IN THE COMPETITION APPEAL TRIBUNAL 1517/11/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 24th April 2026

Before:

The Honourable Mr Justice Michael Green

Merchant Interchange Fee Umbrella Proceedings

CMC – Trial 3

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A P P E A R AN C E S

Kieron Beal KC, Philip Woolfe KC, and Reuben Andrews (Instructed by Scott+Scott UK LLP) on behalf of the SSU Claimants

Kieron Beal KC, Philip Woolfe KC, Reuben Andrews and Flora Robertson (Instructed by Harcus Parker Limited) on behalf of the CICC Class Representatives

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

Brian Kennelly KC, Daniel Piccinin KC and Aislinn Kelly-Lyth (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

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Friday, 24 April 2026

(10.30 am)

(Proceedings delayed)

(10.38 am)

THE CHAIR: Good morning.

Some of you are joining us live stream on our website, so I must start with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Morning, Mr Beal.

Housekeeping

MR BEAL: Good morning, sir. May I please do the introductions. I appear with Mr Woolfe KC, Ms Robertson and Mr Andrews for the active claimants in this case. For the PSR appear Mr Gibson KC and Mr O'Regan. For Mastercard, the usual suspects, Mr Hoskins KC, Mr Cook KC and Mr Leith. For Visa, Mr Kennelly KC, with Mr Piccinin KC and Ms Kelly-Lyth.

I have only one item to deal with very briefly up front and that is to confirm that the parties happily have reached an agreement on item 4 on the agenda, which is the list of issues. There has been a recirculated draft which incorporates some additional alleged benefits from the MIF into the pleaded issues. We are content that those reflect the pleaded case. And, accordingly, that can serve as a guideline, if not a tram line, for the Tribunal's adjudication in Trial 3.

We'll circulate a copy to the Tribunal, I hope, confirming that agreement, but it does mean that item 4 on the agenda comes off and we could proceed, subject to the Tribunal's views, in order with items 1 to 3. I'm not leading the charge on item 3, so I will now sit down (overspeaking).

THE CHAIR: Item 3 being experts.

MR BEAL: Sorry, item 1. Sorry.

THE CHAIR: Item 1.

MR BEAL: Item 1 being interaction with the appeals.

THE CHAIR: Okay.

Submissions by MR HOSKINS

MR HOSKINS: Good morning, sir. I think it might be downhill from here, I'm afraid. Let's see where we get.

THE CHAIR: I thought there was quite a lot of agreement from the skeletons, but --

MR HOSKINS: It's not all bad news.

I just want to just begin with two updates, really, on item 1.

First of all, appeals, and you'll be aware of most of this. Permission to appeal has been granted by the Court of Appeal in respect of the Trial 1 judgment. The hearing date for the appeal is 2 November 2026. It's likely, therefore, that the judgment is going to be delivered probably before the expert reports of June and the Trial 3 proceedings; that dates the 23 April. We're going to have to keep an eye on that. That's what I'm saying at the moment.

As you're aware, Mastercard and Visa have both applied to the Tribunal for permission to appeal the Trial 2 Judgments. You haven't yet handed down a judgment. You probably know what the answer is.

THE CHAIR: You'll get it very shortly.

MR HOSKINS: And I just make the obvious point, which will be uncontroversial, that the appeals in respect of Trials 1 and 2 may well have fundamental implications, both for the basis upon which Trial 3 is conducted and the timetable for that trial, but I go no further at that stage; it's literally written down, the things that we have to keep an eye on.

THE CHAIR: Well, you're not saying it affects anything at this stage.

MR HOSKINS: But it may do.

And the other update is, somewhat oddly, given the longevity of these proceedings, there's been a flurry of notification of new claims in the last few days. I just mentioned three new sets of claims that we've been told about. There are Merchant claims by Hausfeld; I think they've got currently about 135 claimants -- I hope I've done the arithmetic right -- and say they might be signing up some more. That's been issued in the High Court, not yet served and will have to be transferred to the Tribunal. Stephenson Harwood have written to say that they have a series of new claims that they haven't issued yet. And Harcus Parker have indicated, I think, four sets of collective proceedings that they intend to bring and, of course, they'll need to be certified.

So that's all very interesting that there's all these other claims quite late in the day that are appearing. The sting in the tail is that all those sets of solicitors have indicated that they want their clients to participate as active claimants in Trial 3.

Now, again, not for today -- all those things are at a fairly early stage -- but clearly, that's another thing that's going to be very carefully managed if they are -- or any of them are allowed in -- we're into timetabling issues for a Trial 3, but I'm simply bringing it to the Tribunal's attention today.

So that's it. I'm not suggesting you need to do anything specific today, but it is a tight timetable; it's a difficult trial. Active case management is the byword in the Tribunal and this is going to be necessary partly for these reasons, but that's all I need to say at the moment.

THE CHAIR: Anyone else want to say anything?

Submissions by MR KENNELLY

MR KENNELLY: One short point, sorry. You've seen the skeleton on the interaction between Trial 2 and Trial 3.

THE CHAIR: Yes.

MR KENNELLY: Obviously, you can see now: there's no suggestion that Trial 3 wait for the resolution of the appeal at Trial 2, but the opposite is our aim. Our concern is to make sure that Trial 3 proceeds as planned in an orderly manner, and our points arise out of the merchant benefit test. Most of Trial 3 will be occupied by the identification and assessment of the benefits to merchants arising directly from the MIFs. You have a case that the benefits compensate in full for any disadvantages caused by the MIFs, even without taking merchant pass-on into account.

But if you find that the benefits to merchants don't exceed the disadvantages to merchants, the Tribunal will have to consider how much of the alleged overcharge was borne by merchants and how much was passed on by them. That's the economy-wide merchant pass-on. Because it's only the portion that the merchants absorb that is this disadvantage to them that needs to be compensated by any benefits.

So we raise two points relating to merchant pass-on for the purposes of exemption under Article 101(3). The first is whether the Trial 2 findings on merchant pass-on may be applied to the exemption issue for the claimants who were parties to Trial 2. And this is a very short point of law, but we say it should be determined as soon as possible, because the Schemes’ position is that the test for merchant pass-on -- which the

Tribunal applied in Trial 2 -- does not apply in the context of the exemption defence. We say that the merchant pass-on test in Trial 2 relied on a domestic concept of directness for causation of loss. The Tribunal was very familiar with this, which required merchants expressly to take MSCs into account in setting their prices in the short term. We say that the test for assessing the extent of harm for the purposes of the fair share condition is different. It's concerned, we say, with what harm was actually caused, whether or not the merchant was aware of it at the time. And the reason why I'm raising it now is that if I'm right, the parties need to know that that is a test before they prepare their expert evidence for Trial 3.

THE CHAIR: You're saying, I think as part of your proposed appeal, that we got directness wrong?

MR KENNELLY: Yes.

THE CHAIR: As the test.

MR KENNELLY: Yes.

THE CHAIR: So if you're right on that, and assume you're right and you succeed in an appeal, are you saying that the same test actually should apply? So for MPO, the same test should apply. Is it only because we came to the conclusion that directness was the test for the mitigation defence and that it doesn't align with exemption; are you saying that?

MR KENNELLY: Yes.

THE CHAIR: Right.

MR KENNELLY: And that's why -- if I'm right and the Tribunal soon agrees with me and says, "Actually the test for merchant pass-on for exemption is what Mr Holt contended for in Trial 2, because we say it's the same", then we know that that's the basis on which we're approaching merchant costs on for Trial 3. That's not a problem for anyone because the defendants have already done the work; the claimants would have to consider whether to undertake any new analysis, because they didn't do that approach in Trial 2, but they wouldn't need any new or additional evidence for that purpose.

So if I'm right, we would know where we stood and it would not disrupt the timetable for Trial 3. If I'm wrong, the Tribunal will go ahead and make a finding on economy-wide merchant pass-on for the purposes of exemption in Trial 3, covering the parties at Trial 2.

THE CHAIR: The findings that we made in Trial 2 will be binding, effectively, on Visa and those claimants.

MR KENNELLY: Yes. As between Visa and the claimants in Trial 2, yes.

So that's --

THE CHAIR: What are you suggesting, that there should be some preliminary issue?

MR KENNELLY: Yes.

THE CHAIR: Right.

MR KENNELLY: As I said in my skeleton, a couple of hours of Tribunal time as soon as possible to resolve it. The Tribunal might well say, "We address this in the Trial 2 judgment", and we'll have a discussion about that. And we would say that, "It's something that does need to be considered by you for the purpose of Trial 3". In any event, it can be determined relatively quickly.

THE CHAIR: Does it affect, then, the evidence that will need to be adduced in Trial 3?

MR KENNELLY: Yes, because the claimants in particular would have to produce a new analysis which deals with merchant pass-on, applying the test that we say is the correct one, the one that Mr Holt contended for in Trial 2. It wouldn't require any disclosure because they wouldn't be concerned with individual price-setting decisions by merchants, but they would have to undertake a new analysis if they chose to do so.

So my core point here is that it doesn't disrupt Trial 3. That's the key point, and that's why we ask for it to be determined as soon as possible.

The second issue is a bigger one, and that concerns the fact that the parties to Trial 3 include people who were not party to Trial 2. You will have seen that that includes members of the CICC class and claimants whose claims were made host cases in the Umbrella Proceedings after Trial 2 had commenced. And, obviously, no findings have been made in relation to merchant pass-on, as between Visa and Mastercard and those parties.

THE CHAIR: But you're only interested aren’t you, in Trial 3, in an economy-wide pass-on rate?

MR KENNELLY: Yes.

THE CHAIR: Right.

MR KENNELLY: But still, the Tribunal found in Trial 2 that the legal test for merchant pass-on depends on entity-specific pricing practices. So for the CICC Class Members and the new claimants, we are entitled on the basis of Trial 2 to seek to prove merchant pass-on by them in reliance on documentary disclosure relating to their pricing practices.

THE CHAIR: If we're talking about an economy wide pass-on rate, is there not sufficient evidence from Trial 2 to be able to establish that? Or do you need more because you're not assessing each individual pass-on rate at Trial 3?

MR KENNELLY: The CICC Class Members are the new claimants.

THE CHAIR: Yes.

MR KENNELLY: First of all, they're not bound by Trial 2. They have their own evidence that they will put forward that we need to interrogate and that's an exercise that does require some documentary disclosure from them for the purposes of Trial 3. So, that's why we say that the most appropriate efficient route would be to proceed with all aspects of Trial 3 except economy-wide merchant pass-on to the CICC Class

Members and the other parties not bound by the Trial 2 judgment.

THE CHAIR: And what happens to them? They get shoved off to Trial 4?

MR KENNELLY: We'll have to consider what to do with them in the CMC for Trial 4, yes. But this is in order to preserve the Trial 3 timetable because if, as we say, we'd have to get disclosure from these CICC Class Members and other parties in order to work out their own (overspeaking).

THE CHAIR: Are you presently seeking that disclosure? Is that part of your request for disclosure from the claimants?

MR KENNELLY: They may be in the sample for some of these people. Sorry, we're seeking disclosure for the purposes of exemption, but none of that goes to pass-on. None of it goes to the merchant pass-on issue. As I said, those --

THE CHAIR: Why not?

MR KENNELLY: Because we're only concerned with benefits in the merchant pass-on. That's all we're concerned with.

THE CHAIR: Well, this is concerned with net benefits, isn't it?

MR KENNELLY: Yes, but if Trial 3 has to also consider merchant pass-on, then we need to get disclosure from the Class Members in relation to their pricing decisions to work out what was passed on. That would require a whole new type of disclosure from them, which couldn't be accommodated in a timetable we currently have at Trial 3.

THE CHAIR: So in relation to the claimants that were parties to Trial 2 --

MR KENNELLY: Yes.

THE CHAIR: -- you are content -- I mean, subject to your legal point -- with calculating an economy-wide pass-on rate from that evidence?

MR KENNELLY: Yes.

THE CHAIR: Right.

MR KENNELLY: That's because we are -- well, my legal point, if I'm wrong on the legal point, the claimants in Trial 2 have the benefit of the Tribunal's finding on merchant pass-on. If I'm right, then we've done the analysis with Mr Holt, we'll have to update it but for these new CICC Class Members and Umbrella claimants, there's no disclosure from them at all.

THE CHAIR: You're saying that their evidence might affect the economy-wide pass-on rate?

MR KENNELLY: Yes.

THE CHAIR: So that would affect it for all the claimants, wouldn't it?

MR KENNELLY: What would happen is that you could have a situation where you have an economy-wide pass-on rate determined for the parties who were in Trial 2 and then a different economy-wide pass-on rate for the CICC Claimants -- the Class Members -- and the new claimants who were not in Trial 2.

THE CHAIR: Yes.

MR KENNELLY: Which, sure, the Tribunal might well say, "Well, that's an odd outcome when you're dealing with economy-wide pass-on in respect of the same MIFs". That is a function of the fact that you'll be looking at two different sets of evidence. In fact, the Supreme Court in the *Sainsbury's* case acknowledged that that could be an outcome where, in relation to 101(3), different evidence is presented by different claimants in respect of the same MIFs. They said that's just a function of the fact that you've got different evidence produced by different claimants at different stages. So that fact alone isn't a reason to disregard the proposal that I'm putting forward, which really is ultimately designed to preserve Trial 3.

What you couldn't have, sir, is a situation where the CICC Class Members and the new claimants took the benefit of Trial 2 findings on merchant pass-on without having put forward any disclosure of their own, with no interrogation by the defendants of how they passed on overcharge; that would require disclosure from them. And that's a function of your own judgment, in fact.

But, sorry, to echo Mr Hoskins, I'm raising this now, not because I need to ask the Tribunal to do anything in relation to the second point that I've raised, it's simply to be transparent about a concern that arises in relation to these new parties, and to make sure that the Tribunal can see the problem at this stage so there are no surprises down the line.

THE CHAIR: Because it affects the list of issues for Trial 3, doesn't it?

MR KENNELLY: Yes, it could do, yes. It will do.

THE CHAIR: You agreed the list of issues for Trial 3, as I understand it, from the beginning of this hearing.

MR KENNELLY: I'm sure that is (inaudible) accommodate it, if I may. (Several inaudible words).

THE CHAIR: Okay.

MR KENNELLY: But the point is that it's quite a fundamental requirement(?). If you're going to make any decisions now. I raise it with you to alert you to the custodians.

In relation to the first point, I would ask the Tribunal to list a hearing as soon as possible so we can resolve that short point of law.

Submissions by MR BEAL

MR BEAL: If I may, sir, I've got a series of short points. Firstly, most obviously, Visa does not yet have permission to appeal in relation to Trial 2A. Secondly, my understanding of the impact Trial 2A is that it dealt with what, sir, you've rightly called a mitigation defence. What's happened is, unlike Trial 1, the Schemes have objected to the findings in 2A being applied to the CICC Claimants, which does mean technically there is a mitigation defence that is still outstanding for determination against the CICC

Claimants.

That isn't, however, what Trial 3 is about. Trial 3 is obviously about exemption and it's about related quantum issues to the extent that they are engaged. Visa has essentially sought in Trial 2, as you'll remember, to have an economy-wide MPO rate determined but failed to persuade this Tribunal to do that.

Our opposition to that proposal was premised on that issue being more properly an issue for Trial 3, if at all. So, as I understand my learned friend's submissions this morning, he recognises that MPO as an economy-wide issue on his case feeds into exemption; on our case it doesn't. But we can have that debate in due course. What is not on issue, on his case and on my case, is the mitigation defence for the CICC Claimants, which will therefore have to be dealt with at Trial 4.

The question then is, is there a freestanding legal issue for Trial 3, because that involves the question of the extent to which the burden of the costs of the MIF are not ultimately borne by the merchant class. That, we say, is a matter for evaluation based on all the evidence in Trial 3. As you pointed out, sir, that's one of the issues in Trial 3, according to the list of issues that we have settled.

To the extent that their skeleton, but not my learned friend's submissions this morning, seeks to try and box this Tribunal into the corner as to what, if at all, the approach in Trial 2A means for Trial 3, we respectfully suggest that that is a legal question best determined at trial, so long as everyone knows what the parameters of their arguments are.

We understand Visa's argument. They have our pleaded case as to how all of this fits into the exemption issue. The appeal against the Trial 2 findings has, in part, been based on an alleged suggestion that the findings made factually at Trial 2 will be a relevant matter for Trial 3. We pointed out in our response to their application for permission to appeal that the Tribunal in Trial 2 was simply not addressing any of the criteria for Trial 3. The Tribunal recognised that Trial 3 is dealing with separate issues and it will be a matter for evaluation on the basis of all the evidence at the end of the trial and an analysis of what the legal requirements mean.

That could well mean that there is a separate legal test, if that's what the Tribunal finds. The issue is, is it relevant for the Tribunal at Trial 3 to at least have before it and take into account the findings that were made on the basis of the evidence in Trial 2. And our submission, shortly put, is there's nothing to stop this Tribunal considering that material at Trial 3 but the legal test at Trial 3 will necessarily be determined by the legal test for exemption and not the mitigation defence. So to that extent, it's common ground.

There's been no application here for a determination on any point of law. We don't have an application for a preliminary issue that's been drafted by my learned friend. We would respectfully suggest that, given that we have recognised in our response to the application for PTA, that it's a separate legal question to be determined at Trial 3, that it's not appropriate to try and hive off for yet further satellite litigation, a discrete legal issue, so long as everyone knows where they stand. Because what we don't want is a repeat of Visa's attempt to hold back its case, or suggest its case hasn't been fully developed, and then raise a procedural unfairness point because it's just not worth the aggravation.

THE CHAIR: If we were to have the preliminary issue and decided, say, in favour of Visa, there's some sort of different test for MPO in two different trials, how will that affect the evidence that's going to be adduced?

MR BEAL: My understanding is it won't. They've asked for that in their Redfern schedule for disclosure of what they perceive to be documents that are relevant to the issues as drafted and agreed between the parties. The fact that the CICC Claimants will have to deal with a separate mitigation defence in due course, is nothing to the point because that's to be dealt with in Trial 4. It's annoying, but if that's the way they want to do it.

THE CHAIR: You're accepting that?

MR BEAL: Yes.

THE CHAIR: That position?

MR BEAL: Yes. It hasn't been determined in Trial 2A because CICC did not take part in 2A. Visa are refusing to let it be read across. That's within their gift. We will have to hive back, hold back the mitigation defence as a separate defence for CICC in due course. I can't see a way around that.

THE CHAIR: But that also potentially impacts on their arguments in Trial 3 that if we don't have any sort of MPO finding in relation to the CICC Claimants.

MR BEAL: What it means is that you don't have a determination of the discrete question of whether or not, as a matter of mitigation, the CICC Claimants have directly and obviously passed on the impact of the elevated MSC into downstream pricing.

THE CHAIR: Without the impact of any evidence from CICC that would affect the economy-wide pass-on rate.

MR BEAL: Well, I'm not, at the moment, sure how my learned friend says that you would go from a particular MPO rate for an individual claimant, of which we have a number in relation to Trial 2A, who they're not suggesting it's determinative. So, for example, the three categories where this Tribunal found that there was a degree of merchant pass-on -- I think insurance was one, travel agencies was another -- that's material that is open to the Schemes to deploy as part of their analysis of economy-wide pass-on rate. The fact that there isn't an equivalent finding on the mitigation defence for CICC is simply because CICC were, as you know, subject to two separate CPO applications and weren't ready in time to participate in Trial 2A. The absence of evidence is simply a fact of life, as it will be for the joining claimants.

They will no doubt be subject to mitigation defences in due course as well. There could, in theory, be a position where they are admitted to the Umbrella Proceedings. They may well be bystanders; they may well be seeking to take an active part. But the point is there will need to be determinations on them as well. The position is no different, unless and until the Schemes are willing to accept that the findings in principle in Trial 2A apply equally to other merchants in other sectors, which it appears they're not willing to do. And as I've said, I can't force their hand on that.

What matters is, is this Tribunal in a position to determine the issues in Trial 3? And my submission is yes, because Visa should run its case on MPO as a component of the Article 101(3) analysis. If it's contending that causation under 101(3) does not include a directness component, and that's all that is required, as a result is Mr Holt's evidence of economy-wide pass-on, then that's the case that we'll run.

So the absence of a direct finding against other claimants in other claims in relation to a specific mitigation defence won't affect the way they run that case. They are building their case on the basis of the evidence that they have before them in which they're seeking to deploy. Unless they're saying they can't deploy that case without having the mitigation defences for everyone determined first, at which point we are looking at kicking Trial 3 into the very long grass indeed, because everyone will then have to have the mitigation defences dealt with first.

I would invite the Tribunal to bear in mind, I don't wish to add heat rather than light, but the split off between liability under 101(1) and exemption under 101(3) was at the instigation of the Schemes. It wasn't something that we favoured. They wanted to do pass-on first. The Tribunal agreed with that suggestion, and so we've had the somewhat odd position of dealing with liability, pass-on, then exemption. But that's a bed of their own making.

THE CHAIR: Yes.

MR BEAL: But at the very least, one needs an articulated preliminary issue that makes sense in the context of the analysis that this Tribunal is being invited to perform for the exemption trial, not any other trial that may require the mitigation defences to be dealt with in due course.

So unless I can assist further, those are our submissions as to why this is inappropriate, certainly at this stage.

THE CHAIR: Does Mastercard -- you don't take a position on this?

MR HOSKINS: Watching with interest.

Submissions by MR KENNELLY

MR KENNELLY: No doubt we take the benefit of any decision I obtained from the Tribunal.

On the first point about the legal issue, the difficulty we have is that in the Trial 2 judgment at paragraph 481, the Tribunal suggested that the findings on merchant pass-on that you made were equally applicable to Article 101(3) exemption issues. The claimants need to explain where they stand on that, as my learned friend said, and there's no question of Visa holding back its case. On the contrary, we want to resolve this point now so that we know what the proper legal test is for merchant pass-on for the exemption test going into Trial 3, because it will obviously affect the expert evidence that's produced.

The Redfern schedules, and --

THE CHAIR: You often go into a trial not knowing exactly which way the legal test is going to go. I'm not sure it really is going to change the expert evidence that you would be adducing anyway.

MR KENNELLY: So if the test, if the -- well, let's deal with the Trial 2 claimants first, the ones that have the benefit of the Trial 2 judgment.

The defendants, particularly the claimants, may well need to change their evidence if the correct approach is one that we contend for. True it is they could address both in their expert evidence, but it's generally good to know what the correct legal approach is at the earliest possible stage for the purpose of Trial 3.

The bigger question, though, of the --

THE CHAIR: So you're saying that Mr Holt will take the same approach --

MR KENNELLY: Yes.

THE CHAIR: -- as he took in Trial 2, because the approach that he took in Trial 2 was consistent with what you're saying the legal test is for Trial 3.

MR KENNELLY: Yes.

THE CHAIR: So it doesn't really change anything.

MR KENNELLY: But the point is, if that's not the right approach, if the approach, in fact, is that it requires that directness that the Tribunal said was necessary for mitigation in Trial 2, well, then that's something that's very, very important to know for Trial 3 when we come to look at merchant pass-on.

So in particular, for the second point I made about the CICC Class Members and the new claimants. First of all, sir, contrary to what Mr Beal said, the CICC and the new claimants don't have the benefit of any finding of fact on merchant pass-on by anyone. They have to start from scratch on economy-wide pass-on.

So for them, we do need to ask what is the economy-wide pass-on, and that means, if the Tribunal's test in Trial 2 is applicable, that means asking whether those merchants took MSCs into account in their pricing decisions.

So that's why it's very important to know what the right legal test is, because it makes a huge difference to the disclosure exercise that's required to work out if the merchants took the MSC into account in making the pricing decisions or not.

So the idea that CICC and the new claimants can be accommodated without resolving this question is absurd. Because if I'm wrong and the legal test requires showing directness for the purposes of 101(3), then we obviously would need disclosure from the CICC Class Members and from the new claimants as to whether they took the MSC into account in their pricing decisions.

Then the question is, can that be accommodated in Trial 3; that huge, new disclosure exercise which is not currently covered by the Redfern schedules? The answer is it cannot. It is a new exercise; granular disclosure from the claimants, if I'm wrong about the test for pass-on in 101(3) and it can't be accommodated, and that's why we say for CICC Class Members, the new claimants, it does need to be parked.

THE CHAIR: You're not asking for any direction in relation to that?

MR KENNELLY: No.

THE CHAIR: The only thing you're asking for is for this preliminary issue to be determined.

MR KENNELLY: Yes. True it is I don't have an application before you, but really, in view of the narrow point, which I've made very clear in my skeleton and the spirit of co-operation which would animate the parties and Tribunal, it really should be a short point which can be done with minimal procedural fuss, and there's obvious benefit in knowing where we stand at the earliest possible stage on this point.

THE CHAIR: Well, I mean you say it's a narrow point. I would have thought it would perhaps engage the Tribunal for more than two hours.

