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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 26th October 2026

Before:

Ben Tidswell

Merchant Interchange Fee Umbrella Proceedings

A P P E A R AN C E S

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

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

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

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Monday, 26 October 2026

(10.31 am)

THE CHAIR: Morning everybody. I'm about to just do a live stream warning. Some of you are joining via live stream on our website, so I shall start with the customary warning. Official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as contempt of court.

Good morning, Mr Beal.

MR BEAL: Good morning. May it please the Tribunal. I appear in this matter on behalf of the Claimants, with my learned friends, Ms Robertson and Mr Jackson. Mr Cook KC appears with Ms Klimowicz for Mastercard. Mr Kennelly KC appears with Mr Fakhoury and Ms Kelly-Lyth for Visa.

May I extend a welcome to Mr Fakhoury, who is adopting what I call the Cashman position for this particular CMC. He's part of a team of revolving substitutes, as far as I can see. Welcome to him.

Housekeeping

MR BEAL: Housekeeping. Please, can I indicate that I hope the Tribunal has a core bundle?

THE CHAIR: Yes.

MR BEAL: Two supplemental bundles.

THE CHAIR: Yes.

MR BEAL: One of which arrived on Friday, I'm afraid. And then a correspondence bundle, which is voluminous, as always.

THE CHAIR: Yes. And there are quite a lot of authorities bundles as well.

MR BEAL: Yes. If it helps, I'm only proposing to refer to about three of those authorities.

THE CHAIR: Yes.

MR BEAL: Quite a lot of the principles are either common ground or well known to this Tribunal.

The updated agenda is in your core bundle, tab 11 page 48. I hope it is the updated version which was rejigged following an indication from the Tribunal that matters to do with Trial 4 should be dealt with first. This was essentially predominantly a Trial 4 CMC.

THE CHAIR: Yes.

MR BEAL: What our submissions will cover are the scope of Trial 4, some very short points about the limitation PI hearing.

THE CHAIR: Yes.

MR BEAL: The Trial 3 timetable, which I think probably is largely now common ground in the light of the directions the Tribunal has already given. And then CICC matters, which I think the Tribunal is considering dealing with tomorrow as a fresh start.

THE CHAIR: Yes.

Submissions by MR BEAL

MR BEAL: What I'm proposing to do on the scope of Trial 4 is set out what I consider to be the big picture points, and then leave the detail in the directions until after that has been commented on by my learned friends for the Defendants, so that we can thrash out what is the correct approach in principle, because in a sense, dealing with the directions before we know the direction of travel, seems a bit futile. Unless you'd like me to deal with it differently?

THE CHAIR: No, I think that's sensible. I think what's clear is that there is a measure

of agreement about subject matter but significant disagreement about what that actually means in practice.

MR BEAL: I think that's fair, with respect.

So (inaudible) directions, just for your note, are in supplemental bundle 2, tab 19, page 112 but I'm not proposing to go through those in detail at this stage, save to note, if I may, at page 113, that the overall shape of what we're proposing is really as follows. Firstly, a single Trial 4 within the existing allotted time frame, but with three modules that are set to run back-to-back. Module 4A will cover off what we say are all outstanding merchant pass-on matters for UK and Irish claims. Module 4B would then cover all remaining quantum issues for UK and Irish claims, and this would enable CICC to participate in modules 4A and 4B. Module 4C would then deal with liability and pass-on issues for what we are prepared to accept would be a substantial cohort of EEA jurisdictions. We haven't put a number on it at this stage. I did, I think in the 7 July CMC, say a cohort of around five would be appropriate. I'm not resiling from that. Our basic position on the selection of the cohort is that we need to understand what the pleaded position is from the Defendants, so that an educated analysis can be made of what is said to be key differences. An analysis can then be taken as to whether those differences really are key in the light of the pleaded case, and we can then move forward to determine the appropriate selection of jurisdictions. But I'm not suggesting that we deal with all 23 jurisdictions in Trial 4C.

THE CHAIR: So essentially what you're saying is that we need to smoke out all of the jurisdiction issues, the jurisdiction-by-jurisdiction differences.

MR BEAL: Yes.

THE CHAIR: And then make a selection once we've got a sense of what that looks like. Presumably the selection would be not only by reference to where there were identified, plausibly identified or identified plausible differences, but also by reference

to value as well.

MR BEAL: Yes, yes. We accept that entirely. It makes sense to get the biggest bang for the buck in terms of the most coverage of volume of commerce, and then it makes sense to tease out if there are geographical differences that are being relied upon, whether or not there are, for example, common issues for the Baltic countries. We need to see their pleading much as we did with the limitation PI, where this Tribunal directed that the Schemes plead to any particular examples of material differences in the treatment of *Heureka* before we then confirmed the frontrunner jurisdictions.

The reasoning behind that is simply to make sure that we encompass as much as possible, so that at the end of Trial 4, we can say that the bulk of this litigation is over. Now, that's our ambition for the simple reason that some of these claims obviously were started in 2017. If we're looking at 2031, 2032, for final resolution on the Schemes' approach, then that's an extraordinary length of time for concluding litigation and we start giving Jarndyce and Jarndyce a run for its money, in terms of the length of the proceedings.

We hope that our proposal is both realistic and capable of being achieved. We recognise that it does not involve a complete re-litigation of all the issues from Trial 1, Trial 2 and Trial 3 in the course of that Trial 4. And so our approach is necessarily predicated upon a degree of read across. Whether one terms it by reference to the framework or the findings that have been made, there has to be a degree of read across in order for a common sense and proportionate approach to be adopted to Trial 4.

THE CHAIR: In circumstances where at the moment, as I understand it, the Defendants are largely resisting that, any form of read across.

MR BEAL: Yes.

THE CHAIR: That may be unfair. Maybe it's not as extreme as that, but it's

certainly -- the approach of test cases does rather seem to suggest that that's the case. Don't we have to grapple now, are we going to have to grapple now, with what the actual binding effect of those previous decisions is?

MR BEAL: Yes. I think that's right, with respect, because ultimately the key differences between our approach are: what use can be made of the decisions that have already been taken and will be taken in the Umbrella Proceedings framework? In my submission, it was never envisaged -- and I'll come on to give you the detail of this -- it was never envisaged that with the Umbrella Proceedings Order there would be a wholesale re-litigation of all the issues dealt with at Trials 1, 2 and 3 at a future stage.

THE CHAIR: Yes, well, I think that's right up to a point, but I suppose there is a development in which perhaps it wasn't as fully foreseen at the time, which is the constant accumulation of claims, which does somewhat change the picture, I think.

MR BEAL: There have always been claims that have pleaded the jurisdictions in question.

THE CHAIR: Yes.

MR BEAL: All that's happened is: understandably, when you have a finding from the Court of Appeal in this jurisdiction that *Heureka* is part of EU law and therefore claims under EU law claims go back to 1992, that changes the commercial dynamic of bringing a claim for non-UK claims before this jurisdiction. So, what we've seen in terms of volume of commerce and the accumulation of claims, simply reflects the changing legal landscape, coupled with, of course, the outcomes in both Trial 1 and Trial 2, because suddenly people are saying, "Well, it's worth bringing a claim because the hard yards have been done". Whether that's true or not depends, in part, on the approach one takes to read across.

THE CHAIR: Because I mean it's notable, isn't it, that with *Trucks*, you have cases

right across Europe and all sorts of jurisdictions. As I understand, you don't really have that with MIFs.

MR BEAL: I got told off for giving evidence last time based on what I'd been told at the Madrid competition conference in May. It's within the gift of the Schemes to indicate where they are being sued. But certainly, my understanding is that some of the solicitors in this room, either those instructing me or those who are attending as an observer, do have claims in non-UK EU jurisdictions.

THE CHAIR: Yes. Can I just come back to the point about read across because the reason I ask you the question about having to resolve, as a matter of principle, the binding nature of the previous decisions is that, to a point, I think one can deal with this with proportionate case management.

MR BEAL: Yes.

THE CHAIR: There's a point which says, well, in relation to quantum, for example, it is simply not feasible to have a trial for every claimant in the way that there was for Sainsbury's and the other supermarkets that participated in earlier proceedings. So, although it is very interesting to read what Mr Cotter and Mr Cassels say about the time that was taken on those, just as a matter of proportionality, we're just not going to devote Tribunal resource to trying £10,000 MIF claims on a sort of one-by-one basis. So, I think there is a point at which you can say, well, that's not the mechanism for the resolution of these. We need to find a different way of doing it, which is where you get into sample cases and the question of whether they bind or not, at least in relation to the people who are party to that particular trial and so on.

So, you can manage that to a point, but I suppose the question is how far does that go and at what point do we find that we're transgressing upon the Defendants' entitlements to advance their defences properly? Then you have to bring in, don't you, the question of abuse of process as to whether or not that is still a legitimate position

for them to take?

I'm just not sure in my mind about how far we need to go with all of this. Maybe it depends a bit on how the discussion goes, but, in some ways I would much rather not get into the question of abuse of process and how that all works as a matter of law and application here. But of course, if we have to, we might have to.

MR BEAL: Can I perhaps develop my submissions by reference to the three core issues: (1) pass-on, (2) quantum, and (3) the other EEA jurisdictions?

THE CHAIR: Just before you do, just on the age of proceedings. One of the things I picked up from I think, both Mr Cotter and Mr Cassels is that there are, I think, there are 2,000-odd claims.

MR BEAL: Yes.

THE CHAIR: And of those, 1,400 have been filed this year.

MR BEAL: Mr Cassels and Mr Cotter have both indicated, as a matter of fact, how many claims have been lodged. I think those claim figures are broadly accurate. As you know, there were a much larger number of claims brought on behalf of a number of firms, some of which were settled in October 2023 and some of which have settled subsequently. Principally, I think after the pass-on decision where the Stephenson Harwood claims largely went, the existing ones.

If you recall, I was instructed at the big CMC we had in September 2023, when the then president indicated that we would be pushing ahead with Trial 1 regardless of the Schemes' objections to that. We were in a position where I was being instructed by three different firms, and we also had other law firms instructing other counsel in other claims. As you know, Primark, for example, settled, I think during the course of the opening submissions in Trial 1; Allianz also settled out.

We're in a position whereby the Schemes have settled against a substantial number of Claimants. The actual absolute number of Claimants has been something of

a moveable feast. It started off high; it's become lower as claims have settled out. It's now become high again for the reasons I indicated, which are faced with findings that are favourable to the claimant class and the prospect of bringing EEA claims back to 1992, subject to cessation events, the economics and viability of bringing a claim have changed.

THE CHAIR: Yes. I suppose the reason for raising it is that you make a point: there are some people who have been waiting for a very long time.

MR BEAL: Some of them have.

THE CHAIR: Exactly, and obviously that is a matter of real concern. I suppose I'm interested in knowing how that population fits with some of the proposals to move these things off. For example, I seem to recall a discussion in -- I don't know when it was, probably 2022 -- about whether we would include Italian claims in the first trial, Trial 1. So, they've obviously been around for a while. Are they --

MR BEAL: We (overspeaking) --

THE CHAIR: Yes.

MR BEAL: -- and it was opposed, and the opposition won.

THE CHAIR: Yes. I suppose the question is: well, are they still around, and if so, does that have any bearing on the view one should take of the non-UK element of Trial 4? That's the point I'm making.

MR BEAL: I would need to take instructions. This is going to be relevant for the Scott+Scott Claimants.

THE CHAIR: Yes.

MR BEAL: CICC claims don't cover non-UK claims. There are Scott+Scott claims that go back to that period. I don't know off the top of my head whether there are any that pleaded Italian law from the outset and are still with us.

THE CHAIR: I suppose putting it a slightly different way -- and it may not be helpful to

think about it like this and it may be too difficult -- I did actually think about asking you to provide me with a table of it all, and I thought that actually was probably an unhelpful thing to ask you to do so shortly before the CMC.

But it would be unfortunate, wouldn't it, if we designed a process for Trial 4 that didn't at least involve some consideration of whether we were addressing the longest tail claims, and they ended up being pushed out even further? It's not all just about first-in, first-served, of course, but it is, as you say, about timely justice as well. So, I wouldn't want to get to the end of all this and not to be reasonably confident that we were dealing fairly with people who have been around for a long time. That's really the point.

MR BEAL: The only difficulty, I apprehend, if I may say so, is this: the salami-slicing on the basis of the first-in, first-out principle means that you are then potentially leaving for bifurcated adjudication claims that were commenced in 2017 with claims that admittedly were commenced this year but which raise exactly the same issue.

THE CHAIR: No, I understand that. I understand that. Well, that may be right, but I suppose if one were making a decision about what jurisdictions went into Trial 4 for non-EEA purposes -- non-UK purposes, then it might have some bearing on that.

MR BEAL: No, if I may say so, that's an entirely fair point, which is that if the endeavour is to make sure that litigants are having cases dealt with proportionately at reasonable costs in a reasonable time, then the point at which a given claim was started becomes a relevant element of that analysis.

THE CHAIR: I don't think I'm putting it any higher than that.

MR BEAL: No, and I will endeavour, maybe at the transcriber break, to get you an indication of the claims that were within the earliest Scott+Scott claims so that I can tell you the jurisdictions that were invoked.

THE CHAIR: Yes. Thank you.

MR BEAL: You'll appreciate that it's slightly difficult, because whilst in my head I know that it covered quite a lot of jurisdictions, I don't know which of those specifically have been settled out.

THE CHAIR: No, no, of course, and that's really where I did restrain myself from inviting you to give me a table on it, because I thought it might be quite difficult.

MR BEAL: It would have caused some alarm internally if we'd had to produce something requiring that data analysis at very short notice. But I'll do my best to give the Tribunal an indication of what claims we think are within the scope of the earliest Scott+Scott claims that were issued.

THE CHAIR: Yes, and we can keep that in mind. Mr Kennelly?

MR KENNELLY: I'm able to assist you on that too, sir, if you want to hear from me. I'm happy to wait until Mr Beal is finished.

THE CHAIR: Well, why don't we leave it on the basis that you can have a discussion about it in the transcriber break and come up with the best composite indication you can give. Thank you.

MR KENNELLY: Thank you.

Pass-on

MR BEAL: May I first deal with pass-on. We have consistently recognised that it's open to the Schemes to plead and prove pass-on as a defence to claims that were not resolved in Trial 2A. But that, of course, doesn't answer the question of whether or not the findings in Trial 2A are somehow consigned to the box marked "History", and everything else is essentially rerun. That's the submission I made on 7 July. For your note, that's supplemental bundle 1, tab 8, page 574 through to 578, where I covered off exactly the same point I'm going to make now.

What we say is that the effect of bringing further claims into the Umbrella Proceedings for Trial 3 and then Trial 4 is that the findings reached in those earlier proceedings can

be used by the Tribunal in an appropriate way. That includes as a source of evidence for pass-on rates for sectors of the UK and Irish economy which were examined. That's particularly so, for example in relation to the stayed Claimants who were Host Cases throughout, who are now being re-activated but who did not formally participate in Trial 2. They were always Host Cases for Umbrella Proceedings purposes, and therefore the findings from Trial 2A directly impact them because of the terms of the Umbrella Order.

Now, we would respectfully suggest that we're in a position, therefore, where the pass-on findings from Trial 2A will have to be applied to those entities, as well as to the entities that took part in Trial 2A. If, for example, those entities include a hotel from an international hotel chain and a new claimant includes a hotel from an international hotel chain, then we find it very difficult to see why this Tribunal shouldn't be able as a matter of case management to say, absent some sort of wholly exceptional circumstance, that finding shouldn't equally apply to the new claimant as well.

Now, if we look, please, in the correspondence bundle at tab 171.1, page 737. This is part of Visa's submissions on the change of expert, but they make a telling point, paragraph 7. So that's page 737, paragraph 7.

THE CHAIR: Yes, I have it.

MR BEAL: We see what they say there. They say that:

"... (the 'Trial 2 Judgment') was split into Trial 2A, dealing with MPO, and Trial 2B, dealing with ... ('APO'). The CRs are bound by and have the benefit of only the parts of the decision which deal with APO ..."

So, they're saying CICC is bound by and has the benefit of the APO findings:

"... in accordance with the order of the Tribunal designating the CICC Proceedings as Host Cases in relation to the Ubiquitous [Matters] ... (only)."

They're recognising, therefore, that where, as here, Mastercard and Visa have been

party to Trial 2A, they must accept that they are bound by and take the benefit of not only Trial 2B but also Trial 2A, because that's part and parcel of the Umbrella Proceedings.

Now, because it's part and parcel of the Umbrella Proceedings, any suggestion that this is a *Hollington v Hewthorn* issue is simply misplaced. Visa and Mastercard were parties to Trial 2A. Visa's expert, as you recall, Mr Holt, proposed to drive an economy-wide pass-on rate, which I accept I objected to because I said CICC are not party to this part of the proceeding and therefore it's not relevant.

Ultimately, the Tribunal decided not to make an economy-wide pass-on finding, but that doesn't mean that material that was proposed by Visa to be relied upon to determine sectors which could then have contributed to an economy-wide pass-on wasn't deployed. Visa did deploy that case. They deliberately said you can make findings sector by sector. We then have a process by which Mr Holt said sectorisation could be used to achieve an economy-wide pass-on rate. He put that forward as part of his case and Visa adopted it.

We therefore suggest it would be an abuse of process for Visa to resile from those findings and to re-argue the MPO rates for sectors where an MPO rate has been determined for that sector. We can see that perhaps most clearly in Visa's reliance on the APO conclusions from Trial 2B, which no one has appealed.

If, for example, we look at core bundle, tab 23, page 288. There's a section there dealing with the issue of quantum and the proposed formulation. Under "The Claimants' proposed formulation", what we do is we cite a proposition that had been advanced in Mr Cassels's second witness statement dated 28 May 2026. We see that under subparagraph (b). That proposition was as follows:

"... 'Visa does not intend to relitigate the APO findings in the Trial 2 Judgment in the Unresolved MPO Claims if the relevant Claimants are content to proceed on that same

basis' ..."

THE CHAIR: Can you just remind me, what does he define "Unresolved MPO Claims" as? Is that people who were not Host Cases in Trial 2? Is that right? Yes.

MR BEAL: He's acknowledging that essentially what Visa would be doing otherwise is relitigating the findings that were advanced in Trial 2B. Now, as you know, we didn't appeal any of the findings in Trial 2B and nor have the Defendants, and we are not seeking to suggest in any way that that remains a live issue to be dealt with at Trial 4. That's simply because we've recognised that the framework set by the Umbrella Proceedings encourages the resolution on a definitive basis of those issues that are properly before the Tribunal at that stage. There's no obligation to join the Umbrella Proceedings; one can simply bring proceedings in the High Court. Then the question of res judicata abuse of process would become a much more live one.

Instead, we say the whole purpose of the Umbrella framework, which Visa did not appeal, means that they have to take their wins or losses with them from each stage of the Umbrella Proceedings framework, and they can't seek to relitigate those as and when new claims are added to the host list of claims.

THE CHAIR: Does your submission go as far as to say just simply by the establishment of the Umbrella Proceedings, they are bound against any future Host Case in relation to any matter? Are you going as far as that?

MR BEAL: It's not open to them to try and undermine, save by way of an appeal, the legal framework and the necessary factual findings that have been made from Trials 1, 2, or in due course, 3.

THE CHAIR: Effectively, you're really saying it's not abuse of process in the general sense. You're saying they're just bound by the framework.

MR BEAL: They are bound by the Umbrella Proceedings Order.

There's a separate question of what exactly were the findings that were made in -- in

particular, in Trial 2A is where this bites. It bites principally in relation to -- there's a read-across issue for Trial 1, and will be for Trial 3, for other EEA jurisdictions in due course. But we don't need to grapple with that now. It turns really on: is there a material difference between the scheme's operation in the other EEA jurisdictions, and the scheme's operation here? But I'm not proposing that we get into that at this stage, for reasons I'll come on to.

But certainly for the purposes of Trial 2A, where you do have findings that were made in relation to sectors of the economy, we say it would be an abuse of process for Visa to seek to re-argue that those sectoral findings cannot be applied to other cases, new cases, that are within the same sector. It's different if the Schemes wish to argue, "Well, you are not in that same sector and there are no sector findings that apply to you". That of course means that further findings will need to be made.

But as the Tribunal will recall, we had an exceptions process for Claimants who were part of Trial 2A, with a very strong hint from the learned president at the time that it would only be wholly exceptionally that a claimant who was within a sector that had been determined would be able to say, "Actually, even though you've made that finding for the sector, that doesn't apply to me". We simply say that by parity of reasoning, the Defendants have contested -- over a very long trial period, they have contested pass-on. They have advanced submissions and evidence to the extent that they wish to do so, as to what the pass-on rates were on a sector-by-sector basis. There is no suggestion, for example, that they want to go back on those sectors where there was a positive finding of pass-on. So, they're not saying, for example, for Allianz Insurance claims, or Travix booking website claims, that this Tribunal should revisit that. Of course, what that means is: the Claimants have also not sought to appeal against the Trial 2A findings, and therefore new cases are equally bound; if they want to be part of the Umbrella Proceedings, one of the things they have to do is accept that they're

going to be bound by those findings.

We simply say that it would be an abuse of process for Visa to, in a sense, bank its wins with the three subsectors, where a positive rate of pass-on has been found, but then to contest those sectors where no pass-on was found, even though they had the opportunity to deploy their case and advance the evidence they wanted in circumstances where the burden was on them.

THE CHAIR: (Overspeaking). Sorry.

MR BEAL: The Court of Appeal has given them permission only to appeal essentially on legal issues, which are: was the test for factual causation correctly applied, or not?

THE CHAIR: Yes, (inaudible). Yes.

So, if one thinks about the sectors in which no finding of -- let me actually…let me start this in a different way. In relation to the three sectors, as you say, there was a positive finding of pass-on. In relation to all other sectors, there was a finding of no pass-on. That was because there was no evidence that would substantiate the suggestion that the MSC found its way into the price-maximising, price-setting process.

So, I think what's being said by the Defendants is that that is essentially a factual question, and that it might differ within sectors. But are you saying that the effect of the Trial 2A judgment was to make a finding about sectors generally? You're saying that?

MR BEAL: Yes.

THE CHAIR: So insofar as you've got a small hotel chain, which we didn't have in Trial 2A, how would you deal with that?

MR BEAL: The small hotel chain, if it joins, seeks to join as a Host Case. The Umbrella Proceedings is bound by the finding for that sector, unless it invokes the exceptions policy. But of course, no claimant joining has sought to invoke the exceptions policy. Nobody has pleaded that somehow they benefit from exception.

We haven't had insurance companies, for example, as far as I'm aware, bring claims -- I'll be corrected if I'm wrong -- and we haven't, as far as I know, had travel booking websites bring claims either. That's no doubt because they have looked at the pass-on findings and decided that it's not open to them to claim exceptionally that they have got a different pass-on finding, and therefore they've simply been shut out from joining.

THE CHAIR: Well, I'm not entirely sure this is right, but you could read what the Defendants are saying as them exercising their exceptions process.

MR BEAL: Well, I accept, for example, that if they were to make out a reasoned case why wholly exceptionally a given merchant with a new claim was not within the sector on which findings had been made, or that wholly exceptionally there was a reason why that merchant, even though it was a hotel, did things differently; there was a public statement from the hotel, "We do cost plus pricing, for example, and all of our costs therefore get factored into the downstream pricing", the Defendants would of course be able to put forward that evidence and say, "Well, this shows, for example, that the sector analysis can't fairly be applied, and wholly exceptionally, that claimant has to be dealt with differently", for example.

THE CHAIR: Isn't the difficulty with that that they don't know the answer to that question, whereas you do? So isn't there an asymmetry in the exceptions process, then, because they would say, "The only way we're going to find that out is by getting some documents and working out what people really do".

MR BEAL: Well, with respect, no, because the whole point of the sectorisation process was that it was intended to deal with a multitude of different entities, each of which might have had wrinkles in its factual approach, but none of whom, we say, ended up having to adduce evidence of their individual circumstances, but they are still bound by the findings that were made. So we only had findings in relation to an insurer from

an entity that in fact the Defendants decided to settle with shortly before, or at the opening of, Trial 2A; which meant that obviously there was then no cross-examination of the witness, the expert evidence was largely disregarded, and the insurance findings nonetheless are treated as binding by the Claimants' side, and the Defendants are not seeking to impugn those.

So there was necessarily a recognition that we shouldn't let perfect be the enemy of the very good, and that this was the most practical and proportionate way of dealing with a very complex issue where the burden was on the Defendants and where they chose to go down the path of how they presented their case, and where ultimately findings were made on a sectorised basis which they themselves had advanced.

THE CHAIR: That's helpful. I mean, this seems to me to be the hardest of your three categories, because it does seem to me that there is a difficulty in trying to work out a process by which the Defendants can legitimately test, if you like, an exception, which I think you accept if they had a decent reason to, they should be entitled to advance; and yet how do we actually get to a point where they can proportionately and sensibly do that?

That's the problem with it, isn't it; and in some ways obviously you can look at the Trial 2A judgment and say that the logic of the factual findings suggests that it would be quite an unusual case, perhaps, in those sectors, you might say. It would be an unusual case because there seems to be a remarkable consistency in the way that people treated the MSC in the way in which they thought about fixed and variable costs, and the way in which prices were set was more practical, perhaps, than economic theory might suggest; and so therefore even though it could be designated a variable cost, it didn't find its way into those processes.

So, there are very good practical reasons that emerge from the evidence as to why one ends up with a view that the MSC doesn't find its way into the price-setting

process. So you can say that that is a sort of a baseline against which they then need to show some good reason to depart but.

I suppose my question is: how do we get to a meaningful entitlement for them to exercise that right to depart? How do we get to the point where they can find out enough to work out whether that's a sensible thing to do or not?

MR BEAL: But if the proposal for dealing with a wholly exceptional situation is that all of the new Claimants have to go through the entire Trial 2A process all over again, then that, with respect, is transforming an exceptional process into the rule.

