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4 record.

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

1517/11/7/22

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

12 Monday 10<sup>th</sup> March 2025

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15 Before:

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17 The Honourable Justice Michael Green  
18 Ben Tidswell  
19 Professor Michael Waterson  
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24 **Merchant Interchange Fee Umbrella Proceedings**

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

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32  
33 Matthew Cook KC and Owain Draper on behalf of Mastercard (Instructed by Jones Day)

34  
35 Daniel Jowell KC, and Aislinn Kelly-Lyth on behalf of Visa (Instructed by Linklaters LLP  
36 and Milbank LLP)

37  
38 Philip Woolfe KC, Flora Robertson and Oscar Schonfeld on behalf of the Merchant  
39 Claimants (Instructed by Stephenson Harwood LLP and, Scott + Scott UK LLP for the SSH  
40 Claimants and Harcus Parker Limited for the CICC)

41  
42 Jack Williams on behalf of Walter Hugh Merricks CBE (Instructed by Willkie Farr &  
43 Gallagher (UK) LLP)

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Monday, 10 March 2025

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(10.30 am)

(Proceedings delayed)

(10.41 am)

MR JUSTICE GREEN: Morning. Welcome back. Slightly different venue. I need to read out the notice. Some of you are joining us live stream on our website, so I must start therefore with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual of the proceedings, and breach of that provision is punishable as contempt of court.

Right. Can you just give me a moment whilst try and log on? (Pause)

Okay. Are you okay? Right. Mr Woolfe, it's you to go first. Well, at least for the purposes of introductions.

MR WOOLFE: Yes. So, Mr Jowell KC appears with Ms Kelly-Lyth for Visa, the other end. Mr Cook KC appears with Mr Draper for Mastercard. I appear together with Mr Schonfeld and Ms Robertson for the Merchant Claimants, that's the SSH Claimants as was, plus the CICC --

MR JUSTICE GREEN: Yes.

MR WOOLFE: -- class as well. And Mr Williams appears for Mr Merricks.

The agenda, sir. Just want to ask you, you have the right access to the Opus bundle? A sub-bundle, RC-N1, has been created within RC-N and that has all the material for this PTR in it.

MR JUSTICE GREEN: Right.

MR WOOLFE: I wanted to check, sir, if you have got the right documents.

MR JUSTICE GREEN: Yes, I've got that here, and I've also got the skeletons in hard copy.

1 MR WOOLFE: As well as the three skeletons from the Merchant Claimants --

2 MR JUSTICE GREEN: Yes.

3 MR WOOLFE: -- Visa and Mastercard, do you have Mr Merricks' -- it's framed as a  
4 costs application?

5 MR JUSTICE GREEN: Yes.

6 MR WOOLFE: (Overspeaking) the skeleton on the --

7 MR JUSTICE GREEN: Yes, I've got that.

8 MR WOOLFE: So the points on the agenda are in a letter.

9 MR JUSTICE GREEN: Yes.

10 MR WOOLFE: RC-N1, 32, page 1. Letter from (inaudible) solicitors. Those are the  
11 points, so to run through them, so they are effectively, Mr Merricks' costs application  
12 points, the liability for costs, the implications of Mr Merricks' settlement; that is a rubric,  
13 effectively, for a point about what is to be done with Mr Coombs' evidence. Then  
14 there's the Trial timetable, hot tub agenda, confidentiality, and AOB.

15 With that, sir --

16 MR JUSTICE GREEN: I don't think we're going to be that long, are we?

17 MR WOOLFE: No, I certainly hope not. We all have places to go.

18 MR JUSTICE GREEN: Timetable has been agreed, as I understand it.

19 MR WOOLFE: That's right.

20 MR JUSTICE GREEN: So we don't need to spend any time on that; it all looks very  
21 sensible. Obviously, with the departure of Merricks, that's eased the pressure a little  
22 bit.

23 MR WOOLFE: That's right, sir.

24 MR JUSTICE GREEN: So we're sitting four days a week, Trial 2B the first week, and  
25 then closings the second week.

26 MR WOOLFE: That's right, sir.

1 MR JUSTICE GREEN: Yes.

2 MR WOOLFE: Really, apart from the first point, there is -- and a little bit on the  
3 second -- there's very little between the parties on any of this.

4 MR JUSTICE GREEN: Yes.

5 Costs application

6 MR WOOLFE: I'm in your hands, sir, as to who you want to hear from first on this  
7 costs point.

8 MR JUSTICE GREEN: Right.

9 MR WOOLFE: Mr Merricks has made an application, so in a sense, it may be simpler  
10 to hear from him. Our point is simply a logical consistency one, which is if it is possible  
11 that you may later want to reduce cost recovery as between the Merchant Claimants  
12 and Visa and Mastercard, on the basis that some costs should properly be recovered  
13 from Mr Merricks, then you can't make no order to costs now.

14 MR JUSTICE GREEN: Yes.

15 MR WOOLFE: But if that's not a possibility, then we're content for him to depart and  
16 no order to be made. What we don't want is --

17 MR JUSTICE GREEN: What you're saying is that if we decide now that you're able to  
18 recover all your costs, should you win, from Visa and Mastercard, including any  
19 reasonably incurred costs in dealing with Mr Merricks' evidence, then you're content  
20 for there to be no order as to costs.

21 MR WOOLFE: What we're actually asking for is at paragraph 6 of our skeleton, so  
22 that's RC-N1, 38, 4. Zoom in on paragraph 6.

23 MR JUSTICE GREEN: Yes.

24 MR WOOLFE: All we want is a direction that costs will be not treated as irrecoverable,  
25 solely by reason of the fact they were incurred in consequence of Mr Merricks'  
26 inclusion in the proceedings. It's framed in the negative in that way, precisely to

1 achieve what you said, sir, which is if we have reasonably incurred -- we have  
2 necessarily had to deal with Mr Merricks' position in order to pursue our claim against  
3 Visa and Mastercard. We've not been dealing with his position for the fun of it; we're  
4 only doing it because we have a claim against Visa and Mastercard, and --

5 MR JUSTICE GREEN: We're not actually talking about a huge amount of costs, are  
6 we? Because this is, as I understand it, your costs of cross-examining Mr Coombs; is  
7 that basically it?

8 MR WOOLFE: Well, there are those costs, but there are also preceding costs in the  
9 sense of dealing with Mr Merricks' engagement in the pass on issues over a longer  
10 period of time. For instance, in December 2023, for example, there was a joint expert  
11 process in which Mr Merricks engaged. There have been various requests for  
12 disclosure by Mr Merricks and so forth. So there are a number of things, but we have  
13 only been engaging with them because they are necessary, we think, to pursue our  
14 claim against Visa and Mastercard, because the Tribunal decided to hear the points  
15 together.

16 We're not asking for this Tribunal here today to determine that any specific costs are  
17 recoverable; you couldn't be in a position to do that today. All we are saying is asking  
18 the Tribunal to acknowledge that merely because particular costs relate to  
19 Mr Merricks' evidence or Mr Merricks' submission, it's not the case that we didn't  
20 reasonably incur those for the purpose of pursuing our claim against Visa and  
21 Mastercard. Therefore, those costs should be, if we win, recoverable against Visa and  
22 Mastercard.

23 MR JUSTICE GREEN: But can we properly decide that now at this stage?

24 MR WOOLFE: Well, we were not pushing for this point to be (overspeaking).

25 MR JUSTICE GREEN: No, no, I understand you've been --

26 MR WOOLFE: Mr Merricks is pushing for no order as to costs, and Visa are advancing

1 a position that -- it may be that they're saying that certain costs should be paid by  
2 Mr Merricks and shouldn't be paid by the actual (overspeaking).

3 MR JUSTICE GREEN: So is your primary position that we shouldn't really deal with it  
4 today, we should leave it until the end of the trial?

5 MR WOOLFE: If you want to make the order Mr Merricks seeks, we would ask for the  
6 direction that we seek. If you are not going to make the order against Mr Merricks,  
7 then we're quite relaxed.

8 MR JUSTICE GREEN: Right. Okay. Right, is that all you wanted to say in relation to  
9 costs?

10 MR WOOLFE: I was going to hand over to Mr Williams to advance Mr Merricks'  
11 application.

12 MR JUSTICE GREEN: Right.

13 MR WOOLFE: And then I can respond.

14 MR JUSTICE GREEN: All right.

15 All right, Mr Williams.

16 Submissions by MR WILLIAMS

17 MR WILLIAMS: Sir, it's a pleasure to be back.

18 MR JUSTICE GREEN: I'm sure it isn't.

19 MR WILLIAMS: Somewhat surprisingly. Sir, this is an application by Mr Merricks  
20 in response to a Visa suggestion and the Merchants' alternative position that  
21 a portion of the compensation sum available to consumers, as a result of the  
22 settlement between Mr Merricks and Mastercard, is ring-fenced on a contingency  
23 basis at this stage until after Trial 2 for legal fees incurred by Visa and the retailers.  
24 Now, the suggestion, as you've heard already, is that compensation available to those  
25 consumers and potentially charity could be reduced further for legal fees by a scheme  
26 and retailers in other proceedings.

1 Now, that's obviously, in many ways and for obvious reasons, unattractive, but it is  
2 also based, in our submission, on a fundamentally flawed premise that there is any  
3 realistic prospect whatsoever of Mr Merricks being liable for costs in due course, in  
4 any event. Instead, what Mr Merricks today is seeking is certainty and finality for the  
5 class by seeking, as you've already heard, an order that there be no order as to costs  
6 as between Mr Merricks and Visa on the one hand, and the SSH Claimants on the  
7 other.

8 This drop hand solution works in both ways and is, in our submission, pragmatic and  
9 fair. This can be accompanied by a direction that Mr Woolfe has already alluded to,  
10 that Visa and the Merchant Claimants each retain the possibility of recovering their  
11 costs against one another, and that costs shall be not be treated as irrecoverable  
12 solely by reason of the fact that they were incurred in consequence of Mr Merricks'  
13 involvement.

14 MR JUSTICE GREEN: Yes.

15 MR WILLIAMS: That position is the primary position, as I'd understood it, of the SSH  
16 Claimants, and, of course, Mr Merricks. The skeleton argument for the SSH Claimants  
17 suggested that they are willing to agree to a consent order in those terms, and it's only  
18 if Visa convince you otherwise that we shouldn't determine this today, sir, that the  
19 alternative position that you've been addressing with Mr Woolfe -- comes into play,  
20 that they understandably reserve their position, essentially. But the primary position  
21 is that we can and should, in my submission, resolve it today. I propose to address  
22 you on that topic first, if I may.

23 MR JUSTICE GREEN: I mean, this is technically before us, I assume, even though it  
24 was only issued, I think, quite late on Thursday.

25 MR WILLIAMS: It is indeed; it's been canvassed extensively in correspondence  
26 beforehand.

1 MR JUSTICE GREEN: Yes.

2 MR WILLIAMS: So although the application was issued on Thursday, and I like to  
3 think that I've sprinkled some magic dust over it, all of the substantive arguments have,  
4 in fact been made in correspondence.

5 MR JUSTICE GREEN: Yes, but in a sense, it's slightly unfair that you effectively put  
6 in an 11 page skeleton argument, whereas the others have been limited to their five  
7 pages for the PTR.

8 MR WILLIAMS: Well, I was rather hoping that --

9 MR JUSTICE GREEN: And this has been tucked in.

10 MR WILLIAMS: Sir, I was rather hoping that it would be seen that I'd put in a zero  
11 page skeleton argument; the application was --

12 MR JUSTICE GREEN: I know.

13 MR WILLIAMS: -- issued beforehand.

14 MR JUSTICE GREEN: Well, we saw through that one pretty quickly.

15 MR WILLIAMS: But, sir, unless I can assist you in any other particular order, I propose  
16 first to address you on the "Why now? Why today?".

17 MR JUSTICE GREEN: Right.

18 MR WILLIAMS: Then if we get there, secondly, why there's no basis (overspeaking).

19 MR JUSTICE GREEN: Well, do we need to listen first to whether this application is  
20 actually going to be heard now? No one's got any objection to the application being  
21 heard now, have they?

22 MR WILLIAMS: I'm prepared to address you on why we should grasp the nettle today,  
23 sir, as my first submission in bringing the application.

24 MR JUSTICE GREEN: Yes. Right.

25 MR WILLIAMS: Because Visa has suggested that grasping the nettle today is  
26 "premature", to quote them in their skeleton argument.



1 MR JUSTICE GREEN: Well, there's grasping the nettle on the costs, but there's also  
2 grasping the nettle on the application. I got the sense from Visa's skeleton that there  
3 was some objection to me or us even hearing the application.

4 MR WILLIAMS: There is, sir, and I was proposing to address you on that before in  
5 opening the application; it's the very first point I wish to address.

