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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1441-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 21st October

Before:

Ben Tidswell

(Sitting alone as Chair)

BETWEEN:

CICC I & II

Class Representatives

v

Mastercard, Visa & Others

Defendants

A P P E A R A N C E S

Kieron Beal KC and Flora Robertson (Instructed by Marcus Parker Limited) on behalf of
CICC I & II

Matthew Cook KC and Hugo Leith (Instructed by Freshfields LLP and Jones Day) on behalf
of Mastercard

Brian Kennelly KC and Emily Neill (Instructed by Linklaters LLP and Milbank LLP) on
behalf of Visa

Tuesday, 21 October 2025

(10.30 am)

THE CHAIR: Some of you are joining us livestream on our website. I must start 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. Any breach of that provision is punishable as a contempt of court.

Housekeeping

MR BEAL: Morning, sir. Might I deal with representation?

THE CHAIR: Yes, thank you.

MR BEAL: My learned junior Ms Robertson appears with me for the Class Representatives in this case. Matthew Cook King's Counsel is leading Hugo Leith for Mastercard; Mr Kennelly King's Counsel is leading Ms Neil for Visa, the usual suspects.

You should have, I hope, four volumes of material, albeit I anticipate you are working from an electronic copy, sir.

THE CHAIR: I am, I have it all electronically. I have two bundles; I have an authorities bundle and I have a CMC bundle.

MR BEAL: The updated bundle which was circulated late yesterday afternoon has the miraculous accuracy of being able to enter "control" and "G" search function and actually goes to the page you need. I may be speaking --

THE CHAIR: I don't know which one I have. I don't know whether I have that or not, actually, but we will find out in due course.

Submissions by MR BEAL

MR BEAL: What I'm proposing to deal with first is the question of costs because it

1 seems to me that is the issue generating the most heat, if not light, and I'd like to
2 address the Tribunal as to what our (inaudible) way through that particular issue is.

3 I also want to be clear what has happened thus far and what our proposal is to deal
4 with what's happened thus far.

5 The updated agenda, as you will see, is in fact at page 2125 in the bundle, but item 1
6 is the interaction with the Umbrella Proceedings. Could I just give you one sentence
7 on each of the five items -- we have no other business, but Mastercard does, and I will
8 respond to that in due course.

9 The one or two sentences on item 1 is interaction with the Umbrella Proceedings. Our
10 position is, respectfully, that interaction with that is a no-brainer. It's something this
11 Tribunal has envisaged pretty much from inception. It was something that was
12 envisaged almost immediately after certification in 2024. The big ticket item which
13 needs to be dealt with is exemption, and that is the nettle which needs to be grasped.
14 That is the outstanding liability issue which really needs to be addressed. As you will
15 recall from Trial 1, there were quite a lot of arguments which were in fact addressed
16 to the issue of exemption and we say now is the time to deal with it properly.

17 What we seek is not this Tribunal's approval per se because we recognise the
18 constitutional nicety of not wanting to step on another Tribunal's shoes. But it seems
19 to us that if the Tribunal is willing to indicate non-opposition to the proposed joinder,
20 then that would be useful because, of course, the Umbrella Proceedings Tribunal will
21 want to know what the position of the CICC Tribunal is.

22 So, our proposed course is simply to allow an application to be made with
23 non-opposition from this Tribunal, and that application is intended to be advanced at
24 the January CMC.

25 **THE CHAIR:** Yes.

26 **MR BEAL:** Updated budgets, I need to address you on. What we are proposing is

1 an independent costs consultant to be deployed to perform a reconciliation of the
2 existing figures, to provide a monthly report on the basis of the historic figures and
3 figures going forward.

4 That monthly report will be provided to the Class Representatives and from that series
5 of monthly reports, there will be a quarterly summary that will be provided to
6 the Tribunal. Whether that leads to any need for any review or for interaction with the
7 Defendants will have to be a matter to be determined in due course. But the purpose
8 behind it is to recognise that there have been issues with costs historically. They need
9 to be resolved, we recognise that, and we are suggesting there be a tender procedure.

10 There have been expressions of interest so far from Wonnacott Consulting Ltd and
11 Kain Knight, both recognised costs consultants. This will itself of course generate
12 cost, but we think it's important that the independent verification takes place so that
13 the Tribunal, and indeed the Class Representatives, can be satisfied that costs are
14 being tightly controlled.

15 The third issue is pleadings. We had initially suggested these be stayed until the
16 outcome of any appeal against Trial 1. There is an issue as to whether it should extend
17 to the judgment of the CAT in Trial 2. Visa, with respect, quite sensibly have suggested
18 it simply be stayed until further order, which is therefore capable of being adjusted in
19 a satisfactory way to changing circumstance. It's likely to come to a head before or at
20 the January CMC and the Umbrella Proceedings because the issue there of joinder
21 will no doubt involve questions as to whether or not we need to amend our pleadings
22 before we will be permitted to join, or whether that's an unnecessary procedural detail
23 that can be put in abeyance, and we can grasp the nettle of exemption regardless.

24 **THE CHAIR:** That position is agreed between the parties?

25 **MR BEAL:** I hadn't formally communicated to Mr Kennelly that his suggestion in his
26 skeleton argument seems to me to be sensible. But on reflection, rather than arguing

1 the toss about Trial 1, Trial 2 or any other permutation, until further order seems to
2 cover all sorts of mischief. Pragmatically, I didn't see the point of wasting
3 the Tribunal's time with that.

4 **THE CHAIR:** Yes, so we don't need to deal with that.

5 **MR BEAL:** We then have the Opt-In Application. I don't intend to get my retaliation
6 fully in advance, but can I just say that as far as we are concerned, directions are
7 agreed. If the other side want to argue the substantive points, shadow-boxing at this
8 stage, that's up to them. We simply want to cut to the chase and deal with what are
9 the directions for dealing with that particular point. We recognise it is a point which is
10 appropriate for a preliminary issue. It's largely a discrete point of law which will involve
11 some evidence. There is an issue about disclosure, but disclosure can't be
12 adjudicated upon in advance and it shouldn't be litigated through correspondence is
13 our primary position on that. If there's a perceived problem with disclosure, it will have
14 to be raised evidentially in due course on the basis of the documents which have been
15 disclosed, and I'll make some short submissions on that.

16 Then finally, the VoC Application. Again, in one sentence, that is opposed because
17 we say it doesn't meet the criteria for seeking a preliminary issue. It simply amounts
18 to yet another salami slicing of the issues in this trial in a way that's going to generate
19 satellite litigation unnecessarily. Better to deal with things in the logical order:
20 exemption first, then quantum, then there's no need to split off VoC from other issues
21 of quantum because the two are inextricably linked across both sets of opt-in and
22 opt-out proceedings.

23 In a nutshell, that is where we are. With your permission, I will start with costs because
24 that seems to have, as I said, generated some excitement in the correspondence.

25 **THE CHAIR:** Before you do, there was -- I don't think you had anything else to add to
26 the agenda, but both of the Defendants did mention the possibility that you might be

1 changing your experts. Obviously, it's a matter for you whether you want to say
2 anything about that.

3 **MR BEAL:** I can again give you a one-sentence answer. It depends on whether we
4 end up being joined with the Umbrella Proceedings. If we are joined with the Umbrella
5 Proceedings, there may well be sense in an amalgamation of expert evidence. Which
6 way that goes will require negotiation between the Claimants' parties.

7 In *Epic, Coll* and *Rodger* proceedings, for example, the parties have been directed to
8 borrow each other's experts to the extent possible and only really deal with separate
9 points. There will be a costs saving in Trial 3 if all of the claimant entities only have
10 one expert.

11 **THE CHAIR:** If we were to go down the value of commerce route, obviously that
12 opens up a different discussion for them.

13 **MR BEAL:** At the moment, I can't see how any existing instructed expert other than
14 Mr von Hinten-Reed who has looked at that issue, because it won't have been looked
15 at for the purposes of the Umbrella Merchant Claimants. There isn't a methodology
16 involved for them because they simply --

17 **THE CHAIR:** It's not the same issue. Yes, I understand.

18 **MR BEAL:** The answer is it depends on how the trial is managed going forward.
19 Where we can see savings and judicial time saving in only having to deal with one
20 expert rather than two, in our respectful submission that is to be encouraged.

21 **THE CHAIR:** Yes, thank you. Yes, costs.

22 **MR BEAL:** Costs. This is addressed in our skeleton argument at paragraphs 11 to
23 22. Can I take you, please, to the Revised Litigation Plan, which is at page 2022. It
24 should be Annex 1 to a Revised Litigation Plan, and I'm hoping you have there
25 a document which, for fading eyesight reasons, I have printed out in A3.

26 **THE CHAIR:** Yes, it's very small print, isn't it, but I can expand it to some extent ...

1 yes.

2 **MR BEAL:** I need to do it on the screen as well, I'm afraid. Give me a moment.

3 **THE CHAIR:** Is this the document (inaudible) -- it has at the bottom -- the number's
4 not sensitive, is it, the number at the bottom in green?

5 **MR BEAL:** No, I don't think it is. The bottom right-hand side in green --

6 **THE CHAIR:** Yes, 12871, yes, that's the right one.

7 **MR BEAL:** 12872 rounding up is the opt-in proceedings against both Visa and
8 Mastercard. If you then turn to page 2089, we have the -- page 2827 is the
9 spreadsheet showing opt-out proceedings against Mastercard. Bottom right-hand
10 corner is 6322; and the final piece is at 2032, opt-out proceedings against Visa, again
11 showing 6322.

12 **THE CHAIR:** So these are --

13 **MR BEAL:** December 2023.

14 **THE CHAIR:** Yes, onwards.

15 **MR BEAL:** In advance of certification, this is what is anticipated will be spent.

16 **THE CHAIR:** Yes. So December 2023 doesn't include the first certification
17 application, is that right?

18 **MR BEAL:** It didn't include (inaudible words) costs.

19 **THE CHAIR:** I just wondered because it looks like the first column is the revised CPO
20 Application.

21 **MR BEAL:** No, I'm sorry, it doesn't. You are absolutely right. This is stripped out the
22 historic costs incurred in CPO Application 1, so they're not there.

23 One of the joys of looking at the costs schedules across various time periods prepared
24 on various different bases, it's very difficult to actually compare like-with-like, and that's
25 a point I will be making in a moment. What this shows therefore is that going forward
26 and stripping out the historic costs for CPO 1, the budget's anticipated to be around

1 25.5 million, and it was on that basis that the matter was certified.

2 It is true there was then an updated budget served on 7 October 2025, and you should
3 see that at page 194. That's a letter of 7 October which then feeds into an updated
4 schedule. That letter of 7 October was prepared by a Senior Associate at Marcus
5 Parker based on internal documents and internal records held within Marcus Parker.
6 The budget spreadsheet that accompanies it is then attached to that letter, the updated
7 budget. It starts at --

8 **THE CHAIR:** 201, isn't it?

9 **MR BEAL:** 201, yes, thank you. That spreadsheet was actually prepared by
10 accounting staff who come from an external consultancy who have been retained by
11 Marcus Parker to deal with the accounts team. They conducted a reconciliation
12 exercise with Bench Walk, the funder, and they relied upon their combined data to try
13 and reach a reconciled position as to what the historic expenditure had been.

14 Now if one analyses the detail, which we have done, there is unfortunately a
15 discrepancy between the spreadsheet that has been prepared using different data and
16 the figures given in the 7 October letter which has been prepared on the basis of the
17 internal data from Marcus Parker. I'm going to be rough here, but if one knocks out
18 the ATE premium of about 4 million, one ends up with a figure of about 22 million or
19 so on the updated budget spreadsheet, the big one. And if one looks at the cumulative
20 figures shown --

21 **THE CHAIR:** Just give me that number again.

22 **MR BEAL:** The overall updated budget on historic costs is 25.8 million. ATE is 4.368,
23 so if you strip one from the other, it comes to 21.5/22 million.

24 **THE CHAIR:** Yes, I see.

25 **MR BEAL:** What one is then doing is comparing that with the figures given in the
26 October letter. In fact, if you update -- if you sum together all of the figures in the

1 | October letter of historic costs, it comes to roughly 18.5 or so.

2 | Now what we sought to do, aware of that discrepancy, was to produce a quarterly
3 | schedule based on figures that we had internally within Marcus Parker which we could
4 | verify by billing data, and so on. That updated quarterly schedule is at page 2165, and
5 | that was intended to break out on a quarterly basis the expenditure that had been
6 | incurred up until that point in time.

7 | That leads to totals -- which it's not letting me currently access ...

8 | **THE CHAIR:** I'm not getting it either. I don't know why we are not getting it. Won't
9 | even do it. I think actually the bundle only goes to 2159, even though it says 2226. I
10 | don't --

11 | **MR BEAL:** I have the electronic folder PDF number which is 2334, but of course that
12 | is bigger.

13 | **THE CHAIR:** Yes, I have those -- I have somewhere the schedules. Yes,
14 | I have -- this is "CICC schedule of costs incurred on a quarterly basis"; is that right?
15 | Seven pages long.

16 | **MR BEAL:** (Inaudible words). It's tab 105. What we see there, it's been broken down
17 | on a quarterly basis by reference to solicitors' fees, counsels' fees, experts' fees,
18 | disbursements, then a running subtotal on the right-hand side, that then -- having
19 | identified in various footnotes where Mr von Hinten-Reed's expert reports come in, for
20 | example, and certain other matters of detail, (inaudible), and so on, one ends up with
21 | a total at the end, once you've stripped out the ATE, which is a constant extracted from
22 | the equation, you end up with figures approaching 18.5 million.

23 | So, on any view, there is this discrepancy. We tried to get to the bottom of what could
24 | have caused that discrepancy, and there are a number of factors which may need to
25 | be taken into account. Firstly, we had a change in accounts personnel where it went
26 | to an external accounting firm who produced accounts staff to come and help dealing

1 with accounts. There was a change in the internal time recording scheme from using
2 Excel spreadsheets to using a software programme called Aderant.

3 The VAT issue has been a complicated one. There were some invoices which bore
4 VAT and then some invoices which, on the basis of external advice, were found they
5 didn't need to bear VAT. My understanding is credit notes have to be issued, so the
6 VAT position needs to be bottomed out. CEG, the economic consultants for whom
7 Mr von Hinten-Reed works, billed Bench Walk directly for a period of time, and they
8 then billed Marcus Parker, and the VAT treatment of each seems to have been
9 different. There was also a change in the CFA regime so that after the initial rejection
10 of the CPO Application, the CFA figure was reduced to 50 per cent, but then by prior
11 agreement post-certification at the CPO 2 stage, it went back to 60 per cent. So
12 there's been quite a lot of chopping and changing of invoices.

13 What we recognise is that we need to get to the bottom of this, and I readily accept it's
14 unsatisfactory. It's unsatisfactory that two different data sources have been used for
15 producing two different documents which were put before the Tribunal.

16 What we sought to do so that I don't mislead the Tribunal in any way is put this
17 schedule forward on the avowed basis that this is our internal records, and there are
18 two possibilities: our internal records don't cover all of the billing which has in fact taken
19 place, which is a problem, and I recognise that would be a problem; or, alternatively,
20 the updated budget schedule which has caused a lot of anxiety has overstated the
21 actual cost which have in fact been incurred on a historic basis.

22 So we recognise that is unsatisfactory, it needs to be dealt with as a matter of priority.

23 Our proposal is to have the external cross-consultant perform a reconciliation. One
24 suggestion -- I'm not going to go into details of the privileged discussions which have
25 been held on this point -- one suggestion would be to get all of the invoices, reconcile
26 them against payments, produce a monthly blow-by-blow account of what's been

1 billed and what's been paid at different points. Because one of the devilish features
2 of legal billing is that you can do the work for a given project, it's billed at the time but
3 it's then not paid until six months later. So you can have this discrepancy in timing
4 between sums, depending on whether or not it's on a work-done basis or a bills-paid
5 basis, and that can cause issues. We need to make sure that the data is properly
6 reconciled with the underlying documents and can be justified, and the costs
7 consultant would then review our monthly bills on a go forward basis, preparing
8 a quarterly report both for the Class Representatives which can then be shared with
9 the Tribunal. That is our proposal to deal with what we recognise is an unsatisfactory
10 state of affairs.

11 **THE CHAIR:** The two competing numbers which are out there at the moment are
12 18,345,400 from this schedule, and then in the budget, the 7 October letter, it's 25.9
13 million minus whatever the ATE is, 4.4.

14 **MR BEAL:** This spreadsheet was a thing apart from the October letter.

15 **THE CHAIR:** Yes, I see.

16 **MR BEAL:** Some of the totals from the October letter, the diligent would have
17 discovered this discrepancy.

18 **THE CHAIR:** I see. So does this schedule on page 201 correspond with -- no, it
19 doesn't. The number there is 25.9 million and that is before you take off 4.4 million,
20 isn't it?

21 **MR BEAL:** You need to strip out ATE in order to compare like-with-like.

22 **THE CHAIR:** Yes. So, this thing on 201 says it should be 21,500, and then the letter
23 says something different.

24 **MR BEAL:** Yes. The letter sums out about 18.5, which is why --

25 **THE CHAIR:** I see. So, the letter is actually reasonably close to your -- and that is
26 consistent with your explanation that this is based on the internal material.

1 **MR BEAL:** It's broadly identical with the -- it depends on the time period covered
2 because the schedule I understand covers Q3/25 up to the end of August, which
3 necessarily factors in I think some of the costs identified in our 15 October letter. But
4 the easiest way to deal with this is to assume for present purposes that, give or take
5 the discrepancies between 21.5 million and 18.5 million, it may be that 21.5 is the
6 correct figure, we just don't know at the moment, and I wouldn't want to be here in this
7 position explaining this to you, and I'm quite glad that some of the conversations I've
8 had are covered by privilege because it's politer for everyone. But we are here and
9 what I'm trying to do deal practically with and pragmatically is a solution.

10 **THE CHAIR:** Yes.

11 **MR BEAL:** I recognise that the Tribunal will be rightly concerned about this. But until
12 we have a proper evidential basis for working out what the final figures are, it's difficult
13 at this stage to have a meaningful row about costs, save if one wants to assume that
14 18.5 is the correct figure.

15 **THE CHAIR:** You are going to do that, someone has to work out what the answer is
16 and tell us. How quickly can that be done, do you think?

17 **MR BEAL:** It's going to be prioritised as a matter of urgency. We have to finish the
18 tender process, but I anticipate that can take place this week, and we get the final sign
19 off from the Class Representatives' director, who is in the Tribunal behind me. He has
20 obviously heard everything we've said, he's in a position to approve, one hopes, the
21 various competing bids and select the winner. Then it's a question of how soon the
22 costs consultant can come in and perform the reconciliation exercise. I hope that can
23 certainly be done before the January CMC next year, and it will be prioritised at our
24 end.

25 **THE CHAIR:** Yes, okay. That is helpful, thank you.

26 **MR BEAL:** All of that is by way, in a sense, an explanation of where we are.

1 Can I then make, in a sense, some saving grace points, which is that this is high value
2 litigation in a very complex matter. The claim is very large, the estimated aggregate
3 claims across the piece are about £3 billion. I'm not suggesting that overshooting your
4 budget by the extent it's been overshoot is a satisfactory way of doing things, but it's
5 important to realise that these are expensive proceedings. If I could invite the Tribunal
6 to look in bundle of authorities at the *Le Patourel* case. That's in the electronic bundle
7 of authorities, it should be in the pdf page 151, which may or may not be linked to
8 page 88.

9 **THE CHAIR:** I don't think that's where I am.

10 **MR BEAL:** It's also linked, that's helpful.

11 **THE CHAIR:** I seem to be -- I think I'm in *Merricks* at 151. It's page 88 of *Le Patourel*,
12 is it? Yes, I see. It's a costs order, is that right?

13 **MR BEAL:** Yes.

14 **THE CHAIR:** Yes, I have that.

15 **MR BEAL:** I have also received instructions via my learned junior that we can update
16 the Tribunal by the end of next week about when we think the reconciliation would be
17 completed.

18 **THE CHAIR:** So, you will let us know the timetable for it.

19 **MR BEAL:** This is *Le Patourel*, a recent costs order. Turn to paragraph 7, please, BT
20 was claiming costs of 26.2 million-odd. That was on the basis that it had lost, as the
21 Tribunal will know, both its opposition to certification before this Tribunal and on appeal
22 to the Court of Appeal. So that doesn't include all of the costs it has been incurred in
23 that; conversely that Class Representatives' costs wouldn't have included that either.
24 If we look at paragraph 22, page 92, one sees that Mishcon de Reya [treated here as
25 being MdR] has broken down its costs. MdR said the costs figure of 26 million was
26 clearly excessive when its own costs were 17 million. Then there is a caveat: in fact

1 this figure was net of VAT, and in fact the amended budget had been 22.1 million,
2 being exclusive of the cost of purchasing ATE insurance.

3 So one sees there some figures which are not a million miles away from the figures
4 we are dealing with here.

5 There are complicating features, however. When one sees what the Tribunal actually
6 determined at paragraph 36, page 94, the Tribunal made no discount to reduce BT's
7 costs of pleadings where £2.5 million was allowed for that. Over the page at page 95,
8 subparagraph (4), 7.5 million was allowed to BT for its experts.

9 The trial costs came in at 2.9 million, so that's actually substantially lower than the
10 other costs of preparation to trial. The total figure which was then the basis for the
11 overall cost being allowed, subject to the deductions for not winning on everything,
12 came in at 23.35 million.

13 **THE CHAIR:** Did you say -- did I hear you say something about the costs of the CPO
14 Application in here?

15 **MR BEAL:** They're not in there --

16 **THE CHAIR:** They are not in there, they have been dealt with already.

17 **MR BEAL:** -- BT lost that and the Class Representatives wouldn't have been
18 (inaudible).

19 **THE CHAIR:** I don't want to take you out of your way on this, and maybe you're going
20 to come to this. But of course, the thing which strikes me about these costs is just
21 how expensive the CPO Application was, and I'm sure the Defendants are going to
22 have to say some things about the future costs. But actually on the face of them,
23 certainly by reference to some of the things here, they don't look ridiculously out of -- I
24 think one has to say that when you look at the costs of the CPO Applications, the two
25 goes, they are really very extraordinary numbers.

26 When you equate them with this, that's all well and good, but this is the costs of the trial

1 and doesn't include that. I think that's the thing -- in a way, it's a bit of a stable door
2 point, or maybe it's not, which is something I want to explore with you. But the problem
3 here is not so much where we are now and, looking forward -- at least to my mind,
4 maybe others will have different views on that -- it's where have we been and what are
5 the consequences of that?