THE CHAIR: No, I see that. I think I'm thinking of something more modest than that. I'm just exploring this, really, just to -- I'm not suggesting this is the answer, and indeed, I suspect that neither Mr Cook or Mr Kennelly would agree that it should be. But if one were thinking of a way in which you could give the Defendants a degree of information that would allow them to test the proposition, how could you do it with something like this? That's the problem, isn't it? It's actually a very difficult thing, without allowing them some form of really quite intrusive disclosure into a very large number of people, and I'm not sure that is proportionate to--

MR BEAL: Well, it's part and parcel of the Umbrella Proceedings process that in a sense, you sacrifice a determination of a large volume of individual claims in the interests of proportionality and fair case management between the parties, but you don't get the chance to relitigate issues when they go against you. I can make that good by a reference to the learned president Mrs Justice Bacon's ruling in the cut-off application, which is core bundle, tab 5, page 27, where her Ladyship says, paragraph 4:

"The Umbrella Proceedings are a procedural mechanism which is designed to achieve the efficient determination of a large volume of individual claims, while ensuring proceedings remain fair for all parties. It is a process of joint case management with

flexibility to allow future claims, where appropriate and fair, to participate in the Umbrella Proceedings and to receive the benefit of judgments as and when issues are determined between the parties ..."

As I've indicated, if a hotel chain is now a new claimant, and you have detailed findings based on Hilton from the Trial 2A proceedings, then the Umbrella Proceedings envisage that a new Hilton mark 2 will be able to take the benefit of that judgment, subject, as I've indicated -- and I'm simply trying to be fair by referencing the exceptions process, because I recognise that it was an escape valve to deal in the interests of justice with wholly exceptional cases. No claimant has invoked it, and the Defendants have not invoked it.

What the Defendants are doing is not seeking to give effect to an exceptions process. They're seeking to relitigate the whole thing; and that's, I'm afraid, where their procedural methodology for dealing with MPO at Trial 4 falls down, because this Tribunal should not be contemplating a wholesale refight of those sectors it's already covered in Trial 2A. Those findings should at the very least be taken as read, subject as I've indicated to the wholly exceptional circumstance.

How the Defendants identify, amongst the new claims, who is said to be wholly exceptional is not really a matter for us. It's a matter for them. They would need to indicate why there is a plausible case to be made which doesn't involve simply putting us to proof of something that they bear the burden on, because that would be wholly wrong, and it would be simply seeking to relitigate by the back door, by the invocation of a wholly exceptional process. If, for example, they seize upon my concession that there is a fairness element to a wholly exceptional process and say, "Well, we say everyone else is wholly exceptional", well, that, I'm afraid, would stick in the craw.

THE CHAIR: In a way, that's not really the debate, I don't think. I think, and I'm obviously subject to anything that Mr Cook and Mr Kennelly want to say, but it does

seem to me that if anybody is suggesting that every claim that is going to be interrogated in this way, and the subject of what happened in Trial 2, that's obviously just not going to happen. It's just an unrealistic way of proceeding with this.

I think the point I'm slightly struggling with is it seems to me that notwithstanding everything that's been said in the past about the Umbrella Proceedings, if proportionality permitted the Defendants to go down a route now that tested something that was fair, then it would be difficult to resist it, wouldn't it? I mean, I think I'm slightly pushing back on the idea that the Umbrella Proceedings, just by their construction, is the answer, because all they really are is a mechanism for fair and proportionate, just and proportionate, resolution of the claims and I --

MR BEAL: Fair and proportionate resolution of the claims on the basis that the Defendants were party to those trials.

THE CHAIR: Yes, of course, of course.

MR BEAL: Took part in them.

THE CHAIR: Yes. Of course.

MR BEAL: Selected the evidence they wanted to adduce. We then adduced some evidence. They complained that that wasn't subject to a sampling procedure, but they had rejected a sampling procedure.

THE CHAIR: Yes, I understand. That's entirely fair. I see that.

MR BEAL: Can I tell you what we do suggest would be appropriate for fresh findings, which are sectors of the economy that are not considered in Trial 2A so we accept that. We accept that that could include evidence from a sample of Claimants drawn from the merchant claimant class and from the opt-in CICC class. We do say sectors of the economy considered in Trial 2A should not be relitigated afresh. As we've indicated, Visa was content for those findings to be fed into an economy-wide rate at trial. It's only seeking, with respect, to resile from that position because it didn't like

the eventual outcome.

Now, as I've indicated, some sort of reverse exceptions procedure, as a safety valve, could, as a matter of fairness, be permitted but that cannot subvert the overall proposition that Trial 2A, having been fought, contested, by Visa and Mastercard, on the basis of which they chose to advance, can't now be relitigated for all the new claims.

THE CHAIR: Just give me again the sample of Claimants for the sectors not considered in Trial 2A, where do you say they'd be drawn from?

MR BEAL: They would be drawn from both Merchant Claimants and CICC opt-in Claimants.

THE CHAIR: Opt in. Yes.

MR BEAL: Our directions propose procedural steps by which that selection process is done, requiring essentially a CMC to be listed in March to look at the method to be used for sectorisation -- which sectors, if any, require a trial -- and then the process for selection of sample claims. I think probably -- it's not stated there -- but we would envisage the participation of the experts in that process in the way that has proved useful for Trial 3.

It's also notable, we say, just finishing my submissions on the pass-on point that in fact not all the pass-on issues would be resolved, on the Defendants' approach. They would leave economy-wide merchant pass-on to be dealt with in a Trial 5, 6 or 7. That means that there then will have been four separate occasions on which the issue of pass-on, in whatever form, be it MPO or APO, was considered by the Tribunal. That obviously gives rise to the very real risk of further attempted bites of the same cherry by the Defendants.

THE CHAIR: So economy-wide, if there's a need for that after Trial 3 but also in relation to CICC?

MR BEAL: Economy-wide pass-on will need to be determined in Trial 4, one way or another, because we need Trial 4 and CICC are participating.

THE CHAIR: They are going to be part of that.

MR BEAL: Yes. There's a separate question then as to the determination of aggregate damages for the opt-out class. But as we've seen, we're looking at opt-out disclosure as part of Trial 3. I've suggested opt-in Claimants being a source of a potential disclosure in Trial 4 for MPO. If there was a concern about that disclosure we would need to consider, potentially, opt-out disclosure but I do emphasise that opt-out disclosure raises very different issues from disclosure from an identified party to the litigation.

THE CHAIR: Just to be clear, just to make sure I've understood this properly, are you saying that the Host Cases who would obtain the benefit of Trial 4 MPO would include the non-UK Claimants? Or are we still talking about -- we're not just talking about UK Claimants or are we just talking about UK Claimants?

MR BEAL: The MPO aspects would be UK and Irish.

THE CHAIR: Yes, I see. So you're not talking about the other jurisdictions? You accept that is not something which is in your framework of --

MR BEAL: Going to Trial 4C.

THE CHAIR: Yes. Yes.

MR BEAL: We say not just 101(1), 101(3), i.e. infringement and exemption, but also pass-on should be part of Trial 4C.

THE CHAIR: Yes.

MR BEAL: Again, on the same basis that, you know, what is the justification for saying that the pass-on rate for a big supermarket in London is any different from a big supermarket in Berlin?

THE CHAIR: Yes. Yes. Would you really try it like that? I mean, you wouldn't do that

though, would you? Because you'd want to trial the MPO issues together, wouldn't you? I mean, I know you're carving it up conceptually, but in practice actually wouldn't you just do all the MPO -- if we ended up in your world we would do it altogether, wouldn't we?

MR BEAL: Well, that would require the MPO pass-on rates for other EEA jurisdictions, be it three, five, six, however many, to be determined as part of module 4A, as we put it. That could be done.

THE CHAIR: If you're going to do it in 4C anyway, which is --

MR BEAL: The complication is simply that the test for pass-on will be determined by the applicable law, which under the Rome II Regulation, I think is Article 15, makes it clear that the applicable law covers matters such as damages as well. We would need some expert foreign law evidence about whether or not the MPO test was the same as that set by the common law.

THE CHAIR: Yes.

MR BEAL: Happily, that particular issue is subject to the overarching treatment of MPO under the Damages Directive. Speaking from our side of the fence, we don't apprehend that the principles are going to be materially different. The Defendants, of course, may have something else to say on that point.

THE CHAIR: And if you were successful in relation to the preliminary issue, then you are looking at the factual matrix going all the way back to 1992, potentially.

MR BEAL: That's correct. Which is why I think conceptually we had wanted to box and cox UK and Irish every aspect of pass-on so that that's done and dusted and then you have the foreign law expert evidence that deals both with any wrinkles in the approach to liability and exemption -- I'll make my submission on that in a moment -- and also pass-on questions.

THE CHAIR: Yes. Thank you.

MR BEAL: Can I then, unless you have any further questions for me on pass-on, move on to deal with quantum.

THE CHAIR: Yes.

Quantum

MR BEAL: Sir, you made the point in the July CMC that the Tribunal is not going to sift through thousands of individual claims to determine their specific quantum figures. That's at supplemental bundle 1, tab 8, page 573. You've repeated that, with respect, this morning. Again, with respect, we endorse that approach. It can't sensibly be suggested that this Tribunal will sit down and determine the individual quantum figures for 2,000 Claimants. What the Defendants, however, suggest is that you should determine the final quantum analysis for so-called test claimants and they then suggest that that will make the resolution of all other claims straightforward.

The problem we have with that is really the lived experience of suggestions from the Defendants that this is all capable of resolution if only we have a salami-sliced approach to liability, to pass-on, to quantum. We've heard it before: those who don't learn from history are condemned to repeat it. We are in a position where, I'm afraid, we're sceptical at the practical reality of having test claims, where we end up at the beginning of 2030, with a handful of test claimants with a defined figure of claim -- on the assumption that we're successful on exemption and quantum and everything else -- with a defined figure of damages to be awarded to them. But everyone else is still up in the air and we're no further forward. It would be a very short territorial gain, in World War One terms, for a very significant cost.

Now, we're very keen to avoid that. We are also keen to avoid yet further salami slicing, where the Defendants seek at all costs to delay the point at which a final curtain is drawn on these proceedings, because that does -- and we don't intend this to be, if I may call it, a snarky comment -- but of course, it does enable them to continue with

a model of business which is generating very significant profits for the Defendants in the meantime.

In terms of quantum, the Schemes, as you know, have merchant ID numbers for the Claimants. They have been able historically to identify through their systems the MIFs that have been paid because they have been willing to enter into settlement agreements with a large number of Claimants who brought claims. Those merchant ID numbers are used by acquirers when they submit transactions for settlement through the Visa and Mastercard payment systems, and we know from the certification judgment in CICC, paragraph 88, that the MIDs enabled the Schemes to identify, at least at a level of generality, the likely size of the claim.

If I could invite you please, to look in supplemental bundle 2, tab 5, page 39. We don't have the CICC certification judgment in the bundle, the numerous other authorities that are in there, but at footnote 4, we do see a citation in the Harcus Parker letter of the Tribunal's conclusion in this case, which, of course, was your judgment, sir. It said: "The Tribunal noted that 'it seemed to be accepted by the Proposed Defendants that if they were given a MID/CAID for a particular merchant then they were likely, with relative ease, to be able to provide transaction details'."

Then there's some other citation of what's been said publicly by leading counsel for Mastercard at various stages as to what can be achieved with their internal data.

Unsurprisingly, our submission is that the Schemes are capable of doing an awful lot with a relatively modest data disclosure exercise from us giving the merchant ID numbers that are used by the acquirers and which the acquirers necessarily are using when they settle through the Schemes' systems. The whole point about batch files being sent at the end of the day by acquirers is they have to identify the specific transactions and CICC, for example, have just provided an Excel spreadsheet of some of the MIDs in question. That could be done with relative ease.

We've recognised, however, that the quantum does need to be properly pleaded and that we need to submit schedules of loss for each claimant. We've proposed, in our directions, that we will do that by the end of May 2027. Now, that needs to be, we respectfully suggest, taking into account the outcome of the limitation PI. There may need to be some modest movement on that. But what we don't want is to have to do the exercise twice.

If, for example, the outcome of the *Heureka* application is that, in fact, there's only a six-year limitation period across the piece, that makes life much easier because you only have to go back to that period. If, on the contrary, we're successful at the limitation PI and we're going back in some claims to 2009, even 1992, then, of course, you then need to produce the volume of commerce, details of transactions, details of the MSCs that have been paid, either through existing data or through an extrapolation process over that longer period. We suggest that the schedule should necessarily take into account the findings on limitation that are made.

What then could be dealt with in that schedule is the counterfactual MIF rate that is contended for, which on our current case would be zero. So, you have a relatively mechanistic process of working out what the MSC is that's being paid, what the component of that MSC was in terms of the MIF rate. Then that provides the prima facie basis for the overcharge.

Coupled with that, as I've said, mechanistic calculation is the claim for interest. It's true that there are certain claims for compound interest in certain of the claims; not, I think, the CICC opt-out claim. But for other claims, there are, and we recognise that a compound interest claim would need to be properly particularised and properly proved.

In particular, we envisage that the schedule of loss, which will be signed by a statement of truth and therefore is a pleading in ordinary civil litigation and can be

an ordinary pleading here, will set out the facts and matters that are relied upon to justify what is the claimed head of loss, which is interest at a compounded rate. Typically, what that would involve is evidence of borrowing at a compound rate or evidence of an investment strategy that would justify the claim for compound rate and so on. Those aren't exclusive ways of doing it; I'm simply trying to give the Tribunal some practical examples.

So what could then happen is that the Schemes could produce a counter-schedule of loss, again signed by a statement of truth. No doubt, we will see in those counter-schedules of loss, the scheme takes certain generic points because that's what they do in their existing pleadings.

That will enable the Tribunal to look at the schedules and the counter-schedules and identify certain generic points that are pleaded by the Defendants, which can then be common themes for determination at module 4B of Trial 4. Whether or not those common themes need factual or expert evidence can be identified as and when the scope of the pleading has been settled. We're not averse to the possibility of that section of the quantum trial needing to have some evidence, but it's just we're not at the position yet where we think the issues have crystallised to a sufficient extent to justify it.

Now, that's not significantly different, we say, from Mastercard's acceptance at paragraph 6 of its written submissions. For your note, that's core bundle, tab 20, page 110: that key issues would be determined at Trial 4 for the CICC claims. The only difference is that we would envisage the Tribunal supervising the evidence that's required to deal with those key issues, rather than formalising the issue as test claimants. To the extent that the generic issues require evidence, then obviously that could be on a sampled-claimant basis.

Now, you'll have seen, for example, that the Schemes have repeatedly said in various

places -- Mastercard's submissions, paragraph 14, core bundle 20, page 112 -- that a consequential analysis of individual claims ought to be capable of agreement between the parties. That's the formulation that's trotted out. Again, I'm afraid -- forgive my scepticism -- but experience has not shown that to be terribly fruitful.

What we are keen to ensure is that there is no repeated relitigation of issues. Again, the experience to date is not helpful in that respect. Whilst the sample claimant approach has been explicitly rejected by the Defendants, what they're proposing instead is a test claimants approach. With respect, on analysis, what this appears to boil down to is what is the impact of the findings that are made in our proposed module 4B to the remaining cases. In essence, it boils down to a read-across issue. We say where generic issues are determined, they should be read across for every other claim, even if it's not part of the same sample claimant cohort.

I can give you an example of that. Visa, for example, have suggested that quantum would have to be determined as a net figure for tax purposes. Our position is that that's not right. I can hand up, if need be, a recent decision of the First-tier Tribunal (Tax Chamber) that explains why suffering an overcharge of this sort would be a business expenditure item which has therefore been inflated and for corporation tax reasons has therefore been overclaimed, and that gets treated as a species of income for corporation tax purposes. The result of that is essentially the exception to the Gourley principle applies. Would that help now?

THE CHAIR: I think it probably -- it wouldn't, actually, in the sense that I -- when you say "tax", it makes me nervous. I know you know a lot about tax; I know nothing about it. But by all means. I mean, if it's an example --

MR BEAL: What I'm really trying to do is show that there's a live issue.

THE CHAIR: Yes, exactly. Well, I think it's helpful to --

MR BEAL: For your note, paragraphs 91 to 92 contain the points of principle --

THE CHAIR: Yes, thank you.

MR BEAL: -- on a citation of an earlier Court of Appeal authority. This case concerned a redress payment that the taxpayers had received as a result of some mis-selling -- an FCA mis-selling decision led to a redress payment and the question was, is that subject to corporation tax or not? The taxpayer was suggesting it wasn't, and the Tribunal found that it was.

Paragraph 91 and 92 at page 16 to 17 deal with what I've described as the slightly techie tax issue. Whether or not the money received as compensation was revenue, i.e. income or capital, that was the techie tax issue. Then we see that in the *Spencer* case, the landlord had ended up paying an excessive amount of rent for the property, which was an expenditure item for the taxpayer, as a result of a failure to serve a counter-notice in a valuation case.

That was then the subject of a claim for compensation, and the Court of Appeal held that the compensation received from that negligent action was essentially the repayment of sums of rent that shouldn't have been paid -- so it was an overcharge of rent -- and that repayment of the rent was properly to be described as an item of expenditure. Because the item of expenditure had been deducted in full, the lesser sum that was therefore properly due was a lower sum of deductible expense, and the difference between the two reflected income in the hands of the taxpayer. So corporation tax would be charged on it.

What that means in this case was that, when one looks at page 23 at the treatment of the redress payment received through the FCA compensation scheme, it was also treated as a species of income and corporation tax was payable on it. In a nutshell, that is the point.

I'm not suggesting in any way that this arises for the Tribunal for determination now,

but what it shows is that there are some submissions that are being made by, in this case, Visa, as to what goes into the quantum pot and what doesn't, which are perfectly capable of being adjudicated on. Given that a business will typically treat the MIF in its accounts as an item of expenditure, for all the reasons that we looked at in Trial 2A, we're in a position where it would have been treated as an item of expenditure for corporation tax purposes and a deductible expense. What that leads to is a position where any compensation that a client receives prima facie is going to be subject to corporation tax. What that means is you don't need to bother about determining a net position, which is very helpful because you don't need to get into what the tax position would have been in the counterfactual position, which is always a bit of a nightmare.

THE CHAIR: Yes. So that's an example of what is effectively a legal issue, isn't it? I mean, I suppose it's a legal issue. What about more mixed fact and law? So for example, some of the things that I picked up -- again, I can't remember; it was Mr Cotter or Mr Cassels talking about things that had come out of the previous cases. The counterfactual-type points, so the counterfactual points about using Amex instead, which of course we're familiar with from Trial 1, or changes in the rules -- if Mastercard were to change its rules, as a result in the counterfactual, what impact might that have on other benefits that the Claimants --

MR BEAL: You have my submission --

THE CHAIR: -- would no longer have access to? Yes.

MR BEAL: The 7 July CMC, where I'm afraid I simply didn't really understand how it was going to be said that if we had suffered an identified loss on the basis of what is found to be a non-exemptible MIF, that somehow nonetheless, because we drew a benefit from the card payments scheme more generally, that was a countervailing advantage that needed to be taken into account.

Now, just as a matter of theory, I struggle with that because we would have received

the payment service, come what may, from the acquirer. The only issue is do we need to pay for the sum of money that's going from the acquirer to the issuing bank? And it's nothing to do with the provision, we say, of the payment scheme, because you don't need it; it's not a necessary part of the payment scheme.

But assuming for the sake of argument that the scheme has run this type of defence, then the answer is we will need to explore whether or not that's a good answer to the quantum claim or not, and that will need to be determined. Whether or not we need evidence to deal with that point, and who from, will have to be determined as well. But if it leads to a generic finding that, yes, this type of countervailing benefit can be set off against quantum, then that may then require, no doubt, some more detailed analysis of who suffered the same benefits and to what extent, or who benefited to the same extent. If it doesn't lead to that conclusion, then it's a dead issue.

THE CHAIR: There's a sort of a cascade, isn't there? There appears to be an issue of principle.

MR BEAL: Yes.

THE CHAIR: Which you could resolve on a --

MR BEAL: Sample claimant basis.

THE CHAIR: Exactly. So depending on the answer to the question of principle, you either go one way or the other.

MR BEAL: Yes. But this will come out in the pleadings. I mean, my short answer to all of these points is we don't say that there's an obviously right way of doing this, because we don't know at this stage exactly what the parameters of the contested issues are going to be, because they haven't all been pleaded out.

THE CHAIR: Yes.

MR BEAL: As and when they're pleaded out, we can deal responsively with what are said to be the generic issues and work out the best way of dealing with them.

THE CHAIR: But when you talk about pleading out, you're talking about doing that in your schedule of loss rather than --

MR BEAL: Yes, schedule of loss (overspeaking) schedule.

THE CHAIR: Yes.

MR BEAL: And we've given you a proposed deadline for that in our draft directions.

THE CHAIR: Yes.

MR BEAL: There's then a proposal to have a further CMC where we deal with exactly these issues.

THE CHAIR: So you can divide this into mechanical points, can't you? The mechanical points which are -- some of the things you mentioned earlier -- you know, what MSC amount was paid, what the MIF component was and so on. Now, there might be some disputes about that because there might be an absence of data or conflicting data, and I think both Defendants have -- at least Mastercard has -- talked about employing ADR.

MR BEAL: Yes.

THE CHAIR: I mean, it does seem to me that that is precisely the sort of thing that ought to go into some form of agreed expert determination, isn't it?

MR BEAL: Yes, and we accept that. Once the generic issues have been resolved, we're not suggesting that each individual claimant then proves their loss before this Tribunal. We're amenable to either ADR or, for example, the appointment of an independent claims assessor of some sort.

THE CHAIR: I mean, it might operate almost in the other way, mightn't it? Because if you go to the trouble of doing the summaries and the Defendants go to the trouble of doing the responses, and at that stage the mechanical issues will be apparent -- if I can call them mechanical issues -- why not just get on with those?

MR BEAL: Well, it depends whether or not they're dependent upon the determination

of the key issues.

THE CHAIR: I'm assuming they're not.

MR BEAL: If they're not, then one can simply crunch the data and work out what the answer is.

THE CHAIR: Or appoint an independent --

MR BEAL: Or appoint an independent --

THE CHAIR: -- expert or whatever it is -- assessor -- to resolve it.

MR BEAL: Yes.

THE CHAIR: I mean, I suppose the point is I just think it's unhelpful to have done all that work and then not actually take it as far as you sensibly can. Also, I do think it's likely to focus people's minds a bit, isn't it? Because some of these more mechanistic points are really probably not going to be worth putting to an independent assessor when the parties are paying for it, given the amount involved, and so it might encourage people to be a bit more pragmatic about those things. Because if it works this way, if you can get your calculation done on a mechanistic basis, recognising there'll need to be adjustments, that is going to make everything easier at the other end, isn't it?

MR BEAL: Well, might I respectfully suggest that if the parties are capable of reaching a common figure, then that would be agreed. If for example the Defendants refused to try and agree a common figure until the common issues, the key issues, have been worked out, then that would stymie that process. Conversely, if for example there's a legitimate dispute about extrapolation between the people who are dealing with the assessment of quantum, then that can either be treated as a key issue, if there's a point of principle behind it, or that will have to be thrashed out. But again, we apprehend that it would be difficult to reach a final conclusion on that if the Schemes were still contesting if there was a sizable deduction to be made for the so-called

countervailing benefits of card scheme, which is said somehow to diminish the quantum.

THE CHAIR: Yes.

MR BEAL: The only way we respectfully see that happening is if there's a pleaded mitigation. But I made all these submissions back in July, and I don't propose to repeat them.

THE CHAIR: Yes.

MR BEAL: The final point, really, on quantum is that we see no warrant for limiting it to six years. As Mastercard have suggested, it needs to be done once and done for the entire applicable claim period. We have suggested a 21st of May deadline. That may be a little tight if the *Heureka* limitation ruling is not delivered by that point, but that's a point of detail that we can factor into the directions as and when. I'm just trying to deal with the big issue points at the moment.

The third aspect is dealing with other jurisdictions.

THE CHAIR: Yes.

Other EEA jurisdictions

MR BEAL: In my submissions back in July, 7 July, I offered a figure of five or so; see supplemental bundle 1, tab 8, page 581. But I emphasise, as I hope I did earlier this morning, that we're seeking to achieve the largest coverage of the claim value for the minimal effort. That's the bang for the buck point. We are also seeking the greatest chance of being able to apply a read-across of the findings to other jurisdictions, especially those jurisdictions which are otherwise not economically worthwhile investigating. If we can sweep up the small 0.1 per cent jurisdictions, so much the better. What we want to avoid is ongoing salami slicing.

Our core contention here is that we are not yet at a stage when we can identify the frontrunner jurisdictions, but I should emphasise that we're not averse in principle to

the three largest jurisdictions being within the cohort. What we want to do, however, is to identify those applicable jurisdictions as and when we have the full picture of exactly what's being suggested are the key material differences.

If we could look, please, at the existing pleading from the Schemes on this point, I have two obvious points to make. The first is in supplemental bundle 1, tab 1, page 66. I think it's the Mastercard Defence. Visa takes a similar approach.

Page 66, one sees that the Schemes have in fact pleaded out, or Mastercard in this case has pleaded out an appendix dealing with foreign law. So, they have gone to the time and trouble. (Pause)

There is an appendix that begins with Austrian law, goes through Belgian law, et cetera, all the way through.

THE CHAIR: Sorry, I'm struggling with the labelling of some of these. (Pause)

Yes, I have it.

MR BEAL: I've noticed the time. If I could perhaps just deal with the pleaded position, and then subject to your indication, sir, we may need to take a break for the transcribers; but I've probably got another ten or 15 minutes on this point and then I'm done on scope of Trial 4.

Just dealing with the pleadings: if we look at page 66 onwards, the Schemes have obviously obtained foreign law advice, so that's in their arsenal at the moment.

If we look, please, at page 50, one sees at paragraph 97 the approach that's been adopted by Mastercard, at least, to dealing with exemption. We see that:

"Mastercard has filed a specific exemption pleading in relation to UK and Irish MIFs for the purposes of Trial 3. Mastercard refers to and relies on its Trial 3 pleading. In relation to the claims in relation to the other Relevant Countries, Mastercard refers to its Trial 3 pleading mutatis mutandis, but reserves the right to provide further particulars of its exemption case in relation to those countries in advance of any

exemption trial in relation thereto."