6 MR JUSTICE GREEN: Right, okay.

7 MR WILLIAMS: We are all here today, of course. The arguments have been well  
8 canvassed in correspondence already. We are, of course, awaiting the settlement  
9 Tribunal and panel's decision on the allocation of the pots. So it would be very helpful  
10 to know up front now whether there is a need for a contingency in the first place,  
11 because if there is no need for a contingency, Mr Merricks can get on with the  
12 distribution in defined amounts without delay. So it's a slight --

13 MR JUSTICE GREEN: Well, there's going to be quite a delay, isn't there, to the  
14 distribution anyway?

15 MR WILLIAMS: Not to the extent that my learned friends for Visa seek to create, which  
16 is the practical effect of this application. The suggestion is that we wait until after Trial  
17 2A and Trial 2B, and the judgment in that case.

18 MR JUSTICE GREEN: Yes.

19 MR WILLIAMS: I don't wish to tie the Tribunal's hands in how long that may take, but  
20 it's reasonable to assume the end of this year.

21 MR JUSTICE GREEN: Yes.

22 MR WILLIAMS: There will then be an argument as between the remaining parties on  
23 the scope for the allocation of costs. It's only in that circumstance that there is  
24 a "possibility", to quote the words of the Claimants and Visa, that they will then raise  
25 an application against Mr Merricks. So we are talking, in my submission, of a period  
26 of at least a year until this will be determined.

1 MR JUSTICE GREEN: And how long is the distribution going to take?

2 MR WILLIAMS: There's obviously known unknowns in that case.

3 MR JUSTICE GREEN: Yes.

4 MR WILLIAMS: The plan is to distribute as soon as possible; it's anticipated at the  
5 end of this year, sir, but we'll be no further along, in my submission, by waiting, when  
6 we know the position now. I can already make submissions as to why any contingency  
7 of costs is, with respect, for the birds. There is no basis upon which, in due course,  
8 Mr Merricks will be liable for costs in respect of proceedings that he's not a part of, in  
9 respect of parties that he did not sue, later down the line, for reasons that I would wish  
10 to develop today if possible whilst we're here. The agenda items seem, from the  
11 outside at least, to be quite short.

12 But it would in my submission be helpful, sir, for me to walk you through those  
13 submissions first and then hear what Mr Jowell for Visa says in response as to why  
14 we shouldn't deal with this today.

15 MR JUSTICE GREEN: Yes.

16 MR WILLIAMS: In that case, sir, I would wish to make three submissions as to "Why  
17 today?" They're short ones.

18 The first is that Visa is simply operating on an incorrect assumption when it suggests  
19 that it's only merely inconvenient, but not ultimately disruptive, to the consumer class  
20 for matters to remain unsolved. Now, sir, this point has been addressed in detail in  
21 the application at paragraphs 13 to 19, but the short and crucial point is that  
22 ring-fencing a portion of settlement now, to meet any possible applications from Visa  
23 or the SSH Claimants in due course -- as I say, perhaps for another year -- that does  
24 mean that amounts that are otherwise available to consumers and possibly charity  
25 would be reduced in practice, and final distribution would be delayed.

26 Now, these proceedings, as you know, sir, have already been going on for the best

1 part of a decade and relate to events in 1992 to 2010. Mr Merricks is understandably  
2 very keen to distribute defined amounts to the class as quickly as possible.

3 Now, it bears emphasis that it cannot be assumed, and indeed it would be wrong to  
4 assume, that the additional ring fence that my learned friends wish to add in from the  
5 settlement amount would come out of the funder's already ring fenced pot for its costs.  
6 That cannot be assumed.

7 The amount in pot 2, as it's called -- that's the ring-fenced amount for the funders -- is  
8 in relation to already incurred costs, and already budgeted distribution costs, not  
9 a return for the funder, I hesitate to add; just the funders costs to date. Now, for any  
10 contingency for Visa's and the Merchants' legal costs, therefore, that leaves either  
11 pot 1 -- that's the amount ring-fenced for consumers -- or pot 3 -- that's the amount  
12 that, depending on the number of consumers that come forwards, goes ultimately to  
13 consumers, the charity or the funder for a return.

14 Now, the detail is set out in the application and I can walk the Tribunal through it if it  
15 assists, but a key point, in my submission, is that reductions and delays are significant,  
16 and they are highly detrimental for the class. They are not outweighed by any upsides  
17 for what you've already averred to, sir, which is the possibility of applications for  
18 a small amount of around £2 million. That's especially the case where, in my  
19 submission, any such applications for costs against Mr Merricks can already be seen  
20 to be hopeless or at best speculative. And I will develop those points.

21 MR JUSTICE GREEN: Are you saying that ring-fencing a sum to cover the  
22 contingency of a cost liability is itself going to be damaging?

23 MR WILLIAMS: Yes, sir, that's --

24 MR JUSTICE GREEN: I mean, even if ultimately there is no call on those funds  
25 because there's no cost order made why is that prejudicial?

26 MR WILLIAMS: Sir, there are three pots. The first pot, which is up to £100 million,

1 that's reserved and ring-fenced for consumers coming forward. So, in terms of the  
2 distributing the amount that's known and when the class member comes forward, they  
3 can collect their x pounds; it's calculable and known in advance.

4 MR JUSTICE GREEN: Right.

5 MR WILLIAMS: The second pot is ring-fenced for the funders' already incurred costs.  
6 But the issue is that there is a third pot -- I think it's around £50 million -- which is an  
7 unknown amount as to how it's split between the consumers, depending on how many  
8 come forwards, charity and the funder.

9 MR JUSTICE GREEN: So you're only going to know that at quite a late stage, aren't  
10 you.

11 MR WILLIAMS: Yes, that's correct, sir. The issue is, though, adding in another ring  
12 fence from one of those pots would mean that one has to go through a distribution  
13 phase on this assumption in advance of the cost liability in these proceedings being  
14 determined, to come up with a calculatable amount that can be distributed.

15 Until that amount is known, it can't be distributed in practical terms, because the cost  
16 of, later down the line, coming forwards with a second distribution for £2 million is  
17 unlikely to be workable in practice.

18 So if there's an amount which is reserved, and there's a second distribution for a de  
19 minimis amount, there's obviously costs incurred of actually sending the money out to  
20 however many people have come forwards.

21 So you are correct, sir, that there are already some known unknowns -- how many  
22 people come forwards as part of the distribution phase -- but we would be adding in  
23 another unknown in terms of a speculative amount that's reserved at this stage for  
24 potential liability.

25 As I say, when we come to look at the substance, it will be my submission that there's  
26 just no realistic prospect, in our submission, for any of these costs to go to Visa or the

1 SSH Claimants in circumstances where there will not be a judgment in respect of  
2 Mr Merricks' claims. So how would one determine that Mr Merricks has lost?

3 In my submission, there's a helpful analogy with the position of interveners, where the  
4 normal position is that the parties bear their own costs, because you will not have, sir,  
5 a judgment in which you determine the competitive conditions, or the pass-on, in  
6 the years 1992 to 2010, and you will recall the hotly contested debate of the overlap  
7 between the Merchant claim period and the Merricks claim period. It was ultimately  
8 quite small, at best.

9 So there will not be a judgment in which you can say, "Okay, well, the Merchants have  
10 won, or Visa has won, and Mr Merricks has lost". In respect of Visa, it genuinely is  
11 baffling --

12 MR JUSTICE GREEN: I thought we're only -- this is only to cover a situation where  
13 Visa has lost and where the Claimants are getting their costs. And the question is,  
14 I mean, if Visa have lost, it's quite easy to see that Merricks would have been likely to  
15 lose on this issue.

16 MR WILLIAMS: Well, sir, that's making a number of assumptions.

17 MR JUSTICE GREEN: Yes, but you're saying it's absolutely impossible to conceive  
18 of an order being made against Mr Merricks at the end of this case.

19 MR WILLIAMS: Yes, that's correct, sir. And if we look at what the SSH Claimants  
20 themselves say, it's worth paying great attention to. It's at paragraph 4 of their skeleton  
21 argument for today. I don't have an Opus reference directly to hand for that, but it's  
22 on page 2 of the document. I believe it's RC-N1, tab 38, page 3. I'm grateful to  
23 Mr Woolfe for that. The SSH Claimants say their:

24 "... primary position is that it would be wrong in principle for Visa to escape its cost  
25 liability and to leave the SSH Claimants out of pocket".

26 And they say this:

1 "All of the costs that the SSH Claimants have incurred in these proceedings have been  
2 reasonably and proportionately incurred to advance their claims against Visa and  
3 Mastercard."

4 And then the second key passage is the last sentence of 4.2:

5 "However, they did say in relation to incurring costs for cross-examining Mr Coombs,  
6 only because that formed part of the body of evidence on the basis of which the  
7 Tribunal would be deciding the SSH Claimants' claims against Visa and Mastercard.  
8 The costs of doing so were therefore attributable to the SSH claims against the  
9 Defendants, not Mr Merricks."

10 So Mr Beale, when he did cross-examine Mr Coombs, didn't start talking about events  
11 in 1992 to 2010. I'm sure you will hear lots of submissions about this in due course,  
12 but he was targeted and focused at challenging evidence of Mr Coombs that  
13 essentially was either identical or very similar to that of Mr Holt,) in support of their  
14 case against Visa in relation to the later claim period. There is no direct overlap in  
15 relation to that. There's a couple of years at the outset, sir, but that was not the focus  
16 of Mr Beale's submissions. They were very clearly targeted at econometric analysis  
17 of public data, which is what Mr Holt also uses on behalf of Visa, for example.

18 MR JUSTICE GREEN: Well, Mr Holt and Mr Coombs had different approaches. They  
19 had different proxies. So, it was important for the Claimants to challenge both.

20 MR WILLIAMS: I don't demur from that at all, sir. It's obviously their election to do so  
21 and how they do so. But it's important that Visa has always presented itself as aligned  
22 with Mr Merricks. This is not two separate parties running two completely different  
23 cases on different avenues in relation to wholly separate arguments.

24 It was Visa's election not to challenge the joining of Mr Merricks into the umbrella  
25 proceedings in the first place, and it was then Visa's election to also adopt analysis  
26 run by Mr Merricks.

1 Now, I have no crystal ball, so I do not know what the written closings of Visa will say,  
2 but I would be surprised if absolutely none of the cross-examination that we put  
3 forward on behalf of Mr Merricks has no relevance to and will not be relied upon by  
4 Visa at all in the written closings, because the cross-examination that I conducted with  
5 Mr Economides for example, was all about the margins and that evidence was all Visa  
6 claim period or Merchant claim period.

7 My cross-examination of Ms Webster, for example, also was building up the proportion  
8 of the UK retail economy that had applied her base case of 70 to 100 per cent pass-  
9 on. Again, Visa may well utilise some of that evidence. This idea that --

10 MR JUSTICE GREEN: If they are utilising it and then at the end of the day, that's  
11 rejected by us, then that means that the case that you were putting forward on behalf  
12 of Mr Merricks has been rejected in some way.

13 MR WILLIAMS: Well, to some extent that may well be the case, sir, but you won't  
14 have had the opportunity to hear from myself or in our written closings in relation to  
15 that. And it would, in my submission, be rather odd for parties to join in umbrella  
16 proceedings, settle, hope for the finality that settlement brings -- and it's a policy of this  
17 Tribunal to encourage settlements -- and then to be on the hook for costs in relation  
18 to a non-party that they did not sue, in relation to a different claim period and in relation  
19 to costs that the Merchants themselves are saying are incurred to run their own case  
20 against Visa and Mastercard.

21 MR JUSTICE GREEN: If Merricks had not settled and this carried on to the end of the  
22 Trial and judgment, you're not saying that the Claimants would not have been able to  
23 recover any of their costs from Mr Merricks, are you?

24 MR WILLIAMS: I would have to think further about that. There is a possibility that  
25 submission may well have been made because we didn't add to the length of the  
26 proceedings. You heard the submissions at the previous PTR that the length of the

1 proceedings was set prior to Mr Merricks being involved. So one has to ask  
2 themselves, what additional costs did we cause the SSH Claimants that would not be  
3 recoverable from Visa? You see from what they say themselves that the costs that  
4 are not recoverable from Visa don't exist on the Merchant Claimants' own case --

5 MR JUSTICE GREEN: That's the trouble with anticipating what the costs order might  
6 be at the end of a trial, because all sorts of different orders could potentially be made  
7 and there's a pretty broad discretion for the Tribunal. So, what you're telling us is that  
8 it's absolutely clear, at this stage, that no order would be made against Mr Merricks.

9 MR WILLIAMS: My argument does not depend on that submission, sir. I do agree  
10 that that's a facet of it. It doesn't depend upon that, because it's well established in  
11 this Tribunal that to the extent that one does not know whether a party has won or lost,  
12 there can be no order for costs.

13 So just last week, for example, the former president made a no order for costs in  
14 a pharma case where although the CMA's decision was struck down, quashed, it did  
15 so on completely different reasons and there was no order for costs because it was  
16 difficult to tell which party won.

