IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 19th January 2026

Before:

The Honourable Justice Michael Green
Ben Tidswell

(Sitting as a Tribunal in England and Wales)

Merchant Interchange Fee Umbrella Proceedings

A P P E A R AN C E S

Philip Woolfe KC and Antonia Fitzpatrick (instructed by Scott+Scott UK LLP and Harcus Parker Limited) on behalf of the SSU Claimants and the CICC Class Representatives
Flora Robertson on behalf of the CICC Class Representatives

Brian Kennelly KC, Emily Neil & Rayan Fakhoury (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa.

Mark Hoskins KC, Matthew Cook KC & Hugo Leith (Instructed by Freshfields LLP) on behalf of Mastercard.

Nicholas Gibson on behalf of the Payment Systems Regulator.

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(10.30 am)

MR JUSTICE MICHAEL GREEN: Good morning.

MR WOOLFE: Morning, sir. I don't know if we are being live streamed and if you need to give the usual --

MR JUSTICE MICHAEL GREEN: I am sure everyone is very familiar with this, but I am required to read out this short script.

Some of you are joining us live streamed on our website. I must therefore 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 and breach of that provision is punishable as contempt of court.

MR WOOLFE: Thank you.

MR JUSTICE MICHAEL GREEN: Mr Woolfe.

MR WOOLFE: I appear with Ms Fitzpatrick and Ms Robertson for the claimants, represented by Scott+Scott, and for the class representatives in the CICC proceedings; Mr Hoskins, Mr Cook and Mr Leith appear for Mastercard; Mr Kennelly, Ms Neil and Mr Fakhoury appear for Visa; and Mr Gibson appears for the Payment Systems Regulator.

In terms of a brief bit of housekeeping on bundles, you should have two electronic PDFs. You should have received one being the hearing bundle, and one being an authorities bundle. I don't know if you also have them in hard copy as well or if you prefer to --

MR JUSTICE MICHAEL GREEN: I don't know the answer to that.

MR WOOLFE: They are behind you on the shelf.

MR JUSTICE MICHAEL GREEN: I think we do.

MR WOOLFE: There should be four volumes in hard copy, and then two authorities.

MR JUSTICE MICHAEL GREEN: Yes, that's right. I think we are probably both using the electronic versions.

MR WOOLFE: Thank you. Before the hearing, we gave the registrar three letters that were sent over the weekend in hard copy, one being the PSR's letter to the Tribunal, and then there is also the exchange of correspondence between Scott+Scott and the defendants in relation to disclosure.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: That's simply for the Tribunal's information which relates to disclosure. If the letters are relevant, we can deal with them at that point.

In terms of running order, sir, I have had the opportunity to discuss with Mr Hoskins and Mr Kennelly an order in which to deal with the issues. We thought that rather than hearing from one side on everything and then the other side on everything, you would probably prefer to deal with it in a more point by point, issue by issue manner.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: So in terms of a running order for dealing with the issues, we propose first of all to deal with designation of CICC as a host case -- this is all subject to the Tribunal's approval, of course; secondly, with the scope of issues to be determined at trial 3 itself; thirdly, as a single item, timetable towards trial 3 and the timing of trial 3 -- they were listed as separate agenda items, but clearly there is really one point there; fourthly, the Scott+Scott claimants' application for some directions in respect of applicable law and limitation; fifthly, the Scott+Scott claimants' application for the listing of a trial 4 CMC in the summer; sixthly, the defendants' cost applications which arise out of our application that they file experts' reports in advance of this hearing -- if you recall you ruled on that point, sir. Finally, there is the question of the PSR's

intervention - you indicated you wanted to deal with that at the end.

That's our proposed running order. We are in the Tribunal's hands as to how you wish to proceed. I think also Mr Gibson might like to raise with you in the light of that timetable how he fits into commenting on those matters, but subject to that, is the Tribunal content with that rough --

MR JUSTICE MICHAEL GREEN: Yes. How long will we take? The full day? I can see the parties have moved slightly closer together.

MR WOOLFE: We have, particularly in light of Visa's indication that they don't seek disclosure from every claimant, we have come rather closer together. For my part, I would have thought there is a fair chance we can get it done within a day. I can't see we will be here tomorrow afternoon.

MR JUSTICE MICHAEL GREEN: All right. Let's get on with it, then.

MR WOOLFE: Do you want to hear from Mr Gibson briefly on his role?

MR JUSTICE MICHAEL GREEN: Yes.

MR GIBSON: I will be very brief. One point first on housekeeping. Over the weekend, with profuse apologies for the lateness of it, we sent a very slimline electronic copy of the intervention bundle just collating the relevant materials. I don't know whether that made its way to the Tribunal members.

MR JUSTICE MICHAEL GREEN: Intervention bundle, I have that.

MR GIBSON: That's the one.

MR JUSTICE MICHAEL GREEN: Are we going to refer to it now?

MR GIBSON: No. I just wanted to check it was on the radar.

MR JUSTICE MICHAEL GREEN: Some of us have it and the ones that don't will get it.

MR GIBSON: Thank you. The more pressing issue is the question of running order, and obviously we have read the letter the Tribunal sent on Friday. In light of the

indication that we may not be under time pressure within the two days, I make the tentative bid for a higher billing, if I can put it that way.

I note that around the timetabling directions, it would, in my humble submission, make more sense to know who is involved in working out how you are going to accommodate everyone's involvement.

MR JUSTICE MICHAEL GREEN: Yes.

MR GIBSON: It seems to me, given there is no in principle objection to the intervention, the question of the intervention really turns on how we would actually accommodate the PSR if you were minded to allow the intervention. With that in mind --

MR JUSTICE MICHAEL GREEN: I guess it depends how much you are allowed to intervene and on what issue.

MR GIBSON: Indeed so, there is certainly a chicken and egg quality issue to it. I was wondering whether it would be convenient for us to be heard either shortly before the timetabling directions, or as part of that timetabling directions process.

MR JUSTICE MICHAEL GREEN: I would have thought it would make sense for you to participate in the timetabling discussions when we get there.

MR GIBSON: Yes. Hopefully either way, as a result of that timetabling discussion, it will be clear whether or not the intervention is appropriate or not in that context.

MR JUSTICE MICHAEL GREEN: Yes. As you said, I didn't get the sense that there was any real objection to your involvement in the proceedings. It may be the extent of the involvement might be in issue, but yes.

MR GIBSON: That's where --

MR JUSTICE MICHAEL GREEN: Unless there is any objection, I think it makes sense for you to participate in timetabling.

MR HOSKINS: I think that's a fair summary of where we are at. We did get a letter at

8.00 pm on Friday from the PSR. This is the first time we have seen any detailed suggestion of what they might want to do and it does raise a number of questions, I'm afraid to say, it is not that they have now said, "This is what we are going to do", and we say, "That's fine". The timetabling issue is quite complicated, obviously, if the PSR is going to be involved, but with respect they should be fitting in with the parties rather than us fitting in with them. I am just a bit worried that we will get distracted by a detailed debate about precisely what they are going to be doing, but you will manage it as we go along, I'm sure.

MR JUSTICE MICHAEL GREEN: I think it is fair to say that I am not going to let the PSR, having come along quite late, really, to sort of disrupt the timetable in relation to all the main parties. So you will have to fit in with the timetable, but I am sure we can work out how that's going to happen.

MR GIBSON: Sir, that is very much our intention; to dovetail within what is originally proposed. My submissions will be focused on explaining how we think we can achieve that without causing any disruption. So hopefully my submissions will be in keeping with that generally.

MR JUSTICE MICHAEL GREEN: Very good, okay. Thank you.

MR WOOLFE: Thank you, sir. In which case, the first item, therefore, the designation of the CICC proceedings as host cases. The letter of application of 3 December is at page 65 of the electronic bundle. That sets out the application to be designated as a host case for the exemption issues to be heard in trial 3.

The essential grounds for that application are those set out at paragraphs 7 to 9, which are on pages 67 through to 68 of the electronic bundle. If I can summarise, there is an obvious crossover in the proceedings. The CICC claims only relate to commercial card MIFs paid in the UK, whereas Scott+Scott's claimants' claims in the Umbrella Proceedings are broader and encompass other kinds of MIFs and other territories.

But the issue of exemption for commercial card MIFs in the UK is certainly an issue in the Umbrella Proceedings. That is an economy-wide issue regarding the lawfulness of the Mastercard and Visa scheme rules, and it permits only one answer for each scheme. Commercial card MIFs can't be exempt in the Umbrella Proceedings and not exempt in a CICC case and vice versa, it makes no sense.

Exemption has not yet been pleaded in the CICC proceedings, but it is clear the defendants intend to do so. We understand the defendants' proposal is that they will produce CICC exemption pleadings at the same time as for other claimants of the CICC claimants joining in. Dealing with issues together will save costs, avoid inconsistent decisions and ensure fairness, and it is expressly advanced on the basis that the class representatives will share counsel and experts with the Scott+Scott claimants, as we are doing today.

The application to change experts in the CICC proceedings has been made earlier this week, and that required permission from the CICC Tribunal. That application has not yet been dealt with, but if you are minded to make the order designating CICC proceedings as a host case, we suggest you can simply make that order to be effective from the date that the CICC Tribunal makes an order permitting the change of experts.

MR JUSTICE MICHAEL GREEN: Is it actually for us to make the order? I think it is for the President.

MR WOOLFE: Well, the Umbrella Proceedings Practice Direction doesn't say who can designate host cases. It talks about both the President and Chair of Tribunals adding or removing issues, ubiquitous matters, but it doesn't say who can change/add host cases. In fact, Mr Tidswell has in the past made some orders adding host cases to the Umbrella Proceedings, so on that basis we had understood --

MR JUSTICE MICHAEL GREEN: No doubt with the authority of the President.

MR WOOLFE: With the authority of the President. We had understood it to be

possible for this Tribunal to make the order adding CICC as a host case. It may be worth checking with the President, we don't want to do anything untoward, but ultimately the requirement for certain things to be done by the President are in the Practice Direction.

MR JUSTICE MICHAEL GREEN: If it needs to be done by the President. I suppose we can advise her that we think this is a good idea.

MR WOOLFE: Perhaps -- since this is an internal matter for the Tribunal, could we ask that enquiry to be made of the President how she would like the matter to be dealt with going forward. Because clearly she may not want administrative matters on her desk.

MR JUSTICE MICHAEL GREEN: In any event, is there any opposition to this? I didn't anticipate there was.

MR WOOLFE: There is not, sir. On that basis, we simply want the Tribunal's nod, as it were.

MR JUSTICE MICHAEL GREEN: We will endeavour to work out who is the best person to make that order, but it looks like there is no issue in that respect.

MR WOOLFE: Thank you, sir. In which case, once the enquiry has been made, we will wrap it up in the order for this, as it seems appropriate.

On to the second issue, scope of trial 3. If I can begin by showing you what is actually in issue between the parties on this, and it is not a lot.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: In broad terms, it is common ground there should be a trial encompassing firstly exemption; secondly, certain of the issues designated in the current list of issues as being related to quantum but which overlap with exemption issues, and I will show you what those are in a moment; and thirdly, to the extent it remains live, volume effects as well.

The only dispute between the parties relates to the extent of the quantum issues to be included, all the other points are common ground. I will show you all the points in the list of issues, if I may, because if you are making an order for there to be a trial of these issues, you will probably want to see how they are set out. I can take to you the list of issues --

MR JUSTICE MICHAEL GREEN: You said there were three things: exemption, certain of the issues related to quantum --

MR WOOLFE: Which overlap with exemption, yes, and then volume effects, a claim in volume effects.

MR JUSTICE MICHAEL GREEN: That's obviously dependent on our trial 2 judgment.

MR WOOLFE: Exactly, sir, yes.

MR JUSTICE MICHAEL GREEN: Which, just to let you know, should be with you in draft form in the next few days.

MR WOOLFE: Thank you, sir, that's a helpful indication because that means the volume effects element, if it is required, will be able to catch up.

I am going to show you all the issues in the list of issues, not just the disputed ones.

MR JUSTICE MICHAEL GREEN: That is not disputed then, that trial 3 -- I mean, the extent of the quantum issues might be in issue at this stage, is that right?

MR WOOLFE: Yes. It is only the extent of the quantum issues. We actually proposed including the quantum issues, and then having proposed it, we then said we want to carve out a little bit. It is the extent of that carve-out that's in dispute. It is common ground between the parties that these quantum issues should go in because when you see them in factual terms, they relate to essentially the same points the defendants are making about what would happen in the counterfactual, and you can't really sensibly try the same issue for exemption and not implicitly deal with the same issues for quantum.

What is in dispute is the extent to which you have to proceed to a quantification for particular claimants, that is the nature of the dispute, but I will show you in the list of issues in a moment.

The list of issues itself is at page 994 of the electronic bundle, which is at tab 39 if you are in the hard copy.

MR JUSTICE MICHAEL GREEN: 984?

MR WOOLFE: 994.

MR JUSTICE MICHAEL GREEN: Is that right -- yes, it is slightly different to the PDF, I have it. It is always the way.

MR WOOLFE: It is 994 using the bundle numbering on the right-hand side.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: Just to clarify something about this list of issues, this was prepared I think now about almost four years ago, largely by a claimant firm and the defendants, the claimant firm since having moved out of the proceedings, Humphries Kerstetter, albeit Scott+Scott were also involved. So this references pleadings which are no longer live to a significant extent, and Mastercard have suggested --

MR JUSTICE MICHAEL GREEN: You mean it has not been amended since then?

MR WOOLFE: No, it hasn't. It is largely -- it was put together as an attempt, as you will see, to set out the issues and then articulate how they were going to be tried because you will see references in column 3 to a method of determination.

Mastercard have suggested that after -- as it is now common ground, when we do exemption pleadings, it would make sense to amend the issues that are going to trial 3. We support that, we think it is entirely sensible there should be a bespoke list of issues essentially for trial 3. They should be based on the ones we look at today but which are amended appropriately to deal with -- so the Tribunal has something well put together designed for trial 3.

MR JUSTICE MICHAEL GREEN: I think that makes sense.

MR WOOLFE: So in terms of exemption, the issues are 14.3 and 15, which will be on page 1040 using the bundle numbering, but possibly 1042 of your PDF, so the exemption should start there at 14. You will see 14.1 and 14.2 are actually the pass-on issues which you heard in trial 2, sir; whether or not the MIFs increased MSCs, that is require a pass-on (14.1); 14.2 whether the merchants passed on MSCs, but those have been dealt with. 14.3 is exemption. You can see:

"Are the criteria for exemption in Article 101(3) met ...?"

And the criteria are set out. You will see on page 1042 using the bundle numbering:

"This will involve consideration of the extent to which MIFs lead (in the relevant market) to:

(a) cost savings ... innovation ... better fraud protection ...."

These are the kinds of matters that are raised by way of exemption benefits. That is what I think will require a bit of updating following the pleadings, so it is agreed that should be in the trial.

The other matter which is agreed to be in the trial is issue 15, which begins on page 1045, again using the bundle numbering:

"If the MIFs did not satisfy the four cumulative conditions of Article 101(3) [so exemption] are there lower levels of MIFs which would have done so? If so, what is the appropriate exemptible level?"

It is agreed that should also be in the scope for the trial, and again may require some amending. That's exemption and that's all common ground.

In terms of the quantum issues which overlap, those are issues 23, 24 and 26. Those begin on page 1060 using the bundle numbering, 1062 in the PDF. I will deal with these in turn, if I may.

Issue 23 concerns alleged changes to the Mastercard rules in the quantum

counterfactual. It is common ground that issue 23(a) should be included:

"How, if at all, would the scheme rules that determine the following have been different ..."

What is implicit there if there were no MIFs or in the quantum counterfactual. Basically in the absence of MIFs:

"... would the scheme rules have been different:

i. When an Issuer is required to make a payment to an Acquirer even in respect of a fraudulent transaction.

ii. When an Issuer is required to make payment to an Acquirer even when the cardholder defaults on payment ...

23(b):

"Would any such changes have led to higher costs for the Claimants during the claim period, and if so, what?"

It is also common ground that that issue should be in the scope for trial 3. You can see those are issues framed as relating to quantum, but they are intrinsically related to the costs and benefits of merchants as a whole in relation to exemption, therefore you will implicitly be ruling on this in trial 3 in any event, so they should be included. That's all common ground.

Issue 23(c) is:

"In the light of the above, what loss (if any) have the claimants suffered?

That's where the dispute lies in relation to issue 23. As I understand it, Mastercard, in fact, whose issue this originally is, is content for issue 23(c) not to be included. We, the claimants, don't want issue 23(c) to be included, but Visa says issue 23(c) should be included.

MR KENNELLY: 23 only applies to Mastercard.

MR WOOLFE: Sorry. My ... In that case, it is common ground that should be left out.

I apologise.

Okay. Next one then.

MR JUSTICE MICHAEL GREEN: All right. I see there is a similar one for Visa.

MR WOOLFE: There is one in common, which is 24, which relates to both of you, and there is a similar one for Visa which is 26 ...

Okay, in which case we can speed along, sir. Issue 24 then is also in the scope for trial 3, page 1061. That's the issue of issuer or cardholder switching to other payment methods. So if MIFs were zero or lower --

MR JUSTICE MICHAEL GREEN: Which one are we looking at?

MR WOOLFE: Page 1061, issue 24. In the quantum counterfactual, so with no or lower MIFs, what would have happened if issuers had chosen to issue Amex-branded cards instead? That's issues (a) and (b). Issue (c):

"To what extent, if at all, would consumers have used American Express-branded payment cards [instead] ..."

That's over the page. (d):

"To what extent, if at all, would consumers have used other more expensive payment methods to pay each of the claimants ..."

Again this goes to the quantum of loss suffered by the merchants, but equally they are inherently tied up with the exemption issues.

Again, what is common ground is that sub-issues 24(a), (b), (c), (d) and (e) should all be in, and I would have thought issue 24(f) should be in as well. I understand it is now common ground that 24(f), quantification of loss for particular claimants, goes in. In which case, the dispute is even narrower, sir, because we come to issue 26.

MR JUSTICE MICHAEL GREEN: 24(d):

"To what extent, if at all, would consumers have used other more expensive payment methods ..."

So that's more expensive to the claimants, is that right?

MR WOOLFE: Yes, I think implicitly that's right.

MR JUSTICE MICHAEL GREEN: Okay, right. So it is agreed that (f) should not be part of trial 3.

MR WOOLFE: Yes. These issues are being addressed as regards switching, which is sales, and so forth, but not proceeding to quantification of loss.

MR JUSTICE MICHAEL GREEN: (f) is about individual claimants' loss --

MR WOOLFE: Yes.

MR JUSTICE MICHAEL GREEN: -- and whether the benefits that they otherwise receive from payment of the MIF reduce their loss, is that right?

MR WOOLFE: The general quantum issue is back at issue 22, which is on page 1057, which is labelled "Extent of the overcharge", so how much more did merchants actually pay for cards. The allegation is that these increased costs for merchants that would apply if there were no MIFs should somehow be subtracted from that overcharge. That's why 23 and 24 are framed as quantum issues.

Finally 26, which begins on page 1064, 26(a) and 26(b), and I think the dispute relates to 26(b). 26(a) on page 1064, and this relates to Visa:

"In the quantum counterfactual, would the Claimants have suffered harmful consequences under the Visa scheme in the form of (i) the use of more costly forms of payments; (ii) reduced innovation; (iii) reduced fraud protection; (iv) increased credit costs; (v) reduced sales; (vi) reduced quality of service."

It is common ground that although framed as a quantum issue, that should go into exemption.

26(b) over the page:

"If the claimants would have suffered any such harmful consequences, what credit should each claimant give, if any?"

We say that issue should remain out because it essentially involves the quantification for particular claimants of an element of the calculation of their loss. It doesn't make sense to treat one element of the calculation of the loss independently of the others. You should have a single stage in due course of the calculation of loss for particular claimants, and that is essentially why we say that should stay out. I understand that Visa say it should be included, and that appears to be the total extent of the dispute before you.

Now I am in your hands. We can either hear from Mr Kennelly as to why he thinks issue 26(b) should be included, or I can carry on and show you the last point about volume effects so you have a complete view of the list of issues before he does so.

MR KENNELLY: Can I just say one thing because there may be some confusion on the part of the claimants. I hope it is clear from my skeleton that we say 26(b) should stay in but amended so as not to require an assessment of a credit that each claimant would give, but only the claimants or a subset of them included in the sampling exercise which will be required for the exemption trial in any event. We say that in the skeleton, so we are not suggesting that credit needs to be assessed and quantified for each claimant to the proceedings, but only those or a subset of them, that will be involved in the sampling exercise.

MR JUSTICE MICHAEL GREEN: Because you say that would be some -- that needs to be done as part of the process of working out whether the exemption applies.

MR KENNELLY: Precisely, sir. That may assist my learned friend in his submissions.

MR WOOLFE: Sir, I had understood that Visa have rather rowed back from the position in Mr Holt's report. Mr Holt had rather said he would need disclosure from each and every claimant in order for this issue to be determined, and therefore disclosure should be coming from every single claimant in the body, which is obviously a very different task in terms of size and scale compared with a sample of disclosure.

We welcome Visa's clarification of their position that if this issue comes in, it should only be on the basis that a sample of -- it should only be for those claimants who are otherwise being selected to give sample disclosure for the purposes of exemption. That is --

MR JUSTICE MICHAEL GREEN: Do you agree with that, then, on that basis?

MR WOOLFE: No because we say it is going to be potentially problematic to have a determination of an element of quantum for a particular claimant divorced from the rest of their quantum calculation. Because if you are looking at the overall -- so if you look at the specific items that --

MR JUSTICE MICHAEL GREEN: You are agreeing that the determination of the exemption issue would require some evidence from claimants as to benefits they have received from the sample claimants.

MR WOOLFE: We would require some evidence as to benefits received by merchants, yes. It remains to be seen the extent to which specific claimant disclosure is required -- it may be, and I am not arguing positively that it doesn't, but if a sample of claimants is taken, as I understand Visa's position, 26(b) should only be determined in respect of those claimants from whom sample disclosure is taken, we welcome that clarification.

But if we look at what is encompassed under 26(a) in terms of a particular claimant, in looking at credit being given somehow for changes in the form of payment instruments being used in relation to fraud, credit costs, importantly reduce sales and reduce quality of service, it is one thing information being taken from that claimant and being put into an expert methodology as a whole to look at whether for merchants as a whole these things arise, it is a slightly different exercise to quantify for a particular claimant the extent to which they would have suffered, say, reduced sales.

If you are doing that and looking at the quantum of the sales in the counterfactual, you

are inevitably also dealing with, in a sense, all the other quantum issues related to that claimant as well: the overcharge, what the difference is between the sales it would have had on the counterfactual, the rate of MIFs they would have paid, can enough credit be given if the overall loss suffered by that claimant on an overcharge basis is not big enough to cover the credit, as it were? Trying to divorce one element of the quantum calculation is going to be potentially tricky and will involve a great deal of work that is not actually necessary to resolve the exemption issues.

MR JUSTICE MICHAEL GREEN: You have agreed to 24(e), which requires an assessment as to whether there would be reduced sales by the claimants in the counterfactual.

MR WOOLFE: The 24 --

MR JUSTICE MICHAEL GREEN: How is that going to be worked out?

MR WOOLFE: As we understood 24 -- what we are saying should be included are the overlapping quantum issues. Clearly you have to grapple with the extent to which sales would have reduced generally for merchants to grapple with exemption.

MR JUSTICE MICHAEL GREEN: But there it specifically says by the claimants.

MR WOOLFE: We didn't understand that to involve a calculation for each -- there is a higher level issue not -- we did not understand (e) itself to include a calculation for each claimant of the reduced sales. We do understand that is --

MR KENNELLY: You are right.

MR WOOLFE: I think I am being agreed with.

MR JUSTICE MICHAEL GREEN: Not each claimant, but there will have to be some evidence from the claimants, presumably?

MR WOOLFE: Yes, there will have to be evidence from the claimants -- I mean, the claimants' bodies now include, in a sense, merchants generally by virtue of the CICC proceedings being included. There will have to be evidence of the impact of MIFs on

the reduction of sales generally, yes, but that doesn't necessarily entail the quantification in a bottom up way which -- there is a top down estimate of reduced sales and a bottom up estimate, but having a bottom up estimate of reduced sales by each claimant is a different kettle of fish. The quantum -- when you get to what credit should be given by a particular claimant, it is a different and more intensive issue.

If, sir, you are minded to have them in, it is not impossible, we can grapple with it for the sample Visa is proposing. What Visa is proposing is, with respect, not a silly proposal. It's just one we don't think is necessary for the purposes of dealing with the exemption.

MR JUSTICE MICHAEL GREEN: As I understand it, what they are proposing is that given there will have to be some evidence from the claimants in relation to these exemption issues as to what benefits were received by merchants generally, if there is going to be some evidence from individual claimants that the findings in relation to that evidence should -- I mean, it would be binding, probably, but will affect their quantum, the individual quantum claim.

So having made those findings, it would make sense that that is also binding on the quantum issue just in relation to those individual claimants that have actually given evidence in trial 3.

MR WOOLFE: Sir, that is correct if the evidence coming from the claimants is in itself necessarily sufficient -- sorry. If the evidence coming from the claimants for the purposes of exemption is sufficient to achieve the quantification that's required for the purpose of issue 26(b). At the moment it is not clear to us that that necessarily will be the case. Even assuming there is some evidence given by the claimants as to these issues, the evidence may or may not be sufficient in itself to go through to 26(b). As we understood it originally from Mr Holt's report, 26(b) was being used as the basis to look for much more extensive disclosure from the claimants, and also from a larger

number.

If it is now being put purely on the basis that we will work out what disclosure should be given for the exemption issues, and then to the extent it is possible to proceed to deal with quantification for any claimants that are sampled, our concern would be considerably less, but in principle, it is still an extra thing to be done at trial which may involve extra work that's not necessary.

