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IN THE COMPETITION

Case No:1266/7/7/16

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 22nd June 2023

Before:

The Honorable Mr Justice Roth
Lord Ericht
Jane Burgess

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

Class Representative

V

Mastercard Incorporated and Others

Defendants

A P P E A R A N C E S

Marie Demetriou KC Instructed by Willkie Farr & Gallagher (UK) LLP

Matthew Cook KC Instructed by Freshfields Bruckhaus Deringer LLP

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Thursday 22 June 2023

(10.33 am)

Housekeeping

MR JUSTICE ROTH: Good morning, can you hear me?

Ms Demetriou, can you hear me?

MS DEMETRIOU: Yes, I can.

MR JUSTICE ROTH: Mr Cook, can you hear me?

MR COOK: I can, yes.

MR JUSTICE ROTH: I should start by pointing out that

although this CMC is being heard remotely, it is of course as much as a Tribunal hearing as if everyone was physically present in the courtroom at the Tribunal. A recording is being made officially of the proceedings, but for anyone else joining or anyone watching on the Tribunal livestream, it is strictly forbidden to make any visual image or any unauthorised recording of the proceedings. That is punishable as a contempt of court.

I have received various communications forwarded on by the Tribunal to me in the past few days. I can sit till 1 o'clock but we must then stop. I think that should be sufficient time to deal with the various matters.

Draft Order from 6 June CMC

MR JUSTICE ROTH: Perhaps we should start with the draft

1 order arising from the 6 June CMC, which I have got
2 with your alternative comments on it, which pick up
3 some of the matters that have been raised. I think
4 the first is paragraph 4 and that concerns the
5 evidence of Mr Van den Bergh, as it turns out to be,
6 served in response to Mr Dhaene's witness statement.

7 The order was at 4 pm on 19 June and it was, in
8 fact, served the following morning at about 11.30, I
9 think. Mr Cook, if it becomes apparent, as it must
10 have done, to Mastercard that they can't meet that
11 deadline, then the proper course is to apply, first
12 ask of course the class representative, but if he
13 does not agree, apply to the Tribunal a couple of
14 days before for an extension. Why wasn't that done?

15 MR COOK: Sir, the short answer is it didn't look like
16 there was going to be a problem in terms of
17 finalising the draft until very close to the
18 deadline. So it was a question of making sure the
19 witness was happy with the final draft and that
20 simply I'm afraid, sir, took longer than we would
21 have hoped. Had we appreciated a few days earlier
22 that we were not going to meet the Tribunal's
23 deadline, we would have taken that course. I am
24 afraid it was something that slipped up on us
25 relatively late and we were moving at a considerable

1 speed, sir.

2 MR JUSTICE ROTH: I think you should still have applied
3 then on the morning of the 19th, the moment you
4 didn't get consent, it is not attractive to have to
5 grant extensions retrospectively. I will make that
6 clear going forward, should there be any other such
7 instances.

8 I have seen in the correspondence in what the
9 class representative's solicitors have written. It
10 is a short extension and in the circumstances here,
11 where everything has come very late because of
12 Mr Dhaene's witness statement, of course, coming
13 very late in the day, I will grant that extension
14 until 12 noon on 20 June.

15 MS DEMETRIOU: I am not trying to take you off your
16 course, but I think formally they need a longer
17 extension because it wasn't served until 11.30 pm I
18 think.

19 MR JUSTICE ROTH: I misread it, then. It was 11.30 pm
20 was it, Mr Cook, is that right?

21 MR COOK: Yes, it was, I was about to make the same
22 correction, sir.

23 MR JUSTICE ROTH: Yes, that is an admittedly longer
24 extension. Well then, as I say, you could have
25 applied late on the 19th to the Tribunal and you

1 should have done. There really is no excuse for
2 that. I will grant the extension, but that doesn't
3 mean that that sort of disregard of an order will be
4 accepted in future. I think we have got to take a
5 strict approach to deadlines. Certainly, if
6 deadlines cannot be met, which sometimes happens,
7 you must come and ask for an extension.

8 MR COOK: Yes, sir.

9 MR JUSTICE ROTH: I will give you, therefore, until
10 midnight on 20 June.

11 MR COOK: Thank you, sir.

12 MR JUSTICE ROTH: Then next, I think, there is in
13 paragraph 5 of the draft order something that is
14 suggested by Mr Merricks' lawyers, I think it is --
15 I don't actually have a colour version. I am not
16 quite sure what "focused" really adds to anything.

17 MS DEMETRIOU: Sir, we agree. That is Mastercard.

18 Mastercard wants to insert "focused" and we don't
19 see what it adds and so we prefer for it to be
20 omitted.

21 MR JUSTICE ROTH: It is limited to "reasonable and
22 proportionate searches", so one assumes it is going
23 to be focused but I don't think it is normally part
24 of an order, is it, Mr Cook?

25 MR COOK: Sir, I can see that that adds relatively

1 little, as you say, so where "reasonable and
2 proportionate" is added it is difficult to see what
3 "focused" adds.

4 MR JUSTICE ROTH: Let's leave that out.

5 Next, paragraph 6, costs. I have to say that
6 of course we had the ruling on the application
7 regarding Mr Dhaene, it seems to me, subject to
8 anything Ms Demetriou may wish to say, that the
9 appropriate order is as regards the application,
10 insofar as everything going forward, it would be
11 costs in the case. But insofar as it was refused,
12 Mastercard should have their costs and that,
13 therefore, 50 per cent of the costs of the
14 application, it seems to me, of Mastercard's costs
15 should be paid by Mr Merricks, the balance to be
16 costs in the case. Because it was occasioned in the
17 circumstances that I outlined in the ruling and to a
18 significant extent and so far as it was opposed,
19 that opposition was successful.

20 Ms Demetriou, do you want to say anything about
21 that?

22 MS DEMETRIOU: Two things, sir. First, you are being
23 more generous to Mastercard than they have asked
24 for. They have not asked for any costs in relation
25 to the evidence, and secondly we would say that the

1 vast majority of the evidence was allowed in. So
2 you will recall, of course, that it was only to a
3 very limited extent that we were precluded from
4 adducing some of the paragraphs of Mr Dhaene's
5 evidence. So it would be, in my respectful
6 submission, too harsh to say that we should pay
7 costs, let alone 50 per cent of the costs. By and
8 large, our application succeeded, subject to the
9 minority, small minority of paragraphs that weren't
10 allowed in. So for that reason, we do say that the
11 appropriate order is costs in the case.

12 MR JUSTICE ROTH: It succeeded significantly, to the
13 extent it wasn't opposed so there wouldn't have been
14 a hearing, the factual part was accepted. The
15 hearing was occasioned by the fact that there was
16 what was, I understood, the expert part, which was
17 opposed. Otherwise we wouldn't have had a hearing
18 on it.

19 MS DEMETRIOU: I think the opposition went beyond the
20 expert part and, secondly, Mastercard didn't
21 actually, you will recall, delineate in advance
22 which paragraphs they were objecting to. So the
23 hearing was necessitated. So it wasn't the position
24 that Mastercard said, "We object to these particular
25 specific paragraphs." They mounted a more general

1 opposition. Yes, primarily based on their
2 opposition to there being expert evidence, but they
3 sought to characterise, I think, large tranches of
4 it as being expert evidence. You will recall there
5 was a debate as to whether industry knowledge
6 constitutes expert evidence or not. I took you to
7 Mastercard's own witnesses who, in fact, gave
8 evidence not from their own knowledge. So there was
9 a mismatch between the parties on that point and
10 because Mastercard was taking -- Mastercard's stance
11 appeared to be that anything Mr Dhaene didn't know
12 personally constituted expert evidence. That simply
13 isn't where the Tribunal ended up for good reason
14 because that is not how Mastercard itself has
15 approached its own evidence.

16 So I don't think it is right, with respect, to
17 say that had we agreed to Mastercard's opposition,
18 the hearing would have been avoided. I just don't
19 think that that is realistic, given Mastercard's
20 stance.

21 MR JUSTICE ROTH: Yes. Well, Mr Cook, I don't know who
22 suggested, as I say, because I haven't got the
23 coloured version, that it should be reserved. I
24 don't think reserving costs of an application like
25 that is attractive at all because by the time that

1 comes to be dealt with everyone has forgotten all
2 about it and it has been subsumed in much more
3 substantial matters. So it should be dealt with
4 either as costs in the case or there should be an
5 order for costs as I have outlined.

6 I think, having heard Ms Demetriou, what I am
7 minded to order is that 50 per cent of the costs of
8 the hearing of the application should be -- 50 per
9 cent of Mastercard's costs of the hearing-- should
10 be paid by the class representative, but not as
11 regards the correspondence prior to the hearing and
12 the balance, cost in the case. Are you going to
13 push against that?

14 MR COOK: Sir, no, I am not. In terms of the draft
15 order, this was of course a point where the
16 expectation was that this will be sent for agreement
17 to the Tribunal. We are obviously now in a
18 different position where we are in front of the
19 Tribunal for a hearing, so clearly matters that
20 should now be -- the reservation that this is now
21 the opportunity to deal with them. So I won't push
22 back against the suggestion you are making, sir.

23 MR JUSTICE ROTH: So, it is 50 per cent of the costs of
24 the hearing of the further evidence application be
25 paid by the class representative and the balance of

1 the costs are costs in the case.

2 Right, next is amendments, and this is
3 Mastercard's re-amended defence. I have to say, I
4 don't think much time was spent on this at the
5 hearing, but I would not intentionally grant blanket
6 permission to amend without a draft being before the
7 Tribunal and having been provided to the other side,
8 because otherwise anything could come into it. So
9 it was intended to deal with amendments that were
10 consequential, whether that was actually said during
11 the CMC or not. So it seems to me that in that
12 respect Mr Merricks is correct. Equally, if
13 Mastercard wants to make other amendments,
14 particularly if they are amendments that don't
15 impact on the trial in July but relate to what comes
16 later, in the ordinary course one would give
17 permission because there is time to deal with it.
18 As I understand it, the real concern is about the
19 weighted average interchange fees in Annex 1. Is
20 that right, Ms Demetriou? You have taken a
21 practical view that you are not going to object to
22 the other amendments?

23 MS DEMETRIOU: That's correct, sir, and in relation to
24 those weighted average figures, Mastercard said in
25 correspondence that it seeks to make an amendment

1 really in a forward -- for forward-looking reasons
2 for the purposes of any future overcharge trial. We
3 intend to be pragmatic about that so we don't oppose
4 the amendments insofar as they relate to a future
5 trial, but we would oppose them if they were to be
6 taken account of in this trial because we simply
7 don't have time to interrogate them at this stage
8 for the purposes of this trial.

9 So I think that is a pragmatic response.

10 MR JUSTICE ROTH: Yes.

11 MS DEMETRIOU: We would be opposing, to be clear, if they
12 were seeking permission to adduce them for the
13 purposes of this trial.

14 MR JUSTICE ROTH: Do they affect the expert evidence?

15 Which you will both appreciate I have not looked at.

16 MS DEMETRIOU: Yes. So they are figures which are
17 different to the figures that were before the
18 experts when they put in their expert reports. Now,
19 Mastercard says to that, "Well, Mr Coombs didn't
20 include in his correlation analysis figures for '92
21 and '93 anyway, so it doesn't matter." It is
22 correct that he didn't include figures for '92 and
23 '93 but what he can't do in the time available is
24 interrogate the figures for '92 and '93 that have
25 been now put in the amended pleading.

1 So if Mastercard is content for these
2 amendments to take effect after this trial, then we
3 are not going to oppose. But if they are going to
4 rely on these amendments for the purpose of this
5 trial, including for cross-examination of Mr Coombs,
6 then we do oppose because we don't have time to deal
7 with them.

8 MR JUSTICE ROTH: Yes, and what about the later figures
9 for 2002 and the changes, some of them are very
10 minor, but 2002 to 2006?

11 MR COOK: Sir, I don't think there is any opposition to
12 those because those reflect changes that had been
13 discussed in correspondence at least some time
14 previously. So that is bringing matters up to date
15 with prior correspondence. It is right to say the
16 '92 and '93 and for the EEA MIF the '94 figure is
17 not something that has been dealt with previously in
18 correspondence.

19 MS DEMETRIOU: That's correct.

20 MR JUSTICE ROTH: Yes, I understand. Mr Cook you have
21 heard what Ms Demetriou says. What is the position
22 regarding the expert evidence and the July trial?

23 MR COOK: The starting position, sir, we would say --
24 firstly Mr Coombs has made use of weighting averages
25 to do a correlation analysis. However, he has

1 excluded '92 to '93 from that, so it doesn't seem
2 those really take matters -- that that really
3 matters greatly at all.