17 My primary submission to you --

18 MR JUSTICE GREEN: That was at the end of the case?

19 MR WILLIAMS: That was at the end of the case. So I agree this is by analogy, sir,  
20 but in this position, we already know there will not be a judgment in relation to the  
21 Merricks' claim period.

22 MR JUSTICE GREEN: Yes.

23 MR WILLIAMS: You will not hear anything about 1992-2010. So I ask on what basis,  
24 ever, is there a position for this Tribunal in the actual world, rather than getting into  
25 counterfactual analysis about what would have happened if we remained -- in the  
26 actual world, on what basis can it be said that Mr Merricks has lost vis-à-vis the



1 Merchant Claimants?

2 It's a rhetorical question, because my submission is that there really is none. So it is  
3 the question as I framed it: what costs are the SSH Claimants unable to claim against  
4 Visa? They've already said that everything they have incurred was in pursuit of their  
5 claim against Visa.

6 We have been joined in as collective proceedings into umbrella proceedings. There  
7 is an unhappy circumstance about the tensions that creates but that leads us back to  
8 the policy and principle considerations, which is why I raised the analogy with  
9 interventions, because parties should not be discouraged, in my submission, from  
10 joining in umbrella proceedings where there are parallel proceedings on very, very  
11 closely related topics, because they may incur costs in an indefinite amount, for an  
12 indefinite period of time, after they have settled. We would have no finality to the  
13 settlement.

14 MR JUSTICE GREEN: I can see that. But I mean, again, at this stage and on this  
15 application that's been hurriedly brought on, would it be right for us to make a decision  
16 on policy grounds --

17 MR WILLIAMS: Sir, they are --

18 MR JUSTICE GREEN: -- on the wider impact on policy? I mean, I see the argument  
19 but I think that needs quite a bit of careful thought.

20 MR WILLIAMS: Sir, absolutely. That's obviously only a supplementary submission to  
21 my primary one.

22 MR JUSTICE GREEN: Yes.

23 MR WILLIAMS: There is no basis for any adverse costs in any world that we've been  
24 discussing. Perhaps we should look at Visa's skeleton argument for what they're  
25 grasping at straws to say what costs they could receive back from Mr Merricks.

26 But it just highlights, in my submission, that there is absolutely no basis in which, or

1 any scenario in which, Visa will be able to claim costs from us. If we can turn up the  
2 skeleton argument just to see what we're talking about here. It's at paragraph 9.  
3 I invite you to just read that to yourself, sir, about the costs that we're apparently -- Visa  
4 have been required to undertake.

5 MR JUSTICE GREEN: So are they saying or do you understand them to be saying  
6 that they should be able to claim separately against Mr Merricks for increased costs  
7 that they've incurred. So it's not related to the Claimants.

8 MR WILLIAMS: It's both ways. But that's why I say it's totally unsatisfactory, sir, in  
9 circumstances for a party to suggest there may well be up to £2 million worth of costs,  
10 for all parties, at the end of these proceedings, without identifying exactly why or on  
11 what basis.

12 You have the Claimants on the one hand, saying that all of their costs that they've  
13 incurred are reasonably attributable to the involvement of their arguments against  
14 Visa, sorry. They have said that in their skeleton argument.

15 You then have Visa suggesting, well, "we can't tell you on which basis you're going to  
16 be liable for some of these costs that were incurred against us. And also, by the way,  
17 we've undertaken some additional work against Mr Merricks".

18 But when you look at those points, sir, the reason why I wanted to emphasise this, if  
19 you look at (3), for example:

20 "Addressing various ad hoc challenges brought by Mr Merricks, for example, in  
21 relation to without prejudice correspondence against the experts."

22 It shows how desperate the point is. We were agreed with Visa and they had  
23 supported our position that in mini CMCs as Mr Tidswell may well remember, that  
24 without prejudice correspondence between experts should not be marked as such,  
25 and so should have the confidentiality removed. There is a letter in the bundle which  
26 shows that Visa supported that and agreed with that position. So I have no idea why

1 this line item is appearing. It genuinely is baffling how we would be liable for Visa for  
2 those costs.

3 Likewise for the fourth item there, "Addressing contested applications in relation to  
4 joining confidentiality rings". Again in the bundle, and as part of our application, sir, is  
5 an order from Mr Tidswell which acceded to the application of Mr Merricks to join the  
6 Trial 1 confidentiality ring and it refused Visa's objections to joining that confidentiality  
7 ring order.

8 So again, I'm genuinely baffled (and I don't like repeating that word) as to the basis for  
9 the "clutching of straws" as I've been calling it for Visa's application on either basis,  
10 whether they win or they lose, sir.

11 MR JUSTICE GREEN: Was there anything, when Mr Merricks came into these  
12 proceedings, were joined to the pass on Trial, was anything said about costs?

13 MR WILLIAMS: No. And in fact Visa's position in relation to the UPO, the umbrella  
14 proceedings order, was that it generally supported Mr Merricks joining in. Now, the  
15 reason for that is because it's always been interested, we infer at least, in an  
16 economy-wide pass on rate, whether for Trial 2 or Trial 3 and I'll leave that debate to  
17 one side. They supported that.

18 There was one caveat, and I looked last night and I can try in the break to find the  
19 reference -- one caveat to Visa's position was that insofar as Mr Merricks' involvement  
20 would not delay the proceedings and the Trial, because at that stage it wasn't exactly  
21 settled, the timetable. Those were happy days, sir. But a lot was not settled. There  
22 was absolutely no reservation in relation to costs or any suggestion that Visa's  
23 agreement or non-objection was predicated on costs positions. So this is a new point  
24 that's been taken now in relation to de minimis hypothetical amounts, which sound like  
25 they will either be recoverable as between the remaining parties in any event.

26 MR JUSTICE GREEN: But there was no sort of common understanding as to costs

1 and that, I mean, I think what you're basically saying is that the costs, as between  
2 Mr Merricks and Mastercard, are wholly separate to the costs between the Claimants  
3 and Mastercard and Visa. So -- is that right? Are you saying that was the  
4 understanding upon which you were being brought in to the pass-on trial?

5 MR WILLIAMS: If we had come along and added two weeks to the trial timetable and  
6 those two weeks were all about temporal extrapolation, which was no interest to  
7 anybody else but somehow we'd racked up lots of costs and lots of tangential issues,  
8 I could see there being a debate, and I'll put it no higher than that. I don't accept that  
9 we would be liable for costs in those circumstances where they chose to sit in, but  
10 there would be a debate; I accept that. But we have not been in that position, sir. You  
11 will have your own views as to the merits of mine and Mr Simpson's cross-examination  
12 and where they go ultimately.

13 But my position is that you don't need to actually have a view on that, because in any  
14 scenario, whether the SSH Claimants win or lose, there is no liability for Mr Merricks,  
15 whereas there is material upside in having a defined and settled position and grasping  
16 the nettle at this stage. So there is no contingency pot for something which is, in my  
17 submission, speculative at best.

18 MR JUSTICE GREEN: But is it possible that, so as between Visa and the Claimants,  
19 the Claimants, if they win, get all their costs, including any reasonably incurred costs  
20 of having to deal with Mr Merricks' involvement?

21 MR WILLIAMS: Yes, and that's their position. That's why I showed you --

22 MR JUSTICE GREEN: Yes, that's what they're saying. But in that scenario, would  
23 Visa be able to then claim over, as though you were some sort of part 20 defendant,  
24 for those extra costs that they've had to pay the Claimants?

25 MR WILLIAMS: That seems to be the suggestion which adds yet more delay and  
26 more satellite disputes on costs.

1 MR JUSTICE GREEN: But if it's a possibility, then we need to take account of it.  
2 I mean, are you saying there's no possibility that they would have a claim over in that  
3 respect?

4 MR WILLIAMS: That would ultimately be our position. Given the alignment of Visa in  
5 the trial, it would be very odd for one party to adopt evidence or submissions or  
6 cross-examination from one party and then start seeking costs of -- where does this  
7 arise? Visa obviously would have had to deal with the SSH claimant's case.

8 It's why it's particularly helpful for Mr Woolfe's skeleton argument to have mentioned  
9 that the default position in part 20 claims where the two actions are dealt with  
10 separately is the default position. I'm not saying that those default positions should  
11 never be undone, just like in relation to interventions, sir, the default position is that  
12 interveners bear their own costs and the parties bear their own costs. But if there were  
13 unreasonable behaviour or exceptional circumstances, then I fully accept that there  
14 would be a valid claim as a bare minimum against Mr Merricks.

15 But nobody has suggested that Mr Merricks during the trial has run up unnecessary,  
16 unreasonable costs that we should be on the hook for. In circumstances where, in line  
17 with your broad discretion, sir, you have the discretion at this stage of the proceedings  
18 to grasp the nettle and say, "Well, it's a very, very small amount. It seems unlikely.  
19 I can see the potential harm to class members having their compensation reduced or  
20 at least delayed, and in light of all of that, I exercise the discretion to just let everyone  
21 walk away at this stage bearing their own costs". That's essentially what I'm asking  
22 the Tribunal.

23 Just to tackle, finally, one point that Visa has raised, which is the jurisdiction of this  
24 Tribunal to deal with it now. Rule 104 of the CAT rules, at subparagraph 2, and  
25 I quote, states that:

26 "The Tribunal may at its discretion ... at any stage of the proceedings make any order

1 | it thinks fit in relation to the payment of costs in respect of the whole or part of the  
2 | proceedings."

3 | So, at any stage of the proceedings. Now, Visa's skeleton argument refers to  
4 | a cost-sharing decision made in these proceedings by the former president sitting  
5 | alone. At paragraph 5 of Visa's skeleton argument, sir, my learned friend's proposition  
6 | is that it suggests that costs should only be considered at the earliest once relevant  
7 | judgments from a particular stage of the proceedings are handed down.

8 | Now, I would like to take you to that decision, if I may sir, very briefly, because I have  
9 | three short points to make on it. It's at RC-N1, tab 43.

10 | Now, the first point to note is that although this was made at an earlier stage in these  
11 | proceedings, it was done before the joining of Mr Merricks in the umbrella  
12 | proceedings. If we turn over the page -- thank you -- you will see from the list of  
13 | attendees that it was a decision reached without any benefit of submission from  
14 | Mr Merricks. I assume benefits there, of course.

15 | The position of collective proceedings and the interaction of umbrella and collective  
16 | proceedings does not appear, therefore, to have been considered.

17 | Now, more substantively, if we turn over the page again, please, from paragraph 1,  
18 | you can see the rather different question that the Tribunal was considering. The  
19 | Merchant Claimants had made an application for an order that any liability as between  
20 | the Merchant Claimants themselves should be on a several and not a joint basis.  
21 | Then, secondly, the decision is non-binding on its own terms.

22 | If we go to paragraph 6 on internal page 4, please. Thank you. Now, it begins with  
23 | the rather philosophical remark that this "ruling is not a ruling at all" and then goes on  
24 | to say that it's "non-binding guidance", and the final line: "It will be given such weight  
25 | by other panels as those panels see fit".

26 | Just to complete this point that this is really a non-authority for my learned friend's

1 proposition, if you go to paragraph 9 please on internal page 7, the learned judge says  
2 there that he was not prepared to make any firm ruling as to how, in the interchange  
3 fee proceedings, the Tribunal would exercise its discretion in terms of costs.

4 Now, with that in mind, if we turn please to the passage my learned friend for Visa has  
5 cited, which is at the bottom of internal page 9. That should be paragraph 10.2. Thank  
6 you. If I can ask you just to see the whole page first for important context, you can  
7 see from the top of the page, sir, that he's mentioning Trials 1, 2, 3 and 4. And could  
8 I ask you to read the subparagraph 2.

9 MR JUSTICE GREEN: Do I go over the page?

10 MR WILLIAMS: Yes, please. Thank you. It only needs to be skimmed at this stage,  
11 sir.

12 MR JUSTICE GREEN: Okay.

13 MR WILLIAMS: Now, all that this judgment says, in the context that I've provided you  
14 of what was actually being argued about in that case, was that in principle, costs orders  
15 should be after each phase, by which the judge meant Trial 1, 2, 3, and 4 so far, rather  
16 than an order up front that the Merchant Claimants did not have joint liability.

17 There is nothing in here that precludes the application of rule 104 or the determination  
18 of costs once and for all upon settlement. Indeed, settlement can be seen as the end  
19 of a phase in the litigation. It's the end of the Merricks collective proceedings, so it is  
20 an appropriate point, in my submission, to order costs and grasp the nettle now.  
21 Especially in circumstances where -- I don't want to repeat, sir, but we've heard  
22 absolutely nothing as to the real nature or extent, quantity or reasoning as to why any  
23 of these costs would be made. We've invited the Merchant Claimants and Visa to tell  
24 us what, presumably, they already know is apparently the amounts they've spent over  
25 the past six months to a year, dealing apparently with Mr Merricks. The Claimants  
26 have come back and said in their skeleton argument, "Well, all the costs we incurred,

1 including the cross-examination of Mr Coombs for a day, were targeted at Visa. The  
2 evidence was already there and they weren't addressing us or incurring costs because  
3 of us."

