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

Case No: 1517/11//7/22

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

12 Wednesday 24th April 2024

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15 Before:

16
17 The Honourable Mr Marcus Smith

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19 (Sitting as a Tribunal in England and Wales)

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22 **Merchant Interchange Fee Umbrella Proceedings**

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25 **A P P E A R A N C E S**

26
27 Philip Woolfe KC and Oscar Schonfeld (Instructed by Scott + Scott UK LLP and Stephenson
28 Harwood LLP) on behalf of the Stephenson Harwood and Scott & Scott Claimants and
29 HMRC

30
31 Ben Lask KC (Instructed by Pinsent Masons LLP) on behalf of Allianz

32
33 Mark Brealey KC (Instructed by Mishcon de Reya LLP) on behalf of Ocado

34
35 Tristan Jones KC (Instructed by Hausfeld & Co LLP) on behalf of Primark

36
37 Daniel Piccinin KC and Aislinn Kelly-Lyth (Instructed by Linklaters LLP and Milbank LLP)
38 on behalf of Visa

39
40 Matthew Cook KC and Owain Draper (Instructed by Jones Day and Freshfields Bruckhaus
41 Deringer LLP) on behalf of Mastercard

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43 Jack Williams (Instructed by Willkie Farr & Gallagher (UK) LLP) on behalf of Mr Walter
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2 **Wednesday, 24th April 2024**

3 **(10.30 am)**

4 **MR JUSTICE MARCUS SMITH:** Well, good morning. Before we begin, two points of
5 housekeeping. First of all, the usual live stream warning. These proceedings are
6 being live streamed and by my direction transcribed. There will, therefore, be
7 an official recording and an authorised transcript. It is, however, strictly prohibited in
8 any other way to record, transmit or photograph these proceedings and a breach of
9 that injunction is punishable as a contempt of court. I know I don't need to say it, but
10 I have anyway.

11 More generally the reason I am alone is not because I want to sit alone, but because
12 of the diary question. I am therefore going to try and proceed in as consultative
13 a manner as possible in that I have spoken in some depth with both panel members,
14 but in particular Mr Tidswell as effectively co-chair. It may be that if matters that we
15 haven't anticipated emerge, I will not be able to give as clear a steer as possible,
16 because I am very conscious this is dealing with the shape of Trial 2 and both Visa
17 and Merricks have made some fairly chunky arguments about procedural fairness. If
18 I feel that it is appropriate when we adjourn to discuss, I will have to, as it were, hedge
19 my bets and come back, but I hope -- final point -- in light of the very helpful discussion
20 that we had at the hearing last week that, in fact, this is going to be less complicated
21 than we anticipated going forward. It is always very dangerous to say that, but I am
22 touching wood, but I hope that a number of the issues have at least been aired.

23 So subject to those general points to whom do I hand over?

24 **MR PICCININ KC:** There seem to be some different ways in which it could be done.
25 You have seen my objections which are of a fairly fundamental nature to the
26 applications that have been made.

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

2 **MR PICCININ KC:** I am conscious it is not actually my application. I am in your hands
3 as to how you would like to proceed. I could in the space of 45 minutes or so make
4 a submission if that would be helpful.

5 **MR JUSTICE MARCUS SMITH:** First of all, you can take it I have read your very
6 helpful submissions. I think it would be helpful if you did that and I could identify my
7 concerns about Visa's approach, so let's do that and then maybe we need to have
8 those who are in support of the Visa position following and then I will hear the major
9 objections and I think that would be Mastercard first followed by the body of the
10 Claimants followed by the specific claimants like Primark. So shall we do it that way,
11 but I think -- I don't want to cut anyone out, but in a sense I think I want to get to the
12 discussion of the problems. I know the problem very well. It is really how we resolve
13 it that matters. I don't think length is going to help me very much, but you have already
14 got that, Mr Piccinin.

15 **MR PICCININ KC:** I have got that. I am not going to spend a long time on
16 background. I do just want to spend a couple of minutes explaining where we are
17 coming from.

18 **MR JUSTICE MARCUS SMITH:** Of course.

19 **MR PICCININ KC:** The reason I want to do that, sir, is that in a situation like this where
20 there have been lots of hearings with a shifting pass and not many orders made for
21 reasons we all understand, there is a risk that either the parties misunderstand where
22 the Tribunal is coming from or vice versa. So I want to avoid that. So we have
23 absolutely heard, including I have heard or read what you had to say about these
24 applications on Friday and we think we understand where the Tribunal is coming from.
25 If I could just summarise my understanding of that so that you can correct it if it is
26 correct, sir.

1 The proposal that was discussed on Friday is that we should allow the Claimants to
2 put forward the positive case that they want to put forward in July using materials that
3 they already have in their own possession. At the same time the idea was I thought
4 today that you would adjudicate to the extent possible Mastercard's requests for
5 materials that Mastercard says it needs for its positive case to the extent that those
6 are not agreed, but then you want to leave open the question of whether any of that
7 qualitative evidence from either the Claimants or Mastercard is ultimately worth
8 anything for part of the process that comes after that and in particular, as I have
9 understood it, your proposal is that the parties will have an opportunity to probe each
10 other's positive cases in the period between July and September, including by
11 requesting more material that they need in order to prepare their responses, and
12 indeed the Tribunal itself will participate in that, can call it a tyre kicking process in that
13 period as well.

14 Then ultimately, most importantly, at trial we can have the argument about whether
15 any of this qualitative evidence matters, and if it doesn't the idea, as I understand it, is
16 no harm done. We had the evidence in and decided we didn't need it. All we have
17 done is spent a little bit of money.

18 So the upshot of all that, as we have understood it, is we should get back in our box
19 and have our big argument about relevance that we have aired in previous hearings
20 that I know you know well, sir, at trial. We understand that approach to the case
21 management conundrum that is facing the Tribunal and we can see why that approach
22 has its attractions from the perspective of the Tribunal.

23 We have also definitely received the message loud and clear that you are not going to
24 decide the questions of relevance of this material on an interlocutory basis. We are
25 conscious of that, but we are also conscious that you have always said often, very
26 fairly, that if a party sees a big problem coming down the road they need to raise it

1 with the Tribunal in a timely fashion so that it can be dealt with.

2 I know you know, sir, that we have also consistently said that if the Tribunal were to
3 allow qualitative evidence in, our position has always been that that will create
4 problems of triability. It is not just that the material is costly to produce and irrelevant.
5 That's not the thrust of our submission. It has also been that it cannot fairly be
6 accommodated in this trial. That has been our consistent refrain over the past two
7 years.

8 But if that was all I had to say today, I could still understand the Tribunal telling me to
9 pipe down and come back in July when I have something more concrete to complain
10 about, once we have seen the positive cases. We have heard what you say about not
11 wanting to decide questions about evidence in the abstract and maybe that's where
12 you are going to end up anyway, sir, but I just want to make clear to you at the outset
13 that we have thought about that possibility, that approach, and what we are saying is
14 that our concern is that a suck it and see approach, if I can summarise it in that way,
15 is just not going to work here.

16 **MR JUSTICE MARCUS SMITH:** Why not?

17 **MR PICCININ KC:** So just to summarise why not, our position is that if you grasp this
18 particular nettle now, then you can resolve the issues between the parties fairly to
19 everyone in the way that we have set out, but if we don't do that --

20 **MR JUSTICE MARCUS SMITH:** Look, that is the problem, because you say that and
21 Merricks say that. Mr Cook is not going to say that. He is going to say "We need the
22 material in for a fair trial" and so is the Merricks class representative and so are the
23 Claimants. So what you are doing is you are saying "We would like something which
24 other parties in the interests of their fairness would like to have articulated at trial.
25 Please exclude it now". That's what you are saying.

26 **MR PICCININ KC:** Not quite, sir, because we are leaving open -- I am going to come

1 on to this and show you what they have actually said about why they need it for trial in
2 a moment, but we have heard what you have said about not wanting to prevent them
3 from running their case based on qualitative evidence. Our way of dealing with that,
4 as we have said, is to allow them to argue at trial that qualitative evidence --

5 **MR JUSTICE MARCUS SMITH:** I know the preliminary issues. Look, I don't like
6 preliminary issues.

7 **MR PICCININ KC:** I don't like it either, sir. It is just our way of squaring the circle.
8 That's our proposal. Why can't we decide it this in July? That was the question you
9 asked me.

10 Our answer, sir, if we leave it until July our concern is that it will be impossible at that
11 stage to solve the problem in any way other than a nuclear way of one kind or another
12 that would result in the adjustment of the trial.

13 **MR JUSTICE MARCUS SMITH:** That is the bit of Visa's skeleton I really didn't
14 understand. Let's cut to the chase. We have had this positive responsive case in the
15 timetable for nearly a year.

16 **MR PICCININ KC:** Yes, sir. Well, I am not sure.

17 **MR JUSTICE MARCUS SMITH:** The point is we have said we don't want a disclosure
18 process and I bristle every time I hear someone say disclosure. This is not
19 a disclosure process. What it is is a process where each party puts in their positive
20 case with sufficient granularity for it to be tried. That includes, let us be clear, a warts
21 and all approach, because if someone puts in a cherry picked positive case you are
22 going to deal with it in cross-examination and it is going to go down the drain. That's
23 the way these things work.

24 Now the only reason we are talking about disclosure is where one party has material
25 that the other party needs. So Mr Schonfeld's clients don't have a problem. Primark
26 don't have a problem because they have got their stuff already. I don't understand it

1 to be ranging elsewhere. So disclosure is not an issue there. It is Mastercard that has
2 the problem, because they are saying "We would like to understand more about the
3 qualitative evidence in support of the quantitative evidence either for our positive cases
4 in July or in anticipation of what we may want to put in our responsive cases in
5 September".

6 Here is one of the reasons I don't think your two-month period is right, because there
7 is no reason at all why you can't, as Mastercard are very responsibly doing, raise the
8 issue of what you want to see before July, even if you don't use it in your July material,
9 even if it only appears in September.

10 So I don't accept the point that two months is not enough, because that has been in
11 from the moment we, the new panel, took over in this case. Frankly the objection you
12 are making is, I think, based upon a misunderstanding of what we have put in place,
13 because we are not talking about a form of disclosure in order to follow a conventional
14 route of witness statement, experts' reports, pleadings, all that stuff. What we are
15 doing is we are saying we want one package. Work towards that. It is all the material
16 to run the trial in that package. Then you take it apart. Now that has been elucidated
17 for a long time.

18 **MR PICCININ KC:** Sir, it has been since January when, if I recall correctly, the
19 positive/negative case timetable was put down. That's fine, but in January that was
20 put down on the basis that the only types of evidence that anyone actually had
21 permission for at that stage was going to be data and if anyone wanted to have
22 anything beyond data, they needed to apply for it and we were going to have this
23 hearing to discuss whether it could be allowed.

24 **MR JUSTICE MARCUS SMITH:** That's not quite right. I mean, you are absolutely
25 right that we have been spending not months but years talking about sampling and we
26 have cut that particular Gordian knot, but the stage process, that has been around for

1 longer.

2 **MR PICCININ KC:** Yes. My concern is not about whether the stage process has been
3 around for longer. My concern is about what's in it.

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

5 **MR PICCININ KC:** Because it has only been -- up until now it has only been data and
6 there has not been permission for anything else. That's where we left it in January.

7 **MR JUSTICE MARCUS SMITH:** That's again putting it wrongly. We have never said
8 that any party should be closed out from running a positive case that they want to run.
9 I mean, that is just a submission that is really asking for trouble.

10 Look at it from my point of view. Let's suppose I give you that you want and say "That's
11 it. I don't care. It is the qualitative evidence and I am not prepared to entertain at trial
12 any argument about the value of the qualitative evidence that Mastercard and the
13 Claimants are wanting to put in".

14 Let us say hypothetically that there is an appeal of that decision. One of the points
15 that will be taken will be that you, the Tribunal, failed to put yourself into a position
16 fairly to hear the case because you excluded stuff which someone was saying was
17 relevant at an interlocutory stage when, by the way, you were saying quote "we are
18 not going to decide questions of substance".

19 Now, of course, I accept your submission will be that this stuff does not matter at all,
20 but that's allowing Visa to call the substantive shots.

21 **MR PICCININ KC:** Not in the preliminary issue proposal, if I can put it that way, sir,
22 but I accept --

23 **MR JUSTICE MARCUS SMITH:** That depends on your being right that there is no
24 interconnection between the qualitative evidence and quantitative evidence. What you
25 are saying is that even though we are getting only qualitative evidence, that is from
26 the people who are providing the quantitative evidence, there is no nexus between the

1 two. That's a very bold submission, if I may say so.

2 **MR PICCININ KC:** I think that's what I need to unpack a bit, sir. I can accept that
3 obviously the preliminary issue proposal is a last resort. It is not something that's
4 desirable in its own right.

5 I think what I need to do is take this a little bit more slowly and then explaining where
6 the problem is in detail and if you reject it, sir, you reject it. That's fine.

7 My starting point is an understanding of what this evidence is said to go to. To be
8 clear, it is not for the purpose of saying that it doesn't go there and it is irrelevant.

9 That's just because we need to understand how it is going to be deployed at trial in
10 order to understand whether deploying it at trial is going to be a fair process or not.

11 One of the extraordinary things about the position we find ourselves in, sir, is that
12 despite this Tribunal repeatedly asking the Claimants to do that, to explain with
13 precision and clarity what it is they want to do with the material, they still have not done
14 it. They still have not done that.

15 Despite not having done that job, there is one issue where it is very clear what they
16 want to do with the material, and that is really the critical point, which is what is called
17 the proxy question. So there is no doubt that is at the very least one of the purposes
18 that they want to deploy this material for.

19 **MR JUSTICE MARCUS SMITH:** Do you oppose that or do you accept that it should
20 go in?

21 **MR PICCININ KC:** We oppose that, sir. That's what I want to explain.

22 **MR JUSTICE MARCUS SMITH:** Right. Okay.

23 **MR PICCININ KC:** What is the proxy question? The group of Claimants that I am
24 going to refer to as the "substantive Claimants" -- I don't mean that in a pejorative way
25 but just to identify them -- are going to be providing data on their costs and their prices.

26 The point of doing that is so that they can then do a regression analysis that seeks to

1 measure the impact of the costs on the prices.

2 The question is going to be which cost? The Claimants by and large want to say that
3 what you should be measuring is the impact of some category of overheads or
4 administrative expenses or that kind of thing on prices. They expect that that's going
5 to give them a nice low pass-on rate one anticipates.

6 On the other side at trial what you are going to have is Visa saying that you should be
7 using cost of goods sold or some other category of variable cost like that.

8 **MR JUSTICE MARCUS SMITH:** I know that.

9 **MR PICCININ KC:** I know, sir. This is just a couple of minutes by way of introduction
10 to my submissions.

11 **MR JUSTICE MARCUS SMITH:** No, no.

12 **MR PICCININ KC:** Where that's going to leave you is with a binary or at least discrete
13 issue at trial, which is which of those proxies that are being put forward is the right one
14 to use, and depending on which one you select you will be selecting a different pass-
15 on rate that comes out of the regression analyses.

16 Now we had a two-day hearing in January to discuss how the different experts
17 envisaged putting forward their analyses at trial, including the selection of proxies, but
18 not a single one of them put forward any methodology to deal with this point about
19 whether you need qualitative evidence in order to make the selection of this proxy
20 other than their opinions as economists that that was what they think is right.

21 So that prior question of whether you should just analyse the costs objectively as
22 an economist or whether you need to look at how the costs are categorised and how
23 they are treated in the price setting process, the prior question on all of the material,
24 the hundreds of pages of material that have been put before you over the past two
25 years, is going to be just a question of economists' opinions and submissions.

26 **MR JUSTICE MARCUS SMITH:** And they would say some measure of qualitative

1 evidence that they can use to feed their opinions.

2 **MR PICCININ KC:** I will look at that in a moment, sir, but the answer is no.

3 **MR JUSTICE MARCUS SMITH:** Look, it may be that you are absolutely right, but
4 what you are asking the Tribunal to do is to say that you are right months before trial,
5 months actually before the positive cases have even been put together.

6 **MR PICCININ KC:** Sir, if I can just show you one brief exchange from the January
7 hearing where we discussed this very point.

8 **MR JUSTICE MARCUS SMITH:** Look, okay, you can, but I think you need to
9 understand that this Tribunal has been throughout the period firefighting with the
10 tractability of how to deal with this matter. Bear in mind we spent -- and I regret
11 this -- eighteen months trying to lance the sampling boil.

12 Now we were not talking then about qualitative material. We were talking about
13 material in the whole. A lot of time was wasted in dealing with matters which were
14 never ultimately resolved because no one could agree on a sample, because I strongly
15 suspect a sample is not indicative of the group as a whole.

16 **MR PICCININ KC:** Yes.

17 **MR JUSTICE MARCUS SMITH:** So what we did was we said without ruling on
18 qualitative material we said "Let's go down the quantitative route with a more or less
19 who is willing to provide it approach". What we then got was Mr Moser saying "I think
20 we can get 20 people in our grouping who are ready to do it".

21 Then we had popping out of the woodwork, extremely helpfully, people like Primark
22 and Ocado saying "We also as separate claimants are able to assist". We have been
23 managing the matter on this basis, but we have never been excluding out. What we
24 have been doing is including in. That's how we have been dealing with it. We are
25 kicking the can down the road in the hope, clearly in vain, that the can will get smaller.

26 In other words, what we are trying to do is we are trying to ensure that we have

1 a manageable Trial 2 with manageable evidence going forward, and intrinsic to that
2 process, is the framing of positive cases without fetters in July.

3 Now if you are saying that you need more than two months between July and
4 September, then say so and we will think about redoing the timetable. I would be very
5 reluctant to do that, but if you want to make effectively an adjournment application on
6 the basis of an unmanageable process in the timetabling terms, then be my guest, but
7 I do not want, but what I am getting, I do not want a revisiting of a process that the
8 Tribunal has thought of quite carefully and has put in place for some time.

9 **MR PICCININ KC:** Sir, I don't think I am revisiting anything that has been actually
10 decided before today or at least before Friday, sir.