4 In relation to what he did, though, sir, is
5 Mr Coombs went through a detailed (and it is about
6 25 pages in his report) analysis of weighted
7 averages. He did not take previous figures from
8 Mastercard at face value, you will be surprised to
9 know. He went through, analysed weighted averages,
10 produced his own numbers for many other years and
11 did not adjust some of the earlier ones. So he has
12 done his own analysis of all of these. In the
13 ordinary course we would be perfectly entitled to
14 cross-examination a witness who has produced his own
15 averages on the amendments that he has made and, you
16 know if he has made some amendments, perhaps because
17 they help Mr Merricks, not other amendments perhaps
18 because they don't, clearly those are matters that
19 regardless of what the pleading say we can
20 cross-examine him on. As a practical matter about
21 the only point that is going to be relevant is going
22 to be the 1994 number for the EEA MIF where it is
23 now apparent in other bits of the pleadings, for
24 example, that are not contentious, that the previous
25 figure of 1 per cent simply can't be right because

1 there were a whole lot of reduced MIF categories.
2 Those are things that are as much known to
3 Mr Merricks' side as they are to ours.

4 Sir, as a practical matter the significance of
5 this then becomes the EEA MIF for one year. There
6 are categories of reduced MIFs which are known
7 about. At most this is going to be two or three
8 questions about why he has amended all sorts of
9 other weighted averages but not that one. But our
10 fundamental challenge to his weighted average
11 analysis is going to be at a much more fundamental
12 level of principle.

13 Sir, it seems to us this is a point of
14 cross-examination which regardless of the pleadings,
15 we can cross-examine a witness on what he has done.
16 It is a single year in practical terms so it is very
17 difficult to see that Mr Coombs -- he is not going
18 to be cross-examined for another three weeks or
19 so -- can't take account of that factor. He has got
20 warning of it. Sir, with respect, we just don't see
21 how this is going to cause anybody any problems at
22 all. It is certainly not going to be something, I
23 don't think in practice the end results of his
24 analysis in any event, because it is only this one
25 year, it is going to make any difference at all to

1 the analysis, that he has identified some
2 correlation for some periods and not for other
3 periods, and that is going to be the scope of the
4 argument is does that correlation tell anybody
5 anything?

6 MR JUSTICE ROTH: So as I understand it, if this is
7 allowed, you can give an assurance that the amended
8 figures for '92 and '93 are not going to be put to
9 Mr Coombs? It is only the amended EEA MIF for '94.
10 Is that right?

11 MR COOK: Given they are excluded from his analysis
12 because he accepts they are not reliable, it doesn't
13 seem to me there is anything particularly we can ask
14 Mr Coombs about it and if it is necessary to give
15 that assurance, I think we can do so.

16 MR JUSTICE ROTH: So Ms Demetriou, we are down to that
17 one figure in practical terms.

18 MS DEMETRIOU: Sir, we do object. Just stepping back for
19 a moment, Mastercard assumed they had blanket
20 permission to amend. They don't, as you have just
21 clarified. So they do actually need to make an
22 application to amend to adduce these figures. If we
23 were faced with an application, that would be
24 properly reasoned. Instead what we have are these
25 very opaque footnotes, so taking the figure for the

1 1994 figure, you have footnote 15:

2 "Updated estimates based on the information now
3 available about the EEA MIFs prior to 1 April 1995."

4 Then you have a very vague note about various
5 discounted MIFs. So we actually have no idea what
6 the information is on which this amended figure was
7 based, so we can't interrogate it.

8 It seems to Mr Coombs that the figure is
9 flawed, but he can't interrogate it properly until
10 we have more information. So sir, it wouldn't be
11 appropriate, in my submission, just to allow this
12 amendment in and allow them to proceed on the basis
13 of this amendment for the purposes of the trial. We
14 do, with respect, say we would be prejudiced. We
15 would require further information so that Mr Coombs
16 could properly consider whether or not this amended
17 figure is sound but there is just no time. So that
18 is why we would oppose an application for permission
19 to amend, which just hasn't been made. If they want
20 to make an application, no doubt that would be
21 supported with a better explanation than we have got
22 in footnote 15 of why it is being made so late, what
23 the material is on which it is based, and the
24 Tribunal would, as it would in the normal course, be
25 able to weigh all those matters up. But we are

1 simply not in a position to argue about it today.

2 MR JUSTICE ROTH: Yes. Mr Cook, if you were to provide
3 an account explaining how that figure was arrived
4 at, rather than saying, and it says, as I understand
5 it, it's still indicative only in the first place,
6 so it's not even a final figure. Then it says a
7 discounted rate has been applied where a lower floor
8 limit was applied. So that has been taken into
9 account. So if you had to set out the way in which
10 the 0.9 per cent has been calculated, that
11 presumably can be done quickly, can it not?

12 MR COOK: Yes, sir. If I can make two points briefly,
13 sir? I don't accept this is something that is not a
14 consequential amendment. Mr Merricks changed among
15 other things, all of his quantum numbers in his
16 amended claim form. That arose in part from the
17 Tribunal's ruling that he needed to take account of
18 who opted in and opted out and excluded people who
19 had died and matters like that. But all of his
20 quantum figures were adjusted, so we are responding
21 to an amended quantum case. As part of that
22 Mr Merricks previously had certain assumed weighted
23 average MIFs. He has changed that. So we are
24 responding to a new amendment, you know, a pleaded
25 case against us.

1 If terms, sir, of this number, what we have
2 done in the footnote, sir, is identified with
3 document references to the disclosure the four or
4 five documents that we rely upon. And we wrote a
5 letter yesterday which explained the basis of the
6 calculation, which is not very complicated, which
7 is, and I have to find the document quickly, sir,
8 but it was explaining that our position is that at
9 least 20 per cent of transactions, and we had
10 identified various reasons why we think that 20
11 percent must be at least a bare minimum, would have
12 been at lower MIF rates, which would result in an
13 average below 0.9. So sir, we have provided the
14 explanation, which is we have given the document
15 references for the documents which show these
16 reduced MIF categories, explained the best available
17 information on the proportion of transactions that
18 would be in this kind of category and said it has
19 got to be at least 20 per cent and the numbers then
20 follow for themselves. So sir, we have given the
21 explanation. It is no more complicated than that.
22 There is nothing else in terms of documents we rely
23 upon and no further explanation that can be given
24 because it has been given, sir.

25 MR JUSTICE ROTH: The letter you are referring to, I have

1 got a letter of 20 June from Freshfields dealing
2 with this.

3 MR COOK: Yes.

4 MR JUSTICE ROTH: But you are saying there was another
5 letter?

6 MR COOK: Yes, sir, that would be 20 June.

7 MR JUSTICE ROTH: The day before yesterday.

8 MR COOK: Yes, it would have been the day before
9 yesterday, sir. It is 356 in the bundle and it
10 explains, in particular paragraphs 8 and 9,
11 responding to what is said against us that 1 per
12 cent must be the right number. We have set out
13 cross referred to the footnotes and the paragraphs
14 which set out and plead them. None of that is
15 objected to, particularly the paragraphs which plead
16 all the various discount rates. We have set out the
17 best available information on the number of
18 transactions that were electronic. If one is
19 looking at 94, one could probably justify a much
20 lower figure but we are being conservative here. It
21 is saying it is likely at least 20 per cent and the
22 figures we are looking at show 50 per cent
23 electronic and 50 per cent non-electronic. So it is
24 going to be a near miss of certainly no more than
25 0.9, so we have used 0.9. That is simply applying

1 the basic maths that if 20 per cent was at the 0.5
2 reduced level, the rest was at 1 per cent and 1.9.
3 It is as simple as that, sir. That explanation is
4 there in writing. It is very difficult to see how
5 Mr Coombs is going to need to spend more than a
6 short period of time dealing with that point,
7 particularly in circumstances where he has gone
8 through and carried out his own analysis of weighted
9 averages throughout the period. He didn't make an
10 adjustment for this year for whatever reason, and we
11 would like to ask him why not. So it is really not
12 a difficult matter for him to take account of those
13 couple paragraphs, a total of six documents all of
14 which they have had for many months for a couple of
15 questions to be asked in two or three weeks' time.

16 MR JUSTICE ROTH: Ms Demetriou, looking at paragraph 9 of
17 the letter, it is not a very sophisticated
18 adjustment.

19 MS DEMETRIOU: Sir, may I make a number of points in
20 response to Mr Cook? Because paragraph 9 of the
21 letter assumes 20 per cent of cross-border
22 transactions and we don't think that that figure is
23 sound. We would need to interrogate it but we don't
24 have the disclosure at the moment on which to
25 interrogate it.

1 Sir, stepping back, can I just take you --

2 MR JUSTICE ROTH: Just one second. Yes?

3 MS DEMETRIOU: Sir, we have explained this in a letter of

4 ours, can I just show you that so you can see the

5 point?

6 MR JUSTICE ROTH: Yes.

7 MS DEMETRIOU: It is behind tab 18 and if you go to page

8 350.

9 MR JUSTICE ROTH: Is this your letter of the 21st?

10 MS DEMETRIOU: No, it is our letter of the 19th.

11 MR JUSTICE ROTH: An earlier letter?

12 MS DEMETRIOU: Yes, an earlier letter.

13 MR JUSTICE ROTH: Just a moment.

14 MS DEMETRIOU: Sir, if in fact, if you've got that

15 letter --

16 MR JUSTICE ROTH: No, I don't yet. Just a moment. Give

17 me a moment because I am looking at something else.

18 So now you want me to go, this is in the

19 supplementary?

20 MS DEMETRIOU: Yes, sir, sorry, behind tab 18 and if we

21 start with page 348. Just to remind you of the

22 background to all of this, you remember in the CMC

23 back in September, Mr Merricks sought disclosure of

24 disaggregated transaction data, and you may recall,

25 it is a while ago now, that Mastercard resisted this

1 request, saying it would take a long time to produce
2 and that they weren't sure they had it. Then the
3 Tribunal itself said during the course of the
4 hearing that Mr Merricks would need volume data, so
5 that was ordered, but Mastercard didn't disclose
6 volume data for the majority of the claimed period.

7 So the starting point, sir, is that these
8 weighted averages are definitely second or third
9 best in terms of what Mr Merricks was seeking. Then
10 what happened was that Mastercard set out weighted
11 average figures in its defence. There was
12 discussion about those, and on 4 May before the
13 expert report was drafted, Mastercard wrote to
14 Mr Merricks providing updated weighted average
15 figures. You see that in our subparagraph (f) and
16 we call those the "May weighted average data". So
17 those were the figures. At the end of this long
18 process of Mastercard not providing disclosure,
19 don't forget that none of this material was in
20 Mr Merricks' hands at all, we were dependent on
21 Mastercard for this, on 4 May they provided amended
22 weighted average data and those were the data used
23 by Mr Coombs in his analysis. What is being said
24 now is now we are amending it again after the expert
25 evidence has been put in. Mr Cook says, "Well, yes,

1 we have got a very simple explanation for that", but
2 we don't think that that explanation stacks up and
3 we are not capable of interrogating it.

4 We explain that on the next page, on page 350,
5 we explain that at paragraph 8. We say that we
6 don't think, for example, we don't think it likely
7 that 20 per cent of transactions were occurring at
8 discounted rates and we explain why, including by
9 reference to the fact that the petrol discount only
10 applied to a small merchant category in
11 circumstances where specific technical requirements
12 were met, we say in order to explore this issue we
13 would need disclosure. Then we say the figures at
14 paragraph 9 don't match the figures that Mastercard
15 itself provided to the European Commission during
16 the investigation. It is not good enough simply to
17 say this is our asserted explanation for the figures
18 and we can now cross-examine Mr Coombs on them, this
19 close to trial, in circumstances where he is unable
20 properly to investigate whether these figures are
21 correct. We would need further disclosure. That is
22 why we are prejudiced.

23 Sir, we do say Mr Cook is absolutely wrong to
24 say that these are responsive amendments in any
25 sense of the word. These are amendments to figures

1 that they provided in May which have been used by
2 our experts in good faith. So sir, I am not -- they
3 do need to make an application to amend. They have
4 not made one. Had they made one, then we would have
5 responded to it in the normal course. But all I can
6 do now is point to the correspondence saying that we
7 would need to investigate and interrogate this
8 figure further and would need disclosure and it is
9 far too close to trial to allow for that to be done.