4 So, it's very difficult to see the circumstances in which there will be leftover costs to  
5 have to argue about in a year, two years' time. And the unknown, sir, that you refer  
6 to --

7 MR JUSTICE GREEN: Certainly not that long.

8 MR WILLIAMS: I'm sorry.

9 MR JUSTICE GREEN: Hopefully we'll produce our judgment a little sooner than  
10 two years' time.

11 MR WILLIAMS: In which case, some of these arguments may well dissipate, sir. But  
12 there is a real concern on behalf of the class and the client that distribution would be  
13 delayed by this contingency ring fencing. There are serious concerns; they're set out  
14 in detail in the application.

15 There are real concerns that, because of the way that the pots are set up, actually  
16 compensation for consumers is being reduced for legal costs on behalf of a scheme  
17 and Merchants which were not actually in Mr Merricks' proceedings. We joined the  
18 umbrella proceedings to help consistency of justice and for all the arguments to be  
19 ventilated, and you will have your own views as to whether we assisted you or not, sir,  
20 in the trial.

21 But the real touchstone, in my submission, is that there were no costs that were  
22 unreasonably incurred that added to the length of the trial; in fact, the trial length  
23 reduced. So, it's very hard to see how these very small costs outweigh the  
24 disadvantages in terms of practical distribution of compensation. There is also the  
25 position that if the sums are distributed in one tranche and then delayed to deal with  
26 any contingencies down the line, the amount left over would be so small that there



1 isn't actually enough cost to distribute them.

2 So, there are genuine concerns there, sir. It's not just a point of principle. I hope that  
3 I've demonstrated, at least to some extent, why it's very, very difficult to know in what  
4 circumstances we're actually liable for costs, given what the parties themselves have  
5 said.

6 MR JUSTICE GREEN: If we produce our judgment, say by October and I'm giving no  
7 promises on this front, that would mean that that would be before any distribution.

8 MR WILLIAMS: But then, sir, you have our satellite dispute. So we won't just then --

9 MR JUSTICE GREEN: No, there will be a cost application.

10 MR WILLIAMS: There will be a cost application --

11 MR JUSTICE GREEN: There'll be a consequential hearing, but that will presumably  
12 all be done and dusted by the end of the year, which is what I think you were  
13 suggesting was perhaps the earliest date for a distribution?

14 MR WILLIAMS: Well, I will just take some instructions on that, but before I do, sir,  
15 there is also then potentially another step, because once the position between the  
16 parties is known, it seems that it's at that juncture that an application is envisaged to  
17 be made against Mr Merricks.

18 So, if my learned friends for the SSH Claimants are right, for example, that all of their  
19 costs were incurred because they were pursuing their case against Visa, then it would  
20 be for Visa then, as you alluded to earlier, to raise an application and say, well,  
21 actually, now we've had that 100 per cent awarded against us made, X, Y and Z line  
22 items were actually only incurred by Mr Merricks. So Mr Merricks will have to remain  
23 involved and watchful of this litigation; the legal team will have to remain involved and  
24 watch the litigation, and then we'll have to deal with the costs application. It's  
25 ambitious, if I may say so, for all of that process to be resolved this year.

26 But may I just take firm instructions on the likelihood of the date of the distribution?

1 MR JUSTICE GREEN: Yes.

2 MR WILLIAMS: I'm told that the distribution is expected to be closed by November /  
3 December this year. The reason for that, in terms of the sequencing, sir, and why this  
4 is actually a point in my favour, is because we await, firstly, the decision from the  
5 settlement panel this month; there will then be a process of class members registering,  
6 coming forwards to say, "Yes, please, I would like some of the compensation and  
7 I satisfy the eligibility criteria".

8 MR JUSTICE GREEN: Yes.

9 MR WILLIAMS: Thereafter, once those claims have been validated, there is a process  
10 of actually effecting the distribution and it was hoped to have been resolved this year,  
11 and the budget presupposes that it's this year in terms of the ring fenced costs for the  
12 funder.

13 Now, that means that we really are in the territory of distribution being effected  
14 before -- or at least the plan was before -- judgment or resolution of the costs in these  
15 proceedings, which is why I made the submissions to you as to delay.

16 But I don't want to lose sight of the fact that not only is this a question of delay, it is  
17 about reducing the sums that are at least available to consumers because this won't  
18 be coming out of pot 2, as I've called it, for the funder's costs that have already been  
19 incurred and for distribution; it logically has to therefore come out of pots 1 and 3.

20 Now, I certainly will not be making any submissions on behalf of the class for  
21 Mr Merricks that it comes out of pot 1, which is that ring-fenced for consumers, so that  
22 therefore leaves pot 3, which is the pot that either goes to consumers up to the amount  
23 of the award and compensation they received depending on the amount of consumers  
24 who've come forward, charity or the funder for a return.

25 MR JUSTICE GREEN: But your case is anyway that that money is not actually going  
26 to be used because there's no possibility of any order being made against

1 Mr Merricks?

2 MR WILLIAMS: That is why --

3 MR JUSTICE GREEN: So we're just talking about keeping that in reserve for  
4 something that, on your case, will never happen, so the class won't actually be  
5 prejudiced.

6 MR WILLIAMS: Correct, but it's the reservation up front which means the class is  
7 prejudiced in practice at this stage.

8 MR JUSTICE GREEN: Right. You may not know this or you may not be able to  
9 disclose it, but was a potential liability for costs on Mr Merricks taken account of in the  
10 settlement? Also, was it canvased before the Tribunal?

11 MR WILLIAMS: I may need to take some instructions on the direct question, sir, if  
12 I may. The first point is that the settlement is a full and final settlement as between  
13 Mastercard and Mr Merricks in respect of costs, so in that sense, costs were  
14 envisaged, but I'd better just take instructions on the remainder, sir.

15 MR JUSTICE GREEN: Okay. (Pause)

16 MR WILLIAMS: So, I'm reminded that this issue was first raised by Visa in a letter to  
17 the settlement panel a few days before the settlement hearing. Visa did not attend the  
18 settlement panel hearing. So, what happened there -- and it's in the extract in our  
19 skeleton argument, sir -- is that Mr Justice Roth said:

20 "We [ie the settlement panel] can't determine whether there will be any applications or  
21 determine those applications. In those circumstances, we consider it best to ring fence  
22 an amount up front."

23 There was then no further debate. Debate moved on very swiftly, perhaps prematurely  
24 in hindsight, but we dealt with the position in correspondence and have returned the  
25 issue fully to this Tribunal, which is where the settlement panel saw the issue to arise.

26 No applications have been made by Visa or by the SSH Claimants to you, so that

1 | you've got no sense of what these hypothetical academic costs are, which is why I've  
2 | made the submission that, in light of what we've seen today and in the  
3 | correspondence, there really is no basis for any of these costs.

4 | That's why we put forward the application to this Tribunal now, because we could see  
5 | the effects of a contingency, and we're in a position whereby if we grasp the nettle  
6 | today, the settlement panel will know before its judgment whether there needs to be  
7 | a contingency. They were working on an assumption that there needed to be  
8 | a contingency, and they couldn't rule either way.

9 | MR TIDSWELL: To ask you a question about adverse costs protection. Presumably,  
10 | Mr Merricks had that, I think possibly from the funder; is that right?

11 | MR WILLIAMS: I'll check.

12 | MR TIDSWELL: And on the assumption that it's still available, which it may or may  
13 | not be, how would that fit into the pots 1, 2 and 3? Because presumably, it becomes  
14 | a pot 2 item in the sense that it's a cost incurred by the funder, but then the funder  
15 | increases its claim and the settlement. Is that right?

16 | MR WILLIAMS: Not quite. It is in substance, but not in terms of the pot numbers. I'll  
17 | have this corrected if this is wrong, but pot 2 is a ring-fenced sum for the funders' fees  
18 | that have already been incurred and were already budgeted for distribution. So, there  
19 | isn't any wiggle room, as I understand it, for additional new amounts of legal costs for  
20 | Visa and the Claimants, or at least some contingency.

21 | That leaves pot 3. Now, that's the one where it's possible that some of that would go  
22 | to the funder, but in terms of the order of priority, obviously Mr Merricks' position is that  
23 | the class members should receive more than £5, £10, but all the way up to £45. That  
24 | depends on how many people come forwards and what's left in that pot 3. So, there's  
25 | an order of priority in terms of the consumers, the charity and the funder.

26 | MR TIDSWELL: So, even if the funder had a valid claim, like for example, a claim for

1 these costs which it should have been contractually forced to bear, it doesn't get those  
2 out ahead of the funder or the charity; is that what you're saying?

3 MR WILLIAMS: Well, it's possible that it would have come out of pot 3, sir, so I can't  
4 foreclose the possibility that if there were a contingency made, that the funder would  
5 never receive those monies back or that it would always necessarily come out of the  
6 consumers' and charities' pot. It depends on how many consumers come forward,  
7 which is why I have to be --

8 MR TIDSWELL: And therefore how big pot 3 actually is.

9 MR WILLIAMS: And therefore how big pot 3 is. I mean, there's a cap to pot 3 as it  
10 currently stands, because once you subtract from the £200 million pot 1, the  
11 £100 million and pot 2, the costs for the funder, then necessarily there's a total amount  
12 that's available out of the £200 million. So it has to come out from somewhere, and  
13 it's then in the lap of the gods as to whether it comes from consumers, the charity or  
14 the funder. My submission is that it's unattractive to leave that possibility.

15 MR TIDSWELL: What you could --

16 MR COOK: Sorry, if I could raise another concern here that -- and I appreciate that  
17 Mr Williams wasn't at the settlement approval hearing and so won't have the familiarity  
18 of those of us who were -- he's describing a structure which was proposed by  
19 Mr Merricks but formed no part of the settlement, because obviously distribution is  
20 a matter for the Tribunal and Mr Merricks. So, he's describing a structure which is that  
21 proposed by Mr Merricks. At the moment, the Tribunal hasn't approved that structure  
22 either in general terms or in quantum terms. They certainly seemed broadly amenable  
23 to it, but unlike the settlement itself, where we've been told the answer, that three-pot  
24 structure and the amounts has not been subject to even an indication of approval. Just  
25 for the sake of clarity.

26 MR WILLIAMS: My understanding is that's entirely consistent with everything I've

1 | been saying, which is about the availability of the money available to consumers,  
2 | charity or the funders. I think that's consistent. If I could just take one moment.  
3 | (Pause)  
4 | I'm told there's no precise order of priorities, so I misspoke in talking about that. It's  
5 | open to the settlement panel, as my learned friend --  
6 | MR TIDSWELL: To decide who gets what?  
7 | MR WILLIAMS: (Inaudible).  
8 | MR TIDSWELL: Just one final question on that. I think you're suggesting there would  
9 | be something, I don't know if you put it as high as unfair, but perhaps unattractive  
10 | about the funder not getting paid for this amount or indeed somebody else, and  
11 | effectively Visa getting paid for this amount. But if those are costs that, by that stage  
12 | in this analysis, somebody has decided or we've decided that those costs should be  
13 | payable by Mr Merricks, why is that unfair or unreasonable? There's nothing unfair  
14 | about that.  
15 | MR WILLIAMS: I want to be abundantly clear that there is no submission being made  
16 | on behalf of Mr Merricks that it would be unfair for the funder to receive any of the  
17 | amounts in pot 3. Lord Justice Green in Gutmann, I think, made it abundantly clear  
18 | that funders are an important part of any regime and they're entitled to receive a return.  
19 | That's why I was very keen to emphasise that the ring-fenced pot 2 that they've got at  
20 | the moment is just for their costs. I'm not suggesting that pot 3 has no possibility of  
21 | some aspect of that going to the funder, but --  
22 | MR TIDSWELL: No, but you were making a broader submission, weren't you?  
23 | I mean, as I understood it, you were making a submission on two things: one is the  
24 | practicality point, which is that if you end up having to hold the money back and then  
25 | distribute it later, in other words, no cost orders made, that's very unattractive,  
26 | I understand that point. But I thought you were also saying that it was unattractive for

1 the class effectively to be paying the costs that Visa doesn't want to bear from the  
2 Merchant.

3 MR WILLIAMS: The way that would work is that the availability of what's in pot 3 is  
4 there's another ring fence added into that.

5 MR TIDSWELL: So in other words, it's taken away from the class. But why is that  
6 unfair if you've gone into the umbrella proceedings knowing there's a liability for costs  
7 and it's covered, just on the hypothesis we're working on, by the adverse cost  
8 protection and therefore people are entitled to recover that through the structure of the  
9 funding recovery. Why is that unfair?

