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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1517/11/7/22
1441-1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 27th October 2026

Before:

Ben Tidswell

Merchant Interchange Fee Umbrella Proceedings

AND BETWEEN:

CICC I & II

Class Representatives

v

Mastercard Incorporated, Visa Inc. and Others

Defendants

APPEARANCES

Kieron Beal KC and Flora Robertson (Instructed by Harcus Parker Limited) on behalf of the Class Representatives

Matthew Cook KC and Hugo Leith (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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Tuesday, 27 October 2026

(10.34 am)

MR COOK: Before Mr Beal starts off his submissions, sir, how you would like to address the CICC application on the basis obviously, it's originally my application back in May for disclosure.

THE CHAIR: Yes.

MR COOK: It's obviously then a construction point and then if the construction point goes against me, then an amendment application. I don't have any thoughts about -- well, how would you like to deal with it, slice and dice that perhaps rather than just hearing everything or not?

THE CHAIR: Yes, I know you say that it's not necessary to resolve the construction or amendment application in order to deal with the disclosure, but I think probably it does make -- and you may be right about that, but I think it probably makes more sense to do it in the order of what does it actually mean at the moment? In other words, who are we dealing with and who might we be dealing with if the application to amend were successful? Because it rather begs the question as to what you're going to get and who you're going to get it from, if you're entitled to disclosures. So I think --

MR COOK: (Overspeaking) something we've thought about.

THE CHAIR: Yes, unless there are strong views otherwise in the room, I think that's probably the best way to deal with it.

MR BEAL: I assumed I'd deal with class definition, because the initial application was for us to respond to their construction, which we did.

THE CHAIR: Yes.

MR BEAL: And I can deal with the archaeology of the timetable if it's of interest, but I was proposing principally to cut to the chase of partly how the question has evolved, because there seems to be some debate between the parties as to who said what,

where and when. But I'm hoping to cut through that as much as possible and then just turn to what is the actual construction of the opt-in class member.

THE CHAIR: Yes. Okay. Thank you.

MR BEAL: So if I may, the reason, in my respectful submission, it's appropriate to do it this way, is because there may actually be more disclosure to be given than less, if we're right. There may be more things that need to be dealt with.

THE CHAIR: Yes, yes. Okay. Well, let's see how that goes.

Submissions by MR BEAL

MR BEAL: Yes. So this crystallised essentially at the 29 July CMC, when it appeared that Mastercard were seeking to suggest that there was a construction of the definition of opt-in class member that tied it specifically to somebody who was a signatory to an MSA and you needed to be a specific signatory for an MSA to be a class member. Now, strictly speaking, there was a prior letter. I hope, sir, that you've received an additional clip of documents.

THE CHAIR: Not yet.

MR BEAL: It's coming your way.

THE CHAIR: It's on its way. I think calling it a clip is somewhat ambitious.

MR BEAL: Yes, it's a big clip. More of a hair clip than a paper clip. I had understood it had been circulated to the Tribunal electronically, but --

THE CHAIR: It's possible it has.

MR BEAL: That would be rectified here. There's been an update this morning because we have procured a further MSA for a travel company, which we thought it would be useful for you to see.

THE CHAIR: Yes. Well, I have --

MR BEAL: You've seen the MSAs?

THE CHAIR: I have seen the MSAs and I won't mention the names, but I have seen the MSAs numbered 6, 7 and 8 and 9.

MR BEAL: I'm proposing to refer to them by reference to the sectors that they are typically in, rather than mention their individual names.

THE CHAIR: Yes.

MR BEAL: Because they are -- one of the enduring complications of this case for CICC is that they haven't been in the Trial 1 Confidentiality Ring.

THE CHAIR: Yes.

MR BEAL: They were brought into the Trial 2 Confidentiality Ring, but only I think two or so MSAs were actually in that ring.

THE CHAIR: Yes.

MR BEAL: Can't actually remember how many there were. We looked at a lot of MSAs in Trial 1 and so when I've been making submissions about MSAs, that's born of that historical knowledge that, as an advocate, I've seen and I can refer to with this Tribunal, because the Tribunal looked at them as well for Trial 1.

THE CHAIR: Yes.

MR BEAL: But my client's in the difficult position that it hasn't seen the documents I'm referring to.

THE CHAIR: I see, and is that going to be alleviated by the Rule 102 Application that parties have made? Does that deal with that?

MR BEAL: Well, what we're hoping to do is to have a direction at some point that we are a Host Case for Trial 3 and Trial 4 and that that would then enable the confidentiality ring material to include confidentiality material from earlier proceedings.

THE CHAIR: I see, yes. Yes, yes.

MR COOK: I think there's going to be potentially an issue with that approach. Firstly, I have no objection to the fact that the document itself is confidential; third parties

shouldn't look at it. I don't think that the identity of the company should be a matter of confidentiality, though the fact that a limited -- we're talking about a limited acquirer that has an MSA should be confidential at all. That's a prerequisite class membership. Obviously, the fact that it was paying an MSC of 1.5 per cent is potentially commercially sensitive, although a lot of these numbers look very, very historic and massively superseded by what we've seen in terms of current rates. But there should be no reason for us to look at the specific numbers.

I think it will be an issue in terms of which companies are covered if we can't actually mention the names of the companies.

THE CHAIR: You mean today or later on?