We complained in the 7 July CMC -- see page 566 of this bundle -- that it wasn't appropriate to try and reserve the right to provide particulars. It's clear that Mastercard at this stage is content to rely on its overall exemption case from UK/Irish trial for everything else, subject to pleading any particular particulars, and we say that it's appropriate now for them to do so.

We've seen a number of hares set running in the pleaded cases in relation, for example, to EU law and whether or not it requires findings of fault to be made on an individual basis. Our position on that has been clearly stated. If you were kind enough to look, please, supplemental bundle 1, tab 3, page 214. (Pause)

THE CHAIR: Yes.

MR BEAL: We see at paragraph 130, we plead:

"a. Austrian law at all material times gave effect to the substantive provisions of Article 101 ...

"b. Austrian law at all material times conferred a right upon the Claimants to recover full compensation for loss suffered as a result of the infringement of Article 101 ... including through the following provisions [and then they are identified]."

We then see, in 131, we plead that such a claim required the Claimants to prove an infringement, related loss or damage, and under the Austrian domestic law, culpability was an element in the cause of action. However, 132:

"As regards the element of requirement of culpability ... it is necessary for the defendant to have acted either intentionally or negligently; and ... there is a rebuttable presumption of fault ... if a claimant has proven that there has been an objective violation of competition law, it is incumbent on the defendant to prove that the violation cannot be imputed to it. As a matter of EU law, this requirement may not be applied where to do so would render it excessively difficult ..."

Our case has always been: even in those cases where there is a national law identifying an element of culpability or fault, nonetheless that's subject to an overarching EU law requirement to treat a breach of competition law as capable of giving rise to a claim for damages pursuant to the principle of effectiveness.

At page 262, we identify the principles of law. The formatting went slightly weird, so we're back on paragraph 176, second iteration; but we set out the principles of EU law that govern the recovery of loss as a matter of EU law. You have my submission from last time that matters of EU law are for this Tribunal. That's paragraph 3 of Schedule 5, which for your note is bundle of authorities 1, tab 7, page 75, and that says that matters of EU law are matters for this Tribunal. That's the point that is coming up at the limitation hearing, and therefore, it's open to this Tribunal to say what EU law would require through the prism of Austrian domestic law.

That's probably a convenient moment for the transcriber break. I don't anticipate being very long at all on the remaining points for Trial 1 -- scope of Trial 4, sorry.

THE CHAIR: We'll take ten minutes. Thank you.

(11.47 am)

(A short break)

(12.02 pm)

Foreign Laws Pleaded

MR BEAL: May I quickly deal with two points that I should have, one of which I said I would take instructions on, and the second of which I should have addressed, and I'll just make it very briefly.

On the pleading point, foreign laws being pleaded, I haven't yet got specific dates or got to the bottom of exactly, because I haven't been able to track through the pleadings. They're being found as we speak. But my understanding is the Scott+Scott Claimants, and possibly also the Stephenson Harwood Claimants, had initially

pleaded English law by relying on the election under Article 6(3)(b), I think it is, of the Rome II Regulation.

But then following either *Volvo* or *Heureka* -- I'm trying to work out exactly what the time frame was -- there was then an amended pleading which pleaded out the different applicable laws by reference to the different EEA jurisdictions.

THE CHAIR: Yes, I see. When they saw there might be an opportunity to go back in time, they switched horses. Yes.

MR BEAL: But I'll give you chapter and verse if I may, after the short adjournment.

THE CHAIR: Yes.

MR BEAL: The point I should have made, as a responsive point to the test case approach that's been articulated for quantum by the Defendants, was to invite you to look in Mr Cassels's fourth witness statement, at paragraph 27, core bundle, tab 21.1, page 193.

Mr Cassels is making submissions as to the appropriate approach that the Tribunal should follow for Trial 4, and what he says at paragraph 27, five or six lines down:

"Non-test-case Claimants would rely on the findings from the earlier trials, whilst also drawing on the quantum parameters and how they vary across merchants established through the Trial 4 test cases ..."

What is not said there, tellingly, is that whilst non-test-case claimants would rely on the findings, it doesn't mean that that would be accepted by the Defendants. In practice, one sees that the Schemes never suggest that the test claimants' findings could be read across without more to the other claimants, and we can see that at paragraph 30 over the next page; page 194, paragraph 30, four lines down. Even within the context of Irish claims that straddle the Brexit date, we see Mr Cassels is saying, in terms:

"To the extent that a claimant advances Irish MIF claims which fall both inside and

outside the temporal scope of Trial 3, it may not be possible (or efficient) to resolve the quantum issues identified above in the context of Trial 4."

So, you are having this test claimant process which simply doesn't produce an outcome, arguably even for test claimants, if in fact there's a relevant issue as to whether or not they are within or outside the temporal scope of Trial 3. The approach of splitting Ireland in two on the basis of Brexit is exactly what I complained about at the July 7 CMC; for your note, supplemental bundle 1, tab 8, page 675.

I gave the example of claims straddling the Brexit divide as being a classic example where if the Defendants were resisting read-across on a maximalist approach, then that was very much to be disparaged. So having all the findings for the in-time period, and then a subsequent retrial of all those issues based on Irish exemption for periods outside that scope, is just -- with respect -- not the way of conducting this litigation.

Turning, if I may, back to the EEA jurisdictions point, you have my core submission that in the light of the pleadings, there has been an offer essentially to particularise when necessary. We say that time is now. Plead out your position, and we can then sensibly and on an educated basis identify the cohort of jurisdictions that it makes most sense to have determined as part of what we are terming module 4C of Trial 4.

THE CHAIR: Just in terms of the substance of that pleading: am I right in thinking your position on this is that we have Court of Justice and Mastercard, we have *Sainsbury's*, we have Trial 1, which approached this as looking at the six essential factual bases; and so that's what you want. You want to know what's different. Is that right?

MR BEAL: That's for the infringement case.

THE CHAIR: Yes.

MR BEAL: For the exemption case they will need to show what it is about the specific market conditions or general regulatory framework that is so different in a different jurisdiction that you wouldn't simply assume that the same approach would apply,

given that, for example, the Commission's decision on exemption applied to the EEA MIF without drawing any relevant distinction between where, in the different member states of the EU, that EEA MIF was paid.

I'll come on to make some points in response to Mastercard's submissions in particular, to show you why the sorts of things that are being put forward are not, on proper analysis, very convincing. But I'm not suggesting you adjudicate on this today. I'm simply saying plead it out. We'll see whether what you're saying, accompanied by a statement of truth, holds water, and then we're in a better position to know exactly which jurisdictions can sensibly be dealt with for Trial 4C.

Now, as you've indicated, the Defendants do contest the basis for reading across the liability findings. We say that the CAT, in Trial 1, looked at *Sainsbury's* Supreme Court and applied them to scheme rules, which established UK and Irish MIFs. Those same scheme rules apply in materially identical terms in all member states, because the effect of the scheme rules is to set the default MIF. Whilst we haven't been blessed with it this time around in the otherwise voluminous bundle of authorities, the point that was made in *Sainsbury's* Court of Appeal at paragraph 127, was that the measures in question, which had to be removed in the counterfactual analysis, were the agreements between the issuers and acquirers to be bound by the scheme rules and the scheme rules, importantly, then setting a default MIF that was payable in the absence of the bilateral rules.

In one fell swoop, the Court of Appeal has there removed the need to look at who has individually set the MIF rate because the restriction of competition is the very act of agreeing -- issuers and acquirers agreeing -- to be bound by the scheme rules that provide for a default positive MIF rate. If they don't provide for a positive default MIF rate and it's zero, then that is the counterfactual analysis, and there's no claim. If, however, they do provide for a positive MIF, then that is a restriction that causes loss

to my clients.

This issue is actually due to be fought out because the Schemes are contesting the Trial 1 liability finding on that basis before the Court of Appeal in February next year. But it is, as I say, already dealt with by the *Sainsbury's* Court of Appeal at paragraph 127.

Visa says, "Well, let's look at *Dune v Mastercard* because they say in that case [which is true] the Court of Appeal determined that summary judgment could not be granted for Italian MIFs".

If we could turn up that decision, please, it's in bundle E.2 of the bundle of authorities, page 429. We see at paragraph 87 that the Court of Appeal, separate paragraph 157: "It would be remarkable if the same scheme rule requiring the payment of MIFs in default of the agreement of bilateral interchange fees were held to be a breach of ... 101 ... in one Member State, but not in breach of it in another Member State, whatever the factual or expert evidence might have been as to what might have happened in the postulated counterfactual."

At paragraph 88, the Tribunal said:

"We acknowledge that the Italian Claimants might very well succeed on this point. However, the competitive environment in Italy is not a matter of speculation but of fact. Those facts were of course not before the Court of Appeal. Whether the differences between those features and the UK are material when determining the counterfactual and assessing competition is no doubt a matter of assessment and evaluation, but we do not think it can be determined in the abstract on a summary judgment application."

Then they made allowance for the caveats that had seemingly been expressed by Mr Holt and Dr Niels.

The conclusion, then, at paragraph 89, had rested on:

"... the specific evidence placed before the Tribunal regarding the competitive

conditions in Italy, and no evidence was adduced regarding either Malta or Gibraltar."

What we then see is that although Mr Cotter in his witness statement for Mastercard had said that each relevant national market had to be examined in detail before a conclusion can be drawn, that was not sufficiently detailed to amount to more than a speculative basis for saying something might turn up. It followed that the arguable defence, whilst it applied to Italian MIFs, did not apply to domestic MIFs in Gibraltar and Malta.

In fact, summary judgment was granted for those jurisdictions precisely because the Schemes had not identified through an evidential basis or indeed, we would add, pleaded, a material distinction between the market analysis for the UK and the market analysis for Gibraltar and Malta.

We're not seeking summary judgment here. We're simply asking the Schemes to identify properly circumstances in which differences are said to be material between the UK and Ireland.

Now, what we do have obviously is Mr Cotter's monolithic 57-page statement for these proceedings. He's covered foreign law issues in relation to 30 different jurisdictions and sought to give evidence on market conditions in those countries as well. He is the very exemplar of the modern renaissance man: able to cover evidence as a payment analyst, competition economist, banking system industry expert, Mastercard employee and lawyer in 30 different jurisdictions.

I'm only slightly pulling his leg, if I may say so, with good humour, not with malice, because of course, what that shows is that this is an admirable desktop survey or evidence-inspired survey for Mastercard to say that there may be issues or there are issues. Our point is this needs to be properly pleaded and proven by evidence from an appropriate expert, in due course, and we can then take a view as to whether or not any of these suggestions of differences, in fact, are (a) material or (b) warrant

a wholesale relitigation of the exemption issues that are to be determined in Trial 3.

If I could invite you, please, to look at Mastercard's written submissions on this point, that's core bundle, tab 20, page 113.

THE CHAIR: Paragraph 21?

MR BEAL: There are some odd propositions. So we see, at 113, paragraph 21, certain factual differences that are said to exist. We see at 21.a.i:

"In 24 of the relevant countries [it said] Mastercard only had cross-border interchange fees for many years, with no domestic default interchange fees in place ..."

Well, that implies to my mind that the EEA MIF was set as the applicable default rule. If it's the EEA MIF that's the applicable default rule, we've got the finding of the Court of Justice in Mastercard that that was an unlawful interchange fee. The question then is: is it somehow, post the IFR, a lawful interchange fee? Because of course, summary judgment was entered in relation to the EEA MIF in these cases.

We then see a reference to bilateral interchange fees under ii. It's slightly odd that these bilateral interchange fees are said to exist because it was recognised in the Supreme Court that they were of no practical significance but, obviously, to the extent that fees are set bilaterally, it's always been recognised by us that that isn't the claim that's advanced by us. If there are fees that have been set on a bilateral basis, they fall outside the scope of the claim. That would necessarily not mean that they don't have to be subject to an exemption analysis.

We then see that competing payment systems are referred to and it's said, Well, different jurisdictions have different card payment systems in place, which are said to be rivals to the Mastercard and Visa Schemes. Much of that evidence has already been looked at, especially in relation to inter-regional fees for the purposes of Trial 1 and, with the greatest of respect, the fact that a jurisdiction happens to have a different type of domestic card scheme, unless it's material, can't alter the analysis that was

conducted in Trial 1.

There's also an invocation of the UK system of having free banking, and somehow that's an outlier for other jurisdictions. But of course, since the same MIF rate is charged in all European jurisdictions for consumer debit and consumer credit cards, the fact that the UK is an outlier, and one would assume, therefore, a more expensive jurisdiction for banking purposes because of the prevalence of free banking, so-called, means that it's difficult to see why the same analysis can't be applied because, of course, the same MIF rate has been charged regardless of those alleged differences. So even a short analysis, cursory analysis, really of Mastercard's position shows that there are some slightly questionable claims as to material differences. I'm not again, I stress, seeking any form of adjudication on these points. I'm simply saying we need to get to a point where they're properly pleaded out and we can determine whether or not there's any substance to the claim of a material distinction.

Indeed, with respect, Mr Cotter in his third witness statement, paragraph 24, makes the same point that -- that's core bundle, tab 20.1, page 126, top of the page, paragraph 24:

"In certain respects, the extent of the fact evidence covering the 30 countries may be more limited than in the above trials covering the UK (and Ireland ...), because it should be directed more towards key factual differences in these markets as against the factual background of the UK and Irish markets based on which the UKSC Judgment and Trial 1 were determined."

So he's recognising that one needs to identify the key factual differences and work out whether or not they do indeed make a difference. That's all we're asking for. We're simply asking for them to do that as a precursor to establishing what the appropriate jurisdiction should be.

Now, there is a further point that is made in Mastercard's written submissions on the

basis of Mr Cotter's evidence that somehow each jurisdiction needs a two-week trial. I mean no disrespect when I say that that's simply unworkable. With 30 jurisdictions that would establish a 60-week trial. And the suggestion that the CAT has the resources or should be required to devote the resources to a 60-week trial, which would be Trial 6, 7 or 8, as I understand it, on the Schemes' case, is simply wholly unworkable.

There's a further flaw in the Schemes' approach, which is that this Trial 4, dealing with only three, they say, EEA jurisdictions would only cover infringement and exemption. Liability only. It wouldn't cover merchant pass-on. That raises a real concern as to when, on their case, the EEA claims would be capable of being dealt with. If they then require a wholesale relitigation of Trial 2A for the purposes of each EEA jurisdiction, presumably they would suggest another lengthy trial for that. Another lengthy trial after that for dealing with quantum.

My closing submission to you on this is: when will this all end? Because it needs to come to an end as part of effective case management. This litigation cannot go on forever. It's already long in the tooth, for some of the claims at the very least, and it needs to be brought to a sensible and proportionate end.

Would you give me a moment? Nobody's tugging my metaphorical gown so unless you have any further questions, those are my submissions on scope of Trial 4.

THE CHAIR: Thank you very much.

Yes, Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Thank you, sir. I will begin with the Defendants' -- what we say is our pragmatic solution. I'm mindful of the suggestion that you made to the parties at the beginning of the hearing, sir. I will not open with the disputes on the law. I'll

present our pragmatic solution, recognising the constraints on the Tribunal and on the parties. Then I'll respond to the claimant's submissions.

The Tribunal urged us to develop a realistic approach, which would resolve as much as possible in a 10 to 12-week trial. Of course, as much as is realistic and practicable, while ensuring the issues are determined according to the applicable legal tests. I'm going to focus my submissions on the resolution of quantum issues for UK and Ireland and then the issues for the other jurisdictions.

Quantum

MR KENNELLY: I'll start with the quantum issues for UK and Ireland. Although you have our submission, sir, that quantum as a matter of law requires an individualised assessment, it is impossible to try quantum separately for each of the approximately now 2,000 claims. Repeatedly, my learned friend seemed to suggest that we are proposing separate trials for each of the Claimants. That is absolutely not our proposal. How he could say that, having read our submissions and skeletons, beats me.

We are proposing test cases to be chosen by reference to their value, high value, and representativeness for their likely relevance to other similar cases, so that when they are determined, the parties can ask themselves whether new or different evidence would likely lead to a different result for other cases with similar factual backgrounds. That is why we suggest an ADR process following the resolution of these test cases. That would allow us to settle the vast majority of cases based on the guidance that we receive from the test cases.

The suggestion that somehow this is a ruse and the Defendants will ignore the results and will not engage in a proper ADR process, again, is belied by the thousands of claims that have been settled by the Schemes since the beginning of this litigation. It is true that, as suggested by the chair today, that of the 2,000-odd claims that are now

before you, approximately 1,500 or so were issued after April 2026, and about 500 new claims were issued or notified to the Defendants since the last CMC in July. 500, approximately, since the July 2026 CMC. Almost all of these new claims, as I think my learned friend was fairly acknowledging, are foreign law claims. They are joining in full knowledge of the logistical difficulties that we face.

The myth of a foreign law claimant stranded since 2017 again needs to be addressed. Of the 2017 cohort, the solicitors that remain are Scott+Scott, and they had only commenced with English law claims. They amended to include foreign law claims after the judgments to which my learned friend referred in 2024.

So that's what we're facing, in terms of the overall justice piece. Our ADR proposal should leave only a few borderline cases to be resolved by the Tribunal. There may not be a huge difference between the approaches of the Claimants and the Defendants on this issue.

THE CHAIR: I'm just wondering that.

MR KENNELLY: But what we do stress, because it is of huge legal significance, is the idea is to refute the concept of sample cases, the results of which will bind the Defendants formally in the way that my learned friend suggested, at least at the beginning of his submissions before you today.

THE CHAIR: Well, let's just explore that a bit. Because I wonder whether that is really a point of difference at all. Maybe it's helpful to think about -- the way that I discussed it with Mr Beal -- with the mechanics, if you like, if we walk through this process. You've got the mechanics of working out what the volume of commerce is. There will be undoubtedly some things which can be done reasonably easy. There might be disputes about them, but they're not really disputes that should find their way here, except perhaps in the broadest sense of -- perhaps if there's an argument about evidential burden or something, but I can't really see, frankly, that there ought to be.

But if there was missing data or discrepancies between your records and claimant records, clearly someone's got to work out how to manage that. But that's pretty pragmatic stuff, isn't it? And you wouldn't really think that we need to have -- certainly not individualised claimant hearings to discuss that, or indeed that you were going to get much out of bringing one case, and you probably know what the answer is, I would have thought. You've got to just do your best with the data.

So if you think about the mechanical process, perhaps there's a place for some sort of independent assessment in there to resolve some of those more difficult things. But broadly speaking, that process ought to be able to get to a certain point. At that certain point, there will be some bigger questions, which may be largely points of principle, or may be quite mixed principle and fact. I think that's the bit that we're not really clear about: about what falls into which category. But there clearly are some things. I think Mr Beal's tax point seemed to me to be a point that if you ran it on a test case, it would bind you in relation to all other Claimants, because it's a matter of law rather than a matter of fact.

MR KENNELLY: Absolutely. That was the point I was going to make: a finding in relation to the proper tax treatment on a question of law in a test case wouldn't just be guidance; that would be binding, because it would be a question of law. Now, there's no doubt that there are some mechanistic elements to this which again, if resolved in a test case, would be of particularly strong utility in resolving the other cases. The --

THE CHAIR: Sorry, I'm talking about the mechanistic bits. I'm really talking about the bits that I don't think should come here. I mean, maybe you're going to push back on this, but do you really want to come and argue here about what you do with the missing data and inconsistencies in data? I mean, that's not really going to be very helpful, is it?

MR KENNELLY: I'll show you this, sir, but we are proposing a process of expert

engagement where these kinds of mechanistic points should be resolved between the parties and shouldn't trouble you at all. The concern we have is the trickier bit, which is the bit that you mentioned.

THE CHAIR: Yes, the tricky bit. Exactly, exactly.

MR KENNELLY: This is why we're proposing test cases where findings of fact will be made. Because that's the real difference. The Claimants say the findings of fact are almost subsidiary -- it's hard to work out sometimes what the Claimants are really saying, but they seem to be saying, "Well, there are only a few residual factual issues to resolve. Really, all we're left with are issues of principle." Our point is there are significant factual issues to resolve, and that's why test cases resolving actual cases and actual facts will be of particular utility in settling the other claims.

THE CHAIR: Can you give me some examples of --

MR KENNELLY: Yes. Can I show you Mr Cassels's witness statement?

THE CHAIR: Yes, I have looked at that and I --

MR KENNELLY: It would help me show you --

THE CHAIR: Let's go down the list.

MR KENNELLY: The reason why it's important to look at this is because it's not just an arithmetic exercise. The Claimants --

THE CHAIR: Yes. Well, this is really what I've been working off to try and work out what they are. But I mean, it's a little bit unclear still; there's no comprehensive list, is there? I think Mr Beal was saying it's going to be difficult to work out what the comprehensive list is until you've done some engagement on these schedules of loss. People have worked through some of the examples, but there are certainly some that not only are identified by Mr Cassels but also we know about, aren't there? There are some that are very obvious. Exemption is the first obvious one.

MR KENNELLY: Just to step back for a second. Because we're just looking now

at -- I'm not looking at the EEA, non-UK and Ireland cases; I'm just looking at UK and Ireland on quantum.

THE CHAIR: Yes.

MR KENNELLY: The Claimants' submission is, really, once you have -- you take the MIF that was passed on by reference to the APO rate and you take away the exemptible level of the MIF and really then you're kind of there, subject to a few tweaks. The point that we're trying to make, and that Mr Cassels explains in a statement, is that because in principle quantum requires individual assessment, there are claimant-specific considerations that need to be taken into account. He lists a sample of them in paragraph 17. It's at page 189 of his fourth statement.

THE CHAIR: Yes.

MR KENNELLY: So obviously, we've got the first one, 17.1. We're starting with just even the really basic prior question: the extent of the overcharge. Because if you skip down about halfway through that paragraph:

"... the extent to which they participated in 'on us' transactions in which the same bank acted as both acquirer and issuer, such that there may have been no pass-on of the MIF."

The Schemes, as we've explained, do not have a full picture on whether the Claimants participated in on-us transactions or not. So that requires some claimant engagement.

THE CHAIR: Just help me a bit with this. Firstly, is there a point of principle here? As I said, is it agreed that this would be a deduction if that were the case? That's the first question, isn't it? I don't know if you know the answer to that and I don't know if Mr Beal knows the answer to it.

But I mean, if there was agreement on this being a matter that needed to be investigated and deducted, then it isn't really a Trial 4 point at all, is it? It's a point that ought to wash its way out of the quantum schedules, because they ought to be

deducting it. Just like surcharging; everybody knows you've got to deduct surcharging. So why would it be a Trial 4 issue?

MR KENNELLY: I think just, again, to step back for a second. The pleadings point -- because you've mentioned pleadings a few times, sir -- just to be really clear, we maintain that for our test case process to work, the Claimants will need to plead their quantum claims; not just schedules of loss, but proper pleadings.

THE CHAIR: Well, let's come back to that. I appreciate that, but let's just assume that you've got some process by which the Claimants are providing details of their losses. I think I'm asking you, well -- I mean, I see the point. I understand the point that Mr Cassels is making, but it does seem to me to really quite neatly illustrate the reality of this, which is that if there's a legal issue here, then that surely is something we ought to be dealing with in Trial 4, as a point of principle. It's one of Mr Beal's point of principles. If he says, no, you don't need to credit on-us transactions and you say you do, well let's have that argument and work out the answer. Once we've worked out the answer, isn't it pretty mechanical as to whether it's happened or not?

MR KENNELLY: Indeed, and to find out which of the Claimants and to what extent were participating in that.

THE CHAIR: Yes, and so there needs to be a process by which they tell you that.

MR KENNELLY: Yes, exactly.

THE CHAIR: And you can check it if you want to or whatever it is. But it's no different from surcharging, is it, where we know that the Claimants need to give you credit for surcharging? We're not going to do test cases about surcharge here, are we? You're not suggesting that, are you?

MR KENNELLY: No. Indeed. Because where things can be resolved as matters of principle, they should be. So, for example, surcharging, again we need to know from the Claimants and the specific individual Claimants whether they surcharged, whether

they (inaudible) surcharging.

THE CHAIR: Yes, of course. I'm sorry, Mr Kennelly. Maybe we're at cross purposes here. I don't think we are.

MR KENNELLY: So far we've not hit the meat of what --

THE CHAIR: No, no. Fine, fine. But do you see -- I mean, if you're thinking about what Trial 4 does, Trial 4 clearly needs to deal with issues of principle. Quite how one gets there, whether it's done in the context of a test case or some assumed facts or whatever, we don't need to worry about that at the moment. But the question is going to be, what is the next step on from that, where you've got issues of principle which by definition have been found in your favour or might be found in your favour? Then the question is, what factual disputes might arise that require the involvement of the Tribunal as opposed to just the mechanistic determination? That's the point I think that I'm interested in.

MR KENNELLY: Yes, and let's look at 17.3.

THE CHAIR: Yes, so this is the other payment.

MR KENNELLY: Exactly. Now, this is the question of working out the particular loss suffered by particular Claimants due to cardholder switching. Because, for example, we need to find out the extent to whether they accepted Amex, for example, the extent to which they were better off with the MIFs, the extent to which the degree of switching might vary by claimant -- switching to cash might be less relevant for Claimants with online sales.

But for example, for Amex or Klarna, the extent to which the acceptance of Amex or Klarna affected the degree to which the merchants actually benefited from credit cards, the countervailing benefits point that we've discussed before. That is a claimant-specific assessment: we need to know the extent to which individual Claimants, in fact, were better off because of the higher cost, we would say, of Amex

and Klarna, and taking account of that, for the purposes of their individual quantum assessments.

What we're saying is, in the test cases, that's a question of fact that ought to be determined by reference to particular facts or particular representative Claimants, so that then we know how we can take it into account in settling the other cases.

On that point, sir, my learned friend said, well, he didn't really understand how this was a thing at all, the question of countervailing benefits and how it could affect quantum. Again, we find that a surprising submission. These are pleaded defences, and they have been issues in the case for years. It's issues 24, 25 and 26 in those (inaudible). I'm not going to go to them. The Tribunal is familiar with the argument.

THE CHAIR: Yes, I (overspeaking).

MR KENNELLY: And 17.4 gives other examples.