10 MR WILLIAMS: It's unfair in the circumstances of the umbrella proceedings order.  
11 We sought to join into that for efficiency and fairness and consistency in all the points  
12 we made in the UPO stage that were accepted. We joined in on proceedings. There  
13 has been no suggestion that Primark or Allianz's costs when they settled should  
14 suddenly remain at large and Mr Merricks has come to the Tribunal with a pragmatic  
15 solution that has accepted that he is also forgoing the potential possibility of claiming  
16 costs himself against the SSH Claimants in due course. That's because of the  
17 benefits, the finality and certainty for us at this stage -- they get a quick, defined  
18 distribution amount at the very least. And so that's why, in terms of fairness, I make  
19 the submission that I did, sir.

20 Also, the broader context of points of policy that we haven't addressed in great detail,  
21 but Merricks has settled the litigation. It is attractive to have finality of litigation rather  
22 than an outstanding potential cost liability for a year or so on what seems an unrealistic  
23 basis for an amount that's maybe around £2 million.

24 I don't want to overegg the submission any more than that, sir, but there is a potential  
25 scenario in which if lots of people come forward to collect compensation and you're  
26 reducing the amount by £2 million, it is potentially at least coming out of (inaudible).

1 I admit that (inaudible) and not the funder, so I take it no further than that at this stage.

2 MR TIDSWELL: No. Thank you.

3 MR JUSTICE GREEN: Thank you, Mr Williams, thank you. Mr Jowell.

4 Submissions by MR JOWELL

5 MR JOWELL: We consider this application to be both unnecessary and premature. If  
6 I may start with the practicalities and the timing, it is said in their skeleton argument  
7 that it is likely that this distribution -- this ring-fenced amount -- would come out of  
8 pot 3. Pot 3 may go to any of the class members, the funders and the charity, so we  
9 don't know who pot 3 is going to go to, and we certainly don't know when pot 3 will be  
10 distributed, and it certainly won't be in the immediate future, and I think my learned  
11 friend conceded it's likely to be next calendar year.

12 So we don't understand why having a small additional ring-fenced amount within pot 3  
13 causes any serious disruption to the distribution of funds to consumers, and may  
14 cause no disruption at all. So if there is an appropriate time to make this application,  
15 it's certainly not now at this PTR, it would be long down the road at such time when  
16 there is a realistic possibility of pot 3 needing to be distributed, and it actually causing  
17 some kind of real inconvenience.

18 MR JUSTICE GREEN: Do we know when the split in pot 3 as between class, charity  
19 and funders will be made?

20 MR JOWELL: We don't even know that yet, at this stage, no.

21 MR JUSTICE GREEN: I don't --

22 MR WILLIAMS: We do. I'm told it's the Tribunal's judgment in the settlement panel's  
23 hearing --

24 MR JUSTICE GREEN: That will make the split?

25 MR WILLIAMS: Yes, and that will include the ring fence, which is why, considering it's  
26 a contingency ring fence, and we don't think it's going to materialise, we wanted this



1 Tribunal to grasp the nettle now.

2 MR JOWELL: Well, the matter was canvassed in front of the Tribunal at the settlement  
3 hearing.

4 MR JUSTICE GREEN: Yes.

5 MR JOWELL: And I think we will hand up, if necessary, copies of the relevant page  
6 to the Tribunal. It's at RC-N1, 17 and it's partially quoted in paragraph 5 of my learned  
7 friend's application. If I could simply just read it out to you, you'll see that Mr Beale, at  
8 the bottom of page 58, notes that:

9 "Visa, for example, put down a marker, so there will need to be some catering for that.

10 But in effect the adverse costs element potentially might go up." [as read]

11 And the chairman said:

12 "Yes, well, we thought the best thing to do would be to, as it were, carve out a reserve  
13 sum to await, no doubt, what happens in Trial 2 as regards costs, once the Tribunal  
14 hearing, Trial 2 is told that Mr Merricks is no longer participating. And that part has  
15 come out. But if there are any costs application, that is a matter for that Tribunal, but  
16 we will clearly have to reserve sums to cover that contingency. But there will not be  
17 a distribution for some time, so I think the cost positions will have crystallised by then."

18 [as read]

19 So that Tribunal is anticipating that before there is any actual practical distribution, the  
20 cost position in this Tribunal will have crystallised. And we say, that's right. And if it  
21 were the case that that proved not to be the case, and that somehow there's suddenly  
22 a rush on to get this sorted out before the distribution, that's the time that would have  
23 been the appropriate time to make this application.

24 MR JUSTICE GREEN: So you're saying Mr Merricks should have made it clear to that  
25 Tribunal that they were going to ask this Tribunal for no order as to costs?

26 MR JOWELL: Yes.

1 MR JUSTICE GREEN: So that would remove, potentially, this issue.

2 MR JOWELL: Yes, indeed.

3 MR JUSTICE GREEN: But nothing was said.

4 MR JOWELL: They didn't.

5 MR JUSTICE GREEN: But they did know about your letter.

6 MR JOWELL: They did, and they seemed perfectly content to make a provision for it.

7 And they don't anticipate that it will cause disruption. So that's the first point.

8 As to the substance, we say it's wholly inappropriate to seek to invite the Tribunal to

9 make an anticipatory costs order in these sorts of circumstances. There is no doubt

10 that the participation of Mr Merricks in the umbrella proceedings causally increased

11 costs, both to Visa and to the SSH Claimants. We have cited in our skeleton argument

12 a number of instances where their presence has caused significant increases in costs.

13 And of course, one just simply needs to consider the presence of Mr Coombs; the

14 evidence of Mr Coombs; and the cross-examination of the SSH Claimants of

15 Mr Coombs.

16 MR JUSTICE GREEN: Has that really been such a massive increase in the costs

17 incurred?

18 MR JOWELL: Well, it certainly adds, one would anticipate, a significant increase in

19 the costs to the SSH Claimants, and now, because --

20 MR JUSTICE GREEN: I'm not sure they're saying that, are they?

21 MR JOWELL: Well, no, they haven't said that they didn't incur significant costs in that,

22 and it would be very surprising if Mr Beale's cross-examination of Mr Coombs didn't

23 take a good deal of time and effort and expense; I'm sure he spent a good deal of time

24 considering Mr Coombs' evidence, and so did the economists -- I'm sure the economic

25 teams spent a good deal of time considering that evidence, critiquing it, and preparing

26 for a relatively lengthy cross-examination of it, and making submissions, indeed, in

1 relation to Mr Coombs' evidence.

2 Now, the position might be that the SSH Claimants would say, "Well, we are content  
3 not to seek our costs of that."

4 MR JUSTICE GREEN: As against?

5 MR JOWELL: Against Visa. But that's not their position; their position is rather, "We  
6 want to claim; we're not saying we waive those costs. We're not going to claim them."  
7 They say, "We're going to claim those, but not against the person or the team that  
8 caused those costs, Mr Merricks and Mr Coombs, but as against Visa".  
9 We say that it is certainly not something that you can determine now that that is an  
10 inevitable order that will be made, depending on the outcome of the proceedings. On  
11 the contrary, it seems to us to be rather more likely that a more reasonable outcome  
12 would be that we shouldn't have to pay those costs.

13 MR JUSTICE GREEN: But they could only recover costs against Visa that were  
14 reasonably incurred.

15 MR JOWELL: Well --

16 MR JUSTICE GREEN: So insofar as they're seeking to recover the extra costs of  
17 dealing with Merrick's evidence --

18 MR JOWELL: Yes.

19 MR JUSTICE GREEN: -- and seeking to recover those costs against Visa --

20 MR JOWELL: Yes.

21 MR JUSTICE GREEN: -- there would have to be some assessment as to whether  
22 that was reasonable --

23 MR JOWELL: There would have to be --

24 MR JUSTICE GREEN: -- to incur those costs vis a vis Visa.

25 MR JOWELL: There would.

26 MR JUSTICE GREEN: Lots of "vis"es in there.

1 MR JOWELL: There would, but then there is a gap, if you like, or there is an ambiguity  
2 and a lack of clarity. The question is, will they be entitled reasonably to a claim those  
3 costs as against Visa, or will there be some portion that will be unclaimable?

4 MR JUSTICE GREEN: Well, you can argue that at the time.

5 MR JOWELL: Well, potentially, but I don't think that's the order that the SSH Claimants  
6 are seeking; they're seeking an order, in effect, that they should be entitled to claim  
7 the costs incurred as against Mr Merricks from Visa.

8 MR JUSTICE GREEN: Well, yes, I can see that. They're asking for effectively a ruling  
9 now that those costs were reasonably incurred.

10 MR JOWELL: Yes, indeed. Indeed. Indeed.

11 MR WOOLFE: (Overspeaking) you can't judge whether any specific costs would be  
12 incurred.

13 MR JUSTICE GREEN: No.

14 MR WOOLFE: What we're saying is that costs should not be irrecoverable simply  
15 because they relate to -- what Visa can't do is say, "Ah, these costs were caused by  
16 Mr Merricks' involvement, therefore you can't claim those against us".

17 We're saying that is a bad argument. The question is, was it reasonable for us to incur  
18 x costs, whatever they may be, to pursue our claims against Visa? That question will  
19 have to be judged later, clearly. But they shouldn't be irrecoverable simply because  
20 they're related to Mr Merricks' evidence and submissions. That's our position on the  
21 point of principle. Whether or not you need to make the ruling today is a question of  
22 practicality, but that is our position on the point. Thank you.

23 MR JOWELL: Well, it seems to us that's quite a fine distinction to say, "We simply say  
24 they shouldn't be irrecoverable, but we're not saying that they are reasonably  
25 incurred".

26 That then leaves open the question, of course, "Well, why shouldn't Visa be able to

1 claim those costs over against Mr Merricks?"

2 I mean, Mr Trento, for example, had to consider 900 pages of Mr Coombs' reports,  
3 and address that in his evidence. We didn't call Mr Coombs. We certainly didn't adopt  
4 all of his evidence. Our evidence agreed with his points in some areas, absolutely,  
5 but not in all, and as you correctly pointed out, Mr Chairman, we took a different proxy.  
6 One doesn't know at this point the extent to which that evidence will be of assistance  
7 to the Tribunal or not.

8 So we say it's simply not possible at this point in time, reasonably, for the Tribunal to  
9 rule out the possibility of Visa claiming over those costs as against Mr Merricks.

10 Now, when Mr Merricks entered the umbrella proceedings, he must have known that  
11 his presence would potentially increase costs to the other parties. He didn't seek  
12 a pre-emptive costs ruling to clarify the position at that stage. He could have done; he  
13 could have said, "We would like to join, but on a particular basis so that we can pull  
14 the emergency cord and get out without costs liability to certain parties", but he didn't  
15 do so.

16 It's not appropriate for him to come now, after the event, after having racked up a good  
17 deal of costs to the parties to this litigation, and then say, "Well, I should walk away  
18 without even a potential liability for those costs".

19 MR JUSTICE GREEN: When you say it's not possible to rule out the possibility of  
20 Visa claiming costs, what's the scenario in which that will arise? Where you're liable  
21 for those costs to the Claimants?

22 MR JOWELL: To the Claimants, yes. I mean, it would be rather like -- it depends.  
23 I mean, one can imagine a scenario in which it could be said, "Well, we think that the  
24 costs of Mr Trento and others, and his team, considering Mr Coombs' evidence and  
25 critiquing it, and Mr Beale cross-examining, was reasonably incurred as against Visa,  
26 and therefore the SSH Claimants shouldn't have to bear it. In the first instance it

1 should be Visa".

2 Then one could imagine that Visa would be entitled to say, "Yes, but we didn't call  
3 Mr Coombs, and it should be for Mr Merricks to reimburse us for those costs".

4 But that's just one scenario.

5 Or it could be that the Tribunal will consider it appropriate to make a direct order for  
6 Merricks to pay those costs to the SSH Claimants. One doesn't know at this stage  
7 and it's not appropriate to try and engage in a sort of guessing game. It may all be  
8 entirely unnecessary, but it may not. And it's simply not --

9 MR JUSTICE GREEN: If you were to win, say, you accept that you have no claim  
10 against Merricks.

11 MR JOWELL: Well, if we're to win in relation to 2B, then of course we have incurred  
12 some costs considering Mr Coombs' evidence in relation to 2B.