MR COOK: I don't know exactly what submission is going to be made. But I mean, that's the problem. These documents have come in on Friday and this morning, so I don't know exactly what my learned friend is going to do with them. Our immediate look through suggests that they don't cover all of the relevant group companies sought to opt in so there are -- insofar as it is being said they show something, then one of the points I want to be saying is, well, it does look like it covers "A Limited", it doesn't look like it covers "B Limited". Those names, I don't think there should be sensitivity on them but I think it will be relatively difficult if we start talking without being able to actually mention names.

THE CHAIR: Yes, I see. I understand what you're saying. I mean there is some force on that, isn't there, Mr Beal, because at least one of them I thought there seemed to be a difference between the invoice that we'd been given and the document which appears to be the MSA. So I mean when Mr Cook has to talk about whether they correspond, he's going to be using some (overspeaking), isn't he?

MR BEAL: Well, I'm suffering from the same disadvantage in that, firstly, the Rule 102 Application that's been made apparently excludes documents that have been

disclosed into confidentiality rings.

THE CHAIR: Yes, I just worked that out myself actually.

MR BEAL: Secondly, these documents at the moment, the reason we've disclosed them is we haven't been at the stage where we are disclosing this material because we've taken the view that it's premature. When Visa in their skeleton that was served on 16 October said, "Oh, well, you haven't even disclosed any MSAs", my immediate response was, "Oh, for goodness sake, they've seen the MSAs in Trial 1 and whichever ones were in Trial 2. That's a bit of a false point".

THE CHAIR: Yes.

MR BEAL: But because my client doesn't have access to those MSAs and can't refer to them, we've had no option but to disclose, in a sense, prematurely, these materials into the Trial 3 Confidentiality Ring and there hasn't been an application yet, understandably, because they've only just been deposed into the confidentiality ring. There hasn't been a counter application to make open aspects of those documents so we haven't done a redaction process for those documents.

What that means is I'm, at the moment, not in a position where I have a redacted document where I can reveal the client's name and what I'm proposing to do is to say ‘travel sector company’, ‘publisher’, ‘retailer’. And to the extent that there are four retailer subsidiaries, it will be Subsidiary 1, Subsidiary 2, Subsidiary 3, Subsidiary 4.

THE CHAIR: Right. Okay.

MR BEAL: The alternative is for me to waive confidentiality when I have no instructions to do so.

THE CHAIR: No, no, I don't think -- let's not put you in that position. Well, let's just see how we go. If it becomes a real problem, we might have to switch the live stream off or something but --

MR BEAL: I agree. None of this is going to -- my learned friend may wish to take

some forensic points about, "Well, even these documents don't show X, Y, or Z".

THE CHAIR: Yes.

MR BEAL: Mr Cotter, if you recall, we don't have his witness statement before us, but in his second witness statement, the deposed certification, paragraph 46 of that second statement, he said, in terms, "In my experience, there will be entities that can't produce an MSA". So Mastercard's position since 2024 has been, "There may be entities out there that never have an MSA".

THE CHAIR: When you say can't, you're reading that as being can't because there isn't one or can't produce because they've lost it?

MR BEAL: Either way, they can't lay their hands on one and therefore can't prove that they are the counter-signatory to a specific MSA. We said most people will have them, and that remains our position. It may well be that, for example, MSAs from 1997 -- to take a date -- aren't available. Now, we've produced one that is from 1997 and that is available. Not everyone will necessarily have that document retention. So what matters for my purposes is to show you how the contractual arrangements work with or without an MSA through the evidence of practice between an acquirer and the merchant, which is ultimately what matters, in our submission.

THE CHAIR: Okay, well, let's see how we go.

MR BEAL: This came about -- we referred to this briefly in tab 1 of the additional bundle at page 4. There's a reference to the CICC Disclosure Application of 19 May. We see in paragraph 7 --

THE CHAIR: Sorry, we're now in the hard copy bundle, are we?

MR BEAL: This is the additional bundle. The hard copy bundle.

THE CHAIR: Tab 1?

MR BEAL: Tab 1, page 4, paragraph 7b.

THE CHAIR: Tab 1 is a letter from Harcus Parker.

MR BEAL: That's it. 15 July.

THE CHAIR: It's only got three pages. I see, not paginated. I'm sorry.

MR BEAL: Yes, please. Would you be kind enough just to read paragraph 7b and c.

(Pause)

THE CHAIR: Yes.

MR BEAL: Now, that letter seemed to then prompt a submission in Mastercard's skeleton for the 29 July CMC, paragraph 14. We don't have it in the bundle, but I don't need to say more than it was there stated more explicitly that it was only merchants who were the counterparty to an MSA who were within the class definition. I then dealt with that at the 29 July CMC, and the relevant clip starts at page 180 of this bundle, behind tab 14.

THE CHAIR: Yes.

MR BEAL: You see that you're having an interchange with my learned friend, Mr Cook, dealing with group transactions, commercial transactions and so on.

THE CHAIR: Sorry, which page are you on?

MR BEAL: Page 180.

THE CHAIR: 180. Yes.

MR BEAL: Then at the top of page 181, Mr Cook makes the submission that he's not trying to set out his submissions on the reasons why, but the volume of commerce that they need to know for the claims. It's not to determine the right numbers, but simply for the Claimants to set out what sums they're claiming, and those may turn out to be either zero, if they're not part of, or very small -- again indeed, it's important to know that. So he seems to be saying, "Well, we need to know the individual entities' figures". You then indicated to me that this came down as to how we're going to deal with this. I then made a submission that runs, please, from where I start at page 181 through to the top of page -- well, I'm afraid it's quite a long section -- to the bottom of page 184.