MR KENNELLY: The point I'm asking to resolve is only whether the proper approach for merchant pass-on in 101(3) is the approach which the Tribunal suggested was correct in paragraph 481 of the Trial 2 judgment.

But if the Tribunal thinks more time is needed, of course we're in your hands, but it is a short point of law.

THE CHAIR: Well, then, if there's an appeal against that ruling?

MR KENNELLY: That will be rolled up with the appeal against the Trial 2 judgment. We would try and seek permission to appeal as quickly as possible and resolve that in an orderly way.

THE CHAIR: Okay. All right, thank you.

(11.13 am)

Ruling

THE CHAIR: I refuse the direction sought by the Visa defendant for a preliminary issue. Visa may wish to apply by way of an application clearly setting out the parameters of that issue which it wants determined, which is said to be a short point of law, together with the implications for the trial.

But it does seem to me that in preparing for trial 3, it does not cause any real prejudice to the parties to have to prepare for both possible legal outcomes depending on whether there is a different legal test for the purposes of establishing exemption under article 101(3), from the one that we found in trial 2 to apply to the mitigation defence.

I do not see why the parties cannot fairly prepare for a trial 3 with both possibilities in mind. The expert evidence will be prepared presumably by Mr Holt on behalf of Visa, on the same basis as he prepared evidence on this question in trial 2.

In relation to the evidence from the claimants in order to establish pass-on that would be required if we were indeed correct that there was a directness test imported into the mitigation defence, that will be provided and asked for under the usual disclosure process and through the Redfern schedules. I do not see that there is any particular problem in that regard.

To direct a preliminary issue on this matter when there is so much else going on in this litigation and where the Tribunal wishes to ensure that trial 3 does indeed take place next October 2027, would be an unnecessary distraction which would not actually achieve very much in terms of the preparation for trial 3.

So while I bear in mind the submissions that were made in relation to it, and also the wider question on which my direction is not being sought in relation to the evidence from the CICC claimants who were not parties to trial 2A, and in respect of which the mitigation defence of the schemes is still outstanding and will have to be determined at a later trial, the only direction that was actually sought is for a preliminary issue, which I am not going to make for the above reasons.

(11.16 am)

Submissions by MR BEAL

MR BEAL: Thank you very much, sir. The next items are to do with the sampling methodology. I'm going to try something a little bold, which is to roll in the sampling methodology with the question of the disclosure questionnaire.

There's been a lot of ink spilled on the disclosure questionnaire. Speaking for myself, I don't think it's terribly useful to occupy this Tribunal with a blow-by-blow account which repeats the blows.

So what I'm suggesting instead is that there is a broad measure of agreement on the sampling methodology. Mr Dryden and Dr Trento have said that Mr Holt's proposal is capable of producing something that will give a sufficient pool of evidence and data that they think that partly the experts can work with it.

The question really, in my submission, is how does one go about implementing the broad measure of agreement that has been reached? There is one wrinkle, and it is no more than a wrinkle, which is to what extent does one use what are called MCCs, merchant category codes, that Visa has for allotting sampled claimants into a particular category?

I don't think anyone suggests that you should make a ruling on that today. What I'm going to propose instead is that an expert-driven approach tries to agree both the selection of the sampled claimants and their categorisation within whatever schema is considered to be appropriate. What is therefore being proposed and has been proposed recently this week in correspondence, is that disclosure questionnaires are returned by the active claimants by 8 May 2026. We're then proposing that rather than have the next stage being agreement, or coming to the Tribunal that there's a meeting between the expert teams, on 22 May 2026 -- or by 29 May 2026, I should say; they can have it sooner if they want -- to propose a list of claimants to form both the base claimants and the lead claimants.

Sorry, I beg your pardon. Let's take this in stages. 8 May 2026: questionnaires returned. Proposals from the experts, sorry, by 22 May. A meeting by 29 May to try and resolve a common pool.

THE CHAIR: Sorry, proposals by ...?

MR BEAL: Proposals by 22 May based on the questionnaires coming in, so both sides: here's our top 15, here's our top 38, and then meeting between them by 29 May to see if a common list can be agreed. In default of agreement, written submissions to the CAT by 5 June, with a decision to be made on papers thereafter.

What I'm trying to do with the greatest of respect is to cut through quite a lot of the noise in this case, and just come up with a practical solution which gets us to an answer as quickly as possible.

Now, it so happens that those deadlines, i.e. experts to propose lists of teams by 22 May, would also, to the extent that they're able to do so, enable Hausfeld, who have claims that have been issued but not yet transferred, to return their questionnaires for consideration by those experts by that date, which is broadly in line with what they've asked for.

Now, obviously the sooner they can get those questionnaires back, the more likely that is to be useful to the expert teams. But in circumstances where, for example, Mr Holt has said, "Well, I don't know yet whether or not there will be a suitable candidate in the under £100 million per year revenue category", then it may well be, for example, that one of the new claimants that's coming through ticks that box without having to trouble an opt-out claimant. Who knows; I'm speculating.

THE CHAIR: What did you say about Hausfeld?

MR BEAL: Well, Hausfeld have said, "We've issued some claims".

THE CHAIR: Yes.

MR BEAL: I think it's 22 claimant groups, including some pretty big players like H&M and Eurostar, but some smaller players as well. If a questionnaire comes back from one of those proposed new claimants that Mr Holt says, "Oh, actually, that ticks the box I was looking for", then one might escalate them into the warm embrace of the Umbrella Proceedings.

I'm simply speculating that -- this Tribunal allows and facilitates that that can happen, potentially. I'm not saying it will, and it's obviously a matter --

THE CHAIR: The questionnaires won't have gone out to the various --

MR BEAL: Well, they will have done if the Schemes are prepared to send those questionnaires to the Hausfeld entities *de bene esse* and allow them to fill them out; it's a matter for them. If the Schemes are willing to have those questionnaires transferred to them. Hausfeld have a copy of the questionnaires anyway, because it's acting for some stayed claimants whose claims have just been settled.

So it's got a copy of the material; it's a question of whether or not this Tribunal, or the Schemes, are prepared to allow the possibility for these new claimants to fill in those questionnaires and then put themselves forward as a potential candidate. But this timetable doesn't say that will happen; it simply allows that to happen to the extent that it was perceived to be a good thing.

THE CHAIR: So by this timetable, you're saying by the middle of June we will know the sample claimants and then disclosure will be provided from them.

MR BEAL: Yes. To the extent that they are then working on their witness evidence, and the disclosure that goes with their witness evidence, all of that can then be tracked from June. I think that the witness statements are due by December; disclosures due by October. Of course, another proportionate way of doing things might be to find a date whereby witness statements and disclosure go hand in hand from the sample of the claimants.

THE CHAIR: So you broadly agreed with Mr Holt's proposals?

MR BEAL: Well, can I say this; there are reasons why there are some different views as to whether or not it's a correct approach. When Mr Dryden and Dr Trento have cut to the chase, they said, "Well we're not going to get involved in points of principle; there's no point doing that when actually this will produce an outcome that we can live with for the purposes of recognising that it produces as good a sample as we would achieve from any other method".

So I'm trying to avoid the Tribunal getting bogged down in three observations and one objection from Mr Dryden and Dr Trento, in circumstances where it doesn't actually matter, because the parties between them, the experts between them, can propose where the chosen claimants go and which sector they fall into. If there's still disagreement on that by the end of the process, then, of course, we will come back and trouble the Tribunal with it. In the meantime, there's not much point trying to have that fight in advance, because it may go away.

THE CHAIR: Well, splitting the Base Sample, we have a subset of 15.

MR BEAL: The proposal from Mr Holt, I think, was 38 for base and 15 for lead.

THE CHAIR: And the lead will answer all the Redfern requests.

MR BEAL: Yes. Well, the ones that are sanctioned by this Tribunal in this decision.

THE CHAIR: And the others will have what --

MR BEAL: I think the others give a base set of data.

THE CHAIR: Disclosure-lite.

MR BEAL: Yes. It would be the survey evidence, the annexes, but not the more intense trawl-through of the filing cabinet.

THE CHAIR: Okay.

MR BEAL: That's my understanding of the common position, but I will be corrected, no doubt, if I'm wrong.

MR HOSKINS: Can I just clarify one thing? Sorry, I missed it when you said it. There's the new proposal for the timetable, and what I'm not clear on is whether Mr Beal was prepared for the claimants to stick to the disclosure date of 23 October -- he said something that I didn't quite catch or understand -- are you trying to move that date?

MR BEAL: No, I was simply saying that I'm not seeking to move the disclosure date. Another way of skinning that particular cat is to have witness statements and disclosure at the same time. If that is the case, we would need to take instructions as to whether we can bring our witness statements forward so that it's all dealt with at the same time. I'll happily take instructions on that.

The compromise I mooted was having a date halfway between the two dates so that you get everything all in one go. But I can take instructions on whether or not we think it'd be feasible, or -- I mean, it depends in a sense on who the claimants are, but as a matter of principle, could we potentially do our witness statements and disclosure by October? If the answer comes back, "No, that's too much", then we will go back to the timetable as set. I'm not trying to amend the timetable; I'm simply trying to deal pragmatically with options.

MR HOSKINS: So is the suggestion -- I'm sorry to talk through this -- so the disclosure is as the Tribunal directed, and the suggestion is the witness statement might come earlier than the Tribunal directed.

THE CHAIR: I think what Mr Beal was saying --

MR BEAL: What I'm trying to envisage is a situation in which 15 lead claimants, who haven't yet been plucked from the amusement arcade machine -- once they've been selected, they may say, "Well, I don't want to do a disclosure exercise and then do my witness statements; I'd rather do everything together". I'm contemplating that that might be a pragmatic and sensible option with enough lead time notice. Those behind me may be tearing their hair out. I don't know.

THE CHAIR: If they can do that, and I'm sure the Schemes won't mind getting witness statements early.

MR BEAL: Precisely. So I'm not actually asking for a change to the timetable if that helps my learned friend. I'm simply mooting different ways of doing things that might make more sense for some -- if somebody is suddenly plucked from this sample and says, "Right, I've now got a lot of things to do", they may prefer to do everything in one go.

THE CHAIR: We basically have approximately four months, I think, from the time the claimants are established to then producing disclosure and/or possibly witness statements.

Right --

MR PICCININ: Could I just ask that we rise to take an early transcriber break, just because that proposal that we've just had, that series of dates, is new, and I'd just like an opportunity to take instructions on them.

THE CHAIR: Yes, all right.

(11.27 am)

(A short break)

(11.40 am)

MR GIBSON: Sir, the other parties have very kindly offered me just a very short period to make a request to be boosted up the batting order.

THE CHAIR: Okay.

MR GIBSON: As things presently stand, we are due to come as part of the third-party disclosure item 2.3 after Redferns.

THE CHAIR: Right.

MR GIBSON: We would be very grateful if we could be heard before Redferns, so that we can deal with our issues, which are relatively brief, and then depart if that's all right, but I know that other people have different views about that.

MR BEAL: I respectfully endorse that, because it's a shorter item than the Redferns and it's better to get it out of the way.

THE CHAIR: So are we going to continue with this, the sampling, and then switch to PSR?

MR HOSKINS: We don't have time for this. We have to do the Redferns first because it's more important and it's going to take quite a lot of time. The PSR, with respect, is tilting at windmills a bit, because they haven't collected the information yet; there's no application for the data. The defendants have pre-emptively determined various aspects of what a third-party disclosure application might look like.

THE CHAIR: How long do you think the PSR (audio distortion) is going to take? I've read the skeleton.

MR GIBSON: Ten minutes, I would have thought.

MR HOSKINS: There's two bundles of authorities and half of them come from the PSR. Yes, 16 --

THE CHAIR: I'm not sure that I've seen two bundles.

MR HOSKINS: 16 of the authorities out of the 27 come from PSR. It's not a ten-minute job, I'm sorry, with the best will in the world.

MR GIBSON: I intend to go to two paragraphs of one authority, sir.

THE CHAIR: Right. Well, I think if we can do it in ten minutes, let's do it in ten minutes. If it looks like it's going to take any much longer than --

MR HOSKINS: My submission is going to be that we shouldn't be dealing with this stuff today at all. So I put that marker down.

THE CHAIR: Well, it was on the agenda, I think.

MR HOSKINS: Well, there's no application that has been made against the PSR for disclosure. They haven't done the disclosure yet; no application has been made by the PSR. We all had to make our applications by a certain date. We got a skeleton argument earlier this week, which has, for example, a request that we pay them costs and indemnity basis. That was the first we'd seen of that a few days ago. To be perfectly honest, I've been focused on preparing the CMC as between the parties. I've not focused on whether the PSR should be getting indemnity costs. We can deal with it, but it shouldn't be hashed out.

THE CHAIR: Then do you object to dealing with PSR?

MR KENNELLY: Well, no, we share Mr Hoskins's concerns. The Redfern schedule is going to take time and we also read those authorities and this, with interest, didn't seem to us to be a very short issue either.

THE CHAIR: Right. Well, one way or another, I think we should try and, really, release the PSR from this hearing at some point. Rather than arguing about whether I should deal with it or not, I think we should finish off with the sampling and then I will hear from PSR, and we'll see where how far we get with that, bearing in mind that we do have a lot to deal with.

Submissions by MR PICCININ

MR PICCININ: I'm very grateful for that short break, which has enabled me to take instructions.

So just running through the headings in Mr Beal's list of dates. The first one was for the questionnaires, as to which he proposed 8 May for all of the remaining active claimants. That's fine; we can live with that. It's a very long time, but we can live with that.

Staying on that topic, the other thing we need though, and that we seek, is an order requiring all of the stayed claimants who haven't already produced questionnaire responses to produce them by the same date.

Now there aren't any that are represented here. None of them have filed submissions responding to our application asking the Tribunal not to make the order, except for Fortnum & Mason and Heal’s, who wrote to say that they've reached a settlement agreement with us, and so they're coming off the list anyway. So there's no opposition to it. We do say we need them, in order to have enough information about forming the sample. As I say, there's no opposition to that so I would ask the Tribunal to make that order.

Then the third point in relation to the questionnaires, Mr Beal raised the question of what the -- I'll call them the newbies, with no disrespect, might do. All of the new claims that have either just been filed in the High Court or where parties have written letters saying that they're planning to file claims. Mr Beal suggested that obviously, the Tribunal can't make any order in relation to them today and that's right. But he suggested that insofar as they pop up when they can with answers, they could just be slotted into the mix.

What I want to say about that is that our position needs to be entirely reserved as to that, and as to what should happen to those parties more generally, but it certainly isn't as simple an exercise as slotting in and ticking boxes. That's really not the nature of this task at all.

I don't want to spend too long explaining the approach that Mr Holt has set out in his evidence. I imagine you've seen at least a summary of it. But it is reasonably complex and involved. There are five distinct clusters that need to be identified, by reference to five dimensions in which the merchant benefits are said to be correlated and then within each of those clusters, we need to find a certain number of sample claimants to provide disclosure. It's not even as simple as saying, well, as long as we've got someone in that cluster that will do, we need to make sure that it's someone who's got documents and data of the relevant kind.

And then the further point is that even within those clusters, there is still residual variation between merchants. It's not the case that every merchant within a cluster is the same and interchangeable. We need to have a reasonable spread of different types of claimants from within each cluster and that's why we really do need as many of these as possible. We need to have the experts that have proper time with them before we get on to the next step, which is 22 May, when the proposals are made. But it really isn't as simple as saying, "Oh, someone's popped up and they're below 100 million. Great. Let's just slot them in and tick that box".

THE CHAIR: If presumably you do get questionnaires back from the new claimants, you would want to look at them and consider whether they would indeed be suitable sample claimants?

MR PICCININ: Yes. I don't want to answer hypothetical questions about what happens to those parties more generally.

THE CHAIR: No.

MR PICCININ: But we're certainly not opposed to them completing questionnaires and then we'll take them as they come in and deal with them appropriately. That's our position.

THE CHAIR: Yes.
MR PICCININ: The other dates are all fine. So it was 22 May for the experts to make the proposals. It was 29 May for the experts to meet and thrash it out. And then 5 June for us to make written submissions with the Tribunal then --
THE CHAIR: If they happen to agree.
MR PICCININ: Yes.
THE CHAIR: Yes.
MR PICCININ: There were only three other points that I needed to make on this broad topic of sampling. One is just to foreshadow a submission that Mr Kennelly is going to develop in due course in relation to Redferns, which is that there was a bit of a flavour to Mr Beal's submissions, at least as I understood it, of using witness statements to substitute for disclosure. That is something we certainly do not accept, to use the language of competition economics. We see the witness statements and the disclosure as complementary rather than substitutable. We need that disclosure in order to test the witness evidence. So that's going to be a theme which Mr Kennelly will develop. But I just didn't want you to get the wrong impression that we were in agreement on that.
THE CHAIR: You wouldn't mind getting witness statements early, as long as they're not a substitute for full disclosure.
MR PICCININ: The deadlines are always, you know, parties shall file witness statements by whatever date so if someone wants to file witness statements and serve them early, that's a matter for them.
THE CHAIR: Yes.
MR PICCININ: But it's not going to solve any disclosure problems by doing that.
The second point -- so the next two points I've got are points that are not ripe for determination. No one is asking you to do anything on these today, but it's just a flag

that these are points that might come up in the written submissions on 5 June and need to be dealt with, or thereafter.

The first point relates to the opt-out class where you will have already seen, I think, in the skeleton arguments and also in the expert reports, some discussion of the fact that we may need to have disclosure from opt-out Class Members. That's because of the reason I gave before, which is that even within these clusters, it's not the case that a merchant is a merchant is a merchant.

One particular dimension that is not taken into account in the cluster definitions at all is merchant size but merchant size is obviously very significant for the way that merchants experience the cost and benefits of accepting card transactions. So we need to have a variety of large and small merchants in each class. At least on the basis of the questionnaires that Mr Holt had been able to review when he prepared Holt 17 -- so that's his latest report -- it looked like we were cruising towards a destination where we were not going to have enough of the small ones. And if --

THE CHAIR: How do you propose dealing with that? So once you've -- you'll make your suggestions from the questionnaire responses and obviously there won't be anything from the opt-out class in that, but you will, if you consider that there's no one suitable to cover a particular type of merchant, then you might need to go to the opt-out class. How will that work?

MR PICCININ: I'm envisaging that that is something that the experts will be proposing on the 22nd. The proposal will be from the questionnaires we need these merchants in the sample. Here's our 38. But we also need another five from the opt-out class, for example.

THE CHAIR: I see.

MR PICCININ: They'll discuss that. Either they'll all agree or they won't. Then there'll be submissions made on the 5th, which would include that point.

THE CHAIR: I mean how would that work in terms of timing? Then there would have to be some sort of identification of the claimants --

MR PICCININ: Yes. So we would --

THE CHAIR: -- that might be within that class.

MR PICCININ: Yes.

THE CHAIR: And questionnaires sent to them and whatever. And you start the process again in relation to them.

MR PICCININ: That's right. Although it would be a more discrete issue because we wouldn't be trying to fill 38 slots. It would be trying to fill something more targeted.

THE CHAIR: Okay.

MR PICCININ: Maybe one or two, maybe ten, I don't know.

THE CHAIR: Okay.

MR PICCININ: But yes, the idea is that obviously we want to move things along. The proposals, the submissions that we make on 5 June would have to explain how we're going to do that. But we certainly don't accept what has been said by CICC, that it's somehow unworkable. While it's obviously true that nobody has a list of all of the opt-out Class Members, that's not the task. We only need to find a small number of opt-out classes.

THE CHAIR: I suppose we're only in this situation where you're putting in submissions is where the experts haven't agreed a process for, if that's the route we're going down, identifying opt-out claimants to go and sample.

MR PICCININ: Yes. I suppose the only other thing to say though is that if we get to the position where we need opt-out Class Members and they don't agree to provide assistance, then we may need an order. Then we would need an order from the Tribunal compelling that. So that would have to be part of the process.

THE CHAIR: Some sort of timetable and practical way that that can be achieved will have to be developed.

MR PICCININ: Yes.

THE CHAIR: Yes.

MR PICCININ: That's right. So that was the first of my markers.

The second of my markers is just to flag that this exercise, you know, one always hopes that it will be one and done but it may not be and there are several reasons why that may be so, that have already been canvassed in the expert evidence. One is it may transpire that the sample claimants who are selected don't end up holding as much by way of evidence as is required to address the particular issues that they're being leant on for. If that's the case, we may need to get disclosure from others, either in general or on particular targeted gaps that come up.

So those are really the two points. Either it turns out that someone's got effectively nothing and they need to be replaced or it turns out that although they've got some things, there are gaps, particular gaps, that need to be filled, in which case, obviously we'll need to make applications that come back before you.

The only reason I mentioned that was that in the report of Mr Dryden and Dr Trento, there was a suggestion that, "Oh, well, if 38 claimants can't provide the answers, it's possible that no one else can either". I just want to lay down the marker that we don't accept that as an answer to this case.

What we're doing here in this whole sampling exercise is balancing our need to prove our case against the proportionality concern but we certainly have no interest in going out and getting evidence from 100 claimants if 38 will do. But if 38 won't do, we can't have a situation where there are another hundred or so sitting there on documents that would have filled the gap, and then we failed to satisfy our burden of proof at trial. That's not a position that we can tolerate.

THE CHAIR: Is it part of the questionnaire, do you ask them whether they have documentation?

MR PICCININ: That's right. So we have asked for some information on that and the answers that have come back are very partial, not just in the sense of saying they don't have them, but incomplete answers about the extent to which they have them, or the time periods in which they have them. So that's partly what we're dealing with here. It would really help us -- and this is what we said in our skeleton -- it would really help us if people gave answers that were as complete and precise as possible to the questionnaires. But we are where we are and, of course, even then there's having documents and data and having documents and data. We don't give them the whole of the Redferns and say, "Go out and do the disclosure exercise". It may turn out that once you've done the disclosure exercise, we need more. That's all.

I think those are my submissions on this topic.

THE CHAIR: Thank you.

Submissions by MR HOSKINS

MR HOSKINS: I'm happy to adopt Mr Piccinin's submissions. I'd just like to make two observations in relation to the new claimants. We reserve our position on whether the new claimants should be host cases for the purposes of Trial 3, whether they should be active claimants in Trial 3. Those claims are simply too early a stage and as I said in my first submissions this morning, we need to keep a close eye on the timetable for Trial 3 and make sure it's workable.

THE CHAIR: Are the new claimants against both?

MR HOSKINS: Yes, I think they are, yes.

The second point is, if these putative new claimants want to voluntarily complete questionnaires, in a sense, we can't stop them if they want to fill in the questionnaires and send them in. More information is good, but it has to be recognised that the more information there is that impacts on the time that the experts need to do their work. So it can't be the case that, for example, we are drip-fed questionnaires throughout the course of the next few weeks. I think we should be entitled to say now if we are getting voluntary responses and they're coming after 8 May, we may well simply be saying, "I'm sorry, it's just too late to be giving us this sort of stuff".

So if these new claimants do want to submit them, they have to do it by the 8th. I'm not asking for an order. I'm just making the point that we may turn around to them and say, "Very interesting, but too late".

The final point, which is related to the two I've already made, it just ties the two together, is the fact that they've put in a voluntary questionnaire, of course, doesn't then guarantee that they become a host case for the purposes of Trial 3 or that they become active claimants. If they want to do it, that's fine, but that's their choice. It's not then for them to turn around and say, "We did a questionnaire, we must be active claimants". That's all I need to add to what Mr Piccinin said.

Submissions by MR BEAL

MR BEAL: The representatives for some of the new claimants are in the Tribunal today, so they've heard my learned friend's points and they'll take those away, no doubt, and reflect on them.

I think there's a broad measure of agreement on the timetable I proposed. There's a series of markers that have been put down. I don't propose to respond to those now other than to say, I don't understand that what's being proposed is 15 lead claimants, all of whom accept every form of alternative payment method, every one of which has a self-service checkout, every one of which has gone to tokenization, with effect from whenever. That's a unicorn. You're not going to get 15 unicorns that all have the same method of doing business with the same innovations introduced at the same time. And nor should that be, with respect, the object of the exercise, because what we're trying to do here is get a broad cross-section of different merchants so that we can see how they've interacted with the payment system and the benefits and costs they've experienced in doing so.

What one's looking for is a proxy range, across the range, to which weightings are then applied in the way that Mr Holt has broadly outlined to be refined and dealt with in due course and the expert evidence. So I just put that counter marker down, if I may.

It may be that when evidence doesn't come back, it simply means that's not what the merchant does. Self-service checkouts being the obvious example.

THE CHAIR: You're not representing the Stayed Claimants.

MR BEAL: No, I have nothing to say on that.

THE CHAIR: You don't have anything to say about --

MR BEAL: It'd be wrong for me to do so.