13 MR JUSTICE GREEN: Right, okay.

14 MR JOWELL: Similarly, we also have incurred, as we explained in our skeleton  
15 argument, some additional costs by virtue of Merricks' presence in the proceedings.  
16 Now, as I understand the SSH claimants' position, they seem to be content to pay  
17 those costs to us, on the basis that they were reasonably incurred in defending our  
18 position. I mean, they haven't entirely clarified that, but --

19 MR JUSTICE GREEN: (Overspeaking) the other way.

20 MR JOWELL: Yes, I'm assuming that their position works the other way. They haven't  
21 actually quite been entirely crystal clear about that, but I assume that that's correct, in  
22 which case it doesn't arise in the event that we're successful. But --

23 MR JUSTICE GREEN: In 2B, Mr Merricks is aligned with the Claimants on that?

24 MR JOWELL: That's correct, yes, he is. Indeed.

25 MR JUSTICE GREEN: Yes.

26 MR JOWELL: But assuming that they accept that the position is symmetrical, then it

1 | doesn't arise. But it does arise in the event that we are unsuccessful and so we can't  
2 | just simply say, "Well, we're going to underwrite Mr Coombs' evidence prospectively  
3 | like that". And why should we? And so that's the position, and we say --  
4 | MR JUSTICE GREEN: You're not responding to Mr Coombs. Is this right, in 2B? Are  
5 | you responding to Mr Coombs' evidence?  
6 | MR JOWELL: Well, we were hoping that we could get out of that and we could all  
7 | agree that Mr Coombs' evidence would effectively be disregarded --  
8 | MR JUSTICE GREEN: Right.  
9 | MR JOWELL: -- for the responsive cases, but the SSH Claimants weren't prepared to  
10 | agree to that. So they insist that it remains admissible.  
11 | MR JUSTICE GREEN: Well, it remains admissible, but are you actually spending  
12 | money in responding to it?  
13 | MR JOWELL: Well, yes, we've had to spend some money responding to it, yes.  
14 | MR JUSTICE GREEN: Right.  
15 | MR TIDSWELL: But surely that's not money that you could ever claim from  
16 | Mr Merricks. Once you know he's out, then --  
17 | MR JOWELL: Well, that --  
18 | MR TIDSWELL: Then that must be reasonably incurred as a result of whatever it is  
19 | that's making you look at it.  
20 | MR JOWELL: That is a fair point, but we didn't know that they were out until after we  
21 | had done some work on that.  
22 | MR JUSTICE GREEN: Yes.  
23 | MR TIDSWELL: Well, you say that -- just help me with the timeline there, because the  
24 | positive cases were 7 March, is that right? 7 February, I'm sorry, 7 February. And the  
25 | settlement decision was the decision of the --  
26 | MR JUSTICE GREEN: 18th or 19th, was it?

1 MR TIDSWELL: Yes. So we're talking about a matter of a couple of weeks in which  
2 you might have been looking at this and trying to work out what you were going to say  
3 in your responsive cases.

4 MR JOWELL: Well, the economic teams were beavering away in that period; they  
5 couldn't assume anything and the timelines were quite constrained. So yes, but for  
6 those days, for those couple of weeks, as you say --

7 MR JUSTICE GREEN: Probably relatively small fry, in the scheme of thing.

8 MR JOWELL: Relatively small fry, but not nothing. The question is, would we be  
9 entitled to claim them over as against the SSH Claimants?

10 MR JUSTICE GREEN: Yes.

11 MR JOWELL: I think they're accepting that we would, but it's not entirely clear to me.  
12 But --

13 MR JUSTICE GREEN: I mean, we're sort of dealing with the situation where one side  
14 wins and the other side loses. But it may be fall somewhere in between, and there's  
15 not a clear winner. I have no idea how it might turn out. Well, I might have some idea.

16 MR JOWELL: Yes.

17 MR JUSTICE GREEN: But putting that out of my mind, if it was somewhere in  
18 between, I mean, what --

19 MR JOWELL: Well, indeed --

20 MR JUSTICE GREEN: How would the costs flow from that?

21 MR JOWELL: Well, again, there would be an argument about, who is the successful  
22 party? Whether it is appropriate to make any rulings on costs in advance of Trial 3,  
23 where an exemption will be determined? And so on.

24 So those issues will be -- there will be general costs issues that, of course, will have  
25 to be grappled with.

26 But the simple point is that -- I mean, my learned friend talks about interveners typically



1 bearing their own costs. Well, even if one could consider Mr Merricks an intervener,  
2 which one can't really; he's an additional party. But even if one could, even with  
3 interveners, you can have circumstances where there's an intervener in support of the  
4 unsuccessful party. One then has a question, "Well, the intervener certainly will bear  
5 their own costs, but does the successful party get the costs as from the intervener?"  
6 Sometimes, yes. Sometimes, the primary unsuccessful party has to bear the  
7 intervener's costs, and then there may be issues as to whether they can claim those  
8 as against the intervener.  
9 Similarly, one has that dynamic with, of course, with third-party claims and so on, and  
10 contribution claims, so it's not a straightforward scenario where one can say in  
11 advance there's bound to be no order as to costs against Mr Merricks. It's not  
12 appropriate for the Tribunal to make such a prospective order, particularly when  
13 there's no compelling reason to do so, because the distribution of the relevant pot isn't  
14 going to be for a very long time.  
15 So those are my submissions, unless I can give any further assistance.

16 Submissions by MR WOOLFE

17 MR WOOLFE: Okay. I perhaps should have been clearer when I first stood up to  
18 distinguish between the point of principle and the practicalities.

19 On the point of principle, our primary position is that set out in our skeleton, that we  
20 have incurred all our costs for the purpose of pursuing our claims against Visa and  
21 Mastercard, and to the extent those costs are reasonable, they should be recoverable  
22 against them. That is the point of principle, and we may have a disagreement between  
23 us and Visa on that.

24 The point of practicality for you is whether or not you need to grapple with any of this  
25 today, and you'll see a direction set out in our skeleton. We only really urge that on  
26 you if you are otherwise minded to accede to Mr Merricks' application that there should

1 | be an order dealing with costs on this today.

2 | MR JUSTICE GREEN: Yes.

3 | MR WOOLFE: If you are leaving it over for another day, then we're not asking you to  
4 | make that direction now.

5 | MR JUSTICE GREEN: Well, what do you say if we're in that sort of halfway house  
6 | where you've been partially successful but not completely successful? What's the  
7 | likely costs outcome of that? Can we say with certainty at this stage that there's no  
8 | possibility of Mr Merricks being liable?

9 | MR WOOLFE: We were never asking you to rule that Mr Merricks should not be liable  
10 | in any respect. We were only asking you, if such a direction was going to be made, to  
11 | rule by way of direction as well that costs will not be irrecoverable solely because they  
12 | relate to Mr Merricks' evidence. That point of principle, we say, would apply equally  
13 | in some sort of halfway house scenario; it's simply that all these costs are being  
14 | incurred for the purposes of the claims, and therefore the fact that some of those costs  
15 | relate to Mr Coombs, in some way, Mr Merricks' evidence more broadly, doesn't make  
16 | them irrecoverable. That's the only point of principle I was urging upon you. I can see  
17 | completely that --

18 | MR JUSTICE GREEN: But that's if we decide at this stage to make no order for costs.

19 | MR WOOLFE: Only if you are going to make an order about costs today do we ask  
20 | you also to make a direction in the terms that I set out in my skeleton, sir.

21 | The point of principle, we maintain, in any event: if you're not grappling with costs  
22 | today, you don't need to go on to make an order. If you are grappling with the costs  
23 | of this today, then we do urge that direction.

24 | MR JUSTICE GREEN: Is there any authority in support of such a direction?

25 | MR WOOLFE: There's no specific authority in support of that. The case I cite in my  
26 | skeleton is Arkin v Borchard Lines, which was a case of Part 20 claims. That simply

1 says that the usual rule -- which is not inviolable -- where you have the main claim in  
2 Part 20 proceedings, is you treat the costs in the two actions separately, and the  
3 claimant can recover all of their costs against the defendant, including where those  
4 costs relate to evidence of the Part 20 defendants, et cetera. That's all that case says.  
5 Now, that is only an analogy for us. I simply found myself on the basic point that what  
6 the Tribunal should do is lean against the situation where somebody is being left with  
7 irrecoverable costs, because Mr Merricks has settled out, and another party is saying,  
8 "those costs should be paid by Mr Merricks and not by me". Mr Merricks has departed,  
9 and no costs can be recovered against him.

10 MR JUSTICE GREEN: Right.

11 MR WOOLFE: But, sir, if you are not minded to grapple with the points today and to  
12 make an order today, you don't need to decide on the point of principle, which I'm  
13 urging --

14 MR JUSTICE GREEN: Right, I follow that. Thank you.

15 Submissions by MR COOK

16 MR COOK: Just to put our formal position on the record.

17 MR JUSTICE GREEN: Yes.

18 MR COOK: We have only limited skin in the game here; we have a full and final  
19 settlement with Mr Merricks, which includes a drop hands provision on costs. We  
20 settled with the majority of the Merchant Claimants, and again, those settlements  
21 include agreed terms on costs.

22 We haven't settled with all of them, though, so there are some live claims that remain.  
23 But we've settled with a lot of them. Our primary position is simply it is too early to  
24 make any form of cost ruling here. There are a myriad of potential outcomes here, not  
25 least somewhere in middle ground in terms of the percentage, that you make different  
26 rulings in relation to different sectors, or decide not to deal with certain sectors,

1 because the evidence isn't there, or whatever it might be.

2 There are simply a lot -- you know, this is a trial that is potentially open to a variety of  
3 different outcomes, and in turn, for all the uncertainties that go on costs, a huge variety  
4 of possible outcomes in relation to costs. And we do say, at this point, trying to pre-  
5 emptively evaluate all of those possibilities and decide that none of them can include  
6 potential liability for Mr Merricks, is obviously not going to be a claim by Mastercard;  
7 we settle down on this part to pre-empt anything. We say simply it's --

8 MR JUSTICE GREEN: So you say I should follow what Visa is saying and leave it to  
9 the end of the trial.

10 MR COOK: Yes.

11 MR JUSTICE GREEN: All right, thank you. Yes. Mr Williams.

12 Reply submissions by MR WILLIAMS

13 MR WILLIAMS: A very short few points, sir. The first point made by Visa was that  
14 distribution would most likely be next year, and I accepted that. That's not accepted.  
15 The timetable that I ran through with you is that settlement and distribution will be this  
16 year in October/November period of time. That's the first point. It was very telling that  
17 my learned friend for Visa mentioned costs being held over until after Trial 3.

18 Now, that's of some concern and puts into sharp relief the point I've been making about  
19 delay in circumstances where there will be no judgment, which enables anyone to say  
20 whether Mr Merricks has won or lost. There is authority to the effect that where one  
21 cannot and will not be able to be in a position to determine who won or lost, then no  
22 order for costs is appropriate, and that's the authority cited in the application, the  
23 Institute of Independent Insurance Brokers, the Sir Christopher Bellamy decision.  
24 I don't intend to take that up unless it would assist you, sir, but I asked the rhetorical  
25 question about what would happen in relation to the overall UK economy rate. I don't  
26 know whether that's going to be dealt with in Trial 2, but the idea that these are going

1 to be holding over costs until the end of Trial 3, potentially, on that issue -- and there's  
2 a debate as to where it falls in -- is worrying. It puts into sharp relief my submission  
3 on delay and working out who's won or lost.

4 MR JUSTICE GREEN: I can't remember whether you were in Trial 3 or not?

5 MR WILLIAMS: No.

6 MR JUSTICE GREEN: No.

7 MR WILLIAMS: We were never in Trial 3. So that's my first point on the distribution.

8 MR TIDSWELL: Sorry to interrupt you. Can you just help me? Is there likely to be  
9 just two different distribution exercises, though?

10 MR WILLIAMS: The plan is for there to be one.

11 MR TIDSWELL: For there to be one. But I maybe I misunderstood, but I thought you  
12 told me that some of the features of the second one might be determined by the uptake  
13 in the first one. Is that not --

14 MR WILLIAMS: It's not the uptake of the first one. It's how many people come  
15 forwards.

16 MR TIDSWELL: Right. The registration process before the distribution. So you're  
17 anticipating one distribution, of pot 1 and 3 at the same time?

18 MR WILLIAMS: That's certainly the plan. I don't want to tie my client's hands  
19 depending on how today's application goes and speculations of the future as to  
20 whether there's a second distribution. But that's why I addressed you, sir, separately  
21 on the distinct point of the amount that's left over and the costs of entering into  
22 a second distribution process, which will be costly. Distribution is basically not free.

23 MR TIDSWELL: Yes, understood.

24 MR JUSTICE GREEN: I dare mention it, but --

25 MR WILLIAMS: And there's no budget for a second distribution either. The plan is  
26 very much there to be one. So that there is a real question about whether this means

1 | the whole thing has to be postponed.

2 | MR JUSTICE GREEN: Right. You haven't obviously got the judgment yet from the  
3 | settlement Tribunal, but presumably there's a possibility that one or other party might  
4 | seek to appeal that?

5 | MR WILLIAMS: I wouldn't wish to speculate, sir.

6 | MR JUSTICE GREEN: No, no, obviously you can't know that, but that will presumably  
7 | affect any date of distribution.

8 | MR COOK: Sir, I mean, there were certainly intimations. I wouldn't say any more than  
9 | that --

10 | MR JUSTICE GREEN: Yes.

11 | MR COOK: -- from Innsworth, the funder that they were open to the idea of  
12 | challenging that and they continue seeking information which might suggest they were  
13 | considering it.

