MasterCard when setting the MIF whether intra-EEA or domestic UK."  
10 Now if he's going to say there is a factual basis for that belief based on his time at  
11 MasterCard, then he can say that. As I have said, as far as we can tell, sir, he would  
12 have had absolutely no visibility of anything to do with the setting of interchange fees  
13 by the UK banks, who did it prior to 2004, and MasterCard didn't set the domestic UK  
14 MIF until after he'd left. I can't see any basis on which he would have known what  
15 MasterCard was doing internally in terms of the specifics after that departure.  
16 So if he's expressing a view -- if he can say any part of that is based on his personal  
17 knowledge at the time, so be it. But it does at the moment look, sir, to be a general  
18 kind of "as a matter of industry expertise I am sure MasterCard would not have done  
19 this" without any personal knowledge.

20 **MR JUSTICE ROTH:** Yes. That's 59, last sentence.

21 **MR COOK:** Last sentence.

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

23 **MR COOK:** Then we come to paragraph 63. Again, sir, 63(a) we struggle to see how  
24 he feels he can speak to that but if he says --

25 **MR JUSTICE ROTH:** Sorry to interrupt you, but I think if 63(a) were simply the last  
26 sentence of 62, saying "therefore the EDC were a response", because he's just I think

1 drawing -- I think that's unobjectionable and (b) and (c) can be deleted.

2 **MR COOK:** Yes.

3 **MR JUSTICE ROTH:** Yes. And then --

4 **MR COOK:** The end of 66, sir.

5 **MR JUSTICE ROTH:** The end of 66?

6 **MR COOK:** "In my opinion they were very basic models." That may be ... I mean he  
7 doesn't seem to get ... I probably don't push that one. Again it could be said to be  
8 a conclusionary sentence at the end of that.

9 **MR JUSTICE ROTH:** Yes.

10 **MR COOK:** Then 68, sir. "From my knowledge of the market that's incorrect."

11 **MR JUSTICE ROTH:** Yes.

12 **MR COOK:** This all seems to be sort of general industry expert evidence -- largely  
13 unsupported it must be said, but general sort of industry expert evidence about what  
14 was happening with costs in different banks, whether they should be recovered or not.  
15 72, again, sir, we would say that's just -- again it's his "my opinion". Any time he does  
16 that, sir, unless it's directly a conclusion from the previous sentence, it basically seems  
17 to be him setting out his viewpoint based on some sort of industry expertise.

18 **MR JUSTICE ROTH:** There must be some study of relevant levels of fraud -- sorry  
19 relative, not relevant, relative levels of fraud in different countries.

20 **MR COOK:** Sir, our witnesses do point to cost studies, and those were the EDC cost  
21 studies, and among the things they included were fraud costs.

22 **MR JUSTICE ROTH:** Yes, I don't know --

23 **MR COOK:** There is material.

24 **MR JUSTICE ROTH:** I don't know if it covers different levels of fraud in different  
25 countries.

26 **MR COOK:** Yes, I mean there are different cost studies for different countries in

1 different regions. So to some extent it does, by definition, cover exactly that, sir.

2 **MR JUSTICE ROTH:** Yes.

3 **MR COOK:** You might say in many respects it's not very satisfactory evidence to  
4 simply say it's his opinion, something without any evidential basis at all for it, but  
5 nonetheless, sir, it is being put forward as some kind of industry expert viewpoint.

6 Then paragraph 80, "From my experience of the payment cards industry", the question  
7 then about merchants' tolerance, prices, elasticity and matters like that. Sir, that  
8 seems to be a general view.

9 Paragraph 81, that's a distinction --

10 **MR JUSTICE ROTH:** Is paragraph 80 in dispute really, that it became a sort of must  
11 have product at some point for most merchants, MasterCard? I would have thought  
12 that's not something that --

13 **MR COOK:** We would say it's commercially quite the reverse, sir, that we battle for  
14 business of merchants.

15 **MR JUSTICE ROTH:** Yes, I see. But at some point, I don't know ... yes, I see. Right.  
16 Yes.

17 **MR COOK:** So paragraph 80, sir, because it's talking about sort of general industry  
18 experience, I draw a distinction between that and 81 where he says from his  
19 experience he was aware in those days. That's giving factual evidence.

20 **MR JUSTICE ROTH:** Yes. That's 80.

21 **MR COOK:** Yes.

22 **MR JUSTICE ROTH:** And --

23 **MR COOK:** Certainly, sir, with 83, if he is saying that that is evidence he can give  
24 based on his time at MasterCard, we disagree with it but so be it.

25 **MR JUSTICE ROTH:** I think it ... yes.

26 **MR COOK:** Yes. Then, sir, paragraphs 86 and 87, again very much sort of industry

1 evidence about largely later periods of time which, with respect, does not seem to be  
2 terribly probative in any event but certainly is more in the nature of industry expert  
3 evidence rather than contemporaneous evidence of what the position was during the  
4 claim period.

5 **MR JUSTICE ROTH:** Yes. And anything else?

6 **MR COOK:** So those are the areas that certainly we --

7 **MR JUSTICE ROTH:** Yes, I think I have pretty much put to Ms Demetriou that the last  
8 part of 96 should come out.

9 **MR COOK:** Yes. I think we would agree with you, sir, but I think you are already on  
10 top of that point.

11 **MR JUSTICE ROTH:** Partly on relevance really.

12 **MR COOK:** Yes. While we have the witness statement open, sir, I would also make  
13 a point about page 77 of the bundle, which is essentially the bit that the expert is going  
14 to -- or the bit that is going to be signed at the end of the statement. With respect, sir,  
15 this shows why this kind of approach of having a witness statement which is a blended  
16 mix of fact and opinion evidence just, with respect, is simply inappropriate because it  
17 starts off with a confirmation of compliance at the top of the page that says:

18 "I understand that the purpose of this witness statement is to set out matters of fact of  
19 which I have personal knowledge."

20 Of course that is the requirement in the tribunal's rules, that a witness of fact sign that  
21 confirmation, but of course that is then not what the witness statement is doing. That's  
22 the sort of reason why the tribunal -- I'm not telling you what the reason is, sir, but the  
23 reason why the tribunal has set out that kind of requirement, following the High Court,  
24 is to make sure people are alive to what they should be doing and that is -- so if he's  
25 giving a factual witness statement, that's what he should be doing and that's how he  
26 should anchor his evidence.



1 **MR JUSTICE ROTH:** I am not so sure about that. When you are relying -- it is your  
2 personal knowledge from your experience working in the industry, it's a rather difficult  
3 line to draw. If you are not giving opinion evidence but you are saying, "I know this as  
4 a fact because I have worked in this industry for X number of years", that is your  
5 personal knowledge and recollection, even if you can't pin it down to documents or  
6 meetings or conversations and so I don't really think that gets one very far.

7 **MR COOK:** With respect, sir, all I would say is I don't disagree that a witness of fact  
8 can deal with -- can set out something as being a matter of fact based on years of  
9 doing it, without necessarily being able to point to a document or a specific thing. But  
10 that is still saying: this is a matter of fact and this is my personal knowledge of it. What  
11 I am saying, sir, is what this witness statement goes considerably beyond is all the bits  
12 where it says "in my opinion" and then moving to matters that are not factual, that are  
13 simply matters of opinion, based on sort of industry expertise.

14 What my learned friend showed you was the fact that an expert can sometimes give  
15 evidence of matters of fact. But my point is that a factual witness should not move into  
16 just giving points of opinion as opposed to: this is my factual evidence of a matter that  
17 is a matter of my personal knowledge, even if it's as a result of years of experience.

18 **MR JUSTICE ROTH:** Yes, I am thinking about -- you know, look at paragraph 68,  
19 which is one you took objection to, the third sentence:

20 "The costs referred to, that is cost of card, credit write-offs, fraud and funding the  
21 interest-free period were all costs that were borne by the issuer."

22 That's fact. "Could be" may be opinion but "usually were recovered from the  
23 customer", that's also fact. Well, if he says, "I know that from my experience of working  
24 in the industry, this is how things were done", you know, is that opinion or is it fact or  
25 is it -- it seems to me it's fact and it's based on personal knowledge. It's a difficult line.

26 **MR COOK:** It's a difficult line to some extent because an expert report can deal with

1 matters of fact and so can obviously a factual witness statement so there is something  
2 of an overlap.

3 **MR JUSTICE ROTH:** Particularly industry experts, as opposed to an economic expert  
4 (inaudible due to overspeaking).

5 **MR COOK:** But my point of course is not that any part of his evidence could not have  
6 been delivered, you know, there is no part of his evidence which is completely  
7 unacceptable from either a factual witness or an expert witness. My point is that there  
8 are a number of bits that move into territory of industry expert evidence and that is  
9 where MasterCard is essentially prejudiced because we've lost the opportunity to find  
10 an independent expert with the time to properly respond and deal with those kind of  
11 points.

12 That's why we say when you apply the Denton criteria --

13 **MR JUSTICE ROTH:** Yes.

14 **MR COOK:** -- you essentially should trim this down. In many respects, sir, it might  
15 be said a lot of these points of evidence may not end up going anywhere, but that's an  
16 additional reason why the tribunal, with respect, should say the prejudice to  
17 Mr Merricks of not allowing it in is inherently more limited, so that mitigates the need  
18 to let in something which is inappropriate and late and which we ordinarily would have  
19 responded to in a different way.

20 **MR JUSTICE ROTH:** Now dealing with the other parts of it -- and then I will rise  
21 because it's 1.10 -- your point on the Practice Direction, so the bits that we haven't  
22 been looking at, what is it -- and this I don't at the moment understand -- you are  
23 objecting to in those parts that are factual evidence?

24 **MR COOK:** Our point in relation to the Practice Direction, and I think it's paragraph 27  
25 of my skeleton argument.

26 **MR JUSTICE ROTH:** Yes.

1 **MR COOK:** And to some extent it comes down to a question of are these properly  
2 matters of factual evidence or are these matters of industry expert opinion evidence,  
3 it's if he has a basis for saying, "These are matters within my personal knowledge", for  
4 some reason, then he could properly give that evidence.

5 I suggest in general you are required to identify if there are documents that support  
6 your recollection or matters like that. So if there's material that he's relying on or  
7 a basis for saying some of those things, sir, as a matter of his own personal  
8 knowledge, that should be identified, we say, in accordance with the standard  
9 principles of identifying the basis of your evidence.

10 **MR JUSTICE ROTH:** But to what extent? He says, "I was there, I was at MasterCard,  
11 I was working in the time." Sometimes he can identify a conversation with a particular  
12 individual, but everyone recognises that after this space of time that's not practicable.

13 **MR COOK:** Sir, you'll note a lot of the paragraphs that are referred to -- it probably  
14 might be said we are drawing it slightly over broadly, but they are largely the  
15 paragraphs we've just been talking about, sir, perhaps we've identified more sections  
16 with less of the granularity than we've done before you, sir.

17 **MR JUSTICE ROTH:** Yes.

18 **MR COOK:** So essentially it comes back to the same point. There are a lot of areas  
19 within here that appear to be matters of essentially industry expert evidence, without  
20 identifying the basis. If he can't give actual factual knowledge of these matters which  
21 he identified --

22 **MR JUSTICE ROTH:** Yes.

23 **MR COOK:** -- if it's general industry expert evidence, that is the reason why it shouldn't  
24 be adduced under my first limb, sir.

25 **MR JUSTICE ROTH:** Yes, so it does really come down to the industry evidence, the  
26 industry expert evidence point, doesn't it?

1 **MR COOK:** It does.

2 **MR JUSTICE ROTH:** Yes.

3 **MR COOK:** And, sorry, the answer may be he didn't, but there is a requirement if you  
4 use documents to refresh your memory that you identify them.

5 **MR JUSTICE ROTH:** Yes.

6 **MR COOK:** If he has not used any documents to refresh his memory, then so be it.  
7 But if he has, there is a requirement to identify it, because there are a lot of places  
8 where he makes assertions without any reference to materials. If he's happily saying  
9 he remembers something from 30 years ago, obviously he's free to give that evidence.  
10 But if there's material in any way he's using to support those recollections, the  
11 requirements are that that is identified.

12 **MR JUSTICE ROTH:** Yes.

13 **MR COOK:** Sir, could I do 2 minutes on independence because then I will be done?

14 **MR JUSTICE ROTH:** No, I would like you to finish.

15 **MR COOK:** Sir, in relation to independence -- and I appreciate your initial response  
16 to this is: since he is giving evidence in any event, this is a matter that potentially is  
17 a matter for trial.

18 We do want to be quite clear, sir, that the evidence clearly shows Mr Dhaene says in  
19 documents he himself wrote, such as his letter to Mr Selander, who was the chief  
20 executive of MasterCard at the time, (1) that he was dismissed by MasterCard and my  
21 learned friend referred to a document that suggested he had voluntarily left  
22 MasterCard. We have sent them contemporaneous materials which show that, as  
23 Mr Dhaene well knew, that was issued in error and he was sent a new one setting out  
24 the correct position shortly thereafter. It has been sent across. So he was dismissed  
25 by MasterCard.

26 He then sued us for what ended up being over 1 million euros. That litigation went on

1 for 8 years. He failed in his entirety. That was not, as was suggested, litigation just  
2 really asking for some information. He sought 1 million euros, sir, and that was  
3 obviously a very important part of the relief sought but it failed.

4 We say, sir, in those circumstances, there is a clear animus against MasterCard. It's  
5 made worse, sir, by the fact that, firstly, he signed a confirmation saying there was no  
6 conflict and disclosed none of these matters to the tribunal. The case law is very clear  
7 that it is for the experts and those instructing them to bring those matters forward at  
8 the earliest possible opportunity.

9 We will also say that the fact that the explanation that's been given by my learned  
10 friend -- and I am not criticising her at all, she is passing on what she's been told -- but  
11 the fact that he is now disputing dismissal when he wrote at the time saying he'd been  
12 dismissed and that's recorded in both the court hearings in Belgium, the judgment  
13 records that he was dismissed by MasterCard, to dispute that now, sir, we would say  
14 all of this shows somebody who simply lacks the independence and, more critically,  
15 sir, lacks an understanding of the fact that his obligation is to the tribunal, to inform the  
16 tribunal of these matters properly so that you can make decisions.

17 **MR JUSTICE ROTH:** Yes.

18 **MR COOK:** Those we say are essentially uncontested facts in terms of what has  
19 happened or uncontestable facts of what happened. Simply, sir, that's the picture of  
20 somebody who has a grudge against MasterCard and is not worried about concealing  
21 it from the Tribunal and from those instructing him to be allowed to give evidence.