MR JUSTICE MICHAEL GREEN: I don't know if there are other legal issues as to whether credit should be applied in respect of benefits that are proved to have been gained from the MIF.

MR WOOLFE: There are likely to be. Some of these may be forms of financial benefit, and so on.

MR JUSTICE MICHAEL GREEN: As a factual matter, I can't see there could be much objection to the factual findings in relation to a particular claimant that has actually given evidence on this issue that that should be binding for the purposes of assessing quantum.

MR WOOLFE: Sir, I will take instructions in a moment, but to be clear, we would certainly understand the findings the Tribunal makes in relation to exemption, the findings made inter partes in the proceedings on issues of facts or on actual issues, pleaded issues, one would expect them to be binding one way or the other in later parts of the same proceedings. That's precisely why we want these issues on the record so there is no inconsistency of decision.

Sir, may I just take instructions for a moment?

MR JUSTICE MICHAEL GREEN: Yes. (Pause).

MR WOOLFE: Thank you, sir. Can I be helpful to this extent: we can see the point of principle, that it would be helpful to reach some findings on quantum to the extent it is possible. There are, in a sense, two areas of concerns. One is what I have already

said: in a sense if the disclosure that has otherwise been given is sufficient to proceed to make meaningful findings on issue 26(b) as a claim for specific credit decisions, then that's possible, but what we don't want is this being used as a basis for seeking wider and more extensive disclosure which is not otherwise yet necessary. That is our position.

The other point, sir, is that there is a distinction here potentially between the Scott+Scott proceedings and the CICC proceedings. In collective proceedings, what we are looking at is an aggregate award of damages in any event. It is not clear that actually looking at credit given by individual claimants is the right approach to the quantum issue.

With those two points in mind, what we could propose is that the Tribunal revisits whether this issue is in at the time of ruling on -- under the timetable, it is common ground there should be a disclosure CMC at which you have Redfern schedules with agreed and disagreed disclosure requests. The Tribunal may not like that idea, but I think that's our shared position at the moment.

The possibility would be to revisit whether or not issue 26(b) is in at that point when it is clear what the scope of disclosure on exemption would otherwise be.

MR JUSTICE MICHAEL GREEN: 26(b) is being adjusted anyway, I think, according to Mr Kennelly, and it doesn't seem to me that there is much dispute here, frankly. I mean, I think at some point, you are going to have to work out what evidence is going to be adduced on behalf of the claimants in relation to exemption, and it may turn out that you have actual evidence from individual claimants, and as you have accepted, that will obviously be binding on that particular claimant: any findings that are made in relation to that evidence will be binding on that particular claimant.

I think maybe what your objection is that 26(b) sort of assumes the outcome that any such benefit received by the claimants will have to be given credit for the overall

assessment of their quantum of loss.

MR WOOLFE: That is the only thing we object to.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: But then there is this other point again about --

MR JUSTICE MICHAEL GREEN: But I don't think that in itself is requiring wide disclosure. I think that's still being worked out as to how much disclosure is going to be provided by the claimants.

MR WOOLFE: Sir, initially I can see what the Tribunal's instinctive position on this is. I might take that as an indication in principle that this issue should be in, but I think a marker is the exact framing of it may need to be adjusted following the pleading process.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: In particular, I make this point again about the CICC proceedings being collective. It may be that in a sense, there is not a quantum issue for individual merchants within the CICC proceedings in the same way.

MR JUSTICE MICHAEL GREEN: This issue has not been framed with CICC in mind, has it?

MR WOOLFE: No, it hasn't.

MR JUSTICE MICHAEL GREEN: It is from four years ago.

MR WOOLFE: No, exactly. With respect, there is an indication in principle it should be in, we have heard from Mr Kennelly on that. We will have to revisit it after the pleading process, and the extent that it will in a sense drop out of the disclosure process in due course. Is that ...

MR JUSTICE MICHAEL GREEN: I sort of query whether it is actually a separate issue. I think it is just a consequence of any findings we might make in relation to each individual claimant; whether that can then be used for a quantum assessment is

probably not an issue at all for trial 3. I am not really sure what 26(b) adds.

I can see your concern originally that it was being used as a peg upon which they were asking for disclosure from all claimants. They have accepted that that is not going to be the case. Given the amendment to it or the scaling down of it, I am not sure entirely what the issue actually adds to trial 3.

MR WOOLFE: It sounds like this may need a bit of amending to reflect what the Tribunal has just said and we can endeavour to do that, but I think you are talking about there being -- for the claimants to give sample disclosure, there being a quantification for the claimant of the extent of the alleged harmful consequences plateau the benefits, but not necessarily proceeding to make that part of a calculation of damages.

MR JUSTICE MICHAEL GREEN: Maybe we should wait and hear what Mr Kennelly has to say. (Inaudible) can be resolved.

MR KENNELLY: Thank you, sir. I will try to be very short at this stage just to see if this can be resolved and give my learned friend an opportunity to consider it. He is quite right that Visa's proposal in our skeleton argument was more modest than the one we set out in our position statement.

Having considered the involvement of CICC and the need for a practicable solution, in our skeleton argument we proposed that only those sample claimants giving disclosure and evidence in the exemption trial in any event should then be subject to an assessment for the purposes of quantum.

That is because in the exemption trial, it will be necessary for detailed disclosure and evidence to be given. To be absolutely clear, we are not suggesting that the inclusion of 26(b) will add to the disclosure or evidence which the claimants will have to give. Whether these narrow further quantity issues are included or not, Visa's exemption defence will depend on substantial disclosure and evidence from the claimants for the

purpose of quantifying the benefits they received we say from the MIFs.

The point is that having done that work in respect of these sample claimants or a sub-set of them, it will be short step then to include or to quantify those benefits for the purposes of the trial 4 overall quantum analysis. It is as simple as that.

MR JUSTICE MICHAEL GREEN: This assumes that you actually lose on exemption?

MR KENNELLY: Yes.

MR JUSTICE MICHAEL GREEN: So we are still calculating quantum?

MR KENNELLY: Yes.

MR JUSTICE MICHAEL GREEN: But those benefits which assume you didn't manage to establish or not to the full extent for the purposes of proving exemption should then be taken into account for the purposes of assessing quantum?

MR KENNELLY: Indeed. Because for the purposes of the exemption trial you will need to quantify benefits because the test under 101(3) involves a quantification exercise: you need to quantify the benefits and weigh them against the costs of the MIFs to see if one outweighs the other.

That quantification exercise has to happen at an aggregate level in the exemption trial anyway, but to get to that, you will need to assess in respect of individual sample claimants how they benefitted, if at all, and to what extent. Then you will scale that up to the aggregate level in order to answer the exemption question. So you will have to do that work for individual claimants anyway. Having done it, all we say is you should count those benefits for the purpose of quantum also and record that in your findings.

MR JUSTICE MICHAEL GREEN: (Inaudible) for the purposes of exemption, but we're in a world where exemption has not succeeded.

MR KENNELLY: Precisely. So it wouldn't be good enough for exemption, but it will be relevant to quantum.

MR JUSTICE MICHAEL GREEN: Exemption is assessed on an economy-wide basis,

is that right?

MR KENNELLY: Yes. I didn't want to get to the economy-wide figures, it will be building on the individual claims assessments. My learned friend said that even though individual claimants will be considered, the question for you ultimately will be economy-wide. That's correct, but the individual claimants will not be speaking to loss of sales by claimants collectively or on an economy-wide base; they will be speaking to their own loss of sales and their own costs and benefits. So when you have --

MR JUSTICE MICHAEL GREEN: Sorry. Might there be other issues in relation to quantum as to whether this is a valid form of mitigation of loss or something like at that, I don't know, or that's just accepted, is it, that if there is any benefit shown to come from the MIFs, that has to be taken into account on any individual claimant assessment of loss?

MR KENNELLY: Claimants, as far as I can see, accept to the extent that benefits are found to be caused by the MIFs, credit should be given for them in the ultimate quantum assessment. We are not suggesting an overall assessment of quantum, this is simply a finding, a quantification of the particular benefits you are assessing anyway, and then defining them for the purposes of quantum so they will be plugged into the further quantum assessment in trial 4. It is a very modest extension, if at all, to the work you would be doing anyway for the exemption trial in trial 3, which is why I understood there to be very little between us.

As my learned friend pointed out when we looked at the list of issues, when you look at the list of issues, you see that actually there will need to be a quantification exercise in respect of the claimants; and where you have sample claimants individually assessed, there will need to be that quantification exercise in respect of them individually. There can be no other way since they are going to be speaking to their own losses (inaudible).

MR TIDSWELL: (Inaudible). Say, for example, if you are looking at more costly forms of payment and let's say the economists say it would be helpful to get a dataset from a claimant which shows what the costs of their alternative payments has been over a period of time, that might be all you got for a particular claimant, and that is not going to give the answer to this question, is it? I mean, you seem to be suggesting that when a sample claimant is chosen, there's going to be a complete all-singing all-dancing analysis of the application of issue 26, but it might not work like that, might it?

MR KENNELLY: It might not. My learned friend suggested he would be content if we inserted "to the extent possible" in 26(b) so that individual assessment should be made to the extent possible. We would be content with that because plainly it will ultimately be a question of the assessment in respect of an individual claimant whether one is able to quantify based on what you get from the claimant to the particular benefit arising from the MIFs.

To your question, sir, obviously it needs to be shown that the benefit is directly and causally connected to the MIF itself. That's the assessment you will be doing for the exemption trial. All we say is that when you have done that in respect -- if you do that, we say you will have to, but that's a matter for debate -- of individual claimants in the sample as part of the exercise in aggregating them up to economy-wide level, you will have a finding that ultimately the court isn't plugged into the quantum figure. Because if you have quantified the benefit which an individual claimant receives from the MIFs, that ought to be a quantum finding also.

MR TIDSWELL: I suppose what makes me slightly nervous about all this is the possibility that recording it in the way it is creates an incentive for the parties to behave in particular ways in relation to this whole exercise and distorts what might otherwise be the most sensible way of dealing with this.

You might have an incentive, for example, to be pushing for disclosure and pushing

for a completeness of the picture with a particular claimant when in fact that's not necessarily the best way to go about it, and similarly, I think if you accept that CICC is in a different position, you are not going to be doing it in relation to CICC claimants, which I think you do.

MR KENNELLY: The 101(3) analysis is the same whether it is CICC or individual claimants.

MR TIDSWELL: But the quantum analysis isn't.

MR KENNELLY: Indeed, but the exercise you need to do to work out if the MIFs are exempt or not, to the extent you are getting information from individual claimants, will involve an assessment of the benefits those individual claimants or CICC opt in class members.

MR TIDSWELL: The question is what you do with it though, isn't it? I understand that. The question then is what you do with the information once you have it. The point which I think appears to be common ground for everybody is if you go to the extent of actually identifying a benefit which is causally connected which, subject to any other arguments about whether it's to be deducted for quantum, but everybody accepts -- that's something which the claimants accept, I don't think there is any contention around that point.

MR KENNELLY: Yes.

MR TIDSWELL: When you come to CICC, that is not the position, you are not going to be able to say that if a CICC opt-in claimant turns up and gives you evidence, you are not going to be able to say that binds CICC for the aggregate damages calculation.

MR KENNELLY: It seems in quantum how that would be the case, but the exercise for exemption will need to involve an assessment of particular benefits.

MR TIDSWELL: Yes, because it is evidence of (inaudible) economy as a whole.

MR KENNELLY: Yes, exactly. All we are saying is when you have done that exercise,

to the extent that it can be plugged in to the quantum exercise for individual claimants, then you should do so.

MR TIDSWELL: I think the question I am asking you is if you accept that's not going to happen for CICC claimants.

MR KENNELLY: I will take instructions.

MR TIDSWELL: You can't just plug it in. (Pause).

MR KENNELLY: I am reluctant to -- one can see how for the CICC class, the exercise will be different at the quantum stage, but the claimants' concern is it should make no difference. The claimants' concern clearly is they should not be allowed to expand an exemption trial exercise and the disclosure in evidence they have to give. To be clear, that's not what we are saying. We are saying for the purpose of the exemption trial, we would expect a high level of disclosure of evidence anyway, and all we are saying is this is a further necessary step where it can be done based on the findings you ultimately make in relation to exemption.

MR TIDSWELL: The reason for giving (inaudible) the CICC issue is this question of distorting the process, because the (inaudible) from that side of the courtroom might be to push for samples that have come from the CICC claimants, whereas in fact you're going to be trying to do something different. I suppose I am just nervous that the way this has been put is that that particular issue is going to create more collateral argument between the parties about how they go about what otherwise is a very difficult exercise in the first place.

MR KENNELLY: There would be no reason -- the Tribunal is anxious to make sure the process is controlled. I would hope that the fact we have adjusted what we asked for in the position statement should give you some comfort. We also seek to make this a practicable, sensible process, and ultimately when we come to discuss how sampling ought to be done and the best claimants that will give the disclosure and

evidence for the purpose of sampling in the exemption trial, that is the moment at which the Tribunal will be astute to ensure that the correct claimants have been selected in a proper way for the purposes of sampling in the exemption trial.

So rather than worry about it now since the issue, as we can see from my learned friend's submissions, is very reduced, and all we are saying is keep the door open to having those benefits quantified for the quantum trial if possible. The concerns that are troubling you, sir, can be ventilated and addressed in that further CMC when we come to look at how sampling ought to be done. It may be the experts will have agreed it before we have even need to trouble you because it will be preceded by discussion between the experts as to how it should be done.

MR JUSTICE MICHAEL GREEN: Do you anticipate there being some evidence from the CICC claimants, opt-in claimants, for the purposes of exemption?

MR KENNELLY: Yes.

MR JUSTICE MICHAEL GREEN: Can you just help me with this: quantum itself, is that part of trial 4?

MR KENNELLY: Yes.

MR JUSTICE MICHAEL GREEN: It is. So general issues or individual claimants' quantum assessment is an issue for trial 4?

MR KENNELLY: Yes.

MR JUSTICE MICHAEL GREEN: Right.

MR WOOLFE: Can I just clarify that? The present issue lumped everything into trial 3. We are proposing there be an order saying, "This goes into trial 3 and remaining stuff goes to trial 4". So in that sense, it is common ground that quantum will be in trial 4 but in terms of present orders (inaudible) future conduct order made in late 2022 lumps everything into trial 3, just for clarity.

MR JUSTICE MICHAEL GREEN: So any outstanding quantum issue would be in trial

4?

MR WOOLFE: That is what the parties are proposing, yes.

MR JUSTICE MICHAEL GREEN: Right.

MR KENNELLY: To answer your question, sir, just to get the reference, for the opt-in claim, quantum is not being determined on an aggregate basis.

MR JUSTICE MICHAEL GREEN: I take your point, yes, so we are talking with the opt-out point. So it would be opt-out claimants, not opt-in.

MR KENNELLY: Yes. We understand your concerns. The best time to reassure you that there is nothing to worry about is the sampling CMC, when we come to see how it is actually done.

MR JUSTICE MICHAEL GREEN: Do you actually need (b) in there? Why does it actually matter? As we discussed, if we make actual findings in relation to each individual claimant, that will be binding on that claimant for the purposes of quantum, if necessary. Why is it actually -- I think it is just causing a bit of confusion by having it as a sort of separate issue, looking as though we're actually determining a quantum issue in trial 3. If we get to trial 4 and quantum issues are being determined, then any findings in trial 3 about a particular claimant will obviously be binding on that claimant.

MR KENNELLY: The reason why 26(b) is useful is that it actually mirrors the issues which the claimants say ought to be included in trial 3 at 23 and 24, and I will come back to those -- in fact, shall I show you those now, sir? If you are in the list of issues and you go back to page 1060, these are the changes to the Mastercard rules in the quantum counterfactual, but Visa will be amending to raise a similar plea, and the claimants understand that.

In 23(a), you have the general question about how the scheme rules would have been different in the counterfactual. Then over the page, page 1061 at 23(b), which the claimants accept should be included, asks:

"Would any such changes have led to higher costs for the claimants and, if so, what?" That is the quantification of higher costs for the claimants during the claim period. The reason why we were content for (c) to be dropped is because (c) is redundant for our purposes because there will be an assessment of whether there would have been higher costs for the claimants and a quantification of those costs in the counterfactual. We say because you would be using sample claimants as part of that assessment process, where you have -- in respect of the sample claimants, you will be making findings about higher costs and the extent of the higher costs, if any, those are then relevant to the quantum analysis, this is a quantum issue.

MR JUSTICE MICHAEL GREEN: But (c) is a quantum issue, you accept that?

MR KENNELLY: No, sorry. (b) is a quantum issue.

MR JUSTICE MICHAEL GREEN: (b) is a quantum issue.

MR KENNELLY: It is an exemption issue and a quantum issue --

MR JUSTICE MICHAEL GREEN: And (c) --

MR KENNELLY: Well, (c) uses the word "loss", but really for our purposes, it adds nothing to the exercise that will be done in (b).

MR JUSTICE MICHAEL GREEN: (b) is not exclusively a quantum issue, is it? I think it is also relevant to exemption, whereas (c) is pure quantum.

MR KENNELLY: Indeed. For our purposes, since all we want is for quantification in respect of such claimants or a sub-set of them that are included in the exemption trial, then (b) is both exemption and quantum. My point is that assessing the particular costs for a particular sample claimant is a step on the way to the broader assessment you need to make.

So if you are making that assessment for an individual claimant, that ought to count for quantum as well as for exemption.

MR TIDSWELL: So 23, you are anticipating this will be done with some sampling of

claimants?

MR KENNELLY: Yes.

MR TIDSWELL: You are saying you don't need to go on to (c) because you are going to get the benefit of the finding in relation to (b).

MR KENNELLY: Yes.

MR TIDSWELL: So why aren't you taking the same position on 26?

MR KENNELLY: Because on 26 -- that's 23. 24(e) is in relation to sales, just for completeness, 1062. That is the same point. Then in 26(a), there is not such a clear reference to quantification. So in 26(a) all you see is the question:

"Would the claimants have suffered harmful consequences in the form of ..."

Then it gives a list of the kinds of harmful consequences under the Visa scheme.

26(b) talks about the credit each claimant should give, that's a quantification exercise. We accept it is not appropriate in trial 3 to ask what credit each claimant should give, but we do say that since you will be assessing the credit a sample claimant should give, that ought to count for quantum too.

MR JUSTICE MICHAEL GREEN: You accept 26(b) is a pure quantum issue -- having done the exercise in (a), which is exemption, one would expect there would have to be some quantification for the purposes of determining (a).

MR KENNELLY: The problem with (a) is that it doesn't refer to any (inaudible) quantification, and in the exemption trial, 101(3), you will still need a quantification exercise, you will still need to quantify -- for example, the costs to merchants of more costly forms of payment.

MR TIDSWELL: So why don't you just amend to add that? Why not just replicate what's in 23(b), which is unobjectionable; in other words, you are making it plain you are going to go and work out what the amount is of the things in 26(a), and leave aside this whole question of what the implication is for individuals because either they will

be bound by it or they won't be.

MR KENNELLY: Sir, you anticipate my next point, which is these issues, as everyone agrees, have to be amended, the wording needs to be improved. We would have no objection to making that change --

MR JUSTICE MICHAEL GREEN: What you are concerned about is that there is no issue requiring actual quantification, whereas there is under 23 and 24 --

MR KENNELLY: Exactly. So if --

MR JUSTICE MICHAEL GREEN: -- so there is the quantification. I don't see that 26(b) actually adds anything, or what do you think is missing that ought to be there for the purposes of assessing exemption?

MR KENNELLY: My first point is I respectfully agree. The main objection to the current form of wording is that it omits quantification entirely, so it should be amended to include that.

MR JUSTICE MICHAEL GREEN: In 26?

MR KENNELLY: In 26. The merit of having a separate paragraph like this referring to the credit that the sample claimants, or a sub-set of them, is that it breaks out the separate issue in case there is some additional marginal work required for the quantification exercise for the individual claimant concerned. That's the only advantage in breaking it out that way.

MR JUSTICE MICHAEL GREEN: But the problem with the way you are going about it is you are actually bundling these two issues up together. That's at a general level, the quantification is going to be at a merchant-wide level. If that's what you want to say, then fine, you should put it in, but you are bundling that up with the question of the binding effect on the individual claimants, and I think that's quite unhelpful in terms of the way this all works. Because it clearly provokes the suspicion that you are up to something and that this is an attempt to game the sampling process, that seems to be

what underlines the concern about it.

But whether you are or not -- I am not suggesting you are, that's what they are suggesting -- but whether you are or not doesn't really make any difference because at the end of the day, you're going to get what you want in respect of individual claimants to the extent we make decisions about their position.

MR KENNELLY: Yes. Most of my concerns would be addressed if 26 were amended to include that quantification language we see in the earlier issues 23 and 24. I repeat the point that I think there is some merit in breaking out a separate sub-paragraph indicating that the credit for each sample claimant or sub-set should be calculated for quantum, but if the Tribunal is concerned that language is unhelpful -- the most important thing is that issue 26 involves a recognition that the benefits need to be quantified.

To come back to your concern, sir, about gaining assistance is suspicious, again those concerns, whether they are misplaced or not, can be addressed when we come to look at how sampling ought to be done. If it helps, we will be content with inserting, when we refer to the calculation of credit for each sample claimant or a sub-set of them, "if possible" to make it clear that all this depends on what is done in the exemption trial; that we are not seeking to add on an extra mini-quantification trial. This is all about what can (inaudible) can be extracted from the exemption trial. So if we insert the language "if possible", that ought to help the claimants if they are concerned. In any event, how it's done in practice, how it can be best done, sampling and disclosure for the exemption trial will be determined at the sampling CMC when these issues come to be addressed.

It would be premature now to dictate how the issues ought to be drafted because of a concern about how the sampling exercise is to be done. All we are seeking is better language for 26 so it is understood there will be a quantification exercise and, if

possible, a calculation of the credit which a sample claimant or a sub-set of them give for the purposes of quantification. It is no more than that, and that really ought not to trouble anyone since it's such a modest increment to what has already been agreed.

MR JUSTICE MICHAEL GREEN: Do you just need an amendment to 26(a) to say: "Would the claimants have suffered harmful consequences and, if so, by how much?"

MR KENNELLY: "To what extent".

MR JUSTICE MICHAEL GREEN: "To what extent". Would that not cover it?

MR KENNELLY: Yes, indeed.

MR JUSTICE MICHAEL GREEN: Just in case there was doubt as to whether they need to quantify the consequences.

MR KENNELLY: That would deal with quantification, yes.

MR JUSTICE MICHAEL GREEN: Because (b) does look like just a pure quantum issue, doesn't it?

MR KENNELLY: It does, and that's why we would want it changed anyway to make sure no-one was concerned that we were seeking to add to the work that would have to be done in the exemption trial. May I just quickly take instructions on it.

MR WOOLFE: We would have no problem in amending 26(a) in that way.

MR JUSTICE MICHAEL GREEN: Thank you.

MR KENNELLY: Those are my submissions on 26(b). I can --

MR JUSTICE MICHAEL GREEN: So you have no problem living without (b) if we amend 26(a) to include some sort of reference to a quantification of the benefits or the harmful consequences, whichever way around you want to look at it.

MR KENNELLY: Otherwise as you've described, sir. We would be content.

MR JUSTICE MICHAEL GREEN: I think there is no objection from Mr Woolfe to that.

MR WOOLFE: No.

MR JUSTICE MICHAEL GREEN: What about Mastercard? Do you have anything to

say in relation to this?

MR HOSKINS: I am happy, I am not going to enter into this -- we have agreed ours. The basic point is you need to identify the difference in the counterfactual, you need to quantify it at the collective level for the purposes of exemption and for this overlap in exemption. Then there is Visa's separate point: do you then go on and do an each claimant assessment? We are not in that world, we are happy, we have our first two.

MR JUSTICE MICHAEL GREEN: Thank you.

MR WOOLFE: In which case, just very briefly can I just show you what is (inaudible) volume effects in the list of issues because we are going to be wrapping up all these issues in the trial so you can see. That is issue 28(b) on page 1066 of the bundle. Pass on is 28(a). That has been dealt with. 28(b):

"To the extent each claimant did pass on overcharged losses, how much of the claimants' profits reduced through lost sales?"

That is the volume effects issue. If it is in, this is what will come in -- we will otherwise park it.

Just pausing briefly to clarify two other scope of trial points -- this is not in dispute, but just so the Tribunal is aware. First of all, it is common ground that this intended trial 3 issue relate to MIFs charged in the UK and Ireland, the same geographic scope as was covered by trials 1 and 2, not other countries.

Secondly, in terms of the temporal scope of the trial, this is also common ground: the temporal scope of the trial is going to be, in a sense, starting six years prior to the earliest claim against each defendant. So in respect of Visa, that means we are looking back to January 2011, and in respect of Mastercard back to August 2014. So those are the earliest extant claims in the UK against Visa and Mastercard.

MR JUSTICE MICHAEL GREEN: What was the Mastercard date?

MR WOOLFE: 20 August 2014, and that is on (inaudible). We can see an CICC claim

was filed in 2022, so that goes back to 2016 -- that's all encompassed in the period anyway. Those are the earliest Scott+Scott claims against ...

MR TIDSWELL: What about Ireland and your continuous infringement point?

MR WOOLFE: It is common ground that's not going to be in the scope for trial 3. We are just dealing with the UK and Ireland on the basis of what is known about the current limitation period.

MR TIDSWELL: But you are still taking the point, are you?

MR WOOLFE: We are still taking the point, but we are not proposing that it be included in trial 3.

MR TIDSWELL: So what happens to the exemption issue in relation to that if you are right? How do we deal with that?

MR WOOLFE: Well, that would have to be dealt with along with the exemption issues for all the other EU Member States that would apply for a right on the limitation point as well.

This comes on to why we are seeking some steps to be taken in relation to applicable law and limitation because if we are right about that limitation point, we have claims going back much further to 1992/1995 in relation to a whole series of EU Member States, including Ireland, and there would need to be a process for resolving those, but nobody is proposing we have that --

MR TIDSWELL: When you say process for resolving those, do you mean there would have to be another exemption trial for the period 1992 to 2011?