10 MR COOK: Sir, if I could come back on that? As my
11 learned friend is well aware all of the categories
12 of disclosure mentioned in her letter are ones that
13 have been previously canvassed, have been largely
14 ordered by the Tribunal and to the extent that
15 documents existed, they have been disclosed, which
16 is why we point to a couple of documents which show
17 volumes at different types of transactions. By the
18 nature of this case, sir, going back 30 years there
19 is very little information available. There is not
20 some additional category of material that can be
21 searched for, because these searches have already
22 been done pursuant to the Tribunal's order. So we
23 are all at the stage of looking at the best
24 information available, which is imperfect yes, but
25 it is what is available, and Mr Coombs has done that

1 throughout most of the analysis that he has done,
2 which is not simply to take Mastercard's numbers.
3 He has substituted a whole number of his own,
4 identified all sorts of contemporaneous documents
5 from disclosure that he thinks justify different
6 numbers. And in relation to this, it appears that
7 he hasn't made an adjustment where documents support
8 one. Sir, that is simply the point that we will
9 make in cross-examination. But there is no more
10 disclosure that can be done, sir, because the
11 exercise that is available has been completed
12 already pursuant to the Tribunal's order. Despite,
13 you know, many sort of attacks in correspondence,
14 there has been no application to the Tribunal saying
15 that Mastercard's disclosure exercise is in any way
16 flawed. We have done the best we can going back 30
17 years, sir, and there is nothing more we can do.

18 MR JUSTICE ROTH: How significant, Mr Cook, is this
19 particular figure for '94?

20 MR COOK: Sir, we don't think this actually changes the
21 correlation analysis at all, or is going to make any
22 practical difference. It is something that in any
23 event, sir, we will be making submissions to the
24 Tribunal, because it is there on the documents,
25 there is no objection to the bits of our pleading

1 which made these points, that there were a variety
2 of discounted MIF rates for the EEA MIF, which is
3 one of the reasons why we will say it shows that it
4 didn't have any effect upon the UK MIF, or UK
5 interchange fees for this stage which had completely
6 different categories, et cetera. So we will be
7 making these points in any event, sir. All that is
8 really left is what proportion took place. We don't
9 see this as being a significant point. We were
10 concerned that on the pleadings there is a number
11 that we now do not consider to be right and that,
12 you know, Mr Coombs has made adjustments where they
13 appear to help the argument, not on this one, but it
14 is going to be a very short point, sir.

15 MR JUSTICE ROTH: When you say that it is likely, or
16 highly likely, that at least 20 per cent attract a
17 reduced MIF, what is going to be the evidential
18 basis for that statement?

19 MR COOK: Sir, as is set out in the letter I took you to,
20 what we do have is paragraph -- so it is 357. What
21 we do have, sir is in paragraph 9, we have, there
22 are contemporaneous documents that show that 56 per
23 cent of transactions were electronic. Electronic is
24 one of the discounted categories. Then we have a
25 1996 data for cross border transactions which show

1 50 per cent are electronic. We are obviously now at
2 the moment looking at '94. In those circumstances,
3 I think, being very conservative of saying at least
4 20 per cent are likely to have been electronic in
5 the previous year.

6 MR JUSTICE ROTH: I see. So just to interrupt you, so I
7 understand it, an electronic transaction attracted a
8 reduced MIF, did it?

9 MR COOK: Sir, well there was an electronic category that
10 attracted a reduced MIF, that is 0.5, sir. There
11 was a requirement that all electronic transactions
12 were subject to authorisation and again there are
13 indications that that was the case at the time.

14 MR JUSTICE ROTH: I see. I am just absorbing this. So
15 that was 0.5, the other was higher and so --

16 MR COOK: A base MIF of 1 per cent, sir, and electronic
17 MIF of 0.5 and we have got figures of 56 per cent
18 and 50 per cent for -- the 56 then is the following
19 year, 50 per cent is two years later. We are saying
20 it has got to be at least 20 per cent in '94. It is
21 rough and ready, sir, but you know, it is what is
22 available. I certainly can't see it is going to
23 take Mr Coombs more than a few minutes to form his
24 own view on -- there is no doubt a trend which one
25 could see of electronic increasing during this

1 period, which is why we accept it is going to be
2 probably a little bit lower the previous year. But
3 sir, all we are doing is drawing common sense trend
4 lines and saying it is going to be a bit lower. At
5 least 20 per cent seems to us to be an absolutely
6 bare minimum, sir. Mr Coombs will, if he has a
7 different view, no doubt say that when he is asked a
8 question about it, sir, but it will not take anyone
9 any time to prepare for it or deal with it at the
10 hearing sir.

11 MR JUSTICE ROTH: It doesn't really matter at this point
12 whether there should have been a separate
13 application, there certainly should for some of the
14 amendments. We are where we are, we are not going
15 to have another hearing. I think the point has been
16 ventilated. I don't think it is right to hold
17 Mastercard to a figure which they now think is wrong
18 and expect them to stand by it at a trial.

19 The explanation is a simple one. It may or may
20 not be right, but it is one that that is the basis
21 of the change. I think Mr Coombs clearly will
22 understand it and will be able to comment on it. So
23 I don't think that he is prejudiced by this and if
24 it is said that this is all just speculative, well
25 that will be a criticism that Mr Merricks can make.

1 So I will allow the amendment to Annex 1 on the
2 basis that the figures for '92 and '93 are not going
3 to be put, the amended figures, to Mr Coombs in any
4 cross-examination, and that the '94 figure is as
5 explained in -- the explanation is in paragraph 9 of
6 Freshfields' letter of 20 June.

7 MS DEMETRIOU: Sir, I am not seeking to dissuade you from
8 the ruling you have just made, but can I just raise
9 one practical point in relation to this?

10 MR JUSTICE ROTH: Yes.

11 MS DEMETRIOU: Because we do -- we only have a very scant
12 explanation. Mr Cook spoke very quickly that he
13 focused on the electronic discount and didn't
14 mention the petrol discount which this is also based
15 on. Sir, the point, the practical point here is
16 that all of this, the information they rely on was
17 available to them all along, and yet they have
18 produced it now after the joint expert meeting. So
19 if they are going to be putting to Mr Coombs points
20 based on the revised 1994 figure, then I think out
21 of fairness to him, they should give him advance
22 notice of the cross-examination that they are going
23 to be advancing to him on that figure. As you know,
24 that is something the Tribunal does sometimes order.

25 It really isn't appropriate for an expert to be

1 put on the spot when he had no opportunity to
2 canvass it or discuss it at the joint expert -- with
3 his counterpart in relation to the agree/disagree
4 statement. He simply hasn't had an opportunity to
5 discuss this. So we would like advance notice of
6 the questions that are going to be put to him so
7 that he can consider them. I think that is only
8 fair given the late stage as which this has been
9 amended.

10 MR JUSTICE ROTH: I was going to say that if Mr Coombs
11 wants to put in a supplemental note to his report,
12 addressing the -- just on the question of the 1994
13 EEA weighted average MIF, it seems to me he should
14 be allowed to do so because he wrote his report on
15 the basis of the 1 per cent and he now sees what is
16 said. I think he should be able to do that and if
17 he says in that, "This matter of the discussion with
18 my counterpart was on the basis that we are dealing
19 with 0.9 per cent and I did not have this
20 information and therefore I make the following
21 additional point." I think he should have an
22 opportunity to say that in his own words before any
23 questions. Unless you don't want it, but it seems
24 to me it is only permission, you don't have to use
25 it, he should do that. I think if he has, at least

1 ten days to do that, that should be sufficient time
2 on the basis he no doubt has other things to do
3 apart from this case.

4 I don't think you need to go so far, then, to
5 sort of give advance notice of the questions so he
6 can prepare his answers. I think if he explains how
7 he views it and any criticisms he makes of this, I
8 think we are making a bit of a mountain out of this
9 one figure amidst a lot of other figures. So
10 permission to Mr Coombs, and Mr. Cook I am glad you
11 are on that, but it does seem to me right that
12 Mr Coombs should have an opportunity to comment on
13 this because he was working on a different figure.

14 MR COOK: Yes, absolutely sir.

15 MR JUSTICE ROTH: So ten days permission, specifically on
16 this point, within ten days.

17 On that basis, the amendments are allowed. So
18 this is in fact an order that goes back to, I think
19 what we do is we incorporate in the draft order a
20 recital dealing with this CMC and then Mastercard
21 has permission to file and serve, is it a re-amended
22 defence I think, in the form of the document filed
23 with the Tribunal, on condition that as regards
24 Annex 1, table 2, the amended figures for 1992 and
25 1993 are not put in cross-examination or used for

1 the purposes of cross-examination in the July trial.

2 That is the amendment. I think then we come
3 to, there's provision about the costs of the
4 application. This is paragraph 11 of the order. I
5 think this is the costs of the amendments,
6 presumably, not of the application, because there is
7 the other application. I would think the costs of
8 the amendments, should they not all be costs in the
9 case?

10 MR COOK: Sir, that is what I would suggest, given we are
11 in front of you.

12 MS DEMETRIOU: In relation to that, we would be content
13 with that, save for the costs arising from this late
14 amendment on the figure which we think should be
15 Mr Merricks' costs, Mastercard should pay those
16 costs in any event. Because there is no good reason
17 why the amendment was made this late after they
18 submitted evidence.

19 MR JUSTICE ROTH: We can say that the costs of any
20 supplemental report from Mr Coombs be paid by
21 Mastercard.

22 MS DEMETRIOU: Thank you.

23 MR JUSTICE ROTH: Right, then there is this question of
24 causation and the causation issue, which we did
25 spend some time on, on 6 June. It is a rather

1 elaborate formulation here, which I don't find
2 attractive:

3 "The Causation Issue is limited to the question
4 whether there is a causal link as a matter of fact
5 without recourse to any counterfactual enquiry."

6 I don't know what, sort of historic fact,
7 actual fact. It becomes quite metaphysical. The
8 real important point is what follows, identifying
9 the bits of the pleading that we are dealing with.

10 So I think the first sentence can be much
11 simpler:

12 "Causation is limited to the question whether
13 there is a causal link as a matter of fact without
14 recourse to any counterfactual enquiry. Applying
15 that, the court shall determine whether the
16 averments ..."

17 Yes, 102A and B are basically just, they are
18 not really particularly averments at all, are they?

19 MS DEMETRIOU: Sir, I think the problem comes on the
20 pleading and it's a point that we did ventilate at
21 the last hearing. I think the problem arises in
22 relation not to 102A and to 102B so much, which are
23 just setting out our understanding of the rules, but
24 in relation to the following parts, 103 and so on.

25 If I could just explain the point in a

1 nutshell? Those paragraphs all allege a causative
2 link.

3 MR JUSTICE ROTH: Yes.

4 MS DEMETRIOU: As we debated at length last time, that
5 does require, on any view, an exploration of the
6 counterfactual in order to work out whether the EEA
7 MIFs were a but for cause. So it is not possible to
8 lump those paragraphs into this order because it is
9 inaccurate, it doesn't reflect where we ended up at
10 the last hearing, which is that but for causation is
11 not going to be determined at this trial.

12 Our proposal was rather than -- we are
13 certainly not saying this shouldn't be bottomed out
14 now. We were the ones who were very keen at the
15 last hearing, you will recall, to bottom it out.

16 MR JUSTICE ROTH: Yes.

17 MS DEMETRIOU: We don't agree with how it has been
18 formulated, and rather than having a lengthy debate
19 now going through paragraph after paragraph of the
20 pleading. We do think that is an unhelpful
21 approach, and that instead it's possible to set out
22 the principle that was determined, which is that
23 this trial, if the order has to contain something
24 reflecting what was decided, if for some reason that
25 is not clear on the face of the transcript or clear

1 to everyone, then it should simply say that this
2 causation is limited to whether, as a matter of
3 fact, in the factual world, or something like that,
4 there was a causal link and it will not consider
5 matters relating to the back of the counterfactual
6 and will therefore not consider, will not determine
7 but for causation or legal causation, which is where
8 we ended up. But it is, with respect, impossible to
9 include some of these paragraphs that Mastercard
10 purports to include because they do allege causation
11 and therefore require a determination of but for
12 causation.

13 MR JUSTICE ROTH: It is very important we all go into the
14 trial knowing what it is about and we don't then
15 have -- you've got your evidence in now, you've got
16 your expert evidence in, the additional evidence is
17 in.

18 MS DEMETRIOU: Yes, sir.

19 MR JUSTICE ROTH: I am just looking, where in the
20 electronic bundle is -- I have got it separately, I
21 think. So if I go to 103.

22 MS DEMETRIOU: Yes, if we go to 103 and if we look, for
23 example, at 103B, that is maybe a clearer example.
24 So the causative effect of those arrangements was
25 that the intra-EEA MIF operated as a floor and/or

1 guidance and/or benchmark. That is our but for
2 causation plea, that is our but for allegation. To
3 work out whether or not it is well founded one does
4 need to also look at the counterfactual, because one
5 is asking whether the infringement had that
6 causative effect. So it would not be right to
7 include it in paragraph 12 of the order.

8 MR JUSTICE ROTH: We need to establish whether this did
9 operate as a floor, don't we, or guidance or a
10 benchmark, in what happened?

11 MS DEMETRIOU: Yes. Perhaps it is easier to explain it
12 in this way. For example, it may be that --

13 MR JUSTICE ROTH: Can I interrupt you, just so I am quite
14 clear what is really going on here. If paragraph B
15 said -- it didn't say the causative effect of those
16 arrangements as found in the decision as aforesaid
17 was that, but simply said, "The intra-EEA MIF
18 operated as a floor and/or guidance and/or a
19 benchmark", then you would have no problem. Is that
20 right?