14 | MR JUSTICE GREEN: Right.

15 | MR COOK: We think it would be by way of judicial review. There isn't an ability to  
16 | appeal, that may not be accepted by Innsworth, but nonetheless, yes, there is the  
17 | potential for there to be another round of fight.

18 | MR JUSTICE GREEN: Yes. And so given that there is that possibility, you would  
19 | accept that would affect the distribution date, presumably?

20 | MR WILLIAMS: There would have to be, potentially, an application for a stay and the  
21 | amount of worms that are coming out of a number of cans would be considerable,  
22 | because obviously, we've downed tools in relation to Trial 2A and B. It would be easier  
23 | for me to complete the written closings in relation to Trial 2A and address you on those  
24 | having already heard them. But we'd have to think about getting up to speed on  
25 | Trial 2B on acquirer pass-on. I wouldn't wish to think about what that would all  
26 | involve, sir.

1 MR JUSTICE GREEN: I'm not inviting you to go down that route.

2 MR TIDSWELL: There would be a difference between -- there could potentially be  
3 a difference between an appeal of a settlement and an appeal of whatever is said  
4 about the distribution, couldn't there? I mean, it might be that the settlement wasn't  
5 appealed and the distribution arrangements were.

6 MR WILLIAMS: That's entirely possible because there were two aspects of the  
7 settlement hearing. The first was, was it just and reasonable in the amount?

8 MR JUSTICE GREEN: Yes.

9 MR WILLIAMS: And we've had a decision, a very firm decision on that. My instructing  
10 solicitors then after that decision, partway through the hearing, contacted the Tribunal  
11 asking expressly whether one could down tools.

12 In relation to the second half of the application, that was, essentially, "is the settlement  
13 going to be approved in distribution terms"? And the answer came back expressly on  
14 the transcript from Mr Justice Roth, "Yes, you may down tools", meaning that it's been  
15 very strongly indicated by the Tribunal that the settlement overall will be approved.

16 As my learned friend, Mr Cook, says there may be some tweaks to the distribution  
17 pots and models but the settlement is going ahead broadly on the terms. At least  
18 that's very firmly our understanding. So one would hope there wouldn't be an appeal  
19 in either circumstance but we'd have to get to that when we get to it. And there would  
20 be an application for expedition, for obvious reasons, in relation to any appeal or  
21 judicial review.

22 So that deals with the first point on distribution. The second point was made in terms  
23 of the timing of this application. You've heard my points about this all being set out in  
24 correspondence over the past two weeks. But I do also need to add that we needed  
25 to get the funder approval to make this application, which does to some extent explain  
26 the process that's been adopted.

1 The third point that was taken against me was that there was no mention of this by  
2 Mr Merricks in the UPO. The point works both ways: what's good for the goose is  
3 good for the gander. No express reservation was made by Visa or the Merchant  
4 Claimants and this wasn't raised or discussed so it does go either way.

5 The fourth point that was made is in relation to acquirer pass-on. Well, sir, that's again  
6 wholly surprising. The fact of settlement was announced in December; obviously  
7 because there was a risk of settlement not being approved, we prepared Coombs 15,  
8 on acquirer pass-on. To the extent that Coombs 15 is addressed, it's entirely  
9 voluntary on behalf of either Visa or the Merchant Claimants as to whether they, the  
10 Merchant Claimants, adopt Mr Coombs, perhaps by taking some inspiration from it in  
11 relation to Dr Trento's responsive case -- I don't know, I haven't seen those responsive  
12 cases -- in which case Visa's costs will be against the Merchant Claimants, not  
13 Mr Merricks. But we alerted Visa to the fact of settlement as early as possible during  
14 Trial 2A and then since then, it's been well known since the Tribunal approved the  
15 settlement. So it's Visa's choice as to whether to address evidence that's adverse to  
16 it because it would win or succeed.

17 I suppose the point that I should emphasise is that the acquirer data is all in the  
18 Merchant claim period. So the evidence that Mr Coombs was addressing is the  
19 Merchant claim period. And that's because the data from the three acquirers was not  
20 within the Merricks' claim period. So they would be addressing the same evidence  
21 and the data in any event. So that's --

22 MR JUSTICE GREEN: I think the point was that Visa, if they succeed on Trial 2B,  
23 should be able to recover some costs from Mr Merricks who was still in that for the  
24 two weeks that -- until the approval, I think.

25 MR WILLIAMS: I mean, we --

26 MR JUSTICE GREEN: On Mr Coombs' evidence.



1 MR WILLIAMS: We can just decide now in your broad discretion, sir, that these are  
2 such fanciful ideas and possibilities and they're such low sums in question that we  
3 might as well try and avoid all the pain and suffering of continuing this process for  
4 a year or two.

5 Those are costs that if they arise or Mr Coombs' evidence arises in some way before  
6 you in a couple of weeks' time, it will be because the Merchant Claimants are relying  
7 directly on Mr Coombs' evidence for some reason in relation to their claim, or their  
8 independent expert has looked at what Mr Coombs has done and has independently  
9 decided, "Mr Coombs has made a good point there; I agree with it. I'm advancing it."

10 In both scenarios, the costs are as between the parties. We have settled as quickly  
11 as we could. The settlement hearing was unfortunately delayed and it is what it is.

12 But the idea that parties should be discouraged from settlement and seeking finality of  
13 settling in umbrella proceedings because of lots of potential cans of worms that may  
14 or may not be kicked into the long grass, is a surprising one, in my submission.

15 And the final point that nobody has addressed you on, sir, other than me is that the  
16 critical and overarching issue is that there will not be a ruling that concludes that  
17 Mr Merricks is a loser, a part loser or a winner or a part winner. In those  
18 circumstances, this Tribunal is in no position, in my submission, to make a ruling in  
19 due course against Mr Merricks, and so we should just bite the bullet, at this stage. It  
20 would be rather unfair, in my submission, to presume that we would not have made  
21 any submissions at all that would have or curry some favour with the Tribunal in due  
22 course and determine the position now.

23 Those are my submissions, unless I assist you further.

24 MR JUSTICE GREEN: Thank you. I guess we ought to have taken a break, which  
25 we haven't done. So we will take a break now for ten minutes.

26 (12.14 pm)

1 (A short break)

2 (12.33 pm)

3 MR JUSTICE GREEN: Well, thank you very much for your submissions in relation to  
4 this application of Mr Merricks; particularly for the excellent submissions from  
5 Mr Williams.

6 (12.34 pm)

7 Ruling (submitted to the learned judge for approval)

8 (12.40 pm)

9 MR JUSTICE GREEN: So, we have a couple more things, I think, on the agenda.

10 MR JOWELL: Before we do. We received a notice from Mr Merricks that they would  
11 be seeking their costs if they succeeded in this application and providing a cost  
12 schedule. We do not have our own cost schedule but we do seek an order for our  
13 costs of this application.

14 MR JUSTICE GREEN: Against Mr Merricks?

15 MR JOWELL: Against Mr Merricks.

16 MR WILLIAMS: Sir, if I have to make submissions on that, as a matter of principle,  
17 there was a PTR scheduled for today. In any event, we acted proportionately, tried to  
18 join in on this rather than have a separate hearing. Of course, what's good for the  
19 goose is good for the gander. This still leaves costs up for grabs and it may well be  
20 that ultimately Mr Merricks succeeds at the end of the day. So in my submission, it  
21 would be preferable to deal with costs in the round at once. So essentially reserved  
22 until that point in time when we can work out whether any of the points that I've made  
23 are good ones or not in the exact same way --

24 MR JUSTICE GREEN: You do have to come back for the overall costs decision.

25 MR WILLIAMS: Quite possibly, sir. It's a prospect I look forward to.

26 MR JUSTICE GREEN: Right.

1 MR WILLIAMS: But those are my submissions. It was an important point of principle  
2 to determine. Mr Merricks has acted reasonably and in the interests of the class, and  
3 in accordance with his contractual obligations to the funder in seeking to raise this at  
4 the earliest point in time. We were essentially supported by the SSH Claimants'  
5 primary position, which was aligned, and they were prepared to consent to the order  
6 that we sought, and Mastercard were neutral, at least in their written submissions  
7 before you, sir.

8 MR JUSTICE GREEN: I assume there's no other applications for costs? No.  
9 Well, I think you made the application, albeit it was at a pre-arranged PTR, but we  
10 have spent some time over it, nearly two hours really, just on that application and  
11 you've lost it. So, I'm afraid I'm going to order that you should pay Visa's costs.

12 MR JOWELL: Thank you. I hand over to my learned friend.

13 MR WOOLFE: (Several inaudible words) I don't think we'll actually be very long, so  
14 perhaps should we just press on?

15 MR JUSTICE GREEN: Yes.

16 Evidence of Mr Coombs

17 MR WOOLFE: The next item, sir, was implications of the Merricks settlement. This  
18 really is just about what is to be done about Mr Coombs'--

19 MR JUSTICE GREEN: Yes.

20 MR WOOLFE: -- expert report that was attached to Mr Merricks' positive case. Our  
21 position, as set out in our skeleton, is that generally what has been done across these  
22 proceedings is when one party leaves, the evidence is left in, as it were, and can be  
23 used as appropriate.

24 As I understand, Mastercard does not object to it going into the bundle, but says that  
25 no weight should be given. That's a general statement of what their position is.

26 Visa don't say whether it should go in the bundle or not, but I do note, sir, that although

1 | this is not in the bundle, Mr Holt's responsive report --

2 | MR JUSTICE GREEN: Sorry, are we talking about the 2B evidence, or --

3 | MR WOOLFE: The 2B evidence.

4 | MR JUSTICE GREEN: -- are we including -- not the 2A evidence?

5 | MR WOOLFE: Not the 2A evidence.

6 | MR JUSTICE GREEN: So, everyone's agreed that that's in Mr Coombs'

7 | cross-examination and they can rely on it and we can place whatever weight we want

8 | on it; yes?

9 | MR WOOLFE: Yes.

10 | MR JUSTICE GREEN: Right.

11 | MR WOOLFE: This solely relates to Mr Coombs' positive report for Trial 2B.

12 | MR JUSTICE GREEN: Right.

13 | MR WOOLFE: Acquirer pass-on. Effectively, I think it is certainly common ground

14 | between us and Mastercard and I think with Visa as well, but it's in and anybody can

15 | refer to it, but both Visa and Mastercard say it should be given no weight. Indeed,

16 | Visa I think is actually asking for you to indicate at this juncture that you will place no

17 | weight upon it.

18 | Our position, sir, is simply that if one had an academic study that was published and

19 | looked at acquirer pass-on during the claim period, one would expect all the experts

20 | to look at it, see what they thought of it, and to give you their views.

21 | It would be artificial, as Visa originally urged, to instruct the experts not to consider

22 | Mr Coombs' analysis at all. We think, to that extent, it would be wrong to sort of

23 | exclude it entirely from the process.

24 | Given that, as I think has happened, the other experts, certainly Dr Trento and Mr Holt

25 | for Visa have commented on Mr Coombs' analysis. It is in --

26 | MR JUSTICE GREEN: In what?

1 MR WOOLFE: In their responsive cases that were exchanged over the weekend.

2 MR JUSTICE GREEN: All right.

3 MR WOOLFE: I think there were 411 references to Mr Coombs' evidence in Mr Holt's  
4 responses.

5 MR JUSTICE GREEN: 411?

6 MR WOOLFE: 411. I'm afraid we haven't got the bundles. I can't count it for you.

7 MR JUSTICE GREEN: You counted quickly over the weekend.

8 MR WOOLFE: That's purely based on an Adobe Acrobat page searcher.

9 So, it's in and has been commented upon, and simply the weight to be placed on it  
10 should be a matter for the Tribunal at the end of the day. We do fully take Mastercard  
11 and Visa's point that this will not have been subject to cross-examination.

12 MR JUSTICE GREEN: Yes.

13 MR WOOLFE: I mean, clearly that is a major factor going into the weight one would  
14 want to place on it.

15 MR JUSTICE GREEN: Yes.

16 MR WOOLFE: Equally, the other experts would have commented on it responsibly  
17 and they will have been cross-examined. It's part of the mix. You may find yourself  
18 able to place some weight on it; you may not, but that should be a matter for you  
19 following trial. That's our position.

20 MR JUSTICE GREEN: Okay.

21 MR WOOLFE: I think Visa actually want you to rule that you wouldn't place weight on  
22 it, so perhaps I hand over to Mr Jowell.

23 MR JOWELL: My learned friend says that there were a number of references in  
24 Mr Holt's responsive evidence to Mr Coombs. I haven't counted them myself. But  
25 there were --

26 MR JUSTICE GREEN: There is some reference.

1 MR JOWELL: There are some. But the reason for that is very straightforward: once  
2 the settlement occurred, we wrote to the SSH Claimants inviting them to agree that  
3 we could now put Mr Coombs' evidence to one side and it could not be included in the  
4 bundle and we wouldn't have to respond to it, and they declined. So that is why there  
5 are ...