MR WOOLFE: To the extent that different exemption points were being raised in respect of that period, yes.

MR JUSTICE MICHAEL GREEN: When is that going to be? Is that trial 4?

MR WOOLFE: That would be trial 4, but in a sense it is only -- I am going to come on to address you on why we want some steps to be taken in relation to the point of law

certainly because if there is some short answer to us which means that point falls away, then that would clear all that off the table. A lot of cost and time would be involved in proceeding to try infringement and exemption and possibly everything else in relation to all EU Member States in relation to that entire time period. It makes sense to take preliminary steps to see if that work is in fact necessary and justified.

MR JUSTICE MICHAEL GREEN: It is quite unfortunate you do not deal with all possible exemption issues.

MR WOOLFE: It would significantly expand and change the scope of the factual evidence that we are dealing with because to be clear, exemption may differ by a time period, and in principle it is perfectly possible something can be exempt in one time period and not another, that's correct, but it also may differ by territory. So in principle, for example, as you have seen, one argument being made on exemption is that if no MIFs were charged, they would be switching from Mastercard and Visa to other forms of payment which are more expensive; and in respect of the UK, Amex is talked about. In respect of some Member States, there were domestic payment card schemes. That is true in Italy, for example, and Germany, which are cheap comparatively (inaudible). Therefore, the exemption arguments are going to be very different in respect of those Member States, and nobody is suggesting the Tribunal hold in trial 3 an exemption trial for all of these anyway.

The issue, I suppose, is you could do Ireland going all the way back to 1992 if you wanted, that would bring that in scope, but not for the UK. Or do you expand -- in a sense, the issue (inaudible) clearly about what you do with Ireland pre-2011. You could either say we should try it with the rest of the Ireland stuff, or we try it with the rest of the European stuff if the limitation point is a good one. Given the limitation point has not yet been determined, we are assuming we will just do Ireland on the same time as the UK, and that's what has been common ground.

MR JUSTICE MICHAEL GREEN: Assume we go with you and do decide that preliminary issue before trial 3 --

MR WOOLFE: Yes.

MR JUSTICE MICHAEL GREEN: -- and decide it in your favour, does that then mean that exemption has to be expanded for the purposes of 3, going back to 1992?

MR WOOLFE: It doesn't have to be. Whether it is efficient to do so might depend a bit on the time at which that is decided. If it is decided very quickly -- to be clear, though, our points of law we are proposing to be determined are only the points of law. There were also factual issues regarding whether or not there is in fact a continuous infringement covering the entire period, and some other points as well.

So it may or may not still be efficient to include all of those (inaudible) Ireland, it really depends on the timescale, but I think it's common ground that we are just proceeding to a trial on -- we know it is included for Ireland, and then the remainder for Irish (inaudible) could be revisited, together with the rest of the EU as necessary.

MR TIDSWELL: So is the position in relation to the non-UK and Ireland claimants that we haven't done infringement, we haven't done exemption, we haven't done pass-on, presumably. So there's a full set of claimants for which we have done nothing that we're going to have to deal with, we have to do all this again at some stage in the future, and that's suggested to go to trial 4 on the basis -- I can't remember how many weeks we have spent so far on this, but 15 or 16 weeks of trial and another ten or so to come, apparently.

Presumably it is going to be more complicated rather than less complicated to be looking at 20 different jurisdictions for all of those different things. Has anyone given any thought as to how that is going to work?

MR WOOLFE: It has not yet been grappled with significantly in these proceedings. One thing which is true is that the process of dealing with them may be simplified by

the process of the Tribunal having dealt with in respect of the UK and Ireland exemption and pass-on, and so forth because certain issues will have been resolved between the parties.

To clarify, in some cases those are distinct claimants whose claim is purely related to France, or wherever it may be. In some cases, the claimant has both claims in the UK and claims in France, and so forth.

MR TIDSWELL: Yes.

MR WOOLFE: But it is correct that that has not so far been grappled with, and there will need to be trials that grapple with those issues in due course. That's precisely why we want the limitation issue to be resolved so far as possible because it is obviously a very different proposition whether you are looking at those for this country for the past few years, or whether you are looking at them going back much further in time.

It may be also -- I am speaking without instruction -- it may be that rather than having a trial of all 20 EU Member States, what you might do is pick -- well, let's pick the five biggest by value and let's look at them because this one's quite similar to the UK, this one has its own domestic card payment scheme and that may affect the arguments, whatever it may be, but suggesting it may not be sensible to proceed to a trial of 20 jurisdictions all at once.

MR TIDSWELL: I can certainly see if you resolve that limitation point, you get much greater clarity, for example, exemption and the quantum overall, but I suppose it brings into focus, doesn't it, the alarming nature of how much more there is to do in relation to some of these claimants? I just wonder a little bit about the practicality of some of that, let alone a cost benefit analysis, and I wonder if someone should be spending a bit more time thinking about it.

You say, for example, that we might get some benefit from giving a judgment on UK exemption, but I think that begs the question as to whether we have given a judgment

on UK liability because that doesn't give the assistance in resolving the liability position for some of these other jurisdictions. The answer presumably is no, because nobody's looked at it.

But it is very unsatisfactory for this one to be left because someone is going to pop up at some stage and say, "Actually, we're not finishing at 4, we're finishing at 5 or 6", or goodness how much more in order to get that done. I do think there needs to be some sense of how these proceedings are going to be finalised and closed. They can't go on forever.

MR WOOLFE: With respect, sir, we fully agree. We are hopeful that resolving the proceedings relating to the UK will bring clarity to the parties sufficient to either settle or such positions can be conceded on either side. In respect of trial 1 you are right, there has been no concession by the defendants in respect of other jurisdictions to date, but to be fair to them, they are appealing or seeking to appeal the trial 1 judgment. So in a sense, once that -- either that appeal proceeds or doesn't proceed, maybe they will change their position on that.

But we certainly would be saying there should be read across from the trial 1 judgment to other jurisdictions. If there are specific issues in respect to particular jurisdictions as to why it is different in that jurisdiction for some reason, those can be articulated, but there may also be a cost benefit analysis to the extent to which -- the claims are much bigger in some jurisdictions than others, as would you expect. Sir, we take your indication in mind.

Shall we -- the next item on the --

MR JUSTICE MICHAEL GREEN: Is that all the issues on scope?

MR WOOLFE: That's all the matters on scope, sir, yes.

MR JUSTICE MICHAEL GREEN: That's agreed. We are only dealing with the UK and Ireland and that temporal scope you have suggested.

MR WOOLFE: That's agreed.

MR JUSTICE MICHAEL GREEN: Right, yes. All right.

MR WOOLFE: Which would bring us to the next item, which is --

MR JUSTICE MICHAEL GREEN: Do we need to have a break for the transcribers? Yes, we do. That would presumably be a convenient time.

MR WOOLFE: It would, sir.

MR JUSTICE MICHAEL GREEN: We will have a ten minute break.

(11.58 am)

(Short break)

(12.10 pm)

MR WOOLFE: We now come to the third item on the list, which is timetabling towards trial 3 and timing of trial 3, which I anticipate will be a more significant item.

Sir, our revised draft order is at page 100 of the bundle, but I think it is probably most helpful if I work from the annex A to Mastercard's skeleton which they prepared, which sets out their revised proposal as against ours. That's on page 62 of the bundle, but if you have it in hard copy, it might be helpful to have that to hand.

I was going to propose just to work through chronologically the relevant differences and we can see what we get to.

The first one --

MR HOSKINS: Sorry to interrupt. That's not quite our last word because our annex B then runs on, but obviously I'll see how you want to ...

MR WOOLFE: Yes, that is correct. It does differ slightly. What this does do helpfully, though, is identify where all the relevant features are -- perhaps we need to have both annex A and annex B at the same time, then.

MR HOSKINS: Sorry.

MR WOOLFE: No. Thank you. That's helpful.

MR JUSTICE MICHAEL GREEN: That's the defendants' combined proposal, is that right? Yes.

MR WOOLFE: Yes, that is correct. Some of these will just be for the Tribunal to note and approve rather than there being any difference. There is quite a large measure of common ground.

As I understand it, it is now common ground that there should be pleadings on exemption by both sides, and there is a minor difference in the timing that had been proposed. We had proposed 5 February for theirs and 5 March for ours, so we would have a month to respond to their particularised case.

The defendant's position, which is set out in their annex B -- when I say "the defendants", this is both Mastercard and Visa, unless I am told otherwise -- they should serve theirs on 9 February, and we should serve ours on 2 March. What that would mean is -- 5 February to 9 February is not a relevant difference, but that would give us only three weeks to respond to theirs, we are asking for four.

MR JUSTICE MICHAEL GREEN: Yes. I thought they had agreed that.

MR HOSKINS: I think there is a typo in annex B for the claimants' response to pleadings. It should say 5 March instead of 2 March.

MR WOOLFE: That resolves that issue.

The more substantial difference is that revealed by annex A, which is the second item in the table, which is our proposal that the defendants serve, together with their pleading, requests for disclosure covering matters they want from us, together with statements from their experts explaining how the disclosure requests relate to the exemption pleadings.

Now --

MR JUSTICE MICHAEL GREEN: Are you pursuing that?

MR WOOLFE: Yes, we are, sir. I realise this sounds similar to what we requested

before this CMC, we understood it was decided it shouldn't happen before this CMC, but there is a good reason why it would be helpful to the Tribunal and parties to have that at a later stage.

Can I ask the Tribunal to consider two points? One is should statements of that nature be provided at some point, at some point prior to disclosure; and the second is should they come with the pleadings? Because some of the objection of the defendants is it is not practicable to do them literally at the same time as the pleadings.

MR JUSTICE MICHAEL GREEN: Well, it would be fairly odd to do that before seeing your response.

MR WOOLFE: Well, it --

MR JUSTICE MICHAEL GREEN: Surely it depends on what is in issue between the parties, and that depends on your response?

MR WOOLFE: Sir, when you consider the nature of the exemption issue, the burden lies on the defendants to demonstrate that the exemption criteria are met.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: That involves setting out the specific efficiencies on which they reply, which they say arise in terms of innovation, cost savings, and so forth, from MIFs and why (inaudible) that goes to the merchants, and the other criteria as well. Those are the dominant ones.

It is possible indeed that the nature of our response to the pleading may mean that the issues either narrow slightly, or that we put something in issue in our responsive pleading which adds some new issue. We are not suggesting what we put in at that stage would be the last word at all on disclosure.

But in preparing their pleading on exemption, they will have to consult their experts to identify what their case is as to what efficiencies arise. The expert should at that stage be able to say, "These are the alleged efficiencies, here is broadly speaking the kind

of analysis we would need to do to substantiate whether or not those efficiencies are in fact made out, and here is the information that would be needed at a high level". Getting that from the defendants and then our experts being able to look at that and comment on that will help shape the parties' entire approach to disclosure.

Under the defendants' timetable, what they are proposing is the sixth item down, which is simply, "The parties to liaise on and agree scope of disclosure", by I think a revised timing of April. That's a very vague direction and unfortunately the history of these proceedings has been that parties are not actually very good at liaising on and agreeing matters. It is common ground that we should be heading towards the filing of disputed Redfern schedules ahead of a CMC -- filing of (inaudible) schedules some time in April. That's pretty much common ground.

We think that having a structured exchange of views between experts as to the types of analysis which are likely to be needed to substantiate the exemption criteria and as to the disclosure that may be needed to do those analyses would be a very, very helpful step to happen before the parties discuss and before the Redfern schedules are prepared.

MR JUSTICE MICHAEL GREEN: Are you proposing to serve your own expert reports and disclosure requests with your pleadings.

MR WOOLFE: Yes, yes, we are. This is entirely --

MR JUSTICE MICHAEL GREEN: I can't see that on the --

MR WOOLFE: If we go a couple of lines down, you can see 5 March. You can see in our timetable, which is on page -- sorry, the timetable is on page 103 of the electronic bundle. You will see we are proposing to serve comments from our experts on their evidence requests. We would also be content to file our own requests for disclosure at the same time.

MR TIDSWELL: Wouldn't it make more sense for that discussion between the experts

to happen once it's absolutely clear what the issues are? Surely that is the sensible thing to do, isn't it?

MR WOOLFE: The reason for us suggesting it to come together with the pleadings is we think it should be possible to be done and it to be done (inaudible). I can see that it might be best to do it after the pleadings are both done in March, I can see that, but we do think it is important that such reports be prepared and done.

The reason is because when you get to the CMC in around May time when the Tribunal is going to be ruling on the Redfern schedules -- now we know what Redfern schedules are like. If you have a (inaudible) talks about some type of disclosure and is referred to a pleaded issue, that is not going to be hugely helpful for the Tribunal in determining whether or not the disclosure is in fact proportionate.

There is a general problem in competition cases, and this is perhaps an acute example of it, which is that the pleaded elements of the case are not simply primary facts as they are in a lot of conventional pleadings; medical negligence, motor vehicle accidents, whatever it may be. What we actually have -- the thing about the questions whether MIFs lead to an improvement in the production or distribution of goods or to technical or economic progress -- that's criterion 1 -- that is a complex question which involves various features of the market and an exercise of judgment around them. By its very nature, the issues which are pleaded don't reduce to simple binary questions of fact on which you can say this document is relevant, that document is not relevant, in the same way as in many other cases.

What we need to have is expert analysis substantiating a given allegation of a particular efficiency, and you need to have disclosure which is proportionate to that analysis, bearing in mind what alternative approaches are possible, what publicly available data there are, et cetera, whether the analysis itself is really fundamental to the experts' analysis, or whether it is a nice to have, etc.

That's why you do need a much greater degree of input from the experts at an early stage in order to have a useful disclosure CMC in May. That is why we want those kinds of reports to be available to us and to the Tribunal at this stage, that that disclosure seamlessly happens. Our proposal is those be done together with the pleadings, but that is not the most important thing. The really important thing, and perhaps the most important point we would urge upon you today, is the need to have that kind of input from experts before the CMC.

MR JUSTICE MICHAEL GREEN: As you say, they will obviously need to have input from the experts before pleading their case and likewise on your side, I imagine.

MR WOOLFE: Yes.

MR JUSTICE MICHAEL GREEN: The normal run of events is that you don't get early disclosure of the evidence, including expert evidence, upon which a pleading is based. You wait until the issues have been clarified by the disclosure of pleadings, and then it proceeds from there. Why is this such an exceptional case that we should have another round of expert evidence? No doubt we will get many rounds of expert evidence before we get to trial 3 and I think there needs to be some sort of sense of proportion about this. Do we really need a round of expert evidence at this stage?

MR WOOLFE: Sir, we absolutely say you do. To be really clear, we are not proposing that the experts should have to give advanced -- we are not looking for advanced disclosure of their views. The experts, presumably as independent experts, are going to be faced with a dispute between the parties as to a certain point and are going to look at it and say, "Well, in order to investigate which side is right on this particular issue or is it correct that this efficiency arises, I am going to need to conduct this type of analysis". They are clearly not going to be in a position to say in February what results of that analysis are and what their view about it is, they will not have done the analysis yet, and we absolutely accept that, but they are going to say, "I need conduct

this type of analysis and I will therefore need this type of dataset to do it".

It is that kind of report we are looking for, perhaps analogous in a sense to what you see in a collective proceedings context where an expert is asked to say at this stage of collective proceedings when the claim form is filed the types of analysis they would expect to do as the case progresses, but you are not looking for them either to set out their analysis -- they simply can't do that yet -- nor what their opinion is. What we are looking for them to say is, "As a fair-minded independent economist, here are the types of analysis I definitely will/may possibly/am likely to want to conduct in order to analyse this claim for exemption".

If I can take you to the Practice Direction on expert evidence in the authorities bundle which starts at page 1447 in the bundle numbering. This is a recent Practice Direction published in December by the Tribunal. The parts I wanted to take you to in particular were paragraphs 12(c) and 14 -- it covers various matters. On page 1450, paragraph 12, it says:

"The Tribunal will seek to manage cases actively to remove the provision of expert evidence forward in an effective manner and to ensure that the evidence is strictly confined to the issues for which it is necessary. This may include ..."

Then various things are set out.

"Parties to submit to the Tribunal a detailed list of questions for experts, directions to set out factual legal assumptions ..."

The one I wanted to stress was (c):

"Directions to the parties to set out the factual evidence and disclosure, if any, which it is anticipated the expert will draw upon in addressing the questions they are asked to consider."

(d):

"Discussion of key points of data or specific analytical methodology at appropriate

stages before the trial, including CMCs and issues hearing."

So it is anticipated there may be discussion of these issues at an earlier stage. I was going to read 13 and 14 as well.

MR JUSTICE MICHAEL GREEN: At the beginning of paragraph 12 where it says: "The Tribunal will seek to manage actively to remove the provision of expert evidence forward in an effective manner ..."

That doesn't mean bringing the time for expert evidence forward, does it?

MR WOOLFE: No. That simply means --

MR JUSTICE MICHAEL GREEN: It means how you are managing it going forward.

MR WOOLFE: Progressing it, yes. 13:

"The Tribunal may ask the parties at any appropriate stage before the trial to justify any expert evidence."

14 is really the key point:

"While disclosure should be primarily for the parties' legal teams, experts should be involved in any request that concerns data and disclosure specifically for their analysis. Experts should try to keep their requests narrow and targeted so as to avoid requesting disclosure that is ultimately not useful to that analysis. The Tribunal may require experts to submit short letters before a CMC relating to disclosure explaining what they need and the steps they have taken to keep their requests to the minimum."

What we are anticipating -- I know we say report rather than short letter, but we are looking for something short. We are not looking for 100 pages, we are looking for 10/15 pages, whatever it may be, something in the spirit of this.

MR JUSTICE MICHAEL GREEN: "... may require experts to submit short letters before a CMC relating to disclosure."

MR WOOLFE: Yes.

MR JUSTICE MICHAEL GREEN: I think we were agreed that this is not a CMC

relating to disclosure at this stage.

MR WOOLFE: But the main CMC will be, sir.

MR JUSTICE MICHAEL GREEN: Exactly.

MR WOOLFE: And it is in advance of that which we are seeking input from the experts, and it is in the spirit --

MR JUSTICE MICHAEL GREEN: Well, no, you are seeking it on provision of the defendants' pleadings.

MR WOOLFE: That is our -- I ask the Tribunal to keep this separate. One is do we want material like this from the experts; the second is the timing of it. I do maintain the timing, we think it would work. If the Tribunal doesn't think it works on that timing, you can order a different timing.

However, the really critical point I want to urge upon you is that before that CMC, and we say really before the Redfern schedules for the Tribunal are compiled, what we want is the experts on each side to set out what they think they need by way of disclosure to do the analysis they want to do and explain why that disclosure is the minimum necessary; or what is proportionate in order to enable them to do the analysis they want to do.

That's the real nub of what we are seeking. We think merely leaving it to be dealt with by pleadings and then discussion between the parties as on Mastercard's timetable is likely to lead to a very frustrating and ineffective process come May, whereas having some structured input from the experts on what they actually need would be the way to go.

MR JUSTICE MICHAEL GREEN: You say the pleadings in competition cases, which you all know a lot more than I do, are fuller than ordinary pleadings because they don't just plead primary facts, they plead all sorts of other issues and what the particular parties' case is on those issues.

MR WOOLFE: That is correct, sir, but I don't think --

MR JUSTICE MICHAEL GREEN: So you would assume their pleading will be based on what their expert has told them.

MR WOOLFE: That is indeed -- I would imagine so, and our side the same, but the pleading, unless my learned friend suggests otherwise, is unlikely to say, "We plead that these production payment costs that" -- they are unlikely to say something like, "Absent MIFs, payment costs for the claimants would be higher overall", they are likely to say that.

They are not likely to say, "And we propose to prove this at trial by means of a regression of the payment costs of X sample of claimants to be taken over the years from 2015 to 2020, and we have considered looking at publicly available data, but that's not sufficient, therefore we want disclosure from X number of claimants".

MR JUSTICE MICHAEL GREEN: I suppose they wouldn't.

MR WOOLFE: No, but in terms of allowing the Tribunal to rule upon what is actually required by way of disclosure, that's the kind of thing which is going to be necessary.

MR JUSTICE MICHAEL GREEN: I think you are sophisticated enough on your side to be able to work out whichever way they do plead it what they are getting at and also what it's based on. Is that going to be so difficult to work out? If it is, you can certainly make requests for --

MR WOOLFE: It's not our understanding of their pleading -- we will be able to understand their pleading, I anticipate. What I am talking is really how we have a constructive debate about disclosure, about what is actually proportionate by way of disclosure, and to what extent we need to have -- I mean, this doesn't just apply to the claimants. It also applies, for example, to the issuer, the suggestion of third-party disclosure from issuers.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: Experts may take -- both sides may take views about what issuers would have done in the absent of MIFs, and there may be quantitative analyses being proposed in relation to that type of issues. Again, having seen an exchange of views between the experts as to the types of analysis they are proposing to do and what data they need to do them is going to be necessary in order for there to be a constructive CMC come May.

MR JUSTICE MICHAEL GREEN: Assuming that is the sort of thing they will plead: is the issuer reaction to -- or how issuers would behave in the counterfactual or whatever.

MR WOOLFE: Yes. As I say, we are capable of understanding their case, but there is a significant step between a pleaded case and disclosure.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: It is trying to bridge that gap in a way which is actually helpful to the Tribunal come that May CMC. If it is to be done after we have done our pleadings in March, so it becomes but a short step in exchange of letters between the experts at that point, that's fine, but it is the matter of tying for each efficiency alleged, roughly speaking, the type of analysis the expert is going to do in order to look at it, and what data are necessary to do it.

MR TIDSWELL: So it is going to be a month between getting responsive pleadings and the date on which you are supposed to agree the scope of disclosure. Presumably that will be done by you writing to each other and saying, "This is what we want", and no doubt justifying that by saying, "This goes to these pleaded issues".

Doesn't that just answer the question? Why do you need to have a report from the expert which tells you that? One can assume that the schemes are going to write those letters based on the advice of their experts as to how they intend to approach it, so aren't you just introducing an element of verification that's just not necessary? If you're going to get a letter that tells you what they want and why they want it, you can

assume that is because their experts have asked for it. What else do you need?

MR WOOLFE: Sir, there are two points. One is a pragmatic one. The first one is our understanding is that under the Practice Direction on expert evidence, indeed the Tribunal's view is precisely that that kind of verification may be appropriate. If I may take you to paragraph 6, which my learned friend has drawn my attention to for quite some time, at page 1448.

MR TIDSWELL: Which one are we looking at now?

MR WOOLFE: The Practice Direction, paragraph 6.

MR TIDSWELL: This is all about -- there are two different things happening here, aren't there? One of them is about the control of the expert reports, and we're not talking about that now, are we?

MR WOOLFE: No, but -- the thing is when we come to that CMC in May -- at least I think it is common ground it should be in May -- that is all going to be about what disclosure the experts need to file their reports in due course.

MR TIDSWELL: Yes, of course.

MR WOOLFE: We are simply saying having an exchange of views on what methodologies they are going to be using before then will help inform that.

MR TIDSWELL: I think that is quite a different point. If you were standing up saying, "We think it might be quite helpful for the experts to meet because it might be helpful for them to share their views on how they are going to go about it, and if they could come up with a composite list that would be very helpful".

But you are not saying that, and maybe there is some resistance there. I actually personally think that might be quite helpful, but if that's not the parties want to do, that's fine, but producing bits of paper for no obvious purpose is the problem here, isn't it? These reports are very expensive and they take up a lot of people's time, and they're distracting in circumstances where you are going to get a letter that tells you the

answers to the questions you are asking, which is: why is it that a particular piece of disclosure is required?

If you object to that and push back on it, that's the point at which the Tribunal says, "Well, we want some assurance that the expert does really need this", but I don't think you start that process with that assurance. You start the process with people putting out their wish list and then you have a sensible process of discussion by which you get to something which either is agreed as being proportionate, or you ask us to rule on.

I am not sure that spending a huge amount of time and effort right at the front of that process helps you with identifying -- hopefully it will be a relatively small number of disputed items at the end.

MR WOOLFE: Sir, if I can come back on two points. One as to why we are not proposing simply the experts meet I think reflects our experience in this case and others that it puts too much on the experts asking them simply to agree matters. They may come from different perspectives and don't agree a common methodology, they simply come from different places and we shouldn't be trying to tie one side with the other necessarily to all sing from the same hymn sheet, and it being a very expensive process trying to agree things which are incapable of being agreed. What is better is simply to have a mutual understanding of where we are both coming from.

MR TIDSWELL: I have to say we have a real problem with that because it strikes me that the way in which this was done in solicitors' correspondence is very, very expensive and often not particularly useful. The way it's done when experts get together is generally better, if that's the way you want to do it.

Just to be clear, we are talking here about -- it is pretty obvious what the sorts of evidence that are necessary here, isn't it? We know there is some amount of claimant evidence which is going to be necessary -- I am sceptical about there being an awful

lot that's going to be useful, but no doubt there will be some exploration of what is and what isn't. We know we need some (inaudible) evidence and we know that's quite difficult to get, so someone's going to have to get their thinking caps on with that. Traditionally in these proceedings, that has always been left too late and not been done well, so it would be helpful if someone was thinking about that hurdle sooner rather than later.

Then we know there is a whole bunch of other things which actually are quite difficult to get hold of, like cardholder reactions, and so on. So the pool of things the experts know they want to dig into is going to be pretty obvious, and I would have thought pretty easily agreed between them.

Then the question is: how do they want to approach it? They may want to approach it in completely different ways, which is fine, but I don't see any harm in them having a discussion about it and at least identifying whether there are overlaps where they all agree that the information is necessary and this was the right way of going about getting it. Because one of the problems with this is going to be the satellite items which are going to come later on, about the right way of accessing the evidence: should we have sampling; if so, who do we get the samples from; what is representative, what isn't; what does it mean to have samples? All that stuff.