21 MS DEMETRIOU: I think one has to be very careful,
22 because of this. What this trial can determine is
23 whether, in the real world, the UK MIF was
24 determined by reference to the intra-EEA MIF. So
25 for example, did Mastercard have regard in the real

1 world to the intra-EEA MIF when setting the UK MIF?

2 MR JUSTICE ROTH: "Having regard" is a very loose term.

3 We need to know whether it operated as a floor.

4 Nobody has ever pleaded "have regard". We need to

5 determine what is a critical issue in the case is

6 did it operate as a floor or guidance or a benchmark

7 or a minimum price recommendation, all the things

8 you said.

9 MS DEMETRIOU: Yes.

10 MR JUSTICE ROTH: Is that the way they did it? Not what

11 they would have done if the EEA MIF had been

12 different. That we can't do, and we have agreed

13 that, but what we do need to determine is what was

14 going on. So I don't actually see, this is looking

15 at what was going on in the real world, what

16 actually happened, how was the domestic MIF set?

17 MS DEMETRIOU: Sir, yes, how was the domestic MIF set, we

18 agree that is for this trial, but whether or not

19 there was a causative effect can only be determined

20 by looking at the counterfactual. I gave you the

21 example at the last hearing of the 75 per cent rule

22 in relation to the later period. So if there was a

23 75 per cent rule in relation to the later period and

24 it might well be that in the real world, in the

25 later period, the UK MIF was not set by reference to

1 the EEA MIF at all. But if in the counterfactual
2 world of the intra-EEA MIF being zero, the banks
3 would have invoked the 75 per cent rule and
4 collapsed the UK MIF, then one has but for
5 causation.

6 MR JUSTICE ROTH: I see that, but equally, if the
7 intra-EEA MIF operated as a floor and guidance, well
8 then you are happy. If it is found that it didn't
9 operate as a floor, it doesn't stop you then saying,
10 "But if the intra-EEA MIF had been zero, then it
11 would have operated as floor." I understand that
12 and that is a point you want to preserve.

13 MS DEMETRIOU: Yes.

14 MR JUSTICE ROTH: It is about causation in the actual
15 world of did this do what you say it did of actually
16 happening. If we are not going to establish that,
17 we are wasting our time.

18 MS DEMETRIOU: I think it is reference for causation
19 which, speaking for myself, it is difficult to
20 envisage how causation can be determined other than
21 in a but for way. I think what we can agree is that
22 it did. So the factual question, did in the real
23 world the intra-EEA MIF operate as a floor and/or
24 guidance and/or a benchmark, I think that would be
25 okay.

1 MR JUSTICE ROTH: Yes, that is what I was asking.

2 MS DEMETRIOU: Because if we start introducing causation
3 into this, then we are in trouble, because we don't
4 accept you can determine causation without looking
5 at the counterfactual, because it is inherently a
6 counterfactual question.

7 MR JUSTICE ROTH: If you ask did it operate as a floor
8 that involves an element of causation, doesn't it?
9 I think it is clear that what we are looking at is a
10 causal link as a matter of fact on the basis of the
11 EEA MIF that existed, and not whether the same
12 situation would have applied with a much lower EEA
13 MIF. That is what one is dealing with.

14 MS DEMETRIOU: That is what one is dealing with, yes.

15 MR JUSTICE ROTH: I think that is clear and, as I say,
16 you get into an almost a metaphysical discussion of
17 the real world and actual fact, and so on. I think
18 one can say, and one need not go through, as you
19 quite rightly say, it is not productive and we
20 haven't got time to go through each paragraph,
21 without resource to any counterfactual enquiry and
22 say in particular the trial will not consider what
23 the position might have been had the EEA MIF been
24 significantly lower.

25 MS DEMETRIOU: Sir, yes. I think that if we are going to

1 go down this route of including the paragraphs of
2 the pleading, then we will need to make, I fear,
3 lots of caveats.

4 MR JUSTICE ROTH: Yes, so I don't think that is helpful.
5 As you know, the trial generally isn't conducted by
6 extensive reference to the pleading. In fact, in
7 many trials pleadings are not referred to. It is
8 conducted on the evidence and what are really the
9 key questions. What we are saying is, it is a
10 matter of fact, without recourse to counterfactual,
11 in particular, the trial will not consider what the
12 position might have been had the EEA MIF been
13 significantly lower. That is really your point,
14 isn't it?

15 MS DEMETRIOU: That's our point. We can't agree to
16 reference to all of these paragraphs because that
17 would require significant caveating for these
18 pleadings being drafted, which is what we canvassed
19 at length at the last hearing.

20 If you turn to the transcript, I think we are
21 actually all on the same page as to what this trial
22 will be determining. We just don't agree with the
23 way that paragraph 12 has been drafted. But if you
24 look at the transcript of the last hearing.

25 MR JUSTICE ROTH: Let's not worry about that, we have got

1 a lot to do. Mr Cook, if it says simply:

2 "The Causation Issue is limited to the question
3 whether there's a causal link as a matter of fact,
4 without recourse to any counterfactual enquiry, in
5 particular the trial, or this trial, will not
6 consider what the position might have been had the
7 EEA MIF being significantly lower."

8 Will that cover the point, so we just know what
9 we are arguing about without doing a forensic close
10 examination of each subparagraph.

11 MR COOK: Sir, I am concerned about that and the reason
12 we are concerned is, that this is not a conventional
13 trial because it is not a full trial, this is a
14 trial which is restricted to certain issues, and we
15 have got lengthy pleadings and we think it would
16 help everybody to simply know which bits of the
17 pleadings we are focused on. Ms Demetriou has
18 repeated and you, sir, have repeated your answer to
19 it from the last hearing, which was at paragraph 106
20 of the transcript, supplemental bundle 207, which is
21 almost verbatim the exchange we have had today, sir,
22 which is Ms Demetriou said, "You can't deal with
23 causation without but for", et cetera, and you said,
24 "No what we have to deal with is, did the EEA MIF
25 act as a benchmark, for example, as a matter of

1 fact."

2 We keep coming back on the same arguments and
3 unless there is clarity on these paragraphs that are
4 relevant for this hearing, then we are going to have
5 the same disagreement in closing submissions, which
6 would be a waste of very valuable time in that
7 process.

8 With respect, sir, we don't see, and frankly it
9 shouldn't be necessary, for grown up parties to do
10 all this in front of the Tribunal. We have
11 identified all the paragraphs which raise factual
12 questions about what was in fact the alleged impact
13 of the EEA MIF. If there is some disagreement about
14 particular paragraphs, and we recognise that some of
15 them have a little bit of counterfactual in them,
16 that is excluded by the first set of words which
17 makes clear we are not dealing with counterfactual.

18 So we do think it is very helpful for everybody
19 here at the trial to know that we looking in
20 pleadings which are 50, 60, 80 pages long, to know
21 in practical terms we are looking at three or four
22 paragraphs in the middle as being the relevant
23 paragraphs for this causation hearing. With
24 respect, we can't see how it can be difficult for
25 Mr Merricks to go through that list, which is not

1 that many paragraphs, and say yes those are all the
2 factual points that are in issue at this hearing.
3 If there are more, they can tell us. If there are
4 particular other points we do not think the Tribunal
5 needs to be involved in that process.

6 So what we are concerned about is that suddenly
7 we are going to end up with other bits jotting in
8 here, there and everywhere in closing submissions
9 and we will have the same argument again for a third
10 or fourth time. So sir, it should be very easy, and
11 then everybody will know. I think it would help in
12 a case like this for the Tribunal to be able to see
13 in your pre-reading, "Right, what we are focused on
14 is paragraph 103", for example, read through it,
15 fine. Those are the five or six allegations which
16 you know you will need to consider, and you will be
17 able to then hopefully see in the opening
18 submissions. You will see what Mr Merricks says in
19 support of them and you will see our answers to
20 them.

21 For a preliminary issue trial which is narrowly
22 confined to know exactly what the issue is by
23 reference to a very limited number of paragraphs, it
24 seems to us, sir, to be obviously helpful for
25 everybody and anything else is a recipe for us

1 having this argument in closing submissions. With
2 respect, we don't see that there is a need to do
3 detailed caveats. If we know which paragraphs it
4 is, we have got the clear ruling it is the factual
5 issues not the counterfactual issues, and we just
6 deal with those paragraphs on the factual points and
7 it should be very simple, clear and helpful for
8 everyone, sir.

9 MR JUSTICE ROTH: Look, what I think we should do is I am
10 happy to include, which Ms Demetriou did not express
11 any disquiet about and I don't think you object to,
12 in the order to simplify the first sentence and say
13 in particular, "The trial will not consider what the
14 UK MIFs might have been had the EEA MIFs been
15 significantly lower." So that makes clear what --
16 that's the counterfactual.

17 I think what I would ask you to do, rather than
18 necessarily by paragraphs in the pleading, but using
19 that as your starting point, just to prepare a
20 series of factual questions drawn out of them that
21 will be determined at the trial. So we have already
22 got them. So rather than saying it is paragraph
23 103B, without the first two lines, or whatever.
24 Just to say, did the intra-EEA fall-back MIF operate
25 as a floor and/or guide, et cetera. That is one

1 question.

2 So you can draw them out of these paragraphs,
3 and it did seem to me that clearly some of these
4 paragraphs are going to be very relevant and equally
5 that the paragraphs, such as paragraph (d), is
6 clearly not relevant, because that is clearly a
7 counterfactual subparagraph and you have left it
8 out. Similarly, (e) is clearly a counterfactual
9 paragraph. If you just, rather than putting it in
10 the order and arguing about it now, you can seek to
11 agree a list of the questions that we have to
12 address and I would think can be done on one side of
13 paper. That would be very helpful. Then you will
14 both know, the parties will know, the Tribunal will
15 know, and if you can't agree, you can submit
16 alternatives. But I think we have all got the
17 general principle in mind. Ms Demetriou, are you
18 content with that?

19 MS DEMETRIOU: Sir, yes, subject to one practical point,
20 which is that our written opening is due on Monday,
21 and we are also digesting 100 new pages of evidence
22 that Mastercard has just given us.

23 MR JUSTICE ROTH: You don't have to do it by Monday, and
24 I think we all understand what it is, so it is just
25 getting it into a crisper formulation.

1 MS DEMETRIOU: Yes, quite.

2 MR JUSTICE ROTH: So we don't start arguing about
3 subparagraphs of the pleading in closing speeches.

4 MS DEMETRIOU: I think that's fine, and just to explain
5 why, we are not being obstructive here, but why Mr
6 Cook's submission is misconceived is that of course
7 these paragraphs were drafted as conventionally
8 would be the case to allege causation, which is a
9 counterfactual question. So inherent in lots of
10 these paragraphs is a consideration of the
11 counterfactual --

12 MR JUSTICE ROTH: There is no criticism by anyone of the
13 way it has been pleaded and we all understand that
14 it was pleaded, of course, as a total case and now
15 we have extracted for this stage of the trial part
16 of the case, so it doesn't immediately align with
17 the way it is framed the pleading.

18 MS DEMETRIOU: Yes. That is why, sir, it is misconceived
19 as an approach to say these paragraphs are in or
20 out, because inherent on this the very basis for
21 these paragraphs was but for causation which we have
22 all agreed can't be determined at this trial. I
23 think that is a way forward.

24 MR JUSTICE ROTH: Yes.

25 MS DEMETRIOU: We can list out factual issues that we say

1 can be determined at this trial and hopefully agree
2 them.

3 MR JUSTICE ROTH: But drawn from the pleading, and the
4 factual, the actual factual causation in the way I
5 have described it, what happened. Of course it
6 involves an element of causation, we did this
7 because of that. That is causation. It is not but
8 for causation, but it is causation in the ordinary
9 sense.

10 MS DEMETRIOU: Sir, yes, it is a part of but for
11 causation, a step in the but for causation analysis,
12 but we can certainly list out the issues drawn from
13 the pleadings. We are not going to be seeking to
14 add new issues in at this stage.

15 MR JUSTICE ROTH: Even start reframing and rephrasing the
16 whole thing. I think you should stick closely to
17 what we have got.

18 MS DEMETRIOU: Yes.

19 MR JUSTICE ROTH: So that is what we will do with the
20 order. I don't think there is anything, is there,
21 left in the order that is in dispute and it can be
22 drawn up?

23 Then there's an issue, a small issue, I think
24 about the trial timetable before we get to
25 disclosure on limitation.

1 MS DEMETRIOU: That is resolved, sir, I think we now have
2 an agreed trial timetable and Mastercard has agreed
3 to that various of their witnesses will be warned.
4 My concern was we have now got a lot more new
5 evidence.

6 MR JUSTICE ROTH: I appreciate your concern and I am
7 sympathetic, and I appreciate the fact that you have
8 now agreed it.