22 Sir, we say those are all matters that, when you come to consider whether somebody  
23 should be allowed to give independent expert evidence, certainly should be taken into  
24 account. Those are points for cross-examination purposes for his factual evidence,  
25 but Mr Dhaene should not be -- is not appropriate to be an independent expert, sir.

26 **MR JUSTICE ROTH:** Yes, thank you.

1 **MS DEMETRIOU:** Sir, may I just ask, via you, a question of my learned friend?  
2 Because as soon as I sat down a document was passed to us which we hadn't seen  
3 previously. It would have been helpful to have had it before I was on my feet, but in  
4 any event it seems to be -- I don't know if this is what Mr Cook was just referring to  
5 when he says the judgment refers to his dismissal.

6 Obviously at the moment we are under huge time pressure trying to get to the bottom  
7 of the facts and the picture seems mixed. But if this is the document that Mr Cook is  
8 referring to, it seems to be a submission rather than a judgment. So it would be helpful  
9 if over the adjournment -- obviously these documents are in Mastercard's hands and  
10 we are doing our best to work out the position. I have pointed you to material which  
11 goes in the opposite direction. But we are being inundated with or sent material the  
12 provenance of which, the content of which, is not clear at the very last minute. So it  
13 would be helpful --

14 **MR JUSTICE ROTH:** Everything in this matter is at the very last minute because this  
15 all comes in a great rush. I think everyone has been producing material at very short  
16 notice.

17 I have to say if those instructing you had identified the witness they were seeking to  
18 call before 30 May, no doubt you could have been provided with matters sooner. I find  
19 it extraordinary that even the application of, is it, 25 May had still not named the  
20 individual. So I don't think you can fairly complain about matters coming late.

21 You did refer, Mr Cook, to a letter that Mr Dhaene wrote to the chief executive saying  
22 "I have been dismissed", and complaining about that. Has that letter been disclosed?

23 **MR COOK:** Yes. So we sent a whole clip of (several inaudible words) at 2419, sir.

24 **MR JUSTICE ROTH:** Just a moment. Is the transcriber with us?

25 **(The transcriber informed the court that Mr Cook's microphone was off, leading**  
26 **to several inaudible words)**

1 **MR JUSTICE ROTH:** If you just say that again.

2 **MR COOK:** Yes. There was a clip of correspondence or clip of materials which we  
3 sent on Sunday. That included page 2419, a file note which recommends the  
4 termination of Mr Dhaene. That's the final sentence at 2419.

5 **MR JUSTICE ROTH:** Yes.

6 **MR COOK:** Then 2420, this is a letter from Mr Dhaene personally, signed by  
7 Mr Dhaene personally, to Mr Robert Selander, who was chief executive, as you see,  
8 of MasterCard International at the time. It's the second paragraph on the page, sir,  
9 that says "following my dismissal", which is Mr Dhaene himself saying he was  
10 dismissed.

11 Copies of the various -- there were two judgments, sir, of Belgian courts. Both of those  
12 record -- I think it's in section 2 of each, and there is an unfortunate issue which is the  
13 translations which were sent on Sunday for some reason were not included in the  
14 bundles.

15 Sir, I can hand up the translations but it's sections --

16 **MR JUSTICE ROTH:** Well, I don't know if we can get to the bottom of all that at the  
17 moment.

18 **MR COOK:** But, sir, both judgments record that Mr Dhaene was dismissed by  
19 Mastercard. It's section 2, the facts section in each.

20 Then what I referred to and my learned friend referred to is a submission from  
21 Mastercard, which we have identified this morning in response to the letter written  
22 yesterday about this point about what his certificate of dismissal said about whether it  
23 was voluntary or not, and that's a MasterCard submission to the Tribunal which  
24 recorded the fact that that first certificate was issued in error.

25 **MR JUSTICE ROTH:** Yes.

26 **MR COOK:** A new certificate was immediately issued --

1 **MR JUSTICE ROTH:** Just on this point, that you say the judgment records, this is the  
2 judgment of the -- I've got a judgment here of the Leuven labour court.

3 **MR COOK:** You are looking at the Leuven one, sir?

4 **MR JUSTICE ROTH:** Yes.

5 **MR COOK:** It's under discussion on the fourth page or -- so are you looking at it in  
6 French or English, sir? I have handed up --

7 **MR JUSTICE ROTH:** I think I only have -- I am looking at what I have been given,  
8 which is the English --

9 **MR COOK:** You've got the English.

10 **MR JUSTICE ROTH:** -- translation.

11 **MR COOK:** Yes, so it's --

12 **MR JUSTICE ROTH:** I am looking at discussion on page --

13 **MR COOK:** The fifth paragraph, sir, that starts "on 25 May".

14 **MR JUSTICE ROTH:** They terminated his employment by paying him compensation  
15 in lieu of notice, 20 months' remuneration, 20 months' equivalent.

16 **MR COOK:** We say that was MasterCard's dismissal.

17 **MR JUSTICE ROTH:** Yes, I see.

18 **MR COOK:** If you are looking at that document, you see it's the previous page, object  
19 of the action is where it lists out the sums claimed which come to slightly over  
20 1 million euros, and the claim failed in its entirety.

21 But then the document my learned friend was just raising is one that we've found this  
22 morning, in response to the letter from her instructing solicitors late last night about  
23 this document showing the sort of formal record of termination, and that explains that  
24 that was issued in error, it was corrected a month later and actually Mr Dhaene then  
25 claimed that the correction was a forgery, which just gives you some idea, sir, of how  
26 cosy and friendly that litigation was.



1 **MR JUSTICE ROTH:** Yes. Well, I will return at 2.10.

2 (1.23 pm)

3 (The luncheon adjournment)

4 (2.20 pm)

5 **MR JUSTICE ROTH:** Yes, Ms Demetriou, do you want to respond?

6 **MS DEMETRIOU:** Sir, yes.

7

8 **Submissions in reply by MS DEMETRIOU**

9 **MS DEMETRIOU:** Sir, the real question here is whether admission of the expert  
10 evidence would cause Mastercard real prejudice and that turns on essentially whether  
11 Mr Cook is right to say that Mastercard needs to respond by means of independent  
12 expert evidence. We say that that is wrong because all of the evidence is covered by  
13 their factual witnesses in any event.

14 I took you to parts of Mr Sideris' witness statement.

15 **MR JUSTICE ROTH:** Yes. You make the point also that, insofar as it is broader than  
16 simply factual evidence, someone like Mr Sideris doesn't work for Mastercard and is  
17 not necessarily able to drop everything to do work now on new areas of enquiry in  
18 a couple of weeks.

19 **MS DEMETRIOU:** Sir, it's not just Mr Sideris. If we look at Mr Douglas as well, CB2,  
20 tab 27.

21 **MR JUSTICE ROTH:** Yes.

22 **MS DEMETRIOU:** And take it from page 1197. He joined MasterCard in 2005, we  
23 see that on page 1195, and then it lists his other experience. If you look at paragraph 8  
24 on page 1197, through his work at NatWest, RBS and MasterCard:

25 "I am familiar with the UK credit card market and in some respects with the position in  
26 other European markets."

1 And he says the evidence he gives in this witness statement draws on his experience  
2 in particular of the broader commercial context of credit card networks, et cetera.

3 **MR JUSTICE ROTH:** Yes.

4 **MS DEMETRIOU:** Then you see him talk specifically about his roles at NatWest and  
5 RBS as well as MasterCard, and then we have a section, 1198, the characteristics of  
6 the UK credit card market; and there's a section on that. If you look over the page,  
7 this is all general developments in the market, in the UK and EU market.

8 Now just going back to the distinction Mr Cook was trying to draw, I took down his  
9 words. He said the distinction is between on the one hand general industry evidence  
10 versus on the other hand contemporaneous evidence from the claim period. That  
11 simply isn't a distinction which his own witnesses adhere to, by any stretch of  
12 imagination, by their witness statements.

13 Going back to Mr Douglas, you see, if you go to page 1201, evidence about intense  
14 competition in the UK credit card market in the late 1900s; at G about UK retailers.  
15 Then over the page --

16 **MR JUSTICE ROTH:** You are on paragraph --

17 **MS DEMETRIOU:** Now paragraph 19 on page 1203:

18 "A number of other factors distinguish the card issuing business in the UK from  
19 elsewhere in Europe."

20 Just going back to Mr Cook's distinction, nothing here at all about particular documents  
21 he recollects from his time at MasterCard.

22 Then the next section, how banks decide which schemes cards to issue. Again he  
23 says, paragraph 21:

24 "In my roles both before and during my time at MasterCard I have become very familiar  
25 with the drivers behind banks' decisions.

26 That's no different to what Mr Dhaene is doing.

1 Moving on -- sorry, in the same statement, 1206, consequence when a scheme is not  
2 competitive, he's talking here in general terms about conditions of competition. In fact  
3 when he talks about Switch and Maestro, paragraph 34, if I am not mistaken he wasn't  
4 actually at MasterCard at that point.

5 Then over the page, switching between schemes, paragraph 43 and onwards, again  
6 this is general evidence. It refers to Visa as well and it's talking about the incentives  
7 of issuers, for example. We see that from paragraph 48.

8 Mr Cook's proposed delineation just doesn't stack up. Nobody is saying that  
9 Mr Douglas has to identify and cannot give evidence as to matters of which he's aware  
10 because of his roles in other parts of the industry.

11 So we are left with a situation where -- so going back to your point, sir, as to whether  
12 or not Mr Sideris is free. First of all, we don't have any evidence saying that they are  
13 unable in the time available to go back to these witnesses -- who are their witnesses  
14 in the case and presumably they will be asking them about the factual evidence that  
15 will be admitted in any event. There's simply no evidence to say that tips the balance.

16 We've been through the statement now and we see that actually the elements to which  
17 Mr Cook objects are a relatively small portion, but we say important portion, of the  
18 statement. There simply isn't evidence to say: ah, yes, but if you take those bits into  
19 account we can't go back to our witnesses and get responsive evidence. The answer  
20 must be of course they are able to do that. They will consult with their witnesses about  
21 all of this evidence and their witnesses are very well placed to respond to it.

22 So, sir, there is a basic equality of arms issue. This is our only proposed evidence in  
23 the case. Their witnesses have produced detailed evidence of industry practice which  
24 is not based only on their contemporaneous experience from the claim period at  
25 MasterCard. We couldn't -- and Mr Bronfentrinker explains this in detail -- we couldn't,  
26 despite all efforts up to this point, find anyone to give evidence against MasterCard,

1 no doubt because it's a small world and lots of these people consult for MasterCard.  
2 We are now in this very odd situation where Mr Cook is saying: yes, well, we could  
3 respond to your evidence with our current factual witnesses but they are said to be not  
4 independent, so would have liked to have gone away and found an independent  
5 industry expert, so we are prejudiced. But by the way Mr Dhaene is not independent  
6 anyway and so the tribunal should disregard his evidence. And then they are saying  
7 on the one hand none of Mr Dhaene's evidence is really of much relevance, so it's not  
8 going to be of any use to the tribunal, yet it's going to be very difficult for us to respond  
9 to it.  
10 They are really just trying to box us into a corner and none of these submissions are  
11 consistent or fair.  
12 In relation to prejudice, we say there is no prejudice because these are issues which  
13 have been traversed already in detail by their own witnesses and they haven't provided  
14 evidence to say that they can't ask their witnesses to consider those parts of the  
15 statement which are expert evidence.  
16 You have my point about the delineation not being a clear delineation in any event,  
17 because if one expunges the words "in my opinion" and just has a statement of fact,  
18 which is what MasterCard's witnesses do, does that make it any better? No, it's still  
19 the same evidence. It's factual evidence based on Mr Dhaene's experience in the  
20 industry over the years, including his experience at MasterCard.  
21 Sir, that's what we say about the substance of the matter. Now Mr Cook made some  
22 submissions about the test in *Denton*. Really we say that we satisfy the *Denton* test,  
23 we provided an explanation for why this is late. Mr Cook focused on -- there are two  
24 points he made really. The first point is to say we should have said much earlier that  
25 we were thinking about adducing industry evidence, and he said that there was no hint  
26 of that. That submission goes too far because if you look at the core bundle, tab 10,

1 | which our skeleton argument for the CMC back in September --

2 | **MR JUSTICE ROTH:** You say tab 10.

3 | **MS DEMETRIOU:** Tab 10.

4 | **MR JUSTICE ROTH:** I am not sure --

5 | **MS DEMETRIOU:** Page 525.

6 | **MR JUSTICE ROTH:** I have three volumes.

7 | **MS DEMETRIOU:** Core bundle, volume 1.

8 | **MR JUSTICE ROTH:** Volume 1, tab 10, yes, which page?

9 | **MS DEMETRIOU:** Page 525 which is our skeleton -- I don't want to place too much

10 | weight on this, but just to say it's not the case that we didn't --

11 | **MR JUSTICE ROTH:** You mentioned it, I saw that you mentioned it as a possibility in

12 | your skeleton. But it wasn't then raised at the CMC.

13 | **MS DEMETRIOU:** No.

14 | **MR JUSTICE ROTH:** And it wasn't raised in January, and you didn't say what was

15 | actually going on. We see you are hoping -- intending to do so if you can find one and

16 | that's your plan; and as soon as you can identify an industry expert you will be

17 | applying.

18 | **MS DEMETRIOU:** Sir, the simple answer to the point about why we didn't apply and

19 | make a contingent application --

20 | **MR JUSTICE ROTH:** I don't think it is a contingent application, it's just writing to the

21 | solicitors on the other side saying:

22 | "This is our intention. We can't be sure, we can't make an application now because

23 | we've not yet identified an expert and you will appreciate that it's difficult for us. But

24 | as soon as we can that is our intention and we put you on notice."

25 | **MS DEMETRIOU:** Sir, the question really is how that would have assisted because

26 | in circumstances -- there is a danger in doing something like that. In circumstances

1 where Mr Bronfentrinker has made clear that there were very persistent and intensive  
2 efforts on the part of his team to find an industry expert and they came up against  
3 obstacle after obstacle, in the sense that it's a small world and none of the people they  
4 identified -- some of them were just not prepared to act against MasterCard or were  
5 conflicted and so on.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** So there is a real question as to the utility of writing a letter like  
8 that and setting in train potentially an expensive exercise on the other side where the  
9 belief at that time was that we are finding this difficult and we are not sure we are going  
10 to find anyone.

11 **MR JUSTICE ROTH:** Yes, I hear what you say.