Rather than me picking and choosing bits of it, it's probably easier for you to read the whole thing. (Pause)

THE CHAIR: Yes.

MR BEAL: Mr Cook's response then begins halfway down page 185. You've invited him to indicate why he wants this material. His response then is halfway down 185 to halfway down 187. Again, so it's not suggested I've somehow selectively chosen the passages, would you mind reading the entire submission? (Pause)

THE CHAIR: Yes.

MR BEAL: The submission I then make in response at the bottom of page 188 is a reiteration, essentially of the core thrust of the submission I'd previously made, which is it shouldn't be surprising that our claim is brought by people who have paid a commercial MIF, because that's the whole point of the opt-in class. If you've paid the MIF, then one assumes that you've received acquiring services and one doesn't receive acquiring services for free; one receives them in a contractual relationship. Therefore, if it's to be suggested that there's this mismatch between the person who is formally a signatory of an MSA and the person who suffered the loss, and that makes a difference, then that particular argument will need to be addressed. I can't see it another way.

Then at line 16 on page 189, I identify what has been described as the prior legal question -- suggesting that this has somehow been sprung on the Defendants is quite wrong. We identified that to the extent that they were arguing you needed an exact identity between the person who is the formal signatory of a merchant service agreement and the person who has paid the MIF, that was, to our knowledge, a wrong construction of the commercial arrangements that are out there in practice and which everyone knew about from Trial 1.

And (2), an excessively formalistic approach to the class definition when construed in

context, because what one is seeking to do is ascertain who has paid a commercial MIF and therefore suffered the loss. That would be the person whose transaction has been processed and settled, because it's the merchant who is being paid for a transaction with a commercial card who should be within the class definition.

So, you anticipated that if there was any ambiguity or that it might need adjustment, then it might be necessary to amend the class definition. That's something that the Tribunal then picked up with us saying, “you haven't applied to amend the definition and the application will need to be made by a date”, and we then made the application by that date.

The core issue, therefore, is really the construction of the class member definition. Now, in terms of the archaeology, which in a sense isn't going to help us, it's right that Mastercard set out its construction of the opt-in class member definition in the letter of 3 August 2026, and I'm sure, sir, you've seen that. They then applied -- because of unfortunate circumstances for those who instruct me, which you've probably read about in the correspondence, there wasn't an immediate response to that. Because of the absence of an immediate response, Mastercard applied for an order requiring us to confirm or deny our agreement with their construction.

There was then a letter from my solicitors. That's correspondence bundle, tab 134, page 620, which explained why there had been a delay. If one needs to see that, perhaps we could turn that up. I mean, I don't propose to necessarily dwell on this point, but the solicitors were clearly indicating the personal difficulties that they had had.

THE CHAIR: I think I've seen this, yes.

MR BEAL: A substantive response was then filed on 2 October 2026, well, part 1 was. That's at tab 151 of the correspondence bundle. What that set out, at paragraph 3 on page --

THE CHAIR: Sorry, 1-5 ...?

MR BEAL: Sorry, I think I've given you --

THE CHAIR: 151, yes.

MR BEAL: 673, I'm sorry. I've given you entirely the wrong reference. It's tab 151, starting at page 672 but if we turn, please, to 673, paragraph 3. This letter comprises both the first part of our substantive response to the request set out in paragraph 9 of your 3 August letter and our response to the points raised in the 22 September letter. We indicate that we are chasing the relevant data from advisors at Ankura and BBMS, and we therefore suggest that there was no need for the Tribunal to make a formal order.

Paragraph 4, please, if you would read that. That sets out the permutations that may exist within a corporate group as to the different way in which merchant acquirer services are obtained on behalf of the entities within the group. (Pause)

THE CHAIR: Yes.

MR BEAL: At paragraph 7, there's a repetition of the explanation that had been given for the unfortunate delay.

Then at paragraph 8, there is a suggestion, I hope a fair one, that at least in the 29 July CMC, the submissions you've just read had sought to identify the issue and outline the parameters of the debate between the parties, which is what I'd been trying to do.

There was then a substantive response filed, part 2, on 16 October 2026. That's in the second supplemental bundle, tab 5, page 37. It's quite a lengthy document. If I can take you to the highlights.

THE CHAIR: Yes.

MR BEAL: Page 38 refers, in paragraph 4, to the repeated offer that had been made to provide MIDs on an undertaking basis, and that would give the Defendants a clear idea of the overall scale of the claims they were facing.

There's then a citation of the Disclosure Application and what's being said against us, which -- sorry, a reference to the Disclosure Application and then a reference to our 15 July letter, which you've seen this morning. We suggested in paragraph 6 that that hadn't really been engaged with.

Then in paragraph 8, we deal with specific suggestions about individual companies who are said not to have -- or the concern has been expressed that these companies do not hold or have not entered into merchant service arrangements, contractual arrangements and paid a commercial MIF. Entity by entity, this table goes through the specific responses.

One sees, for example, in relation to ASOS, which my learned friend Mr Cook had referred to in the 29 July CMC, it's confirmed that ASOS.COM LIMITED, contrary to his understanding, is not a holding company and it does process commercial card transactions.

