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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1517/11/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 12th January 2024

Before:

The Honourable Mr Marcus Smith
Ben Tidswell
Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

IN THE

Merchant Interchange Fee Umbrella Proceedings

BETWEEN:

SSH CLAIMANTS

Claimants

v

Mastercard Incorporated and Others

and

Visa Europe Limited and Others

Defendants

APPEARANCES

Kieron Beal KC, Philip Woolfe, Oliver Jackson & Antonia Fitzpatrick (instructed by Stephenson Harwood and Scott+Scott) on behalf of the Stephenson Harwood and Scott+Scott Claimants

Brian Kennelly KC & Ava Mayer (Instructed by Linklaters and Milbank) on behalf of Visa

Matthew Cook KC & Owain Draper (Instructed by Jones Day) on behalf of Mastercard

Friday, 12 January 2024

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THE PRESIDENT: Well, good morning. I will make the usual live stream warning. These proceedings are being streamed and a recording and transcript is being made by the authority of the Tribunal. It is otherwise strictly prohibited for anyone to record or transmit, photograph, whether audio or visually, these proceedings and a breach of that would be a contempt of court, so please do not do it.

With that introduction, thank you very much for your written submissions, which we have read. Is the best way to trip through the items that are in dispute between the parties? Or does anyone want to make a sort of general statement about anything? No. I see shaking of heads. Very good.

Well, in that case, in no particular order, let us start with dates for expert reports. We felt that we have put the parties under a lot of time pressure, but we do not want to create further time pressure for Visa and Mastercard. Could we agree a date of 24 January? Or does anyone want to push back on that?

MR BEAL: Sir, that would be very helpful. The instructions I had were that every day counts; that is two extra days -- fantastic.

1 THE PRESIDENT: I will see what ...

2 MR KENNELLY: I will take instructions.

3 THE PRESIDENT: That would be very helpful. Thank
4 you.

5 MR KENNELLY: We are content with that too, sir.

6 We are content.

7 MR COOK: We are content with that, sir.

8 THE PRESIDENT: Very grateful. We appreciate that
9 it is difficult for everybody; and we are very grateful for
10 that assistance. So ordered.

11 The timetable. The main point on that is the
12 utility or otherwise of the in-chief evidence. I, and
13 I think Mr Tidswell, are on the record that we do find some
14 utility in that. That being said, it is a utility that
15 varies from case to case, and this case may be perhaps at
16 the more marginal end than at the extreme end.

17 Against utility there is the fact that we are very
18 conscious that we have shaved two weeks off the trial
19 timetable; and things might get tight. What we are
20 wondering is whether, for that reason alone, we ought to
21 jettison the rather generous in-chief allocation, with a
22 little bit of regret, but I would rather that we did not
23 start in a configuration which we then cannot change, where
24 there is real pouring quarts into pint pots when, if it
25 proves, as we strongly anticipate that it will, that it is a

1 quart and a pint pot, we are going to have to start staying
2 longer hours. I am very unkeen on guillotines because
3 I want parties to have the ability to cross-examine. Ought
4 we to grasp the nettle now and say: well, it is a five week
5 trial, not a seven week trial and we do not really have the
6 luxury of time?

7 Mr Beal, I think you are the person to speak
8 first; but you were quite rightly reflecting points that the
9 Tribunal had made to the parties and to that extent I have
10 given you a bit of a steer in terms of the price we are
11 willing to pay to free up a bit of time.

12 MR BEAL: I mean, if it is simply a question of
13 allocation of time to that process then another option would
14 be to confine it to half a day, in which each expert would
15 have half an hour plus half an hour of general questions
16 from the Tribunal, which would be a more streamlined
17 version, but still getting the benefit of each of the
18 experts seriatim being able to set out their stall and the
19 benefit of this panel being able to test the propositions,
20 to understand where the fault lines lie. We respectfully
21 agreed with the observations of the Tribunal earlier in the
22 various CMCs that that would produce real benefit. I fully
23 take on board that this is -- we are squeezing a lot into a
24 short space of time. I would hope, perhaps, that some of
25 the factual evidence will not take the full allocation --

1 who knows? Let us see. But certainly six days for
2 cross-examining four experts is tight, on any view.

3 So I readily appreciate that there is a risk of
4 overspill, but that one way of dealing with this might be
5 to, as I have said, confine it to half a day rather than
6 allocating a full day to it.