THE CHAIR: I just want to move off this one. Again, Mr Beal, I think, is signalling fairly strongly he doesn't agree with the legal basis of that pleading, so he's going to contest that, and so that clearly is or should be a Trial 4 issue. The question, I think, the difference I think between you at the moment -- and it would be interesting to hear what Mr Beal has to say after he's heard all this, but the question is whether there is any utility in taking up Trial 4 time in taking a set of facts which would illustrate somebody who -- you would be doing this on the assumption that you were right, and Mr Beal would have to put up a claimant, or the experts would select suitable Claimants. You would run some cases to see whether, in the circumstance in which you were correct, and it was to be taken into account, how that played out in a particular case. That's what you're saying.

I think Mr Beal is saying he doesn't want to do that at the moment, but I'm not sure, if it's put that way, he necessarily would object to it. I don't know. It's an interesting question, because I think what he's saying is the most important thing in Trial 4 is that

we resolve the issue, and once the issue is resolved as a matter of law, then it's going to apply to every single claimant, because it is a pass/fail point, at least at one level. Once you get past the pass/fail, if you win, you pass. Then I think he's accepting there may well be some factual matters, and the question is: how can we use the time sensibly in Trial 4 to investigate those, and if we do have a constraint in Trial 4 timing, is it a sensible thing to do, which is partly, I think, a measure of his confidence about whether he's going to win the pass/fail point, isn't it?

I think that's the landscape we're trying to navigate, isn't it?

MR KENNELLY: Indeed. But we're all trying to do the same thing, which is to resolve as much as possible, as concretely as possible. If Mr Beal wants to argue that the countervailing benefits defence is not open to us as a matter of law, he could apply to strike out those parts of our defences. It would be a bit of a waste if the Trial 4 trial only heard that question of principle.

The Trial 4 should be used, if it's going to be useful in settling the others, to resolve the point of principle, if that's still alive -- if he hasn't taken a strike-out point sooner -- and then by looking at a particular claimant, or particular Claimants, looking at whether they accepted Amex or Klarna, and the extent to which they benefited from the credit cards by reference to the counterfactual, where they would have been paying more under Klarna or Amex, if that's what comes out. If in a trial, we have that determined as a question of fact and the degree to which they benefited and the value of that, that's much more useful to the parties in settling the other cases than as a generally abstract point of principle.

THE CHAIR: Yes, I understand that point.

I suppose that leads to the interesting question, as to whether we should be having some more preliminary issues, or rather, perhaps a preliminary issue which is aimed at some of these points of principle. Then you're into the debate about whether you

can sensibly do that without really knowing what a factual situation might look like, and then, of course, that's really your point, isn't it, that that's what the test cases are. So, if you're not going to do it as a preliminary issue without the facts, then you need some facts.

MR KENNELLY: Absolutely. I mean, let's be clear. If Mr Beal wants to apply to strike out the countervailing benefits defence, he's welcome to do so at any time. But really, it's a currently pleaded issue, and it's an issue in the case as clear as day, and we're proceeding on the basis that in order to resolve as much of it as possible, that is an issue which ought to be tried on facts, so that we can then have something useful to apply.

My submission moving on from this, is: it would be a real waste of the opportunity to resolve these issues if all we got at Trial 4 was determination of that question of principle, whether the countervailing benefits defence was open to us or not.

THE CHAIR: So you're not objecting to Trial 4 dealing with the points of principle?

MR KENNELLY: Not at all.

THE CHAIR: Indeed, would you accept that to the extent there are any points of material principle arising out of whatever the quantum process is, they should be dealt with in Trial 4 whether or not they deserve a test case? So, for example, Mr Beal's tax point doesn't require a test case, so why -- I mean, it might come up. He might design a test case so that it included it, but you don't have to have a test case for it.

MR KENNELLY: That could be part of Trial 4, and --

THE CHAIR: I'm sorry to interrupt you. I want to just pin you down on this, because I think we are making some progress.

What you're accepting, I think, is that Trial 4 is about matters of principle. All you're saying is that it might be either necessary or helpful for those matters of principle to have some facts around them, and a test case is a good way to do that.

Mr Beal at the moment is saying, I think, what he said so far is, "We want to do the trial, but we want to do the matters of principle on Trial 4, but we're not very keen on having any facts".

I think that's actually the point of difference, isn't it? Am I right, do you think, or am I --

MR KENNELLY: You're right. Some of the labelling troubles me just in this sense, that the test cases that I'm proposing are test cases involving actual Claimants --

THE CHAIR: Yes, of course.

MR KENNELLY: -- where their facts will be determined by reference to disclosure and qualitative evidence from them. In that context, of course, it's open and appropriate for questions of principle to be determined also; and the points of principle, such as the tax point that my friend wants to raise, that can be raised in those Trial 4 test cases.

THE CHAIR: You see, I don't know why you're turning it around like that, because the one thing that we do all want to do, presumably, in Trial 4 is to achieve resolution of the points of principle insofar as they can be resolved. That surely has to be the first priority, mustn't it? That's the bit I --

MR KENNELLY: (Overspeaking) I'm not suggesting that because these test cases are going to be by reference to specific Claimants, that this is somehow -- and in that context, points of principle will be determined, but we'll be saying later, "Well, those points of principle don't apply to other merchants".

THE CHAIR: Well, you couldn't.

MR KENNELLY: Exactly, because there are points of law --

THE CHAIR: At that stage, assuming everybody is a Host Case, you're all bound by it, aren't you?

MR KENNELLY: There are points of law, as well. So if that's the concern, Tribunal --

THE CHAIR: I'm just a bit curious as to why you're approaching it the way you are, because it seems to me that the right way to approach this -- which is actually, I think,

consistent with what you want to achieve -- is that you look at all this and you say, "I've got a bunch of things which I know are points of principle that actually I don't need any facts, so I can have some relatively short assumed facts to deal with them. I've got a bunch of things which are points of principle, but actually it would be helpful to have some more factual context for them", so it would be appropriate to have disclosure and witness evidence and a focus on a particular merchant selected by the experts to give some sense of representativeness. Then you've got a bunch of things which are not really points of principle at all, and probably on the assumption that you've won on some of the points of principle, are all about factual investigation to see if it helps you about the approach to other things.

That's the logical order, isn't it? You're sort of jumping slightly into the second of those, and I'm just wondering if there's a reason for that. I think you're saying, as I understand the thrust of what you're saying, that you don't want to be in a position where these points of principle are divorced from facts, which might make a difference to the outcome. That makes perfect sense where that's warranted. Some of them it might be warranted; some of them it mightn't.

But I don't think that means you describe this as a test case process, because it's not. It's a process where it's warranted you put a proper factual context around it by reference to claimant-specific disclosure and evidence, which of course is a type of test case, but that's only where it's warranted, and this process is a result of trying to work out the maximum resolution of the points of principle.

MR KENNELLY: Sir, yes, I think --

THE CHAIR: You're jumping to point 3 when I'm really more interested in point 1. I'm not saying point 3 is irrelevant. I'm just saying that we ought to start with point 1 and agree on that, and on point 2, where there's possibly some room for agreement. It's difficult, point 3, because it rather assumes you're right on things that Mr Beal says

you're wrong on, and so it's quite hard to work out what the right answer to that is. But that doesn't mean that it doesn't wash out of the process that we've designed for points 1 and 2.

MR KENNELLY: Indeed. I do think we're on the same path.

THE CHAIR: I think we are.

MR KENNELLY: But the concern I have, and the concern the Defendants have, is that -- and the Tribunal shouldn't be troubled by the word "test case". "Test case" is simply a label given to a case that will be hopefully representative and of utility in helping us resolve the other cases.

THE CHAIR: You've got a point about not wanting to be bound. I understand that.

MR KENNELLY: Formally bound, indeed.

THE CHAIR: Well, I think that's an interesting question, isn't it? Because it does seem to me you will have some difficulty -- let's say that you're wrong, and you can't manage to agree all the stuff in an ADR process afterwards. Then Mr Beal comes along and says, "I've now got another 1,997 cases I would like to pursue" -- I know it's not that number; whatever it is -- "hundreds of cases where I want to pursue a quantum resolution with you", and you're stuck with the findings of fact that apply to these people as well, because their facts aren't different. Now, in this the facts are different. You have got the abuse of process problem. So, you're going to then be in a position where you're going to have to the facts are different, and it may well be that some of them, for example, if you're right that we have to look at people's proportion of online sales, it may well be that that is why that is different. I don't know. I'm not saying you're wrong. I'm just saying that that's quite a long way down this path, isn't it?

MR KENNELLY: May I come back to abuse of process?

THE CHAIR: Yes.

MR KENNELLY: Just so we don't lose track of what we're talking about.

On the points one, two and three that you were mentioning to me, the test case, our concern that if we have test cases that they do resolve the points of facts that needed to be resolved for that particular claimant and for which we will need disclosure and evidence. The point you made to me, sir, is, well, how do you know if you need that, because it will depend on the point of principle being resolved first?

THE CHAIR: Yes.

MR KENNELLY: If we don't get the disclosure and evidence, first of all, so long as it's a pleaded issue, we say it ought to be tried and the disclosure and evidence needs to be produced for it to be tried.

THE CHAIR: That may or may not be the case, depending on the nature of the issue, might it?

MR KENNELLY: Yes, but for certain -- I'm focusing here on issues like switching, in particular, or compound interest or even pass-on. I'll come back to pass-on.

THE CHAIR: But it is possible that switching could be tried as a preliminary issue, isn't it? I mean, we all know enough about the facts of these things to understand what the permutations are. I mean, does it really help to have a test case to decide switching? I don't know.

MR KENNELLY: Well, of course, because I take the point that there may be an issue of principle as to whether the defence exists or not.

THE CHAIR: Yes, that's the point I'm talking about resolving.

MR KENNELLY: But that should really be resolved in advance of Trial 4 because --

THE CHAIR: Well, that's what I'm saying to you. I mean, I think the difficulty I have with the way you're looking at this is that we're going to end up going down the rabbit hole of vast amounts of disclosure, at least extensive disclosure, for a number of Claimants in circumstances where if you were to lose that issue, that would be wasted and all the preparation of trial and everything else that happens.

Now, do we want to put ourselves in that position if there is a pass/fail point here? Maybe we have to because you've got to have some factual context beyond the one that we could all agree, or maybe that we could all agree sufficient factual context that we would know the answer to that. In which case, should we not be trying that sometime next year?

MR KENNELLY: Well, really, like I said, the ball is in the claimant's court.

THE CHAIR: Well, I'm not sure that's right, Mr Kennelly. I mean, I think we're trying to come up with a coherent process here in a very complicated situation. I don't think that's a satisfactory answer. If you're advocating -- if, you know, you said you've turned up with a pragmatic solution and I think I'm just really inviting you to accept that you start this by working out what is the maximum and most efficient way of resolving the issues of principle. I think that's my first point and I don't know whether you accept that or not, but I think you do.

MR KENNELLY: I do, of course I accept it.

THE CHAIR: And then the question becomes, when we get to Trial 4 what are we going to need to do in relation to those issues of principle in order to try them fairly and proportionately, justly and proportionately? Of course, it may be that we depart from that because we can get rid of some of them beforehand, which saves everybody a whole lot of time and cost and effort. But it maybe we can't. I mean, I'm not trying to (inaudible) the answers to any of this. But isn't that the lens through which you should be looking at and the whole question of what evidence we then want and how it's presented should be coming at the back end of that, not the beginning of it. I think that's the point I'm troubled about in the way you're approaching this.

MR KENNELLY: May I tell you the point that's troubling me?

THE CHAIR: Yes.

MR KENNELLY: Which is that if these points of principle are resolved, in advance of

Trial 4, and say we succeed on them.

THE CHAIR: Yes.

MR KENNELLY: But then we're very close to Trial 4.

THE CHAIR: Yes, I understand that.

MR KENNELLY: At that point the Claimants say, "Well, really, it's going to be a real problem getting the disclosure and evidence that you need to make good your defences at these points. It's too bad". And now we're coming to Trial 4 and the Tribunal says, "Well, we're limited by the time and the resources" and so we end up going in with one hand tied behind our backs. I entirely accept the point of principle that the chairman makes to me, but my concern is to avoid Trial 4 being undermined by the approach with which we address these issues in advance.

THE CHAIR: Let me put this other way. Would you accept that -- let's assume that we end up with a list of the points of principle we want to resolve and let's assume that for some of those there is a view or the Tribunal takes the view that it would be helpful to have a good factual context around them, rather than just an agreed statement of facts and therefore, it would be appropriate for you to have disclosure for there to be witness evidence, for there to be cross-examination. Let's assume that that's where we get to. Would you accept that that disclosure, cross-examination, should be limited to the material that's relevant to that point of principle? In other words, you're not going to be expecting disclosure about Mr Beal's tax point, because we know that we don't need any factual material for that.

MR KENNELLY: Again, the Tribunal approaches disclosure in these cases always as a matter of proportionality and so disclosure would not be ordered where it's not needed for the determination of issues of principle.

THE CHAIR: Yes.

MR KENNELLY: But where there are questions like this, like the Klarna/Amex

switching point or the merchant pass-on, which are claimant-specific and require qualitative evidence from individual merchants there, we would say, so long as that defence is open to us, we ought to have that disclosure and qualitative evidence for particular Claimants in advance of Trial 4.

THE CHAIR: Yes. So if I can summarise, I think what I'm hearing from you: as far as trying to deal with any of these points of principle in advance of trial, you're nervous about that because of the time scales. I understand that point. And so if anyone was going to come up with a bright idea they'd have to deal with that problem. On that basis, it may well be it's necessary to go into Trial 4 with some of these points of principle yet to be fully identified, but we will need, at some stage, a definitive list, and that will need to be the list for all time, won't it? I mean, we can't have people coming back in a year's time saying, "We want to add some more points of principle". We need to work out what are the points that are being taken. Obviously, you've got the pleadings and so that should be the guide to that.

So we go into Trial 4 knowing that there are some points of principle where it's necessary to have some factual background in order to decide the point of principle, and as a result, you will get some selective disclosure and witness statements addressing that point will be provided, and there'll be some time allocated for cross-examination at the trial. And, as a result of that, you'll get the benefit, on the assumption that we've chosen some Claimants to go through this process sensibly, you'll get the benefit of an outcome, which will be helpful because it'll indicate how the facts really play out. If it turns out that you win, then we need to address these points. So to take the online point, you would expect disclosure about what their proportion of business was dealt with online, and to what extent they use Klarna, what extent they use cash, whatever it happens to be. So, you've got that sort of factual background when we look at the countervailing benefits argument as a matter of principle. Make

that decision. If you win, then obviously the judgment will deal with the answer for that particular Claimant but it's limited to that point.

If you lose, the judgment needn't deal with it, although it might well deal with it because of the risk that the Tribunal might be wrong.

MR KENNELLY: I need to obviously take instructions and discuss this with Mastercard also so --

THE CHAIR: Yes, of course.

MR KENNELLY: Is the Tribunal's suggestion that in this scenario, it wouldn't just be a selection of the defences that the Schemes are mounting, which require claimant-specific disclosure and evidence. Because, again, I need to understand the difference between our test case proposal and what the Tribunal is (inaudible) now, because --

THE CHAIR: I'm not sure --

MR KENNELLY: In our test case proposal, there will be a number of issues which will require a claimant disclosure and evidence. For other issues, there will not be such a need depending on the pleaded issues in the case. It seems to me, from what the Tribunal is suggesting, is that the Tribunal does recognise that in this proposal, depending on the pleaded issue, depending on whether it's a question of fact or principle, there will be proportionate disclosure from the Claimants and qualitative evidence, if that's what the issue requires, in order for the fair resolution of it.

THE CHAIR: I think so. I mean I don't think there is any difference between -- I have to say I don't like the expression "test case", because it seems to me to bring with it just a whole lot of ambiguity about what the consequence of that is and I think it's the distinction you've obviously deliberately made between sample cases and test cases, I think is actually really unhelpful for these proceedings, because we all have to grapple with the reality of what comes out the other end and, you know, we're dealing

with that now in relation to Trial 2. It's a problem. It's difficult. But labels aren't going to help very much.

Your position is, as I understand it, that if the facts are different, then you're entitled to test them -- however that might work out -- you're entitled to test them and satisfy yourself that they don't lead to a different result. Fine. I accept that is something you're entitled to say up to a point, but there is a point at which it ceases to become proportionate or strays into abuse of process territory. I'm anxious to avoid trying to run some perimeter around all that, because I just think it's not a very helpful way to construct a trial.

So I think the difference between us is that you want to frame it through that lens for reasons I understand, which I think are a bit unhelpful, and actually it then draws the focus into a claimant in which we're thinking, well, what are the things we could test with this claimant rather than what is it we need to decide and what's the evidence we need to deal with it? And that's why I put it the way I put it. I don't think the outcome is any different because when we get to the trial, on the assumption it hasn't been dealt with before, as a matter of principle, if it requires factual context, then you're going to get your disclosure and your cross-examination.

MR KENNELLY: So, I really do think we're on the same page. Just to reassure you -- and I hope that the Tribunal hasn't been perplexed by the way it's been put by the Claimants -- the reference to test cases -- and I take the Tribunal's point about labels being unhelpful; we can call it a representative case. The label doesn't matter. What matters is the Tribunal understands that although this decision will bind the particular claimant in the case, the whole point of the proposal is that these cases will be selected on the basis of being high value and representative, so that we can use the result to settle all of the other cases.

THE CHAIR: Well, I understand that, but I think there's a -- what I think is unhelpful is

trying to work out now what the binding effect of the outcome of these things are. Because we don't know where they're going to end up. I just don't see how we can do that. I think we know that if it results in a point of law, then you're going to have to accept that it binds across the whole population. If it ends up being something which is very obviously fact-specific and claimant-fact-specific, then you're presumably going to be in a better position to argue that that doesn't stop you from relitigating the point with someone else if you choose to.

But it's an argument that will have to happen at a later stage; depends what it is. I don't really want to have that discussion now, because I just don't see how we can resolve it.

MR KENNELLY: (Overspeaking) --

THE CHAIR: No. Well, except that I think you are trying quite hard, understandably. I'm not criticising you. You're trying quite hard to put yourself in the position where it has the least binding effect later, and I'm not really very interested in that. What I want to do is make sure that we deal with all the issues we can, starting with the ones that are very obviously points of principle that don't require any fact, or material facts, and then moving on to those which may require some facts.

So, it's not about test cases; it's actually about evidence. It's about what's the evidence we need to determine the points of principle. If that results in having some factual outcomes which are helpful to you for the purposes of ADR or whatever it is, fine. That's great. But that's the back end of the process, and it's ancillary to the primary objective which is: let's make sure there are no serious points of principle between you on quantum by the end of Trial 4.

MR KENNELLY: Absolutely. That's very helpful, sir. Let's look at the kinds of facts that we think ought to be debated in order to produce a useful result in Trial 4. So, you have the point about switching.

THE CHAIR: Yes.

MR KENNELLY: I'll show you compound interest.

THE CHAIR: Well, compound interest is different and I think Mr Beal accepts it's different. You clearly need to have a pleading on that, and you clearly need to have information on it. So I think in some ways -- I'm not trying to put you off -- but I put it in a different compartment altogether. It's a separate process, I think.

MR KENNELLY: That does -- and I also (inaudible) what Mr Beal said about that. He said, "Well, we'll have to see whether it needs factual evidence or not." It will obviously require factual evidence, because it turns on individual claimant's choices about whether they would have spent the money on reducing their borrowing costs --

THE CHAIR: And when they went into business. If it's pleaded out, regardless of how it's pleaded out, we need to find a way of working out how you can test that sensibly. That may be that that does have to be through some form of selection of Claimants. In a sense, that is very much a bucket 3 point rather than a bucket 1 or 2, because nobody's arguing about whether as a matter of principle it's available; the question is it all depends on the facts, isn't it?

MR KENNELLY: Indeed, and that's why again we say if you have representative cases where compound interest is actually tried by reference to disclosure and evidence, we'll have the Tribunal's ruling on the kinds of evidence and disclosure that is sufficient to show a proper claim for compound interest and how, if it succeeded in a particular case, why it succeeded, and then that's of great utility for the other ones.

THE CHAIR: But part of the difficulty with that is because it's very much in -- I mean, there is a question about the utility of the bucket 3, where you're just resolving some facts that are specific to Claimants. There's some real questions about that, I think. I do think there's some force in the points that Mr Beal is making about the lived experience, as he puts it.

Not, again, criticising you, but the reality is that you're not taking the findings, as I understand it -- the findings in Trial 2 -- and saying, "Oh, well, game's over. We're not really going to bother with that anymore. We accept that's the way it looks." I get the sense there's a deep sense of grievance about Trial 2, and I'm sure that will be aired in the Court of Appeal. But as far as I'm concerned, this Court of Appeal (inaudible) is different. It is what it is.

Now, you know, I'm not criticising you for taking the position that you are, and we'll have to test the limits of that and what you can legitimately -- obviously going to come on to that in a minute. But there is some form here, Mr Kennelly, that makes me wonder if we were to give you some very sensible cases about people's investment strategies, whether you would just turn around and say, "Well, we need to look at everybody's investment strategies before we pay out." I mean, it wouldn't surprise me, given the way that you've approached this hearing.

MR KENNELLY: Well, sir, may I, in our defence, since you talk about form. Our form in terms of settling the cases is extremely relevant. The cases weren't settled by simple concession. These thousands of cases that have been settled by the Schemes were settled in the context of negotiations where both sides assessed the relative strength of their case --

THE CHAIR: But that's a different point --

MR KENNELLY: -- by reference to the authorities as they stood at the time.

THE CHAIR: I'm sorry to interrupt you, but I think that's a different point altogether, isn't it? I understand that. Perfectly sensible, and I absolutely accept that's happening. But this is about the attitude that you're taking to previous decisions, which have in some depth canvassed certain subjects. (Inaudible) somewhat criticising you, because if it is open to you to say they're not binding, then fine, you can do that. But if you're coming along and saying, "Don't worry, if you find these test cases, they'll be

helpful to resolve lots of other things", I think there is some scepticism that comes with that, given the way you were approaching the previous decisions.

I mean, it just comes with the territory, Mr Kennelly. If that's the position you want to take in those -- legitimately; I'm not saying it's illegitimate -- if that's position you want to take, it will give rise to some scepticism about what happens later.

MR KENNELLY: I understand. You've seen in Mr Cassels's and Mr Cotter's statements that we're not saying that even when we come to merchant pass-on -- I'll come to that now -- which is again a claimant-specific question where qualitative evidence is what the Tribunal wants to see, that we're coming from a standing start.

We accept that we will be building upon the work done by the Tribunal in Trial 2. What we will not accept, because it's not the law, is the submission which my learned friend has made. It may be his submissions about bindingness and telling us now that it would be abusive for us to go back on in respect of new claims, findings made in the Trial 2 judgment, that's what drives us to focus on the bindingness of these issues. We're all trying to find a pragmatic solution, but that's where we're coming from in relation to --

THE CHAIR: That's helpful, and I shall look forward to that discussion. Can we leave it on the basis that I think it would be helpful if you could talk to Mr Cook about this quantum point we've been discussing.

MR KENNELLY: Yes.

THE CHAIR: And actually maybe Mr Beal as well, if you can manage that over the short adjournment. Because I think it would be helpful to know whether -- it seems to me that we are not very far away from a process which says: let's try and work out what the mechanical issues are for quantum; everybody accepts we should try and do that one way or another. We can come back to how that's done, the pleading point versus the statement of claim, the account.

That's the first bit. Then the second bit is that we need, sooner rather than later, a list of all the points of principle that need to be resolved in Trial 4. We need a decision to be made, possibly with a CMC, about which of those should properly involve consideration of material evidence as opposed to just a simple agreed statement of facts. Then at that stage, we will be in a position to think about which Claimants should be selected to provide that evidence, and then one can start factoring into that some of the benefits you might get out the other end from having some factual findings. But I mean, that for me is the tail of the dog rather than the working end of it.

MR KENNELLY: I'll take instructions on that and discuss it with Mr Cook over the short adjournment.

THE CHAIR: Yes, and if you have a chance to talk to Mr Beal about it.

MR BEAL: While my learned friend does that, it might help if I just venture two points. Firstly, the pleaded cases on exemption for Trial 3 already raised the question of switching to so-called costlier payment methods, such as -- it's said Klarna and Amex. So there's already a pleaded contest on that point.

THE CHAIR: Which will presumably produce some factual evidence --

MR BEAL: It will produce some factual evidence.

THE CHAIR: -- which then requires a finding.

MR BEAL: Yes. As a matter of principle, if I can just state clearly, yes, of course there is a legal question of what exactly does it mean to have this concept of countervailing benefit in a quantum assessment. Is it a form of mitigation? If so, does it need to be specifically proved, et cetera? To the extent that it becomes apparent that evidence is necessary to determine that, then we're not averse to evidence being produced, but it would need to be targeted and focused.

THE CHAIR: Yes.

MR BEAL: We would prefer -- I don't want to get into labels -- but we would prefer an

analysis of Claimants who go to that issue, who could be said to be broadly representative of the cohort of Claimants, for example a big hotel, a retailer and so on, so that it's a meaningful exercise that can then be read across to other Claimants.

THE CHAIR: Yes. I mean, I think Mr Kennelly was all in favour of that. I think that's basically what he's saying.

MR BEAL: I think we're agreed on that.

THE CHAIR: I think the only point where I can see there might be some friction is you can see that you've got your points of principle don't require any factual context and points of principle that may require some factual context, and the question is how much factual context do you need, and are you actually going to be resolving the factual dispute that arises if you lose the point of principle with those facts; or are you just using them as a matrix, if you like, for deciding the point of principle?

Probably the answer is to try and do as much as possible at that stage. Because if you're going to lose, you might as well find out what the answer is. In which case, if that's your view, it does strike me that that is probably the right answer. I think Mr Kennelly's more or less agreeing with that. We don't know what Mr Cook thinks, so we'll find out after lunch.

MR BEAL: (Overspeaking).

THE CHAIR: Yes. Good. No, that's very helpful. Thank you. 2.00 pm. Thank you.

(1.01 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Yes, Mr Kennelly.

Discussion on Quantum and Points of Principle

MR KENNELLY: Thank you, sir.