We have had all that before and we know it is quite difficult with this claimant group and with the type of issues we have -- I am just pushing back a bit on this idea that somehow the experts shouldn't be able to efficiently agree on some of this. I'm not sure that's right.

MR WOOLFE: If the Tribunal is minded to say the experts should meet following pleadings and see if some discussion can be undertaken, I am not going to resist that strongly. The core of it I think sir, is this: at the time you are looking at the Redfern schedules, there is a difference between an explanation which goes along the lines of,

"This class of material as to payment costs", or, "This class of material as to the extent to which you have adopted unmanned tills" -- I think is said in one of them -- is broadly speaking part of what we have pleaded and we want disclosure of -- you know the kind of thing: we want management reports, we want board minutes, et cetera, relating to that, we want data from your accounting system related to it.

The issue mainly comes down to if experts are going to be trying to construct some form of dataset on the one hand to conduct a particular kind of quantitative analysis -- I say a type of quantitative analysis, it is helpful to know what that type of analysis is. They should be able to say, "Here's my menu of analyses that I might pick from, is broadly from this type of thing I want, therefore I want that type of data". If when they are asking for it in a Redfern schedule, they can explain what type of analysis it goes to, not "our expert has asked for it, take it on trust", but "Here is the type of analysis it goes to".

It is likely to be a great deal easier for these matters to be agreed because the experts' (inaudible) response may be, "Yes, I fully agree", or, "Yes, I largely agree but what you are asking for goes beyond what is necessary for that particular type of analysis and therefore you don't need items X, Y and Z". It's a more granular kind of discussion that can take place.

We understand, in a sense, in asking for disclosure they should already have a view from their experts as to the type of analysis they need it for, and both sides should be able to share that in broad terms. We are not asking for the expert to say what their view is, their view may well change come trial, but that's the meat of the point.

In terms of dealing with the timetable, rather than hear from me on the whole of the timetable, I wonder does it make sense for you to hear from my learned friends on this particular point?

MR JUSTICE MICHAEL GREEN: If we are against you on expert involvement at the

time of pleadings, serving their pleadings, where later in the timetable do you say there should be this expert involvement in accordance with paragraph 12(c) of the Practice Direction?

MR WOOLFE: It is needed effectively by the time of the filing of the disputed Redfern schedules ahead of the CMC, which is the last but one item on the table. So on our timetable, we say it is 9 April, I think. On Mastercard's amended timetable in annex B, it is now 27 April, but we are looking at April, roughly speaking, followed by an April CMC before the Tribunal, but we think it would be helpful to have it before the Redfern schedules because it will help narrow what goes into dispute.

MR JUSTICE MICHAEL GREEN: Do you agree there should be -- assuming there is no early disclosure from the experts or no early statements from the experts, that it makes sense for the parties to try and agree on the scope of disclosure at some point?

MR WOOLFE: Clearly in order to get to -- we are anticipating a schedule of disputed requests. Realistically there are going to be some disputes, that assumes we are going to be discussing and agreeing the remainder.

MR JUSTICE MICHAEL GREEN: So there will be a certain amount of correspondence between the parties no doubt based on what each of their experts are telling them they need, and then it may get to the stage when you are preparing disputed or your own Redfern schedules that there is an appreciation that we need some sort of evidence from the experts for the purposes of the CMC. Parties may agree that's that sensible. Would that not be a better way of approaching this once the issues have been narrowed to a certain extent?

MR WOOLFE: That is a way of approaching it. I think the difficulty is if those only come after the Redfern schedules are filed, we end up with a lot of argument between the parties. It kind of goes at cross-purposes and we end up with more disputed items in the Redfern schedules than are actually necessary, matters which were capable of

being agreed.

Then you have the unilateral filing of reports by one party with another saying, "Our expert says this, that or the other about the disputed requests". It would be better and more efficient if those were exchanged prior to the finalisation of the Redfern schedules. That's really where we are coming from.

MR JUSTICE MICHAEL GREEN: So at some point between 13 and 27 April?

MR WOOLFE: No. At some point between the close of pleadings and the filing of the disputed Redfern schedules.

MR JUSTICE MICHAEL GREEN: All right. Shall we hear what the others have to say about that? Mr Hoskins?

MR HOSKINS: I have been dragged into this swamp, I have no choice. It is common ground that disclosure requests should be reasoned; it is common ground that the experts will be involved in formulating the disclosure requests. We proposed this Redfern schedule-type procedure because the whole point is you start wide and you narrow. It doesn't make any sense whatsoever to have experts writing reports or letters too early before you have got to the narrow point. It is a complete waste of time and money.

So we envisage that we will make reasoned requests for disclosure. There will be a response, there will be additional requests for disclosure, and this will lead to the production of Redferns which will have the remaining disputes identified. We will have to give reasons in the Redfern why we want it, they will have to give the reasons why they don't think it should come.

Insofar as there remain disputes, there no doubt will be, they are provided for in the CMC. Insofar as the parties think it is helpful, they can produce the short letters from their experts before the disclosure CMC precisely as envisaged in the Practice Direction, and that's it, there is no great difficulty to this. It is just a waste of time and

money to try to micromanage the process at the start rather than at the end. The experts will be involved throughout, they will provide short letters if needs be on the disputes. I can't really say anything else, that's it.

There is a separate point, which is not about experts' involvement in disclosure, which is about the experts' methodology which Mr Tidswell raised. If it is considered helpful to have the experts meet and discuss methodology -- the parties will hear what Mr Tidswell has said about that -- the period for that to happen (inaudible) about methodologies, et cetera, as a precursor to the expert reports, we are proposing it is going to take six months to do disclosure.

If the parties decide it is helpful for the experts to meet and talk methodology before the reports, then there is a period for that to happen, but that's a different issue, that's methodology discussion, not disclosure discussion.

MR TIDSWELL: I was actually raising it in the context of a disclosure discussion, but it applies equally to both.

MR HOSKINS: I am sorry.

MR TIDSWELL: The reason for raising it was that it did seem to me to be one of those cases where everybody knows what the pool of material is. They might have different ways of approaching it, which is fine, but it would make sense -- it would be helpful, I would have thought, to the parties for them to understand what the experts agree if necessary in order to be able to deal with these points.

I don't think that's a very difficult and expensive exercise because I would assume that the experts will have focused their minds as they assist with the pleadings, but if people don't think it's going to help, I'm certainly not going to push it.

MR HOSKINS: There is also a timing issue here. We've been told that our timetable is outrageous, et cetera, but there's not a lot of fat even in our annex B timetable to make this work. So absolutely the parties will have to consider the best way to use

the experts as part of the disclosure exercise, but we are talking matters of days here to do things, not -- there is no leisure built into this timetable at all.

So I absolutely hear what you say. If we think it is useful, obviously we will suggest it. There is also a timing constraint throughout this, there is no fat in it.

MR JUSTICE MICHAEL GREEN: If they were to do this, the experts are not bound into the way they are looking at methodology forever more. I mean, their methodology might change as a result of the disclosure.

MR HOSKINS: It will absolutely change. I don't know and I am not a betting man, but if I were, this will change because it depends what comes out of the disclosure.

That's why we have suggested this whole process, which is for us to plead the best knowledge we have at the moment, what arguments we expect to run on 101(3), and then we will have disclosure and then we will have the reports when we see what the experts think they can do with the disclosure.

This is really difficult stuff and that's why it is so important, in our submission, to have these separate steps identified; not to micromanage the bits, but to have these separate steps identified. It is an iterative process. That's very much what we have tried to propose here to make that work because if we don't identify the right steps or we don't allow enough time for each of the steps, from that side and this side, you can see how painful this trial could be and nobody wants that.

On this particular point about should the experts be producing mini reports on disclosure at some early stage, you have my submission: absolutely not. We have a process and we submit our process is the correct one. It's less wasteful and more likely to get to the correct result.

Unless I can help you further, that is all we want to say on that particular aspect.

MR JUSTICE MICHAEL GREEN: Mr Kennelly?

MR KENNELLY: We agree with Mr Hoskins.

MR JUSTICE MICHAEL GREEN: Right.

MR WOOLFE: I hear what my learned friend says. What we pointed to is the danger of the parties getting to these Redfern schedules based upon yes, on instruction from experts, but not with sight of each other expert's position, and therefore there being disputes about what is necessary, and then in a rush between, on the defendants' timetable, 27 April when the disputed Redfern schedules are filed, and 11 May when they say a CMC should be, we have each side's experts putting in short letters explaining not just why they want what they want, but also why they don't think what the other side's experts are asking for is in fact necessary to that which they think but don't know for sure what the other side's experts are doing. It is that transparency on both sides which is actually necessary to try and narrow the issues and to enable the Tribunal to rule effectively.

If this is done in a rush before that CMC then not done at all, but something in advance of that CMC which does tie disclosure requests to specific types of quantitative analysis which the experts are proposing to undertake, we do submit that will be of real use to the Tribunal in working out what disclosure is necessary.

We accept experts may change their methodologies later on. They may say, "Actually, I tried this route but in the end it didn't work and therefore I did something different", but if they are asking for documents and data, they must have in mind what it is they are intending to do with it. All we are asking for is the exchange of -- what their intentions are, steps --

MR JUSTICE MICHAEL GREEN: Without bringing forward the time for the parties to liaise and agree on scope of disclosure. Because at the moment, we have over a month between the close of pleadings and for that to happen.

MR HOSKINS: The intention is as soon as the responsive pleadings go in on 5 March, the liaison starts.

MR JUSTICE MICHAEL GREEN: The reason is the agreement happens on the 13th --

MR HOSKINS: Yes, that's right. It is a deadline rather than --

MR WOOLFE: I certainly understood that to be the case. From experience, it takes much longer than a day for parties to agree.

MR JUSTICE MICHAEL GREEN: Presumably in that time the parties will be discussing their different approaches to disclosure and whatever requests they are going to make and the general shape of disclosure, it will be quite apparent where they are coming from, their experts. It may even include reference to what their expert has wanted. I do have difficulty in seeing why we should specifically include a requirement that expert reports or statements be filed at a very early stage. I think that is just going to be wasteful of time and costs.

MR WOOLFE: Is that the Tribunal's decision, or an invitation --

MR JUSTICE MICHAEL GREEN: Yes, that is our -- I was going to suggest maybe we have a discussion about it, but I think you probably need to know from us in order to proceed with the other items on the timetable.

But certainly it is my view, and I think Mr Tidswell agrees, it would just be premature to require experts to show their hand and say what they think is required in terms of disclosure in a couple of weeks' time, which is what it is, with the filing of the pleadings. I don't see any reason why this shouldn't follow the normal course of any proceedings that evidence and expert opinion follows certainly after the close of pleadings, and possibly even after disclosure.

Now in this case, obviously the expert requirements will shape disclosure and they will have to be involved, but I don't think it will be proportionate for us to require expert reports or a further round of expert evidence at this early stage of these proceedings. I think the parties should endeavour to agree the scope of disclosure in that time

between close of pleadings and 13 April. That will give time for the parties to work out whether expert involvement and expert statements will be necessary for the Tribunal to decide any disputed disclosure requests for the next CMC. I think it should be done in that way.

MR WOOLFE: I am assuming we don't get in with pleadings, it is leaving open whether or not they may be necessary in advance of the CMC, but we will revisit it in the process of liaison, if in fact that were necessary and proportionate at that stage.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: Thank you, sir. I was going to proceed, the next item is the timing of the Redfern schedules. There is not a great difference, it is a matter of a couple of weeks. Might it make sense to break now, sir, and then we can press on with the -- most of the remaining differences on the timetable are not real differences, we have approached it like that.

MR JUSTICE MICHAEL GREEN: You mean the actual stages are not disputed, I think.

MR WOOLFE: The actual stages are largely agreed, yes. It is then just a matter of assigning the dates to them.

MR JUSTICE MICHAEL GREEN: The timing.

MR WOOLFE: There are some small ones, like the primary Redfern schedules which will be provided in a couple of weeks. Then there are the big ones, like the time required for disclosure as a whole, the time required from disclosure to expert evidence as a whole, but they are the big money items, as it were.

MR JUSTICE MICHAEL GREEN: The big issue is the trial date. They are suggesting January 2028 and you are suggesting mid-2027, is that right?

MR WOOLFE: That's right.

MR JUSTICE MICHAEL GREEN: I think January 2028 sounds far too far away, it

seems to us. I know there are a lot of complicated issues here, but these proceedings have been going on for some time and we really do need to get on with trial 3, not least because we have a trial 4 also to come. So I think you should know that we are looking at -- we were thinking, on the basis of what has been said to us, that there ought to be a trial in around October 2027, but on that basis, I think we would ask you to try to liaise over the lunch break to see if you can fit within that endpoint, as it were, fit your timetables within that.

MR HOSKINS: Our original proposals -- you have annex A -- had a trial landing then.

MR JUSTICE MICHAEL GREEN: Yes. You say because of the involvement in the CICC, that adds a few weeks.

MR HOSKINS: Six weeks added for CICC.

MR JUSTICE MICHAEL GREEN: Really?

MR HOSKINS: Can I just tell you what the differences are? I don't want to keep you from your lunch, or anybody else. The claimants' proposals included certain aspects that we didn't have, so extra steps that we thought were a good idea. For example, we put in reply expert evidence, so that's a claimants' suggestion we adopted and put extra time in.

Then the claimants' timetable doesn't have any provision for reply of factual witness statements, clearly there should be that possibility. Nor does the claimants' suggestion have a pre-trial review, you need to allow time for that. So there are certain items -- it has built up. Our original proposal absolutely takes you to 11 October. The difference is CICC claimant proposals, and then they still lack reply witness evidence and the PTR. So those are the bits.

I think my suggestion is we just go through the list and you will tell us what dates you want us to do it by, and we will come up with -- but I was content to go through each of the things, then you see where it lands and you will see what trial date is sensible

and possible, but I hear what you say, but you will understand why there is quite a lot that would have to be cut out to get from our original proposal to what we have put in before. We would be missing bits or having a very curtailed timetable. I don't want to make any promises to you that we're going to come back after lunch and say, "We have sorted it".

MR JUSTICE MICHAEL GREEN: It is good to manage expectations. All right.

MR WOOLFE: Despite my learned friend's pessimism, we will try.

MR HOSKINS: Absolutely.

MR JUSTICE MICHAEL GREEN: Pleased to hear it. All right, we will resume at 2.00.

(1.01 pm)

(Lunch break)

(2.00 pm)

MR HOSKINS: Sir, as directed, we have had some discussions over lunch about the indications you gave. It is agreed that I should stand up because we are, I think, to date, the only party that has put forward a timetable that leads to a trial starting on 11 October 2027.

The first rule of advocacy is listen carefully to what you have been told by the bench. You said you wanted a trial starting in the middle of October 2027 and you pulled a bit of a face about the time we had allowed for CICC. So let's look at what a timetable would look like that would start in October and finish before Christmas that year, if that's helpful.

It is on annex A, which is page 262 of the bundle.

MR JUSTICE MICHAEL GREEN: Yes.

MR HOSKINS: It is the second column headed "Defendants' Proposal". So the main difference is we had suggested we allow six weeks for CICC. You see how we split it up. It is two weeks, two weeks, two weeks, but if you completely strip that out so there

is no extra time at all allowed for CICC, then you have all the steps that I think are now agreed between us and the claimants, save for a couple of points I should raise. One on date and one on a step.

At the moment in annex A it says that the claimants' responsive pleadings would come on 27th February. The claimants have asked for the 5th March. Let's assume you put in 5 March there. You would have to adjust the dates that follow but you could either do that by losing a week off something or just losing a day off each step and that would give you the days back. We can sort that if that's where you end up.

You then have the provision for trying to agree disclosure. It leads to the CMC on disclosure.

Then over the page you have 20th October 2026, completion of disclosure --

MR JUSTICE MICHAEL GREEN: You are saying -- I am looking at the parties to liaise and agree on scope of disclosure. Should that be 27th March or should it be later?

MR HOSKINS: The trouble is if you start moving it along, you are quickly moving towards the trial starts at the end of October and with a ten week estimate you are running over Christmas. So I am showing you -- I think the others are going to make submissions, I have agreed to stand up and they can then take pot shots at what I am showing you, but I am trying to give you an indication of what this would look like and I think that means there is not that much flexibility thereafter.

MR JUSTICE MICHAEL GREEN: Okay.

MR HOSKINS: The disclosure and accompanying data would be 27th October. We have asked for that date and this is our most important point. We think we are really going to need that time for that disclosure. That works on this timetable so we get what we want on disclosure.

You have witness evidence, reply witness evidence. On the expert evidence, this is slightly unclearly labelled --

MR JUSTICE MICHAEL GREEN: The reply witness evidence, does that necessarily need to be there?

MR HOSKINS: I think we need provision for it.

MR JUSTICE MICHAEL GREEN: What do you anticipate? I mean each side is going to be producing very different evidence. It is not as though it is dealing with the same issues, unlikely to be. So do you really -- I mean parties can apply to adduce reply witness evidence but I am wondering whether at this stage it needs to actually be built into the timetable.

MR HOSKINS: I think it may well do because the expert evidence will be built on data, disclosure, et cetera. It will also be based, I imagine, on some factual witness evidence. So there will be some factual witnesses probably on both sides who say "in my experience X", giving factual evidence, which is then taken account of by the experts, and therefore --

MR JUSTICE MICHAEL GREEN: I don't want to unnecessarily extend the time for expert evidence. Anyway.

MR HOSKINS: The point I was going to make is I think it would be prudent to have that provision in. We have allowed here 18th December to 29th January. I mean that is partly to take account of the fact that this is coming in just before Christmas and some people want a Christmas holiday. It's not an excessive time. It doesn't stop the trial starting on 11 October.

MR JUSTICE MICHAEL GREEN: If you didn't have it, would it bring forward the time for expert evidence?

MR HOSKINS: No, because --

MR JUSTICE MICHAEL GREEN: Do you need until 23rd April for anything --

MR HOSKINS: It wouldn't, because you have seen in Mr Sansom's first witness statement that he has spoken to our expert economist and she has said that the

minimum she would want for the date for her to file her expert report is six months from the --

MR JUSTICE MICHAEL GREEN: I know she says that but I mean --

MR HOSKINS: There is no other evidence before you.

MR JUSTICE MICHAEL GREEN: We don't have to take her word for it.

MR HOSKINS: No, you don't.

MR JUSTICE MICHAEL GREEN: If we think it can be done in a shorter period of time, then that's what we will direct.

MR HOSKINS: Of course you will, sir. That's your prerogative, but the point is that merely reducing or taking out reply witness evidence doesn't have an automatic effect on the timetable, because the date for expert evidence has been set by reference not to when witness evidence closes, but when disclosure completes in order to give the experts sufficient time with the data. So it is not -- you absolutely can take whatever decision you want, but it is not a knock-on effect. If you take out reply witness evidence, it doesn't move forward expert evidence on the basis I have described.

MR TIDSWELL: (Inaudible) to the disclosure entry, which is disclosure can be provided in one go. Why are you doing that? Surely rolling disclosure would be helpful, wouldn't it?

MR HOSKINS: The problem with rolling disclosure is it can take longer depending on the nature of the process. I think if you want to revisit rolling disclosure, as opposed to disclosure in one go, I suggest we do that at the CMC for disclosure. You may well be right. Maybe we will all say yes, that's a better way to do it but I wouldn't like to sign up to it now.

MR TIDSWELL: The point I think is that if Ms Webster is saying she needs six months that is six months from when, isn't it? And if she was setting substantial material prior to 23rd October, then she might feel a bit more comfortable about it --

MR HOSKINS: It depends what it is. If you are getting rolling disclosure but the stuff that she needs comes at the end it doesn't help.

MR TIDSWELL: No.

MR HOSKINS: So then there is the expert evidence. When it says expert evidence, that's the defendants' expert evidence, because we will go first. Then when it says reply expert evidence, that's actually the claimants' expert evidence.

Now, what this doesn't include is any provision for actual reply expert evidence from us, which is something the claimants had suggested. If you live without that and knock out a stage of expert evidence, I think it would then be important when you have the joint expert statements and what we have called the expert position papers, it is really important you then have them because we need to have a chance to comment on the claimants' expert evidence. Ideally, as we explained in the skeleton, the joint experts' statements and these position papers should be on key issues. So you are narrowing things down. It is not we are coming back in a position paper and responding to everything the claimants' expert has said. What's envisaged is there will be agreement between experts on what actually matters and then in the position paper insofar as necessary we will respond to the claimants' position, but that means you get rid of a step, which is reply expert evidence. It is not the norm, but I think we would live with it if we have this sort of structure. That does take you to a trial on 11 October 2027.

Now, I understand you are pushing me to say can we prune this, can we prune that? I can only say to you this was sort of at the limit of what we thought was possible. This then increased, because if you put in time for CICC and you put time in for reply evidence, it takes you to where it took you in annex B. We have not moved because there is fat in this. This was already lean. We do think it is important we are allowed the time we seek for completing disclosure and for doing the expert evidence on the date we suggest. This takes you where I understood you wanted to be.

MR TIDSWELL: CICC, I can see that the ability to seek disclosure and other material from CICC might expand the effort of the disclosure period, although whether it does that by six additional weeks is questionable. It is quite difficult to see why after that it makes any difference to the timetable, because single counsel, single expert for the claimants, why does it make any difference to the timetable?

MR HOSKINS: It may or may not. The thinking was if we are getting material from CICC that we wouldn't otherwise have got from the claimants, then we had simply allowed two weeks extra at the stage of witness evidence in case we needed to take account of extra material and we had allowed two weeks for expert evidence in case again there was extra material. So the question you put to me is it possible even with CICC's involvement we would have the same amount of disclosure we would have had if it was just the claimants. That's possible. I just don't know.

MR TIDSWELL: You might have more disclosure and you might have more material, but at the end of the day that doesn't necessarily translate into more expert evidence.

MR HOSKINS: It might do but it doesn't necessarily. That is why we have given up these iterations. What we were trying to do it was say to the Tribunal if you do something that is very slimline, you get the second column. If you think we need some extra time for CICC, you get that column, and if you want to put in extra steps that the claimants have suggested, then these are what the steps should be. This would allow you to make charts, but if you want the October trial date it is the slimline version.

MR JUSTICE MICHAEL GREEN: Is the time estimate for trial four or five day days a week?

MR HOSKINS: We have not broken it down because, we haven't got the expert evidence but we have put in our skeleton argument a ten week period. That was including we imagined the volume effects because at the moment it may or may not. It hasn't been finetuned to that level. We just had a reading week, a week for opening,

a week for evidence, a week to prepare written closings, a week to complete. We put that at that level.

We are very far apart from the claimants on this. They had seven weeks for an exemption only trial. That didn't include a reading week but we are in the same sort of ball park on both sides in terms of the length of the trial. So I think on this slimline version, even with volume effects, we should be finishing before Christmas on this timetable.

MR JUSTICE MICHAEL GREEN: It seems the only saving you are putting forward is maybe on the time for expert evidence could go back by a month and similarly reply expert evidence, but you probably end up in the same place.

MR HOSKINS: The thing is if we move the trial to September, there is going to be a lot happening in August when nobody is going to be here.

MR JUSTICE MICHAEL GREEN: No, I am not suggesting we move the trial to September, certainly not.

MR HOSKINS: I am glad to hear that. Then there is no need in a sense to move expert evidence.

MR JUSTICE MICHAEL GREEN: No. I can see that.

MR HOSKINS: It is tight but it works on this basis. There is no ... I mean, this commends itself --

MR JUSTICE MICHAEL GREEN: Only that it will perhaps put in place a certain amount of slippage, if necessary.

MR HOSKINS: I just don't think there is scope for slippage here. We have asked our experts more than once "how much time do you need? How much time for that?" We asked them in the short adjournment, "if we go back to this can you live with this?" The message very strongly from our experts is "we really need this time", I think it is a six month period from the expert evidence, from the completion of disclosure. That's

the strongest message we have had from our experts.

MR JUSTICE MICHAEL GREEN: They don't know how much disclosure they are going to get.

MR HOSKINS: This is based on --

MR JUSTICE MICHAEL GREEN: It is going to be less than that I am thinking.

MR HOSKINS: It is simply based on their experience of other heavy cases. They have said generally they would expect to have between six and 12 months from the completion of disclosure to preparing the report in a case which involves heavy data. So we are at the minimal end of that by definition. They said "we usually see six to 12. That's what we need and we are asking for six here because we understand you want to get this on quickly".

MR JUSTICE MICHAEL GREEN: Obviously in Trial 2 they had a very short period of time for the receipt of the data and the date of evidence.

MR HOSKINS: I think we have learned from that experience because it was not a very happy experience as I understand. I don't think anyone really has the stomach to go through that again. It just wasn't a very happy experience. Thank you very much.

MR WOOLFE: We have an alternative proposal also going into October but it is a slightly different route. I think Mr Kennelly wants to push back on the October. I don't know who you want to hear from first.

MR JUSTICE MICHAEL GREEN: Yes.

MR KENNELLY: It is probably better to hear from me since you have at least the defendants' submissions in one go.

Obviously I would never dream of taking potshots at Mr Hoskins and I appreciate that we are pushing back on an indication that the Tribunal has given and all the risks that that involves.

I have three points, if I may, on the timetable. The first is that Visa is very anxious to

retain the deadline in November 2026 for disclosure. What that means is that at least two weeks needs to be added to the Mastercard proposal, which does mean a trial starting at the end of October and completing in January. So it has the disadvantage of going over the Christmas vacation. The reason why disclosure is so important in November and why that period is needed is because we are concerned not only with our own disclosure but also with issuer disclosure. The issuers over whom we have no control. This has an echo of the experience the Tribunal had in Trial 2 with acquirer material. It is very difficult to anticipate now how long it will take to get the disclosure, to discuss with them what's adequate, to do the backwards and forwards that is necessary in order to obtain disclosure from people who are not participants in the litigation and that disclosure as we will see is said to be relevant by the claimants and all parties.