9 The other thing to mention on the timetable is
10 I have not as I indicated earlier, looked at the
11 expert reports, nor has the economist on the
12 Tribunal because, as you will appreciate, Professor
13 Waterson will be back, it won't be Lord Ericht, who
14 came in because of the Scots law point. Whether it
15 is sensible and appropriate to have a hot tub,
16 either in part or in whole, for the two economists,
17 is not something we can address yet. We will let
18 you know by the time -- well, probably at the start
19 of the trial but that would give over a week to
20 consider. That may save some time on the experts,
21 if it is possible. It can do, but I have no idea at
22 the moment whether that is appropriate.

23 Good, does that conclude everything that is
24 relevant to the trial?

25 MR COOK: I am afraid, sir there is one additional point

1 that I would like to mention in relation to the July
2 trial. That relates to cross-examination of
3 Mr Dhaene. Sir, you made an order a few days ago, a
4 week perhaps, ordering some additional disclosure on
5 Mr Dhaene and at the end of the order that you said
6 that Mastercard is limited to cross-examining by
7 reference to those documents. We understand that of
8 course we can't cross-examine by reference to
9 documents that haven't been produced by now, or by
10 the date you have given us for additional
11 disclosure.

12 Sir, the wording of that -- on its literal
13 wording, I think it indicated we could only
14 cross-examine by reference to the documents you have
15 just ordered. We have, of course, provided a lot of
16 documents previously and we just wanted to formally
17 check that the Tribunal -- it was common ground that
18 we will be entitled to cross-examine by reference to
19 that full suite of documents that we have provided
20 over time and it wasn't simply the new documents we
21 were producing that we can cross-examine by
22 reference to, because actually that's only a limited
23 subset, sir.

24 MR JUSTICE ROTH: I am a bit concerned about that

25 Mr Cook, because if you start cross-examining on

1 other documents where the disclosure, it may be
2 said, is not complete, then we go into the fact that
3 what do those other documents deal with, are there
4 yet further documents going to those matters which
5 have not been disclosed? And it opens it all up.

6 This cross-examination, as I understand it, is
7 all about credibility. It has got nothing to do
8 with his substantive evidence, which of course you
9 can cross-examine him about. It seems to me that as
10 far as that is concerned, it is to do with the
11 circumstances in which he left, there is apparently
12 an argument whether he was dismissed or resigned or
13 constructively dismissed or what, and then the
14 litigation that was conducted.

15 Beyond that, what he may have done and so on,
16 it seems to me we start straying into areas that are
17 not appropriate and if they are to be explored, then
18 there has to be full disclosure of them. I don't
19 think it is right that then Ms Demetriou has to sort
20 of re-examine the witness where perhaps the
21 disclosure and matters raised by the other
22 documents, they would have wanted more documents.

23 MR COOK: Sir, I fully accept that the only two areas of
24 cross-examination are going to be whether he was
25 dismissed and the litigation he brought against us.

1 My concern was simply, sir, that we had given a
2 certain number of documents about whether he was
3 dismissed and also about the litigation previously
4 and we wanted to check. It is simply, sir, almost
5 reading the order indicated that we were limited to
6 cross-examining on the documents you had ordered
7 disclosed and in practice they had been given in two
8 tranches, previous documents and new documents we've
9 been ordered to disclose. We just want to be clear
10 as long as they fall within those two categories or
11 whether it was previously produced or will be
12 produced at the end of this week, that doesn't alter
13 our ability to cross-examine on them, sir.

14 MR JUSTICE ROTH: As I say, I am a bit concerned about
15 that. I don't see why you need to cross-examine on
16 further documents. Obviously I have not seen them,
17 but if you are, then there's the question of whether
18 there should be full disclosure of matters raised by
19 those other documents.

20 MR COOK: Sir, these are only documents that would fall
21 within the categories defined in the order, but it
22 is just we had already produced them.

23 MR JUSTICE ROTH: I may have misunderstood you. I
24 thought the order said insofar as not already
25 disclosed or provided.

1 MR COOK: Yes, it does.

2 MR JUSTICE ROTH: Of course, if they have been provided
3 previously and they come within those two
4 categories, you can cross-examine on them. But you
5 may have provided other material, such as some
6 internal note I think I saw, which you have provided
7 but you can't cross-examine on that just because
8 Mr Merricks' team has seen it.

9 MR COOK: Sir, that is understood. Then confusion was
10 only that the order said we could only cross-examine
11 Mr Dhaene by putting to him documents -- we weren't
12 allowed to put documents other than those covered by
13 the order and it wasn't clear that if they had been
14 previously disclosed, they would be covered. It was
15 just a fill-in point.

16 MR JUSTICE ROTH: Yes. Ms Demetriou, is that clear?

17 MS DEMETRIOU: I think that is clear, subject to one
18 point, which is they disclosed a note from Loyens
19 which we say they waived privilege in and we would
20 want --

21 MR JUSTICE ROTH: No. We are not going to look at any
22 other documents and they can't use them. Okay, you
23 have had that document for what it is worth, but
24 they are not going to be able to use it.

25 MS DEMETRIOU: Thank you.

1 MR JUSTICE ROTH: Right. I think we should look at the
2 subject matter for which this hearing was arranged,
3 which is the Redfern Schedule. I don't know if we
4 should take, because the hearing is being
5 transcribed, just because we are online, remote
6 doesn't make a difference. May I just check with
7 the Referendaire, should we take a short break?

8 REFERENDAIRE: Yes, please, sir.

9 MR JUSTICE ROTH: Very well, we will take a ten minute
10 break and come back -- it will give us one hour to
11 get through that. I hope we can achieve it. So we
12 will resume at noon.

13 (11.50 am)

14 (Break)

15 (12.00 pm)

16 Redfern Schedule

17 MR JUSTICE ROTH: Can we resume? I have got the Redfern
18 Schedule on the basis of which this is proceeding
19 and the first question is temporal scope. Is that
20 right?

21 MS DEMETRIOU: That's right, sir.

22 MR JUSTICE ROTH: Ms Demetriou, I can see that there may
23 not be a complete cut-off, the point where you say
24 the limitation period would have kicked in and that
25 something post that point may be relevant, but

1 equally, I think 2008 is quite disproportionate.

2 My provisional view is that it should go to the
3 end of June 2002, which is when Europay was dealing
4 with it. And not thereafter, when it went to a
5 different -- the organisational structure changed.
6 That would give you several years post-June '97 in
7 which you can see what is there because as you say,
8 there might be a certain dearth of documents for the
9 earlier period. Is that something that would meet
10 the concerns in the right way?

11 MS DEMETRIOU: I think that yes, it largely does,
12 although we have come across some documents in the
13 disclosure we've been given from 2006, for example,
14 which is why we have sought the longer period. But
15 it may be that we can agree on the end of 2002 and
16 then follow up with any specific applications for
17 disclosure in relation to documents that we have
18 found in relation to the later period.

19 MR JUSTICE ROTH: It is always a balancing exercise,
20 isn't it? Because you can never say that one can be
21 absolutely sure there's nothing later that's
22 relevant hence the whole concept of proportionality.
23 I would have thought it is actually the end of June
24 2002, that's when I think the arrangement changed.

25 Mr Cook, are you going to push against that?

1 MR COOK: No, sir, I am not.

2 MR JUSTICE ROTH: So we will say the temporal scope is
3 the end of June 2002, but clearly, if there's a
4 particular document that leads to an application for
5 specific disclosure, that can be pursued.

6 Then the next one is the subject matter scope.
7 As I understand it, Mr Merricks is asking for all
8 European MIFs, domestic MIFs and the interregional,
9 international MIF. Is that right?

10 MS DEMETRIOU: Yes, I think the only dispute about is
11 international, the interregional MIF. The reason
12 that we are concerned about that is that you may
13 have picked up in relation to the causation trial
14 that there is a dispute between the parties as to
15 what the international MIF related to. So there are
16 documents referring to the international MIF and our
17 case, as you will see at trial, is that that refers
18 to the EEA MIF and Mastercard's case is that it
19 refers to the interregional MIF. So we are
20 concerned and their own witnesses agree that there
21 is confusion about the terminology. Is that is why
22 we want the disclosure to extend to the
23 interregional MIF.

24 MR JUSTICE ROTH: We can sort out the confusion over
25 terminology so it is clear what one is talking

1 about, but there the international MIF, which deals
2 with, as I understand it, transactions with
3 merchants not in the EEA, but in the US or Canada,
4 which I think was set by a completely different
5 entity in the Mastercard organisation. That is what
6 they say is irrelevant. If some people call a
7 European MIF an interregional MIF, clearly it is
8 still the European MIF.

9 MS DEMETRIOU: Sir, they call it the international MIF.

10 So there is an interregional MIF which applied in
11 relation to transactions with the US and there is
12 the intra-EEA MIF and, we say, that what people call
13 the international MIF is the intra-EEA MIF and that
14 is going to be a dispute between us at trial.

15 We make two points really --

16 MR JUSTICE ROTH: Can I interrupt you. The interregional
17 MIF that applies to North America, whatever people
18 call anything, you are not seeking disclosure for
19 documents concerning that one, are you?

20 MS DEMETRIOU: Well, we are seeking disclosure concerning
21 that one.

22 MR JUSTICE ROTH: Why?

23 MS DEMETRIOU: For two reasons. First of all, because
24 Mastercard's attitude towards secrecy in relation to
25 that MIF is going to be relevant to its attitude

1 towards secrecy and confidentiality generally, and
2 so one can make -- if there are documents showing
3 that they wanted to keep the interregional MIF or
4 aspects of it secret or confidential, one can infer
5 from that that one can say they were taking the same
6 approach to the intra-EEA MIF. So we do seek
7 disclosure on that basis. But there is also, as I
8 was explaining, a supplementary reason, which is
9 that there is a terminological confusion in the
10 documents which Mastercard's own witnesses agree.
11 So Mr Hawkins agree there is confusion about
12 terminology. So if one restricts the disclosure,
13 then there is a very strong chance that relevant
14 documents would be missed, so we do rely on both of
15 those reasons for saying that the scope of
16 disclosure should extend the interregional MIF.

17 MR JUSTICE ROTH: Mr Cook, I am not attracted by the
18 first point, so you need not address that. But it
19 is important that one gets documents regarding the
20 EEA MIF and if people called it something else, that
21 is not a reason, clearly, that those documents
22 should not be found. I think the second concern of
23 the Merricks side is that if the search is by key
24 words or whatever, and if interregional is not
25 included, they will miss documents because the terms

1 were used somewhat loosely.

2 MR COOK: Well, so what there are as a matter of fact is
3 there is an interchange fee set by Mastercard
4 International in New York, which was for
5 transactions between regions and as a matter of fact
6 there was an interchange fee set by what at the time
7 was Europay, which was a separate organisation, in
8 relation to cross-border transactions in Europe.

9 Then what my learned friend refers to, is an
10 argument about what the rules mean by referring at
11 various times to the international MIF and how that
12 might apply. But in terms of disclosure searches,
13 it is very clear that, we say, we should not be
14 looking in New York, quite apart from anything else
15 because that would require us to do a document
16 gathering exercise in New York, for documents in
17 relation to the fee set by Mastercard International.
18 We will be looking in relation to the fee set by
19 Europay within Europe, which are -- so that is the
20 distinction that we are very keen, sir, to avoid
21 having to go out and gather documents for the first
22 time in relation to Mastercard in New York.

23 So within that, sir, as a practical matter, we
24 don't think there is going to be any difficulty in
25 identifying from Europay documents, references to

1 the fee that it was setting. But nonetheless, those
2 are documents that we have gathered and those can be
3 searched through. The most important part for us is
4 not to have to embark on a new document gathering
5 exercise, sir, but certainly we don't see there to
6 be a problem, given the extensive material we have
7 already gathered and disclosed for the purposes of
8 the causation trial, such as all the documents that
9 went to the Commission, which was investigating the
10 intra-European fee, the OFT, for example, scheme
11 rules, matters like that. So we are looking in the
12 right places and that is what is important for these
13 purposes.

14 MR JUSTICE ROTH: Yes. Ms Demetriou, given that I am not
15 prepared to order disclosure from other parts of
16 Mastercard on the basis there is some possible
17 indication of an approach that might be inferred as
18 the same approach in Europe, I think that goes way
19 beyond what's proportionate. So they won't be
20 looking at MCI documents. Does that mean that you
21 are going to get the EEA MIF documents however the
22 EEA MIF was described? It seems to me it is where
23 you look, rather than the description of the MIF,
24 really.

25 MS DEMETRIOU: So long as international MIF is included

1 in the searches because, as I say, we say that
2 references to that are to the intra-EEA MIF.

3 MR JUSTICE ROTH: Yes, so it is the intra-EEA MIF however
4 described?

5 MS DEMETRIOU: Yes but there is a dispute as to how it is
6 described, so we do want searches for international
7 MIF because as we say that refers to the intra-EEA
8 MIF. There is a dispute about that between the
9 parties.