12 **MS DEMETRIOU:** Sir, the next point Mr Cook focused on was very recent conduct.  
13 Can I just take you to Mr Bronfentrinker's statement. So that's core bundle tab 5.

14 **MR JUSTICE ROTH:** Yes.

15 **MS DEMETRIOU:** And page 14.

16 **MR JUSTICE ROTH:** Yes.

17 **MS DEMETRIOU:** Now the position is that my instructing solicitors acted extremely  
18 speedily once they were told even there was a possibility that somebody might be  
19 a suitable expert. So they made some preliminary -- you see on paragraph 23:

20 "The agency informed us that they'd identified a further proposed candidate."

21 **MR JUSTICE ROTH:** Yes, on 5 May.

22 **MS DEMETRIOU:** On 5 May, and on 11 -- so my solicitors didn't meet Mr Dhaene  
23 until 17 May.

24 **MR JUSTICE ROTH:** It's not clear why not.

25 **MS DEMETRIOU:** I think the reason why not was that there were -- he obviously has  
26 professional commitments and there was -- I imagine, I think this is right. Let me take

1 instructions.

2 Sir, I am told they had one call with him before travelling to investigate whether or not  
3 he was a potential witness.

4 **MR JUSTICE ROTH:** Yes.

5 **MS DEMETRIOU:** And then they travelled -- the first available date they could meet  
6 him was 17 May.

7 **MR JUSTICE ROTH:** Yes.

8 **MS DEMETRIOU:** Despite that, so despite the fact -- and this, sir, you'll appreciate is  
9 quite risky for any litigant because at this stage they don't know what he's going to  
10 say. They haven't proofed him.

11 **MR JUSTICE ROTH:** No, but by the time he makes the witness statement of 25 May.

12 **MS DEMETRIOU:** Yes.

13 **MR JUSTICE ROTH:** Clearly they are making an application.

14 **MS DEMETRIOU:** They are making an application.

15 **MR JUSTICE ROTH:** They've had a meeting, they know what he's going to deal with,  
16 but nowhere in this witness statement does it say he is going to address the following  
17 four issues.

18 **MS DEMETRIOU:** Sir, the difficulty with that was that my solicitors were working round  
19 the clock during those days and so the request was made by -- the letter referred to  
20 by Mr Cook was a letter of 26 May which followed the application. The position was  
21 that the evidence itself was served -- that was a Friday.

22 **MR JUSTICE ROTH:** Yes.

23 **MS DEMETRIOU:** The evidence itself was served on the Tuesday after the bank  
24 holiday. I know myself, from my own experience, that my solicitor team was working  
25 around the clock over that bank holiday weekend.

26 **MR JUSTICE ROTH:** I am sure they were, preparing the statement. But it doesn't

1 explain why, having decided, yes, he's suitable, yes, he can say some valuable things,  
2 having met with him on the 17th, that then a week later, when a witness statement  
3 with the application is made, they don't say he is going to address the following five  
4 matters. So at least before getting the statement -- and of course you couldn't serve  
5 the statement at that point -- there would be that extra week at a time when literally  
6 every day is precious.

7 **MS DEMETRIOU:** Sir, the reality of that is that they weren't -- they couldn't -- there  
8 was simply not time to engage in a shadow exercise in advance of saying what the  
9 witness statement was going to contain because they were working right up against  
10 the clock to proof Mr Dhaene and produce the evidence on 30 May.

11 So they weren't in a position on 25 or 26 May -- it didn't work out that neatly. They  
12 couldn't say: these are the five areas he is going to cover. They were starting from  
13 a very standing start. They had to ascertain what his experience was, they had to talk  
14 to him about the issues in the case and they had to proof him. It was a lot of work.  
15 They simply weren't able to give helpful evidence above and beyond, yes, we are  
16 going to use him, we are going to make an application on the 25th really because  
17 every hour counted in terms of getting this statement together.

18 It would have been a distraction, on 26 May, to have tried to summarise what the  
19 evidence was going to be when that wasn't yet determined. It hadn't yet been  
20 determined at that date. They really were working against the clock over the bank  
21 holiday weekend --

22 **MR JUSTICE ROTH:** I find it hard to understand if you meet the witness, you decide  
23 he's going to be a useful witness, he can say useful things, but you have no idea what  
24 he is going to say useful things about. There we are. That's the explanation.

25 **MS DEMETRIOU:** Sir, yes. Clearly I understand why this has come to the fore  
26 because this evidence is late. But normally when one is proofing a witness -- it is



1 a process and we see from MasterCard's own statements that they say it was  
2 a process, it was an iterative process --

3 **MR JUSTICE ROTH:** We understand all that, Ms Demetriou, but you appreciate  
4 obviously it's not just late, it's exceptionally late, and therefore one can't follow the  
5 normal process when you are seeking the court's indulgence and seeking, obviously,  
6 to cause inconvenience -- not deliberately but the effect is going to be to cause  
7 enormous time pressure on the other side, right.

8 **MS DEMETRIOU:** Sir, you've had my submissions, everybody was working against  
9 the clock, that actually the information that would have been provided on 25 or 26 May  
10 would have been in a very inchoate form given the speed and the amount of material  
11 that had to be discussed.

12 Really what this comes back down to is prejudice and we say that there is no real  
13 prejudice to MasterCard. It has said that it can respond to the factual evidence. In  
14 their own witness statements they haven't distinguished between factual evidence and  
15 the type of what they call expert evidence in Mr Dhaene's witness statement, which  
16 their own witnesses give. They have not said: that's the straw that breaks the camel's  
17 back, we don't have time to deal with X and Y paragraph which we are seeking to  
18 exclude.

19 On other side of the ledger, the prejudice to Mr Merricks would be extreme because  
20 this is the only evidence he has.

21 **MR JUSTICE ROTH:** Yes.

22 **MS DEMETRIOU:** So, sir, those are my submissions in reply.

23 **MR JUSTICE ROTH:** Yes. Thank you.

24 I had hoped to give a full judgment today, but I am very concerned about the time and  
25 the other matters on the agenda. So I will give my ruling with reasons to follow shortly.

26 **(Ruling given but reserved for approval)**

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**Discussions regarding other CMC matters**

**MR JUSTICE ROTH:** Yes. So we go next, do we, to the timetable for pleading amendments?

**MS DEMETRIOU:** Yes.

**MR JUSTICE ROTH:** And supplemental evidence. So where are we on pleading amendments?

**MS DEMETRIOU:** On pleading amendments, should we work from the draft order put in by MasterCard?

**MR JUSTICE ROTH:** Yes. I don't recall seeing that. Where is it?

**MS DEMETRIOU:** It should be appended to their skeleton argument.

**MR JUSTICE ROTH:** Ah. Yes, because that was sent to me by email I am not sure I have it.

**MS DEMETRIOU:** Tab 2 of the core bundle.

**MR JUSTICE ROTH:** No, my tab 2 is blank. **(Handed)** Right. 2.16, is it? Is that right?

**MS DEMETRIOU:** That's right, yes. Sorry, I am not working from a paginated version.

**MR JUSTICE ROTH:** Amendments.

**MS DEMETRIOU:** So amendments --

**MR JUSTICE ROTH:** It's said here 4 pm on 7 June for your --

**MS DEMETRIOU:** Which is fine.

**MR JUSTICE ROTH:** MasterCard's amendment defence 4 pm on 13 June.

**MS DEMETRIOU:** Yes, that's also fine with us.

**MR JUSTICE ROTH:** You reply 20 June.

**MS DEMETRIOU:** Yes.

**MR JUSTICE ROTH:** Factual evidence --

1 **MR COOK:** I think we could pause there for a moment. There is an additional issue  
2 before we come to that, which is we were sent another draft amended claim form last  
3 night. I presume my learned friend is going to move to have that amendment  
4 permitted.

5 **MS DEMETRIOU:** Well, sir, I was going to deal with that separately under disclosure,  
6 but I can certainly deal with it now. It's in volume 4 of the core bundle, tab 167.

7 **MR JUSTICE ROTH:** Yes.

8 **MS DEMETRIOU:** Page 2459. So we refer to this in our -- sorry.

9 **MR JUSTICE ROTH:** That's a letter.

10 **MS DEMETRIOU:** This is a letter but that includes -- so it should have appended the --

11 **MR JUSTICE ROTH:** No.

12 **MS DEMETRIOU:** Someone will tell me -- tab 19. So that should be at tab 19 of core  
13 bundle 2.

14 **MR JUSTICE ROTH:** Yes, it is.

15 **MS DEMETRIOU:** Can I just explain the issue first of all by reference to my skeleton  
16 argument. I think that might be most efficient. So our skeleton argument is behind  
17 tab 1 of the core bundle.

18 **MR JUSTICE ROTH:** Yes.

19 **MS DEMETRIOU:** Paragraph 27.

20 **MR JUSTICE ROTH:** Directions include searches --

21 **MS DEMETRIOU:** So this relates to the 75 per cent rule.

22 **MR JUSTICE ROTH:** Yes.

23 **MS DEMETRIOU:** Which is one of the rules for setting of the MIFs. We were surprised  
24 to find out very recently that MasterCard doesn't appear to have conducted any  
25 searches in respect of the 75 per cent rule, which is after all one of the rules that's in  
26 issue in the trial.

1 **MR JUSTICE ROTH:** Yes.

2 **MS DEMETRIOU:** We say that such searches plainly fall within disclosure ordered by  
3 the tribunal. In fact, we say the causative impact of the 75 per cent rule is covered by  
4 the existing amendments which aver that the rules provided for the intra-EEA MIFs to  
5 apply by default. So we've always said that.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** The way that the 75 per cent rule seems to operate is that it  
8 provides for -- it relates to the later periods.

9 **MR JUSTICE ROTH:** Yes.

10 **MS DEMETRIOU:** It provides that if 75 per cent of banks did not support the proposed  
11 UK multilateral interchange fee then it would default to the EEA MIF. It's always been  
12 part of our case that this is one aspect in which the EEA MIF operates as a default.  
13 So we were very concerned to see from MasterCard's letter that they don't appear to  
14 have done any searches in relation to the 75 per cent rule.

15 **MR JUSTICE ROTH:** Yes.

16 **MS DEMETRIOU:** We say Mr Sideris, for example, refers to the 75 per cent rule in --

17 **MR JUSTICE ROTH:** That's a disclosure point, yes.

18 **MS DEMETRIOU:** It's a disclosure point.

19 **MR JUSTICE ROTH:** What's the pleading point?

20 **MS DEMETRIOU:** The pleading point is that they said: where is this in your pleading?  
21 And we said we don't need it to be in our pleading because it's covered by our general  
22 allegation, which is our fundamental allegation that the EEA MIF operates as default.  
23 But then, to cut through it and to avoid any satellite dispute about that, we sent them  
24 an amendment, a further amendment, setting it out.

25 So that's --

26 **MR JUSTICE ROTH:** I see, that's the voluntary particulars.

1 **MS DEMETRIOU:** That's the voluntary particulars. So that's at 912. So that's tab 19,  
2 912. You see at 102-O -- so that sets out --

3 **MR JUSTICE ROTH:** Hang on. Hang on.

4 **MS DEMETRIOU:** Sorry.

5 **MR JUSTICE ROTH:** I don't -- 912, paragraph 102 stops at N.

6 **MS DEMETRIOU:** I see, you have not been -- it's coming to you now. You have not  
7 been provided -- I am so sorry.

8 **MR JUSTICE ROTH:** So this is the old one, is it?

9 **MS DEMETRIOU:** The old one. It's the draft one which until yesterday was before  
10 you. But as a result of this issue in relation to the 75 per cent rule --

11 **MR JUSTICE ROTH:** This is a new one, right.

12 **MS DEMETRIOU:** The difference is after 102-N you'll find a 102-O and a 102-P; and  
13 then there's also a change to 103 which I will take you to.

14 **MR JUSTICE ROTH:** Yes. So 102-O, further ... yes, I see. So that's O and P, and  
15 was there something else?

16 **MS DEMETRIOU:** There's 103-E on page 914. So you can see that the allegation  
17 is -- and this is why it matters that it operated as default, which is that if the unlawful -- if  
18 the EEA interchange fee in the counterfactual - the default had been zero, then net  
19 acquirers, whose interests it would have been in to have a lower interchange fee,  
20 would have withdrawn their consent to the application of the UK MIF in order to ensure  
21 that the substantially lower intra-EEA interchange fee would apply as the relevant  
22 fallback rate. So that's essentially why it matters.

23 As I say, we don't think we need to provide those particulars. But so everybody is  
24 clear we thought sensible to do so. It does raise a disclosure issue. We are concerned  
25 that searches haven't been conducted in relation to the 75 per cent rule.

26 **MR JUSTICE ROTH:** Yes. Okay. Now I understand. So that is the point. Is that the

1 point, Mr Cook, you were --

2 **MR COOK:** Yes, sorry, the reason I wanted to raise it now is obviously just so the  
3 tribunal is aware of how much is going into the next ten days and it's dangerous to  
4 look at it in isolation and say: yes, MasterCard can do that; and then say: MasterCard  
5 can do that; sort of run into the same problem in relation to this.

6 What we are concerned about is we've had several iterations of defence since it came  
7 in on 11 May. This is the most recent one --

8 **MR JUSTICE ROTH:** Not of the defence.

9 **MR COOK:** Sorry, not of the defence, of the claim form. This is the most recent one  
10 that came in last night. This case cannot work on the basis, with respect, sir, of a sort  
11 of rolling claim against us which is amended every time my learned friend has  
12 a different idea.

13 So what we say is they've raised the point now, it is very late. It is something that we  
14 can just about accommodate with all the other things that are going on, but enough,  
15 with respect, is enough, and they shouldn't be allowed to do this again.

16 Of course, you won't prohibit them as such, sir, I recognise that, in the sense that they  
17 will have to apply. But I am putting down a very clear marker that this should not  
18 happen again.

19 **MR JUSTICE ROTH:** No.

20 **MR COOK:** And we will resist it absolutely if a material change is being made.

21 **MR JUSTICE ROTH:** We are all aware we are getting closer and closer to the hearing.  
22 Equally if there is some late disclosure from MasterCard which throws something up  
23 unexpected there may be grounds for a late application. I can't rule anything out and  
24 you are not asking me to.

25 **MR COOK:** I am not asking you to, sir, and of course if they want to apply (inaudible)  
26 trial to amend their case they can make that application; and you will probably

1 anticipate what we'll say about it.