MR JUSTICE MICHAEL GREEN: But you had originally agreed the defendants' proposals of 23rd October, but 6 November came in because of CICC.

MR KENNELLY: Yes, it is true, but on reflection --

MR JUSTICE MICHAEL GREEN: Not because of issuer disclosure.

MR KENNELLY: I fully accept that.

On reflection, looking at the timetable, the reason why we want more time beyond 23rd October is not only concerns about disclosure. I might just briefly add that there is a disclosure issue, but there is a second problem. True it is that we signed up for 23 October, but at this point, having discussed in more detail with our teams and our experts likely problems that may arise in relation to disclosure, it is critical we say that some flex be built into this timetable. That's the real concern here.

Sir, you were looking for room for slippage in the timetable a moment ago with my learned friend. That instinct to try to find room for slippage is we say with respect astute because in major litigation like this it is often the case with the best will in the

world problems arise in relation to disclosure and disclosure deadlines are missed. So unless we have some slack built into this timetable, there is a real risk that things will be derailed at a later stage. Tempting though it is to tighten the timetable and excise all room for flex that will ultimately be of no assistance to you or to the parties.

It is very possible that in relation to disclosure, which is so critical in this case, that disputes arise, whether of the adequacy of the claimants' disclosure or our disclosure or someone else's disclosure, and that they will need to be resolved before you within this timetable. The disputes in relation to disclosure are critical because in the Visa case, and I am sure in the Mastercard case too, the claimant disclosure and the claimant evidence will be of critical importance to our ability to satisfy the requirements of the 101(3) defence in this case.

Just to recall, the Supreme Court has set for these schemes a very onerous test that we have to satisfy to show that the MIFs generate benefits which are directly connected -- the MIFs and benefits are directly connected and we can demonstrate that. We have to demonstrate it with compelling empirical evidence.

For that exercise the claimant material will be of vital importance. It would be a real shame and contrary to the interests of justice if in order to stick to deadlines that allow no flex the necessary disclosure wasn't obtained and the ability of the schemes to exercise their rights of defence were prejudiced. That is why flex is so important in the process.

MR TIDSWELL: Can you give us just a better sense of what you are expecting to get from the claimants, what sort of material? Are we talking about costs data? Are we talking about a different sort of analysis? You talk about making the causal connection. How are you going to do that with material from the claimants? I am not asking a detailed question. I want to get -- one of the things that's apparent here is people are talking about sampling and about -- and I am not sure whether that's

something which everyone has signed up to or whether that's just some of the parties think that's a sensible thing do, but you will recall we had all sorts of difficulty with agreeing how to approach samples and what they mean with the claimant data in the past. I just wondered to what extent you think this is likely to lead us into the same sort of territory whether we are getting data bases -- getting data from claimants that then people are then going to have to clean and then there is going to be difficulties working out whether, in fact, analysis can be done on it and so on. Is that the territory we are heading for?

MR KENNELLY: In relation to individual claimants, sample claimants, possibly yes. Certainly it is likely that all the claimants will need to contribute to an RFI as part of this sampling process in order to work out which claimants are appropriate for a sampling process. Once claimants are selected for sampling, it will be necessary to obtain detailed disclosure and evidence from them in order to be able to test what benefits arise and the extent to which those benefits are causally connected to card usage. That granular process will be disclosure and document heavy.

MR TIDSWELL: Just when you say what benefits arise, so if, for example -- let's take a very obvious one, the saving on the use of cash processing, for example.

MR KENNELLY: Yes.

MR TIDSWELL: So you are going to want detail from their accounts about the costs of cash processing. Is that the sort of thing we are talking about?

MR KENNELLY: Yes. Exactly.

MR TIDSWELL: How do you prove causation from the data?

MR KENNELLY: It will be linked to -- well, causation is in two parts. One is the link between the MIFs and issuer behaviour and how the schemes interact with the issuers.

Then secondly, once card usage increases or card usage is stimulated, what cost

savings arise from that on the part of the merchants.

MR TIDSWELL: Are there going to be natural experiments that you are going to use? Is that the sort of thing we are talking about?

MR KENNELLY: Absolutely.

MR TIDSWELL: Where there has been a change of card usage and we see what the changes in costs --

MR KENNELLY: For example, we talk about costs of accepting Visa and Mastercard cards. Well, you compare them to the cost of alternative payment methods, such as Amex or the BNPL, the Klarna type thing, where the costs for merchants are higher and where increased card usage saves merchants money, because if fewer cards were issued or if card usage wasn't stimulated, merchants would have to deal with more expensive payment methods. Consumers would switch to other payment methods, which would be worse for merchants.

MR TIDSWELL: There would be no one for costs of alternative payments -- it is not difficult to work out what the costs of those alternative payment methods are. You don't need to ask lots of claimants for that, do you, because mostly they are published rates or at least the rates that are available? We know what the Amex rate for a merchant would be, don't we?

MR KENNELLY: The extent to which different merchants and different merchant segments would suffer these costs will vary depending on the merchants and depending on the segments in which they sit.

MR TIDSWELL: So, for example, if you were in hospitality, you might have a greater exposure to Amex already.

MR KENNELLY: Exactly.

MR JUSTICE MICHAEL GREEN: So are you trying to find ways to measure how changes in the past have changed that mix of card acceptance? Is that the sort of

thing you are going to be doing?

MR KENNELLY: Indeed. In order to show that we will need to investigate on a granular level the individual claimants. It won't be enough, according to the Supreme Court, for us to do this at a theoretical level. The Supreme Court says that we need to demonstrate the link with empirical evidence and to show a direct causal connection.

MR TIDSWELL: So just to see how you think that would play out. If you then -- let's just take a hotel group, Hilton, who we know and love from previous trials. If you were going to get a lot data from Hilton, are you then going to accept or argue that that is representative of the sector? How do we deal with that sort of problem?

MR KENNELLY: I am afraid now you are asking me to go beyond my area of expertise, because this will require expert assistance in deciding what are claimants for a sampling process. This is the very question the Tribunal will have to engage with when we decide which merchants, which claimants, are to be the sample merchants, because it will be necessary to find representative ones. It may be Hilton is it a good example. They may need a large hotel, a medium sized hotel and small hotel. I can't say at this stage but it will be necessary for it to be a probative exercise to have a sufficiently representative sample of claimants from the different sectors.

When Mr Holt looked at this and the experts looked at this in the previous trial and we have Mr Holt's second report -- I am not going to take you to it -- but where the overall approach of sampling is addressed,

it is not just costs such as those. We say that the schemes provide fraud protection and issuers are incentivised to provide that, but if the MIF revenue is taken away, fraud protection will be taken away and then the merchants would have to find other ways to protect themselves from fraud. Which may be more expensive. That's an exercise where the claimants themselves may have tried to obtain fraud protection from other

sources, incurred those higher costs, and the claimant disclosure and evidence will allow us to see how likely it would have been that they would have switched to other forms of more expensive fraud protection if the schemes didn't do it.

MR TIDSWELL: So it would be qualitative evidence. You would be asking in your RFI whether they considered alternative protection.

MR KENNELLY: Exactly and then if they did disclosure and evidence so we can test that. Because we need to show you that the MIFs are causally connected to those benefits and in the absence of the MIFs those costs would have been incurred by the merchants.

These are just two examples of many benefits that we say that the MIFs have created. We need to prove that by reference, among other things, to the claimants' disclosure and evidence. My fear, our fear, is that if this timetable is extremely tight, when we come to argue about the adequacy of disclosure we have those inevitable fights about whether disclosure is sufficient for the purposes of our ability to satisfy our rights of defence, there is no flex.

My learned friend Mr Hoskins' timetable does not allow any flex at all and in order to -- and the bare minimum we say is to add two weeks to what he has proposed to allow time for the disclosure process. Even if the Tribunal thinks it can be done by then, if only to build some flex into the timetable that the extra time should be allowed. This is my third point. Better to build that in now, despite the unattractiveness of my submissions, than deal with the consequences of an overly strict timetable next year.

MR JUSTICE MICHAEL GREEN: The way to build in flexibility is to have tighter timetables, knowing that if that particular deadline is missed, there is still some fat in the system that could allow for a bit of slippage.

MR KENNELLY: Here I would agree with my learned friend Mr Hoskins. There is no scope for pulling forward the outstanding deadlines on the Mastercard proposal. To

bring forward the expert evidence deadline doesn't work because, as he said, that expert deadline is not linked to the witness evidence or reply witness evidence. That's linked to disclosure. Even if disclosure is provided on a rolling basis, we cannot anticipate now whether the critical disclosure that will form the experts' ability to meet the deadline will be provided at the beginning, middle or end of that process.

So the Tribunal should in my respectful submission avoid being overly prescriptive about that. We simply don't know how that will transpire.

MR JUSTICE MICHAEL GREEN: I find it difficult to see how you can say at this stage that two weeks is going to make all the difference on disclosure in October.

MR KENNELLY: Sir, if I could ask for more -- two weeks is the bare minimum.

MR JUSTICE MICHAEL GREEN: Extra.

MR KENNELLY: Extra. I would ask for more if I thought I had a chance of getting it. Not for my own benefit but for the Tribunal's benefit. This is the point. I am saying this -- it may not be understood in that way, but I am really saying this for everyone's benefit. This is flex we will be very glad to have this time next year. Two weeks might not seem a lot but if there is a problem about disclosure and we need a separate hearing to debate something that might be critical to the experts' work, having a week or two extra will be gratefully received by all parties.

I will just check there is anything to add to that. Sir, that's my submission.

MR JUSTICE MICHAEL GREEN: You are just asking us to add two weeks. Is that right?

MR KENNELLY: Two weeks at a bare minimum.

MR JUSTICE MICHAEL GREEN: 2nd November. Knock on effect. Everything is increased by two weeks.

MR KENNELLY: Yes, and has the effect of bringing us into the New Year. Again we won't be under pressure to finish it before Christmas.

MR JUSTICE MICHAEL GREEN: But if you say, add two weeks to the joint experts' statements, that takes you to the middle of August. why does that stop us having a PTR in September and the trial beginning on the 11th? I don't really see that it affects things dramatically at all.

MR KENNELLY: Not just the arithmetic exercise of adding on the weeks. What we are doing is -- I am trying to introduce a period for unforeseen problems. Even if the Tribunal thinks that these deadlines are being met on their face, my submission is simply that you need to build in some slack for unforeseen problems and in relation to disclosure and the experts, there is very likely to be a need for that extra time.

MR HOSKINS: Sorry. On the joint expert statements and expert position papers, one of the reasons why there is the time between that and the pre-trial skeleton arguments is to allow counsel to know where the evidence has landed so that we can prepare for trial. Because if we get the expert statements and the final position papers two weeks before trial even sleepless nights isn't going to cure that as a defect. So that is why we have 30 July as the finalisation, if you like, of the expert position and the skeletons.

MR JUSTICE MICHAEL GREEN: You will have the expert evidence itself for some time. So you will be able to tell where there might be room for agreement between experts.

MR HOSKINS: You can, but you probably remember being this side of the bar and how difficult it is to prepare cross-examination. There is a very big difference between preparing cross-examination on a suite of expert reports as compared to what we are proposing here, which is a narrowing to the key issues. Of course it can always be done, but -- and I accept this is for counsel's benefit, but it is also then for the Tribunal's benefit. We need proper time to prepare cross-examination.

MR WOOLFE: Sir, we did have an alternative proposal that gets you to a trial in October 2027. That would essentially involve having an earlier date for disclosure and

having less time between the completion of disclosure and the expert reports than Mastercard's proposal allows for. I can set it out for you in a moment, but in a sense that would just get you to the same ultimate trial date of an October 2027 trial, but it would do so with there being more room in the back end of the process, as it were. It gets you to expert evidence being completed earlier and that would then allow for joint expert statements and even the PTR to be completed before the summer in 2027. That allows for some slippage if there are problems at that stage.

MR JUSTICE MICHAEL GREEN: Where do we find this timetable?

MR WOOLFE: We were working it out over the short adjournment based on your indication. I can give you some dates in a moment.

If I can just explain why we would want in particular for disclosure to come significantly sooner than Mastercard's proposal, it is -- because, as matters stand, Mastercard and Visa are repeat players in this particular game. They have discussed exemption before with a series of different regulators and they have run their exemption cases in that context. They have also fought to the door of trial and even at trial about exemption previously. I accept not in relation to all the exact same MIFs and not in relation to the same late time period we are looking at in our case, but they have gone through all of this before. That's one of the reasons why we say they should be in a position to know what their arguments are. They are not addressing this for the first time.

So when they are asking for -- in a sense I know that pleadings will only be completed early in March, but nonetheless they know now the documents that they themselves hold and they have gathered previously in other litigation from other claimants and so forth. They know that universe, they have that universe of disclosure in a sense already. We will not see any of that until October, whereas they are in a position to be to some extent working on the analysis they want their expert to do. They have a lot

more information than we do about the way MIFs work, about the potential effects they have on the issuer side of the market and indeed what effects they may have had in relation to certain claimants they litigated against before.

MR JUSTICE MICHAEL GREEN: Your disclosure, you are going to be ready by July, are you, on your side?

MR WOOLFE: We were going to take advantage of the trial and we would like to propose 7th August and move it back by a couple of weeks. That is the date I was going to give you. So we would propose both sides should give their disclosure essentially before the summer. So our date was originally 23rd July. We looked at it over the short adjournment and said 7th August might be sensible. It adds a couple more weeks. It allows it to be completed before the summer. Then if we took -- if you took a period of four months, four months and a bit for defendants' expert evidence, that would take you to something like 11th December for their expert evidence. That would allow us to put in our evidence by 2 March. They could put in a reply report. That could stay in the process.

MR JUSTICE MICHAEL GREEN: Your reply, your expert evidence --

MR WOOLFE: 2 March.

MR JUSTICE MICHAEL GREEN: So pretty much the same as on the original plan.

MR WOOLFE: And the defendants' reply report --

MR JUSTICE MICHAEL GREEN: You are asking for three months for yours after they have had four weeks with no disclosure, is that right?

MR WOOLFE: No, they have had four months.

MR JUSTICE MICHAEL GREEN: Four months, but you will have had the disclosure obviously in that time as well so you can be working on that --

MR WOOLFE: The crucial thing is though is to an extent is they bear the burden of proof. They are going to be saying this causes this efficiency positively. Our experts

are to some extent going to be saying "your analysis doesn't work because". You can't start doing that -- if you are going to have methodological statements you can't start doing that work until you get the reports from the other side and you can see what you are looking at. Of course, our experts may say they are absolutely right.

Now 7th May we proposed for their reply report and then that can lead you to joint expert statements. We would abandon the position statements that my learned friend is proposing, but I wouldn't exaggerate that difference between us --

MR JUSTICE MICHAEL GREEN: Sorry, what was the date for joint experts?

MR WOOLFE: Joint expert statements was 4th June. That therefore gets us to -- a PTR can be fitted in either in July or it can be fitted in in September according to choice. It doesn't necessarily make a huge difference at that point. Then that has more space in the back end.

Sir, that was our proposal. Essentially it gets you to the same place my learned friend does.

The bigger point I want to urge upon you is this, is if you go with their proposal and their date for the completion of disclosure, it places more emphasis upon -- as you will see, we included in our timetable the defendants to give a certain tranche of pre-existing disclosure much earlier in the process. That's what the exchange of correspondence over the weekend related to because we had said this was something we were seeking, and Mastercard in its skeleton argument gave what we thought was quite a helpful response to this, because, if I can take you to page 56 of the bundle. This is Mastercard's skeleton argument, paragraph 29. They refer there to our proposal that the defendants should provide --

MR JUSTICE MICHAEL GREEN: Paragraph?

MR WOOLFE: 29. On page 56 of the bundle. Page 8 of their skeleton. My learned friend is commenting on our proposal that the defendants should provide pre-existing

disclosure by a much earlier date, by which we mean essentially documents that had been gathered together for previous litigation and regulatory processes. What he says about this was I think fair at the time it was said but the precise scope is unclear. Whilst there are pre-existing documents that may be relevant, not all pre-existing documents will be relevant, and they don't want to disclose just by batch.

They then make --

MR JUSTICE MICHAEL GREEN: This is before the CMC on disclosure you are suggesting they produce that.

MR WOOLFE: Yes, because it would be helpful to us. If this material is readily available it would be extremely helpful to us to get it at an earlier stage in the process because the parties are on more of a level playing field. I will show you in a moment more what it is we are asking for. They complain they should not have to review documents whilst preparing a case on exemption in parallel, but then they say more helpfully:

"If there are particular, identifiable “pre-existing documents” that the SSU claimants would like to see in advance, they should request them in correspondence. The defendants will facilitate reasonable and proportionate requests."

It was -- we therefore wrote on Friday, in the light of that skeleton argument, setting out what we would request. Those were the letters which were handed up to you, our letter and their response, two of the three letters which were handed up to you this morning. Do you have those to hand, sir? There is our letter of 16th January and I think there is the response of the 18th? What you see is on the second page. What we seek. Paragraph 2.1. In relation to the Sainsbury's litigation, Ms Williams, Visa's solicitors had explained what factual evidence was given in the Sainsbury's proceedings in relation to exemption. We have said that what we want are the documents referred to in paragraphs 20 and 21 of her statement. That's essentially

the factual and expert evidence from those earlier proceedings. I think it will also include hearing bundles, indices and the exhibits and annexes to those witness statements and expert evidence, and the same for the Asda proceedings and we also want an index from a JR case as well.

So we have identified quite closely the witness statements and expert evidence from two particular pre-existing sets of proceedings that we are asking for. That's the material -- I am sorry, then in relation to regulatory proceedings as well we identify the regulatory proceedings at paragraph 3.1 and set out that we want the documents relating to exemption provided in those proceedings.

Now, I am not asking you to rule today, sir, on that, because of the defendants have responded and said essentially that they are going to look at it. They have some concerns around confidentiality and the like and thinking about how to manage alongside regulatory processes. So that's what they have said and clearly they are going to have to respond on that. We are taking them on their word that they are prepared to cooperate as they indicate in Mastercard's skeleton argument --

MR JUSTICE MICHAEL GREEN: It's not been a straight no.

MR WOOLFE: No, it has not been a straight no. They are going to look at it, which is why it is not appropriate for you to rule apart from anything else on this.

We do think disclosure can be done sooner, completion of disclosure, according to our timetable by August, but if you think it can't be and should be by October, we put a lot more emphasis on why it would be valuable to us to get this tranche of material from a previous case, discussing the exact same type of arguments on exemption that the defendants know about and we don't have the same -- in relation to Sainsbury's we can see the judgment. We can't see any of the underlying material. In relation to the other case, Asda, that settled before judgment. So there is an information asymmetry and we want to address that information asymmetry.

MR JUSTICE MICHAEL GREEN: So if they don't produce anything or are being particularly difficult about it, this can be raised at the disclosure CMC and possibly an order given that that be disclosed before the main bulk of disclosure.

MR WOOLFE: Indeed. We may need to come back to you sooner, sir, absolutely. I just wanted to flag that if the eventual deadline for disclosure to be completed is pushed out to October, it would be even more helpful to us to get some material put on sort of the same footing at an earlier stage in the process.

But you have the overall shape of our proposal, which would also have disclosure being done somewhat earlier and expert evidence being done somewhat earlier which gives more space, more room for slippage in the back end as required.

MR JUSTICE MICHAEL GREEN: The only thing that's not earlier is your expert evidence. The other items are earlier. By the time we get to your expert evidence -- no, sorry. I got that wrong.

MR WOOLFE: No, sir, I think it is all happening sooner.

MR JUSTICE MICHAEL GREEN: I take that back.

MR WOOLFE: To be fair, we are not squashing the gap between their expert evidence and ours but it is happening earlier.

Sorry, sir, there is one more point which is actually to agree with my learned friend, the provision for reply evidence doesn't make a great deal of difference because fundamentally the time the experts seem to require goes from the date of disclosure to when their report is filed. We entirely agree with the Tribunal that if we have two different groups of witnesses, we have merchants and people who run payment schemes, they can't really comment on each other's evidence to a huge extent. We have some provision for it in case it is a small point but it shouldn't really affect the date for the service of the expert evidence.

MR JUSTICE MICHAEL GREEN: It seems to me if there is some burning desire on

one side or the other to put in reply witness evidence, then an application can be made.

MR WOOLFE: We have no problem with that.

MR JUSTICE MICHAEL GREEN: Yes. As you say, it doesn't affect the overall timetable.

MR WOOLFE: That's why we did not have it in the first place. We couldn't see what we would have to say about their witnesses and vice versa, but there might be something.

That's everything I have to say. I don't know if you want to take a view, sir.

MR JUSTICE MICHAEL GREEN: Mr Hoskins might want a reply.

MR WOOLFE: I don't know if the PSR have any view on how they might fit into this process.

MR JUSTICE MICHAEL GREEN: They might fit in after everyone has had their say.

MR HOSKINS: I am trying to keep hold of the threads. I mean, essentially you have my point. The absolutely crucial thing is enough time for disclosure and enough time for expert evidence. I am not sure how hard it was really being pushed by Mr Woolfe, cutting earlier disclosure, cutting expert evidence just to end up in exactly the same place doesn't seem to make a lot of sense.

I understand why it is always desirable to have some slippage in a timetable, but you have heard from Mr Kennelly, you have heard from me. If we want a trial on this date there is not really scope for a lot of slippage. There just isn't. So I would say that we do need the time we have asked for disclosure. We do need the time we have asked for expert evidence. There is this concern about the need for early disclosure. You have seen the correspondence. It is not just not a no. We were the ones who suggested they write to us so that if this is genuinely something they want and can be given in a fairly straightforward basis. We are not saying we will not do any work, but we just want to scope it out, but it is a goodwill offer we have made. If actually the

concern that is driving the suggestion is that you slash the time for disclosure and expert evidence is the sort of because we want stuff early, well there is a process for that and there is correspondence, and if the claimants aren't happy with the correspondence, as Mr Woolfe said, they can clearly make an application before the disclosure CMC or we can deal with it at the disclosure CMC, but that will get rid of this concern about seeing stuff early. That is the solution to this problem. That's why we would encourage you to go with our proposal rather than the claimants'.

MR KENNELLY: Very briefly, my key concern on behalf of Visa is the proposal to bring forward the disclosure deadline. Mr Woolfe anticipated the submission he hopes his expert will be able to make at trial, which is that the schemes failed to satisfy 101(3) because there was insufficient empirical support for the benefits that we say MIFs cause. That is the submission they hope to make.

MR WOOLFE: I said I had problems with this analysis.

MR KENNELLY: That's their pleaded claim to our defence. That's the submission they hope to be able to make. My only concern is that we're truncating the process of giving disclosure such that we will be unable to get the material we need to vindicate our defence rights at trial. It is predicated on the assumption that very limited claimant disclosure will be given. We see that at paragraph 26 of their skeleton. The Tribunal shouldn't allow the timetable to be used to pre-judge what disclosure can be given when that comes to be determined by you at the next CMC. That is our concern regarding the claimants' approach. It ties a little bit into what Mr Tidswell was worried about earlier, that these procedural issues might then be used to dictate what disclosure ought properly to be given. If that's going to be determined by the timetable in a way that prejudices our defence rights, then we are very concerned about that.

MR JUSTICE MICHAEL GREEN: Right. Mr Gibson, did you want to say something then about the timetable?

MR GIBSON: I thought it would be an opportune moment. Would it be helpful if I explained a little bit about our motivation in seeking to intervene, to contextualise the particular steps at which we proposed to contribute? Obviously you have seen, I hope, our application to intervene in which we set out our sufficiency of interest and other points, but building on those in outline we are here to help is what we hope to be the key message. What we don't want to do is -- we can help in two regards. The first is we have been in a similar situation in the context of our own investigations, which have been ongoing for some time. Section C of our application sets out the various investigations we have conducted in a similar space. We would hope that we could contribute to the sum of human understanding on those issues, from the unique perspective we have as the independent regulator for payment systems, which brings obviously impartiality and neutrality but also a perspective on the system as a whole. Obviously there are merchants represented here today. There are schemes represented here today. There are parts of that four party payment system who are not represented and we would hope to be able to contribute a holistic view, independent, impartial and holistic. So that is why we come here today. We also would be able to impart, we hope, the benefit of our experience, having looked at these things. What we wouldn't want to do, and the defendants in their letter of Friday quite rightly pointed out, it wasn't our intention but it was a reasonable misunderstanding to have drawn from our original application. We are not proposing to wait until the very end of the process to make our contribution because it would be too late, I think the defendants put in their letter. Instead, we would hope to make a contribution at timely intervals in order to assist in the most effective way.

We have in our letter of Friday -- it is in the intervention bundle, tab 5 -- identified four points at which we think the PSR could make a useful intervention. I propose very briefly to elaborate on each of those four steps, explaining how we propose to

contribute and also precisely when we propose to do so. I will do so by reference to the annex A timetable as has been sliced and diced and updated.

The headline point is we will do all we can to dovetail our proposed intervention timings within the deadlines that are being discussed back and forth this afternoon. It is important, of course, to recognise that as a public sector body with limited resources and responsibilities to third parties in respect of the protection of their confidential information and the expenditure of the funding from those parties, there are limitations on what we can contribute and when we can do it by. It is particularly acute around vacation periods. On the other hand, those constraints happily give you some reassurance we have every intention and every need to make our intervention contained and focused.

The first point on which we hope to contribute is by filing what we have called a methodology statement. The idea there would be to draw on the PSR's experience of having conducted investigations outlined in Section C of the application and in some sense to make sure we are not re-inventing the wheel.

Now we readily appreciate that what we have done in the context of our investigations may not map precisely on to what was being considered in these proceedings. Obviously we will explain the extent to which we think you can draw useful lessons from what we have done. Obviously it is a matter for the parties to comment on the extent to which the Tribunal is assisted by those interventions and the Tribunal will form its own view.

But we thought it would be appropriate for us to do that, consistent with our role as the independent regulator in this area. The last thing we would want is to have the esprit d'escalier of waiting until the judgment came out and said, oh, if only we had mentioned we could have helped avoid that difficulty.

