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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 7 – Wednesday 8 July 2026

Before:

Ben Tidswell

Merchant Interchange Fee Umbrella Proceedings

A P P E A R AN C E S

Kieron Beal KC, Philip Woolfe KC, Flora Robertson, Oscar Schonfeld and Oliver Jackson (Instructed by Scott and Scott UK LLP and Harcus Parker Limited) on behalf of the Merchant Claimants and Kieron Beal KC (also instructed by Hausfeld & Co. LLP) in relation to the Host Case Application

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

Brian Kennelly KC and Daniel Cashman (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: ukclient@epiqglobal.co.uk

Wednesday, 8 July 2026

(10.30 am)

(Proceedings delayed)

(10.34 am)

Housekeeping

THE CHAIR: Good morning.

Can you hear me? Just checking if you can hear me.

MR KENNELLY: Yes. Thank you, Sir.

MR COOK: Sir, we can. You're a little bit quiet, Sir.

THE CHAIR: We've got a new microphone arrangement, I think. I'm not quite sure where it is, actually. Is that better?

MR COOK: Yes, Sir. It is.

THE CHAIR: I'll just try and speak again. I better do the live stream warning. Some of you are joining us live stream on our website so I'm going to start with the customary warning: an official recording is being made and an authorised transcript will be produced. 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.

So good morning, everybody. Welcome back.

Mr Kennelly, are you kicking off this morning?

MR KENNELLY: I am, Sir, yes. On the application for preliminary issue on economy-wide merchant pass-on.

THE CHAIR: Yes. Thank you.

Actually, one thing, before you do, there was a little bit of homework, wasn't there?

Are we going to need to deal with the amendment application in relation to the Scheme Rules? Does that need to go on the agenda or has that been sorted out?

MR COOK: Sir, it hasn't been sorted out. I think one of the disadvantages of online is I haven't had a chance to speak to Mr Woolfe. But I can confirm, I think we will be able to agree a form of words. I mean, as long as the wording is clear what the goal is, to protect our right to argue, which in due course I'm sure the form of words can be agreed between us.

THE CHAIR: Yes, very helpful. Obviously, if you have a problem with that you can come back to me on it. But we don't need to deal with it today.

MR COOK: No, Sir.

THE CHAIR: Thank you very much.

Yes, Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Thank you.

So, just a brief introduction and then I'll show the Tribunal our application. As the Tribunal well knows, in determining exemption under Article 101(3) the Tribunal will need to decide whether the benefits to merchants caused by the MIFs compensate for any harm, and in deciding the extent of any harm caused by the MIFs to merchants the Tribunal will need to assess how much of the MIFs the merchants passed on to their customers. Because, of course, it's only the portion of the MIFs absorbed by merchants that constitutes disadvantage to them that needs to be compensated by the fair share of any benefits.

THE CHAIR: Sorry to interrupt you so early on, Mr Kennelly. I'm just not sure I completely follow that. I mean, I have to say, that wasn't how I had understood the way that the test worked. In other words, the sort of salami slicing of the harm on the acquirer side of the market. Because it doesn't seem to me that's really what -- in a sense that's partly, perhaps, the issue that you are suggesting needs to be litigated. But I don't think I can accept, as a sort of statement of a proposition of the settled law, that you need to undertake this exercise in the first place in order to assess harm on the acquirer side of the market.

MR KENNELLY: I'm sorry, Sir. I'm not talking about harm on the acquiring side of the market. The point is that, at the 101(3) stage, you will have found that the positive MIF is an infringement. The question then is: can we satisfy the conditions for exemption? So we have to show that the benefits, in crude terms, outweigh the harm which is the amount of the MIF which has to be paid.

THE CHAIR: Just to make sure we're on the same page, we're talking about the second condition, are we?

MR KENNELLY: Yes. The fair share condition. But in terms of the harm for which we need to compensate, we need to isolate the amount of the MIF which is actually absorbed by the merchants. Because if they simply pass it on, subject to a volume-effects argument, then that's not harm they've suffered. That may be harm suffered by somebody downstream, but it's not harm which the merchants themselves have suffered.

So our starting point is that the benefits outweigh the entirety of the MIF, and there's no need to get into this, but if we're wrong about that, then we have to isolate the amount of the MIF which has been absorbed by merchants because that's the bit that has caused them harm, for which we need to compensate through the benefits and so forth.

THE CHAIR: Well, I'm just not sure that that's right, Mr Kennelly. I don't know that I accept that that is a proper understanding of the way that fair share exercises are to be carried out. In a way, I don't want to distract you by getting into that because I don't think it's the proper place to work out the answer to that. It's actually probably the question that needs to be determined, but is a question that might need to be determined in Trial 3.

I'm just saying to you: I don't accept as a starting point that that is the right way of looking at this.

MR KENNELLY: When I say "fair share", the fair share is the assessment of the benefits. So we have to show that the merchants benefit at the level which we claim. That's the fair share condition. The need to isolate pass-on goes to the extent of the harm, for which we claim the benefits compensate the merchants. So --

THE CHAIR: (Audio distortion) and I think I understand it that way, but I think I'm saying to you: I'm not sure that that is actually the test. Because it seems to me that what you're actually trying to do is to work out whether the benefits on the acquiring side of the market -- so effectively for merchants and consumers who purchase -- is a net positive or not. That's what you're actually trying to do.

If you go back to *Sainsbury's* in the Supreme Court and you look at the -- I mean, I haven't been right back into all the decisions but it seemed to me at least open to argument from *Sainsbury's* in the Supreme Court that you are interested in direct and indirect purchases on the acquiring side of the market, as opposed to absolutely ignoring, for the purpose of the fair share assessment, the benefits to cardholders, derived from issuers. If that's the distinction I think I'm drawing.

MR KENNELLY: I understand, Sir. Just for completeness, the issue of the extent to which any such higher MSCs were passed on by merchants in the economy as a whole is issue 14.2 in our List of Issues.

THE CHAIR: Yes. I mean I just --

MR KENNELLY: Which is under --

THE CHAIR: Yes, go on.

MR KENNELLY: So if you go to the core bundle, page 312, behind tab 20. That's where the Article 101(3) issues begin.
THE CHAIR: Yes.
MR KENNELLY: The issue that I'm addressing is the one at 14.2 on page 313.
THE CHAIR: Yes. But just because that's (audio distortion) right, does it?
MR KENNELLY: No, not at all. I think the point you make, Sir, may well be a point which the Claimants will make and that's a legal question suitable for a preliminary issue.
THE CHAIR: But when you say (audio distortion) the point, I think (audio distortion) consistent also with the point you make. Because as I understand what you're saying, you're not saying that we should be trying to slice these things up in fine detail. You're saying there should be a generalised understanding of what happens on the acquirer side; aren't you? I mean, I appreciate you’re saying that in order to do that you need to address pass-on. But you're not suggesting that it should be done at the level that was carried out in Trial 2. That's not your case at all; is it?
MR KENNELLY: It's not our case that that needs to be required. Our case on what is required for Article 101(3) has been pleaded. The question is, if we're wrong about that, in order to show economy-wide merchant pass-on, it is necessary to show that sufficiently close and direct causal connection that the Tribunal said is appropriate in Trial 2 for merchant pass-on. If that's the test, we need to know so that -- that's not our case, but if that is the test then we need disclosure in order to meet the Claimants' claim, applying that test.
THE CHAIR: Yes, I understand the reason. The reason why I pulled you up is because that's all fine and logical in the way that you've put it. I understand that. But if you stand back and ask yourself what's really going on here with the 101(3) analysis, it actually seems to me to be quite a long way away from what we're really trying to

do. Because, as I understand it, what we're doing under the 101(3) analysis is we're looking at the benefits that come across. For the purposes of the first condition, we're looking across the entire market and trying to assess what the impact is of the efficiencies and so on. But then that recognises that there might be a particular group in a particular part of the market -- in this case, the acquiring market and principally the merchants -- who suffer an allegedly anti-competitive effect as a result of that, suffer some harm, and then the exercise is to work out how that all fits together and the balance of it.

But if you're doing that, it seems to me a very odd thing to do to start to distinguish between the acquiring side of the market, the harm suffered by merchants, and the harm suffered by the cardholders who bought from them. That seems to me to be just completely inconsistent with the object of the exercise, which is to work out whether, given the efficiencies that might be established in condition 1, it should still be permitted because whoever the group is affected by it on the acquiring side of the market actually managed to benefit from that, nonetheless.

Because otherwise, what you're doing is you're just ignoring a big chunk of the harm that gets shuffled off to cardholders with pass-on, and no one ever looks at the impact on them. And that can't be the right way to apply 101(3), can it?

MR KENNELLY: Well, that's the legal point. I don't think it's suggested that we resolve that legal point today, and --

THE CHAIR: But that's not the legal point you've put. The legal point you've put is what the test would be for carrying out the exercise which I'm not sure you need to carry out in the first place.

MR KENNELLY: Yes. But that's the problem, Sir. We're not sure either way. That question of whether even our starting point is the right one is itself a legal point which needs to be resolved. Because if that's the case, it will affect the extent to which we engage with the other issues.

But even if that's the case -- even if that's the case -- well, first of all, it still may be necessary for us to undertake the exercise that we envisage happening if proximity is part of the test for merchant pass-on.

Even if you're right, Sir, and that's something -- I'm afraid the point you're making is the point which the Claimants haven't fully articulated and so that's a point we'll have to reflect on. But the core concern for us is: if it is appropriate, if it's necessary in order to show merchant pass-on in 101(3) to examine the proximity issue, if that is part of the test that has to be undertaken at the 101(3) trial, then we will need disclosure in order to be able to defend ourselves on that issue. If it's not required, if it's not part of the test, well, then our concerns change. But understanding what the proper approach is and then making sure we can defend ourselves on that issue is what's driving our concern.

Really, how we get there doesn't matter as long as it's done sufficiently quickly for us to be able to defend ourselves in time if the issue of economy-wide merchant pass-on remains in Article 101(3).

THE CHAIR: Yes, no, I understand all that. I suppose what I think comes out of that exchange is that there's actually a number of different questions, all of which are not for today whatever the position is. I'm not suggesting I know the answer to any of this or that it's any particular outcome that we've discussed.

But it does seem to me that there is first a question as to whether you need to engage in the identification of pass-on at all on the acquiring side of the market. Whether it's relevant to the assessment, I don't know what the answer to that is. But it does seem to me that that is a perfectly reasonable understanding of 101(3).

Then there's the question, I think, that you're advancing which is: if you do, how do you do it? I suppose I'm really just making the point that we're already one significant legal issue downstream by the time we get to your point.

MR KENNELLY: No, I absolutely see that, Sir. The point you make is a legal issue which needs to be addressed. Again, we're perfectly happy to include that legal issue in the preliminary issue as long -- our concern, really, as you've seen from our skeleton argument, is just to make sure that if merchant pass-on is to be included in the 101(3) trial, and if proximity is to be part of that test, that we have sufficient time to deal with it and to get the disclosure needed. That's really the concern. It's a concern about a fair process in the 101(3) trial.

THE CHAIR: I understand that. I want to talk about that. I wasn't suggesting that we put the whole lot into a preliminary issue. In fact, what I'm really saying to you is if you're asking a question which is downstream, by one removed from potentially a bigger question as to whether you need to do it at all. Whether either of those are suitable for a preliminary issue, I think, is the case that you have to make, but I'm not sure. I mean, it would be quite odd, wouldn't it, to be pursuing the preliminary issue you have identified without actually addressing the question as to whether we need to do it at all. So, in a way, it may be that if we were to do your preliminary issue, we would have to do the anterior point.

MR KENNELLY: Yes. And the concern is timing, because if we were to have that first issue determined first, and if it turned out that whatever the answer -- it still was necessary to determine merchant pass-on on an economy-wide basis, applying the proximity test which you identified in Trial 2 that is the appropriate test for merchant pass-on in 101(3) -- if that is something which has to be determined, if that's the outcome, it's important that we get that answer in time to get the disclosure necessary to address it in Trial 3. So maybe it's a question of timing.

