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IN THE COMPETITION
APPEAL TRIBUNAL

1517/11/7/22
1441-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 29th July 2026

Before:

Ben Tidswell

Merchant Interchange Fee Umbrella Proceedings

AND BETWEEN:

CICC I & II

Class Representatives

v

Mastercard Incorporated, Visa Inc. & Others

Defendants

A P P E A R A N C E S

Kieron Beal KC and Flora Robertson (Instructed by Scott and Scott UK LLP, Harcus Parker Limited, Hausfeld & Co. LLP and Stephenson Harwood LLP) on behalf of the Merchant Claimants and CICC I & II

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

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

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Wednesday, 29 July 2026

1 (10.30 am)

2 THE CHAIR: Good morning, everybody. Can you hear me?

3 MR BEAL: Yes, Sir, we can hear you.

4 THE CHAIR: Good. Thank you. I think we might have people on the live stream, so
5 I should start with the customary warning: an official recording is being made and an
6 authorised transcript will be produced, but it's strictly prohibited for anyone else to
7 make an unauthorised recording, whether audio or visual, of the proceedings, and
8 breach of that provision is punishable as contempt of court.

9 Who's in charge of this one? Mr Beal, are you going to kick off?

10
11 Jurisdiction

12 Submissions by MR BEAL

13 MR BEAL: I'm happy to kick off, yes. Good morning. I'm appearing with
14 Ms Robertson this morning for the claimants. My learned friends, Mr Cook KC, and
15 Ms Klimowicz appear for Mastercard, and my learned friend Mr Cashman appears for
16 Visa.

17 The agenda was set out in the supplemental bundle tab 16, page 100. The Tribunal
18 will be aware that there were five matters to be addressed: the initial disclosure
19 application was the first; second one was the restriction on witness evidence
20 application; third one was the CICC questionnaire application; fourthly, the CICC
21 disclosure application; and finally, participation of CICC in Trial 4.

22 The parameters were set out at the top of page 101 in the fifth supplemental bundle,
23 where you indicated, Sir, that you intended only to hear these matters if they were
24 straightforward and the parties agreed it could be determined. Otherwise, it was
25 intended to see how the matters were to be dealt with.

26 There are a number, happily, of agreements that have been reached. Items one and

1 | three have now been agreed, and I'll address you briefly on those in a moment. What
2 | I've then proposed to do is to hand over to the defendants to deal with the witness
3 | evidence application, and then the CICC matters.

4 | There are a number of subsidiary matters that the defendants have thrown into the
5 | ring, none of which, as far as we can see, seems to have had a formal application with
6 | a direction that it be determined today, or indeed considered today. To the extent that
7 | we can chat about those informally and find a way forward, we of course have no
8 | objection to that. We think it's sensible with respect to try and bottom out the terms of
9 | the order that arises from the Trial 4 CMC that was held on 7 July. But if there are
10 | going to be tendentious matters, then we will need to find a means by which the
11 | subsidiary issues can also be addressed in short order.

12 | The reason I say "short order" is -- can I just put down a marker as to our overall
13 | approach? What we're keen to do so far as possible is to get the limitation issues and
14 | the exemption issues resolved as soon as possible within the existing time frames that
15 | are suggested for them. We think that the remaining issues, for example, for
16 | jurisdictions will be easier to resolve once we've grappled with the core essence of the
17 | question of limitation and on exemption as a general matter. Hopefully, that will allow
18 | the remaining issues to be dealt with more expeditiously.

19 | That does, however, raise -- and it's become clear in correspondence that it's
20 | raised -- the issue of jurisdiction; this Tribunal's jurisdiction. That becomes a problem
21 | that we need to grapple with, including perhaps for the limitation preliminary issue
22 | hearing scheduled for March or April next year.

23 | The short point we would like to make is it would be very useful if the High Court judge
24 | could be persuaded to sit alongside you, Sir, as a panel member, with you remaining
25 | as chairman. We appreciate that that is a resource issue, but anything that we, the
26 | parties, could do to encourage that resource to be made available, we would be,

1 | I think, happy to do so.

2 | The absence of a High Court judge does not, at this stage, jeopardise Trial 3, because
3 | Trial 3 is capable of dealing with UK exemption issues across the board, and it can
4 | deal with Irish exemption issues up until 1 January. We are suggesting, as I indicated
5 | last time, an addendum to that, which is that we would expect, and indeed we will ask
6 | formally, for the defendants to confirm whether or not there are any material facts
7 | arising in Ireland after 1 January 2021, which would mean that the exemption
8 | determination would be modified before and after that date.

9 | We would expect the defendants to come clean at this stage so that they don't say in
10 | four years time, "Well, of course, the situation in Ireland is totally different after
11 | 1 January 2021". Put shortly, that would be annoying and we would rather know the
12 | situation now. If the Schemes do say there's been a material change, then of course
13 | it increases the need for a High Court judge to be appointed so that Trial 3 can be
14 | dealt with and effective, and cover all of the issues, even for the UK and Ireland across
15 | the material period.

16 | I'm not suggesting that this can be resolved today, but we respectfully suggest that we
17 | would need to try and ascertain whether or not the resource is available before the
18 | CMC listed for 26 October with a day in reserve. The short reason for that is that if
19 | that can't be resolved, and if it poses a problem, we will have to grapple with the
20 | unwelcome but inevitable consequence of potentially having to think about a transfer
21 | back to the High Court of all these claims.

22 | Can I just put on the table now what that would mean: the CICC claims can't be
23 | transferred to the High Court. The only jurisdiction that can hear those is here, and so
24 | we would have bifurcated proceedings with the risk of inconsistent decisions. That is,
25 | as I've said, unwelcome at the very least. It obviously leads to a duplication of scarce
26 | judicial resources as well, which is equally unwelcome.

1 | That's the position we're in. I'm flagging those now just so that it doesn't get lost, and
2 | it does have a bearing perhaps on how we deal with certain things down the line. But
3 | at the moment, Trial 3 can go ahead subject to the election point. The limitation
4 | preliminary issue, we may need to think about whether or not the CAT has jurisdiction
5 | to rule on questions of national law from other member states if there is no jurisdiction
6 | to hear a claim arising from that national law.

7 | That's an issue that Mr Cashman raised with me this morning, and which I thought it
8 | right to draw to the Tribunal's attention.

9 | THE CHAIR: Just before we move on, Mr Beal. A couple of things, really. First one
10 | is a point of detail: I've only briefly looked at a letter from Jones Day that came in this
11 | morning. I don't know if you've seen it, but it does raise this question of effect on trade
12 | between Ireland and the UK, which I think the defendants are saying is another reason
13 | why there might be a jurisdiction problem, even for the pre-January, pre-withdrawal
14 | day claims. It's been suggested there might be a problem for all Irish claims.

15 | MR BEAL: If the defendants want to argue that the compartmentalisation of national
16 | markets along national lines doesn't trigger the test for actual or potential effect on
17 | trade, then they're welcome to do so and we'll have to resolve that. But it's not an
18 | argument that is destined to have immediate success on the basis of the existing case
19 | law from the court of justice.

20 | THE CHAIR: Yes.

21 | MR BEAL: But of course, they would say that that doesn't matter. But yes, if they
22 | want to argue that one, we'll have to deal with it.

23 | THE CHAIR: Yes, so that is factored into your position that Trial 3 can go ahead?

24 | MR BEAL: Yes, because it would be a question as to whether or not, prior to
25 | 1 January 2021, the effect on trade test was met. If it's not met, it's simply a question
26 | of national competition law that would have to be determined, I suspect, as part of the

1 | preliminary issue on limitation. But, my argument would be that the effect on trade
2 | test can be seen to be met as a matter of EU law.

3 | EU law, as I indicated in my submissions on 7 July, is a matter for this Tribunal, and
4 | this Tribunal can therefore deal with the threshold jurisdiction question as to whether
5 | or not the effect on trade test is met.

6 | THE CHAIR: Okay, thank you. That's helpful.

7 | More generally, and hopefully to help the discussion later on, this is a matter I'm
8 | discussing with the President. Obviously we will do our best to try and -- well, we'll
9 | have to manage the jurisdiction issues, of course, and we'll do our best to try and do
10 | that in the way that's most efficient for everybody, including the parties and, of course,
11 | judicial resource and the High Court as well as here.

12 | There is a practical point -- a procedural point, really -- that someone's going to have
13 | to transfer some of your claims back, because we don't have jurisdiction for them. So
14 | whatever happens in a practical sense at the hearing, let's say in Trial 4, we're going
15 | to have a demarcation between claims in which -- assuming that there's a common
16 | position on jurisdiction post-withdrawal day -- there's a demarcation of pre-withdrawal
17 | claims in the Tribunal and post-withdrawal claims which are High Court cases, which
18 | can be dealt with in the same hearing for Trial 4.

19 | MR BEAL: The orders for transfer typically have only transferred over those claims
20 | that are susceptible to the jurisdiction of the CAT. Therefore, there's an inherent
21 | retention of those claims which the CAT rules it doesn't have jurisdiction on.

22 | The practical way to overcome that in the past, and I think it was dealt with by
23 | Mr Justice Marcus Smith in the litigation whose name escapes me.

24 | THE CHAIR: *Sportradar*, was it?

25 | MR BEAL: Yes, thank you. It was to have a High Court judge, not necessarily as
26 | chairman, sitting on the panel of the Tribunal, and therefore exercising equivalent

1 | jurisdiction for the purposes of determining those parts of the claim that were
2 | High Court only. To that extent, the High Court judge would be ruling, not as the
3 | Tribunal but as a High Court judge, for the purposes of dealing with those claims, and
4 | applying the same rationale as the Tribunal reached if he or she was of the same view
5 | that it should be applied. That, of course, assumes that there isn't a minority split. But
6 | one hopes that that would be the case.

7 | THE CHAIR: Yes. I'm not disagreeing with the approach. I suppose it's a little bit
8 | more complicated than *Sportradar*, because we're here thinking about circumstances
9 | in which there might be factual material which is very different for the period after
10 | withdrawal day. It also potentially may be economic evidence, I don't know, which the
11 | High Court judge would need to make a finding on without reference, if you like, to the
12 | panel, because the panel would only have jurisdiction for other matters which didn't
13 | include those factual economic matters.

14 | MR BEAL: I'm sorry, Sir, I'm not fully understanding what the distinction is between
15 | the issues that would be live pre- and post-1 January that would require different
16 | determination depending on the jurisdiction question. The same issue --

17 | THE CHAIR: Yes. If the facts were different -- and I appreciate you're saying they
18 | won't be, or at least you're sceptical about whether they will be -- but the whole point
19 | of this is that the Schemes are going to be saying that the facts are different. If the
20 | facts are different, and the judge is actually going to be making a separate
21 | determination of facts which haven't been considered by the Tribunal as a whole.
22 | That's the point I meant.

23 | MR BEAL: Yes, I see. I apologise for being slow. Yes, I think that follows, with
24 | respect.

25 | THE CHAIR: Yes. Not an insuperable problem, but a bit more complicated than
26 | *Sportradar*, I think.

1 MR BEAL: Yes. Obviously, you couldn't have a simple read across and there would
2 need to be a separate judicial determination of the facts that the panel wasn't involved
3 in for the post-1 January period.

4 THE CHAIR: Yes.

5 MR BEAL: Because otherwise the Tribunal would be exceeding its jurisdiction.

6 THE CHAIR: Yes, okay. Well, look, let's see what the Schemes have to say about
7 that, but that's helpful. Thank you. As I say, it is a matter of active discussion here
8 and we are trying to work out what the best way forward is.

9 I think the letter from Jones Day is helpful. I did pick up that there was some question
10 as to whether it represented the claimant's views, Mr Beal. I mean, it would be really
11 helpful to have, to the extent it's possible, an agreed position from all the parties or at
12 least an understanding of what the differences are.

13 MR BEAL: Yes. I'm afraid that letter was only sent to me at 10.02, by which stage
14 I was in this conference room with my client, so I haven't had time to read it, other than
15 to very quickly skim and see what it was about. But let me see if we can reach
16 a position where what is agreed and the parameters of what is disputed are clearly
17 laid out. I think that would be helpful.

18 THE CHAIR: Yes, I think that would be helpful and maybe we -- no doubt will some
19 of this will come out a bit later on in this hearing, but it just would assist me in my
20 conversations with the President to be absolutely clear about what the parties think is
21 and isn't in the Tribunal's jurisdiction. Because otherwise I'm really not able to present
22 a clear view to the President on that.

23 MR BEAL: Yes. I mean, if it helps, I hope what I indicated last time was that we accept
24 that any claims other than UK claims after 1 January 2021 are not within the scope of
25 the CAT's jurisdiction. The complicating feature for pre-1 January claims is whether
26 or not they are brought on the basis of EU law or not. If they're brought on the basis

1 of EU law, then they're within the jurisdiction. If they're brought up on the basis solely
2 of national law, then they wouldn't be. That's my understanding of the position, but we
3 can confirm that. What's happened with the letters that you've seen, which have
4 sought to introduce some obstacles to that clear position -- I won't put it any higher
5 than that -- is an argument as to whether or not the effect on trade test is met, so that
6 these aren't simply EU law claims. That raises a separate issue but logically feeds
7 into the jurisdiction question. I accept that.

8 THE CHAIR: Yes. And then there's a point about pre-92 claims, I think. Is that right?
9 Or at least the point about accession. I'm not sure I completely understand it, but there
10 is a point about accession as well. At the other end of the --

11 MR BEAL: I accept that any pre-accession claims based on the law of a member state
12 that is not yet a member of the EU are going to be purely domestic only and therefore
13 fall outside the scope of the Tribunal.

14 THE CHAIR: And I think EEA claims as well?

15 MR BEAL: EEA claims do indeed fall outside the scope of the Tribunal because the
16 national law giving effect to the EEA claims is the cause of action, not the -- and the
17 statute has never allowed EEA claims as such to fall within the scope of the jurisdiction,
18 only EU claims. So that's absolutely right as well.

19 THE CHAIR: Well, that's helpful. I mean, it does sound as if there's not an awful lot
20 of difference between you and the Schemes. But anyway, it would be really helpful
21 just to have that confirmed at some stage. No criticism because I only read it at the
22 same time as you got it, I expect. But just in due course, it would be quite helpful to
23 have a very clear picture about what the jurisdiction position is and, to the extent there
24 are any disputes, those identified as well.

25 MR BEAL: Well, I'm hoping, if those who are gathered with me in this conference
26 room don't disagree with what I've just said, that we can write a letter in relatively short

1 | order confirming that. The parameters will be: is the effect of trade test met for the
2 | jurisdictions that we're relying on, which will be a question of EU law that this Tribunal
3 | is capable of dealing with. After that, it should be a relatively straightforward matter.
4 | Everything else is domestic law and outwith the scope of this Tribunal's jurisdiction.

5 | THE CHAIR: Yes. Okay. Thank you.

6 | MR BEAL: In terms of the initial disclosure application, where we got to, as you saw,
7 | is that a letter was sent to the CAT withdrawing that application. If we need a formal
8 | order, I'm sure we can draw one up. But disclosure, I think has been given yesterday
9 | and is due to be given by 5 August for the second tranche. So that's off the to-do list.

10 | In terms of the questionnaire responses, Sir, you signed the consent order yesterday.

11 | THE CHAIR: Yes.

12 | MR BEAL: So that's done as well. I think that's probably the point at which I can
13 | usefully turn my microphone off and allow, I understand, Mr Cook to make his
14 | submissions on the witness statement position.

15 | THE CHAIR: Yes, good. Thank you.