Prompted by the Tribunal, I had a useful discussion with my learned friend Mr Cook and my learned friend Mr Beal, and we all agree respectfully with the Tribunal's suggestion that it's important to identify and distinguish points of principle and points of fact, and we discussed whether it might be possible to have points of principle determined earlier than the current trial window for Trial 4. We agree, in fact, it would be better for issues of principle to be determined in Trial 4, and not at an earlier stage.

THE CHAIR: Yes. No enthusiasm for any preliminary issues?

MR KENNELLY: No. The process -- and my learned friends will correct me if I've misrepresented the consensus -- is that we should have quantum pleadings from the Claimants to which we will respond. The mechanics of this we can work out separately and timing and so forth. That will allow us on an expert-led basis to identify merchants. I hesitate to use the forbidden term. We can call them illustrative or representative, whatever --

THE CHAIR: Call them cases.

MR KENNELLY: Sorry?

THE CHAIR: Just cases.

MR KENNELLY: Cases. Even better, cases -- and in respect of those, identify issues of principle and issues of fact, and then having done so, work out the targeted and proportionate disclosure that they would give, and any evidence going to the questions, the issues that require evidence. As Mr Beal reminds me, that will be building upon the disclosure and evidence that will be given for the purpose of Trial 3.

THE CHAIR: Yes.

MR KENNELLY: Again, that goes to the proportionate approach the Tribunal would adopt in any event.

THE CHAIR: Yes. Just to pick up a couple of things there: quantum pleadings. Is Mr Beal offering pleadings now, or is that -- I think he talked --

MR BEAL: The schedule of loss is a pleading.

THE CHAIR: Is a pleading. Fine. Is there any dispute about that? Do you think -- obviously you'll have to see what it looks like, but he's saying he's going to give you a statement of truth on the bottom of something which sets out what his quantum claim is.

MR KENNELLY: Mr Beal has the submission that we've made by reference to the questions of fact that are currently in dispute between us, and that go to quantum issues, including, for example, countervailing benefits.

THE CHAIR: Yes.

MR KENNELLY: It's up to Mr Beal and his clients to plead what their case is on these pleaded issues which are already before the Tribunal.

THE CHAIR: Because you've pleaded them, but they haven't. Is that the point?

MR KENNELLY: Yes. We've pleaded them in detail, and we'll see what the Claimants produce, and we will have to respond, and it will be on the joined issue then, that you discuss the targeted disclosure and evidence that will be required. I can't put words in my learned friends' mouth. But this is not new. The issues are before the Tribunal already. The questions of fact, the factual issues that we've been discussing, are in the list of issues, and they go to quantum. It's really for the Claimants then to decide how they want to plead to those.

THE CHAIR: Yes. I think you went pleadings expert, and then identification of the principles. Isn't it the other way around? Isn't it pleadings, identification of the principles, and then the experts deciding how they want to deal with the evidence that's necessary? Because --

MR KENNELLY: Yes, I agree.

THE CHAIR: Yes.

MR KENNELLY: In identifying what are the issues of principle, that's a lawyer-led job.

But in working out the overlap between issues of principle and issues of fact, there may be some expert assistance. But you're quite right, sir. In identifying the pure issues of principle, that's a question primarily for (inaudible).

THE CHAIR: So that's an agreed process, then? Is that now where we are with that?

MR KENNELLY: Yes.

MR BEAL: Yes. I mean, where we've come out is we are maintaining that schedules of loss and counter-schedules of loss is a sensible way forward, rather than within the existing pleadings. Our reply gives a reply to the pleaded case of alleged benefits that are said to arise, and basically denies that there are such things. But this will come out in the wash, because once the pleadings are settled, the issues are identified, the Defendants will say, "These are the issues of principle X, Y and Z. X and Y don't require any factual evidence or disclosure. Z does". We recognise that there will be a mixture of targeted requests for disclosure, insofar as the data and details are not available from Trial 3, and there is a space for qualitative evidence from witnesses to the extent that that will help inform the determination of those issues of principle.

In a nutshell, you end up with an evidence-led approach, no doubt steered by the experts, as to the identification of the cases that are giving rise to that material, but that then informs the Tribunal and helps the Tribunal reach a resolution on the issues of principle identified.

THE CHAIR: Yes. I mean, principles-led approach to the experts identifying the evidence, isn't it -- I know I'm labouring the point, but I want to I want to start this process with knowing what the principles are we're trying to resolve.

Mr Cook.

MR COOK: Sir, the only thing from our perspective that we are keen to avoid is a process of going much further than the list of issues, where we spend a lot of time and as it happens, money, which is a consideration, trying to sort of agree the

fine-tuning of the wording of some of these issues. It's useful to have sort of a headline description, which we largely already have, so we know what we're talking about. But trying to agree the precise wording has in the past been difficult and expensive.

But clearly, when we come to ask for disclosure, it's going to need to be identified by reference to a set of disputed points, which will probably come out of the pleadings, rather than trying to then neatly sum up the dispute in a single sentence which we can (inaudible) the wording on.

THE CHAIR: No, that's fair. I absolutely understand that, and I'm not asking for, you know, great specificity and careful drafting of the principles. Maybe "principles" is the wrong word. But I suppose what I want to be clear about is once the pleading process is finished, however it looks, we know what are the items -- what are the points that are going to be considered, the disputes that are going to be considered in Trial 4, and we can categorise them in a way that Mr Beal has just described, so we work out which of them need evidence and which of them don't.

That's all I'm concerned about, and I'm happy for people to work on the basis that no weight is to be attached to any of the wording of those disputes, how they're put. Obviously, you're right: the list of issues is where we start from, but we're dropping down a level below that, as I understand it now, and we're talking about things that aren't always articulated clearly in the list of issues, because they're more granular, and I'd just like to know how many of them there are and what they are. Because, actually, some of them --

MR COOK: As long as it's been left to the level of (inaudible) there's sufficient granularity to allow everyone to know what we're talking about without being something where a lot of time and effort is (overspeaking) --

THE CHAIR: Exactly.

MR COOK: -- disagreeing about whether a word goes in or not, which is a process

that has been gone through before Trial 1. It was something that a great deal of time and effort was spent on, calling for the list of issues, which was difficult and expensive, and with the greatest respect, ultimately not helpful for the case management (inaudible).

THE CHAIR: No, absolutely. I entirely accept and agree with that, Mr Cook.

I think what I'm keen to do is -- because it seems to me that there is going to need to be another discussion about all this, partly because I would like to know what is in dispute, and, you know, how many things there are and how you see it playing out, and also partly because I anticipate there may be some differences of view about how much fact is required for what. I expect that it would be much better to bring that back here before you all waste thousands of pages of correspondence on it. So --

MR COOK: It would be very surprising, sir, if there wasn't a process whereby -- well, if there was a situation where we all agreed without any difficulties at all upon all the evidence that was required and all of the specific cases that were needed. I'm sure there will be a disagreement process which will result in that coming back for Tribunal, hopefully largely for blessing, but realistically to resolve some of the areas (inaudible).

THE CHAIR: Yes.

Just in terms of the way forward, if I'm thinking about an order to reflect all this. Mr Kennelly, we will need some dates for the pleading, however that's executed to be provided, and any consequential -- you presumably will respond to that, will you?

MR KENNELLY: Yes.

THE CHAIR: So, we need a timetable for that. I'd like it to be a date by which you've worked out what is in dispute.

MR KENNELLY: Yes.

THE CHAIR: Then there will need to be a check back in here at some stage, once you've formed some views and shared them on which of the disputed items are likely

to need factual material to support the argument, and then we can see where it goes from there.

I'm not going to try and set the dates now, but obviously the dates need to correspond with a March 2029, trial to give people plenty of time to go away and select the evidence they need and make sure it's done properly and so on.

MR KENNELLY: Absolutely. We're anxious that it really quite speedily --

THE CHAIR: Yes.

MR KENNELLY: -- to make sure that there's proper time to prepare for the Trial 4.

THE CHAIR: Obviously, we're going to move on and talk about some other things, but would it be possible for there to be a bit of a running draft order that we could have a look at the end of business tomorrow, just for you to start putting some dates in so we've got those and we know where we are?

MR KENNELLY: Yes, of course. Others will already be working on that now.

THE CHAIR: Yes. Good. Thank you.

MR KENNELLY: Just to put in a marker, though, based on what my friend Mr Beal said about what they propose to plead. I take this point about, he's going to say that they don't recognise that there are any countervailing benefits, but of course, he does need to deal with compound interest. I think he accepted that for compound interest, the Claimants have to plead with specificity.

THE CHAIR: Per claimant.

MR KENNELLY: Per claimant (overspeaking) issue.

THE CHAIR: Yes. I think he accepted that. As I understand, I don't think there's any dispute about that point.

Submissions by MR KENNELLY (continued)

Pass-on

MR KENNELLY: The next point, before I move on to how we deal with the non-UK and Irish claims, is just to touch briefly on that discussion which my learned friend had with the chairman about abuse of process.

THE CHAIR: Just before you go on with that: what about merchant pass-on? Are you going to come to that?

MR KENNELLY: Yes.

THE CHAIR: I'm sorry. Okay.

MR KENNELLY: I'll deal with it now, because that's where his abuse of process arguments were.

THE CHAIR: Oh, I see. (Inaudible)

MR KENNELLY: Merchant pass-on is again a claimant-specific issue, which in principle requires individualised assessment. That was the outcome of the Trial 2 judgment. You were concerned with short-term pricing decisions by merchants and you found qualitative evidence, the greatest value, in that regard. So merchant pass-on, for the Claimants not bound by the Trial 2 judgment, also needs to be determined in Trial 4.

THE CHAIR: Yes.

MR KENNELLY: That includes the sectors which were covered by the Trial 2 judgment, because merchants that were in those sectors but were not before the Tribunal in Trial 2 have a right to -- sorry, the Defendants have a right to interrogate those new merchants in respect even of the sectors that were covered by the Trial 2 judgment. We had that discussion, the last CMC, about whether the Defendants are bound now in respect of the new Claimants of findings made in the Trial 2 judgment, in respect of the Claimants who were before the Tribunal in Trial 2. That is, of course, the active Claimants and the stayed Claimants who are bound.

THE CHAIR: I don't want to take you out of your way or to shortcut it, but I mean, in

a way, all of that is yes, but subject to obviously abuse of process, which you are warming up to, but also proportionality, which is really more interesting to me because you're not suggesting you're going to look at every claimant, as I understand it.

MR KENNELLY: No, because -- and indeed, that's absolutely right. Because that's why, in choosing these cases, in these cases that we are choosing, these illustrative cases, and in these cases, one of the issues, issues of fact that has to be determined, is merchant pass-on.

THE CHAIR: So why are the Trial 2 cases not illustrative cases for the purposes of those sectors that were considered in Trial 2? Why are you now looking for new illustrative cases?

MR KENNELLY: Because we have the right to look at the new Claimants and see if there are better illustrative Claimants in respect of the new cohort than the ones who were before the Tribunal in Trial 2. But that's not another bite of the cherry. That is because these are claimant-specific questions, and it may have been in Trial 2, we didn't have access to them. We didn't have available to us, merchants with the disclosure and the qualitative evidence appropriate for the question and now, possibly, we do and we're entitled to propose those merchants as probative of the question of merchant pass-on in respect of new Claimants.

THE CHAIR: So maybe just to try and bring it to life a bit. If in the new claimant group, there is a large international hotel group, are you saying it's open to you just to look at all that again? Or are you saying that you would accept that it's likely to be in the same sort of position as Hilton was?

MR KENNELLY: It's in principle open to us.

THE CHAIR: Yes.

MR KENNELLY: But the question for us then will be: are we likely to get a different outcome with these new large hotel groups, for example, on the basis of these

Claimants? We're not bound by the decisions made in the Trial 2 judgment, but obviously in deciding what our approach will be to merchant pass-on in Trial 4 we are not starting from scratch. We will look at how the Tribunal addressed the pricing decisions made by those hotel groups in Trial 2.

THE CHAIR: Putting aside abuse of process for a minute, do you accept that I have any say in how you approach that as a matter of proportionality? In other words, if you were to come to me and say, "We want to look at hotel group X", that looks very similar to Hilton to me, and you don't give any reason for that, should I be entitled to say, "I don't think you should be doing that"?

MR KENNELLY: Absolutely. The Tribunal's rules require you to manage these cases proportionately but proportionately while respecting the legal rights of the parties, obviously. What we have opposed is the Claimants' submission that we are bound by findings. That it's not open to us to interrogate new merchants in respect of merchant pass-on for them when they were not before the Tribunal in Trial 2. But in terms of what we do and how it's managed, the Tribunal will adopt a course in a proportionate way.

THE CHAIR: I mean, I can understand where you're coming from, and we'll explore it a bit more in a minute as to how it might work. I mean, I think for me, the problem here is what the right process is rather than -- I'm not suggesting at the moment that you should not be entitled to some form of further investigation. What I'm troubled by, in relation to your not binding position, which I understand, is that it leaves us with a sort of a bit of a black hole, doesn't it? Because if you are a hotel group very like Hilton, your current position is that you're not acknowledging that that person is entitled, pragmatically, if not legally, to the benefit of the pass-on judgment, because you would accept it as a matter of practicality -- this is my hypothesis; you don't have to agree with it -- but you accept as a matter of practicality that that international hotel

group is probably in the same place as Hilton.

Because of the way you're approaching it, which I understand, perfectly reasonable, but it has the effect of leaving that claimant in limbo to some undefined and unspecified time, unless they happen to be put into the Trial 4 process, which would be a complete waste of time and money if we all think it's going to be the same as Hilton.

Somehow we've got to get to the bottom of how are you going to accept, pragmatically -- fine, I take your position legally -- but what are you going to accept pragmatically in relation to Hilton and what would we know about that when we finish Trial 4? Which is another way of saying really Trial 4 for this population surely has to be a bit of put up and shut up, doesn't it? You have to accept that this is your last chance to have a go at this and if it's -- because I just don't like this idea, you're going to pull out some test cases from some other things, and then we're going to be left with this sort of group of people who just don't know where they are because, by all common sense, they should be treated the same as Trial 2A, but you're not acknowledging that.

MR KENNELLY: Well, let's unpack that.

THE CHAIR: Yes.

MR KENNELLY: We respectfully agree that, legally, the Defendants are entitled to look at a hotel group or a hotel that looks very like Hilton and say, "Let's look at merchant pass-on. In your case, we're not bound by the findings of Trial 2, but" --

THE CHAIR: Sorry to interrupt you. I'm not actually saying I do accept that, but that's the hypothesis. I mean, Mr Beal says you can't do that because of his abuse of process argument; I'm trying to take abuse of process just off the table for the meantime.

MR KENNELLY: Sorry.

THE CHAIR: Sorry, I interrupted you. Please, please --

MR KENNELLY: Mr Beal, I'm afraid, sir, I have to take that just right now.

THE CHAIR: Yes.

MR KENNELLY: The submission is that it would be an abuse of -- you can say now that it would have been an abuse of process for the Defendants to fail to accept, in respect of businesses from the same sectors as were addressed in Trial 2.

THE CHAIR: Where the facts are the same.

MR KENNELLY: Well, we don't know. That's the point.

THE CHAIR: Well, no, quite. I understand that.

MR KENNELLY: The only fact that would be the same is --

THE CHAIR: But if the facts are the same, would you accept that it's an Ashmore-type problem?

MR KENNELLY: Well, if at the end of trial -- let's skip ahead and maybe kind of cut out all of this unfortunate discussion because we fully accept that at the end of Trial 4, we have these illustrative cases determined and disclosure and evidence in respect of and findings made, and at that point, after these cases have been determined, we have our ADR process, we come back before the Tribunal and say, actually, this identical case should be determined differently, that does look like an Ashmore-style abuse. Because at that point, there would have been a test case or representative or illustrative case process, and one of the parties comes back from Tribunal and says, "Well, we want this case to be heard again and this argument heard again and determined differently". But it's at that point, far in the future, where the abuse of process issue crystallises. What we cannot accept is the suggestion that you can say now -- one can say now -- that for us to seek to argue that merchant pass-on is different in these same sectors on the basis of these new merchants that that is abuse of the process. If Mr Beal invites you to make that finding -- ultimately he backed away from that finding.

THE CHAIR: I don't really want to have to deal with this problem as an abuse of process problem. I'm not encouraging that. I think that the can of worms you're opening up is quite a complicated one, because I think Ashmore is not a straightforward case. And also, it seems to me that, you know, I don't think Mrs Ashmore was a party to any proceedings at all at the time that the first set of proceedings took place. It was just that she'd been sampled -- There was a population she'd been sampled from. So she had no different status from any other merchant who was hanging in the wings in Trial 2, arguably. I'm not sure you're right about that. I'm not encouraging a discussion about Ashmore or indeed about abuse of process, because I just don't think it helps us very much. I mean, at the end of the day, we need to find a proportionate way of dealing with this and at the moment, I'm not closing the door on you coming up with a proportionate way of saying, for obvious reasons of fairness, logic suggests that this type of claimant in this sector might be different from the one you looked at. In other words, a sort of exceptions-based thing. But based on some sort of rationale that bears scrutiny at the early stage we're at. And it seems to me if you do that, I don't have a problem and I don't think Mr Beal is really pushing back that hard on you doing it. The problem with this is how we get to that point.

MR KENNELLY: Yes. And to get to it, we need -- this is why, again, choosing the illustrative cases is a good idea because then we can get disclosure and evidence from them and that will allow us then to work out if, in fact, the facts are there that demonstrate merchant pass-on in a way that wasn't available in Trial 2.

THE CHAIR: Well, I just don't understand that because you've had -- so just to take it back to hotels again. You've had evidence in Trial 2. I appreciate you might not agree everything you wanted and the evidence didn't come out the way you want it perhaps. But basically you've done the test case. You know what the answer is and the Tribunal gave a view on the facts of that. Now, I can understand your position that there might

be a different case out there, but you're going to have to articulate why it is, aren't you?

MR KENNELLY: Absolutely. That's what I said when I said we're not starting from scratch. In explaining to the Tribunal, in respect of hotels, why the approach to merchant pass-on should be different. For example, it's possible that we will find hotels with algorithms or pricing algorithms which are quite different from the Hilton hotel. On that basis we can say, well, here, here you can see pricing decisions, direct and proximate causation, which you did not see in the Hilton hotel, and therefore -- because these are not bound by Trial 2, and this demonstrates that a different finding is required and we invite you to make it. That's a perfectly proper thing for us to do.

THE CHAIR: So just to be clear. You're going to -- on the basis of if you really are accepting that there's anything in Trial 2 of any value, you know, which at least I think is a good starting point if you're prepared to accept there's something there that you might get something out of, surely the one thing that comes out of it is that unless you have a merchant who puts the MSC firmly into its price setting process -- it may be through an algorithm, however -- you're going to struggle with this. You're going to struggle with pass-on, because of the ruling on direct and proximate. We know that. Surely you should be looking for someone who's likely to be doing something materially different, like a small hotel, that doesn't use a pricing algorithm at all. I don't understand why you think -- How are you going to find out about -- Are you going to ask all the Claimants about their pricing algorithms or their pricing -- is that what you're planning to do?

MR KENNELLY: The exact questions that we're going to ask the Claimants have yet to be formulated. That is why we refer to an expert-led process where we ask them for targeted disclosure. I cannot say at this stage, sir.

THE CHAIR: Doesn't it follow -- this is the difficulty I have with the submissions you're

making, because it seems to follow from that that you're planning to go to every single claimant and ask them for information.

MR KENNELLY: No.

THE CHAIR: What I want to know from you is how are you going to decide where you're going to put your efforts here?

MR KENNELLY: Initially -- I mean --

THE CHAIR: I'm not asking you to tell me the answer to -- I don't mean on a specific basis, just to be clear. I'm not asking you to unlock all the thinking about it. But what is the process by which you, with the burden of proof on this -- obviously there's, as we know from the Supreme Court, a heavy burden that then shifts on someone to provide the material. But what I'm saying is that you need to justify who you're going to before I'm going to make an order that they should provide the material for you. I think you said that. And so what is the test we're going to use for justification? Are you going to do it on the basis of, what?

MR KENNELLY: In our submissions, one approach we suggested was to look at merchants with illustrative or representative pricing practices, and on the basis of the pleadings that we're hoping to get from the Claimants and information from them, to try and discover the representative group who would have similar pricing practices. If that company was chosen for determination in a case in Trial 4, that would cast light on how merchant pass-on should be approached in other instances where Claimants have similar pricing practices. So, I think --

THE CHAIR: I'm sorry, I'm afraid I don't understand that. So, are you saying you're going to ask them to plead out for each claimant what their pricing practices are?

MR KENNELLY: Yes. Not in detail, obviously, because it's just a pleading. But initially, in order for this to be determined justly, the Claimants do need to engage with the merchant pass-on defence that we have raised. So, we will be looking to them to

explain to us the different pricing practices that they employed in order for us to be able to identify illustrative merchants for the purposes of merchant pass-on.

THE CHAIR: That does involve going to every single claimant, doesn't it?

MR KENNELLY: Well, yes, it could begin with questionnaires -- it's a question of the burden. It could begin with questionnaires going to every single claimant, and then we can filter it down. This is a process the Tribunal has done in other cases where it's had to deal with large cohorts of parties. But it can start with a questionnaire, and then we can identify the most useful merchants for the purposes of dealing with merchant pass-on.

THE CHAIR: I suppose the difficulty -- I mean, I absolutely understand the questionnaire approach and it's very sensible, but is it really suited to the sort of question you want to ask? I'm at the moment struggling a little bit to see how you're going to pose a sensible question that gives you a meaningful answer from a bunch of merchants who operate their business and probably -- I mean, most of them presumably will operate their business in more or less the same way in the way they set prices, because one assumes that everybody is taking a reasonably pragmatic approach.

I may be completely wrong about this, but I think one can reasonably start with a presumption that what we found out about what merchants do in Trial 2A is probably pretty generic. It might not be, but it certainly wouldn't surprise me if that were the case. So, isn't it better for you to be starting with identifying places where it's likely to be different and focusing your enquiries there, rather than asking everybody a generic question which you're probably going to get a pretty bland answer to?

I have this feeling that we're going to start off down this process where you're going to ask them, "Well, tell us about your pricing practices." You're going to get back something which is very unsatisfactory. You're going to then ask for all sorts of further

information, which I'm going to say is not proportionate, and then we're going to turn up at Trial 4 and you're going to say it's not a fair process.

MR KENNELLY: No, no. The beauty of this process is because we're so far in advance of Trial 4, that between ourselves and the Tribunal, we can develop a fair process. We fully understand, sir. Your concern is about a useful and proportionate engagement with the Claimants on this question. I'm afraid if you're asking me to give you chapter and verse on exactly how we're going to approach this and the questions we ask the Claimants, I cannot help you. What I can tell you is that we have fully in mind the rules of the Tribunal. Putting to one side what you're saying to us today, this Tribunal will not entertain disproportionate requests and requests that aren't focused on resolving the issues in a cost-effective way.

Now, the questionnaire -- back to the questionnaire process -- is that it's a light burden on the Claimants and it may cast light on pricing practices. The experts then will guide us into determining how we can best identify merchants in a way that will answer the legal questions that you established in the Trial 2 judgment about short-term pricing decisions directly and proximately connected between the MSC and pricing. Those questions that you identified will guide us in the questions that we ask the Claimants.

The Tribunal has a concern that this may not go anywhere, but it's premature, sir, for you to say at this stage it doesn't seem like it's going to go anywhere. Because the task, it seems to us, is relatively clear. It may be difficult to get there, but the job, which is to look at the claimant body, the 2,000-odd -- and as I said before, the vast majority of which are recent Claimants and not bound by Trial 2 -- and say to them, "Tell us about your pricing practices", and then we will probe in more detail depending on the answers that we get.

Because the legal question in respect of these new merchants not bound by Trial 2 is whether in setting their pricing, was there that direct and proximate connection with

the MSC? To your point, sir, you know, "Mr Kennelly", you may be suggesting, "you've got quite a job to do, because the burden on the Defendants is a tough one; it's a tough burden to discharge." Absolutely. Subject to appeal, we are affixed with that judgment. That's why we're so anxious to engage the Claimants on this question, because we know we're getting nowhere on merchant pass-on unless we have disclosure and qualitative evidence dealing with these questions.

THE CHAIR: Well, yes, okay. I mean, in a way -- it's difficult to form any view about this at the moment, isn't it? I mean, I think from what you've said, you're not in a position to tell me even what the question would be. For us to have a debate about whether you should be allowed to send a questionnaire like that, I do think you and Mr Cook need to go away and come back with a proposal as to how you're going to get into this problem.

I understand the problem you've got, which is you don't know what's behind the screen on the other side of the court. That's fine. I'm not saying you can't have a go at it, but I am saying that you're going to have to have some rational, proportionate approach to it that's likely to work, and at the moment I'm not convinced you have one. I appreciate the difficulty of it. I'm not criticising you. But I think if you expect to be able to open this issue up, which obviously you need to if you want to run your defence, then you're going to need to come up with a properly formed suggestion for it.

MR KENNELLY: That's all we ask. Give us a chance to work it out, because --

THE CHAIR: Well, I mean, you obviously have a chance. I think, you know, you clearly may meet some significant resistance when you do it, and so you need to have it in mind. It just seems to me to be a very -- I just don't really quite understand why you're taking the approach you are, that you've suggested.

I would have thought a much better approach would be to look at the claimant population and say, there are some people here who look quite different from what

we've seen before. You know, we've had restaurants where we haven't had, you know, roadside coffee vans, and one might think that they do things differently. Maybe they do, maybe they don't. Your experts might tell you that there was a -- and I suspect it's probably -- I don't know if the economic experts will help you or not; you might need to go and talk to some roadside coffee van owners. You see where I'm coming from?

MR KENNELLY: We are doing that. Focusing on those sectors that were outside Trial 2 is absolutely central to the task that we face.

THE CHAIR: Well, I'm sorry. I didn't mean it like -- perhaps you're right; my example is. I didn't mean that to be outside the sector. I meant it to be within the sector. But it's possibly sufficiently far away from the practices we saw in Trial 2, so maybe it's a bad example. But you see where I'm coming from?