On the question that you raise, we will need to consider how we can factor that in to the preliminary issue identified and to the timing of it. Could we have a short break, Sir? I'll just take instructions on how that's going to fit into the submissions I'm going to make, because it isn't accommodated in the order which I propose to you, so I might need just to quickly confer to see how it could be included.

THE CHAIR: If that's helpful. I'm now regretting having taken you off course so early on, Mr Kennelly. I suppose from the way I'm looking at it at the moment, just to give you a sense of that, I'm asking myself the question, "Well, what is the benefit we're getting out of this if we do the preliminary issue?", and I understand all the points you make, and it would be useful to discuss the points about how Trial 2 fits into Trial 3 and what the disadvantage might be and so on, so we should definitely do all that.

But just thinking about what do we get out of dealing with the preliminary issue, as you put it. The point, the real point I'm making, is that it seems to be -- "obscures" is perhaps putting it too high -- but it does seem to me to be a somewhat ancillary point. It may well be a point that's live at Trial 3; I'm not saying it isn't. But it isn't something which obviously, to me, arises from the straightforward application of 101(3), partly because I think there's a preliminary point as to whether you need to get into any of this at all.

So I think I'm just saying to you that looking at your application, it does not seem to me to be falling directly, and materially, into the central questions that we need to determine for Trial 3. I'm not saying it won't come up, but it just seems to me that it's actually ancillary rather than central to the main thrust of Trial 3, as I see it at the moment. That was the only point I was really making. I'm not trying to resolve the answers to any of these points. Obviously, if it's helpful for you to take further instructions, then of course you should do that.

MR KENNELLY: I think that I will need to because the problem, Sir, is that when you say that the question of merchant pass-on, and the question of whether a proximity test, is part of it, you say, "May be live at Trial 3". See, if it may be live at Trial 3, then we need to have the disclosure sufficiently in advance to be able to deal with it. That's the concern.

So I entirely take the point, Sir, that you make that there's a prior question which informs whether the issue ought to be ordered. That will need to be addressed, but that would need to be addressed pretty quickly in order to address, then, the points that flow from it if it remains the case that merchant pass-on on an economy-wide basis needs to be addressed.

So that's why I would be grateful for some time quickly to confer to see how this can be done. But I mean, I don't need more than five minutes. We are all together here and, Mr Cook, if he has any thoughts, will no doubt let me know.

THE CHAIR: Yes. Just to be clear, if you were now thinking about adjusting the framing of your preliminary issue to include that prior point -- I mean, I don't think in any world it would be sensible to have two preliminary issues. Obviously, we'll hear what others have to say about that, but it doesn't seem to me that you would do it in any other way than saying, "Look, here are all the preliminary issue points" if they were suitable for preliminary issue, and do them all together. I don't know if that's helpful, but I wasn't thinking about doing one and then another.

The real question is if these points are sufficiently important to justify doing them separately; in other words, are they meaningful enough to do them separately (inaudible) the trial? I appreciate that they cover possibilities that you're concerned about, but that doesn't mean that they should be dealt with in a preliminary issue.

Then the second question, obviously, is whether it's a good idea to separate these things from the evidence itself and the context of the trial. Obviously, the bigger you make the preliminary issue, the more challenging that point becomes.

So why don't I let you go and have your -- should we give you -- how long do you want? We'll give you ten minutes.

MR KENNELLY: Thank you.

THE CHAIR: Come back and tell me if you need longer. Just send a message. I'll be ready to go again in ten minutes' time.

MR KENNELLY: Thank you very much.

(10.54 am)

(A short break)

(11.07 am)

THE CHAIR: Yes, Mr Kennelly.

MR KENNELLY: Thank you, Sir.

So, I was grateful for the last indication you gave just before we rose, that you didn't see the point we've been discussing as a reason to have a separate prior preliminary issue. Just to round out the discussion that we were having, and to make sure that I haven't misunderstood the point that the Chairman's making. Can I explain why we framed it in the way we did? Can I ask you to turn up the Supreme Court judgment in *Sainsbury's v Visa*.

THE CHAIR: Yes.

MR KENNELLY: It's in the first authorities bundle, tab 10, paragraphs 173 and 174.

THE CHAIR: Yes.

MR KENNELLY: This is the second condition. This is where they discuss the fair share condition. Of course, and you're very familiar with the debate that we had here and the arguments that we made, which were rejected, but 173(1), I'll draw your attention to where the Supreme Court said that, "The 'consumers' referred to in the second condition are the ... merchants".

THE CHAIR: Hang on. But (audio distortion), "The 'consumers' referred to the second condition are the direct or indirect consumers of the goods". Then they say, "here, the merchants". The reason they do that is because the whole point of this is to distinguish between the acquiring side of the market, and issuing side, isn't it? That's what this is all about. You know this better than I do because I think you were probably there, or were certainly very close.

My understanding, and tell me if I've got this wrong, is that this debate is about whether you're looking at the fair share condition by reference to benefits and harm on the issuer side as well, and the answer is, "No", because you've got to focus on the people who are really harmed by the measure. And the people who are harmed by the measure are the direct or indirect consumers. The point is that it is the merchants, I think, that that's the merchants to the exclusion of consumers who buy from merchants. That's the point I'm making.

MR KENNELLY: Well, then we go on to 174. If you look again, because this is the exercise that we understood the Supreme Court to be requiring us to undertake. So four lines down:

"If the merchants are not fully compensated for the harm inflicted on them by the restrictive measure, it is difficult to see how they can be said to receive a 'fair' share of the resultant benefits."

THE CHAIR: But if you look at the next paragraph, it's my point that this is about making sure that it's the people in the market that's harmed rather than the people in another market.

Just to put the point another way, Mr Kennelly, don't you think it's a bit odd that if there's a harm that's been caused by the activity, the effect of assessing pass-on would be to compartmentalise a big chunk of that harm, or a small chunk, depending on what the pass-on rate was, and send it off to consumers on the same side of the market -- so indirect purchases -- then that harm suddenly falls out of account altogether in the assessment of the fair share. Now that just seems very odd to me; why would you do that?

MR KENNELLY: Well, just take that to its logical extension, what that assumes is that we ought to take into account the harm that's caused to the downstream consumers to whom the MIF is, in part, passed-on. But if we're supposed to look at that, then we ought to be looking at the benefits to consumers too. We should be asking then not only, "What benefits accrue to merchants?", but, "What benefits accrue to consumers?". That's what the Supreme Court said.

THE CHAIR: Look at the List of Issues, because the List of Issues involves you looking at the benefits to merchants and cardholders. If you look at 14.3, that's what the List of Issues says.

MR KENNELLY: Yes, but to the extent that those benefits accrue to -- certainly, we understood the Supreme Court to be saying that we were confined to analysing direct and indirect benefits to merchants. Now, cardholders benefit in a way that benefits merchants; those may be benefits which accrue to the merchants. But the logic of the approach which the chairman suggests is that, if we're looking at the harm to consumers also, we should be looking at benefits to consumers also. That is not our reading of the Supreme Court judgment.

Again, I'm not asking the Tribunal to resolve this point now. It goes to the proper interpretation of paragraph 173 and 174, and that's a legal question, which, if the Claimants take it up, we'll have to resolve.

The question, really, is how does that feed into the application which I have before you? What it indicates is that there's an extra layer of complexity. There's an extra legal question, which, if the chairman's instinct is correct, means that the need to address the points which I've canvassed in my application falls away potentially. So the point needs to be addressed.

But the question then is how can we best address that in the context of the orderly resolution of Trial 3? In that regard, of the three options we have outlined to you -- because our shared objective is not to disrupt Trial 3. The three options, which we've canvassed in our application, as you know, are: one, to resolve the question of whether proximity between MSCs and price is relevant for the calculation of market-wide EPO; and the second is to adjourn the issue of EPO from Trial 3 into Trial 4; and the last is to give us the disclosure we seek now.

I can explain the reasoning behind those, and I think I'll have to explain the reasoning behind those three alternatives. But if the question is more complex and if there's a potential shortcut then it suggests that the best of the three may be to adjourn the issue of EPO out of Trial 3 into Trial 4 entirely, and then Trial 3 would focus only on the -- well, we're still focusing on a very substantial question, which is the benefits or lack of them which arise from the MIFs, and which we can show are causally connected, for the purposes of Article 101(3), the benefits causally connected to the interchange fees themselves.

That's my introduction. I can go back now and outline the application and the options in it, but I'll pause, Sir, if you have any more indications to give me before I begin.

THE CHAIR: Thank you. That's helpful.

The only indication to give you, I think, is of all the things on the table, the one that's least attractive is splitting up the exemption exercise. At the moment, I can't really see the attraction of moving EPO into a separate trial, and obviously, that's for discussion. It's a suggestion that Mr Cook has made and may no doubt want to address, but I just to give you a sense of that, it doesn't strike me as being a very helpful way to deal with exemption or Trial 3.

But – so why don't you carry on and let's see where we get to.

MR KENNELLY: Thank you.

Can I ask you to go then to the EPO bundle and tab 1, which is our application.

THE CHAIR: Yes.

MR KENNELLY: Page 4, you see the first option, paragraph 2.21. The first option is to resolve the question of whether proximity is required for establishing EPO at a preliminary hearing.

Now the challenge for you is listing such a hearing -- the challenge for all of us, because if EPO is to be determined in Trial 3, and if proximity is required, then extensive disclosure will be needed in short order to be addressed by witnesses and experts under the existing timetable, because, as we discussed yesterday, the directions for Trial 3 provide for disclosure by 23 October this year, with factual witness evidence on 18 December of this year.

Now, the Tribunal could say that insofar as proximity is required, then EPO as an issue should be adjourned from Trial 3 to Trial 4 because of the complexity that it introduces, because of the need to examine internal claimant thinking about treatment of costs. You may decide that if proximity is required, then it goes to Trial 4, and in those circumstances, if that's your approach, then there wouldn't be so much urgency about when to list the hearing of the preliminary issue.

Or, of course, you could decide that you want to keep EPO within Trial 3 even if proximity is part of the test. In those circumstances, if you were to want to keep EPO in and contemplate the proximity is required, then we would need to have this preliminary issue hearing heard urgently in the coming weeks to allow sufficient time for a proper disclosure exercise from the Claimants relevant to this issue in advance of Trial 3, in the event that it's necessary for the Defendants to prove proximity in Trial 3.

Because just to be clear, and I know I'm repeating myself, the concern is that we simply cannot wait until trial to know whether that disclosure and evidence is needed or not. Because if it turns out a trial, that proximity is part of the merchant pass-on test for Article 101(3) and disclosure was necessary for us to prove it, it would be too late for the Schemes to ask for that disclosure then, and the burden is on us to make good our defence under Article 101(3).

So we really would be in a situation, like in *Sainsbury's* in the Supreme Court, where the burden of proof is on us. But because the disclosure is normally with the Claimants, the disclosure required to address the issue, there would be a heavy evidential burden on the merchants. It's paragraph 216 of *Sainsbury's*. But it'd be too late for us at trial to say that, because we would have missed the opportunity to seek the disclosure necessary to make good our defence, and that's what we're trying to avoid. So that's the first option.

The second is the one that you indicated, Sir, you're less happy about, which is the adjournment of the issue of EPO entirely from Trial 3 and Trial 4. Now, as you say, this was an alternative favoured by Mastercard, but we see its attraction too, because the pressure to list this preliminary issue hearing would go as long as it was listed in advance of Trial 4. As my learned friend Mr Cook says in his skeleton, there is a clear overlap between the EPO issue and the quantum pass-on issues in Trial 4, so it is sensible to hear them together, and Trial 3 would still be able to resolve the vast majority of the issues relevant to exemption, identifying and quantifying the various benefits for merchants, which, we say, are caused by the MIFs.

THE CHAIR: So tell me, how would you come (audio distortion)? Would you deal with the fair share condition at all?

MR KENNELLY: Sorry, Sir, you cut out slightly there on your microphone.

THE CHAIR: Would you deal with the fair share condition at Trial 3 at all?