THE CHAIR: Yes.

MR BEAL: I think we have a broad measure of sympathy with the defendants' position on this, in terms of getting questionnaires back sooner rather than later.

THE CHAIR: I guess that's the point (inaudible).

MR BEAL: It's very nice to free ride.

(12.00 pm)

Ruling

THE CHAIR: The parties are close to agreement in relation to sampling of claimants and the timetable that was set out by Mr Beal in his submissions. This means that the questionnaires should all be provided by 8 May 2026.

I agree with the submissions of Mr Piccinin that this should also apply to the stayed claimants, who should provide their questionnaires by the same date. Thereafter the proposals will be made by the experts by 22 May 2026 as to how sampling should progress and their suggestions for those sampled claimants. A meeting of experts is to take place by 29 May 2026. If there is no agreement between the experts, then written submissions on behalf of the parties are to be filed at the Tribunal by 5 June 2026 for the Tribunal's determination.

The position as to the new claimants is that they are certainly able to provide questionnaires if they wish to do so, but I agree with Mr Hoskins's submission that if they are going to submit questionnaires, it should be done by 8 May 2026. It would cause difficulties for the other parties in considering their positions if there is a dribbling in of further questionnaires during the course of what is quite a tight timetable.

Various other markers were laid down in particular by Mr Piccinin, which were all good points. These related to the seeking of disclosure from the CICC opt-out class and seeking disclosure in addition to the proposed 38 claimants which will be identified in the sampling exercise. These were not matters I had to determine today but may appear in any written submissions filed with the Tribunal by 5 June 2026.

(12.03 pm)

THE CHAIR: Okay. Shall we now deal with the PSR in 10 minutes?

Submissions by MR GIBSON

MR GIBSON: Yes. Thank you, sir. As you know, we've attended because this was billed as the CMC to deal with disclosure. As it transpires, we don't have anything to disclose yet materially, and no one has made any applications. But nonetheless, having prepared to attend, we say there are three short points that we hope can be dealt with today.

The first, which I don't think is going to be controversial, is in relation to the provision for a confidentiality ring order. I think everyone's agreed that there should be one because the information that we hold and will hold, it will be confidential. The question is just a question of when it should be done by. We would like a provision -- and I don't think it will be controversial -- for an order that the confidentiality ring order should be complete by the end of May. We ask for that so that we have that in place before, or at least shortly after, we start the process of trying to get the information from the parties as part of our internal processes so that we can give reassurance to these people - because obviously, we're going to be open and candid about the fact that we're being asked to provide this information to the parties to this litigation - that there will be adequate protection of that information when it's provided to us.

Second point is in relation to the legal basis on which the PSR is permitted to provide disclosure. Again, I don't anticipate this is going to be controversial. You may have seen or remember that in Trial 1, Trial 2, there was a question about whether the PSR properly could give disclosure: whether one of the exceptions under the FSBRA regime applied. The then President, Mr Justice Marcus Smith, gave a ruling that it did. We would just like confirmation that everyone agrees that the same applies today, whether by a formal ruling or an indication from an abundance of caution, given the fact that the regime carries criminal sanctions. For understandable reasons, the PSR would like that reassurance. That's the second point.

The third point is in relation to the costs of the PSR undertaking this process. When we sought to intervene, we made clear that we were reserving our right to seek costs of any disclosure we provided. We intervened in the public interest for the reasons you'll remember in order to assist the Tribunal generally. We did not intervene in order to be able to provide assistance by giving disclosure, although we were happy to do so. We reserved our position on costs, and in those circumstances, I don't think it's disputed that we should get our costs. What has proved slightly more controversial is the proposal that those costs should be assessed on the indemnity basis, and that's the point I'd like to briefly address you on.

The reason we make this request is because in the context of the Trial 1/Trial 2 third-party disclosure exercise, the PSR actually ended up carrying a significant part of the costs it had incurred in circumstances where the indication from the President, when making the order that we should give disclosure, was that the PSR should not be put to any expense. It's in those circumstances, we're sort of once bitten, twice shy, as it were, and we would therefore like an order that maximised the chances of us recovering our costs in full.

I'd like to take you very briefly to one authority, as promised, in tab 7 of the authorities bundle. If you're dealing electronically, it's page 63 of the authorities bundle, sir.

THE CHAIR: (Inaudible) but I've got it separately. Sorry. I'll look at this. Right. Sorry. I've only had one authorities bundle. Is that right? Or was there a separate one from you?

MR GIBSON: No. It's consolidated.

THE CHAIR: Right.

MR GIBSON: It's tab 7 of the consolidated authorities bundle, the *Excelsior* case.

THE CHAIR: Yes.

MR GIBSON: Court of Appeal case.

THE CHAIR: Yes, I've got it.

MR GIBSON: Before Lord Woolf and others. Paragraph 15, which starts on page 63, goes over the page to page 64.

THE CHAIR: Yes.

MR GIBSON: And if you want to just read that paragraph, which is --

THE CHAIR: It's about out of the norm, is it?

MR GIBSON: No, this is actually just the consequences of an indemnity order and the point I want to --

THE CHAIR: I know that.

MR GIBSON: Yes. No, indeed. But the point I wanted to highlight, I know everyone knows this, is that the point made on page 64, towards the end of the paragraph:

"The indemnity order means that a party who has such an order in effect is more likely to recover a sum which reflects the actual costs in the proceedings." [as read]

Which obviously is what we understood the Tribunal to be seeking to achieve last time around. We would invite the Tribunal to seek to achieve this time around.

The second point I'd like to take you to, sir, is on page 67.

THE CHAIR: There's still not a full indemnity. I mean, it's called indemnity costs, but all it affects is whether there's a proportionality requirement and who the burden is on.

MR GIBSON: Indeed, that's what the rest of paragraph 15 explains.

THE CHAIR: Yes.

MR GIBSON: We think this is as far as we can go. If you'd like to make a ruling that we get a full indemnity, we're not going to stand in your way on that, sir. We thought this was a reasonable and conventional device by which to seek to achieve something close to that, in circumstances where we are acting in the public interest and the consequence if we don't get --

THE CHAIR: I see the logic of it, but I mean, you're asking for a sort of preemptive indemnity costs order.

MR GIBSON: We're asking --

THE CHAIR: Has that been done in favour of the PSR before?

MR GIBSON: Not in favour of the PSR, sir. No.

THE CHAIR: Has it been done in favour of any other similar public body?

MR GIBSON: Not as far as I'm aware. The principle, sir, is --

THE CHAIR: Seems like it's quite a big point and whether we can really determine that in 10 minutes, I'm not sure.

MR GIBSON: Well, we've made the point now. If you want to make a ruling on the other two points that I've made on indication, we can park this and come back to it, but we've put down a marker. That's what we're looking to achieve.

The reason I suggest doing it now is because the costs that we're incurring have already started, because we asked for our costs in relation to anything involved in the disclosure exercise, and we wanted everyone to be quite clear as we go that that is the basis on which we should be --

THE CHAIR: So the costs order that was made in relation to Trials 1 and 2 that the then President ordered, was that a standard cost order?

MR GIBSON: It was silent, and therefore by default it was assessed on a standard basis.

THE CHAIR: There was a cost order made in your favour?

MR GIBSON: It was. A reasonable cost to be summarily assessed by the President on the papers, which we're content with, or by you, sir, obviously, as the person presiding. But we do ask that it's on an indemnity basis.

The second paragraph I wanted to take you to in that judgment, sir, explains why we say it's reasonable. This is paragraph 31 on page 67. So that paragraph makes clear that it's:

"... an indemnity order is appropriate not only because of the conduct of the party [which we don't suggest applies here at all, obviously] but also because of other particular circumstances." [as read]

And he goes on to give the example of a party who's involved in a test case:

"... has no other interest in the issue that arises, but is drawn into expensive litigation and therefore, if successful, [in our case obviously doesn't apply to the question of success] should not be suggested anyone's conduct is unreasonable, but the nature of the litigation means that it shouldn't be expected to act in a proportionate manner." [as read]

We say that there's an analogy here, having intervened in the public interest, that the options are: we bear a portion of our costs having no interest, no skin in the game, purely to assist the Tribunal and the parties, or that the parties who are gaining the benefit of this should bear a higher proportion, something closer to the full cost that we incur. We think in the circumstances that's not a controversial position to adopt.

This obviously - whilst it's anticipatory in relation to costs that we are going to be incurring going forward - we've incurred costs attending today on what was billed as a disclosure CMC, so we are in some ways just seeking an order that sets a principle.

THE CHAIR: There's been no actual application yet for disclosure from you.

MR GIBSON: No, sir. We're obviously not going to make an application for disclosure. But of us, no, sir. Because as we said, this is the state of affairs. But we were told that this was a CMC at which disclosure matters would be considered and we're obviously an agenda item.

THE CHAIR: Yes. Okay.

MR GIBSON: But if you want to reserve that point, then --

THE CHAIR: I think I probably will be reserving that point, subject to anyone who wants to agree to it. But, I think, it does potentially raise issues of principle and I mean, certainly a third-party disclosure order normally provides for the third party, if it's an innocent third party, to get their costs of complying with the order. But whether that should be done on an indemnity basis, I think, needs perhaps a little more time than we've got today to resolve. There will be further opportunities, obviously. And also probably most sensibly after an actual application has been made for third-party disclosure.

MR GIBSON: Well, we put in a marker based on which we are currently incurring costs.

THE CHAIR: Of course.

MR GIBSON: The other issue was in relation to confidentiality ring order.

THE CHAIR: Yes.

MR GIBSON: So to put in place a process by which we achieve that outcome, and the indication as to the basis on which we'd be given disclosure.

THE CHAIR: Yes.

MR GIBSON: That could come closer to the time we actually give it, but I wanted to put down a marker on that as well.

THE CHAIR: Right, well, is there any dispute about confidentiality?

MR BEAL: No, sir. We think a confidentiality order should be agreed between the parties. We've put in place some suggested steps to enable that to happen. There's a bit of disagreement as to how it should happen, but if I can say, I think both sides would try and work towards a confidentiality ring as soon as possible. I think the suggestion has been made that it broadly follows the Trial 2 confidentiality ring. Mr Holt has already disclosed some confidential material into that ring for the purposes of today's hearing.

So it's certainly not beyond the wit of humankind to draft something pretty similar to the Trial 2 one, and we should do so as soon as possible. I don't think that needs a formal direction.

On jurisdiction, the jurisdiction this Tribunal will exercise is the one that was identified by the learned President previously. We're not suggesting otherwise, and that direction was not appealed.

On an indemnity basis, we oppose it, but not for today. I'll keep my powder dry, if I may, on that.

MR KENNELLY: From the defendants' perspective also, we're content and we endorse the Tribunal's view that the cost issue should be reserved with no objection to the other matters, and the CRO, some adjustments will need to be made, but we all agree it should be done as quickly as possible.
THE CHAIR: Right, thank you.
Mr Hoskins?
MR HOSKINS: Nothing to add.
THE CHAIR: Thank you.
Well, I don't think you need a direction from me in relation to confidentiality, but I would hope the parties --
MR GIBSON: No, rightly (overspeaking).
THE CHAIR: -- can come to some sensible arrangement in relation to an order which will obviously then be approved by the Tribunal in due course.
In relation to the jurisdiction point, is it a jurisdiction point or the legal basis --
MR GIBSON: The legal basis, with the exception that --
THE CHAIR: -- for disclosure? What do you actually want me to do about that?
MR GIBSON: Sir, I think it's sufficient for you to indicate -- and as the parties(?) seem to agree, that the ruling that applied last time obviously continues to apply to Trial 3. It's from an abundance of caution more than anything else, we want you to --
THE CHAIR: Yes, I'm happy to do that.
MR GIBSON: Thank you, sir.
THE CHAIR: All right. Thank you very much, Mr Gibson.
MR GIBSON: May I be excused?
THE CHAIR: You may.
MR GIBSON: Thank you very much. I appreciate it, and thank you to the parties for accommodating our very short intervention.

MR BEAL: Sir, whilst I take advantage of a moderate degree of disruption to my right, can I just ventilate two things.

Firstly, there are some shorter points on the agenda than the Redferns. I mean, I have to say, I think our Redfern requests will be dealt with more quickly than the defendant's Redfern request to us, simply because of the outstanding issues. But there's then also the question --

THE CHAIR: (Inaudible).

MR BEAL: Well, they say they have. Expert evidence is a shorter point, and then we do need to deal with disclosure by the issuers, which is a more complicated point, but I don't think will actually, in truth, take very long.

THE CHAIR: No.

MR BEAL: But I'm in the Tribunal's hands as to whether we subvert the order of the agenda in order to leave the afternoon free for Redferns.

THE CHAIR: Well, did you mean we can get through everything else this morning and then leave the afternoon, Friday afternoon, for a lovely discussion about Redfern schedules?

MR BEAL: I imagine that's exactly what you wanted for your Friday afternoon: is a trawl line-by-line through the Redferns.

THE CHAIR: I was hoping you would get through it all by lunchtime. That's clearly not going to happen.

All right. Well, does anyone object to that?

MR HOSKINS: I'm just concerned we get through the Redferns.

THE CHAIR: Yes, I know you are.

MR HOSKINS: Because in terms of timetable, that's the most immediate thing, but I'm in your hands; whatever you think is going to be most useful to you.

THE CHAIR: Well, if you think there's going to be a lot of discussion and dispute about

the Redferns, I think we ought to get cracking on that.
MR HOSKINS: Well, you won't have the benefit of hearing from me in the Redferns. That's going to be Mr Kennelly and Mr Leith.
THE CHAIR: Right, okay.
MR HOSKINS: So I think it's probably better that they give an indication of what they would prefer.

Submissions by MR KENNELLY
MR KENNELLY: Speaking to the defendants' Redfern to the claimants, which I'm addressing, there are 61 outstanding items. It probably won't be possible in any event to go through each and every one of those. So what I propose, subject to Tribunal, is to deal with the high-level objections the claimants have raised, possibly pull out some examples and then discuss the Tribunal how you would prefer to resolve the individual line items. So even that will take time --
THE CHAIR: What am I required to do? I'm required to go through each of those 61 and say yes or no?
MR KENNELLY: Yes, exactly.
THE CHAIR: There must be a better way of doing this.
MR KENNELLY: Hopefully once you've decided what the proper approach is, whether you say yes or no will be relatively quick because the objections boil down to three or four common objections.
THE CHAIR: Right.
MR KENNELLY: Once you've worked out (overspeaking) --
THE CHAIR: The general point. Yes, yes.
MR KENNELLY: -- view, which will be relatively quick. It just won't be possible to read out each request and deal with the detail of it.

THE CHAIR: So how long do you think you will be?

MR KENNELLY: It depends a bit on Mr Beal, but it could be an hour. It could take an hour at least.

THE CHAIR: What, to deal with the Redferns, or just for your submissions?

MR KENNELLY: No, no. Just the defendants' Redfern schedules to the claimants.

THE CHAIR: Right.

MR KENNELLY: It could take an hour and a half easily, if we have to go through even a small number of the line items themselves.

THE CHAIR: Right.

Mr Leith?

MR LEITH: The claimants' requests of the defendants, the areas of disagreement, are narrower and could be dealt with much more succinctly than the corresponding Redfern going in the other direction. So it'd be for the claimants to make their application, but I wouldn't have thought (audio distortion) our overall (audio distortion).

Submissions by MR BEAL

MR BEAL: I'm certainly not going to be an hour advancing our case. I'm proposing to deal with the high-level concerns as succinctly as possible. I would hope that we'd be done in half an hour.

Going back to my learned friend's concern about the defendant's Redfern schedules, I'm not suggesting that you go through it line by line; I'm proposing to deal with it at a high level and then invite the Tribunal to apply that logic, where it fits in. For any given request, I'm prepared to say exactly what the high-level response is. There's a couple of points of detail, but beyond that ...

THE CHAIR: Right.

MR BEAL: We should be done comfortably in the afternoon on both sets of Redferns if that high level approach meets with the Tribunal's approval, which it sounds as though, with respect, it might well do. I'm not proposing to go through each of the 60 or 61 items line by line.

THE CHAIR: Okay, so the issue is whether we deal with all the other things just to get them out of the way in case we run out of time.

MR BEAL: Yes, and we could make a start on my Redfern request before 1.00 as well, potentially.

THE CHAIR: All right.

MR BEAL: That may be ambitious.

THE CHAIR: Okay, so what is that, expert evidence?

MR BEAL: If I deal with expert evidence, then disclosure by issuers, and then if I get the chance to start my Redfern requests and four or five high-level points.

THE CHAIR: Yes, okay.

MR BEAL: So in terms of expert evidence, there's broad agreement on competition economics. There's a suggestion that we need to identify whether it's Mr Dryden or Dr Trento who will be formally giving evidence.

THE CHAIR: Yes.

MR BEAL: I accept that there will only be one of the two likely to be tendered for cross-examination, but I, with respect, don't see why they couldn't do a joint report. Mastercard used two experts, Mr Harman and Ms Webster, for Trial 2. We're not even proposing that.

THE CHAIR: (Inaudible) joint report?

MR BEAL: They didn't do a joint report, no.

THE CHAIR: No.

MR BEAL: But we would only tender, I think, one of the two experts for cross-examination, because otherwise it obviously becomes messy and duplicative.

But who that is, in my respectful submission, doesn't need to await the report, because it can be a joint report, but simply one of the witnesses then speaks to all of it.

In terms of the other evidence that we seek --

THE CHAIR: Sorry, they're at the same firm, are they?

MR BEAL: They are, yes, (inaudible) --

THE CHAIR: Same expertise.

MR BEAL: Yes.

THE CHAIR: So ...?

MR BEAL: Why is it a joint report? They're approaching things together, because one of them has got the history and background from Trial 1, and the other has got the history and background from Trial 2. There are themes from both of those trials that are necessary to --

THE CHAIR: There's no problem with them being involved in preparing the report, but normally, one would identify who is actually going to be the witness --

MR BEAL: Yes.

THE CHAIR: -- by this stage.

MR BEAL: Can I take instructions on that?

THE CHAIR: Yes.

MR BEAL: We will obviously confirm that there will be only one.

THE CHAIR: I mean, I don't think it's a huge point, frankly, but ...

MR BEAL: The point that seems to be more controversial is our application for evidence from an industry expert in relation to a number of matters: principally, how the payment card industry works, with a view of how it operates from the point of view of issuers, acquirers, fraud protection measures, innovation and so on. What this has intended to do is to equalise an informational asymmetry between us and the defendants. They obviously work in this industry, in this sector. The defendants are responsible for some of the innovations that have taken place. I think Visa led the charge on contactless payments, for example. I may have got that wrong; apologies if it was Mastercard.

But the point is that we would like to have our own industry expert who's been embedded in that industry to explain how the industry practice has developed, what the innovations have done, how fraud and default protection has worked, and so on.

Now we are in final discussions with an identified expert to instruct him to provide a report. True it is that we haven't, unfortunately, been able to finalise that. There is a certain delicacy in the card payment industry to be seen to be too vocal in taking on, if I may put it this way, the Schemes. I'm not saying that's motivating things, but it does mean that there's a certain delicacy to be overcome before somebody will stick their head above the parapet. And that's the stage we're at now.

What we therefore seek is permission to adduce evidence of an industry expert in relation to those payment industry matters that I've identified with formal identification of the expert, in due course. We completely recognise that if, for example, there's some objection taken to the appropriateness of the specific expert we, in due course, notify, then that will have to be resolved, but we suggest it shouldn't prevent this Tribunal -- if it's minded to do so -- endorsing our application as a matter of principle.

Then, a formal application --

THE CHAIR: Do you know what sort of evidence, in this respect, will be forthcoming from the Schemes?

MR BEAL: They've indicated --

THE CHAIR: Well, what is it to me?

MR BEAL: We know from their pleaded case that they're proposing to adduce evidence as to how the MIF is directly related to innovations in the payment industry that are of benefit to merchants; how the MIF is directly related to fraud protection.

I imagine that they will have a mixture of witness evidence, either from --

THE CHAIR: Factual evidence.

MR BEAL: -- factual evidence from Visa and Mastercard by people who have been involved at the coalface in developing technology, for example. To the extent that the technologies have been developed by issuers, my understanding is they propose to invite an issuer to give factual witness evidence on behalf of the Schemes, in the same way that we had a witness from Barclays in Trial 1 who was aligned with the Schemes case.

THE CHAIR: But if they're going to call evidence -- and obviously they're not bound to -- but if they were to call evidence from a sort of industry insider, that's the same as what you're proposing, really, isn't it?

MR BEAL: Well, the difference is that their industry insider would be an employee, and therefore not independent, and therefore not capable of --

THE CHAIR: Within the Schemes.

MR BEAL: Within the Schemes, or with an issuer; they still wouldn't be independent either. We're proposing to find somebody who has extensive experience in the industry, but is not in the direct employ of any of the above, and therefore is independent. That's simply to match the evidence.

THE CHAIR: That becomes expert evidence, whereas theirs is factual evidence.

MR BEAL: It's that very bizarre borderline when one's looking at industry practice in a specialist industry, where, for example, a specialist engineer who's dealing with an industrial process can give evidence, that there's a mixture of factual and expert opinion evidence. The court has recognised that you can have strands of that evidence given by an expert appropriately, because it becomes artificial to try and separate the factual from the opinion evidence within that context. I haven't brought an authority to that effect, but I'm sure the Tribunal's seen experts of that ilk before.

I think that's all I need to say, please, on the expert evidence at this stage. There's a responsive point in relation to expert evidence that Mastercard wishes to call, but I'll let them develop that.

THE CHAIR: Okay.

Right, Mr Hoskins.

MR HOSKINS: Thank you, sir.

Submissions by MR HOSKINS

MR HOSKINS: On the economic experts: I'd understood from the correspondence in the skeleton that there was going to be one report and the economist, and it's the first I've heard now that the intention is that there might be a joint report. I've not --

THE CHAIR: It's still one report.

MR HOSKINS: Still one report, absolutely. I just think it's preferable for them -- if you're going to cross-examine someone, it should be their report, I think.

THE CHAIR: Yes.

MR HOSKINS: As you say, it's not a big point but they need to sort themselves out with who their expert is, and let's just get on with it. But that's the only comment on that.

On the industry expert, I think, sir, it's not a dispute about whether they might need an industry expert if we put in factual industry evidence; it's just the basis on which the application has been made at the moment. If I can quote you from the Tribunal's Practice Direction on expert evidence, paragraph 6:

"The Tribunal will normally require the parties to provide notice of the identity and field of expertise of their experts, and the issues proposed to be addressed by each expert."

Which seems a fairly obvious and basic requirement, and yet, the claimants haven't done that yet. Mr Beal explains that they haven't found or settled on someone yet.

Well, that's fine, but what they're actually seeking is a sort of carte blanche order, I think, in advance. Yes, you can produce someone and you can put in evidence from them.

All we're saying is, when they know what they're actually seeking: who is it? What areas is he/she going to cover? Write to us and say, "This is what we propose". Hopefully, we can agree it, and if not, we can make the application then. But it's a very odd situation to find oneself in, where you're being asked -- I've said this for you -- to make an order saying, "Yes, have an industry expert", without any details at all.

THE CHAIR: The point, opposing it in principle, is that, if it's really -- I mean, you do intend to produce some evidence as to the way the industry works, I assume.

MR HOSKINS: Of course there will be that. That's why I'm not saying this is a big issue, I'm just saying it can probably be sorted out. They should work out what they want; they should ask us. I'm not going in with a hammer and tongs saying, "Under no circumstances can you have an industry expert of any sort".

THE CHAIR: The Tribunal rule does say that's what's normally required. Mr Beal tells me that they're close to appointing someone and you will be able to object to that person if there is any reason to do so.

MR HOSKINS: Well, there might be an issue as well as to what they're going to cover. If I can ask you to look at the claimants' application, because the oral submission hasn't quite been tallied with the application. That's core bundle 1D, tab 24, page 441.

THE CHAIR: Did you say core bundle?

MR HOSKINS: Yes, I've got a core bundle. Well, I've got -- it's just one bundle, so everything's a core bundle apart from the --

THE CHAIR: A core bundle of 2500 pages.

MR HOSKINS: Indeed. So I'm not sure -- it's tab 24, it's page 441, if that helps you find it electronically.

THE CHAIR: Yes, I've got it.