10 MR JUSTICE ROTH: It will look at Europay's and I don't
11 know what has been agreed about the national
12 entities, but approach to all the documents relating
13 to the MIFs which it set, whatever they were known
14 as.

15 MS DEMETRIOU: I am not sure that I am in a position to
16 say where the repositories are. That is really for
17 Mastercard. The key point, I understand you are
18 against me on the first point, the first argument I
19 made, but on the second point, wherever these
20 documents are located, we want documents that refer
21 to the international MIF because we say that that is
22 a reference to the intra-EEA MIF and so if they
23 don't conduct searches for the international MIF,
24 then we think our case is that documents will not
25 be -- will be missed.

1 MR JUSTICE ROTH: I think one has got to leave it to the
2 defendants. It is the EEA MIF however described or
3 known that they have got to look for, but I am not
4 going to order them to look for all documents
5 concerning international MIFs, when that clearly
6 will also cover a whole lot of other things which
7 are not the EEA MIF; indeed, mostly. It seems to me
8 that the EEA MIF is going to be in Europe, it is not
9 going to be with the American entity.

10 MS DEMETRIOU: Sir, the difficulty from our perspective
11 is, take the earlier period, the rules say that the
12 default was the international MIF and there is
13 then -- so our case, and this is what is going to be
14 one of the key issues, for the trial, our case is
15 that that means intra-EEA MIF and Mastercard say,
16 "No, no, we think that that refers to the
17 interregional MIF." So there is a fundamental
18 dispute as to what the default the relevant rule
19 says. If we are right on that point and
20 Mastercard's own evidence says that the evidential
21 picture is ambiguous and mixed, then if they don't
22 search for documents that refer to the international
23 MIF, they are just not searching for documents which
24 relate to the default rule on which we rely in these
25 proceedings.

1 MR JUSTICE ROTH: What is the earlier period that you say
2 the rules were?

3 MS DEMETRIOU: It is from 1992 through to 1997.

4 MR COOK: Can I say, sir, the practical thing here is we
5 are going to look for the cross border European
6 interchange fee set by Europay, however described,
7 because that is the basis of the infringement found
8 in the Commission decision is that interchange fee.
9 That is what we are looking to see whether we
10 deliberately concealed any facts by reference to
11 that. That would capture if somebody casually
12 refers to that as the international MIF but it will
13 be obvious from the document they are talking about
14 the one set by Europay or a completely separate
15 interregional MIF set by Mastercard International.
16 So the important thing is that we will be looking in
17 the repositories in Europe, because that is where
18 the only relevant MIF for these purposes, because
19 that's the basis of the infringement, was set. But
20 however it is described, we will be looking for
21 documents relating to that.

22 MR JUSTICE ROTH: The rules that Ms Demetriou is
23 referring to for that earlier period are rules of
24 Europay, are they?

25 MR COOK: They are rules of both Mastercard International

1 and Europay, but they are dealing with what was the
2 default at the time. The point being, sir, we say,
3 the rules made the default the interregional MIF.
4 My learned friend wants to say the rules made the
5 default the EEA MIF. So that's a point that goes to
6 the causation trial. But what we are looking at
7 here, sir, is only the question of limitation
8 disclosure. So what was the deliberate concealment
9 of facts referenced, relevant to the infringement.
10 The only infringement is the EEA MIF, so that is
11 what we should be looking for, is concealment of
12 relevant facts in relation to the EEA MIF however
13 described.

14 If we are right on how the rules work, then it
15 simply means there was no default to that EEA MIF
16 which is the subject of the infringement. If my
17 learned friend is right then there was a default to
18 it. It becomes, that is a construction point, it
19 has no relevant scope for the purposes of, what is
20 relevant to the question of what we concealed, or
21 not, in relation to the EEA MIF which is the subject
22 of the decision.

23 MR JUSTICE ROTH: Yes.

24 MS DEMETRIOU: If I may just briefly respond to that, the
25 difficulty with that submission, sir, Mr Cook says,

1 "We will search for the intra-EEA MIF however
2 described", but their case is that it wasn't
3 described as the international MIF and that is a
4 fundamental point of dispute between us. So if that
5 means they are not going to be searching for
6 documents referring to the international MIF, that
7 is no good for us.

8 The second point is that there is common ground
9 between the parties that the relevant default, it is
10 not just Europay, but it was also set by Mastercard
11 International, so one can't just hive off Mastercard
12 International from the disclosure obligation.

13 MR COOK: Sir, with respect, that submission is
14 completely confused because the only infringement is
15 the EEA MIF set by Europay. That is it, sir. That
16 is what we are looking for disclosure in relation
17 to, not in relation to any other MIF. So sir that
18 is what we intend to search for.

19 If we came across documents which are concerned
20 with MIFs set by Europay and somebody described that
21 particular MIF as the international MIF, clearly we
22 would disclose that, sir. So what we are looking
23 for is MIFs, cross-border MIFs set by Europay,
24 however described. That should capture everything.

25 MR JUSTICE ROTH: If you are using search terms as part

1 of that disclosure, are you including, going to
2 Europay sources, international MIF as one of those
3 terms?

4 MR COOK: Sir, we have no objection to doing that. We
5 would not look for interregional, because that would
6 be a term that would absolutely make clear that it
7 was the Mastercard International MIF, but we are
8 certainly happy to look for international MIF as a
9 search term within those documents.

10 MR JUSTICE ROTH: Ms Demetriou, it seems to me that
11 should be adequate and I think the construction of
12 the rules, the argument on that does seem to me a
13 slightly different point from the deliberate
14 concealment point that is what the January trial is
15 about.

16 MS DEMETRIOU: Sir, yes. I understand that they are
17 different points. If Mastercard search for
18 international MIF, then that's of assistance because
19 that deals with the terminological point. Of course
20 we are concerned about excluding Mastercard
21 International from the searches because of course we
22 don't have disclosure from the banks. So
23 communications between the banks and Mastercard
24 International are going to be important in relation
25 to deliberate concealment.

1 MR JUSTICE ROTH: It will be the banks, the acquiring
2 banks or issuing banks won't be dealing with
3 Mastercard International on EEA MIFs because it has
4 got nothing to do with them. Of course Mastercard
5 International will have a lot of communication with
6 banks, well banks across the US apart from anything
7 else and maybe Canada and so on, but I can't see how
8 that is relevant.

9 MS DEMETRIOU: Sir, I fear it is not as straightforward
10 as that because the rules that -- I think it is
11 common ground looking at Mastercard's pleading that
12 the rules that applied include rules set by
13 Mastercard International. They are not just Europay
14 rules.

15 MR JUSTICE ROTH: In the period '92 to '97? Mastercard
16 International set the EEA MIF?

17 MS DEMETRIOU: Perhaps we could take it from their
18 amended pleading.

19 MR COOK: Sir, the answer is Mastercard International
20 never set the EEA MIF, sir.

21 MR JUSTICE ROTH: Yes, that was my understanding from --

22 MR COOK: I just ought to caveat that, sir. It didn't
23 during this period. It may be true that in
24 2006-2007 it may have done so.

25 MR JUSTICE ROTH: Yes, after things were reorganised. I

1 am looking at your re-amended defence, which goes
2 into this in considerable detail. I think you
3 explain the setting process. Is there anything?
4 It's really for you, Ms Demetriou, that you want to
5 show me that suggests that in that early period MCI
6 were involved?

7 MS DEMETRIOU: Can you just give me a moment, sir, to
8 take instructions?

9 MR JUSTICE ROTH: Of course.

10 MR COOK: Sir, if Ms Demetriou is going to take
11 instructions, there is one point I want to clarify.
12 We had understood that they were not pressing for
13 disclosure in relation to European domestic MIFs
14 other than the UK one.

15 MR JUSTICE ROTH: That was my understanding because I
16 asked you about that, Ms Demetriou, and you said the
17 only issue now is the interregional -- international
18 MIF.

19 MS DEMETRIOU: Yes, that's correct.

20 MR JUSTICE ROTH: I think from memory the decision goes
21 into some detail about how the MIFs were set because
22 it was a whole question of whether it is an
23 association of undertakings.

24 MS DEMETRIOU: Sir, yes. Our understanding is that, for
25 example, on 22 June 1994, Europay's board -- as at

1 that time the international interchange fee applied
2 as the applicable fall-back rate, pursuant to the
3 1993 Mastercard International rules. So we do say
4 it is difficult to -- we do say that the MCI rules
5 were applicable and so it is not the case, it is not
6 the case that it was simply the Europay rules that
7 were relevant to establishing the default. So that
8 is really the key problem in simply Mastercard
9 seeking disclosure, or rather excluding MCI from the
10 disclosure process.

11 MR JUSTICE ROTH: Wasn't the application of that
12 fall-back a decision of the Europay board?

13 MS DEMETRIOU: Yes.

14 MR JUSTICE ROTH: So it was the Europay organisation that
15 decided, "We are going to have a MIF that may have
16 been determined elsewhere."

17 MS DEMETRIOU: That's correct, but then by that decision
18 you are then bringing into play the Mastercard
19 International rules. You will see, just by scanning
20 their defence that they refer throughout, both to
21 Eurocard rules and the Mastercard International
22 rules.

23 MR JUSTICE ROTH: Yes, but if we are looking at the
24 question of deliberate concealment, which is the
25 only point we are concerned with, it will be then

1 what happened with the adoption of the MCI rule, but
2 in Europe.

3 MS DEMETRIOU: Once the MCI rules are in play, then
4 clearly MCI is also in play in terms of its policy
5 whether or not it was directing concealment.

6 MR JUSTICE ROTH: The question is whether these matters
7 were known at all and if they were not known,
8 whether there was any deliberate attempt to keep
9 them confidential. That will be by the parties
10 applying them in Europe, as an EEA rule, won't it?

11 MS DEMETRIOU: No, not necessarily, which is our point.
12 So it won't necessarily be by the entity in Europe,
13 given that by their decision, they have then, as it
14 were, deferred to the MCI rules. So we do say that
15 you can't just excise MCI from the disclosure
16 enquiry.

17 MR JUSTICE ROTH: Mr Cook, how does this work?

18 MR COOK: Sir I think my learned friend is confusing the
19 issues that are relevant to the causation trial with
20 the what is relevant to deliberate concealment
21 purposes. The infringement found in the decision is
22 the European cross-border default. My learned
23 friend agrees with me that that was set by Europay.
24 Any concealment of facts associated with that is
25 going to be Europay dealing with European banks. So

1 the fact there were two sets of scheme rules because
2 there were two schemes at the time, doesn't indicate
3 that there is going to be any sort of relevant
4 dealings by Mastercard in New York concerning
5 concealment of the EEA MIF. Simply sir, it is a
6 fishing expedition because Mastercard International
7 set the interregional MIF, which is not the subject
8 of the Commission decision. So with respect, sir,
9 we do say the EEA MIF is the only basis for
10 infringement as found. Relevant facts associated
11 with that, in those circumstances, sir, it is just
12 completely disproportionate, I think was the point
13 you accepted sir, to look somewhere else on the off
14 chance that an organisation which didn't set the EEA
15 MIF has anything relevant to show on the subject.

16 MR JUSTICE ROTH: Ms Demetriou, I am sorry, I think that
17 is right and if they incorporated something else,
18 it's still -- that becomes the EEA default and
19 that's the matter that then one has to see whether
20 in doing that in the way it was done, it was being
21 deliberately concealed. So no, we stick to the EEA
22 MIF, but the search term will include international
23 MIF and there doesn't have to be a search of
24 Mastercard International.

25 Right, next we go to number 1. This is what

1 Mastercard considered to be confidential and
2 guidance and direction on confidentiality.

3 Mastercard says that if there was any guidance, that
4 will be in the scheme rules. You say, well, it
5 might not and that if there are documents setting
6 out what can or cannot be shared with third parties,
7 produced by the Mastercard defendants regarding the
8 EEA MIF, such documents are relevant and should be
9 disclosed.

10 MS DEMETRIOU: Sir, yes, we say that goes to the very
11 heart of our case.

12 MR JUSTICE ROTH: Yes.

13 MS DEMETRIOU: To say we are just looking at the rules
14 themselves, it is obviously much more likely that if
15 there are going to be documents setting out what
16 shouldn't be said, that they are not going to be in
17 the rules, but they are going to be in separate
18 communications. Indeed, we have said in the Redfern
19 Schedule, given some examples of those. Those
20 documents are clearly relevant.

21 MR JUSTICE ROTH: I see that. Mr Cook, there may not be
22 any, but if there is guidance, it is not
23 self-evident that everything is in the rules. There
24 may be guidance documents to members or
25 communications to members, or circulars to members

1 saying, "Don't forget that these figures, this
2 material, this decision is very confidential." It
3 does seem to me that any such documents would be
4 relevant.