16 | Submissions by MR COOK

17 | MR COOK: Yes, good morning, Sir. I suppose probably just a couple of points to
18 | make in relation to the jurisdiction position first. I mean, we have been trying to
19 | clarify -- we wanted to be in a position to put an agreed position before the Tribunal.
20 | We wrote to the claimants on the 20th to try and do that. Essentially, we haven't
21 | managed to get agreement, which is why our letter followed this morning which sets
22 | out Mastercard's position. It appears, helpfully, that the position we set out on the 20th
23 | is actually largely agreed now.

24 | There is perhaps one additional wrinkle, which is there is a separate question in terms
25 | of the scope of the High Court to transfer claims to the CAT, which has a completely
26 | different set of rules and whether those actually operate exactly the same way as the

1 jurisdiction of the CAT when the claim is actually in front of it. There is some
2 uncertainty, certainly in my mind, in relation to how that operated. We haven't gone
3 into that additional wrinkle in the letter on the basis that the focus very much at the
4 moment is on the immediate considerations of the claim in front of this Tribunal. But,
5 as further claims are in the process of being issued and requests for transfers are
6 being sought, proposals for transfers are being made, we're also going to have to
7 grapple with that jurisdiction to transfer issue with respect to the High Court.

8 THE CHAIR: Sorry, Mr Cook, can you just explain what you mean by that? Are you
9 talking about the point that I raised, or Mr Beal really, raised in response to my
10 question, which is that he says there's, if you like, a partial transfer because all that's
11 transferred is what can be transferred and what isn't transferred is retained residually
12 in the High Court. That was his answer to that point. Are you saying that's -- is that
13 the point you're talking about?

14 MR COOK: Well, that's certainly -- I mean, there are two sides to the point, but that's
15 certainly part of it. That is to what extent have claims previously been successfully
16 transferred to the Tribunal. I think from what Mr Beal said, it's going to be common
17 ground that substantial parts of claims that perhaps we've been talking about rather
18 casually as being in front of the Tribunal aren't in fact. So anything which is under
19 non-UK domestic law, so pre-accession, any of the claims in relation to EEA countries,
20 and post-1 January 2021. So I think it's common ground those haven't been
21 transferred. And obviously the post-January 2021, as we go further along, that is
22 increasingly large parts of these claims.

23 But there is, I think, also a sort of a jurisdictional wrinkle in relation to section 16,
24 I think, of the Enterprise Act about how far the High Court has the power to transfer.
25 And that is something that hasn't been ventilated in correspondence and we'll need to
26 do so, which is whether that operates differently from some of the CAT's jurisdiction.

1 | So it's one of those matters where the rules aren't always seamless because they've
2 | been drafted at particular times and sometimes there's transitional legislation in place
3 | and sometimes there isn't.

4 | But certainly the end thrust of this is going to be that significant parts have not been
5 | transferred and that needs to be grappled with and that certainly the issues for the
6 | purposes of Trial 3 are pretty narrowly confined on the basis that all of the UK claims
7 | are in front of the Tribunal. Ireland has always been, with apologies to my learned
8 | friend, you know, somewhat of an "also run" in the context of value terms. So it's never
9 | been a huge aspect of this in value terms, and particularly not the claims pre-2021.

10 | So value-wise, Trial 3, absolutely, the vast majority of that is not a -- there is no
11 | jurisdictional issue. We do need to grapple with it sooner rather than later in the
12 | context of the PI trial where that is essentially the first thing that's going to happen,
13 | that's due to happen in Q2 next year and where the point immediately starts to arise.

14 | THE CHAIR: Just on Trial 3, the letter, as I recall, suggests that -- sorry, I'm getting
15 | a bit of feedback from someone, I don't know, maybe from you, Mr Cook. I can hear
16 | myself talking. I don't know whether that's you or somebody else maybe.

17 | The letter from Jones Day suggested that you were seeking the appointment of a High
18 | Court judge to chair or to participate in Trial 3. But from what you've just said,
19 | you're -- I mean, obviously there's -- well, let me start again.

20 | There are several options with Trial 3, aren't there? One is to hive Ireland off entirely
21 | on the basis that you say might be a problem with all Irish claims because of the effect
22 | on trade point. Not terribly attractive but no doubt if you want to argue that, we can
23 | talk about it.

24 | The second option is to work out whether there is a point about effect on trade, which
25 | I would have thought was something we could do pretty easily and pretty quickly, for
26 | example, as an adjunct to the 26 October CMC, find out what the answer to that is and

1 | so we know where we all are.

2 | The third thing to do is to find some way of -- and sorry, that would result then in
3 | maintaining claims up to withdrawal day but not afterwards. And then there's Mr Beal's
4 | question about whether you're prepared to come to the party with what might be
5 | different afterwards. I don't know what mechanism there might be for that, but certainly
6 | it would seem to make sense for you to put your cards on the table and tell us what is
7 | happening in Ireland after withdrawal day that might make any difference. Then the
8 | third option would be to try and keep it all in Trial 3 regardless of what it is by the
9 | mechanism of having a High Court judge sit as well.

10 | So those are sort of the options. I mean, do you have a -- I took it that you were
11 | expressing, in the Jones Day letter, seemed to be expressing a preference for
12 | option 3. Is that the position?

13 | MR COOK: In relation to Trial 3, it's absolutely clear that Trial 3 can go ahead in
14 | substantially the way planned in any event. So even if we can't have a High Court
15 | judge, the bulk of what we're going to be fighting about is absolutely -- i.e. the UK,
16 | that's where the value lies -- can go ahead as planned. So, you know, this is not
17 | a situation where there is a major problem in relation to Trial 3.

18 | There is an issue that we need to grapple with in relation to the Irish claims and
19 | potentially parts of those claims, but that, in value terms, is less important and that's
20 | not going to be the sort of altering whether or not it's appropriate for Trial 3 to go ahead
21 | which was what I was saying as being -- you know, the core of Trial 3 going ahead as
22 | planned is not a problem.

23 | Where we get to subsequent trials like Trial 4, we start to get into rather more
24 | substantial issues and there's a whole different consideration about how --

25 | THE CHAIR: Yes, of course.

26 | MR COOK: -- (overspeaking) to proceed. So what I'm really saying is, for the moment,

1 | there is an issue on the PI trial where it's potentially a big point and that's the urgent
2 | one. Trial 3 can go ahead largely as planned, sort of in any event. But there is the
3 | aspect of, can it go ahead completely as planned? And that is where, you know, our
4 | suggestion to that was if a High Court judge could be available, that would be the
5 | easiest solution to that and that would be our suggested route, but obviously, only if
6 | that's a practicable solution. If it's not, then we have to think about alternatives.

7 | Something I do want to clarify just, Sir, so that there's no question of anyone feeling
8 | later that I've misled the Tribunal: Mastercard does not take the effect on trade point;
9 | that is a point that Visa takes. We do not. Jones Day's letter is setting out a problem
10 | on the face of the pleadings which the Tribunal needs to grapple with.

11 | There is the jurisdictional problem post-IP completion date, January 2021, but we do
12 | not take the effect on trade point. We acknowledge, if they're right about everything
13 | else, effect on trade is met. Visa takes a different position in relation to that. So we
14 | are trying, in that letter, to flag the full scope of problems, but I didn't want it to be
15 | thought that I was putting forward a submission now which contradicted our pleadings
16 | in relation to that point.

17 | THE CHAIR: That's helpful, thank you. Okay, and also very helpful in relation to
18 | Trial 3. To put the point on the table so we're clear about it, the difficulty with asking
19 | a High Court judge to come and do this is largely a resourcing question, and it takes
20 | a High Court judge out of the Rolls Building for ten weeks. If we don't need to do that,
21 | then clearly we don't want to do that.

22 | So if we have to find a High Court judge to deal with certain aspects -- and it sounds
23 | like we may have to do that for Trial 4, and of course, we'll look at that and see what
24 | we can manage. There may well be preferences as to how one wants to deal with it
25 | from your point of view, and I understand from other parties as well, that it may be
26 | more seamless to have somebody from the High Court do it all the time, but that's not

1 | necessarily the most efficient way of doing it. That's the point.

2 | Because at the moment, it is possible for me to do it with two other panel members,
3 | and we don't need to trouble a High Court judge. I mean, that's the central point,
4 | really, for Trial 3. I mean, if we need to do it, we'll do it, but if we can avoid it, that is
5 | probably the preferred course, at least as far as I see it at the moment.

6 | MR COOK: I mean, the other point I suppose is just to note, Sir, is it is likely
7 | a substantial portion of the evidence is going to be in relation to Ireland. It is going to
8 | be relatively contemporaneous, by which I mean a lot of the evidence is going to be in
9 | relation to the post-IP completion date. That's sort of the nature of this case, which is:
10 | it's always easier for parties to produce more up-to-date material, rather than going
11 | back into the 2010s -- even more so when we come to some of the later claims that
12 | go back even earlier.

13 | There's going to be a slightly odd situation where the Tribunal will be looking at
14 | material in relation to a period which is outside its jurisdiction and in part making rulings
15 | about areas that are within its jurisdiction based on that later material, which is perhaps
16 | an additional wrinkle to this.

17 | But in terms, Sir, of how far we can identify the way in which the world has
18 | changed -- obviously, we're not suggesting there are some clear bright line changes,
19 | certainly, in payment system terms on 1 January 2021. But what, inevitably, we will
20 | see is a trend over time where markets shift, the use of payment systems -- the use of
21 | different technologies -- has shifted significantly over time in terms of some of the
22 | alternatives. Simply, what was the case in a world of 2011, the start of the claim -- use
23 | of cheques, high levels of cash usage, et cetera -- will be very different from a world
24 | in which people are using Klarna and Clearpay and internet shopping, et cetera, in
25 | today's date.

26 | There will be -- and obviously, these are matters the experts will address in their

1 | evidence -- a spectrum of changes over the course of the period that's being looked
2 | at, rather than us suggesting there is some, you know, night and day change on
3 | a particular date.

4 | THE CHAIR: Yes, okay. Thank you. I suspect we should probably move on. I think
5 | that's very helpful. Thank you, Mr Cook, and I've got all that on board. If we can have
6 | clarity about what the claimant's position is, then I can go and discuss that with the
7 | President and we'll see where we get to.

8 | Reply submissions by MR BEAL

9 | MR BEAL: Yes, Sir. I mean, just on that last point, my learned friend is obviously right
10 | that things change over time and there isn't necessarily a watershed moment. It did
11 | strike me as I was listening to his submissions, that, of course, the defendants are now
12 | in a position where if they want to rely on material that postdates 1 January 2021, they
13 | are going to need to encourage this Tribunal to take that as somehow within the scope
14 | of the Tribunal's jurisdiction for factual determination, which is going to be problematic.
15 | Someone can't confer jurisdiction by agreement, so it's going to be problematic, absent
16 | some sort of workaround, which doesn't immediately spring to mind, short of having
17 | a High Court judge hear part of the Trial 3. I fully take on board everything that's said,
18 | but if the defendant's proposal is to rely on material postdating 2021, for example, and
19 | that is, strictly speaking, outwith factual determinations that this Tribunal can
20 | make -- for Ireland, at least.

21 | THE CHAIR: Yes. I take the point, Mr Beal, and it actually occurred to me as well as
22 | Mr Cook said it, but I'm sort of anxious to avoid a great thrash around about all this,
23 | just partly because of time.

24 | MR BEAL: Yes.

25 | THE CHAIR: I mean, it is a bit of an odd point, though, isn't it, really, because whatever
26 | the position, the Tribunal is going to have to make a finding about facts within the

1 relevant period. Now, if it did that by inference to things that happened later and said,
2 "Well, we don't think there's any reason it was different earlier", then perhaps that's
3 fine, but I am struggling a bit with the idea that something had happened prior to
4 January 2021, dating back perhaps as far as 2011 or 2014, can be evidenced by
5 things that happen in 2025. I'm struggling with that as a basic proposition. Indeed, it
6 seems rather inconsistent with what Mr Cook said about things changing in that period.
7 But look, I don't particularly want to have that debate now. I understand the marker
8 you've put down and I can see why you've done it.

9 Mr Cook, I don't particularly want to ask you to respond to that, unless it's something
10 you feel you want to say. I just think that we need to understand what the problem is
11 here, and then I can go away and see if we can find a solution to it.

12 MR COOK: Sir, briefly, I don't agree with Mr Beal's analysis of that particular issue,
13 but as you say, I don't think it's productive for us to exchange submissions in relation
14 to that at the moment. The fact that he's raised the point obviously adds another
15 wrinkle to the issues the Tribunal is going to have to address in this regard.

16 THE CHAIR: Yes, thank you. Okay, well, let's move on.

17 Mr Cashman, I wasn't planning to come back to jurisdiction, but I don't want to leave
18 you out if there's anything you had that you wanted to say.

19 MR CASHMAN: No, I'm grateful, Sir. On behalf of the Visa defendants, we can
20 endorse the position that's been expressed by Mr Cook.

21 THE CHAIR: That's very helpful, thank you. Good.

22 In that case, Mr Cook, do you want to jump into witness statements?

23
24 Witness statements

25 Submissions by MR COOK

26 MR COOK: Absolutely, Sir. It was suggested by my friend Mr Beal, that certainly from

1 | his side, he wasn't expecting you to resolve this today, but rather to discuss how this
2 | might be resolved. Certainly, we understood that the intention, since we were here,
3 | was: it would make sense for the Tribunal to actually resolve some of these
4 | outstanding matters rather than talk about how we resolve them. But obviously, Sir,
5 | we're very much in your hands as to whether you want to hear submissions. I mean,
6 | this is one where the parties have fully dealt with the issues, and with respect, we say
7 | there isn't a reason why you shouldn't address it today.

8 | When we come to the CICC disclosure application, I think that's a slightly different
9 | matter: (1) because you're sitting as the Umbrella Proceedings chairman rather than
10 | the chairman of the CICC tribunal; and (2) because there is a suggestion from my
11 | learned friend, he might want to put in additional evidence, and that therefore does
12 | raise rather different issues.

13 | For the moment, Sir, I just welcome an indication from you, Sir, as to whether you were
14 | anticipating resolving this today, or whether you wanted to understand the shape of
15 | the dispute and consider how best to resolve it?

16 | THE CHAIR: Well, I think it probably depends on how far apart you are. I mean,
17 | I understand the Schemes' position, I think, which is broadly that it's unfair if witness
18 | evidence can't be tested with disclosure, and unfair if the claimants can cherry-pick
19 | witnesses to distort, if you like, the work that the experts have done, and the balance
20 | that's been set on that.

21 | I understand the problem as you're putting it forward. I suppose I'm still a little bit
22 | unsure about exactly what -- maybe that we need to hear from Mr Beal on this -- this
23 | problem is in terms of how many witness statements, and what about, and when.

24 | It does seem to me that it may be not something that we can resolve, because the
25 | answers to those things may need to be put forward, and there may need to be an
26 | application in relation to some of this.

1 | In some ways, I think I'm probably inclined to hear a bit more from Mr Beal about what
2 | he thinks he might want to do, and then we can perhaps see whether there's some
3 | common ground that might allow the way forward. But if we can't do that, then
4 | I suspect it is going to have to be resolved at a later date. I appreciate the timing
5 | difficulties.

6 | I mean, I've got the gist of it. Why don't you just add anything you want to, and perhaps
7 | we could see what Mr Beal says about what he thinks is going to happen here. That's,
8 | I think, what I'm really interested in: what he actually thinks is going to happen. Then
9 | what the implications of that are, we can then discuss those.

10 | MR COOK: I mean, you're obviously very much on top of the principal considerations
11 | from our perspective. I mean, obviously, the big one from our perspective is to ensure
12 | that the procedure the Tribunal has laid down operates the way in which it's intended
13 | to, and ensures that we can carry out trial preparations in the orderly way that the
14 | Tribunal's laid down, which -- there's a lot of work to be done in a short period of time,
15 | comparatively. And that sort of timetable can't be upended halfway through.