MR HOSKINS: And if you read 3.4 --
THE CHAIR: Yes.
MR HOSKINS: -- you'll see a suggestion of the sorts of issues that might be covered. The Tribunal is usually quite careful about the type of permission it gives in terms of what an expert is entitled to cover, and that's for obvious reasons because, otherwise, we can end up wasting time and money on stuff that's not necessary and not appropriate.
So again, an application saying, "This is who we intend to appoint, and these are the issues that we seek permission to provide expert opinion on", would be the norm. What you're, I think, being asked to do today is just say carte blanche for one industry expert, full stop, and that just makes us a bit nervous.
THE CHAIR: Would it normally be spelled out a bit more carefully in the order?
MR HOSKINS: For any expert, yes, it's quite common for it to be specified --
THE CHAIR: Right.
MR HOSKINS: -- in a more granular fashion. That's certainly my experience.
There's one final point, which is just about the timing. Although this will be an expert report, of course, the purpose is to deal with factual evidence, as Mr Beal has explained. If and when permission is given for an expert report of this sort, our point is that it has to be filed at the same time as the factual witness statements, because our factual witnesses need to be able to respond to their industry report, and the experts on both sides need to be able to take account of that industry evidence, which is, in essence, factual, albeit it's been given by an expert in this case. So there is that timing point: it can't come at the same time as the economic report.
THE CHAIR: Do you agree that it is expert evidence requiring permission?
MR HOSKINS: Yes, that's the norm for an industry expert. If you don't have someone who works for you, et cetera, in the industry, then it's not unusual to see this form of --

THE CHAIR: But it's being treated as factual evidence, because you want it at the time of the factual evidence that's going to be disclosed.

MR HOSKINS: It would still be an industry expert report on behalf of the claimant, but my point is: because it is, essentially, dealing with factual matters, it has to come at the same time as factual evidence.

THE CHAIR: Right. Okay.

MR HOSKINS: That's that.

There is an issue in relation to the manner in which we propose to collect and collate data from issuing banks. I don't know if you want me to deal with that, or if you want to deal with these two issues that relate to the claimants' applications first. Maybe it's easier just to tidy them up and then we can come to issuers.

THE CHAIR: (Inaudible).

Submissions by MR PICCININ

MR PICCININ: Just a couple of very short points.

One is that, of course, Visa needs to apply for permission to introduce expert economic evidence from Mr Holt, and we have an application for that; it's not opposed.

Then just on the points that Mr Beal had been addressing earlier: in relation to the economist, we say that what is critical is that whoever is put forward to come into the witness box and swear the report, or affirm the report, is taking entire personal responsibility for all of the opinions that are expressed in the report. You can't have a situation where Mr Dryden says, "Well, that was Dr Trento's idea". In those circumstances, we can't detect any purpose to having two names on the report. Whoever's put forward, it needs to be their report, even if other people have contributed to it.

Then the second point, just on the industry expert evidence, all I wanted to add is that at the moment, it does seem very unclear as to whether what is being proposed will actually be factual in nature, or expert in nature, precisely because we don't know who it is. There is, of course, no reason why fact witness statements need to be limited to employees. If the evidence is purely factual in nature, you can have a factual witness statement. If it's expert in nature, then we need to -- and, of course, industry expert evidence can be expert in nature, but we need to know exactly what it is. The Tribunal's Practice Direction envisages that the Tribunal will scrutinise proposals for expert evidence and make sure it understands what it is giving permission for.

THE CHAIR: But it doesn't scrutinise proposals for factual evidence; it's up to each party to decide what factual evidence they adduce, and this is a sort of hybrid situation, I would suggest.

MR PICCININ: Yes, in terms of factual evidence, that's true, but if what is being sought is permission for an expert report rather than for a factual witness statement, then it needs to be properly justified and explained so we know what we're dealing with, and so we don't end up with a situation where someone produces a report that doesn't actually have any proper basis to be called expert evidence.

THE CHAIR: I mean, it's fairly clear what the expert is going to be directed at.

MR PICCININ: The broad topic is fairly clear.

THE CHAIR: It's only ever going to be pretty broad at this stage, isn't it?

MR PICCININ: But the basis for their expertise obviously needs to be explained so that the Tribunal can be confident that what's going to be provided is going to be useful expert evidence.

So all we're saying -- it's similar to Mr Hoskins -- I'm not saying, "No, absolutely not, never", but just that there needs to be a concrete application made in the usual way.

THE CHAIR: You're saying that it should be decided at some later stage when they've (overspeaking) --

MR PICCININ: When they've got a proper application.

THE CHAIR: Right.

MR HOSKINS: I need to formally ask for permission for our expert economist, but that's not opposed so, fortunately, it's not a problem.

THE CHAIR: Right.

Mr, Beal, do you want to reply?

Submissions by MR BEAL

MR BEAL: Yes, I mean, obviously, there's the rather arid debate about whether it should be one expert or two experts for the economist report. I think the shortest way of dealing with this is to say, "Fine, we'll have one", and that one expert will say he's drawn on the benefit of experience from his wider team, including the other one. That covers the point, so rather than argue about it, let's just say we're very happy to do that.

Secondly, on the industry expert: the areas have been identified and delineated by the pleadings. Our application has identified the areas to be covered. We understand that there's no objection in principle to us producing evidence that deals with these points.

Indeed, it's a central feature of the defendants' case, and it would be very unfair if we couldn't respond. The suggestion is made, "Well, that could be factual evidence". The difficulty usually is that when you produce factual evidence from an industry expert, the other side object that you have produced opinion evidence, and they say, "You didn't have permission to call an expert".

We're trying to circumvent that by saying, to the extent that the person or persons that we require to give help on, for example, fraud detection issues and innovation issues, it may consequently be two people rather than one if the person says he can't deal with fraud, or she can't deal with fraud. But the point is that we will identify the people who are giving the evidence if we have a sanction from the Tribunal, in principle, that this sort of evidence can be received. If that means that a formal application in due course has to be made for identified expert or experts, then so be it, but it would be very useful to --

THE CHAIR: Do you actually want anything from me, apart from an indication that the Tribunal will look favourably on an application to adduce such evidence?

MR BEAL: Well, in the light of the somewhat surprising push back we've had today, then that seems to be the most sensible way forward, allowing Mr Hoskins and Mr Piccinin to maintain their reservation to the extent that they wish to do so, but in light of the knowledge of the indication from the Tribunal that such an application will be favourably received.

THE CHAIR: Thank you, Mr Beal.

(12.39 pm)

Ruling

THE CHAIR: Regarding the claimants' application for permission to rely on industry expert evidence, I note it is somewhat unusual to be asking for permission to adduce expert evidence where the actual expert has not yet been identified, and the detailed areas that that expert will cover have, similarly, not been identified.

I take the point that the issues are broadly understood in relation to industry evidence, and they were set out in the letter of application on behalf of the claimants. They have also no doubt been clear from the pleadings, so I am, in principle -- and I do not think this is opposed by the defendants -- in favour of allowing the claimants to adduce industry evidence as to the payment systems industry. That will be necessary to meet any such evidence that is adduced on behalf of the defendants in due course, which will possibly be largely factual evidence, but may also include some sort of expert evidence. We are in this sort of in-between world where the evidence will be a bit of both. While it would make sense for the Tribunal to give permission for the adducing of that evidence, I will not make such an order at this stage, and we will await the formal application from the claimants with a name and a further delineation of the issues that the expert or experts would cover.

I do also agree with Mr Hoskins's suggestion that evidence, when it comes -- and assuming permission is given -- should be adduced at the same time as the factual evidence, so that the defendants' factual witnesses in that area will be able to respond to it within the timetable. That is what I will do in relation to the industry evidence.

In relation to the economic expert evidence: there is not any real dispute between the parties at this stage. The claimants have not decided whether it is to be Mr Dryden or Dr Trento who is to be their expert witness. It is accepted now by them that it ought to be one or the other and not both. The expert who is giving evidence and being cross-examined has to own the whole of the report and be able to give meaningful evidence in relation to it as a whole.

I therefore give permission to all parties to adduce economic evidence, with the defendants' experts having been identified and approved, and with the identity of the claimants' experts to be confirmed in due course.

(12.43 pm)

Submissions by MR HOSKINS

MR HOSKINS: Thank you, sir.

I then move into the question of evidence from issuers, and there's actually two related points here. One is the manner in which the defendants can seek to obtain evidence from issuers, and the second question is how any information obtained from issues is to be presented at the trial. I'll take those two together because they are related.

In relation to obtaining documents from issuers and issuer disclosure, we intend to seek documents, including data on a voluntary basis from third-party issuing banks,

with the intention that that can then be disclosed into the proceedings. Now as I understand, the claimants' position on this, if I can just again quote from paragraph 47(a) of Mr Mansfield's second witness statement, he states:
"Our complaint is not that they are seeking evidence from third parties ..." [as read]
Sir, do you want to see it in the text?
THE CHAIR: No.
MR HOSKINS: It's just a short quote.
"Our complaint is not that they are seeking evidence from third parties. We are not asserting that they should not be allowed to do so ..." [as read]
So it seems to be the agreement that we can seek information on a voluntary basis.
"... rather, our complaint is that they are refusing to engage with us as to how that evidence can be gathered in a fair and balanced way."
So there's no objection for us seeking voluntary disclosure from issuers, but the claimants say that they want to be involved in that voluntary process.
What is it that the claimants actually want? Well, if you can go to their skeleton argument -- you have it in front of you, it's paragraph 42 -- it suggests that they want four things.
One and two go together. First of all:
"A timetable should be drawn up for the defendants to circulate draft issuer disclosure requests on which the claimants could comment." [as read]
And (ii):
"Any disputes about these requests may be referred to the Tribunal." [as read]
So that's a sort of joint process of making requests to the issuers.
Then (iii):
"The claimants will be copied into any relevant communications with issuing banks [so that's communications between the defendants, solicitors and the third-party issuers]."

[as read]

And (iv) --

THE CHAIR: Potentially your witnesses.

MR HOSKINS: That's right. These are the points I'm going to be making to you, so you can immediately see the problems.

And (iv):

"If any third-party involvement is necessary, it should be with someone genuinely independent." [as read]

And that relates to the manner in which we intend to provide some of the evidence that we hope to get from the issuers, and that's by way of a witness statement from Mr Sidenius and I'll come to that separately.

So I'm looking, first of all, at the voluntary disclosure process. First of all, as the claimants reiterate in their skeleton and it’s common ground, the burden of proving that the exemption conditions are satisfied lies on the defendants, and cogent empirical evidence is required. Therefore, as a threshold remark, we say: it is inappropriate for the claimants to seek to insert themselves into our efforts to meet our burden, because that's what they are trying to do.

In relation to (i) and (ii) -- so the document requests that we wish to make to issuers -- in our submission, the suggestion that the claimants should be involved in that voluntary process is inappropriate. The issuers are third parties to these proceedings. There are therefore two ways in which documents can be obtained from them, either voluntarily or by way of third-party disclosure orders. Of course, the claimants cannot insist on being involved in a voluntary process; that could only be done with the consent of the issuers. It can't be --

THE CHAIR: Involved in a third-party disclosure application.

MR HOSKINS: That's right. So in the absence of the consent of the issuers to the claimants being involved in voluntary process, the only option is third-party disclosure. We submit that, if possible, if we can manage this, it would be far preferable if disclosure could be obtained voluntarily from issuers. And I want to make it absolutely clear that the issuers are clients of ours, but that the process is not straightforward. One of the reasons for this is that the material that we are asking issuers to provide is highly sensitive to their businesses, as you can imagine.

Now, without waiving any privilege -- and I'll come on to the point of privilege in a minute -- the defendants are reasonably optimistic that we will get a degree of voluntary disclosure from issuers if we are allowed to do it our way. However, we do not have such confidence if the claimants were to be part of those discussions. You will understand there is a great sensitivity on the part of the issuers, and there's a great difference in their perception between a voluntary process in which the defendants are asking for information, and a process in which the claimants have inserted themselves. Sir, as you've already remarked, if it were not possible to obtain the documents and data on a voluntary basis, the only other option would be for the defendants, and/or the claimants, to apply for a third-party disclosure orders. As we all know, those sorts of applications are time consuming, they're expensive -- in the grand scheme of things in this case, that's probably not so important, but what is important is it's likely to lead to a more limited provision of documents than would come voluntarily.

As we all know from having to deal with these third-party disclosure applications, you have to be very specific about what you're asking for, and understandably, courts and tribunals are quite restrictive about what can be solved. So in our submission, a voluntary process is far more likely to be successful in producing the evidence that the Tribunal wants to see, and that we need for our defence, for our case and exemption.

THE CHAIR: If you obtain voluntary disclosure from the issuers, you would obviously have to disclose that in these proceedings, assuming they're relevant.

MR HOSKINS: That's right; it becomes disclosable as soon as it's in our hands -- subject to any privilege point but obviously that goes without saying -- that's absolutely right.

So that's the process of asking the issuers to provide voluntary disclosure, and we say that the claimants have no part in that. Particularly with no consent from the issuers, it's just not possible. It doesn't have a role in that; we should be allowed to pursue that process.

Then there is (iii), which is the claimants' suggestion that they should be copied into any relevant communications with issuing banks. Now, the problem with that is: it is flatly inconsistent with the law on privilege. In correspondence, we have made the point that communications with issuers for the purpose of obtaining evidence are privileged, and the claimants have not challenged that privilege in any way. And that's hardly surprising given what the law says.

If you could go to authorities bundle 2, tab 37 --

MR BEAL: If it helps, we accept that litigation privilege is exercisable by a litigant communicating with a witness or potential witness. We're not seeking to go behind that privilege, but I'll develop that submission. That can be taken as a legal proposition that is common ground.

THE CHAIR: Yes.

MR HOSKINS: That's helpful and, I say, not surprising, but I would like to show you, just very briefly, some statements in relation to that.

THE CHAIR: Sorry, which tab was it?

MR HOSKINS: I'm sorry, I may have got the wrong reference. It's 36.

THE CHAIR: The White Book?

MR HOSKINS: It's the White Book. Exactly. It's the bottom of the page, 31.3.8, and this won't be controversial:

"Communications between a solicitor and a third party after litigation is contemplated or commenced and made for the purpose of obtaining or collecting evidence to be used in that litigation are covered by litigation privilege." [as read]

So that's the basic principle.

You'll see the reference to *Anderson v Bank of British Columbia*, and that should be behind the next tab. This principle is long established. This is the Court of Appeal from 1876. If I can invite you to look at the judgment of Sir George Jessel, the Master of the Rolls, at page 1708 of the bundle.

THE CHAIR: Yes.

MR HOSKINS: If you begin six lines down, you see, "The object and the meaning of the rule is this". If I can ask you to read to the end of that paragraph, please. (Pause) If you could read the paragraph that begins at the bottom of the page; it goes on to the next. Again, "The solicitor's acts must be protected". (Pause)

So the point of litigation privilege is that a party should be free to seek evidence from wherever, without being required to report on that process to the person on the other side. It's a fundamental principle of justice.

Having said that, to the extent, sir, as you've pointed out, that we do receive information from the issuers on a voluntary basis, we will have to disclose that to the claimants.

So our point on this is the claimant's suggestion that they should be copied into relevant communications between the defendants' solicitors and the issuing banks is simply inconsistent with the law on privilege. I go so far as to say the Tribunal doesn't actually have power to make that particular order that the claimants are seeking.

So let's assume that we are successful in obtaining data from the issuers through this voluntary process. We then come to the second aspect, which the claimants are complaining about, which is how is that to be presented to the Tribunal in the trial? We intend to engage a firm called Edgar, Dunn to produce a costs and revenue study using data from the issuing banks, and we intend to present that data in a factual witness statement from someone called Mr Sidenius. Any applications that shall rely on expert evidence from Mr Sidenius has only been made as a fallback, should that prove necessary.

So our primary position is: we intend to produce this evidence as factual evidence from Mr Sidenius in a factual witness statement.

Edgar, Dunn is a consulting firm which specialises in payments and financial technology. Mr Sidenius is a senior advisor in the London office with over 30 years of experience. The plan is to appoint Edgar, Dunn to collect and collate relevant data from the issuers if they agree to participate in this process. Mr Sidenius will then present the results of that exercise in his witness statement.

THE CHAIR: So the data that's obtained from the issuers will obviously be disclosed.

MR HOSKINS: Absolutely. The data itself will be disclosed.

THE CHAIR: So he is presenting that data in a particular way.

MR HOSKINS: That's correct.

THE CHAIR: Hopefully it will be useful to the Tribunal.

MR HOSKINS: So the issuers hold the information in different ways, as you would understand; they have different systems. Mr Sidenius, through his experience, knows how to get the relevant data.

THE CHAIR: Right.

MR HOSKINS: The data is held -- it's not necessarily held on a consistent basis. So you get apples and pears from different banks. Mr Sidenius, through his experience, can collate the information so it's presented in a consistent basis to assist the Tribunal. So that is why we say the exercise is one of collection, which requires relevant knowledge, and collation, to get rid of the apples and pears.

THE CHAIR: You won't actually be evaluating the evidence?

MR HOSKINS: That's one of the points --

THE CHAIR: It's a way of presenting.

MR HOSKINS: Absolutely. Mr Sidenius's expertise lies in the process of obtaining and presenting the relevant data on a consistent basis. He is not going to be asked to draw any conclusions on the basis of that data. That's why he's a factual witness statement and not an expert.

THE CHAIR: So you're not asking for permission.

MR HOSKINS: That's right.

THE CHAIR: Okay.

MR HOSKINS: On that basis, this is a dead letter, because there's nothing for the claimants to bite on.

THE CHAIR: You can use whatever factual evidence you want.

MR HOSKINS: That's right.

THE CHAIR: Well, it's subject to the control of the Tribunal.

MR HOSKINS: Exactly. Ultimately, if you thought we were doing something inappropriate, you could step in.

Now, we have said if it becomes apparent during this process that we are concerned that Mr Sidenius is straying into expert territory, then we might have to come back and say, "Actually, we think it's going to be an expert", but we're not at that stage yet; that's simply a fallback.

Just to be clear so there's absolutely no -- I don't want anyone to be under any misapprehension. Although Mr Sidenius will appear as a factual witness, we are going to ask him to actually comply with the obligations of independence that one would ask an expert to comply with, hopefully to assuage concerns about the manner in which he is acting. We intend to provide Mr Sidenius's statement and the data upon which it is based by the deadline for disclosure in Trial 3, 23 October 2026, because obviously this information has to be available to the factual witnesses as well. So this statement will come at the disclosure deadline date.

As I've said, we're not seeking permission from Mr Sidenius to give expert opinion evidence at this stage because, as I've explained, the process is not --

THE CHAIR: Yes. It means that -- I mean, if he does express an opinion in his report, that you couldn't rely on that.

MR HOSKINS: That's right. If he is expressing expert opinions, then the claimants will object. But that's for us to manage.

THE CHAIR: Right.

MR HOSKINS: I should say that in previous proceedings in the High Court and the Tribunal, Mr Sidenius has given evidence a number of occasions, and always as a factual witness. That was uncontroversial in each of those cases, and his evidence was described in the judgments as "clear and fair, and presented with great competence and clarity". If you go to our application, bundle 1, tab 26, at page 446. If I could ask you, please, to read paragraph 8. (Pause)

THE CHAIR: What is your actual application, then, you say of this?

MR HOSKINS: I don't have one.

THE CHAIR: Well, this tab is "Mastercard's application for permission for expert evidence". That was the other ...?

MR HOSKINS: It's an application for the economist expert. In here, we say: as a fallback, if necessary, we'd need permission, but we're not at that stage yet; it's not crystallised.

THE CHAIR: All right. Okay.

MR HOSKINS: But I'd like to just go -- because it's important you understand what we're intending to do again, so that this can be dealt with absolutely clearly.

I notice the time. I could probably finish in the next five or ten minutes, but it's up to you whether you want me to rabbit on or whether we come back at 2.00.

THE CHAIR: Well, I imagine -- I had hoped to finish this issue before lunch, but ... I guess Mr Beal will want to respond to this.

MR HOSKINS: I think he probably will.

Submissions by MR BEAL

MR BEAL: I can do so very quickly. Given that no application is being made, we thought an application was being made. That makes things simpler.

THE CHAIR: I did too, so ...

MR BEAL: There we are.

THE CHAIR: But are you applying to be involved in the voluntary disclosure process?

MR BEAL: I've heard everything my learned friend's said. It's his choice to go to an issuer and seek their participation, either on a documentary basis or with witness evidence, and I'm not proposing to be involved with that at all.

My concern is this: that when one looks at the areas that are going to be considered by the issuers -- if one turns to page 1489 in the bundle, the hearing bundle, tab 114. There are five areas where, I think Milbank is proposing to approach issuers to deal with things. That simply doesn't cover the sorts of matters that the Supreme Court in *Sainsbury's* said would need to be dealt with by issuers.

My concern is the eminently practical one: that if we're going to issuers on a voluntary basis and it comes back and they haven't dealt with a host of things that we say need to be dealt with, in a position in late October, early November, where we're having to apply separately for specific disclosure from the issuers, which may then take some months to resolve, in circumstances where, for example, if we are inputting at this stage saying, "Please, can you also get details of the revenue they receive from other sources, how they allocate the MIF, how they deal with their management accounts and so on", which the Supreme Court in *Sainsbury's* at paragraph 130 says is exactly the sort of inquiry that ought to be being made, then we're having to do the whole thing again.

THE CHAIR: But I mean, that's something that the defendants have to prove, isn't it? I mean, if their evidence from the issuers is deficient in that respect, then they might not come up to proof.

MR BEAL: But if there's no underlying disclosure on the issue of revenue and they're asserting that the revenue is used, for example, from the MIF for fraud detection, and we're saying, "Well, what about the other sources of cardholder income? What are you using those for?", and there's simply no evidence on that, then we've got nothing to rebut the assertion in the witness statement from an issuer, which would go to prove the point that they weren't simply relying on MIF revenue to produce something.

It's literally a practical concern that we have, of having to do everything twice, because the timetable is tight.

THE CHAIR: I would have thought you recognised the concerns that Mr Hoskins has raised about privilege --

MR BEAL: Absolutely.

THE CHAIR: -- and about the likely reaction from the issuers as to if you were involved.

MR BEAL: With the greatest of respect, that I have more of a concern about, because of course, there's two parties to this system. Mastercard have two sets of clients: they have acquirers and issuers.

Acquirers at the moment are being forced to pay money to the issuers through the scheme rules. That's the objection that we have, in competition terms.

Issuers, therefore -- I can understand -- are going to want to preserve that income stream, because it's in their commercial interest. What that means is if they're being invited to provide data that supports the scheme's case, that's one thing, and that's what I would expect my learned friend to do when approaching the issuers.

My concern is in October, when that proves to be the case, and we say, "Well, hold on. There's a whole swathe of material from issuers that simply hasn't been provided that gainsays the scheme's case", we have to go through the rigmarole of having a further disclosure exercise, because it wasn't done properly in the first place. That's our concern.

THE CHAIR: Are you asking me for a direction that you should be allowed to be involved in some way?

MR BEAL: The spirit of co-operation under the CAT rules suggests that it's open to this Tribunal to encourage the parties to agree on a common sense, pragmatic approach to obtaining disclosure. The suggestion, with respect, that issuers will somehow baulk at the idea of providing data because they don't think it supports the scheme's case would be revealing. I don't think for a moment they will ever say that.

So if they are seeking to help the Tribunal as a source of information, which is what they should be doing, then responding to our complementary requests for data at the same time means they don't have to do the disclosure exercise twice. That, in a nutshell, is our point.

Now, how much longer I need to develop that point, I suspect is not very long. But when Mr Hoskins has finished, I can perhaps try more succinctly to make the point and persuade you.

Submissions by MR HOSKINS

MR HOSKINS: I don't know what's being sought. I can't push back against something that isn't being sought. They can't have a direction that they are imposed into a voluntary arrangement; it's simply not possible. They can't have a direction that they have access to privileged communications. There's nothing for me to push against.

THE CHAIR: Well, I rather agree. It's not clear to me that I can make any sort of direction in that respect. I mean, as you say, if there can be some sort of co-operation between the parties and some sort of involvement that Mastercard agrees to, so be it, but I don't think I can impose on them. They've got to gather their evidence to support their case in their own way.

MR BEAL: The concern we have is that we will therefore have to go to the expense-time inconvenience of having to approach issuers for specific disclosure through the Tribunal process.

THE CHAIR: I think, I'm afraid, that will probably be the case. I understand the problem that you're identifying is that you won't know whether there is a deficiency in that evidence until this is all disclosed in October, but I'm afraid I think that normal process needs to be followed, and you will have to take a decision at that stage whether you want to take it further forward.

MR BEAL: In terms of Mr Sidenius, could I just draw it to your attention, please, at tab 27, page 449.1. The correspondence that came in --

THE CHAIR: Tab 27?

MR BEAL: Tab 27, 449.1. I appreciate that if no formal application is being made to adduce expert evidence from this individual, this complaint only goes so far, but, you know, I would --

THE CHAIR: My tab 27 just has a placeholder.

MR BEAL: Ah, well that needs to be rectified. If I may, we'll liaise with the registry to get that inserted into your bundle over the short adjournment.

THE CHAIR: But in relation to Mr Sidenius, there's no application.