7 THE PRESIDENT: I can see that. The reason I am a
8 little cautious about that is, going back to the last case
9 I did this -- which was, I think, Phenytoin -- we had got
10 strict time limits. We easily exceeded them because it was
11 so helpful; but we had the fat in the timetable to make it
12 work. My worry about embarking upon the process is,
13 suddenly, half an hour becomes 40 minutes, becomes 50
14 minutes, because of the use of the process; and my feeling
15 is that one then gets to a situation to, well, one expert
16 got 40 minutes, surely the next expert should have the same
17 amount and, before you know it, you are in trouble.

18 So I am absolutely not pushing back on the
19 benefits, because we have articulated them. What I am,
20 I think, saying, and, in a way, I am answering the question
21 in talking, that we cannot afford the luxury of this going
22 wrong. As you have said, it is a tight line. So unless,
23 Mr Beal, you want to push back harder, I do not think
24 Mastercard and Visa are -- they are saying we should kill
25 this now.

1 MR BEAL: They are -- what they are actually
2 saying -- I do not know if you have received, sir -- what
3 I prepared yesterday was a proposed timetable which is
4 instead of having the block style produced by the parties it
5 was a sort of calendar.

6 THE PRESIDENT: Yes.

7 MR BEAL: It reminds me of my A level revision
8 plan, but it gives you a date --

9 THE PRESIDENT: It is not shaded.

10 MR BEAL: We are hoping to stick to this; but this
11 was my proposed timetable. If we can just see that there is
12 quite a lot of space built in through non-sitting days.

13 THE PRESIDENT: Yes.

14 MR BEAL: I fully anticipate that the heavily
15 resourced teams on all sides will not be turning to the
16 closing submissions at the end of the thing, they will be
17 doing it as an ongoing process as we go through, as we
18 always do. Therefore there is already quite a lot of leeway
19 in terms of people doing things on non-sitting days and of
20 course we all have to work weekends. But the outcome of not
21 having what is identified to be the beneficial process at
22 day 10 of the expert evidence-in-chief is that we fit in,
23 instead, an extra day for preparing written closings in the
24 week of Monday 18 March.

25 THE PRESIDENT: Yes.

1 MR BEAL: That is the extra space that is
2 allocated to this. Being utilitarian about it, as a
3 cost-benefit analysis, is it worth having an extra day for
4 written closings in circumstances where, in our submission,
5 the expert quasi hot tubbing process would produce real
6 benefit?

7 That is really a matter for the Tribunal. If the
8 Tribunal recognises that benefit and the quid pro quo is
9 that there is a slight restriction on time available for
10 preparing written closings then -- historically, of course,
11 we did not have time for preparing written closings in
12 trials and people simply got on with it and did it; but
13 I appreciate this is a very complex, very valuable piece of
14 litigation, and, therefore, time is needed. But I do invite
15 the Tribunal to bear in mind that Friday 15th, for example,
16 is already a non-sitting day; there is the weekend; and you
17 then have Tuesday 19 March to polish things off. I do
18 reiterate that this is a process that the parties will be
19 engaged in from the off because as and when the factual
20 witness comes in, for example, that factual witness section
21 can then be dealt with in the closing submissions.

22 I do not wish to push a ball uphill.

23 THE PRESIDENT: No, that is very helpful. Let us
24 hear from Visa and Mastercard in light of that dialogue and
25 we can take it from there. Mr Kennelly.

1 MR KENNELLY: Thank you, sir. Three short points.
2 Our first is the point the Tribunal makes itself which is
3 that ordinarily that discussion, which is envisaged, is
4 useful, but here the timetable is extraordinarily tight; and
5 inevitably the process will overrun. It is in the nature of
6 the thing and it carries real potential for unfairness to
7 the extent that it does overrun.

8 The second point: the idea of having it done in a
9 half day simply is unrealistic and far less useful. If it
10 is to be confined to half a day, each expert gets a very
11 short period for what will inevitably be a very high level
12 summary of his views, which the Tribunal will already have
13 in the reply reports and in the joint expert statement. So
14 it will add very little. What would be more useful possibly
15 is the dialogue between the Tribunal and the expert, but to
16 think that could be done for each expert fairly in half a
17 day is unrealistic and there is a real potential for
18 overspill as the President outlined.

19 Finally, because the timetable is so compressed
20 that extra day that we save by not having this
21 examination-in-chief is extremely useful. My learned friend
22 refers to the fact that there is some time earlier in the
23 trial for closings, but, critically, it is the time between
24 the expert evidence and the written closings that counts.
25 This case, as the Tribunal has already seen, is heavily

1 weighted in favour of the expert evidence and the disputes
2 between experts; and currently we have two working days to
3 draft written closings during and after the expert evidence.
4 To add a day to that would be of immense value; and the
5 written closings are of huge importance to the Tribunal's
6 ultimate resolution.