MR KENNELLY: In part, because Trial 3 would be examining one part of the fair-share condition, which would be examining the benefits which, we say, accrue to the merchants from the MIFs. So you could find in Trial 3 that other parts of the 101(3) testers aren't satisfied, and so this question falls away. You could also find that the benefits from the MIFs are so great that this pass-on issue doesn't arise.

THE CHAIR: But if we ended up in the world in which you're suggesting we might, and we have to deal with the proximity, and we've heard the evidence on the fair-share condition, except we haven't heard evidence about pass-on, so we don't know how much of it sits with merchants and how much of the harm sits with merchants and how much sits with consumers. We can't reach any conclusion on the fair-share condition, can we? I mean, what findings could we make about fair share in the Trial 3 judgment without having the evidence of pass-on? It seems to me we couldn't find any?

MR KENNELLY: You couldn't reach a final conclusion unless you found, for example, that -- sorry, on the fair-share condition, you couldn't reach a final conclusion because you wouldn't have assessed what the Supreme Court said was the harm inflicted on the merchants by the restrictive measures, but you would have addressed the other parts of Article 101(3), and in doing so, you may find that the question of pass-on falls away entirely.

THE CHAIR: Yes, I can see that. The point I'm putting to you is what you're really suggesting is not dealing with the fair-share condition in Trial 3 at all. It does seem to me to be quite a novel approach to do exemption in two parts like that. I mean, that's my reluctance to go down that path, because after all, what we're doing here is a judgmental exercise, isn't it?

We've been directed to go and make an assessment of benefits and harms, and that's quite a complicated assessment because of the way the conditions work, and the interrelationship, for example, between the first and the second condition, particularly with the nature of these markets, the two-sided market. And so all of this is quite nuanced, very fact sensitive and very much a judgment assessment by us, and you're going to chop that in half and we're going to be doing parts of it separately from other parts.

That does seem to me to give rise to some quite serious concerns about how we compartmentalise the different bits of evidence and what goes and what judgment and the questions of consistency. That's my concern about it.

MR KENNELLY: No, I understand that. Even if the Tribunal couldn't reach a final conclusion, the fair-share condition with this option 2, the adjournment point, adjourning EPO. It's a question of practical possibility, what's practicable. Although you wouldn't reach a final conclusion -- we understand that's not ideal from the Tribunal's perspective -- a very useful exercise will have been undertaken because you would have addressed the most significant part of the Trial 3 exercise, which is the question of benefits.

And it's not true to say that fair share wouldn't have been addressed at all. You won't be able to reach a final conclusion on it at the end of Trial 3, but you will have done the lion's share of the work on the fair-share condition. It's a question of what's practically possible in the time available to us.

THE CHAIR: Yes. Okay.

MR KENNELLY: And then the third option is to order the non-Trial 2A Claimants now to provide the disclosure relevant to the issue of whether merchants decisions on prices were directly influenced by the MSCs, because if the Tribunal declines to order the preliminary issue, or can't list it in short order, or decides not to adjourn it as you've suggested, then that is what the Tribunal ought to do. The Tribunal ought now to order the disclosure we seek because then we would have the opportunity to defend ourselves in the event that the Tribunal does require proximity to be demonstrated by the Defendants in Trial 3. So that's the third option.

THE CHAIR: Yes. I just want to be clear about how this works. The concern that you're advancing here is, as I understand it, largely about what I call the "new Host Cases" --

MR KENNELLY: Yes.

THE CHAIR: -- so the people who weren't Host Cases for Trial 2. And even, I think, on the adjournment point your adjournment is actually only the adjournment of pass-on in relation to the new Host Cases. So I think you would be suggesting, as I understand 2.2.2, you're actually suggesting we would go ahead and do fair share for everybody else, but we would adjourn the new Host Cases? That itself raises, I think, quite a complicated question as to could we possibly end up with two different figures or two different assessments, if you like, for fair share for effectively the same merchants, albeit that they just happen to participate procedurally in a different way?

So I'm just a little bit unclear about how that is supposed to work. I mean, are you now saying you adopt Mr Cook's position that the adjournment would be of everything related to the harm, if you like, of fair share for all Host Cases or just the new Host Cases?

MR KENNELLY: It could be either, Sir. We're really only focused on what can be achieved in a just way in time.

To the point you make about there's the possibility, and this arises in many contexts which we're discussing, where the ultimate answer may be different, you've got my submission on that, which is that that's a function of litigation where the evidence will be different and that is not a forbidden outcome. In fact, it's the proper outcome where the evidence is different.

The merchants aren't the same if they're different merchants producing different evidence, the answers may well be different, even if they're addressing the same MIFs during the same period. You have the reference to the Supreme Court in *Sainsbury's*, where they addressed an analogous submission and said, "Well, that's just a function of adversarial litigation where the evidence presented the Tribunal is different".

THE CHAIR: Well, it's a bit different, isn't it? (Audio distortion) because in the

Umbrella Proceedings, you've got the same Tribunal dealing with the same issue in two very closely-related hearings and reaching a different conclusion on something which is not actually claimant specific at all. It's actually market-wide. That would be pretty odd.

MR KENNELLY: But in the *Sainsbury's* case, what the Supreme Court was examining was a 101(3) situation. So I appreciate that it wasn't dealing with Umbrella Proceedings, but the basic point you're addressing: 101(3) is looking at the same MIFs on a market-wide basis. The Court of Appeal found, and it was put to the Supreme Court, well, it was very odd to have different answers to the questions about the application of Article 101(3) on a market-wide basis, and Supreme Court said, "No. If the evidence is different, the answers may well be different". Even in that scenario, they were actually looking at 101(3).

Now, I know in the Umbrella Proceedings we seek consistency as much as we can, but it's not a bar to a fair trial. The consistency can't trump the basic fair trial rights of the participants. That was never the idea.

THE CHAIR: Can you help me just understand how is this going to play out? I'm struggling a little bit to understand what the interplay would be between the Trial 2 judgment and finding of market-wide pass-on and the new Host Cases. So this is all in the world that you fear, where suddenly we have to deal with it as a direct and proximate causation point. So let's say that's where you end up. I'm not suggesting for a moment -- I think you probably will guess from what I've said that I'm sceptical about that as an outcome. But if that's where you end up -- and I appreciate you're trying to avoid being in a position where you have to deal with that -- how does this work?

We've got a Trial 2 judgment which is binding on the old Host Cases but it doesn't give us an economy-wide pass-on rate. So presumably, we would be looking at the findings on the Trial 2 judgment and saying, “well there's no economy-wide pass-on rate, but it is pretty clear that if you were a particular type of business, you did this, and if you're a particular type of different (audio distortion)”. Somebody would provide us with some evidence of extrapolation, and we would end up with some figure which produced some weighting between largely the binary outcomes. I think they're not quite binary, are they, because there are some degrees. But presumably there's that sort of exercise going on.

Do you say that that only applies to the old cases? So would you be saying that it's completely impermissible to look at that and make any finding that was to the benefit of the new Host Cases? Is the Trial 2 judgment completely irrelevant for the purposes of the new Host Cases in that world?

MR KENNELLY: Yes.

THE CHAIR: So what we have to do is we have to conduct what? An exercise in relation to the new Host Cases, which is identical to the one we did in Trial 2, in order to work out what their specific circumstances were, and then to extrapolate that to the sectors to get an economy-wide figure. Is that what would be planned?

MR KENNELLY: Yes, and we would do that with the disclosure and evidence from the Claimants and class members who did not participate in Trial 2. That is (overspeaking). Sorry.

THE CHAIR: Sorry, please go, sorry.

MR KENNELLY: No, no, I cut across you, Sir. Please forgive me.

THE CHAIR: (Audio distortion) the lag or whatever it is. It's a lot more difficult than interrupting you in court. I'm afraid it's much less elegant when I do it on the video conference. So please forgive me for the inelegance. But you carry on.

MR KENNELLY: No, because I'm going to make my points. Because what you're suggesting to me, Sir, is obviously very much like the Claimants' suggestion about, first of all, what the Umbrella Proceedings contemplate and what is abuse of process. May I deal with those submissions, and in doing so, I may answer the questions that you're putting to me.

THE CHAIR: Just to be clear with you, I'm not putting an abuse of process point to you. I'm certainly not suggesting -- I mean, obviously, abuse of process is very fact sensitive -- that where there are different facts, you're not entitled to run a different case. I'm not putting an abuse of process point, but by all means, deal with it if you wish to, now.

MR KENNELLY: I think I have to because the point has been put to me by the Claimants. So that's their response to my submission, which I just made to the chairman, that the Trial 2 findings in respect to the participants in Trial 2 are inadmissible in Trial 3 and, if proximity is part of the test -- contrary, of course, to the Scheme's submission -- then we will need to look at the new claimants and ask if those merchants expressly considered the MSCs when setting the profit maximising price in the short term.

That's a very merchant-specific question and that's the starting point for analysing the economy-wide pass-on. Of course, the economy-wide figures are then extrapolated, but extrapolated from the starting point which is: did individual merchants expressly consider the MSCs when setting the profit maximising price in the short term? That can only be done with, as the Tribunal said in Trial 2, qualitative evidence adduced by individual claimants. Then we use quantitative evidence to assess the level of merchant pass-on if that is the test which we are subject to in Article 101(3).

Now, part of the confusion as to what the proper approach is arises from the Claimants' own approach. In the Trial 3 CMC, when I raised this issue in my skeleton argument in advance of the hearing, Mr Beal, my learned friend, accepted that, for merchants who did not participate in Trial 2, the issue of EPO would need to be considered afresh in Trial 3. He said it wasn't very convenient, but he said that was our entitlement. Can I just show you the transcript? It's in the second supplemental bundle.

THE CHAIR: Yes.

MR KENNELLY: Behind tab 16.

THE CHAIR: Yes.

MR KENNELLY: Tab 16, page 114. Obviously, we had a discussion about this at the CMC, and the Chairman said, at page 114, line 16, raising a similar point to the one, Sir, which you've just raised with me:

"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?"

And my learned friend said:

"'... it won't [skipping down three lines] ... The fact that the CICC Claimants will have to deal with a separate mitigation defence in due course [those are the Opt-In Claimants], 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 Chairman said:

"You're accepting that?"

Mr Beal said:

"Yes."

So there'd have to be a separate merchant pass-on examination for the new claimants.

The Chairman again pressed him and said:

"That position? [Are you really accepting that?]" My learned friend said:

"Yes. It hasn't been determined in Trial 2A [that is merchant pass-on for those Opt-In Claimants] because CICC did not take part in 2A. Visa are refusing to let it be read across. That's within their gift ... [And he says]. I can't see a way around that."

The Chairman says:

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

Mr Beal said:

"... you don't have a determination of the discrete question of whether ... the CICC Claimants have directly and obviously passed on the impact of the elevated MSC into downstream pricing."

At the bottom of the page, Mr Beal said:

"... they will need to be determinations on them as well ... unless and until [over the page] the Schemes are willing to accept that the findings in principle in Trial 2A apply equally to other merchants in other sectors ... they're not willing to do. And ... I can't force their hand on that."

But in the response to our application, the Claimants took a different position. A very different position. Can I just show you that. It's in the EPO bundle, tab 5, page 179, paragraph 4.1.

THE CHAIR: Yes.

MR KENNELLY: Because their response in the skeleton is that we are required to treat the trial to MPO findings as binding for all of the new claimants required by the Umbrella Proceedings order, and by the rules of abuse of process. 4.1 says that our application:

"... proceeds from a false premise, namely that findings made in the Trial 2 judgment are not binding on [the Schemes] ... in respect of the non-T2 designated Host Cases, such that there is potentially a live evidential issue as the proximity of pass-on for non-T2 designated Host Cases."

They're saying that's a false premise. In their skeleton argument, paragraph 20. Could you turn that up please. Top of page 9 of the Claimants' skeleton argument.

THE CHAIR: Sorry. Just give me a minute. Just remind me the skeleton is it in the bundles anywhere?