MR BEAL: No, I appreciate that.
THE CHAIR: Again, I'm not sure I can do anything. I've heard what Mr Hoskins has said, and they can adduce whatever factual evidence they want.
MR BEAL: Mr Sidenius has been involved since 1990 -- so 36 years or so -- with the Schemes, producing evidence on a number of different investigations and issues. To suggest that he's got relevant expertise is a bit like saying Sir Alex Ferguson has relevant football expertise and can give independent views about the status of football clubs. But there it is. I've made my point. I don't think I need to say more.
THE CHAIR: If anything, he will be adduced as a factual witness, and no doubt you can put that sort of stuff to him if he's suggesting that he's independent. All right.
MR BEAL: Nothing further I can say.
THE CHAIR: Okay, so I think we've resolved that issue by me not making any orders.
MR HOSKINS: Yes, it's a great success (inaudible).
THE CHAIR: Not orders -- where any orders are being sought.
MR HOSKINS: Exactly.
THE CHAIR: All right. Okay, so we'll start again at 2.00. Are we on to Redferns then, or is there something?
MR HOSKINS: No.
MR BEAL: I think that's it.
MR HOSKINS: Yes.
THE CHAIR: Yes, all right. Thank you very much.
MR HOSKINS: Thank you.
(1.09 pm)
(The short adjournment)
(2.02 pm)

Submissions by MR BEAL

THE CHAIR: Yes, Mr Beal.

MR BEAL: Sir, I've just been told our Redfern is going to go first, so that's fine. Could I also just note, I spoke to my learned friend, Mr Hoskins, and he very kindly informed me that the disclosure from issuers will be given at the same time as the disclosure from everyone else in October. I'm grateful for him confirming that.

THE CHAIR: With the report from (inaudible). Yes. Yes.

MR BEAL: The Redfern schedule from us is at page 210. I understand that there was a request for an extra A5-size copy of it. I don't know who made that request, but I can pass those up. Oh, you've got them. Thank you. Whether or not you want them, different question.

What we have is a series of overarching points. In essence, we're not suggesting we go through our Redfern requests line by line. What we would suggest is that few of the requests in our schedule are agreed without any caveat. Whilst my learned friends' skeletons have each suggested that they've substantially agreed or entirely agreed to disclose pursuant to all of our requests, that's not without a caveat.

Secondly, of course, the fact that we are pursuing these requests but on a broader basis than has currently been volunteered, doesn't mean that there's nothing to see here, as it were.

Six separate questions. They are essentially as follows, if I can just give you the roadmap. Firstly, the geographic scope of the searches. Secondly, the type of documents. Thirdly, the issue of Trial 1 and Trial 2 disclosure. Fourthly, informal studies or analyses. Fifthly, identification of documents relevant to multiple requests. Finally, scheme fees.

THE CHAIR: What was the last one?

MR BEAL: Scheme fees. Disclosure of data about scheme fees over the relevant period.

In terms of geographic scope, where the parties have, in a nutshell, come to is that the defendants are willing to search for documents in comparable markets but they have not explained what the comparable markets will be. We're not in a position to comment on the comparable markets but we do say that the geographic scope should be sufficient that we can see if, for example, there's a particular jurisdiction where the MIF was reduced substantially, then that may well have useful information or useful evidential value if in fact fraud protection didn't suddenly drop out. If fraud rates didn't go through the roof, then that is relevant information to know for a market.

Now, the Schemes have said, "Well, we'll do that but for comparable markets", but they simply haven't told us what the comparable markets will be or how those will be selected. But I'm not sure I can take that particular issue much further than that. Moving --

THE CHAIR: You're content to accept that?

MR BEAL: I'm content for not every jurisdiction to be given and I can't do more than say, "Well, we'll have to wait and see, I think, what the comparable markets are". If they aren't sufficiently broad to capture useful evidence, then we may have to revisit the issue. But I'm not sure at this stage I can take it further than that.

In terms of types of documents, I think the issues are slightly more crystallised. This focuses essentially on the question of internal and external communications and in relation to general response 4, which is at page 213, the objection is taken that the range of documents being sought is very broad and what we said in response, in the fourth column, was:

"The claimants maintain their request for strategy documents, internal and external communications, training documents. The defendants have not explained on what basis such documents are significantly less likely to be relevant." [as read]

What we've proposed is searching for such documents by reference to a list of custodians limited to personnel within certain senior roles, so that deals with the proportionality point, and we invited them to provide an appropriate list, which they've declined to do.

In relation specifically to independent reports, they said, "Well, they should be in the public domain". And we said, "Well, not necessarily. They could have been procured for a bespoke range of companies of whom you are one, or alternatively, they might be behind a paywall or some sort of membership structure". So we do seek those.

Mastercard have said in their skeleton argument that these types of internal and external communications are less likely to be informative, but they haven't provided any reasoning for that. Obviously, if it's key personnel working in relevant areas who are dealing with strategy issues, then their internal and external communications looking at those strategic issues that are relevant to exemption questions is, we say, as likely to be relevant.

More importantly, they also resist communications with investors. There, with respect, we simply don't understand why if, for example, the Schemes are communicating with investors in the Schemes, and the Schemes are explaining how the Schemes are going to be successful and what they're doing with either the overall strategy of the Schemes or with the income streams that come in from the streams and the income streams that go to issuers, for example, if they're saying to investors, "We are a successful scheme. We're going to be more successful because we're rolling out this or that piece of technology", then that's highly material. Not least because one would expect investors to be told who is going to be paying for something.

Next item is Trial 1 and Trial 2 disclosure. In essence, what we sought was disclosure of material in Trial 1 and Trial 2 that went to the exemption question. The defendants said, "Well, you've already got that. We're not going to redo the exercise and also we're not going to tell you which ones we rely upon".

What the defendants then in their skeletons have agreed to do, or at least Visa at paragraph 32(d) has agreed to do, is carry out further searches in case additional documents exist. But of course, we don't know the search terms that went into Trial 1 and Trial 2. We made the point in Trial 1 that now was not the time to be discussing exemption issues and we simply don't know the scope of the disclosure exercise that was conducted in Trial 1 by reference to Article 101(3) issues, because we didn't think 101(3) was an issue for Trial 1.

THE CHAIR: You're asking for all relevant documents from Trial 1 and Trial 2 disclosure?

MR BEAL: Yes. We have those documents, but we don't know the ones that are being relied upon for the purposes of advancing the 101(3) case. We're also asking for confirmation that appropriate searches have been done for exemption issues as opposed to liability issues, if they are relying on the Trial 1 and Trial 2 material.

THE CHAIR: Are you entitled to know what documents they're relying upon at this stage?

MR BEAL: Well, the difficulty --

THE CHAIR: You are only entitled to documents that are relevant.

MR BEAL: Well, because the burden of proof is on them --

THE CHAIR: Yes.

MR BEAL: -- they have to say that they have disclosed all relevant documents to these issues. In order to do that, they have to satisfy themselves that the documents in the existing disclosure are indeed relevant. They can't make the assertion that the documents so far disclosed, and no more, are all of the relevant documents from the disclosure exercise that was conducted.

THE CHAIR: You want them to go through the Trial 1, Trial 2 disclosure and only sort of redisclose what's relevant to Trial 3?

MR BEAL: Well, I'm not sure we're saying that necessarily because it makes more sense, frankly, to have all of Trial 1 and Trial 2 disclosure put into a confidentiality ring if need be for Trial 3. And that way, to the extent we want to rely on our own disclosure from Trial 1 and Trial 2.

The difficulty we have is we simply don't know the documents from the Trial 1 and Trial 2 disclosure that they say are the disclosure that is relevant to the issues in this case, and because the burden is on them, they have to satisfy themselves that the disclosure that's been given by reference to the document searches they themselves conducted and on which we have no visibility, meets the criteria for disclosure this time around.

Now, what they say is we're asking them to carry out our work but if, for example, we look at request 1.3 at page 215. So at 1.3, we asked for documents, including documents prepared for decision-making or regulatory purposes, analysing consequences of setting certain MIFs, for example at zero -- that level's different from the factual level -- for each of the different market players.

The defendants' response was they've already provided disclosure in relation to this request in Trial 1. Now, we don't know on what basis they are saying, "You've had everything that you need on that question" from Trial 1, because they don't particularise the disclosure that they say, in fact, meets that request. They also then agree to undertake reasonable --

THE CHAIR: Are they saying that everything relating to this has been disclosed in Trial 1?

MR BEAL: Well, they've agreed to undertake further searches.

THE CHAIR: Yes.

MR BEAL: So no, they're not, at this stage.

THE CHAIR: Right.

MR BEAL: But we obviously don't know what searches they undertook last time, but what they say is they're prepared to undertake further searches, but only insofar as it relates to the UK and Irish acquiring market during the claim period to the extent that those searches have not already been completed for Trial 1. And of course, we don't know the searches that were conducted for Trial 1 so we're not in a position to understand how it is being said that the Trial 1 disclosure exercise and the documents produced, necessarily meet the request that we've made at 1.3. We're being asked essentially to prove a negative, which we can't do.

THE CHAIR: How do you not know what searches were made for Trial 1 and Trial 2? Was there no sort of DRD?

MR BEAL: Well, there were disclosure statements, but of course those disclosure statements were all by reference to the issues in Trial 1 which did not include exemption. That's the problem. They're using this as a shortcut to have to avoid redoing a disclosure exercise but given that the issue in Trial 1 was not exemption, patently not exemption, we don't understand on what basis they're saying, "Well, we've done this disclosure exercise before, albeit by reference to different issues in a different trial , but it nonetheless does the job".

Now, that isn't simply us asking for them to do our work to identify the relevant material. It's how are we satisfied that the searches that they say were undertaken historically do, in fact, meet the requirement for proper disclosure by reference to the issues in this case, which are necessarily different.

THE CHAIR: In relation to 1.3, the final column says the only varying dispute relates to geographic scope.

MR BEAL: Well, that's not our suggestion. That's from the Schemes. What happened -- I won't bore you -- but there was a series of correspondence that took place as to how these Redferns would be drafted. It was initially proposed that the Redfern process should have a rejoinder column. We said there's no point having a rejoinder column, that's just going to take up time when we should be having longer to deal with columns 2 to 4. The Schemes accepted there was no need to have a rejoinder position. I think at the beginning of last week, they suddenly decided that they wanted a rejoinder column and we said, "Well, what we'll do is colour coding instead." So when you look at their request to us and our response, that's all colour coded. It doesn't have this final rejoinder column in it. But there's no point having a spat. The point is that that's their position and not ours. So that's Trial 1 and Trial 2. There's a residual point in any event, which of course is that CICC was not party to Trial 1. Its solicitors and its legal team, save for me, were not involved in Trial 1. They're therefore not in a position where they can simply go through the disclosure that was given in that case, unless and until the entirety of the disclosure from Trial 1 and Trial 2 is put into a confidentiality ring for Trial 3, which can, of course, take place in due course but we say it doesn't obviate the need for the defendant to satisfy the Tribunal that they have indeed disclosed relevant documents. Simply saying, "Well, we did this previously by reference to different issues in a different stage of the trial", we say, does not meet that requirement.

Visa have suggested that the Scott+Scott team can simply brief the CICC team. Well, they can't do so until the material is put into a separate confidentiality ring, and in any event, with the greatest of respect, having one legal team brief another about the defendants' disclosure doesn't seem to be an ideal way of doing things.

The next item was informal studies or analysis. Mastercard's skeleton argument at paragraph 32 in the annex has suggested that they are:

"... prepared to search for such materials, provided that they were generated by, or for, or presented to the board, executive committees and management committees."

[as read]

We are content with that suggestion with the following addition: that it would be, in our respectful submission, appropriate also to conduct that search by reference to the key personnel identified as guardians, which is the stance that's been taken in relation to external and internal communications, leaving the defendants to set the list of the key people likely to have the key material.

What that means is if, for example, there was a person who was heavily involved in a particular aspect, be that introduction of contactless payment machines or something equivalent, the fact that there's an informal study or analysis that is otherwise relevant, but that person wasn't before a board, executive committee or management committee when the document was created, would not stop it being disclosable.

But it's proportionate, because it's confined to key personnel identified by the defendants themselves as likely guardians.

The next item is the identification of documents relevant to multiple requests. Here, certain documents may be relevant to more than one request. The defendants have responded to our schedule by noting that certain requests overlap. We are content for them to disclose documents which pertain to multiple requests, but we simply ask that when they disclose those documents in response to one request, they identify the other requests to which it goes.

The response from Mastercard on that is that that would be costly and time consuming. Our response is: well, they need to satisfy themselves that they have disclosed documents by reference to the Redfern schedules, which they've promised to do. In the course of so satisfying themselves, one would anticipate that they are identifying the documents that go for each of the individual categories that they've agreed to provide documents for.

Given that they're going to be producing some sort of record that they have met the requirements for disclosure by reference to the different categories of document, it's not actually a big ask to then say, "Well, can you let us know which documents go to which requests?"

The final item is scheme fees. This is request 6.8 -- and this is the only specific request I need to turn up -- at page 225. What we sought was data on transaction value, MSCs, including MIFs paid, and scheme fees incurred by merchants in the UK and Ireland over the claim period.

So the objection in respect of that --

THE CHAIR: 6 ...?

MR BEAL: 6.8, bottom of page 225.

THE CHAIR: Yes.

MR BEAL: The ultimate position is the request is agreed, but not for scheme fees. There's a point about the bullet point, but I don't think that need (inaudible). It's only scheme fees that we're saying is the outstanding aspect of this request.

Now, here, if one looks in the bundle at Visa's statement of case, which is tab B6, page 11 of the bundle.

THE CHAIR: Yes.

MR BEAL: At paragraph 10, Visa puts in issue, as part of the purported counterfactual analysis, what might happen to scheme fees. Halfway down that paragraph 10, they say:

"The precise amendments that would have been made to Visa Rules and/or Visa Fees will be a matter for evidence in due course, including from issuers and claimants. However, by way of illustration only and without limitation, Visa could have:

"(i) introduced new fees payable by acquirers to Visa via scheme fees; or

"(ii) introduce new payments to issuers from Visa via scheme fees." [as read]

So they are recognising that direct payment of fees to the scheme could have been in issue, and that is what scheme fees are.

Now there's a rather semantic objection taken to this, which is it's said, "Well, merchants don't pay scheme fees; acquirers and issuers do." But of course, that's our point. Our point is, if one is looking at what would have happened in the counterfactual, then one needs to look at the impact on merchants by virtue of the scheme rules, and the scheme rules that are being put in issue by Visa's pleaded case are the potential use of scheme fees to generate income, which one assumes that they would then somehow pass on to issuers or provide issuers with a differential scheme fee payment system in order to produce what they say the incentives towards the innovations they identify as being necessary for the maintenance of the scheme.

THE CHAIR: The scheme fees are paid by the acquirers to the schemes.

MR BEAL: They are. Issuers and acquirers, but of course they're passed on to merchants through IC++ contracts.

THE CHAIR: Yes.

MR BEAL: So in the same way as the MIF. So this objection is a bit like saying: well, you don't need to give data on the MIF, because the MIF is paid by the acquirer, which is true, but it doesn't answer the question. That's why we're here seeking data on MIFs, so that we can deal with the restriction of competition which is achieved through the acquirer pass-on to the merchants of the MIF.

But here, we're looking at data that's necessary to understand the counterfactual position. It's no answer, we say, to say, "Well, hold on. It's acquirers that pay." Well, of course that's true, but it doesn't answer, relevantly, the question.

THE CHAIR: So whether it could be used to replace the MIF in some way.

MR BEAL: Yes. So scheme fees are relevant to the -- take for example contactless, which my understanding is Visa was substantially responsible for developing. If, in the counterfactual, scheme fees go up and Visa can afford to develop contactless by relying on an income stream from scheme fees, then that would be a relevant consideration.

More generally, scheme fees are relevant to the scheme's ability to provide incentives to innovate. They are the income that the defendants receive for operating the scheme. Since the Schemes argue that MIFs fund issuer innovations that benefit consumers, we need to know the magnitude of the income issuers receive, either directly through the MIF, or indirectly if they receive a rebate on scheme fees or indeed a differential scheme fee payment compared to acquirers.

Now, that interaction between issuers and the Schemes is, of course, the reason why Mastercard have not brought an application to rely upon cost studies by Edgar, Dunn. They're treating that as a factual matter, so they clearly recognise the relevance of costs and revenue streams going to the issuers, because that's what they're hoping to achieve through the data analysis that they do with the Edgar, Dunn factual witness.

Of course, we also know that after the IFR caps were introduced, there were material changes to the scheme fees. That's the whole point of the PSR's current investigation into scheme fees.

So if, for example, we're in a position where there's a zero MIF and the Schemes opt to reduce, for example, issuers' scheme fees, then that would be a highly relevant material consideration for analysis of the exemption position.

So we do say scheme fees are relevant, we do say that this request is justified, and the Schemes have articulated no sustainable reason why the disclosure shouldn't be given.

Those are the high-level points on our Redfern requests. There is an additional point which I could mention as any other business, but I may as well deal very briefly with now, and that's the so-called "initial disclosure". What happened, was on 16 January, in the light of a witness statement from Ms Williams of Linklaters, who had said we've got a bunch of information that we've already disclosed in previous proceedings that goes to the exemption issue and which we think will be relevant to be disclosed -- on 16 January, we wrote, asking for it. The Schemes said they would get back to us. They got back to us, I think, on 17 April, substantively, to say: yes, we could have some of it; no, we couldn't have other bits.

Adopting the approach of Mr Hoskins before the short adjournment, we have no application before you, so I'm not making an application today. I'm simply saying it will need to be dealt with, if necessary, through an application in due course, but I hope that a co-operative approach to producing that material and in the near future, rather than in the mid to long future, can be achieved through correspondence. If it can't be achieved through correspondence, we'll have to bring a separate application.

Those are our submissions on --

THE CHAIR: (Inaudible).

MR BEAL: Sorry?

THE CHAIR: Another marker laid.

MR BEAL: Well, I haven't got an application. I could have chanced my arm, but given the form this morning, I chose not to.

THE CHAIR: Thank you.

Mr Leith.

Submissions by MR LEITH

MR LEITH: Sir, just by way of introductory remark and to frame the nature of the defendants' objections. The defendants are willing to give disclosure to a very substantial degree in these proceedings, and have made proposals to do so. They have a strong interest in the relevant materials being available to the experts and the

Tribunal because of the nature of the assessment that's conducted in a trial of exemption. The defendants have approached the claimants' requests accordingly. Where the defendants have disputed requests that have been made by the claimants, this is because, as I will show the Tribunal, the claimants' further requests are for searches that would be disproportionate and unjustified.

As the Tribunal will have seen from the skeleton arguments, the defendants have sought to narrow the disputes on the claimants' Redfern schedule, and they've made pragmatic proposals and compromises in correspondence that have resulted in the scope of disputes at the CMC being relatively confined. It was suggested that in our preparation of that version of the Redfern schedule, we'd reserved to ourselves a rejoinder. In fact, what we've done is tried to reflect, in that colour-coded version, the extent of actual disagreement that remains, following proposals that we made in correspondence.

So if I could just perhaps show you the letter that we've sent that bridges much of the gap, sir, it's at volume G, page 1529 of the bundle, which is our letter of last week: 15 April.

THE CHAIR: Which tab, sorry?

MR LEITH: Tab 133, thank you. (Pause)

THE CHAIR: Yes.

MR LEITH: So just for the Tribunal's reference and for my learned friend, this sets out the last statement of our proposals. I note that quite a few of these points, while they have been -- while a few of these proposals had been the subject of some comment in the claimants' skeleton, my learned friend's only actually now addressed some of them. So to the extent that there haven't been any further comment on them, I understand that the defendant's approach as set out in this letter is agreed on those topics. But I'm going to go now to the specific points that were raised.

Starting with geographic scope, there had been two aspects of dispute on this point, but now, as I understand what Mr Beal has said, there's now really only a point as to a question of us identifying comparable markets. That comparable markets point arises in relation to request 1.3 from the claimants' side, which I can show the Tribunal at -- it's in volume C, tab 16 at page 215. Do you have that, sir? Documents and so on:

"Analysing the consequences of setting certain or all MIFs at zero or at levels different from the factual level at which they were set at the time of the document for each of the different market players [and so on]." [as read]

And then it's the second paragraph. It's really important and this is where the comparable markets point arises. The claimants say that they:

"... request any such documents relating to the defendant's wider global operations, which concern the setting of MIFs at zero or a reduction of MIF rates due to regulation or pursuant to agreement with regulatory authorities." [as read]

So if I can put it this way, there's two limbs to request 1.3. One of them is any document that considers differences between the MIFs of the actual level and the different level, and then there's this point about regulatory interventions. The scope of this request extends to the wider global operations, wherever such regulatory interventions have been made or have been considered and analysed.

So on its face, that is a very, very broad request. We say it's an unfocused request and we have noted and explained to the claimants that there are at least 90 countries in which such regulatory reductions in the MIFs or investigations into MIFs have occurred. We'd say it's plainly not going to assist the Tribunal or anyone else for searches to be conducted in all of these countries, as the claimants have requested. That would be just grossly disproportionate.

What we've proposed, as my learned friend has explained, is that we'll identify comparable markets as we go. I understand that my learned friend is content with that and isn't seeking anything further on it at this stage. But just the point to make now is to observe that we're essentially trying to make this very broad request, made by the claimants, make it workable and practicable and that's where we're coming from.

THE CHAIR: I think the request now is just to identify those comparable markets.

MR LEITH: Yes. And I think that my learned friend explained that he'd be content for us to see that when that process is finished, when the disclosure is given, and we're content to proceed on that basis.

MR BEAL: I'm sorry if I -- I certainly didn't state that; if I've been unclear. We would like to know which comparable markets are being proposed so that we can have observations to make on further or better comparable markets for disclosure purposes. But until we know which ones are being suggested, it's very difficult for me to tilt against anything because I just -- if for example, they were to say --

THE CHAIR: They don't know, at this stage.

MR LEITH: We don't know.

THE CHAIR: Hence on further investigations to be done and try and identify which would be comparable.

MR BEAL: Seeing as they're in charge of the global network of payment Schemes, one would hope that they could come to a conclusion on what's comparable. Is Australia comparable pretty quickly, one might say.

MR LEITH: But sir, with respect, the point you made, which is we don't know yet, that's factually correct. There are enquiries that will have to be undertaken as to other markets and the availability of documents and so on. That's all part of it. The correct approach is for the claimant to raise any questions once the fruits of those enquiries have finished. If the claimants --

THE CHAIR: Are you saying they will only know when you actually give disclosure in

October, which comparable markets you have selected?

MR LEITH: Well, that is, I understood, the position to be that the claimants weren't seeking anything earlier than that, but if it were to be sought earlier then that could be --

MR BEAL: It has to be.

MR LEITH: Sorry, if I may --

MR BEAL: It's a *fait accompli*, if it's only at the end of October and we're back to the problem of everything then being crammed into six or seven months next year to sort out what should be sorted out in advance.

MR LEITH: It is open to the claimants to make proposals as to particular markets they say we should explore. They haven't done so. They can do so at any time, and I --

THE CHAIR: Presumably, well before October you will know which comparable markets are going to be disclosed by you?

MR LEITH: Yes.

THE CHAIR: Why can't you notify them when you have made that decision, which I assume will be relatively shortly?

MR LEITH: The defendants would be in a position to do that.

THE CHAIR: Yes.

MR LEITH: Within the next, we estimate six to eight weeks.

THE CHAIR: Okay. Well, as soon as you can, I think it would be advisable just to tell them the list of other jurisdictions that you're proposing to provide documents from.

MR LEITH: Yes, sir. There was another question on geographic scope, but I understand no points taken on that because of the further proposals that we've made.

THE CHAIR: Yes.

MR LEITH: On document types, there are a couple of different aspects to this. One of them is on internal and external communications. Just to put this into its context, if

I could just show the Tribunal, please, sir, you saw this, I think, just before but just to remind you. This is on page 213 of the bundle in tab 16.

The first paragraph in the response column, the first substantive paragraph, we explain the nature of the searches we propose to do is:

"... to look for documents that were provided for, provided to, generated for, or used by or generated by these various decision-making bodies, the boards, executive committees, any other committees or governance bodies with relevant responsibilities." [as read]

THE CHAIR: This is the bodies of the defendants.

MR LEITH: Of the defendants.

THE CHAIR: Yes.

MR LEITH: Yes, that's right. We've proposed this approach because the documents that are prepared for or presented to these kinds of bodies or generated by them, are likely to be the best evidence that's available on the points in question. Because where a document's prepared in the course of business for such an executive or management body, it's likely to reflect the most comprehensive information and analysis available to the business.

Taking this approach of looking at that universe of material, taking this approach means that the disclosure exercise will be proportionate and is much more likely to identify the documents and the materials that are the most useful. And so that's the scope. That's the basic, sort of, starting parameters of the searches that we propose to do.