7 So, in terms of a cost-benefit analysis, it
8 plainly favours taking that day and giving it for the
9 written closings drafting.

10 MR COOK: Just a couple of points to add to
11 Mr Kennelly. I mean, first this is by far and away -- it
12 might feel like, you know, there have been interchange fee
13 cases previously -- this is by far and away the most
14 complicated there has been. The Sainsbury's trial was about
15 one kind of MIF. We are actually dealing here with three
16 separate kinds of MIF, five separate kinds of rules; and the
17 expert reports are lengthy, partly because they go through
18 each one independently and then, to some extent, in
19 combination.

20 So the idea with 30 minutes for an expert the
21 Tribunal can really get very far with essentially eight
22 issues to be dealt with is -- and there is obviously object
23 and effect within that as well.

24 So it simply cannot be sliced and diced in that
25 kind of way we would say. The other point, just to flag, is

1 more whether the Tribunal is comfortable with it, is, at the
2 moment, the plan is that written closings are being served
3 on the morning of oral closings, so there is not going to be
4 an opportunity for pre-reading; but, you know, that is sort
5 of how it is being done with the parties at the moment as a
6 sort of squeezing everything in. That is by far and away
7 not ideal because it means the Tribunal has not had the
8 benefit of reading the documents apart from alongside the
9 oral closings.

10 If the Tribunal is comfortable with that proposal
11 at the moment, I wanted to make sure you were very conscious
12 of that, not least because I have had periods -- been in
13 trials where you have gone part of the way through on a plan
14 and suddenly the judge focuses on what is happening with
15 closings late on and everything gets re-jigged; but to flag
16 now that that is what we are proposing, but it is unusual,
17 in my experience, not to have reading time.

18 THE PRESIDENT: No.

19 MR COOK: If the Tribunal is now concerned that
20 that is not a good idea and wants any form of reading time,
21 I am afraid that this is, most obviously, the first bit that
22 needs to go to accommodate that possibility.

23 THE PRESIDENT: Well, I think we have a more
24 generic concern about pressure, rather than a specific one.
25 I mean, the fact is if you are not putting in time for us to

1 read the written closings then, clearly, they will not be
2 read and you will have to bank on your oral submissions
3 having to be focused on a Tribunal that will be reading
4 those submissions after the event; and that will affect the
5 way in which forensically you do it. I do not have a
6 problem with that. You will say: I am not going to address
7 you on a point but you will find it fully addressed in the
8 written closings; if you have any questions, off you go.
9 I mean, that is a perfectly sensible way of doing it; and
10 I am not going to propose anything different. All I am
11 really focusing on here is the tension between territory to
12 be covered and what we throw into the trial timetable, given
13 that territory.

14 So that is very helpful. Mr Beal, do you have
15 anything to say?

16 MR BEAL: I would simply be repeating myself.

17 THE PRESIDENT: I am very grateful.

18 We are going to remove the in-chief or teach-in
19 elements, not because it was not a good idea to float it and
20 not because we think Mr Beal was wrong in advancing --
21 he was right to press to retain it, but weighing up the
22 risks we think that they are just too great. We will grasp
23 the nettle now, rather than in the course of week 2 or week
24 3.

25 Is there anything more that we need say about

1 trial timetable? I will be coming on to remote witnesses
2 next; but -- well, let me do that. If there is anything
3 I miss out, we can --

4 MR BEAL: Sorry, I have not invited the Tribunal
5 to move the date for the joint expert statement because of
6 the compromise position of 24 January, I did not see the
7 need to. I just make that clear.

8 THE PRESIDENT: I am very grateful. Thank you.
9 No, that is very helpful.

10 So remote witnesses. First of all, we have
11 absolutely no issue with witnesses being called remotely;
12 and we note that there is no such issue between the parties.
13 What, though, we do want some discussion of is: is it
14 envisaged that -- well, whose working day is going to be
15 disrupted, given the time differences of the various
16 witnesses? I mean, the Tribunal is perfectly willing to sit
17 unusual hours and no doubt demands will be made of the
18 witnesses to sit or give their evidence in unusual hours,
19 but we do need to plan that quite carefully. It is not a
20 matter for today, but we do need it sorted out well before
21 the witness comes into the box, simply because the logistics
22 of attendance physically in court will have to be considered
23 quite carefully if we are sitting, you know, much before
24 9.30 or much after 5.30.