16 | If we're going to get substantial additional disclosure in December or January, that is
17 | going to be a real problem. Then, as you say, the second issue is very much
18 | procedural fairness. My learned friend will help you as to what he's suggesting, but
19 | from our perspective, we understand he's simply saying they will be free to call witness
20 | evidence from anyone who's provided a questionnaire response, and the possibility of
21 | asking for somebody else who hasn't provided a questionnaire response.

22 | With respect, we say that is just simply not addressing the issue at all, because the
23 | fact someone has provided a questionnaire response tells us very little about that
24 | company, and certainly doesn't provide the material that will be needed to allow us to
25 | challenge the evidence from a witness. By definition, the fact that someone provided
26 | the questionnaire response, and was not selected by way of sample, means they have

1 | not given disclosure, and on the face of it, they have not been seen as being
2 | a representative claimant for the purpose of providing a representative sample by the
3 | experts jointly, which of course includes the claimant's expert.

4 | So with respect, we say the suggestion that the mere fact someone provided
5 | a questionnaire response is good enough to resolve this problem just really doesn't go
6 | to the issue at all. The evidence needs to be testable, that needs disclosure, and,
7 | frankly, as soon as they're providing any material number of witnesses who are not
8 | part of the representative sample, and therefore logically non-representative, that then
9 | causes its own difficulties.

10 | THE CHAIR: Sorry to interrupt you. Just on that last point, that cherry-picking point,
11 | I mean, it's a separate point, isn't it? The disclosure point, I can see, to put it neutrally,
12 | there was a sequencing problem. If it's right that you should be entitled to disclosure
13 | to test witness evidence, and we've got the disclosure coming in October, and witness
14 | statements coming in December in a very tight timetable, I can see there's
15 | a sequencing problem. Clearly, we need to work out how we're going to manage that
16 | problem, however one does that, whether it says you don't have witness statements,
17 | or you get the disclosure earlier or whatever it is, I don't know.

18 | I think that's really why I'm interested to hear from Mr Beal about what it is he has in
19 | mind, because that seems to me to hopefully provide some of the answer to that
20 | problem.

21 | But the separate point about cherry-picking, I mean, I think it is a different sort of
22 | problem, isn't it? I understand the point you make about the sample, and the way in
23 | which it's been set up. But if you had, for example, a clear indication from the
24 | claimants now about who they intended to call, outside of the lead claimants, and you
25 | had a promise of disclosure by October for those, is there any principled basis on
26 | which you could really object to them putting those statements in?

1 | MR COOK: Well, Sir, the problem with all of this, of course, is that we're not being
2 | given any indication at all of what we're talking about. There's a world of difference
3 | between there being, you know, one additional claimant that hasn't given disclosure
4 | and an order for disclosure was made so they have to do it by October, in which case
5 | that's probably not going to be a particularly big problem and, in any event, the experts
6 | at that point could analyse that claim and see how far it is of relevance or does cause
7 | problems for the sample.

8 | But insofar as it is going to be significantly more than that, ultimately we are, in terms
9 | of the lead claimants, we're talking about fifteen of them. If we are talking about
10 | witnesses coming in from five, six, seven, ten additional claimants, then that really is
11 | having a very substantial impact upon the group which are providing disclosure if
12 | disclosure is going to be provided by them and what that does to the sample is
13 | something that will need to be looked at by the experts. It may very well be at that
14 | point that the experts say, "Well, that is causing a big problem because suddenly we
15 | have a sample group that is heavily weighted in one particular direction". And
16 | where -- as I said, it's a cherry-picked problem. And the sampling process was set up
17 | specifically as being an agreed neutral process which identified as far as possible from
18 | the claimants we have something representative. Had it been suggested at that stage
19 | by Mr Beal that the expert should identify something representative and they should
20 | be allowed to add another ten cherry-picked of their choice, we'd have said, "Well, that
21 | doesn't make any sense at all. That's not acceptable". There are various ways that
22 | could potentially have been dealt with: either to say no or potentially to say -- and that's
23 | the one of the proposals that's been made -- we're allowed to select, you know, some
24 | on our own side to try and weigh it the other way.

25 | But the problem is that we are now some considerable way through that process:
26 | there's been the sampling process agreed between the experts, they've identified

1 something representative, and now we're trying to grapple with how far that is going
2 to be a problem. Until we know who and how many, those are essentially theoretical
3 problems. I can't take it any further than that. Once we know that, it might be very
4 different.

5 THE CHAIR: That's really partly why I think we do need to hear from Mr Beal about
6 what he has in mind, or at least if he does have things in mind.

7 So just in terms of the numbers, there are 15 lead claimants; is that right?

8 MR COOK: And then a wider group of 38 providing which includes the 15. So you
9 have 38 that are the base sample, providing sort of narrow categories of disclosure,
10 and then a lead sample of 15 out of the 38 who are providing -- I don't want to use the
11 word "full disclosure" because obviously it's disclosure by reference to the agreed
12 categories. But they're providing the detailed disclosure. So that's the shape of it.
13 You can see, you know, four or five claimants would have a big impact upon a sample
14 of 15.

15 THE CHAIR: Yes. And then the questionnaire, the number that filled in
16 a questionnaire, how many of those are there?

17 MR COOK: I'd have to confirm numbers. We're talking sort of well over 100, I would
18 imagine.

19 THE CHAIR: Yes, okay. And there is a point, isn't there, that the people who are base
20 claimants who are giving data may consider it helpful to provide some sort of
21 explanation of the data. That's one of the points that was, I think, made by the
22 claimants as to why they ought to be able to put in a witness statement. Do you accept
23 that, as a matter of principle, that would be helpful and it's just a question of timing?
24 Or do you say they shouldn't be doing that?

25 MR COOK: In terms of somebody who's providing substantive evidence going to the
26 issues, we suggest that should be from the lead sample. If somebody is going to put

1 | in an explanation of how their internal accounting system puts out data or something
2 | like that, I mean, that is a completely different type of evidence. That's, you know,
3 | helpful explanatory material, one would hope, fairly neutral. I mean, we certainly
4 | wouldn't be saying that somebody who provided an explanation of an internal
5 | accounting system suddenly needed to provide full-suite disclosure in relation to how
6 | their internal fraud checks work or whatever else it might be. That would be on a much
7 | narrower point.

8 | THE CHAIR: Am I right in thinking that base claimants are all providing a level of
9 | disclosure which is substantially about data? Is that right?

10 | MR COOK: Yes, that's fair to say.

11 | THE CHAIR: Yes. Would it be sensible, then, to deal with that point by saying that if
12 | anybody wanted to provide context from providing the data -- as to the data itself,
13 | I mean, context about the data itself -- they could do so in a short document with
14 | a statement of truth attached to it? That might be a way of regulating it a bit more,
15 | make it a bit clearer that the limitation was associated with that exercise, rather than
16 | allowing witness statements at large. Would that be a sensible thing to do?

17 | MR COOK: Sir, that would -- I mean, anything which provides clarity is obviously
18 | going to be sensible, Sir, and that would be helpful. One would also say in relation to
19 | that kind of document, it would make far more sense if that was provided along with
20 | disclosure, rather than waiting until December, because the whole point of providing
21 | disclosure is so the experts can get on with doing their work in relation to it. And if
22 | there's some kind of explanation that we need, or rather that they need, then clearly
23 | the last thing we want to do is then start working on material and either say we don't
24 | understand it until we get the explanation or get the explanation and have to go back
25 | and redo it, because suddenly they understand it in a different respect. So that kind
26 | of explanation, in whatever format, would be much better coming along with disclosure

1 | rather than in accordance with the witness statement deadline.

2 | THE CHAIR: That's helpful. Thank you.

3 | Do have anything else, Mr Cook? If not, we'll just ask Mr Cashman.

4 | Mr Cashman, do you want to say anything before I ask Mr Beal about what he has in

5 | mind?

6 | MR CASHMAN: I don't need to add anything at this point, Sir.

7 | THE CHAIR: Okay, thank you.

8 | Submissions by MR BEAL

9 | THE CHAIR: Mr Beal, I can absolutely see that we've got sort of a coincidence of

10 | different principles here, aren't there? I can absolutely see where you're coming from,

11 | but I can also see whether the defendants are coming from it. It does rather seem to

12 | me the answer is, it sort of depends. It depends on what it is you have in mind. Now,

13 | you may feel you're not in a position to tell me with any precision now what you have

14 | in mind, but I don't think we can leave it on the basis that you're going to have an

15 | unchecked hand on this, because there are things you could do which would, it seems

16 | to me, cause a real problem in the way this is being set up. On the other hand, it

17 | seems to me you ought to have at least some latitude to be able to put forward

18 | evidence you want because it's your case, but that's going to have to be on a cards

19 | on the table basis rather than any hint of any surprise or ambush with it. So, I'm just

20 | wondering whether this is actually as big a problem as it appears if you're able to

21 | identify what do you think we're talking about here?

22 | MR BEAL: I respectfully agree that this problem, so-called problem, is more apparent

23 | than real, for the simple reason that, in practice, if you're on the claimant side and

24 | you've got 15 clients who are heavily involved with a very extensive disclosure

25 | exercise, they are going to be the people who are going to be your first port of call for

26 | factual evidence on any view.

1 | What, with respect, the application does, and it's really stark: it says the only people
2 | you can call to give factual evidence at the trial in October 2027, regardless of what
3 | we raise as an issue, are those 15 claimants. That, with respect, is both unprincipled
4 | and inconsistent with the stance that the Schemes took when we wanted to have some
5 | involvement in the selection of the issuing banks or the communications with the
6 | issuing banks that were going to go to provide witness evidence at the defendants'
7 | election at the CMC in April. Mastercard laughed at us. They said, "What are you
8 | doing getting involved in our selection of witnesses? It's a matter for us." And we
9 | were put back firmly in our box. I'm candid about that. And the Tribunal ruled that it
10 | wasn't part of our job to get involved with the defendants' selection of their witnesses.
11 | We say that that principle must apply here as a matter of principle.

12 | I can, however, give the Tribunal reassurance that, as a practical matter, we are highly
13 | likely to go to those claimants who are heavily involved in the disclosure exercise, be
14 | that the claimants or base claimants, as the first port of call for witness evidence.
15 | What, with respect, we are seeking to preserve is our right to call witnesses of fact to
16 | deal with issues if those issues are not within the knowledge of the 15 or the 38 base
17 | claimants.

18 | My learned friend is quite wrong to say that base claimant disclosure is just data.
19 | Firstly, the parameters of the disclosure exercise have not yet been finally determined.
20 | There's an ongoing debate between the parties as to what that is. But the defendants
21 | themselves, and I include Mr Cook's client in this, are seeking very extensive
22 | disclosure that is broadly a couple of categories short of full disclosure from the lead
23 | claimants from the base claimants as well. So it sits very ill for the defendants to say,
24 | "Oh, well, it's only data that the base claimants are providing". If the base claimant is
25 | actually in a better position to cover off a particular issue than a lead claimant, then
26 | why shouldn't we go to a base claimant?

1 | What we are not suggesting, and I can make this categorically clear now, is that,
2 | having had those 38 claimants go through the hassle, frankly, of conducting
3 | a significant disclosure exercise, and it's never easy persuading a client to do this, we
4 | are somehow going to open the Yellow Pages and pick another claimant out of the
5 | ether from either the CICC claims or indeed the listed claimants and say, "Right, we
6 | now want you to give evidence about fraud protection between 2011 and 2016". That's
7 | just not on the agenda for us.

8 | And the suggestion that we are going to try and unravel the expert-led approach to
9 | data analysis through adducing a witness statement is simply wrong. We're not going
10 | to try and supplement the so-called representative selection of what has happened.
11 | The experts have chosen what they decided would be a representative sample of data;
12 | that isn't necessarily a representative sample of evidence. It may be that those 15
13 | claimants are not the best placed to deal with, I don't know, the impact of contactless
14 | technology from the payment Schemes as a payment method. We are simply
15 | reserving the right to identify on the basis of the disclosure that takes place, who is
16 | best placed to deal with a live issue.

17 | I also add that, of course, there's also a place for responsive evidence in due course.
18 | If the Schemes were to raise something that was simply outwith the knowledge of all
19 | of the 15 lead claimants, then the effect of the direction they're seeking from this
20 | Tribunal would be to exclude us from getting access to a source of evidence in
21 | response at this stage. That's why we say this is both unreal and premature because
22 | they're tilting at a windmill that doesn't yet exist.

23 | If we were to submit, on whatever the date is in December, 15 witness statements
24 | from witnesses who had had nothing to do with the disclosure exercise, all of which
25 | dealt extensively with matters covered by the disclosure exercise, I can see why there
26 | would be grounds for complaint. But that's not where we're at. Trying to legislate for

1 | that in advance, with respect, is simply wrong in principle because, as you've
2 | recognised, Sir, the party has autonomy as to the selection of witness evidence.

3 | We are well alive to the need not to extend the disclosure process any further than
4 | necessary. But there's a mistaken premise in my learned friend's application. His
5 | premise is that because you are a witness, you have to give disclosure. It depends
6 | entirely on what that witness is giving evidence about. If that witness is giving evidence
7 | about a very specific issue covering a very short period of time, why do they need to
8 | give full data disclosure for the purposes of the experts' data analysis? The answer is
9 | they don't. They can deal with a very specific bespoke issue.

10 | Say it's, for example, how an innovation worked in France rather than England, I don't
11 | know. Say the Schemes have some evidence that suggests that you can see from
12 | the introduction of payments in the UK earlier than France that that was a benefit to
13 | merchants. We would need somebody who had experience in the introduction of
14 | payments in France and could compare and contrast that with the introduction of
15 | payments -- I keep on saying payments, I mean contactless technology -- in those two
16 | jurisdictions, if that were to be an issue that suddenly raised by the defendants'
17 | evidence. We cannot be precluded by a direction at this stage from answering that
18 | sort of introduction of evidence from the Schemes, which is the logical consequence
19 | of the very broad direction that they are seeking.

20 | So what we say, and what we've sought to suggest with our compromise
21 | solution -- that was in a letter that you may have seen, it's at bundle S5, tab 32,
22 | page 203, but it's repeated in our skeleton paragraphs 5 to 8. What we've said is,
23 | look, we can commit to making sure that we only go to witnesses, where possible, who
24 | have already given a disclosure statement so that they've been considered by the
25 | experts, but have been rejected by the experts for reasons known to the experts as to
26 | not being a lead claimant or a base sample claimant. That's fine, but we've narrowed

1 | the gene pool, and we will go to them in preference. But if, exceptionally, we need to
2 | seek to produce factual evidence from somebody else, we will file that evidence and
3 | invite this Tribunal to confirm that we're entitled to rely upon it.

4 | THE CHAIR: I'm sorry, Mr Beal, you finish.

5 | MR BEAL: That way, the CAT retains its supervisory jurisdiction under rule 55. We
6 | produce the evidence -- it's on us to justify, if it's not from the gene pool that I've
7 | identified. But otherwise, I'm afraid it really is quite an extreme form of direction that
8 | the defendants are seeking.

9 | THE CHAIR: That's helpful, thank you. Is that offer of an application limited to reply
10 | evidence or does it apply to primary evidence as well?

11 | MR BEAL: That would also apply to primary evidence. If, for example, we wanted to
12 | adduce evidence from somebody, as a matter of fact, who had experience of
13 | contactless technology, or fraud protection, or something like that, then we would say
14 | to the Tribunal, "This isn't from the claimant cohort", but of course they're dealing with
15 | a bespoke factual issue, which it's appropriate for them to deal with given their factual
16 | experience.