MR KENNELLY: The skeleton is in the third supplemental bundle. I'm afraid I have it loose, so I don't know which tab it's in. Tab 1 in the third supplemental bundle.

THE CHAIR: Anyway, I've got their skeleton. Yes.

MR KENNELLY: It's just the first sentence of paragraph 20 where they say:

"... the Tribunal should proceed on the basis that findings made in the Trial 2 Judgment ... are binding (so far as they go) in Trial 3."

THE CHAIR: Is this -- sorry. Carry on.

MR KENNELLY: Obviously, there's no explanation for the reversal of the position. Of course, the implications for this argument are far reaching: that all the factual findings in Trial 2 -- factual findings -- are binding on the Defendants in respect of all future claims brought by different merchants. So they say it's false even to contemplate the potential for an evidential issue as the proximity of pass-on for non-Trial 2 Claimants. They say that that's a false premise. So a (overspeaking) point --

THE CHAIR: Yes, can I just ask you. Sorry.

MR KENNELLY: Yes.

THE CHAIR: We're talking here about CICC Opt-In Claimants. Is that right? Is that sort of --

MR KENNELLY: Yes.

THE CHAIR: And also the ones who (audio distortion) fell out of the CICC Opt-In Proceedings also who have joined the Umbrella Proceedings.

MR KENNELLY: Yes.

THE CHAIR: I think we (audio distortion), yes.

I suppose, as I understand -- I'm not sure how Mr Woolfe would be able to, I'm sure, elaborate on this -- but I don't think Mr Beal could say, could he, that the Trial 2 judgment would dispose of a merchant pass-on issue in its own right in Trial 4 in relation to those new claimants. I think that's what I understood him to be saying in April, but there is some more nuanced question. You may say the answer is no different. I understand you say the answer is no different but this creates the same sort of complication we discussed, doesn't it?

Let's say we're doing Trial 3. We're in Trial 3 and we're not separating any bits. It's all being dealt with in Trial 3. I was really just pursuing the question I was asking you earlier, which is: how does this work in practice? Are you saying that, as a matter of (audio distortion), when we come to work out what the economy-wide pass-on is in Trial 3 -- if we need to do that -- and we're working on a proximate causation basis -- direct and proximate, we've got to do it that way -- are you saying that we can look at Trial 2 to help us infer the economy-wide pass-on for the old Host Cases, the Trial 2 Host Cases. But again, when it comes to Trial 3, we need to look at a different set of evidence and exclude the Trial 2 judgment evidence from our minds. So we're then going to end up in the same judgment, finding potentially different fair share outcomes for different categories of claimants. Is that a possible outcome from your argument?

MR KENNELLY: Yes. I mean, that is a possible outcome. Our primary case is that --

THE CHAIR: It's been hard, Mr Kennelly, and in a way the answer to it may be that we shouldn't be doing any of that at all, which is the point I put to you at the beginning. But I just find the whole thing just really odd. I'm not saying that logically you're wrong. I'm not challenging the logic of your position. It just strikes me as being just a very odd position for us to be getting into.

As I say, the whole point of this is for us to make some sort of broad judgment about whether benefits and harms in a market that might be affected is balanced out. I just find the whole thing very peculiar.

MR KENNELLY: Well, indeed. It's peculiar. I'm sorry, I missed that. Maybe it was better that I --

THE CHAIR: I might be alone in that view. I'm saying, am I the only person who thinks that that's a very peculiar place for us to be?

MR KENNELLY: It is peculiar. Our primary case, as you know, is that the proximity test, which of course was settled on in Trial 2, is not -- we obviously have our points about whether it's appropriate, even in Trial 2. We certainly say that we will say it's not appropriate in Trial 3, but we may be wrong about that, and then we're fixed with this.

But to the peculiarity of having different outcomes on economy-wide merchant pass-on, really, when one looks a bit closer, it seems less peculiar because the evidence is different. If proximity is the test, and your own judgment is used as the basis for assessing merchant pass-on in Trial 3, then it's quite normal that if you have got different, even successive, trials dealing with this question with different evidence, and we're directed to ask qualitatively the extent to which different merchants took into account the MSCs in setting their profit maximising prices, which is a very merchant-specific point, one could easily end up with different answers.

What we mustn't, in our respectful submission, allow is the Tribunal's sense of the oddness of that to override really fundamental rules about the inadmissibility of past factual findings, and the fair trial rights of the Schemes when faced with new claimants in different evidence. Because even more peculiar, in my respectful submission, would be a situation where new claimants come on board with different disclosure and different evidence, and the Tribunal says, "For the sake of convenience, we're going to disregard their different evidence and their different disclosure, and apply to them factual findings made in an old judgment based on different disclosure and different evidence from different merchants". That, in my respectful submission, would be even more peculiar.

THE CHAIR: Yes, okay. My question, if I can, and I'll leave you in peace and let you finish your submission, just when you get to this exercise, let's say we identify that we need to do this and you get disclosure, and you go off and -- I don't know how many claimants there are, there are quite a lot, I think -- and you've asked them all for all this information, and you're going to get back no doubt the sort of documents that we had floating around in Trial 2, and they may or may not tell you very much, so you may therefore presumably want to call some of these people as witnesses as we did in Trial 2.

MR KENNELLY: Yes, indeed. Yes.

THE CHAIR: Then there's this whole question as to how we do that, whether we have samples and so on. But you would accept that, at least at that stage and subject to any intervention from the Court of Appeal, the legal test and Trial 2 obviously is established; what makes you think you're going to get any different answers? In other words, what makes you think that the exercise you carry out in relation to this new population is going to yield a different average economy-wide rate than the one that was carried out in Trial 2?

MR KENNELLY: Well, partly for the reasons, Sir, which you mentioned yesterday when you mentioned briefly Mr Holt's evidence in Trial 2. One of the problems in Trial 2, from our perspective, was of course the lack of disclosure from individual merchants which allowed us to interrogate the extent to which they did take into account the MSCs when setting their profit maximising price in the short term. One of our concerns in Trial 2 was, I'm sure you heard repeatedly, that there was, we would say, insufficient engagement by, or insufficient evidence from individual claimants backed up by disclosure from them, which prevented us from interrogating the qualitative evidence which they were producing, because one can only really cross-

examine and interrogate qualitative evidence with the benefit of disclosure.
We fully expect that with these new claimants, if we have time to get proper disclosure from them and qualitative evidence, which we can then interrogate and test with disclosure, we fully expect to get a different answer on merchant pass-on, because we will have the disclosure, which we unfortunately say we lacked in Trial 2.
In fact, as Mr Cook pointed out to you yesterday, even in the circumstances in Trial 2 -- and again, we're not going to argue that, but you've heard our concerns about Trial 2 -- even then on the basis of the testing of that qualitative evidence, the Tribunal found very substantial levels of pass-on for three of the merchants in question, the sample merchants, and for the sectors that were represented by them.
So what that demonstrates is that with disclosure, and with the ability to test the qualitative evidence, one really can get different answers on questions of merchant pass-on even when looking at the same sector.
THE CHAIR: I'm not sure if that's right, is it? Where we ended up, where you did have disclosure, I don't think it actually helps you very much. What it did show was that the way in which the prices were set were not affected directly and proximately by the MIF. This is much more about the way people set their prices, isn't it, than any documents? It's not about what's in their documents or not; it's about the nature of the business they've got and whether they would put a charge that is normally, for most of them, as small as a MIF, relatively speaking, and which is treated as an overhead, into a price setting calculation when they're doing they're trying to set the optimum prices. So I'm just not completely sure that I understand that.
Sure, if we're in this world, I understand that you need to know, "Is this a business which feeds, obviously, so directly and proximately, MIFs into the price setting process?" As we saw with those three that we identified, as you say, we identified three where that was clearly the case and was acknowledged to be the case; I think,

well, at least two of them, if not three of them. Or is it, as was the case with an awful lot of the other merchants, that it is just largely irrelevant to any price-setting process and therefore couldn't be said to be direct and proximate?

So it's quite a binary outcome. It didn't strike me as being something that was going to be changed by careful analysis of lots and lots of documents and nuances and things. It's actually really about, "Do I do it this way? Or do I do it that way?" You could find that out relatively quickly, I would have thought.

MR KENNELLY: I'm afraid, Sir, that Trial 2 is a very unfortunate example from the Schemes' perspective, because one of the concerns we had in Trial 2 -- and you heard this at length -- was that because of the way in which the issues developed, in order to deal with this question of proximity, the Claimants who did come forward were in our opinion -- as you heard us admit, were not a fully representative sample. In many cases, we were unable to properly test the qualitative evidence they produced with adequate disclosure from them. That's what we're trying to avoid here.

If we have a proper process whereby the Claimants aren't simply self-selecting or cherry picked, if we can properly interrogate the Claimants who are coming forward, and then test their qualitative evidence with disclosure, we will have a fair process.

The concern we have is that, as you say, Sir, if it's to be done quickly, we can get witness statements from claimants at some later stage saying, "Oh, well, these are small fees. We don't take the MSCs into account when we set our profit maximising price in the short term". Without disclosure, we have no way of testing that, and it would be contrary to our basic fair trial rights if we have to simply take that at face value and aren't able to test it with the benefit of disclosure.

Disclosure is the only way that this qualitative evidence can be properly tested. That's what we're trying to ensure here by ensuring that we are able to test that qualitative evidence when it's produced by the Claimants. The fact that in Trial 2 it didn't seem in the Tribunal's mind to make a difference, I'm afraid, doesn't tell you what's likely to arise in Trial 3 with different claimants giving fuller disclosure and qualitative evidence that we can test with the benefit of that disclosure.

THE CHAIR: Mr Kennelly, you've made your submission; I understand the point. How much more have you got? I'm just conscious of time.

MR KENNELLY: I'll be as quick as I can. So the --

THE CHAIR: I'll leave you to get on with it.

MR KENNELLY: Yes. The question now is the Claimants' position that it's an abuse of process for us not to accept the binding effect of Trial 2. Although I have to acknowledge that yesterday, the Claimants appeared to moderate that position despite what I showed you in their skeleton, and Mr Beal appeared to accept that findings in Trial 2 would not be binding in Trial 3, in respect of sectors not considered in Trial 2. He said that it was not a question of legal principle, but of proportionate case management, and that it was of course open to the Schemes to raise the issue of pass-on in respect of other claims. It was just a question of judicial resources. That's not an abuse of process argument; that's a case management point. He also said that the findings in Trial 2 might not be binding for the sectors which were considered in Trial 2, if there was a good reason to depart from those findings.

So we're in this odd position where the Claimants have made a very clear abuse of process allegation in their skeleton, but haven't advanced it at the hearing yesterday or today. We'll hear from Mr Woolfe, but that certainly was the position of Mr Beal that was outlined yesterday. You have my point that the findings in Trial 2 are actually inadmissible in later cases, and normally legislation is needed to abrogate that rule, like under section 47A.

The Claimants say that the new claims in the skeleton have the benefit of factual findings made in respect of old claims, even if the evidence in the new claims are different. They say that they can keep issuing fresh proceedings to take advantage of the factual findings in these other older cases, regardless of their own evidence. That was not what the Tribunal ordered. There's nothing to that effect in the July 2022 Order, and nothing in the 16 March 2022 Order ruling either.

Can I just show you that, because that explains what the Tribunal had in mind for these kinds of new claims? It's in the authorities bundle one, tab 15. (Pause)

THE CHAIR: Yes.

MR KENNELLY: On page 461.

THE CHAIR: Yes.

MR KENNELLY: Paragraph 14 is the objective, which is well known to you. I'll skip ahead, because the Tribunal was concerned about relitigation of the same, or similar, issues, and it was relying on the principle in *Ashmore v British Coal Corporation*, and it raised itself this idea of *Ashmore* abuse of process. We see that on page 466, and it cited the Ashmore judgment at page 466 as the indented passage, the judgment of Lord Justice Stuart-Smith. If you skip down just below the three dots, it says:

"... If the matter were relitigated on the applicant's claim, she would merely invite the Tribunal to reach different findings of fact ..."