5 MR COOK: Sir, the point we make is this. If it was
6 given in written correspondence, I think one of the
7 categories we were asked to address previously was
8 written correspondence with the banks. So what we
9 are saying, sir, is that we have given disclosure of
10 the rules. We were also required to look at
11 correspondence with the banks and we have done that,
12 sir.

13 MR JUSTICE ROTH: I think here it is -- I assume it would
14 come in correspondence, but if you produced any
15 guidance notes or circulars to all acquiring banks,
16 all issuing banks, all instructions as to what they
17 should tell their merchants, that should be
18 disclosed. I would have thought it should have been
19 disclosed already.

20 MS DEMETRIOU: Or internal documents, sir, which talk
21 about what their policy is going to be. So it would
22 also capture internal documents setting out what
23 information Mastercard considered to be
24 confidential.

25 MR COOK: I think we have already agreed in

1 correspondence, sir, to provide anything to do with
2 transparency. So we have got guidance on
3 transparency being provided to the banks, we have
4 agreed to disclose that.

5 MR JUSTICE ROTH: Guidance on transparency and the
6 converse, guidance on confidentiality, any guidance
7 to.

8 MR COOK: Yes.

9 MR JUSTICE ROTH: And any internal documents considering
10 what should be kept confidential.

11 MR COOK: Yes, sir.

12 MR JUSTICE ROTH: I think that is clearly relevant.

13 Right, so you get that.

14 Then we go to 2:

15 "Standard disclosure of Mastercard's business
16 secrecy rules in relation but not limited to
17 interchange."

18 I really didn't understand that request,
19 Ms Demetriou. They might have business secrecy
20 rules for all sorts of things, such as salary scales
21 or what mergers and acquisitions they might want to
22 make and how that evaluation is to be kept secret.

23 It is completely irrelevant.

24 MS DEMETRIOU: I see that point, sir. I think if we
25 tweak that so it says, "In relation to interchange

1 fees", we would be happy.

2 MR JUSTICE ROTH: I think that is pretty much covered by
3 what we have just dealt with it, isn't it? When you
4 said internal documents as well that is about
5 secrecy -- confidentiality/secrecy, same thing -- in
6 relation to interchange fees.

7 MS DEMETRIOU: Yes.

8 MR JUSTICE ROTH: Then you say guidance as to what is not
9 for minuting. Highly unlikely there is any guidance
10 of that sort, in my view, but if there is, it comes
11 into the category of internal guidance of what
12 should be confidential.

13 MS DEMETRIOU: I think that what that means is if you
14 look at (ii), so instances, documents recording or
15 indicating instances in which there was in fact no
16 minuting so that gave guidance. We have set out
17 examples of that in the third column, examples where
18 we have got documents already within that category.
19 So if you look at the first bullet, you see there
20 those are minutes of a meeting which then says,
21 "Extremely sensitive so no papers." So it's things
22 like that which would fall -- documents like this
23 would fall within this category, but we wouldn't, I
24 don't think, fall within the previous category. So
25 we do want those.

1 MR COOK: Sir, with respect to that, sir, to the extent
2 there is anything relevant that will already have
3 been disclosed because we have already been ordered
4 to disclose all the documents from the Commission
5 and OFT investigations, all of the MMF documents,
6 all of the documents associated with the setting of
7 the UK MIFs and the EEA MIFs over the various
8 period. So if there was -- if there were minutes or
9 not minutes of a meeting in relation to these, we
10 would have found them and disclosed them. That is
11 the reason why my learned friend has points to make.
12 Since it is now a common ground that the limit is
13 going to be by reference to the EEA MIF and not any
14 other form of national MIFs, interregional MIF, then
15 they already have all the board and committee
16 meetings, minutes of those, at which the EEA MIF and
17 also the UK MIF was ever set. So they have a
18 comprehensive category of everything. There is no
19 reason for us to then go through that category again
20 to try and see if there are any examples of what my
21 learned friend seeks, because she already has those
22 documents.

23 MR JUSTICE ROTH: Ms Demetriou?

24 MS DEMETRIOU: I think the difficulty is that we don't
25 know if we have got a comprehensive set of documents

1 because obviously we have got what has been
2 disclosed, but we are asking them to conduct
3 searches to see if there are additional documents
4 indicating that discussions in relation to the
5 interchange fee weren't minuted or were otherwise
6 kept secret.

7 MR JUSTICE ROTH: What you have just been told is you've
8 got all the documents concerning the EEA and UK
9 MIFs, so if any of those documents say, "No further
10 minuting", or "This to be kept confidential", you
11 will have got it. So they have been through all
12 those documents and they have provided them and,
13 hence, all your examples. So to say they have got
14 to go and look and see if they have not missed any,
15 but they have done that exercise. I think that is
16 covered. I think you've got that.

17 MS DEMETRIOU: Sir, I think --

18 MR JUSTICE ROTH: Right, number 3. I am not entirely
19 clear what this is really asking for.

20 MS DEMETRIOU: Sir, yes. This relates to the test, the
21 legal test. It is our pleaded case. I can take you
22 back to the pleading. These are documents which are
23 directly relevant to our pleaded case and
24 Mastercard's only response is to say the first time
25 it was asked to disclose these documents was in our

1 amended reply. So be it, but that is our pleading.
2 So there no suggestion that these documents are not
3 relevant. They are plainly relevant to our pleaded
4 case and to the test, to the statutory test.

5 MR JUSTICE ROTH: Yes, but I am not quite clear what sort
6 of documents you here have in mind that are not part
7 of documents that address the EEA or UK MIF, the
8 setting of the MIF and the communications with
9 others and the internal documents about it. Because
10 insofar as they considered a duty to disclose
11 information about them, that will be in their
12 internal documents about those MIFs, won't it? I
13 agree the fact they say it is the first time it was
14 ever suggested is not particularly relevant, but the
15 real question is what additional sort of documents
16 are these beyond the broad categories already
17 identified?

18 MS DEMETRIOU: For example, any internal discussion as to
19 whether or not they owe a duty of transparency to
20 the public or to consumers. If you think that that
21 would be caught by the previous categories, then so
22 be it, but that's what we were seeking to include.

23 MR JUSTICE ROTH: I would hope it was caught, even if it
24 hadn't been specifically pleaded, because if there
25 are documents dealing with Mastercard's approach to

1 confidentiality, this is very much part of it.

2 Mr Cook, am I under a misapprehension?

3 MR COOK: No, sir. I mean as you said, sir, we are
4 ordered to provide disclosure of documents which
5 involve our internal consideration of disclosure and
6 transparency and secrecy. It is difficult to
7 envisage how there could possibly be a discussion,
8 of the kind my learned friend is talking about,
9 without it occurring in that context of somebody
10 saying, "We should disclose more because we feel
11 under a moral duty, apparently, or we shouldn't
12 disclose more for whatever reason." The reasons
13 would be it, yes.

14 MR JUSTICE ROTH: It clearly should be covered and that
15 is now on the record. It is relevant and you will
16 get it. But I don't think it needs a separate
17 category, because it is part of the previous
18 category.

19 That's (i). Then there's (ii) under 3. Now,
20 there Mastercard says -- this is about
21 confidentiality -- they would be preliminary,
22 wouldn't reflect any decision. You've got the
23 minutes and anything else is preliminary. Well,
24 there can be internal documents prior to, board
25 minutes, which are fairly succinct. I'm not quite

1 sure that is a helpful explanation Mr Cook in
2 relation to 3(ii), you say you agree in principle
3 any relevant information, documents relevant to any
4 review is potentially relevant.

5 MR COOK: Sir, I think this category has been overtaken
6 by events because you have made clear, sir, that we
7 do need to give disclosure of internal
8 correspondence of these matters. It is difficult to
9 see how this could add anything to what you have
10 already said, sir, is the appropriate disclosure.

11 MR JUSTICE ROTH: So these will be provided.

12 MR COOK: Yes.

13 MR JUSTICE ROTH: Right. I think 4(i) and (ii) are
14 agreed and then we have got 4(iii) and (iv), and
15 (iii) is OFT and (iv) is European Commission. You
16 are getting the correspondence of everything
17 exchanged with the Commission and Mr Merricks is
18 asking for what the internal deliberations behind
19 this. Is that what it is, Ms Demetriou?

20 MS DEMETRIOU: Sorry I was on mute. Yes. So the
21 internal deliberations behind this and any -- so if
22 we start with (iv), so documents and/or
23 correspondence in relation to the confidentiality
24 claims. So it is the internal consideration or
25 correspondence relating to confidentiality claims.

1 You will recall that this is a plank of our pleaded
2 case that even in their dealings with the
3 regulators, Mastercard was keen to keep details of
4 the interchange fees confidential, so we do say this
5 is plainly relevant.

6 MR JUSTICE ROTH: You get the correspondence, that's
7 agreed. Therefore you will see what Mastercard was
8 saying to the regulators has to be kept
9 confidential, but you won't in addition, as I
10 understand it, as it were, what, all the drafts of
11 these letters, the internal discussion with
12 Mastercard and its lawyers about what it can
13 reasonably ask to be kept confidential. It seems to
14 me it goes far beyond what's really necessary.

15 MS DEMETRIOU: Sir, in a sense it goes to the heart of
16 our case, because it really highlights. So what
17 Mastercard considered had to be kept confidential is
18 that the documents relating to that really go to the
19 heart of our case. Because in their interactions
20 with the Regulator, if they were saying in the
21 background, "We think that this has to be kept
22 confidential because we don't want the public or we
23 don't want merchants to know this so we want to make
24 that confidentiality claim", then that kind of
25 internal explanation is obviously highly relevant to

1 what their attitude was in terms of concealment.

2 So the upshot in terms of what the Commission
3 agreed to be confidential doesn't really take you
4 very far. What we want to see is the internal
5 deliberation about it all because that's what really
6 sheds light on what Mastercard's position was in
7 terms of concealing these things.

8 MR JUSTICE ROTH: It is not confined to what the
9 Commission agreed should be kept confidential, but
10 if Mastercard didn't ask for certain things to be
11 kept confidential, even if someone at a meeting had
12 said, "I think we ought to", but then Mastercard
13 didn't, why is that relevant?

14 MS DEMETRIOU: Sorry, sir, why is it relevant to have --
15 can you just repeat the last?

16 MR JUSTICE ROTH: I see it is not limited to what the
17 regulators actually decided should be kept
18 confidential.

19 MS DEMETRIOU: Yes.

20 MR JUSTICE ROTH: And it goes beyond to look at what
21 Mastercard asked should be kept confidential, even
22 if some of its requests were turned down. But to go
23 yet a stage further and say, "We want to know about
24 what individual views there were within Mastercard
25 as to what one might claim confidentiality for and

1 might not", as I said, as one may have said, "I
2 think this should be kept very confidential, we
3 ought to make that point", and then others say, "No,
4 we shouldn't", and they don't. What's the relevance
5 of that sort of internal discussion and
6 deliberation?

7 MS DEMETRIOU: Sir, that internal discussion is, in a
8 sense, most likely to shed light on their attitude
9 to concealment. Because if they were saying, "It's
10 important to keep this confidential because we don't
11 want merchants to find out X", then that's not going
12 to be reflected necessarily in what the Commission
13 is told. So it's precisely the internal reflection
14 on why they are making the confidentiality claims
15 that is likely to be most pertinent to our
16 deliberate concealment allegation.

17 MR JUSTICE ROTH: Have you had the documents, the
18 communications about confidentiality with the OFT
19 and the Commission yet? Has it been disclosed yet?

20 MR COOK: Yes. Sir, yes, that was disclosed in October
21 and November last year, sir. That's the Commission
22 file and the OFT file, so they have all exchanges,
23 so far as they are on the file, with both, sir.

24 MR JUSTICE ROTH: I think it is far too broadly framed.
25 There is a general failure to grapple or take on

1 board the Tribunal's practice direction on
2 disclosure, which makes very clear that it has got
3 to be -- emphasises proportionality by reference to
4 the article of the damages directive. I think you
5 go through the correspondence you've got. If there
6 is a particular claim for confidentiality made to
7 either Commission or OFT and you say, "We would like
8 to see the internal documents that led to this
9 claim", then you can ask for it. But I think a
10 blanket -- there would be a huge amount of internal
11 documentation and e-mails generated by these
12 investigations and to have to go through all of that
13 to see everything there I think goes far beyond
14 what's appropriate.

15 So conduct your search of the correspondence
16 you've got. That will tell you quite a bit about
17 their attitude to secrecy. They will have to
18 justify their requests for confidentiality to the
19 regulators. If you then think this letter begs a
20 lot of questions, then you can say, "We would like
21 to see any internal documents that led to the
22 writing of this letter." But I don't think a
23 blanket disclosure is appropriate.

24 Right, 5 is agreed. 6.

25 MR COOK: I think that's sort of a moot point, sir, we

1 dispute -- actually they already got all of the
2 correspondence anyway.