MR KENNELLY: No, no. It's a good example, with respect, and that's exactly where we'll be looking. The reason why you and I are stuck in this debate is because I'm trying to explain why we, in addition, will be going back over some of the types of businesses that were looked at in Trial 2. That's, I think, where the Tribunal is saying, are you sure that's a proportionate thing to do? But that is in addition to the significant work that we will be doing on the types of businesses that were not looked at in Trial 2.

THE CHAIR: I think -- well, let's leave it at that. I mean, you've got a task to do there and I don't think we can progress the shape of Trial 4 any further. But I mean, the default position, I think, just to be absolutely clear, is that you've got, whatever it is -- two and a bit years -- within which you can come up with a process. You need to design this process.

MR KENNELLY: Yes.

THE CHAIR: Because you need to work out what you think you can reasonably ask for and the reasons for it. You need to tell the Tribunal why you're asking for it. It's not just going to be a question of, "It'd be interesting to know." You need to explain

what you're trying to achieve and the reasons for the focus you're giving, and you need to get on with articulating that and putting it to Mr Beal's clients and trying to work out whether you can agree it or not, and being back here to argue about it so that it works for a March 2029 trial.

If you don't do that, there'll be no sympathy here for the arguments about not having progressed the defence. As far as I'm concerned -- I mean, we can talk a bit about what the implications are of the Claimants who are not chosen for any investigation. I don't understand at the moment how your position can be -- in fact, I thought you sort of said something inconsistent just before. It seems to me that once we get to Trial 4 and you've had the opportunity to put anything else you want to put on the table, subject to what we can fit into Trial 4 -- obviously the proportionality point -- once you've had that opportunity, you're going to have to accept that pass-on applies at whatever rate is determined to the whole claimant population that's a Host Case. I can't see how you can avoid that outcome.

Because we've given you the chance. What I'm effectively saying is you now have the chance to run an exceptions process against the whole claimant population outside of the post-Trial 2 Host Cases, and you need to take that opportunity now. I don't think you should be getting another one after that.

MR KENNELLY: We certainly would take that opportunity now. And at this stage, the only reason that I'm going to these abuse of process points is because it was said against us that we are bound, bound now, in two respects: bound by the factual findings made in Trial 2 even in respect of new merchants -- but our hands are tied in respect to them and those sectors that were addressed in the Trial 2 judgment -- and that it would be abusive for us to seek to argue anything differently. That's a submission which Mr Beal made, and then I think he was slightly by saying, well, in exceptional cases, maybe you can.

Then he said that after Trial 4 is determined, again, those cases which will be resolved, the results of which will be binding in a formal sense on every other claim. Again, all we said there was, you cannot say now that they will be binding in that formal sense, and you cannot say now that it would be abusive for anyone to come back and say, this one is potentially different. Whether it's abusive or not is something that can only be determined at that point. We have well in mind the Tribunal's point, which is that this process is being developed in order to get resolution across the piece. So if we come back, we have to bear in mind the risk that these abuse of process arguments may have some strength. They have no strength now. The concern is in the future.

THE CHAIR: Well, I'm asking you about the future. I understand your position on the now, but what I'm I think I'm saying to you: you now have the opportunity to run a process to resolve all of the MPO issues against the current claimant population, so the new Host Cases, and you need to take that; and if we get to March 2029 and you haven't done that, then it seems to me that issue has been litigated between you and the Claimants, and you are going to be subject to a binding finding, whatever it is. If it's because you haven't raised it and, and there is no finding, it's the same thing. I mean, obviously it doesn't matter that it hasn't been resolved if you could have raised it. I'm saying to you: you now need to raise.

MR KENNELLY: Yes.

THE CHAIR: And it's only subject to one point, which is if you justifiably come back and say, "Here's a bunch of things we really need", and we work through that and work out we can't fit it all into Trial 4, then obviously it'll have to go off to something else, and clearly you're not going to be stuck with being bound in relation to the things that can't be fitted in. That's not an invitation to make the list as long as you can.

But I just want to be really clear with you. I just don't think that whatever position you're taking now in relation to Trial 2 is going to be something that you're going to be able

to take after Trial 4.

MR KENNELLY: I understand that.

THE CHAIR: Because the door is very much open for you to come with a process that is proportionate, and we will fit that into Trial 4, and then pass-on is done.

MR KENNELLY: Yes. The last point I want to make about this before I move on to the non-UK and Ireland -- again, I don't think this is even in dispute -- is the suggestion that the Umbrella Proceedings Practice Direction or Order requires Defendants to be bound by factual findings made in earlier trials, even in respect of new merchants. That suggestion is obviously wrong, and it's telling that my learned friend didn't show you the Umbrella Proceedings Order to make a submission good. That's not what the practice direction says. It's not what the order says. In fact, the order says in terms that people who join, who become Host Cases, are bound by the outcomes of determinations in ubiquitous matters, except those matters dealt with at Trial 1 and 2 judgments, but the parties may seek to have the Trial 1 and 2 judgments applied by other means, including by agreement.

THE CHAIR: Yes. Just to be clear, I'm not going to make any findings based on the effect of the Umbrella Proceedings. But for me, this is all just about proportionality.

MR KENNELLY: I understand.

THE CHAIR: I don't think it's necessary to get into either the effect of the Umbrella Proceedings as a framework or a piece of process in order to resolve the issues we've been talking about.

Other EEA Jurisdictions

MR KENNELLY: Now we move on to -- again, we're trying to be pragmatic and practical, and we're looking at what we can do in Trial 4 in relation to the non-UK and Irish claims.

The Defendants' proposal, as we see, is to try the 101(1) and 101(3) issues for

three frontrunner jurisdictions, for the full claim period, subject to the limitation PI, from 1992 to the present. We make that proposal with the Tribunal's injunction well in mind that we try and resolve as much as is practicable.

Faced with the Claimants' submissions, it is necessary to go back to the Tribunal with the scale of the task, to look at the issues that arise for the non-UK and Irish claims, and why we cannot assume that they will be answered in the same way as for the United Kingdom.

The Claimants' overall submission is: it's all very straightforward, because these member states are all applying the same CJEU judgment in Mastercard that the Supreme Court applied in *Sainsbury's*. But as you saw yourself from that *Dune* judgment of the Tribunal, it's the differences in the national markets, the national acquiring markets, that matters. That's why one cannot assume what my learned friend calls a read-across from the United Kingdom to the other EEA jurisdictions.

He showed you a couple of passages from *Dune*. May I ask you to go back to that, just to possibly remind you of the question of principles, in the authorities bundle E2. It's the first volume. E2, tab 5, page 427.

Paragraph 83: it is common ground the relevant market is the acquiring market, which is national in scope. Of course, you recall that in this case, the claimant sought summary judgment in respect of the Italian, among other Italian MIFs, on the basis that the Supreme Court had ruled in the *Sainsbury's* case.

If you go to paragraph 84, at the bottom of 427, you see our submissions about the differences between the United Kingdom and Italy: the distinct domestic debit card scheme; the fact that the majority of credit cards are issued under the CartaSi credit card brand, and that it's an issuer and acquirer, and therefore no MIF involved; the lower prevalence of card usage; cash accounting for the majority of in-person transactions. Of course, that's going to be particularly relevant if we lose on limitation

because of the 1992 period. More prepaid cards that are substitutable for debit cards. Mr Holt for Visa, paragraph 85, made the point that these different facts may mean that Italian merchants are able to decline the Schemes' cards, because everyone has a domestic debit card, and that constrains the level of MIFs, so there may be no restriction on competition at all. For Mastercard, Dr Niels said that these different competing options for issuers mean that MIFs may in fact be objectively justified for the Schemes, because the issuers had choice without the MIF; they may not bother with the Visa/Mastercard Schemes at all.

Then my learned friend showed you the reference to the Court of Appeal, but of course, the Tribunal ultimately weren't persuaded that decided the issue. They said over the page, paragraph 88, this is a question of fact, and so it is.

In that regard, just to explain why the read-across idea is not realistic, and Mr Cotter did examine in his statements in detail eight particular jurisdictions; if you go to that, please, you see first of all the issues and then the scale of the task involved. We're not for a moment suggesting, to be clear, that in respect of the 30 or so jurisdictions, there should be a trial. My learned friend said, oh, the defendant is suggesting a 60-week trial. No. Nobody has ever suggested that. (Pause)

Mr Cotter is in the core bundle, tab 20.1, paragraph 8, on page 119.

First of all, these are the distinctions. Paragraph 8, he points out that the market participants are different in each country. There are in some countries, Portugal and Austria, issuer or acquirer monopolies. Domestic payment card Schemes were often the largest card scheme in Belgium, France, Germany, Italy and the Netherlands; obviously going to make a difference to the competitive conditions.

Competing payment products, at 8.2. Based on his research, domestic payment card Schemes in France and Germany account for the vast majority of domestic card payments.

Skipping down, payment cards in some countries only had a marginal presence where payments were predominantly in cash or credit transfers; Greece and Germany. 8.3, the structure of interchange fees applicable to the Schemes transactions vary differently or very significantly between European countries.

Over the page, 120, he makes the point that bilateral interchange fees agreed between issuers and acquirers are present to a substantial degree; Sweden, Latvia, Estonia. Finally, at 8.4, in many of these countries, legislatures and antitrust authorities have actually positively endorsed the interchange fee rates applied; so a question of foreign law, because the foreign law will be the applicable law, that might be that there is no infringement at all, because of the blessing which the domestic authority gave it.

Then at paragraph 9, he makes the point that this is even more complex by virtue of the fact that the claims go back to 1992, the 35-year period, by the time we get to trial and huge changes and asymmetric changes between those countries over that period. This has real implications when you try and do the read-across for which my learned friend contends.

At paragraph 11 of Mr Cotter, we have the six essential facts in the Supreme Court judgment, drawn from the Mastercard judgment in the Court of Justice. But then how are they to be determined when the national market facts are so different? You've got the point at 11.1 about approval or endorsement by the member state authorities. Who is the correct defendant when the MIFs aren't being set by the Schemes at all? Is there a collective agreement where the bilateral agreements are in place?

Then at 11.4, the participation of merchants in negotiating interchange agreements, because one of the six facts, the Tribunal will recall, is the non-negotiable nature of the MIF. If it's negotiable, that falls away. Then 11.5, the counterfactual analysis. In the absence of interchange fees, would there be more competition? That would require an analysis of the competing payment methods.

For infringement, over the page, he makes the point at 14, Mr Cotter, that in several of these countries there is a fault requirement, which we pleaded, before one can show a breach of Article 101(1). That's a question of foreign law. My learned friend said in response to that, well, that's a breach of EU law, or potentially a breach of EU law, of the fault requirement, and therefore they want to argue in respect of each of these national legal systems that the court should disapply whatever they treat as not valid, the fault requirement. But that's again a complex question of law that would arise in respect of the jurisdictions listed here.

Now on causation and quantum, because of course the Claimants are saying that the pass-on should also be determined for the foreign jurisdictions in Trial 4. At paragraph 17, Mr Cotter makes the point, and this is a really critical point: the legal tests for pass-on and quantum will be different. My learned friend said, well, you simply read across, even based on the Trial 2 judgment. But of course, the question of direct and proximate causation derives from our domestic law. The test for merchant pass-on in these other jurisdictions may be quite different. We cannot simply assume it will be the same, since it's a matter of national domestic law. It's true that obviously it has to be effective as a matter of EU law. That leaves a large margin of discretion to the member states' legal systems to work out their own approach. At paragraph 18, you see why this is not an abstract concern. Mr Cotter has researched the key factual differences in those jurisdictions that he lists on the fourth line.

What this means is that when we come to work out what we can accommodate in Trial 4, bearing in mind the complexity of the 101(1) and 101(3) issues, we do say that we can only manage the frontrunner jurisdictions that we have identified. To be clear, we mentioned infringement questions under 101(1), but exemption issues in respect to these foreign jurisdictions are also highly fact-specific, and require detailed, factual evidence of the particular conditions in these member states.

We have a taste of that from our own approach to Trial 3. The factual position in respect of exemption is likely to be very different in each of these foreign jurisdictions. When we work out what we can accommodate, how long this will take, we are entitled to look at how long these issues took to resolve (inaudible) the United Kingdom consumer MIFs. If you look at, again, Mr Cotter's statement, paragraph 21.3 --

THE CHAIR: I thought you meant -- (audio distortion) Cassels rather than Cotter. I assumed you meant Cassels. (Audio distortion)

MR KENNELLY: On the question of what's required for the foreign jurisdictions, there's more detail in Mr Cotter's statement, which is why I went to his statement.

THE CHAIR: Oh, right. I see. You've been taking me through Mr Cassels' statement.

MR KENNELLY: No.

THE CHAIR: I think you have. That's what I've been looking at and it corresponds with all the points you've made.

MR KENNELLY: Well, that's a coincidence, because I asked you to go to -- I think I asked you to go to page --

THE CHAIR: I'm at page 100 -- paragraph 17 is in Mr Cassels' statement, isn't it? 123 or maybe that's --

MR KENNELLY: Core bundle, tab 20.1.

THE CHAIR: No, maybe that's just -- sorry. I'm sorry, it's just the way the app is showing where I am. No, that's fine. I understand. I have been looking at the right pages. Don't worry.

MR KENNELLY: That's a relief.

THE CHAIR: I just thought it was a different statement.

MR KENNELLY: No, no, it's Mr Cotter. I mean, obviously it doesn't matter. We are relying on --

THE CHAIR: No, no, of course.

MR KENNELLY: On this point, Mr Cotter has done more work. Although Mr Beal said it is to be dismissed because he isn't qualified to give the evidence. And I'll come back to the relevance of Mr Beal's submission there. But what Mr Cotter has touched on here is the complexity of the task.

THE CHAIR: Yes, I understand.

MR KENNELLY: Even just for infringement and exemption. Yes.

THE CHAIR: Just pausing there for a minute, if we may. I think the way you've positioned this, as I understand it, is you accept that a sensible starting point -- for the most part. It may not be for everywhere, but for the most part -- is to start with the Mastercard and *Sainsbury's* Supreme Court six essential facts and work out how different it is when you get to Slovenia or somewhere.

MR KENNELLY: Yes.

THE CHAIR: So, we're at least starting from a fixed point which says, okay, well, we know we're all very familiar with how that works and we know what we're looking for. That's not in dispute. I mean, you are working -- everybody agrees we're working for that basis. I don't know whether Mr Cook is in the same place, but I think that's --

MR KENNELLY: The starting point is the (overspeaking) Courts of Justice.

THE CHAIR: -- how we all think (overspeaking). So, when --

MR COOK: Since you looked at Mr Cotter's statement, that very much is my position.

THE CHAIR: Yes. Of course. Exactly. And obviously exemption's a bit different because we haven't done that yet. We don't quite know how we're going to do that. But presumably once we've done it, we'll have some reference point. It may work as well. It might not work as well, but broadly speaking, one would hope, at least as a methodology, we're all going to be thinking about in the same way.

MR KENNELLY: Yes.

THE CHAIR: So that's the first point. I guess, the second point is this question of the

utility of asking you to provide more detail, in other words, to plead out properly in relation to these points, recognising that you're saying, and I think Mr Beal accepts that we're not going to have -- certainly not going to do all of them in Trial 4. There clearly is going to be -- the argument we're having here is how many we can fit in. I'm not sure at the moment that we have a specific pleading, do we, for Germany, France and Italy? We don't yet have that. Is that right? Of these points?

MR KENNELLY: No, we have pleadings on the law.

THE CHAIR: Yes, but not on the --

MR KENNELLY: Not on the facts.

THE CHAIR: Just taking liability for a minute. 101(1). What we don't have from you is a statement of where we depart from 1 to 6 and the reasons for that.

MR KENNELLY: Yes.

THE CHAIR: That presumably is something that you accept has to be done at some stage reasonably soon if we're going to include those in Trial 4?

MR KENNELLY: Yes.

THE CHAIR: So that's the sensible next step, at least in relation to those three.

MR KENNELLY: Yes.

THE CHAIR: Presumably I don't think there's any dispute if we're going to have anybody in Trial 4, we may as well have the three biggest jurisdictions. The question is what else can we fit in there.

MR KENNELLY: Yes.

THE CHAIR: At the moment we don't actually know how many of these points are going to engage France and Germany and Italy. I appreciate probably Mr Cotter and Mr Cassels between them have a pretty fair idea, but I don't. I don't know whether you have a sense of that. I mean, have we got a sort of -- well, we haven't got a pleading and we need a pleading, don't we, to work out just how big this issue is for those three

jurisdictions.

MR COOK: Well, if I could, on that. Attached to the appendix for Mr Cotter, he has actually gone through eight jurisdictions.

THE CHAIR: Yes, he did. I remember. Yes, thank you.

MR COOK: And in fairly lengthy terms. And of course, Mr Beal makes one of his many shots at Mr Cotter in terms of how long that is because of the length of the detail. It's right --

THE CHAIR: Yes. Should we treat that as being complete?

MR COOK: No. I mean, it's absolutely not --

THE CHAIR: Okay. Well, that's what we want to know, isn't it?

MR COOK: It's not a pleading and it's not complete.

THE CHAIR: Yes. Well, that's what we want to know, isn't it?

MR COOK: It's intended to be illustrative of, first of all showing the weight of work that's been done, but I think it does address those three jurisdictions.

THE CHAIR: Yes. No, that's helpful. But I think the question I'm asking is: can we get to the position where we know exactly what's on the list for those three jurisdictions? Because in a way, until we know that, we haven't really got any idea about what's going on, have we?

MR KENNELLY: Mr Cotter's schedule points out is the complexity of the task. It's not a pleading and more work needs to be done, but it's to refute the suggestion that one can read across from our national situation here. But we do need a pleading in respect of the three jurisdictions. That needs to be pleaded by reference to the facts, which are relatively complex.

THE CHAIR: Yes.

MR KENNELLY: The point we've made here is the Claimants' suggestion that we plead in detail for all of the 29 or so non-UK and Irish jurisdictions is completely

disproportionate when even the Claimants accept, I think, about five jurisdictions will need to be in play. We have said that you pick the biggest ones with the largest VOC and then, in respect of those the Tribunal chooses, we will do that pleading so that the Tribunal and the Claimants can see the differences, which Mr Cotter explained in less detail in his statement.

To expect us to do the pleading in detail for every single jurisdiction is disproportionate for the reasons really given by my learned friend, Mr Beal, because he said that it's not really appropriate for someone like Mr Cotter to explain the differences between France, Germany, Italy and so forth, from the United Kingdom. He said he's holding himself out as a banking industry expert to foreign law expert and a witness of fact from the jurisdiction. Well, that tells you what the Claimants expect us to produce in order to be able to properly plead these questions in our defence to the foreign law claims, that in order to produce the necessary detail, the Defendants have to instruct industry experts from those jurisdictions, foreign law experts and any necessary witnesses of fact in order to work out the exact position of the other jurisdictions. It's a massive job and completely disproportionate when we all agree that we say our number, they say theirs, will be ultimately determined in the trial.

THE CHAIR: Yes, I suppose, there's a question, isn't there, about -- so we've got three buckets, haven't we? We've got a group of countries where we all think we're going to deal with them in Trial 4 -- so France, Germany and Italy, because you take a point on all three of them, which you say, certainly in relation to 101(1), justifies a departure from *Sainsbury's* Supreme Court. We know we've got them.

In the second bucket, you've identified a bunch of other countries where there are some obvious differences which you say are meaningful. Mr Beal says some of them are not meaningful. But, you know, you've done some work on that and we know quite a bit about them and the question is going to be how we're going to resolve those.

There's a third bucket, which is ones that you've not said much about of anything and the proportionality question here is: are we ever going to be dealing with these? What I'm wondering is what would be useful, I think, would be at the end of Trial 4 to know what we had live that was proportionate and was contested, without just having a long list of countries which we don't know anything about.

So, my challenge, I think, to you is: are you in a position to be able to commit to come back and say, "Here are the countries we're not going to take a position on"? That might be because you think that you're not prepared to spend £1 million on a bunch of claims that are worth £15,000. I appreciate that's not the only exposure you might face, but that's definitely something you would want to think about, I would have thought. It might be because you have been able to satisfy yourselves, at least at some reasonably sophisticated level, that there isn't a difference, at least for liability. I appreciate that exemptions are a bit harder because we haven't done that yet and so that might have to wait.

But can we put this into four buckets rather than three? The three we know we're going to do: the ones that we know we would have to do at some stage and the ones that we don't think we'll ever have to do and therefore this is not an issue and we can put them off the table.

In other words, I'm really inviting you to accept that there might be some Claimants here, for whatever reason, you're going to accept a read across from the liability judgment.

MR KENNELLY: And as a matter of proportionality and commercial good sense, there may well be a decision taken by the Schemes not to argue the differences for the very small value jurisdictions, especially after the Trial 4 judgment when we have your ruling on these three major jurisdictions, because there will be aspects in those jurisdictions that will arise equally in other civilian jurisdictions. But that's a pragmatic

commercial decision. (Overspeaking).

THE CHAIR: Exactly. I'm inviting -- I obviously can't force anybody to make those concessions, but it would be quite helpful if you could apply your minds to that. And the sort of the debate for it, the benefit of doing it is that the shorter we can make the list of unknowns, the less pressure I think there is to put more things into Trial 4.

MR KENNELLY: Absolutely. I can't say right now, sir.

THE CHAIR: No, no, of course, I understand. I wasn't expecting you to.

MR KENNELLY: Visa and Mastercard are not in the business of wasting their money. These trials are enormously expensive and if the country in question gives rise to an amount of money that is not worth trying, you can be sure that that point will not be taken by the Schemes.

THE CHAIR: Well, I suppose I'm suggesting that consideration could be accelerated so we have a clearer view about what we're looking at. Anyway, I'll leave it there. You can't take any further. I'll take that away. I can’t push it any further.

MR KENNELLY: No, we hear you, and my clients and Mastercard (inaudible) the Tribunal, we hear you loud and clear on that point. The key question really is, what can we fit in in the time available to us? That's where it is useful to look at how long things took in the United Kingdom.

Of course we accept we're not coming from a standing start. We accept that we have a better idea of how to approach these questions from Trial 1 and Trial 2. But having said all of that, we still can only fit the three main jurisdictions and only in respect of 101(1) and 101(3).

You saw Mr Cotter's evidence and Mr Cassels's evidence in relation to the lessons learned from the other trials. Trial 1, for example, the trial that we did, the expert evidence took six and a half days. That was just 101(1), just from 2011 and just for the UK and Ireland; no foreign law evidence. *Sainsbury's v Mastercard* [2016], that

was 101 and quantum. It was nine days of expert evidence.

Then we look at the factual evidence. Our Trial 1, we had five and a half days of factual evidence. This is in Mr Cotter's -- if you go back in Mr Cotter's statement.

THE CHAIR: I've read it.

MR KENNELLY: Yes. You know as well as anyone how long things took, and you were trying as best you could to force us in a proportionate way into the tightest possible time frame as you would in Trial 4. But even then, the factual evidence, as I said, in Trial 1, was five and a half days. In the *Sainsbury's v Mastercard* case, that was seven and a half days. UK-only and only covering ten years.

THE CHAIR: So, there might be some points -- there's a bit of a rerun of the quantum discussion -- because there might be some points which on Mr Beal's case are actually points of principle that would apply across the whole population. He makes the point about who sets the MIF, whether it's (inaudible) somebody else, and he says that doesn't matter as a matter of law. It's hard to see why national law would make any difference to that.

I mean, if it's an infringement under 101, he's right that Mastercard and the Supreme Court -- actually, Mastercard is probably the decision that matters -- that the effect of that is it doesn't matter who sets it, then if that was what Trial 4 determined, that would apply to every single situation in which you put forward a non-scheme-involved rate-setting exercise.

MR KENNELLY: Absolutely. If you imagine for France, Germany and Italy, there might well be points of principle where if Mastercard wasn't involved in setting the MIF, it's not the defendant, that's a point of principle. There'll be points of principle, of course there will be, in respect to these foreign jurisdictions also.

But the problem, what's going to take time, are the questions of fact. The point about countervailing benefits, for example: absent the MIFs, to what extent must the foreign

merchants give credit for the advantages that the MIFs gave them in their foreign jurisdictions? That will require looking at cash, Amex, Klarna and other alternatives which might be more expensive for merchants. (Inaudible) 1992 and in that whole period afterwards, it varies significantly over the time period.

The question of merchant pass-on, whatever the Tribunal feels about our approach to Trial 2 in respect of UK and Irish MIFs, the question of merchant pass-on in these foreign jurisdictions will be a question of their national law. We will have to have the question of principle determined as to how merchant pass-on is approached there, and then how it worked in practice, depending on whatever the test is under French or German or Italian law.

THE CHAIR: And you're accepting that that should go into Trial 4 for France, Germany and Italy?

MR KENNELLY: No.

THE CHAIR: You're not.

MR KENNELLY: Sorry. That's a reason why you cannot put merchant pass-on into -- sorry, I wasn't clear. That's a reason why that cannot go into Trial 4, because that's a massive exercise. The questions for Trial 4 are 101(1) and 101(3).

THE CHAIR: Okay. So, does it boil down to this? You say it should be three; Mr Beal wants more. Hard to resolve that until we see what the three look like, so you need to plead the three out.

MR KENNELLY: Yes.

THE CHAIR: And you do that pretty smartly, I think, given that you have obviously done quite a lot of work on it; hopefully that won't take too much longer. Then when you've done that, we can make an assessment about how many issues there are, how many of them require facts. Mr Beal can make his pitch for putting some more in if he thinks that he can make a case for some room. It depends a bit on where we get to

with some of the other things we've been talking about as well. We've got 10 to 12 weeks to play with and, you know, there are several moving parts, aren't there?

MR KENNELLY: I'm with you, respectfully, so far. But if we're going to plead out those three main jurisdictions, we should be pleading out in respect of the legal and factual differences for 101(3) and 101(1).

THE CHAIR: Yes.

MR KENNELLY: We invite the Tribunal now to say that pass-on will not be an issue in Trial 4 for these jurisdictions. Because if you expect us to plead out the proper approach to merchant pass-on and the foreign jurisdictions, is another separate, enormous task. There is no world in which those issues can be determined in the trial window available to us, along with the --

THE CHAIR: I don't think I'm prepared to rule it out now, but I see the point you're making. I think in some ways I would rather wait and see what you come up with in relation to pass-on generally. Because it is sort of the same thing, isn't it? What's going to be different? The theme that runs through all of this is what good reason have you got to suggest that you should do all this because you think it might be different? That applies to pass-on both in the UK and Ireland, but also I think probably in principle to the foreign jurisdictions. I understand the point about going back to 1992 and it may be you're right about that, but I don't think I'm willing to rule it out yet until we have your suggestion about how you're going to deal with that.