25 One thing I would be unkeen to have is for us all

1 to be listening remotely in separate places. I think we
2 should be watching the same witness, with the same technical
3 issues, if they exist, in the same room, because if one is
4 making a point about demeanour, it is quite important that
5 we see exactly the same demeanour on the screen. So that is
6 something that does need to be addressed and I do not think
7 has been, at least I am not conscious of it having been.

8 The other point which is related to that is we
9 would want to understand, so that we do not have to go
10 through the witnesses giving evidence about this -- we want
11 to understand the environment in which they are giving
12 evidence; and we would want there to be clear communication
13 between the parties that they were all happy about that
14 environment.

15 In most cases, where timing is not a problem,
16 I will go through the environment in which the witness is
17 giving evidence; you know: who is sitting with you? What
18 access to documents do you have? How are you accessing
19 them? Are you going to be disturbed when you come in? All
20 these things matter. One always makes the check that there
21 is not, you know, someone sitting in the room, out of camera
22 sight saying, "Yes, that is great" or "no, stop". We know
23 that will not happen but we would like to be assured that it
24 is not happening. We would like the parties to think about
25 that so that we do not need to do anything more than the

1 usual swearing of witnesses and not ask 20 questions which
2 simply relate to the environment in which they are dealing
3 with matters.

4 Equally, we are assuming that there are no foreign
5 law issues regarding the giving of evidence in this
6 jurisdiction remotely from abroad. There are in some
7 jurisdictions, problems. Germany is one; but we are assuming
8 that is not a problem. If it is, then we would want to be
9 handling that pretty quickly because we are not far off
10 trial.

11 Lastly, the connection -- I am sure the parties
12 will be doing their level best to ensure that we have the
13 best connection that there can be, so that the evidence is
14 received in the best possible way. So these are all
15 technical matters. If you want to address us on these, that
16 is fine. I have got them on the record. Mr Beal, I do not
17 know if there is.

18 MR BEAL: If the Tribunal would be kind enough to
19 look my proposed timetable again. There are two witnesses
20 who we are proposing to call to give evidence remotely. The
21 first is on day 4, Tuesday 20 February, and it is
22 Geraldine Burke. We have pencilled her in for 2 pm that day
23 so that she gets a clean start and so that we can make
24 arrangements with her for testing the connection and so on
25 over the short adjournment. I anticipate she will give

1 evidence from Vodafone's offices in Ireland, but we will
2 double-check; and I am not aware of any issues of Irish
3 witnesses giving evidence from Ireland to the UK because of
4 the closest direct links.

5 The second one is day 8, page 2, Mr Simon Jensen.
6 Now, New Zealand is 13 hours ahead. There has been e-mail
7 discussion between the parties mooted the possibility, if
8 it meets with the Tribunal's approval, of sitting at 9 am
9 that morning, which would be 10 pm New Zealand time.

10 I anticipate he will either do it from his home or from his
11 business premises; but, either way, again we will provide
12 confirmation that there is no interference, etc.

13 In terms of slotting him in for a defined time
14 it would be very useful to give him a specific time. I am
15 anticipating, for example, that he will not be more than two
16 hours and we would then be back on track for having a full
17 day before the Tribunal in the usual order of events.

18 I have not been provided with a schedule of
19 defendants' witnesses and the order in which they intend to
20 call them; that was going to be given today. I am very
21 happy to receive it today if it is available; but obviously
22 we would need to interpose him in between the claimants'
23 evidence and some of the defendants' evidence, which
24 I appreciate is inconvenient, but he is dealing with a
25 distinct and specific issue of the UIFM in New Zealand, so

1 I do not know if that helps.

2 THE PRESIDENT: Well, that is very helpful. We
3 will take away the 9 am start; for ourselves we do not have a
4 problem with that, but there is the question of burdening
5 both transcribers and the staff that are needed to come in.
6 So we will take that away and get back to you as soon as we
7 can; but I do not know whether Visa or Mastercard have
8 anything to say. We are very happy for you to say nothing
9 but take away what we have said by way of administrative
10 checklist; but Mr Kennelly, I do not know if there is ...

11 MR KENNELLY: Well, as the Tribunal has seen from
12 our submissions we have no objection to sitting at 9 o'clock
13 to accommodate Mr Beal's witnesses; and the points the
14 Tribunal makes, we take on board and we will engage with the
15 claimants appropriately.

16 THE PRESIDENT: Very grateful. Indeed. Well,
17 thank you very much. That is very helpful.

18 Trial bundles. We are all on Opus. We notice
19 that there was an articulated statement that there might be
20 some problems. Are those problems things that we need to be
21 discussing today? Or are they just the usual problems?