2 **MR JUSTICE ROTH:** No, I've got -- you've put down your marker. With that, are you  
3 content with the form of the order as drafted on page 2.18 for the time for defence?

4 **MR COOK:** Yes, sir, we are. I think there is a point of disclosure on this which I can  
5 come to.

6 **MR JUSTICE ROTH:** You can come to in a moment. Right, so we've got that.  
7 Anything else then on the amendments?

8 **MS DEMETRIOU:** On the amendments, I don't think so.

9 **MR JUSTICE ROTH:** It says timetable for amendments and supplemental evidence.  
10 I think we've dealt with that, have we not? Well we haven't quite, no, because  
11 Mr Dhaene's actual witness statement, that's to say with -- the excisions are easy, the  
12 appending of any documents he relies on, can that be done -- he's obviously on notice  
13 to work for this -- by 4 pm on Friday?

14 **MS DEMETRIOU:** Yes.

15 **MR JUSTICE ROTH:** Which is -- today is -- it's the 9th, isn't it, Friday? 4 pm on 9 June  
16 and obviously it's not to contain new material.

17 **MS DEMETRIOU:** No.

18 **MR JUSTICE ROTH:** Other than a list of any documents.

19 **MS DEMETRIOU:** Exactly.

20 **MR JUSTICE ROTH:** Yes. So that is the supplemental evidence timetable I think.  
21 We've said that any evidence in response by 4 pm on the 19th.

22 **MS DEMETRIOU:** Sir, in relation to that, because our skeleton argument is due as  
23 the current directions stand on the 21st.

24 **MR JUSTICE ROTH:** Yes, we might push that back slightly.

25 **MS DEMETRIOU:** We might push that back.

26 **MR JUSTICE ROTH:** The skeleton slightly. Yes, we'll come to that when we do

1 | directions to trial, under 4, shall we?

2 | **MS DEMETRIOU:** Yes.

3 | **MR COOK:** If I could just draw the tribunal's attention to paragraph 10, that our factual  
4 | evidence will address the pleading amendments as well as Mr Dhaene's statement.

5 | **MR JUSTICE ROTH:** Yes. Yes, thank you. Shall we turn to the causation issue?

6 | **MS DEMETRIOU:** Yes. Sir, actually if we keep this open -- I was just putting it away  
7 | but if we keep open MasterCard's draft order, then we see at paragraph -- so we can  
8 | see first of all that --

9 | **MR JUSTICE ROTH:** It's 12 and 13, isn't it?

10 | **MS DEMETRIOU:** Yes, but in the recitals they define reserves, counterfactual  
11 | matters, as being all issues as to counterfactuals. So they say the tribunal has  
12 | excluded all issues as to counterfactuals from the scope of the causation trial which  
13 | had been reserved for subsequent determination. Then we have 12 and 13, these  
14 | really encapsulate the two issues between the parties. So the parties are not permitted  
15 | to adduce evidence, to cross-examine or otherwise to seek to elicit evidence or make  
16 | submissions as to the counterfactual. That's 12.

17 | Then save as precluded by the tribunal's exclusion of the reserved counterfactual  
18 | matters, the issues for the causation trial should include whether the levels of EEA  
19 | MIFs were the legal cause of the domestic interchange fees.

20 | So we say in relation to 12 that we should be able to cross-examine in relation to the  
21 | counterfactual; and we say in relation to 13 that the tribunal without looking at the  
22 | counterfactual won't be able to reach a conclusion on legal causation.

23 | **MR JUSTICE ROTH:** Can I explain how I understood this to work.

24 | **MS DEMETRIOU:** Yes.

25 | **MR JUSTICE ROTH:** And then you can tell me if you think that's unworkable or wrong  
26 | or not what you -- if you turn to the pleading and I am in the original -- not the original



1 but the existing claim form at tab 15 of core bundle 2. I know it has been  
2 re-re-amended now but I don't think this will change. At page 39, internal page in the  
3 pleading, or core bundle page 720, paragraph 103, there is pleaded at subparagraph  
4 (b):

5 "The causative effect of these arrangements as found in the decision was that the  
6 intra-EEA fallback MIF operated as a floor and/or guidance and/or benchmark and/or  
7 minimum price reduction and/or minimum starting point and/or minimum level for the  
8 setting of either bilateral domestic arrangements, if any, or the domestic MIF."

9 Right.

10 **MS DEMETRIOU:** Yes.

11 **MR JUSTICE ROTH:** I mean that's your pleading. You then go on -- at  
12 paragraph 105, over the page, it says:

13 "Without prejudice to the foregoing, (b) given that ..."

14 And that's a reference back:

15 "... the UK domestic MIFs or any bilaterally agreed domestic interchange fees for the  
16 United Kingdom would have been negotiated and/or set from a lower starting point  
17 resulting in a zero or lower UK domestic MIF or bilateral interchange fees."

18 Right?

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE ROTH:** That was the pleading. Then in the defence, which is at the  
21 next tab, internal page 45, core page 780, paragraph 97, MasterCard pleads:

22 "Therefore insofar as paragraphs 103 to 105 relate to debit cards ..."

23 And then --

24 **MS DEMETRIOU:** It's the next paragraph you want because we are not dealing with  
25 debit cards.

26 **MR JUSTICE ROTH:** Debit cards have gone completely, have they? All of them,

1 right. Then it's not that one. It's the one relating to credit cards which is --

2 **MR COOK:** Just to clarify, that's not actually strictly correct. There is a claim in  
3 relation to Debit MasterCard.

4 **MR JUSTICE ROTH:** Yes, I thought so. It's Solo that's gone.

5 **MR COOK:** Solo has gone and Debit MasterCard is relatively small, but nonetheless  
6 there is still a claim in relation to domestic transactions on Debit MasterCard.

7 **MR JUSTICE ROTH:** Thank you, that had been my understanding. In any event let's  
8 follow it through, it doesn't make much difference. At 97 you have (c), they didn't act  
9 as a floor, et cetera, et cetera.

10 **MS DEMETRIOU:** Yes.

11 **MR JUSTICE ROTH:** And (e), consequently no scope for a claim in relation to UK  
12 domestic transactions on debit cards.

13 Then starting at 98, the defence turns to credit cards, lots of detail of how they were  
14 set.

15 Then 101:

16 "There is therefore no scope for a claim in relation to UK domestic MIFs in any event."

17 Or alternatively:

18 "Any claim is limited to the difference between the actual UK domestic and what UK  
19 domestic interchange fees would have been in the counterfactual and any such  
20 difference would have been minimal."

21 So the purpose of my ruling back in October, I think it was the order, in saying we won't  
22 get into the counterfactual is to say that if Mr Merricks succeeds in showing that it did  
23 have a causative effect on the UK domestic MIF, we are not going to look at what the  
24 UK domestic MIF would have been and seek to determine the level at which it would  
25 have been in the counterfactual.

26 **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** That would have been a complicated question of expert  
2 evidence, maybe industry expert evidence, maybe economic evidence, some way of  
3 trying to work out what the level would have been. That's the determination of the  
4 counterfactual that I had intended to exclude. I did not intend to exclude questioning  
5 on the basis of, well, if the EEA MIF had been 0.5 per cent lower or zero would that  
6 have had any effect on the UK domestic MIF.

7 **MS DEMETRIOU:** No.

8 **MR JUSTICE ROTH:** Clearly it seems to me one has to be able to ask that sort of  
9 question.

10 **MS DEMETRIOU:** Yes.

11 **MR JUSTICE ROTH:** Because otherwise you can't establish causation. So that's  
12 what I intended to decide in terms of excluding the counterfactual. I haven't read the  
13 economists' reports, but I imagine they have not engaged in the exercise of trying to  
14 work out what the UK domestic MIF might have been.

15 **MS DEMETRIOU:** No. So, sir, MasterCard's submissions go much further than that  
16 because obviously if the tribunal was seeking to establish but for causation, then  
17 necessarily it will have to have regard to the counterfactual. Let me just give  
18 you -- I am sure that is clear to you.

19 **MR JUSTICE ROTH:** Yes.

20 **MS DEMETRIOU:** But let me give you a practical example relating, for example, to  
21 the 75 per cent rule that we just spoke about which operated in the latter part of the  
22 period.

23 So, for example, let's say as a matter of fact in the factual world we can't make out  
24 causation in the sense that let's say that MasterCard's witnesses, and the tribunal  
25 accepts this evidence, say that they didn't have any regard to the intra-EEA MIF in the  
26 real world and they were just looking at cost studies. That's what they say. At the

1 moment let's say, for the sake of argument, that the tribunal accepts that that is their  
2 position in the factual world.

3 That wouldn't be a defeat for us on factual causation because you would then need to  
4 go on and look at the counterfactual. If in the counterfactual world the intra-EEA MIF  
5 was set at zero in a lawful world, then the incentives would have been different. So  
6 the acquiring banks who wanted a lower interchange fee would have looked at the rule  
7 that said, well, if you can't agree a domestic interchange fee you go back to the fallback  
8 zero per cent interchange fee. Therefore, we say, well, they wouldn't have agreed to  
9 the domestic interchange fee because their interests would have been to have a zero  
10 MIF.

11 So the key point really is that it's not possible to decide factual causation without the  
12 consideration of the counterfactual.

13 **MR JUSTICE ROTH:** Yes.

14 **MS DEMETRIOU:** So MasterCard says: no, no, no, we can't have a consideration of  
15 the counterfactual at all because we haven't dealt with that in our evidence, that's what  
16 they say in their skeleton argument; all of that's excluded and so you can't even ask  
17 questions on it.

18 So that really raises quite a fundamental issue as to what the trial is going to decide.  
19 That's why we were quite surprised to see their answer, that we can't cross-examine  
20 in relation to those matters at all.

21 It seems to us, just stepping back, that there are a number of possibilities.

22 **MR JUSTICE ROTH:** Yes.

23 **MS DEMETRIOU:** So when you went to the pleading, one of the key points, and this  
24 was in 103 subparagraph (a) and it was responded to in terms, is whether or not just  
25 as a matter of the fact EEA MIF operated as a default. Now that's hotly contested  
26 between the parties.

1 **MR JUSTICE ROTH:** Yes.

2 **MS DEMETRIOU:** Mr Hawkins in his evidence said: no, no, it wasn't the EEA MIF that  
3 operated as a default, it was an inter-regional MIF which was a different creature.

4 **MR JUSTICE ROTH:** Yes.

5 **MS DEMETRIOU:** Obviously the tribunal is able at this trial to determine whether  
6 causation is possible, so whether the EEA MIF was capable of having a causative  
7 effect.

8 If we lose on that point, to put it another way if we lose on whether or not in fact the  
9 EEA MIF was a default in the rules, then our causation argument will lose. So it's  
10 capable of deciding that point.

11 However, the next stage would be to say: can the tribunal decide factual causation,  
12 can it decide 'but for' causation? For the reasons I've given, in order to decide but for  
13 causation the tribunal would need to make findings or would need to have regard to  
14 the counterfactual.

15 Now one possible way forward is to say, yes, the tribunal should do that and should  
16 assume the counterfactual was zero because we've had the exemptibility judgment.

17 So the tribunal could work on the basis the counterfactual is zero and make findings  
18 as to what would have been the position in the counterfactual, and that would enable  
19 the tribunal to make findings as to but for causation.

20 **MR JUSTICE ROTH:** When you say the counterfactual EEA MIF --

21 **MS DEMETRIOU:** EEA MIF.

22 **MR JUSTICE ROTH:** -- is zero for MasterCard.

23 **MS DEMETRIOU:** For MasterCard.

24 **MR JUSTICE ROTH:** Yes, and to say, well, in those circumstances would that have  
25 affected the domestic MIF.

26 **MS DEMETRIOU:** Yes.

1 **MR JUSTICE ROTH:** But, as I think you say in your skeleton, it doesn't mean that the  
2 domestic MIF would necessarily be zero. It might have been something lower than it  
3 was, but above zero.

4 **MS DEMETRIOU:** Nobody is saying you can get into that.

5 **MR JUSTICE ROTH:** It's clear we can't do that. We'd need a lot more expert evidence  
6 to explore that.

7 **MS DEMETRIOU:** That's correct, so that we can't get into. But I think the real question  
8 is -- when MasterCard responded by saying, well, you can't question on the  
9 counterfactual and all elements of counterfactual are excluded, if that is correct, then  
10 the consequence of that is the tribunal wouldn't be able to reach a conclusion as to  
11 'but for' causation because that does necessarily involve getting into the  
12 counterfactual.

13 **MR JUSTICE ROTH:** Yes, I see.

14 **MS DEMETRIOU:** In relation to MasterCard's position, we say what definitely can't  
15 be right is that we are precluded from asking questions about the counterfactual but  
16 then they say: ah, well, despite that, the tribunal is in a position to make findings about  
17 legal causation. That just make no sense at all, with respect, because obviously there  
18 is a factual question which is 'but for' causation which does involve grappling with the  
19 counterfactual scenario, for the reasons I've given, and that assessment may show  
20 that there is more than one cause, and then the question, the legal causation, would  
21 be: are any or all of those causes legally relevant?

22 We don't see how the tribunal could possibly get into that without a much more detailed  
23 analysis of the counterfactual because you are then looking -- for example, it may well  
24 make a difference if the EEA MIF was zero or if it was 0.9. That may well make  
25 a difference to the extent of the causative link.

26 So those submissions from MasterCard are inconsistent, they are mutually

1 incompatible. You can't say we are going to exclude any reference to the  
2 counterfactual, you can't even ask questions on it, but then in the same breath say,  
3 however, the tribunal can make findings as to legal causation which necessarily --

4 **MR JUSTICE ROTH:** Don't we know what the EEA MIF counterfactual for MasterCard  
5 is?

6 **MS DEMETRIOU:** We know that it's zero.

7 **MR JUSTICE ROTH:** That's been held, that's been determined subject to any  
8 potential appeal.

9 **MS DEMETRIOU:** Yes.

10 **MR JUSTICE ROTH:** Which may be a problem. We equally know, certainly for part  
11 of the period, Visa had an exemption, didn't they? So we know what the Visa's lawful  
12 MIF is for that period.

13 **MS DEMETRIOU:** Well, sir, no, with respect, because what one is positing in relation  
14 to Visa is: what would Visa's MIF have been if MasterCard's MIF was zero? So it had  
15 an exemption in the real world, but in a counterfactual world, where MasterCard's MIF  
16 was zero, we can't conclude that it would have been the same. So that does involve  
17 a more complex enquiry.

18 **MR JUSTICE ROTH:** Why on earth would they have wanted it to be zero if they could  
19 lawfully charge the MIF they did charge?