6 **MR BEAL:** If I may say so, depressingly, I predicted this was going to be an area of
7 concern for the Tribunal in the (inaudible) the right time to update us. But what I have
8 therefore done is I've taken the costs schedule you saw which was served on Monday
9 morning and I've then played with it, and can I show you how I played with it -- this is
10 all my work, it's an advocacy tool. What I have done is I have summed up -- I'll walk
11 you through what I've done. If one turns to page 1, you have exactly the same costs
12 schedule with exactly the same configuration all the way through to the top of page 2,
13 and then I have inserted a row which is blank. The reason for inserting the row that is
14 blank is you can then you add a row in the table above that and you can sum all of the
15 totals which have gone before.

16 **THE CHAIR:** The sum is the subtotals to the original CPO, is that right?

17 **MR BEAL:** Yes. So, you there see solicitors' fees -- so the third column is solicitors'
18 fees; fourth is counsels' fees; fifth is experts; sixth is disbursements; seventh is running
19 total, so it's the same as the usual configuration. We see solicitors' fees through to
20 the original CPO were 2,429,061; counsels' fees were 717,000, experts were
21 2 million-odd -- so there's a front loading of the experts' costs in any CPO -- and then
22 disbursements were 834,000-odd. Obviously one can take issue if one wishes to with
23 elements of each of those costs, and that would be subject of a costs assessment in
24 due course where the Tribunal will only direct the losing party to pay. If we don't win,
25 then of course it's academic, but if we do win, then the losing party will only be required
26 to pay costs that are reasonable and proportionate on any assessment.

1 **THE CHAIR:** Well, yes, although it's not quite as simple as that, is it? Because if you
2 are successful and whether that's in a settlement or in a judgment, regardless of
3 whether the Defendants have to pay all of these costs, those costs do feed into this
4 whole question of what the class members get.

5 **MR BEAL:** It does, but the Tribunal has complete control as we saw in *Merricks* over
6 the distribution and therefore the amount that gets returned to the fund (inaudible)
7 solicitors at that stage --

8 **THE CHAIR:** Yes, and it does seem to me -- the issue comes up in *Merricks* and it's
9 not actually -- and in a sense it goes away again because the Tribunal accepts the
10 funder's assurance that it's scrutinised the costs. The question I suppose I'm asking
11 you is: how am I going to be satisfied that there is a process which has either taken
12 place or can take place so that somebody takes accountability for whether those costs
13 are properly incurred or not before we get to -- we may never get there because of
14 course you may not succeed -- but if you do succeed before we get to the situation in
15 *Merricks*, where actually the Tribunal's hands are not tied but certainly constrained
16 because the difficulty that comes and isn't really explored in *Merricks* because it
17 doesn't arise, but the difficulty is, if you are going to do something about it, you are
18 effectively taking money out of the funders' pockets.

19 So if the premise of this is that the lawyers have charged too much money -- and I'm
20 not making any assumption about that, and I certainly don't want anybody to feel that
21 I'm unfairly categorising the costs of it, but they are very, very large and the question
22 must arise as to whether firstly, all the decisions that have been made are sensible
23 decisions which should have been made; and secondly, whether the costs to
24 implement those decisions are reasonable and proportionate.

25 If there hasn't been any scrutiny of that to date, that's a bit of a problem, and I suppose
26 my question is: if there hasn't been, what can be done about it; and if there has been,

1 can we know a bit more about it? I suppose those are the two things which occurred
2 to me.

3 **MR BEAL:** Obviously my solicitors have had ongoing conversations with Bench Walk
4 as the funder on a monthly basis because they have been submitting monthly bills to
5 Bench Walk for payment, there have been discussions around the bills, and there have
6 been amendments made to billing is my understanding.

7 The costs consultant we're suggesting be brought in is intended to be, much as was
8 suggested in the *Roger* certification judgment, an external source of advice for the
9 Class Representatives which can be used to go in to bat for the Class Representatives
10 against the solicitors -- and indeed against counsel and any expert -- that the external
11 costs consultant thinks has charged too much or is doing work that is not reasonably
12 necessary for the purposes of the litigation. What I'm trying to do with this document
13 is simply to break out where the pinch points were in the costs at each stage.

14 **THE CHAIR:** I know you want to get back to it, but just before you do, just to finish
15 the discussion. I think that all makes good sense and seems very helpful, but it doesn't
16 necessarily address the problem I'm airing, which is -- put it another way, and again
17 this is not in any way intended to criticise the funder, one assumes the funder does
18 want to have some eye on what's happening here, but of course when the funder's
19 return is based on a multiple of outlay or funds expended, it could be said it's not really
20 in their interests to produce that number. I'm not suggesting that is their incentive or
21 the way they are acting, but it is a bit of a problem.

22 I'm looking forward to a problem that might happen in the future and asking: is there
23 anything we can do now to satisfy ourselves that at least somebody who doesn't have
24 a potential conflict of interest has been able to scrutinise the numbers you have been
25 showing me and has been able to test those -- not in an unreasonable way, just in the
26 way in which you'd normally expect a client to do that, a sophisticated client with the

resources available, and with --

MR BEAL: (Inaudible) on a going forward basis only was that the external costs consultant basically is a form of (inaudible) for -- what I'm hearing from the Tribunal, which I will take back to my clients, is that the reconciliation process is extended to include what might be thought of as a preliminary costs draftsman exercise where you kick the tyres on what a bill of costs would look like, what you think you could reasonably get away with, and you make the adjustments now -- when I say reasonably get away with, as one knows, solicitors put in bills of costs with an expectation that some of it will be knocked off by the costs judge.

THE CHAIR: Yes, that's sort of where I'm going with it. I suppose two things, really: one is I don't know -- and I'm not inviting you to tell me if you don't know because you may well not know, you may need to take instructions on this -- but I don't know what the position is with these bills. Some of them go back a long way -- and I'm afraid I'm not sufficiently au fait with what the treatment of solicitors' bills ought to be, but I've forgotten what I ever knew -- as to whether they're still open to challenge, or indeed what Harcus Parker or indeed counsel's views might be on some of these things, or the experts, and one assumes there might be different views on that.

So if one's going back to £6 million spent in the first CPO Application, and if one does go through your exercise of effectively scrutinising to see whether the costs are reasonable, then is there anything which can be done about it? I suppose that's the first question.

The second question is: I don't think I'm necessarily -- I think the way you've put it is right, subject to one point. I'm thinking about this as a solicitor-to-client costs point rather than a party-to-party costs point, and I think you are too, but just so we are clear about that. What I'm thinking about is a process that doesn't necessarily replicate a client forcing its solicitors to tax their invoices, but actually at least a level of scrutiny

1 which allows a robust engagement that one can be satisfied that someone's taking
2 accountability for the reasonableness of the costs, and also the decisions which were
3 made where those decisions turn out not necessarily to be good ones.

4 **MR BEAL:** If you would be kind enough to look at paragraph 19 of our skeleton,
5 page 3.11 of the main bundle, which one gets to by "control" "G" 3.11. What one sees
6 there is, following the costs judgment, which I readily accept was critical of the level of
7 costs incurred by the Class Representatives in conducting this litigation, the Class
8 Representatives then proactively introduced additional cost management processes,
9 holding a monthly budget meeting with Marcus Parker and the funder, and the
10 retention of a specialist firm, Wonnacott Consulting, to provide auditing services in
11 relation to some past fees. So that's what's being conducted on a historic basis.

12 Then going forward, what is then dealt with at paragraph 21 is the scope of the work
13 intended to be engaged through the tendering process we have gone, which would be
14 monthly advice on interim bills available to the CRs to answer questions on costs
15 incurred or future budgeted costs, monthly budgetary meetings, and so on. So that
16 level of scrutiny is baked-in. What I'm hearing from the Tribunal is: can you roll that
17 backwards; and if so, what can you do about it?

18 **THE CHAIR:** Yes, or really to the extent that paragraph 19 deals with the point by
19 talking about auditing services in relation to some past fees. I think I am probably
20 suggesting it needs to be more than just that, and actually it would be really helpful to
21 know what is possible in terms of, it may well be, it's just too late to do much about
22 some of these numbers; and if it's not, what is actually being done about it?

23 More actually, obviously to the point of addressing any issues that might arise from
24 that process, but also so we've drawn a line in the sand, and we know that if we ever
25 get to a settlement or a judgment distribution hearing, we know at least we've
26 addressed the question of what look like some very extraordinary costs and how they

1 should sit in that discussion, rather than leaving it until the end when it's too late to do
2 anything about it.

3 **MR BEAL:** I don't have --

4 **THE CHAIR:** I'm not really inviting you to tell me the answer actually today, Mr Beal.
5 I'm merely saying I think that's probably something it will be helpful to come back on,
6 and I'm sure the other side of the court will have some things to say about this as well,
7 and maybe it needs adjustment, depending on what they say.

8 But that is certainly where I am on it at the moment.

9 **MR BEAL:** Absolutely. Can we take that away and see what we can do to satisfy the
10 Tribunal?

11 **THE CHAIR:** Yes, that's helpful.

12 **MR BEAL:** My costs knowledge is unfortunately rather thin, but my recollection is
13 there's a one year rule for client challenging own client fees. I don't want to venture
14 a view as to that because I'm not a costs specialist, and Alex Hutton KC, who is on the
15 advisory panel for the Class Representatives, is the ideal person to provide
16 independent advice to the Class Representatives on this issue.

17 Going back, if I may, at the risk of (inaudible), if I can run you through the rest of this
18 document. If we turn to page 4, you will see a similar exercise has been conducted
19 for the position up until the revised CPO Application, so the second CPO, and the
20 figures are roughly 2.23 or so for solicitors; an increase of costs for counsel, 1.485;
21 an increase of costs for experts, 3.46; and a decrease in disbursements. There's
22 a modest decrease in solicitors' fees.

23 What we then see is a run-through at page 7, at the bottom of the page, where I have
24 tracked through the totals to where we get to "total post-certification up until the end
25 of August". That's the last second to last row on that page before the blank row.

26 **THE CHAIR:** Yes. So it's everything after the second CPO hearing.

1 **MR BEAL:** Exactly, through to the end of August, and it comes to roughly 2.2. So
2 again a modest increase in solicitors' fees, a decrease of counsels' fees -- which are I
3 think principally at this stage attributable to Trial 2B where Marcus Parker took the lead
4 for their acquirer pass-on point -- and then 1.165 for experts' fees, which now includes
5 some Compass Lexecon fees because they were specifically dealing with that issue
6 at Trial 2. 578,000 for disbursements.

7 You can see by looking at the totals how the litigation has progressed across those
8 three stages. What I then sought to do at page 9 -- I should say page 8 strips out the
9 ATE because that's the common vector, that doesn't change. Page 9, I have sought
10 to summarise exactly what those costs are so the Tribunal can see -- addressing your
11 concern, sir -- where the bulk of costs have been incurred and who has incurred those
12 costs. Whether that is revealing or not, it's simply intended to be a factually accurate
13 statement of where the burden of the costs have fallen over that period. You will see
14 the total in the bottom right-hand corner is the 18.345 million total which is the subject
15 of verification, if that's what our internal records show.

16 What I have then done on page 10 is simply to add, because it's my duty to my clients
17 to do so, a bit of perspective. What I sought to do is compare like-with-like. That
18 like-for-like involves stage 1 fees, so through to the original CPO determination which
19 was rejected, solicitors' fees for the proposed Class Representatives were 2.42-odd;
20 counsel 717,000; experts 2 million-odd; disbursements 834. So those are all the
21 figures we have seen.

22 What I've then done is, looking at the documents we have provided, based on the
23 schedules that Visa and Mastercard produced for the purposes of a costs application
24 in CPO 1, I have stripped out the figures they've claimed. I should add Visa's
25 expenses didn't include VAT and then did include VAT, and somewhere in the VAT
26 there's a penny rounding issue. So, in fact, I think the invoice, if one looks at the

1 second to last column, the right-hand subtotal says 41p, I think the invoice itself said
2 42p. Attention to detail can be important, I don't think that one is. What you then see
3 are the totals, and what I'm inviting the Tribunal to consider, bearing in mind the Class
4 Representatives always bear the burden of front loading the work in a CPO
5 Application -- I'm incurring substantial experts' costs because you have to get your
6 blueprint to trial in your methodology -- one can see solicitors' costs are about give or
7 take £475,000 lower for the combined Defendants, counsels' fees are higher, experts'
8 costs are lower. Experts are providing relatively short reports in response to
9 Mr von Hinten-Reed's much lengthier reports, yet their experts are charging £843,000
10 through to certification.

11 Disbursements understandably are substantially lower, and that is what's driving -- it's
12 principally experts and disbursements that's driving a substantial difference between
13 the two figures, but of course that is reflective of the front loading you have to do to
14 get the litigation plan in place, to get the book-building exercise to the extent you need
15 to start looking at that, experts' reports in place with a methodology, getting in place
16 all the teams supporting communications to the class, and so on.

17 But there are inevitably, in a book-build and in a CPO Application substantial costs,
18 which you incur. But the unfortunate thing here, I recognise that, is that a level of costs
19 have then been incurred in doing the whole thing again for CPO 2.

20 **THE CHAIR:** More costs, wasn't it, not just the level of costs setting --

21 **MR BEAL:** It was more costs, yes.

22 **THE CHAIR:** In a way, the one thing I don't think I am in a position to do is to venture
23 a view on any of these historic costs, other than we have done already in Tribunal
24 judgments, which is to indicate that we think they are really -- I think astonishing was
25 a word we used -- I think we might have borrowed that from somebody on this side of
26 the court.

1 **MR BEAL:** I'm not seeking to suggest in any way that analysis is inappropriate at this
2 stage. I recognise there have been very substantial costs incurred. What I would say
3 is that this is litigation which has already been through a level of procedural complexity,
4 which isn't reflected, for example, in *Le Patourel*. In *Le Patourel*, you had a challenge
5 to certification which went to the Court of Appeal and then was robustly dealt with, and
6 we had an adverse costs order against BT. It was a relatively expedited trial all the
7 way through with no satellite litigation. Now here, we have had two CPO Applications,
8 both of them vigorously resisted by the Defendants. They were then -- even though
9 they won the first CPO Application, they then took it on appeal to the Court of Appeal
10 as a result of the finding that the Umbrella Proceedings should have provided, they
11 said, an appropriate venue for these claims rather than a CPO. They lost that at
12 a contested oral hearing. They then appealed against certification itself, that was
13 rejected on the papers by the Court of Appeal -- I think the Chancellor said no to
14 permission on paper.

15 They then had satellite litigation about funding, including *PACCAR* to the Supreme
16 Court, and then the Neil Class Representative in the *Sony* litigation, where the CICC
17 took the lead role in the Court of Appeal, and permission to appeal to the Supreme
18 Court has been sought in that case.

19 We have identified in our skeleton, I don't propose to weary the Tribunal with
20 repetition, a number of areas where points have been taken and subsequently
21 withdrawn which have contributed to the level of costs being incurred. And dare I say
22 it, we are now facing an application to have the Opt-In Application dealt with -- i.e. you
23 say you've been instructed by these parties, prove it -- which is an unusual position in
24 litigation, but it's one we are prepared to deal with. I'm not complaining about that, but
25 it's yet another example of satellite litigation.

26 Then, rather extraordinarily, we have the VoC Application where Mastercard, before

1 we deal with the question of exemption, want to have another avenue of satellite
2 litigation dealt with which will, in our respectful submission, only serve to delay the
3 point at which we grasp the nettle of exemption when that is what should be the next
4 stage in these proceedings. It's unfortunate that at the same time as complaining
5 vociferously about our costs, which I accept are higher and need to be justified, they
6 are also then suggesting further steps be taken which will only serve to incur further
7 costs and, in a sense, delay the inevitable point at which the key question of exemption
8 is dealt with, which is what this litigation is crying out for.

9 It's also crying out for joinder with the Umbrella Proceedings, in particular Trial 3,
10 because that is the best way of ensuring that the issues which are before this Tribunal
11 in multiple different proceedings are managed effectively, not just for the parties' costs,
12 but for judicial time and resource.

13 That brings me really on to agenda item 1.

14 **THE CHAIR:** Yes. Have you finished with future costs? Are you going to say anything
15 else about them?

16 **MR BEAL:** Well, future costs are budgeted on the basis that hopefully we will join with
17 the Umbrella Proceedings.

18 **THE CHAIR:** Yes, certainly that. It is encouraging to see that that participation is
19 bringing the costs down, and I was also very encouraged to see the steps that have
20 been taken, some of which you have described, in a short scrutiny.

21 I suppose the question for me is: in their budgeting process, and again this is another
22 point you might want to take away and think about whether you can come back and
23 give me some assurance on -- just to be clear, I think you have agreed you are going
24 to go away and see what can be done about historic costs as a matter of practicality
25 and what the plan is to deal with anything that can be dealt with.

26 In relation to future costs, the thing I wonder about is it's all very well to have

1 a budgeting system, and it sounds perfectly sensible what's suggested in your
2 skeleton, but the question is: what happens when the budgets are exceeded? That's
3 where budgets go wrong, in my experience; everybody thinks it's going to cost X and
4 it turns out to cost Y. By the time you've worked out it's cost Y, it's too late to work out
5 whether it was a good idea to do it or not. Maybe part of that is about whether the
6 review process for the budget as sufficient monthly seemed quite a long time between
7 review processes when money has been spent at the rate it is, I wonder whether that
8 was sufficient. And I wondered about the independence of the scrutiny in the
9 budgeting process, it wasn't entirely clear to me how that worked.

10 **MR BEAL:** I think I deal with the Class Representatives to instruct directly the costs
11 consultant and for the reporting line to be from the costs consultant directly to the Class
12 Representatives. But basically (inaudible words) as I understand via the solicitors or
13 indeed counsel for some sort of party pre-process where you defend your own costs
14 and it gets fed into the class --

15 **THE CHAIR:** Yes, exactly. I think what they are concerned about is just to be
16 confident that it's -- and also it's a regime in which if a budget is exceeded, it doesn't
17 just get paid. In other words, if there is going to be -- I fully understand and expect
18 that budgets will at times get exceeded. If they are going to, that's a matter that should
19 be raised before the money is spent wherever possible; and if it's not possible, then
20 obviously someone needs to be accountable for having a good look and making sure
21 there was no choice, and it was the right thing to do. One gets a sense that maybe
22 hasn't been much of that to date and there needs to be more of it.

23 **MR BEAL:** I think the area I'm most familiar with is obviously Trial 2B because
24 I understand from instructions -- I haven't been instructed historically, and I've
25 relatively recently been instructed for the main proceedings. But 2B, for example, we
26 did prepare what we thought was an estimate of what the 2B costs would be, and then

1 as one remembers, the acquirer data was delivered in different batches. Some of the
2 data from some of the merchant acquirers was tangled shall we say, some of it was of
3 better quality than others.

4 The experts ended up billing more than we had budgeted for. We had budgeted for
5 that on the basis of an estimate that had been provided to the Merchant Claimants'
6 solicitors, and for actually good reasons: the experts ended up doing more work than
7 they had budgeted for. I think there was also a suggestion from the Merchant
8 Claimants' solicitors that there should be a contribution towards some counsels' costs
9 towards Trial 2 more generally, and Marcus Parker acceded to that as part of
10 the *quid pro quo* of coming in on the tail end of Trial 2, as it were. So there were some
11 bits which came into the Trial 2B process that hadn't been foreseen, and the trouble
12 with budgets is things do happen and you suddenly have deal with them.

13 **THE CHAIR:** Well, no, I accept that. I've certainly had plenty of experience going
14 wrong. But I think the point I'm making -- maybe I'll put a different way. It's actually
15 that the people -- it's not so much actually a point about counsel and I'm not trying to
16 excuse you from it. But it's actually solicitors and the experts, who absolutely
17 understand they have deadlines and are trying to create these things, and it's a difficult
18 job. But part of their job is to understand and recognise when they are going beyond
19 their budgets in real time, not afterwards. If they don't have an effective mechanism
20 to do that and it's not being enforced by someone else, then it will just go wrong, it
21 absolutely will go wrong.

22 So my question really is: what is the mechanism, what is the assurance we have that
23 the solicitors and the experts particularly recognise that they have to stick to their
24 budgets; and if they don't, they are not going to get paid unless they make a good
25 case in advance, or at least in real time when they realise it doesn't work anymore.
26 That's the question I'm asking, and I think the answer to that is always going to be: of

1 course, there's a mechanism for that because something is going to happen.

2 So, in a way, perhaps I'm making more of a point than actually asking a question. I just
3 don't think there's going to be -- if one is looking at this later in relation to -- particularly
4 given everything that's happened in relation to budgets and exceeding budgets -- and
5 now we have the budgets, we know what they're going to be, I don't think there's going
6 to be an awful lot of sympathy if there's not a proper story around any exceptions to
7 budget. That is probably the short point.

8 **MR BEAL:** With respect, what I'm taking away from that helpful observation is: (1) the
9 Tribunal will need details of precisely what process is envisaged; and (2) how is it
10 going to be effected?

11 **THE CHAIR:** Yes, that's exactly it.

12 **MR BEAL:** Those are essentially the two questions I will take away. This is not
13 intended to be a moan, but this has been exceptionally attritional litigation. Quite often,
14 we face two letters from two different parties coming at things from a slightly different
15 angle. Sometimes it reminds me of the Jurassic Park movie where you have two
16 velociraptors on their victim, and one distracts you over here and the other one attacks
17 you from behind. It has shades of the Umbrella Merchant proceedings before the
18 learned former president of the CAT introduced those glorious bi-weekly CMC
19 meetings at 8.30 am in order to discourage litigation by correspondence and
20 encourage co-operation.

21 I won't say we are getting the full blast of what it was like back then all over again, but
22 it's not far off, and the trouble is when you are constantly getting letters at 10.34 on
23 a Friday which require solicitors' teams to look at things over the weekend and
24 antisocial hours and -- it's the volume of correspondence you will see from the
25 chronology I passed up. With the greatest of respect, that's not a sensible way of
26 conducting this litigation.

1 **THE CHAIR:** That may be an entirely fair observation and certainly -- it is apparent
2 there is a bit of that going on, and obviously where we see that, we will deal with it by
3 way of costs award, so people should be conscious that is what's going to happen.
4 The short answer to point in the current discussion, though, is you might have to
5 increase the budget. If the budget is not realistic to deal with the problems you are
6 facing and you can justify it on that basis, then I'd much rather you had a bigger budget
7 you kept to than have an unrealistic which you didn't.

8 **MR BEAL:** Well, it may be unrealistic for us to think that the panacea is to join the
9 Umbrella Proceedings and everything will settle down. But I'll take that away --

10 **THE CHAIR:** We have some sense of actually -- but I absolutely understand the
11 dilemma, and I see the point.

12 **MR BEAL:** I don't wish to raise more heat --

13 **THE CHAIR:** No, no, that's a perfectly fair observation. Right, okay. So that's really
14 pretty much done with costs then, is it, as far as you are concerned?

15 **MR BEAL:** Unless you would like to hear --

16 **THE CHAIR:** No, that's been very helpful, thank you. It's been a useful exchange.