MR JUSTICE MICHAEL GREEN: Is the proposed methodology, is that really a matter

for evidence from you?

MR GIBSON: It is less a question of evidence as more setting out our experience of having considered very closely analogous situations in the context of our investigations into what is, after all, the same sector involving very similar parties and explaining the methodological approaches which we found were of assistance to us in doing that --

MR JUSTICE MICHAEL GREEN: Considering exemption issues.

MR GIBSON: Considering issues around the merchant indifference test, which is a context we are undergoing at the moment. Obviously we appreciate the merchant benefit test will have differences, but we would submit there is a wealth of learning we have which we would like to share with the Tribunal on that topic.

We had anticipated that this would be something useful to do at this stage prior to the disclosure CMC, so that would be a consideration that could be taken into account in shaping and refining the disclosure requests which after all are going to be designed to input into the methodologies which the economic experts will be undertaking.

I will come on to timing in a moment, but we envisaged providing a statement in advance of that CMC. That would be looking at the pleaded positions of the parties which have been distilled through the exemption pleading process and will conclude at the end of March. If and to the extent there is any additional information about the precise methodologies the experts propose to undertake, obviously we can comment on that as well.

We have heard what the Tribunal has said about the utility of a freestanding pleading at this stage, and I understand it is something which may be revisited in the context of the discussions about disclosure after pleadings. If there is something for us to comment on there, we can obviously comment on that. Otherwise we will be looking at the issues arising in this case and explaining how looking at similar issues in the

context of the regulatory investigations, the methodologies approach is an evidence basis which we have found helpful in the context of our work.

MR TIDSWELL: When you talk about the methodology statement, are you talking about limiting that to, if you like, the conceptual framework of the exercise and the sort of evidence that might be available, or are you going beyond that and talking about your experiences and applying the framework?

MR GIBSON: We will do whatever we think will be of most assistance to the Tribunal. The first step is what we had in mind, if the application would be of interest or assistance, we can obviously set that up.

MR TIDSWELL: I think it's the opposite, really. I think the nervousness I have is of (inaudible) getting involved in relation to the facts on this case and the right answer. That's something which I think we would all want to avoid. I just have in mind, we have obviously all had some experience before of the CMA intervening, and I know you are very familiar with that. In a way, that seems to have been a much cleaner proposition because really the way it was put was: we'll come and tell you what the framework we apply is for market definition, for example, and how we see that fitting within the law. But this is slightly different, isn't it, because the framework here is very general. So in a way, the risk is that you are not telling us about something which is reasonably objective and (inaudible) could become subjective in what you have done and the way you have done it.

MR GIBSON: I readily appreciate that to a degree -- we come to this with the benefit of experience, and I emphasise again: what we say obviously is only intended to share our experience and the parties will no doubt have views on the extent to which that is something you should take into account, but we would want you to have the benefit of that experience for you to factor into your consideration.

MR TIDSWELL: Perhaps we should (inaudible) to it when we talk about the

application.

MR JUSTICE MICHAEL GREEN: Maybe.

MR GIBSON: Do you want me to talk about timing specifically on that? We consider we could fit any such contribution into the timings by providing what I am calling the methodology statement in advance of the disclosure CMC. The precise timing would depend to some extent on what is finally agreed in relation to preceding steps, but if I understood the submissions on both sides correctly, there seems to be common ground that the Redfern schedules would be done by 10 April, and the CMC on disclosure would be taking place towards the end of April, and therefore --

MR JUSTICE MICHAEL GREEN: I think it is in May, proposed.

MR GIBSON: If it is in May, that's even better, but the point is between the Redfern schedules and the CMC, we would propose that we serve our methodology statement at that juncture. That's the first step.

The second stage at which the PSR would be open to assisting is in relation to the potential provision of appropriate and proportionate disclosure of data and other evidence in the PSR's possession to the extent it goes to the trial 3 issues, and subject of course to appropriate arrangements in respect of confidentiality and the costs of providing any such disclosure. The PSR has already provided disclosure in the context of preparation for trials 1 and 2, and the CAT ruling on that is [2023] CAT 59. Therefore, the PSR pragmatically acknowledges the parties may seek data from the PSR in the context of preparing for trial 3, and the past and ongoing work undertaken by the PSR means the PSR might at that juncture have some relevant data.

I have outlined already the past and ongoing work we have undertaken and the fact that as I say, that work is ongoing, and in the course of the early part of this year, we are undertaking survey exercises and other data-gathering exercises in respect of the remedies process for the market review.

Just to manage expectation in terms of what we would be able to provide in this context, firstly: precisely what data we will have available depends on exactly what the methodologies involved are and the pleaded issues, and obviously we will be better placed to comment on that at the disclosure CMC. Our ability to disclose confidential information is of course subject to the statutory constraints under FSBRA, sections 91 to 93 which were discussed at the prior hearing in relation to PSR's contribution for trial 1 and trial 2. In due course, it will be necessary to consider, if any disclosure was sought, the appropriate scope of disclosure and the appropriate confidentiality protections that would be needed in that regard.

We also recognise that the data we provide will be focused very much on, or likely to relate to the UK-EEA cross-border payment corridor, that particular aspect of matters, because that's what forms the subject of the PSR's cross-border interchange fees market review work.

MR JUSTICE MICHAEL GREEN: So based on the data you will want to appear at the CMC on disclosure.

MR GIBSON: In terms of timings, we would propose -- yes, that the parties should, in the context of developing their proposals in relation to disclosure, they would decide whether or not they wanted to avail of the opportunity to ask the PSR for data. We could comment in writing on that in advance, but it may be convenient for us to make brief submissions, if that would assist, at the CMC.

MR JUSTICE MICHAEL GREEN: Yes. That can be sorted out exactly what, if any, data or information the parties are seeking from the PSR, and what we are prepared to direct. So that's for a future occasion, really, isn't it?

MR GIBSON: Yes. Our purpose is to outline the different steps which we could contribute.

The third possible contribution which may be useful for the PSR to make is in relation

to the expert evidence once it's actually being developed, and the methodologies of the experts in this case are proposing to adopt and their use with the evidence.

This would, if you like, build on what we have said in the methodology statement. The methodology statement would offer the benefit of the PSR's experience by reference to any preliminary proposed approaches that one can understand from, for example, the comments on the Redfern schedule, but the statement on the expert's evidence would do so by reference to the application of those approaches to the actual evidence as it emerges if and to the extent the PSR considers it can usefully add to what has been said in its previous methodology statement.

MR JUSTICE MICHAEL GREEN: When you say the evidence, what do you mean? Do you mean all the disclosure?

MR GIBSON: No. You are absolutely right, sir, I should be clear about that. We are talking about what the experts of the respective parties have said about the approach to methodology, which obviously will be building on their views of the evidence. With our limited resources, we obviously wouldn't be able to and wouldn't consider it appropriate --

MR JUSTICE MICHAEL GREEN: This is before expert reports have been filed?

MR GIBSON: No. I am sorry, sir. In terms of when, we are talking about preparing this after the expert reports have been filed.

MR JUSTICE MICHAEL GREEN: So it is different from the letter?

MR GIBSON: I apologise, yes, sorry. I am trying to deal with these rather too quickly. In light of what we have seen from the skeletons we received on Friday after writing the letter, we thought it would be more appropriate for us to make that intervention after the expert reports have been filed. In terms of specific timing, I think on the Mastercard schedule they were talking about the evidence from experts finishing on 2 July 2027.

MR JUSTICE MICHAEL GREEN: Yes.

MR GIBSON: We would propose to put in a statement on the expert evidence by middle of July, the 16th, which would be in advance of the joint expert process at the end of that month, so they would have an opportunity as part of that joint expert process to comment on what we had said, if anything, in that context, and similarly --

MR JUSTICE MICHAEL GREEN: I don't think we are going to be directing that you should be able to do that at this stage. I think that probably needs to be determined, doesn't it? But if you are -- then it fits in with the timetable is the point you are saying.

MR GIBSON: That's essentially the point I am making. I am illustrating, if I can, how the proposed steps we would take as intervener can be accommodated, or dovetailed as I have put it, within the timetable to show there will be no disruption.

The final step, more in keeping with the way the CMA has approached its interventions, is to comment on the application of section 9 in advance of the trial by making short written submissions, non-duplicative, to the extent there is anything we can usefully add to what the parties have said after they have filed their skeletons and before the opening of trial. So they would have an opportunity to comment on that in their oral openings.

As I said in the letter, the PSR does not envisage at this stage making oral submissions at trial 3, but would like to reserve its position on that point. In the unlikely event we concluded it would be of assistance for us to say anything orally, we would apply for permission to do so at an appropriate juncture, the PTR or whatever stage seemed to be opportune for that, and even if we did, it would obviously be very brief and along the lines of the *Kent* and *Le Patourel* oral submissions.

That's a very quick thumbnail sketch of the points on which we propose to contribute.

MR JUSTICE MICHAEL GREEN: Thank you, Mr Gibson. Does anyone else want to say anything else about that?

MR HOSKINS: I would like to make a few points. I want to make absolutely clear we are not opposed to the PSR coming in. We were a bit nervous about exactly what they are coming in to do, and it's helpful that they sent the letter on Friday, but I must confess, sitting here now, I am still not entirely clear on what they intend to do.

Just to take some examples of that: on the methodology statement, it was said -- Mr Tidswell made the point this is limited to the conceptual framework as the CMA has done in other cases; or is it applying the framework? To which you got the response from Mr Gibson -- sorry. I am paraphrasing from my notes -- "We want to give you the benefit of our experience", but that doesn't really answer the question. Is this a regulator coming in to say "use this framework", or is the regulator coming in to say, "Use the framework in the following way in this case"? I can see how the former may assist and may be acceptable, but with respect in inter partes litigation, it really does overstep the mark and actually impinges potentially on what the Tribunal is trying to do to (inaudible) come in and say, "This is what the answer to the question should be in their case --

MR JUSTICE MICHAEL GREEN: (Inaudible) really telling us how we should do our job. That's the problem, and query whether that's an appropriate thing for them to be doing.

MR HOSKINS: They'll hear the concerns being expressed from the Bench, they'll hear our submissions. As I say, we are not opposed to them coming in, I just think it needs some more thought about what they actually want to do in light of what has been said by the Tribunal and by us today.

MR JUSTICE MICHAEL GREEN: I think what's fairly clear is it will be managed as we go along. So the extent of their involvement and the extent of their disclosure, and whatever, will be dealt with on the particular occasion when it should be dealt with.

MR HOSKINS: That's fine as long as we are given more notice.

MR JUSTICE MICHAEL GREEN: Yes.

MR HOSKINS: Because obviously that's desirable. We can manage it and we can see what's appropriate at each stage of the proceedings. I absolutely get the sense of that. Not three or four days before --

MR JUSTICE MICHAEL GREEN: Sure. You have been heard.

MR HOSKINS: We would like to work with the PSR on this point. This is absolutely not hostile, but it needs a bit more thought, it needs a bit more calibration. I could go into more detail, but I am not sure it is going to help today, to be honest.

MR JUSTICE MICHAEL GREEN: We agree, and I think probably recognised by Mr Gibson as well that this needs to be worked out clearly as to the exact extent of their involvement. All right, thank you.

MR KENNELLY: I am particularly concerned about the idea that the PSR would have the last word on the evidence and they would have that after the reply evidence, but I think the Tribunal has the point, and we also need to see a revised position before we could offer a better --

MR JUSTICE MICHAEL GREEN: It is not thought they will have the last word as they are not a party as such and cannot be regarded as having the last word, but there may have to be some adjustment as to when they do put in whatever they are going to put in.

MR KENNELLY: Indeed, as long as legal rights are observed.

MR JUSTICE MICHAEL GREEN: Yes.

MR GIBSON: Just very briefly: what I meant to say, and perhaps did not say clearly enough in response to Mr Tidswell's question, was the former, i.e. conceptual framework, unless there is anything more we can do to assist. That was my answer. So I think I can reassure my learned friend on that front; the methodology statement is very much designed to be a conceptual framework.

I would also reiterate the point that perhaps I should have made explicit but is in our application. We are very, very astutely aware that it's not our job to make decisions on this. We are trying to provide information which may assist you in doing your job. So again, we can provide reassurance on that front.

As to the last word point, I had originally misunderstood, no doubt because I had not read the skeletons carefully enough, that the evidence process was going to be a round of evidence both ways, followed by a round of reply evidence on experts, and I was going to propose that we would go in the middle of that so they can reply to us as well, but as it happens, it now appears it's going to be defendants, then claimants, so I was just trying to put us in a point, and indeed the last word would actually be in the joint expert statements.

But the bedrock point we would like to make is we are here to help. If people would prefer us to make an intervention at a different time, then subject to making sure we are still going to be adding value at that time, we are obviously open to all suggestions.

MR JUSTICE MICHAEL GREEN: I am sure we will be grateful for any assistance we can get from any quarter, in particular from the PSR, but I think it will need to be carefully managed because you are not a party, you are an intervener. It is understandable the slight nervousness about your involvement, given that not much notice was given of it before this hearing.

MR GIBSON: I apologise for that.

MR JUSTICE MICHAEL GREEN: Now you are here and you will be here, you can give a little bit more notice in the future.

MR GIBSON: We will definitely do that (inaudible), I do apologise. It was a judgment which came down the week before which used up the resources of the team, but I apologise for the late notice.

MR JUSTICE MICHAEL GREEN: All right, thank you. Yes.

So in relation to the timetable, thank you very much for all your suggestions. We think essentially that we are with Mr Hoskins' timetable, which gets us to the place we wanted to be and which we indicated we wanted to be with a trial starting on 11 October. I think the first contentious date in that was the date for disclosure. We think that 23 October, which happens to be my birthday, is a very suitable date for disclosure to be given in this case by all parties.

Mr Kennelly was arguing for an extra two weeks, but in our view that is obviously impossible to say an extra two weeks is needed at this stage, but it does not actually do what he was suggesting, namely build in some slippage into the system. Slippage is only available in a timetable if there are tight timetables but the possibility of being able to extend time deadlines should the need arise. So we think it is better to stick with a slightly earlier date just in case any application to move that date has to be made.

In relation to the other dates, I think we would have probably preferred there to be an earlier date for disclosure of the expert evidence, but given that the timetable put forward by Mr Hoskins with 23 April for the defendants' expert evidence still does lead to an 11 October start date for the trial, we are prepared to stick with that.

I should say that Mr Woolfe suggested disclosure should be given far earlier than October, namely 23 July, and for it to be on a rolling basis up to then. Actually I think he adjusted that and said 7 August, but as his timetable similarly leads to a trial starting on 11 October, we see no advantage in requiring that disclosure to be given at that earlier date, and I think it would on any view be quite tight to do so.

We also note that Mastercard and Visa are quite prepared to consider providing early disclosure of documentation that has already been collated for earlier proceedings, and we would hope that any issues in relation to that can be sorted out at the disclosure CMC.

So for all those reasons, we will direct that the timetable at this stage to be that as set out by Mr Hoskins.

MR HOSKINS: There is only one small detail. I raised, which was (several inaudible words) refer to their responsive pleadings in our timetable on 27 February. They had asked for 5 March and I said we were happy to accommodate that, but we will just need a few days to (inaudible) other things here and there. So we are happy with that if Mr Woolfe wants to~--

MR JUSTICE MICHAEL GREEN: Change 27 February to 5 March?

MR HOSKINS: That's right, yes. Well, we might need to juggle other things by a couple of days.

MR JUSTICE MICHAEL GREEN: I think I said when Mr Gibson was making his submissions that the CMC was in May, but actually you have it in April here. That date -- well, you definitely can't do that, can you? I think I am sadly available on that day, so that's the date we are working towards.

MR WOOLFE: These are obviously dates on both sides we put forward without knowing everyone's availability. We think disclosure can be done more quickly anyway, so I would have thought if that moves by a couple of days or a week, it shouldn't impact when disclosure is given on 3 October, there's quite a long time in that.

I appreciate my learned friend may say that's pushed back by a month, it may be different, but I didn't --

MR HOSKINS: Are you -- sorry. As long as we're both happy with a CMC of 24 April and the Tribunal can accommodate us, I think we were not in the swamp. Sorry, to address my learned friend, would he prefer 27 February or 5 March for our pleadings?

MR WOOLFE: We do actually want March, yes.

MR HOSKINS: I didn't want him to be disadvantaged.

MR WOOLFE: There is one point which I don't think anybody's discussion touched on, and I merely mention it, I don't think it requires you to decide anything now. You will have seen this reference on the top of the second page of annex A to "Claimants to complete any survey/RFIs". That wasn't a step in Mastercard's timetable. You heard from Visa that they may well want claimants to fill in some sort of survey.

It was actually something we'd suggested might be useful. Essentially it was a step to gather information from the claimants potentially in parallel with the disclosure, but that was premised on there being slightly earlier --

MR JUSTICE MICHAEL GREEN: What do you mean by surveys?

MR WOOLFE: Well, for instance, if you -- can I just show you Mr Holt's report because it tells up the kind of information he is looking for and it might give you an idea of the kind of thing we are talking about. Essentially, I want to say this should be used by the parties after pleadings (inaudible) the Redfern schedules, and then we can determine the scope there may be for such a survey if it is useful and the Tribunal can rule upon it. If you are content with that, we don't need to go into it further now --

MR JUSTICE MICHAEL GREEN: Surely it should be dealt with at the CMC?

MR WOOLFE: Yes. I wanted to merely say although you have ruled we should go with Mr Hoskins' timetable, we didn't really consider that element of it. I am merely saying it should be left over now to the CMC. It wasn't part of their timetable --

MR JUSTICE MICHAEL GREEN: (Several inaudible words) nor do we consider the trial 4 CMC.

MR WOOLFE: Exactly. I merely wanted to say it shouldn't have been treated as being decided. I appreciate the other side may want to apply for something in due course.

MR KENNELLY: That's a matter accommodated by the Mastercard timetable which the Tribunal has adopted, and it is a matter ultimately for the next CMC, the disclosure CMC.

MR JUSTICE MICHAEL GREEN: Right. Given we have spent an hour and a half on timetabling, it looks as though we do need build some slippage into the system, but we should have a ten minute break before.

What are we going on to consider now?

MR WOOLFE: We are going on to consider now our applications for (several inaudible words) on applicable law, so that is the defendants to give us some further information of their case and (inaudible) the CMC and in relation to trial 4 listing of the CMC.

MR JUSTICE MICHAEL GREEN: Trial 4 issues, basically?

MR WOOLFE: Yes. All we are asking for there is that a CMC should be listed. That's the extent of our application.

MR JUSTICE MICHAEL GREEN: You want a preliminary issue on that?

MR WOOLFE: It's not that. We want a preliminary issue -- on applicable law and limitation, we are seeking an order first of all that of the defendants particularise their case, and secondly that a CMC be listed to consider setting down a preliminary issue. And in relation to trial 4, all we are asking for is a CMC be listed.

MR JUSTICE MICHAEL GREEN: Oh, I see. On your proposal on the second page of annex A, the first item is "Hearing preliminary issues on applicable law and limitations" --

MR WOOLFE: That's not what -- our draft order, which is at page 100 of the bundle, doesn't set down a timetable for preliminary issues. All we are asking is particularisation of case and the listing of a CMC, that's it; and on trial 4, all we are asking is listing of a CMC. That's from our side. Then the defendants' cost applications.

MR JUSTICE MICHAEL GREEN: We should be able to deal with that this afternoon.

MR WOOLFE: I would hope we can.

MR JUSTICE MICHAEL GREEN: (Inaudible) Mr Gibson?

MR GIBSON: I just wanted to clarify whether the outcome on the discussion of directions also disposed of the question of intervention, or whether you are going to want me to make further submissions specifically on the application.

MR JUSTICE MICHAEL GREEN: Well, do we need to determine the scope of your intervention; or we just need to determine that you should be allowed to intervene on terms to be decided?

MR GIBSON: In some cases, the Tribunal has approached it -- well, they have taken a position as to whether or not intervention would be helpful and then dealt with directions separately. I think that would be convenient in this case, given that no-one objects to us intervening in principle, it is a question of how we intervene and how we could deal with it.

I think the Tribunal has indicated you would take it step by step and on that basis, I would invite you to grant the application to intervene on terms to be decided as the matter progresses.

MR JUSTICE MICHAEL GREEN: Does anyone object to PSR being allowed to intervene but on terms to be determined in the future?

MR HOSKINS: I think that's a very sensible use of public money (several inaudible words) have to apply to intervene every time they want to. Obviously we need to see what they propose, as you have suggested, each time. In principle, it doesn't make sense to leave them hanging in that sense on the principle.

MR JUSTICE MICHAEL GREEN: The understanding will be that they are entitled at least to participate in the disclosure CMC.

MR HOSKINS: Absolutely.

MR JUSTICE MICHAEL GREEN: It may be to the parties' advantage that they can ask for disclosure from the PSR.

MR HOSKINS: It's in our interests to liaise with the PSR sooner rather than later on,

absolutely.

MR JUSTICE MICHAEL GREEN: Yes, all right. So that's your answer, and you don't need to hang around, I imagine.

MR GIBSON: I was going to ask to be excused.

MR JUSTICE MICHAEL GREEN: You are not interested in trial 4?

MR GIBSON: I am extremely interested, but I don't think my client would consider my interest sufficient to pay for me to be here.

PRESIDENT: Thank you for your attendance, Mr Gibson.

MR GIBSON: Thank you.

(3.27 pm)

(Short break)

(3.38 pm)

MR WOOLFE: You may noticed things have thinned out a bit on this side of the courtroom. From hereon, I am speaking on behalf of the Scott+Scott claimants only for the remainder. This is all just on behalf of -- the CICC class representatives with respect have departed.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: So the first matter is -- there is two points: our applications both in relation to applicable law on limitation, and in relation to trial 4. The actual directions we are seeking for both are set out in our proposed order at page 100 of the bundle. It is behind tab 7 if you are looking in hard copy.

MR JUSTICE MICHAEL GREEN: Right.

MR WOOLFE: The relevant orders, and I will deal with them altogether, are both -- first of all, if you start with paragraph 1 and paragraph 2, that explicitly puts certain issues into trial 3 and then says:

"Everything else shall be the subject of a further order for a trial 4 [so that establishes

the idea of trial 4], save for such issues in relation to applicable law and limitation as may be ordered to be tried as a preliminary issue pursuant to paragraphs 4 and 5 below."

Paragraph 3:

"A CMC shall be listed for the first available date from 1 June 2026 to determine initial case management directions in respect of trial 4."

So that's what we are seeking.

MR JUSTICE MICHAEL GREEN: In paragraph 2, you are saying, "Save for those issues", but those are issues for trial 4. It is just you want them to be dealt with by way of a preliminary issue to trial 4.

MR WOOLFE: Potentially, yes. There should be a CMC to consider doing them as a preliminary issue.

MR JUSTICE MICHAEL GREEN: All right.

MR WOOLFE: I hope it should be common ground that something like paragraphs 1 and 2 are necessary simply to say these are being -- currently the future conduct order puts everything in trial 3. What we are proposing is that be amended so trial 3 is narrowed, but there is a trial 4 established, but a CMC for trial 4 from 1 June 2026.

MR JUSTICE MICHAEL GREEN: In paragraph 2, that is all other issues, is that right?

MR WOOLFE: As (inaudible) in the defence. I do appreciate that if it turns out in the CMC we are proposing that actually --

MR JUSTICE MICHAEL GREEN: That we need a trial 5 and trial 6?

MR WOOLFE: That's why at the moment we are saying trial 4, but I think our basic concern mirrors exactly what, with respect, Mr Tidswell said earlier, which is no progress has been made on aspects of this case that don't relate to the UK and Ireland. There are other points as well, so scheme fees, which is the abuse of dominance cases as well. Only a minority of claimants plead that, but there is that as well.

What we want to avoid is drift whereby nothing is done at all on any of those aspects of the case until after we get judgment on trial 3, which on the basis of the timetable you have directed today, sir, we will be having our trial 3 trial October through to December 2027 and judgment will come in the course of 2028. Then if we only fire the starting gun dealing with any further issues then, another two and a half years goes by and nothing ever gets done.

MR JUSTICE MICHAEL GREEN: Take it from us that that would be completely unsatisfactory. We can't allow this to drift another three years or so without anything happening on trial 4. There has to be some effort made to get to the end of this litigation in some way or other.

MR WOOLFE: Yes.

MR JUSTICE MICHAEL GREEN: At the moment, we are having difficulty seeing how we get to that game, but we assume that somebody has thought about that, but in the meantime, we certainly think that issues can't just be punted off to trial 4 and forgotten about for the next two or three years. There needs to be something done in relation to them.

MR WOOLFE: Thank you for that indication. That's precisely what we want to achieve by listing this CMC. It is a fair way away, we are proposing a CMC at some point after 1 June before the summer vacation, in that period there. We do appreciate there is going to be quite a busy period immediately grappling with exemption, and parties will need some time to know the CMC is coming, to develop their thinking, exchange their thoughts with each other, and then we come to the Tribunal in a reasonably orderly way with our probably competing proposals as to what is to be done, and also having it after the disclosure CMC in the trial 3 element of the case will allow any steps that are ordered to be fitted around what's going on in relation to that. There is no magic in that timing.

I should clarify as well --

MR TIDSWELL: You mentioned earlier some work to revise the list of issues.

MR WOOLFE: Yes, sir.

MR TIDSWELL: One of the things that would be very helpful for the trial 4 CMC, if that's what we end up doing, is something which gives us a clear view of everything else out there because I am not sure I have a clear view of everything that needs to be decided in this litigation between the parties, and then of course some form of roadmap for resolving those, whether it's in trial 4, trial 5 or something else.

At the moment, you're using trial 4 as a parking lot.

MR WOOLFE: Yes, indeed.

MR TIDSWELL: And I don't think it can stay like that. We need to develop it, don't we? It needs some clarity and therefore I cannot reconcile with that when they are about to leave the parking lot, I suppose is the ...