20 **MS DEMETRIOU:** Sir, one point that we've pleaded in our Reply is that the  
21 exemptibility decision may not have gone the same way if MasterCard's MIF was zero.  
22 So it's a completely different world that we are looking at. In a counterfactual world  
23 where MasterCard doesn't have a MIF, has a MIF at zero, then it may well be that  
24 things would not have evolved in the same way in terms of the exemption decision for  
25 Visa.

26 It's difficult now to think about the different permutations, but there would have to be

1 an investigation into that.

2 **MR JUSTICE ROTH:** It becomes an extremely abstract exercise, doesn't it, on that  
3 basis?

4 **MS DEMETRIOU:** Sir, it does. Let me show you what MasterCard has said in  
5 correspondence just by way of illustration. In core bundle 4, tab 143 -- sorry, 2368.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** We wrote to MasterCard pointing out that in a particular period of  
8 the infringement period certain UK domestic transactions were processed using the  
9 EEA MIF. So it applied because there were no bilateral arrangements.

10 **MR JUSTICE ROTH:** Yes.

11 **MS DEMETRIOU:** We said, well, do you accept that in those circumstances causation  
12 is proven as it were, we don't need to show causation because the EEA MIF applied  
13 directly? They said no. They say, and this is at (a):

14 "Even if it were to be found that certain UK domestic transactions took place using the  
15 EEA MIF as a default, it would not follow that this caused the interchange fees paid on  
16 those domestic transactions to be higher than they would have been had the EEA MIF  
17 been set at zero. Even assuming without prejudice to MasterCard's case on  
18 exemptibility and pending application for permission to appeal that the lawful  
19 counterfactual level of the EA MIF was zero, it would still be necessary to determine  
20 what interchange fees would have been charged on those domestic UK transactions  
21 in that counterfactual."

22 I think what they are saying there -- so we thought, well, isn't it clear, haven't we got  
23 home on causation? If a transaction was actually processed on EEA MIF, aren't we  
24 home and dry in terms of causation? They are saying: no, you are not, because you  
25 have to examine the counterfactual world. I assume what they are lining up is an  
26 argument to say that if the EEA MIF was zero in the counterfactual the UK banks would



1 have done something different and adopted a different rule.

2 **MR JUSTICE ROTH:** Yes.

3 **MS DEMETRIOU:** One can see that these counterfactual questions are not easy and  
4 MasterCard's position is that they all need to be hived off, but that does raise  
5 a question as to --

6 **MR JUSTICE ROTH:** Yes, I see. That may be one of the perils of trying to split issues,  
7 but, going back to your pleading, are you saying the only thing we can explore at this  
8 trial is the allegation in 103(a)? That would be very limited.

9 **MS DEMETRIOU:** Sir, I think I am saying that there are some options available to the  
10 tribunal. So one option is that, yes -- I mean that's a hotly contested issue. So the  
11 tribunal could determine that point in 103(a).

12 **MR JUSTICE ROTH:** I hope everyone can agree as that's a question of fact I think --

13 **MS DEMETRIOU:** That's a question of fact.

14 **MR JUSTICE ROTH:** -- that that is something which should be determined, 103(a).

15 **MS DEMETRIOU:** That needs to be determined, we all agree it could be determined.

16 **MR JUSTICE ROTH:** Yes.

17 **MS DEMETRIOU:** The next thing that the tribunal could determine is what was taken  
18 into account in the factual world by MasterCard when it set the MIFs.

19 **MR JUSTICE ROTH:** Yes.

20 **MS DEMETRIOU:** Just pausing there, that would not determine -- we have to be clear  
21 that that would be a useful determination but it would not by itself determine but for  
22 causation, still less legal causation, for the reasons that I gave earlier.

23 **MR JUSTICE ROTH:** I suppose one would need to consider what --

24 **MS DEMETRIOU:** How things would have been different.

25 **MR JUSTICE ROTH:** Whether things would have been different and how.

26 **MS DEMETRIOU:** In the counterfactual, and the two examples I've given you were

1 the 75 per cent rule and also I have shown you MasterCard's example as well.

2 **MR JUSTICE ROTH:** Yes, and MasterCard I suppose on that basis could say: well,

3 we wouldn't have maintained the 75 per cent rule in the counterfactual world.

4 **MS DEMETRIOU:** They might have done.

5 **MR JUSTICE ROTH:** All sorts of possibilities.

6 **MS DEMETRIOU:** There's all sorts of possibilities. But what you can't have is

7 a finding on factual causation without examining those possibilities. That's why we

8 say, just going back to pleading at 105(b) that you read, sir, the question is -- you see

9 at the end of that page:

10 "Would they have been different had the intra-EEA MIFs been set in a lawful manner?"

11 So but for causation does inevitably involve a comparison between the factual and the

12 counterfactual.

13 **MR JUSTICE ROTH:** But going back to 103(b).

14 **MS DEMETRIOU:** Yes.

15 **MR JUSTICE ROTH:** We can determine whether in the factual world they operated

16 as a floor, guidance, et cetera.

17 **MS DEMETRIOU:** We can and so --

18 **MR JUSTICE ROTH:** We should, I would have thought.

19 **MS DEMETRIOU:** Yes, we should.

20 **MR JUSTICE ROTH:** I think everyone has prepared their evidence on that basis.

21 **MS DEMETRIOU:** Yes. Now --

22 **MR JUSTICE ROTH:** I see the problems about going into the counterfactual. So if

23 we therefore say -- rather than doing it in more general terms but by reference to the

24 pleading -- that this trial will determine whether the allegations in 103(a) and (b) are

25 made good.

26 **MS DEMETRIOU:** Well, sir, I am not sure we can say because inherent in causative

1 effect is -- in any causation question there is a comparison between the factual and  
2 the counterfactual. So I think it would need to be tweaked to say in the factual world.

3 **MR JUSTICE ROTH:** Yes, the intra-EEA fallback MIF actually applied by MasterCard  
4 as opposed to what it might have done.

5 **MS DEMETRIOU:** Yes. Sir, I am told -- I think Mr Luckhurst is right that it might be  
6 easier to do this by reference to the new pleading.

7 **MR JUSTICE ROTH:** Yes, we probably should. I have not resolved the new pleading.

8 **MS DEMETRIOU:** It's tab 19.

9 **MR JUSTICE ROTH:** Has 103 changed?

10 **MS DEMETRIOU:** 103 has been expanded.

11 **MR JUSTICE ROTH:** So 103(a) --

12 **MS DEMETRIOU:** Is the same.

13 **MR JUSTICE ROTH:** -- is effectively the same. 103(b) is effectively the same.

14 **MS DEMETRIOU:** Yes.

15 **MR JUSTICE ROTH:** There's a new (a)(a).

16 **MS DEMETRIOU:** And that's explaining the position in terms of the rules in relation  
17 to the early period from 1992 to --

18 **MR JUSTICE ROTH:** And that's a factual question.

19 **MS DEMETRIOU:** That's a factual question.

20 **MR JUSTICE ROTH:** We have not had the defence to this yet.

21 **MS DEMETRIOU:** No.

22 **MR JUSTICE ROTH:** So we don't know if that's in dispute, but if it is that's a dispute  
23 that can be resolved. 103(b) this same. There is a lot more.

24 **MS DEMETRIOU:** So --

25 **MR JUSTICE ROTH:** 103(b)(a).

26 **MS DEMETRIOU:** It's the point about the EEA MIF applying directly to at least certain

1 transactions. It's the point that we wrote to MasterCard about.

2 **MR JUSTICE ROTH:** Yes, so we can determine that.

3 **MR COOK:** May I make a suggestion, sir? We can look at the first couple of  
4 paragraphs as illustrating the point between the parties. I think if you make a ruling  
5 about broadly where the line lies, we can probably see if we can agree to follow that  
6 through into subsequent paragraphs. I don't think you need to understand all seven  
7 or eight different allegations to deal with the question of: are we essentially looking at  
8 the factual or is there some but for causation question? It's just there are a lot of  
9 variations and particulars.

10 **MR JUSTICE ROTH:** Yes, it's very important we resolve this, which is why I changed  
11 my mind about giving a judgment because we absolutely need to determine this now.  
12 If all those causative questions are determined on the MIF or MIFs that MasterCard  
13 was applying at the time, then we are not getting into the counterfactual of, well, might  
14 the answers be different if the EEA MIF had been zero and how and what would the  
15 counterfactual world have looked like.

16 **MS DEMETRIOU:** Sir, that's correct. If we do that, which we can do, we just need to  
17 be clear that that doesn't answer the question of but for causation. So, for example, if  
18 you were to find, well, in the factual world MasterCard's witnesses didn't take account  
19 of the EEA MIF, that would not be determining but for causation against Mr Merricks  
20 because there would need to be a subsequent examination of the counterfactual. It's  
21 still a useful exercise. Obviously if we failed on the first point, so was it a default at all,  
22 then that would be determinative against Mr Merricks, the factual point.

23 Let's say we succeed in showing that the EEA MIF was at least for certain parts of  
24 period, or at certain points, a default in the rules and so our causation mechanism is  
25 capable of taking effect, if the tribunal were to go on and say, well, actually in the real  
26 world MasterCard didn't have regard to it, that would not determine causation against

1 Mr Merricks. Just in the same way as if we were to succeed in showing that they did  
2 take it into account, MasterCard says, well, that wouldn't determine causation against  
3 us either because you would still need to look at the counterfactual.  
4 That's why I took you to their letter. So I think it's important to be clear about that.  
5 **MR JUSTICE ROTH:** I think it also goes to the point if -- and I don't know whether the  
6 application to appeal on the exemptibility ruling is being pursued in the Court of Appeal.  
7 I am told it is. We may or may not know whether permission is granted by the start of  
8 this trial, but we certainly won't have had a judgment if permission is granted. It would  
9 be rather artificial to do this without knowing where we are on exemptibility, I think.  
10 Yes, I see.  
11 **MS DEMETRIOU:** Sir --  
12 **MR JUSTICE ROTH:** I'll have to hear from Mr Cook, but if that is then the scope, the  
13 next question is what sort of questions then come into play.  
14 **MS DEMETRIOU:** If that is the scope, then the two questions are: are we allowed to  
15 cross-examine, ask questions in relation to the counterfactual? And we say yes,  
16 because, even though you are not deciding but for causation, we still have to test the  
17 plausibility of MasterCard's evidence.  
18 **MR JUSTICE ROTH:** Yes.  
19 **MS DEMETRIOU:** For example, if they say, well, we didn't take into account the EEA  
20 MIF at all, it was just irrelevant to the MIF because all we took account of was costs,  
21 then we would want to explore the extent to which costs were relevant and we might  
22 want to ask, for example: well, would that still have been the same if the EEA MIF had  
23 been zero?  
24 **MR JUSTICE ROTH:** But isn't that precisely what you just said we can't get into  
25 because if the EEA MIF had been zero then the other rules might have been different  
26 and you get into this whole counterfactual question, which we've agreed we can't get

1 into.

2 **MS DEMETRIOU:** So you can't make findings in relation to that.

3 **MR JUSTICE ROTH:** What's the point of asking questions?

4 **MS DEMETRIOU:** Because MasterCard's witnesses say in their written evidence that  
5 the banks and the relevant bodies were just not interested in the EEA MIF at all.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** That's what they are saying. Almost as a matter of principle, they  
8 say: it was all different in Europe, we just weren't interested in it, we were doing our  
9 domestic thing. So I really do have to test the plausibility of that by saying: imagine if  
10 it was zero. You knew about it, you say you weren't interested in it, but is that really  
11 correct that as a matter of principle it was just excluded? Imagine if it was zero, how  
12 would that have affected what you were doing? Not so that you make findings about  
13 it, but really to test the plausibility of their evidence which is very black and white on  
14 this. They say it just was irrelevant to the whole thing.

15 **MR JUSTICE ROTH:** But if it had been zero, the world would have been a different  
16 world and all sorts of other things might have been different. It seems to me one is  
17 then getting into a sort of muddle of what the world would have been like.

18 **MS DEMETRIOU:** Well, sir --

19 **MR JUSTICE ROTH:** You can test their plausibility in all sorts -- of course you test  
20 their evidence in all sorts of other ways, and against the documents, no doubt, which  
21 you've got a huge number of, what they looked at and what they considered, and if it  
22 was different, how could they justify that at the time; and all the rest of it. But to start  
23 saying, well, would you still have ignored it if this, you are then getting into precisely  
24 the problem you have very graphically explained to me.

25 **MS DEMETRIOU:** Sir, it's not -- if I can take it in stages. Whether or not their evidence  
26 is plausible as to what they would have done in the factual --

1 **MR JUSTICE ROTH:** As to what they did in the factual?

2 **MS DEMETRIOU:** It is, but, for example, where they say, well, the EEA MIF was just  
3 completely disconnected from us, so in the factual we took no account of it because it  
4 was just a completely different kettle of fish, then it's difficult to see how that can be  
5 explored without putting to them whether or not that would have still been the same if  
6 the EEA MIF had been, for example, zero because that sheds light on what happened  
7 in the factual.

8 We are not trying through this cross-examination to establish what they would have  
9 done in the counterfactual, but we think we do have to ask questions along those lines  
10 to shed light on the plausibility of what they said happened in relation to the factual.

11 Sir, I don't see -- it would be an odd direction to stop me cross-examining in any way  
12 I wanted to cross-examine. Obviously if it looked like it was not being useful at the  
13 trial then you could intervene and tell me to stop. But it would be odd at this juncture,  
14 if we are all clear as to what can be determined and can't be determined in the trial, to  
15 say: this line of cross-examination is precluded a priori to you.

16 **MR JUSTICE ROTH:** This has come up because you've both raised it, or one of you  
17 raised it, and it's therefore been placed before me. I assume it's not been addressed  
18 in the evidence. Normally if people say, "This is what we took into account and we  
19 didn't have regard to that", you look at the factual evidence of the decision-making  
20 process; and it's not just some witness standing there saying, "This is what we looked  
21 at and we didn't look at the EEA MIF." No doubt there are a lot of documents -- and  
22 you are asking indeed for more, I think some on limitation I know, but you've talked  
23 about further disclosure being required -- as to the deliberations that set these  
24 domestic MIFs and you would test the evidence on that basis.

25 **MS DEMETRIOU:** Sir, I hesitate --

26 **MR JUSTICE ROTH:** And not by saying, "You didn't take it into account in this world,

1 but in a counterfactual world might you not have taken it into account?" They may  
2 say, "Yes, we might", but it doesn't help.