17 **MR BEAL:** Then item 1, which is -- in a sense, the points are all made, but this
18 Tribunal is very familiar with fact that you or your judicial colleagues have repeatedly
19 suggested it would make perfect sense for this case to join with the Umbrella
20 Proceedings. It's what I think the learned former president would have called
21 a no-brainer from our perspective. I don't mean to be glib about it, but when you have
22 structured litigation that's dealing with all of the core issues which is being carefully
23 case managed, namely the Umbrella Proceedings, if we could glide paths and slip
24 slide into that, that is the most effective use of both costs and judicial resources.

25 I think probably more than that, I don't need to say. When it's suggested by Visa and
26 Mastercard that it's somehow premature to consider this issue now, what we are

1 actually seeking -- and this is why it's all a bit of a storm in a teacup -- we are simply
2 seeking non-opposition from this Tribunal that we should make an application to the
3 Umbrella Proceedings Tribunal to be listed as a host case for the purposes of Trial 3.
4 Simple as that.

5 **THE CHAIR:** Yes.

6 **MR BEAL:** What we didn't want to do was be discourteous to this Tribunal by making
7 that application directly without seeking your, at least, non-opposition, or indeed
8 approval, if you feel minded to endorse the application at this stage.

9 The third point is pleadings and, as we've said, there's nothing on that. The fourth
10 point --

11 **THE CHAIR:** Shall we deal -- I'm just wondering, the remaining points I think are
12 probably the Defendants' Application. So shall we deal with that point now, Mr Beal,
13 and I'll see what the other parties have to say about it.

14 **MR BEAL:** Thank you.

15 **THE CHAIR:** Mr Kennelly.

16 **MR KENNELLY:** Thank you, sir.

17 **Submissions by MR KENNELLY**

18 **MR KENNELLY:** I will go through each of the issues and give you a sentence for each
19 to tell you where we are. Because the bulk of the points raised by my learned friend
20 are in relation to budget, I will hand over to Mr Cook who will deal with that first before
21 we deal other items in substance. Mr Cook and I have divided the matters between
22 us; I will take items 1 and 4 on your agenda, he will take 2 and 5.

23 **THE CHAIR:** Just before you launch into 4 and 5, what I would like to do is deal with,
24 I suppose, are matters which you might say are Mr Beal's matters. So, we will deal
25 with -- resolve one point, 1.2, to the extent it needs resolving, whatever that means,
26 and if you want to make some observations about the budget -- I think I've made my

1 position plain, but you're very welcome to add to those if you wish to. And if there's
2 anything else that (inaudible) Mr Beal about that or he wants to say about it, then we
3 will deal with that, and then we'll deal with your applications. Can we proceed like
4 that? By all means, give me your snapshot.

5 **MR KENNELLY:** I'll take this Tribunal to (inaudible) instead. I'll go straight into item 1
6 and I will hand over then to Mr Cook on budget, and we will deal with those before we
7 get on to our application.

8 **THE CHAIR:** Yes. Good, thank you.

9 **MR KENNELLY:** On item 1, we all agree that these Class Representatives should
10 participate in Trial 3 in some way. But how they participate, the extent of their role, is
11 a matter for another day and another Tribunal. Our concern has always been to avoid
12 duplication and to control costs. The Class Representatives in their skeletons sought
13 positive endorsement from this Tribunal that they should be involved in Trial 3 to the
14 fullest extent.

15 My learned friend has adjusted that today; he's put forward something more tentative.
16 He asks for the Tribunal's non-opposition to their joinder application. We would add
17 that the extent of any involvement by these Class Representatives be a matter for the
18 Trial 3 Tribunal. We say that for the reason Tribunal will well understand: there is huge
19 scope for duplication and waste in the Class Representatives' involvement in Trial 3.
20 We are encouraged by what they say about the fact there should be costs savings,
21 but the Tribunal will forgive us if we are not entirely convinced by the estimates we see
22 in their costs provisioning.

23 One aspect in particular -- and I will deal with this very briefly because this is a very
24 short point -- the Class Representatives say they have an important role to play on the
25 exemption issue. The Tribunal has seen Mr von Hinten-Reed's methodology for
26 exemption for the opt-out class relies on disclosure from opt-in class members. I shall

1 take you to it, it's paragraph 200 of his sixth report, E53/1202, and you see
2 straight away the problem. If there's only limited opting in, that will affect the Class
3 Representatives' methodology for Trial 3 issues.

4 **THE CHAIR:** I thought that Mr Beal -- the way I thought Mr Beal was putting it -- and
5 maybe you're right, he's put it more firmly, but I thought he was just simply saying that
6 the Class Representative has a corresponding interest in the outcome of exemption
7 and there's no reason to deal with it separately. I don't think he was necessarily saying
8 that, I think he was actually saying that whatever happened, there would be some
9 degree of amalgamation, or he would expect some degree of amalgamation between
10 the Class Representatives and the Merchant Claimants. And who knows whether we'll
11 end up with Mr von Hinten-Reed or somebody else, that's obviously a matter for them,
12 but I am not sure the target you are aiming at is actually the one -- you are absolutely
13 right that we don't want to find we have all sorts of different cases being run at the
14 same time in an uncontrolled way in an exemption hearing in Trial 3, that doesn't seem
15 to me very attractive, and I don't think that's what Mr Beal is suggesting.

16 I think at least the way he was putting it, at the moment he was accepting that it would
17 be for the Umbrella Proceedings Tribunal to decide what the common issues were,
18 and no doubt that's why you come back to this question of the pleadings and what
19 needs to be dealt with.

20 It did seem to me that the whole question -- I've just put it to you -- the whole question
21 of exemption did seem to me to be an entirely general one as to Claimants as opposed
22 to specific merchant Claimants or the Class Representative. Unless I'm missing
23 something, exemption is exemption and it doesn't matter who the group of Claimants
24 is particularly, does it?

25 **MR KENNELLY:** That's why, sir, if that's the case, it may well be the Class
26 Representatives here have very little to add to what was already put before

1 the Tribunal in Trial 3.

2 **THE CHAIR:** Well, it depends on whether -- sorry to interrupt. Sorry, carry on.

3 **MR KENNELLY:** It may inform, then, the extent to which the Trial 3 Tribunal permits
4 them to be involved in Trial 3 in order to avoid duplication and waste. My short point
5 is --

6 **THE CHAIR:** Sorry, just on that point. Doesn't that rather depend on how -- we can't
7 tell them how they're going to run the case, but what we can say to them is we expect
8 it not to be duplicative. So if, for example, they were given permission to join on
9 a common issue of exemption, it would be a matter for them as to who is providing the
10 expert report, what the argument was. It's not for us to determine how they run it, is
11 it?

12 **MR KENNELLY:** I think the discussion we're having now, sir, is discussion for the
13 Trial 3 --

14 **THE CHAIR:** Yes, exactly. Yes, it is.

15 **MR KENNELLY:** -- and we would expect to see an application -- because there is
16 no application so far -- an application from them explaining a plan which will show how
17 they will avoid duplication --

18 **THE CHAIR:** Or at least an assurance that they're not going to, yes, as they did with
19 Trial 2B.

20 **MR KENNELLY:** In view of the waste that's already taken, place we would expect
21 something more than an assurance --

22 **THE CHAIR:** Let's not get into that. As you say, it's a matter for the Umbrella
23 Proceedings. The point I think I'm putting at you, and I don't think you are pushing
24 back on, is: on the face of it, exemption is something which ought to be dealt with all
25 the claimants and being bound by it at the same time, rather than a separate
26 exemption trial in relation to the Class Representatives. And I think that's the only

1 point Mr Beal is pushing today, which is --

2 **MR KENNELLY:** (Inaudible) he's pushing today, his skeleton was more ambitious.

3 But there's non-opposition in circumstances where it's for the Trial 3 Tribunal to decide
4 the extent of any CICC involvement --

5 **THE CHAIR:** I think the non-opposition was -- for my part, I think I would go beyond
6 that. I would say if there are things which -- maybe this is stating the obvious, if there
7 are things like exemption which apply universally, then there is every reason why they
8 should be dealt with together, provided there is no other problem with that.

9 So I think I would say there a presumption, and there has always been a presumption,
10 that where the CICC issues overlap with the Merchant Claimants one, it's better to
11 deal with them together if that's practical.

12 **MR KENNELLY:** My concern, sir, is not the question of whether they should be
13 involved, it's the extent of involvement.

14 **THE CHAIR:** Yes, exactly. I think it's entirely fair for you to reserve your position on
15 that. I'm certainly not going to say anything here that pre-determines or prejudices
16 what the Umbrella Proceedings Tribunal will decide about that. If that is helpful, I think
17 that --

18 **MR KENNELLY:** That's all we want. We didn't want the assurance to go as far as
19 that which the Class Representative sought in their skeleton. Before I finish ...

20 **THE CHAIR:** Yes, of course.

21 **MR KENNELLY:** Just to cut to chase before I sit down on this issue, it's really this
22 concern about budgets.

23 The Trial 3 Tribunal will not thank us if we drop all of our problems on them. There
24 are issues which need to be resolved here in these proceedings, which you will hear
25 in our applications later on today, which ought to be resolved. I think the Tribunal in
26 Trial 3 would be grateful if they were resolved before these Class Representatives

1 participated more fully in that other case. But that's again a matter to debate on
2 another day, I have nothing else to say about that now.

3 On budget, as I said, Mr Cook will address you. I think that's the point where I hand
4 over to him --

5 **THE CHAIR:** And then we'll come back (overspeaking).

6 We should take a break at some convenient point. Mr Cook, I don't know whether
7 you'd prefer to start for five or ten minutes, or whether you would like to have -- how
8 long are you going to be, do you think?

9 **MR COOK:** I wouldn't have thought I'd be more than about ten minutes or so. Now
10 would be a convenient time to break on that basis --

11 **THE CHAIR:** Why don't you carry on if you are happy to. I don't want to make
12 a constraint for you, but I'm just not sure -- I hope there's not an awful lot to say after
13 what I have said to Mr Beal, but if there are things you want to add to that, of course
14 you are very welcome.

15 **MR COOK:** I'm conscious you have already expressed a number of concerns that
16 we'd obviously expressed in our skeleton argument and frankly which arise as a matter
17 of just obviousness in terms of where we are today.

18 **THE CHAIR:** Clearly there's a problem, isn't there, and we need to know more about
19 how it's going to be addressed. I think that's plain, at least in the historic costs. I mean,
20 going forward, you may want to say some more about that.

21 **Submissions by MR COOK**

22 **MR COOK:** I'm going to come to historic costs as well. What I say is history is no
23 guide to future performance, nonetheless we often look to it to see what might happen
24 in the future.

25 This is a very startling position we are in today. The Tribunal has been expressing
26 and has repeatedly expressed serious concerns about the Class Representatives'

1 expenditure in previous judgments, and also about whether they were effectively
2 managing the proceedings. That has happened again and again, including most
3 recently, so the concerns you expressed about preparations for the CMC and the
4 Class Representatives' sort of failure to meet the deadlines the Tribunal had laid down
5 for that, sir.

6 So, the problems today aren't coming out of the blue. The Class Representatives have
7 been very much on notice for some time that (1) the Tribunal needed proper and
8 effective costs management in these proceedings; and (2) that the Class
9 Representatives need to manage the proceedings far more effectively than they were
10 doing.

11 Then we come to a CMC. It's one that's been in the diary for some time, for
12 some months, and where everyone knew that one of the key issues to be addressed
13 today was the budget. We end up with a situation where my learned friend is -- and
14 I recognise entirely, sympathy of one advocate to another, that he's in the wholly
15 invidious and undesirable position of having no idea how much his clients have spent
16 on this -- having no real idea, not being able to provide a proper number, that's been
17 spent. All he can say is a number that may be several million pounds out in terms of
18 actual expenditure.

19 With respect, sir, it is utterly startling that they are multiple millions of pounds, and the
20 budgets are off-set. So, it's not just £3 million or so identified, they cover slightly
21 different periods. The lower figure, the 18 million, actually covers several months
22 longer. So, the disconnect between the two -- the most recent budget covers more in
23 terms of matters which for the previous budget were part of the projected future costs.
24 So, the disconnect's more than just that 3 million.

25 Just simply not even to be close to the actual number is a startling position. It very
26 much puts in context the various assurances which had been made by the Class

1 Representatives previously about promises that there were new case management
2 structures being put in place which would resolve these problems. With respect, those
3 assurances have now proved to be entirely hollow because they are in a position today
4 where they still don't know even what they've spent to date.

5 I recognise to some extent that is dealing with the history. What as much as anything
6 concerns us is of course while what we have is a budget, the historic expenditure has
7 all the concerns you've expressed previously about it, sir. It's right to say that the
8 numbers we're looking at in terms of future costs aren't as immediately concerning.
9 The problem is how far can we place any reliance upon predictions, budget numbers,
10 from a party where the representatives can't even at the moment tell the Tribunal how
11 much they've spent; and secondly, where the budget is completely out of keeping with
12 the amount of money they have already spent. That's what we are concerned about,
13 not if the budget coming forward today was one which one had confidence in that it
14 would be a particular concern. It's whether that is writ in water, essentially. And we
15 are very worried about what my learned friend would love to do, which is to kick this
16 into the long grass and say, "We're going to do reconciliation, we're going to hire more
17 costs consultants, more expenditure to try and resolve these problems". And it keeps
18 on moving forward with budgets that are put forward, the budget looks all right, and
19 the Tribunal says, "That looks fine", and then you get excessive expenditure, which is
20 what we have with the Trial 2 budget. They put forward something that didn't look
21 excessive, but they actually spent a lot more.

22 That's what we are worried about: things being kicked off into the long grass again and
23 again, and each time it comes back -- and obviously the Tribunal's ability to do
24 anything about money which has already been spent is much more limited. But each
25 time all you're being told is, "The future will be fine, don't worry", then we come back
26 again and suddenly more's being spent excessively, and the Tribunal simply isn't

1 being given the ability to carry out the kind of supervisory function that is the essence
2 of the CPO regime, because you are not being given the material to do so. So we are
3 very worried about it just being kicked off and kicked off with the Class Representatives
4 just not giving you the material to do it properly, sir.

5 **THE CHAIR:** Mr Beal's saying the cost consultants are now going to be brought in to
6 have complete oversight of this; they are going to be independent, and they are going
7 to scrutinise the budget, they are going to do all the things which have been discussed.
8 I've asked him first for clarification of exactly how that will work, and we know we have
9 a very experienced specialised costs King's Counsel sitting on the advisory
10 committee. So that must be helpful, one would hope, and at least provide --

11 **MR COOK:** I was going to come to that. But in relation to that, of course that's
12 a structure that's meant to be in place for the last two years, I think. I mean, whatever
13 is happening at the moment we can see isn't working, so we don't know what's
14 happening --

15 **THE CHAIR:** Yes. Well, you can see that it --

16 **MR COOK:** -- whether they're involved, how much, or whatever it is. But whatever's
17 been given to that cost management structure just clearly -- whatever the issue is at
18 the moment, that's clearly not a structure --

19 **THE CHAIR:** I think that's right, I think that's what's been recognised. I suppose I am
20 inviting you to tell me what other bits you think are missing because at the moment
21 Mr Beal's saying, "Hands up, we accept it's not working. We're going to get some
22 proper retainers around costs counsel to do all the things [he's] described in the
23 skeleton", and that does seem to me to be the obvious thing to do. Provided that that
24 information is then made available to Mr Allen, and indeed to Mr Hutton KC on a timely
25 basis and there is proper oversight of that, then -- if you have anything else we should
26 be doing to suggest, I'm inviting you to tell me. That's the question: what else, sensible

1 suggestion? Of course they would be --

2 **MR COOK:** (Inaudible) some other time. What there does need to be, we would
3 suggest, a feedback loop the Tribunal where insofar as budgets are going up beyond
4 the figures that are being put forward today, which you've obviously looked at and
5 thought those aren't too concerning. If those are going to be going up beyond the sort
6 of budgeted numbers, that needs to be something the Tribunal's made aware of,
7 particularly if we are talking about the kind of levels of over-expenditure which
8 happened historically. But whatever structure's put in place, there needs to be an
9 update for the Tribunal making sure it's happened, it's in place, it's operating regularly;
10 and that the historic budgets now being put forward, if they are going to be (inaudible)
11 the Tribunal gets told about that essentially in advance in time to do something about
12 it before it happens, rather than only finding out after the event.

13 **THE CHAIR:** Quite. I absolutely share the sentiment, but in reality that's quite difficult
14 because it requires firstly the material to reach my desk at a time when I can look at it,
15 and also it presupposes in the heat and light of preparation for trial whatever it is one
16 can do anything sensible about. So I'm certainly prepared to put to Mr Beal that I think
17 there is an obligation on the Class Representative to update the Tribunal if the budgets
18 applied are materially wrong, and I hope he would accept that. But I'm not sure we
19 can do much more than that, can we? In terms of expecting the Tribunal to regulate
20 the costs as they're spent, I don't think that is a realistic proposition.

21 **MR COOK:** (Inaudible) or something we can do is deal with future costs, but it's being
22 told about future costs going -- look like they're growing beyond the numbers you have
23 already provided at a time that actually allows you to express views about them.

24 **THE CHAIR:** Or at least an alarm bell where it's plain that things have gone off track,
25 so there is an opportunity to intervene to the extent that's possible.

26 **MR COOK:** Absolutely, sir, but I recognise there's only so far you can engage into the

1 micromanagement (inaudible words), but were we to get -- an ongoing process is the
2 critical one because the Class Representatives are essentially undermining your ability
3 to do so by making a CMC application today somewhat pointless.

4 We do say there is absolutely a need, and we suggest in our skeleton, to have
5 a witness statement or some kind of communication to the Tribunal, somebody saying
6 they are happy -- now they know what the historic costs are that the budgets they
7 prepared are ones which are realistic. Because it's very difficult to see how anyone
8 could produce a realistic budget without an idea of what they've spent historically.
9 That's going to give them a very good idea of how expensive these things have
10 become for them.

11 So, we do say that kind of process is absolutely critical; we're basically saying now
12 they know what the picture is, they stand behind the budgets they've put before the
13 Tribunal, or put forward some alternative one.

14 **THE CHAIR:** Again, I think when Mr Beal was saying we're going to get that, I don't
15 think he was suggesting a witness statement, and I'm not sure that that's really
16 necessary or helpful, at least at this stage. The reality is they (inaudible) costs, and
17 I think we are entitled to assume that if we get a letter from Mr Allen's solicitors, or
18 rather from the Class Representative's solicitors, that Mr Allen has directed that the
19 Class Representative will stand behind it. And I'm sure he has that message loud and
20 clear, I know he's sitting in court today. I think that's being offered by Mr Beal, as
21 I understand it.

22 **MR COOK:** The only other thing I planned to say in relation to costs was just to
23 pre-empt some of my -- answer some of my learned friend's sort of barbs thrown to
24 this side of the courtroom in an attempt to try and defend the indefensible, I would
25 suggest.

26 **THE CHAIR:** You are welcome to do that in a general way because it really makes

1 no difference to anything we are doing today.

2 **MR COOK:** I was only going to do it in the most general way, not least because my
3 learned friend has thrown general barbs around without condescending to specific
4 examples, one might say because he lacks those specific examples. The reality is,
5 sir, Mastercard and Visa have been sued separately in separate claims, and one of
6 the issues is they chose to commence four separate sets of proceedings right from the
7 start, which has inevitably impacted on the costs. Mastercard and Visa are separately
8 represented for obvious reasons, not least non-competitors and the confidentiality of
9 respective commercial information is obviously a very important consideration.

10 We are perfectly entitled to send separate letters where there are separate issues to
11 be addressed. We have been careful at all times to liaise and where possible
12 coordinate, including sending joint letters throughout. With respect, there is no basis
13 to -- by my learned friend's attempts, his dinosaur analogies, as much as I enjoyed the
14 imagery, to suggest that we are engaged in anything other than trying to ensure this
15 case is brought in a sensible way.

16 **THE CHAIR:** I think to be fair to Mr Beal -- and we now go back into the history
17 again -- there were certainly some aspects of some of the things which happened in
18 the CPO Applications, which we indicated in our judgment we thought were -- it was
19 certainly not suggested you were not entitled to do them. But this is hard fought
20 litigation and it can sometimes be fought to a point where it is increasing the costs of
21 it without any obvious purpose, and that's certainly a conclusion we reached about
22 some of the things that happened. I don't think we need to go further than that, but
23 I don't think I'm prepared to accept the submission that you are doing this at all times
24 entirely -- I think there is, as far as I can see, some merit in Mr Beal's point that this is
25 being fought very hard and at times it seems to be too hard, disproportionately hard.
26 That's entirely a matter for your clients, I'm not suggesting you don't do what you are

1 instructed to do. But as far as we are concerned -- and the ability to deal with those
2 things in costs, we obviously where we see it, will call it out and deal with it. I don't
3 think we need to say anything more about it, I'm not sure an argument about it any
4 further is productive. But just so we are clear, I don't think there's any right or wrong
5 in all of this, it's much more nuanced, isn't it?

6 **MR COOK:** (inaudible).

7 **THE CHAIR:** Thank you. Mr Beal, anything you want to add?

8 **MR BEAL:** I don't have any reply to my learned friend Mr Kennelly's points. Just in
9 relation to Mr Cook's points, cutting to the chase, what we have offered is a historic
10 reconciliation which we'll set out in a letter by the end of next week the process and
11 scope of that. That will include, second point, the effectiveness of any control that can
12 be exercised over historic costs and our proposals in that regard. That's the first point.
13 Second point is, and it's a point well made by my learned friend, Mr Cook, we do need
14 to deal with the unexpected. The unexpected will range from matters such as what
15 happens if they get permission in *PACCAR*, in the Neil Class Representative. That
16 would be something that's not present in the budget; if they suddenly get permission,
17 we will have to update this Tribunal about who is going to be involved in that and how
18 much that is going to involve. That's not ruled out at this stage, but it's something you
19 can see potentially on the horizon; whether or not they get permission is not for us.

20 The second type of example of an expected item would be if they come up with another
21 form of satellite litigation, for example, such as an application for some sort of limitation
22 point. We think that is unexpected and highly unlikely, not least in the light of the Volvo
23 litigation proceedings and the restriction on the class claim period. We don't anticipate
24 any issue there, but we don't know what otherwise might come out of the fruitful legal
25 minds acting for Mastercard and Visa in terms of another satellite point; we have seen
26 the VoC Application, we have seen the Opt-In Application.

1 Thirdly, we have the totally unexpected, what I would call the Spanish inquisition style,
2 of unexpected which nobody can predict and it's suddenly on your doorstep. For each
3 of those points, what we are prepared to offer is an update to the Tribunal with
4 an indication of what the likely costs consequences will be, which will be discussed
5 with the costs consultant, and a revised budget will be prepared if need be.

6 With respect, we heard what Mr Cook said about the importance of control over those
7 unexpected items, and we respectfully agree. We think it's a sensible aspect we can
8 build into the process we are suggesting. It will be set out in this letter by the end of
9 next week.