17 | THE CHAIR: Yes. So as a general proposition, I think you're accepting that if there's
18 | a bespoke issue that's outside the lead claimants, or indeed outside the base
19 | claimants, you would accept that there might be some limited disclosure relating to
20 | that issue that might need to be made; is that right?

21 | MR BEAL: Yes.

22 | THE CHAIR: So in a way, this is all really just about making sure that the disclosure
23 | lines up with the evidence, and that there's a timeliness about that which doesn't
24 | create a problem. I mean, put the cherry-picking point to one side. Your proposal is
25 | a way of regulating that, because obviously, if you didn't have a good reason to be
26 | going outside the claimant pool, then that point could be brought back in again. But

1 | let's just assume that there is a perfectly legitimate reason why you need to go outside
2 | the lead -- and indeed the base claimants, let's say outside the base
3 | claimants -- you're accepting that you would have to give disclosure. The question is:
4 | how do we make sure that happens in a timely manner? In some ways, that might be
5 | easier with primary statements than it is with reply statements, because the time for
6 | reply statements is very, very tight, isn't it?

7 | MR BEAL: I think the primary statements from those witnesses would need to be
8 | accompanied by disclosure of the salient documents that they thought were relevant
9 | to the issues. Typically, that's the standard way of doing witness statements.
10 | A witness says, "Here's a bundle of exhibits, those exhibits exhibit the relevant
11 | documents". If, for example, the Schemes were then to think, "Well, that witness
12 | hasn't disclosed X, Y, and Z", then there would be an application for disclosure in the
13 | usual way. I accept --

14 | THE CHAIR: Yes, not quite the standard way, is it? Sorry to interrupt you, but it's not
15 | quite the standard way, is it? Because in the standard way, there would have been
16 | general disclosure first, and so everybody would have had the documents. I suppose
17 | I'm edging towards inviting you to say, well, we should know comfortably in advance
18 | of December who's giving evidence about what, and if we know we need to go outside
19 | the pool, then we ought to be providing the disclosure as soon as we know we're
20 | providing the witness statement.

21 | MR BEAL: Well, I can see the force of that, if it were going generically to all the issues.
22 | The difficulty comes that the disclosure may reveal bespoke issues that arise that we
23 | haven't covered with our generic disclosure, that we do need to then cover off both
24 | with a combination of witness evidence and bespoke disclosure. But --

25 | THE CHAIR: That's sort of where we are though, isn't it? I mean, I appreciate that
26 | might not be ideal from your point of view, but if you're not being obliged to give broader

1 | disclosure -- because obviously, you know, you're not going to be asked to give
2 | general disclosure in the Tribunal anyway. But if the disclosure is being reasonably
3 | restricted -- and I appreciate you saying it's broad for those who are giving it -- it does
4 | seem to me you're getting the advantage of a relatively limited order in terms of the
5 | number of merchants who are involved. The price of that may be that if you want to
6 | put something else into the pot, you're going to have to reveal that through the
7 | disclosure process.

8 | MR BEAL: I think my submission, Sir, is that we can identify, potentially at this stage,
9 | people who we would be calling upon to give evidence in due course. Certainly, if the
10 | Tribunal were minded to say that anyone we are proposing to call evidence for has to
11 | get their disclosure in by the disclosure date, then I'm sure we can accommodate that,
12 | so long as the disclosure is not perceived to be the very wide general disclosure that
13 | my friend seems to think is necessary from anyone who sticks their head above the
14 | parapet and becomes a witness.

15 | THE CHAIR: Yes, I think I'm just talking about -- if it's about contactless payment, it's
16 | quite hard to think what the disclosure would be, but if it was a merchant who had
17 | a particular view about a particular experience of contactless payment -- if you knew
18 | you were going to put that witness statement in -- it seems to me it would be
19 | appropriate for you to be asking that witness to produce the documents relevant to
20 | what they were saying -- so relevant to contactless payments -- and to make sure that
21 | was available in a timely manner. That seems to me to be a perfectly reasonable
22 | position.

23 | MR BEAL: Yes, insofar as we're leading that as part of our -- we don't bear the burden
24 | here, of course, so it's part of a case that we're advancing. I won't say positive case.

25 | THE CHAIR: Yes.

26 | MR BEAL: My concern, if I'm being frank, is, given that we are in a sense the

1 | defendant in this part of the trial, my concern is more with: once we see the Schemes'
2 | disclosure, that usually gives you a pretty good idea of the points that they are going
3 | to seek to make. If, responsively to that, we want a witness to deal with the disclosure
4 | that's given in October by a witness statement in December, then you're having to
5 | second guess in advance what the issues are going to be, even though there may not
6 | be an issue that you think is calling for disclosure or calling for witness evidence at the
7 | moment.

8 | THE CHAIR: Yes, I think I see that. I suppose there is merit in you doing that in that
9 | way rather than just dealing with it as a matter of reply, particularly given the tight
10 | timetable. So I can see why, if you realise, at a later stage than, say,
11 | October -- because you get the Schemes' disclosure and you realise there's a point
12 | you, you now want to cover -- obviously you're not going to be able to meet the
13 | disclosure deadline, but there may well be some merit in saying, "Well, you've got to
14 | get some disclosure in on that as soon as you can; you can't just wait for
15 | 18 December".

16 | MR BEAL: Ah, well, it's quite a tight timetable already. Usually, from a practitioner's
17 | point of view, when one's dealing with a witness statement, one looks to the witness
18 | to provide documents to support what is being said in the witness statement, and it all
19 | coalesces together at the crucial moment, one hopes. In the experience of putting
20 | together witness statements over the years, that's pretty much invariably how it works,
21 | and there's a mad rush at the end to make sure that everything ties in.

22 | Doing that in advance, before we know how the issues have crystallised in the light of
23 | disclosure and the material that's coming out from the lead claimants in the base
24 | claimants, is quite challenging. I can see why if, for example, we already know that
25 | a bespoke issue that we want a particular factual witness to cover, we would naturally
26 | provide disclosure from that source as part of our general disclosure at this stage.

1 | But it's very controlling, if I may say so, to say, "You have to do it this way in order to
2 | satisfy the concerns of the Schemes that may not actually be justified". It's intruding
3 | on our freedom to run the case the way we want. I heard entirely what the Tribunal
4 | says and the concern about the tight timetable, and as I've said, if we do have
5 | a standalone witness who we are thinking we will call, and it's appropriate to have
6 | disclosure from that witness on the issues that the witness will be giving evidence
7 | about, which may go further than simply the documents that are exhibited, then we
8 | would endeavour to provide that disclosure as part of our general disclosure obligation
9 | by the deadline in October.

10 | Beyond that, with respect, the evolving position in the light of disclosure is likely going
11 | to determine the nature and extent of the factual witness evidence that we seek then
12 | to adduce in December.

13 | THE CHAIR: Okay. Just can I just come back to the letter -- I don't know what date it
14 | is -- but the offer that's recorded in your skeleton. That is, in the letter, limited to those
15 | who have provided it going outside people who've provided a disclosure
16 | questionnaire. So that's going to the whole merchant group outside the 100 or so that
17 | have provided a disclosure questionnaire.

18 | In some ways, it seems to me it might be appropriate for you to stump up a justification
19 | for why you're going outside the lead claimants. I think our conversation was really
20 | more about that, I wasn't sure whether you were accepting that as a revised offer, or
21 | whether you would push back on that.

22 | MR BEAL: (Overspeaking).

23 | THE CHAIR: The reason I put it that way, Mr Beal, is that in a way what I want to do
24 | here, I think -- my temptation, I think -- is to provide some form of regulation for what
25 | you're doing. Not saying you can't do it, but saying it's got to be some regulation,
26 | because you have to justify what you're doing, which I hope will cause there to be

1 | careful thought about when it's done and what's done, with the expectation that it'll be
2 | permitted if it falls within the sort of thing you were talking about.

3 | I'm not, I hope, setting up a barrier to you putting forward proper evidence which helps
4 | the Tribunal to decide the matter, but I think there does need to be some form of
5 | regulation, or oversight is perhaps a better word, that at least forces that discipline.
6 | That's really where I'm coming from.

7 | MR BEAL: If I may say so, the indications you've given, Sir, have been heard by those
8 | sitting around this room. If we were to do something stupid in December and bombard
9 | the Tribunal with all sorts of witness evidence from people who haven't been involved,
10 | either as lead claimants or as base claimants, then we would expect to get a tough
11 | time from this Tribunal on the admissibility of that evidence. Because it's open to this
12 | Tribunal to rule that it's not acceptable to have a witness giving evidence on something
13 | that the lead claimant or a base claimant has covered as an additional form of
14 | evidence without having undergone the disclosure process. We're very much alive to
15 | that. What we're seeking to do is to give us the freedom to cover the issues properly
16 | on the basis of the disclosure that is an evolving piece without the constraint of saying
17 | it has to come from only 15 people.

18 | So I'm not putting forward, I'm afraid, any evolved offer from the one that is in the letter,
19 | which is an indication that we will do our best to make sure that the only people who
20 | provide material factual evidence, other than exceptionally, are those who have
21 | provided the questionnaire, precisely because those who have provided the
22 | questionnaire put themselves forward as active claimants in these proceedings and
23 | it's been open to the experts to say, "Right, you are the people we want disclosure
24 | from".

25 | Now, if they're simply giving evidence on a bespoke issue that requires bespoke
26 | disclosure, then they don't need to give the generic disclosure because they haven't

1 | been selected to go into that particular pot. This is really the fallacy in the defendants'
2 | approach to this case, which is just because they are selected to give evidence on
3 | a particular issue doesn't mean that they have to give disclosure and therefore
4 | evidence on everything.

5 | As I've said, I can reassure the Tribunal that we wouldn't propose to go beyond the 15
6 | lead claimants, save where they can't deal with something, and then it would be the
7 | base claimants to whom we would turn, because they are the ones who are actively
8 | involved in issues.

9 | THE CHAIR: Would you have an objection to a position where you were constrained
10 | from going outside the lead claimants, except in those circumstances? What if we
11 | were to say, "You're not to go to outside the claimants unless there are specific
12 | reasons to justify them"? It's a fairly large gap for you to get through, but at least it
13 | provides some measure of limitation.

14 | MR BEAL: Well, I mean, we would seek to -- the advantage of the claimants is that
15 | it's just a broader category and then we've got a better chance of finding somebody
16 | who can speak to a specific issue. But if the Tribunal's so minded that we have to
17 | justify moving from a lead claimant to a base claimant on a given issue, we would
18 | internally be deciding why that was appropriate in any event.

19 | This constant refrain of cherry-picking is very unfortunate because encouraging
20 | a client to come forward, give evidence and be cross-examined and have to open up
21 | their filing cabinets is not something that most solicitors enjoy doing with a client and
22 | most clients don't like having to do. So it does require goodwill from the client to take
23 | part in this process.

24 | In a sense, the claw has come down and picked the 15. And those 15 have got no
25 | choice but to live with it. Given that they're being troubled already, they were the
26 | people we would turn to naturally to provide the evidence. So we internally would only

1 | trouble other people if there were a reason for doing so.

2 | Now, if, Sir, it placates the defendants' concerns that that becomes formalised as being
3 | the Tribunal's anticipation that we would justify going beyond the lead claimants, then
4 | so be it. But we do respectfully suggest it's unnecessary and contrary to the approach
5 | that was adopted by this Tribunal with the issuing banks, for example, where the
6 | Tribunal said it's a matter for the defendants to choose their witnesses, speak to them
7 | and communicate with them and you can make disclosure requests in due course if
8 | you see fit.

9 | So we aren't getting parity of treatment with the defendants on this issue, and I do
10 | want to just put that marker down.

11 | THE CHAIR: Yes, okay. That's helpful, I understand.

12 | Okay. Well, look, that's very helpful. Why don't we see what Mr Cook has to say about
13 | that, and then we can work out whether we can make any further progress today,
14 | Mr Cook.

15 | Submissions by MR COOK

16 | MR COOK: Sir, I think certainly we have made significant progress today. The
17 | position Mr Beal is taking is a significant change from where his clients were in
18 | correspondence and indeed his skeleton argument. I would urge upon the Tribunal
19 | the desirability of two things. One, making exactly the kind of direction that you've just
20 | indicated, Sir: one that says to the claimants, "You should not go beyond the lead
21 | sample of claimants unless there is a good justification for doing so". That would
22 | simply provide, you know -- essentially, that is what my learned friend has been urging
23 | the Tribunal is how his clients would approach it anyway. So it's difficult to see how
24 | he can really object to exactly that kind of direction being formalised because it clearly
25 | makes sense that, where you have people providing disclosure that have been
26 | selected as a representative sample, they are the first port of call. I certainly accept if

1 | there is a good reason -- and in any event, there would always be scope to apply to
2 | the Tribunal -- to say, "We need evidence from a French merchant in relation to what
3 | happened in France", and that's not part of the general disclosure exercise, then
4 | clearly that would be *prima facie* a good reason for going, you know, more widely. But
5 | it should be something that is justified on that basis and that will certainly focus minds
6 | and diminish some of the cherry-picking concerns. So that certainly, Sir, is one point.

7 | There is then the issue in terms of disclosure. With respect, at various points, my
8 | learned friend was talking about, you know, the client producing the documents that
9 | they want to rely upon that support the evidence they're giving. With respect, that is
10 | exactly one of the concerns we have and a concern that the Tribunal very much
11 | echoed in the comments made at the April CMC in relation to the propriety of dealing
12 | with things on the basis that a party puts forward only the documents it wants to
13 | support its case.

14 | But if somebody is giving evidence, it needs to be testable and that needs to have
15 | adverse and positive documents, not just positive documents. With respect, we say
16 | that that should be made clear today, and then there is a need to try and get that
17 | material in as soon as is possible, either by the disclosure deadline or, if the point that
18 | arises legitimately later, as soon as possible once the issue arises. But it does need
19 | to be adverse and positive documents that comes out in that regard and there should
20 | be an expectation that material comes in.

21 | Now, I would certainly accept if somebody is being proffered as a witness on a narrow
22 | issue in relation to contactless, the example we were talking about, there might well
23 | be evidence saying, "Look, we introduced contactless and it didn't make any
24 | difference, people carried on paying in cash in the same proportions as before". That
25 | would be a narrow category of relevant material and there wouldn't be a reason to say
26 | they should provide disclosure in relation to other issues merely because they're giving

1 narrow evidence. But once it's become clear that somebody is being proffered on that
2 narrow basis, there should be disclosure on that narrow basis. But it should be, as
3 I said, proper disclosure, not simply the documents that they want to advance to put
4 forward their particular case. Both for and against documents should be disclosed at
5 that stage.

6 So it is a question of trying to practically manage this, not that we simply get material
7 that comes in in December and then it's a problem, but putting in place a structure now
8 which will prevent those problems arising and puts the burden upon the claimants to,
9 if they want to go outside what is the obvious pool of claimants and the ones who are
10 providing disclosure, to do so in a way that is consistent with the timetable that's been
11 laid down. So the material should come in by the disclosure deadline or if they -- we
12 recognise there may be points when issues do arise later down the track, but it is only
13 points that arise later, for example, in reply statements and is produced as soon as
14 possible and not held back until the deadline for witness evidence if they know two
15 months earlier that they're going to do something which goes beyond the remit of the
16 standard disclosure exercise.

17 THE CHAIR: Yes, I think the difficulty is really -- all those points, I think, are sort of
18 probably not contested, or at least not in broad terms contested. So I mean, I think
19 you've got an offer that says they'll come back for permission if they go outside the
20 questionnaire group. Presumably you would back that if nothing else, and so they
21 have to get permission in advance if they're going to do that.