And I rely on this on the same evidence that was the abuse. Skipping down three lines:

"... [it] is not in the interests of justice [to have that kind of relitigation] ... if some other Tribunal reached a different result on the same evidence."

The focus there was on relitigation where there was no change to the evidence.

In *Re Norris*, the judgment of the House of Lords at paragraph 23, immediately below it, over the page, 467 --

THE CHAIR: Mr Kennelly, I don't want to -- First, I'm very familiar with this judgment, but secondly, I don't think this is really about abuse of process. I mean, Mr Woolfe will have some things to say about it, and if that changes, then I'll let you know. At the moment, I'm not viewing this as an abuse of process. As we discussed, it's an odd situation; I take the points you're making about claims and new facts, but I just don't think that it's necessary for you to get into this at the moment.

MR KENNELLY: Okay. Well, I'll skip my submissions then on abuse of process and I'll hear what Mr Woolfe has to say.

I'll come then to the practical solution which the Claimants offer. If we go back to the Claimants' skeleton. That's at paragraph 21.

THE CHAIR: Yes.

MR KENNELLY: They say:

"A preliminary issue is simply inappropriate as a matter of case management ... [because of the risk] of appeal, it is doubtful whether the parties could have certainty as to whether proximity is or is not a requirement of Article 101(3) [and so] ... As such, the sensible approach is to assume that it may require to be tried ..." [as read]

That is the question of whether proximity is part of the merchant pass-on test for Article 101(3). So "assume that it may need to be tried". Fine. Well, then, what about disclosure in those circumstances? And the Claimants say at paragraph 23, we can't deal with the question of disclosure at this CMC because, they say, it's an application that all members of the Opt-In Class should give disclosure for a wide range of material. It's disproportionate and inappropriate, and so they say it should be put off. But for the reasons I outlined when I opened the application, if disclosure is to be ordered, it does need to be ordered now in order to be produced in time, to not disrupt the timetable for Trial 3. I mean, we heard concerns yesterday, Sir, about the need to get on with disclosure for Trial 4. It's even more urgent for Trial 3. Our application was made on time on 15 June. The Claimants had time to respond, the time allowed to them by the Tribunal, and if they disagreed with Mr Cassel's evidence as to why this disclosure was appropriate, they should have adduced evidence to that effect, and they failed to do so. And so that --

THE CHAIR: It's broad application, isn't it? You were going to show me the disclosure application?

MR KENNELLY: Yes. I'll show you the disclosure that we seek. It's in the EPO bundle. It begins at page 173.

THE CHAIR: Yes. It just seems to me you are asking for a wide range of documents from a very large number of people. I just wondered whether you felt that that was entirely within the discussion we've had, given that we're trying to identify what ought to be disclosed. I appreciate, you might want it to be substantiated, but we are trying to identify, I think, a relatively narrow point, which is how the MIF is dealt with in pricing, is whether you need all this documentation from all these people?

MR KENNELLY: But the problem we face, and the problem the Tribunal faces, is that if proximity is part of the test, if the test in Trial 2 is carried over, then we need to show that merchants expressly considered MSCs when setting their profit-maximising prices in the short term, and we need to show then -- and that will then be extrapolated out for economy-wide merchant pass-on. And that is a qualitative question which, to repeat myself, will be backed up by evidence from the merchants, but can only be tested by disclosure produced by them, and it has to be done per merchant.

Obviously, when the disclosure is given, we see patterns and categories, and then we can isolate how the merchants are to be treated at the trial, and we limit the cross-examination to what is proportionate. But in order to do that slimming down process, we need to begin with the disclosure from the merchants themselves, because the test is a very merchant-specific test. In my respectful submission, it's no answer to say in Trial 2, "You didn't have all this from all the merchants". In my respectful submission, that was the problem in Trial 2.

If the test is this question of whether merchants expressly consider MSCs when setting the profit-maximising price in the short term, then this is the kind of granular disclosure that we need from all of them, and the Claimants, apart from simply saying, "Oh, it seems like a lot", haven't set out an alternative approach to how and what disclosure ought to be given by them. It's not good enough in response to our application, simply to say, it seems like a lot. We've explained why this is proportionate, and there's no answer to that apart from a reference to its volume.
THE CHAIR: If you're (audio distortion) to a sector-wide, economy-wide answer, why can't you do a sampling process?
MR KENNELLY: Because we don't know how to sample. We don't know properly how to undertake that sampling exercise without an understanding of how the Claimants themselves undertake that qualitative exercise, that question of considering how they take into account merchant service charges. And, in the time available, if we were to undertake some form of sector analysis by the Schemes and then make a disclosure application, we wouldn't have disclosure in time for Trial 3.
I mean, all of this is feeding into what you found to be the least attractive option, which is Mr Cook's suggestion of adjourning EPO off entirely, and no doubt we'll hear from him. But in the circumstances, in order to have this issue, if it is to be tried in Trial 3, then this is disclosure that we need now.
Mr Woolfe may have particular concerns about particular parts of the disclosure, and I'll deal with them in my reply, but we've had no substantive response on any part of this request, so I'm afraid I'm unable to answer it until I hear what he has to say.
THE CHAIR: Yes.
MR KENNELLY: Those are my submissions on the application.
THE CHAIR: Yes. Thank you very much.
Mr Cook, are you going to go next?

Submissions by MR COOK

MR COOK: Yes, Sir, I think it's probably sensible if I can.

Sir, we respectfully agree with you, which is always a nice way to start, that pass-on is, to use your term, an ancillary issue for Trial 3. There are a number reasons why it might turn out that economy-wide pass-on is not legally or factually relevant. That's the reason why we've suggested that the right way through this is for Trial 3 to proceed as planned with, we suggest, with EPO being parked for consideration of Trial 4, if it remains a live issue following Trial 3. That avoids complicating the Trial 3 process, which is already a very demanding one now.

Now, Sir, I'm very conscious of your initial indication that you are not attracted to splitting up exemption between trials. So we do say that splitting off EPO would be a sensible reflection of what you yourself described as the ancillary nature of the issue and the very real possibility that EPO may turn out to be irrelevant to exemption.

That could happen for a variety of reasons. Firstly, as you've said, it may be determined that EPO is legally irrelevant to fair share, that you just look at the merchant position and that is a benefit versus detriment calculation at that merchant-based level, in which case EPO is simply irrelevant in any event. We may demonstrate fair share regardless of EPO, that is certainly what we will be aiming to do. So if we justify the full harm, it's irrelevant if merchant-only retained part of the harm, we've already justified all of it.

We may fail -- and this is obviously not the outcome we hope for at all -- but we may fail to demonstrate fair share in a way that could never possibly be saved by EPO. It may be that the Tribunal doesn't accept that we've demonstrated to the required standard certain benefits, or potentially all of the benefits, or that the level of the benefits demonstrated is so far below the headline harm that EPO is never going to ride in and save us.

So there are a whole variety of possible outcomes where EPO would just, you know, basically fall entirely by the wayside, so we would only be deferring an issue that may well not end up being an issue at all. So there will, in fact, be a final determination of fair share at the end of Trial 3. But we acknowledge that there's a possibility of an outcome, a grey outcome, where it may be that EPO could play some role in altering the position. But that's going to be whether there's a very middle of the ground, where we just fail potentially to demonstrate it and maybe EPO could be the tipping factor in the balance.

There are three other points I make in support of this approach. First point is, it doesn't make any difference to the overall timing of the resolution of the UK and Irish MIF claims if the EPO is dealt with in Trial 4 instead of Trial 3, because there's not going to be a final determination of what loss, if any, the Claimants have suffered until Trial 4 anyway. And however much that involves some process that's largely taken place outside the assistance of the Tribunal, the final determination is going to be as part of that Trial 4 process. So putting this off doesn't defer a final conclusion. It may well be there's a final conclusion, if we win, during Trial 3 in any event.

The second point is it now appears to be common ground that there will be at least some MPO issues to be determined in Trial 4, and it's clearly, we would say, far more sensible and efficient for all pass-on issues to be determined together with a single set of disclosure and expert evidence, rather than splitting up pass-on between Trials 3 and 4.

So, Sir, while I understand your concern about splitting up exemption and the possibility there may be a grey outcome on fair share, by which I mean an outcome where EPO could still be a deciding factor, the choice here is really do we split up exemption or do we split up pass-on? And it seems to us that splitting up pass-on is by far the less attractive of the two options, given the much greater similarity of the issues.

THE CHAIR: How would you split? What's your view on how you would split exemption? Mr Kennelly, I think, suggests that we might be able to do some of the fair-share analysis, but we'd have to stop at a certain point, because we couldn't obviously conclude the harm. Is that your view as well? Are we dividing fair share up or are we taking fair share out of the exemption analysis to do later? How would you see us doing it?

MR COOK: Sir, it seems to me that what the Tribunal will certainly be in a position to do if EPO is pushed off, is determine firstly what the benefits and the harms are, quantify what those are -- and that is the exercise in order to do the balancing exercise -- and reach a stage which clearly shows either that the benefits exceed the detriments or that the sort of prima facie detriment exceeds the benefits either by a small margin -- and that's the only circumstance in which EPO could be relevant -- or by a very large margin -- possibly if the benefits are ones that we fail to demonstrate or fail to demonstrate to any pronounced degree -- in which case EPO is not going to be enough to save it.

So the Tribunal can do all of the determination of the benefits, the harms, the quantification of those and identify which one is larger. It's only then going to be when they're finally balanced that EPO could potentially be a relevant factor there, and only if, as part of that process, you conclude that it would be a legally relevant consideration.

So we do respectfully say, Sir, the Tribunal can go a very long way, and, frankly, in a substantial number of circumstances, that very long way will answer the question.

THE CHAIR: Would it be possible to split up pass-on in this way I'm not quite sure how you'd frame this, but if we were to say Trial 3 was going to deal with fair share and EPO at an economy wide level without reference to direct proximate, and then we would also deal with the question as to whether or not it was necessary to consider it at a direct and proximate. So it's actually only direct and proximate EPO you've hived off. What about if we were to end up with that situation?

So basically the issues for consideration would assume that direct and proximate might be a point that needed to be resolved, but if it was, it would be left over for Trial 4, and we would know by the end of Trial 3 whether it was or not.

Is that feasible, do you think?

MR COOK: Sir, actually, it's not one we've given, as it's just been suggested, a considerable amount of thought to. Certainly, my initial thought is certainly that would be a realistic way of dealing with it on the basis that the disclosure issue largely goes to the direct and proximate point. So, you know, without disclosure, one is very much at the level of the kind of evidence Mr Holt was putting forward in the course of Trial 2, which is talking in general terms about how far costs of all kinds impact upon prices at a sort of headline economy-wide or sector-wide level.

So yes, if we are pushing off the point that is a point of fact that one needs to address, that is rather easier to deal with, certainly.

THE CHAIR: But we would then be left with a fully-formed fair share analysis in the Trial 3 judgment. Except if, in considering the legal points we've been discussing, it became apparent that we needed to make a further adjustment for direct and proximate EPO, in which case we would need to go and find out the answer to that to make the adjustment. That's basically where it would be, isn't it?

MR COOK: Yes, and only if you decided that, legally, the test under Article 101(3), direct and proximate, was a feature of -- well, I would say European law but for these purposes we're also considering UK law, but they're identical. Yes. So if you'll consider that the direct and proximate test under English tort law was also a feature of 101(3).

THE CHAIR: That's helpful. Thank you, that's helpful.

MR COOK: Yes. I mean, that certainly would be one way of slicing up the issue, Sir. But I was going to say my third point -- which is premised on the notion that it will be EPO in all its formats -- is that splitting up EPO is far more attractive than the alternative. The alternative is: if EPO is not put off then in order to protect our ability to (inaudible) EPO in all possible facets of the test that might arise, including direct and proximate, we would need to press for some version of disclosure that would be necessary to demonstrate EPO now. The expert evidence would then need to address that evidence. That goes to, Sir, what you've fairly described as that binary issue of where it figures within the price setting process.