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

12 **MR PICCININ KC:** It is clear from you said to me --

13 **MR JUSTICE MARCUS SMITH:** I confess I think you are. You see, it is the difference
14 between excluding and including in. What we have been doing is we have been
15 working out what goes in. That's what we have been trying to do. So yes, we started
16 with the quantitative evidence and that was a problem in and of itself. It took us, as
17 I say, 18 months to sort it out and in the end it was the Tribunal that had to sort it out
18 because if we were still talking about sampling, we would still be talking about sampling
19 now, but we weren't saying that's it, that we have drawn a line.

20 **MR PICCININ KC:** No, I am not suggesting you had said -- what I am suggesting is
21 that you said if anyone wanted to rely on qualitative evidence, then they needed to be
22 making an application.

23 **MR JUSTICE MARCUS SMITH:** They needed it, yes. So that's what Mastercard are
24 doing, but it is not closing out the Claimants who have the material from putting it in.

25 **MR PICCININ KC:** It applied to the Claimants as well, sir.

26 **MR JUSTICE MARCUS SMITH:** Not if they have the material ready. They have not

1 made a disclosure application.

2 **MR PICCININ KC:** No, sir, but they have made an application for permission to rely
3 on the evidence that they wish to rely on.

4 **MR JUSTICE MARCUS SMITH:** I must say that seems to me entirely redundant.

5 **MR PICCININ KC:** That's exactly what you said in January needed --

6 **MR JUSTICE MARCUS SMITH:** What we said in January was we wanted a positive
7 case with everything in it. How can we properly say to someone "In order to run your
8 positive case we are going to allow you to, with one hand tied behind your back".

9 **MR PICCININ KC:** Sir, if you could just look at page 4205 in the bundle. It is in
10 tab 110.

11 **MR JUSTICE MARCUS SMITH:** Of course. Yes.

12 **MR PICCININ:** From line 9 you are referring to a point -- I can't remember who
13 actually was making it. Dr Trento had been making. You say:

14 "There will obviously be an order regarding adoption of expert evidence. There will be
15 permission to call expert economists. We are not going to give permission for anything
16 else".

17 So not for other types of experts like pricing experts at that stage. Line 16:

18 "There will be no further permission for anyone. That's not to say there won't be room
19 for further witnesses either expert or factual, but we propose to maintain a strict control
20 over the evidence that we hear at the end of the year because we don't have unlimited
21 amount of time. We have a very limited amount of time."

22 So no permission was given to the Claimants at that stage to rely on material even if
23 --

24 **MR JUSTICE MARCUS SMITH:** You are wrong. What we were envisaging was that
25 the factual evidence would go in via the economists. That's the point about expert led
26 processes.

1 **MR PICCININ KC:** Perhaps if we can put to one side that --

2 **MR JUSTICE MARCUS SMITH:** The way we see this working is the economists. It
3 worked perfectly well in MIFs one and it seemed after Friday to be working quite well.
4 That's what we have been working towards over the weeks. What we are saying is
5 we don't want this to be driven by the lawyers. We want this to be driven by the expert
6 economists for whom permission has been given. The expert economists are leading
7 the positive case. Of course they are going to require help.

8 Now at the moment there is no application for an expert economist to be helped by
9 an industry economist and we agree that if you are going to be calling an extra witness,
10 that's fine, but that's not what's being proposed here. What's being proposed is in
11 order for them to do their job, the expert economists need certain material. In the case
12 of the Claimants, they don't have to worry about an application, because they have
13 got it already and it goes into the positive case.

14 Mastercard have a problem because they don't have the material and they would like
15 to have it in order to do their own positive case or perhaps their responsive case.
16 Frankly I am indifferent as to which it is, but that's all that's happening. There's no
17 application, as I understand it, for an additional expert, but if there was, we'd hear it.

18 **MR PICCININ KC:** I think there is, sir --

19 **MR JUSTICE MARCUS SMITH:** Well, let's --

20 **MR PICCININ KC:** -- from the SSH Claimants.

21 **MR JUSTICE MARCUS SMITH:** Are you objecting to that?

22 **MR PICCININ KC:** Yes, sir.

23 **MR JUSTICE MARCUS SMITH:** We can hear the expert applications. At the moment
24 we are on qualitative evidence?

25 **MR PICCININ KC:** Yes.

26 **MR JUSTICE MARCUS SMITH:** Let's lance the qualitative evidence boil and come

1 to specific applications next.

2 **MR PICCININ KC:** Okay. I think what I need to explain, sir, is why we perceive that
3 allowing the Claimants to rely on that material is going to give rise to unfairness and
4 that is already --

5 **MR JUSTICE MARCUS SMITH:** Go ahead.

6 **MR PICCININ KC:** There are two reasons. They are both presented in our
7 submissions. I will start with the second of them first because it is simpler.

8 The problem is this. Assume for the moment that you can determine at trial by
9 reference to the internal subjective qualitative evidence that the Claimants put forward
10 that the best proxy for MSCs for some particular claimant, some particular merchant
11 is overheads or some other similar category. So, in other words, assuming that one
12 or more of those self-selecting claimants get their evidence in and they persuade you
13 at trial that they are right about what I am calling the proxy issue. What then?

14 To make it more concrete let's take an example. Think of Hilton, for example, which
15 is one of them. Then you can calculate the pass-on rate for Hilton by reference to
16 whatever proxy it is that they identify. Great, but what is the Tribunal supposed to do
17 with that, because you keep telling us, sir -- the Tribunal keeps telling us that it is not
18 in the business of simply determining pass-on for individual merchants. That's not the
19 exercise we are doing here, but then what are we going to do with the pass-on rate
20 that you calculate for Hilton, if you have calculated it on a basis that depends on the
21 precise way in which Hilton categorises its costs and sets its prices.

22 The question is what are you even supposed to do with that number when the thing
23 you are looking for is a pass-on rate that can apply to a single hotel as well, like the
24 Savoy or like Chewton Glen, who are other Claimants in the SSH group.

25 Equally what reason is there to suppose that Primark's approach to cost categorisation
26 or setting prices will have anything at all in common with the approach that's taken by

1 Dr Martens.

2 I need to show you just one paragraph from --

3 **MR JUSTICE MARCUS SMITH:** I don't disagree with that. I mean, if it was common
4 ground that sampling could solve the problem, in other words, that one could
5 extrapolate from A, B, C or D to work out what the position was for the rest of the
6 alphabet, we would be doing it, but the reason we spent 18 months trying to answer
7 that was because actually nobody could agree on the sample.

8 I infer, and I think with some good reason because one can't extrapolate from
9 a sample. So everyone is trying to pick the instances that would favour them. Now if
10 that's the case and if it is absolutely clear, as I think it is, we are not deciding individual
11 cases, we are deciding pass-on in the ground informed by such evidence as there is,
12 then if extrapolation is not possible, if this data is useless to understand pass-on
13 generally, well, then what is the problem? You win?

14 Now it may be that it is, in fact, useful. I don't want to anticipate, but I don't want to
15 close out that possibility. It may be it is useful, because -- by that I mean not useful
16 on an individual basis, because we are not trying individual claims, but useful in the
17 generic we are trying all of these actions together basis. If so, then I want to have that
18 evidence before us so that we can consider it. What you are doing is you are asking
19 us to close it out.

20 Now it may be, though I don't think that's a very real possibility, but it may be that
21 something comes out of the woodwork which enables us to reach a view that, in fact,
22 the process is an incomplete one. In other words, we have made a bad job of trial
23 management and we can't actually fairly determine the matter because we haven't got
24 all the evidence in.

25 Now I don't think that is going to happen, and everything we are doing to put in place
26 by way of anterior steps is intended to avoid that risk, but if it eventuates then we will

1 have an ineffective trial and effectively you will get your preliminary issue by the back
2 door and we will have to manage that accordingly.

3 I don't think that is going to happen, because we are alive to the risk and we will come
4 to how to manage that later on this morning, but I don't think you should be
5 assuming -- and we will hear the individual Claimants to see if this is actually their
6 position -- I don't think you should be assuming, because I am certainly not, that if
7 Primark come along with a bunch of individual material and say "Please decide the
8 Primark case as if it was a trial of Primark before us", we are not going to do that.

9 We are deciding X hundred, going up to 2,000 cases in the round and we think that it
10 would be useful to hear the Primark and the Ocado and the other Claimants' evidence
11 in order to decide that. We are not saying that it is demonstrably useful. We can't say
12 that. We are not prepared to say, however, that it is so useless that we get it out of
13 the system now and try it without that matter.

14 Your preliminary issue point does not work because of the connectedness of the data.

15 I have said a number of times -- I don't have the transcript references -- that we want
16 to adopt a triangulation process. We have a real sense of usefulness in what's
17 an incredibly difficult question of having more fact rather than less and we are
18 prepared to take a degree of risk of irrelevant material in order to have that ability to
19 triangulate. That's why we want Visa's approach. That's why we want Mastercard's
20 approach. That's why we want the Claimants' approach. Actually that's why we want
21 the Merricks' approach, because we enable a better decision by seeing different
22 viewpoints as to how one calculates a generic phenomenon and working out what
23 factors cause that phenomenon to change.

24 The reason that Primark and the Ocado data is important is not because they help
25 resolve the Primark and Ocado case. It is because they enable us to understand
26 a general phenomenon that we will then apply generally across the multiple Claimants

1 so that we get a proper answer. That is what we have been doing from day one.

2 **MR PICCININ KC:** Sir, I understand that. The point that I am trying to make is that in
3 that part of the argument, the part that the Claimants are seeking to advance, there is
4 concealed an untriable question. That's why I tried to set out before what it is that the
5 Claimants are trying to do with this material, because what they are trying to say is
6 that because Primark subjectively categorises its costs in this particular way and then
7 uses this measure of costs and not that measure of costs when it is subjectively setting
8 its prices, when you do a regression analysis of Primark's prices on Primark's costs,
9 you need to use this particular category of Primark's costs in order to do the regression
10 analysis. That is what they are proposing to do, sir.

11 I think you are right that we are all on the same page, that they are not doing that
12 because you want to give a judgment on what Primark's pass-on rate is, but that is the
13 outcome of conducting that regression analysis. The point of doing it is supposed to
14 be, and this is where we come to the untriable question, sir.

15 **MR JUSTICE MARCUS SMITH:** What is the untriable question?

16 **MR PICCININ KC:** That's what I am about to state, sir. The untriable question is what
17 does that tell you about anybody else's prices, about anybody else's pass-on rates
18 because if you have calculated the Primark pass-on rate in a way that depends on the
19 idiosyncrasies, the ways in which Primark categorises its costs and sets its prices,
20 then you unavoidably run into that question of extrapolation that you said you don't
21 want to answer, and you rightly said you don't want to answer it because you can't.

22 **MR JUSTICE MARCUS SMITH:** Thank you. Does everybody agree with that
23 formulation of the untriable question, just as a matter of head count? Yes or no will be
24 enough.

25 **MR WOOLFE KC:** We agree the question of generalisation is a question. We don't
26 agree it is untriable.

1 **MR JUSTICE MARCUS SMITH:** Right. Anyone else?

2 **MR JONES KC:** Similarly we don't agree it is untriable. I had understood that my
3 learned friend's position was that it should be tried but in a different later trial rather
4 than it shouldn't be tried at all.

5 **MR JUSTICE MARCUS SMITH:** Mr Brealey?

6 **MR BREALEY KC:** I completely disagree with what's just been said.

7 **MR LASK KC:** Sir, as I said, we agree that's what the issue is, but again not that it is
8 untriable.

9 **MR WILLIAMS:** Sir, just for completeness we don't agree.

10 **MR JUSTICE MARCUS SMITH:** Just how fair do you think the process would be, the
11 gentlemen who are saying it's untriable, if I say it goes out before positive cases go
12 in? Do you see it as fair or unfair?

13 **MR PICCININ KC:** Sir, the difficulty that I have with the process which we have just
14 conducted is that this is a point that we have been raising consistently for years. What
15 I have not had, it is one thing to say that Mr Brealey says it is triable. What I have not
16 heard at any stage in these two years with hundreds of pages of expert material with
17 a hot tub that you can -- sir, very fairly giving everyone the opportunity to say what
18 they had to say, what I have never heard is an answer to the question of how that
19 question is supposed to be tried.

20 **MR JUSTICE MARCUS SMITH:** Mr Piccinin, that is the point of the positive case.
21 That's when the rubber finally hits the road. You see, we spent quite a lot of case
22 management hearings before Trial 1 talking about sampling and we had a large
23 number of hours spent just ensuring that we had a proper extraction of the evidence
24 so that everybody was in a position to make the arguments that they could at trial. Do
25 you know what? The sampling evidence actually was not used. The parties went to
26 other arguments and that's great because the material was brought into the ring. It

1 was then not used perhaps as much as we anticipated it would be. And that's
2 absolutely fine because the whole point about a fair process, particularly in adversarial
3 system is that you give the party who wants to make a point the opportunity to do it.
4 That is what we are trying to do here.

5 Now we, of course, accept that it is probably the most difficult question in competition
6 law at the moment how one assesses in a situation where proxies are uncertain
7 because there is so much noise in light of the size and matter. We accept that this is
8 a really difficult question. We also understand, as is common ground, that enormous
9 amounts of money turn on this because when you aggregate it all up you are talking
10 big money.

11 It is very important in that context that we have a process that is fair. We also need
12 a process that is manageable because we can't try hundreds of cases individually.
13 We can't do a Trucks 1 case for every case. I can't do Ocado and Primark and Allianz
14 in one go without being very controlling about the evidence but also having a very
15 clear eye on fairness.

16 What I really don't understand is how it is that Visa, well manned as it is in terms of its
17 teams, can seriously be suggesting that the exclusion of evidence which lots of other
18 parties are saying we need in order to put our case, should be excluded before the
19 positive cases come in. We understand the points about fairness. We have always
20 understood them. That's why we have responsive cases. That's why I am going out
21 of my way to say that if you are concerned about an absence of material that enables
22 you to rebut these points, go for it, but, as I understand it your point is actually not
23 going to help. That's absolutely fine.

24 **MR PICCININ KC:** It is more than it is not going to help, sir. The point was nobody
25 has articulated how it can be tried at all, notwithstanding having been given many
26 opportunities to do so. My concern, sir, is that we can just park it and see in July. Of

1 course we can do that. If we do that my concern is what you are going to have is the
2 positive cases have already been written. The expert reports have already been
3 written on the basis of the material that the Claimants have been allowed to deploy.

4 **MR JUSTICE MARCUS SMITH:** I think what you are presuming, Mr Piccinin, is that
5 you are actually wrong and there is mileage in this point and you won't have time to
6 deal with it. I mean, what you are doing is you are saying "I am a little bit scared of
7 what they may be doing --

8 **MR PICCININ KC:** No --

9 **MR JUSTICE MARCUS SMITH:** Let me finish. "I am a little bit scared of what they
10 may be doing and if they come up with something that is actually really rather good,
11 I may not have enough time to knock it on the head or in fact I may not be able to
12 knock it on the head at all".

13 Now if that is the position we will hear an adjustment of the timetable question in July.
14 If you come to us and say -- let's pick a party at random -- "Mr Brealey, Mr Jones have
15 done such a good job that actually we think our defence is in trouble because we think
16 there is something to this" -- I am sure you would not put it this way, "and we need
17 more time to deal with it," of course these applications come along all the time, and it
18 ought to be tolerably clear by now that this process is one which is not operating by
19 the ordinary rules.

20 Now if it was the case that this was an ordinary bilateral dispute and Mr Jones was
21 saying "I am not going to articulate my case in pleadings. Go away", of course I would
22 send Mr Jones away with a flea in his ear, because the way one does the manageable
23 case with a single party is by way of pleadings and disclosure and witness statements
24 and experts' reports. We are precisely doing the inverse. We are saying "We don't
25 know what the answer is and we don't think it can actually be framed as a pleading.

26 What we want is we want the economists to take the lead. We want them to identify

1 that which they need to put forward their opinions. If they need other experts to help,
2 then they should ask. If they need documents from the other parties, they should ask,
3 but otherwise off they go."

4 That is when one gets what you are so keen on, the pleadings. We get them in July,
5 on 20th July, and we have built in for some time a period which enables the trial to
6 take place when scheduled.

7 The reason it is so kaleidoscoped, and we think kaleidoscoped fairly, and I am sorry
8 about this but there we are, the reason that has been done is because we spent 18
9 months faffing around trying to work out how to deal with this and getting precisely
10 nowhere.

11 So to that extent I share your pain, but there is no adjournment application before us.
12 I don't think that adjournment is necessary, but if someone makes that application we
13 will hear them obviously, but this is the way we have been proceeding for a long time.
14 I don't accept the point that this was only clear in January, because we have been
15 stressing this approach since the first rulings that Mr Tidswell, myself and not
16 Mr Justice Roth, but a third chair whose name now escapes me, took over this case
17 and registered a degree of unhappiness about a pure sampling process. So we have
18 been tilling this particular furrow admittedly in a generic way for nigh on two years,
19 because triability has been the problem from the very beginning, and instead of saying
20 "Let us have 2,000 cases tried from day one to Christendom", we have rejected that
21 approach.

22 We have also rejected the approach because everyone has agreed sampling isn't
23 capable of extrapolation. So we have gone down this approach. We are saying "We
24 don't actually know what the material is. We are leaving it to the economists to work
25 it out, but they need the material in order to do so", and we have been groping towards
26 that, starting with the list of 20. I don't know what we are down to now. We are actually

1 framing the qualitative evidence quite well because we have already established we
2 are going to draw from the same well as the quantitative evidence. There is not going
3 to be external additional qualitative evidence going there. That seems to me a big win
4 that has come out of the iterative process that we have been doing.

5 What you are doing is you are really saying "Yes, we see what the Tribunal has been
6 doing for months but let's kill it and start with something completely different".

7 **MR PICCININ KC:** No, sir. Sir, I have made my submission to you about the problem
8 of extrapolation and I anticipate you don't like that submission.

9 **MR JUSTICE MARCUS SMITH:** No. I am agreeing with you.

10 **MR PICCININ KC:** That it gives rise to unfairness is what I meant. I can see you don't
11 accept that that issue gives rise to any unfairness because your position is --

12 **MR JUSTICE MARCUS SMITH:** I just don't understand why, because if you are right,
13 then you are right, aren't you?

14 **MR PICCININ KC:** Yes.