22 You've got an expectation that's been expressed by Mr Beal and indeed by me that
23 they should look to the lead claimants in the first instance. There's an understanding,
24 I think if they go outside the lead claimants, they'll need to provide disclosure on
25 a timely basis, and that means at the disclosure deadline, unless there's a reason why
26 not and clearly that has to be justified. And there is obviously at least a basis for

1 | scrutiny under rule 55.

2 | I think the difficulty, Mr Cook, is trying to regulate all that in advance is quite
3 | problematic because as Mr Beal says, you won't necessarily know now. He may not
4 | know until he sees your disclosure, and the time is very, very tight. So what I'm not
5 | clear about at the moment is when you say that there needs to be a mechanism rather
6 | than leaving it till later, what does that look like? How do we deal with this? Is Mr Beal
7 | obliged to come and make an application every time he thinks he might need a witness
8 | statement from somebody asking him to set a timetable for disclosure for the subject
9 | matter? That seems to me to be somewhat overengineering the position.

10 | I do take the point that at the other end it's very tight and very difficult to see how we
11 | could make -- I mean, you're not going to get a decision of the Tribunal after
12 | 18 December that has any use to anybody working out whether reply statements can
13 | go in. So it's really quite tricky, isn't it, given the timing of that. I don't quite see how
14 | we regulate it in advance, though. I'm not quite sure how that works.

15 | MR COOK: I think the first point you asked me, Sir, is would I accept the idea that it
16 | shouldn't be going beyond the questionnaire the claimants have given.

17 | THE CHAIR: No, I think I was saying you might as well bank that offer because at
18 | least that gives you one -- at least then you know that there's not going to be something
19 | coming from that direction that they don't have permission for first. So they're saying,
20 | "Look, if it's outside the questionnaire, we accept we have to come and get permission"
21 | as I understand it. They're saying, "If it's within the questionnaire or the base or the
22 | lead, then we should be entitled to do it, subject to, if you like, a justification of whether
23 | we've done it properly and sensibly, looked at it from the other end". That's what
24 | they're saying.

25 | So all I'm saying is why wouldn't you accept the offer in relation to outside the
26 | questionnaire group? That's all I'm saying.

1 | MR COOK: So in relation to that, only on the basis that I don't want it to be thought
2 | that if I'm accepting that offer in any way, I'm accepting it's sort of good enough,
3 | essentially.

4 | THE CHAIR: No, no, no, I'm not suggesting that. It's just as part of the package. It
5 | may be you don't get anything else, but all I'm saying is that you might as well accept
6 | that; we might as well agree, because it's been offered and it's uncontentious, that if
7 | they go outside the questionnaire group, they'll have to come and get permission first.
8 | That's on the table. Let's get that out of the way.

9 | Now, we're dealing with a more limited pool of people. I appreciate it's still 100 and
10 | something. Then the question is: what do we do with them? I think the position seems
11 | to be that Mr Beal saying it's not practical or reasonable or fair, by comparison with
12 | what's happening with issuers, to require him to come and see permission first. But
13 | he is saying he accepts that there has to be some regulation of this -- it might have to
14 | happen at the back end -- but he accepts he doesn't have a free hand to go and do
15 | what he likes.

16 | The question I'm putting to you is: if you don't agree with that, and you think there
17 | needs to be some form of regulation for the questionnaire group and the base and the
18 | lead claimants, what does it look like? How does it work?

19 | MR COOK: Firstly, dealing with the questionnaire point: every live claimant, including
20 | all the stayed claimants, provided a questionnaire response. Essentially, you know,
21 | the offer only relates to new claims that are being introduced or being brought on an
22 | ongoing basis. So in practical terms, it's a very limited one.

23 | THE CHAIR: Fine, it is what it is, but that's not really the point, is it? The question I'm
24 | asking you is: what does the mechanism look like? How does this actually work in
25 | practice?

26 | MR COOK: With respect, Sir, in terms of where we are today, I would suggest the

1 | right approach should be that at any point it becomes clear to the claimants that they
2 | intend to call witnesses that are going beyond the lead sample -- that is something
3 | where they will need to make an application to the Tribunal, you know, the common
4 | sense thing, of course, is in the first instance, write to us and, clearly, if they've got
5 | a sensible justification, then you know, we're going to accept it because there's no
6 | point troubling the Tribunal with something where the answer's obvious.

7 | But if they need to go outside that group, they would need to justify it and would do so
8 | once they became clear that that was what they intended to do.

9 | THE CHAIR: How does that sit with your freedom to call issuers as you choose fit?
10 | I mean, isn't that a fairly draconian restriction on their ability to call evidence?

11 | MR COOK: There is a fundamental difference between the two, Sir, and the
12 | fundamental difference comes down to who is a party and who is not, and therefore
13 | who is going to be providing disclosure. The core of the issue here is: we are talking
14 | about parties putting forward witness evidence, and the question is: how do we ensure
15 | that the evidence they put forward is matched by appropriate disclosure coming in at
16 | the right time? That is something that --

17 | THE CHAIR: I'm not sure that really is the question, actually, because I think Mr Beal
18 | is accepting that he's got to do that; he's got to do his best to make sure the disclosure
19 | does come in at an appropriate time. Perhaps we can work on that, but I don't think
20 | that's really what this is about, and in a way that's why I think it's quite draconian.

21 | Mr Beal is saying, "Look, I accept I need to give disclosure that's relevant to the issue
22 | I'm putting the witness statement in on". And he's saying, "I accept I have to do that
23 | as soon as I sensibly can". He's just saying that that might actually be quite late; we
24 | need to accept that might be quite late, if he doesn't form the view he needs to put the
25 | witness statement in until he sees your and digests your disclosure, at which stage
26 | we're pretty close to 18 December anyway.

1 | That's, I think, that's what he's saying. So what's going to happen here, on your
2 | mechanism, I'm going to get a whole lot of applications from Mr Beal in mid-December,
3 | where it's going to be pretty obvious that he should be putting the evidence in, and
4 | pretty obvious that he hasn't given you disclosure yet. What am I supposed to do with
5 | that? Am I supposed to say, "No, you can't do it because you haven't given Mr Cook
6 | disclosure", and then we have an argument when he should have realised he gave
7 | you disclosure. I mean, none of it seems to be terribly helpful, really. That's the bit
8 | I'm struggling with; I don't really see how this works.

9 | MR COOK: Sir, I think the fact you're saying: what happens if we had a whole lot of
10 | applications? I mean, that is, of course, one of the problems with that. If there are
11 | going to be -- essentially there's a whole lot of material that, you know, the sooner the
12 | issue arises and becomes clear to everybody, the more likely we are to be able to
13 | manage that in a way which ensures the trial can proceed and the trial timetable can
14 | proceed properly. I mean, it's essentially one of those points, which is: either it doesn't
15 | arise at all, in which case this is all entirely moot; or it arises to a limited degree, in
16 | which case it's not a problem, because we can accommodate one or two witnesses
17 | with a small amount of additional disclosure without a problem.

18 | It is precisely if it does become a whole lot of applications -- that's the point at which
19 | we might well be saying to the Tribunal, "Well, it's not appropriate. They've got 15 new
20 | claimants, why do they need 5, 10 additional claimants giving a whole lot of additional
21 | material? And why is this being dealt with so late?"

22 | The more the applications, the more appropriate it is for the Tribunal to know about
23 | that and be aware of the problems sooner rather than later.

24 | THE CHAIR: Would you anticipate that we would see draft witness statements for
25 | those applications and the disclosure. I mean, how is that going to work?

26 | MR COOK: In the first instance -- if, really, the kind of examples that my learned friend

1 | has given today turn out to be right -- for example, the French example, that, you know,
2 | it's clear from Mastercard's disclosure we've got a chunk on contactless in France. I'm
3 | going to ignore the likelihood or relevance of that example. They say, "Therefore we
4 | want to go out to a French merchant to address their experience of French
5 | contactless". That would be two lines in a letter, and on the face of it, it would obviously
6 | be sensible and right, because all of the existing claimants are English or UK
7 | merchants or Irish merchants who've given disclosure on the UK and Ireland, so it
8 | would be two lines, and it would be perfectly sensible.

9 | THE CHAIR: Okay.

10 | MR COOK: Or for contact experience, it would be two lines again. It would be very
11 | short if it's very simple. If it becomes more complex, then by definition it's because it's
12 | a bigger problem, and then it needs to be grappled with because it's a big problem.

13 | THE CHAIR: Okay, I'm conscious -- I think we've spent a lot of time on this, and I think
14 | I've probably gone as far as we're going to.

15 | Mr Cashman, do you have anything you wanted to add?

16 | Submissions by MR CASHMAN

17 | MR CASHMAN: Yes, if I may just briefly add four points.

18 | THE CHAIR: Of course.

19 | MR CASHMAN: We would endorse the position that the starting point, when you have
20 | undergone an agreed sampling process, is that witness evidence comes from the lead
21 | sample, and if they say there's a good reason why they want to adduce witness
22 | statements from outside of that sample, they have liberty to apply, and it can be
23 | considered on its merits rather than floating around with theoretical ideas as to what
24 | certainly won't be being brought. We're being told today, but we're not being told
25 | anything about what actually will be brought.

26 | The reason why the questionnaire group is of very limited value -- you'll already have

1 | the points, Sir -- there are hundreds of questionnaires. I think we have 305 at the
2 | moment. That number may yet increase, because as Host Cases are added, people
3 | can continue to add disclosure questionnaires, or people who didn't provide disclosure
4 | questionnaires might provide them. So the fact of providing a disclosure questionnaire
5 | obviously doesn't go to assisting us in identifying the issue of fairness at all.

6 | Now, insofar as we are talking about adding someone to give witness evidence outside
7 | of the lead sample, there is also going to be a question about what is the nature of the
8 | disclosure that they are required to give. Of course, that cannot be, as Mr Cook has
9 | said, simply, the documents that that witness considers relevant to them; it must be
10 | a broader process than that.

11 | My third point is the cherry-picking risk, I'm afraid we do think is very material, or at
12 | least has the potential to be very material. Insofar as an application is brought forward,
13 | on concrete terms, that at least gives us the opportunity to address whether it is a live
14 | risk, and if it is, either to oppose the application on that basis, or to explain what other
15 | mechanism may be required in order to redress the balance.

16 | Finally, Sir, if an application is going to be made, and the suggestion is that they can
17 | put in witness evidence and disclosure, there will be a live question as to the timing of
18 | that application. If an application is made too late, then we would reserve the right to
19 | say, "This is made too late and it should be refused on that basis".

20 | Of course, that will turn on: well, at what point did it or could it have reasonably become
21 | apparent to the claimants that this was witness evidence that they wanted to put
22 | forward? This, we do suggest, is not draconian at all; it's a structured way of bringing
23 | the issues before the Tribunal, so that the question of fairness of testing the evidence,
24 | and fairness in terms of disrupting the sample, can actually be considered in concrete
25 | terms.

26 | It's the only way that they can be considered in concrete terms, I respectfully submit.

1 THE CHAIR: Thank you very much. Mr Cashman, I'm not inclined to allow the
2 application. I think the way we've set this up is that I wouldn't necessarily make
3 decisions today, so if you would prefer that I didn't and I gave you a ruling on the
4 papers, which I think is probably the alternative, then I'm happy to do that.
5 Alternatively, I'm happy to give you the reasons now and we can move on. A matter
6 for you, really, I don't mind which way we do it.

7 MR COOK: Sir, if you've made a decision and you're happy to provide a brief ruling
8 now, I think that would be sensible, subject only to whether or not we have enough
9 time for other issues. You know, if it's the case that we're going to run out of time for
10 something else because you're delivering a ruling now, that would be a reason to do
11 it on the papers.

12 THE CHAIR: Yes. Mr Cashman?

13 MR CASHMAN: Agreed.

14 THE CHAIR: Yes. Well, thank you. That's helpful. I'm going to do it very quickly, in
15 fact, because I don't think there's much point in getting into a great deal of detail the
16 arguments.

17 (11.58 am)

18 **Ruling**

19 THE CHAIR: The application from the defendants seeks to impose some form of
20 restriction, put in various different ways, on the way in which claimants, who are not
21 lead claimants already giving evidence and disclosure, can put in witness evidence.
22 It is said that it is necessary to do that to ensure that there is not, first, a mismatch
23 between the evidence and disclosure supporting or concerning the evidence, and,
24 second, a risk of cherry-picking by the claimants.

25 Mr Beal has made it very clear that that cherry-picking is not the intention of the
26 claimants, and he has given assurances that they would not intend to go beyond the

1 | lead claimant group unless that was necessary for a particular issue. He also
2 | accepted that if that happens, then proper disclosure, including documents which are
3 | adverse to the issue dealt with in that witness statement, will be given on a timely
4 | basis, which means at the earliest sensible time that can be done.

5 | The question that arises is whether the regulation or oversight of that position should
6 | take place in advance of or after the statements are served. I do not see any practical
7 | way of doing this in advance. Mr Cook has encouraged me to require the claimants
8 | to put in an application in relation to any witness statement that goes beyond the lead
9 | claimants. That seems to me to be a process which is unworkable, given the timetable
10 | for witness evidence and reply evidence in particular. Instead, I would prefer to deal
11 | with this as a matter of oversight once the statements are available and we understand
12 | what the disclosure implications are. It will be open to the defendants to challenge
13 | such statements both on the basis of the subject matter (whether a witness outside
14 | the lead claimant group was necessary) and the adequacy and timeliness of
15 | documents disclosed in relation to the subject matter of the statement. That can be
16 | done promptly after reply witness statements are served, if required.

17 | However, I do wish to make it very clear to the claimants that this position I have
18 | reached in refusing the application by the defendants is based on the assurances
19 | given by Mr Beal recorded above. The Tribunal will not accept witness statements
20 | that could have been given by lead claimants, but are instead given by other claimants.
21 | Equally, if there are issues in relation to the extent or timing of disclosure, particularly
22 | if those issues put at risk the preparation to trial and trial timetable, then the Tribunal
23 | will not hesitate to rule that those witness statements are inadmissible and should not
24 | be used at the trial.

25 | I am therefore expecting the claimants' solicitors to apply their minds very carefully,
26 | both to the question as to what evidence is needed outside the lead claimants, and

1 | also the question of timely disclosure to support that in every case where they consider
2 | that witness evidence to be necessary.

3 |
4 | (12.00 pm)

5 | THE CHAIR: That's my ruling on that issue. I think we should take a break for the
6 | transcriber. As you say, Mr Cook, we're a bit short on time, so we're going to have to
7 | move pretty quickly through the remaining items. What I suggest is that when we
8 | come back, we just do a very quick round robin on each item and I'll give you a view.
9 | I don't think there's anything necessarily that you're going to ask me to rule on because
10 | they're probably things that need to go off for other hearings, subject perhaps to the
11 | wording of the order from the last hearing which I think we can probably deal with quite
12 | quickly. So let's take a ten-minute break and return at -- we'll make it
13 | seven minutes -- 12.10. Thank you.

14 | (12.03 pm)

15 | (A short break)

16 | (12.10 pm)

17 | THE CHAIR: Yes, thank you. Shall we move on to talk about CICC? Who's leading
18 | on that?

19 | CICC

20 | Submissions by MR COOK

21 | MR COOK: Well, Sir, it's my application. I was certainly going to lead from the
22 | perspective of the defendants on that. I think that is one where there is a greater
23 | degree of agreement between the parties that it is not one that you are likely to decide
24 | today. There is a disagreement between us about the best way to resolve that going
25 | forwards. Certainly from our perspective, there is a lot of material on the papers, but
26 | we would hope the Tribunal could resolve it on the papers.

1 | The alternative, which Mr Beal suggests, is that there should be a short hearing on
2 | this in September. Particularly, he also suggests that there needs to be further witness
3 | evidence in relation to the issue of merchant identification numbers. With respect, we
4 | don't really understand what witness evidence is going to do in relation to this.