With respect, we don't perhaps think it is something that requires a significant -- in the sense of a number of documents to be disclosed by at least a subset of merchants, because businesses don't tend to be ones that have a formal, written down, one page document that says, "This is how we price". Pricing is something that emerges in practice from how they operate their businesses. So we need to see the documents associated with the price-setting process to see where the MSC comes in, on which side of the line. But it is a focused exercise under the terms of the Trial 2 test, but it's one that is not going to be answered by one or two documents. It needs to be disclosure of the price-setting process.

I think, certainly, we perhaps would be more open to the idea that there is a sampling process available here, a sectoral sampling process, than Mr Kennelly perhaps was. But it would still need to cover a significant number of merchants and that becomes a demanding addition to what, in our respectful submission, is already a process that is straining at the absolute limits. So you did ask Mr Kennelly why he thought --

THE CHAIR: Sorry, Mr Cook. I just want to make sure I understand. I think

I understand your submission just now to be, essentially, that if we have to get into the question of pass-on on a direct and proximate basis for any of these claimants in Trial 3, then obviously that has implications because you're going to be stuck with the result of that when it comes to Trial 4. That's the point you're making, isn't it? In other words, whenever it's done, it has to be done properly because it's only going to be done once with these claimants and you're stuck with it. That's the point, isn't it?

MR COOK: It is absolutely the point, yes. But realistically, Sir, it needs to be done properly even if we're doing it in Trial 3 because if it turns out to be a point of significance, it needs to be done properly. But in any event, Sir, as you rightly say, if we go down the process of having a determination for these claimants, of direct and proximate, then of course, as long as the legal test is the same, it's going to be binding.

THE CHAIR: But you're right to pull me up on "properly". What I mean is that the purpose of Trial 3 is actually different because we're trying to get an economy wide and we're using it as a benchmark. Obviously, when we get to dealing with them as individual claimants then we're doing it because you are entitled to test it, as you've said.

But I suppose I'm just making the point that we might actually approach that exercise in a different way if it didn't have the significance that you pointed out. But because it has the significance you've pointed out, you're saying you can't do it in a more light way for the purposes of the economy wide if you're then stuck with the outcome when it comes to Trial 4. That's the point I was making.

MR COOK: Yes, and that's absolutely right to say. We obviously recognise that Trial 4 is also going to need to take a proportionate approach in relation to this, and that one would never anticipate a situation where one looks at every claimant individually at all. It's going to need to be done with some kind of sampling process. But, essentially, where we got to in the course of Trial 2 was a recognition that actually this differs significantly between different sectors.

It may well be that there isn't much difference within sectors. One would expect similar businesses price the same way. Sectors don't always involve necessarily identical businesses. But certainly, with different sectors, one found very different outcomes. 100 percent pass-on for one merchant class, two others around the 50 percent mark and it not being established in relation to several others that we looked at.

Sir, one of the questions you asked Mr Kennelly is why he thought further disclosure might alter the outcome from Trial 2. My answer to that is a very simple one. We only looked at a very small number of merchants and, consequently, quite a small number of sectors in Trial 2. If one goes back to the actual number of merchants that provided documents and witness evidence, I think I count that up as seven. Others provided less material. For example, Sony provided documents but didn't provide witness evidence. But however exactly one slices the numbers that we got close to a full process on -- whether it's seven, eight, nine -- out of those we managed to show substantial pass-on for three of them.

Certainly, Sir, we would realistically expect, based on that success rate and recognising there wasn't any aspect here of cherry-picking sectors that would have high pass-on -- quite the reverse -- if we look at merchants in other sectors, there are bound to be a number of other sectors where MIFs are taken account of in their price setting process, given the three we showed come from very diverse, different kinds of sectors. There'll be others that are similar but we'll only find that out when we have the material to test those factors.

With respect, Sir, we do say: if it's going to be done, it needs to be done properly and it would be best to do that as part of Trial 4. But as you rightly say, Sir, if it's the direct and proximate aspect of that, that is certainly one that can be dealt with in Trial 4 just the once.

THE CHAIR: That's very helpful, Mr Cook.

Mr Woolfe.

Submissions by MR WOOLFE

MR WOOLFE: Thank you, Sir. I'll try and be as quick as I can. We're somewhat pressed for time.

If I can begin by addressing some of the fundamental assumptions underlying these applications. One of those is the point about binding effect and I will come to that in due course. But I actually want to show you the other one.

Although there's a preliminary issue wrapped up in it, the centre of Visa's application -- I don't think Mr Kennelly would dissent from this -- is that, if proximity is an issue, they may need a very, very wide set of disclosure and it may be a very big issue that needs to be addressed extensively at trial in respect of this new cohort of claimants. The logic for why they want a preliminary issue is because of that concern about disclosure and adjournment. That's what's driving all of this.

Now, if I can take you to Mr Cassels's witness statement, that is in the bundle for the preliminary issue application at tab 2. What I want to take you to is paragraph 50 to 53 of that.

THE CHAIR: What page is it?

MR WOOLFE: Tab 2, pages 31 and 32.

THE CHAIR: Yes.

MR WOOLFE: You can see, at paragraph 50, in the last four lines of that paragraph, he sets out there the circumstances in which he considers the economy-wide merchant pass-on issue would not arise as part of the fair share condition. They say:

"... unless the Tribunal finds that either (i) there are no merchant benefits to MIFs, or (ii) the benefits to merchants more than fully compensate for any disadvantages of

MIFs, the Article 101(3) assessment in Trial 3 would not be complete and the Tribunal would not be able to completely determine liability."

So in a situation where you adjourn out the economy-wide pass-on issue, it's only in the event of these two fairly extreme scenarios that the issue falls away. Either the merchants win completely and there is no conceivable benefit from MIFs, or the Schemes have a storming victory and show the benefits of MIFs to merchants are so huge that pass-on is simply irrelevant. So that's what he's contemplating. He is contemplating that you wouldn't be able to reach a complete determination of the Article 101(3) issue.

Anyway, in terms of the two assumptions which I'll draw attention to, paragraphs 51 and 52 represent Mr Cassels talking about the binding nature, or not, of the Trial 2 findings. He says in paragraph 52:

"... the claimant specific findings on MPO [at the bottom of that page] in the Trial 2 judgment do not apply to the CICC Claimants and the Screwfix Claimants."

I think it would be said now, and I think it is being said to any of the other new claimants either(?). So that's the binding effect point.

The other key assumption, though, is in paragraph 53. I invite you to read that:

"... Visa would seek to show that the represented persons in the CICC Proceedings (or, at least the Opt-In -- "

THE CHAIR: (Overspeaking). (Pause)

Yes.

MR WOOLFE: Yes. The bit I wanted to stress was the sentence in the middle of that:

"This would be the equivalent to the analysis that Visa would need to undertake to prove MPO by these Claimants."

So what Visa is contemplating is that in order to address economy-wide merchant pass-on, or proximity as an element of economy-wide merchant pass-on, they need to do exactly the same analysis as they would do if they were just trying merchant pass-on by each and every one of these claimants individually. That is indeed why we understand they are seeking disclosure from all members in their application of the CICC Opt-In Class. What's not stated, but I assume Mr Kennelly would say, is that any other claimants who are involved in Trial 3, they would seek the same disclosure in respect of them as well. They're treating proximity on an economy-wide basis as though it requires disclosure from absolutely everybody, because it needs to be addressed separately for everybody.

THE CHAIR: Yes. That's what I've just been exploring with Mr Cook, I think, isn't it. I think he accepts that, although there might be different exercises, he says in practice, once you start embarking on it even on an economy-wide level and you're looking at individual claimants then, effectively, everybody would be bound by the answer. So when you have got to Trial 4, you've done that job already. So that's why I think he says that.

MR WOOLFE: That's what Mr Cook said. But in a sense, what I wanted to emphasise to you is: the issue for Trial 3 on fair share is economy-wide merchant pass-on. That's the potential issue we're talking about. That is an economy-wide issue even if proximity has to be assessed in relation to it. We say it is --

THE CHAIR: The problem is, though, how do you do that? Let's just say you're doing it with a blank bit of paper. You do it effectively in the way that we did it in Trial 2. You take some samples and Mr (audio distortion) is resistant, but I think inevitably you would have to. You take some samples, and then you would work out, for them, what the pass-on position was, and then you would try and extrapolate that across the economy. That's the only way you can do it, isn't it?

MR WOOLFE: Yes. We said that the Tribunal has, in a sense, already done that in the Trial 2 judgment. They've reached findings in respect of certain individual claimants who were before it, and then it also reached conclusions in respect of sectorisation and the matching of different sectors as well. That's in the Trial 2 judgment, paragraphs 357 and 364, where you reach those conclusions, Sir. So that is the kind of exercise one would have to do, and that would allow you to reach conclusions regarding those sectors in which there is approximate pass-on, and those sectors in which there isn't.

But on any view, you don't need to address the economy-wide issue. There are two points: one is that you don't need to address the economy-wide issue on the basis that you have to perform an analysis of each and every individual claimant. Secondly, it's not necessary to do that, nor is it, in fact, sufficient to do that.

The real oddity of what Mr Kennelly is proposing is that we would have: at Trial 3, you could reach conclusions in respect of the Trial 2 Host Cases based on the Trial 2 judgment for proximity. You would then have another trial, in respect of the non-trial 2 Host Cases -- the new claimants -- in which I think that you said that you'd have evidence from those claimants, and you'd be reaching inferences about economy-wide pass-on evidence from those claimants.

But that -- I'm not saying what his proposal is -- would seem to exclude evidence reconsidered at Trial 2 in respect of the Claimants who were considered at Trial 2, and it is very odd to reach inconsistent findings as to an economy-wide issue -- in one case on one sample of evidence, in another case on another sample of evidence -- and in doing that, you are, in the second case, blinding yourself to the conclusions that have already been reached. That is a very, very odd scenario.

We say that the sensible way to address proximity, if it has to be addressed on the economy-wide pass-on level, is to seek to draw inferences about the population of merchants as a whole, having regard to how they operate in different sectors, as in fact the Tribunal did in the Trial 2 judgment. That doesn't require the kind of huge exercise which is contemplated by the defendant's disclosure application. If anything needs to supplement the Trial 2 judgment findings, that can similarly be done on a sample basis and done sensibly.

THE CHAIR: Mr Woolfe, I'm sorry to interrupt you. It's very difficult to interrupt you because you keep talking, and I want to ask you questions about things.

MR WOOLFE: I'm sorry.

THE CHAIR: I wonder if you could just pay attention to when I seek to -- you're just talking -- I'm not getting a chance to talk back to you.

MR WOOLFE: Sorry, Sir, I didn't appreciate -- maybe the lag is -- I'm sorry, Sir. Please do pose any questions.

THE CHAIR: I don't understand the point you've just made. If you're not looking at individual claimants, how do you use the Trial 2 judgment in relation to people who were not party to Trial 2? That's the essence of this.

I've put the point you've just made about the oddity to Mr Kennelly, and he accepts that it's odd, but he says that that's what they're entitled to do, and I think that he's probably right. So I don't really understand what you're suggesting by way of inference from the Trial 2 judgment and where does that get us? Not dealing with --

MR WOOLFE: Can I show you the part of the trial judgment in which findings were made about sectors rather than just individual claimants?

THE CHAIR: But that's not the point. The point is not what was said in it; it's what use can be made of it as a matter of law. They must be right, mustn't they? I mean, I think that Mr Beal has rightly accepted, as I understand it, that when we get to Trial 4 and pass-on for people who were not Host Cases at the time of Trial 2, it's going to be necessary to do this exercise again for them, and that's because the Schemes are insisting on doing that and they're entitled to. So I don't understand how you get away from that point if the entry point into Trial 3 economy-wide pass-on is looking at individual samples to build up a picture. It's exactly the same point, isn't it?

As Mr Cook says, once you start looking at the individual samples, it doesn't matter what the purpose is for; when you make a finding about pass-on for an individual sample, then everybody's bound by that and it has implications for the outcome and Trial 4. So I just don't think you're really addressing the point that's at issue here. It's not what it says in the Trial 2 judgment, it's how it can be used, how it can be deployed in circumstances where we've got a mixed, set of cases, some of which are bound by it, some of which aren't.