Over the page, page 40, in relation to universities. It's referring to my evidence. Of course, a university had been one of my clients for the Trial 2 proceedings, and we had examined quite closely how that university dealt with card payment transactions. It was clear that it had a single corporate structure. From recollection, there was only one corporate entity for that university.

So, the suggestion I thought that was being made was, well, it's not very likely that students are paying with commercial cards. My recollection is that the witness for that university in Trial 2 explained how foreign overseas students would typically pay with cards that could indeed be a commercial card, be it debit or credit.

We then come on to deal with charities, tab 3. Confirmation that those charities have processed commercial card transactions. Gambling companies are then dealt with and so on, foreign companies.

Then at page 43, we provide some sample MID lists for, in that case, various entities

including charities, section 4, the Jockey Club, section 2, and then some other entities, section 1, who I think are gaming companies.

So that shows what we were doing. Universities are provided in section 3. That shows what we were providing by way of confirmation. When a particular entity's eligibility has been challenged, we have engaged with that and dealt with an explanation as to why, contrary to the perception that they weren't likely to have made any commercial card transactions, we were confirming that they had. As promised, that letter went into considerable detail as to why the specific claimants, when challenged, were confirmed to be people who were eligible because they had made payments of commercial card MIFs.

Our primary case that remains -- and this is really my core submission before I come on to deal with some of the detail -- is that the definition of "merchant" that is very familiar to this Tribunal is met for these types of merchants and anyone who has paid, in fact, a commercial MIF without any change in the wording being needed. That is because you do not get to have a claim for loss unless you have had transactions that have been processed in return for payment on commercial cards.

We have seen some examples where, on closer investigation, it's turned out that the individual entity has got it wrong as to who has actually entered into the transactions that have borne the commercial card MIF, and they've been removed from the register. You will have seen a series of applications to have draft orders approved by the Tribunal to remove entities from the register if that turns out to be the case.

That mirrors a process, with respect, that has been going on -- well, as long as I've been involved in interchange, which was since 2012, where occasionally it turns out that the entity that is being put forward as the claimant is not the entity that has in fact been billed for or paid or suffered the loss for the particular MIF. Typically, this is dealt with by an amendment to the claim form and the particulars of the claimants, and it's

thrashed out between the defendants and claimants and it leads to an amendment of the identified claimants.

What's bringing this into focus is the Defendants targeting the list of opt-in claimants, because the guillotine has come down on the ability for replacement entities to be added to that list. Whereas usually, you would amend and there'd be a limitation fight about when the amendment should take effect from. But at least the claimant entity is still going ahead with their claim in the Chancery Division or the Commercial Court. Why it matters here is because, of course, the Defendants are, in a sense, tilting at a one-way pitch, because if they knock somebody out, there's no way of getting a replacement back in.

THE CHAIR: Just looking at it from the point of view -- as you say, what I think we're primarily concerned with here is merchants who have suffered loss.

MR BEAL: Yes.

THE CHAIR: All on the assumption that, you know, everything else goes in your favour that needs to. But that's the premise of the conversation. So is that the basis on which the opt-in list has been constructed? Are you able to tell me whether that is the sort of -- so in other words, if that really is the one thing we really care about, have you got problems about people being on that list because they're not the person who suffered the loss?

MR BEAL: No, because the process of doing the data crunching --

THE CHAIR: Yes.

MR BEAL: The opt-in process, as one knows, has suffered from some historical bumps in the road --

THE CHAIR: (Inaudible) some bumps, yes.

MR BEAL: And that was initially done, as you know, on a group basis, but the group was then required to identify individual claimants. That has led to a process of data

crunching by Ankura and BBMS, trying to identify the specific entities, so far as possible, that has the commercial card MIFs attributed to it as the paid sum. That allocation is taking some time because one needs to understand, per individual business, the process by which the allocation is being done.

THE CHAIR: Allocation, meaning ...?

MR BEAL: If, for example, you have a merchant service agreement with a parent company and it says, "This is for and on behalf of the affiliates."

THE CHAIR: Yes.

MR BEAL: Which is an example in the papers. The affiliates may not be named. So you've got, in a sense, an agency contract, as I'll come on to explain, by a principal, who is an unnamed principal, but being conducted by an agent. But it's not an undisclosed principal, because the identity of the affiliate has been disclosed. It's the affiliates who fall within typically the company law definition of affiliate.

THE CHAIR: Yes. So just sticking a bit with this question of who suffered the loss, though. So, when you talk about the allocation process, one of the scenarios raised by the Defendants -- I don't know whether this is a realistic scenario or not -- is that you might have a different rate of recompense between the trading merchant and the payments company as then you did between the payments company and the acquirer. In other words, there might be some standard fee or some other method of distribution of the cost of the MSC. So, I guess my question is when we're talking about, well, I suppose the main point is that there would be, even in those circumstances, there would be a loss. It just might not be all of the loss that was suffered. Is that right?

MR BEAL: Can I identify the Morton's fork that the Defendants are seeking to capture us on?

THE CHAIR: Exactly. Yes.

MR BEAL: As you know, I do some VAT law for my sins. VAT corporate groups are

quite common. In a VAT grouping scenario, you have a representative member of the VAT group who is responsible for charging and paying VAT on all of the services that are supplied by the group, and it's the VAT representative member that recovers input tax on supplies into the VAT group.