5 | The issue between us is he has offered us, in a sort of *déjà vu* aspect from the opt-in
6 | hearing, undertaking-level information. And our answer is that undertaking-level
7 | information, i.e. group-level information, is completely pointless for this purpose
8 | because what we want to do is identify whether specific legal entities that have opted
9 | in meet the class definition. And so --

10 | THE CHAIR: That's a point about who signed the merchant service contract; is that
11 | right?

12 | MR COOK: Well, it's your point about -- yes, who signed them up; who is the entity
13 | that is a party to the merchant service contract; and who actually had the transactions.
14 | I mean, certainly the areas that we've identified, and there's a slightly problematic bit
15 | but the claimants keep on saying Mastercard hasn't told them what problems we've
16 | identified. We did, actually, back on 31 March so they've had that for nearly four
17 | months already.

18 | But for example, there are a number of these companies that appear to be things like:
19 | it's the holding company or it's the head office company who, on the face of it, you
20 | wouldn't necessarily expect would be the ones who would enter into the transactions
21 | at all, who have entered into the merchant service agreement. So there are reasons
22 | to think these may be the wrong entities that have opted in, which of course was in
23 | part the reason why we had the big fight in relation to the opt-in hearing previously.

24 | There are also some of these companies where there are serious doubts about
25 | whether they actually had commercial card transactions at all because they never
26 | accepted commercial cards. That's true of some of the gambling companies, for

1 | example. So it goes down to the question of: are these entities, do they meet the class
2 | definition, which often is a question of is this the right group company that has joined
3 | the claim? And so, telling us that --

4 | THE CHAIR: Sorry to interrupt you. If you have, just on the MIDs, if you have the
5 | merchant identity for the undertakings, you would be able to see the transactions,
6 | wouldn't you?

7 | MR COOK: The problem with that, Sir, is what we'd be able to see is the transactions
8 | at the group level.

9 | THE CHAIR: Yes, exactly. Yes. So you would know whether there were any, for
10 | example, commercial card transactions in the group and how big they were, you
11 | wouldn't necessarily know which entity they related to and therefore you couldn't make
12 | the connection with the MSC.

13 | MR COOK: Yes. Well, you say connection with the MSC, but of course we don't have
14 | the MSCs. We've never seen them.

15 | THE CHAIR: No, no, I understand. Exactly.

16 | MR COOK: So yes. And you know, the reality is, it's obvious with many of these
17 | claimant groups that of course they would have had group, they would have had
18 | commercial card transactions somewhere within the group. So, confirming that they
19 | had commercial card transactions somewhere within the group doesn't really move
20 | the dial or assist in any way. What we want to know is, the specific entity which is
21 | opted in, does that meet the class definition? And even if it does meet the class
22 | definition, what value of claim does it have on the basis it might be that it had a very
23 | small proportion of the group transactions passing through it so its claim is
24 | correspondingly very small.

25 | THE CHAIR: Okay, we need to keep it short. Just keep it short, Mr Cook, because
26 | we've got short on time. But I've got the message, I think.

1 | Anything else you want to say about that? Do you want to say something about the
2 | value of commerce point?

3 | MR COOK: Well, Sir, again, I mean, I'm not trying to set out my submissions on the
4 | reasons why, but the value of commerce is, as a result of that, to know what are the
5 | claims that are being advanced. Not to determine the right numbers, but simply for
6 | the claimants to set out what sums they are claiming. And those may turn out to either
7 | be zero, if we're right they're not part of it, or very, very small indeed. Again, it's
8 | important to know that.

9 | THE CHAIR: Yes. Okay, thank you.

10 | Mr Cashman, do you want to add anything to that?

11 | MR CASHMAN: No, thank you, Sir.

12 | Submissions by MR BEAL

13 | THE CHAIR: So, Mr Beal, this really comes down then at the moment to how we're
14 | going to deal with this. I mean, one way of me dealing with this is to have a look at it
15 | on the papers more closely and to let you know whether I think I need a hearing or
16 | not, in which case it would have to be September anyway. Do you think we do need
17 | a hearing? You're saying we do?

18 | MR BEAL: I think we do, Sir, because there is a fundamental difference between us
19 | as to what the defendants are able to do if they have the MIDs available to them. It
20 | seems to be that Mastercard's position is, well, you can't necessarily connect that to
21 | a given claim. Our case is, yes, you can. You can show that commercial MIFs have
22 | been charged as part of the MSC. What this seems to be teeing up is a legal argument
23 | by Mastercard that only a signatory to a merchant services agreement that has also
24 | had transactions that have been subjected to a commercial MIF can be an eligible
25 | claimant. Now, that's a legal issue.

26 | Our case is: if you paid a commercial MIF, you have done so because you are

1 receiving acquiring services. Those acquiring services have been provided to you by
2 an acquirer, otherwise you don't get a MIF, and you've either received those services
3 pursuant to a contract to which you are a signatory, or you're part of a group that has
4 a group arrangement for the provision of acquiring services to the group as a whole,
5 and that includes the subsidiary.

6 So it's a rather arid debate between the parties as to whether that's enough to fall
7 within the strict definition of eligible member of the class, which is largely a legal
8 question.

9 THE CHAIR: But is that about the wording of the class definition? Is it because it
10 talks -- I can't remember what it says. Does it talk about there being a contract with
11 the class member?

12 MR BEAL: It talks about the class member having, either through a merchant service
13 agreement or something similar, received merchant acquiring services through which
14 they paid the commercial MIF. It's in essence what the class definition, the
15 membership definition, is getting at. If, for example, it's the head of the group and the
16 treasury function that's paid all of the MIFs for all of the transactions, then that would
17 be the company that has the claim. If it's a subsidiary that happens to have conducted
18 the transactions and paid the MIF, then it would be the subsidiary. But all of that is
19 going to be very factually sensitive to the particular facts of a particular group. And it's
20 going to require a great deal of unpicking if, legally, they are right that you have to both
21 have a signed copy of the MSA in your paw and also have the relevant transactions.

22 THE CHAIR: Are you anticipating that the hearing would actually resolve that issue
23 then, so we'll get into the question of the class definition, what it means? Is that what
24 you have in mind?

25 MR BEAL: No, because what they're seeking is simply the disclosure with a view to
26 making that argument in due course. They're not seeking a resolution of that issue,

1 | which is why it's premature, we say, because one way or another, these claims are
2 | going to be brought.

3 | I mean, take the universities, for example. Typically, the university doesn't have a very
4 | convoluted corporate structure. There is only one entity. Mr Cook has said, "Oh well,
5 | if you look in footnote 15 or whatever it was of his letter of March 2026, that shows
6 | we're objecting to universities". But why? I mean, if the university has a MID and that
7 | MID shows a commercial MIF and there's only one entity, what's the beef? We just
8 | don't understand what the point behind this application is at the moment.

9 | THE CHAIR: Yes. I'm just trying to get to trying to get a sense of what this hearing
10 | would look like. So we'd be dealing with the disclosure application, but you'd be
11 | saying, what, here's the evidence that suggests that they -- that the MID's enough
12 | and -- because in a way, whether or not you're right depends on whether they're right
13 | about the legal point they want to take later, doesn't it?

14 | MR BEAL: Well, it depends really what they're after. I mean, are they asking, for
15 | example, for disclosure of merchant service agreements for each of the entities? That
16 | would be one thing, and that might be capable of being done, who knows? But the
17 | application is very unfocused at the moment as to how it plugs in at this stage to any
18 | relevant issue that is before this Tribunal for the purposes of Trial 3. And CICC is only
19 | involved in Trial 3 because of the common ubiquitous issue that ties it. Everything
20 | else, it's not even into Trial 4, it's into a separate category which will need to be
21 | resolved at some point. And this goes to the participation point.

22 | THE CHAIR: Yes, a point coming up on that. I think they say, encouraged by some
23 | other observations in other cases, that it's important to get on top of who the members
24 | of the class are early on. And, you know, there probably is some point in that. But if
25 | what we've got here -- I'm just trying to sort of cut through this -- is a big dispute about
26 | what is necessary in order to be a class member, which may depend on the wording

1 | of the class definition which may actually need to be adjusted if it's not capturing
2 | people who should be able to claim so there's a further question there, I mean, is that
3 | not an issue we should be getting on the table and, and getting resolved because, in
4 | a way, it decides whether or not you need to give disclosure? If there's a point of
5 | principle and an example that we can take as to whether there's an issue here at all,
6 | shouldn't we do it that way round?

7 | MR BEAL: Well, we haven't framed an issue because we don't quite understand,
8 | through their shadow-boxing application, what their point is. What our letter of the
9 | 15 July said -- and this is at supplemental bundle 5, tab 18, starting at page 111 -- was
10 | firstly we had offered to provide the MIDs for the opt-in claimants on an undertaking
11 | level and that would be all of the MIDs for that particular group.

12 | We say that would then enable the defendants to show the transaction data, because
13 | the acquirer liaises with the scheme to have the transactions processed and the
14 | Schemes have records of those transactions, and one anticipates that they can identify
15 | the transactions that have taken place associated with those MIFs. That enables the
16 | defendants to then identify the commercial card transactions that have taken place.
17 | Those commercial card transactions cannot have taken place without a merchant
18 | service agreement.

19 | The merchant service agreement, typically, will be entered into by a parent for and on
20 | behalf of everyone who's in the corporate group. So if this boils down to a surrogate
21 | application for disclosure of a merchant service agreement for everyone, that's one
22 | point. But of course, that then turns on the construction of the various 76 different
23 | merchant service agreements that each of the remaining entities in the opt-in claim
24 | have. So I'm not sure how one can frame that or distil that into a point that's capable
25 | of being adjudicated in one day before this Tribunal, and it may be that all thereafter
26 | actually is disclosure of the merchant service agreements. I don't know.

1 THE CHAIR: Okay. I understand, I mean, I accept that if you want to have a hearing
2 and you think that there are things that you should -- particularly if you want to put
3 some evidence -- be entitled to do that. What I don't really want to do is to spend a day
4 arguing about something which is academic. I suppose I'm stumbling towards how we
5 actually get some focus on this hearing so that it does something sensible.

6 I mean, Mr Cook, it's really a question for you. Have you set out anywhere exactly
7 why you want this material? Obviously, there are no doubt a number of points you
8 want to make, but are you making a point here about, for example, the identity of the
9 contracting party vis a vis the identity of the person who's in the register, for example;
10 is that a point you're making?

11 Submissions by MR COOK

12 MR COOK: Sir, I think it might assist you, Sir. I think it would certainly assist Mr Beal.
13 Our application, which is in supplemental bundle 2, page 78 -- it's not particularly long;
14 I think it's about five or six pages. Page 78 provides the background, page 80 then
15 sets out this is what the class definition says. We've underlined it to help Mr Beal with
16 that. The merchant is defined as a person which has a contractual relationship, known
17 as a merchant service agreement, with an acquirer. So it's absolutely clear what the
18 requirement is. They also have to have paid a merchant service charge in respect of
19 one or more commercial card transactions. So we set out what, on its face, the
20 definition is. Of course, this letter, which followed on from prior correspondence
21 started back in March, is 19 May.

22 None of the points my learned friend is making now about, "There may or may not be
23 some contractual difference", have been made in correspondence. We've set it out,
24 the issue that's been set up.

25 If we go then to paragraph 16, which is on page 81, we set out what we seek.
26 Paragraph 16(a) is evidence that the opt-in person has or had a merchant service

1 | agreement. So yes, the initial point is: were they a signatory to a merchant service
2 | agreement? The relevant part of that would be simply a cover page with the identity
3 | of the parties and the signatory pages. As my learned friend says, that should be
4 | readily produced -- should have been readily produced four months ago when we first
5 | asked for it.

6 | Evidence of the payment of merchant service charge: again, you know, an invoice
7 | would show that readily, or the absence of invoices will show that there wasn't. It's the
8 | point about turnover. Then in relation to VoC.

9 | So we've set out exactly what we see as being the issue. That's not been challenged
10 | until my learned friend spoke. We have set out exactly what we seek, which is
11 | narrowly focused upon a small category of very specific documents, which we're
12 | frankly rather surprised that CICC has not already gathered together in order to check
13 | that these opt-in companies -- so we're only talking about 76 companies now; it's not
14 | a huge number in the scheme of things -- do in fact meet the class definition and do
15 | have claims. If they have claims, are those claims for £10.50 or claims for £1 million,
16 | which is the VoC --

17 | THE CHAIR: So you are taking a point then, for example, if you had a holding
18 | company that had entered into the merchant services agreement, and an operating
19 | company that had transacted, and the interchange fee had been paid by the -- well,
20 | I don't know who would have been paid by. But you're taking a point about the
21 | difference between those two, are you?

22 | If you're saying that the operating company wasn't party to the merchant services
23 | agreement, but is in the opt-in register, you're saying that's a problem; that's the point
24 | you're taking?

25 | MR COOK: There may be problems, potentially, the other way around. It may be
26 | that -- part of the background to this, of course, is part of the reason CICC tried to add

1 | all sorts of extra companies into the claim was, in many cases it seemed, because
2 | they've got the wrong person joined. So it may be --

3 | THE CHAIR: Sorry, I don't want to go into the merits of it.

4 | MR COOK: Either it will be something like a holding company has opted in, but they
5 | simply are not party to anything; they're not an operating company, so they just have
6 | zero basis to claim. Or potentially, we have an operating company that simply isn't
7 | the party that undertakes the transactions. One example we've given is Asos, where
8 | it appears that one group company has opted in -- Asos Payments Limited, I think it's
9 | called, is a company that did try and opt in, failed to do so under the prior ruling. On
10 | the face of it, it looks like that's the company that probably would be party to the
11 | merchant service agreement and be the one that has the claims. So if it's the wrong
12 | entity, then they are not a member of the class and shouldn't be in the claim.

13 | THE CHAIR: Yes, I understand. I just want to be clear that what you're effectively
14 | doing is exposing where you say there is a mismatch between a person who suffered
15 | the loss, a person who signed the merchant services agreement, and which are the
16 | right ones of those -- indeed, if either of them -- could meet the class definition should
17 | be in the opt-in register; that's where this is all going, isn't it?

18 | MR COOK: On the first half of it, that's indeed where it's going. And you know, against
19 | the background, where there have already been quite a number that have dropped
20 | out, on the basis that they've been found not to meet the class definition.

21 | THE CHAIR: I understand. I was there for that as well, Mr Cook. I mean, it seems
22 | clear we're going to have to have a hearing, Mr Cook, I think we're going to have to
23 | have a hearing. The question is: how can we most usefully use the time? I don't quite
24 | know how we have this argument without trying to work out whether the class
25 | definition -- we're going to end up having some examples, aren't we, at the hearing,
26 | where you're saying, "Well, this is the problem and this is what we need to work out".

1 | Are we not going to end up deciding whether or not it is a problem at the hearing?

2 | In other words, to what extent do we need the disclosure before we have an argument
3 | about who's in and who's out, if I can put it that way? I mean, obviously you need the
4 | detail for the individuals, but I think I'm asking you: are there some points of principle
5 | which we can deal with at the hearing as well, on the basis of an assumed set of facts.
6 | So at least we know, firstly, whether there's anything that anyone needs to disclose
7 | and secondly, what the implications are.