For example, there's a request by the claimants that we search for strategy documents, training documents, internal manuals and bulletins and independent expert reports. We're going to do that by looking at the extent to which these materials were placed before, generated by and so on, provided to these kinds of bodies. I don't understand there to be any issue with that.

There is a point made, though, as to communications; internal and external communications. Initially, the claimants had not, in their Redfern schedule, sought internal communications, but their position is now expanded. Internal communications between people in Mastercard or people in Visa. That position is now -- they've gone further than they initially had in seeking internal as well as external communications. The kind of qualification the claimants have put forward on that proposal is to say it can be limited to custodians in senior levels. But my submission, sir, that would still be disproportionate and essentially unconstructive in comparison with the exercise that the defendants have proposed to carry out.

The target that we are aiming at in this trial is to identify evidence that's useful and probative under the legal test, obviously, and the documents that are created by or provided to management and responsible committees and bodies are much likelier to meet that standard than communications such as emails, in particular, internal communications.

Communications very often provide only a fragmented view or a snapshot of a process that may be very lengthy and that may evolve. What's better and more helpful is the more considered and comprehensive material that is then actually considered by and used by or created by the people in the business that make decisions. It's through these bodies -- board, executive committees and other committees with relevant responsibilities.

Extending the search beyond the kind of analysis and reports and so on, and records of decisions, to extend to communications generally, even where they're limited to key custodians, would not be proportionate. It would greatly expand the scope of the exercise that the defendants have to undertake. For example, even if one were to limit or to take key senior decision-makers as the set of custodians, I'm instructed that on an initial review of Mastercard's business, having regard to the length of time involved and the number of issues, there may be as many as 100 individuals who'd have to be custodians.

THE CHAIR: But surely, as any part of any disclosure exercise, you have to identify custodians, don't you?

MR LEITH: If the exercise is to identify materials that have been used by particular bodies, then it might depend on how the information is stored in the system. It could be that those bodies have their own separate section of a drive or it could be that there are particular individuals who hold all those materials. They might be the secretary of the body or the secretary of the board or something. Those people would be custodians.

What's being proposed is a much wider conception of custodian. It includes the individual personnel who have responsibilities and the body of their materials would extend to materials well beyond the materials that were prepared for those particular decision-making bodies.

THE CHAIR: It might be material that doesn't actually go before the particular board or committee that is sent to a member of that --

MR LEITH: Yes.

THE CHAIR: -- board? (Several inaudible words) possible.

MR LEITH: Yes. But it would be the material that's prepared or if it's sent to them in their capacity as a member of that board or pertaining to their responsibilities as a member of an executive committee, it would be captured by the searches we've proposed. But these custodians may have other duties or those individuals may have other duties beyond the scope of that -- sitting within that body and those materials wouldn't be as important and wouldn't be as relevant. So, we say it's best not to embark on a process of seeking --

THE CHAIR: Do you want to limit it to only documentation that has actually been presented to these committees?

MR LEITH: Presented to, prepared for, or generated by them. That's the basic parameter that we're proposing, sir, yes.

THE CHAIR: If it's not actually discussed at a meeting or actually presented at a particular meeting, but it was prepared for that particular board, how do you identify that?

MR LEITH: I might have to take instructions on that, sir, but I would imagine if material was being prepared and compiled for a particular function of the business, it could be identified by reference to those kinds of bodies. There'd have to be some kind of proper process put in place through the disclosure review that would ensure that those kinds of materials were captured, even if there was, in the end, no actual meeting. If the purpose of it, if it was, as we've said, prepared for those bodies, then they'd have to be searches that are appropriately tailored to capture those materials.

THE CHAIR: You say it would be disproportionate to have to provide a list of key custodians and to search by reference to them.

MR LEITH: Yes. That's the basic point, because there's this alternative proposal -- the one we've made -- is much more likely to capture the materials that are really important and that present the concluded, comprehensive view, based on the compilation of internal analysis and thinking and so on. That's just simply how the nature of decision-making in the course of business -- that's the best way of finding material that's important and helpful.

There was a point made about communications with investors. In my submission, these are unlikely to add very much to the documents prepared for and generated by these kinds of bodies. Sir, as you know, communications with investors very often tend to be more succinct, if I may say, than the materials that are presented internally, and so it wouldn't be incrementally useful to conduct searches of such communications and --

THE CHAIR: I assume, yes, whatever is being communicated with investors will have been considered in detail by a suitable body.

MR LEITH: I would imagine so, yes. So I don't see that creating a further set of search parameters aimed at investors specifically is going to add anything to what we've already proposed to try and find.

I think there was a point made about independent industry reports and whether we'd search for material that's public. I understand us to have said that we're not limiting -- this is in our letter, the one I showed you earlier, sir, G133. We've said we're agreeing not to limit disclosure under requests to documents not already in the public domain.

THE CHAIR: Which paragraph, sorry?

MR LEITH: This is in paragraph 4(c) of our letter. (Pause)

At the start:

"In particular, the defendants have, as set out below ..." [as read]

I think "agreed" is missing from there:

"... [agreed], as set out below, not to limit disclosure under these requests to documents not already in the public domain." [as read]

So I think --

THE CHAIR: So even if a document is in the public domain, it will still be public, subject to the disclosure.

MR LEITH: Well, yes, for those requests, I think the point that was being made is that we had at some stage said that independent industry reports, if they're in the public domain, we won't look for them. Well, that's not a point we've -- you know, this is a compromise that we've made, so I think that this doesn't arise.

On Trial 1 and Trial 2 disclosure. So what's happened is initially, in the iterative process of the Redfern schedule, for a few requests, 1.1, 1.2, 1.4 and 6.2, the defendants' initial response to the request was to say, "You've had disclosure on this in Trial 1 and Trial 2. Further searches aren't appropriate." What we've since done is to say, without prejudice to that point, we will conduct further searches to make sure that what's done has been comprehensive; what's been done has been sufficient. This is again in the letter that we sent last week at paragraph 4(b).

I had understood the dispute about this to be: should the defendants go through and identify, from the Trial 1 and Trial 2 disclosure, the documents that we rely on? I think at one point, my learned friend said that wasn't what he was seeking, but if I may just address that just for completeness, because I was, I confess -- this is my fault, I'm sure -- not completely sure what was being sought.

It's not necessary or reasonable or part of the disclosure process at all for a party to have to identify documents it's relying on from a body of material. That would be a matter for the presentation of evidence and so on at trial. The suggestion that in any case, the claimants are disadvantaged by not having this is quite hard to understand, if I may say.

If I could just show you, sir, one of the requests where this point arises. This is request 1.1. This is in the Redfern schedule at C tab 16, page 214. (Pause)

So have you got that, sir?

THE CHAIR: Yes.

MR LEITH: The requests for documents setting out the rationale for MIFs, including an A, B, C, D guideline for rate setters, commercial policies, analysis of specific decisions and minutes, packs, appendices and so on for decisions.

I mean, if the claimants aren't in a position themselves to identify documents that correspond to those categories, well, they -- if I may put it another way, they ought, really, to be able to identify for themselves any documents that correspond to those categories from the material they've had for some years.

So it's difficult to see why the defendants should be put to the trouble and indeed the cost of going through materials for the claimants for a considerable period, to tick a box on the disclosure platform saying, "This is the kind of thing that would fall within the category of guidelines for rate setters", where material that's common to the parties.

There was a point about CICC not having been party to trial. We have no objection to CICC having access to this material, we've said so in correspondence.

THE CHAIR: Going, obviously, into the Trial 3 confidentiality ring.

MR LEITH: Yes.

THE CHAIR: Yes. I assume this usual undertaking lies in the CAT, does it? That documents disclosed in one set of proceedings are --

MR LEITH: Yes, that's the usual rule.

THE CHAIR: Can't be used for another.

MR LEITH: That's true, sir, yes. Well, maybe we should think about that.

THE CHAIR: There needs to be some sort of release from that.

MR BEAL: Because we're Umbrella Proceedings in separate trials, I don't think the collateral use obligation applies. But you still need to maintain the confidentiality, in particular for those clients who've settled out and are no longer before the Tribunal. But, strictly speaking, we are one set of proceedings: the Umbrella Proceedings, formally.

THE CHAIR: Sorry, does that include CICC?

MR BEAL: Yes, because they were admitted to the Umbrella Proceedings for the purposes of Trial 3 (overspeaking) and the application they made.

THE CHAIR: Oh, right.

MR LEITH: Yes, they're host cases, I think, for exemption.

Back on document requests, just taking my learned friend's submissions in order, there was a point about informal studies or analysis. This is one of the points where we had proposed to look for informal studies or analysis, and we're proposing to do so where these were provided to, prepared for, or generated by these various bodies. I think the point of disagreement, if there is still one, is as to whether it should be those bodies or by looking at the custodians.

Just to make one further point on custodians, if I may. Firstly, there'd be a process of identifying custodians, but it's really then the further process of then reviewing any of their electronic materials, their emails and so on, which runs into the millions and millions of documents. So that's where it becomes disproportionate, I think. So you've got that point already, but just to make clear that -- you know, we'd say, at least on our initial view, 100 custodians, and then you're looking at millions of documents. So the question is whether that's proportionate by comparison with what we have proposed, and we'd say it's not.

THE CHAIR: I think Mr Beal said that they'd accepted Visa's suggestion, but I'm not sure exactly what the suggestion was, in this respect. (Inaudible) studies.

MR LEITH: I think that was, as I recall -- my note is that Mr Beal said that Visa had accepted that they would do some further searches beyond the Trial 1 and Trial 2 disclosure for those requests where we'd said, "Oh, there's some overlap with Trial 1 and Trial 2." Both the defendants have proposed to do that, so it's not just Visa that's accepted --

THE CHAIR: Well, this was in the context of these (overspeaking).

MR BEAL: Paragraph 32 of the Mastercard's skeleton, is the concession.

MR LEITH: Yes, so it's not -- sorry, yes.

MR BEAL: The suggestion I made was that was acceptable as long as we extended it to key personnel as guardians or custodians.

MR LEITH: So that's the -- sorry, sir, I'll let you find paragraph 32.
THE CHAIR: Sorry, paragraph 32 of ...?
MR LEITH: Of Mastercard's skeleton. Last page.
THE CHAIR: Oh, the annex?
MR LEITH: Yes.
THE CHAIR: Yes. (Pause)
MR LEITH: So the point, sir, is we're saying that it wouldn't be proportionate to look for informal studies or analysis by using this custodian-based searching, where we'd identify, say, 100 custodians and have to trawl through all of their material to find such informal studies or analysis. We're happy to look for such materials by looking at the materials that are provided to, prepared for and used by, or generated by these decision-making bodies: the board, executive committees, other relevant committees.
THE CHAIR: It's the same point as the first one?
MR LEITH: It's the same point. Because it was dealt with in that order, I just dealt with -- I have repeated myself, sir. Yes.
There's a point made: where documents pertain to multiple requests in the Redfern schedule, we should say so and tag them in some way. I mean, again, this is something we just say is unnecessary. If the documents are responsive to the Redfern requests or to the searches that have been ordered, it will be disclosed and the claimants can then form a view as to its relevance and how it might be useful to either side. This just adds a layer of unnecessary work and expense, because the material is going to --
THE CHAIR: Once you have decided that it responds to one of the requests, then it's in, and if it also satisfies one of the others, you don't need to identify that.
MR LEITH: That's the position -- I mean, that's our submission as to the approach, sir.

THE CHAIR: Yes.

MR LEITH: Because otherwise, you're putting an extra layer of administration, really, into the --

THE CHAIR: I'm not sure why it really matters. I mean, it's sort of ... I mean, it's been disclosed. It's then up to the claimants to make of it what they want.

MR LEITH: Yes. I think that's exactly so, sir.

THE CHAIR: Yes.

MR LEITH: I think the last point, then, is on scheme fees, which is -- maybe we can turn to that part of the Redfern schedule, which is a request 6.8 on -- so this is C, tab 16 page 225.

So the request is -- in the first column -- data on transactions and so on, and scheme fees incurred by merchants.

Now, the first point we have on this, the first observation, is that, as you've said, sir, to my learned friend: merchants themselves don't pay scheme fees. If the point was then made, "Well, they ..."

THE CHAIR: Nor do they pay MIFs (inaudible) or the MSC.

MR LEITH: That's right. So there's the question of pass-on, but the issue that then arises is: well, is there actually going to be data? What is being asked for here?

So it's not purely a semantic request or a semantic point; the disclosure that is actually sought is of data as to scheme fees paid by merchants. So it's not clear on what the target is, really.

Leaving that point aside, as to the rationale for this request -- this is in the second to last column on the right, and it's the fourth bullet point. This is where the claimants provide some explanation as to why this is being sought. They say:

"Scheme fee data is essential to understand the defendants' ability and incentive to innovate to the extent that issuer-driven innovation would be lower in the zero MIF counterfactual as pleaded by the defendants, as the Schemes may react by reducing issuer scheme fees." [as read]

Sir, it's right that Visa has pleaded that scheme fees may be reduced in the counterfactual. Mastercard hasn't pleaded that. So there's a difference between the defendants on that point. I just note that.

But there's a more general answer to this, which is that the suggestion that scheme fees would be relevant to the defendant's ability and incentive to innovate, which is the point that Mr Beal then returned to, is an unpleaded point. He repeatedly said that this was a highly relevant and material factor in consideration, but something that the claimants themselves haven't actually pleaded as having a bearing on the question of innovation. Nowhere do the claimants in their statement of case suggest that changes in scheme fees in the counterfactual could have any effect on innovation by the Schemes.

THE CHAIR: They presumably plead what the counterfactual is.

MR LEITH: The claimants?

THE CHAIR: Yes.

MR LEITH: I mean, it's quite a lengthy, detailed pleading. I'm not sure I can do it full justice, but I think it's more in the nature of saying that the Schemes are put to proof as to their counterfactual, with, you know, quite -- over some pages.

THE CHAIR: So these are (inaudible) that the scheme fees could have been adjusted in the counterfactual, because there's no MIF.

MR LEITH: That's right.

THE CHAIR: And that could be in a number of respects, couldn't it? It could be an increase in scheme fees paid by acquirers; it could be a reduction in scheme fees to issuers. I think they just want to know what is likely to happen in the counterfactual.

MR LEITH: That's the question. How would this disclosure have a bearing on the point that they've raised, which is: would it affect the scheme's ability to innovate? That's something that they haven't sought to make an issue in their statement of case. So it's a, if I may put it this way, quite speculative point, as to how --

THE CHAIR: I thought it's the Schemes' point: that issuers would not want to innovate where they're receiving less money from the Schemes in order to do so.

MR LEITH: That's right. But, nevertheless, the question as to how scheme fees might be changed is not something that the claimants have sought to suggest would actually have a bearing on innovation in the counterfactual. And so, it's quite a tangential request.

THE CHAIR: But it's talking about whether issuers would change their behaviour as a result of receiving less money from the Schemes. It must be relevant to that, isn't it?

MR LEITH: Well, if it were relevant, you'd think it would have been relied on by the claimants, but it hasn't been, so this is quite detached from the way that the cases have been.

THE CHAIR: But anyway, the issue is raised by Visa at least. I mean, you say Mastercard don't similarly plead that, but it is an issue.

MR LEITH: Yes, it is an issue, sir.

Sorry, (inaudible) have my -- just to check my instructions, sir. Sorry. (Pause)

I'm very helpfully reminded that the request is for the current scheme fees, or scheme fees in the actual world -- the data as to scheme fees that have actually been paid. The point that I think you're putting to me, sir, and that was being made by my learned friend, is as to the counterfactual. So if the question -- if it's of interest to --

THE CHAIR: You can only work out the counterfactual from what's going on in the actual, can't you? I mean, you need evidence as to the actual to work out what is likely to happen in the counterfactual.

MR LEITH: Yes, but you have then got this question as to the connection between the factual scheme fees, and then the question of innovation in the counterfactual. There's several stages of reasoning, and it hasn't been spelled out or addressed by the claimants.

THE CHAIR: Are you saying it's difficult to provide this document, this disclosure, in relation to scheme fees or are you just objecting on a point of principle?

MR LEITH: It's a point of principle.

THE CHAIR: Right. (Pause)

MR LEITH: Thank you, sir.

THE CHAIR: Yes.

Submissions by MR BEAL

MR BEAL: If I may very briefly, firstly on comparable markets: please could we invite the Tribunal to make a direction that we are notified of those markets by 12 June 2026, which I'm told is 49 days.

Next point: internal/external communications. This ties in also with informal studies. The crystallised position is: should that be restricted to the formal committees or semi formal committees operated by the defendants, or should it also go to the key custodians of the data, i.e. the principal people involved in the decision-making process?

My learned friend suggested it was disproportionate to give disclosure from key custodians, which, with the greatest of respect, is a surprising submission and one which would not land well in the commercial court. But it's also with greater respect, excessively formal. The idea that it's only something that formally goes before a specific committee for formal decision by that committee will ignore a slew of evidence, which is galvanising the decision-makers to make the recommendation they do for any given decision. Those key decision-makers are where the power lies, and where the decision-making responsibility lies, even if they are formally convened in a formal committee. Comitology should not be the determinant; it should be who is likely to be the most useful and fruitful source of the key material that is going into the decision-making process.

THE CHAIR: You say that some members of those committees, those decision-making bodies, will have had -- well, individuals on that would have had information that hasn't necessarily gone to the committee itself, and which they will have taken into account in ultimately coming to the decision.

MR BEAL: Yes, because we all know, in comitology the fewer documents you have, the better. But you are bringing to the decision-making process an accrued knowledge based on other material. Because we're only seeking this from the key custodians, which we're inviting them --

THE CHAIR: When you say, "key custodians", what do you actually mean?

MR BEAL: Well, the key personnel who are decision-makers, the senior personnel.

THE CHAIR: So it is the members of these committees?

MR BEAL: They should be members of the committees, but they might not necessarily sit on every committee. The composition of a committee may vary, I don't know.

THE CHAIR: Are you inviting the defendants to identify these key --

MR BEAL: That's exactly what we've done in our request. Wherever we've mentioned this -- I think it was at 1.3 at the start -- we said, "Please provide a list of the key personnel".

THE CHAIR: As you say, it is slightly curious not to have a list of custodians for the purposes of disclosure.

MR BEAL: So that deals, I think, with two of the points.

One of the points was on investors. It was said, "Well, the communications with investors might be succinct; if they're succinct, it's not going to be disproportionate to produce that evidence", but again, it's a restriction by reference to comitology that is the problem. If you've got a senior exec at European level who has written to investors saying, "This is what we're going to do as a key member of the personnel team", that may or may not have gone before a board or a subcommittee, one doesn't know, but it will be an important communication. It may have been considered, in abstract, by a board and then the specific wording is then vouchsafed by the personnel, because he or she has been given delegated authority to send the final communication along the lines that have been outlined, but there's specific communication that only goes from the key custodian.

On Trial 1, Trial 2: can I please give you an example of request 5.2 of what we're talking about. So 5.2 at page 222: the request is for documents and analyses assessing the relationship between credit terms and cardholder spending. We say that it's necessary to test the claim about improved credit terms being attributable to the MIF. The response is:

"The defendants' note that they do not dictate or control how issuing banks use their MIF revenue. The defendants also note that they have already provided disclosure in relation to this request in Trial 1. Nonetheless, the defendants agree to undertake, et cetera, reasonable and proportionate searches to the extent those searches have not already been completed for Trial 1." [as read]

And we simply don't know why that issue, which was not necessarily a Trial 1 issue, would have generated the relevant search results in --

THE CHAIR: (Inaudible) and they will be disclosed.

MR BEAL: That's correct, but the difficulty we've got is: if they say, "Well, all of the disclosure that you've got from Trial 1 already satisfies that term", we're in a position where we don't understand on what basis they say they've done the job. Given that they have to satisfy themselves that they've done the job, one would envisage that they are making sure that the disclosure that was given meets that requirement.

THE CHAIR: What are you saying in relation to -- are you saying that they have to actually identify the documents that were disclosed in Trial 1 that respond to that?

MR BEAL: If they simply carried out the search afresh for that material, they would be having search terms for that material. The difficulty we've got is that we don't know on what basis they're saying that the search terms that went in previously -- because we don't know fully what they are -- do the job of looking for documents that fall within this category. So if they were simply to introduce new search terms for the previous material that they've been through, they would need to identify those documents.

We say it's the same process, even though the disclosure exercise has already produced a bucket of documents that they are then conducting the search by reference to it. It's simply a way of ensuring that there is an adequate and proportionate search across the entirety of the material. Simply saying, "Well, we did this before", is not going to discharge that duty. Those are the only submissions I propose to make in response.

THE CHAIR: I think maybe we should take a break now and then I'll give my ruling on those. After that, we've got the other request, the defendant's request.

(3.10 pm)

(A short break)

(3.20 pm)

Ruling

THE CHAIR: There is no time for me to give a long and detailed judgment on these matters, so I will just deal with the points raised by Mr Beal in relation to the claimants' Redfern request and the broad points that were raised and responded to by Mr Leith.

First of all, as to geographic scope: the point has largely now been agreed, with the defendants agreeing to provide documentation in relation to comparable markets. It was also agreed during the course of the hearing that those comparable markets will be identified and disclosed to the claimants. I see no reason why that should not be done by the date suggested by Mr Beal, namely 12 June 2026. That is all that I need to deal with in relation to geographic scope.

In relation to document types, the defendants wish to restrict their searches to documents that were prepared for, presented to, or generated by: a) boards of directors; b) executive committees; and/or c) any other committees or governance bodies with relevant responsibilities.

That does seem to me to be limiting their disclosure obligations too far. While there will have been reports and other forms of documentation prepared for those bodies in order for important decisions to be made, it seems to me that there is also likely to have been other documentation relevant to the issues that was received or prepared by members of those bodies, but outside of the formal proceedings and meetings of them.

It would be the normal course for disclosure of this sort, certainly in commercial proceedings, for it to be done by way of the identification of key custodians, as suggested by the claimants. Mr Leith said that this would be disproportionate because there will be many such custodians, who I assume will largely be the members of those committees. However, it does strike me that it is necessary for this exercise to be conducted by reference to custodians, and it will be up to the defendants to identify those custodians and then make appropriate searches. I am therefore going to direct that the disclosure of documents should not be limited in the respect that the defendants have suggested, but that the document types should include all relevant documents going through the key custodians.

A point was also raised by Mr Beal in relation to external communications, and he specifically mentioned communications with investors. I think that that is perhaps straying outside the proper scope of disclosure in this case. Any external communication, as Mr Leith said, would likely be more succinct than any reports or documents prepared for the governing bodies. It does seem to me that that would only likely happen after a decision has been taken by the board, or under the direction of the board, so the substantive document type that I am ordering to be disclosed should be sufficient to cover all relevant issues or responses to those requests.

The third matter was trial 1 and trial 2 disclosure and the response of the defendants to some of the categories in the Redfern schedule that those documents may have been disclosed or fully disclosed in the trial 1 and trial 2 disclosure. The claimants seem to be asking for the defendants to identify either what documents from that disclosure the defendants will be relying upon in trial 3, or what were the actual relevant documents from that previous disclosure.

It seems to me that this is really not a matter that the defendants should be obliged to do. It is something that the claimants have to work out from the disclosure that is given. They have had the trial 1 and 2 disclosure. No doubt, they will be going through that for the purposes of deciding what is relevant from that for trial 3. I do not think it would be proportionate or necessary to require the defendants to identify which specific documents from that disclosure are either relevant or that they are relying upon at this stage. It will obviously become clear at a later stage which actual documents they are relying upon.

In relation to informal studies, it seems to me that that is -- whatever the distinction between formal and informal studies -- a matter that is really covered by my ruling in relation to document types and that that should be disclosed by reference to the custodians that have been identified. If there are any such documents that do not otherwise fall within the formal studies disclosure request, that will be picked up by searches in relation to those key custodians.

The fifth category is multiple requests and this is where documents might respond to more than one of the requests in the Redfern schedule. Again, it does not seem to me to be sensible or proportionate to require the defendants to disclose exactly which requests a particular document is being disclosed pursuant to. Once they have satisfied themselves that it has to be disclosed pursuant to one of the requests, it is going to be disclosed and it is up to the claimants then to work out, if they need to, whether it might also have been a response to a further category.

Finally, in relation to scheme fees, the defendants were objecting to paragraph 6.8 of the Redfern schedule, insofar as it covers scheme fees, and not just MSCs and MIFs. I do not see that this is a relevant distinction that can validly be made. The scheme fees are relevant to the counterfactual insofar as whether scheme fees will change when there is no MIF. Visa itself has pleaded that this may be an aspect of the counterfactual, that scheme fees might have been adjusted if there was no MIF. It being an issue on the pleadings, I see no reason why documents in relation to scheme fees within requests 6.8 should not be disclosed.

Those are my rulings.