10 **THE CHAIR:** Yes, that's helpful. I think all that I would expect is that if you have
11 a process with proper control on it, where it became apparent there was going to be
12 a change in the estimate, if that was material, the Tribunal would be notified of that.

13 **MR BEAL:** Absolutely.

14 **THE CHAIR:** That's really, I think, the high point of it.

15 **MR BEAL:** It wouldn't wait until the quarterly report; it would be drawn to the Tribunal's
16 attention sooner than that so that something can be done about it, if it looks as though
17 it's going to produce a spiralling cost.

18 **THE CHAIR:** Yes. Yes, that's helpful.

19 **MR BEAL:** That's our respectful suggestion.

20 **THE CHAIR:** Good, okay, thank you. In that case, I think that deals with the costs
21 point.

22 So, the timetable, end of next week you said?

23 **MR BEAL:** Yes.

24 **THE CHAIR:** Yes. That's really helpful, thank you.

25 I will rise for ten minutes and then we will come back and deal with the defence
26 applications. Thank you.

1 (11.54 am)

2 (A short break)

3 (12.06 pm)

4 **THE CHAIR:** Yes, Mr Kennelly.

5 **Submissions by MR KENNELLY**

6 **MR KENNELLY:** This is our Opt-In Application.

7 **THE CHAIR:** Yes.

8 **MR KENNELLY:** The real issue before you is what to do about disclosure, because
9 the steps to the hearing have been agreed. The Class Representatives claim, my
10 learned friend said it today, that everything has in fact been agreed. That's not so.
11 There is an outstanding dispute about disclosure.

12 The application that we put before you sought disclosure. May I show you the relief
13 that we sought? It's in E, page 487. Do you have that?

14 **THE CHAIR:** I have it.

15 **MR KENNELLY:** Paragraph 36.

16 **THE CHAIR:** Yes, this is in your skeleton, yes.

17 **MR KENNELLY:** It was actually the Reply to their Response. And it is (d), 36(d), that:
18 "The Class Representatives disclose the documents submitted to the CR, by which
19 opting in is said to have occurred, and any other documents relied upon as indicating
20 that any particular legal entity has opted in to the proceedings."

21 **THE CHAIR:** Yes.

22 **MR KENNELLY:** The Class Representative did not consent to that form of words and
23 suggested something else. That we can see in the F bundle, page 2150.

24 **THE CHAIR:** This is Harcus Parker.

25 **MR KENNELLY:** This is Harcus Parker, 14 October. At paragraph 3, they say:

26 "Our clients are willing to disclose documents that are in its possession or control

1 | which are relevant to the matters raised in the application..." [as read]

2 | These appear to be cumulative criteria:

3 | "... upon which our client relies for the purpose of defending your clients' application
4 | and which are not privileged." [as read]

5 | **THE CHAIR:** Yes.

6 | **MR KENNELLY:** And, to be clear, there's no need to turn it up, a subsequent letter
7 | that Harcus Parker sent at page 2154 confirms that what they are going to disclose
8 | are the documents upon which they rely for defending the application.

9 | **THE CHAIR:** So, the bit that's missing, or the bit that I suspect you think is missing,
10 | is there's nothing in there about disclosing documents which are adverse.

11 | **MR KENNELLY:** Indeed. Well, we are content with the formulation that we put
12 | forward.

13 | **THE CHAIR:** Yes.

14 | **MR KENNELLY:** And we would like this to -- and I will come to this on the question
15 | of privilege, because -- could you turn over the page to 2151.

16 | **THE CHAIR:** Yes.

17 | **MR KENNELLY:** Paragraph 5:

18 | "Our client agrees to disclose on the above basis by 31 October, but for the avoidance
19 | of doubt the Class Representative does not expect that many non-privileged
20 | documents will meet the criteria above." [as read]

21 | So there are two problems with the Harcus Parker proposal. The first is that it's
22 | ambiguous. The Tribunal can see right away that the documents evidencing opt-in fall
23 | into three categories: the documents showing whether authority was granted by the
24 | class members for the purposes of opting in; documents showing whether decisions
25 | to opt in were taken by class members, and documents showing whether those
26 | decisions were communicated to the Class Representative.

1 It's not clear if the Class Representatives intend to disclose all of those documents.

2 **THE CHAIR:** I mean, I appreciate you don't know any more than I do about what
3 these documents actually are. I'm just trying to get into my head what we are talking
4 about here.

5 As I understand it, and I think I have read the witness statements of Mr Robinson,
6 who --

7 **MR KENNELLY:** Yes.

8 **THE CHAIR:** Yes, so I have read that witness statement, I've got that much
9 knowledge. But just putting aside that for a minute and just trying to think about what
10 might in practice happen here, you have Marcus Parker or Mr Allen going to
11 a corporate and perhaps dealing with, I don't know, let's say the general counsel at
12 that corporate, and the general counsel goes off and has some discussions and then
13 comes back and says, "yes, we are going to join", without specifying whether it's, you
14 know, all the corporate entities in their corporate -- but just expresses that on behalf
15 the group.

16 I mean, that's broadly the territory we are in, I think, isn't it, or am I wrong to be thinking
17 about it in that way?

18 **MR KENNELLY:** That's only part of the picture. This is the problem. The Class
19 Representative has been so vague, in the response and in Mr Robinson's evidence
20 about what actually happened, that disclosure is very important to test what's going to
21 come up at the opt-in hearing on this question, because that's part of the general
22 process they took, but what is needed is to bottom out whether these individual legal
23 entities opted in or not.

24 It's common ground that what is required for the individual legal entity to opt in, they
25 are the class members, is first, what documents show the authority given by them for
26 someone to opt in on their behalf.

1 **THE CHAIR:** Question 1.

2 **MR KENNELLY:** Yes. The second is --

3 **THE CHAIR:** So if it's the general counsel --

4 **MR KENNELLY:** Of that legal entity.

5 **THE CHAIR:** -- of that legal entity, they probably don't have -- well, they may or may
6 not have express authority for a subsidiary company, but they do have,
7 obviously -- well, that's the question, isn't it. That's the question.

8 **MR KENNELLY:** That is the question, exactly. It will depend on the person and there
9 may be documents showing to what extent they had authority for that particular
10 decision. Express authority by reference to a mandate, or broader authority by
11 reference to some other documents -- (overspeaking)

12 **THE CHAIR:** Yes, and so if they've been off to see the chief executive and said, "What
13 do you think?", and the chief executive says, "Go for it", then --

14 **MR KENNELLY:** Yes.

15 **THE CHAIR:** I mean, I'm just wondering where this is all going in terms of -- and your
16 expectations about what you are going to get. Obviously, I can explore this with
17 Mr Beal, but are you saying you want to look at the communications between the
18 General Counsel and the Chief Executive in my analogy? Is that necessary?

19 **MR KENNELLY:** It's for the Class Representative to show -- and I will show you
20 where they accept this. They need to show that the individual legal entity gave
21 authority to someone to opt in on its behalf. How they show that will be a matter for
22 them. And they will produce documents. I can't anticipate what documents they had
23 at the time to show that that authority existed.

24 **THE CHAIR:** Because the Class Representative isn't going to have, one would think,
25 the records of communications between the general counsel and the chief executive,
26 so I suppose that's what I'm pushing you on. Are you suggesting that this is

1 a proactive exercise, effectively a proactive disclosure exercise that somehow binds
2 the corporate entities, or are you just simply saying you want to see what sits on the
3 desk on the CR's -- whether it's Marcus Parker or Mr Allen or whoever it is, you want
4 to see what they have seen and we will just have to draw our conclusions from that.

5 **MR KENNELLY:** It could be both.

6 **THE CHAIR:** Well, I'm sorry, I am going to push you a bit on this. If you are saying
7 it's the first, then it's a different ball game, isn't it? It's not asking the Class
8 Representative to provide disclosure within the ambit of the Class Representative's
9 documents. You're actually talking about getting, I don't know whether it's third party
10 or -- I mean, on your analysis, it's third party disclosure because they are not class
11 members.

12 **MR KENNELLY:** Let's just step back for a second and ask what the Class
13 Representative has.

14 **THE CHAIR:** Yes.

15 **MR KENNELLY:** The first thing, before we get -- the authority is logically the first
16 question. But if you are concerned, sir, about what the Class Representative has --

17 **THE CHAIR:** Well, no, I think because you start with authority, it begs the question as
18 to whether you want disclosure from the corporate entity. That's the point I'm making.
19 I don't see how you can address the question of authority without getting copies of the
20 internal authorities.

21 **MR KENNELLY:** Sir, it's a matter for them. Our submission will be at the Opt-In
22 hearing that they need to demonstrate that individual legal entities did grant authority
23 to opt in on their behalf. And I will show you in their response where they positively
24 aver that authority was granted.

25 How they show that may well involve documents from the opted-in class members
26 themselves, in which case it will be for the Class Representative to get those

1 documents to show that the authority was granted. Because they positively say that
2 the corporate group was able to opt in for individual legal entities, there must be some
3 documents that make that good. And those documents may well be documents which
4 they haven't seen but which the class members who have opted in already have. So,
5 there may well be a need for the Class Representative to ask the class members who
6 have opted in: can you show us that you had authority; this representative that we
7 spoke to had authority to take a decision to opt in for the class member. And the
8 reason why we asked the question is when you look at Mr Robinson's evidence, it's
9 very concerning that in fact such authority may not have existed at all.

10 **THE CHAIR:** Yes. Yes, okay. I'm just a little bit uncertain about -- perhaps I have
11 misunderstood what your position was, but I had taken it -- we can go back and have
12 a look at your 36(d) again.

13 Sorry, just remind me, where do I find 36(d)? What page reference?

14 **MR KENNELLY:** Page 487.

15 **THE CHAIR:** Yes. Thank you.

16 Yes, okay, I understand.

17 I'm afraid this is my fault for taking you off on a bit of a tangent. I had understood,
18 I think wrongly, that you were effectively asking for some form of general disclosure
19 from the Class Representative and potentially the Opt-In Claimants, but you are not,
20 are you. You are just saying you want to see what they've got. You want to see what
21 they've got, basically.

22 **MR KENNELLY:** Yes, and again, it's the Class Representative who would be
23 positively relying on documents to show the Tribunal that these individual legal entities
24 did in fact decide to opt in and the person who opted in on their behalf had authority
25 to do so.

26 **THE CHAIR:** But if their position is -- if you are saying it's really up to them to produce

1 the evidence --

2 **MR KENNELLY:** Yes.

3 **THE CHAIR:** -- is this a disclosure exercise at all? That's the bit I'm just struggling a
4 bit with, because on the one hand you seem to be saying, we'll just see what they turn
5 up with; on the other hand you seem to be wanting to regulate what they are going to
6 turn up with, and I'm not quite sure on what basis you are doing that if you are not
7 seeking disclosure.

8 I am sorry, I don't mean to be difficult about it, Mr Kennelly, I'm probably being a bit
9 slow, but I am just not quite sure that I understand what you --

10 **MR KENNELLY:** Well, the problem is, why won't the Class Representative simply
11 agree to the wording that we have put forward? Our concern is that what they are
12 putting to you is something more limited. They speak about the documents they put
13 forward to resist the Defendants' application. We want specifically the documents by
14 which opting in is said to have occurred.

15 Now, the Tribunal might say to me: Mr Kennelly, there's no difference between those
16 two things. But it's important to be precise because we will need to look at these
17 documents to work out whether these companies have opted-in or not, regardless of
18 who wins on the legal issue.

19 That's why we seek it in that way, but --

20 **THE CHAIR:** Well, I would have --

21 **MR KENNELLY:** (Overspeaking) because I didn't answer your question about what
22 (inaudible words). Ultimately, the Tribunal's quite right, it's for them to produce
23 documents to show that these class members opted in.

24 If they produce nothing, well, that's a point we will have to discuss at the hearing, about
25 the extent to which they've made good their duty to show these companies have opted
26 in.

1 But what they can't do is say: there's a whole lot of documents which are privileged
2 which show that authority existed and that decisions were taken to opt in but we can't
3 show you any of them. And use privileged documents to fill in gaps.

4 **THE CHAIR:** Well, obviously if they don't -- well, but this is the same thing again, isn't
5 it? I mean, I'm sure it's my fault, but I'm still a little bit confused about where you are
6 on this, because in figure 6(d) you say you want an order, effectively for disclosure,
7 but at the same time you seem to be saying that it's really for them to decide what they
8 turn up with or not. If they make their case then it's all well and good, and if they don't,
9 they don't.

10 I would have thought actually that latter position is entirely consistent with them saying,
11 with the formulation in their letter: the Marcus Parker letter says we are going to choose
12 what we give you and we are going to turn up with it.

13 Whereas, I think you have actually asked for more than that in your -- and I'm just a bit
14 confused about what you really are asking for. Do you want me to make an order for
15 disclosure?

16 **MR KENNELLY:** No, sir. Sorry.

17 **THE CHAIR:** You are no longer pursuing that?

18 **MR KENNELLY:** No, no, no. All I pursue is the order in 36(d). The three categories
19 of documents that I described to you are the kinds of documents you would expect
20 them to produce to show people have opted in. And my --

21 **THE CHAIR:** But 36(d) contemplates me making -- I mean, I appreciate you may not
22 be seeking it because you've agreed it, but you haven't agreed the terms of it, and so
23 you are back to the point that you are effectively asking me to at least give guidance
24 as to the ambit of the disclosure, and in 36(d) you are asking for disclosure. You are
25 not just saying they need to turn up and tell us what the answer is; you are actually
26 asking for the disclosure.

1 **MR KENNELLY:** Yes, sorry. We are asking for disclosure in 36(d).

2 **THE CHAIR:** Yes, disclosure in the normal sense of: give us everything you have.

3 **MR KENNELLY:** Yes. Yes, exactly, but constrained by the terms in (d)(i) and (ii). We
4 are identifying specific documents. We have tried to be limited in this request. We
5 are asking them to list the documents which they received by which opting in is said
6 to have occurred, and any other documents relied upon as indicating that legal entities
7 have opted in.

8 **THE CHAIR:** Well, is it constraining evidence, just not adding -- it's not really
9 constraining sub (i), is it?

10 **MR KENNELLY:** Those are two limiting factors to the disclosure which we seek. We
11 never intended to seek anything broader than that in (i) and (ii).

12 **THE CHAIR:** So (i) is basically what happened at the time of the opt-in exercise.

13 **MR KENNELLY:** Yes.

14 **THE CHAIR:** And (ii) contemplates that there might have been other discussions
15 subsequent to that.

16 **MR KENNELLY:** Exactly.

17 **THE CHAIR:** Yes.

18 **MR KENNELLY:** And really, the difference between us is that we are focusing on the
19 documents which go directly to opting in, whereas the Class Representative first says:
20 we are only giving you documents relied upon in resisting the application. Which
21 troubles us because why are they not happy with this very limited language we put
22 forward? So even further, they are trying to limit their disclosure.

23 And secondly, this reference to the fact that nearly everything will be privileged. That
24 is why I identify those three categories.

25 **THE CHAIR:** Yes.

26 **MR KENNELLY:** Because there's just no way in which those three types of

1 document -- which you would expect the Claimants to be producing, the Class
2 Representatives -- could be privileged.

3 **THE CHAIR:** Well, you could see they might be part of a chain of correspondence in
4 which there was privilege, couldn't you.

5 **MR KENNELLY:** Of course. That (inaudible) be redacted then.

6 **THE CHAIR:** So for example, Marcus Parker write and say: this is a wonderful claim
7 for all these reasons, here are the weaknesses, here are the strengths.

8 **MR KENNELLY:** Yes.

9 **THE CHAIR:** You wouldn't suggest that you're entitled to see that.

10 **MR KENNELLY:** Of course not.

11 **THE CHAIR:** Of course. And so, if that is part of a chain of correspondence, then you
12 would accept that there is the ability to compartmentalise that in the usual way.

13 **MR KENNELLY:** Of course, but that's not what the Class Representatives say. They
14 said very few non-privileged documents will be produced. Now, there may be an email
15 chain, but the bit that says, "I have authority from the board to opt in" --

16 **THE CHAIR:** Or "we're in".

17 **MR KENNELLY:** Or "we're in", whatever, that's the bit we want. The privileged advice
18 cannot be redacted. But that's not what the Class Representative is saying.

19 **THE CHAIR:** Yes, okay, I understand that, yes.

20 **MR KENNELLY:** It's important because we obviously have the point of law which we
21 have to resolve, but there is also this question that once the Tribunal has determined
22 the actual test for opting in, who has opted in, you will then need to decide by reference
23 to the documents which class members can be demonstrated to have opted in, in
24 these proceedings. And for that you will need documents to show authority, a decision
25 to opt in and the communication of that to the Class Representative by the deadline.

26 **THE CHAIR:** Yes, and so it's possible, isn't it, just thinking about this -- and this may

1 be a question for Mr Beal, not for you, in which case you are free to say so. But we
2 have 95 entities I think, haven't we? Is that the group level?

3 **MR KENNELLY:** Group level, yes.

4 **THE CHAIR:** And so below that we could have hundreds of legal entities. And I think
5 you are effectively saying we can't treat any of those as being opt-in class members
6 unless we have satisfied themselves that there was some authority given for that
7 entity.

8 **MR KENNELLY:** That's common ground.

9 **THE CHAIR:** No, no, I'm not -- I'm just trying to work out where this all goes. I am
10 talking about the practicalities here, not the principles. Actually, it's possible that
11 Marcus Parker don't have the answer to some of that because it may well be -- well,
12 the sheer task of obtaining that information may depend on getting board minutes and
13 all sorts of things, mightn't it. Potentially quite a significant task that you are saying
14 they are tasked with, to demonstrate the answer for that question.

15 **MR KENNELLY:** Yes, and my learned friend says there's no evidence before you
16 with specifics as to that. And of course, they had six months to identify class members
17 and to get the necessary authority decisions, between the decision and the deadline
18 for opting in. The deadline is designed to be -- the period is long in order for individual
19 legal entities to do those things.

20 Our sense is that the Class Representative is downplaying the relevance of disclosure,
21 and we had a sense of that from my learned friend today. But it's really central to how
22 the Tribunal will resolve the application when it comes before you. And for that we will
23 need to show you the response of the Class Representative and the evidence. I'm not
24 obviously arguing the legal point, but I would ask you to look at that first.

25 **THE CHAIR:** Yes.

26 **MR KENNELLY:** That is in (d), tab 39.

1 Before we look at that, we obviously moved on from the question of authority. We
2 moved on from the other documents you would expect to see and of course there are
3 obvious documents which you would expect the Class Representative to have, which
4 would be the notices which they were required to get from class members opting in.
5 There's no reason why those should be privileged and no reason why we shouldn't
6 have those in full.

7 Now, looking at the --

8 **THE CHAIR:** Is there a suggestion that that is not accepted, or are you going to show
9 me that now?

10 **MR KENNELLY:** We will see what they say in the response to the Defendants'
11 Application and in Mr Robinson's evidence.

12 In the response to the Application, could you go first to page 439, just so we orientate
13 ourselves, just to show what is common ground as to who is a class member for the
14 purposes of these proceedings.

15 This was the concession that the Class Representative made. I'm not going to go over
16 the correspondence that led up to this; you have seen in the skeletons how things
17 changed.

18 Paragraph 3.1, (iii) and (iv), class members, as defined in the rules, must be legal
19 persons. So not a corporate group or an undertaking. A class member must be
20 a legal person.

21 And the class definition refers to merchants, which are further defined as legal
22 persons. So, the class member has to be a legal person.

23 But the Class Representative argues that persons at the group level, individuals at the
24 group level, can opt in on behalf of class members. We see that at 3.3. What's
25 happened in the present case, we are told, is that individuals with appropriate authority
26 have taken the steps stipulated by the FCPOs by the deadline to communicate the

1 intention of all entities in their respective corporate groups to opt in.

2 So they are saying that the individual legal persons, the entities, the class members,
3 did communicate an intention to opt in through individuals, natural persons, with
4 appropriate authority, presumably from -- well, it's ambiguous. From the individual
5 entities or from someone else?

6 Then at 3.4, they say in the first sentence:

7 "Not all entities (inaudible) in the group will necessarily meet the class definitions."

8 That's interesting because it suggests they didn't know which legal entities are claimed
9 to have opted in.

10 That passage and the passages which follow strongly suggest that no specific
11 authority is given by individual legal entities for someone else to opt in on their behalf.

12 Then at paragraph 4, we see the reformulation of the question by the Class
13 Representative, the legal question:

14 "Whether on a proper construction of the CPO, communication of their intention to opt
15 in made on behalf of an identified corporate ... by the person duly authorised to
16 communicate the decision of that corporate group has been effectively to opt in ... the
17 class members."

18 That's the legal question.

19 So even though the class members must be legal persons, they may opt in by their
20 corporate group, that person authorised, not by its sophisticated(?) class member, but
21 authorised by a corporate. That's the arguments they were facing in that hearing.

22 Obviously we say that's wrong, it has to be authority from an (inaudible) class member.

23 But in any event, we need to look at the question of authority: what is it, who's
24 (inaudible) to the question?

25 **THE CHAIR:** Anyway, it might well be a question of fact as well. You are certainly
26 accepting that there may be factual circumstances in which that could conceivably be

1 true.

2 **MR KENNELLY:** I'm not just speculating. It will have to be, according to your
3 (inaudible), a proper chain between the specific legal entity, the class member, and
4 the authorised entity to opt in.

5 **THE CHAIR:** So if the certain main board of a corporate has given authority to the
6 general counsel to act on behalf of the subsidiaries, I mean, who knows -- you can see
7 that -- or actually, another example would be ratification, if it had been ratified.

8 **MR KENNELLY:** One can see that (inaudible) agency recognised ratification. That
9 would require documents (overspeaking).

10 **THE CHAIR:** Yes, yes. That's really the point I'm putting to you: I'm trying to get the
11 connection right between this argument and the documents you are interested in.

12 **MR KENNELLY:** Then at page 441, the same document. This is just the legal basis
13 for the Class Representative concession, 8 to 10. We can skip all this because we're
14 not arguing that Application now and go directly to paragraph 21 on page 445, where
15 the Class Representatives say, halfway down in an example of how opt in may take
16 place:

17 "Nothing prevents ...(Reading to the words)... on provided he has due authority to do
18 so on behalf of each legal person."

19 We say yes, but please show us, and then that's what they need to demonstrate. Then
20 this bit in 22:

21 "It is not clear whether they are suggesting the authorised individual would be required
22 to sign or to return individual forms in each company." [as read] [We say obviously
23 yes], however, as can be shown that individual legal persons are authorised
24 ...(Reading to the words)... decided to do so."

25 There is ambiguity in 22. And in 22.1, (inaudible) of the paragraph:

26 "In respect of almost all opt-in groups, the relevant authorised individuals that have

1 completed the online form ...(Reading to the words)... have identified only corporate
2 group."