3 **MS DEMETRIOU:** Sir, it's a little different, I hesitate to draw analogies, but imagine  
4 someone gives evidence: at the weekend we decided to go out for a picnic. Then  
5 I cross-examine them and I say: that's because the weather was nice. They say: no,  
6 no, we took no account of the weather whatsoever, it was an immaterial consideration.  
7 Then I say: imagine if it had been hailing, would you have taken account of it then?  
8 And they say: oh, yes, actually, yes. Then I say: well actually your evidence isn't quite  
9 right then, is it, as to what you did in the factual? That's really the point. So it's not  
10 trying to establish what they would have done in the counterfactual, but I hope by that  
11 example I am illustrating why it might shed light on the factual.

12 **MR JUSTICE ROTH:** Well it's difficult to, as it were, at a pre-trial review to rule out  
13 absolutely any particular question and I am reluctant to do that. All I can say is I think  
14 it becomes difficult if you start asking here the sort of questions about a particular  
15 aspect of the counterfactual when in that particular aspect of the counterfactual other  
16 matters might also have been very different.

17 So that to say, "Well, if everything else had been the same, but the MIF had been zero,  
18 would you have taken it into account", may not help us hugely on this.

19 **MS DEMETRIOU:** Sir, that's right and there may be a risk of diminishing returns. But  
20 I do say, for the reason I hope I have illustrated with my picnic example, that to shut  
21 me out from going there wouldn't be appropriate because --

22 **MR JUSTICE ROTH:** Um --

23 **MS DEMETRIOU:** I bear in mind what you are saying, but we do need the flexibility  
24 to test the plausibility of their evidence in the factual.

25 **MR JUSTICE ROTH:** Yes, I am not sure how far it will help in testing the plausibility  
26 in the factual to do it that way. You can certainly ask why did they take no account of



1 it, of the EEA MIF. I don't see there's any difficulty, if they say they took no account of  
2 it, why not, and explore that, and see whether they have cogent reasons; and is that  
3 reason connected to the level of the EEA MIF. So that sort of questioning I can see  
4 may be possible. But I think starting to put specific counterfactuals is problematic.

5 **MS DEMETRIOU:** Sir, I don't want to now get into how I am going to do it but --

6 **MR JUSTICE ROTH:** No, I think it's a useful discussion in this sense because it has  
7 been raised by the parties. I think it's helpful that we have an understanding of what's  
8 going to be decided, that's very important.

9 **MS DEMETRIOU:** Yes.

10 **MR JUSTICE ROTH:** But then how we are going to go about it. Does that give you  
11 enough indication -- I have not heard anything from Mr Cook yet, so obviously I need  
12 to do that -- in terms of where we might go. Then if there's a line of questioning that  
13 is objected to, obviously that can be dealt with as and when it happens.

14 **MS DEMETRIOU:** Sir, yes, it does. Thank you. Of course, inherent in what you've  
15 just said, in terms of you can test the reasons whether the level mattered, that is  
16 another way of saying: would you have acted differently if had been lower? We can  
17 play around with the wording, but I do completely take your point that putting specific  
18 counterfactuals to witnesses may not be very useful. Of course, we understand that  
19 a specific line may be objected to and indeed you may cut me off if you think it's not  
20 useful.

21 Sir, the other point I just wanted to raise was the point about legal causation. It does  
22 seem us to that if the tribunal is not going to be making findings about factual causation  
23 it can't possibly get into legal causation because legal causation is looking at the  
24 different but for causes and deciding whether or not they are legally relevant. So you  
25 have to have the but for causes first.

26 **MR JUSTICE ROTH:** Yes. Yes, I think I see the point you are making.

1 **MS DEMETRIOU:** I will sit down so Mr Cook can speak.

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

3 **MR COOK:** Sir, I don't know if now is a convenient time for a very quick break for the  
4 shorthand writer. That is our window of opportunity.

5 **MR JUSTICE ROTH:** I think that's right. I am just looking at the ... right. We will  
6 obviously have to deal with consequential directions and trial timetable and we'll see  
7 how far we can get with limitation and disclosure. Obviously that's not for this trial,  
8 that's for the trial in January. It would be desirable if we can do something on that, but  
9 we'll do the best we can. We need to iron these matters out.

10 Yes, so if I come back at just after quarter to.

11 **(3.38 pm)**

12 **(A short break)**

13 **(3.49 pm)**

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

15 **MR COOK:** Yes, thank you. Sir, certainly that elaboration on the exchanges there  
16 have been extremely helpful on our side as well in terms of crystallising certainly what  
17 we think the trial is about. I am not sure at the end of it there's actually any  
18 disagreement between anybody about what this trial is and should be about.

19 When you started off by saying, sir, in effect both sets of pleadings break into two  
20 parts, we agree. Both of us set out a case that in the factual certain things happened  
21 or certain things had effects in the factual. That is what -- and then both parties go on,  
22 positively or negatively, to say that in a world in which the EEA MIF had been different  
23 or zero, the counterfactual -- there would have been an outcome as follows, and that  
24 is the but for question.

25 So there is what happened in the factual and then there is what would have happened  
26 in the counterfactual. I think by the end of my learned friend's submissions it was

1 pretty clear she was saying this trial is confined to the first issue, what in fact happened  
2 in the factual.

3 **MR JUSTICE ROTH:** Yes.

4 **MR COOK:** We agree with that. That is the ruling that we understood the tribunal  
5 made back in September. That is the basis on which all of our evidence, both factual  
6 and expert, has proceeded, that they have only looked at in the factual the following  
7 things happened, the following things were taken into account; and not if X was  
8 different we would have taken a different decision or not. So to that extent I don't think  
9 there's very much disagreement.

10 The disagreement I think between the parties now becomes question of whether my  
11 learned friend is permitted to ask questions that trespass into the issue that we all  
12 agree is not in this trial, which is in a counterfactual world where something was  
13 different, would that decision making process have been different.

14 Sir, we do say, firstly, that my learned friend absolutely should not and it is something  
15 where, with respect, we say clarity at this hearing is desirable and necessary because  
16 our witnesses have not dealt with those issues and if there is going to be substantive  
17 questioning put on the terms of, "If this was different surely your reasoning process  
18 would have been different", that is counterfactual questioning that is not the issue for  
19 the trial. But in terms it should also not be an issue for cross-examination because,  
20 one, for the obvious reason it is not part of the hearing but, two, because we have not  
21 prepared to have our witnesses or experts deal with those matters because it is not  
22 part of the hearing.

23 That, in a nutshell, is our position. We do think -- and to some extent one can see it  
24 quite easily from the old paragraph 103, just because there are a lot of bells and  
25 whistles that have been added, the old paragraph 103 of the claim form said (1) our  
26 scheme rules did certain things, (2) the EEA MIF, as a result, acted as a floor, et

1 cetera, the actual EEA MIF. Again we say that's absolutely fine, that's a factual  
2 question.

3 There's then a point about weighted voting. Then, fine, that's about the factual.

4 Then it goes on to say: absent the infringement, X, Y and Z would have happened that  
5 was different and that's where we cross the line. So it's 103(a) to (c) on the old  
6 pleading, fine. 103(d) on the old pleading, not fine.

7 I think the only distinction essentially between the parties now is just how far my  
8 learned friend can trespass across the line that everyone is agreeing the tribunal has  
9 drawn.

10 **MR JUSTICE ROTH:** Yes. I mean I think -- that's very helpful, Mr Cook. I think,  
11 rather than making a sort of absolute rule that there is no question about the world  
12 other than absolutely as it was, there's I hope enough clarity in it -- and Ms Demetriou  
13 will be the trial counsel, I think, you told me at the start you won't be but -- or perhaps --

14 **MR COOK:** I will be there, sir.

15 **MR JUSTICE ROTH:** You will be there but you won't be -- I can't imagine  
16 a MasterCard hearing without you, Mr Cook. But the primary questioner who may be  
17 cross-examining, Ms Demetriou, has got the clear message of where we are, what the  
18 scope is.

19 Rather than saying no question which says anything other than actual can be allowed,  
20 we are all alert to it. I am certainly much better informed as a result of this, and I had  
21 not appreciated quite the subtleties of what's involved, I readily admit, and so I have  
22 no doubt that Ms Demetriou, as very skilful counsel, will be careful to seek to stay in  
23 the right area. If she should stray, you will be free to object and I, as it were, am  
24 apprised of the point and where we are not going to go. I would rather leave it like  
25 that, rather than making an absolute rule about questions.

26 **MR COOK:** Yes. We do understand how, in the abstract, there is a limit as to how

1 far you feel you can go, but there is a clear direction of travel here and Ms Demetriou  
2 is on notice of it.

3 **MR JUSTICE ROTH:** Yes, and I think it's right that legal causation then really doesn't  
4 come into play.

5 **MR COOK:** Sir, we are relaxed about that. To some extent, the word --

6 **MR JUSTICE ROTH:** (Several inaudible words due to overspeaking).

7 **MR COOK:** (Several inaudible words due to overspeaking) causation, that was  
8 something you asked for, to be added, sir.

9 **MR JUSTICE ROTH:** Yes.

10 **MR COOK:** Causation in a legally relevant sense.

11 **MR JUSTICE ROTH:** Yes.

12 **MR COOK:** I mean what we would say is it's very difficult to see how something could  
13 be a cause without having a somewhat probative aspect to it, which is sort of -- but,  
14 yes, we are certainly relaxed about that.

15 I do formally just have to say -- again I am not asking the tribunal to do anything about  
16 this at all because it's entirely a matter that we'll need to consider when we get the  
17 judgment following the trial -- if my learned friend was suggesting there might be  
18 a need for a trial in any event, regardless of what you find, with respect, we find that  
19 just slightly surprising. If her case is that the EEA MIF was a floor and you decide  
20 that's wrong, it's difficult to see how --

21 **MR JUSTICE ROTH:** We don't need to --

22 **MR COOK:** I just didn't want that to look like it was something I accepted necessarily  
23 that that was the outcome.

24 **MR JUSTICE ROTH:** No, I understand what --

25 **MR COOK:** But that's a question-

26 **MR JUSTICE ROTH:** -- Ms Demetriou said.

1 **MR COOK:** It's very much a question of what the judgment says. If it knocks down  
2 each of the arguments about why this could have had an effect, then, yes, we can see  
3 that we would say that's the end of it essentially.

4 **MR JUSTICE ROTH:** Yes. I think that's accepted, but I understand Ms Demetriou's  
5 point that it will all depend obviously on what the findings are, that it may still be  
6 possible, depending on how the findings are, to advance an argument saying: yes, but  
7 if the EEA MIF had been zero, then it would have had an effect. That's the  
8 counterfactual argument.

9 **MR COOK:** Yes, we don't necessarily -- we think there are scenarios, and we hope  
10 we'll be in those scenarios, where the claim necessarily fails at that point, but we are  
11 just saying that's obviously something to be considered when we have the benefit of  
12 the judgment.

13 **MS DEMETRIOU:** Sir, I think it's important actually, now we are here, to understand  
14 what scenarios. Because going back to 103 and the point Mr Cook just made, so he  
15 says 103(a) and (b) are in, but it's really important to be precise about this because  
16 (b) says the causative effect of these arrangements and our case about whether they  
17 act as a benchmark is dependent on a counterfactual analysis. So one isn't going to  
18 get a cross against (b), (b) isn't going to be determined in this trial, because that is  
19 dependent on a counterfactual analysis. We are saying it acted as a benchmark  
20 because, absent the infringement, things would have been different. So that's an  
21 essential --

22 **MR JUSTICE ROTH:** The question is did it, in the factual world, when they fixed the  
23 domestic MIF, were they basing themselves or using the actual EEA MIF as the  
24 benchmark.

25 **MS DEMETRIOU:** Yes.

26 **MR JUSTICE ROTH:** That's the question.

1 **MS DEMETRIOU:** Yes, but what you can't decide is 103(b) because that's asking  
2 whether the causative effect arose because it operated as a benchmark, and that does  
3 require a factual versus a counterfactual analysis.

4 **MR JUSTICE ROTH:** But the question we can decide is did it operate as  
5 a benchmark.

6 **MS DEMETRIOU:** Yes, and so I want Mr Cook to be clear, with respect, about this.  
7 It's not satisfactory to have it off till after the judgment. If it were to be established  
8 against us that in the factual world the tribunal -- it's really the point I put to you. If the  
9 tribunal is with MasterCard that in the factual world these witnesses did not have  
10 regard to the EEA MIF and so it did not act as a benchmark, we will have to come  
11 back inevitably for a further trial because that will not have answered the but for  
12 causation question. I think it is really important to establish this --

13 **MR JUSTICE ROTH:** You say it will have to come back. It may be depending on why  
14 it did not act as a benchmark.

15 **MS DEMETRIOU:** Well, sir, can I just take it from -- let's look at the new pleading. So  
16 tab 19, paragraph 103(f), which is at page 915.

17 **MR JUSTICE ROTH:** Yes.

18 **MS DEMETRIOU:** Now this relates to the latter part of the period, the difference  
19 between --

20 **MR JUSTICE ROTH:** Sorry, the new pleading. I am in the wrong bundle.

21 **MS DEMETRIOU:** So it's tab 19, page 915.

22 **MR JUSTICE ROTH:** Yes, 915.

23 **MS DEMETRIOU:** Yes, subparagraph (f). So this relates to the latter part of the period  
24 after 1997 where there was for the first time a UK domestic MIF. So what we are  
25 saying is that when the UK domestic MIF was first set the illegal intra-EEA fallback  
26 MIF had a causative effect on the level at which was it first set and so it had an ongoing

1 impact because it was set initially higher than it would have been in 1997, the UK  
2 domestic MIF.

3 **MR JUSTICE ROTH:** I am sorry.

4 **MS DEMETRIOU:** I am looking at the middle of the paragraph.

5 **MR JUSTICE ROTH:** What you are saying is they did so by reference to the  
6 interchange fee which previously applied?

7 **MS DEMETRIOU:** Yes.

8 **MR JUSTICE ROTH:** Now --

9 **MS DEMETRIOU:** So there is an ongoing infection, as it were, of the UK domestic  
10 MIF by the intra-EEA MIF, even though at that stage it wasn't in the rules a default.

11 **MR JUSTICE ROTH:** Yes.

12 **MS DEMETRIOU:** Aside from the 75 per cent rule. So that question is a mixed -- it's  
13 obviously a mixed factual and counterfactual question.

14 **MR JUSTICE ROTH:** Yes, but I mean the question of whether they did so by  
15 reference to the previous one, that's a factual question, isn't it?