15 **MR JUSTICE MARCUS SMITH:** So why are we -- you see, your concern is -- it is
16 understandable. It is the lawyers' concern of the unknown. "Have they got some point
17 up their sleeve" --

18 **MR PICCININ KC:** No, it isn't that.

19 **MR JUSTICE MARCUS SMITH:** -- "which is going to screw me at trial?"

20 **MR PICCININ KC:** No, sir, it is not that. My concern is that even if they do have
21 evidence of how Primark set its costs, set its prices and approached its costs, that we
22 don't have any methodology that has been put forward at all as to how --

23 **MR JUSTICE MARCUS SMITH:** Yes, and you will be saying in opening and in closing
24 and no doubt in between "It doesn't add to the price of fish". Do you know? I might
25 agree with you, but I would rather agree with you after having heard the evidence than
26 before. That's what it boils down to.

1 **MR PICCININ KC:** I don't want to press that point further. I would like to move on to
2 my second.

3 **MR JUSTICE MARCUS SMITH:** Am I wrong?

4 **MR PICCININ KC:** Yes, sir.

5 **MR JUSTICE MARCUS SMITH:** Why am I wrong?

6 **MR PICCININ KC:** We say you are wrong. The reason we say you are wrong is
7 because if you allow this evidence in, if you allow the positive cases that they say they
8 want to run in you are scheduling a trial that includes within it a question that is just
9 untriable. No-one has put forward a methodology for how it will be tried.

10 **MR JUSTICE MARCUS SMITH:** When you say untriable, I think you mean that it is
11 not possible from individual evidence to make any form of extrapolation generally, that
12 is what you are saying. It is untriable in the sense that it doesn't lead to an outcome
13 that is meaningful. Is that how you use the term untriable?

14 **MR PICCININ KC:** Nearly. The way that I am using the term untriable is that the
15 question of how you can draw your inferences from these categorisations of pricing
16 decisions made by Primark for other fashion retailers is not a question that you can
17 have evidence and argument on at this trial which will lead to any kind of resolution.

18 **MR JUSTICE MARCUS SMITH:** No, that's not I think the way you can put it. It is too
19 vague. Let's work out what actually the untriable question is, because that may be the
20 key.

21 What I think you are saying is that the evidence that they want to bring in is totally
22 useless and therefore should not be heard. Let me be clear. By totally useless, it may
23 be totally useless even if this was a Primark versus Visa case, which this isn't, because
24 that all turns on the proxy selection. That's your primary position, isn't it?

25 **MR PICCININ KC:** That is our position at trial. I am not asking you to find that.

26 **MR JUSTICE MARCUS SMITH:** I understand, but we wouldn't be having this

1 argument at a Primark versus Visa level because you would be saying "Well, okay.
2 Maybe it is arguable. We will let it in and I will be able to deal with matters as it comes
3 but, in fact, our position is going to be that Primark's evidence on this point is
4 fundamentally useless because the proxy should be the proxy we say".
5 Fine. You can make that point. What we are not going to be doing is saying if it is
6 right and you are wrong on the proxy question, we are going to be using the specific
7 evidence in Primark to decide Primark only. That is clear. So the question then
8 becomes is there any mileage in having this material in, as a deep dive into elements
9 of the market, the 20 odd days cases or less that we are going to be having because
10 it is just conceivable that it may shed light on our ability to extrapolate to other material.
11 That's what we are doing.

12 Now I understand you say, and I have a lot of sympathy with this, that if you can't
13 effectively sample then you can't effectively extrapolate. That's absolutely fine, but
14 how can I possibly say with six people saying "This is not utterly meaningless. This is
15 something on a generic pass-on basis that we want the court to hear", how can I say
16 no even if I am enormously sceptical about the exercise?

17 **MR PICCININ KC:** Well what you can quite legitimately do, sir, and it is what
18 I understood you were doing up until this hearing, this application or at least until last
19 week, is say if somebody wants to take the Tribunal down that route of introducing this
20 kind of evidence, then they at least need to say how it is that they are going to use it
21 to conduct that extrapolation.

22 **MR JUSTICE MARCUS SMITH:** Yes. I think you are chewing at the wrong end of the
23 stick there, Mr Piccinin. So we have consistently said that disclosure needs to be
24 expert led and we have consistently said that if an expert asks for this disclosure, prima
25 facie they get it. Where we have said we want an application because we have been
26 trying to do it by consent because we have been very clear that when we have got the

1 experts leading the process what they want is what they on the whole get. Where the
2 objection comes in is where the expert is saying "I need this" and the producing party
3 is saying "This is going to cost me an arm and a leg".

4 **MR PICCININ KC:** I understand the issue --

5 **MR JUSTICE MARCUS SMITH:** Let's finish the thought because I don't think you do,
6 "It is going to cost me an arm and a leg to produce or I can't produce it, and therefore
7 I am going to say no".

8 Now at that point if it is not in existence, I imagine it won't emerge before the Tribunal,
9 but if there is a money question, a proportionality question then, of course, we do need
10 to understand the purpose and the production process but it is not something that
11 constrains any of the parties who have their own documents. They don't need to make
12 an application. Their experts simply can go and do it and I imagine they are already
13 doing it. They would be pretty irresponsible if they weren't.

14 So we are back to the problem of the asymmetry between Mastercard and the
15 Claimants. There is no asymmetry between Visa and the Claimants because you are
16 taking a different tack. You are saying "It doesn't matter. Don't need to look at it. It is
17 irrelevant". That's fine. That is your case. It is not Mastercard's case.

18 **MR PICCININ KC:** Moving on to that point, I am afraid that's not quite right either.
19 Certainly it has always been our position that the way the case should be tried is by
20 reference to the data and economic theory, but if the Claimants are going to be given
21 permission to put forward their evidence on how they set prices in order to rebut the
22 inferences that would otherwise have been drawn from economic theory, then we
23 would need to have a proper investigation of the cost categorisation and price setting
24 and all of the mechanisms.

25 **MR JUSTICE MARCUS SMITH:** Doesn't that depend on the point they are making?

26 **MR PICCININ KC:** We know what point they are making.

1 **MR JUSTICE MARCUS SMITH:** No, you don't because you haven't seen their
2 positive case yet.

3 **MR PICCININ KC:** What they have said already is they want to use their approach --

4 **MR JUSTICE MARCUS SMITH:** Mr Piccinin, I don't know whether it is going to
5 amount to a row of beans. You don't either. What you want to do is you want to stop
6 them making the point.

7 **MR PICCININ KC:** The reason I want to stop them making the point, sir, is because
8 if they are allowed to make the point there is not going to be a fair way to test it at trial.
9 This is my second reason, moving on, sir, because the investigation of the
10 mechanisms through which one cost or another cost or a category or whatever it is or
11 competitor's prices, the investigation of the concrete practical subjective mechanisms
12 through which those impact prices is just inherently one that is going to take time.
13 Now I understand that you are not doing a trial. I do understand, sir, you are not doing
14 a trial in the old fashioned way like we did in the first wave of litigation where you have
15 a full investigation of all the materials and you take two weeks per claimant, or anything
16 like that. I understand that is not your idea, but the problem is that a quick and dirty
17 approach, which seems to be what is on the cards, is --

18 **MR JUSTICE MARCUS SMITH:** You are wrong and here is for why. Let's suppose
19 that you are wrong in this respect also that there is, in fact, mileage in the subjective
20 approach. Let's suppose that as a matter of generic understanding it is the case that
21 we perceive that your objective econometric analysis is not the right course but instead
22 how the subjective pricing policies and pricing approaches and accounting approaches
23 of the parties actually are useful material in terms of extrapolating across a class of
24 claimants. Let's suppose we get there. Now that's implying you lose on a number of
25 points.

26 **MR PICCININ KC:** Yes.

1 **MR JUSTICE MARCUS SMITH:** The one thing that we are not going to be able to do
2 is say if it's right that there is a subjective element, that here is the basis on which one
3 extrapolates out the subjective elements across all 2,000 claimants. We won't be able
4 to say that, but we will be able to work out if it matters, which you say it doesn't, how
5 it matters. That is one of the virtues of the trial, because we will be able to work out,
6 assuming that you are wrong, just how one feeds in subjective questions into a generic
7 approach.

8 Now I, for my purposes, find it very hard to understand how that can be right. It is
9 incredibly difficult to frame, because what you are saying is that actually there is some
10 way in which the purely subjective feeds into the objective and that seems to me
11 an extremely strange thing, but I don't understand how these businesses work and
12 I think I need to.

13 Now if it were to be the case that there was a bridge by which one could use the
14 subjective to extrapolate into the generic, then at least we could in Trial 2 work out the
15 evidence that one actually needs in order to resolve the issue fairly. There is no way
16 we can -- again assuming you are wrong -- there is no way we can on a non-sampled
17 basis work out what can be drawn from the Primark instance and from anything else,
18 but we will be able to frame what evidence is needed going forward.

19 We will be able to make a questionnaire that matters, and effectively but as a last
20 resort you get your preliminary issue, but we don't decide it ex ante. We decide it ex
21 post.

22 Now it means that actually nobody loses on that basis. I don't think it is going to
23 happen but I can't decide that question now. I can't possibly do that.

24 **MR PICCININ KC:** Sir --

25 **MR JUSTICE MARCUS SMITH:** So what I am seeking to do is to put in place
26 a process where the point can be made, where it can be argued, where you can knock

1 | them dead and explain why it is wrong. We will get a benefit out of that, because we
2 | will be able to try it without sort of holding a finger in the air and working out what
3 | evidence we need to try an issue that we don't yet understand.

4 | So I don't really get your fairness point either, because the last thing we are going to
5 | be doing, because you will have us on toast in the Court of Appeal, is requiring Visa
6 | to accept a result that it hasn't been able to litigate. Of course not, but I don't think we
7 | are going to get there. The thing is if we do what you are saying we will never get
8 | there, because you effectively win before day one has even started. Before day one
9 | of the trial you get your way. I am saying that with considerable sympathy with the
10 | way you are putting your case because it seems to me quite a natural thing that pass-
11 | on ought to be informed by objective rather than subjective matters, but I could easily
12 | be wrong. You could easily be wrong. That's why we have trials.

13 | **MR PICCININ KC:** Sir, I understand that and we are at risk of just repeating ourselves.
14 | I don't agree with it but I understand that.

15 | I want to move on to my next point. You have given an answer to the submission
16 | I have been making and that's fine. I have a further submission which is not targeted
17 | at the extrapolation problem, it is targeted at the prior point of how it is we are even
18 | supposed to work out the subjective qualitative position for ten to 20, as you say,
19 | different merchants in a six week trial that is taking place this year, because that is
20 | something that again on the Visa side we just can't understand how that could feasibly
21 | be done.

22 | If I can just unpack that a little bit, sir, our concern is that – with this question. You can
23 | tackle – this question of how prices are set can be tackled at a superficial level or it
24 | can be tackled more deeply. At a superficial level if you just look at how the costs are
25 | categorised in the accounts and how the people who are in a day-to-day sense
26 | responsible for setting prices or even setting budgets go about setting them in the

1 ordinary course, that might tell you one thing and it may well be that when we look at
2 the ten to 20 merchants, the Hiltons and Primarks and so on, that they all say at that
3 skin deep level "Look, the MSC is in this bucket and this bucket doesn't really enter
4 into the price setting process or doesn't to the same extent as other categories of
5 costs", but the problem we have is that if our case about economic theory is right, then
6 you would need to look much deeper in order to see that in the qualitative material and
7 you need to have an understanding of how even costs that are in the buckets that don't
8 feed directly into pricing can have an influence through competitive pressures and
9 pressures from shareholders.

10 **MR JUSTICE MARCUS SMITH:** It is the same answer, isn't it?

11 **MR PICCININ KC:** Sorry. It is the same?

12 **MR JUSTICE MARCUS SMITH:** The same answer to your earlier first objection. We
13 don't know, do we? We don't know how they are going to be making good their case.
14 One thing they are going to be doing is making good their case so that each side has
15 a fair attack in the course of however many weeks we have allocated for the hearing
16 of this.

17 Let's be clear. We are not having a situation where the Claimants take all eight weeks
18 and you are left with a sliver of the ninth week. We are going to have fairness and
19 that's going to be at trial and before trial, but we can't really get a grip on how this is
20 being done until we see how it's being done.

21 Now I know you want your pleadings, but we have told you that you are not getting
22 those. We have told you many times you were not getting those. What we have said
23 is you are going to get a positive case which makes that point and produces the
24 evidence and then you have a go at knocking it down, but you do it when the other of
25 the positive case, because everyone gets a chance to put a positive case in, you too.

26 It is just your positive case is rather closer to the Merricks positive case than the other

1 parties.

2 Now that is all within the context of a case where everybody understands that we are
3 not trying matters individually. We are not doing 2,000 bilateral disputes. I understand
4 that. That does mean that there is a grey area, resolvable at trial but not now, where
5 one determines the value of the individual case into a different methodology to the one
6 you are contending for, or into a means of extrapolating perhaps from your
7 methodology. It may be useful for you. I don't know. That's all we are talking about.
8 That's why we have given an obligation on the positive cases not to plead something
9 away, because this is not pleading driven. You can say until you are blue in the face
10 "Yes, subjective orientation matters". I am on the record because I think it was in the
11 second hearing when Mr Rabinowitz made this point. I said I don't get how subjective
12 pricing works but that's not for me to decide now. I can't decide that now. What you
13 are doing is you are saying "I hear what you say, judge. Don't decide it now, judge,
14 but kind of do".

15 **MR PICCININ KC:** Sir, that's not what I am saying but I think you have heard our
16 submissions.

17 **MR JUSTICE MARCUS SMITH:** I have.

18 **MR PICCININ KC:** I am conscious, sir, that there are other matters you need to deal
19 with today as well. So I don't want to spend all day going over the same ground.

20 **MR JUSTICE MARCUS SMITH:** The trouble is we are hanged either which way,
21 aren't we, because you are saying it is unfair if we go down this route and the other
22 parties will say it is unfair if we go down your route.

23 **MR PICCININ KC:** I do understand that, sir.

24 **MR JUSTICE MARCUS SMITH:** What I think is the margin by which to resolve these
25 equally potent submissions is by making clear that we have put in place an unusual
26 but we think fair process. Now you are saying it is unfair. I am saying I don't think you

1 can possibly say that at this stage.

2 **MR PICCININ KC:** I understand.

3 **MR JUSTICE MARCUS SMITH:** I think I am absolutely not saying that if you come to
4 me at the end of July and say "For these very concrete reasons it is not going to work",
5 that I am going to slam the door in your face and say "Get lost, Visa". Why would
6 I want to say that?

7 **MR PICCININ KC:** In that case, sir, I think--

8 **MR JUSTICE MARCUS SMITH:** This is a very hard situation. We are trying to
9 try-- I don't think this has ever been done before, but because we don't want to have
10 2,000 odd cases of tried seriatim, which is effectively the alternative given that
11 sampling can't work, what choice do I have? So I have got to make it work. The one
12 thing I can't do is have this argument where I'm saying I am sympathetic to your points
13 on the substance but I don't know what the answer is.

14 **MR PICCININ KC:** I understand that, sir. You are saying "Come back in July".

15 **MR JUSTICE MARCUS SMITH:** What else can I do today that won't be grotesquely
16 unfair, with someone saying they don't get their chance? What can I do to make Visa's
17 position more comfortable?

18 **MR PICCININ KC:** Sir, we have made our proposal. I don't think there is anything
19 else. I don't want to press it further now.

20 **MR JUSTICE MARCUS SMITH:** (Overtalking). That is your answer?

21 **MR PICCININ KC:** That was our way of--

22 **MR JUSTICE MARCUS SMITH:** How does that resolve the interaction between
23 quantitative and qualitative? I know you say there is not such a thing but that's doing
24 exactly the same as deciding in advance.

25 **MR PICCININ KC:** You are right, sir, to this extent that our submission rested on the
26 proposition that nobody had identified anyway, but if you don't want to decide that

1 today and what you are saying to me is we can come back in July and you would
2 rather hear that argument, if it needs to be made, in light of concrete positive cases
3 that have actually been advanced, then I hear that. That's what we will do.

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

5 **MR PICCININ KC:** That's fine.

6 **MR JUSTICE MARCUS SMITH:** Well, it is not fine.

7 **MR PICCININ KC:** I shouldn't have said it is fine. It is not fine, but that is--

8 **MR JUSTICE MARCUS SMITH:** It is not fine, because I do want to make this clear.
9 We are in the end of April. What I think Mastercard are doing-- I don't want to be
10 second guessing the tactics-- I think Mastercard are scoping the concern that they
11 can't rebut positive cases in advance of the positive case coming. Mr Cook, you don't
12 need to answer any of this, but it seems to me what Mastercard are looking for is stuff
13 which may go into their positive case but may also go into the responsive case. If Visa
14 want to do that-- well, let me put it differently.

15 I think they should want to do that, because if there is a way of making a good case
16 that you are running stronger, then you should be identifying the material that is
17 needed in order to do that. Of course, you may say you can't do that because the
18 point is unarticulated, and I understand. If that's the case, then you clearly can't ask,
19 you obviously can't ask for the kitchen sink and everything because that would make
20 the process up to positive cases in itself unmanageable, and indeed Visa's skeleton
21 very helpfully identified certain areas of qualitative evidence that it thinks should come
22 in.

23 The reason I am so troubled by this point now and the reason I am pushing back so
24 hard is because we are actually getting to a situation where a high degree of
25 manageability has already been imposed on the quantitative evidence. We have got
26 a limit. I don't know how far we are finally to the list of limited protagonists who are

1 providing quantitative data, but we at least agree that that set will only be providing
2 quantitative data. So we have already excluded 1,800 claimants and the rest of the
3 market. Now that is from my point of view pretty good news.
4 So it is then a question of managing the policing so you can make fair points in
5 response to what they know they are going to be adducing.
6 Really the problem is this. You think there is an unarticulated middle ground. You
7 think that there is something between the pleading and the positive case that enables
8 you to get going. I don't think there is because I think if there was they would have
9 done it. They would have done it because it would have enabled a closer focus from
10 the Tribunal to get what the parties wanting qualitative evidence were trying to get in.
11 So the problem is I think you remorselessly slide from pleadings, which we all agree
12 are useless because they will just articulate it, to the full fledged monty of the positive
13 case. That has been the problem from day one. I recall pressing Ms Smith, I think,
14 Ms Kassie Smith on this. How does it all work? How does pass-on work? Her answer
15 was "You don't need to worry about this. It is burden of proof." So the argument at
16 that time was actually we don't need to worry about this very difficult question, because
17 actually the burden lies on the other side and it is your problem. Well, that went down
18 very badly because we don't decide cases on the burden of proof. We decide cases
19 on the evidence and the burden of proof is the last resort, so we moved on from that,
20 but it has always been at the heart of this case how you manage it. We have been
21 trying to manage it for, as I say, 18 months plus, and this is just the latest iteration of
22 a manageable problem.