Now, this quite frequently in practice leads to a scenario where an unidentified treasury company or finance company will be the financial hub, and the travel company that we now have the MSA for is an example of this, I can say on instructions, without waiving privilege. They operate a VAT group and they have a dedicated treasury function. A dedicated treasury function will pay expenses, and one expense is Merchant Service Charges. Those are paid. What will typically happen is that the finance company then recharges those sums on an appropriate basis to the various different subsidiaries, based on a specific allocation of the transactions in question, so that they recharge the right amount.

Now, I'm not aware, but it will be a matter for evidence in due course, of any treasury company recharging on anything less than a cost basis. So, you pass on the entirety of the cost. Typically, however, they will have transfer pricing issues, especially if they're a multinational company, where they might need to add on a bit in order to satisfy transfer pricing rules. So, it's not straightforward. If data is held on a non-granular basis, you do need to work out a way of extrapolating between what is the -- in a sense, the figures are likely to be higher than the bare cost of the MIF, but that doesn't mean that they haven't been passed on. It would only be if the full cost of the MIF was not passed on to the subsidiary, that there would be a pass-on issue.

THE CHAIR: Precisely, so if the recharge for the treasury company to the trading company was less than the MIF, it's effectively a pass-on point.

MR BEAL: But it would mean the treasury company has to claim. That's the trouble.

THE CHAIR: Yes. Well, for the balance, because obviously --

MR BEAL: Yes. Because it wouldn't have passed on that bit to the subsidiary.

THE CHAIR: No.

MR BEAL: So, it's no good, my learned friend saying, "Oh, well, you've brought this claim by the treasury company, but in fact all of that loss has been passed on, on a cost or cost-plus basis to the subsidiaries, therefore, you've not suffered any loss". And then when we say, "Well, it's the subsidiaries therefore bringing their claim", they say, "Well, that's not in the contractual counterparty scenario and it hasn't paid the actual bill".

THE CHAIR: No.

MR BEAL: I mean, there's no loss there either.

THE CHAIR: Yes. No, absolutely. I see the --

MR BEAL: So that's the Morton's fork that they're trying to capture.

THE CHAIR: Yes, exactly. But that's really why I start, I think, with the question of what we're interested in, which is: where's the loss we've suffered?

MR BEAL: Yes. No, I completely agree, and that's what we've been trying to figure out.

THE CHAIR: Yes.

MR BEAL: Because it is quite complex and it does require quite a lot of detailed analysis and sometimes some extrapolation. All of that will require evidence in due course from those entities, because they will need to prove that they've suffered the loss. We accept that.

THE CHAIR: Yes.

MR BEAL: That's part of the process. When you directed yesterday that we provide schedules of loss -- we've proposed a date at the end of May in order to be able to take into account at least the way that the Limitation Hearing has gone, if not expecting a ruling necessarily within four weeks. But we will have a better idea. It also gives us

time to do this data crunch, not just for CICC, but for all the Merchant Claimants, where you say, "Right, we've trawled through the accounts, we've looked through the data, here's the VoC data, here's our analysis of which entity has paid what". All of that will be provided by the end of May, if that's the date selected or whatever the date that the Tribunal lands on, we will have to make it happen.

But, the reality is that exercise is now being done, and what we've resisted doing up until now, because it goes to Trial 4 quantum, and not anything to do with Trial 3, is having to do that prematurely at this stage before it's part of a properly structured process. We now have the properly structured process and we're happy to fit in with it. CICC have been brought into the fold. We respectfully suggest for 4A and 4B, they're out for 4C because it doesn't touch them, that's an effective proportionate way of dealing with it. They can now slipstream behind the other Merchant Claimants in preparing these schedules of loss and, and shaping out how the VoC lands with the hard yards being done by the data companies in conjunction with the individual claimants, to work out an appropriate way of allocating between the different entities.

At the moment, what we've said we will give, and we're happy to give, is the MID figures, because if Mastercard is saying, "Well, we need to know the specific value of the claim now". Well, you will get that on a group basis from the MIDs that we are prepared to provide. Why do you need the individual breakdown? The answer is you don't. You're going to get that in May, June, whenever it is, come what may. Why do you need it at this stage, if you've got the overall shape of the claim from the different entities in the group?

With some entities, there isn't a group, a single university entity, and they know exactly what -- if we give them the MID for the university -- they know exactly what the commercial card transactions attributable to that MID should be. That was the point you made in the CPO Judgment, paragraph 80 from August 2024, and to which we

haven't had a good answer, with respect.

But if I can then just sort of track through how all of that, what we say is the commercial overlay structures into the overall submission. What this means is that the class definition was structured by reference to the actual payment of the MIF. True it is that the class definition referred to contractual arrangements with a merchant acquirer. You've got my submission. Merchant acquirers don't do things for free. They will require to be paid, and the element of providing service for payment is evidence of a contract. Basic contract 101.