16 **MS DEMETRIOU:** The reference -- so, yes, that's a factual question. But the  
17 question --

18 **MR JUSTICE ROTH:** What actually happened. And therefore if the previous one, if  
19 it was a floor for the previous one, then you say it continued to have an effect.

20 **MS DEMETRIOU:** Yes. But in the real world, let's say the EEA MIF was 1 per cent,  
21 and then you are considering whether or not that acted as a benchmark, well, the  
22 tribunal may say: well, no, it didn't act as a benchmark when it came to deciding the  
23 UK domestic MIF because everyone was looking at other things.

24 But obviously if it had been zero in the counterfactual things may have been different.

25 So one can't decide whether there was that ongoing causative effect or infection, as it  
26 were, without looking at both sides of the coin.



1 **MR JUSTICE ROTH:** I don't see where this is going. This is saying simply that when  
2 it was first set the previous interchange fee was the point of reference.

3 **MS DEMETRIOU:** Yes.

4 **MR JUSTICE ROTH:** Well. Either it was or it wasn't. If it wasn't, then that's the end  
5 of this paragraph.

6 **MS DEMETRIOU:** No, sir, that's the point, it's not. Because if it wasn't in the real  
7 world a point of reference, that's not the end of this paragraph because it may not have  
8 been a reference point in the real world but in the counterfactual world it may have  
9 been different, and so one is looking at the difference between those two things. So  
10 one can't actually decide this paragraph without looking at the real world and the  
11 counterfactual world.

12 **MR JUSTICE ROTH:** This paragraph is just talking about the effect of the factual EEA  
13 MIF on the domestic MIF.

14 **MS DEMETRIOU:** No, because it's looking at whether it constituted a floor or  
15 guidance or a benchmark. Our case on that requires a comparison between the  
16 factual and the counterfactual.

17 So, for example, it's maybe easier to see in relation to the 75 per cent rule that in the  
18 factual world they may well be able to establish that no regard was had to the EEA  
19 MIF. But then in the counterfactual world where the EEA MIF was zero the operation  
20 of the 75 per cent rule may have been that it was in acquirers' interest to collapse the  
21 UK domestic MIF because they then could have accessed the EEA one.

22 So these paragraphs just can't be dismissed without that counterfactual analysis, and  
23 that goes back to the point that Mr Cook made by reference to the original pleading  
24 (b), which is on page 913, that has not changed.

25 When one is looking at -- so the tribunal will not, in my respectful submission, be able  
26 to decide what is the causative effect of those arrangements, whether the causative

1 effect was that they operated as a floor, because the whole case on whether they  
2 operated as a floor depends on comparing the factual to the counterfactual.

3 So the tribunal will be able to decide as a matter of fact whether people in the actual  
4 world took account of the EEA MIF as it stood in the actual world, but without carrying  
5 out the counterfactual exercise the court won't be able to decide, won't be able to  
6 dismiss paragraph (b).

7 **MR JUSTICE ROTH:** Well, it will be able to decide whether, in the events that  
8 happened, the EEA MIF was regarded as relevant.

9 **MS DEMETRIOU:** Yes.

10 **MR JUSTICE ROTH:** And in what way it was regarded as relevant --

11 **MS DEMETRIOU:** Yes.

12 **MR JUSTICE ROTH:** -- by those who took the decision.

13 **MS DEMETRIOU:** Yes, but it won't be able to decide whether there was a causative  
14 link and whether it acted causally as a benchmark because that does require  
15 a counterfactual analysis.

16 **MR JUSTICE ROTH:** Well, it will be able to decide whether in fact it operated as  
17 a benchmark. What we won't be able to decide is if we say it did not operate as  
18 a benchmark in the actual world as to whether it would have operated as a benchmark  
19 in the counterfactual world. That's what we won't be able to decide.

20 **MS DEMETRIOU:** No, that's right. So I was just concerned --

21 **MR JUSTICE ROTH:** Whether that is -- I mean one is a causative effect of what has  
22 happened. The other is whether it caused you -- there's a quite different question as  
23 to whether the illegal level caused you damage. That's the causative effect we can't  
24 establish.

25 **MS DEMETRIOU:** No.

26 **MR JUSTICE ROTH:** Because the cause of damage requires you to say, well, what

1 would have happened had it been a lower EEA MIF.

2 **MS DEMETRIOU:** It goes to more than simply the amount of damage that's caused  
3 and looking at what the effect on the actual levels would have been. It goes to  
4 establishing but for causation in the first place.

5 It goes back to the point I was making, the illustration I gave in relation to the  
6 75 per cent rule. So let's say that MasterCard establishes at the trial that in the real  
7 world the EEA MIF in the latter period didn't act as a benchmark because nobody took  
8 any account of it. Well, that doesn't get rid of our causation argument that it acted  
9 causally as a benchmark because it's only half of the story, because in order to  
10 establish causation we are saying it's not enough -- in order to defeat our causation  
11 argument it's not enough for MasterCard to say, to establish that nobody in the real  
12 world took account of the EEA MIF. They also have to establish that if the EEA MIF  
13 had been lawful, we say zero, that nobody would have taken account of it.

14 So that's why -- one of the -- I suppose one of the inefficiencies of this trial, if one is  
15 going to look at factual causation -- sorry, if one is going to look at what happened in  
16 the real world is that -- and it comes back to the sort of options that I said were  
17 available to the tribunal at the beginning -- if the tribunal is doing more than looking at  
18 in fact what rules, et cetera, but going on to look at -- make factual findings about what  
19 happened in the factual, that's fine so long as everyone understands that factual  
20 causation can't be determined until we've had a counterfactual analysis.

21 Also, it does give rise -- I am not trying to dissuade you, sir, but it does give rise to an  
22 inefficiency in the sense that we'll have to have another trial looking at these parts of  
23 our pleading where we do go into the counterfactual. Now it may be that that's just  
24 a function of how things have been set up, but I was just concerned when Mr Cook  
25 said: oh, well, we don't agree that there will have to be another trial, because we do  
26 say that in order to decide but for causation there will have to be a trial in relation to

1 the counterfactual. So there will have to be an analysis of how would these witnesses  
2 have acted, how would MasterCard have acted, if the EEA MIF had been zero.

3 Now one way of dealing with that, it may be more efficient to say let's have that trial  
4 now. They say: well, no, we can't because our witnesses haven't dealt with it. I mean  
5 it would be possible for the tribunal to do that because the tribunal could work on the  
6 basis that the counterfactual EEA MIF was zero. But they say: well, we can't do that  
7 because we haven't addressed it in our witness evidence.

8 But a consequence of that, I think we should all be clear, is that there will be duplication  
9 because we will have to come back inevitably at a further trial to look at the  
10 counterfactual in relation to these same events. So we are only going to be looking at  
11 half of the picture.

12 **MR JUSTICE ROTH:** Well, I mean the prospect of having a second trial with pretty  
13 much the same witnesses is horrific. But if that is the way the case is put, clearly it will  
14 then be open to MasterCard to say: well, had the EEA MIF been zero, our rules then  
15 would have been different and they would want to put in witness evidence about that,  
16 and that's not something that can be done now.

17 **MS DEMETRIOU:** No.

18 **MR JUSTICE ROTH:** So I think we are, in the old expression, where we are and  
19 there's not much we can do about it at this point.

20 **MS DEMETRIOU:** No, although I suppose there is a question which is if we are all  
21 accepting that there needs to be another trial looking at the counterfactual --

22 **MR JUSTICE ROTH:** I would never accept there is going to be another trial because  
23 commercial considerations can come into play.

24 **MS DEMETRIOU:** Yes.

25 **MR JUSTICE ROTH:** And it depends how things go. But conceptually I can see there  
26 would have to be another trial.

1 **MS DEMETRIOU:** Yes.

2 **MR JUSTICE ROTH:** I don't think we can do anything about that now. If we had had  
3 this discussion back in January -- and, as I said earlier, I had not fully appreciated the  
4 subtlety of this point at that stage -- it may be we would have structured things  
5 differently.

6 Equally, I think it would be unsatisfactory doing a trial on that basis, even if we could,  
7 if we don't know what the ultimate answer is on exemptibility.

8 **MS DEMETRIOU:** Yes.

9 **MR JUSTICE ROTH:** Because then we'd be exploring scenarios that may not be  
10 open.

11 **MS DEMETRIOU:** Well, sir, again one possibility to mitigate the inefficiency would be  
12 to use this slot for the trial to determine the purely factual question which is in dispute,  
13 heavily disputed, as to whether or not in the rules as they stood the EEA MIF was  
14 a default as well as the VOC question.

15 **MR JUSTICE ROTH:** No, I think we should determine the things we said earlier we  
16 were going to determine.

17 **MS DEMETRIOU:** Then, sorry to harp on about this, but since we are all here, I think  
18 it would be useful to ask Mr Cook to clarify what he meant in terms of -- I mean if he  
19 doesn't accept what I have said about there will have to be a second trial conceptually  
20 in relation to causation because our causation argument depends on both parts of the  
21 analysis, if he disagrees with that, I think it would be as well to have it out now.

22 **MR JUSTICE ROTH:** I don't think we need to have it out now. We know what we are  
23 going to try. We know how we are going to do it. What will follow on from that can be  
24 disputed afterwards. I think we should now -- having determined what we will try, how  
25 it will be run, as I say there are benefits of splitting up a big case into different trials as  
26 opposed to doing the whole thing all in one --

1 **MS DEMETRIOU:** Sir, I see that.

2 **MR JUSTICE ROTH:** -- 20 week trial. But one of the perils is you end up with  
3 a potential of people having to come back.

4 **MS DEMETRIOU:** Sir, I see that. But for the purposes of our opening submissions,  
5 can we take it that but for causation and legal causation are not on the menu and we  
6 are deciding what we've said we are going to decide.

7 **MR JUSTICE ROTH:** We have decided whether -- we are deciding, if we go back  
8 to -- and I know there's more in 103 now, whether the factual things that you've said  
9 in the actual world of the way -- what was taken into account, what the rules were and  
10 what was not taken into account, is that established, one way or the other.

11 **MS DEMETRIOU:** Yes, sir. So it follows I think from that that but for causation is not  
12 going to be determined.

13 **MR JUSTICE ROTH:** Well, we can't determine full but for causation without looking  
14 at what might have happened had the EEA MIF been at a different level.

15 **MS DEMETRIOU:** Thank you.

16 **MR JUSTICE ROTH:** Is that sufficient clarity for everyone?

17 Right. Now let's turn to -- and I really cannot sit late tonight. I had to -- I've taken on  
18 this CMC because it's very urgent. I had to actually get a colleague to take on a case  
19 I had today so it could be done and I really have to rise promptly.

20 **MR COOK:** Can I make a practical suggestion on timing and where we are now?

21 **MR JUSTICE ROTH:** Yes.

22 **MS DEMETRIOU:** We suggested in our timetable that, given the volume of new things  
23 that we have to do, limitation disclosure is essentially put back by a month, on the  
24 basis that the prospect of my solicitors trying to review limitation disclosure at the  
25 moment, there will be many sad faces behind me if that carries on being the position.  
26 So, as I say, what we suggest is that limitation disclosure is essentially put back, which

1 also means that resolving it now doesn't have the same degree of urgency because,  
2 given it's 4.15, and there is a point about I think the 75 per cent rule, which is a point  
3 we need to decide today if there is anything more to do on that because that does go  
4 to the causation case, we are then going to be close enough to 4.30 and going  
5 through --

6 **MR JUSTICE ROTH:** Is there a date for disclosure for the limitation trial at the  
7 moment?

8 **MR COOK:** There's sort of a rolling obligation to do some and we've done some  
9 already --

10 **MR JUSTICE ROTH:** Yes.

11 **MR COOK:** -- where it was a discrete category we could do. The anticipation is we  
12 would do some more I think in June -- to finish by 26 July, sir, and where we are now  
13 that does look like an impossible burden on those behind me.

14 **MR JUSTICE ROTH:** Yes.

15 **MR COOK:** Given we are looking at a limitation trial I think in January, and it's not  
16 going to be one of those cases where there will certainly be -- the claimants will need  
17 to put in evidence because the most it's going to be is a MasterCard witness  
18 saying: this is what we did, or whatever else. It does not look to me like that that's  
19 something that has the degree of urgency that requires that to be completed in that  
20 timescale, not least because the other side, as we are aware, are also going to be  
21 quite busy over the next six weeks in terms of looking at that disclosure and making --

22 **MR JUSTICE ROTH:** There is some disclosure you've agreed to --

23 **MR COOK:** Yes.

24 **MR JUSTICE ROTH:** -- on the latest Redfern Schedule so that can perhaps proceed.

25 **MR COOK:** Yes.

26 **MR JUSTICE ROTH:** So it's really a question of when we can resolve the dispute.

1 I think realistically we can't go through the Redfern Schedule this afternoon so it's  
2 really a question of whether we are going to find a date in the next few weeks, it could  
3 be done on an online hearing, or whether we really concentrate on this trial now.

4 **MS DEMETRIOU:** Sir, I think ideally we'd find another date soon because the problem  
5 with just punting it off, as it were, is that it's meant to be completed in July.

6 **MR JUSTICE ROTH:** Yes.

7 **MS DEMETRIOU:** And if we don't have resolution about these points, then it's difficult  
8 to see when it's going to happen. All the information is on MasterCard's side. We  
9 have the same informational asymmetry.

10 **MR JUSTICE ROTH:** Yes.

11 **MS DEMETRIOU:** So we do need resolution of it soon. I understand that this  
12 afternoon might not be possible but I think we need to find a date in the very near  
13 future to resolve the issue.

14 **MR JUSTICE ROTH:** That will be some time in the second half of June and it will be  
15 I think done on an online hearing, but I think realistically the disclosure won't come  
16 until some time later.

17 **MS DEMETRIOU:** Okay.

18 **MR JUSTICE ROTH:** I can see that you want to perhaps get it going for September.

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE ROTH:** Right. Can we turn to --

21 **MR COOK:** The other matter, sir, that we would strongly urge is dealt with today is  
22 the timetable for the trial --

23 **MR JUSTICE ROTH:** Yes. No, we must do that. No, no, four and five, directions for  
24 trial I think we've done but trial timetable, I've been sent a timetable which I think  
25 is -- I don't know if it's agreed.

26 **MR COOK:** No, it's Mastercard's proposal, sir.



1 **MR JUSTICE ROTH:** First of all, we are not able to commence on 4 July because  
2 one member of the tribunal is not available so the trial first day in court would be the  
3 5th. I think we will need two days of reading in any event.