8 | MR COOK: I'll just say it came as something of a shock to understand from Mr Beal,
9 | given we've been in correspondence for months, for Mr Beal now to be saying there
10 | is a potential argument that the class definition doesn't say what it does. If he's going
11 | to make some kind of point on that: (1) it would help to have that set out so we know
12 | what point he's making; but (2) if there is a disagreement, as a matter of principle, what
13 | the class definition says, then clearly that needs to be resolved as a first consideration.
14 | Because, if our interpretation of the class definition was wrong, then the disclosure
15 | would not be necessary or relevant in the same degree, possibly. So --

16 | THE CHAIR: Okay. Well, look, I think what we'll do is we'll find a date for it. I can't
17 | do anything before 21 September. I imagine we will need the full panel for this,
18 | Mr Beal? Well, it's a disclosure application, I don't know, but it may have an implication
19 | for whether claims are continuing or not, mightn't it?

20 | Submissions by MR BEAL

21 | MR BEAL: I respectfully agree it will need the full panel, especially if it's going to deal
22 | with the logically prior question of what is the issue to which this disclosure goes. If
23 | the issue has to be formulated by reference to each party's perception of what is the
24 | eligibility criteria, then yes, I think it will need the full panel.

25 | It shouldn't be surprising that our claim is brought by people who have paid
26 | a commercial MIF, because that was the whole point of the opt-in class. If you've paid

1 | the MIF, then one assumes that you've received acquiring services, and one doesn't
2 | receive acquiring services for free; one receives them in a contractual relationship.
3 | Therefore, if it's to be suggested that there's this mismatch between the person who
4 | is formally a signatory of an MSA and the person who suffered the loss, and that
5 | makes a difference, then that particular argument will need to be addressed. I can't
6 | say another way.

7 | THE CHAIR: I agree. That's where we are. Okay, well, in that case we will find a date
8 | after 21 September with the panel, which will be in touch about availability.

9 | I think it would be helpful -- I think there's probably some work for the parties to do to
10 | actually crystallise what this hearing is going to be about. I think it would be helpful if
11 | your instructing solicitors could do a bit more about trying to identify the real issues
12 | that we need to decide. Now, I'm not quite sure what the best way to do that is;
13 | whether they could agree a list of issues or something. But I mean, if we are going to
14 | get into this whole question of what the class definition means and the implications of
15 | that, then I think it needs a bit of structure around it, doesn't it?

16 | MR BEAL: Yes. Ideally, I think we would need to have a prior legal question identified
17 | based on the construction of the definition of merchant in the opt-in order, with a view
18 | to then working out what disclosure is necessary as a result of whatever ruling is given
19 | on that definition.

20 | THE CHAIR: Can I just -- yes.

21 | MR BEAL: Yes, I mean, the parties can then make suggestions as to what disclosure
22 | is needed at this stage, depending on the outcome of that construction. That would
23 | seem to me to cover the bases.

24 | THE CHAIR: Okay, that's helpful. Well, can I leave it to the parties just to try and
25 | formulate something?

26 | MR BEAL: Yes, of course.

1 THE CHAIR: Good. Okay. Thank you.

2 Trial 4. I mean, I understand the points about all this. I just wonder whether we should
3 put this into the October CMC and have a proper discussion about it then, shouldn't
4 we? We can do that in a way that doesn't require CICC to sit through the whole thing,
5 although I think probably in practice that doesn't really make much difference -- or
6 certainly for the counsel team. But I think it would be quite helpful if we could have
7 some fleshed out proposals from CICC about how these issues are going to be dealt
8 with: so MPO; quantum; economy-wide pass on -- I suppose the same thing. If we
9 can have some alternative proposals then shouldn't we just be dealing with this in
10 October; is there any reason why it shouldn't just go into that CMC?

11 MR BEAL: I think formally it would need to be a CICC panel hearing the CMC, but
12 obviously the desire of CICC is to avoid being caught up in Trial 4, for the obvious
13 reason that the vast majority of Trial 4 concerns jurisdictions where it has no interest
14 whatsoever.

15 Sir, I think you've rightly identified that EMPO ruling now means that there is
16 a common issue between the quantum trial, as I've termed it, the CICC, and Trial 4 as
17 it stands. It does make sense for the parties to consider -- CICC to consider -- the
18 extent to which EMPO can be dealt with, for example, in a trial for its quantum ahead
19 of Trial 4, for example, so that that particular issue is removed from Trial 4 and brought
20 forward into a CICC trial in, say, 2028.

21 But I accept that this hasn't been the subject of any correspondence, and it makes
22 sense for CICC to take the issue away and propose both a CMC hearing for their
23 claims, and also what, in practice, the case management of CICC might look like now
24 that we have the EMPO ruling.

25 THE CHAIR: Yes. It's possible that we might never need to do EMPO for the purposes
26 of the Umbrella Proceedings.

1 | MR BEAL: But I think we would need to do it for the CICC opt-out.

2 | THE CHAIR: Yes.

3 | MR BEAL: Which is why, arguably, it makes sense to have it included in the CICC
4 | portion and then the other active non-CICC claimants can jump into that trial rather
5 | than the other way around. I'm floating this now; this hasn't been broached in
6 | correspondence at all.

7 | THE CHAIR: Well, look, I think the answer is that CICC needs to put forward its
8 | proposals and needs to do that pretty smartly, I would have thought really by the
9 | beginning of September or thereabouts, because we haven't got long till the October
10 | CMC and, you know, there will need to be a proper exchange of views.

11 | Then I think in terms of constituting the Tribunal, I imagine that the most efficient way
12 | of dealing with this is for me to tack it on the end and sit alone in relation to the CICC
13 | issues. That's probably the easiest way to do it. I don't think the CICC panel will -- as
14 | I recall, it's got Mr Fraser on it, I think, who won't be sitting on the MIFs Umbrella
15 | Proceedings.

16 | MR BEAL: Absolutely, Sir. I think it doesn't probably need a full panel for procedural
17 | issues. The only suggestion might be that CICC issues are dealt with first, so that
18 | CICC can then remove themselves from the hearing and keep costs down because
19 | obviously we are cost-conscious.

20 | THE CHAIR: Yes. Well, I'm very happy to -- however you think it's most efficiently
21 | done and whatever you can agree with the other parties. But that would make sense,
22 | I can see that.

23 | MR BEAL: Thank you.

24 | THE CHAIR: Mr Cook, Mr Cashman, anything you want to add to that?

25 | MR CASHMAN: I was going to be making submissions on this, and what I was
26 | seeking was that the 26 October CMC be listed also for the CICC proceedings. So

1 | I'm very content with the proposal you've put forward.

2 | THE CHAIR: Okay, thank you.

3 | Right, where do we go now? I think we're into the sort of bits and pieces aren't we
4 | now, which weren't necessarily on the agenda.

5 | Submissions on *Heureka* by MR CASHMAN

6 | THE CHAIR: This is perhaps one for you, Mr Cashman: the 7-8 July order. There's
7 | dispute about the wording of it in relation to *Heureka*. I just wonder whether -- I mean,
8 | this is probably my fault for giving a ruling and then adding some bits at the end of my
9 | discussion with Mr Kennelly. I can't remember if you were there, Mr Cashman, or not.

10 | MR CASHMAN: I was, Sir.

11 | THE CHAIR: Yes. I think the point that I'm driving at that is causing the difficulty in
12 | paragraph 4 is simply this: there's going to be an argument about *Heureka* and how
13 | that might apply in domestic law. We're dealing with that on a sample basis, shall we
14 | say, or at least we're dealing with looking at some jurisdictions, a small number of
15 | jurisdictions, because it helps us understand what the arguments might be. But the
16 | question is either going to resolve itself into "*Heureka* applies generally as a matter of
17 | European law across all jurisdictions in the EU" or "it's necessary to look at domestic
18 | law to see how it applies *Heureka* and that might be different depending on what the
19 | domestic law is and their approach to rulings of the CJEU".

20 | Now, all of that is tied up in the preliminary issue and there's no question about that
21 | and there's no need for you, I think, to do anything other than advance your cases in
22 | relation to whoever the countries are. We'll come back to that in a minute.

23 | The point of the exchange I had with Mr Kennelly was I didn't want to find there was
24 | anything else about domestic law and limitation that fell outside that debate that hadn't
25 | been properly put forward by Visa or indeed Mastercard. In other words, I don't want
26 | to finally go through all this and then suddenly you pop up and say, "Oh, by the way,

1 | we've got another limitation point based on domestic law for these countries".

2 | So the drafting of the order needs to reflect -- and maybe the answer is if you look at
3 | the claimants' wording, I don't know if you've got in front of you, and the sentence that
4 | says, "Where there is a general point in relation to the application of EU laws may be
5 | done generally" -- well, that is the point I've just discussed -- "where there is a specific
6 | point other than the application of *Heureka*". Maybe if we add those words in there,
7 | that makes it clearer.

8 | But does that make sense? I'm not getting into the question as to how *Heureka*
9 | interacts with domestic law; I'm getting into the question as to whether you say there's
10 | anything else outside that. Because if you're right about *Heureka* and we do need to
11 | get into domestic law, then obviously we're gonna have to look at lots of them, if not
12 | all of them. So the point here is that, if the claimants are right about *Heureka* and it
13 | does apply, I don't want to find you turning up and saying, "Oh, there's another point
14 | that we haven't dealt with". Does that make sense?

15 | MR CASHMAN: I'm grateful for the indication, Sir. It seems to me the key point might
16 | be your indication that the point we need to put forward in respect of domestic law is
17 | in relation to one of the PI jurisdictions and that we understand and that we will do and
18 | that we have no problem with. Our concern is the suggestion that we need to go away
19 | and get 33 experts from all of the jurisdictions, the 0.0 per cent and 0.1 per cent, such
20 | that we are particularising any point of domestic law which may arise in respect of any
21 | jurisdiction. And it was that which, I respectfully submit, Mr Kennelly sought
22 | clarification from you at the hearing to ensure that that wasn't what was required. And
23 | our concern with the claimant's wording is they say, "If there is a point based on
24 | domestic law in any jurisdiction, it shall be identified and particularised".

25 | THE CHAIR: Well, I suppose maybe it's my fault for throwing the point in. But I think
26 | I am saying you need to go to all of the 33 jurisdictions if it's not a point as simple as,

1 "If *Heureka* does not apply automatically, there is a different limitation period". Does
2 that make sense? I suppose maybe the point I'm making doesn't sort of exist as
3 a matter of reality. I'm just wondering whether I've overly confused this.

4 So if you take an example, let's say you have Italy, which -- oh, Italy is one of the
5 jurisdictions -- let's say you've got Denmark. Let's say under Danish law, there's
6 a regime for limitation. That regime for limitation is inconsistent with *Heureka*. Okay?
7 If the claimants are right, then that inconsistency with *Heureka* is going to be resolved
8 by Danish law giving way to *Heureka*. That's their argument. In which case, we don't
9 need to know what the difficulty is with Danish law; we're only going to need to know
10 that if you're successful. And if you're successful, everybody accepts we're going to
11 have to go around the houses and look at all the places where you say there's an
12 inconsistency.

13 So I'm not asking you to get into that question at the moment. That is clear. We're
14 not asking you to identify what the inconsistency with *Heureka* would be that would
15 lead to a different limitation period. I suppose what I'm saying to you is that if there's
16 going to be any other argument, if you assume you lose on *Heureka* and it does apply,
17 and is the law in every EU jurisdiction overriding whatever the national law is, I'm
18 saying I don't want to find there's anything else out there. If you're telling us there's
19 another point out there other than the *Heureka* point which you've lost in this
20 hypothetical, that you then say, "Aha, but", I want to know what that is.

21 Now, maybe that's just identifying something which is non-existent or indeed not even
22 on your radar, but what I don't want to find is that we get to the end of the preliminary
23 issue, you lose on *Heureka* -- which you might or might not, who knows -- it applies by
24 default in all EU jurisdictions and you suddenly say, "But we've still got some limitation
25 points beyond that". That's the point I'm making.

26 MR CASHMAN: There may be simply a slight mismatch in the way of looking at the

1 | question as a whole in circumstances where this is always fundamentally a question
2 | of domestic law in each jurisdiction as to how the supremacy of EU law gets fed
3 | through and how that gets interpreted by the domestic courts, the Supreme Court in
4 | that jurisdiction.

5 | What we fully understand, Sir, is that we need to lay our cards face up on the table;
6 | there need to be no surprises. If it's easier for us to categorise that by way of
7 | arguments of principle, then perhaps that might be the way we frame it. I wonder
8 | whether really what the Tribunal is asking us to do is to ensure that we provide further
9 | and better particulars of our case on the application or non-application of *Heureka* in
10 | the way suggested by the claimants on a full and complete basis, without needing to
11 | go and get expert evidence from all 33 jurisdictions as to how the Supreme Court
12 | would decide the particular issue in light of the particular domestic law as applies in
13 | each country for the purposes of the PI hearing.

14 | THE CHAIR: Sorry, are you saying, for example -- take my Danish example -- that,
15 | even if the claimants succeed, you still have to look at Danish law to see whether it's
16 | inconsistent? Is that the point you're making?

17 | MR CASHMAN: Well, it could be. I'm speaking entirely theoretically here, but that
18 | when the Danish Supreme Court comes to look at this, it accepts that *Heureka* is
19 | supreme. But given the particular nature of the Czech limitation provision that was
20 | applied there, and given the statutory provision by which EU law is fed in in
21 | Denmark -- see European Communities Act and how that was interpreted for the UK
22 | equivalent -- that the Danish Supreme Court has something particular to say about it.
23 | Now, I don't know whether it does or it doesn't, because I haven't investigated that
24 | question with a Danish expert.

25 | THE CHAIR: (Inaudible) --

26 | MR CASHMAN: But what we can do is provide the principles by which we say the

1 | argument would feed through and make sure they are very clearly identified in full for
2 | the Tribunal.

3 | THE CHAIR: I think Mr Beal was saying, and I probably agree with him, that's a bit of
4 | a problem, isn't it? Because we sit down and we do a week's preliminary issue based
5 | on three, four jurisdictions, whatever it is. And then even if Mr Beal succeeds in
6 | showing that, as a matter of principle, *Heureka* will override inconsistent national law,
7 | which I understand there still to be some dispute about, you're going to say, "Oh, we
8 | still need to go and look at all the individual jurisdictions to work out what that means".
9 | I mean, that's a complete waste of time, isn't it? Why would we have a preliminary
10 | issue if that's what we get out of it?

11 | MR CASHMAN: What we're doing is we're exploring three frontrunner jurisdictions.
12 | We're taking these first. The Tribunal is going to make determinations about the law
13 | as it applies to those, and the Tribunal can expect the Schemes and indeed the
14 | claimants to be pragmatic about what the conclusions from that hearing means for
15 | other jurisdictions. But it's not a sampling exercise, and I don't think we can say that
16 | the Tribunal is necessarily in a position to reach a determination about all other 30
17 | jurisdictions for the purposes of that hearing. That's not what the hearing is set up to
18 | do.

19 | THE CHAIR: Well, yes, but I appreciate that, I understand that, but I think it's a bit of
20 | a problem here, isn't there? Because I think your position seems to be to say, "Oh,
21 | we think we might have some other arguments which are based on particular
22 | jurisdictions, but we don't know at the moment and we're not going to tell you until we
23 | found out what happens with the three". I can't see any basis on which you can do
24 | that.

25 | If you've got -- if you're going to turn up and say, Denmark, who is not one of the three,
26 | has got a position which is not inconsistent with *Heureka* but still leads to a different

1 | limitation outcome, I think we need to know what that is. That's really the point I'm
2 | making, which is that if there's nothing that emerges from the jurisdictions that we're
3 | focusing on in the preliminary issue to suggest that *Heureka* is not binding as a matter
4 | of national law, then I'm not sure I can accept you say that you'll act appropriately
5 | because actually at the moment the Schemes seem to be taking every point they can
6 | and taking the point that nothing is binding on them. So it seems to me that we are
7 | creating a real risk that we're going to end up having to use a lot of valuable Tribunal
8 | time and resource and spend a lot of money, because you're going to want to litigate
9 | the 2 per cent in Denmark or wherever it is and I'm trying to avoid that. I think if that's
10 | the position that you're leaving open, then you're going to have to stump up and tell
11 | us what it is now rather than later. In other words, you're going to have to do the work.