22 MR BEAL: Mr Kennelly and I are collectively two
23 species of dinosaur and prefer hard copies, but that is not
24 the Tribunal's problem. So I have no need to raise any
25 bundling issue with this Tribunal at this stage.

1 MR KENNELLY: Likewise. I have a separate point
2 to make about redactions and confidentiality and the expert
3 reports, but I will make my point at the appropriate moment,
4 nearer the end.

5 THE PRESIDENT: I am grateful. Given that I have
6 now just put a line through my "Trial bundles, what is the
7 problem?" question, we are now on to -- oh, I am so sorry.

8 MR COOK: Well, yes, I mean, I am afraid I am
9 slightly more enthusiastic about electronic technology.
10 I understand the issue with the trial bundles is just that
11 they have not yet been fully finalised. There is good
12 engagement going on with the parties; but apart from the
13 fact that is a process that now needs to come to an end
14 rather rapidly. So we are not asking you to do anything,
15 say anything particularly, but just, know, we are
16 emphasising it needs to be done as soon as everyone can; and
17 I think that is a process that is ongoing.

18 THE PRESIDENT: I understand. Well, that is
19 helpful.

20 Well, that does bring us, neatly, to the question
21 of Visa against Mastercard confidentiality, which I think is
22 the confidentiality issue, Mr Kennelly, you were referring
23 to. Is it sensible for Visa or Mastercard to go first on
24 this? Or Mr Beal do you want to lead?

25 MR KENNELLY: While Mr Cook is reflecting, my

1 point is very short, so I will go first, if I may.

2 THE PRESIDENT: I am grateful.

3 MR KENNELLY: In the Trial 1 CRO provision is
4 made -- and I can take the Tribunal to it if necessary, but
5 provision is made for redactions to be made, specifying
6 whether it is confidential information or restricted
7 information and, by use of colours, indicate which it is,
8 and also to specify whose confidential or restricted
9 information is in issue.

10 Now, being realistic, it has not been possible for
11 the parties -- for any of the parties to do that for every
12 single document disclosed; and that is the pragmatic
13 approach we have all taken. But for expert reports it is
14 important.

15 Mr Holt has done that for his expert report.
16 The -- as far as I understand it, the claimants have not
17 done that. Possibly Mastercard, but I am focusing on the
18 claimants for a moment -- have not done that for their
19 expert reports; and it makes Mr Holt and his team's jobs
20 harder, when producing their reply reports, to identify,
21 when referring to the claimants' reports, what is
22 confidential information and restricted information.

23 It was required -- that labelling was required by
24 the CRO; and we ask that the claimants re-serve the expert
25 reports with the proper redactions and proper descriptions

1 as soon as possible. We are not asking for any direction
2 from the Tribunal at the moment, simply to raise it so that
3 it can be done. It will definitely speed up the work that
4 Mr Holt's team is doing; and it is required by the order in
5 any event.

6 My second point is non-confidential versions of
7 the expert reports. From my reading of the order, there is
8 no requirement for the parties to produce non-confidential
9 versions of the expert reports. The expert reports have
10 been served as entirely confidential.

11 Mr Holt did produce a non-confidential version of
12 his report which is no doubt of some utility to the
13 claimants, meaning they can show Mr Holt's report to their
14 clients, they can engage with them, to the extent they need
15 to, to reply to his report. We would ask that the claimants
16 produce non-confidential versions of their expert reports
17 for the same reasons. Plainly important that people outside
18 the confidentiality ring can follow the expert evidence in
19 the trial. Not everything in the expert reports is actually
20 confidential. So they ought to with the -- as Mr Beal
21 said -- the large resources available to them to produce
22 non-confidential versions of their expert reports as soon as
23 possible. It would assist Visa's engagement with its
24 experts. It means that we can show non-confidential
25 versions of the reports to the non-lawyers, which is

1 important for something so complex and detailed; and also
2 plainly appropriate for the trial itself.

3 MR BEAL: At the risk of cutting short my learned
4 friend's submissions, can I say it is already in progress
5 and we will do so within the next week. I hope that
6 short-circuits the matter.

7 MR KENNELLY: I am obliged.

8 THE PRESIDENT: That is very helpful. That is on
9 both of the points, the --

10 MR BEAL: Yes, Professor Frankel's and
11 Mr Dryden's.

12 MR KENNELLY: From both of the points --

13 THE PRESIDENT: Both of the points that were made
14 in respect of both of the reports? In other words, the
15 nature of the restriction and the production of
16 non-confidential versions, because I think Mr Kennelly had a
17 double barrelled...