4 Do you need two days for openings?

5 **MR LEITH:** (Several inaudible words as counsel did not have a microphone).

6 **MR JUSTICE ROTH:** Could you just introduce yourself for the benefit of the  
7 transcriber.

8 **MR LEITH:** Yes, my Lord. It's Hugo Leith for MasterCard.

9 **MR JUSTICE ROTH:** Yes.

10 **MR LEITH:** On that timetable, my Lord, you'll see that on the 6th we have a witness  
11 down as Mr Sideris.

12 **MR JUSTICE ROTH:** Yes.

13 **MR LEITH:** The footnote indicates that he's unavailable in the two weeks following.  
14 Unfortunately he lives abroad and he's not a MasterCard employee. So we had hoped  
15 that his evidence could be dealt with right at the beginning, otherwise it may cause  
16 difficulties trying to find a different date for him.

17 **MR JUSTICE ROTH:** Yes.

18 **MR LEITH:** But if the tribunal can't begin until the 5th with opening speeches, perhaps  
19 the options are either then that the opening speeches are shorter or that if there is any  
20 possibility of sitting on 7 July -- we had understood that wasn't possible previously, but  
21 if that were the case then Mr Sideris' evidence --

22 **MR JUSTICE ROTH:** No, it's not possible. There's another hearing that some  
23 members of the tribunal are involved in.

24 **MR LEITH:** He's back on 24 July, my Lord, which is not going to --

25 **MR JUSTICE ROTH:** I think that's not very helpful. Well, we can start at ten on the  
26 5th. I think we'll start at ten and we'll seek to sit till five. We'll have both openings in

1 a day and have shorter oral openings. I think that's the --

2 **MR LEITH:** That would accommodate Mr Sideris. Yes, I suppose there's one other  
3 option to slightly increase the length of the oral openings is if Mr Sideris wasn't going  
4 to be a full day, and my learned friend might be able to assist us on that, then it could  
5 be that the openings go into the morning --

6 **MR JUSTICE ROTH:** That's something you can discuss.

7 **MR LEITH:** Yes, my Lord.

8 **MR JUSTICE ROTH:** But I will say that we start at ten on Wednesday, the 5th. As  
9 regards the timing of openings, that is something you discuss with Mr Merricks' legal  
10 team.

11 **MR LEITH:** Yes.

12 **MR JUSTICE ROTH:** And they will know the length of time that Mr Sideris is going to  
13 deal with -- it may depend of course on whether there's any responsive evidence from  
14 him --

15 **MR LEITH:** Indeed.

16 **MR JUSTICE ROTH:** -- regarding Mr Dhaene.

17 **MR LEITH:** On oral openings and the interplay with opening written submissions, we  
18 did ask in our skeleton argument for this CMC whether we could have an increase in  
19 the usual length of opening written submissions to 80 pages for each side. Longer  
20 written submissions might mean there's less pressure on the oral openings as well,  
21 my Lord.

22 **MR JUSTICE ROTH:** Well, it doesn't always help your case because there's a limit to  
23 what is readily absorbed. I think our limit at the moment is it 50 in the -- what's the  
24 current Practice Direction limit?

25 **MR COOK:** 25 pages.

26 **MR LEITH:** My Lord, there was some rationale behind our request for that length and

1 that's because there are some distinctions factually between the different time periods.

2 **MR JUSTICE ROTH:** Yes.

3 **MR LEITH:** There's the period where bilateral interchange fees were agreed in the  
4 mid-1990s. Then there's a period where --

5 **MR JUSTICE ROTH:** No, I appreciate that.

6 **MR LEITH:** And then there's expert evidence and there's volume of commerce as  
7 well, my Lord, so there's quite lot to get through.

8 **MR JUSTICE ROTH:** I will say 60 pages.

9 **MR LEITH:** Thank you, sir.

10 **MR JUSTICE ROTH:** Right.

11 **MR LEITH:** If I can just address you briefly on the rest, or perhaps it's self-explanatory,  
12 my Lord.

13 **MR JUSTICE ROTH:** So we are not sitting on the 7th. We can start at ten on the 5th,  
14 but we'll have to start at 11 on the 10th, 11 am.

15 **MR LEITH:** Yes, my Lord.

16 **MR JUSTICE ROTH:** We can sit on the 14th, which I see you've kept as a non-sitting  
17 day.

18 **MR LEITH:** Yes.

19 **MR JUSTICE ROTH:** But that will be possible.

20 **MS DEMETRIOU:** Sir, we will need that because we don't have enough time, we don't  
21 have the time we need in this proposal for our factual cross-examination.

22 **MR JUSTICE ROTH:** Of?

23 **MS DEMETRIOU:** Of MasterCard's witnesses. So, for example, they have put -- this  
24 is their proposal.

25 **MR JUSTICE ROTH:** Yes.

26 **MS DEMETRIOU:** And we need -- they've given us half a day with Mr Peacop which

1 isn't enough and they've put Mr Sidenius and Mr Douglas, I think that will be more than  
2 a day. So I think we will need the 14th.

3 **MR JUSTICE ROTH:** That's fine. So we'll sit on the 14th. Equally, we can sit on the  
4 31st. But it is I think desirable, if possible, to have -- well, if then you want a day each  
5 for closing so that closings are on the 27th and the 31st --

6 **MR LEITH:** The 26th and the 27th was our proposal, my Lord, unless that was  
7 unsuitable.

8 **MR JUSTICE ROTH:** Sorry, I know, but I am saying that if we are sitting on the 31st,  
9 not only is that an extra day but I think if you are doing full closings which you were  
10 preparing over -- you've got the 20th, at the moment you've got the 20th, the 21st, the  
11 weekend of the 22nd to prepare your closings. It may be that the 20th is needed for  
12 hearing and you are preparing it on the 21st and the weekend of the 22nd.

13 **MR LEITH:** That could be -- sorry.

14 **MS DEMETRIOU:** I think we'd prefer on our side to finish by the 28th and not go over.  
15 I think that we are happy with four days -- three days to prepare our written closings.  
16 I think the effect of going over would be that we then finish our oral closings on the  
17 27th and then MasterCard has another three days to prepare its oral closings, which  
18 I don't think would be desirable.

19 **MR JUSTICE ROTH:** Oh, I see. Actually we can sit on the 28th. Is there any reason  
20 we are not sitting on the 28th? I think that is perhaps the better -- but I do think two  
21 days to read closings, if they are full closings, is helpful.

22 **MS DEMETRIOU:** So shall we say oral closings on the 27th and the 28th and  
23 reading --

24 **MR JUSTICE ROTH:** The 25th and 26th, and preparation is probably if you need  
25 it -- you need the 20th for hearings, it will be the 21st, the weekend, and the 24th.  
26 Does that sound sensible?

1 **MS DEMETRIOU:** That sounds sensible. Just on the directions for skeleton  
2 arguments, can those be moved please because we are going to be facing new  
3 evidence and also disclosure.

4 **MR JUSTICE ROTH:** Yes, the proposed directions, are they in the draft order or are  
5 they in the old order?

6 **MS DEMETRIOU:** No, they are in a different -- let me find them.

7 **MR LEITH:** The current directions, my Lord, are in volume 3, tab 34.

8 **MR JUSTICE ROTH:** Is this the order of 18 January? No. Yes.

9 **MS DEMETRIOU:** I wonder if --

10 **MR JUSTICE ROTH:** It's the 18 January order; is that right? We said 21 June.

11 **MR LEITH:** That's right.

12 **MS DEMETRIOU:** Yes.

13 **MR JUSTICE ROTH:** No, I think we can -- clearly if the evidence is coming in on the  
14 19th that is not going to work, is it?

15 **MS DEMETRIOU:** And disclosure on the 23rd, they say.

16 **MR JUSTICE ROTH:** Yes, let me just get it.

17 **MS DEMETRIOU:** We were wondering whether we could say the 26th and then the  
18 30th.

19 **MR JUSTICE ROTH:** Just a moment. Sorry, June 26 and the 30th and we start on  
20 the --

21 **MR LEITH:** There would have to be some reading time I think for the opening  
22 submissions, I expect, my Lord.

23 **MR JUSTICE ROTH:** Well, we've got two days I think reading, the 3rd and the 4th.  
24 Just one moment. Yes, I think that sounds sensible, the 26th and the 30th.

25 **MS DEMETRIOU:** Thank you. Sir, I think just one other loose end is MasterCard are  
26 providing disclosure in relation to processing systems by 23 June and we've also got

1 the issue about the 75 per cent rule.

2 **MR JUSTICE ROTH:** Yes, what's the position there?

3 **MS DEMETRIOU:** We've asked for disclosure in relation to the 75 per cent rule and  
4 we'd like it as soon as possible.

5 **MR JUSTICE ROTH:** Is that resisted, the disclosure?

6 **MR COOK:** It's resisted, sir, in the sense that we have given disclosure which will  
7 cover everything about the 75 per cent rule in any event. We were required to give  
8 disclosure in relation to MasterCard's rules. That happens to be one of those rules.  
9 So we've given all copies of the rules we can find. We accept, given it's 30 years ago,  
10 that we don't have a copy of every single version all the time. That's I'm afraid the  
11 product of going back 30 years, but we are not going to find more material now.  
12 We've checked for the rules. They've copies of the meetings in which rule  
13 amendments were discussed and --

14 **MR JUSTICE ROTH:** And the disclosure does include material about the 75 per cent  
15 rule, does it? There is a suggestion -- I thought there was some suggestion that  
16 Mr Merricks' team were not aware of it until they got a witness statement which  
17 referred to it because they'd seen nothing about it before.

18 **MR COOK:** Well, there are multiple documents in the bundles which show the  
19 documents we disclosed and it's in the rules. They may not have understood the  
20 significance or matters like that, but the disclosure we've done covers the rules and  
21 decisions about the rules.

22 **MS DEMETRIOU:** Sir, it seemed from their correspondence that they have not  
23 conducted searches specifically in relation to the 75 per cent rule and the disclosure  
24 categories should cover communications in relation to the rules. So it doesn't appear  
25 that the disclosure does cover any communications relating to the 75 per cent rule. If  
26 Mr Cook --

1 **MR JUSTICE ROTH:** My understanding is that they've done disclosure, searches  
2 therefore, for all the rules relating to EEA MIFs, which will therefore include the  
3 75 per cent rule as well as the other rules.

4 **MS DEMETRIOU:** Well --

5 **MR JUSTICE ROTH:** They may not have specifically been looking for 75 per cent but  
6 they looked for all the rules; is that correct?

7 **MR COOK:** Yes.

8 **MS DEMETRIOU:** Just to confirm whether it's the case that they've  
9 searched -- because the categories of disclosure extended to communications relating  
10 to the rules, amongst other things.

11 **MR JUSTICE ROTH:** Yes.

12 **MS DEMETRIOU:** So have they searched for communications relating to the  
13 75 per cent rule and, for example, communications with acquirers about the  
14 75 per cent rule?

15 **MR COOK:** Sir, we've searched for communications about the rules. Did we use  
16 a search term that was 75 per cent? No. We were looking for -- it was a much broader  
17 search of which this is a narrow subset.

18 **MR JUSTICE ROTH:** Is there any document you have which you look at and you  
19 say: ah, this refers to another document which we haven't been provided with or?

20 **MS DEMETRIOU:** Sir, we'd like to know, for example, are there any documents  
21 showing a discussion as to whether to trigger the 75 per cent rule. We don't have  
22 anything like that. Since they haven't specifically searched for the 75 per cent rule,  
23 they say their searches have been broader --

24 **MR JUSTICE ROTH:** Well, they've searched for all rules and it's one of them. So  
25 I am not quite clear what more you are asking them to do. I mean if there's a rule that  
26 says, I don't know, that says specifically a large merchant's acquirer rule, they may not

1 have specifically searched for that rule but it would have been covered by their search  
2 for all rules.

3 **MS DEMETRIOU:** Well, I am not sure, sir, it would, with respect, because Mr Cook  
4 has not confirmed -- has said that they haven't searched specifically for the 75 per cent  
5 rule and we think the disclosure is very patchy in relation to the 75 per cent rule. It's  
6 not even clear when it came into effect. So we would like them to conduct searches  
7 specifically in relation to the 75 per cent rule. It's important to our case.

8 **MR JUSTICE ROTH:** Well, I can understand it's important to your case. You know  
9 about it. Isn't the sensible thing, if you have particular questions about it, to serve  
10 a request for information rather than going through the whole process over this  
11 prolonged period effectively asking for a revisiting of all the disclosure?

12 **MS DEMETRIOU:** Sir, our suggestion is that they run basic search terms because it's  
13 not so much the rules we want, it's communications relating to the rules.

14 **MR JUSTICE ROTH:** But that was covered by the disclosure order, wasn't it?

15 **MS DEMETRIOU:** But it doesn't sound like they've done a search with, for example,  
16 75 per cent in the communications, and so it would be -- I think that would need to be  
17 searched in order to make sure that communications relating to the 75 per cent rule  
18 have been unearthed.

19 **MR JUSTICE ROTH:** But if they searched for rules -- just searching for 75 per cent  
20 isn't going to add anything, is it?

21 **MS DEMETRIOU:** I am not sure they've searched for all communications containing  
22 the word "rules". I am not sure that's how they've gone about it, but maybe they can  
23 confirm.

24 **MR COOK:** The searches we've done have been designed to identify the people who  
25 were involved with dealing with issues concerned with the rules and then looking  
26 through their communications to see which ones related to the rules. That is



1 a proportionate and reasonable way of dealing with it.

2 Of course the reason why they know about this was there are multiple documents that  
3 were caught by that search because the 75 per cent rule is a rule like the (inaudible)  
4 cards rule. There's all sorts of other rules there that were part of that search.

5 **MR JUSTICE ROTH:** Yes. Ms Demetriou, I think one has to draw a line at some  
6 point, particularly going back this long period. It is covered by the search. It may not  
7 have produced all the documents that once existed, some may have gone by now, but  
8 you obviously -- there are documents dealing with this rule. If you want to know  
9 specifically when it came into effect, write and ask and, if necessary, serve a request  
10 for information. It does not require a hugely expensive search for documents.

11 So, no, I am not going to require further disclosure to be redone on something that it  
12 seems to me was covered.

13 Anything else?

14 I will endeavour to get you short reasons as soon as possible, but I am a bit occupied  
15 with other matters at the moment.

16 **(4.35 pm)**

17 **(The hearing concluded)**

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