MR WOOLFE: I am grateful for that indication. Can I just (inaudible). We see that entirely as a good idea and it would have to be something that looks rather like the previous version of the list of issues which says, "Here are the issues, here's where they arise on the pleadings", and also roughly what we intend to do to try these issues.

MR TIDSWELL: I think the point -- I don't think it matters terribly how it is done, but somebody needs to be -- everybody needs to be clear about what is left to be resolved.

MR WOOLFE: Yes.

MR TIDSWELL: And there needs to be some plan at least as to how that's going to be done right through to the very end so we all know -- obviously things might change and it might not work out as planned, but there does need to be a plan.

MR WOOLFE: For our part, we would gratefully adopt that. We think it would be very helpful (inaudible) to be done prior to that CMC. It probably should be kept separate from the much smaller and more confined process of restating the issues for trial 3,

which is going to very much come off the back of the exemption pleadings, and we are going to want to do them fairly quickly, and obviously that's a slightly different process. But the remainder of issues which are not subject to trial 3, mapping out what they are across the universe of claims we have, and then how we get to a world where they are all resolved --

MR TIDSWELL: Yes, I understand. The difficulty -- and I may be wrong because I have not looked at it in this light, but I think the problem with the list of issues is that a lot of these things are just as (inaudible) because once the existence of the foreign law claims is acknowledged, it is not broken out so it is clear that certain things have to be done in relation to the foreign law claims that haven't been done. So they sort of get lost and they disappear, if you like, in the list of issues.

MR WOOLFE: Yes. There are many different claimant groups who have come and gone through the whole thing towards this litigation have had perhaps different emphases in their --

MR TIDSWELL: Yes, and there is a point there too, isn't there, about you making a decision about which claimants are bringing what claims, so we are all clear about -- there is quite a lot of talk about intention to amend in relation to various things. I think we are now at the stage where we need to finish those intentions and know exactly what claimants are bringing what claims so the defendants can deal with them and we all know where we are. Because that goes very much to the proportionality point as well: if we only have, say, a small number of claimants who are interested in the scheme fees argument, that has quite a different complexion and if the whole claimant population decides they want to run that argument ...

MR WOOLFE: I can see that very much. There has been a tendency to -- because the trials have not been set solely by reference to the pleadings but by reference to the list of issues and people have been dealing with them pragmatically, there has

perhaps been a tendency to say: we will just notify you that we may wish to amend in this respect, and then at some point -- I think it is right that if we are looking for -- if the Tribunal wants an advance of that trial 4 CMC to have a complete view of everybody's case as to what (inaudible), then that amendment process has to be done in advance of that. I can very much take that point, sir.

If I can just finish walking you through this order. We then have at paragraphs 4 and 5 what we were looking for in relation to applicable law and limitation, and I am going to be slightly parsimonious on my feet. We had to request by 5 February, the defendants to provide particulars of their respective cases of the relevant content of the law of EU Member States as to limitation -- and I will cover in a minute why we were looking for that -- then a further CMC for the (several inaudible words) to determine directions for a preliminary issue trial -- to deal with any issues arising from that particularisation.

On reflection, we have decided that we do want that CMC, but it can probably just be combined with the trial 4 CMC, but in a sense, as you pointed out, sir, it is a matter of whether or not there should be a preliminary issue to be heard in relation to trial 4 issues.

MR JUSTICE MICHAEL GREEN: That is an issue in trial 4, is it, limitation?

MR WOOLFE: It is an issue which is not being dealt with in trial 3, so in that sense, yes, if I can put it that way.

MR JUSTICE MICHAEL GREEN: It's one of the everything else. Can you identify in the list of issues where -- is it in the list of issues?

MR WOOLFE: Our limitation was in the list of issues -- I think not this point, however. This was the EU limitation point arising from the Court of Justice judgment in *Heureka*. I was going to remind you about it by showing you the authority, if that might be helpful.

MR JUSTICE MICHAEL GREEN: Well, we have seen what you have said in the

skeleton.

MR WOOLFE: Yes. So the EU principle as stated in *Heureka*, which was stated as an aspect of the principle of effectiveness in EU law and applies to the period of time before the damages directive ever came into force.

The answer to the principle they stated was that time cannot start to run for a competition infringement until the infringement has ceased. So that mirrors what is now the provision in the Damages Directive which says this was always the case previously, even though they didn't realise it.

MR JUSTICE MICHAEL GREEN: EU states are required to give effect to that in their domestic law.

MR WOOLFE: Yes. We say that's right as a matter of simple, direct effect as a general principle of effect -- sorry. Article 101 is directly effective in Member States. In order to give effect to that, Member States are required to afford an action for damages to those whose interests are harmed; and in relation to that action for damages, the principle of effectiveness applies. This is an aspect of the principle of effective necessary, therefore it applies by virtue of the direct effect of Article 101. That's our case on *Heureka*.

MR JUSTICE MICHAEL GREEN: And then you have pleaded an infringement --

MR WOOLFE: We have pleaded an infringement, yes. That is inherently a factual issue because the defendants will say: at this point we set the MIF to zero, we amended our scheme rules in respect of this point, and therefore if there was an infringement. You had an earlier infringement and a later infringement, there is not a single continuous infringement, and so forth. There may be factual issues to be tried to stay in the (inaudible) as well.

MR JUSTICE MICHAEL GREEN: That's meant to happen in trial 4, is it?

MR WOOLFE: At some point, yes, that will have to happen in trial 4, or in a trial.

MR JUSTICE MICHAEL GREEN: I am quite surprised this hasn't been thought through and you are asking us to direct a trial 4. That's essentially -- I mean, everything was going to be dealt with in trial 3, but you have now agreed that trial 3 is limited to exemption and volume effects. So surely there needs to be quite a clear definition, I think, as to what is still live in trial 4.

MR WOOLFE: Yes. That's precisely why we are seeking a direction there should be a CMC in relation to trial 4. The schemes are resisting that direction being made.

MR JUSTICE MICHAEL GREEN: Right.

MR WOOLFE: That is the difference between us. We had actually wanted to have some discussion at this CMC about how, for instance, the issue of scheme fees might be tried as well, but Mastercard and Visa resisted that strongly. In practice, if that was going to be tried, we accepted it was just too much to put into trial 3 if you are going to have a trial that's actually manageable for the parties to be done in the time. That's why we accepted that it couldn't be done in the same time slot as exemption and volume effects, but we are wanting to press on with the other issues in these cases.

MR JUSTICE MICHAEL GREEN: Yes. I think there also needs to be some recognition as to the appropriate use of court and Tribunal resources. I mean, this is obviously going to take up a huge amount of further time and there needs to be a clearly defined route to get all the outstanding issues resolved. If it is by way of a CMC for trial 4 in which we establish exactly what is still left outstanding to be determined, so be it, but I think that does need to be done in fairly short order.

MR WOOLFE: Thank you, sir, we fully agree. The other point I just want to get across is these things need to be dealt with in parallel. It's not simply a matter of saying there should be a trial 4 that will come at some point in the future. It is getting going --

MR JUSTICE MICHAEL GREEN: I quite agree.

MR WOOLFE: Sir, can I just briefly touch upon what we want further particulars of,

why we want them, and why it would be helpful to us because that's the other aspect of our application.

If I can pick this up in some of the most recent pleadings. I was going to show you the pleadings relating to Louis Vuitton -- only the highest class pleadings for us -- and they are one of a set of claims brought by the wider LVMH group, so there are other pleadings which are essentially identical, this leads into a sample, these plead in relation to this *Heureka* principle. Other clients represented by Scott+Scott also plead *Heureka* but haven't been updated since the Court of Appeal judgment, so that's why I am showing you these ones.

So if we can go in the bundle to -- the particulars of claim is at page 1131. This is the claim by Louis Vuitton against Mastercard, and the section on applicable law begins at page 1175. To explain the structure of the pleading, we plead separately as to choice of law for the period covered by the Rome II Regulation 2009 -- you see from paragraph 100 -- then as to applicable law for the period covered by the 1995 Private International Law (Miscellaneous Provisions) Act, and then in respect of the period from 1992 to 1995 English common law, so double actionability -- I think we were all rather scraping our memories to recall how double actionability worked.

So this pleads out, in a sense, applicable or by relation to those periods. Under section A from 102 and 103, you see at 103 effectively the result we say arises from the application of the Rome II Regulation. So UK transactions are governed by UK law; Austrian transactions are governed the law of Austria, et cetera. It's not rocket science.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: Then at paragraph -- I should just note 103(w), contentions made about cross-border acquiring, we have now abandoned that. Mastercard basically admit all of 103 and agree that Austrian transactions should be governed by Austrian

law. They denied 103(w), which is about cross-border acquiring, and actually we have now conceded that point. So in fact there is no issue in terms of applicable law on this pleading between us and Mastercard, it is agreed which laws apply.

Where the disagreement comes is to the content of that law as to limitation because we say at 104 none of the claims in respect of transactions particularised at paragraph 103 above is time-barred. By the relevant law, it is based on or must comply with European Union law, which provides a limitation period cannot begin to run before the infringement has ceased, and we cite *Volvo* and *Heureka*. That's where we cite the *Volvo* and *Heureka* principle.

Obviously it's not normal for us in our particulars of claim to plead to limitation, you'd expect to come in defence and reply, but we took the point at that stage so it was clear.

If we then look at how the defendant and Mastercard responded to it, we see that at page 1247 -- you see at paragraph 147, "Paragraph 103 is accordingly admitted", so they admit applicable law for that later period.

Essentially to summarise, we are agreed on applicable law for post 2009; we are agreed on applicable law for the period covered by the 1995 Act as well. The only actual issue between the parties as to what law applies is that set out at paragraph 151. This is between the claimants and Mastercard, which is about the application of double actionability. They say full double actionability applies, we say the exception as to double actionability applies, so there is a specific issue about applicable law for the period 1992 to 1995. That's on applicable law.

Then as to the content of foreign law as to limitation you see at paragraph 153 they say:

"Insofar as the claimants' claims are governed (solely) by the law of a Member State of the European Union or EEA, the application of *Heureka* under each foreign law will be a matter for expert evidence in due course."

Then they say the continuity of infringement point, but there is a distinction --

MR JUSTICE MICHAEL GREEN: So far as any particular EU Member State has decided not to adopt *Heureka*, is that right, on a cessation condition --

MR WOOLFE: It seems to be their contention that we would have expert evidence of each for foreign law, and each foreign law expert may say: well, we know the ECJ said this in *Heureka* but for some reason under that specific national law, that doesn't actually have a direct effect and we don't give effect to it". We are not sure what that principle would be, given the principle of direct effect.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: But that seems to be the implication of it, albeit it is not completely spelled out.

Then if I can show you the equivalent in relation to Visa, because Visa do say a bit more. Perhaps if I can skip straight to Visa's defence. The numbering is a bit different, because it is a defence to a different claim but another one from the same group. If we can go -- this is in tab 46, page 1429, in "Applicable Law". Effectively again at paragraph 104, broadly speaking it is admitted that --

MR JUSTICE MICHAEL GREEN: Page?

MR WOOLFE: 1429, sir.

MR JUSTICE MICHAEL GREEN: Yes.

MR WOOLFE: Paragraph 104. That leads to paragraph 105, that's the paragraph where we set out French transactions are governed by French law and so forth. Broadly speaking that is admitted. Again it is only denied -- the point about cross border acquiring.

But then at paragraph 105 of this pleading, on page 1430, Visa take a series of specific points. 105.1:

"The application of *Heureka* under the law of each relevant EU Member State will be

a matter for expert evidence in due course. This includes, without limitation, whether *Heureka* established any retrospective cessation requirement as a matter of the particular foreign law (either at all or, alternatively, in the period prior to any relevant EU Member State acceding to the EU."

So they are taking a point about whether or not *Heureka* applies retrospectively in other Member States.

Then they say -- at 105.2 they take the continuous infringement point.

105.3 they say if *Heureka* did establish a retrospective cessation requirement under any relevant foreign law, giving effect to it would give rise to undue hardship and therefore is manifestly incompatible with English public policy and therefore you shouldn't give effect to it under article 26 of Rome II, and then they also plead --

MR JUSTICE MICHAEL GREEN: That's an issue of English law?

MR WOOLFE: I think it is a sort of overriding -- that must be the argument, I assume. Anyway you see the way Visa follows Mastercard as a matter of expert evidence. Visa also says for expert evidence but then hints at this point that there may be points under foreign law that should apply retrospectively.

When we are looking at this, we can see that because limitation will determine the scope in which we are potentially looking for all these other claims going into trial 4, there is an advantage to being able to determine legal points as to limitation as a preliminary issue if it can be done proportionately.

We would like to apply for a preliminary issue, which would be able to deal with anything falling in with Visa's 105.1, anything falling within Visa's 105.3 and probably 105.4 as well and also we add to that the double actionability -- but not the exception to double actionability applies. That's a point of English law.

MR TIDSWELL: (Inaudible) preliminary issue look like, because they say you need to go and get evidence from individual states. Are you saying the preliminary issue would

be whether that's necessary or not?

MR WOOLFE: Sir, our proposal is we don't think it will be necessary -- the end game. We don't think it should be necessary to have expert evidence from each and every single EU Member State, because the starting point is that *Heureka* as a matter of EU law has direct effect and the members have to comply. If they are able to particularise and say, "Ah, in Germany there is this particular provision of constitutional law which means that for a particular reason about German law, German courts will refuse to give effect even to an element of EU law that should have direct effect", then we could have a trial based on expert evidence of that particular law, but what we shouldn't do is assume that speculatively, "Oh, it might be the case that Member States may have some bit of law that will stop this" which seems to be the basis of what Visa is doing at 105.1.

In a sense either they have spoken to a foreign law expert and they have some proper basis for saying under a statement of truth that some law somewhere would refuse to comply with *Heureka*, notwithstanding they are a Member State of the EU, and if they have done that, they should be able to give us particulars, or they have not done that and this is pure speculation, in which case this pleading is rather obstructive in terms of defining what the issues are. That's why we want them to particularise.

MR JUSTICE MICHAEL GREEN: So you want them to particularise which states they are talking about. Is that right?

MR WOOLFE: We want them to particularise which states, if any, have not --

MR JUSTICE MICHAEL GREEN: Have not adopted -- will not apply *Heureka*?

MR WOOLFE: Will not apply *Heureka*, yes.

MR TIDSWELL: So it's a sort of put up or shut up argument?

MR WOOLFE: Yes, exactly. (Inaudible).

MR JUSTICE MICHAEL GREEN: You are not asking as part of the preliminary issues

that we determine at this stage whether that's correct as a matter of foreign law in that particular state that's been identified?

MR WOOLFE: Whether or not it is appropriate it will drop out of what particulars are given, because if it is put forward they have good reason to say it in respect of 18 different Member States, then we need to think about what we are going to do about it. If they can put forth, "Actually it is only true of this one state", then the matter may look different.

Alternatively we may be coming before you at the CMC saying, "Notwithstanding what the defendants have said, we think this is a matter which should be capable of being tried by reference to an expert giving evidence as to what EU law requires in the context of an ongoing EU Member State or by way of pure legal submission on what EU law requires", and we might be seeking for a ruling from the Tribunal that in a sense you don't need to look at what foreign lawyers say more widely. You can just decide that EU law requires the cessation requirement and that has direct effect.

MR JUSTICE MICHAEL GREEN: (Inaudible). There is not much of an issue on this.

MR WOOLFE: That's really rather where we are coming from. It's not just this issue. We want the issues generally around limitation to be trimmed down. For instance --

MR JUSTICE MICHAEL GREEN: So you are not asking for limitation to be resolved on a preliminary basis? You are just trying to narrow it down to work out, for instance, where you need to go and get foreign expert evidence from.

MR WOOLFE: That is the short point. What we are still proposing should be parked for the moment -- it will have to be grappled with at some point, but we are not asking for a preliminary issue on it -- is 105.2, which is whether or not there is a continuous infringement, because in a sense that's quite hard to divorce from the Tribunal's exercise of looking in other Member States and deciding whether there is an infringement at all. It is not enough simply to say, "You have had some rules

continuously in place". It is a question of has there been a continuous infringement? That's why it is quite hard to take that bit and say you just can decide limitation across the board. We are arguing it is chopping down -- trying to identify the distinct legal issues on limitation, and if turns out, following particularisation, that a good preliminary issue can be framed, we will be coming back at the CMC in June and saying we would like you to order a preliminary issue, because it will help narrow matters and expedite matters for trial 4.

MR JUSTICE MICHAEL GREEN: So at this stage you are just asking for particulars of their case?

MR WOOLFE: Yes.

MR JUSTICE MICHAEL GREEN: Are you really simply asking, "Which Member States are we talking about?" Do you actually want their case on it?

MR WOOLFE: We want to know what provision of law it is that they say means *Heureka* isn't given effect.

MR JUSTICE MICHAEL GREEN: In a particular EU Member State?

MR WOOLFE: Yes. That's it. That's what we are asking for and we would like a CMC listed.

MR JUSTICE MICHAEL GREEN: You have not previously asked for that. You have seen their pleading. You have not said, "Well, which EU states are we talking about?"

MR WOOLFE: Not in the pleading process. The pleading process for these has been going on at the same time as we have been having the correspondence regarding -- so this defence, for example, was only filed on 26th November 2025, the one you are looking at for Visa. Mastercard's came a bit earlier. I can't remember exactly. At the start of October or something like that I think. So this has been going along in parallel to our discussions about the CMC.

What has happened rather is we had talked in setting the agenda for this CMC in

September/October about having directions towards a preliminary issue on *Heureka*, because we anticipated it would be an issue. Having received these pleadings, we are now in slight difficulty actually framing a preliminary issue, because an element of it is still unclear. So in that context what we have done is to change our position and say, "We want particulars of your case in order that we can think about it".

MR JUSTICE MICHAEL GREEN: It's essentially an RFI on which Member States we are talking about and do they actually have to set out their actual case on that or is it not sufficient because of the way they have pleaded it that the states that they are identifying we assume they are saying have not directly applied *Heureka*?

MR WOOLFE: The case is not -- because it is not a matter of a Directive that's implemented into law, because all Member States will have passed law implementing the Damages Directive. It implements the cessation requirement on an ongoing basis. I wouldn't necessarily expect that any cases -- any states have passed a law saying the cessation requirement applies in the past by virtue of *Heureka* to things that happened before 2017 simply because that's not the way states tend to legislate when the EU rules on something. Maybe one has. I don't know, but we are not looking for that. Their case seems to be there is something about national law which would stop *Heureka* applying retrospectively. So we would want to know which states they are talking about and what bit of national law it is that prevents it, so Article 3 of the constitution or whatever.

MR JUSTICE MICHAEL GREEN: Is this the only aspect of trial 4 that you are seeking to progress?

MR WOOLFE: It is the only one we are seeking to progress between now -- well, we want that CMC listed in June, and obviously that would involve things starting to move before then, people making proposals as to each other and so forth and we gratefully adopt --

MR JUSTICE MICHAEL GREEN: On what? On scheme fees and others?

MR WOOLFE: Scheme fees, infringement under Article 101 in other EU Member States, exemption in other EU Member States and so forth. So there's a lot to be done and we do feel --

MR JUSTICE MICHAEL GREEN: You want directions at this stage in relation to all issues that are going to be decided in trial 4. Is that right? Why do you want them?

MR WOOLFE: There should be a CMC to consider what directions should be made in relation to all issues. That doesn't necessarily mean that all issues should progress. The Tribunal may say, "Right. What we want to do is progress or we will progress at (inaudible) speed". That would be a matter for the CMC in June. It may make sense, for instance, to put scheme fees and other (inaudible) on slightly different tracks. I am merely speculating.

What we do want -- if a CMC is in the diary, the parties have to start taking steps towards it, and indeed what Mr Tidswell proposed, an updated list of issues, is a very sensible matter.

With respect, the direction for the Tribunal in relation to this CMC requiring the exchange of position statements was also very helpful, because it forced both parties independently even after some discussion to come forward and say positively what they wanted to do to resolve matters.

If some equivalent structure is adopted, then the Tribunal will in June have before it sets of proposals for the resolution of all outstanding matters and it can decide what to progress and at what speed.

MR JUSTICE MICHAEL GREEN: Limitation is the only one that you have identified so far as needing to progress.

MR WOOLFE: It is the only one we want a direction other than the CMC, yes, because we want to understand what lies behind 105.

MR JUSTICE MICHAEL GREEN: Essentially it's an application for particulars.
MR WOOLFE: Yes.
MR JUSTICE MICHAEL GREEN: Did you issue an application?
MR WOOLFE: I think we did include it in our position statement filed back at the start of September. Yes. So this is in tab 6 of the bundle. It may have been in a slightly different form at that stage.
MR JUSTICE MICHAEL GREEN: What page?
MR WOOLFE: So that is in our -- our position statement and application, which is ahead of that, starts at page 74 of the bundle. Within that our application as to applicable law starts on page 83. You can see our application set out at paragraph 19. So that's our position statement, which we filed on 3 December. This is all expressly with a view to there being a preliminary issue, but we are simply not now in a position to say "Here is the actual specific issue we want resolved".
MR JUSTICE MICHAEL GREEN: So there will be a further hearing with a time estimate of one day to give directions towards the trial of these issues, meaning?
MR WOOLFE: Issues as to applicable law (inaudible).
MR JUSTICE MICHAEL GREEN: Right. Okay.
MR WOOLFE: I have been on my feet for a while. I am conscious that we are slightly running short of time and my learned friends probably want to respond to what I have said.
MR KENNELLY: I'm afraid it looks like we will not get finished.
MR JUSTICE MICHAEL GREEN: Really?
MR KENNELLY: We have listened with some concern to the submissions of my learned friend. Can I just begin, if I may, with the broader point he makes about the trial 4 CMC, just an overall point? I will come back to that when I have dealt with the foreign law limitation issue, because the suggestion is that there be a CMC listed to

make directions in respect of potentially all of the trial 4 issues, and the Tribunal will have well in mind just how many of them there are, and, as Mr Tidswell observed, how little particularity he had in relation to a large number of those issues, especially the ones concerning the foreign MIFs, because when one breaks them down, breaks down the issues that need to be determined in respect of the foreign MIF claims in the 21 territories where these MIFs are imposed, various separate factual issues are thrown up. Before any directions can be made in respect of those issues the issues themselves need to be identified.

MR JUSTICE MICHAEL GREEN: Yes. Well, the first stage is to be very clear about what further issues still need to be resolved.

MR KENNELLY: Indeed. Before a CMC can be listed to decide what directions are made in respect of those issues the parties need to agree between themselves, or seek to, how the issues are to be described and how they are to be prioritised so as to make trial 4 manageable.

MR JUSTICE MICHAEL GREEN: Why can't they do that?

MR KENNELLY: Well, they should be doing it. The claimants should be doing it and we should be doing it and that's something we should be getting on with. It is something we should be doing between ourselves in the first instance before troubling you at a CMC.

MR JUSTICE MICHAEL GREEN: Well, if we have a CMC in the diary, then it will focus everyone's minds to actually be thinking about these issues.

MR KENNELLY: There is real force in looking at the lists of issues and seeing what can be done now based on the pleadings, but the pleadings themselves in relation to these other issues are not complete.

Mr Tidswell observed the fact that the claimants have been saying that they intend to make various pleas in relation to issues but have not done so. If the claimants are

going to do that, they would need to do that first before we can crystallise the issues that need to be addressed in any trial 4. So there are a number of prior steps that we need to see achieved before we can finalise the issues for the purposes of the trial 4 CMC.

My basic point is a trial 4 CMC now is premature. We can understand the Tribunal's desire to list something and to get on with it, but it is premature in view of the lack of progress that's been made in relation to the pleadings on the trial 4 issues and --

MR JUSTICE MICHAEL GREEN: We are talking about a CMC in six months' time.

MR KENNELLY: Yes, sir, but the difficulty is it's a CMC that's happening right in the middle -- the proposal is to have it right in the middle of the preparation for trial 3 and the disclosure exercise.

MR JUSTICE MICHAEL GREEN: We are going to be preparing for trial 3 for the next 18 months, so we can't punt it off forever. It has to be grappled with sooner rather than later.

MR KENNELLY: Indeed, but in the first instance the parties need to make progress as to what they proposed to achieve in any trial 4, because it is simply not realistic to say that everything left is going to be resolved at trial 4. That's not realistic.

MR JUSTICE MICHAEL GREEN: No. We need to know exactly what that means.

MR KENNELLY: Indeed. In relation to that overall CMC my starting point is that right now it is premature to order, because the parties don't even have a clear idea as to what would be on the menu at that CMC and we need to progress that first before a CMC for trial 4 is listed.

To be clear, a CMC dealing simply with making progress on pleadings and the list of issues, that doesn't require a CMC. That ought to be done between the parties and on the papers. If there's to be directions on the listing of abuse of dominance issues in relation to scheme fees in a trial 4, that is a major undertaking, because that would

require the parties and the experts to consider what methodologies would be needed to make good that case, how long it would take, what directions would be needed. That is not simply case management. That is to tee up a substantial and entirely novel and new legal claim, because we have not addressed abuse of dominance issues in relation to scheme fees ever before in these proceedings. So that would be a major --

MR JUSTICE MICHAEL GREEN: Is it a pleaded issue?

MR KENNELLY: It is a pleaded issue for one set of claimants. Others have threatened to bring similar claims. They need to progress that before we can decide what exactly would be involved in any scheme fees trial preparation. That is an overall submission in relation to this monster trial 4 CMC that's being proposed.

On the foreign law issue we had come to the Tribunal expecting to argue as to whether a preliminary issue was going to be ordered. That appears not to be the request from the claimants.

MR JUSTICE MICHAEL GREEN: That's what I thought.

MR KENNELLY: Instead what's sought is further particularity in relation to our defences and a CMC in relation to that, which would be the same monster CMC that's proposed for all the issues in trial 4. You have my initial submission on the impracticability of that.