23 **MR PICCININ KC:** Yes, indeed.

24 **MR JUSTICE MARCUS SMITH:** But I think the problem is getting smaller.

25 **MR PICCININ KC:** Yes. We are immensely sympathetic to the scale of that problem.

26 I can say as well -- I have had instructions now -- the very helpful articulation of the

1 process forward from here that you have just made is something we can work with.

2 **MR JUSTICE MARCUS SMITH:** That is helpful. I mean, one of the benefits, and
3 I know I have been giving you a hard time, Mr Piccinin, but it is useful, because it
4 informs all of the expectations of everyone. I mean, I have said certain things about
5 how we are handling this case, which I hope will be helpful for others.

6 **MR PICCININ KC:** Yes.

7 **MR JUSTICE MARCUS SMITH:** So you have certain markers which I am sure you
8 will be banking. I hope to the extent that anyone thinks that those markers have been
9 articulated by me too forcefully, they will stand up and say so, not that I intend to
10 resolve it, but I wouldn't want it to be said by Mr Piccinin later on "You said this" and
11 you lot didn't object. I am not going to change the course, but I do want the thinking
12 to be clear about where everyone is sitting and the benefit of this exchange, and it has
13 been hugely beneficial, is that we have all been putting our cards on the table, the
14 Tribunal in particular, as to how we are trying this, because there aren't rules of
15 procedure for this. The reason is because it is impossible to frame them in advance,
16 because if you do that you are trying the case in advance, and we are seeking to
17 manage extraordinarily difficult warehouse litigation in a manner that is above all else
18 fair.

19 It is probably worth ending on this point and I know you were not pressing your
20 arguments anymore, Mr Piccinin, and that's very helpful, but I do want everyone to
21 understand that we are obviously interested in an efficient trial process, proportionate
22 costs and a manageable trial but at the end of the day fairness trumps that.

23 **MR PICCININ KC:** Yes.

24 **MR JUSTICE MARCUS SMITH:** At the moment I think we have a process that does
25 square the circle that's both fair and efficient, but if we have bitten off more than we
26 can chew, if we find that it doesn't work then we will have to look at it again.

1 | There are two tensions there, just to unpack those. We have been quite deliberately
2 | opaque about the exceptions process.

3 | **MR PICCININ KC:** Yes.

4 | **MR JUSTICE MARCUS SMITH:** And I think Visa was very keen that we stay opaque
5 | about that because what we don't want is serried ranks of people who were very happy
6 | to engage in the trial process producing a generic result suddenly finding that there
7 | were exceptions when once they didn't like the generic result.

8 | So you can't have an articulated exceptions process, just as you can't have articulated;
9 | let's set our case before the evidence process, because these points -- it's exactly the
10 | same question. These points are not capable of proper resolution until you actually
11 | see the colour of the very difficult factual money that is being put on the table here.
12 | Thank you for enabling me to say that, because it wouldn't have been said but for your
13 | forceful and very careful submissions. So I am very grateful.

14 | **MR PICCININ KC:** I am very grateful for the time that you have given me, sir. If I could
15 | just trespass on you for five more seconds just to take one quick instruction.

16 | **MR JUSTICE MARCUS SMITH:** Please do.

17 | **MR PICCININ KC:** Nothing further, sir.

18 | **MR JUSTICE MARCUS SMITH:** Nothing further. Merricks, I will hear from you.
19 | I don't, Mr Williams, need to hear from you very long, because I think the Merricks
20 | situation is rather more straightforward than Visa's. You see, Visa are party and for
21 | reasons which are blindingly obvious, I take points of articulated unfairness
22 | extraordinarily seriously because they are undermining the whole process.

23 | You don't actually have that problem, because we have quite deliberately parked your
24 | status as a party to these proceedings until we have a degree of concrete
25 | understanding -- it will never be perfect -- a degree of understanding about what the
26 | evidential basis will be, and if you want to, when that is clear, withdraw your application

1 for UPO then we will, of course, hear that, and I want to make clear that the making of
2 an umbrella proceedings order is one that is in the Tribunal's discretion and we could
3 make an umbrella proceedings order even if you didn't want us to do so, but it goes
4 without saying that we will listen very carefully to any points of unfairness that you
5 made if we were saying "Right. The time has come now for you, Merricks, to come
6 in", and you were saying "Thank you. We may have asked for that a month or two
7 ago, but we have rethought ourselves and we would rather have our own trial". That's
8 something which we will want to think about.

9 So to that extent that is why I will cut you quite short on fairness, because having
10 I hope at least for a month or two dealt with the concerns that Visa have, your concerns
11 don't add very much, because you are out, not in.

12 **MR WILLIAMS:** Sir, I understand that, but with respect Mr Merricks does have
13 prejudice against his case regardless of whether he is involved in Trial 2 or not at this
14 stage. So it is important in my submission to hear and understand those points of
15 prejudice that Mr Merricks will suffer in my submission regardless of his involvement
16 in Trial 2 or not, which do arise.

17 I have, of course, heard and listened very carefully this morning to the submissions so
18 I'll be incredibly brief, but it is perhaps my worth making a limited number of points just
19 to develop the three points, sir, that you will have seen from the position paper signed
20 by myself and Mr Simpson so they are on the record and the other parties have
21 an opportunity to push back against them this afternoon.

22 The first of those brief remarks is that it is not sufficient for the merchants to only
23 provide documents in support of their positive cases.

24 **MR JUSTICE MARCUS SMITH:** Just pause there. Why are you prejudiced if you are
25 not a party?

26 **MR WILLIAMS:** Sir, there is a number of facets to that aspect. Even if Mr Merricks

1 does not participate because his application is rejected or for some other reason, he
2 still will be affected by the applications essentially for the procedural fairness issues
3 as set out in our position paper and that of Visa's response.

4 This is because if the merchants have put in, of course, what we say could risk being
5 one-sided or unrepresentative evidence that Mr Merricks has not had an opportunity
6 to comment on before its procurement or test once it has, then Mastercard will
7 undoubtedly seek to rely upon that which to the extent it is favourable to it in any event
8 in the Merricks trial on this assumption to be heard after Trial 2.

9 So in that case it will have had two bites at the cherry essentially deploying evidence
10 favourable to it.

11 **MR JUSTICE MARCUS SMITH:** I don't get that, because let's suppose you are not
12 in but you're out. Then there's no estoppel. There's no commonality. We have
13 a separate trial.

14 **MR WILLIAMS:** Sir, of course, that's understood but there is significant overlap in the
15 analysis and the underlying evidence.

16 **MR JUSTICE MARCUS SMITH:** Yes. I don't think that can be right, because the
17 evidence will be de novo.

18 **MR WILLIAMS:** Of course, but in the second hearing to what extent are the -- the
19 Merricks hearing this would be after Trial 2 -- to what extent are the merchants to turn
20 up again, say, for cross-examination by Mr Simpson in respect of and on behalf of
21 Mr Merricks in that trial, and how is any inconsistency to be dealt with, sir, save
22 Mr Simpson comes up with a killer line of cross-examination that no-one else has
23 thought about or if the second Tribunal takes a different view.

24 **MR JUSTICE MARCUS SMITH:** Why are we going to be accepting material that has
25 any weight, material on which you need to cross-examination, when it is not there?

26 **MR WILLIAMS:** Well, Mastercard have already said that the evidence that is being

1 adduced in these proceedings stands in the Merricks proceedings as well and --

2 **MR JUSTICE MARCUS SMITH:** It can be read but, I mean, it will be in by way of
3 a CEA notice and we all know what that means when it is something other than data.

4 **MR WILLIAMS:** Of course, but Mr Merricks has to have the opportunity in my
5 respectful submission to challenge that evidence.

6 **MR JUSTICE MARCUS SMITH:** That's what we have process for. So if you want to
7 require a witness to be called, we will handle that when it comes. Look, I am not
8 having some kind of halfway house between an umbrella proceedings order and
9 a sequential trial. That is not what we are doing. If you are a separate trial, you are
10 a separate trial.

11 **MR WILLIAMS:** Sir, yes, but we would inevitably be impacted by the first trial which
12 in this scenario we would not have been involved in or --

13 **MR JUSTICE MARCUS SMITH:** You are like a Trucks 2 or Trucks 3.

14 **MR WILLIAMS:** I am not aware of the detail of that situation.

15 **MR JUSTICE MARCUS SMITH:** What we have is a series of trials threading the same
16 cartel but starting de novo each time. It is why sequential trials aren't a great idea
17 because you have to be procedurally fair on each occasion. So this is why I don't
18 really understand where you are coming from, because you have got at the moment
19 the opportunity to say "Yes, I don't like what's going on here. I will go somewhere
20 else".

21 **MR WILLIAMS:** Of course, our primary intention is to be part of Trial 2 and at the
22 moment we have the order of, I think it is 5th December 2023, which said we are
23 participating in the process. As of now --

24 **MR JUSTICE MARCUS SMITH:** Absolutely.

25 **MR WILLIAMS:** -- our positive case is being filed on 19th July, which, as you say, is
26 incredibly important, sir.

1 **MR JUSTICE MARCUS SMITH:** Mr Williams, that's the point. We are very
2 deliberately riding two horses, one where we want to make an umbrella proceedings
3 order in favour of Merricks and you have heard what I said about triangulation, we
4 think there is benefit in having you in, but we can't see that it is fair to decide that point
5 until we have some understanding of the evidential questions arising here and that's
6 why I am in the nicest possible way asking why are you on your feet, because I don't
7 actually see the problem for you at the moment, because I don't buy the idea that the
8 outcome of these proceedings is going to be unfairly determinative of Trial 2.
9 I mean, what you are saying is that whoever tries the Merricks trial, if it is separate,
10 has so nebulous an understanding of the fair process that they allow Mastercard
11 effectively to bank their winners without you being able to challenge them. Well,
12 I mean, give whoever hypothetically is trying a separate Merricks case some credit.
13 I mean, they are not going to let that happen.

14 **MR WILLIAMS:** Well, of course, our primary hope is that this scenario is very much
15 the alternative, sir. So as of today we are on the Trial 2 track.

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

17 **MR WILLIAMS:** We should perhaps proceed on that basis otherwise Mr Merricks
18 would be prejudiced. In those circumstances I do say that to set up a process of
19 disclosure which only seems to provide documents in support of positive cases and
20 only from those which are readily accessible and just a sample, does set in motion the
21 train of process which is unfair to these and Mr Merricks.

22 Disclosure cannot be ordered only on a positive basis only in support of one party's
23 case, sir, in my respectful submission. That would be more limited and more restricted
24 than even the most limited of the disclosure models, known adverse documents Model
25 A in the practice direction, sir.

26 How would Mr Merricks, Visa or any party be able to respond to such positive evidence

1 if only that were supplied without any adverse documents? So adverse documents
2 we do say are required and likewise reasonable and proportionate searches are
3 required to prevent cherry picking and to ensure the safeness and reliability of that
4 evidence in advance, otherwise we can't wait until July, sir, and then by September be
5 able to actually challenge those positive cases in any meaningful way, if only positive
6 disclosure is disclosed before then.

7 We already know that I will be turning up, or Mr Simpson will be turning up, in July
8 asking for adverse documents, sir. So on the basis of the applications as they have
9 been put that would set in motion an unfair process. That is the key practical point
10 I wish to make about today's applications. It may well be that I or the parties have
11 misunderstood because of the label of positive case, but disclosure in my submission
12 cannot be just so one sided when we all know that we have to be able to challenge it
13 and respond to it come September.

14 **MR JUSTICE MARCUS SMITH:** It is not going to be disclosure. I can't really recall
15 how many times I have said this. We are not talking about disclosure. We are talking
16 about producing material that experts say they need in order to make their case. Now
17 I will have a few things to say about what that material should look like in the positive
18 cases, but we don't have a disclosure process here at all. We have not had schedules
19 of issues. We have not had lorry loads of documents or electronic equivalent precisely
20 because we are looking to see what the experts need.

21 Now if your experts have a shopping list, then they should say.

22 **MR WILLIAMS:** I am certainly not seeking to shut out anybody from making their
23 positive case and I want to immediately reassure you on that, but we must be able to
24 test that positive case.

25 **MR JUSTICE MARCUS SMITH:** Yes. That's what the responsive cases are there
26 for.

1 **MR WILLIAMS:** Sir, we won't be able to make that responsive case in September
2 without the adverse documents, if any, of course, being disclosed in advance. At the
3 moment the premise of the application is that they are only seeking to provide
4 supporting -- that is a quote -- and positive documents that support their positive case.
5 If that does not come along with adverse documents, sir, there is no basis for a fair
6 procedure in which any party between July --

7 **MR JUSTICE MARCUS SMITH:** What are you asking for?

8 **MR WILLIAMS:** I am asking, sir, today for any order which is made for the disclosure
9 from the Claimants to also be accompanied not just by positive disclosure but adverse
10 documents too.

11 **MR JUSTICE MARCUS SMITH:** But all we are talking about -- all I am talking about
12 is Mastercard's disclosure. I am not making any disclosure orders for the Claimants
13 to disclose documents to themselves.

14 **MR WILLIAMS:** No, they are obviously disclosing them to the parties in these
15 proceedings, sir, and at the moment --

16 **MR JUSTICE MARCUS SMITH:** They are not disclosing anything at the moment.
17 What they are doing is they are working out a way of producing their positive cases
18 which will set out in full granularity their argument. You will then have a chance to say
19 "Right. We understand your argument. We would now like to understand what you
20 have done in order to put it together and what you have omitted". These are questions
21 you can obviously ask. We expect you to.

22 **MR WILLIAMS:** Sir, at the moment that would give rise to a trial issue that my learned
23 friend has been discussing. An additional facet to that is the challengeability of it,
24 because otherwise we know as of today that, come July, we will be coming along and
25 asking for adverse documents in that case, sir, and there is currently not enough time
26 to do that process.

1 **MR JUSTICE MARCUS SMITH:** You won't be asking for adverse documents. I can
2 tell you that now. You will be asking for material that enables your expert to
3 deconstruct their case.

4 **MR WILLIAMS:** Sir, I think I have made my position on that clear. I can see the time
5 for the transcribers.

6 **MR JUSTICE MARCUS SMITH:** Yes. We will rise for ten minutes. Before we do
7 that, I won't need to hear from the parties who are opposing the Visa application in the
8 substance, because I am not going to be closing out disclosure. I will have something
9 to say about how this all works and I will welcome push back to the extent that anyone
10 thinks that I have over stepped the mark in describing how I envisage the process
11 working, because Mr Piccinin has quite rightly pressed me on how this works and
12 I have said how I think it is going to work and I think it does work that way, but if any
13 of you are saying "No, I have got the wrong end of the stick", then I would like that
14 articulated. It is not going to change how I resolve this matter, because I am very
15 firmly of the view that these are problems, if they exist, for later down the line, but
16 I wouldn't want hopefully the full Tribunal hearing an argument about process to be
17 met with Mr Piccinin saying "Well, I said this on 24th April and no-one said that was
18 wrong and by the way I am entitled to rely on what the President said without his wing
19 members because we never spoke up".
20 I don't want long submissions but I do want, as it were, countermarkers down there so
21 that we just have a sense of problems going down the line that we need to be thinking
22 of further. So brief -- I hope there aren't any, but if there are, then I would very much
23 like to hear them. We will rise for ten minutes.

24 **(Short break)**

25 **MR JUSTICE MARCUS SMITH:** Mr Woolfe.

26 **MR WOOLFE KC:** Thank you, sir. I won't be very long. I am not going to respond

1 on the substance of an application which is being withdrawn, but I do want to correct
2 certain misapprehensions during the interchange between the bench and counsel this
3 morning as to what it is we are proposing to provide.

4 This is partly in order since he has put down a marker, because the basis on which we
5 are proposing to provide it is understood, concerns about people being taken by
6 surprise later in the process I think will diminish and therefore we are less likely to be
7 back here in two months facing either a very extensive or a very broad application for
8 adverse documents, or something of that nature at that point, or concerns regarding
9 fairness.

10 Sir, in the bundle can I take you to the expert table, which is at tab A15?

11 **MR JUSTICE MARCUS SMITH:** You had better give me a page, because I have got
12 a --

13 **MR WOOLFE KC:** I think it starts at 85 of the -- 95 of the pdf, 85 using the
14 bundle numbering in the corner.

15 **MR JUSTICE MARCUS SMITH:** I am on page 95 which unusually here corresponds
16 with the pdf number.

17 **MR WOOLFE KC:** It should say "1. Introduction. 1.1. Scope". In which case try 85
18 then.

19 **MR JUSTICE MARCUS SMITH:** I know. It is unprecedented for the numbers to
20 match but that seems to have happened. I have that.

21 **MR WOOLFE KC:** That's the expert table that was agreed in preparation for this
22 hearing. It is divided under heading 2 "Objectives for the request for evidence". In 2.1
23 you say:

24 "Understand how costs were treated by the merchant claimant in the course of its
25 business and how they may have affected prices either directly or indirectly."

26 So that's the objective and each expert sets out what they want in relation to it or not

1 and why.

2 If I can take you to what Dr Trento says. So this is on page 87.

3 **MR JUSTICE MARCUS SMITH:** Thank you.

4 **MR WOOLFE KC:** Just starting with why he says he wants such information, he says
5 in the central column:

6 "Information on how costs were treated will enable us to understand how costs may
7 have affected the prices directly or indirectly."

8 This is important. He says:

9 "This knowledge is essential for the correct set-up of the econometric model"

10 and so forth. If you look over the page in the same column on page 88, he says:

11 "This qualitative information is necessary for (a) the assessment of which cost is more
12 likely to be a relevant proxy cost and (b) the specification of the econometric model."