Now, typically that contract will be evidenced in writing through an MSA, because that's what the industry typically does. The wording typically reflected a submission that was made at CPO stage and was carefully chosen because, as Mr Cotter in paragraph 46 of his second statement for the CPO application pointed out, there might be circumstances where, exceptionally, an MSA wasn't available, but a merchant had been merrily paying Merchant Service Charges for years at MIF rates on commercial card transactions, and that is evidence of a contractual arrangement, even if you can't get your grubby paws on an MSA. So, the other point to bear in mind is that the MSC is usually deducted at source, or can be deducted at source. There are typically two or three different ways of doing it, but for merchant acquirers that set up a dedicated merchant bank account, contractual provisions typically will say, "We are going to remit the funds for these transactions into that account, and we will also deduct the charges from that account." So they have an account that they have access to, and they will set off the MIFs and the other charges that they're charging for the MSC from the remitted funds. So you get the net fund into your pocket, and a merchant will know that they've paid it because they've received £0.98 in the pound for a transaction, for example.

Because most of these contracts are IC++, as we know, that itemises or can itemise

the commercial card portion of the MIF. It might not; it might have a bundled MIF, and you need to then disaggregate charge that's attributable to the commercial MIF. That introduces complexity as well.

But either way, if the merchant whose transaction is being settled and processed has received payment via a commercial card, it will have paid MIF, because the sum that is attributable to the merchant service charge for that payment contains the MIF one way or another, and that payment has therefore been made by the merchant who is receiving money for that transaction.

The core of our claim has always been premised on we will identify those merchants within a corporate group in due course. Having identified them at group stage, we will identify those merchants within a corporate group that have had transactions that are processed that bear the commercial MIF. That's the aim of the exercise.

THE CHAIR: So what does the reference to the MSA bring to the party, and why do we need to have a reference in there at all?

MR BEAL: You don't. I mean, we'll see in due course, there's another CPO application that's just been filed, where the definition has been amended.

THE CHAIR: Well, I'm aware of that. So, I suppose it could be said that it identifies where in the market, the levels of the market. In other words, it makes it plain that it's the payment that is happening adjacent to the acquiring activity. I suppose there's some point in that.

MR BEAL: Where this came out and, you know, I readily accept this, a point that was made by my clients -- not by me, I wasn't instructed at that stage. The point that was made by my clients is you don't need to worry about this being suggested to be complicated, because typically merchants have MSAs, and typically the MSA will identify who the paying party is and who is receiving the services. So it was a question of: is the class definition going to give rise to undue complexity? Answer: no, because

typically people will have MSAs. Now that was a typical scenario. It wasn't a *sine qua non* for eligibility for the member membership of the class. What's happened is Mastercard -- I'm not going to use any adverbs on this. Mastercard have chosen to construe the word "typically" to mean "in every case". So we're in a position where it's now being suggested that only counterparty signatories to the MSA are ones who have contractual arrangements. Therefore, if your name's not on the MSA, you're not in the class.

THE CHAIR: Well, right or wrong, it's being treated as a second condition to class membership, isn't it?

MR BEAL: Yes.

THE CHAIR: And the question is --

MR BEAL: Is that right?

THE CHAIR: Well, is it right as a matter of construction? Obviously, the first question then second question is: if not, is it right to do anything about that and, if so, what? Yes, the first question is complicated, isn't it, by the fact that it is there at all?

MR BEAL: Well, CICC, I think teaches us that hindsight is a wonderful thing.

THE CHAIR: Yes.

MR BEAL: And we were now two years, plus two years, into the process of looking in detail at some of these points and a number of points have been raised that weren't necessarily alluded to at the CPO stage. That isn't a criticism. We were trying -- or those who were instructed at the time were trying to do their best to identify exactly what the merchant class would comprise, because you need to. And the view was taken, because the Tribunal certified it, that that had been done with sufficient precision that the class could be identified and the crux of that was you've paid a commercial card MIF on a payment transaction because you've accepted a commercial card in settlement of the consideration that you're charging for a good

or service.

THE CHAIR: Yes.

MR BEAL: It's very straightforward. Now, what we had sought to do -- I'm reminded by my learned junior, who has been involved throughout -- that it was intended to exclude payment service providers from the definition of the class. So, I think either micro merchants or those who were engaged in essentially another level of agency between the acquirer and the client, is my understanding. You recall that we had some evidence about that in Trial 1 and Trial 2.

THE CHAIR: Yes, and I think is that something that arose in the first round of certification that was identified as a problem so it was taken up in the second?

MR BEAL: That's my understanding, yes. But I mean, what we're trying to do, we were using the reference typically to an MSA as being: this should help individual claimants work out whether they're in the class. They can look at the MSA and that will give them a pretty good idea. That didn't obviously cater for all of the contractual arrangements that might have been made, because we know now that you have MSAs -- it might be worth having a quick look at them -- you have MSAs in the bundle.

THE CHAIR: Just before we do that, can I just ask you, I'm not sure I could put it as high as a concession but certainly an indication in the defendants' submissions that they would accept a contractual is sufficiently broad to cover references to treasury companies entering into contracts that identify, certainly specifically, I think possibly not with lack of specificity, but --

MR BEAL: Yes.

THE CHAIR: There's an acknowledgment there that the merchant who suffered the loss does not have to have entered directly -- perhaps I won't use that word -- have entered themselves into a contract with the acquirer, as opposed to someone else doing it on their behalf. So in a way, to the extent that that was a problem for you in

relation to the people on your list, I don't think it is a problem. If we're trying to think about what the problem is here, from your point of view --

MR BEAL: Yes.

THE CHAIR: It may not be.

MR BEAL: Understood. I'm going to move on to deal with the principal agency issue. There's a question of law.

THE CHAIR: Yes.