18 MR BEAL: What usually happens is the redaction is
19 done in a colour scheme. Once that has been done, that then
20 gets blacked out and that produces a non-confidential
21 version --

22 THE PRESIDENT: Yes, I see. So the two are
23 linked.

24 MR BEAL: So the two are twinned.

25 THE PRESIDENT: Very helpful. Well, thank you

1 very much. Mr Cook, does that meet your issues?

2 MR COOK: I was told I had a confidentiality
3 problem. I am afraid that was news to me. I do not, as it
4 happens, have a confidentiality problem. What we have
5 explained in our skeleton argument, paragraphs 40 and 41,
6 was the existence of confidential versions of the trial
7 bundle, non-confidential versions, the colour scheme -- all
8 of that has been agreed between the parties. It is all
9 completely conventional. You know, it needs to be done. It
10 is a process that is ongoing; but there is certainly nothing
11 that I was planning to raise with the Tribunal.

12 THE PRESIDENT: Very grateful. In that case, we
13 can move on to -- there was some debate amongst us as to
14 whether this was the most interesting point or not. It was
15 a difficult decision, but perhaps it is.

16 It is the disclosure declarations and the issues
17 that are made by both Visa and Mastercard in regard to the
18 question of disclosure.

19 MR BEAL: Before we get on to that -- question
20 mark -- interesting issue, please could I ask the Tribunal
21 whether or not they have reached a conclusion as to which
22 day will be non-sitting --

23 THE PRESIDENT: Ah, yes, we have. The manner in
24 which you framed it in your timetable, that is to say with
25 Monday 25 March non-sitting, is right; and you can therefore

1 remove the request for confirmation that is contained in the
2 last column. Thank you for raising that Mr Beal.

3 MR BEAL: That is very helpful. Thank you.

4 THE PRESIDENT: Very grateful. So what we will
5 say, before we hear from the parties, on the question of
6 disclosure is this --

7 MR BEAL: I am sorry, sir, but there was one
8 further issue.

9 THE PRESIDENT: Not at all.

10 MR BEAL: I am not sure it qualifies as the most
11 interesting issue, sir, page limits.

12 THE PRESIDENT: Yes, I have got that as the final
13 hurrah.

14 MR BEAL: I will sit down again.

15 THE PRESIDENT: So dealing, first, then, with
16 disclosure. We can see why it is that Visa and Mastercard
17 are raising issues about disclosure. We say that without
18 intending to be in any way critical of the rather difficult
19 job that the claimants have had in dealing with a -- a large
20 group of disparate claimants and getting them to do a job
21 which they may or may not have been keen and excited to do.

22 We are not, unless either Mastercard or Visa are
23 hugely persuasive, going to oblige the claimants to re-do
24 anything; but that comes with a significant sting, which is
25 this: we do expect -- and I am sure they will do so whatever

1 our expectation would be. We do expect Mastercard and Visa
2 to identify concerns about disclosure in their closing
3 submissions. At that stage, we will have a very good idea
4 of what material -- factual material matters and what
5 material does not matter. If it is the case that documents
6 appear to be not present when, perhaps, had a disclosure
7 exercise been done better, they would be, or if one simply
8 cannot say that documents which might matter have not been
9 produced with the assurance that one would get in an
10 ordinary exercise then we would expect that to be made, so
11 that we can make the necessary factual inferences going
12 forward.

13 At the moment, we do not know whether there is
14 anything in that sort of point or not; and of course,
15 Mr Beal, your clients would be saying exactly the opposite
16 which is: we have done an exercise which is, all in all,
17 sufficient and inferences ought not to be drawn. That we
18 take for granted; but we do not think that it is an
19 appropriate matter for debate or discussion now because we
20 know the pressures that all of the parties are under. We
21 just do not think that, absent a clear articulation of gap,
22 anything can properly be done.

23 If there is, at this moment, some gap which Visa
24 and Mastercard have identified where they say: look, there
25 must be documents of this sort; we have not seen them; we

1 need an explanation, then that point should be raised not
2 before us but should be raised now with the claimants so
3 that it can be addressed. But if it is now much more, as we
4 perceive it to be, a generalised issue -- an important
5 generalised issue -- about the disclosure process, then we
6 think that the argument about adverse inference needs to be
7 left over to the closing submissions when we can properly
8 assess the importance of the point, if it turns out that the
9 facts are actually pellucid and clear, whatever the
10 disclosure process, whether it has been done badly or well
11 or somewhere in between, well, then, we do not need to go
12 into it. If, on the other hand, problems surface, we most
13 certainly will, but I would rather do it in an informed way
14 than a non-informed way.