12 | MR CASHMAN: I have heard what the Tribunal's said. Of course, our concern is
13 | almost the alternative, which is: we don't want to have to be expending huge amount
14 | of time and resource and Tribunal resource on a claim that has a value of a jurisdiction
15 | of 0.0 per cent or 0.1 per cent. What I can --

16 | THE CHAIR: The answer to that is to concede that it will follow the jurisdictions we're
17 | looking at, Mr Cashman. You can't have it both ways: you can't say we're leaving it
18 | open; but say we're not prepared to tell you whether we think we're going to take the
19 | point or not. I mean, you know, you've got to go one way or the other on this. Either
20 | you say, when we decide France, Germany and Italy and whoever else is in here, we
21 | accept that that will apply to all other countries, or you've got to tell us which ones it
22 | doesn't apply to so we know what we're dealing with. I think we need to know that
23 | now or not sometime later.

24 | MR CASHMAN: That's very helpful. It's that second exercise which -- I just wonder
25 | whether it might be able to be done on us giving further and better particulars of our
26 | case as we see appropriate. So it might be categories. There might be principles that

1 | we say will apply to resolve all 33. I'm just not in a position to commit that we can
2 | necessarily get 33 expert reports within the time that's allowed, and say that it's framed
3 | that way. But I think what I'm proposing achieves what the Tribunal needs.

4 | THE CHAIR: Well, let's see what Mr Beal says about that, but I don't think anyone's
5 | asking you to do 33 expert reports. Certainly, you've got to go and talk to the experts.
6 | But I would have thought you must have done a lot of that already; this has been
7 | floating around for a long time, and surely by the 18th -- and if you need more time
8 | than we can give you some more time.

9 | But surely you are in a position to be able to go to 33 different countries, and find out
10 | from a senior lawyer there what the limitation position is and whether it's likely to be
11 | inconsistent with what *Heureka* says? I mean, most competition lawyers will tell you
12 | that in five minutes, I would have thought. It's not a difficult exercise, Mr Cashman.
13 | I'm not asking you to produce an expert report, I'm just asking you to particularise to
14 | tell us what are the jurisdictions that have a limitation provision which you say is still
15 | going to be different, if you like, from the *Heureka* outcome, notwithstanding that
16 | *Heureka* applies. That's probably not a very sensible way of putting it, but you know
17 | what I mean.

18 | MR CASHMAN: We understand that request, Sir. And I think framed that way, that's
19 | entirely what we're intending to do anyway. We're very content that it be put that way.
20 | We will put our cards face up on the table and we will identify what are the principles
21 | by which the Visa defendants say this outcome may or may not apply. The Tribunal
22 | will have the full panoply of them before it for the preliminary issues hearing.

23 | THE CHAIR: By reference to the countries as well as the principles?

24 | MR CASHMAN: Yes, Sir.

25 | THE CHAIR: Yes. I mean, Mr Beal, I don't know whether I can take that much further.
26 | I don't know whether you have anything to add to that, but I think we might have to

1 | wait and see what turns up on 18 September and see whether it meets the --

2 | MR BEAL: If my career had been more successful, Sir, I'd simply say, I agree and

3 | have nothing to add, which I understand is the conventional formula. With respect, we

4 | agree with everything you just said.

5 | THE CHAIR: Thank you, that's helpful.

6 | Okay, Mr Cook, have you got anything you want to say about it?

7 | MR COOK: No, Sir.

8 | THE CHAIR: Okay, well, Mr Cashman, I mean, you're going to have to do the best

9 | you can by 18 September. If for some reason you do need more time, you obviously

10 | can ask for it, but I think you've got the message. In terms of the drafting of the order,

11 | I don't want to do that on the hoof, but hopefully it's very clear now what, what is

12 | required.

13 | MR CASHMAN: Yes, thank you, Sir.

14 | THE CHAIR: Good. Okay, thank you.

15 | Right. So what we've got left is this cutoff point.

16 |

17 | Discussion re order

18 | MR CASHMAN: Sorry to intervene. There's just another couple of points on the 7

19 | and 8 July order, and I wonder whether it might be convenient to complete them now.

20 | THE CHAIR: Yes. I have to say, I wasn't delighted to be asked to be dealing with

21 | these sort of points. I mean, there seem to me to be points the parties should be able

22 | to work out for themselves. It's very unsatisfactory that you're arguing about weeks

23 | and names and things like that and asking me to resolve those. I mean, I don't care

24 | what you call the countries that we're dealing with. I think we decided that we would

25 | do the three largest jurisdictions.

26 | Mr Beal, you had a go at Ireland. It struck me that there wasn't really much -- any

1 particular reason to put it in. But if you can't get the Schemes to agree to it and there's
2 an issue, then I'm not really inclined to go back on that, really.

3 MR BEAL: Sir, Mr Cashman and I should be able to, I hope, have a meaningful
4 discussion in the light of your observations today and put this to bed without troubling
5 you further.

6 THE CHAIR: Well, that would be helpful. I mean, you know, if you think that Ireland
7 is interesting and you can convince the Schemes, then by all means. But really, I'm
8 not quite sure what we get out of adding anything else into this, particularly given the
9 indication that Mr Cashman's just given us.

10 MR BEAL: Well, this drafting was designed to tease out either a very strong
11 jurisdiction on your Danish example where, for example, there's evidence from the
12 Danish Supreme Court that they would plough their own furrow on EU law, regardless
13 of the obligation to follow EU law. We suggested Ireland for all the reasons I gave
14 previously, but as I say, rightly indicated that didn't immediately find favour with you
15 and the Schemes haven't agreed to it. So we are where we are.

16 THE CHAIR: Okay, well let's see what happens on 18 September. If there's
17 something which you think obviously should be in there, because it's a relatively large
18 amount and because it's obvious there's going to be a serious fight about it -- it's
19 leaving it pretty late, but it's not impossible -- I suppose we could fit it in.

20 MR BEAL: Yes, thank you.

21 THE CHAIR: Good, okay. Thank you.

22
23 Cutoff

24 Submissions by MR BEAL

25 THE CHAIR: Cutoff. Just so I'm with you, Mr Beal, am I right in thinking that you
26 accept that there should be a cutoff, it's just a question of the date, whether it's

1 | September or 1 January; is that where this has ended up?

2 | MR BEAL: I think we said 31 January 2027.

3 | THE CHAIR: You did. 31 January. Yes.

4 | MR BEAL: This is all about active participation in Trial 3.

5 | THE CHAIR: Yes.

6 | MR BEAL: The reason why we might need people to be active is if the experts say,
7 | "We haven't had sufficient data from the lead claimants and or the base sample
8 | claimants, and so we need something else". It makes most sense, with respect, to
9 | have a cutoff date for active participation that precludes the experts from calling upon
10 | further claimants who are available, after it becomes apparent that the disclosure is
11 | insufficient.

12 | Disclosure won't be analysed to be insufficient until at least disclosure is given, which
13 | is the end of October. There will then be a point of time at which it needs to be
14 | considered. If the experts say, "Well, actually, there's another claimant out there who
15 | we think, looking at the publicly available information about that claimant, might be
16 | a decent substitute for one of the lead 15, because the lead 15's data is inadequate,
17 | why are you cutting off your nose to spite your face to say that shouldn't be available?"

18 | We've suggested 31 January just to enable that process to take place. What is being
19 | proposed has no bearing on whether or not somebody can apply to transfer from the
20 | High Court to the CAT. It can be designated as a Host Case by an application to the
21 | President. It has no bearing on any of that. It's simply making Trial 3 as practical and
22 | as efficient as possible, and giving the experts the latitude they need. So we've
23 | suggested at the end of January, because it gives them time to do the job.

24 | THE CHAIR: Just to be clear, you would accept, do you, that at the end of January
25 | then, claims that arrive after that are not subject to the benefit of Trial 3? They're not
26 | parties; they're not Host Cases for Trial 3?

1 | MR BEAL: They can be made Host Cases, but they just won't be active claimants for
2 | the purposes of taking part in Trial 3 as a claimant.

3 | THE CHAIR: Because I think that the defendants are coming at it from a different
4 | point. I think they're saying you shouldn't be getting the benefit of Trial 3 if you're
5 | turning up late. So it's a different point, I think.

6 | MR BEAL: I have to say, I struggle to understand that, because Trial 3 is about finding
7 | whether or not the criteria for exemption are met for the scheme as a whole. The
8 | scheme as a whole will apply to every claimant. So with the greatest of respect, this
9 | is not an individual assessment of each individual exemptible level for a given
10 | claimant; there will be an exemptible level if there is one, or there are no exemptible
11 | level because the criteria for exemption aren't met. So --

12 | THE CHAIR: Well, I like your optimism, but I think what we're seeing at the moment
13 | is the scheme is taking the position that if a claimant is not a party to a trial, then they
14 | don't consider that that resolves the issues between them. So they are saying that
15 | firstly, if people turn up late, they shouldn't get the benefit because they aren't taking
16 | the burden. Secondly, if they're outside Trial 3 as a Host Case, then they're not bound
17 | by the decision vis a vis that claimant. I think that is their position. I'm not saying
18 | I agree with them, I'm just saying that's their position.

19 | MR BEAL: But what they've actually sought is that anyone who arrives after the cutoff
20 | date can't be an active claimant; that's not saying you can't be a Host Case. It's not
21 | open to them to apply to constrain applications for Host Case status: (a) because that
22 | application is made to the President; (b) because it would require a rewriting of the
23 | Umbrella Proceedings law.

24 | THE CHAIR: Well, I think they are anticipating the President will make the order.
25 | I don't know where this is -- maybe Mr Cook will tell us -- but I had understood that
26 | they were saying, a bit like Trial 2, there comes a point at which people stop being

1 | made Host Cases for the purposes of the Trial 3 issues.

2 | MR BEAL: Yes.

3 | THE CHAIR: And that should happen at a specified date, well in advance of Trial 3.
4 | That's the position they're taking, I think.

5 | MR BEAL: That isn't actually what they've applied for. What happened with Trial 2 is
6 | CICC, for example, were only designated as a Host Case for the purposes of Trial 2B,
7 | and that was a specific direction from the then President. That's what has to be done.

8 | THE CHAIR: Yes.

9 | MR BEAL: The cutoff point doesn't actually serve any purpose other than depriving
10 | the experts of the option of selecting an active claimant from amongst the pool as it
11 | stands, by 1 September 2026 or 31 January 2027, of the opportunity of selecting
12 | a replacement. It doesn't have the effect which they've submitted in their skeleton it
13 | has.

14 | THE CHAIR: Oh, okay. Well, let's see what Mr Cook says about, or
15 | Mr Cashman -- I don't know who's in charge of this.

16 | Submissions by MR CASHMAN

17 | MR CASHMAN: Yes. Sir, I'm leading on this issue. What we have been doing, further
18 | to the exchanges that we had with the Tribunal on 7 and 8 July, is considering what is
19 | the mechanism by which a cutoff date should fall to be imposed. There is common
20 | ground that there should be a cutoff date; that's been established in correspondence.
21 | The question is: what is that date? We say 1 September 2026; the claimants say
22 | 31 January 2027. But what we have proposed --

23 | THE CHAIR: Sorry to interrupt you. Just before you go any further, I'm sorry, I don't
24 | think there is common ground because I think Mr Beal saying he thinks you're doing
25 | something other than what I think you're doing. Is that not right? When you say cutoff,
26 | what do you mean by cutoff? What are the implications of the cutoff?

1 MR CASHMAN: So what we are proposing to do, what we describe in our skeleton
2 argument, is that we will make an application to the President to be determined in
3 consultation, no doubt, with you, Sir, for an amendment to the Umbrella Proceedings
4 Order which imposes a date which says, "After 1 September 2026, we will not be
5 adding Host Cases for the purposes of Trial 3". That is how effect is given in the way
6 that we understood the claimants also to have accepted in correspondence. I am
7 surprised to hear Mr Beal's different characterisation of it just now.

8 THE CHAIR: Okay. Well, look, I mean, I'm not sure we can take it any further today.
9 I think Mr Beal does seem to be in a different place. I don't know why that is, but I think
10 you need to make your application.

11 I think it would be helpful, perhaps, if you're talking to Mr Beal, you might have
12 a conversation about this as well if you're talking about the order and maybe just see
13 if you can get straight about at least understanding what it is you're doing and making
14 sure he gets that as well. Then I think it's really a matter for you to make your
15 application and we'll deal with it on the papers.

16 MR CASHMAN: I'm grateful Sir, and we will get on and make that application this
17 week or next so that you and the President know it's coming.

18 THE CHAIR: Yes, okay. Thank you.

19 Mr Beal, anything you want to add to that? No, good. Okay. Thank you.

20 MR BEAL: The other problem here is that there has been no formal application. I think
21 what's been offered in correspondence doesn't necessarily -- in the sense there's been
22 acceptance of a partial offer rather than an acceptance of the full offer of what was
23 initially proposed. So that amounts to a counter-offer in contract and therefore there's
24 no agreement.

25 THE CHAIR: Perhaps if you can just sort out between you what you think the battle
26 lines are, if there is a battle, and then that'll make it a bit easier when the application

1 | is issued, at least Mr Cashman will know what he's dealing with.

2 | Discussion re disclosure

3 | THE CHAIR: Okay. There's some points about disclosure. We've really run out of
4 | time. They were all things that you might or might not need to bother the Tribunal with.

5 | Is there anything that's burning there that you need any assistance with? I've got out
6 | of disclosure sample for Trial 3, the scope of the base sample disclosure and the
7 | defendant's Trial 3 disclosure proposals. I've got noted down. Any of those require --

8 | MR BEAL: The short point is that there hasn't been any application on any of these
9 | points to the extent that they can't be resolved by agreement. They will have to be the
10 | subject of formal application and either added to the October CMC or a date is found
11 | for them to be determined at a different time.

12 | THE CHAIR: Yes, of course. Okay. Just in relation to that October CMC, I think we've
13 | listed it for Trial 4, but I think pragmatically we ought to include in that anything that's
14 | necessary to keep the Trial 3 machine on the tracks.

15 | MR BEAL: Yes. I think formally we will need to add in a slot for the CICC CMC at the
16 | start of that hearing. But if it includes Trial 3, then CICC can be there anyway.

17 | THE CHAIR: Yes. Good. Okay. So is there anything else we need to do now?

18 | MR BEAL: No. There's the vexed issue of costs of all of these things over three days,
19 | but I suggest that that's resolved offline where possible and if not, we'll trouble you
20 | with cost applications.

21 | THE CHAIR: Yes, of course. I mean, there's a point -- these are quite complicated
22 | things to get to hearings, aren't they, Mr Beal? You know, in a way, there is a point
23 | about having regular case management that doesn't carry cost consequences, but
24 | I also appreciate that where there are significant applications that require a lot of time
25 | and effort, then a lot of money has been spent. So it's just a balance, isn't there,
26 | really?

1 | MR BEAL: The Trial 4 order suggests costs in the case. I anticipate it would require
2 | good reasons to depart from that principle, if I can put it that way.

3 | THE CHAIR: Yes. Good. Okay. Thank you very much, everybody. It's been very
4 | helpful. Hopefully we made some progress and grateful for all your assistance. I'll
5 | now end the hearing.

6 | MR BEAL: Thank you very much, Sir.

7 | MR CASHMAN: Thank you, Sir.

8 | (1.06 pm)

9 | (The hearing adjourned)

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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?