MR WOOLFE: Thanks. There are two points I want to make in response to that.

First of all, about what Mr Beal said. First, he was addressing whether or not findings in the Trial 2 judgment can be completely conclusive of pass-on as a mitigation defence in respect of the CICC Claimants. That was a different issue from exemption. Also, in a sense, he was saying that there would need to be a triable issue.

The abuse of process principle on which we rely is a broad and a flexible one, and it is accepted that there may be circumstances in which fresh evidence, or fresh circumstances, do make a difference.

THE CHAIR: I think that that's all fine, but the reality of this is that, I think, as you've just said, Mr Beal accepts -- rightly so -- that when you get to Trial 4 with the CICC Claimants who were not party to Trial 2, then you can't just start and finish pass-on with them by looking at the Trial 2 judgment. Indeed, the Trial 2 judgment is inadmissible as evidence of what the pass-on rates of those parties are.

I had understood Mr Beal to accept that, and he may not have, and there may be some arguments around the margins about things that are abuses of process and aren't -- I mean, I don't want to get into all that because I don't think it helps with the answer to this, I just think that the point is that if we go into a process on Trial 3 that involves the determination of pass-on rates for the new Host Cases, then that has significant implications for everybody and I can see why that is a point that the Schemes are taking. I think that we need to deal with the way we resolve that problem, rather than arguing about whether it's a problem, because it clearly is a problem.

What I would like to ask you is whether you see any attraction in the solution that I was debating with Mr Cook, which is that we just proceed on the basis that we do Trial 3 and we know that if parties want to raise and argue about economy wide pass-on on a general basis, as opposed to direct and on a mitigation basis, direct and proximate, then they can do that. That's certainly within scope and they can call expert evidence and do all that, but nobody is to bring any evidence, or to seek to bring any evidence, on direct and proximate in that trial.

However, if anybody wants to argue in that trial that direct and proximate is the test if pass-on is to be considered, then we'll resolve that in Trial 3. Then, if necessary -- which I suspect it's not going to be, but if it is necessary -- then we will have the factual inquiry into that direct and proximate in Trial 4, which we have to do in Trial 4 anyway. That's the solution that, I think, Mr Cook and I have edged towards. It's a bit different from the one that I indicated I wasn't very interested in, and he may have some views on that, but I'd quite like to get your views on that.

MR WOOLFE: Thanks, Sir. I'll give you my views on that and then I'll make one other point about the use that can be made of the Trial 2 judgment, which I think is partly relevant to it.

So we think that it is preferable to what was being advanced by Visa, if I can put it that way. Because the idea of a preliminary issue that's not going to give you finality on the question of proximity, and then you go into a trial not knowing if proximity is an issue or not, their appeals and so forth, is very, very unattractive and we didn't think it really solved anything.

The solution you put forward, Sir, is better in that respect. However, the reason why we would still oppose it, respectfully, is that it does lead to a situation where you're contemplating not reaching a final decision on exemption. It is also preferable, I should say, because it does contemplate that you can reach a final decision on exemption. But it, rather than Visa's proposal -- which we think was pushing towards definitely not reaching a final decision -- does leave open the possibility that we'll get to the end of Trial 3 and exemption still won't have been decided.

Our preference would be that all factual matters related to exemption are ventilated in Trial 3, if necessary, with any evidence that's required on a sample basis to address that. That would be our preference, but we prefer -- sorry, Sir.

THE CHAIR: If you were faced with the choice, Mr Woolfe, of that outcome or having to give disclosure in relation to at least a sample of claimants, which would you prefer?

MR WOOLFE: Sir, it may be that I need to take brief instructions in relation to that matter before giving you a definitive answer. "It may depend on the degree of the sample", is the, perhaps, slightly unsatisfactory response.

The final point I was going to make about the use of the Trial 2 judgment and what's being proposed, Mr Cook said that people will be bound in Trial 4 by the findings in Trial 3 in relation to economy-wide merchant pass-on. Yes, they would, but those are findings about economy-wide merchant pass-on, not about individual merchant pass-on.

You can go from the Trial 2 judgment's, Sir, individual findings in merchant pass-on and build up to economy-wide, but you can't go the other way and take a finding from economy-wide merchant pass-on and say, "Because merchants in general didn't pass-on in a proximate way, this merchant did or didn't". The inference doesn't flow that way, Sir.

THE CHAIR: I think that that's the point he's making, Mr Woolfe. He's making the point that in order to get to economy-wide, you have to deal with individual claimants, and that is binding. That's a different point.

MR WOOLFE: We would accept that, Sir, but you would have to do it for every individual claimant, and that's --

THE CHAIR: (Audio distortion) but that is exactly, precisely, his point, which is that he's saying to the extent you do that -- and he's saying he's open to sampling, and Mr Kennelly is not so open to it -- but to the extent you do it, there's going to be a reasonable cohort of claimants in relation to Trial 3 where, in order to do this, you really have to do it properly. You've got to get into all the documents that they would be entitled to test the proposition of how the price was set. Now, it might not be as long as the list that is produced, but there certainly will have to be, as I think Mr Cook says, reasonably, some degree of inquiry into what is probably not documented as a black and white thing in company policy. So we are stuck in this difficulty, Mr Woolfe. One of the points I wanted to ask you was: what is your position as to the direct and proximate causation element? What exactly do you say about this? Are you saying that the test for the (inaudible) needs to take account of pass-on at all, and if so, on what basis?

MR WOOLFE: If I can take those in turn. If pass-on is an issue as part of the Article 101(3) test, we say, yes, proximity is required.

There is an authority in relation to the first exemption condition, that you're only looking for efficiencies that are a sufficiently direct -- "a sufficiently close and direct link", I think, is the phrase from the general court in Mastercard between the restriction and the efficiencies and the benefits. We say that you have to look at the first and second conditions together because the second condition about benefit, fair share of benefit, is about whether you get a fair share of these efficiencies. So it's all one; there's a link there. Both benefits and dis-benefits have to meet that test as a sufficiently close and direct link. So we do say that all causation questions, as it were, under the first and second conditions do include a question of whether or not the link to the restriction is sufficiently close and direct.

Now in terms of whether or not pass-on is an issue: Sir, you put a point to Mr Kennelly about the extent to which you have to look at merchants and their customers for the purposes of assessing pass-on. Now, it is clear from the authorities that you have to look at both direct and indirect consumers of the product in question, and, in a sense, the customers on that side are indirect customers.

I think what is an open question, Sir, and we are having to consider, is whether you look at the merchants and their customers as a single group on the acquiring side, such that pass-on by merchants simply isn't an issue, or whether you look at those as two separate groups of customers, in which case pass-on would be potentially an issue, but in which case the Schemes would have to satisfy the fair-share test, both in respect of merchants and in respect of the more indirect consumers as well.

The Supreme Court in *Sainsbury's* were looking at the Advocate General Mengozzi opinion, and if you look at the Advocate General Mengozzi opinion, there are bits in that could be read both ways on that, Sir, so I'm not going to give you a definitive answer on that today. But we've accepted in our response to Visa's RFI that pass-on may be a matter which has to be decided at Trial 3, even though it doesn't necessarily have to be decided in all circumstances.

THE CHAIR: Yes. No, that's helpful.

So I think as I understand it, you're saying you don't have a particular position on pass-on, but if it's going to be run, which it may well be because that's the advantage of the Schemes, then you would say it should be done on a direct and proximate basis?

MR WOOLFE: That's right, Sir.

THE CHAIR: It would be helpful, I think, for you just to take some brief instructions about whether you have a preference for hiving off the direct and proximate point, or whether you would prefer to be dealing with what is likely to be, I think, a reasonably substantial sampling exercise and disclosure. I think that's probably the obvious choices you're facing at the moment. So maybe you should just do that now.

MR WOOLFE: Thank you, Sir.

Time is short. Should we say five minutes, Sir? Is that possible?

THE CHAIR: Are you not able to do that right now? You can't just turn your mic off and ask?

MR WOOLFE: I can turn my mic off. I think it might require more than just 30 seconds, Sir.

THE CHAIR: You're not in the room with your instructing solicitors?

MR WOOLFE: I am in the room with my instructing solicitors, but I'm instructed in this respect by more than one firm of solicitors, so there's an element where a small amount of discussion may be needed.

THE CHAIR: Absolutely. We'll give you five minutes and if you need a bit longer, say so. It's an entirely fair point.

MR WOOLFE: Thank you, Sir.

THE CHAIR: Thank you.

(12.41 pm)

(A short break)

(12.51 pm)

MR WOOLFE: Thank you, Sir. Thank you for that time.

The reality is there is some difference in views between different groups of claimants on this issue. It may be simplest if -- I don't know whether you intend to give a judgment on this point today or not, or if it might be easier if each firm just simply wrote to you a short letter setting out their particular preference, if you're interested in that.

The concern of all parties is that they do want the exemption trial to be as final as possible, and that if a disclosure exercise is being undertaken in advance of Trial 3, that it is focused and is not taken as is insulated from the possibility of there being an adjournment of Trial 3 generally to try and kick Trial 3 off on the basis of the exercise being too huge to be manageable.

I'm sorry to give a slightly caveated answer, but that's where we are.

THE CHAIR: I think it's understandable. I can see the tensions. Okay.

MR WOOLFE: One more point, Sir, in view of time.

I did have some submissions for you on abuse of process. I've obviously not made those submissions extensively today, partly in view of time, but partly in view of your indication that it would not be helpful.

Two points, Sir. First of all, we do reserve our right to argue at a later stage the Trial 2 judgments are binding and dispositive. We'll run that argument at a point where the point actually arises for decision.

Secondly, Sir, if you are minded to adopt your suggested approach of having a trial of economy-wide merchant pass-on in Trial 3, but not of the proximity issue, the amendment we would suggest says there's no reason why Trial 3 can't consider the proximity issue in respect of the Trial 2 Host Cases, in respect of those people who are covered by the Trial 2 findings, and I think that was accepted by Visa. So that could be a potential amendment, Sir, to your suggested approach.

THE CHAIR: I think from the Tribunal's point of view that's pretty unattractive because we would then be making a finding about one thing before we'd hear the evidence about the other. And, of course, as Mr Kennelly says, they're quite separate, but I don't think it's immediately appealing. Okay, but I've got the submission. That's fine. I understand that.

Mr Kennelly, having started off saying I wasn't contemplating splitting anything off, I'm now contemplating splitting something off, so something's changed.
What's your view on that as a solution? Is it something you would support?
MR KENNELLY: Sir, yes, because it appears to us that the solution which you discussed there with Mr Cook -- and just to make sure I've understood it properly -- appears to be that we proceed on the basis of the Scheme's primary case to proceed on that basis. So we're looking at a top-down econometric approach to economy-wide merchant pass-on. There's no need then for the detailed disclosure which I seek today.
At Trial 3 we'll proceed on that basis, assuming that the direct and proximate test isn't part of the test for merchant pass-on and 101(3). At Trial 3 we'll resolve the legal question, if we need to, if direct and proximate is part of the test or not, and if it is, that then will be that will require further disclosure and resolution at a later trial.
THE CHAIR: Yes, I think --
MR KENNELLY: May I finish, Sir? Just to make sure I get all my errors across in one go so that, if I misunderstood them, it's comprehensive.
And the final piece is that, contrary to what the claimant is suggesting, the approach which the Tribunal is proposing doesn't involve any extrapolation from the Trial 2 findings, we would be doing the economy-wide pass-on analysis, as I say, on a top down econometric basis, but we would not be extrapolating out from individual findings in relation to merchants or sectors in Trial 2. That's not what the Tribunal is envisaging in this proposal that you discussed with Mr Cook.
I'll stop there.
THE CHAIR: It may just be a question of framing of it. I don't think it changes the basic essential point. I think what we're doing in Trial 3 would be, assuming that everything was in play -- so it would be possible for people to argue that there was no

pass-on to be taken into account. There was pass-on to the economy by (inaudible) which was not subject to the mitigation test or that there was pass-on on an economy (inaudible) was subject to mitigation test.