13 He further explains in relation to that second point, specification, that you need to know
14 the frequency with which a cost is modelled to understand the timing of its possible
15 effect on prices and that may effect the set-up of the model.

16 The reason for emphasising that, sir, is to say that this causative information is needed
17 not on the subjective point of claimants saying "Oh, we did think about MSCs or didn't
18 think about MSCs". It is information about the proxy costs that may be selected which
19 is something other than MSCs and how that works on a day-to-day basis. It is quite
20 objective in nature and our expert says he wants it for his modelling.

21 So with everything that's being said about somehow being faced with evidence coming
22 in I think Mr Williams in particular was pushing this in a somehow untestable way for
23 Claimants to be turning up and asserting we didn't pass on costs. We didn't think
24 about it. That's not what this evidence is going to be going to. That's the first point.

25 The second point is in the next column, where Dr Trento says he would like witness
26 statements on this because he thinks this might be better than documents, but

1 | importantly what he says is -- this is back on page 87.

2 | **MR JUSTICE MARCUS SMITH:** Yes, I have that.

3 | **MR WOOLFE KC:** "For reasons set out below I consider the main source of
4 | information should be one of the statements of the claimant" -- and this is
5 | important -- "corroborated by documents that are responsive to the request and that
6 | would allow the party to verify the accuracy of those statements."

7 | You, sir, this morning said that documents -- we should be putting forward on a warts
8 | and all basis. That is very much what we intend to do. We don't intend simply to put
9 | forward documents which we have cherry picked to prove and select our case. Insofar
10 | as we come across adverse documents in a loose sense, sir, in the course of preparing
11 | the witness statements, they will be provided. I want that to be clear at this stage,
12 | because otherwise when we come down the line we are going to get -- if they think
13 | that these have been compiled on a cherry picked basis, we are going to be facing
14 | more aggressive applications down the line. I want to make clear at this stage that's
15 | not the case.

16 | **MR JUSTICE MARCUS SMITH:** That's very helpful, Mr Woolfe, because it enables
17 | me to put down a clearer marker than I think we have done although I think it has been
18 | said by us before, but let me say it again, and it is this: we intend to exercise quite
19 | a high degree of control over who is called by the various parties, and let me explain
20 | what I mean by that and why I am saying it.

21 | Let's suppose you put material in which you say has been pulled together as
22 | a representative sample by Mr X of a particular company and it is said in the witness
23 | statement that this is a fair and proper view as to how pricing is done. Let's say that.
24 | If that is contentious let us say on the part of Visa, then we will be extending every
25 | facility to Visa or any other party who wanted to challenge it to challenge it, not
26 | necessarily or just through the production of further disclosure.

1 It may be that we will be saying Mr X will have to be presented at a particular point in
2 time of the trial in order to defend what's going on. In other words, if there is a pool of
3 data which appears to be skewed and Visa want to test that, then we will be requiring
4 that person to come in and be cross-examined so that one can assess the extent of
5 the skews.

6 Now we may not get the full set of adverse documents that way, but what we will get
7 is a sense of a process that has been conducted either fairly or not fairly, and so that
8 is it seems to us a long stop. It is not a very satisfactory long stop, but it is certainly
9 something that we would be anticipating would be a means of controlling a cherry
10 picking process and, of course, that's what the, in part the period between positive and
11 responsive cases is intended to achieve.

12 If you serve up something which is not fully capable of being understood, then the
13 parties responding will say "Well, we see what you say. Why do you say it? What's
14 the answer to this question, that question?" and it may be resolvable prior to trial so
15 that one gets an agreed corpus of data which one can argue about its significance, or
16 it may be one gets a corpus of data which is controverted because it is seen as
17 skewed.

18 You are absolutely right. The way to avoid that is to ensure that it is a warts and all
19 process. I am hugely encouraged by what you say about the process but at the end
20 of the day this is not a consensual process and I do want those who are responding
21 to understand that we will be quite aggressively allowing the testing of that data so
22 that ex ante it will be produced warts and all.

23 So that's how we see the trial operating and I hope that gives a degree of additional
24 comfort to those. After all what's sauce for the goose is sauce for the gander. Exactly
25 the same applies if you were challenging Visa's case and you don't understand what's
26 going on. So you can ask so that you can respond better.

1 **MR WOOLFE KC:** Thank you, sir. That leads I think to a couple of other points
2 perhaps to clarify. The first is we are not very clear on our side what the nature of the
3 "adverse documents" are that Visa and Merricks have referred to. Clearly if you had
4 sort of the smoking gun document of saying "We are looking at MSCs and specifically
5 at the MIFs component there are and we are going to adjust our prices in consequence
6 of that", we can see that, but it is not clear to us what other adverse documents in the
7 classic CPR sense there would be, and we understand that they need material with
8 which to test our witness evidence.

9 **MR JUSTICE MARCUS SMITH:** That's fine. Mr Woolfe, that's why I bristle whenever
10 someone mentions disclosure because disclosure and adverse documents is not the
11 process we are engaged in. If I can describe what it is I think you have to do, I will go
12 to the language of insurance.

13 You need to make a fair presentation of the risk. In other words, what you need to do
14 is you need to come up with a case that is a fair articulation of the point you are
15 making. In other words, you don't white-out or shove under the carpet points which
16 actually materially damage the point you are making. Instead of in the insurance
17 contract the contract being avoided if you fail to make a fair presentation, what will
18 happen is it will go, and go quite stringently, to weight.

19 So if we get a situation where you have put in a positive case which is skewed, then
20 we will try to rectify it by enabling the other side to be put, but if we get a situation
21 where there is a case that is skewed and it can't be corrected, in other words, it is
22 untestable, then the evidence just goes in the bin. We won't be attaching weight to it.

23 So that's the incentive for producing a fair point.

24 Of course, I know you are all advocates. It is for you to put forward the case that best
25 suits your clients, but you do need to have in mind the importance of testability,
26 because even if the respondents do not probe, you can bet that the Tribunal will,

1 because I am not really in the business of writing judgments that are plucking figures
2 from nowhere that are ungrounded in the facts.

3 So you can expect questions as to how things have been done from the parties I am
4 sure but equally from the Tribunal.

5 So it is not adverse documents. I don't want you going around saying "Well, here is
6 the disclosure we are making. We need to do a search which we then need to verify
7 by a statement that we have conducted the following searches". We are not going to
8 be making questionnaires like that. That is disclosure which we are not doing.

9 What we are doing is the experts or other witnesses, if you are producing them, will
10 be saying "Here's why the pass-on rate is X rather than Y. This is the argument. Here
11 is how we get to it in a rational way and by the way in order to test how right we are,
12 you need to know the following". That ought to be all in the positive case, because it
13 makes the positive case stronger. If it isn't there, then we have got the responsive
14 positions and if we haven't got satisfaction on the responsive positions, we have the
15 ability to deploy the weapon of cross-examination and get to the truth that way.

16 If we get to the level of having to cross-examine on this material, chances are if there
17 is a point in the cross-examination, in other words if the evidence is materially
18 incomplete and unrepresentative and not making a fair presentation of the point, then
19 we won't be able to rely on it.

20 So that's how I see it as panning out but I think that's exactly what you are telling me
21 is your intention.

22 **MR WOOLFE KC:** That's extremely helpful to all parties I think.

23 There are a couple of more points I have to make. First of all, a concern has been
24 mentioned about timing. In our letter of application for permission to adduce the
25 qualitative evidence, I appreciate that you say we don't need formally to apply in that
26 sense, but if I show you what we have said, this is on page 63 of the bundle.

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

2 **MR WOOLFE KC:** This again drops out of the point that our expert wants this
3 information to start his analysis. Therefore it is not information that is merely going to
4 be finalised in July and we are not actually proposing to wait until July to provide it. If
5 you see paragraph 9, which is on page 64, the exact date may need some --

6 **MR JUSTICE MARCUS SMITH:** What you are saying is there is going to be an
7 exchange between experts before July in terms of the raw material that is being used.

8 **MR WOOLFE KC:** Sir, once we have gathered the material which we anticipate our
9 expert will need, it is generally agreed between the parties that material provided to
10 the experts needs to be shared and it will be shared on that basis.

11 Now it will then, of course, be bundled up again in the positive case that is due in July
12 and if you have a witness who has said something and then they have thought about
13 it a bit more -- I am not saying this is likely -- "I now want to caveat it in this way" or
14 something like that sort, the positive case will be set in July, but we are proposing to
15 share the material that we have in a cooperative way ahead of that.

16 So it is not the case that Visa and Merricks will not hear anything about this until July,
17 and dropping out of that you said, sir, that Mastercard may well have articulated their
18 categories of request with an eye not only to what they want in the positive case but
19 what they may want in a negative case. Within reason, sir, we think that's entirely
20 sensible and proper to bring things forward if they are confident they will want it. You
21 wouldn't want a whole lot of speculative disclosure to people too early but in principle
22 we don't have an issue with documents being identified at an early stage to give you
23 more time for the relevant searches to be made.

24 So I think those two points together should go some way to assuaging the Tribunal's
25 concern. What I don't want is to be here in July and have Mr Williams standing up and
26 relaunching the same application on a continued misapprehension of what's going on.

1 We are proposing to be cooperative and provide things on a warts and all basis.

2 The final point of reassurance is what happens with Mastercard's application. I don't
3 want to step too much on to that. As you will have seen from our position statement,
4 sir, essentially we now accept that we need to provide material falling within the
5 remaining categories of Mastercard's request.

6 What is in issue is whether that should be done -- how comprehensive, how large that
7 disclosure should be in those categories, but we are not proposing in any kind of
8 response to that to cherry pick. There will be an agreement as to what searches
9 should be carried out, what documents should be compiled, and whether that's on
10 a smaller, more restrictive basis or a larger basis, what is agreed will then be compiled
11 and given. It is not a matter of being -- that also will be a non-cherry picked pool of
12 documents assuming some such --

13 **MR JUSTICE MARCUS SMITH:** Really what is going to be informing the scope of
14 provision is not a dispute about why it's needed but a dispute about whether it can be
15 produced in time and at proportionate cost.

16 **MR WOOLFE KC:** Exactly. Without trampling too much on Mr Cook's application,
17 our expert has set out most of the objectives. Some of them he said were nice to have
18 rather than the essential. I think those ones Mastercard have now very helpfully
19 dropped. We are perhaps rather closer together with Mastercard than you might have
20 appreciated sir.

21 Essentially what we understood to have been indicated was if there is a helpful
22 discussion between the parties as to how proportions -- I hate to say samples. I don't
23 mean samples as in let's set out a sampling basis approach.

24 **MR JUSTICE MARCUS SMITH:** You mean on a selective basis.

25 **MR WOOLFE KC:** A selective basis. For instance, I think Mastercard, their expert in
26 the expert table suggested picking certain years or certain months of the year and so

1 | forth.

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

3 | **MR WOOLFE KC:** That's what we had understood there to be a discussion about.
4 | We are concerned with the Mastercard's order as put today is that it appears to be sort
5 | of everything in these categories. What we want is there to be a discussion about
6 | what's to be done.

7 | **MR JUSTICE MARCUS SMITH:** I think that does arise very helpfully out of the useful
8 | hearing we had last Friday where it was clear that viewed in the abstract, there was
9 | considerable concern on both sides, one, Mastercard, that they were not getting what
10 | they needed, and the other, the Claimants, that they were being obliged to provide
11 | either something which would be wholly disproportionate in terms of cost or something
12 | they could not actually provide at all.

13 | I think what we defaulted to was that there should be an involvement between experts
14 | not to test Dr Niels' reasons for the production of this material, but to explain to Dr Niels
15 | what was in the cupboard that could be provided so that one could reach a degree of
16 | agreement. It seems as if you are putting it far more eloquently than I have about that
17 | process.

18 | **MR WOOLFE KC:** Exactly. That's right. We are fully supportive of that process. It
19 | needs to be an individualised one in relation to each claimant. What can't be done is
20 | to make an order across the board saying each should apply, say, 2018, 2019,
21 | because one claimant may have interest in 2019 and the other may not or whatever it
22 | may be. So there needs to be a discussion on that basis.

23 | **MR JUSTICE MARCUS SMITH:** That's extremely helpful. Can I just check?
24 | Mr Cook, is that an approach that you are going to push back against or are you happy
25 | it is going to resolve Mastercard's issues?

26 | **MR COOK KC:** Sir, it is one of those things, which is we made our application seven

1 weeks ago and you gave everybody, but perhaps more the Claimants, a kicking, a firm
2 steer - however one wants to put- it on Friday last week. and since then there has
3 been a lot more engagement, primarily it must be said and perhaps fairly from the
4 individual claimants, so Ocado, Primark and Allianz, perhaps less so from the SSH
5 Claimants, though they have more claimants behind them so it is a bigger job, and
6 there is a substantial movement certainly in terms of my understanding of where they
7 are coming from in terms of what my learned friends have just said.

8 So it is a process which is starting to bear fruit. What we are concerned about is that
9 it has borne fruit in the shadow of this hearing with the knowledge that we are about
10 to be in front of you and as long as there is something that continues holding feet to
11 the fire, you know, we are absolutely clear that the Tribunal is not going to be accepting
12 a suggestion that there needs to be disclosure -- well, document searches going back
13 12 years hunting through e-mails if it is the case that, for example, as Primark has
14 done, they have said "We can readily produce the last four years of particular material",
15 then those kind of things are very sensible, practical limitations but there needs to be
16 engagement to get to those.

17 If feet are held to the fire, we can see this being something productive, but if essentially
18 the shadow of the hearing goes away and it all goes quiet again, that will be a problem.

19 **MR JUSTICE MARCUS SMITH:** Well, we are certainly not going to be jettisoning the
20 fortnightly case guidance hearings that we have been holding , I think with a degree
21 of success, and if I make it clear that exceptionally if there emerges -- I would be very
22 surprised if it did -- but if there were to emerge a sudden volte-face that we would be
23 prepared exceptionally to make an order at a case guidance hearing -- normally we
24 don't because they are for guidance -- does that give you enough comfort that there
25 remains the sword of Damocles hanging over whoever is trying to remove their feet
26 from the flames?

1 **MR COOK KC:** Sir, when is the next CMC? I am afraid I am slightly out of the loop.

2 **MR JUSTICE MARCUS SMITH:** A week.

3 **MR COOK KC:** In a week's time essentially. If there was a clear steer from you, sir,
4 that if you expected very substantial progress to be made between the parties on this
5 by the next CMC, then the fire will be very firmly there once again and there is, certainly
6 based on what has happened over the last couple of days, significant progress that
7 can be made here., and I think we would all anticipate a degree of unhappiness from
8 the Tribunal if we came back in nine days' time and it turned that out no real movement
9 had been made.

10 **MR JUSTICE MARCUS SMITH:** Well, the thing is I am just not convinced that
11 an order today would help. I think that it would hinder, because what would happen is
12 that the Claimants would then play to the order rather than play to what is helpful to
13 the experts. That's the problem with a granular order. You either say it's too wide and
14 can't be dealt with and therefore shouldn't be in the order, can't be ordered, or it
15 becomes a very narrowly framed point in which case you don't get what you want and
16 the producing parties play to the limits of what they have been ordered. So everybody
17 is unhappy.

18 If I can just make the point that Ms Neill always makes at these hearings, which is that
19 progress is never fast enough and I doubt if this would be an exception, but if I put
20 down our own marker that we will be looking at this as anxiously as the qualitative
21 evidence -- I mean, it is fair to say we have been focusing on the qualitative evidence --

22 **MR COOK KC:** Quantitative.

23 **MR JUSTICE MARCUS SMITH:** I am so sorry. You are quite right. We have been
24 focusing on the quantitative evidence so far. I think we are getting to a resolution
25 there. We are now turning our minds to the trickier but in procedural terms, I don't
26 want to say anything about substantive terms -- in procedural terms is as important as

1 qualitative evidence, and I think we are making progress there. We will certainly be
2 probably inverting the order of concern, probably at the next hearing because we do
3 need to ensure that everyone has the material they need in time actually to do their
4 positive cases.

5 So if that's a sufficient marker, then we will not need to have anything more specific
6 and I hope it is enough, because I am, for the reasons I have given, quite reluctant to
7 make an order, because I think that will just mean we will be having to schedule
8 another hearing, which really isn't helpful.

9 **MR COOK KC:** Can I have a moment just to take instructions?

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

11 **MR COOK KC:** Sir, I think with that kind of guidance from the Tribunal I think there
12 should be no doubt on either side of the courtroom about where you expect this to go.

13 **MR JUSTICE MARCUS SMITH:** No, there shouldn't be. I mean, Mr Draper has made
14 clear in the past that the reason this application was moved was to essentially force
15 consideration at a not quite last chance saloon stage but at a late-ish stage so that
16 expectations could be corrected, and I confess that's how I have seen this hearing. It
17 is more formal than a case guidance hearing, but it is intended to create expectations,
18 but without making orders because those orders are too late. So that is how we will
19 proceed.

20 No-one should leave this courtroom thinking that we don't regard swift production of
21 all material as extremely important, because if we prejudice the July date we prejudice
22 the September date, and if we prejudice the September date we prejudice the trial
23 date, and we are not in the business of doing adjournments.

24 **MR COOK KC:** Sir, absolutely. As Mr Draper has obviously said on several
25 occasions, the reason it was brought forward, because it seemed to us unless we
26 make progress with it now we would be prejudiced at each of those stages going

1 forward.

2 **MR JUSTICE MARCUS SMITH:** We are very grateful to Mastercard for putting this
3 forward. I noticed -- no doubt Mr Woolfe was slightly pushing a point to get a nibble,
4 but we don't regard Visa's application as having been withdrawn. We regard both
5 applications as being helpful in terms of informing the debate of what is a fluid and
6 challenging process for all concerned. So we are putting down markers. We are not
7 making orders, but the markers are very important and we have just put a marker
8 down.

9 **MR COOK KC:** Sir, there is another limb of my application and it may not be
10 appropriate to deal with it now, and that is permission to have Mr Harman give
11 evidence as an expert.