3 MR JUSTICE ROTH: I see. They say in their reply the
4 right-hand column, "Mastercard can provide the
5 relevant Bates numbers." I don't know what the
6 Bates numbers are.

7 MR COOK: Basically they are the numbers on the
8 disclosure system that are given to the each
9 document, sir. So this a request for us to go
10 through and basically review the documents to find
11 the ones that engage in this correspondence. With
12 respect, that is absolutely not a justifiable
13 approach.

14 MR JUSTICE ROTH: It looks as though you have had all
15 this, Ms Demetriou.

16 MS DEMETRIOU: That's what's being said. We weren't
17 clear we had had all of the correspondence, but if
18 Mr Cook is saying, "You have had had all the
19 correspondence with the European Commission that
20 fits within this category", and they are clear
21 having conducted searches and they are happy to
22 confirm that on the record, then we have had it.

23 MR JUSTICE ROTH: Yes, you can't expect them to go
24 through it and tell you what are the most useful
25 documents.

1 MS DEMETRIOU: No, sir.

2 MR JUSTICE ROTH: I think you have confirmed that,
3 haven't you, Mr Cook?

4 MR COOK: It is covered by disclosure searches we have
5 already done, sir.

6 MR JUSTICE ROTH: Was there anything else on the Redfern?

7 MR COOK: Sir, there was only the question of timing. At
8 the last hearing you sort of stayed the deadlines
9 for limitation disclosure on the basis there was no
10 point of us doing an exercise without knowing what
11 it was. There is a question now we have clarity, it
12 is 22 June, when should this exercise be done. So
13 my suggestion, given obviously what is going on for
14 the next four weeks, is that matters are very
15 pressed and the team is going to be very, very busy
16 indeed on both sides, which is both important in
17 terms of us doing the exercise, but in terms of
18 whether there is a need for anyone at the other end
19 to see documents because they are not going to be
20 doing much with them.

21 So I would suggest this is something that a
22 deadline in early August would be -- 26 August, sir,
23 is our suggested deadline on the basis that that
24 would then, basically it would allow us to start the
25 exercise properly once the causation trial is over,

1 complete it, and I think the next deadline is one in
2 late September for my learned friend to review the
3 documents we provide and amend their reply to the
4 extent they wish to do so. So that still gives them
5 plenty of time to complete that step, sir.

6 MR JUSTICE ROTH: Yes.

7 MS DEMETRIOU: It absolutely does not give us plenty of
8 time. This was disclosure that was meant to have
9 already been completed and we have to review the
10 documents and replead by, I think 18 September, so
11 it is completely hopeless to be dumped with
12 documents at the end of August and expect to review
13 them and replead within about three weeks. This
14 should all have been done already. That is why we
15 pressed for this hearing now. The end of August is
16 hopeless.

17 MR JUSTICE ROTH: When are you going to be dealing with
18 them, is the question in practice?

19 MS DEMETRIOU: As soon as possible.

20 MR JUSTICE ROTH: Presumably, in July your team is very
21 engaged with the trial, is it not? Or have you got
22 another team?

23 MS DEMETRIOU: Yes, the team is largely involved with the
24 trial, but there will be members of the team that
25 can be usefully engaged in this. So we are

1 certainly not saying that July is a dead month
2 because of the trial. We really do need as much
3 time as we can get to review this disclosure.

4 MR JUSTICE ROTH: Yes. Well, Mr Cook, is there a way
5 this can be done in stages, so that -- first of all,
6 I haven't even looked at the matters that are agreed
7 and have been agreed for a little while, so that you
8 have known, I don't know when the agreements were
9 reached, but in any event.

10 MR COOK: Sir, we have provided a number of tranches, I
11 think one tranche of disclosure already at the end
12 of May, sir, where those were stand-alone
13 categories. Of course, while the categories, some
14 of the later ones, were agreed, they were subject to
15 the overriding issue of timescale, i.e. time period,
16 and also whether they cover the interregional MIF.
17 So even the areas of agreement, you know, there were
18 still those overarching points to be resolved. So
19 we have given some disclosure already in relation to
20 this, and obviously a lot of the answers we give to
21 this is to say we have already given disclosure of
22 very large amounts of material for the purposes of
23 the causation trial, which almost completely
24 overlaps with this, such as the entire OFT file, the
25 entire Commission file, all of the documents

1 relating to the setting of UK and EEA MIFs. So we
2 do not expect there is going to be a huge volume of
3 material here, sir, because all that is left to look
4 for is effectively bits around the edges, were there
5 some policies at some time, was there the exchanges
6 and discussions of some policies at some time. That
7 is still a big issue to look for, sir, but in terms
8 of the product, we are not going to be talking
9 thousands of documents, sir, by any means.

10 MR JUSTICE ROTH: The major issues of scope and time have
11 been largely resolved by this hearing in your
12 favour, so your burden is to that extent very
13 curtailed. It is generally the case that while
14 everyone is incredibly busy now, once one gets close
15 to trial, the burden moves to counsel and the
16 experts and the solicitors and paralegals who have
17 been beavering away on disclosure, that has all been
18 done for the July trial. To say that, therefore,
19 they can't be continuing this because everyone is
20 involved in the trial, I can see you are and maybe
21 the partner is, and so on, but you wouldn't be doing
22 this exercise anyway.

23 So I do think we need to make some progress
24 before the holidays.

25 MR COOK: Sir, the problem of course with this case, sir,

1 is that we have not had the luxury of a clear
2 six-week preparation time that one might normally
3 hope for in litigation. So we are going to be
4 leaning very heavily on solicitors who actually are
5 familiar with the documents in the run-up to trial.
6 So they are the ones who know the documents best,
7 sir, and they are going to be important in that
8 process. That's going to be true leading right up
9 to preparing cross-examination and cross-examining
10 witnesses, particularly the expert. It is something
11 where this has ended up being a very compressed
12 process where we have not had the clear separation
13 you might think sometimes arises, sir. So we do
14 think this is something that would be best a process
15 started after the causation trial has completed, so
16 if you feel it should be done a bit faster than I
17 suggested, then sir, if you set a deadline, we will
18 have to set a deadline.

19 The deadline in any event for the completion of
20 this, sir, was 26 July so my learned friend is wrong
21 to say this should all have been done already. That
22 was the prior deadline in circumstances where it was
23 thought there would be clarity on the categories by
24 April. So there was always an expectation this
25 would be a two or three month process. With

1 respect, sir, we do say we should be given the
2 opportunity to focus on this properly once causation
3 is over and that should not cause my learned friend
4 great problems because what is left to be disclosed
5 here cannot be any means be a large volume of
6 material.

7 MS DEMETRIOU: Can I just make three points just to
8 correct a couple of things that Mr Cook has said.
9 He spoke blithely of tranches of this disclosure
10 that have will have been provided, but we have
11 received a grand total of 12 documents. 12
12 documents, I wouldn't describe documents as
13 "tranches", plural. He also says this disclosure,
14 in any event, had to be completed by the end of July
15 but he omits to say that there were set dates for
16 the tranches from May, so it wasn't all to be
17 provided at the end of July. Then he says there is
18 not going to be much of it anyway. With respect to
19 him, and his omniscience in relation to these
20 matters, he is certainly not in a position to say
21 how much disclosure there is going to be before the
22 searches have been conducted. He is certainly I
23 hope not prejudging the results of those searches.
24 It causes enormous difficulty if they are provided
25 late and they have a very, very large document

1 review team, we know from previous evidence they
2 have submitted, and they should really just be
3 getting on with it.

4 MR JUSTICE ROTH: I think 26 August is too late. If
5 people are keen to work on things through August, or
6 some will have to. It seems to me there should be a
7 little time after the end of the trial if matters
8 have to be reviewed at more senior level. What I am
9 thinking of, Ms Demetriou, is 11 August for
10 disclosure. If you need then an extra week for
11 your -- trial is not till January. You say you've
12 got to plead an amended reply by what date?

13 MS DEMETRIOU: 18 September, sir.

14 MR JUSTICE ROTH: Yes, and then which order is it that
15 sets out our timetable? Is it the October order, or
16 is it the -- no, it doesn't seem to be.

17 MS DEMETRIOU: It was the February order. I am just
18 trying to find it in the bundle but it was amended.

19 MR JUSTICE ROTH: I have got the February order. Yes,
20 just a minute.

21 MR COOK: I think that has the same deadlines, which is
22 core 1317, sir, paragraph 14 is the reply 18
23 September. We either consent to it, if we do we can
24 then serve an amended rejoinder by 20 October,
25 witness statements 27 October, reply statements 17

1 November perhaps unlikely, and then skeletons at the
2 end of December. There are not a -- the deadlines
3 after that are relatively limited, in practice. It
4 is pleading back from us and witness statements.

5 MR JUSTICE ROTH: Yes. Just bear with me a moment.

6 Looking at that, it seems to me that if the
7 re-re-amended reply is done by 25 September, that's
8 paragraph 14 of that order, it is an extra week,
9 paragraph 15 defendants confirm whether they consent
10 by 5 October, you are just considering it and
11 deciding where you consent or not. I think the
12 other dates can stand, it seems to me.

13 MS DEMETRIOU: Sir, we may need more than a week. Taking
14 into account that disclosure was supposed to be
15 completed by 26 July and we were supposed to have
16 tranches in May and June, then it may be that we
17 need more than a week. It has all got to be
18 reviewed, so it is all coming at once, it has all
19 got to be reviewed and the re-pleading has to be
20 done.

21 MR JUSTICE ROTH: Are you having a June tranche or not?

22 MS DEMETRIOU: We have had a grand total, I think, of 12
23 documents.

24 MR JUSTICE ROTH: But I don't know if that includes the
25 June tranche.

1 MR COOK: Sir, you stayed all additional steps on
2 disclosure on this at the last hearing, sir. There
3 has been one tranche. It was 12 documents because
4 as I indicated there is not likely to be a great
5 deal of consideration of these matters. So the next
6 tranche --

7 MR JUSTICE ROTH: Disclosure you said of the OFT and all
8 correspondence with the OFT and the European
9 Commission that's already been given, hasn't it?

10 MR COOK: Yes, sir, so as part of the main disclosure
11 last year, sir, the OFT file, the Commission file,
12 all of the minutes of the meetings, all of those
13 matters were disclosed last year. That's why I am
14 saying we don't anticipate there is going to be a
15 great deal because this is sniping around the edges
16 of something more informal in terms of a policy or
17 discussion.

18 MR JUSTICE ROTH: I will say 11 August. I will put it
19 back by a week to 25 September and paragraph 15,
20 this is the order of 10 February that is being
21 varied. So the date in paragraph 15 is put to the
22 25th and the first sentence of paragraph 14 is 5
23 October. I am not going to make any other changes.
24 There is liberty to apply.

25 I think you have a lot of material already and

1 I would be surprised if a huge amount of additional
2 material comes on 11 August, but you will see and
3 then you can then decide whether really you need
4 more time. But 11 August, I expect some people will
5 be away, you have then got most of September to
6 consider the reply. I think that should be
7 adequate. So that is what we are going to do.

8 MR COOK: Thank you, sir.

9 MR JUSTICE ROTH: As I said, I would sit till 1 o'clock.

10 It is now five past. Is there anything else?

11 MS DEMETRIOU: Sir, my instructing solicitors ask me to
12 clarify one point on disclosure which I think we had
13 agreed, but because I am being asked, can I be
14 certain. That Mastercard is being ordered to
15 disclose communications relating to what they do and
16 don't record. I think we agreed that I think, but I
17 just wanted to make doubly clear.

18 MR JUSTICE ROTH: Yes. If there are any sort of policy
19 documents in relation to, which apply to interchange
20 fees about what should be kept confidential, then
21 they are to be disclosed. But if they are not
22 recovering interchange fees, but other matters, then
23 they need not be disclosed. So they might have a
24 policy about how they disclose employee reference
25 files or how they disclose decisions about annual

1 bonuses, but I don't think -- those are quite
2 plausible matters that may be subject to a certain
3 confidentiality and they are completely irrelevant.
4 Be so it is not all policies on what is kept
5 confidential, only insofar as it relates to
6 interchange fees.

7 MS DEMETRIOU: Yes, so relating to interchange fees but
8 not just policies, also communications. So, "Don't
9 note that because we want to keep it" --

10 MR JUSTICE ROTH: Yes, if there are any documents
11 regarding the setting of the MIFs, that would
12 include things saying, "We shouldn't note this"
13 because something is noted, mainly the fact that we
14 don't note it. So that will have been provided is
15 what you have been told.

16 MS DEMETRIOU: Thank you very much.

17 MR JUSTICE ROTH: We have got to stop. Very well.

18 That's the end of this hearing.

19 MR COOK: Thank you, sir.

20 (1.09 pm)

21 (The hearing concluded)

22

23

24

25