(3.29 pm)

THE CHAIR: All right. So now on to your Redfern, Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: So this is the defendants' Redfern schedule to the claimants. I start, if I may, with the approach which the Tribunal should take to the claimants' disclosure in the context of exemption. I would ask you to take up the claimants' skeleton argument. You may have it loose, but it's in the first hearing bundle on page 34.

THE CHAIR: Sorry, the claimants ...?

MR KENNELLY: The claimants' skeleton argument. Paragraph 7.1 on page 3 of the document.

THE CHAIR: The "burden and standard of proof"?

MR KENNELLY: That's the one.

THE CHAIR: Right.

MR KENNELLY: I'm taking you to this because just to remind the Tribunal, you know this well, it bears repeating when one thinks about the kinds of disclosure the claimants will need to give in order for justice to be done, because the defendants do, it is true, bear the burden of proving that the exemption conditions are satisfied. It's common ground that cogent empirical evidence is required and the relevant benefits must be causally linked to the restrictions. Causation must be established by facts and evidence, supported by empirical analysis and data, not just economic theory. The causal link must be sufficiently direct to be capable of proof.

And that, of course, is all taken from the Supreme Court in *Sainsbury's*. That is a tough test for the defendants, not least because the evidence as to the specific benefits received by the merchants will generally be in the hands of the merchants and not in the hands of the defendants. Disclosure from the claimants is critical if the defendants are to have the opportunity to discharge the heavy burden placed on them.

Unfortunately, the claimants show us little sign of recognising that in their approach to disclosure in this case. We see that from their high-level objections to the defendants' requests that have prompted them to refuse so many of them.

Staying in the claimants' skeleton, sir, I'd ask you to turn to paragraph 25. We have the first of their high level objections. It's on page 11 of the document itself.

The first point is paragraph 25, "who is to give disclosure and of what". They note that Mr Holt proposes that a smaller sample of lead claimants should answer all the requests and a larger Base Sample should answer only a subset but they say neither Mr Holt nor Visa identify which requests a larger Base Sample would be required to answer.

Stepping back, you will have seen, sir, that there are about 482 claimants in the litigation, according to Mr Mansfield, suing the defendants for millions of pounds, as we know.

THE CHAIR: As of a couple of weeks ago. As of a couple of weeks ago.

MR KENNELLY: As of a couple -- well.

THE CHAIR: Seems to be a bit more now.

MR KENNELLY: Yes, indeed. Indeed. And they are at least currently mostly large merchants; that's also common ground. The Tribunal has heard, and you've seen it just now in the claimants' skeleton, that a sample of 38 claimants will be selected to answer some of the questions and from them, a group of 15 will be asked to answer all of them. Only 15 claimants have to answer all of the requests and that is relevant. That figure is relevant when allegations --

THE CHAIR: That's your figure. I mean, that's Mr Holt's figure, isn't it?

MR KENNELLY: Yes, indeed.

THE CHAIR: Yes.

MR KENNELLY: Yes. It's common ground that that's --

THE CHAIR: Been agreed, yes.

MR KENNELLY: Indeed. But when one thinks about whether this is an oppressive exercise, the fact that only 15 are being asked to answer all the questions in the context of a group action, really, where there are nearly 500 claimants, is relevant. Of course, Mr Holt cannot say precisely which parts of the requests need to be addressed by the 38 until he knows what the Tribunal will allow for the 15, because if the Tribunal cuts back on the requests for the group of 15 that will affect which requests he formulates for the broader group of 38. It affects the smaller sample of queries that he asks the broader group to answer. He explained this in his 17th report. Could I ask you to turn to that. That's in the first hearing bundle, tab 20, page 349, paragraph 22.

THE CHAIR: Yes.

MR KENNELLY: There's got to be a lead sample and a larger base sample that the Base Sample of 38 claimants will be asked to provide a narrower, more targeted scope of disclosure. That is the annex. The annex is seeking data and selected Redfern schedule questions.

Skipping down two sentences, he says:

"The questions directed to the Base Sample [the bit that concerns my learned friend] would mostly focus on collecting quantitative information relating to the calculation of the merchant benefit test, as opposed to information about topics such as incentives to innovate or roll out certain payment technologies."

He is explaining there what his approach will be when he comes to produce the more narrow set of questions. That should give the claimant some reassurance. But that's all he can do at this stage until the Tribunal rules on the broader set.

Turning now to the second of the claimants' high level objections in their skeleton argument, you see that, at paragraph 26, the claimants say that there's no need -- and I paraphrase -- to give disclosure when publicly available documentation may be sufficient. They're saying that don't need to consider what they may have to provide by way of disclosure, because publicly available materials may be sufficient to address the relevant issues. They don't try and reconcile that with the strict requirements for empirical evidence showing a direct causal link between the MIFs and benefits to merchants.

You see Mr Holt's evidence that the best evidence on benefits to merchants comes, unsurprisingly, from merchants than from wider sources which may complement, they cannot replace, the evidence from merchants themselves.

The claimants go on to say that the defendants haven't considered this, and they point out some sources which they say may be of assistance. Publicly available material. They produce a list, and we'll come to that, but if you look at paragraph 27 of the claimants' skeleton -- it's about four lines down -- they don't claim these sources they've identified are relevant or reliable or have the correct scope.

THE CHAIR: (Several inaudible words).

MR KENNELLY: Indeed. Two broad points in response. The first is that Mr Holt has, of course, taken the public sources into account and he explains their limitations. And for that, I'd need to take you to his report. It's in the third volume -- this is a different report -- the third volume of the hearing bundle, at tab 145, it's his fourth report. I'd ask you to go, please, to page 1612. This question of the adequacy of public domain evidence has already been raised in the past.

THE CHAIR: Which page?

MR KENNELLY: 1612, sir.

THE CHAIR: I've got it.

MR KENNELLY: That's just to give you the heading. Over the page 1613, paragraph 47, he is sketching out advantages of receiving data from the merchant claimants themselves before discussing features and drawbacks of the public domain evidence that was relied upon against him at that stage. At 47(a), he says that:

"The public studies often provide information that is heavily aggregated or otherwise redacted. They rely on assumptions which are either opaque or whose quantitative significance cannot be verified without access to the underlying data, and as such, any figures may be significantly skewed to a particular sector, time period or transaction types." [as read]

And it's just obvious, pausing there, that granular information from merchants themselves will be more useful. If you think about an example such as contactless technology, in relation to the question of to what extent is contactless technology led to higher sales volumes generating additional profits, it's obviously an important point in the trial. You can't just multiply the average time saved in the United Kingdom by the average margins at the UK level, because there'll be a significant difference between low ATV coffee shops and high ATV luxury retailers. Contactless will have an obviously different effect on sales volumes and additional profits as between those two different categories of merchant.

If you stick with paragraph 47(b), again, Mr Holt points out that some of these studies rely on subjective responses from merchants on which cost items vary with the value of volume of transactions, that they may have a vested interest in providing answers, which, for example, reduced the estimated cost of cash, and in past proceedings, it was valuable to be able to test these underlying assumptions with reference to merchants' internal documents and invoices. I'll come back to that.

He makes a point, finally, the last one I'll take you to, (c), that they sometimes rely on a single snapshot of data or a very short time period.

And on that question of scope --

THE CHAIR: This report is obviously quite a long time ago.

MR KENNELLY: Absolutely, but these points he's making about publicly available material generally, are valid today. In fact, we see some of that, even in the sample which Mr Mansfield has put before you for the purpose of this hearing. I appreciate that it was done at speed. It's just a snapshot desktop research. But if you go to what Mr Mansfield put before you, in the second volume, behind tab 38, page 1218. (Pause)

Mr Mansfield has set out here a table. You see at the top of the table, it says:

"List of publicly available information responsive to requests in the defendants'

Redfern schedule [for which the claimants indicated that publicly available information is likely to exist]" [as read]

If one just skims through that.

If you go over to page 1219, on top of the page, this is in relation to self-checkout and cashless checkouts across the merchant's business, and transactions and transaction volumes handled by self-checkout and cashless checkouts. Mr Mansfield refers to -- you see in the second column -- a global study on self-checkout in retail.

Then we see the time period analysed isn't provided, but multiple countries are analysed. I'm instructed that this covers -- because obviously, my instructing solicitors did a quick check themselves -- 93 retailers across 25 countries; it is not specific to the United Kingdom.

Following down that column, if you look at the time period covered and the geographic scope -- those are the two middle columns -- you see that many of these studies have the same problem Mr Holt identified all those years ago in his fourth report. At number 16, the period is just 2024. In 16, below that, it's analysed across different metrics, but multiple countries are covered.

Then below that, the period is 2019 to 2023. Of course the Tribunal knows the claim period is after 2011, so the snapshots we're seeing here are short and much more recent.

Over the page, at page 1220, again, look at the periods that are covered by the studies. Just one year: 2025, 2023 to 2024 and so on. You see the same problem at the bottom of 1220: short time period, multiple countries -- it's a global study -- and it appears that the costs are ignored in that tokenization study which is summarised.

Same at 1221: short periods, and not UK scope.

Now, that's not to say -- and the same problems arise as one goes through the table.

Mr Holt accepts, as do we, that publicly available material and public studies will complement the empirical data and evidence from the claimants, the sample of claimants who will give disclosure and data to the Tribunal, but it cannot replace them. Mr Holt said so at para 29 of his 16th report.

THE CHAIR: Well, I do find it difficult to see how it can replace them. I mean, which categories are they saying we can do without claimant disclosure because there's available public disclosure?

MR KENNELLY: When we come to look at the Redfern itself, you can see where the claimants say, "Oh, this is publicly available" or, "may well be publicly available, therefore we're not going to look to see what we have. You should examine public sources first."

In terms of burdens and efficiency, it could be far more burdensome for the defendants to scour the sources for publicly available information, find something that's not quite adequate, extrapolate it to our circumstances, and all the while, the claimants are sitting on the most probative documents, indispensable for the purpose of the defendants' defence, and they're not supposed to even search for those until we have undertaken this exercise, which may prove to be futile.

Coming back to the claimants' skeleton, para 29 now. That's the objection in relation to public sources.

The next objection, at paragraph 29: confidentiality issues. They say that much of the documentation and data will be highly commercially confidential. It's a concern --

THE CHAIR: (Inaudible) had deal with that all along, haven't we?

MR KENNELLY: Well, absolutely. But they say that the fact that it's confidential is relevant to the proportionality of its disclosure, and that a higher relevance threshold should be applied for disclosure of commercially sensitive information.

Now, to be clear, since the claimants haven't actually identified any documents, any specific documents, they're talking about potential confidentiality. They say they shouldn't even be required to search for such information, because it is potentially confidential. There is no authority cited for that.

Of course, the Tribunal, as you just indicated, sir, is very familiar with ensuring that the receiving party has the fullest possible access to relevant information, while ensuring the disclosing party's confidential information is protected. That is, of course, by way of a confidentiality ring. The Tribunal uses confidentiality rings to protect the most sensitive business secrets, litigation before it, and ensures that disclosure shouldn't be inhibited by concerns about confidentiality.

The claimants are seeking to be excused from carrying out a disclosure exercise in respect of particular requests because the disclosure might throw up confidential materials.

The claimants' next point is on paragraph 30: the overlap of requests with annexes. They say, in paragraph 30 their skeleton:

"In many cases, the documentary disclosure sought overlaps wholly or in part with information requested by Annex 1, which is a survey on costs of payment methods, and for Annex 2, a data template." [as read]

In the time available, I'm not going to take you to the annexes themselves. Annex 1 seeks data --

THE CHAIR: (Inaudible) the annex to your Redfern request?

MR KENNELLY: Yes.

THE CHAIR: Yes.

MR KENNELLY: Annex 1 seeks data and some information. Boxes are sought to be filled in. Annex 2 is all data; a very dense data request.

The claimants' point is that where there's an overlap, they shouldn't have to provide documents at all. They say it's disproportionate and unnecessary; it'll be sufficient to give the data and the summary information.

Now, we have made clear that where the response to a request would be duplicative of the data provided in the annex, the claimants don't need to provide it twice. We don't need the same information twice. But as you'll see when you come to look at the response in the Redfern schedule, in many cases the information sought cannot be reduced to a data point, and therefore we do need documents to give the information that we seek. It's not a question of a number.

I'll give you an example of that: information that cannot be reduced to a data point. Just briefly, if we look at the Redfern schedule now, I'll show you what I mean. It's page -- I had it taken out of the bundle. I think it's behind tab 16, the first --

THE CHAIR: I (inaudible).

MR KENNELLY: I'm obliged. If you go, please, to page 181.

THE CHAIR: Yes.

MR KENNELLY: At the top of the page -- it's paragraph 8 -- "The request in question", the very first line at the top:

"... many of the points, the claimants have said that information will be provided through the Annexes, the requests in question concern points that are not in fact sought in the annexes at all, or cannot be easily reduced to a data point." [as read]

I'll give the example -- I'll come back to this -- of matters such as a certainty of payment ease of online checkout, protection for fraudulent transactions and qualitative points, and so on. I don't want to take you to the specifics now, because you'll see those when you come to look at the requests themselves. But many of those points cannot simply be reduced to a data point.

But moving away from the information and asking whether documents are necessary, they are obviously necessary to validate, among other things, the accuracy of the responses in the annex. Since you have the Redfern before you, if you go to page 180, on paragraph 5. It's near the end of the second line, paragraph 5, we say:

"Disclosure of documents provides an important evidential basis for assessing the accuracy and completeness of information provided through the Annexes. That is because completing the annexes is not a mechanistic exercise; in many instances, it involves the exercise of judgment and a degree of subjectivity or discretion. For example, where information is sought as to costs, certain activities through the Annex, the merchants completing the Annex may need to assign certain costs, and issues such as this give rise to potential problems of accuracy and consistency [and reference is made to the *Asda v Mastercard* judgment from 2017] ..." [as read]

This is worth saying, because it shows how -- this is a long running case, but we have learned lessons along the way, and this is one of them. May I show you briefly, sir, this authority to show you a problem Mr Justice Popplewell observed. This is in the first authorities bundle, behind tab 10. (Pause)

THE CHAIR: Yes.

MR KENNELLY: You see there, at the end of page 396.

THE CHAIR: Yes.

MR KENNELLY: This is a judgment you've seen before at the earlier (inaudible) litigation.

THE CHAIR: Yes.

MR KENNELLY: If you go, please, to page 503. (Pause)

THE CHAIR: Yes.

MR KENNELLY: The learned judge was considering whether costs were fixed or variable for applying the merchant indifference test to understand it at this stage. At paragraph 349, he makes the point that, "Whether a cost ...", this is three lines down on 349:

"Whether cost is fixed or variable depends upon the time frame being considered for the analysis." [as read]

If you skip ahead, please, to page 507.

Because of course in that trial, the claimants answered questionnaires, but then also had to give documents in relation to these very questions, this question of fixed and variable costs. Because we have the documents as well as the questionnaire responses, it was possible to test them with the documents.

At subparagraph (3) on page 507, Mr Justice Popplewell, as he then was, observed:

"The responses of some individual claimants illustrate the unreliability of subjective judgments. In evidence before me were answers which had been given by claimant merchants to the request for information. These are proceedings which, amongst other things, require the claimants to categorise costs as fixed or variable. There were significant differences between the ways individual claimants categorised the costs in its RFI response, and where the same claimant categorised them in response to [a different survey; the Deloitte survey]." [as read]

Because we had those documents, we could test the accuracy of the information provided in the questionnaire, and the same would be true of data inputs (inaudible) annexes in this case.

The claimants say, in paragraph 30 of their skeleton, "There is no ..." and I'm quoting there:

"There is no valid basis to second-guess the information provided in good faith in response to the annexes." [as read]

But the annexes are being completed by litigants in this litigation, and they need to be capable of being tested, just in the same way as a witness statement needs to be tested, even though it's accompanied by a sworn statement of truth.

THE CHAIR: They do need to answer the questions in the annex. They will need to look at the documents.

MR KENNELLY: In fact, sir, that is what the claimants themselves acknowledge in their skeleton argument. If you have the skeleton before you, you will see at paragraph 30, in that same paragraph 30, just below the halfway point:

"The Annexes will have been completed on the basis of the relevant documentation." [as read]

So in those circumstances, it must be relatively easy for them to provide the documents they've used.

Finally, the claimants say, at paragraph 31 -- this is their final objection to providing disclosure -- they refer to the use of witness statements and supporting evidence.

So what do they mean by that? We see, if you go to paragraph 32 and look at just below the halfway point in paragraph 32, the claimants say:

"Where qualitative evidence is likely to be important, a witness statement can address the point. Where quantitative evidence is likely to be important, targeted data sets may suffice." [as read]

No reference there to disclosure; just a witness statement for qualitative issues.

If you go back up to paragraph 31 --

THE CHAIR: Again, the witness statement will be done by reference to the documents.

MR KENNELLY: Absolutely, but they shouldn't be required only to provide the documents that they've used to make the witness statement. They should be, as a matter of fairness, be given the relevant documents on the issue. What they say at the top of paragraph 31, they say instead of disclosure, what they will give is witness statements, and then in brackets there, "(With supporting documents)".

What does "supporting documents" mean? It isn't disclosure. The witness will exhibit what he or she regards as the documents that support the evidence that's being given and that creates an obvious risk of cherry-picking. That's not an allegation of bad faith. A witness may, in good faith, take the view that certain documents are of marginal importance and choose not to exhibit them. But that's not his or her decision to make. That's the whole point of disclosure and why disclosure is indispensable for a fair procedure.

In these circumstances, of course, Visa bears the burden of proof on exemption, and we have to be able to obtain the evidence necessary to discharge that point.

THE CHAIR: We don't know whether they're saying this in relation to the 38 or the 15?

MR KENNELLY: No, we don't know. When you come to look at the schedule, you'll see that they cite this alternative of witness statements and supporting data sets as an alternative to disclosure. Where they acknowledge there's a qualitative issue that plainly requires something from them, instead of giving disclosure, which is what fairness requires, they offer a witness statement with supporting documents or with a targeted data set, which again is just data. That's not a contemporaneous document that throws light on the accuracy of the witness statement when it comes to be tried.

Those are the claimants' high level objections to providing disclosure. They have an overarching point that where the defendants seek documents referring, relating to or evidencing a particular matter -- because that's the formulation they've used in the Redfern -- documents referring to, relating to or evidencing particular matter, the claimants should be required to provide only documents evidencing that matter. That goes to the point that I've just made. Whether a document evidences a matter or relates to it without evidencing it, is a question for the Tribunal, not for the claimants. If the documents are relevant to the issue in question, they should be provided.

If the claimants are allowed to decide whether documents evidence these important matters or not, then there's a real risk that highly material documents will not come to light.

Finally, on this, if there are proportionality concerns on the part of the claimants that searches will be over-inclusive and overly burdensome, that can be addressed at the next stage, when we come to look at custodians and search terms. That's where those proportionality concerns can be addressed. At the high level of reasons the claimants have given in the Redfern schedule responses now are just not sustainable and they are delaying this disclosure process. We should be talking about custodians and search terms, not high level material. That's why, because of these high level responses, of the 78 requests, the claimants have agreed to 17 of them.

THE CHAIR: Well, we've only got till 4.30 today.

MR KENNELLY: Yes.

THE CHAIR: How are we going to deal with this then?

MR KENNELLY: We're going to have -- well, Mr Beal obviously will need to respond.

THE CHAIR: Yes.

MR KENNELLY: We will need to deal with these high level points orally. The granular line-by-line analysis of the Redfern schedule, the Tribunal can probably do on the papers but, in my submission, it will be necessary to deal with the -- attractive proposition that that may be -- but it will be necessary to deal with the high level objections orally. That's not really canvassed in detail in the schedules themselves. So, I will have one more point to make, and then Mr Beal will need to respond, and that will take us -- Mr Beal may need more than half an hour. I don't know how much time he needs. But we won't get through the detail of the Redfern today.

THE CHAIR: Well, we simply can't carry on much beyond 4.30.

MR KENNELLY: Indeed.

THE CHAIR: Yes. I'm not sure I understand how you're suggesting we deal with the sort of more technical points on the Redfern schedule on paper or do we -- are we --

MR KENNELLY: Sir, if the Tribunal has a concern, I'm more than happy to come back, speaking for myself, and deal with them in more detail orally. There are some tricky

points on the face of the Redfern schedule itself, things like surcharging, and whether the merchants should give disclosure in relation to their own experience as cardholders relating to commercial cards. If that's something that comes up in the Redfern schedule, I could also benefit from some oral argument.
I'm happy, and I'm sure Mr Beal is too, to come back and continue the debate before you but it can't be completed today.
THE CHAIR: In your skeletons, you just dealt with these high-level points, didn't you?
MR KENNELLY: Yes.
MR LEITH: Sir, in Mastercard's skeleton, on the remaining points, we've covered them -- we've tried to group them, paragraph 25 of the annex, into five or six categories with footnotes to the particular requests. It covers the points beyond those that Mr Kennelly's addressed. But it's right, the claimants haven't (inaudible) those points either in the skeleton.
MR KENNELLY: We adopt that useful passage to which my learned friend refers in the Mastercard annex. We adopt that. That's probably sufficient for the purpose of the high-level answers that we can address before you orally today. What I would do next is I'd invite the Tribunal (inaudible) Mr Beal to respond on the high level points and then engage with the detail of the Redfern schedule.
THE CHAIR: Which is where we are.
MR KENNELLY: Indeed.
THE CHAIR: Mr Beal.

Submissions by MR BEAL
MR BEAL: I haven't responded to Mastercard's skeleton because they were exchanged some time (inaudible).
THE CHAIR: Yes.

MR BEAL: Can I, please, make a series of introductory points. Firstly, as this Tribunal held in *McLaren* by reference to the CAT Guide at paragraph 5.87:

"The purpose of disclosure is to obtain documentary material that sits in determination of the issues raised by the pleadings and it's not to be used as a weapon in a war of attrition."

So to the extent that the very broad requests are made, essentially requiring all of the business data and business documents that go to a wide range of issues: labour costs, floor space, self-service tills, innovations, and so on, that's a very burdensome request. Even if it's only for the 15 lead claimants, it's an extraordinary -- when one looks at the breadth of the requests one by one, in the light of the annex, which we have agreed to provide detail for, it is a very burdensome set of requests that are being advanced here by the Schemes. That's particularly important because the information they're seeking is also of the highest commercial confidentiality to the merchants. It's essentially asking them to replicate for the purposes of a disclosure exercise, pretty much the operational running of their business. In circumstances where, of course, the Schemes are, for example, in competition with alternative payment providers, that brings with it a certain tension.

What I propose to do now is to deal with the various themes, but I would like to draw attention to one or two salient points on the face of the Redfern itself, starting at page 179. The first point to note, please, is that paragraphs (i) to (vii) at the top of that page, front of the page, make it a series of points which are the ambit of what is being sought by the Schemes.

(v) says in terms:

"If a claimant considers that the request can be addressed by factual evidence and/or targeted data sets with a supporting witness statement, the defendants invite the claimants to confirm this in their response to the relevant request." [as read]

So wherever we said we will give you a witness statement and the documents that go with it, that's a specific response at the invitation of the Schemes for that to be a proportionate way of doing things. Of course, we would then give disclosure of relevant documents that go to the issues covered by the supporting witness statement. It's not simply us cherry-picking the bits that suit us. The witness statement and the documentary disclosure that accompanies the witness statement will go to the issues that the witness is addressing.

Now, the witness -- if the merchant does not have a self-checkout -- imagine, for example, a very high-end luxury store, of which LVMH is the owner of quite a number, they simply don't allow self-service checkouts, for obvious reasons.

Now, conversely, an entirely online provider of goods or services is not going to be in a position where they're worried about the footfall in a particular store. Each of these merchants have a very different profile, very different interaction with the payment card system and one size does not fit all. It's therefore important, we say, to look at the annex itself, which my learned friend didn't take you to -- it's at page 140 -- because this is already doing an awful lot of the heavy lifting of the core data and detail that the Schemes are after. Page 140, tab 12.

There's some instructions as to what to do, but then the detail of what is required is not simply a data dump. So, there are passages where the client has to describe, for example, their main revenue generating business. Then at page 141, a series of textual questions about merchant basic information:

"What's your split between face-to-face and distance transactions?"

"What's your split between different payment types?"

"What's the split between different payment types for a number of transactions? [There's actual or estimated.]"

"On what basis are you giving the data you're giving? Please provide turnover, [et cetera]."

And then as one tracks through, there are a series of sub-items. Page 142, merchant labour costs is then dealt with in detail, over four or five pages, including qualitative, i.e. not just a data dump, it's actually, "How do you do this? How do you transport cash? How do you deal with deposits of cash at the bank? What's your transport system? Have you outsourced any tasks? What's your back office arrangements?" True it is that we then come onto page 146 where there's a request for specific figures and hours to be given but all of this is a very detailed, extensive analysis of the core operations of the business. These are specific categories of information that the Schemes have themselves sought. In a number of our responses, we're saying, "Well, look, we can see the relevance of what you're doing but given that we have to put this to the merchants, why don't you add something into this annex to cover off that point, and then they can do it all in one go and it's there in one form of information?" And it's --

THE CHAIR: Your clients will have to gather various documentation and information in order to complete this questionnaire?