12 **MR JUSTICE MARCUS SMITH:** Don't let me forget, but let's come back to that in due
13 course. I just wanted to ensure that Mr Woolfe was not pushing at a closed door. It
14 may be, Mr Woolfe, you can then take your submissions more quickly in light of the
15 fact I think we are ad idem.

16 **MR WOOLFE KC:** I think there is not much more I need to say about explaining how
17 we see the evidential process working in general terms. I think we are now fully
18 understood where Mastercard is coming from and the Tribunal is coming from and we
19 understand where we will be in nine days' time is back in front of you, sir, with the
20 expectation that serious progress will have been made. We fully understand that.

21 I don't think I need to go into the untriable issue and so forth. I don't think that is
22 appropriate. That is fine. I can simply say I think you may also need to hear from me
23 about LEK, the pricing expert point. That is an aspect of our qualitative evidence
24 application, I think you indicated this morning we might need permission for. I can
25 either deal with that -- I can deal with that -- that's perhaps a discrete point again.

26 **MR JUSTICE MARCUS SMITH:** As we have made clear, we don't want to close out

1 material that forms part of your positive case. We want the parties to see this an
2 exercise in adequacy and persuasion. I would therefore hope that the general
3 approach is that you get your permission and it is not opposed at this stage, but again
4 putting down a marker, we are all concerned about triability.

5 If it is the case that you present a positive case that is simply not triable in the seven
6 weeks or so that we've got, then we will have to think about how it can be pruned back
7 in order for there to be a trial. So my thinking is both regarding Mr Harman and LEK
8 is that you ought to be given your lead subject to the general control of the Tribunal in
9 order to make sure that the process is manageable. So I don't know if on that basis
10 there's going to be any objection to the admission of this evidence.

11 **MR WOOLFE KC:** That's probably not a question for me. That's more a question for
12 Mr Piccinin.

13 **MR JUSTICE MARCUS SMITH:** I am looking around. Mr Piccinin, it is really a re-run
14 of the argument we had this morning.

15 **MR PICCININ KC:** Yes. Exactly.

16 **MR JUSTICE MARCUS SMITH:** I don't want you to think that the fact that something
17 is in the positive case means that we are relinquishing all questions of control over
18 that case.

19 **MR PICCININ KC:** No. My understanding, sir, is that you want it to go in. We will see
20 it in July and then if we have a complaint to be made about it along the lines that I was
21 making today, we make the complaint then.

22 **MR JUSTICE MARCUS SMITH:** Exactly so. You see, if we have the argument in
23 advance, we will have to then work out exactly how much court time Mr Harman or
24 LEK will take in order to have the evidence heard. You would want to know what
25 evidence in response you need to adduce and we are in the same problem.

26 **MR PICCININ KC:** I understand.

1 **MR JUSTICE MARCUS SMITH:** That is controlling. So on that basis we can move
2 forward and say it is in but.

3 **MR PICCININ KC:** Subject to what we will have to say later on.

4 **MR JUSTICE MARCUS SMITH:** Good. Well, that's very helpful. I think it is important
5 that we have that marker on the record.

6 **MR PICCININ KC:** Absolutely.

7 **MR JUSTICE MARCUS SMITH:** Thank you. So I think on that basis we can grant to
8 the extent permission is needed both of those applications. We have I think made
9 clear that permission is needed and I am going to grant it, but can I put down the
10 further marker, which is this. Mr Woolfe's point about communications anterior to the
11 production of positive cases, very helpful in regard to the production of documents, but
12 equally if you've got witness evidence that you are proposing to adduce, if you could
13 flag it early when you know what you are doing or when you think you know what you
14 are doing, that would be very helpful just to avoid people being taken by surprise.

15 The fact is 20th July is late in the month. We will have to deal with problems in July
16 and the more advance notice there is about how it's going without commitment, the
17 better for all concerned, including the Tribunal in terms of providing the guidance.

18 What I don't want is a sense that because the Tribunal is giving all parties the latitude
19 that the Tribunal is, that that is being taken advantage of. So notice is very important
20 but you are not saying any different and I am very grateful for you to say that but I am
21 saying that to all the parties. It is true of every form of positive case. It is just I think
22 Visa's and Merricks' position is narrower because they are looking at things through
23 the econometric lens and you are looking at it through that lens and a few others as
24 well. So there is more uncertainty in the Claimants position, and Mastercard's, than
25 elsewhere.

26 **MR WOOLFE KC:** Thank you, sir. I have two other points. One is not really -- it is

1 something consequential upon Mr Harman rather than anything that prevents him
2 coming in, which is we did identify in our response to the application for Mr Harman
3 we think if supplier pass-on is coming in it would be extremely advantageous if some
4 extra time could be found early in 2025 for that issue and the (inaudible) issue to be
5 heard for a couple of reasons.

6 Firstly just to expand the trial timetable but also potentially so that financial issues, so
7 the evidential issues, disclosure in the loose sense, have got slightly longer potentially
8 to run on that. It's a slightly less essential operation. That is a plea rather than a --

9 **MR JUSTICE MARCUS SMITH:** You want an extra how much?

10 **MR WOOLFE KC:** I think we suggested an extra week. Perhaps in a sense you might
11 want to take a decision on it when we have seen more what Mr Harman is producing,
12 but if enquiry could be set in train at this stage it might be a pragmatic approach, sir.

13 **MR JUSTICE MARCUS SMITH:** That is certainly something we will look into. My
14 recollection is that it is already a somewhat fraught trial timetable. I think we have split
15 it, haven't we? So do the parties have -- two things -- agreement as to whether
16 an extra week is needed and, more significantly, is it the same week that they agree?

17 **MR WOOLFE KC:** Sir, I think I can say there is not agreement on this point. No-one
18 is vociferously objecting to a bit more time, but I don't think there is positive agreement
19 and there certainly have not been discussions about a specific week. Whether it is
20 needed I think will partly depend on the extent to which any factual evidence we put in
21 should require to be set out at trial. Again it is something which you are going to be in
22 a position in July to take a better view on.

23 **MR JUSTICE MARCUS SMITH:** The trouble is one probably wants to make
24 arrangements sooner rather than later even if that extra week is not actually needed.
25 Well, look, can we leave it at this; I am not earmarking an extra week for any particular
26 purpose at all. I just want to see whether it is doable in terms of everybody's diaries.

1 My sense is that it may be rather difficult entirely irrespective of the merits of the points,
2 it may just be very difficult to do because I think we looked at the timing and the
3 available time with some care when we listed this, but if the parties can find a week
4 then we will certainly look at it, but otherwise all we will do is track the point that there's
5 a -- we will track the management rather more closely. I am not sure that's actually
6 possible. We will be tracking the management very closely whatever, but let's see
7 what's going on.

8 I think, though, there are issues with the Tribunal's availability for Trial 2 which is why
9 we have got this gap in the hearing. It will have to be I think at the end of the second
10 part rather than anywhere before then and that may not be suitable. So thank you for
11 raising it. We will certainly not close it out from consideration, but I think it may not be
12 doable.

13 **MR WOOLFE KC:** That is everything I had to say about the matter we have generally
14 been debating. I do have something very short to say about HMRC which will take
15 two or three minutes, perhaps distinct from other issues and if in anyone else wants
16 to say anything now about the substance of the issues I should sit down.

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

18 **MR JONES KC:** There are two topics I want to address you on. The first one is just
19 to pick up on the extra week suggestion and actually the broader point which that goes
20 to, which is the application by Mastercard to adduce evidence from Mr Harman. We
21 do not understand, to put the point very simply, what the evidence is going to be. The
22 description which has been given by Mastercard of what they call the methodology for
23 working out supplier pass-on is actually just a list of factors relevant to whether or not
24 there would be supplier pass-on.

25 There is no description that we have seen of any quantitative analysis, of any
26 econometric analysis, and what is said is that documents should be provided and that

1 Mr Harman is going to carry out -- it is described in his methodology as a factual
2 question. He is going to carry out analysis of a factual question by looking at some
3 documents. We simply don't understand what that involves, how it is going to come
4 up with any rate, why it is an expert issue.

5 My understanding is he is broadly speaking as an economist, but at the same time as
6 saying that they want evidence from Mr Harman, they say the reason for it is that it is
7 not really an economic issue. I appreciate he is an accountant, so he brings -- has
8 other strings to his bow, but the short point is we don't understand what he is going to
9 do and we don't understand why an expert is needed, and because of all of that we
10 also don't know what evidence we should be bringing.

11 We don't know whether more time is needed, whether an extra week is needed. It
12 may be that along with looking at our diaries, Mastercard can be asked to give us
13 an explanation of what the actual quantitative analysis is that they are proposing.

14 **MR JUSTICE MARCUS SMITH:** Well, it sounds like a re-run of Mr Piccinin's point
15 this morning. Can I suggest this or ask this? To what extent has Mr Harman's need
16 for disclosure been articulated in the granular sense?

17 **MR JONES KC:** Well, he has said in a granular sense what documents he wants, if
18 that's the question, sir?

19 **MR JUSTICE MARCUS SMITH:** Not quite. It is "Have you got agreement as to what
20 will satisfy his need for documents such that it can be provided?"

21 **MR JONES KC:** Yes.

22 **MR JUSTICE MARCUS SMITH:** Without undue expense or undue loss of time?

23 **MR JONES KC:** Broadly speaking yes, in the sense that it is not a distinct set of
24 difficulties to the other documents that they are asking. So my point is more about
25 whether they should put in expert evidence and we should be building in the timetable
26 to trial around that, but the documents question is not problematic, sir.

1 **MR JUSTICE MARCUS SMITH:** So there is no issue about managing disclosure.
2 There is an issue about managing trial but that is going to be true of every positive
3 case and possibly every responsive case. We are going to have to think about how
4 we try it.

5 What's the harm apart from incurring the cost of Mr Harman's evidence coming in as
6 part of the Mastercard positive case on the basis of the points that I made to
7 Mr Piccinin earlier that we are not saying if it is disruptive of the trial, it inevitably does
8 go in because if we have something that makes the trial unmanageable we will have
9 to start pruning?

10 **MR JONES KC:** Yes. Sir, the only point I could make would be what he is proposing
11 to say is not a matter for an expert. Normally you only get permission to put in expert
12 evidence on matters which are actually suitable for expert opinion. If we get to a stage
13 where we are having to cross-examine an expert on what are basically factual points
14 about documents --

15 **MR JUSTICE MARCUS SMITH:** I see that, though, to be fair, particularly economist
16 experts often serve two purposes. One is to provide expert opinion evidence and the
17 other is to co-locate documents, in other words to bring them together in an ordered
18 process, and it may be that Mr Harman is doing the latter rather than the former. I don't
19 know. But again isn't the point answered by case management going forward rather
20 than ex ante saying it doesn't come in?

21 **MR JONES KC:** Sir, very well. I hear the point, sir. I will move on.

22 **MR JUSTICE MARCUS SMITH:** I am very happy to push back.

23 **MR JONES KC:** I have nothing to push back further than what I have already said.
24 We have a concern about it.

25 **MR JUSTICE MARCUS SMITH:** I don't want anyone to feel that they shouldn't come
26 with their concerns. So it may be that the exchanges between myself and Mr Piccinin

1 acted as some deterrent. I hope not. They were very helpful, Mr Piccinin. I want to
2 put that on record, but you could see which way the wind was blowing in that I don't
3 want there to be an exclusion without consideration, but if we've got something which
4 is, you know, untestable fact masquerading as expert evidence, well, that can be dealt
5 with in the course of a few days at trial and we can kill it then. That would be my
6 preference, but if it's sufficiently disruptive of the trial and not probative, then we'll kill
7 it earlier at the positive case stage. I am just very reluctant to kill it now when I have
8 not seen the colour of Mastercard's money and we will have a debate about what it's
9 going to, which is unanswerable in that I think with most of these points, because pass-
10 on is a such an all-encompassing phenomenon.

11 The problem is you can articulate the point in a general sense and you can articulate
12 it in the very specific sense, but I am just not sure there is an intermediate landing
13 point which enables applications like this to be determined. So do please push back
14 if you want to, because I don't want anyone to feel shut out, but this was very much
15 a re-run of the debate I had earlier on, and if you are happy to leave it there, then so
16 am I.

17 **MR JONES KC:** Sir, I am very happy to leave it there. We will pick it up once we see
18 the positive could if we need to at that point.

19 Can I make a second point?

20 **MR JUSTICE MARCUS SMITH:** Of course.

21 **MR JONES KC:** It is a point about the rates that you will be deciding at the substantive
22 hearing. There is a point which was in the background of some of the discussion you
23 had with Mr Piccinin earlier today.

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

25 **MR JONES KC:** Including, for example, when you were discussing what would be the
26 relevance of evidence from Primark, for instance.

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

2 **MR JONES KC:** I am going to suggest two things. The first is that you have on
3 previous occasions left open the precise nature of the rates that you will be deciding
4 at trial. I will explain what I mean by that in a moment, but that is the right thing to do,
5 to continue to leave yourselves some room for manoeuvre, as it were, on the kinds of
6 rates that you might end up deciding upon, but, secondly, that if a firm decision has
7 been made that certain rates are off the table, that it would be super helpful for us to
8 have clarity on that from you now.

9 So what I mean by that, just to flesh it out slightly, is that we, of course, appreciate that
10 the Tribunal is looking towards sector wide rates, but even if you start with that as
11 a proposition there is some wooliness. There are disputes around what is a sector,
12 for example, which is going to have to be looked at the trial.

13 There are questions about, which may be influenced by whether Mr Merricks
14 participates or not. There are questions around whether the focus ends up being the
15 sector as an economic sector as a whole or the Claimants within a particular sector,
16 the Claimants who are actually before you as a sector wide rate. You can see
17 immediately that actually someone like Primark, if you are only looking at the
18 Claimants in the fashion sector, is going to be a very heavy part of the value of
19 commerce before you. If you are looking at the economy as a whole, it will be smaller,
20 5%, but still substantial but it will obviously be smaller.

21 Then drilling down further, you come to question what are we going to derive in any
22 event from, for example, a Primark analysis. The short answer to that is it depends.
23 It may depend, as I have said, on the nature of the sector you are looking at, but it may
24 also depend on how you go about triangulating between the evidence, the different
25 sources of evidence before you.

26 We did have a discussion about this back in January at which it was pointed

1 out -- firstly, of course, the reason we are looking at sectors is there is an expectation
2 that some of the factors relevant to pass-on are sector specific, but, secondly, that you
3 might in triangulating want to know are there good reasons to think that, for example,
4 Primark would be particularly different to others in the sector, and knowing what those
5 reasons are and testing them will help to triangulate between different sources.

6 So just to complete that thought, in the course of that discussion in January you
7 indicated that at an extreme -- I don't think you used that word, but just to -- at an
8 extreme one might say, for example, in relation to Primark "Well, we have looked at
9 the factors and Primark is so different that it tells us nothing about the rest of the sector"
10 but that being so, we can give a Primark specific rate for Primark and a different rate
11 for the rest of the sector.

12 Sir, I am not pushing in any particular direction other than to say that those sorts of
13 outcomes should in my submission be left open, because one simply does not know
14 where the evidence is going to take us.

15 **MR JUSTICE MARCUS SMITH:** Well, this is moving very close to the intrinsic
16 difficulty of this trial, which is the scope of an exceptions process and the extent to
17 which one can make general findings within a trial. What you are saying is actually
18 the two may, in fact, merge. One may identify in the course of a trial an exception.

19 Now I want to be extremely clear that we are not confining ourselves in advance as to
20 how we are going to determine how pass-on works, because that is the essence of
21 the trial. So there are no restrictions in terms of what outcome we might get, but I do
22 want to be very clear that we are not trying individual cases.

23 Primark and Ocado and the other, as it were, nominate parties are in because they
24 are submitting themselves to a process where they are contributing to an ability to
25 decide a whole series of cases in the round. Now how granular or how broad brush
26 the points are, that depends.

1 Now it may be that one gets to a situation where we do say that Primark for certain
2 reasons are so different that we can actually say there is a specific category of one.
3 I don't want to exclude that, but I don't want your clients to be thinking that the evidence
4 they need to be adducing is what they would adduce in a bilateral trial where the only
5 question was Primark versus Visa and Mastercard. That would be to entirely distort
6 the process and effectively put the exceptions process at the beginning rather than at
7 the end.

8 So there are a variety of potential outcomes. One is that it is simply a general
9 articulation of how pass-on operates across all sectors, identifying the different factors
10 and essentially creating rates for those factors by reference to the evidence in the
11 round.

12 It may be that we at the other extreme come to the conclusion that, in fact, it is so
13 individuated, all we can do is provide a template for further applications to be made
14 mainly on the papers whereby a date is provided to enable the pass-on rate to be
15 adduced. In other words, you articulate the way in which pass-on operates, you
16 articulate what factors go to it and then you say "Well, they are so subjective, so
17 individual, that we then need to go to effectively a further stage beyond Trial 2 in order
18 to sort things out".

19 Now that is very undesirable, but I am certainly not saying it is not possible, because
20 that would be to pre-judge, and there will be no doubt possibilities in between where
21 one says "Yes, there are broad classes, narrow classes. Maybe there are classes of
22 one". I certainly don't want to close that out either.

23 So yes, I am violently agreeing that there is to be flexibility. That's the whole point of
24 this, to get evidence in so we can decide this generally, but we are not trying individual
25 cases, and that I think is understood, and if there is an attempt, as it were, to peel
26 down the layers of the onion for one particular party because it suits that particular

1 party to resolve that particular claim, then we are not going to be very impressed.

2 **MR JONES KC:** I understand that. Thank you, sir.

3 **MR JUSTICE MARCUS SMITH:** I see the time. We will rise until 2 o'clock and I will
4 receive any further markers then. Are we getting to the end or is there something
5 I have missed in terms of --

6 **MR BREALEY KC:** I was wondering if we were at the end.

7 **MR JUSTICE MARCUS SMITH:** Are we at the end?

8 **MR WOOLFE KC:** The only other thing I have is something which will take two
9 minutes.

10 **MR JUSTICE MARCUS SMITH:** I am unfortunately going to give a very short of
11 summary of what I have been saying this morning. It is annoying, but we will come
12 back at 2 o'clock rather than rush. 2 o'clock.