6 Then, our experts had to continue to grapple with Mr Coombs' evidence. And we do  
7 think that really these proceedings should be run as efficiently as they can be. They  
8 have their own expert, Mr Trento, and it really would be desirable if at least the Tribunal  
9 could give an indication that insofar as they seek to invoke Mr Coombs, they should  
10 be on costs risk for that, because it is very unsatisfactory, effectively --

11 MR JUSTICE GREEN: What does that mean?

12 MR JOWELL: Well, that in so far as we're successful, that we will be entitled to recover  
13 our costs of that and perhaps in any event.

14 MR JUSTICE GREEN: But I mean, much like your response to the Merricks  
15 application, isn't it premature to be deciding at this stage how much weight to be put  
16 on evidence and what the costs outcome might be?

17 MR JOWELL: I won't push the point, but I do think it is regrettable in our submission  
18 that the parties couldn't agree --

19 MR JUSTICE GREEN: Yes.

20 MR JOWELL: -- that this should simply be put aside because it is unnecessary.

21 MR JUSTICE GREEN: Well, they clearly want to place some weight on it and, you  
22 know, I would have thought there is evidence that is admissible, that has been filed in  
23 accordance with the directions of the Tribunal and, much like other evidence of settled  
24 Claimants that I think was allowed in, in Trial 2A, we're well able to judge whether any  
25 weight should be placed on it at the end of the day and you can obviously argue for  
26 costs as well.

1 MR JOWELL: I won't push the point.

2 MR JUSTICE GREEN: All right. Thank you. And Mastercard, you're --

3 MR COOK: Happy to go in the bundle and matters --

4 MR JUSTICE GREEN: Yes. Whatever. Exactly.

5 MR COOK: -- (overspeaking) assumed you (overspeaking) --

6 MR JUSTICE GREEN: All right.

7 MR COOK: Obviously, having an expert that is not going to have been cross-

8 examined --

9 MR JUSTICE GREEN: Yes.

10 MR COOK: -- damage (inaudible).

11 MR JUSTICE GREEN: Thank you.

12 MR WOOLFE: The second point (inaudible).

13 The third point, I understand you're content with the trial timetable as --

14 MR JUSTICE GREEN: Yes, absolutely.

15 MR WOOLFE: In that case, the fourth point is hot tub.

16 MR JUSTICE GREEN: Hot tub, yes.

17 MR WOOLFE: We simply, I think all parties would like the Tribunal to indicate either

18 that we should prepare an agenda, in which case we'll go away and do it, or as was

19 done with, I think, Trial 2A, that it will be a matter for Professor Waterson.

20 MR JUSTICE GREEN: Yes. But I think Professor Waterson has looked at this and

21 has indicated that he would benefit from an agenda being produced by the parties, if

22 that were possible, and we can take it from there.

23 Is that going to be okay?

24 MR WOOLFE: Sir, I think we all stand ready to assist the Tribunal.

25 MR JUSTICE GREEN: Yes.

26 MR WOOLFE: It will take a bit of time to do, but --

1 MR JUSTICE GREEN: Yes. All right. That will be very helpful. Thank you.

2

3 Confidentiality

4 MR WOOLFE: The next point, sir, is just confidentiality.

5 MR JUSTICE GREEN: Yes.

6 MR WOOLFE: On this, really, I just wanted to emphasise a couple of points because  
7 it's a slightly different confidentiality situation from usual. Perhaps Mr Jowell can add  
8 any points he wants to this.

9 First of all, the information that's relevant at Trial 2B is information that is confidential  
10 to acquirers who are third parties to the proceedings --

11 MR JUSTICE GREEN: Yes.

12 MR WOOLFE: -- and whose disclosure was given under third-party disclosure orders.  
13 So, we will all have to be careful with it and its confidentiality is not something that any  
14 of us can simply concede if pressed.

15 MR JUSTICE GREEN: No.

16 MR WOOLFE: So that is in itself a factor that will make it harder for sessions to be  
17 done in open court, because often one can sort of be working one's way around  
18 something and then can we press, is this really confidential? One can take instructions  
19 and say, actually, this is okay, we're not going to be in that situation.

20 MR JUSTICE GREEN: Right.

21 MR WOOLFE: The second point is this: I think the real issue is probably competitive  
22 sensitivity between the acquirers themselves. They're all quite sophisticated, or we  
23 think they are, and they may well be able to back-engineer the information from things  
24 that are quite abstruse to us as laypeople. So, I think all of us have been quite cautious  
25 and accept that Visa has taken the lead on this and they've made quite extensive  
26 confidentiality proposals and markings.



1 MR JUSTICE GREEN: So, is this just related to whether we're in open session or not?

2 MR WOOLFE: Essentially. I just wanted to --

3 MR JUSTICE GREEN: The actual confidentiality rings are all sorted, are they?

4 MR WOOLFE: There's no disagreement between the parties on this.

5 MR JUSTICE GREEN: Okay.

6 MR WOOLFE: There's one minor point about pseudonymisation where we're in  
7 discussion, but there's no real -- I just wanted to flag for the Tribunal that we may be  
8 in closed and unable to go into open --

9 MR JUSTICE GREEN: Yes.

10 MR WOOLFE: -- for longer periods than is normal or ideal, but --

11 MR JUSTICE GREEN: Right. Well, I mean, I can understand that for the evidence;  
12 what about the openings? Will they be ... they can be done?

13 MR WOOLFE: I imagine that they'll all be in open. There may be points where if one  
14 is looking at -- for instance, it's to do with forms of equations that the economists have  
15 used for their regressions, for example. Even some of those equations are, I think,  
16 being redacted as being confidential, because that in itself discloses something,  
17 I understand, about the structure of the data. Insofar as one was going over matters  
18 and submissions explaining how things worked, it may be that there are points that  
19 are confidential, but I would imagine that we can mainly work in open for openings and  
20 indeed closings, but a lot of the expert cross-examination will be closed, so that's what  
21 I want to flag.

22 MR JUSTICE GREEN: Yes.

23 MR WOOLFE: The other final point is that we had a proposal to pseudonymise the  
24 acquirer's name, so instead of saying, for instance, a certain acquirer's name,  
25 Worldpay, for example, you could have, you know, a name put in there instead, to be  
26 consistent.

1 We're in discussion with the parties to whether that will actually assist or not. I think  
2 Visa said we should report back to you later if we think we should do that, but there's  
3 nothing for the Tribunal to decide about that.

4 MR JUSTICE GREEN: Okay.

5 MR WOOLFE: Finally, sir, under ... (Audio error)

6 MR JUSTICE GREEN: Mr Tidswell is making the valid point that Professor Waterson  
7 is going to need some help in relation to confidentiality, I imagine, in the hot tub and  
8 ensuring that he doesn't stray into anything that he shouldn't be doing in open court.

9 MR WOOLFE: Thank you, sir.

10 MR JUSTICE GREEN: I mean, I don't know whether it all ought to be in closed  
11 session then, as a result?

12 MR WOOLFE: Perhaps we can keep it under review as we prepare the agenda,  
13 because it may be there's some points of principle that need to come out --

14 MR JUSTICE GREEN: Yes.

15 MR WOOLFE: -- in open and then and so forth. But why don't we look at that, discuss  
16 it between ourselves along with the agenda, and when we send it to the Tribunal, we  
17 can inform you what our steer is on that and then Professor Waterson can take it from  
18 that stage.

19 MR JUSTICE GREEN: Yes. So, the acquirers themselves will not -- I mean, they're  
20 not participating at all? I guess they could send representatives, or they could be  
21 watching the live stream.

22 MR WOOLFE: They could be, but I have no reason to think that they will be. I mean,  
23 if they're concerned about access to disclosure, they might, but we have no reason to  
24 think they will.

25 MR JUSTICE GREEN: Right, right. All right.

26

1 AOB

2 MR WOOLFE: Finally, under AOB, which we'll spill into very quickly.

3 MR JUSTICE GREEN: Yes.

4 MR WOOLFE: A very exciting point: hard copy bundles, sir.

5 MR JUSTICE GREEN: Yes.

6 MR WOOLFE: Because for Trial 2A, you had hard copy bundles, a sort of core bundle,  
7 as it were, and you informed us what you wanted in it. Insofar as you wanted the same  
8 again, to cover, for instance, positive and responsive cases, for example, do let us  
9 know. Realistically, I think because the electronic bundle is still in preparation and  
10 then hard copy bundles sort of flow on from that, the earliest I understand those could  
11 be prepared is probably next Tuesday. But I wanted to let you know if you want them,  
12 let us know and what do you want in them.

13 MR JUSTICE GREEN: I think I'm okay with electronic. Are you?

14 MR TIDSWELL: Yes.

15 MR JUSTICE GREEN: Yes, I don't think we need hard copies of the positive. I think  
16 electronic's okay.

17 MR TIDSWELL: Yes. Do you want any hard copies for the (inaudible)?

18 MR JUSTICE GREEN: No. I'm okay going fully electronic, actually.

19 MR WOOLFE: Thank you, sir.

20 MR TIDSWELL: Likewise. I think maybe if Professor Waterson takes a different view,  
21 we can let you know.

22 MR WOOLFE: Certainly. If we're told -- I mean, I understand once the electronic  
23 bundle is prepared, printing off a hard copy bundle of it is quite straightforward.

24 MR JUSTICE GREEN: Yes.

25 MR WOOLFE: Finally, the exciting point, as I understood the exchange at the end of  
26 trial, our written openings are due a week today with 25-page limit, as I understand.

1 | I just want to check that that's still --

2 | MR JUSTICE GREEN: Of the?

3 | MR WOOLFE: Of the written openings for trial.

4 | MR JUSTICE GREEN: Openings for 2B?

5 | MR WOOLFE: Yes. We're content with that but I wanted to check.

6 | MR JUSTICE GREEN: Good. Well, yes. That's good.

7 | MR WOOLFE: That brings us to --

8 | MR JUSTICE GREEN: I don't think I put a limit on the closing submissions, did I?

9 | MR WOOLFE: Not yet.

10 | MR JUSTICE GREEN: Not yet.

11 | MR WOOLFE: I don't think we've been canvased yet.

12 | MR JUSTICE GREEN: No. Okay.

13 | MR WOOLFE: Perhaps we can revisit that.

14 | MR JUSTICE GREEN: Well, I'm going to leave it to your good sense. Knowing what

15 | a burden it might be if we are required to read, you know, tomes and tomes.

16 | MR WOOLFE: I understand. Also, these are going to be produced during the trial,

17 | therefore it may be they won't be that long.

18 | MR JUSTICE GREEN: Yes. Just remind me, the closings for 2A are being produced

19 | when? That's in --

20 | MR WILLIAMS: They came on Friday, sir.

21 | MR JUSTICE GREEN: They've come in already?

22 | MR WILLIAMS: Yes.

23 | MR JUSTICE GREEN: Wow, okay.

24 | MR WOOLFE: Sorry, I misunderstood the question. They were 125 pages apiece.

25 | MR JUSTICE GREEN: Okay.

26 | MR WOOLFE: They've been produced and are available for your reading pleasure.

1 MR JUSTICE GREEN: What, everyone's produced 125 pages?  
2 MR WOOLFE: Yes.  
3 MR JUSTICE GREEN: Sounds like I imposed a limit.  
4 MR WOOLFE: Yes, you did.  
5 MR JUSTICE GREEN: Okay.  
6 MR WOOLFE: Yes, I'm informed that it's 124.  
7 MR JUSTICE GREEN: Well, with the back sheet.  
8 MR WOOLFE: That's everything I think there was going to Trial 2B. The only other  
9 point, sir, which I may raise in AOB: you may recall we had an exchange during Trial  
10 2A about the listing of a CMC for Trial 3. There was an exchange of correspondence  
11 about this and we wrote to the Tribunal on 11 February, setting out the dispute that  
12 evolved between the parties.  
13 Effectively, I think there's agreement on what issues remain to be decided and we  
14 would like the CMC to be listed sometime next term to get on with process towards  
15 that. Visa are saying no step should be taken, no CMC should be listed until judgments  
16 of Trial 1 and Trial 2 are in. That is the difference of opinion.  
17 I'm not asking for the Tribunal to rule on that today. I'm simply commending our letter  
18 to the Tribunal and saying that it would be good to have a decision one way or the  
19 other about whether or not that CMC can be listed.  
20 MR JUSTICE GREEN: Okay, well, no doubt if you don't hear from us in writing, we  
21 can also sort that out at the end of the trial.  
22 MR WOOLFE: Yes. That's everything I have to say, unless my learned friends have  
23 anything else as well.  
24 MR WILLIAMS: No.  
25 MR JOWELL: Nothing further from us, thank you very much.  
26 MR JUSTICE GREEN: All right. Well, thank you very much and see you in a couple

1 | of weeks.

2 | (1.00 pm)

3 | (The hearing concluded)

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