MR KENNELLY: So, you're not really at this stage (overspeaking) --

THE CHAIR: No, I think at the moment I'm not --

MR KENNELLY: -- those three main jurisdictions?

THE CHAIR: Well, I don't think you're in a position to plead pass-on, are you? At the moment, this is all about the process you're going to suggest. The ball is in your court on pass-on; to come back and tell me in relation to UK and Ireland why you think and

how you think you should progress that. It seems to me we should do that before we even turn our attention to the non-UK countries.

So I'm not suggesting at the moment you should plead anything out in relation to that; plead out 101(1) and 101(3). Subject to anything Mr Beal has to say -- I'm sure he'll have plenty to say about all of this -- but at the moment, I'm not suggesting that. But I'm not saying it goes away either.

MR KENNELLY: Understood. No further submissions on scope of Trial 4. That's it from the Defendants.

THE CHAIR: Good. Then, Mr Cook, you're ...?

Submissions by MR COOK

MR COOK: Well, I had a very small number of points, but essentially most of my thunder has already been stolen, including my witness.

THE CHAIR: That's very good news. I was hoping I wasn't going to get it all again.

MR COOK: (Inaudible). You're really not going to get it all again, sir. I mean, from Mastercard's perspective, it looks like there's essentially agreement between the parties and the Tribunal in relation to the UK and Irish quantum. In relation to MPO, there's acceptance that some issues, on any view, need to be determined in relation to UK and Irish MPO.

We very much take on board the uphill struggle we'll have if we want to try and -- you know, we certainly do entirely endorse Mr Kennelly's views and submissions we've made previously that there's no sort of abuse of process or binding effect as a result of the Umbrella Proceedings Order. But it's going to be very difficult to shift in relation to something like international hotels unless there's a reason to think it's done radically differently, as long as the legal test is the same.

THE CHAIR: Yes.

MR COOK: That, really, when we come to the foreign MIFs, is likely to be a very different point. Of course, a lot of what the Tribunal did in the Trial 2 judgment was, for a number of merchants, effectively stop at the first stage of the analysis. I don't mean that critically. Having established the legal test was, in your judgment, subject to the appeal, direct and proximate cause, a number of the merchants, effectively the Tribunal said it is clear that this was not part of stage 1 of price setting, and it's not therefore necessary or appropriate to look at some of the arguments we were running, for example in relation to gross margin targets, which was the other way we said it came in on a wider causation test.

So in those situations, if there are jurisdictions -- and we suspect there will be, or there are, and of course the (inaudible) legal test in many of these countries is likely to change over time as a result of Damages Directive as well, so it's a timing point -- there may very well be a situation where we say the legal test is significantly wider than the direct and proximate cause test the Tribunal concluded applied as a result of English mitigation law.

As a result, we need to, even if it's a hotel -- we were running arguments in relation to (inaudible) there are hotels with gross margin targets. If that is the test, then we're going to need to go further. That, of course, is the reason why the Tribunal concluded that some of the EMPO, economy-wide pass-on issues, should come out of Trial 3. Because once we start getting into a test that is either arguably or is wider than direct and proximate cause, that involves essentially a much wider, evidential analysis, and that goes significantly beyond the analysis that the Tribunal actually did in the Trial 2 judgment.

So we do see where certainly it comes to foreign MIFs. But as long as the test is confined (inaudible) the UK and Ireland in relation to direct and proximate cause, we recognise it's going to be difficult to shift or produce a different analysis from what's

come before. Perhaps we're being more realistic, or at least less optimistic than Mr Kennelly is in that regard.

When it comes to foreign MIFs, you know, we very much endorse where the Tribunal appears to be in terms of direction of travel, which is for the moment, start with the three countries, the three big ones. As you've seen, we've done quite a lot of work in relation to those. We haven't rolled it all the way back to 1992, so there is more work to be done.

But yes, certainly in terms of pleading that out for a small number of countries, and those three would be very suitable ones, that is something we can do in -- I don't want to say too short order, but yes, over the next couple of months, over the next couple of weeks. That's very much something we can do. Then essentially a wait-and-see policy to see what else can be added is a very sensible one (inaudible) how far we are out from trial.

The only point I would make in relation to this is -- and I appreciate there is a judgment coming on cessation events. I don't know if that's an oral judgment or a written one.

THE CHAIR: I was going to give you an oral ruling on it later. There was just a couple of things I wanted to discuss.

MR COOK: Yes. But just to sort of flag in relation to that, of course insofar as we're going -- you know, one of the points we were making in terms of cessation events -- and it may very well be, sir, that you've concluded that cessation events, that essentially that trial is too full already. With respect, one can absolutely understand, if that's the view you've reached.

If we do get to the stage of a Trial 4 that is going to encompass Germany, for example -- and we do say in relation to Germany that we have a very strong cessation event in relation to Germany, because there was, we say, an exemption for a significant part of that time period, which would remove that first half of that time

period.

It may absolutely be sensible not to deal with that in April next year, because that's a trial that's full. But it may very well be appropriate, once we know the scope of Trial 4, to try and trim this down to size in relation to those jurisdictions. Because it would be, with respect, wholly inefficient to try and have a trial that goes all the way back to 1992 if there is a point that is suitable, whether that's PI on the absolute classic sense of very little evidence at all, or even if it's one that involves a little bit more, perhaps, but has the potential to radically reduce the scope of a big trial.

So we do say that would be sensible, and that is a point where we think there is a strong point on Germany, which would essentially remove almost all of the historic claims going back, particularly since it's already accepted against Mastercard, but in relation to the EEA MIF, that they cannot sue us in relation to the EEA MIF prior to, I think, July 2009. We've already got rid of the EEA MIF claim, so if we get rid of domestic credit card, domestic debit, whatever, you really are wiping out Germany for half the claim period.

THE CHAIR: That is something you will presumably plead as part of this exercise we're talking about, because, I mean, I appreciate it sort of probably sits in the limitation, but at the pleading rather than the liability bit. But we need to have that on the table too, don't we, because it's all part of understanding what the shape -- it does seem to me it is properly a Trial 4 subject. If we're looking at Germany, we should be doing it, and it's not in the preliminary issue. I can give you an early reveal that that's where we've got to, that we don't think there is room for it.

MR COOK: Sir, you told us that already.

THE CHAIR: Yes, exactly.

MR COOK: We understood it hadn't made it in, but without knowing the reasons, I didn't --

THE CHAIR: No, exactly.

MR COOK: I assumed you rejected it as a matter of principle, as opposed to rejecting it as a matter of practicality for a hearing that is already very full, and we do understand that.

THE CHAIR: Yes, exactly. (Overspeaking).

MR COOK: And it would be. I mean, we've put it in terms of cessation events, but essentially, if there is -- as we say -- an exemption, there is no infringement. It is simply a reactive (inaudible).

THE CHAIR: Precisely.

MR COOK: So, it would be in that bit of the pleading where we set out those matters, and we certainly do say it would be efficient and sensible, given we've got two-and-a-half years to -- in good time, before we embark on disclosure to evidence, expert evidence -- see if there are bits like that where we can trim these cases down. The other side of it may also be that -- and actually that's where we consider the schedule of losses might well be useful -- having been through this before with Sainsbury's and with Asda, Argos and Morrisons, it's surprising how even quite large businesses struggle to go back significant periods of time in terms of finding their numbers. The other possibility here is that it may turn out that Mr Beal's clients are the ones that say it's not worth the candle, or it is simply not possible to identify what the claim is for the 1990s, for example; going back already 26 years, right at the end of the 1990s, let alone all the way back, and whether anyone can actually identify (inaudible).

Again, a mixture of schedule of loss and also particularly taking those kinds of points, has the potential to try and trim some of these claims back, and that would clearly be sensible for everyone, rather than just everyone saying, "I can go back to 1992". You might be able to, legally -- April will decide -- but being able to do it legally, being able

to do it practically in terms of being able to bring a claim with any form of evidence at all, are very different matters, and I would be surprised if there are many businesses who are readily able to tell me what proportion of credit card transactions took place in 1993 in some of these businesses; or indeed, in many cases, whether these businesses actually existed in all of these jurisdictions in 1993, certainly in any significant (inaudible).

Those are really the points on the foreign MIF claims, but with respect, we do say that the direction of travel that said, let's do, start the process on the three we know very much should be in there, and we have time to think about what, if anything, (inaudible) added. That includes both other countries, but also other issues such as (inaudible).

THE CHAIR: Yes, thank you. That's very helpful. Thank you.

Mr Beal, we should probably take a break.

Reply submissions by MR BEAL

MR BEAL: I've got one observation and then two very short points.

THE CHAIR: Yes. Okay. Let's do that, then.

MR BEAL: I'm hoping to be less than two minutes.

The observation is just in relation to on-us MIFs. You were taken to *Dune*, paragraph 85, which contained the recognition that if it's an on-us MIF, there's no MIF; i.e., if we dispense with MIFs being an issue because no MIF is charged, if no MIF is charged by the Schemes for on-us MIFs and it doesn't get processed by the acquirers of MIF, and the acquirer doesn't pass it on to us, and therefore there's no claim.

THE CHAIR: It's not in your loss schedule, so it doesn't need a credit.

MR BEAL: Exactly. Yes.

The second point is, if you'd be kind enough just in the correspondence bundle to turn to tab 53, page 201, this is on the country cohort selection point, and I'll make the point

again. (Pause)

One sees there the concentration of claim value. In the top ten, the two that are missing from Mr Cotter's analysis are Netherlands and Ireland, there is considerable claim value there. One can see the omission of Ireland. There isn't an explanation for the omission of the Netherlands.

All we're suggesting is it would be very useful if the Defendants could, in a pleading somewhere, say what it is, for example, about the Netherlands that's different from Belgium, which is number 11, or indeed Luxembourg, which is a lot further down the list; not least because, traditionally at least, the Benelux countries have functioned as a pretty much single market for many years, and certainly since the EU have done so. What's different between Sweden and the other Scandinavian countries; for the sake of argument, Denmark and Norway, where there are close trade links. What's different between Austria and Germany?

These are not difficult questions, but if we had a recognition that, for example, Germany and Austria were substantially similar in their market conditions, then we only need concentrate on Germany, and it can then be more easily read across the German findings to the Austrian findings; if we had a finding on the Netherlands that could be read across to Belgium and Luxembourg, for example.

These are the sorts of enquiries that we're suggesting the pleading process could tease out, and it would be helpful in our submission for it not simply to be confined to the big three, if one calls them that, because the difference between Italy and Spain is relatively modest.

THE CHAIR: So, it would be possible to say, get on with pleading France, Germany and Italy; and maybe to my exchange with Mr Kennelly, to say, "We expect you to tell us whether you are going to take a point in relation to the rest of the top ten".

MR BEAL: Yes.

THE CHAIR: Albeit not necessarily pleading it out at this stage.

MR BEAL: We would envisage something similar to the limitation process, where we just needed to be told which ones were being earmarked for separate treatment, and which ones could be lumped together with others. So when you asked about *Heureka*, the answer came back, "Well, France and Germany are the two candidate countries that we're predominantly relying on", and it was then teased out which other ones were then being put forward as potential jurisdictions, and we've ended up with a frontrunner of three. A similar process here. That's the first substantive point I was going to make. The next substantive point is if I could invite you, please, to look at, supplemental bundle, tab 1, page 60; Mastercard's Defence. This goes to pleading pass-on and whether pass-on should go into 4C.

THE CHAIR: Yes.

MR BEAL: As currently pleaded, paragraph 127 of Mastercard, its defence doesn't distinguish between any of the jurisdictions. It simply pleads that costs have been passed on through increased retail prices at downstream level or through surcharging, or have been offset by reducing other costs by negotiation with one or more of its suppliers. They're running both MPO and supplier pass-on for each of the jurisdictions where they are pleading this defence.

The current pleaded position is that the same pass-on position applies across the board. We're fine for them to maintain that position, but it follows from that that the findings that you make for what we're calling module 4A of Trial 4 would necessarily have to be read across for everything else, because there is no pleaded distinction based on any of the jurisdictions. If that remains the position, then we're simply putting the marker down that pass-on should be treated in exactly the same way, because --

THE CHAIR: Well, Mr Kennelly is saying we shouldn't be doing any pass-on at all at Trial 4.

MR BEAL: It's subject again to the point that they haven't identified any difference of treatment on a per jurisdiction basis from the UK and Ireland.

THE CHAIR: Part of the difficulty -- I do have some sympathy for a claim period that goes back to 1992, Mr Beal. It's a pretty enormous job, isn't it, if you're really expecting them to go through all of these jurisdictions and find out what factual differences might apply to liability exemption, you know, pass-on. It's a big job, isn't it?

MR BEAL: Pass-on requires the Defendants to establish that the Claimants have mitigated their loss, for example, from the period from 1993 to 2016 through a specific act of mitigation.

THE CHAIR: Well, it does under English law, but it might not under Italian law.

MR BEAL: Well, they haven't yet proved or pleaded that there is a distinct and different approach, because they have adopted a generic pleading to pass-on.

THE CHAIR: Yes.

MR BEAL: So all we're inviting them to do is plead out pass-on, and then we can determine more readily whether or not it can be accommodated within trial 4C. If at present, as a generic pleading to pass-on, it draws no distinction between any of the jurisdictions, then our submission is, well, there's nothing to say it can't be done. If they're saying there's a key difference here and it requires this evidence, then that needs to be pleaded, and we can then take stock of what the position is.

THE CHAIR: Yes. Okay. Well, I mean, they need to do the work to do the pleading though, don't they?

I think probably where we are at the moment on pass-on is the ball is firmly in the Defendants' court to come back and say, "If you want to run a pass-on argument in Trial 4 in relation to UK and Ireland, you need to explain how you're going to do that". Mr Kennelly, I think, has accepted the challenge and that's what they're going to have to do. We haven't talked about timings, we should do that; but when we see what that

looks like, I think we'll need to revisit this question.

At the moment, I think there may well be a choice, Mr Beal, that you might have to confront, which is: do you want to spend the time in Trial 4 doing more jurisdictions without pass-on, or fewer jurisdictions with it? Because I think it is apparent that to the extent that there are arguments about differences, be they legal, like the test, or factual, like we didn't use cards in 1996 or whatever, that's going to occupy quite a lot of trial time.

MR BEAL: If I may say, sir, I can see the force in that. What, with respect, would be useful, therefore, if they are pleading out France, Germany and Italy, is that they plead out the legal position on pass-on if it's said to be different, because they've already acquired the expert foreign law evidence to be able to plead the foreign laws said to apply in these jurisdictions, and one infers from that they've taken advice on all of the aspects of defending these claims from their foreign law experts. I'm not obviously seeking to go behind the litigation privilege that is covered there. I'm simply asking the Tribunal to infer that they have got that readily to hand.

THE CHAIR: Yes. Okay.

Well, I think we should take a break for the transcriber.

MR BEAL: Yes, those are my only submissions.

THE CHAIR: Those are your points. Yes, thank you.

Mr Kennelly, Mr Cook, there's just two points there, which I think would be useful to canvass with you after the break. First one is whether we could -- I've now lost the reference to the correspondence bundle, 201 -- is there anything you can do? Can we say to you: we would like to know where you are on the top ten even if you don't plead them out. And we'd also like you to identify, for example, Benelux, Germany, Austria, as to whether you are going to take separate positions in relation to them. What more can you offer there? Or what are you going to say, if I were to push you

a bit harder on that?

The second point is the point that Mr Beal's just raised. I think it would be possible for you to tell us something about pass-on in relation to France, Germany and Italy, without getting into pleadings of all the facts. In other words, if you're going to say the legal test is different, it would be interesting to know that. I would have thought that is something you could accommodate within the pleadings.

Can I leave those with you to take instructions and we'll deal with them when we come back. Thank you.

(3.27 pm)

(A short break)

(3.43 pm)

THE CHAIR: Yes, Mr Kennelly.

Further submissions by MR KENNELLY

MR KENNELLY: Just coming back on the two points that you left us with when we broke. The first was whether we could plead out particulars in respect of articles 101(1) and 101(3). I think I heard you say in the top ten jurisdictions in the list in that table in the Stephenson Harwood letter.

THE CHAIR: Yes. It wasn't pleaded out particular so much as just tell us whether you're going to take a point or not.

MR KENNELLY: Yes.

THE CHAIR: It was a higher-level point than that. I think we've got the particulars obviously, for France, Germany, Italy, expecting something less but wanting to know whether they're in play, really, I think is the point.

MR KENNELLY: Well, the short point is that it would be disproportionate at this stage to require us to say if they're in play, because in order to work out if they're in play, in

addition -- and by “in play”, we mean we see the claim values so there's definitely a value. The question would be how different are they? For the purpose of 101(1) and 101(3). In order to work that out, there's no substitute for doing the very detailed work that would be required to work out how different each of these jurisdictions are. On 101(1), you have the points about situation with competing Schemes, domestic card Schemes, and the acquirer monopoly point. That's just 101(1). Tracking from 1992 until the present day is a massive job.

And then 101(3), again, in order even to know if it's in play, we would have to investigate from that period, from 1992, to the present, questions of cost savings to merchants, from increased usage, innovation, fraud protection, better credit terms, the ticket lift effect, innovation like contactless. In order to even answer the basic high level question that you asked me, sir, we would have to do that work. To require us to do that -- and it would be very significant -- for these ten jurisdictions, plus the smaller jurisdictions which are outside the top ten, like Belgium, Norway, Denmark, Finland, Luxembourg, it would be really, really disproportionate indeed.

THE CHAIR: Am I to take it that you haven't looked at the Netherlands, for example? Is that the position? Because obviously, Mr Cotter and Mr Cassels have both given us some evidence about having looked at things. Are you telling us that you've not looked at the Netherlands?

MR KENNELLY: Well, speaking for myself, we haven't looked at the Netherlands in detail for 101 or 101(3) to know if it's sufficiently different or not. Unless I'm (overspeaking).

THE CHAIR: I take the point about 101(3). I think maybe that's a bit more difficult, but just 101(1), are you able to confirm that you're not aware that you've done that investigation?

MR KENNELLY: Unless I'm told by someone behind me, I'm going to submit to you

that we have not done that investigation.

THE CHAIR: No. Fine. Okay. Okay. Thank you. And the second question?

MR KENNELLY: Second question was whether we could assist the Tribunal in understanding whether the approach to merchant pass-on, as a matter of law, is different in France, Germany and Italy than it is from the position under English and Welsh law here.

THE CHAIR: Again, I think the point is that there are some places where one might think -- sorry. Carry on. I'm sorry to interrupt you.

MR KENNELLY: For those three front runner jurisdictions, yes, I can't commit at the moment to a time. I need some instructions on a time frame, but we can do an investigation into what the approach is to merchant pass-on in those front runner jurisdictions, and to identify how it is different, if it is, from the English law position.

THE CHAIR: Yes, I think it is just to be clear -- yes, absolutely. It is just the question of whether the legal test would be different.

MR KENNELLY: Indeed. Yes.

THE CHAIR: Of course, which may, in itself, be a contentious point so maybe it doesn't take us terribly far, because we know that it was a contentious point under English law so it's quite possible it's a contentious point under French law as well.

MR KENNELLY: Well, let's see. We'll do as the Tribunal has asked and then see what the Claimants make of it.

THE CHAIR: Yes. Okay. That's very helpful. Good.

MR KENNELLY: And Mr Cook (inaudible).

THE CHAIR: Yes, Mr Cook. Yes.

Further submissions by MR COOK

MR COOK: So from Mastercard's perspective, I mean, at the moment we have

provided information on Germany and Austria, on both of those and that was one of the examples Mr Beal proposed are things we could deal with. They are very different countries --

THE CHAIR: Yes.

MR COOK: -- despite proximity, in relation to this. The countries that are put forward to Mr Cotter's statement are the ones that we have investigated to that degree of detail. There isn't a sort of back pocket set of other countries that we investigated to the same degree but were less helpful. So it's not the case that there is -- that I'm in a position to sort of put forward a sort of similar level of information on any other country at all. In terms of what the legal team know and Mr Beal always objects when I say things like that, because I'm giving evidence, that there are factors associated with the Netherlands that are likely to give rise to similar kinds of arguments. The Netherlands had its own very strong domestic scheme for a long time but we just simply haven't investigated that. Those are things that the legal team simply know in (inaudible) experience.

At the moment there are none of those where we're in a position to say we don't think that we're going to take a point -- to take a point of view to all of them. Significant value; lot of differences in all these markets.

THE CHAIR: Yes. And you're in the same position in relation to pass-on to France, Germany, and --

MR COOK: Yes, we're happy to provide that sort of legal pleading. It will take a little bit of time. It's not something we have, again, ready to produce overnight but it's something.

THE CHAIR: Okay. Thank you. Thank you.

Anything else, Mr Beal?

MR BEAL: Well, just to note that if we're in a position where the Schemes can't say

whether or not any other jurisdictions are the same or not, it doesn't give much hope for the read across of the three front runner jurisdictions that they've identified, notwithstanding their protestations that it will be very easy once we've got those three identified and nothing more. I simply make the obvious point that this looks like another salami-slicing exercise. But, there we are. We are where we are.

I don't know whether you'd like me to deal with --

THE CHAIR: I think I might summarise where we've got to.

MR BEAL: Of course.

THE CHAIR: Just so we've got that and I think I'm obviously going to do that without the benefit of any submissions about timings. So I think what we might do is just try and get a clear record of where I think we've got to, which is largely, I think, by agreement, and then ask you to work that into the draft order that's hopefully circulating around and suggest some times and have a dialogue about that.

The one thing I would say about the timing is that it's obvious that these are interrelated. I suspect they're not going to work together terribly well in terms of processes, because I suspect that the process of working out how many quantum issues we have to deal with is going to take some time and isn't necessarily going to throw much light on what other time we've got available for things which might operate on a shorter timetable. But I think it would be helpful if we could all do our best to try and align it so we can have sensible conversations about what requirements we have for each subject, if I can put it that way, for the Trial 4 hearing.

(3.53 pm)

Ruling on Scope of Trial 4

THE CHAIR: The position in relation to Trial 4, which I think is largely by agreement, is as follows. It is clear that we should have in Trial 4 a section of the trial devoted to

UK and Irish quantum, which I will say a bit more about in a minute. Also, that we should have a section of the trial devoted to non-UK/Irish MIF claims concerning Article 101(1) and 101(3) issues, focused at least in the first instance on France, Germany and Italy but with a further consideration to be given to other candidate countries.

Just dealing with quantum, the position, agreed between the parties, is that the first step is for the Claimants to plead out their quantum claims on an individual claimant basis. It is up to the Claimants how they do that (they say they will produce schedules of loss signed by a statement of truth) but they will need to address all the quantum points that have been raised by the Defendants in their pleadings. I am not otherwise going to prescribe the format of that, but it does need of course to be done properly. The second step is that the Defendants should then respond to those pleadings, however they are formulated.

The third step is that the parties are then to produce, for the Tribunal's review and approval, a list of the matters in dispute which arise from that pleading process and which justify consideration in Trial 4. When I say justify consideration, the point is that I am not expecting to include things like the mechanics of calculation, which I will come back to in a minute. The list should be focused on matters of significant dispute, which the Tribunal can and ought to be resolving.

When producing that list of matters in dispute, the parties should do their best to indicate for each item whether they consider: (i) it to be a matter of law, where there is no real factual dispute and any factual background can be dealt with by way of agreed statement of facts, or (ii) whether it is a matter which requires, or would benefit for resolution purposes from, a wider factual context and, if so, at least in broad terms, what sort of factual context that might be.

Then, step four, there should be a process of expert engagement to determine what

evidence is required to resolve each disputed matter.

Step five, at that stage, we will need a CMC to deal with any disputes about any of that. I suspect, given the indications of timing, that is probably going to be within the second half of next year.

Then step six, running alongside all of this, I would encourage the parties to develop a process for dealing with calculation and other mechanical issues. How that is constructed is a matter really for the parties, but it does seem to me that some form of ADR, independent assessment or something like that, would be advantageous and would help to take some of these issues away from the Tribunal.

That is the quantum part of the trial. Related to that, is the question of merchant pass-on. The point here is that the Defendants need to put forward a process for whatever factual enquiry they say is necessary into merchant pass-on in relation to the UK and Irish Claimants who were not Trial 2 Host Cases.

Where the Defendants wish to conduct further factual enquiry in order to develop their merchant pass-on case in relation to those Claimants, they need to put forward a process. It needs to be proportionate, it needs to be justified by reasons and justified by reference to the Trial 2 merchant pass-on outcomes. That obviously needs to be done fairly smartly because it is likely, if the process is acceptable to the Tribunal, to involve evidence gathering, witness preparation and so on, and we need to leave plenty of time for that to be done properly before Trial 4.

To the extent the Defendants do not put forward a process that is satisfactory to the Tribunal in time for merchant pass-on issues in relation to that claimant cohort to be dealt with at Trial 4, my current expectation is that the Defendants will be prevented from re-opening that issue with that claimant group. That will not apply of course to any merchant pass-on issues in respect of which a decision is made by the Tribunal to defer them to a later trial.

Turning to the non-UK or Irish MIF Claimants. The Defendants are to plead out their article 101(1) and article 101(3) cases for France, Germany and Italy. At this stage, they are not required to provide any further indications or pleading in relation to other countries. They should also plead out any foreign law points about the legal test for merchant pass-on in France, Germany and Italy.

Once that is done, we will revisit what other jurisdictions can be accommodated in Trial 4 and/or whether any further pleading should be required from the Defendants in relation to other jurisdictions in the list of claimant countries. I should note that will be residual Irish MIF claims which post-date the UK's departure from the EU and also, potentially, Irish claims for periods before the claim periods in Trials 1, 2 and 3, which will need to be addressed at some stage.