MR BEAL: And we accept that there needs to be a contractual relationship.

THE CHAIR: Of some sort, somewhere. Yes.

MR BEAL: Of some sort. That can be a contract that's entered into by an agent on behalf of the individual merchant whose transactions are being processed, either because they are the principal who has been identified, expressly and named -- and that will be in the schedule.

THE CHAIR: Named in the schedule. Yes.

MR BEAL: No problem.

THE CHAIR: Yes.

MR BEAL: The second configuration is that the principal whose transaction is in question has been alluded to but not specifically named. So that's category two. And then the third example is, it's apparent from the contractual framework and/or the understanding of both the acquirer and the contractual signatory, the merchant, that the services are being provided, not simply for that particular contractual counterparty but for other people whose transactions the acquirer is *de facto* processing.

So if the acquirer gets given a list of transactions that have MIDs and the acquirer does not have a contractual relationship to settle that MID, then the acquirer is not going to settle the transaction, full stop.

THE CHAIR: You say that the fact of the transaction is evidence of a contract of some

sort.

MR BEAL: Exactly.

THE CHAIR: And in that -- yes, I see.

MR BEAL: But the contractual analysis there has nothing to do with whose name is on the merchant service agreement.

I'll show you a Privy Council case where there was an insurance that was written by a shipping agent, as a form of effectively employer's liability insurance. There was a tragic accident in Hong Kong. The person who actually was procuring the contract of insurance was the employer, not the shipping agent, and the Privy Council said, "Well, that contract was entered into by the shipping agent on behalf of" -- they thought it was probably on behalf of an unnamed principal, but it was known that the shipping agent was not going to be the employer. But there was some factual findings at first instance that made that obvious common sense deduction not possible.

But the Privy Council said, "Well, it doesn't actually matter" because it was clear from the contextual framework in which the services were being provided, i.e. a contract of insurance, that it would be the employer that was covered, as well as the individual employees if they suffered an accident, and that was sufficient to say, well, the contract was entered into by the shipping agent on behalf of an undisclosed principal, at the very least, and that was enough to establish a contractual nexus.

THE CHAIR: Yes. So when you come to the construction point, really it all turns -- I think you're saying it all turns from your point of view on the word "contractual".

MR BEAL: Yes.

THE CHAIR: It does say contractual relationship (inaudible).

MR BEAL: Yes. Typically it says, and I've changed that --

THE CHAIR: In the class definition?

MR BEAL: Yes.

THE CHAIR: Yes.

MR BEAL: In the existing class definition, it says a contractual arrangement typically through an MSA.

THE CHAIR: And so your sort of thrust -- just so I know where you're going -- the thrust of your submission is going to be that is sufficiently broad to cover your three categories.

MR BEAL: Yes.

THE CHAIR: Am I right in thinking that if -- I don't know whether you have or not -- but let's say you have a situation where you've got treasury company, you've got a whole bunch of trading companies, you've actually got MSA that lists all the trading companies but one, where someone's forgotten to put them in, and they have conducted transactions which have been acquired, then you would say that fell within your category three and therefore within the contractual relationship?

MR BEAL: Yes. It depends on whether they've identified them as an affiliate. But if, for example, there is a known subsidiary whose transactions are processed, it's just been omitted from the list, then that would be an undisclosed principal with an agent. What supports that analysis is the submission of the MIDs.

The MID is what goes on to the batch file that gets submitted for the end of day transactions, that get processed by the acquirer, putting all the transactions together and submitting them through the scheme for processing and settlement.

THE CHAIR: So does that not suggest that it does turn a bit on the facts of every case?

MR BEAL: The argument that the nature of the contract between the individual merchant and the acquirer, if that has to be the focus, then yes, there will be some further evidence, which is why I say disclosure could be wider than the disclosure that

they're seeking. We would then have to prove that through the submission of MIDs -- I mean, the submission of MIDs carries a lot of weight here, because it's prima facie evidence that the transactions were within the scope of what the acquirer was prepared to settle.

THE CHAIR: But all that does rather suggest that if you're right about that, then there is some force in the Defendants being entitled to test that at some stage.

MR BEAL: Yes, we would --

THE CHAIR: Then the question becomes when, does it?

MR BEAL: Well, we would suggest that the schedule of loss is the perfect opportunity to set out exactly who has paid the sums in question, because we are then itemising, if necessary, over a very long period, who has paid what, where and when and how.

THE CHAIR: But also if you have to disclose some -- at least the MSA that is in existence, wherever it is -- and any other circumstances you say are relevant, would you anticipate that being the schedule of loss as well?

MR BEAL: Yes, we would anticipate disclosure of the MSAs that are available as part and parcel of proving our case of who has suffered the loss that it goes into the VoC calculation.

THE CHAIR: Yes. If the contractual relationship wasn't clearly expressed in a contract, you would then have to supplement that with some sort of pleading about what you say gave you the --

MR BEAL: There would almost certainly, I would have thought, need to be some form of disclosure or possibly witness evidence to explain a consistent course of trading by which the acquirer had been processing these transactions and consistently receiving and paying on MIDs that are submitted to them and then the sums being remitted by the treasurer. I mean, for example, evidence about the remittal -- if there is a remittal from a treasury function to individual subsidiaries, then you would need either data or

some form of witness evidence to confirm that that is being done.

THE CHAIR: Yes, that's very helpful. I've taken you probably well out of your way.