15 So I will hand it over to Mastercard and to Visa.
16 I think, Mastercard, you are taking the lead on this, but we
17 will hear from you and then, Mr Beal, you can reply.
18 Mr Draper.

19 MR DRAPER: Owain Draper for Mastercard. We are
20 happy with that, my Lord. There is the question of adverse
21 inferences, of course, but also a more general question
22 which is just: what is the reason for a document not being
23 present? It might be said because it does not exist or it
24 might be said searches were not conducted. It is to that
25 that we will make submissions.

1 THE PRESIDENT: I understand. So it is the latter
2 of the two concerns that I articulated.

3 MR DRAPER: Well, both, I think. I just wanted to
4 emphasise that that one will certainly arise.

5 THE PRESIDENT: I see. Well, we have that well in
6 mind.

7 MR KENNELLY: I have nothing to add, sir.

8 THE PRESIDENT: Nothing to add. Mr Beal, does
9 that work for you?

10 MR BEAL: Sir, you have my view that our evidence
11 is not the dispositive evidence for this trial.

12 THE PRESIDENT: I am grateful. Well, in that
13 case, having made that point, we will say nothing more.

14 Page limits. We would be minded to say that we
15 will direct, but as an advisory page limit, the shorter
16 limits, which I think everyone is equally unhappy with. Is
17 that a way forward?

18 MR COOK: Sir, it is something I would very much
19 push back on. We are very far advanced with our written
20 closings (sic), so I am in a position of standing here in
21 effect knowing that I have a draft, we have a draft, that is
22 a long way along and having done the work. So it is not
23 sometimes, as happens, people saying: we think it is going
24 to be a problem; I am standing here today saying: we have a
25 draft at the moment which was close to 100 pages before --

1 and obviously there is another round of expert evidence to
2 go in.

3 Now, the reason why it is that long -- and it is
4 always the case that we understand that the Tribunal would
5 always rather have a concise document than a long one is --
6 as I alluded to earlier -- this is a very complicated case.
7 There are eight -- essentially eight separate issues under
8 consideration. It is more complicated than that because in
9 many cases actually it is eight issues but there are
10 separate time periods where there were different rules in
11 place, different regulatory regime in place; and sometimes
12 what we are doing is then saying: well, this -- you know,
13 the Central Acquiring Rule is a good example that there is
14 an early period, a middle period covered by the Mastercard 2
15 decision, which is not in issue, and then a later period.

16 So we end up often saying -- having sections that
17 are quite explanatory saying: this is the rule in this
18 period, this is the regulatory background, these are the
19 arguments. Then we come to the next stage.

20 So we have done the exercise of going through and
21 trying to see what we think would assist the Tribunal; and
22 there is quite a lot of exposition of what the story is and
23 what are the uncontentious facts, before we get into the
24 analytical side of, you know: is this a restriction of
25 competition? The various arguments, recognising as well, as

1 I said, in many cases there is an allegation it is an object
2 infringement, there is an allegation it is an effects
3 infringement. We then run defences sometimes of objective
4 necessity. So, you know, there are a lot of sub-issues even
5 within that.

6 So I can stand here today saying: now, ultimately,
7 we all know that whatever page limit is directed -- I know
8 you are talking about an advisory one -- you can always trim
9 it down. Our concern is if we trim it down below 100 pages
10 then we are going to end up taking out detail that will
11 genuinely assist the Tribunal, because otherwise you are
12 going to be launched into factual evidence which is -- you
13 know, it is going to be less directly focused on particular
14 rules in the sort of clear different eight separate issues
15 sense; the expert evidence which is just going to be
16 launching into different sub-matters. We think unless we
17 can give you that exposition and that framework, which is
18 essentially something that is going to be, you know, almost
19 a giant table that you can then go back to us and say:
20 right. Okay. We are moving on to the card rule in this
21 time period. Great. We can see that we can look at what
22 the rule was. You know, we can cut -- so we have actually
23 cut and paste in it: this is what the rule was at this
24 time. You actually have that kind of detail. Then, you
25 know, we are going to be in the middle of the expert

1 evidence and the Tribunal is going to be either thinking or
2 asking the parties: so what exactly was the rule at that
3 time period? You know, what was the position?

4 So the documents that give that clarity we think
5 is going to make a lot of assistance to the Tribunal. So if
6 we take the detail out we just think it is going to be less
7 helpful for you, which is why we have suggested -- and, you
8 know, I am genuinely sitting on a draft which is 100 pages
9 at the moment with more expert evidence to go in. We can trim
10 it, but I think we are going to be taking out things that
11 would help you.