The Claimants should then respond to that pleading in the usual way, and then there will need to be a CMC listed shortly after that to consider the implications of all of that for the Trial 4 timetable. I think that is probably going to mean a CMC in the first quarter of next year. That process will need to move fairly smartly. Mr Kennelly said it might take a couple of months for the Defendants to produce their pleadings. I can understand that, and I imagine the Claimants will need some time to respond. I would think that certainly by March, we ought to be gathering back to talk about that aspect of the Trial 4 content.

(4.00 pm)

THE CHAIR: So I think that deals with that issue. Are there any questions about any of the practicalities of that before we move on to the preliminary issue?

Yes, Mr Beal.

MR BEAL: The only practicality question (inaudible), I think you asked to see a copy of a draft order --

THE CHAIR: Yes.

MR BEAL: -- as we discussed, by tomorrow afternoon. What would you expect that to cover? All of the matters you've just dealt with in that ruling?

THE CHAIR: Well, I think it would be helpful for the draft order to include the requirements to plead things out. So in relation to quantum, I think it should cover the Claimants pleading out their claims, you responding, a date for the list of disputed matters. I think probably after that, it may as well indicate generally that there will then be a process and a CMC to be listed to determine how the expert should engage and so on. Well, actually I suppose the experts may engage before the CMC, but I think at that stage it's not so much order as general indication of direction.

Similarly, in relation to the non-UK claims, the pleading dates should be specified, the responses from the Claimants and the expectation there'd be a CMC. I think if the question is aimed at whether there's an order in relation to the merchant pass-on part of the ruling I've just given, well I'm not sure there really is an order to make, because ball's in your court and hopefully that's entirely clear and it's on the record. I don't think we need an order. If you don't do anything, then there will be consequences. If you delay and do it late, then there will be consequences. If you get on with it and produce it, then obviously we'll deal with it and make some progress with it.

MR BEAL: That's very helpful, sir.

THE CHAIR: Yes, thank you. Good.

Discussion on Preliminary Issue

THE CHAIR: Mr Beal, preliminary issue. I think we've probably got time. I've got a short ruling to give, but there are a couple of points I'd like to raise with you. I think some of them probably -- unless you particularly want to make some points, it may be helpful for me just to indicate --

MR BEAL: The only answer I was going to give you was to whether or not there should

be an EU commitments decision in there.

THE CHAIR: Yes. Well, just before we do that, can I just check that you -- I think we've said to you we'd like to have a statement of facts, and I assume everybody's willing to do that. Was that in the letter? I can't remember.

MR BEAL: It was, yes. The letter of 23 October, I think, was the --

THE CHAIR: Friday, I think, was it? Yes.

MR BEAL: Yes. You requested, I think, a statement of agreed facts lying behind this by December, which --

THE CHAIR: Yes, 15 December. Just to be clear about that, the reason for that is it seemed to me, looking at your per se amendment, that it probably wasn't necessary to put that in, which is what I'll say in a minute. But it did beg the question as to what the factual basis of all this is going to be. It seemed to me that that was the way to deal with it: to say, well, let's just have a statement of facts. And actually, we should, I think, have that for the purposes of the preliminary issue anyway.

MR BEAL: You'll appreciate what I was trying to avoid was special pleading by the Defendants. This is desperately unfair for them, which isn't, we say, the right test for public policy for litigants as a whole.

THE CHAIR: Yes. Well, I mean, you can run both of those out, both of the arguments. Neither of them, I think, need to go into the wording, but they're both at large if you want to run them. But it seemed to me that if you have a clear statement of the facts that are relevant to the preliminary issue, that --

MR BEAL: In terms of the Scottish law point, in fact one finds that the Defendants in a submission in the CICC claim are relying on the five-year Scottish limitation period as a pleading point. I just want to be able to argue in April, or whenever it is next year, that it's appropriate for this Tribunal to bear in mind the Scottish law limitation provisions, because it's relevant to the public policy test.

THE CHAIR: Yes, absolutely. Okay.

MR BEAL: If we don't need wording for that, we don't need wording for that.

THE CHAIR: No, I don't think we need wording for that. So a statement of facts by 15 December. There was just a small point about the order which seemed to contemplate more than one report per jurisdiction.

MR BEAL: We only want one expert. I don't know what the defendant's proposal is there.

THE CHAIR: It may be that I'm shadowboxing, but if you -- it's tab 18, I think, of the core bundle. If you look at the way in which the expert report dates are described.

MR BEAL: Sorry, tab 18?

THE CHAIR: Yes, tab 18, page 96 of the core bundle.

MR BEAL: Yes.

THE CHAIR: It talks about the Defendants -- it's the same for the Claimants, so it's not just a point about you, Mr Kennelly -- "shall file and serve their expert ..." There's an "s" in brackets after "expert reports". But this is actually only for each of the PI jurisdictions. I just wanted to be clear that we're not expecting more than one report per jurisdiction for each side.

MR BEAL: Absolutely.

THE CHAIR: Yes.

MR BEAL: It'll be a single report from the Defendants for each jurisdiction.

THE CHAIR: Yes. I'm not quite sure why it's got the "s", then. Maybe that was an excess of caution from someone, but just to be clear that's the position.

MR BEAL: Each jurisdiction will have its own expert.

THE CHAIR: So one --

MR BEAL: One for France, one for --

THE CHAIR: Yes, exactly.

MR BEAL: Per country, yes.

THE CHAIR: Yes. Well, it's just the wording. You don't need the "s" if it's for each of the jurisdictions. It's an expert report for each of the PI jurisdictions.

Good. Okay, thank you. Then the third thing was the PTR. I've had a discussion with Mr Justice Waksman about the hearing, and he was keen that we should have a PTR just to make sure it was all in order. We've been quite directive, I'm afraid, about the date. I don't know whether that does work for you or not, but just to make it work for him and for us.

MR BEAL: I've asked my clerks to put it in my diary. As far as I know, it's gone in.

THE CHAIR: Yes. I don't know if Mr Kennelly -- you may not have caught up with that, but it's the ...

MR KENNELLY: I'm currently in difficulty on that date.

THE CHAIR: Yes.

MR KENNELLY: We were told that the Tribunal was indifferent to my difficulty. But if that's not the case, then --

THE CHAIR: Nothing personal.

MR KENNELLY: Don't worry.

THE CHAIR: The only thing is it's an hour and a half. It's only going to go in the diary for an hour and a half. I don't think it's going to be terribly substantial. It is possible we could accommodate some change in timing, not do it at 10.30 am, if that made any difference, but I'd have to explore that with --

MR KENNELLY: (Several inaudible words).

THE CHAIR: Yes, of course.

MR KENNELLY: Yes. I'm told that if it could be fixed after lunch, then tomorrow (inaudible).

MR BEAL: It's currently in my diary for all day, so that's fine.

THE CHAIR: Yes. Mr Cook, make any difference to you?

MR COOK: I'm afraid, I haven't had the opportunity to (overspeaking).

THE CHAIR: You haven't yet. Oh, fine. Okay. Well, look, why don't I leave it with you to come back -- I mean, I have no idea about Mr Justice Waksman's diary. I will have to see whether he could do that. But it certainly works for me if it was after lunch. If we can accommodate that, we will. If we can't, we won't.

MR KENNELLY: I won't take it personally.

THE CHAIR: Yes, good. Okay, thank you.

MR BEAL: Did you want submissions on the commitments point?

THE CHAIR: Yes, I do. That's the only thing I do want submissions on, actually. Because it just seemed to me -- and really just to set the scene a bit, Mr Beal -- it just seemed to me you're making this point that says, just as a matter of principle, you can't see how a commitments decision could give rise to a cessation event, because they're expressly on the basis that they don't affect private enforcement rights. I guess the question was an invitation to you whether you thought it would be sensible to include at least one of them for the purpose of testing that proposition.

MR BEAL: That does rather short circuit the point, if it's simply a very short point that's dealt with at the hearing. I was simply going to refer you to the Trial 1 decision in your part of the judgment at bundle of authorities, E2, page 1171, where you say it's not binding; the correct position is Mastercard and Visa commitments decisions are not binding on the Tribunal.

What that means, in my submission, is that whilst there may be an argument as to whether or not the exemptible level for a MIF, if there is one, should be set by reference to the commitments decisions as a matter of either policy or just analysis. That, of course, would mean that if there was an exemptible level, the claim would fail to the extent that, you know, there would be no difference between the amount charged and

the amount that was said to be the exemptible level. That wouldn't have any bearing on limitations as such.

THE CHAIR: No, the limitations point's just under that. It's just an --

MR BEAL: (Overspeaking).

THE CHAIR: -- extension from liability.

MR BEAL: Yes.

THE CHAIR: But I anticipate, I think, we'll hear from Mr Kennelly and Mr Cook, I just fear they're going to make a slightly different point, which is that somehow -- and I don't know how -- they're going to say that because there is an exemptible level of any sort, that has an effect on cessation. You see that, because they make the point about the IFR as well. It seemed to me that whatever the answer is to that broader point, the one place where it might be interesting to explore that would be a commitments decision because of the status -- your argument, the status is that they expressly do not affect liability. That was the reason for suggesting it.

MR BEAL: It was my case that they did have a standing, but it was rejected. I've lost that point. I'm not going to use a point I've lost.

But the short point is, if it's not binding, then the fact that a commitment is being given at a certain level isn't binding either, so it's not de facto exemption.

THE CHAIR: Yes.

I don't know, Mr Kennelly, whether you think it's a sensible thing to do or not. It just struck me -- as you know, we're not terribly enthusiastic about any of the other ones you've put forward, but it does strike me that it might be, if it could be done quickly and we could deal with that point, however you want to argue it -- I'm not completely sure I do understand how you're going to argue it -- but if it is just a matter of law and you want to argue it, then perhaps we should do one and see what happens.

MR KENNELLY: Thank you. We respectfully agree, because it is a pure point of law.

We're not asking the Tribunal to determine a dispute of points of fact. It's an open question of law about the significance of a commitments decision, whether the fact that the Commission accepted commitments marked a sufficient change in the legal and regulatory background to bring one infringement to an end; and possibly, if an infringement continues after it, it's a different infringement. That's a question of law. It's an open question.

THE CHAIR: Yes. So we know there's no factual material about any of this. We know what the -- I mean, whichever one we choose, and I might leave it to you to discuss which one you wanted. There are three of them, I think, at the Commission level, so up to you which one you think I would suggest is the easiest to deal with.

Anyway, on that basis, if you're supportive of that, Mr Cook, do you have any views?

MR COOK: It's not one that we've taken (overspeaking).

THE CHAIR: No, so you're not --

MR COOK: We're neutral in terms of (inaudible) Mr Kennelly (inaudible).

THE CHAIR: Yes. Okay.

MR KENNELLY: May I just make one possibly inappropriate and opportunistic suggestion?

THE CHAIR: Yes, of course you can.

MR KENNELLY: You mentioned to my learned friend Mr Cook that the reason why the cessation events -- you're about to give us a ruling. Certainly, why some of them were excluded was because of logistical difficulties. Of course, the parties haven't had a chance to discuss this, but if it were a question of time and we needed more trial time, and the trial could be heard slightly later, one possibility would be to accommodate at least the cessation events that Mr Cook put forward, in addition to the ones the Tribunal is endorsing as candidate cessation events, and moving the limitation trial to a period where a longer slot could be obtained.

THE CHAIR: Yes. I think that is quite difficult, Mr Kennelly. We've managed to secure the time and Mr Justice Waksman's diary, and -- I mean, I think the difficulty is: with all of these, it's not entirely clear to me how straightforward they are. Some may turn out to be more straightforward than I fear, but all of them on the face had a bit of a sniff of being not absolutely that straightforward.

I understand the point you make. I don't think it really is the practical answer, given where we are. Thank you for that, though. I'll give you my ruling in relation to this.

(4.16 pm)

Ruling on Preliminary Issue

THE CHAIR: There are two areas of dispute between the parties in relation to the preliminary issue which is to take place in April 2027. The parties were content to have these decided on the papers, but as it happens, they have been aired to some extent today, so I will give an oral ruling on them now.

The first area concerns two minor disagreements about the wording of issue 6 of the list of issues for the preliminary issue hearing. One of these is whether it needs to be made clear that the Tribunal is determining the public policy point as a matter of law, rather than determining factual matters. The Claimants suggest including the words "per se" to deal with this. I do not think that is necessary, as the Tribunal has now directed the parties to prepare and agree a statement of facts for the purposes of the preliminary issue hearing. That statement is to be filed by 15 December 2026. The Tribunal will deal on the papers with any dispute between the parties about the content of that statement.

The other of these issues concerning issue 6 is the wording regarding which public policy we should have reference to – just English or potentially other nations in the

UK. I do not think we need to include the reference to UK and/or English public policy. Instead, we should remove these words and replace them with "incompatible with relevant public policy", to leave it open to the parties to argue about the relevant public policy in April.

The second area of concern is the inclusion of cessation events for the purposes of issue 4 of the list of issues for the preliminary issue. In this regard, it should be noted that the primary purpose of the preliminary issue hearing is to address issues 1 to 3 and 5 to 7 in the list of issues, and the examination of cessation events was always considered to be supplementary, and only appropriate where there was no need for material factual input. The Claimants say issue 4 should be limited to the 24 July 2002 Commission exemption decision in respect of Visa's intra-EEA MIF arrangements for debit and credit consumer cards, which is agreed by all parties as a suitable event for consideration of the preliminary issue hearing. As I understand it, the parties all agree that the status of this decision as a cessation event can be determined largely by reference to the face of the document, without much or indeed any reference to a wider factual context.

The Defendants between them suggest a myriad of different events across a number of jurisdictions. I have counted 22 events in total, including some which fall outside the three jurisdictions selected for consideration at the preliminary issue hearing. Nearly all of the events suggested by the Defendants are unsuitable for inclusion in the preliminary issue hearing, because they variously involve questions of fact, fall outside the selected jurisdictions, are likely to be complex and time consuming, and in aggregate, are likely to consume too much time at the hearing, especially given the limited benefit some may bring.

By way of example, both Mastercard and Visa have put forward events in Germany in

which the Bundeskartellamt is said to have given an exemption either expressly, or in Visa's case, by not objecting to a notification. Mastercard's suggestion seems to depend on some analysis of the rate-shifting responsibility within the Mastercard scheme, which itself suggests at least some factual enquiry. Visa's suggestions all beg the question of the effect of non-objection to a notification for the purposes of assessing infringement. None of that seems to meet the criteria of an absence of any material factual input.

In relation to various jurisdictions, it is said by the Defendants that reductions in the MIF through various means would amount to a cessation event, but that raises the question of whether the reduction is to a non-infringing level; for example, because it is below an exemptible level. That sort of issue is entirely unsuitable for determination at the preliminary issue hearing, for obvious reasons.

Visa has also put forward events at the European level which involve aspects of Visa's rules other than the MIFs themselves or decisions of the Visa Europe board. Again, these are not straightforward assessments of a legal instrument which largely on its face, with limited factual context, determines whether or not an infringement is continuing.

Visa puts forward various decisions which are limited to periods of marginal relevance; for example, a Commission comfort letter, which was withdrawn in December 1992, which is barely a few months after the earliest possible start date for the claim period.

Visa also puts forward events which involve narrow slices of commerce, such as Italian fuel distribution. These seem likely to take up material time at the preliminary issue hearing for only marginal benefit as far as the wider proceedings are concerned.

In order to ensure that the preliminary issue can fulfil its primary intended purpose, which is to resolve issues 1 to 3 and 5 to 7, I have decided that subject to one point, all of these suggested cessation events put forward by the Defendants are unsuitable

for determination at the preliminary issue hearing in April 2027.

The single point arising is whether it would be sensible to have some form of commitments decision event included, to test the proposition advanced by the Claimants that as a matter of principle such decisions or agreements cannot amount to a cessation event in the absence of a reduction of the relevant MIFs to zero. Having discussed that with the parties, I have concluded that it would be feasible and consistent with the nature of the preliminary issue hearing to include one such event at the European level. The parties are therefore to agree on the most suitable of the three Commission commitments decisions identified by Visa, which are: 8 December 2010 in relation to consumer debit payment cards; 26 February 2014 in relation to intra-EEA MIFs for consumer credit cards; and 29 April 2019 in relation to interregional debit and credit card transactions. The parties should seek to select the event which has the simplest factual context for the purposes of the argument about the effect of the event.

It should be noted that the Tribunal's consideration of this particular type of event may not necessarily result in a yes or no answer, as it may turn out that it is necessary to engage in further factual enquiry, which would be inappropriate at the preliminary issue hearing, in order to resolve the cessation event in question. In that case, it may require further consideration at a later date.

(4.18 pm)

Are there any questions or issues arising from that? (Pause)

Discussion on Costs

MR BEAL: I've got instructions to ask for costs on the cessation events issues to be

reserved to the outcome of the preliminary issue hearing in April.

THE CHAIR: Yes. Okay. So, you are not asking for a costs order; you're asking for the costs to be reserved.

MR BEAL: Exactly.

THE CHAIR: Yes.

MR BEAL: But not determined now, but as and when we see how everything plays out, we may wish to make submissions about the costs specifically of dealing with cessation events that aren't going forward.

THE CHAIR: Yes. Mr Kennelly?

MR KENNELLY: Really, the costs are in the limitation hearing itself, agreeing and resolving the cessation events were part and parcel of the directions to bring the limitation issue to fruition in the most constructive way. So, it seems inappropriate to, as Mr Beal would say, salami slice it in that way.

THE CHAIR: If it was to be costs in the preliminary issue, then it would be open to the Tribunal at that stage to make an adjustment to the costs as a result of the points that Mr Beal might complain about.

MR KENNELLY: Yes, it would be.

THE CHAIR: Yes.

Mr Cook.

MR COOK: (Inaudible). This isn't dealt with by way of any (inaudible) specific costs order at all. I mean in relation to the cessation events, it's not that you said those are sort of wrong in principle, inherently. You basically said there is no time to fit them in, in April. A number of them, for example, about Germany, are ones that we will then plead out as part of the defences that you've ordered in relation to these points and they may very well end up being cessation events dealt with by way of preliminary issue but as part of a process that's several months later. So, this is just part of the

knockabout of litigation that these points will be raised in due course and they will be resolved in due course.

We can't kind of carve them out as a specific process, particularly when the time investment spent certainly by the Claimants on them has been relatively small. They've simply come back and said, "It's all too complex, let's not do it now".

THE CHAIR: There's a peculiarity in a way, isn't there, because we're actually dealing with this in the context of -- I suppose this is in the context of a wider case management of Trial 4 when one ordinarily might, as you say, not make any costs at all. But you would accept, wouldn't you, at the end of that process, whenever we get to the end of the preliminary issue, it may be appropriate to make a cost order? It may not.

MR COOK: But in relation to a preliminary issue trial, absolutely. The cessation events have effectively been not included within that trial. So, they don't turn on rights and wrongs of *Heureka*, for example. They are simply being pushed to either be dealt with as part of Trial 4 or later trials or potentially a separate preliminary issue trial, if that's something that seems appropriate down the track. Whether or not part of the substantive merits of the issues will be determined at that period.

THE CHAIR: Yes. The cost of the preliminary issue hearing, if they were to be awarded, would include all the costs associated with it, wouldn't it? The preparation. This could be said to fall into that.

MR COOK: Well, except essentially those aren't part of the costs of the hearing because you've decided it was a decision about what should be within that area. That's very different. We would say difficult to separate out of just the general run of case management, in the same way that the knockabout of the formulation, the exact formulation of those issues, is going to be difficult to identify separately. It's not part of the: these are the case management, we are now moving on to substantive work.

That will be separately identifiable (inaudible) costs orders. A scoping argument should or should not be in trial.

THE CHAIR: No. Have you got anything further?

MR BEAL: I have great sympathy for that point, if Mastercard hadn't advanced plainly unsuitable cessation events. Having been told it was fact-based, it shouldn't involve any factual determination, it should be a legal submission, they then chance their arm with suggesting all sorts of cessation events, which clearly were unsuitable, not least because they involved jurisdictions that we'd contended for should be front runner jurisdictions, which were then rejected.

But anyway, be that as it may, in my respectful submission, costs in the limitation PI hearing would adequately leave the issue open to be determined in due course, depending on the outcome of the limitation PI hearing as of April 2027. The difference between costs reserved and costs in the PI limitation hearing is not going to be material in enabling us to argue points we would wish to argue on costs in due course.

THE CHAIR: Yes, thank you.

So the Claimants seek an order that the costs associated with the cessation events, that should be expressly reserved for consideration at the end of the preliminary issue hearing. Visa submits that if the costs are to be dealt with, they should be dealt with as part of the costs of the preliminary issue hearing, which Mr Beal points out is more or less the same thing. Mr Cook for Mastercard has suggested that the costs should not be in issue at all and should be effectively excluded from consideration at a later date.

I do think these are costs which are part of the process of setting up and conducting the preliminary issue, and they should be considered to be at least available for consideration for the Tribunal as costs of the preliminary issue at that hearing. I don't think it's necessary to make any further order at the moment. These costs can be

revisited as and when cost issues arise in relation to the preliminary issue.

MR BEAL: Thank you very much.

THE CHAIR: Thank you. We're done, I think, with Trial 4.

Discussion on Host Case Applications

MR BEAL: Yes. There were two points of any other business which I think are not any other business because I understand they've been agreed and that's Host Case applications, which I understand have not been objected to, and a Rocco Forte application to have the stay lifted in respect to Trial 4, which I understand has been agreed.

THE CHAIR: Yes.

MR BEAL: So that's --

THE CHAIR: Host case application, there are some that are objected to, aren't there? I understood that there were some objections to some of the Host Case applications we received on Friday?

MR BEAL: I'm not aware of any objection having been noted, but I may be --

THE CHAIR: I think they were -- well, I think to be more specific, I think they may have related to the collective proceedings which may not be in your --

MR BEAL: Which proceedings, sorry?

THE CHAIR: There are some further collective proceedings, aren't there, I think?

MR COOK: CICC's application?

THE CHAIR: Well, no, I don't think it is one of them because I think there is another CICC collective proceeding, as I understand it, that's been issued.

MR BEAL: There was one that was issued on Friday.

THE CHAIR: Yes. But that's not seeking to be a Host Case.

MR BEAL: Not for Trial 3.

THE CHAIR: For Trial 3, for reasons I'm not sure I understand but --

MR BEAL: I'm not going to be instructed in that, going forward, I think.

THE CHAIR: Right. Okay. Then there are some other collective proceedings, which I think there are objections in relation to Host Cases, but they're not --

MR BEAL: I think that's been lodged by Milberg. Is that right?

THE CHAIR: Yes. I think it's at the end (inaudible) collective proceedings and --

MR BEAL: I'm sorry. Geradin. I'm sorry.

THE CHAIR: Geradin, yes.

MR BEAL: Mr Teague appears behind me, waving.

THE CHAIR: Yes.

MR BEAL: So, yes.

THE CHAIR: But anyway, they're not your problem.

MR BEAL: That's not --

THE CHAIR: No, no. Fine. Okay. So at least insofar as your clients are concerned, that's gone away from the timetable.

MR BEAL: Yes.

THE CHAIR: Yes. All right.

MR KENNELLY: So, there are two different ones. There are outstanding queries in respect of Henderson and Jones, which I think are (inaudible) to my learned friend. So, we still object to those because the queries that we've raised haven't been addressed.

In respect of the Geradin collective proceeding, we'll be writing to the Tribunal separately about that.

THE CHAIR: Yes. Fine. Okay. Well, look, I mean, we're not going to deal with any objections at the CMC. It'll have to be dealt with -- I expect it can probably be dealt with on the papers if need be.

MR KENNELLY: Indeed. That's certainly how we've dealt with them so far.
THE CHAIR: Yes. Good. Okay. Thank you. In which case, so were they on the agenda, Mr Beal? Where would I --?
MR BEAL: No, our draft directions have dealt with permission being granted for them to be Host Cases and I just wanted to make sure that, in the core bundle there's the reference to the Rocco Forte stay being cited.
THE CHAIR: Okay, so I don't --
MR BEAL: I was simply doing a sweep up of points I didn't think were contentious.
THE CHAIR: No, that's helpful.
MR BEAL: I (inaudible) told that H and J concerns an assignment. It's not something, I'm afraid, I'm across.
THE CHAIR: No. Understood. I don't get any improvement on the agenda then, that's as it is. Okay, so we'll start tomorrow morning with CICC issues and then how long do you think that's going to take?
MR BEAL: Well, if I can just run through what I apprehend are the issues. We've got the class definition issue, which I was proposing to deal with because it's essentially we have provided a response that was sought in my learned friend's application and I need to deal with the class definition amendment. That segues into the disclosure issue, which at the moment is their application so therefore, technically, I think I need to respond to that, although they're very closely connected.
We've then got the opt-out class disclosure issue where directions are sought by my learned friend. It's really for them to lead on that.
THE CHAIR: That's a Trial 3 issue, isn't it?
MR BEAL: That is a Trial 3 issue, and --
THE CHAIR: We might as well pick it up in the context of CICC, though.
MR BEAL: Yes. Then there's the change of expert methodology issue, which again,

I think, is Visa's application. There's a small issue about a replacement base sample claimant.

THE CHAIR: Yes. Again a Trial 3 point.

MR BEAL: Yes.

THE CHAIR: In relation to -- what was item -- I don't know was item 9 on the one you've got, but at some stage the interplay between Trial 4 and the quantum trial.

MR BEAL: Yes.

THE CHAIR: We've covered that today, have we? I mean it's clear that there's no continuing dispute about how CICC fits into that.

MR BEAL: Well, our case has been made that they should be participating in 4A and 4B, as we've termed it. I haven't heard any pushback against that. Indeed, Visa wanted them to participate.

The only other issue is whether there's a separate VOC, volume of commerce, application that's made, I think it was primarily by Mastercard in the first instance. Obviously, if we're pleading out the claims for loss, one wonders whether there's any merit in having a separate treatment of the CICC opt-in Claimants from that process, given that we are proposing that they plead out their schedules of loss in exactly the same way as the other merchants.

THE CHAIR: Yes, okay. Well, we can pick that up tomorrow.

MR BEAL: Yes.

THE CHAIR: Good. Okay. So, 10.30 tomorrow morning. Thank you.

(4.31 pm)

(The court adjourned until 10.30 am on Tuesday, 27 October 2026)

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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?