3 They say:

4 "Properly construed ...(Reading to the words)... intention and authority to opt in all
5 entities ...(Reading to the words)... class members."

6 They say at 22.2:

7 "In practice, such a decision is made at group level."

8 Again, it's hard to see if they're saying that's what happened in these respective cases
9 for these class members, or that's just a general comment.

10 But ultimately, the question is whether individual class members have authorised
11 someone to act on their behalf and whether their individual decision to opt in was taken
12 and communicated pursuant to the EPL(?). And that (inaudible) demonstrated
13 regardless of what the Tribunal determines what on, whether that can be done via
14 corporate entity or through the legal person itself.

15 **THE CHAIR:** Can I just understand your position in relation to -- if you are right about
16 all of this, in relation to the significance of it, and I don't want to get into argument,
17 obviously it's a matter for the hearing in due course, but just so I understand where
18 you are on it. If you are right and they haven't done it properly, are you saying it can't
19 be fixed or that I haven't got discretion -- or the Tribunal hasn't got discretion to deal
20 with it?

21 **MR KENNELLY:** If they have failed to -- if the (inaudible) members have failed to opt
22 in class members via the relevant MRC(?), it is of course open to Class
23 Representatives to make an application, like an application for relief from sanctions.

24 **THE CHAIR:** Yes.

25 **MR KENNELLY:** We know certainly from other cases (inaudible words) that initial
26 (inaudible) should apply to the Tribunal, the principles are the same. In the (inaudible)

1 | where we had applications for relief from sanctions, we don't say that they're barred
2 | from certain sanctions. That's what we required, and we have an accrued limitation
3 | defence.

4 | **THE CHAIR:** I appreciate there's a limitation point but of course the limitation point
5 | could be dealt with as part of the relief, presumably. By reference to the date on which
6 | the opt-in took place. It's important just so I understand what you say about that
7 | because -- the limitation point simply depends on whether it was February 2025 or
8 | some later date that was the date on which the opt-in took effect; is that right? That's
9 | the limitation argument. On the assumption that -- just to be absolutely clear I'm not
10 | expressing any pre-disposition to giving relief but if that's where we ended up and we
11 | were persuaded we should give relief, the complaint you'd have is: well hang on
12 | a minute, we had a limitation cut-off that started in February 2025 (inaudible) and now
13 | we shouldn't be exposed to further claimants having that six years, if you like; and so
14 | therefore if you were going to let them in, you should only let him in with a limitation
15 | cut-off of 1 February 2026, if that was the date we decided, whatever it is. Is that the
16 | point? I just want to understand -- there may be two --

17 | **MR KENNELLY:** That's the main point, because that will be applying the (inaudible
18 | words) case where by analogy that's how one --

19 | **THE CHAIR:** Yes. I appreciate you don't want them in at all, I'm not suggesting that's
20 | the answer. I am just saying there's no other limitation point than a timing point, as
21 | I understand it.

22 | **MR KENNELLY:** I'm just thinking on my feet, but obviously --

23 | **THE CHAIR:** No, no, no, I'm not going to foreclose you from running something else
24 | later. I just want to make sure I understand the significance of what we are doing.

25 | **MR KENNELLY:** One can see right away even from this exchange that this is not just
26 | a side show, an obstacle thrown up (inaudible), it's a serious problem. What the

evidence reveals is that the Class Representatives approach this in a -- I don't mean this pejoratively -- in a rather chaotic way, and it's important for them in order to (inaudible words) to supervise this process under the opt-in basis of having been -- we need to get to the bottom of whether this is (inaudible words) of opting in or not.

The importance of disclosure is even clearer from (inaudible) witness evidence, Mr Robinson's evidence at D41 page 463. He's actually a partner in Marcus Parker, he's chosen his words very carefully in his statement. Paragraph 10 is revealing, just by way of observation, before we get to the meat of it, the last sentence at page 465.

THE CHAIR: Yes, I have it.

MR KENNELLY: Paragraph 10. He said:

"If our application were to succeed, many class members would be unable to continue as represented persons." [as read]

As you recall, they are saying that in order for our claim for (inaudible) class members (inaudible) decide to opt in. They are saying that would be a problem. We strongly suggest that's not what has happened. That's because they wrongly, as they now accept, believed that all it would be necessary to do is get an undertaking in a broader sense (inaudible).

Page 466, paragraph 14, again here we see why disclosure is so important to getting to the bottom of this because what Mr Robinson says here is:

"All the discussions we had were with (inaudible) business rather than entity. What that means is that the parent company is (inaudible). In effect that means we approached ...(Reading to the words)... but the ostensible authority was Merrick."

So he isn't claiming he saw evidence of actual authority to decide on behalf of class members to opt in.

THE CHAIR: There's a peculiarity of this. I think Mr Beal hinted that normally we wouldn't be interested in actual authority; normally you would accept that solicitors

1 turned up on the other side for a client that they had -- well, they had been told that
2 they had authority to act and that may well just be ostensible. I mean, there may be
3 all sorts of occasions where the general counsel tells solicitors to do things which
4 actually probably there hasn't been strictly real authority, it's ostensible authority that
5 is relied on.

6 **MR KENNELLY:** And if the Class Representative (inaudible) a series of documents
7 and general counsel class members are saying, "We've decided to opt in", they may
8 well have (inaudible) them to make. That's the question --

9 **THE CHAIR:** Yes -- I think your microphone is not on.

10 **MR KENNELLY:** So sorry.

11 **THE CHAIR:** Or maybe it's not working.

12 I think you are saying that we are really interested in real authority here because not
13 ostensible authority because of the statute. That's the point, isn't it?

14 **MR KENNELLY:** Indeed. And Mr Robinson is aware of this, he is choosing his words
15 very carefully and he says:

16 "That is all entities therein wish to obtain." [as read]

17 Then he says this:

18 "Neither I nor my team were privy to how each business ..."

19 Again, what does that mean?

20 "... decided which individual or individuals to put forward to discuss with us or who
21 would be the relevant contact in putting data on behalf of which group entity. The
22 Class Representative and Marcus Parker considers it both practical and appropriate
23 to permit each business to determine these questions according to its own corporate
24 governance."

25 So not privy to how things were done suggests no idea as to what kind of authority
26 was actually being exercised.

1 **THE CHAIR:** That's what I'd read as him saying. Maybe I'm wrong in reading it like
2 that, but I read him as saying, "We relied on ostensible authority". That's how I read
3 it.

4 **MR KENNELLY:** We will have to discuss that and test it but that's something that
5 needs to be made good.

6 **THE CHAIR:** I think you are saying it doesn't matter if he did, aren't you? Aren't you
7 saying that's not good enough?

8 **MR KENNELLY:** We're saying first of all it's not good enough and even if it is let's see
9 what kind of ostensible authority they are talking about. Just to show, I'm afraid, how
10 bad things were, page 468(d) repeats what he said earlier; that they tried to speak to
11 people with authority. Then he says, second half of (d):

12 "In several cases, the initial response ...(Reading to the words)... were held with more
13 junior staff or other staff in the business who were relatively senior do not appear to
14 have authority to decide whether to opt-in."

15 Then (e):

16 "Individuals within potentially ...(Reading to the words)... as the point of contact.
17 Sometimes they were the same individual or individuals which we'd had initial calls,
18 sometimes they were other people."

19 And these are the individuals who are said to have authority to make decisions to
20 opt-in on behalf of individual class members. This it's entirely unsatisfactory if this is
21 to be unsupported by any skeleton. This is what we need to be -- in order to test this,
22 we need to see what kind of documents they are talking about.

23 Then the next bit, the next paragraph:

24 "Further information is given by email. The information was tailored to specific
25 questions or points raised by the targets." [as read]

26 And then this, (f):

1 "When an organisation decided in principle to opt in, it was directed to the website.
2 Either at the same time as the decision was made to opt in or afterwards, there was
3 an exchange and calls regarding the formal documentation."[as read]

4 What does that mean, "formal documentation"? Again, that's -- we would expect
5 disclosure there of documents evidencing whether authority was granted, decisions
6 taken by individual class members and communication of that to the Class
7 Representative.

8 If you go to page 469, page 22, he makes a frank admission that they didn't know the
9 governance and decision-making procedures of the organisations, he wasn't aware
10 that any organisation opted in without at least one senior individual within that
11 organisation considering the matter.

12 And one can see how vague that is.

13 Further in the paragraph, he inferred from the conversations and exchanges, often
14 with multiple senior individuals, including at board level, that the decision to opt in
15 "involved multiple senior stakeholders in a business and the resulting opting-in
16 communication was made with appropriate authority on behalf of the business as
17 a whole."

18 That's why disclosure is so important, because by itself, it's so vague as to be
19 meaningless.

20 And the issue is pressing because knowing who has opted in and the value of the
21 opt-in claim will be particularly useful for the Trial 3 CMC, because it goes to the
22 significance of the opt-in claim and it feeds into the question of whether, if they
23 continue Mr von Hinten-Reed's methodology, it is likely to be of any use to you, or not,
24 since it relies on disclosure from the opt-in class members.

25 Now, finally, on the question of privilege, we have had the discussion about why,
26 subject to redactions, there is no reason why any of that should be privileged. But if,

1 if, privilege is claimed over documents -- and I didn't mention this in my skeleton, it
2 occurred to me only yesterday -- then the usual proviso should be inserted into any
3 order. This is the one that the Tribunal has made in other cases where, if privilege is
4 claimed, the reason for privilege is to be given with sufficient detail to allow any claim
5 to be challenged, without obviously waiving or disclosing the privileged information
6 itself. That's a matter of drafting in any order the Tribunal chooses to make.

7 **THE CHAIR:** So you are inviting me to make an order?

8 **MR KENNELLY:** Oh yes.

9 **THE CHAIR:** In the terms of your 36(d).

10 **MR KENNELLY:** Yes.

11 **THE CHAIR:** And so, in spite of the fact that you've -- I mean, I am still slightly unsure
12 about how we've got to this point, but I had understood you had agreed the position in
13 relation to -- subject to a wrinkle between you, but now it seems I am being invited to
14 make an order for disclosure; that's what you are actually inviting me to do.

15 **MR KENNELLY:** Yes, because what I've been trying to explain is that unless we get
16 something very clear in writing, there is more than a wrinkle between us.

17 I failed to mention, an example of the kind of document we would expect to see, and
18 we specifically sought it, were the damages-based agreements which each class
19 member is supposed to have signed with the Class Representative. This is exactly
20 the kind of documentation you would expect to see. Again, it goes to whether
21 individual class members have opted in or not.

22 Can I show you the very last document I want to show you: Mr Allen's witness
23 statement for the Class Representative. It's in F, page 2197. Then page 2216.

24 **THE CHAIR:** I'm afraid I don't have it. I don't think I have the updated bundle, I think
25 is the problem.

26 **MR KENNELLY:** I'm sorry.

1 **THE CHAIR:** What tab number is it?

2 **MR KENNELLY:** It's tab 112.

3 **THE CHAIR:** Yes, I'm afraid I don't have it.

4 **MR KENNELLY:** I can deal with it orally.

5 **THE CHAIR:** Just tell me what it says.

6 **MR KENNELLY:** Mr Allen says at paragraph 58(1) that he agreed with the Class
7 Representative legal advisers to enter into a damage-based agreement with the opt-in
8 Claimants. He refers to Claimants. He suggests that each legal person has entered
9 into a damages-based agreement as part of the opting in process.

10 Now, if that's what's taken place, those documents will demonstrate which entities
11 have actually opted in. It would be part of the process for opting in. Obviously it won't
12 be a complete picture, but it's the kind of document that would help us work out who
13 has opted in.

14 That request was resisted by the Class Representative, I think again on the grounds
15 of privilege, but it's hard to see why the DBAs should be privileged in themselves, and
16 of course anything that is sensitive or records legal advice should be redacted. It's the
17 identity of the opted-in class member, on their case, that we need to see.

18 **THE CHAIR:** There's something slightly surreal about this, Mr Kennelly. I can
19 absolutely understand all the points you are making about the arguments and
20 I understand why we are here, but there is something slightly surreal about a situation
21 where somebody, and we don't know who and how, but somebody has signed
22 a damages-based agreement, if your supposition is correct, so that they can
23 participate in litigation, and yet you are saying that it's not clear that anyone has the
24 authority to commit an entity to be a class member. I mean, that is pretty odd, isn't it?

25 **MR KENNELLY:** That's --

26 **THE CHAIR:** I mean, part of that may be about the way that -- this is not a criticism

1 of you, because I understand precisely why we are where we are and it may well be
2 that you -- I think you say it's because of the way the Class Representative has
3 approached this, by firstly denying it and now running an argument which you say is
4 unsustainable.

5 I can't help -- and one of the things I wanted to ask you about was the hearing date for
6 this, whether you have given any thought to that. But there's just a part of me that just
7 feels this is all just slightly odd and do we really want to spend a day or two days
8 racking up costs if what this is all about, really -- and I may be wrong about this -- is
9 the application of the limitation period.

10 If you take the view that, if they really wanted to, the class members could ratify this
11 and they would have to apply for relief and they might or might not get it and you might
12 fight that, all those points, I understand that. But if you are really interested in keeping
13 costs to a minimum and just getting on with this stuff, is that the right way to deal with
14 all this?

15 You might fairly say that's because that's the way they are dealing with it. But I just
16 wonder whether, before I say to you, let's put a date in the diary to hear it, I just wanted
17 to put that to you: is this something that really deserves a proper contested hearing,
18 or is it something that should be sorted out some other way.

19 **MR KENNELLY:** It absolutely does require a hearing. As my learned friends said
20 themselves, they positively rely on the fact that this claim, this opt-in claim is worth
21 billions of pounds. They are seeking billions of pounds of payments on behalf of class
22 members which are, as the Tribunal will recall, legal entities within undertakings that
23 earn more than £100 million per annum. All we want to know is which of them, if any,
24 have actually opted in to --

25 **THE CHAIR:** That's really not the point I'm making, though. I absolutely accept we
26 need to work out what's happened here.

1 **MR KENNELLY:** Yes --

2 **THE CHAIR:** Well, no, hang on, just to make sure of the point I'm driving at. I'm not
3 driving at fixing this. We obviously have to fix it, whatever that means, and it may be
4 that you are right and it's possible that you can run this argument so that some of these
5 people never become class members. I can absolutely see that as a possibility, and
6 I'm not in a position to assess how significant a possibility that is. That is the question
7 I'm asking you: is this really worth it, or are we actually going to end up with
8 the Tribunal being asked to give relief against sanction, and we set this knowing
9 exactly who is in and who is out, on the basis of proper ratification and with a limitation
10 adjustment.

11 If that is where we are realistically going, and I don't know whether it is or not, it does
12 seem rather a long route to get there, to go through a big hearing at some stage about
13 all this stuff. That's the point I'm putting to you.

14 **MR KENNELLY:** Sorry, I interrupted you. I see now what the Tribunal's concern is.
15 I think the problem is that we can't get relief from sanctions until we know what they've
16 done wrongly, assuming they have.

17 **THE CHAIR:** Yes, because you say the way they approach it effectively means you
18 have no choice but to respond; that's right.

19 **MR KENNELLY:** Exactly. We can't assume against my learned friends that these
20 class members just haven't opted in by the deadline, even he may have a fantastic
21 answer to the points that I am raising.

22 **THE CHAIR:** Yes.

23 **MR KENNELLY:** Then after the hearing, when we establish that -- and it needs to be
24 gone into in some detail, so that's why a hearing is required -- then you can get into
25 relief from sanctions.

26 **THE CHAIR:** Yes, that's fair enough, I understand that.

1 **MR KENNELLY:** And that process is a very useful one because it involves a very
2 frank explanation from the Class Representatives and their legal advisers as to what
3 went wrong, and that assists the Tribunal and the Class Representative if it takes place
4 in the future conduct of the --

5 **THE CHAIR:** I understand, that's a perfectly fair answer.

6 So do you have any thoughts about when we deal with this?

7 **MR KENNELLY:** We've said as soon as possible. I don't think -- have we suggested
8 dates?

9 **THE CHAIR:** I don't remember seeing any dates. I was going to suggest a date to
10 you, but it's not --

11 **MR KENNELLY:** Yes, please.

12 **THE CHAIR:** It's not a very big range. At the moment, I think the only place we could
13 sensibly deal with this before Christmas would be the week of 15 December, and not
14 the 15th, because other panel members have commitments.

15 I'm just putting that as a suggestion. I don't think it's possible to do it any earlier
16 because of other commitments and also probably because of the time it will take you
17 to get to that point. If we can't do that week, and I'm obviously conscious that a lot of
18 people have other things going on, especially at that time of year, then I think
19 realistically we are into January, if counsel's availability is going to drive the hearing
20 date.

21 **MR KENNELLY:** Could you just give us one second?

22 **THE CHAIR:** In a sense I can perhaps leave that with you and let's see what -- I don't
23 know if Mr Cook wants to add anything on the discussion, but we will see what Mr Beal
24 says and then we can come back and deal with it. I suspect it'll be after lunch before
25 we resolve the way forward. Thank you.

26 Mr Cook, do you want to add anything?

1 **MR COOK:** Very, very briefly indeed, because obviously I adopt my learned friend's
2 submissions, this is a joint application.

3 **THE CHAIR:** Yes.

4 **MR COOK:** From our perspective, what is important is one (inaudible, no microphone)
5 deadline for the production of documents, and that is the reason why it's phrased as --

6 **THE CHAIR:** I think you need your microphone back.

7 **MR COOK:** -- (overspeaking) the Tribunal should order disclosure. As much as
8 anything, it said there should be a Tribunal order that says: produce the body of
9 documents that we are going to be fighting about by a deadline; we suggest
10 31 October. That's why it's put in terms of wanting an order from the Tribunal.
11 Because what we can't have is material trickling in on an ongoing basis leading up to
12 a hearing as they realise there are problems. There should be a deadline --

13 **THE CHAIR:** I think that's agreed, isn't it? Haven't they agreed the date?

14 **MR COOK:** That's the reason why I put it in terms of seeking an order --

15 **THE CHAIR:** Well, I can understand --

16 **MR COOK:** -- so that there is something that says: this is the deadline.

17 **THE CHAIR:** Yes.

18 **MR COOK:** Because you are querying why it was put in terms of seeking an order,
19 and that's why.

20 **THE CHAIR:** I think actually I was making a slightly different point, which is, I think
21 possibly unfairly, I'm trying to push Mr Kennelly on why, on the one hand, he says it's
22 up to them to decide what they are going to hand over, and on the other side, asking
23 for an order, when the two of those do seem to be somewhat inconsistent. He's done
24 a very good job of dealing with it and therefore I'm sure Mr Beal is going to have
25 something to say about it.

26 That is the point I was making; I had understood the position to be: you decide. Your

1 | problem, you decide what you are going to give us. And yet it wasn't that position at
2 | all that was articulated in the argument.

3 | But we have dealt with all that and you don't need to go back over it.

4 | **MR COOK:** Yes. The other thing from our perspective was the concern that it seemed
5 | to us that there was undoubtedly a suite of documents which should be disclosed,
6 | should be produced here. If nothing else, there are 95 -- I don't want to use the word
7 | "entities" -- 95 opt-ins. One would expect there to be at the very least 95 opt-in notices
8 | in one form or another. And that is what we say is the first category in 36(d)(i), is the
9 | opt-in notices themselves in whatever form they were produced.

10 | **THE CHAIR:** But you are not saying that's the only document --

11 | **MR COOK:** I'm not saying the only document.

12 | **THE CHAIR:** No.

13 | **MR COOK:** But that's a very specific category --

14 | **THE CHAIR:** As an example of what might be used.

15 | **MR COOK:** -- to get the response that says: very few non-privileged documents will
16 | be produced.

17 | What we're concerned about, and that we've tried to flush it out in correspondence
18 | and been told they are not going to engage with us anymore: at the very least we must
19 | be getting those 95. And what we were concerned about is there appeared to be
20 | a suggestion in some way that the number will be significantly lower than that.

21 | So we wanted that clarification that there is undoubtedly a block of material which
22 | cannot be withheld, can't be privileged, and should be produced.

23 | And if it is being suggested in some way that that material can be withheld, today is
24 | the time to flush it out, particularly -- and it comes from the point we are making about
25 | the hearing date. 15 December is something I will check over lunch, but in principle
26 | that was the kind of timescale we were thinking. There isn't time to have some

1 production of material and then to be told: oh, by the way, they are not giving us
2 obviously relevant categories in material, and then try and sort of fight that very quickly
3 in November in some way. The material should be coming in rapidly to make that
4 hearing date effective.

5 So if there's a point on privilege now, it should be capable of identification and
6 resolution. Nothing I say takes away from that, but if there's advice being given, of
7 course that's privileged, but there is a body of documents, 95 notices being an obvious
8 example, that cannot be privileged.

9 **THE CHAIR:** Thank you.

10 Mr Beal.

11 **Submissions by MR BEAL**

12 **MR BEAL:** We have had 50 minutes of argument going to issues that aren't to be
13 substantively determined today in respect of directions that are agreed. And that's
14 why costs in this case are difficult.

15 So, it's velociraptor playbook version 2.0. It's a classic example of costs being wasted
16 unnecessarily in the course of this CMC, dealing with things that aren't to be dealt with
17 at the moment.

18 Can I explain so that it's absolutely clear: what we have agreed to disclose is
19 effectively what is set out in our letter of 14 October. It is documents that go to the two
20 requests. My learned friend took you to paragraph 36(b) and in fact it was framed by
21 reference to a paragraph 23 which is at page 483 of the bundle.

22 The two aspects that are broadly similar -- it's dealt with in more detail in paragraph 23
23 and that's what we thought we were responding to.

24 So, firstly, the documents that were submitted to the Class Representative by which
25 opting in is said to have occurred, that's what they will get.

26 For the avoidance of any doubt, there are 94 entities because one has withdrawn; that

1 is Alexander Mann Solutions, entity number 5 on the opt-in register. What happened
2 was we found out that they had surcharged their commercial card client the entirety of
3 the overcharge, and therefore they have no claim. So, they have withdrawn.

4 So, it's 94. We have also finalised the lists of Claimants who are found to have eligible
5 claims within the undertakings in question, and that is 232 separate legal entities.

6 **THE CHAIR:** So, 94.

7 **MR BEAL:** 94, with 232 underlying Claimants behind them.

8 **THE CHAIR:** Yes.

9 **MR BEAL:** What we will provide is obviously documents that go to explain the
10 notification process by which the undertakings in question notified their intention to join
11 the opt-in class.

12 The reason why it's undertaking is because there was a cut-off threshold above and
13 below 100 million, and so everyone was working out: are you in the 100 million plus
14 class or not. And that was – undertaking on a turnover level basis. And so merchants
15 submitted the forms to the website by which they expressed, in terms, what they were
16 doing.