Even requiring the defendants to plead their cases on foreign limitation law in detail would be a wasteful and disproportionate step at this stage, because in order to plead or to see what we can plead in relation to each of the 21 jurisdictions where these foreign claims are made the defendants would need to instruct foreign law experts to provide advice as to the impact of *Heureka* in each of these 21 jurisdictions.

MR JUSTICE MICHAEL GREEN: I presume you had some advice in order to be able to plead it in the first place.

MR KENNELLY: We have had advice in relation to the very limited plea that the

Tribunal has seen. We have pleaded, as you have seen, that the application will be a matter of expert evidence. We have said that we will need expert evidence in due course as to whether *Heureka* established a retrospective cessation requirement. Pleas we have made are not pleas by reference to established foreign law positions. In order to plead out what the actual limitation position is in relation to these jurisdictions we would need -- to give the level of particularity that the claimants seek we would need specific foreign law advice from each of the 21 foreign jurisdictions, because it is not sufficient simply to say the CJEU in *Heureka* said that the principle (inaudible) requires a cessation requirement of the type described by my learned friend.

It will probably be tomorrow, if the Tribunal is rising at 4.30, that I come to show you why, in fact, that position may well differ between the different Member States. Since foreign law is an issue of fact to be proven by evidence, the defendants have a right to adduce expert evidence from the different jurisdictions as to the impact of *Heureka* in those countries. It is not enough simply to say, "Well, we in England think the CJEU said this and that must have retroactive effect throughout every Member State of the European Union".

Before you rise I will show you why this --

MR JUSTICE MICHAEL GREEN: I am slightly confused, because, I mean, obviously limitation is a matter for the defendants to plead.

MR KENNELLY: Yes.

MR JUSTICE MICHAEL GREEN: You are pleading that it is a matter for expert evidence in due course, but are you thereby pleading a limitation defence or you are saying, "We have to wait and see what that expert evidence shows and we may have a limitation defence then"?

MR KENNELLY: We are pleading the best we can at this stage in the absence of

detailed foreign law evidence. We know that at some point we will need to get that foreign law evidence in order to plead out the detail of the position, but the work involved in that will be considerable and the question for the Tribunal is, is it proportionate for to us do that now when all that will be achieved is some clarity as to the particular limitation period in each of these 21 Member States?

It will not tell you even on the claimants' case what the actual claim period is in relation to these foreign claims, because, as my learned friend said, if the infringement was broken during the claim period in each of these 21 Member States because of an exemption decision or because of changing Visa rules, then the claim period will shift, and that would be a fact specific question the claimants accept. It will not tell you whether there's been an infringement in these Member States and it will obviously not go near the issue of exemption, which is a very fact specific question and will vary in each of these 21 Member States. So the most you will get --

MR JUSTICE MICHAEL GREEN: Are you saying you are not aware at this stage of any one EU Member State that has not applied *Heureka*?

MR KENNELLY: We have high level -- we have some high level understandings of the position of various Member States, but not enough to plead out particulars in relation to these issues now. To plead it out with the particularity that the claimants seek we would need specific expert advice from the Member States concerned.

The question for the Tribunal is, is it worth putting the defendants to the cost and effort of doing that now when what you will be progressing is a very narrow aspect of the case? It will not progress the foreign claims in any real way. Ordinarily the preliminary issue -- the question is if you have a preliminary issue has it the potential to resolve the claim? The answer here is not at all, because it is a very narrow point that actually has very little limited utility in the overall context of resolving these foreign MIF claims.

MR TIDSWELL: If the claimants are right, though, isn't it very helpful information?

I appreciate not perfect information, because your point you make about continuous infringement as a fact, but it's quite helpful, isn't it, because we know then that -- well, whether they are right or you are right, we know that we are either dealing with a certain time period or a shorter time period. If we are going to sit down and try to work out what to do with the rest of this case and particularly the foreign law claimants, we do need that information, don't we, because it makes a considerable difference to the exercise that's going to be undertaken for all of the (inaudible) you've mentioned: liability, exemption, whatever it happens to be.

MR KENNELLY: It will make a difference. The question is, is this issue sufficiently urgent in view of the Tribunal's plan for resolving the other foreign MIF issues, infringement and exemption under 101(3)? At this stage the Tribunal understands just how fact heavy and complex those issues are. The reason why this Tribunal in the past has parked those foreign law issues is because the Tribunal has recognised that it would have been disproportionate to have incurred the kinds of costs that we have seen incurred in relation to the resolution of the UK and Irish issues to resolve much smaller value foreign MIF claims.

One cannot read across the findings that have been made in the UK trials to the foreign MIF claims. They require a separate infringement analysis and a separate exemption analysis. So before the Tribunal puts us to the cost of getting expert evidence from 21 jurisdictions the Tribunal will need to consider is it realistic that this will bring forward or will be of assistance in an imminent foreign MIF trial and consider just how much work, time and money that will involve, and will that be a proportionate thing to do in view of the limited value of those claims.

MR JUSTICE MICHAEL GREEN: If you --

MR KENNELLY: No, indeed. It was the point I made about what is left out, what is left to be decided even if you have the limitation period rule determined. It doesn't

even tell you the claim period, because the claim period depends on whether the infringement -- I think I have made this point already -- whether the claim period extends right from 1992 to the present or whether it has been broken by exemption decisions.

MR JUSTICE MICHAEL GREEN: The (inaudible) point.

MR KENNELLY: Absolutely, and the claimants expect (inaudible).

MR TIDSWELL: But at some stage you have to work out whether you are going to go back to 1992 to find the answer to that question --

MR KENNELLY: Of course.

MR TIDSWELL: -- and if you turn out to be right and the limitation period doesn't go back that far, that saves everybody a lot of work. I mean, I can absolutely understand the point you are making, but what your submission really amounts to is that we should just continue to push all this off into the unknown future. I think we are saying to you we are not prepared to do that anymore with these issues and we want to at least understand how we can timetable them to be resolved, even if that does take quite a lot of time and probably will, but if this is part of an exercise of unlocking that decision-making, then it does have some value, doesn't it?

MR KENNELLY: The question is does it have a major impact on unlocking the work needed in the resolution of the foreign MIF claims? It is an element, but the Tribunal will need to consider realistically -- we totally understand the need to determine the foreign MIF claims, but the Tribunal has to think about realistically whether those foreign MIF claims will be determined in trial 4.

MR TIDSWELL: I don't think anybody is making any assumption about that, Mr Kennelly. It may be -- if that's what's driving your concern, I don't think anybody is saying that. What I think we are saying is that we want to have a CMC to work out what we have in front of us and how we can best deal with it. All those arguments

about what goes where will take place in June, not now, but it does seem, given you have pleaded the limitation point, that it would be helpful to understand what the significance of that is when we get to June rather than get to June and not know the answer to that, because some of the questions we are going to address in June may depend -- where we put things and how we try them may depend on what the length of the claim period is.

MR KENNELLY: I understand. It is a question -- my final point -- really of proportionality -- I will come back to this tomorrow -- because it is a major exercise to go to these 21 jurisdictions and get this advice and then to plead. My simple point is if the Tribunal is going to make us do that, is that going to be useful for some short or medium term purpose? It would be a shame to put us to that expense and cost when ultimately it has very little effect on the resolution of the foreign MIF claims and is relevant to a trial that's happening through no fault of anyone at some point in the distant future.

MR JUSTICE MICHAEL GREEN: What aspects of trial 4 do you say we can progress at this stage?

MR KENNELLY: The quantum issues in relation to UK and Irish MIFs. These proceedings have been successful in many respects, because they have focused on what is manageable. In trial 1 and in trial 2 you focused on the MIFs in UK and Irish acquiring markets. You did that and you positively decided to exclude Italian MIFs, for example, in order to have a manageable trial focusing on easily ascertainable markets, recognising the very different factual situations that arise in the 21 different foreign markets. By focusing on the UK and Irish MIFs, contrary to Mr Tidswell's pessimistic observation earlier on, you have caused settlements to be made.

I will show the evidence -- in fact, I will show it to you now before we -- as my last point. Ms Williams points out that as a result of the judgments we have seen settlements and

settlements concerning the foreign MIF claims also. It is in her third witness statement at paragraph 10. She says that --

MR JUSTICE MICHAEL GREEN: Which page is this?

MR KENNELLY: It is page 253 of the hearing bundle.

MR JUSTICE MICHAEL GREEN: Yes.

MR KENNELLY: The concern is we need to resolve this to try and encourage settlement of the foreign MIF claims that are effectively parked. As she points out in the middle of paragraph 10:

"Visa has agreed settlements with two significant groups of claims, the [ones] brought by ... Humphries Kerstetter and Stephenson Harwood", withdrawn as recently as May 2025.

"Mastercard has also agreed settlements with the same groups ... Those settlements resolved claims which pleaded a total of 23 different applicable laws of European jurisdictions, four of which are not pleaded by any other claimant and therefore no longer require determination in the litigation" -- Croatia, Malta, Slovenia and Slovakia.

So as a matter of commercial reality the progress that this Tribunal has made in relation to the UK and Irish markets has prompted settlement, which has included the foreign MIF claims. The foreign MIF claims were brought as part of these claims because they were of lower value and presumably it was harder for them to justify bringing them in the foreign jurisdictions independently, so that the price they pay in a way -- the benefit they get is to be riding on the coat-tails of the UK claims, but the price is that, where it is proportionate to do so, they have been parked behind the UK claims.

I will come back tomorrow on why --

MR JUSTICE MICHAEL GREEN: It is disappointing that we couldn't complete it.

MR KENNELLY: If the Tribunal is willing to sit late, I am happy to carry on, but I just

don't want to trespass upon you.

MR JUSTICE MICHAEL GREEN: How long do you think you would be?

MR KENNELLY: I just need 15 minutes. I can try to be quicker.

MR JUSTICE MICHAEL GREEN: Then, Mr Hoskins, you would want to speak too?

MR HOSKINS: Unless something untoward happens I am not going to add anything to that.

MR KENNELLY: I will try to be faster if I can. I think the points are rather more narrow than I thought coming into it.

MR JUSTICE MICHAEL GREEN: All right. I think it would be better to ...

MR KENNELLY: So I understand where the Chair comes from in saying "the CJEU said it. Isn't that just the end of the story?" Well, if you turn to where the Court of Appeal addressed this issue -- it is the second authority bundle, tab 13. It is the Umbrella Interchange Fee claimants' claim obviously where the implication of the CJEU judgments was addressed by the Court of Appeal.

If you go to page 942 --

MR JUSTICE MICHAEL GREEN: Sorry. In the authorities bundle?

MR KENNELLY: Yes. Page 942 of the authorities bundle. I hope the PDF matches the hard copy. The Court of Appeal said that *Heureka* had the effect that my learned friend described, but at paragraph 32 on page 942 the Master of the Rolls observed that:

"It is not necessary for us to reach a conclusion on the retrospective effect of the decision in *Heureka* as it affects current EU member states."

Just pausing there, there is a limit as to how much weight can be placed on that, but it simply observes it is an open question as to whether that decision in *Heureka* is a statement of the law, will be treated as a statement of the law in each of the Member States from the beginning of the claim period which extends back, as we know, as far

as 1992.

There is a suggestion in *Heureka* itself as to why that might not be the case. It is true that ordinarily CJEU judgments on issues of general EU law principles are treated as applying as if they were in effect at all times, but if you go into *Heureka* itself, same authorities bundle --

MR TIDSWELL: Sorry. Just before you do that, the point you are making, you are not suggesting that the Court of Appeal is not recognising the binding nature of *Heureka* on national law, are you?

MR KENNELLY: No.

MR TIDSWELL: (Inaudible) paragraph 30, doesn't it?

MR KENNELLY: Yes, going forward. The question is -- that's the Court of Appeal's observation, although it is not necessary for it to decide, because that wasn't the issue before it.

MR TIDSWELL: But the retrospective point is about -- that's the point about the law always being as stated in *Heureka*. That is not really in issue, is it?

MR KENNELLY: Of course, because the question for us will be in these Member States do they treat *Heureka* as changing their limitation laws in respect of cause of action that accrued in the past or is it treated as changing their limitation rules on a forward looking basis?

MR TIDSWELL: But it is all historical, because it all predates the Directive. So by definition it must be the first of those, mustn't it?

MR KENNELLY: No, not necessarily, because if the Member States in their own national legal systems say that "We're not treating *Heureka* as applying to causes of action that applied in the past but only from the date of the judgment" on the basis that it clarified or stated EU law --

MR TIDSWELL: That can't be right, because at the date of the judgment everybody

had the Directive implemented. They law is already as *Heureka* says, but for a different reason.

MR KENNELLY: You might be right, sir, but that's a question we need to check with the foreign lawyers, because how the Member States have dealt with *Heureka* will be a matter in the first instance for each of the Member States' legal systems. As my learned friend said, it is not like implementing a Directive. They have to in their individual legal systems look at *Heureka* and decide how it's to be incorporated into their legal systems.

Again I appreciate how counter-intuitive this must seem. To us it seems very straightforward, but the court reports of the European Court are littered with examples of Member States' courts taking views of the implications of EU law, especially general principles, for their legal systems that strike us as odd. Since foreign law is a question of fact to be established by evidence, the defendants have at least the right to check with proper foreign qualified lawyers in a rigorous way how *Heureka* has been addressed by their national legal systems, if at all, because it definitely came as a surprise to them, because we see that from *Heureka* itself.

If you go in the judgment -- sorry. If you go in tab 17, the Advocate General's opinion is at page 1355. The report begins at page 1355 and the Advocate General's opinion is at 1380. The curious thing with *Heureka* was that the European Commission supported Google in arguing that the cessation requirement was not required as a general principle of EU law.

MR JUSTICE MICHAEL GREEN: Which paragraph are you on?

MR KENNELLY: I am looking at paragraph 103. There the Advocate General records that:

"... prior to the transposition of [the] Directive, none of the legal systems of the Member States made the starting point of the limitation period for an infringement of

competition law conditional upon the infringement having ceased."

So the existing limitation rules we infer from that of the Member States did not contain a cessation requirement. The question will be then -- there will be a question for each and every Member State how and to what extent they adopted their rules to *Heureka*.

MR TIDSWELL: Sorry. It's just what they did as a matter of fact is that. So if they -- I think it is fairly obvious, isn't it, that there will be quite a lot of jurisdictions that didn't comply with *Heureka*, because they didn't know that *Heureka* was the law. That's the whole point, isn't it? Certainly you will recall -- I can't remember if you were involved in the *Volvo* hearing.

MR KENNELLY: No.

MR TIDSWELL: We certainly didn't think *Volvo* had changed the law in the way that *Heureka* says it had. So it is not surprising that there might be some people who didn't think that *Heureka* was the law. Once *Heureka* is the law, isn't that the point? Isn't that the whole point, that once we know it is and has been the law, it doesn't matter what the jurisdictions did then. The question is what do they now accept they have to comply with.

MR KENNELLY: Indeed. I am not suggesting that the national legal rule prior to *Heureka* is determinative. I took you to that simply to show that you can't assume that every Member State -- that it would be a straightforward thing for every Member State to simply adopt *Heureka* as expressed in the Court of Justice. What it demonstrates is that in the Member States, and each of them appear to have legal systems that did not contain this, their national legal systems will have to consider how and to what extent, including in relation to retroactive effect, they comply with *Heureka*.

I know this may seem obvious to you --

MR JUSTICE MICHAEL GREEN: What if they have not decided yet? What then is the position?

MR KENNELLY: The question -- because it is a question of fact and a question of foreign law, the question being "What would the Supreme Court of the relevant Member State determine if the question was put before it?" and that is a question that only a foreign lawyer can answer. The foreign lawyer may have recourse to procedural constitutional niceties which make a difference, depending on the Member State in question. Although it is tempting for us to say, "Isn't it obvious? Surely they will all do it the way we would do it if we were still Member States," it is not safe to make that assumption, because it is a question of foreign law upon which we need proper advice.

MR JUSTICE MICHAEL GREEN: You say we might be in a better position in two years' time, because more national legal systems will have decided what they are going to do.

MR KENNELLY: I will not speculate. That is the temptation. The claimants have entered into that kind of speculation too. One only has to look at the list of Member States to see -- back to Ms Williams' second statement. It is at page 140 of the hearing bundle. The hearing bundle now, please, tab 11, page 140. In her footnote she lists the Member States concerned. It is a reality check to see what we are talking about. One sees the list of Member States in footnote 51 at the bottom of the page.

A further point that arises is that many of these Member States acceded to the European Union relatively recently. So in 2004 Cyprus, the Czech Republic, Poland and then in 2007 we have --

MR JUSTICE MICHAEL GREEN: Romania.

MR KENNELLY: Cyprus, Czech Republic in 2004. It is right. Poland in 2004. Then in 2007 Romania. Bulgaria, 2007. The question will be since the claim period extends far earlier than that date, what are the implications, if any, for *Heureka* the period before they acceded to the European Union, because in the transition period between

the application for membership and joining the European Union many Member States decided to track EU law anyway. We don't know what the position is in relation to those Member States. That will itself require expert legal assistance.

Now the claimants say "You don't need experts from all these different countries. You can get a single expert to opine on all the Member States". Mr Mansfield, paragraph 42 of his statement, he says, "Simply get a single expert from a typical Member State". The words "typical Member States" are in his statement. With respect, that makes no sense. What kind of expert would that be? A lawyer from one Member State who feels able to speculate about the laws of other Member States where he or she is not qualified? That doesn't make any sense. We can't assume that all the national laws read *Heureka* as we do. That's why we have a right to and we need to get expert legal advice from the Member States concerned.

My short point in conclusion is the one I made earlier on. That will be an expensive and time-consuming process. Is it proportionate in circumstances where we are some way from even thinking about when these foreign law issues will be resolved? The foreign law issues will require very serious work, because the Member States concerned have very different markets. There will be no read-across from the UK work we have done and we must not underestimate. It would be premature to even make preliminary decisions about how much work that would involve and when it could be done.

MR JUSTICE MICHAEL GREEN: Are you objecting to a trial 4 CMC in June?

MR KENNELLY: Not necessarily, no. That could be --

MR JUSTICE MICHAEL GREEN: So would you think it might be appropriate to reconsider these issues then after there had presumably been a bit of “to-ing and fro-ing” between the solicitors on this issue?

MR KENNELLY: Yes.

MR JUSTICE MICHAEL GREEN: Do you think that might be appropriate?
MR KENNELLY: Yes. Certainly without instructions it seems a good idea to me.
MR TIDSWELL: Just while you are taking instructions -- before you take instructions, we have no sense of the profile of these claimants, foreign law claimants. I don't know if anyone has that detail, but it would be really helpful to know more about that. It seems to me that if there were some of them that were in jurisdictions where there was material value, then that might be something you could pay some attention to. It might be proportionate for you to go and look at those jurisdictions and get some advice if that was a small number and it was a relatively easy thing to do. I think there may be other ways of addressing this before June as well.
MR KENNELLY: I think that's precisely what you were telling us we should be getting on with in order for these issues at least to be considered for ultimate resolution. All we have at the moment from Mr Mansfield is a reference to the fact that foreign claims may be worth tens of millions of euros I presume, but that really is all we have. It is far too vague and it doesn't break down between the jurisdictions themselves.
MR TIDSWELL: But you don't know what the profile of the claimants is?
MR KENNELLY: Right now I don't. I would have to check what that is. Even if it is just tens of millions, the Tribunal will know how much it costs to run a full infringement and exemption trial for 21 jurisdictions with very different facts -- Bulgaria, Finland, Cyprus. The proportionality of trying those on an expedited basis for a claim value of €10 million, well, the Tribunal will form your own view.
I will just check before I sit down. I have nothing further. Thank you.
MR HOSKINS: I don't have anything to add.
MR JUSTICE MICHAEL GREEN: So you don't object to a trial 4 CMC either in June and an attempt to -- I think the main thing is to actually determine what are the trial 4 issues by reference to the list of issues or anything that's happened since and resolve

that and to see which of those issues can sensibly be progressed and how.

MR HOSKINS: I think the phrase that pops into my mind when listening to the exchanges was a housekeeping CMC. We will just see where the land lies on these things, but --

MR JUSTICE MICHAEL GREEN: Yes. We don't want to just let them drift.

MR HOSKINS: You know, the claimants are bringing these claims and they need to give some serious thought about which ones they want to prioritise and which aspects, etc, but clearly a degree of housekeeping is desirable.

MR JUSTICE MICHAEL GREEN: Mr Woolfe.

MR WOOLFE: Sir, I will be extremely brief.

First of all, in relation to the trial 4 CMC we are grateful for the outbreak of consensus that should now happen. This had been resisted strongly for some months.

May I suggest in the interests of time that the parties liaise between themselves to try to agree sensible directions towards that CMC in terms of pleading amendments, the list of issues as suggested by Mr Tidswell, the indications given, and by I suppose middle of February if we are not able to agree all those directions -- if we are able to agree directions, we tell the Tribunal. If we are not able to agree directions, we ask the Tribunal to put in writing what directions there should be. For instance, there may be -- there should be a list of issues that we should be pleading. Hopefully it should be largely capable of being agreed, because we have been told we need to crack on with stuff and so we take that well in mind. That's my proposal.

Then a few minor points from my learned friend. Firstly, regarding the retrospective effect of EU decisions, just to remind you the ECJ can when it wants to limit the temporal effect of its judgments. It normally declares the law as it has always been but can -- there is a case called *Meilicke*, which says that it can when it wants to specifically state, "This judgment is so disruptive to the established legal order

effectively that we will say it only applies prospectively". That's referred to for the Tribunal's note in footnote 10 to Mr Mansfield's witness statement. It is page 236 of the bundle. It didn't do that in either *Volvo* or *Heureka*. So ordinarily it should just apply.

Secondly, also a point regarding Mr Mansfield's statement, it was said that we were asking for evidence of a typical Member State. That rather took what Mr Mansfield was saying out of context.

Can I show you page 237 of the bundle and what he actually said, which is why we are seeking particulars?

MR JUSTICE MICHAEL GREEN: You are still asking for particulars?

MR WOOLFE: We are still asking for particulars. Paragraph 42.

MR JUSTICE MICHAEL GREEN: Which page?

MR WOOLFE: Page 237. The reference to the idea of a single foreign law expert of a typical Member State was put in the context of the first clause of that paragraph:

"... subject to there being some particular unusual features of national law which requires consideration in respect of a specific Member State ..."

So if all that is being said is there is something about EU law that means this doesn't apply retrospectively, then that could be dealt with by a single foreign law expert. If there is something specific about some particular national law, we need to know what it is. That's why we seek particulars.

Finally -- two more points. It was said there was a lot of evidence about a Member State's pre-accession before they joined the EU. That is not necessary. Our pleaded case is only that *Heureka* applies where the relevant domestic law is based on or must comply with European Union law. That was not the case in respect of those states before they joined the EU. So we are not saying that *Heureka* applies to Member States pre-accession. So that category of evidence wouldn't be necessary.

Finally, we heard what the Tribunal said regarding it being helpful to have a sense of the profile of the claimants with foreign claims. This may be where there is a slight difference between the claimant group you have before you and the defendants, because the Scott+Scott group as it now stands -- some Scott+Scott claimants have settled out -- the claim is very heavily skewed towards foreign jurisdiction. The LVMH claim is much more weighted towards foreign jurisdiction than it is towards the UK. Mastercard and Visa affects claims from lots of people, including CICC, etc. It may be that on their own exposure the picture looks different just as a point.

In terms of the LVMH claims the two largest Member States are France and Italy to give you an indication. We can, however, give you more detail on that in writing if that would be helpful and indeed can issue that in advance of the trial 4 CMC. That gives you a picture of why we care about it.

MR JUSTICE MICHAEL GREEN: Given the lateness of the hour and that I have a meeting at 5 o'clock, I am not going to give detailed reasons, but we are not going to order the particulars that you are seeking. We think it would be premature and potentially disproportionate at this stage to order it. That's not to rule it out being directed at some future time.

We think the first things that need to be done is for there to be engagement between the parties leading to a CMC on trial 4 as to the issues that are to be determined in trial 4 and as to the matters which can sensibly and proportionately be progressed in the meantime whilst trial 3 is going on.

It may be that this question of limitation and applicable law and whether foreign laws -- foreign states have applied *Heureka* in the way intended could be the subject matter of a preliminary issue and for the provision of particulars, but we think that that should await the trial 4 CMC in June, where hopefully further directions can be given in relation to that and possibly other matters. So we are not putting it off, parking it.

We are very keen that the parties do progress the issues in trial 4 in the best way that they can, but we think there needs to be a clearer vision as to the shape of these proceedings and how trial 4 and possibly other trials will progress over the next few years, and hopefully that will be explored at the CMC.

MR HOSKINS: Sir, we have our costs application. We will write you a short letter, because you don't need to (inaudible) this already, but just to say it's still there.

MR JUSTICE MICHAEL GREEN: This was about the expert reports?

MR HOSKINS: Exactly. Just we wanted our costs.

MR JUSTICE MICHAEL GREEN: Of what? Of responding to that request?

MR HOSKINS: Yes. There was work done. It is just something we want to bank.

MR JUSTICE MICHAEL GREEN: Okay. Well, as I say, we will rule on that in writing then.

MR HOSKINS: Well, we were going to send -- I think Mr Leith wants to send you a page or two to respond to what was said in the skeleton, if that would be helpful.

MR JUSTICE MICHAEL GREEN: Yes.

MR HOSKINS: We will do that. Thank you.

MR WOOLFE: Unfortunately if they are going to say something in writing, we should be allowed to respond to an application against us, which we will -- it is a very short point. We say you shouldn't descend into --

MR JUSTICE MICHAEL GREEN: Well, it is their application. You have responded to it in your skeleton I think. They are just seeking to reply basically.

MR WOOLFE: If it is reply submissions, then --

MR HOSKINS: That's the intention, just to wrap up what was said in the skeleton.

MR JUSTICE MICHAEL GREEN: That's what it is. All right. Thank you very much.

(4.58 pm)

(Hearing concluded)