13 **(1.14 pm)**

14 **(Lunch break)**

15 **(2.00 pm)**

16 **MR JUSTICE MARCUS SMITH:** Mr Woolfe, was there anything more before you
17 passed over to Mr Brealey and then went on to HMRC?

18 **MR WOOLFE KC:** No, nothing else on HMRC.

19 **MR JUSTICE MARCUS SMITH:** Mr Brealey, I think the line was you had nothing to
20 say, but if you have repented yourself over the short adjournment, I'll be delighted.

21 **MR BREALEY KC:** No. Mr Piccinin said I've made two great submissions. One is "I
22 completely disagree" and "The hearing is at an end". I have got nothing to add, but
23 thank you very much indeed.

24 **MR JUSTICE MARCUS SMITH:** Anyone else on the side? No, Mr Lask. That's great.
25 In that case, Mr Woolfe, HMRC.

26 **MR WOOLFE KC:** Thank you, sir. Essentially this is simply in the nature of a marker

1 and a marker of a rather watch this space variety, but I should explain why HMRC is
2 in a slightly different position both in substance to the other Claimants and also
3 procedurally on the other side of the track.

4 HMRC is clearly in a different position to the merchant claimants generally in that it
5 doesn't trade in goods and services in any market. It is a tax collecting authority and
6 it incurs MSCs when payers pay their tax by debit or credit card.

7 Now in pre-action correspondence we have served particulars of claim. We are
8 awaiting a defence. The defence I think is going to be served today. It was due
9 tomorrow but is going to be served today. We don't know exactly what's in it. Now in
10 pre-action correspondence no allegation of pass-on was made by Mastercard and we
11 thought they were not raising one. However, out of an abundance of caution we wrote
12 to them asking two months ago "Are you raising this" on 13th February. There was
13 a holding response, but despite some chasing on late February and the end of March
14 no substantive response has been provided.

15 Now we will find out when the Mastercard defence is served. We were told yesterday
16 first of all that they won't be raising a pass-on defence but then a correction came
17 saying they won't be raising a merchant pass-on defence. So we do anticipate that
18 there will be some form of pass-on defence being read, but we don't know what. This
19 is simply a marker to say that if Mastercard does put in a pass-on defence, HMRC will
20 need to put in some form of evidence to deal with it but we don't know what yet at this
21 stage. Therefore, we are on a different procedural track to other parties. We don't
22 want to be blamed if we have to put in some stuff later not having put it in earlier.
23 Beyond that, of course, it is possible depending on what is said we may be on a slightly
24 different track in relation to Trial 2 generally.

25 **MR JUSTICE MARCUS SMITH:** That's helpful to know. It seems to me obviously if
26 the position is clear and there is no pass-on question on either side, then the question

1 resolves itself. To the extent there is a pass-on question, it would be helpful I think to
2 try to at least sweep it into the positive and responsive cases as a thing. Quite where
3 it emerges first is probably the problem.

4 **MR WOOLFE KC:** Exactly. We will have to take stock when the defence comes. We
5 anticipate that if it can be slotted in we will join in with that process, but it may not fit in
6 well with the dates because of that. It may be quite different in nature or may be very
7 similar in nature. That's really it, sir.

8 **MR JUSTICE MARCUS SMITH:** That's very helpful. Does anybody have anything to
9 say by way of response?

10 **MR COOK KC:** It is Mastercard's position which is relevant here. What we are putting
11 in issue is going to be acquirer pass-on, on the basis that we rather anticipate that
12 HMRC might turn round and say it had a MIFs plus plus contract, at least for most or
13 perhaps all of the period. Their pleading at the moment doesn't say that. Of course if
14 there is MIF plus plus, then acquirer pass-on is obvious. It is put in because we don't
15 know what the factual position is. If the factual position is as one perhaps suspects it
16 might be, then that point will go away, but we will see.

17 **MR JUSTICE MARCUS SMITH:** That's very helpful. Thank you both for that
18 information.

19 **MR COOK KC:** Thank you, sir.

20 **MR WOOLFE KC:** That was all I wanted to say.

21 **MR JUSTICE MARCUS SMITH:** Is there anything else before I make a short
22 summary of where I think we are at?

23 Mr Piccinin.

24 **MR PICCININ KC:** One very small point, which is we have talked a bit today about
25 July after the positive cases come in. I was just looking back over the order that we
26 had from January and we don't have at the moment --

1 **MR JUSTICE MARCUS SMITH:** The date.

2 **MR PICCININ KC:** Any hearing. That was all. It may be something that can being
3 dealt with later.

4 **MR JUSTICE MARCUS SMITH:** I think perhaps the parties could find the least worst
5 date between 20th and the end of July and get it in the diary for the Tribunal. It can
6 be removed if not needed, but as late as possible in July after 20th.

7 **MR PICCININ KC:** It may be that that does not leave enough time as it is. Perhaps
8 this is just something that should be taken offline and discussed between the parties
9 in the run-up to the next CMC. I think there is a bit of a concern on our side that if we
10 see these positive cases with all of the evidence that comes with it, to the extent that
11 we are seeing things for the first time on 19th July, there may not be very much time
12 to consider that with the experts and what they need in order to put a responsive case
13 together.

14 **MR JUSTICE MARCUS SMITH:** I think there are two questions here, aren't there?

15 **MR PICCININ KC:** Yes.

16 **MR JUSTICE MARCUS SMITH:** One is the need for additional material to test.

17 **MR PICCININ KC:** Yes.

18 **MR JUSTICE MARCUS SMITH:** And I hope I have been clear, but I will say it again,
19 that the presumption will be that you ask and you get, and to that extent I would not
20 be very keen on having applications whether it is in July or August or September. My
21 concern is more that what you got was so cataclysmically awful that it required major
22 surgery in order to rescue the process altogether, in other words, the nightmare
23 scenario of an unfair process that you have been raising quite properly throughout the
24 morning.

25 There it seems to me that one ought to have in place a let's try and rescue this process
26 hearing, which I very much hope will not be needed, but it might be better to have

1 something in the diary that is removed rather than have the parties fretting about
2 whether a hearing is necessary and spending ten days arguing about that.

3 My sense is that this has been an extremely helpful hearing precisely for the reasons
4 that Mr Draper articulated in earlier hearings, which is that it did not actually much
5 matter what the Mastercard application said. What mattered was that it generated
6 a hearing at which points could be aired. Frankly that has proved to be absolutely
7 right. I don't think I have very much consciousness now of what the Mastercard
8 application does say and it hasn't mattered, but we have got I think progress today
9 and my feeling is that a sense that the Tribunal will be online and available to deal with
10 points will enable the parties to calibrate their positive cases in that way, because it
11 will be quite clear that if there is a problem it will need pretty drastic remedial surgery
12 in July, and that very threat I suspect will ensure that positive cases are created that
13 don't create that sort of dramatic need for intervention.

14 So why don't the parties see if they can find a date which most can manage and we
15 will see whether we can accommodate and we will try to do that.

16 **MR PICCININ KC:** Could I ask a question about the first thing you said there as well.
17 I certainly had had the message loud and clear that ask and you should get is the
18 default. I wasn't clear on what the procedure for that will be.

19 **MR JUSTICE MARCUS SMITH:** Well, I think it will have to be -- given the August and
20 September line, I will give that some thought but I think it will have to be an on the
21 papers approach and we will have to make sure that we have a chair who is able to
22 deal with matters throughout the summer to ensure that you are swiftly served with
23 a response.

24 Again one anticipates that if such a process is in place, it will be less needed than if
25 a process is not in place, because people will game the system. So you can rest
26 assured that we will have some form of process and it is likely to be rather a brutal

1 process in the sense that the presumption "Ask and you will get" will be maintained
2 and it will have to show some fairly unnuanced objections in order for that to fail.

3 Obviously we have in mind things like proportionality and cost, but some effort will be
4 required and we do take the point that a two-month period is not very long. We think
5 it is long enough, but it does require a degree of careful effort. Of course, the extent
6 to which Mr Woolfe's process of a warts and all identification is done, to the extent to
7 which there is pre-positive case discussion, all of this will make August a less painful
8 month for all concerned, but I don't think we can presume that it will be an unfraught
9 period.

10 **MR PICCININ KC:** No.

11 **MR JUSTICE MARCUS SMITH:** You should probably presume the opposite.

12 **MR PICCININ KC:** Thank you. That is very clear and I will rest assured.

13 **MR JUSTICE MARCUS SMITH:** Well, we will see. Thank you very much.

14 **MR WILLIAMS:** Sir, I am genuinely sorry to pop up again given the time of day that
15 we have reached and I may well be pushing very firmly against a closed door, or some
16 of this may be about to be addressed in any event. However, I do need to make a brief
17 point and I have been instructed to do so.

18 In circumstances where no firm orders or directions appear to have been made today,
19 at least yet, but you have indicated on a number of occasions, sir, that Mr Merricks'
20 application is predicated on the shape of Trial 2 being settled, we are, I am afraid to
21 say, very concerned about being in a status of limbo and the timing for the hearing
22 and the determination of that application, which is needed – for the reasons set out in
23 my solicitors' letter – by 22nd May so that we are in turn ready for our position
24 statement in July, if that comes.

25 A number of proposals have been made today but they don't have a fixed end point,
26 which is of some concern because we are all at the stage of needing more certainty

1 and certainly well before the end of May for the reasons set out in the letters that you,
2 sir, will be well familiar with already?

3 **MR JUSTICE MARCUS SMITH:** Well, I am, Mr Williams, but exactly where is the
4 prejudice, given that you are actually working towards positive cases?

5 **MR WILLIAMS:** Sir, in the context of the mini-CMCs we will have and have had
6 discussions on the status of the quantitative disclosure which we are -- I am sorry to
7 ring the alarm bells yet again -- concerned about the position on and our concern when
8 that will all be finished. We are now adding to it qualitative disclosure as well.
9 We have heard, and are relieved to hear, that it will be coming by mid-May at least by
10 one party, but some of the other applicants or the Claimants --

11 **MR JUSTICE MARCUS SMITH:** Mr Williams, that is your fairness point.

12 **MR WILLIAMS:** It is indeed, sir.

13 **MR JUSTICE MARCUS SMITH:** If you want me to say I will decide the umbrella
14 application today and you are out, then I will do that, if you want to be satisfied that
15 you are safe and then you can run down a separate procedural track, but I don't
16 anticipate that that is your position.

17 So my point is given that you are actually being involved, albeit on a contingent basis,
18 where is the prejudice in not making an order until I am satisfied we are in a proper
19 position to do it justice?

20 **MR WILLIAMS:** We, sir, do have to understand the shape of Trial 2 ourselves in order
21 to assist the Tribunal and make submissions to the Tribunal on our application and the
22 nature of it so we understand what we are being signed up for voluntarily or otherwise
23 in light of your indications, sir. It is necessary for us to be well prepared and ready for
24 July as well. You indicated quite understandably, sir, at the recent CMC the
25 importance of those positive cases and we are, I am afraid to say, in some ways being
26 shut out of making procedural points in terms of the selection of the Claimants that are

1 coming off the menu.

2 My learned friend for the SSH Claimants at a later CMC suggested that we should
3 have no role in that process. Now we are, of course, like you, sir, very keen to ensure
4 the representativeness of those Claimants so that they are capable of the
5 extrapolation, if that is appropriate at trial, which is a submission for trial, but we should
6 and hope that we are still involved in that process and perhaps the real punchline is
7 for me to take this offline and address you, sir, at the next mini CMC once we know
8 where we are.

9 I am just laying down a marker at this stage that we are concerned that there is
10 an ongoing process when we are incurring significant and substantial costs without
11 really knowing what the shape of the evidence is or the shape of the trial is and we do
12 say that our application needs to be determined by the end of May so that we are
13 ready and it is not a continuous state of limbo where we are incurring significant costs.

14 **MR JUSTICE MARCUS SMITH:** Well, you see, my understanding is that you were
15 being involved, not as a party, but certainly as an interested party that has
16 an application before the court. That's why we have been engaging with you at the
17 informal case management hearings. You see, where I am a little bit puzzled is I have
18 got you pigeon-holed in the Visa camp where you are running an econometric case
19 and where your concern is about the adduction of material, not about the framing of
20 your positive case. Now if you are saying you need certain forms of party on the list,
21 on the menu selected, because otherwise your case will be prejudiced, then that has
22 not been my understanding to date.

23 **MR WILLIAMS:** Sir, I know that's on the agenda for the next mini-CMC, the menu or
24 I should say the order from the menu. We are certainly not seeking to extend the
25 menu in any way.

26 **MR JUSTICE MARCUS SMITH:** To what extent do you actually care what is on the

1 menu? I know others do, but ...

2 **MR WILLIAMS:** Sir, we do. You will recall that there are the four sectors of
3 Mr Coombs' twelve sectors which don't have complete coverage of the public data.

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

5 **MR WILLIAMS:** We are very interested in ensuring that there are
6 Claimants -- whether they are representative or not is to be determined and discussed
7 given how the menu has been selected, which is not on the basis of any principled
8 selection. I am afraid we are at a stage, sir, where, despite the indications given over
9 18 months, we have ended up with a sample which is not selected on a principled
10 basis, just on who could provide the data.

11 **MR JUSTICE MARCUS SMITH:** Ah, yes. You see, this is why it is good not to decide
12 this, because the fact is you are getting a real advantage if you are allowed in, in the
13 fact that you are getting data which you wouldn't otherwise get.

14 Now I am very happy to ensure that that is one of the advantages of making an
15 umbrella proceedings order, but I am not having the tail wagging the dog, and at the
16 moment you are very much the tail and this side of the courtroom is the dog. I need
17 to make sure that -- I hope I am not taking this analogy a little bit too far -- but I want
18 this dog to be primed and prepared ready for trial. At that point when I am satisfied
19 that it is in a fit state for Crufts, that we can think about adding a collar to the dog which
20 has the badge of Merricks on it.

21 **MR WILLIAMS:** Well, sir, you will forgive me for one moment of indulgence in that Mr
22 Merricks certainly does not see himself as only a collar or a tail. His claims in value
23 dwarf those of the merchant claimants and are on behalf of many millions of
24 consumers, sir.

25 **MR JUSTICE MARCUS SMITH:** You are absolutely right, Mr Williams, but all you are
26 saying there is, if this process is not an appropriate vehicle for the Merricks class, then

1 a further trial is available. Now I think we can proceed on the basis, which is why we
2 have not listed a separate hearing, that this will work itself out, but I do understand
3 where you are coming from, but I think you do need to understand that we are, as
4 I said earlier, riding two horses. So we know that you need to decide and we know we
5 need to decide it, but we do need to ensure that the question of whether you are
6 a separate entry into Crufts or merely an appendage to the single entry that is before
7 the court at the moment, well, that's a matter which we are anxiously deciding and
8 need to get right.

9 **MR WILLIAMS:** Sir, I hear that and I understand that. I think I have laid down my
10 marker there. We do request a decision by the end of May and we do need a bit more
11 progress from our perspective, sir.

12 **MR JUSTICE MARCUS SMITH:** Duly heard. If I could ask, though -- Mr Cook, you
13 are about to rise. It may be in response to that. When you address me, if you could
14 identify any issues very briefly in objection to Merricks coming in over and above the
15 ones that we are very conscious of, which is manageability of trial, then bullet points
16 would be very useful, but I don't want to stop you from saying anything else.

17 **MR COOK KC:** I was going to rise more to say Mastercard is in the rare position of
18 agreeing with Mr Merricks on the basis; from our side as well, we fully understand the
19 Tribunal wants to have the clear shape of Trial 2 before it makes a decision, but equally
20 from our perspective as well it would be helpful to know somewhat sooner rather than
21 later. whether this is a trial which is -- because obviously Mastercard is in the position
22 where there is a substantial difference between the positive case we would have to
23 submit in July if it is only in relation to, in simple terms, 2010 onwards for the Claimants
24 suing us or it goes back to 1992, which is obviously, you know -- and many of the
25 considerations that we have set out in our response to the Merricks application deal
26 with what we say. This is an area where we are going to fall into disagreement, but

1 we say that is a massive increase in the scope of what would need to be done in terms
2 of expert analysis, but obviously that feeds through into the scope of the trial.

3 **MR JUSTICE MARCUS SMITH:** Right. I mean, that is really what I want to get
4 a sense of. I think -- please do correct me if I am wrong -- that what you are saying is
5 that even if the Tribunal is satisfied that bringing Merricks in is a good idea, because
6 it enables a better triangulation and from the Tribunal's point of view a more efficient
7 resolution of two big trials rather than one big trial, Mastercard would still have
8 an objection to us making an umbrella proceedings order in those circumstances.

9 **MR COOK KC:** Well, I think the starting point, sir, would be one, I would be submitting,
10 that that is not right. The Tribunal shouldn't see that as being useful, because, for
11 reasons that, you know, we have developed in writing, we don't take the view that
12 Mr Merricks will actually add anything useful to the material that will be before you.
13 These are all matters we would have to develop in some greater detail. So we
14 disagree with that proposition.

15 In terms of the bullet points you asked for, step one is, you know, we say in relation to
16 Mr Merricks that the most important thing is that we are at a stage where it could
17 become clear relatively soon what we are actually fighting about in Merricks in terms
18 of the pass-on issues, because, as you may appreciate, there is this massive potential
19 difference between the claim as pleaded at the moment, which in very simple numbers
20 is £10 million, 93% of which is domestic transactions, versus where we say -- this goes
21 to a causation issue -- the claim actually based on a Commission decision is properly
22 limited, which is to cross-border transactions, and there is a fundamental difference of
23 degree, as one gets from some of the recent Tribunal decisions on pass-on,
24 particularly *Royal Mail*. When you talk about the scale of an overcharge, it potentially
25 is quite significant to the analysis but also the result one gets to.

26 Certainly our starting point is that when you have a situation where we may just be

1 fighting about cross-border or we may be fighting about something which is 20 times
2 larger, then that is an important preliminary point to decide, which would matter for the
3 Merricks Tribunal. We think we are 90% of the way home on that. Different views will
4 be taken on that. I don't ask the Tribunal to inform anything on that at all, but there
5 are points that could be dealt with in Merricks in short order which would resolve that
6 question, and then the Tribunal would know what is being passed on, because we do
7 say it potentially makes a significant difference to the outcome of the pass-on. It may
8 or may not do, but the scale of what we are talking about, which has a whole series of
9 factors in terms of the analysis, because cross-border transactions tend to be in
10 particular sectors, mainly travel and entertainment, and domestic transactions tend to
11 be high street shops and supermarkets. So there is a whole series of differences to
12 the analysis that one builds into that process, which is -- so we say, step one, one
13 should resolve that. Step two, we say, properly analysed, that Mr Merricks does not
14 actually add anything of value. He is either duplicating for a different time period what
15 Mr Holt was planning to do anyway, or, because he is doing it for a different time
16 period, something which is of no utility, because pass-on in '95 provides very little
17 indication what pass-on will be like in 2020.