17 I can show you at page 440 how that was done and the form in question.

18 I'm sorry, I said page 440. It's in our response, page 444. And the undertaking -- just
19 to be clear, nobody sent a letter in. So this is all website entry forms, and the website
20 entry forms are held on a database with the data that was submitted by each of
21 the relevant people submitting the form to the website. It was all processed through
22 Angeion, who are the claims management company that we are instructing, and one
23 sees in section 9 of the notice what they had to do was:

24 "If you fall in the class definition and wish to opt in to the claim, you can visit the website
25 and fill in the online opt-in form. You will need to provide your name, personal address
26 and email address and the name of the individual authorised to opt your business into

1 the class. Alternatively, you can opt in by letter."

2 Nobody did the letter route so I'm going skip over. The letter template, however, gave
3 equivalent wording to the form; it was going to be signed by an authorised person.

4 So, it's pretty clear that when somebody submits a form, they are effectively confirming
5 that they are authorised to act -- to opt the business in to the class.

6 You then have a separate process of working out within those undertakings who have
7 more than £100 million: what are the eligible claims and what are the eligible
8 Claimants. And that is a separate process, and that's the process that has been done,
9 which is described by Mr Robinson in his witness statement, where we have been
10 liaising closely with each of those undertakings and the relevant eligible Claimants to
11 determine what their level of claim is. That's the process that has involved privileged
12 communication with the eligible class Claimants and the undertakings more generally,
13 with a view to working out what their claim is.

14 So, as of 31 October, when this list and the disclosure will be produced, we will have
15 the relevant database analysis of who opted in, on what basis, for which merchant,
16 and who the signatory for that was, which is an authorised person according to the
17 form.

18 **THE CHAIR:** Will that be a summary of the information that 19 captures, or will it
19 actually be a replica of what they put into their website?

20 **MR BEAL:** It will be the data entries --

21 **THE CHAIR:** The data entries, okay.

22 **MR BEAL:** -- that are then fed into the field, and in order to make sense of it one will
23 need a screenshot of the form; I'm sure we will produce that as well.

24 **THE CHAIR:** Yes, yes.

25 **MR BEAL:** There won't be any disclosure of any letters because there weren't any.
26 There will be disclosure of the signatory strips for each of the damage-based

1 | agreements, whereby --

2 | **THE CHAIR:** Yes, so have they all -- well, maybe not all, but --

3 | **MR BEAL:** They've all entered into --

4 | **THE CHAIR:** They have all entered.

5 | **MR BEAL:** -- the standard form DBA on the same terms because the Class
6 | Representative took the view it wasn't appropriate to negotiate different terms for
7 | different class members. And the disclosure of those DBAs has been agreed, and it
8 | was never suggested that that information was privileged. To my knowledge.

9 | So that's going to be provided. What we have also agreed to provide is any other
10 | documents we rely upon, and the reason for that is because that tracks the wording,
11 | going back to paragraph 23 of the reply, where they say in terms: we want documents
12 | that are relevant to the opt-in process. Which they will get.

13 | **THE CHAIR:** Just give me the page reference for that again?

14 | **MR BEAL:** Paragraph 23 of the Reply is page 483.

15 | I'm not going to take you through the archaeology where the request was more
16 | confined than this. This is ultimately where we ended up and I just want to cut to the
17 | chase.

18 | So, where we have ended up is we will provide both adverse documents, if there are
19 | any, and -- well, at least everything that's relevant to the documents that were
20 | submitted to the Class Representative, by which we say opting in has occurred. And
21 | they'll get that.

22 | **THE CHAIR:** Yes. You say you have offered to give them exactly what they have
23 | asked for in (d)(3).

24 | **MR BEAL:** Exactly, and then (b): any other documents we rely upon as indicating any
25 | particular legal entities opted in to the proceedings.

26 | **THE CHAIR:** Yes.

1 **MR BEAL:** There is then the inclusion of documents indicating any authority, which -- I
2 mean, to the extent that we are relying on any individual document to that effect, that
3 will be included in our disclosure.

4 If we are not relying on any individual document to that effect, they can make all the
5 submissions they have trailed before you today on December 16th.

6 Everything else, to be honest, is simply a waste of the Tribunal's time today.

7 When one looks at 487 at the terms that are in fact sought:

8 "Any other documents that the Class Representative relies upon indicating any
9 particular legal entity has opted into the proceedings."

10 The answer to that will be: yes, we will give disclosure of those documents we rely
11 upon. That's not the same as saying you need to give disclosure of all the documents,
12 we think you ought to have.

13 Now, if they don't like what we give them, then they will do one of two things: they will
14 ask for further disclosure in a properly substantiated application making good their
15 complaint. We can deal with that hopefully on the papers to avoid costs being incurred
16 unnecessarily on yet more satellite litigation. Or, they will make all the submissions
17 that they have trailed before you today with a view to saying that what we have done
18 is not enough.

19 But it has to be borne in mind that some of the evidence that we rely upon is from
20 Mr Robinson, setting out exactly what steps he has taken to liaise very closely, along
21 with the HP, with the members of staff who are involved in each of the 94 entities and
22 the 232 legal entities that they represent. And one might have thought that if you end
23 up with a situation where you have specific people being added to the Claimant class
24 register, 232 legal entities identified, with each of those legal entities saying to my
25 solicitors they want to be added to that class list, then everything else is just a pointless
26 waste of time.

1 And I haven't even got to the simple possibility that at the end of all this, they could
2 ratify the authority that was given by the person who signed on to the website form
3 *ex post facto* and that would count as perfectly legitimate authority to legitimise what
4 was done. Regardless of the limitation position.

5 So, we just think this is a colossal waste of time. It's classic satellite tactics. If they
6 want to do it, we will do it. But it needs to be borne in mind they can't then complain
7 that we incur costs of dealing with a one-day hearing in December which ultimately
8 proves utterly pointless.

9 I am sorry to use those strong terms, but when one's dealing with complicated sensible
10 litigation in this way, and we've said we recognise you need a list of individual class
11 entities and that is being done, then the only issue is really the legal one of: can the
12 undertaking that's filled in the form, authorised by the person who is avowed to say
13 they are authorised, then bring in the Claimant entities that are then properly identified
14 by reference to the eligibility criteria, which is a separate step.

15 If they want the argue that you should have done the exercise first for each individual
16 Claimant entity, that's a legal argument we could have.

17 **THE CHAIR:** It's a very technical argument, isn't it, because you're then left with the
18 question, well, what are you going to do if they are right.

19 **MR BEAL:** If they are right on everything, then we fall back to your position -- your
20 articulated, sorry, intervention with my learned friend, where it ultimately boils down to
21 an accrued limitation argument. And that's where it ends up.

22 **THE CHAIR:** Yes.

23 **MR BEAL:** Whether or not it's the right place to do this now, rather than in Trial 4,
24 who am I to say. If they want to do it now, we'll do it now, but they can't then complain
25 about budgets.

26 **THE CHAIR:** Yes, well, I mean, I have to say I'm not sure I want to do it now, because

1 I'm not entirely sure that at the end of it we are going to be much further forward. But,
2 in a way, if there is a legal point that needs to be taken, then I don't think there is any
3 way of shortcutting it if they want to proceed with it, is there, Mr Beal, they may be
4 right, they may be wrong. If they're right, there may be consequences that need to be
5 dealt with in a different way. Maybe it's better just to get it out of the way.

6 **MR BEAL:** Absolutely. If it's going to be a running sore, one simply can't expunge on
7 it, then it feeds into the Trial 3 --

8 **THE CHAIR:** I think that's the problem --

9 **MR BEAL:** That's my concern: if we don't get rid of this now, they will simply reiterate
10 all the submissions before the wider panel in the Trial 3 Umbrella Proceedings, where
11 Mr Wolff will be covering that CMC and he's not privy to this particular hearing.

12 **THE CHAIR:** That does seem to be quite unhelpful to go into CMC without at least to
13 a degree of certainty about who is in the opt-in class.

14 **MR BEAL:** Whether or not it's a sensible course of action now it's been raised it
15 seems to me that unless my learned friends pull the Application, we have to deal with
16 it.

17 **THE CHAIR:** It may be that they take a different view once they see your disclosure,
18 maybe they don't.

19 **MR BEAL:** If we book in 16 December or whatever date people can do, that at least
20 gives us a backstop.

21 **THE CHAIR:** Just in terms of availability, I know I've sprung it on you but are you in
22 a position to --?

23 **MR BEAL:** I can confirm I'm free. Hopefully my learned junior is.

24 **THE CHAIR:** Yes. Thank you, that's very helpful.

25 Mr Kennelly, we should stop for lunch at some stage but that just depends how long
26 you are going to be.

1 **MR KENNELLY:** I'm going to be less than five minutes.

2 **THE CHAIR:** Let's get it done the, shall we?

3 **MR KENNELLY:** I can be short because my learned friend was short. It really isn't
4 helpful for Mr Beal to suggest that we are behaving like some pre-CPR litigant. We
5 have been asking for disclosure on this issue for six months. Mr Beal said that it was
6 agreed that we would get the DBAs. No such agreement was communicated to us.
7 This is why the costs are being wracked up because Mr Beal (inaudible) the Tribunal
8 to fix mistakes for failures to engage with things that were permitted or omitted months
9 previously. We will reflect over the short adjournment on the changes which Mr Beal
10 has made to the express written provision, and they may prompt us 20 come back to
11 you after lunch with -- because we have to consider what he said today was
12 an advance on what they said in their skeleton argument and in the correspondence.

13 **THE CHAIR:** The essence of what he said, and put aside all the arguments about
14 whose fault it is because actually it does seem to be a bit of a holy mess, whoever's
15 fault that is I don't know, but it's not great, is it, and I hope everybody in the room
16 recognises it's not great. But however we've got here he's saying, I think -- you asked
17 and -- he's referring back to 23(a) and (b) and he said: that's what I've offered to give
18 you and what's the problem?

19 **MR KENNELLY:** He said that if they have any documents indicating any authority
20 that natural persons may have had to execute the opt-in documentation: we'll have
21 that too.

22 **MR BEAL:** I said the ones we rely upon.

23 **MR KENNELLY:** Sorry, yes, forgive me.

24 **THE CHAIR:** I think, unless I'm wrong, and you have characterised 23(b) as being
25 entirely documents -- all of 23(b), it falls under the heading of documents that they
26 wish to rely on. So it's not a disclosure request, it's an invitation for them to put forward.

1 So as long as you get what you want under 23(a), which is a disclosure request, they
2 have to hand over everything they have submitted at the time that's not privileged if
3 there is any -- I don't get the impression there was any privilege at that stage, which
4 looks like it's actually the website entries, possibly other things but possibly limited to
5 the website entries. I mean in a way he's just saying: I don't know what all the fuss is
6 because I'm giving you what you want. It may be the correspondence has obscured
7 that clarity. I can understand that might be the case. But I just wanted to put this thing
8 to bed. Are we satisfied that -- I think it probably does need to be recorded in an order,
9 on the basis as Mr Cook says (inaudible) actually clear what the timing is. But in terms
10 of the wording of it, is there any room for dispute about the wording that is in
11 the -- I can't remember what the letter, 14 October letter --

12 **MR KENNELLY:** Can I take instructions, please?

13 **THE CHAIR:** Of course. **(Pause)**

14 **MR KENNELLY:** We agree. There is no dispute remaining between us on this issue.
15 It's recorded in an order, and the deadline is as indicated and we have in the transcript
16 what my learned friend said about what they will give us. That will do, if that's helpful.

17 **THE CHAIR:** Yes, that's helpful. And you are going to get the DBAs as well which is
18 presumably -- that's a helpful and interesting bit of information as well.

19 Of course it's entirely up to you, Mr Kennelly, I don't know enough about what's going
20 on here to understand whether you -- the discussion we had before about whether you
21 think this is a sensible thing to be doing or not is a matter entirely for you. But of
22 course, there is the opportunity once you get the disclosure to make decisions about
23 how you want to deal with it.

24 And (inaudible words) and my understanding, (inaudible) as far as I do, if we have to
25 have this hearing we have to have it, and I understand there may be good reasons for
26 that. I'm not in any way contesting that, I just want to make it clear I don't want to have

1 | it if we don't need to have it.

2 | **MR KENNELLY:** We are not in the business of having hearings that we don't honestly
3 | believe is strictly necessary to progress the litigation, still less in December. So we
4 | hear what you say, sir, but you must trust us --

5 | **THE CHAIR:** I'm sure that's right --

6 | **MR KENNELLY:** (Overspeaking) Mr Beal suggesting, we're not running a war of
7 | attrition, we just want to know who is actually suing us in the opt-in class.

8 | **THE CHAIR:** It's not an attractive week to be having a hearing of this sort, is it, so I'm
9 | sure that will focus the mind.

10 | I don't imagine we are going to be very long this afternoon with value of commerce.
11 | Do you have any sense of how long it's going to take, Mr Cook? Presumably not the
12 | whole afternoon.

13 | **MR COOK:** I certainly expect to be fast. I'm hoping not to be here at (inaudible).

14 | **THE CHAIR:** Oh, good, okay. In that case, why don't we take a full hour for the short
15 | adjournment just to make sure the shorthand writer gets a proper break, and we will
16 | start again at 2.10.

17 | **(1.10 pm)**

18 | **(The short adjournment)**

19 | **(2.10 pm)**

20 | **THE CHAIR:** Yes, Mr Cook. Before you jump into your application, just coming back
21 | on the date for the opt-in hearing, shall we put that in the diary -- does anybody have
22 | any objection if we put it in the diary for the 16th and the 17th in reserve? That would
23 | be the obvious time to do it, I think.

24 | **MR COOK:** (Inaudible).

25 | **THE CHAIR:** Yes, good. Let's put that in, obviously all subject to the conversation
26 | we had before lunch. But we'll consider that a fixture, then.

1 Yes, thank you.

2 **Submissions by MR COOK**

3 **MR COOK:** Sir, I invite you to follow the approach taken very successfully in the
4 *Merricks* proceedings of addressing at an early stage those issues which had the
5 potential to have a very substantial impact on the value of the claim, and which can be
6 resolved relatively quickly and cheaply. In the *Merricks* proceedings, there were
7 a number of such issues, such as limitation, which cut off the first five years of
8 a 15-year claim. Another one of the ones was value of commerce where Mr Merricks
9 had used inflated figures for transaction values and MIF rates. Those, among other
10 issues, were dealt with as preliminary issues and had a very substantial impact on the
11 claim; the correct VoC figures alone cut off billions from their claim. In *Merricks*, once
12 the realistic maximum value of the claim was apparent, following the determination of
13 those preliminary issues, the parties were ultimately rapidly able to negotiate
14 a settlement without having to litigate every single issue to its conclusion. Looking at
15 the present proceedings, we say the obvious candidate for early determination is once
16 again value of commerce, particularly in relation to the opt-out proceedings. When
17 I refer to value of commerce, I use that term compendiously to encompass both the
18 value of commercial card transactions and the applicable commercial MIF rates which
19 are then multiplied together to calculate the headline damages claim.

20 An accurate VoC figure will tell the Tribunal and the parties the maximum potential
21 value of the claim. That is obviously then subject to the other defences we raise, but
22 it immediately tells us the upper limit that can possibly be claimed in the proceedings.
23 We say that value of commerce is the prime candidate for early determination for three
24 reasons. Firstly, it is obviously central to the calculation of damages, it is the starting
25 point for any calculation. In turn, it is also central to the Tribunal's analysis of the
26 potential benefits of this claim and any costs benefits analysis you might embark on in

1 the future. First point, a key piece of information.

2 Second, the only figures which had ever been advanced by the Class Representatives
3 for the value of a commercial card claim are massively inflated and heavily disputed,
4 and there are two particular problems with the figures. The first is the simpler of
5 the two, which is the use of inflated MIFs. This point is set out particularly effectively,
6 stealing my learned friend's thunder, in Visa's letter in support of the application. If we
7 could turn that up, sir, it's page 494, or it's the pdf page 554, depending on which one
8 you are able to access. 494 is the bundle reference.

9 **THE CHAIR:** I'm in the pdf.

10 **MR COOK:** Pdf will be 554, sir.

11 **THE CHAIR:** I have something quite different, I think.

12 **UNKNOWN SPEAKER:** The control G function actually works with the paginated
13 number. The paper number is the same as the pdf number.

14 **MR COOK:** Try 494, perhaps, sir. It should be a letter dated 23 September.

15 **THE CHAIR:** I have something from CEG. Sorry, do you have a tab number?

16 **MR COOK:** Which number are you looking at in the bundle reference (inaudible) the
17 red numbers. I can read out what it says, we don't necessarily need to see it.

18 **THE CHAIR:** 494, you say?

19 **MR COOK:** 494, sir.

20 **THE CHAIR:** I have that. It's 494 in this bundle as well. Maybe I'm mixing up the
21 bundles, but I have it.

22 **MR COOK:** It's paragraph 3 in particular, (inaudible) in relation to that. This is Visa
23 supporting the application which Mastercard made in issue. Paragraph 3:

24 "Mastercard's application describes the methodology proposed by the CR's expert,
25 Nils von Hinten-Reed, for assessing VoC so Visa does not repeat it. We do note the
26 only information Visa or the Tribunal has on the CR's on VoC is the high level estimate

1 prepared by Mr von Hinten-Reed at the certification stage provided a figure of just over
2 1 billion, up to 1.34 billion."

3 Gives the reference in relation to that, then explains Mr von Hinten-Reed's
4 methodology was heavily criticised by the Defendants:

5 "But it is notable that even only considering Mr von Hinten-Reed's starting point of the
6 assumed average MIF for Visa commercial card transactions, Mr von Hinten-Reed's
7 estimate was very significantly inflated, used a figure of 1.5 per cent compared to an
8 estimated 0.4 to 0.5 per cent based on Visa's data which vastly exaggerated Mr von
9 Hinten-Reed's estimate of VAT."

10 So essentially, he used a figure which was three times higher than the data which
11 Visa's own internal data showing MIF rates showed to be correct.

12 **THE CHAIR:** That's the average rate for the Visa commercial card transactions.
13 I can't remember all of this, where did he get that from, why did he do that? Do we
14 know?

15 **MR COOK:** One of the things which drives the numbers often tends to be the
16 proportion of debit cards versus credit cards. Visa has a much stronger presence in
17 the debit card market, and as a result using a kind of figure which is an upper level for
18 commercial card MIFs Visa then has a lot more debit cards which end up with a much
19 lower average, but the end results used a figure which Visa says on their data was
20 three times higher than it should be. Because it's a pure multiplication, what it means
21 then, being the entry -- effectively his number, the range he provided, the 1 billion to
22 1.34 billion, was essentially three times higher than it should have been based on
23 Visa's data. So even that point alone, the MIF rates means the value of the claim is
24 overstated by hundreds of millions of pounds.

25 The point's probably less substantial, but there's also one in relation to Mastercard
26 about the impact of the correct MIF rate. But immediately you can see, sir, these are

1 making really big differences to the value of the claim. Then there's the second side
2 of this, which is the calculation of commercial card transactions for the opt-out class,
3 and that's the second half of the equation. It's transactions multiplied by average MIF
4 rates; and in relation to this second bit of the calculation, the way it was done because
5 we simply can't, as we would with an individual merchant -- with an individual
6 merchant, it's relatively easy, certainly one of the big merchants that has a direct
7 relationship with its acquirer: they ask their acquirer for data, the acquirer provides the
8 information, and it's relatively easy to get numbers which are likely to be at the very
9 least in the right ballpark.

10 When we come to the opt-out class where we are talking about an averages damages
11 calculation, what the Class Representative proposed was to calculate essentially the
12 whole economy value of commercial card transactions, then slice off all of the bits that
13 weren't taking place at the opt-in class. What you were left with, they say, is the value
14 which is going to be left at the opt-out class. That requires exclusion -- this is largely
15 common ground, there may be points of detail between us, but certainly the broad
16 categories are common ground. You need to get rid of the transactions of large
17 merchants -- so that's the merchants in undertakings which are more than 100 million.
18 You need to get rid of merchants which use payment facilitators -- there are a lot of
19 them but to be fair, there are a lot of the quite small ones of -- get rid of overseas
20 merchants in those whole economy numbers, and merchants which have been
21 dissolved, so they've dissolved before the claim's been brought or before damages
22 are being assessed.

23 The headline figures put forward by the Class Representative here were substantially
24 inflated as well. First, there was no attempt made to make a number of the sort of the
25 smaller reductions -- and I accept they are smaller ones, but they all bring the number
26 down -- so the only attempt that was made was to work out the exclusion of the large

1 merchants. But in relation to that, even that calculation put forward originally was
2 based on a methodology which even Mr von Hinten-Reed, the Class Representative
3 expert, ultimately accepted resulted in a material overestimate of the accuracy of
4 damages. It was common ground the numbers were too high, what we didn't have
5 was an easy way of calculating what the proper numbers would be.

6 But what's clear on the evidence is the overstatement is likely to be very large. And
7 what we were able to do, this was the sort of run-up to the hearing where these
8 numbers came in very late, was an illustrative debt calculation was carried out on
9 a sample of data by Mastercard's expert, which indicated that even if we just look at
10 the large merchant issue, the Class Representatives indicative figures might be
11 overstated by a factor of 5 or 6. It's just what is a proportion of what you get rid of
12 what's left is for the smaller matter.

13 **THE CHAIR:** It's Dr Niells' (inaudible), he did a calculation (**overspeaking**).

14 **MR COOK:** Yes. To be clear, I accept that.

15 **THE CHAIR:** He didn't put it forward as being anything other than --

16 **MR COOK:** (Overspeaking) but it said we've done -- what will happen essentially was
17 Mr von Hinten-Reed accepted, after we challenged it, that his approach wasn't the
18 right one, it would lead to a material overstatement. We tried to provide some
19 indication of the level of that, but the important fact for the moment is that illustrative
20 example said it could be overstated by a factor of 5 or 6 times, so we are talking about
21 massive reductions in the figures.

22 We say in relation to this that all of this shows that the key determinants of the potential
23 value of this claim is, we know the numbers we have are much, much too big, and the
24 real numbers could be a fraction, potentially a very small fraction, because obviously
25 the two number go together; the MIF rates being too high, and then the value of the
26 transactions being too high, you really do get very, very large potentially reductions

1 indeed. So, we say it's an absolutely essential point where there is a real issue to be
2 decided, which really makes a difference to the value of these claims of the
3 order -- multiplying the two together, you end up with a claim which is 10 per cent,
4 perhaps, of what's been talked about in terms of the numbers.

5 So it really does make a huge potential difference. We don't know how much until we
6 do the exercise, but it's a really important point. You're obviously concerned with why
7 are we doing some of these things, the reason is this is something that has a very big
8 potential impact.

9 The third reason we say for addressing VoC at an early stage is it's a relatively narrow
10 issue which should be capable of being determined quite quickly, easily and
11 consequently relatively cheaply. This is not an issue where we are going to require
12 factual evidence from witnesses. It's going to be a matter of expert evidence analysing
13 the available data -- and again it's not going to be minutiae of data analysis, it's going
14 to be large-scale datasets about what proportion of transactions took place in
15 particular ways, and how best essentially to analyse those. So these are not going to
16 be looking at thousands of lines of code on contentious issues.