All those things would be in play as a matter of legal submission, but there would be no factual evidence tendered in relation to the third possibility that mitigation was required in order to assess pass-on, and if the Tribunal reached the conclusion that that actually was a relevant consideration, then it would revisit that question in Trial 4, with the benefit of the outcome of the Trial 4 pass-on inquiry.

So inevitably that means, as Mr Woolfe says, that if we reach that position, the Trial 3 judgment is incomplete because we don't know what the answer is until we've done the extra bits of inquiry into pass-on. As to what happens with the Trial 2 judgment, again, that is left entirely open for the parties to make submissions on that at Trial 3, but I think -- and I'm still thinking, I think, about the point that Mr Woolfe made -- but my instinct is that if we get to the position where direct and proximate is important, I think we would want to deal with that in its entirety, and that would all become a Trial 4 subject for everybody in Trial 3, not just some of the cases. But Mr Woolfe's obviously raised that point and I think I need to consider it properly, but that's broadly the outline of it.

MR KENNELLY: Yes. We will be content with that approach, Sir, we're grateful for it, and our submission would be that the Tribunal should stick with its instinct in relation to dealing with them together at the later stage, and not to follow Mr Woolfe's proposal. So on the Visa side, we would be content to proceed to Trial 3 on that basis.

THE CHAIR: What I was going to suggest is if there were other things you want us (audio distortion) Mr Woolfe, but given that's where I think we are, what I'm going to suggest was that someone should take responsibility for recording that as an option -- at the moment still just an option, but, if you like, a variant of your application -- and that everybody should have to have a look at that and to comment on it again, because I appreciate it's coming in the middle. It's really my suggestion cooked up with Mr Cook, and I don't want anyone to feel they haven't had a chance to think about the things that might go wrong in that -- and send that back to us, on the basis that everybody has a chance to comment and make a further submission on it. I don't want rounds of submissions, but just if anybody has anything further they want to add about what might go wrong, particularly, if we did that.

Then, if everybody agrees on it -- obviously subject to any further thoughts I might have -- that looks like the outcome. If there's not (audio distortion), I would deliver a ruling in which I will make a decision about exactly what we do do going forward, obviously informed by the further submissions.

The only thing I would add to that is that to the extent, Mr Woolfe, there are people who actually rather give the disclosure and get on with it, I think you need to try and settle that position in your camp, if I can put it that way. Because if you were going to say to Mr Kennelly's and Mr Cook's clients, "This is what we're offering", and they were to accept it, then we might take a different approach if all of that.

So the door's still open for you if you wanted to go down that path, but you're not going to do it by just resisting the application, you're going to need to come forward very promptly with a very clear explanation of what you could offer and see whether they're interested in it or not, and if they're not interested in it, then really, we're back to me trying to decide whether the option we've just discussed is the best way forward.

MR WOOLFE: Thank you, Sir, for that indication.

My one question is, do you have a timescale in mind by which the parties should come back to you on this option? Obviously, time is somewhat pressing, particularly if somebody was saying, "No, we shouldn't take the option that you're proposing".

THE CHAIR: I think it's a week. I think I need from you within a week of today, by

4.00 pm by next Wednesday. It may be a bit fast for you to progress any definite… if you wanted to go down the path of offering disclosure instead. There may be time, Mr Woolfe, but that doesn't mean that, you know, if in a week's time you've made some progress and there's some interest from the Schemes, then obviously I can factor that in and we can see how we deal with it. But I think people need to get their skates on is the short point.

MR WOOLFE: That's what I thought you would say, Sir. So 4.00 pm, Wednesday, 15 July.

THE CHAIR: Yes, thank you.

MR WOOLFE: Thank you, Sir.

THE CHAIR: I'm just going to move on from that now. Is there anything anybody else wants to say about that?

Mr Cook, we've discussed it but, just in terms of the process, you're happy with that process?

MR COOK: Certainly, Sir. We're happy with the process. The only point I'd make is that the more we get into this process, the more important it's going to be at some point to impose a guillotine upon new claimants because we're starting to get increasingly contradictory positions being adopted. Certainly the mood we took from you, Sir, yesterday was that that will be appropriate at some point. We're not there yet but just to note that we will need to revisit that in due course.

THE CHAIR: Yes. No, understood. My immediate reaction to it, Mr Cook, is we're still some way out. We're about 15 months, 16 months out from the trial. I absolutely understand the point about disclosure. I know there's a point about witness statements from people who haven't given disclosure, which we need to deal with at some stage. I don't think that it's a today problem but I think there will come a point reasonably soon where, in fairness, it does need to be dealt with. So I'm very happy to leave that on the radar for further consideration.

We haven't got very far down the agenda. What I was going to suggest was that we try and find a morning between now and the end of July for me just to run through that list of disclosure items to the extent the parties would find that helpful. So that's an offer, really, to try and move things along. We could do that on the basis that we don't need quite so many people on the screen. I'd be very happy to do it with junior counsel if that was -- (Pause)

But I think probably we do have to stop now and I think people have other commitments this afternoon. So the question is, would you like to convene another half day in the next two weeks in order just to finish the agenda?

MR COOK: Sir, can I just check would you be intentioned to wear both hats and deal with the CICC application in that context? Because I think that is, certainly from our perspective, an application of a greater degree of importance, certainly in the short term, than some of the other issues. Witness evidence is also a significant matter going forward.

I could say, just to clarify, that the initial disclosure point looks like it is essentially being resolved by agreement. There's one point still between us but I think that's likely to be wrapped up. So at least that one is off the list.

THE CHAIR: Just remind me again -- I should know this but there has been so much going on -- the CICC disclosure application is essentially for what?

MR COOK: So what we're seeking is to, with the clarity that's now been established by the Opt-In ruling in terms of who validly opted in, what we'd like to do is obtain the material which will demonstrate whether these people are actually proper members of the class. There is an issue with the fact that a number of them, as far as we can see, probably don't meet the class definition. So it's for material to test whether they are valid members of the class and what scale of claims they are making, at least at a headline level.

THE CHAIR: Okay. Well, look, when these were put on the agenda for today, the direction from me was that we weren't necessarily going to resolve them, because I'm not sure this is an efficient way of resolving some of them. But we would certainly discuss them, and I can't see any reason why we shouldn't leave CICC on the list. Ms Robertson, I don't know whether Mr Woolfe is doing --

MR WOOLFE: I can, at least (inaudible). I think as respect to most of the items on the agenda; initial disclosure, witness statements, et cetera for non-lead claimants and the questionnaires with respect to CICC, those can be dealt with, I think, fairly shortly at a hearing along the lines you described. They're all quite small issues.

The application in respect of disclosure from the CICC claims, there seem to be two different things that are being talked about. One is an (inaudible) application for VoC data, and there's also complaints about a methodology for MPO. The suggestion of paragraph 16 of Visa's skeleton is there might be decertification coming along as a result of failure to put forward a revised methodology for merchant pass-on.

Now, in respect of both the VoC disclosure application and that, those are both big issues that couldn't just be resolved on a short hearing along with other items in the course of the next couple of weeks. They're significantly more substantial. With respect to the disclosure one, VoC, I think there's actually a dispute of fact as regards what use can be made of merchant identification numbers and existing data and so forth. There would be a potential need for some evidence about that. So they're both substantial matters and I think would require proper listing, probably for a date in September or something like that.

THE CHAIR: So just to be clear, I don't think I have in mind dealing with anything heavyweight at this. It's about trying to move these things forward and resolve them. Secondly, in relation to the CICC, I certainly wouldn't anticipate getting into questions of decertification and applications for that. However, if we're going to have a discussion about disclosure, I can't see any reason why I shouldn't at least understand what the issues are (audio distortion) and I think it would make sense to have a 10 or 15 minute conversation about what the problems are and how we resolve them. I think that's the purpose, Mr Woolfe. So unless anybody objects to that, I suggest it remains on the list.

MR WOOLFE: Thank you. A discussion about what can sensibly be done to progress matters is fine, Sir, as you say.

THE CHAIR: Okay, well --

MR KENNELLY: Sorry, Sir, from our perspective, just to complete the picture, to reassure Mr Woolfe, when we raise the question of decertification, we weren't suggesting that that was going to be resolved, and that's not on the table for resolution at the hearing that you contemplate. We are simply asking for a direction from the Tribunal, and I'll address this with you next week or the week after, whenever you set this hearing for the opt-out, CICC class representative to provide an answer to our question about when they're going to give us a workable methodology for merchant pass-on that's consistent with Trial 2. That's the only issue for the opt-out class members in CICC. And the CICC question about involvement in Trial 4 is a very short point that could be addressed at this hearing that you contemplate.

THE CHAIR: Well (audio distortion) a long list of things that are not disclosure related that stray out of the Umbrella Proceedings, but I'm not going to stop you raising them, Mr Kennelly. I just don't think you can expect me necessarily to be dealing with things on that basis. So if you want to mention them, that's fine.

Okay. Well, that's fine. So we'll find a date. If perhaps you could deal with the registry to find a convenient date, and we'll fix a morning or an afternoon just to deal with those points, and someone presumably will produce a revised agenda.

I don't want any more bundles, so unless there's, obviously, updated correspondence or something like that, but if anybody feels it necessary to refer to bundles, I'd like to think we could do without any more of them.

MR COOK: Sir, I'm afraid in relation to that, my understanding is that because this was a Trial 4 CMC, the CICC application materials aren't in the bundles everywhere. Unbelievable, I know, that we have so many bundles, but they're not complete. Even the basic application just isn't in the bundles at the moment, so I think we would need to give you a slim additional bundle, simply with the -- I suspect that's only about 40 or 50 pages in total of the back and forth on that. But you would need that, Sir. That's part of the reason why you're perhaps less familiar with the issues. It's not in the materials in front of you.

THE CHAIR: Okay, fine. That's fine. I understand.

But is there anything --

MR KENNELLY: The very, very final point from our side, I should have mentioned it before: the cut-off date for joining the Trial 3 proceedings. I heard, obviously, what you said, Sir, about that. We would like to mention that briefly to you again when we come back in front of you next week or the week after. The concern is still that a date needs to be set in order for us to be able to get disclosure from the new claimants as they come in, and if they are coming in, if they're allowed to come in after October, well, obviously there's the potential to get disclosure from them then is really ephemeral. That's our concern. But it's a short point and we obviously understand the Tribunal's steer already on that point.

THE CHAIR: Yes, the only thing about it, it's obviously of some significance just in the way we're operating these proceedings, and I think, as Mr Beal said, it's not the sort of thing that people should find that has happened without there being some advance warning or signalling about it. So I suppose what I'm anxious about with this is that if anybody's going to be told "This is when you've got to be in", that should be clearly signalled in advance so that everybody knows. That gives people proper time in order to make a decision that they do want to be in.

That's what I'll leave you with. If you want to come with some suggestions -- and I think you need to make a proper application, I imagine in order to deal with that. And you know, we'll need to deal with it as a sort of formal piece of business because it does carry significance.

MR KENNELLY: We'll make a proposal, Sir, and we'll address you on that.

THE CHAIR: Yes. Thank you.

MR WOOLFE: Thank you, Sir.

Finally, apologies again for the overspeaking at the start of my submissions. The IT service didn't allow me to understand that you were trying to interject, so I do apologise.

THE CHAIR: No, no don't worry, Mr Woolfe. I mean, I have to say, I think we all find these hearings where you want to have an interaction like this quite difficult because, you know, if we were face to face, I think we would all find it much easier to read the body language and pick the moments. But the moment you have a lag and it's not entirely clear when you jump in, I'm sure I've trodden on everybody's toes a number of times today, and I apologise for that.

Thank you. Well, we'll see you shortly. And thank you for all your assistance this morning.

MR WOOLFE: Thank you, Sir.

MR COOK: Thank you.

(1.12 pm)

(The hearing was 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?