MR BEAL: Yes, they will. And the 15 sample claimants will also then be doing witness statements, as I mentioned earlier, and they will be providing the documents necessarily that they're relying upon in order to provide this information to the Tribunal. Now, the difficulty with providing certain of the documents is --

THE CHAIR: Sorry, you're saying that the completion of this questionnaire, or whatever we call it, the annex, that that should replace the obligation to disclose relevant documents?

MR BEAL: Not for the lead 15 claimants. It's unclear to us exactly what requirements are being made of the wider pool of 38. Where, for example, they are giving management information about their turnover or about the number of hours spent by staff, that's likely to have been obtained from bespoke business software that is typically used by businesses to record information. It's not terribly easy to give disclosure of, for example, a database maintained on an Excel spreadsheet or some other form of Oracle business software, which will typically contain the standard business revenue, business expenses, some sort of human resource timing system. It's simply not very easy to give disclosure of that sort of underlying material.

What can be done, to the extent that it's necessary to do so, is the witness can be asked to give evidence to -- well, for a start, if we go back to page 179 of the Redfern, the Schemes are already asking and we have agreed to provide not simply a statement of truth in relation to the information that's being provided, but also a disclosure statement which will of course set out the sources of documentation that were searched, the basis upon which the answers are being given and so on. And that applies equally, we say, to the return of the Annex 1 and Annex 2 material.

My learned friend's right, that the Annex 2 material is a data dump. It's a series of time series for costs and expenses, as far as I can tell, and revenues. But we've agreed to give that as well. So there's an awful lot of information that is already being provided.

THE CHAIR: But you've agreed on behalf of the 15 that (overspeaking) been identified, or --

MR BEAL: I think it's on behalf of the 38 that we would --

THE CHAIR: On behalf of the 38.

MR BEAL: Yes.

THE CHAIR: Just so I understand what we're actually arguing about here --

MR BEAL: Yes.

THE CHAIR: The 38, you're going to provide Annex 2 or Annex 1.

MR BEAL: Annex 1 and Annex 2. The defendants have reserved the right to ask those 38 bespoke, but specific, questions by reference to the Redfern. So the Redfern at the moment is proceeding on the basis that all of these questions will be asked to the 15. My submission is by reference to the sample of 15 that is the first through the fence, as it were.

THE CHAIR: I don't understand.

MR BEAL: Well, my understanding is that the scheme's position is: the 38 in the base camp don't need to answer everything on this Redfern schedule. Their position is: the people who need to give every answer to every question on this Redfern are the 15 sample claimants. And my immediate response is, "Well, those 15 sample claimants are going to be the ones that are producing factual evidence". As invited by (v), they can produce factual evidence alongside targeted data sets in the basis of providing a supporting witness statement. That is a proportionate approach.

THE CHAIR: But you're saying that some of the 15 should not have to provide documents responsive to some of the requests, because the answers will have been provided in the annex.

MR BEAL: Yes. To the extent that answers are given in the annex to requests, for example, transaction data, asking for the documents that lie behind transaction data is just asking us, in a sense, to prove that what we've done by lifting data from our internal software systems has been done properly. And I say that that's utterly unnecessary, because there's a statement of truth that has to be given by the claimant, and a disclosure statement has to be given by the particular claimant, and that provides the check that my learned friend seems to want to be able to put to a witness, "Have you done this properly"?

It's also, we say, relevant to note that a large number of our responses have said in terms, "Why don't you amend the annex" -- and indeed the Schemes have done so to a certain extent in one of their answers -- "Why don't you amend the annex, and by the way, we will give you this disclosure. We'll do so most easily and most proportionately when we're settling our witness evidence". For example, my learned friend said, "Well, you've refused to answer request 5". If we just look briefly at request 5, page 185: we've accepted the relevance of that request, which goes essentially to alternative payment methods for both consumer and commercial card transactions, and documents that go to a weighing up of the advantages and disadvantages in relation to speed of payment and a bunch of other criteria. And we've said we accept the relevance of this, but to the extent it's duplicated with 3 -- dealing with administrative costs and fraud costs -- it overlaps with 3 and we've already dealt with 3 above.

Then the claimants therefore suggest that in order to simplify the process and make it more straightforward, the defendants add to annex 1 any specific requests that are relevant to request 5, which they consider incremental to that already sought in the annex. We will then respond to those additional requests.

So we're willing to give the disclosure; we've accepted the relevance of the point, but we would prefer to do so in two forms. Firstly, in an amended form of the annex that targets the information, so it's all dealt with in one go. And secondly, of course, to the extent that these claimants are giving witness evidence, they will be providing the supporting/relevant documentation at the same time.

On publicly available sources of information, our point is not that this is a substitute. Our point is: what is going on here is an attempt to find an economy-wide answer to the question of costs, benefits, advantages, disbenefits and so on.

The specific treatment by an individual merchant of what will be a very bespoke set of criteria that go into its interaction with the payment system is not likely to yield, on anything other than a highly individual basis, information that will help the Tribunal answer the big picture question. So something like contactless technology. Yes, an individual merchant will be able to say, "Yes, I started taking contactless terminals in

2015. I've relied on contactless terminals to process payments". That isn't going to give this Tribunal a sense of what the economy-wide benefits from contactless terminals is.

So what we have done in the Annex 2 to Mr Mansfield's second statement was simply point out that there are other sources out there that might give you economy-wide data, and an economy-wide view, which are more likely to provide a source of information that is helpful to determine the issues, and which is not at risk of being so individualistic that it risks not being representative of the wider picture. We've simply said to the defendants, "Have you thought about trying to find this information in the public domain, because it's more likely to suit your needs"?

Now, we haven't, and I accept this --

THE CHAIR: Is it so difficult for the claimants to provide this information?

MR BEAL: On the extent to which they've used contactless terminals, I would expect them to provide that information anyway. What is being asked, however, is much more broadly detailed than that, which is: all the information that you've ever had, weighing up the benefits and disbenefits of different alternative payment methods -- well, those alternative payment methods, there may be merchants who have only used three out of the 15 of them. There may be merchants who have never used ChinaPay; there may be merchants who have never taken Amex.

So the difficulty with getting a fragmented picture of a perceived benefit or disbenefit from an individual merchant's point of view is that it's not going to give you the economy-wide picture. So all we're saying is, "Have you looked, in the first instance, at the publicly available information before asking for chapter and verse on this from specific claimants"? That's as far as the point goes.

THE CHAIR: I think that their answer is yes, and (inaudible) need this, you're going to provide it.

MR BEAL: Well, if there was a specific request, once the composition of the individual claimant class is known -- say, for example, that of the 15 picked, none of them have ever had self-service checkouts, then how are any of them going to give evidence about self-service checkout? The trouble is that this is taking place in the abstract --

THE CHAIR: (Several inaudible words), isn't it?

MR BEAL: Yes, but at the same time, these requests are being rolled out to everyone and they do have this very burdensome aspect to them.

Overlap with the annex, I think, I've largely covered. The reality is that an awful lot of the data is already being requested in that annex; and that annex is going to be subject to the statement of truth.

Use of witness statements and target data sets: when one's dealing with proportionality -- and I made this point earlier -- of those 15 claimants, once they are told that they are the lucky ones going through for this detailed process, my estimated guess at the moment is that they are likely to say, "Well, this is quite burdensome; what's the easiest way of doing it? What am I being asked to give evidence on"? They're asked to give evidence on the issues that are in the case, because the pleaded case delineates the issues. They will look at those issues; they will say whether or not they've ever had a self-service checkout; they will say to the extent to which they've used this technology, and they will give disclosure that goes to the evidence they're providing in that witness statement.

With the greatest respect, that's a proportionate way of dealing with the disclosure requests, and as I indicated earlier, there will probably be some claimants who say, "Well, I'd rather deal with everything in one go", and you get everything in advance in October, and happily, my instructing solicitors haven't fallen over at that proposal, so there may be one or two that go down that route.

But it's important to bear in mind that this Tribunal, for example, in the Ryder case, which was part of the Trucks litigation at paragraph 41 -- for your note, that's at page 669 of the authorities bundle -- recognised that when one's dealing with large amounts of pricing and market data, that is going to be part of the data dump. As I've said, that's part of Annex 1 and 2.

The Tribunal then said, "That's not to say that evidence of witnesses of fact would be irrelevant, but we anticipate it will be of a more general nature". For example, how the original equipment manufacturers priced their trucks, the nature of the relationship between gross and net prices, the significance of configurations and so forth. The witness evidence goes to explain the pricing policies and the pricing structure and the card payment usage by a particular merchant, just as it did with Trial 1 and Trial 2. What, with respect, doesn't have to be done is the very extensive trawl for documents that go uphill and down dale on all sorts of aspects, which are simply not going to be relevant for that particular claimant.

The final point is on evidencing or referencing. This is, in a sense, with respect to simply a terminology issue. If the defendants had said, "You, the selected claimant, will look at the issues and give disclosure of matters that you're covering, which are relevant", then I suspect we wouldn't be having this rather arid debate. The trouble is they've asked for documents that refer to or evidence and that suggests there's a category of documents that don't evidence an issue, which merely refer to an issue. If what my learned friend is after is relevant documents that go to that issue, then of course, that's unobjectionable in the context of a specific claimant, when they are giving evidence on the things that they can give evidence about. What is harder is making them give disclosure of a document that might refer to something but have absolutely no bearing on it. So with respect, it's simply loose language.

THE CHAIR: What is the point here? That the witness statements will be cherry-picking the documents that support what is said in the witness statement? Or?

MR BEAL: That's a prior point. This specific objection is simply that 56 out of the 78 requests asked for documents not simply that go to, i.e. evidence, a matter but which merely refer to it. It's just a very broad formulation of what one would have expected to be a test by reference to relevance to an issue.

I mean, the standard way of dealing with documents is that they go to an issue in the sense that they are actually engaging with the issue. To the extent that that is what is meant by the word "evidencing", we've got no objection, but it's the concept of documents that refer to an issue but don't deal with it that is the problem.

Classic example is request 59. This is benefits from increased sales, including through ticket lift effects, et cetera, and rewards. Page 202, sorry.

Left-hand column, "Documents including data referring to or evidencing the merchants participation to issuer-led reward programmes". [as read]

Mr Woolfe is pointing out that we've agreed to that one. But the point is referring to an issuer-led programme, if, for example, there's a document held by a particular client that says, "Oh, well, have you seen Barclays are now offering a rewards programme that includes X", that may not have any bearing on the merchant actually engaging with the rewards programme in a meaningful sense. It's simply a reference to a rewards programme in a document, which is incredibly broad. The point is it ought to be geared towards what the defendants are actually seeking, which is the extent to which merchants would incur losses due to reduced sales if rewards programmes were less abundant, as I understand it.

Mr Woolfe's suggesting a better example at page 191, which is:

"Documents including data referring to or evidencing whether, and to what extent, the merchant has adopted or transitioned to an omnichannel business model." [as read]

Again, this concept of an omnichannel business model is somewhat new to me, but I understand it to be a co-ordinated approach to online and physical sales and a mere reference to something isn't going to be terribly meaningful. Whereas a document that says, "Yes, we've looked at omnichannel sales, this is what we're going to do. This is our proposal", is clearly relevant.

In a sense it's a semantic point, which is that if an order is given that we have to disclose documents that merely refer to something rather than actually are relevant to it, then that's unduly broad and risks putting us in breach of a direction in circumstances where --

THE CHAIR: I'm just (inaudible) understanding that what you had -- I thought that you raised the point that you should only be required to disclose documents that were evidencing?

MR BEAL: Yes. As in, they are probative, one way or the other, of the relevant issue.

THE CHAIR: That's what they're seeking documents --

MR BEAL: Well, they're seeking documents.

THE CHAIR: -- refers to or evidence and whether -- is it the "referring to" that you object to?

MR BEAL: Yes.

THE CHAIR: Right. So if they deleted "referring to".

MR BEAL: We would have no objection. There we are. That's the submission. So obviously rather --

THE CHAIR: When it says "evidencing" it means "relevant to"?

MR BEAL: Yes. Well, that's how I --

THE CHAIR: I thought that was the distinction that was being made by Visa; it certainly seems to be in their skeleton that -- but then, I see from the Redfern that that's what they're actually seeking: documents evidencing. Have I got the wrong end of the stick?

MR KENNELLY: I think it was just relevance. "Relevant to", we'd be happy with that. And if the claimants are happy with "relevant to", relevant to the understanding we have as a matter of civil litigation, that would be fine.

THE CHAIR: So take out your words "referring to or evidencing"?

MR KENNELLY: Yes and just say "relevant".

THE CHAIR: Just say "relevant". Okay, done.

MR BEAL: That's five minutes that I won't get back on a Friday afternoon. Sir, unless I can be of any further assistance, those are my submissions.

THE CHAIR: Okay. Yes.

MR KENNELLY: It's 4.30 now.

THE CHAIR: It is. I'm well aware of that.

MR KENNELLY: Sorry. I've very short points to make in reply, but the real task is to go through the Redfern schedule itself.

THE CHAIR: And it's not going to happen today.

MR KENNELLY: It's definitely not going to happen today. But may I suggest an online hearing if that is more conducive to the Tribunal. Rather than come into Tribunal physically, we could do it on a video call, if that makes it easier. We're in your hands, but we will need some time to go through the schedule.

THE CHAIR: Well, whether it's me or someone else, I don't know, at this stage. But I think that will have to be arranged outside of court. I can't say now, how are we going to deal with that one.

MR KENNELLY: (Several inaudible words) to finish on the high-level points, get a ruling from you on these high-level points, and then reformulate the Redfern request based on the high-level points. Just need to agree with the claimants. That may just introduce more delay into the process. It may be better just to get through the schedule with you, and then express a view on the request themselves in the context of the high-level objections that we (inaudible).

THE CHAIR: I can certainly decide the high-level objections that we've just been discussing over the last hour or so.

MR KENNELLY: Maybe I can find two minutes to (inaudible).

THE CHAIR: Yes, yes. Thanks.

Submissions by MR KENNELLY

MR KENNELLY: Very briefly on the point my learned friend made about no need to give disclosure where annexes are providing information to the defendants. He made very clear that the annexes are supplied for the purposes of information and data and he said that there will be no need for documents to go to the issues covered by the annexes, because they were supported by a statement of truth, and that is the check. He did not claim that it was difficult to find documents, and plainly it wouldn't be because the documents need to be assembled in order to answer the questions in the annexes that provide the information.

THE CHAIR: I think he said that they might be in some sort of unusual format, and it might be difficult to write Excel spreadsheet.

MR KENNELLY: I'm sure that can be --

THE CHAIR: I mean --

MR KENNELLY: If it's unduly onerous to somehow present the document that can be explained. There are normally technical solutions for nearly any formatting issue. The key point is a question of procedural fairness: how are we to test the answers given to the questionnaire or the data sets?

THE CHAIR: Meant to rely on the statement of truth?

MR KENNELLY: Well, if only that was sufficient. But unfortunately, how can we cross-examine witnesses with no documents going to the points that they're raising? This is as true for witness statements as it is for these questionnaires.

THE CHAIR: Yes.

MR KENNELLY: In fact, request 5 that he took you to in the Redfern schedule itself, is a classic example of why a data point isn't good enough. To go to that quickly, it's on page 185. This was a request for documents as to the advantages and disadvantages arising from alternative payment methods. That's obviously a really important point for us because we want to show that the MIFs generate efficiencies that they get through the cards, which are better than the alternative payment methods or less costly.

On that list of matters that we want documents to, where if documents relate to them we want disclosure, if we skip down to (iv) and (v), "Protection from fraudulent transactions", "Certainty of payment" and (vii) "Ease of online checkout". The ease of online checkout, certainty of payment, those are not data point issues. Data will not tell you how good or bad alternative payment methods are and where they provide data points in Annex 1 and 2, we need documents to test the answers that they give, because just as in the *Asda v Mastercard* case, as Mr Justice Popplewell observed, it is often the case that the answers given to questionnaires when tested against the contemporaneous documents do not necessarily reflect the underlying documentary evidence.

THE CHAIR: And this will be from just the 15?

MR KENNELLY: Just the 15.

THE CHAIR: Yes.

MR KENNELLY: Large merchants.

Second point was about publicly available material. We said that since we're concerned with economy wide issues, what benefit can you really get from individual merchants' disclosure? The same might be said about individual merchant information. It begs the question, what are we doing here with the sampling exercise and the clustering exercise, which Mr Holt advanced, and to which the claimant's economist raised no objection. It's obviously critical for the 101(3) exercise to understand what benefits these particular merchants take. That's crucial for working out the economy, and what are the benefits.

To your question, sir, when you asked how difficult is it actually for the lead claimants to give this information? There was no answer. There's no evidence to say that it's difficult. The point was it's probably not very useful. We say, as Mr Holt does in his report, to which no objection is made, it is useful, and obviously public material is complementary but we need the merchant material.

Finally witness statements and data sets. This is a very dangerous suggestion. The suggestion that a witness can speak to an issue, a qualitative issue, instead of documentation in support of the witness statement. Either give us just data points, the data set, or cherry-picked documents which are found to be supporting by the witness in question. That is not a substitute for disclosure. It is a recipe for injustice. It's not the procedure in the Tribunal or the High Court.

And the request 20, page 191, my final point, to which my learned friend referred, gives you a flavour of the claimant's approach to disclosure. Request 20 that he took you to, it was an important request from us. We asked for documents that I would say are relevant to the extent to which the merchant has adopted or transitioned to an omnichannel business model. An omnichannel solution is one that's facilitated by payment technology, improvements payment technology, and we want to say that's something which is driven by the MIFs.

Instead of offering a witness statement or a data set or anything as my learned friend suggested, the claimant's response is in the third column, and that is an outright refusal, "We don't agree to request 20, as you haven't pleaded this as a benefit. It's out of scope". So that was not a response that offers anything. That was just a flat "no".

That was the example my learned friend took you to, the proportionate response to the change.

Sir, those are my submissions on the points of principle.

THE CHAIR: All right, okay.

(4.37 pm)

Ruling

THE CHAIR: Given the time, I will give my high-level responses to the high-level points that have been made in relation to the Redfern schedule.

First of all, I take into account what Mr Kennelly was saying about the high burden on the defendants in relation to the exemption issues under article 101(3), and the fact that most of the relevant evidence is in the hands of the claimants rather than them, so they are heavily dependent on there being adequate disclosure being provided by the claimants.

As we have discussed, that means, principally, the 15 lead claimants that will be identified in due course by the experts as being required to provide the disclosure in response to all of the Redfern requests. So it does not seem to me, on the face of it, to be a hugely burdensome process. It might be burdensome on those individual claimants, but overall, in the context of the scale of this dispute and the number of claimants involved, it is not as burdensome as it might otherwise have been.

In relation to the specific issues that are raised by the claimants in response to the defendants' request for disclosure, the first matter is where the claimants refused certain requests on the basis that there was publicly available information and sources of information that the defendants could use as a substitute for disclosure from the claimants.

I am afraid I do not see that. I think that whilst there is clearly some substantial publicly available information, it can be no replacement for the actual information from the specific lead claimants. I think in the end, Mr Beal was really just making a suggestion to the defendants: that they go and look for publicly available information, and they may be surprised as to how much there is, which may be useful to their defence. But, as I have said, I do not see that it can be an adequate replacement or reason to not require the claimants to provide disclosure as to the specific requests.

The second point is in relation to confidentiality. The claimant suggests that much of the information will be highly confidential and goes to the heart of the way the merchants operate their businesses. That is obviously correct. It is, and the Tribunal is well used to dealing with such information through the use of confidentiality rings, as it has done through trials 1 and 2.

In terms of protecting the information, that is not an issue. But what the claimants seem to be saying is that it affects the proportionality of the requests for disclosure. I do not think that is so. The fact that they are highly confidential documents does not affect whether the disclosure should be made or not. As I have said, it can be protected in the usual way.

The next point concerns whether there is an overlap between the requests and the annexes, which set out very detailed information that the defendants are seeking from the specific sample claimants. Indeed, it is extremely detailed information that will be provided by the annexes. Mr Beal says that it should be sufficient to provide the data supported by a statement of truth, rather than also providing the documentation underlying the answers to the annex.

Again, I am afraid I do not see that. The information as requested in the annexes will necessarily have to be derived and substantiated from documentation that the claimants possess. The defendants must be entitled to these relevant documents if only for the purposes of testing whether the information provided in the annexes is correct or not, by way of cross-examination at the trial. The fact that there is an overlap between information provided under the annexes and the document requests in the Redfern schedule is not a reason for not complying with the Redfern requests.

The next point concerns the use of witness statements. The claimants' position is that some of the requests can more proportionately be dealt with by the relevant claimant providing a witness statement, together with supporting documents and/or targeted data sets.

Now, again, that is providing essentially the claimants' case in response to the defendants' case. That means that they are necessarily putting their best foot forward and providing evidence that supports their case, whereas the disclosure exercise is designed to provide the parties and the Tribunal with all relevant documents.

Given that those documents responsive to the requests would have to be searched for in order to prepare witness statements, I see no reason why all such documents relevant to the issues should not be provided by the claimants, and that the provision of a witness statement should not supplant that obligation.

Finally, the question was raised about -- an overarching point about -- whether the requests were too broad, in that it was seeking documents referring to or evidencing certain matters. But I think we resolved that during the course of the hearing, and that will now be amended to documents relevant to the particular issue.

(4.46 pm)

THE CHAIR: Those are my rulings, then, in relation to those general points. I think I have covered them all. (Inaudible) just need to work out what's going to happen to the balance of the disclosure requests.

MR KENNELLY: Thank you, sir. In view of your ruling, it may be that the claimants want to reflect on their answers to the Redfern schedule, rather than trouble you with a hearing based on the current draft; that the claimants reflect on their current position, and the parties have an opportunity to discuss that before we come before you. Then if we can't agree outstanding disputes, we'll need some (audio distortion).

MR BEAL: I think, with respect, that's absolutely right. It'll be a much more targeted process if we go away, lick our wounds and come back with different responses.

THE CHAIR: All right. Because obviously that does need to be done quite soon.

MR BEAL: Yes, it does.

THE CHAIR: Because time is ticking, and it's not actually that long way till October (inaudible).

MR BEAL: It needs to be done as quickly as possible.

THE CHAIR: Of course, if you're not able to agree anything, there will have to be some sort of hearing, whether it's a remote hearing or an oral hearing or deciding on paper. You'll have to liaise with the Tribunal to try and sort that out.

MR BEAL: Yes.

THE CHAIR: I don't think I can really say now whether it would be better to deal with it on paper or in a hearing. I suspect it will probably need another hearing of some sort. You don't agree.

MR BEAL: Well, it depends what's left to argue about.

THE CHAIR: Yes.

MR BEAL: Obviously if we come back with a revised set of answers, it's possible that the defendants will reflect on what's to be gained from ones where there are fewer disputes.

So there may be a --

THE CHAIR: (Inaudible).

MR BEAL: Yes. Well, hope springs eternal.

Could I just mention the question of costs?

THE CHAIR: Yes.

MR BEAL: I mean, we haven't quite finished as such, but my suggestion would be that costs be in the case, or if we are to have a further process at the very least, costs reserved for a further point.

THE CHAIR: Is there any objection to that?

MR KENNELLY: Costs in the case, I think (inaudible) the CMC.

THE CHAIR: It should be costs in the case, you say?

MR KENNELLY: Yes.

THE CHAIR: Yes.

MR BEAL: Peace has broken out on one point.

THE CHAIR: I mean, it is a CMC. We probably had to be here for whatever -- you win some, you lose some.

MR KENNELLY: On the subject timing for -- do we need to -- sir, we'll contact the Tribunal separately to make sure that we get a slot, or at least provisionally book one. Because it is urgent, of course, because this is only the first stage of the disclosure journey with the claimants, so we will --

THE CHAIR: We still don't know who the claimants are that you're going to be seeking disclosure from, so it obviously needs to be sorted out by that stage.

MR KENNELLY: Absolutely, but we really should progress it before that. It can be done in parallel --

THE CHAIR: Yes.

MR KENNELLY: -- but the point is it's urgent. But we'll contact the Tribunal to make sure that we get that.

THE CHAIR: Yes, sure. All right.

Well, thank you very much.

MR BEAL: Thank you very much.

THE CHAIR: If there's nothing else (inaudible).

MR BEAL: Sorry we've trespassed on your time.

THE CHAIR: Well, we got through most of it anyway.

(4.50 pm)

(The court adjourned)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?