17 What we've suggested, it would be sensible to make provision of a hearing of up to
18 a week, but we see that very much as a worst-case scenario. On an issue like this
19 where we are not dealing with hypotheticals, what would happen in a counterfactual,
20 uncertainties. We're just simply dealing with a frankly relatively simple question of
21 what transactions took place at a class of merchants and what MIF rates, which would
22 come from the schemes relatively easily, and what MIF rates those transactions took
23 place.

24 With respect, we say the experience suggests when you're looking at that relatively
25 narrow factual question, once the experts have analysed the data, it may be that there
26 is little or nothing between them, and that indeed is what happened in *Merricks*. The

1 VoC figures were ultimately agreed between the experts, subject to one narrow point
2 of essentially which of two agreed sets of figures was the right ones in terms of how
3 the claim was brought, and that was a point which was dealt with in submissions; it
4 took ultimately less than an hour in total to deal with that point because the numbers
5 were actually agreed following the expert work that was done.

6 So we do say in relation to this, obviously one can't assume the best, one has to make
7 provision potentially for it to take longer, which is why we're suggesting up to a week.
8 But realistically, a lot of this should be narrowed down and narrowed away by the time
9 we get to any form of hearing. We say all of this means the VoC can be dealt with
10 relatively cheaply relatively quickly, long before any exemption trial.

11 Obviously Trial 3 is -- we then have the CMC in January, that is going to be a complex
12 process. There is absolutely no prospect of there being a trial on that in 2026
13 respectfully, we would say, and we say there is absolutely an opportunity to make
14 progress in everybody knowing what this claim is really about in financial terms. And
15 that is in everyone's interests, in particular in the interests of the class. A lot of money
16 is wasted, it's not wasted dealing with litigation without people knowing really
17 potentially what it's worth. We say it's obviously desirable to determine the VoC at
18 an early stage.

19 My learned friend seeks to characterise that as me trying to embark on satellite
20 litigation. Sir, it's nothing of the kind. We are determining an issue which everyone
21 agrees has to be determined in any event before we can possibly reach a resolution
22 of this case; and in doing so at a point which will establish the maximum potential value
23 of the claim.

24 We can see, with respect, the problems which arise from the lack of an accurate VoC
25 figure -- and cynically might say explains the Class Representatives' desire to delay
26 determining that figure for as long as possible -- from my learned friend's submissions

1 today, which echo paragraph 14 of his skeleton argument. That paragraph and his
2 submission sought to justify Class Representatives' costs on the basis that this is high
3 value litigation with a combined damages ballpark estimate of around £3 billion, which
4 is a figure he repeated this morning.

5 I'm a little at loss for the origin of the 3 billion figure itself, which is not consistent with
6 any valuation of the claim provided in the CPO Application, but the numbers put
7 forward in the CPO Application were in any event sort of combined opt-in and opt-out.
8 What we now know of course is that whatever might have been hoped, there has been
9 little interest in the opt-in claim from large merchants. Ignoring for the moment the
10 points in relation to the Opt-In Application about exactly who's in or who's out, they've
11 ended up with 94 opt-ins and we're told 220 limited companies. That's a tiny fraction
12 of the large businesses in the United Kingdom.

13 So the opt-out claim is where the value is really associated with this. But what we
14 know is that there's every reason to think the figures for the opt-out claim are
15 potentially a tiny fraction of the headline numbers originally advanced. We say it's
16 clearly desirable when we can do it relatively quickly and cheaply to actually get some
17 accurate numbers before huge sums of money are spent on other far more complex
18 issues, like exemption, which the experience of Trial 1 and Trial 2 are going to be
19 complex, evidence-heavy, expert evidence-heavy pieces of litigation with very
20 substantial costs associated with them. It's much better that everyone knows what we
21 are really fighting about in terms of value before all of those costs and the Tribunal's
22 time are spent in relation to these proceedings.

23 **THE CHAIR:** As things stand, it wouldn't make very much difference, would it, if on
24 your premise the opt-out claims are much smaller than Mr Beal says it was because
25 we're still going to do exemption anyway, aren't we, in the merchant Claimants'
26 proceedings, the Umbrella Proceedings. So the value of -- it might make a difference

1 as to the extent to which it was sensible for the CICC Class Representative to
2 participate how much it spent on it, but it's going to happen anyway, isn't it?

3 **MR COOK:** Sir, with respect, I don't think that's an assumption one can or should
4 make --

5 **THE CHAIR:** As things stand at the moment.

6 **MR COOK:** Well, as things stand at the moment, there are extant merchant umbrella
7 claims. If you remember the position in relation to Mastercard, the number of extant
8 claims against Mastercard by the Merchant Umbrella Claimants is actually very small
9 indeed in relation to Visa. We simply can't know, but given the proportion who have
10 settled to date, a very large proportion of all of the claims against both Defendants
11 have settled.

12 **THE CHAIR:** So your submission is that there is a prospect of all the merchant
13 Claimants settling, in which case this is the only game in town for exemption. Is that
14 the submission?

15 **MR COOK:** It's part of what we're saying, in terms of saying -- and that was in part
16 the reason why it was said the CICC Claimants took the lead in relation to Trial 2B and
17 they end up doing so in relation to Trial 3. But in quantum terms, they are very much
18 the biggest game left about town.

19 **THE CHAIR:** That's a slightly different point, isn't it? I suppose the point I'm making
20 is it's not clear to me, unless you are -- I don't know whether you are submitting this or
21 just saying it's a possibility, but there's at least the possibility of all the merchant
22 Claimants going away comes to fruition, we are still going to have an exemption
23 hearing in the Umbrella Proceedings, so really the size of the CICC opt-out claims isn't
24 going to make an awful lot of difference to that, is it?

25 **MR COOK:** With respect, sir, if you are left with merchant umbrella claims which are
26 not worth a very large amount of money, and certainly the claims against Mastercard

1 aren't worth very much at all, the question is: are we actually going to go through the
2 process of having a very expensive lengthy trial with not that much money associated
3 with it? Obviously, you can't make any promises about exactly what the outcome of
4 that process will be, but common sense might suggest it will be that circumstances
5 sensible to reach a resolution on everyone's part --

6 **THE CHAIR:** But that's the point, isn't it? That's exactly where we are, which is you
7 haven't done that, and where we are having a CMC in January to talk about Trial 3.
8 I think we've covered the ground ...

9 **MR COOK:** What I'm saying is clearly if a point can be reached where sensible
10 resolutions of the claims are available, that would be a sensible thing. My approach,
11 I would invite you to adopt, sir, allows that possibility. If we simply then have sensible
12 VoC numbers, what it means essentially is it is not possible to settle CICC claims
13 without resolving these kind of figures and knowing what the real numbers are.

14 **THE CHAIR:** Yes, I certainly understand the submission. But as I understand it, in
15 terms of at least the parties working out what that number might be, your clients are in
16 the best position in the room, aren't they? You have yours and Mr Kennelly's, you
17 have all the information at the moment and the Claimants don't. So in terms of actually
18 working out what you think the right number would be, you're best placed to do that
19 for settlement purposes at the moment, aren't you?

20 **MR COOK:** With respect, sir, I have two points to make in relation to that. On the MIF
21 rate, yes, we have data. In terms of the volume of transactions which took place at
22 different size merchants, that's not something anyone has a readily accessible data in
23 relation to. Do you remember we had the --

24 **THE CHAIR:** Yes, I remember the argument --

25 **MR COOK:** -- whole dispute in relation to merchant identification numbers and how
26 those are allocated and points like that. But in any event, even if we can privately

1 come to our own view on what we think the numbers are, of course until the Claimants
2 have done the same exercise themselves, they are not going to say, "We think your
3 claim is only worth 10 per cent of the numbers". That's very interesting, but they'd like
4 to see the colour of the data and establish that for themselves, which is a reason why
5 we say it's desirable to actually get a resolution on something which is a quite narrow
6 issue so everyone understands what this litigation is worth in value terms, and what's
7 worth fighting about and what's not.

8 So we do say in relation to that, sir, what you should be doing is opening the door to
9 there being a central resolution to these proceedings. My learned friend is saying: we
10 will only find out if this litigation is worth the candle once we've gone through all the
11 really expensive stuff. With respect, we say that's not a sensible approach to
12 management of these proceedings.

13 In terms of the other points made against me, it's said there should be a resolution of
14 the Umbrella Proceedings first, essentially all the CICC-specific issues should be left
15 to the end, and we say no. There's absolutely no reason why progress cannot be
16 made on something that's going to give everyone a lot of clarity in all sorts of respects
17 about what this claim is worth. It's said against me as well that there's no suggestion
18 that we need to address VoC in relation to all the umbrella Claimants which remain.
19 But of course for individual merchants, as I've said, the same problem doesn't arise.
20 It's the aggregate damages and particularly the methodology of starting with a whole
21 of the cake and then cutting it down to what's left which causes the problem here. So
22 we don't need there to be mini-trials in relation to individual Claimants because
23 numbers can be produced in relation to them by the individual Claimant and
24 Mastercard or Visa, and resolution has been possible with a lot of them without the
25 need for trials. That is because it's an issue of a fundamentally different nature and
26 a fundamentally different level of complexity which requires actually a determination,

1 or at least the expert process to be gone through. As I've said, we are hopeful once
2 you get through the process, the issues will be a lot narrower between the parties. To
3 the extent they are not, then the resolution of those issues by the Tribunal. But it's
4 important to recognise there's an issue of a different complexity to quantification of
5 individual claims in this context.

6 It's also suggested against me that essentially what we are doing is we may be
7 incurring costs which are wasted if Mastercard or Visa win on exemption. With
8 respect, we say the problem in relation to that is it's looking at it the wrong way round.
9 It's essentially working on an assumption that we only know what the value of this
10 claim is once we've done the big expensive thing, i.e., the exemption trial. With
11 respect, we say it's much better to know what we are fighting about at an early stage
12 rather than sort of adopting a route which doesn't give anybody an offramp until we've
13 done the big expensive Trial 3.

14 It's also said this won't accelerate the final determination of proceedings. The problem
15 with that again, that submission assumes that the only way we get a resolution of these
16 claims is to work our way through to the final calculation. But the reality is, as we
17 know, there have been a lot of merchant claims in the past and not one of them has
18 reached the stage of final judgment and quantification. Sainsbury's obviously did
19 initially but then that was overturned on appeal. But since then, there have been about
20 many, many, many settlements between the parties.

21 So knowing the maximum potential value of the claim is a prerequisite to any
22 resolution and it's better to open that door now in the short term than saying, "We can't
23 possibly resolve this for two years and once we have done exemption".

24 It's also suggested this is inefficient, it's going to distract from Trial 3. With respect,
25 we simply disagree. There's no reason why parties cannot get on, make good
26 progress on this, and resolve it long before we get anywhere near Trial 3, not least in

1 | circumstances where it's being suggested that the Claimants might have different
2 | experts for VoC and for Trial 3 in any event. But there's a process we can start to get
3 | largely underway before we really get into the complexities of the Trial 3 process.

4 | There's no reason at all why this can't be managed realistically without a great deal
5 | less difficulty than the juggling that took place in relation to trials 1 and 2. The VoC is
6 | a completely different kettle of fish, it's a much smaller issue than we were dealing with
7 | in that context. So there's absolutely no reason at all why this can't be case managed
8 | in a way that will not hinder Trial 3 or delay it in any way at all.

9 | We say looking at all of this, it's sensible to deal with VoC at an early stage, have that
10 | clarity. When my learned friend says costs are proportionate in relation to the claim,
11 | we'll know whether that's accurate or not. When the parties think about how these
12 | proceedings might resolve, we will be in a position to do so, sir, and that is essentially
13 | what the Tribunal adopted as an approach in *Merricks*. It was very successful and
14 | with respect, we invite you to adopt the same approach here, sir.

15 | **THE CHAIR:** If you have an issue like exemption sitting up there, which is an all or
16 | nothing issue --

17 | **MR COOK:** With respect, I'm afraid it's not an all or nothing issue. It's absolutely not
18 | because what you have is the potential for the answer to be somewhere between
19 | actual MIFs and real MIFs.

20 | **THE CHAIR:** That's fair and I don't want --

21 | **MR COOK:** That's how it works. You may end up with a situation where -- give the
22 | Sainsbury's example where it wasn't done on exemption, but it was on a slightly
23 | different basis. The Tribunal turned round and said the counterfactual MIFs are 0.5
24 | for credit cards, your actual MIFs were 0.9 per cent, damages the difference -- and
25 | with exemption at least we'll try and justify our actual MIF rate.

26 | **THE CHAIR:** Yes, I understand. Sorry, I didn't express myself very well. It has the

1 potential to be all or nothing, so you absolutely are in no doubt if you were -- I don't
2 want to get into anything other than a purely hypothetical level for the purposes of your
3 argument. But if you're sitting there thinking about a settlement discussion with the
4 other side of the room, surely one of the things you are thinking about is we have a
5 possibility of getting out of this with nothing, no liability. If we were to justify the
6 (inaudible) entirety, of course as you say it might be anything from there down to no
7 justification at all.

8 So you have a big moving piece there in terms of value, and equally you have a big
9 moving piece in terms of value of commerce in terms of value. I just wondered how
10 much difference it really makes to your ability to settle it, to deal with one of those
11 before the other. Does it really make any difference? I appreciate you are saying that
12 if you can resolve a number on this side, the value of commerce might be quite low,
13 perhaps you might take a much more pragmatic view in relation to fighting exemption.
14 But course that depends on whether you have to fight exemption anyway, in which
15 case you'd probably think, "Why don't I find out the answer and then I can be more
16 precise about it". Do you see what I'm saying? I'm just wondering from a settlement
17 point of view, it really makes that much difference, the order these things are done in.

18 **MR COOK:** The reason I'm saying there is a logical reason to do it the way I'm
19 proposing comes down to the simplicity of the issues -- or the complexity of the issues,
20 another way round. If you have two issues, yes, both of them play a role in the final
21 number, but one can be dealt with quite quickly and relatively cost-free, VoC; versus
22 exemption which is expensive, it's going to take a long time and it's going to be very
23 costly, it's better to resolve the one uncertainty sooner rather than later on the basis
24 that what's left may not be worth the candle in terms of fighting about it, or at least the
25 proportionality of fighting about it may be a different factor.

26 That's the reason why we are saying it's better to look at VoC being dealt with in

1 relation to exemption because why would you do the very expensive thing first when
2 you can do the relatively cheap thing first?

3 **THE CHAIR:** Yes, thank you.

4 Mr Kennelly, are you going to say anything about this?

5 **MR KENNELLY:** Nothing.

6 **THE CHAIR:** Nothing, yes.

7 **MR KENNELLY:** (Inaudible words)

8 **THE CHAIR:** Okay, thank you very much.

9 Mr Beal.

10 **Submissions by MR BEAL**

11 **MR BEAL:** This is very odd for me because I always thought exemption was the thing
12 the schemes were very keen to say gave them a complete answer to these claims.

13 They are so good in the scheme's view that it was trotted out as a reason at Trial 1
14 why there shouldn't be any finding of liability, full stop. It was the wrong stage,
15 admittedly, it was the Trial 1 stage, and as this Tribunal pointed out, that's a matter
16 for 101(3), but clearly the submissions were so good, they had to be made twice.

17 So it's very odd that a scheme which is saying we have a cast iron case on exemption
18 doesn't want to grasp the nettle of exemption immediately. Why go through
19 a two-week hearing with expert evidence, and indeed factual evidence for reasons I'll
20 need to come on to, when in circumstances you'll be home and hosed with exemption
21 if everything goes in your favour? It's very curious.

22 More importantly, preliminary issues are often a longcut rather than a shortcut. I'm not
23 going to deal with the substantive issues which have been ventilated; in a sense the
24 reasons why it's said our claim is massively overstated. That was addressed at
25 certification stage, it passed certification stage, and now is not the time, save to say
26 that we respectfully disagree with my learned friend's analysis.

1 The question for this Tribunal: is it fair and just to hive this off as a preliminary issue at
2 this stage when we have Trial 3 waiting in the wings to deal with exemption and
3 a number of other issues as well?

4 The answer to that can be seen, if I may invite the Tribunal to look at the Upper
5 Tribunal decision in a case called Wrottesley. It's a VAT case but it sets out the criteria
6 which should be applied generally by courts when deciding whether to hive off an issue
7 for a preliminary determination. If you could turn to page 12.1 of the bundle of
8 authorities, which should be the same number that one enters for the control G task
9 of finding it.

10 **THE CHAIR:** Has this been updated, this bundle?

11 **MR BEAL:** It has.

12 **THE CHAIR:** In that case, I don't have it, I'm afraid. I can probably find it.

13 **MR BEAL:** I have a hard copy, I will pass that up.

14 **THE CHAIR:** That would be helpful.

15 **MR BEAL:** I'm sorry about that. **(Handed)**

16 **THE CHAIR:** If you don't have it handy -- you have, thank you.

17 **MR BEAL:** I'm hoping the first of the three authorities on there is Wrottesley, the
18 second should be the Allianz case, and the third should be Kent v Apple, which you
19 will be very familiar with. Kent v Apple was actually looking at split liability and
20 quantum, and this Tribunal rejected the suggestion that you should split those and
21 deal with dominance and market definition separately. I'm not proposing to necessarily
22 go through that; similar principles were applied, as I am about to show the Tribunal,
23 as have been applied here. Picking it up in Wrottesley at paragraph 1, the relevant
24 preliminary issue which the Appellant in this case identified was whether or not his
25 domicile of origin for tax purposes should be dealt with as a preliminary issue in
26 advance of the main hearing.

1 One notes then at paragraph 20, the Upper Tribunal has similar powers to this Tribunal
2 for case management, and it's obviously open to this Tribunal to direct that something
3 be dealt with as a preliminary issue. We then see at paragraph 15 a range of cases
4 cited which set out the general parameters for selecting a preliminary issue. Then
5 would you be kind enough to read paragraphs 17 through to 22; in particular 21 and
6 22 set out ten criteria which Mr Justice Neuberger, as he then was, adapted in the
7 Steel case. **(Pause)**

8 At paragraph 25, the Upper Tribunal said:

9 "We do not think there is any conflict between these cases and we agree with HMRC
10 that they are of general application. It is also important to bear in mind that in case
11 management decisions, the overriding test must always be what is fair and just in the
12 circumstances of the particular case."

13 So that's the overarching test to be applied. If one then looks at paragraph 28,
14 the Tribunal set out the key principles to be taken away in a series of eight
15 propositions, rather than Mr Justice Neuberger's ten. Please would you cast an eye
16 over paragraph 28. **(Pause)**

17 **THE CHAIR:** Yes.

18 **MR BEAL:** Those similar principles have been applied by this Tribunal in the Allianz
19 case 2022 CAT 44. Could we pick it up at paragraph 43, which is internal page 15 of
20 the report -- I don't know whether it's been numbered 12.36 on the bottom right-hand
21 side -- one sees there a reference to the Wentworth case, a decision of
22 Mr Justice Hildyard, and we see the ten Steel criteria set out. At paragraph 33 of the
23 extract from Mr Justice Hildyard's judgment, he notes:

24 "These were referred to as the ten commandments in the course of argument. That
25 is not in fact to say they are written in stone, but they provide useful criteria. Caution
26 should not be such as to oust the use and utility of preliminary issues where on the

1 best judgment can be made at the time, their direction appears appropriate, especially
2 as it seems to me where there are limitations or other time-bars potentially in issue.
3 The purpose of a time-bar can only really be cured by early determination of its
4 application."

5 This case was being cited by me, as it happens, as counsel for the Defendants to push
6 for a limitation preliminary issue to be determined ahead of the main trial, and that was
7 being cited in support. At paragraph 44, it was recognised that:

8 "The ordering of a preliminary issue is bound to include advantages and
9 disadvantages or pros and cons, some of which predictable and some of which are
10 not. The task is to weigh up the possible pros and cons and decide where the balance
11 lies."

12 That was the overall legal framework. As it happens, the CAT in this case,
13 Mr Justice Jacobs, declined to order a preliminary issue on limitation grounds because
14 he thought it would be what had been described in the case law as something of a
15 treacherous shortcut rather than actually a useful way of determining a key part of the
16 case. That was a case where limitation would have substantially whittled down the
17 value of the commerce and knocked out some claims in their entirety.

18 So with that approach in mind, one needs to consider: have those criteria been met in
19 the light of my learned friend's submissions? What he relied upon by way of authority
20 in support was the approach adopted in *Merricks*. Could I please take you to that, that
21 should be in the bundle of authorities you have.

22 **THE CHAIR:** Yes.

23 **MR BEAL:** It's either at page 17 --

24 **THE CHAIR:** I have it, thank you.

25 **MR BEAL:** I'm hoping that numbering works. What we see there three/four lines
26 down:

1 "Accordingly, a trial of certain preliminary issues concerning limitation and the
2 appropriate counterfactual had resulted in a judgment of the Tribunal. The question
3 whether the limitation period could begin to run from the cessation of the infringement
4 was then dealt with in a separate set of preliminary issue hearings which led to the
5 Volvo Umbrella Interchange litigation limitation decision for the Court of Appeal."

6 Then:

7 "The present judgment follows the trial of two issues, whether the domestic IFs and
8 MIFs charged in the UK were as a matter of fact caused by the EA MIFs ..."

9 That's the causation point. Then second:

10 "The value of commerce to which the UK IFs and MIFs applied."

11 So there were two separate preliminary issues which in fact were being addressed in
12 this case.

13 If we could then please go all the way forward to what I hope is page 83,
14 paragraph 173. One sees there at 173 and 174 a definition of what was meant by the
15 value of commerce -- obviously very familiar to this Tribunal what the concept is. Then
16 at 174:

17 "Although there were previously disputes as to the correct figures [and this was the
18 subject of separate reports from the two experts], as noted above, their efforts have
19 fortunately resolved those differences and an agreed table of VoC for each year has
20 been produced."

21 One then sees what was left in issue at 176 was the value of on-us transactions, and
22 there was a debate about the significance and volume of on-us transactions. But
23 nonetheless, at 177 the Tribunal found that on balance, they were satisfied an internal
24 fee had been applied to on-us transactions in any event such that it made no difference
25 whether they were to be excluded or not. The short answer was they were not to be
26 excluded.