18 Then the third point is that because of the differences here, the scale of what one is
19 adding to the expert process and in terms to the trial that flows from that is something
20 that can't sensibly be accommodated within Trial 2. So that sort of the blows up the
21 trial in a way that goes beyond what can sensibly be dealt with, given all the issues
22 that one sees in Trial 2 already.

23 So those are the thumbnail list of thumbnail sketches of the points.

24 **MR JUSTICE MARCUS SMITH:** That's very helpful, Mr Cook. I am grateful.

25 **MR COOK KC:** But those are the points that we've developed a bit more in writing
26 and I'll develop a lot more at a hearing listed to deal with those matters, sir, but from

1 our side we do think there is, you know, a desirability, shared with Mr Merricks, of
2 resolving this over the next month or so.

3 **MR JUSTICE MARCUS SMITH:** I entirely understand that.

4 Well, let's see if we can make this process a little bit more manageable now. I read
5 your objections as being under three heads. One is the manageability of the trial if
6 Merricks is in; the second is the usefulness of the additional material that will come in;
7 and the third is your ability fairly to prepare. Would that be a fair articulation of the
8 heads under which your objections will be taken.?

9 **MR COOK KC:** Yes, sir. As with any summary, it is lacking in detail, but that's the
10 nature of a summary, sir.

11 **MR JUSTICE MARCUS SMITH:** So, looking at the usefulness, what does Merricks
12 bring to the party? I don't think the Tribunal is going to be very much helped by that,
13 except in a marginal way, and that's because of -- it is the third time of running
14 it -- Mr Piccinin's debate with me this morning. I am not sure that we can judge the
15 usefulness without a trial. My very strong instinct is that triangulation, as I call it, is
16 a good thing, as is having different stances from different people -- we have at one
17 end of the extreme a very broad-brush case from a different time period, Merricks. At
18 the other end of the extreme, we have very specific Claimants running very specific
19 and granular points. I see real virtue in having all that material, provided it is
20 manageable, before the Tribunal. How useful it is is something which the trial is there
21 to determine. So I don't have much sympathy, but you may want to unpack it with your
22 usefulness points, but if it helps on the submissions, that is the third in terms of
23 helpfulness for the Tribunal.

24 Manageability, as I understand it, is something which we are controlling now, and the
25 reason we are not going to hear the application until we are satisfied things can be
26 managed is because I want that to be essentially a no brainer question. In other

1 words, I am not really in the business of allowing the application to be brought until we
2 are tolerably confident that it will be granted on that head alone. So that's how I am
3 seeing the manageability question. Does the addition of the Merricks action prejudice
4 a Trial 2 which is to the extent that we can be assured of it properly being managed
5 and capable of trial?

6 That leaves the third point, which is Mastercard's ability to prepare. Now you are
7 actually right. Sooner rather than later on that is clearly correct, but I would want to
8 get a sense of how far the addition of Merricks actually adds to the Mastercard burden.

9 The reason I ask that is because a long time ago, and I confess I can't remember who
10 told me this, but I think it was an advocate for Merricks, which was the way in which
11 they were putting their case was by way of an extrapolation from data that was in any
12 event in Trial 2 and that the virtue of a UPO was that you would, from existing data,
13 simply extend the run without materially adding to the work.

14 Now that's something which, if it is not right, is material, and it seems to me that is the
15 area which we would want to look at most carefully. If Mastercard are saying the ball
16 game has changed, well, frankly it does look quite closely aligned as a point of
17 manageability, and I would be quite surprised if manageability and preparedness fell
18 very differently in terms of their outcome, but it may be that they do. That's the point
19 on which I think I would want your assistance the most.

20 **MR COOK KC:** The other thing to say, sir, is that I am not sure you have really ever
21 heard from me on these points or anybody else from Mastercard. It is not so much
22 a question of the game having changed. It is that these points have not been
23 developed previously other than in passing in writing. So we certainly never accepted
24 that is an accurate statement of the position, and also Mr Merricks may choose to do
25 it one way. From our perspective he wants to do it that way by essentially just
26 assuming away all of the differences that we know exist in the world between the

1 1990s and 2020s. We will need to put forward factual material -- I don't mean witness
2 statements -- you know, reports of various kinds and regulator materials like that that
3 are external independent sources of material explaining a lot of the differences that
4 exist in the acquiring market, the retail market, the payments market, you know, in
5 a variety of ways. So there's a difference between how Mr Merricks might choose to
6 simplify his case versus what we say are the proper matters, the difficulty that he faces.

7 **MR JUSTICE MARCUS SMITH:** Presumably, though, you have been doing some
8 work in working out what might need to be done in order to respond to Merricks'
9 application.

10 **MR COOK KC:** Sir, we certainly obviously started thinking about it.

11 **MR JUSTICE MARCUS SMITH:** Okay.

12 **MR COOK KC:** I mean, the process that's ongoing for Trial 2 and in terms of the data
13 that's being produced there, is obviously, until the sort of quantitative data comes in,
14 that's going to be the starting point for a lot of the work we do. Then obviously
15 alongside that, you know, dealing with all the matters that go towards Merricks, but ...

16 **MR JUSTICE MARCUS SMITH:** Well, I think it would be helpful to have sooner rather
17 than later an articulation of that third point, the one we have just been discussing.
18 I don't think, though my memory is possibly failing, we have had that articulation so
19 far.

20 Could you provide a two or three page explanation of the problems on that head, so
21 not usefulness, not manageability, but your ability to prepare a response to whatever
22 it is that Merricks is doing in pretty short order in the course of next week?

23 **MR COOK KC:** Sir, there was a submission that went in yesterday supported by
24 an expert report that deals with this. I am afraid it is rather more than two or three
25 pages, which is the nature of these things. A document of this kind has gone in. It is
26 not on the papers in front of you I suspect, but if it is not, it is because it is not sort of

1 before you on this hearing. So there is, you know, a process that's ongoing in
2 anticipation of that hearing.

3 **MR JUSTICE MARCUS SMITH:** Okay. Well, we will look at that. My thinking is that
4 we probably want to get ourselves into a position where we have at least internally
5 resolved and heard from the parties on all points that are outside the manageability
6 question so that we can move quite quickly to deciding this when manageability allows
7 us to do so.

8 Is this something on which the parties will want an oral hearing or can it be dealt with
9 on papers?

10 **MR WILLIAMS:** Yes. From our perspective it is obviously a very important
11 application. So an oral hearing would help, if only to answer your or any other panel
12 members' questions that you may have.

13 **MR COOK KC:** I think an oral hearing would assist as well, sir. I am conscious as
14 well that the reality is that you, sir, have no involvement in Merricks and therefore there
15 is a certain amount of unpacking what's going on in Merricks and issues like that that
16 will need to be done and questions will arise out of that for the members of the Tribunal
17 quite naturally as the process goes on.

18 **MR JUSTICE MARCUS SMITH:** What I am getting is that there is at least one
19 fundamental issue which you say precludes the making of the umbrella proceedings
20 order, which is over and above the points that the Tribunal has been focusing on,
21 which is the general manageability questions to which --

22 **MR COOK KC:** Yes. Precludes, makes less desirable, you know, matters like that.
23 I wouldn't put it as a hard-edged proposition necessarily. These are case
24 management choices that --

25 **MR JUSTICE MARCUS SMITH:** I am sure you would put it as high as you could, so
26 "preclude" is probably the right word. Of course you are right. It is a discretionary

1 question. Thank you. That has been very helpful.

2 Is there anything else before I say a few words by way of summary? No. Thank you
3 very much.

4 This is a hearing that was quite rightly put in the diary by Mastercard to ensure that
5 there was a hearing before the Tribunal at which evidential points of dispute could be
6 aired and finally resolved so that Trial 2 can proceed unimpededly.

7 There has been no resolution of I think anything except the adduction of certain expert
8 reports, and even then on a substantially provisional basis, during the course of what
9 has nevertheless been a very helpful hearing. What has happened is there's been
10 an exchange between the parties and the Tribunal of what I will call markers, and each
11 party has been putting down a series of very clear markers as to how the trial process
12 and the processes before trial will work.

13 What I am saying here is by way of a summary of how the Tribunal sees matters
14 proceeding in the coming months and it is no more than that.

15 I anticipate and I would encourage those who see the shape of the proceedings in the
16 future in a particular way to pay particular regard to the exchanges that took place this
17 morning between counsel and in particular myself and Mr Piccinin, because that very
18 helpfully served to identify the potential for future problems and the potential equally
19 to resolve those in due course.

20 The Tribunal notes the concerns expressed by Visa that introducing wide-ranging
21 qualitative material could lead to an unfair trial. The Tribunal obviously is going to go
22 out of its way to avoid even giving the impression of unfairness.

23 Although it is tempting to take the sort of bright line approach advocated by Visa, the
24 problem is that not all parties -- indeed the majority do not -- accept that bright line.

25 To them this evidence is necessary for a fair trial. On their view it is being on Visa's
26 approach excluded before trial and effectively without a hearing.

1 The options are therefore highly unattractive. On the one hand, one has Visa saying
2 that a fair trial requires the elimination or exclusion of certain evidence, albeit with
3 certain nuts and bolts added to enable the evidence to come in later, such as the use
4 of preliminary issues. That is one problem. The other is the unfairness point of
5 excluding evidence without incorporating it properly into the trial.

6 We have sought to resolve this problem by making clear that the process is one that
7 has fairness and a review of the evidence that is submitted embedded in it, and on
8 that basis we have reached two conclusions.

9 First, no matter how right Visa may be at a trial as to the irrelevance of the material
10 sought to be adduced, Visa should not, and we do not accede to this, seek to press
11 the matter of exclusion at this stage, but, secondly, and as an immediate consequence
12 of that, the adduction of qualitative evidence needs to be controlled most carefully so
13 as to achieve the related objectives of a manageable trial and a fair trial.

14 Let me be clear that I do not regard those two elements as of equal standing.
15 Obviously a manageable trial is highly desirable, but at the end of the day a fair trial
16 trumps manageability every day and we are in the business of trying things fairly, but,
17 if possible, also manageably and that is what we are striving to do.

18 Consistent with the approach of positive cases, we consider that the parties' experts
19 in particular need to be given a wide latitude in terms of the evidence that they seek
20 to incorporate into their positive cases. Of course, that is subject to case management,
21 and case management of a peculiarly intrusive sort over the coming months. We are,
22 however, at this stage operating at too generic a level for case management to have
23 any bite.

24 As discussed at the case management guidance hearing last week, the parties need
25 to get on with identifying the evidence that they need to deploy with a view to that
26 evidence being reviewed and embedded in the positive cases.

1 In terms of the fairness of that process, a number of points need to be made. First,
2 the time for responsive position papers was carefully considered and has been laid
3 down for some time. We consider that the period between July and September, the
4 period between the submission of a positive case and the submission of a responsive
5 case, is time that is critical and needs to be used. We stress that to the extent that
6 material by way of elucidation or explanation for positive cases has to be produced,
7 whatever shape or form that is, it will have to be produced very quickly and at the
8 prompting of the lead expert economists on the side of the person having to respond
9 to the positive case.

10 In short, although it is not a blank cheque, if the material is asked for, prima facie it will
11 be given and we will not be very interested in objections on the grounds of relevance.
12 We will be interested in objections on the grounds of proportionality and costs, and it
13 may be that if it appears that a request is disproportionate or unduly costly, we need
14 to explore the question of relevance more, but we are not very interested in getting
15 into questions of relevance where material can at reasonable cost be provided.

16 So much for the time between July and September.

17 A further control I should mention is that late in July, as late as possible, we are minded
18 to have a hearing at which car crash problems can be dealt with so that if a positive
19 case is clearly on the face of it going to result in an unmanageable trial or
20 an impossibility to respond, we get a grip of that as soon as is practically possible.

21 Secondly, and as has already been mentioned, a party putting in a positive case needs
22 to make sure that this is done in a balanced way. During arguments, the notion of
23 deploying language from the law of insurance was mentioned, that instead of making
24 a fair presentation of the risk, what needs to be done is making a fair presentation of
25 the point.

26 Now, of course, we appreciate that the parties are acting as advocates, not as in any

1 way a neutral reporter, and the points they put will be to benefit their client's case.
2 That being said, we consider that a positive case properly put is one that provides the
3 context and provides a fair presentation of the point so that it doesn't have to be
4 impacted by the requesting of further information in the course of August
5 and September.

6 What we expect is that it will be on the face of it clear why a point is being made and
7 what the points that go either way in regard to the merits or demerits of that point are.
8 I stress that this is not a question of the production of adverse documents. We are not
9 talking about documents at all. We are talking about points that are articulated in the
10 positive case which need to be fully and properly understood and for which information
11 may need to be provided or data may need to be provided in order to understand and
12 rebut the point, but we expect that every party producing a positive case will do so
13 fully, ideally articulating before the service of positive cases what sort of material they
14 are looking at, and Mr Woolfe, leading counsel for the SSH Claimants, made clear that
15 that point had been taken well on board by the Claimants and I am very grateful for
16 his submission. What he said was that what went to their experts would also go to the
17 experts of other parties to do with what they will. So to that extent surprise is being
18 taken out of account, but I do stress that after positive cases have been served every
19 party producing a positive case will have to be ready to answer and answer swiftly
20 questions from the other parties.

21 We also want to make clear that at the end of the day there will be a substantial trial,
22 and the whole point about a substantial trial is that the vehicle, powerful vehicle, of
23 cross-examination will be deployed, and if and to the extent it becomes clear at that
24 late stage that a skewed analysis or skewed point has been put in, well, at that stage
25 it will not be possible to de-skew it and present it neutrally. The point will simply go in
26 the bin as being of little or no weight, because we are in the business of fair trials in

1 which both sides are heard, and we consider that the vehicle of cross-examination as
2 a last resort is an extremely important one and one which we are ready to deploy.

3 In that regard I should make clear that we will exercise our very considerable case
4 management powers to ensure that if a party wants to put a point to a person which is
5 relevant to a point in a positive case, if and to the extent that requires a live witness,
6 we will oblige the party relying on the point to present that witness so that person can
7 be cross-examined, and we are not going to say the order of witnesses or who the
8 witnesses are is exclusively in the gift of the party producing the positive case. If there
9 is a need to hear from a particular person, and that is articulated by the party
10 challenging a positive case, then we think that person should be called.

11 All of that is subject to the overriding point that we need a manageable trial that is
12 concluded within the periods allotted to it. There may be -- we have discussed the
13 possibility of adding an extra week. The parties should not count on that, but they
14 should proceed on the basis that what we have ordered is the time available, and if it
15 can be stretched, well, that's a benefit, but at the moment don't count on it.

16 So we will exercise our trial management powers to the full in order to ensure that the
17 right sort of cross-examination is made available for the ultimate benefit of the
18 Tribunal.

19 Mastercard of the Defendants is moving a number of disclosure requests against the
20 parties. We anticipate that those requests are to an extent anticipatory; in other words,
21 they are intended to keep the other producing parties on the straight and narrow and
22 not actually to inform Mastercard's positive case but its negative and responsive case.

23 We have no difficulties with that approach to the extent it has been adopted. We
24 endorse it and we will be minded to facilitate it to the extent it has not already been
25 facilitated by the helpful approach of the SSH Claimants.

26 The final point I would make here is that the scope of the qualitative evidence is, in

1 fact, quite limited. We may be in danger of making mountains out of mole hills. The
2 limits on the qualitative evidence arise for a number of reasons. First of all, because
3 of the limited numbers of Claimants producing quantitative evidence, it being agreed
4 that those Claimants should be the only ones providing qualitative evidence. That
5 immediately limits the ambit of the qualitative evidence. In itself that is also a good
6 thing. We will understand the quantitative data better.

7 Equally, it does appear that the material is of at least a relatively narrow subject matter,
8 the relationship between costs and pricing. I do understand that Mr Piccinin is
9 concerned about how deep one goes into the layers of the onion in terms of identifying
10 the links between costs and pricing, because, as every economist knows, price is not
11 necessarily linked to cost, but that is a point which is one of the points in issue, and
12 we will be concerned if there is a too granular slicing of what is a point that really can
13 be regressed almost ad infinitum.

14 It seems to us likely that a targeted approach between July and September, provided
15 that due process is observed before July, will provide enough material for a responsive
16 case to be produced and for cross-examination to take place effectively, noting that
17 requests for disclosure can certainly continue after September if justified and made
18 before July if the parties wish.

19 In all those circumstances, therefore, we consider that, given the procedural
20 safeguards just outlined and discussed in greater detail this morning, a fair trial
21 continues not merely to be possible, but is to be expected given the processes we
22 have put in place, but we are very conscious that this is an enormous and very difficult
23 to manage trial and for that reason we are keeping an extraordinarily close eye on the
24 process, including at the fortnightly case management guidance hearings, which
25 enable the parties to raise problems with us and us to give guidance in respect of
26 those problems.

1 In all those circumstances I am going to make no order today. That would be
2 inappropriate, but I hope and trust that sufficient direction of travel and guidance and
3 markers have been put in place so that the parties are confident or as confident as
4 they can be that the approaching litigation in which they are all engaged will proceed
5 as expeditiously and as focusedly as possible.

6 With that, I want to express my gratitude to all concerned, including in particular
7 Mr Piccinin, who was in the firing line this morning. I am very grateful to you in
8 particular. It enabled a number of points to be made on the record, which was I think
9 helpful, but I am grateful to you all. This is not an easy case and you have made the
10 management of it considerably easier by your very helpful cooperation and advocacy
11 both today and in previous weeks and months. So thank you very much. I look
12 forward to seeing some of you in nine days' time. Thank you.

13 **(2.53 pm)**

14 **(Court adjourned)**

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