12 THE PRESIDENT: Is there a portion of that
13 document which is setting out what you would hope is a
14 common position and that could be agreed between the parties
15 as a common position, which we could read, as it were,
16 detached from your opening submissions?

17 MR COOK: There will be aspects of that -- it
18 would be quite limited aspects of that -- that fall into
19 that category.

20 THE PRESIDENT: Right.

21 MR COOK: I think, in practical terms, it is going
22 to, again, be more helpful to have it in a document that
23 actually says: that is the rule, this is the regulation.
24 There are disagreements about -- we say in many cases
25 because the claimants have not and their experts, in their

1 initial reports, have not fully grasped some of the ways in
2 which the regulatory regime has changed over the time
3 period. So I am not sure how far those are -- they should
4 not be in dispute, but certainly the initial drafts of the
5 expert report --

6 THE PRESIDENT: That is what everyone says.

7 MR COOK: -- show people might have just missed
8 some of the detail with those; but also it is just simply
9 a -- realistically it is a time period problem here which
10 is, you know, expert reports have not finalised yet; then we
11 have got the joint expert statement, opening submissions
12 coming in very quickly. The process of trying to agree
13 something, I think, is going to be quite difficult in that
14 process. It is also likely to be a disagreement, as much as
15 anything, about the significance of some of these points; so
16 a point that we are keen to emphasise the significance of
17 that the claimants may not see the same significance.

18 THE PRESIDENT: Well, Mr Beal, I think the notion
19 of an advisory limit that we know is going to be breached
20 already is not appropriate.

21 MR BEAL: The suggestion that the card schemes --
22 cannot state in objective terms what the card scheme rules
23 were for a given year from 2007 onwards seems far fetched,
24 if I may say so.

25 If a document is capable of being produced saying:

1 this rule was introduced at this date and it is sourced by
2 reference to the Opus 2 documentation and reference number
3 then of course we can agree that because it is very
4 straightforward; and you do not need the exposition behind
5 that in that document. You can have a much more focused
6 document where brevity is indeed the source of wit, rather
7 than having reams and reams of exposition; but I am in the
8 Tribunal's hands because ultimately you have to read it.

9 THE PRESIDENT: Well, we have got to read it. We
10 have also got to write a judgment. So we will direct the
11 longer limits, but I want to make clear that we would be,
12 ourselves, assisted by a form of foothills document that we
13 could essentially insert into our judgment as something
14 which represented an agreed process or agreed chronology
15 regarding rules and rule changes between the parties. I do
16 not think it would be appropriate to say anything more than
17 that, given what Mr Cook has said in relation to potential
18 agreements or disagreements. We do not know the documents that
19 Mr Cook has in mind; he does; and he rightly is not going to
20 tell us very much more about it because it is in the process
21 of being worked on, but I think that is something that we
22 would be assisted by; but it is not a point that is related
23 to the question of length of document.

24 We have got three extremely capable legal teams
25 before us. We are not going to tell them how to do their

1 job. You all know that we appreciate brevity because it
2 makes our job easier and we will read more the shorter
3 submissions than the longer ones because one can read
4 shorter things twice over, whereas a longer document, if it
5 takes longer, well, one reads it once. You know that, but
6 we do not, I think, think it is appropriate to force Mr Cook
7 to start hitting the "delete" button or more likely
8 translate what is in the main text into an annex -- that is
9 the other way of side stepping these things. So we will
10 direct the longer limits.

11 Is there anything more that I have missed in the
12 list of documents or points to be addressed? Would it help
13 if we rose for five minutes just to enable the parties to
14 take stock? It would be a shame if you left the courtroom
15 thinking about? No?

16 MR KENNELLY: Sir, the only point I wanted to add
17 was -- and we are very grateful for Mr Beal indicating that
18 next week his team will produce a compliant version of the
19 expert reports and a non-confidential version, but if it is
20 the back end of next week that leaves things very late and
21 tight for the purpose for which I have made the request. It
22 will be useful to have an earlier commitment from Mr Beal.

23 MR BEAL: It will be dealt with as soon as
24 possible. That is the best I can do. I mean, it is in my
25 interests to get it in as soon as possible as well because

1 we can then finalise the bundles and I can start marking up
2 the proper final versions in hard copy.

3 THE PRESIDENT: Well, I do not think we can go
4 further than that. It is clear that everyone is working to
5 capacity. You have made your point, Mr Kennelly; and I am
6 sure it will be taken fully into account by the claimants'
7 team. So I do not think it would be right to make any kind
8 of direction. So we will not.

9 Thank you all very much. We look forward to
10 seeing you on day 1 of the trial. Thank you.

11 (11.18 am)

12 (Hearing Concluded)

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