1 So in other words, the experts, when they had got together, had reached an agreed
2 calculation of what the VoC should be. We don't have it available, but if one looks at
3 the transcripts for the hearing back in 2022 before the CAT, in fact it was the Class
4 Representative, Mr Merricks, who had applied for the VoC to be determined at the
5 same time as the causation issue; and it was Mastercard who simply wanted the
6 causation issue to be tried. Mastercard didn't push for the volume of commerce to be
7 included as a preliminary issue. The response from the Class Representative was:
8 we want to EEA MIF causation issue to be dealt with at the same time as volume of
9 commerce, because they then wanted to join the umbrella pass-on trial. That can be
10 vouchsafed if necessary by reference to the transcript to be provided. In short,
11 Mastercard was not at that stage pushing for VoC to be included. It was then included
12 at the CR's instigation, the Class Representative's instigation, and the parties were
13 then able to agree the value, so query to what extent that actually supports my learned
14 friend's case here.

15 What we do have on any view is a very different case management consideration in
16 this case. The Umbrella Proceedings which we are avowedly seeking to join are
17 aiming to resolve the last significant piece in the liability jigsaw, namely exemption. If
18 one needed to think about what an obvious barrier to settlement would be, that would
19 be it.

20 Secondly, there's a very strong likelihood of overlapping economic evidence and
21 analysis which weighs in favour of dealing with volume of commerce at the quantum
22 stage. So when one is considering overall quantum issues, one necessarily factors in
23 volume of commerce and the analysis of the data in the transactions which are there,
24 but as part of the overall quantum picture. There isn't, we respectfully suggest, a good
25 reason to salami slice a part of that quantum trial so as to deal with this at this stage,
26 especially in circumstances where the exemption trial is ready to go and ultimately is

1 going to be the big sticking block to settlement in the context of this litigation.

2 We therefore say quantum is more appropriately determined in one go at Trial 4. And
3 the obvious way to test that proposition is that this application is only dealing with the
4 opt-out class, it's not dealing with the opt-in class. Yet my learned friend's just
5 said -- with respect again he's correct -- that you need to work out what the volume of
6 commerce is and what the quantum of the opt-in claim is in order to exclude it from
7 the recoverable loss in the opt-out class. So you are necessarily going to have to
8 determine as a factual matter, with factual evidence from the opt-in Claimants, to the
9 extent necessary, what their value of commerce is. That necessarily has to be treated
10 as an excluded matter for the purposes of working out what the opt-out class quantum
11 is.

12 **THE CHAIR:** But the quantum for the Opt-In Application is only here in relation to
13 those people who have opted in, isn't it? It's not going to be for the whole --

14 **MR BEAL:** It is.

15 **THE CHAIR:** Whereas you have to deduct as for the whole economy in that category,
16 isn't it, that part of 100 million? So the numbers are not very helpful-- it may be helpful
17 but not as helpful as the whole number.

18 **MR BEAL:** It's true that one would need to exclude not only those who actually have
19 opt-in but those who are in the excluded class which goes beyond it. But in order to
20 ascertain whether or not the prediction of what the excluded class contains is accurate
21 or not, one might have thought that the volume of transactions related to the 232
22 Claimant entities which we now have would be useful factual evidence in order to help
23 opine on that question.

24 The point is it doesn't make sense to deal with something in isolation, opt-out versus
25 opt-in, in circumstances where the evidence from one is likely to bleed into what is
26 necessary for the adjudication on the other. But in any event, putting that to one side,

1 in terms of whether or not this is a necessary factor which goes into the likelihood of
2 settlement, it isn't something that's been necessary to determine the settlement of all
3 of the merchant Umbrella Proceedings to date. There hasn't been a holdup in the
4 settlements which have taken place in that case.

5 Therefore, I stand by our submission that this is yet another piece of satellite litigation
6 which seeks de facto to kick the exemption can down the road, and that is its avowed
7 aim, seemingly. We don't need this as a way of reaching agreement on volume of
8 commerce necessarily if one can reach a position where the experts, through
9 a mediation, for example, are able to agree amongst themselves exactly what the
10 value would be.

11 That mediation option is something we are prepared to sign up to. Sir, you will have
12 seen that the government's consultation document raises specifically the question of
13 whether this Tribunal should have an express power to direct mediation, and the Bar
14 Council's submission which went in has supported that as a proposition.

15 But if my learned friend is serious that he simply wants to be able to know what the
16 size of the opt-out class claim is on the volume of commerce basis, then the cheaper
17 and more effective way of dealing with that would be for the parties to mediate through
18 their experts and see if they can reach common accord on what the value would be.

19 That needn't take up two weeks of Tribunal time, and it enables Trial 3 to proceed
20 undisturbed in the meantime, sailing a clear course towards establishing the final
21 position on liability which is, in my respectful submission, the thing which is really
22 needed in order to crack the bulk of this litigation. Working out who gets what at the
23 end of it is, in that sense, a lesser order urgent matter. It will of course be important
24 in due course, but it's capable of being dealt with in a more cost-effective way once
25 liability has been determined fully. Therefore, we respectfully suggest that the
26 appropriate course is to deal with Trial 3 first and then deal with quantum afterwards.

1 Even if that weren't right, as you have seen from our skeleton, the fall-back position
2 would be: let's get through to a sensible place in Trial 3 and if there is going to be some
3 big delay, we can then assess whether or not it's appropriate to try and do something
4 in the meantime.

5 But at least let's not hold up Trial 3. Let's see how Trial 3 progresses in order to work
6 out a sensible way of dealing with this litigation, and we can cut our cloth accordingly
7 in due course if it looks as though it's much more sensible proposition this time next
8 year.

9 I'm not suggesting anyone -- no one is asking me to make any further points.

10 **THE CHAIR:** On these cases, I think to some extent they are aiming at a slightly
11 different target, aren't they, the emphasis on preliminary issues on matters of law, and
12 so on. I think what we are dealing with here, and you may say -- I think you do say it's
13 not the right approach, but there is something of a practice of taking these very big
14 unwieldy cases, chopping them into chunks, and not necessarily following the logical
15 analytical sequence of doing that. Obviously we've done plenty, and you know as well
16 as I do how much of that we've done in the merchant and in the Umbrella Proceedings.
17 So I'm not taking your submissions in relation to these as anything more than a
18 caution. You're not saying we don't pass six of the ten commandments, therefore
19 should not proceed. You are just saying be careful.

20 **MR BEAL:** If we follow that to the letter, we would never have had acquirer pass-on,
21 the merchant pass-on dealt with where they were because logically they were out of
22 sequence, we dealt with them. Trial 3 is the next one up, Trial 4 seemingly is being
23 used for quantum, at least in the opt-in and opt-out claims -- we will have to see
24 whether Trial 3 includes quantum for the merchant Claimants, that's to be discussed,
25 not by me on instructions here today because I don't have instructions to put forward
26 an argument on that.

1 Do we salami slice at this stage to interrupt what is otherwise quite a carefully
2 calibrated sequence of trials in the merchant Umbrella Proceedings? My submission
3 is that wouldn't make sense. Let's fold this proceeding into the merchant Umbrella
4 Proceedings in January, work out where we stand, and then see a sensible route
5 forward for everything. Now is not the time to be embarking on yet another piece of
6 litigation which could in theory then lead to appeals, and so on, and which requires
7 experts and witnesses of fact to give evidence over what is likely to be at least a week
8 and more likely two weeks, of a hearing, and for only half of the collective proceedings.
9 It's only dealing with the opt-out class and not with the opt-in class, subject to point
10 I've already made about we would need to have figures for the opt-in class readily in
11 mind.

12 Unless I can help further, those are our submissions.

13 **THE CHAIR:** Thank you. Mr Cook.

14 **Submissions in reply by MR COOK**

15 **MR COOK:** Sir, a few brief points in reply. Firstly, with respect, and sir you have
16 alluded to it already: the case law is aiming at a completely different target. The case
17 law is dealing with a situation where the choice is between having a trial of everything,
18 or whether you promote one issue to come out of the trial of everything to be dealt with
19 at an earlier stage, and that involves very different kinds of considerations. As you put
20 it, sir, these cases have always been salami sliced for very, very good reasons. It's
21 common ground between myself and Mr Beal that VoC should be salami sliced from
22 exemption; the only question is which slice should come first, essentially.

23 **THE CHAIR:** Yes. He says don't salami slice it from quantum is what I think is his
24 submission. I think he's also saying it's ambitious enough to be salami slicing -- there's
25 a lot of salami around! -- in the Umbrella Proceedings: do you really want to start doing
26 it in another set of proceedings which are interacting with the Umbrella Proceedings?

1 Those are two points he made.

2 **MR COOK:** I understand. I just want to knock on the head that the case law is really
3 aiming at radically different targets. What we are looking at is: is this a sensible thing?
4 The answer is: it is entirely subdividable and will give us a lot of very useful information
5 about what this claim is about, so it is clearly sensible to deal with it.

6 My learned friend's submissions were really designed to turn a relatively simple matter
7 to try and make it seem hugely complex. With respect to him, the points he made
8 missed the target rather considerably, though bizarrely then we were told: it's very,
9 very complicated, but actually it's something the experts could deal with through some
10 sort of mediation, with an inherent conflict there.

11 Just to deal with the points he tried to make in terms of saying this will be very
12 complicated, the need to evaluate (inaudible) numbers for the individual opt-in
13 Claimants, class members, with respect, as you said sir, that is a total red herring and
14 is wrong. We are not interested in the value of easyJet's claim or Cancer Research's
15 claim. Whether they have a claim for 5 or 10 million is just totally irrelevant for these
16 purposes.

17 **THE CHAIR:** Is it totally irrelevant, or perhaps only -- does it not provide us with any
18 information about what the profile of the opt-in class might look like?

19 **MR COOK:** No, sir, because we have no reason to think that the very small number
20 of merchants which have opted in are in any way illustrative of the entire class, not
21 least because they fall within a whole series of rather ad hoc sectors. So they are not
22 going to provide us with very much information there because they are such a tiny
23 subset.

24 At the moment at least, nobody is putting forward a methodology, has never put
25 forward a methodology, which suggested an analysis of an individual opt-in claimant
26 is going to tell us anything interesting about what the total value of all the opt-in claims

1 are going to be.

2 **THE CHAIR:** Just to test that a bit. You mentioned easyJet. If you had a lot of
3 information about easyJet, and I don't even know if they're not opt-in Claimants, so
4 I hope they'll forgive me -- let's just use any airline. If there is a reasonably substantial
5 airline which is an opt-in claimant and survives your challenge and remains an opt-in
6 claimant until all the way to quantum; and we're still in the quantum hearing and we
7 learn about the profile of their interchange fees, does that give us no information, you
8 are saying, about what the profile of the airline industry as a sector might be for
9 interchange fees for a commercial account? You say that's just of no value.

10 **MR COOK:** Well, nobody has put forward any form of methodology which suggested
11 that was going to be of utility --

12 **THE CHAIR:** That's not really an answer to my question. I'm not saying -- and I think
13 Mr Beal backed off slightly when I challenged him on this -- I don't think he's saying
14 this answers the question, at least he accepted it probably wasn't going to. But he
15 said it would be useful, it might be useful in some respect, and I think I'm inviting you
16 to tell me why it wouldn't be useful, as opposed to saying no one's come up with it yet.
17 It's not beyond the realms of likely outcomes that it's going to have some value, isn't
18 it?

19 **MR COOK:** With respect, sir --

20 **THE CHAIR:** You think not.

21 **MR COOK:** -- I can see why knowing what one individual claimant is -- I'm told one of
22 the first points of course is that there are no airlines who have business below
23 100 million or no material --

24 **THE CHAIR:** That's certainly a step forward in the interests of accuracy, but it's not
25 a step forward on the hypothetical discussion we are having.

26 **MR COOK:** The methodology being put forward requires a calculation of what all

1 merchants that are part of undertakings with -- turnover of above 100 million, what the
2 commercial card transactions and MIFs were at those merchants. Telling me that
3 Airline A had 5 million of commercial card transactions doesn't in any way inform what
4 all of the merchants in all of the different varieties of the economy: what Sainsbury's,
5 what Tesco, what John Lewis has --

6 **THE CHAIR:** But might it be helpful in the sector? Could you imagine an expert
7 economist saying: I think this is indicative of what the sector might look like and it gives
8 me a range of outcomes that I can put forward for the sector?

9 **MR COOK:** The point being, sir, nobody is suggesting this can be done by taking X
10 number of sectors in the economy and doing 10/20/30/40 calculations and saying:
11 right, we add sector A, this proportion of commercial card transaction, that sector, we
12 add up sector B. The reality is we just don't have data on that sectorial breakdown.
13 It's difficult enough to do it at the economy-wide level. No one's suggesting it should
14 be done by doing 10/20/30/40 sectorial calculations and then adding up the total. It's
15 completely different from what might have been the case for pass-on in relation to
16 *Merricks*.

17 The point being, sir, nobody has indicated that any way we could do that in a way
18 which would be of any relevance to the question we are actually trying to answer,
19 which is to come up with a number which is all of the merchants across the whole
20 economy who are bigger than 100 million, what commercial card transactions did they
21 have.

22 The point, sir, is we don't even have some comparison, we don't even have a small
23 airline we can compare to a big airline or anything else because that's just not the way
24 this is structured. There is no comparison scope at all. So with respect to my learned
25 friend, that is a red herring which no one has ever suggested will be of utility, and they
26 were right not to do so because it won't be, and everything is being done at the

1 economy-wide level for very good reasons, which is doing it sectorially would simply
2 add a whole series of complexities which we don't have data for without providing us
3 with any useful at the end of it, other than just making it 10 or 20 calculations we have
4 to do on to come to a total.

5 So with respect, we do say that -- and there's been a whole process about what's the
6 right methodology here. Nobody is suggesting anything different, but you need to look
7 at it across the economy as a whole, economy-wide data, and it is a relatively simple
8 process.

9 My learned friend made the point in relation to *Merricks*, which is indeed what I'd
10 submitted, which is when the experts embarked on an economy-wide exercise
11 there -- and again at that stage it was economy-wide, the volume of commerce -- they
12 ultimately got to, as you saw, an agreed set of numbers because the data sources are
13 limited here and there's only a limited way of looking at the way you analyse it.

14 So we do say with respect there is no conceivable situation which would be useful to
15 start looking at what Airline A may or may not have individually done for these
16 purposes. It is just a question of looking at the economy-wide numbers and seeing
17 what they end up being. The idea that you need to make this a two-week hearing in
18 relation to those numbers is just simply an advocate on his feet trying to make
19 something of nothing, with respect.

20 As my learned friend's sort of contradictory submission that this could all be dealt with
21 through some kind of mediation and then the experts reaching common accord, sir,
22 we would be absolutely delighted if as part of the process, and accord is reached
23 between the experts on some sensible numbers. But the way to ensure parties
24 embark on that process is to lay down a timetable where they are doing so, where at
25 the end of it if there are disagreements, those are resolved by the Tribunal. We can't
26 assume those disagreements will end up being mediatable or not. In any event, the

1 parties won't be doing that process without a direction from the Tribunal to do so.

2 **THE CHAIR:** You say that, but I think you are expressing a desire to know more about
3 what the answer might be for settlement purposes, and it seems to me the impediment
4 to that might be Mr Beal's clients saying we're not interested in having that discussion.
5 I think he's now said we are interested in having that discussion, so if you were
6 genuinely interested in knowing what the answer was, that door is open. It may not
7 be the way you choose to deal with it, and obviously I'm not in a position to, nor would
8 it be appropriate, on the information before me to say you should go off and do that.
9 But in a sense, he has rather opened the door to that as a possibility if that's what
10 you'd want.

11 **MR COOK:** Sir, if it's the case we're certain we can short-circuit things, we'd
12 be delighted to do so.

13 **THE CHAIR:** You don't have to have an order from the Tribunal for a trial in order to
14 have a discussion between the experts on a without prejudice basis, do you?

15 **MR COOK:** Well, the first stage would be exchanges of data and matters like that,
16 which is how it was left at the end of seeing the opening statements; that the Claimants
17 would want certain data, that would then be produced, and that would then be
18 (inaudible). That is the process that should be gone through. If it results in
19 an agreement without needing a hearing all the better.

20 **THE CHAIR:** But the point I'm making is you don't --

21 **MR COOK:** You don't suggest that you can't assume there will be effective
22 co-operation, not least because Mr Beal spent much of the morning trying to say that
23 we are velociraptors, and velociraptors are incapable of co-operating apart from with
24 each other.

25 But with respect, the sensible thing what I'm inviting you to do, sir, is structure the
26 procedure for this process in a way which is the most efficient way to allow clarity about

1 the claims' worth. Parties can be sensible and resolve points, surely will, but basically
2 sort of saying effectively there is no need to consider this is wrong and it isn't likely to
3 result in that sensible outcome.

4 So we do say it's a narrow point. My learned friend's attempt to make it more complex
5 just simply doesn't stand up. The idea that this kind of point is going to result in
6 appeals, again is very difficult to see. This is just simply going to be a bit of expert
7 analysis. There is no right of appeal from the Tribunal on points of fact and this is just
8 quintessentially running the numbers with the benefit of the experts. There will be
9 an outcome in relation to that.

10 So we do say for all of these reasons the reason why it's better for everyone to know
11 what this claim is worth and a process which points the way towards doing so, if we
12 can short-circuit all the better, but there should be a process leading up to that. It's
13 going to be your advantage to know that this is a claim worth 50 million, 100 million,
14 500 million. Whatever it turns out to be, that is informative for everybody in the room.

15 **MR BEAL:** Could I just make, please, two factual corrections: firstly, there is within
16 the opt-out class at least one airline has annual turnover of below 100 million. And in
17 the interest of balance it's not just easyJet, in alphabetical order it's Aer Lingus, British
18 Airways, Iberia, Ryanair and Wizz Air. So multiple airlines in the opt-in class but
19 there's also at least one airline in the opt-out class.

20 **THE CHAIR:** I think we are interested in the opt-in class anyway. The presence of
21 the airlines in the opt-out class is neither here nor there, so in fact actually -- you are
22 asking serious airlines in the opt-in class.

23 **MR BEAL:** I've named six (inaudible).

24 **THE CHAIR:** Yes. Thank you.

25 That's been very helpful. I will rise for ten minutes and then I will give you an answer
26 on that. I don't think there's anything else after that but if there is -- if you can think of

1 anything between now and then we will deal with anything else that's outstanding.

2 **(3.15 pm)**

3 **(A short break)**

4 **(3.33 pm)**

5 **RULING**

6 **THE CHAIR:** Mastercard, supported by Visa, seeks the early trial of the value of
7 commerce in issue in the opt-out CICC actions. It is said that this would be good case
8 management as it can be dealt with alongside the timetable for other matters in the
9 Umbrella Proceedings, it is an important unknown question, and the size of
10 the potential claim affects case management decisions and settlement prospects, and
11 it is a relatively narrow issue which can be dealt with efficiently.

12 It might be sensible to identify the value of commerce at an early stage in some cases,
13 as happened in *Merricks*. It is not so obvious that it is necessary or desirable in these
14 proceedings.

15 The current position is that CICC is engaging with the Umbrella Proceedings where
16 a significant proportion of the same issues arising between CICC and the Defendants
17 are being litigated by a wider group of Merchant Claimants.

18 The next important step in those Umbrella Proceedings is likely to involve the issue of
19 exemption, which Mr Beal KC described as "the last significant liability issue". It is not,
20 therefore, clearly the case that the determination of the CICC value of commerce
21 would make a considerable difference to the approach to the Umbrella Proceedings,
22 meaning that there is no real case management advantage that would be delivered by
23 better understanding the size of the Class Representatives' opt-out claims.

24 It would also introduce a further element of complication to start case managing the
25 CICC Proceedings in separate trials, alongside the same exercise in the Umbrella
26 Proceedings. Given the overall complexity of the wider procedural context in these

1 cases, there is a serious risk that it would be a step too far in procedural terms, and
2 cause things to go unhelpfully off track.

3 In relation to settlement, it seems to me that exemption and value of commerce are
4 indeed likely to be important unknowns in the context of any settlement discussion. It
5 is not, however, obvious that the right way to promote settlement is by dealing with
6 value of commerce first. In addition, the CICC Class Representatives have made it
7 clear that they are open to some form of mediation involving the experts looking at the
8 value of commerce issues, and if the Defendants really thought it was an impediment
9 to resolving the litigation while the exemption issue remains outstanding, then that
10 course is open to them.

11 There was also the potential for wasted costs while the Defendants maintain that they
12 are entitled to exemption, which on their case may remove all liability.

13 In my view, it makes considerably more sense to deal with value of commerce in the
14 context of wider quantum issues, in which context, it seems to me at least possible
15 that evidence from the wider issues might be helpful in determining the value of
16 commerce in question. I say that despite Mr Cook KC's scepticism about that.

17 Overall, it seems to me it is not consistent with trying to control the CICC costs and
18 avoid duplication to deal with value of commerce separately.

19 Accordingly, I will not at this stage order a value of commerce trial. Nothing stops the
20 parties agreeing on a programme of disclosure in the meantime, especially if it assists
21 with any mediation exercise.

22 **(End of Ruling)**

23 Mr Beal, is there anything else on your list?

24 **MR BEAL:** No, thank you.

25 We are suggesting costs in the case because a number of issues have been dealt with
26 in the course of case management and it's frankly administratively simpler to deal with

1 costs in the case rather than trying to pinpoint any particular aspect of that before
2 singling out for separate costs application.

3 **THE CHAIR:** Yes. That's helpful. I don't suppose there's going to be any objection
4 to that from the other side of the court. Mr Kennelly, Mr Cook?

5 So we will proceed on that basis, costs in the case. If someone is going to do an order,
6 which I think needs to deal with the pleadings point, just so that's recorded, and deal
7 with the opt-in disclosure date and fixing the hearing date for the --

8 **MR BEAL:** We can draft an order and circulate it to the other parties hopefully with
9 consensual approval before it gets submitted to the Tribunal.

10 **THE CHAIR:** Yes. I'm not sure if there are views about whether the follow-up work
11 you have on budget needs to go into the Order, I think it probably is quite difficult to
12 describe it in an order that is going to be perhaps more trouble than it's worth. I think
13 it's very clear what you are going to do and if you don't --

14 **MR BEAL:** I have communicated via assurance from my solicitor what steps will be
15 taken. I hope that's sufficient for these purposes.

16 **THE CHAIR:** I would have thought so and if you don't, obviously we'll find out fairly
17 quickly and you can be sure we'll be invited to deal with it even though we don't
18 immediately find the need to do so ourselves.

19 Mr Kennelly, Mr Cook, are you content with that?

20 **MR KENNELLY:** Subject to Visa's perspective, we are content with that, yes.

21 **THE CHAIR:** Yes, thank you.

22 **MR COOK:** We are content as well.

23 **THE CHAIR:** Is that all from anybody on this side of the court as well? We are all
24 done? Good. Thank you very much, that's helpful. We may see you all in December.
25 And obviously in relation to any of these points, particularly the budget point, we will
26 be expecting material, and certainly a matter on which I am focused so I will be keeping

1 | an eye out for that.

2 | **MR BEAL:** Thank you very much for (inaudible).

3 | **THE CHAIR:** Thank you very much, everyone.

4 | **(3.38 pm)**

5 | **(The hearing concluded)**

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