MR BEAL: No, no.

THE CHAIR: It's been very helpful.

MR BEAL: It's very helpful for me because, in a sense, I'm making the points as I go. You've got my submission that the amendment really is only on a fallback basis. The amendment application is that -- I was going to take you to -- no, I'll come on to the MSAs in a moment, if I may.

Just to deal with the fallback application. It's correspondence bundle, tab 175, page 760. It's in a letter from my instructing solicitors. And then at page 762, we see paragraph 11, it confirms that:

" ...the Defendants' construction of the Class Definition is wrong. It can and should be construed, as the proposed amendments set out above now make explicitly clear, so as to permit a Merchant ... to contract with an acquirer either directly or indirectly; and to pay an MSC either directly or indirectly. The construction should necessarily reflect the common commercial arrangements prevalent in corporate groups ..."

You've then got my submission that those include, for example, deducting the MSC from remitted sums, the specific transactions that are being processed, the nature of the MID that is identifying the transaction and by reference to which the remitted sums are paid.

We've identified that there may be some cases where there is a separate invoice that's raised for the charges and, for example, one of the examples I'm about to take you to, there's a direct debit arrangement so that the MSCs are paid by direct debit rather than being deducted at source from the remitted funds. That's another way of doing it.

If that direct debit is paid by the central treasury company, then one would anticipate a process of reallocation I've already outlined, insofar as there are group companies.

If it's a single entity with a direct debit, then there's no complication.

But the fundamental point is each of these relevant entities must have had transactions processed in order to be eligible to bring the claim. If they've had no commercial card payment transactions processed, then they have no business being a claimant. That's always been our case.

Merchant Service Charges are charged by acquirers on the relevant transactions because they're contractually bound to offer that service and they are providing that service not simply to the treasury company, but also to the entities whose MIDs they are processing.

That brings into framework then, the principal agency arrangements. Before getting on to those, you will have seen, I hope, the evidence from Mr Filbrook --

THE CHAIR: Yes.

MR BEAL: -- where he describes and explains the different contractual arrangements that he's seen in practice. In a sense, he's treading over old ground because we examined MSAs very closely as part of the analysis for Trial 1. I recall going through a few of them. And then --

Before coming on to look at the approach that's been adopted by the Defendants in their 14-page joint submission on the class definition issue, could I quickly have a look at the MSAs that have been submitted, I accept recently, for the reasons I've given.

The first one is at your paper bundle, tab 6, page 14. It's from a utilities group. One sees the definitions -- the parties to the agreement are at page 17. Then there's a reference in page 18 to an affiliate to a party:

"... any other entity which directly or indirectly controls, is controlled by, or is under direct or indirect common control with that party from time to time." [as read]

That's the interpretation that is typically given by both the Companies Act and the relevant taxing statutes when dealing with affiliate companies.

There's then a separate reference to an associated company, which requires something that's dealt with under clause 2.3. The difference is that an associated company, clause 2.3, is then at page 26. We see a reference to a separate procedural step that needs to be taken by an associated company, which is to execute a letter of adherence to the terms of the agreement.

I think this is one of the ones we looked at for Trial 1, actually, or something similar, where the party, the associated company, can formally execute a letter of adherence and then it's brought within the direct scope. So it's a direct contractual counterparty through that procedure, because it's deemed contractually to be party to the agreement rather than benefiting from the contract as an affiliate.

We then see that the acquirer's obligations are set out, clause 3:

"... will provide the services to the merchant in accordance with the terms of the agreement." [as read]

Now, strictly speaking, that is the merchant identified, but it's doing that clearly -- the services are being provided to the merchant for and on behalf of affiliates and any associated companies that sign the letter of adherence.

THE CHAIR: The merchant is defined as company or associated company.

MR BEAL: Yes. That's "or associated company", but it's clear from context --

THE CHAIR: That it would be the affiliates.

MR BEAL: -- that it would also be the affiliates as well, but it's just they're not directly named as a contractual counterparty. But they are the obvious beneficiary of this arrangement, and they are -- because my understanding is the affiliates are not directly identified, they would be treated as an identified principal which is unnamed, and that's relevant for a passage in the Privy Council decision I'll come on to in a moment.

So that's one example. I'm not going to labour these. The next one is at tab 7.

Publication company or publisher with a well-known acquirer. We see that page 60 identifies two individual companies. Then we have various definitions given at page 63 and onwards, with the submission of transaction data and so on. Then provision of services, page 65:

"In consideration of the merchant paying the fees, the acquirer will, in accordance with the relevant laws, provide the services." [as read]

It says it's only in relation to the merchant's business. It's set out in the application form at the commencement date that the services will be provided. The merchant's general obligations are set out and so on. So that's another way of doing it.

THE CHAIR: And there's no attempt to create a list of other companies in the group, is there? Is that right?

MR BEAL: Let me just check that. I think that's right for this one. There's not an annex list.

THE CHAIR: Interestingly, schedule 2 lists a number of different jurisdictions. If you look at page 101, a company in one region. If you look at page 103, it's a company in another region. Which are not -- (inaudible) not parties or maybe they are parties. They're not, I think?

MR BEAL: That's a point of detail. I'm afraid I hadn't --

THE CHAIR: No, well, I'm just trying to work out how it works. Page 105.

MR BEAL: The merchant name is just the generic name. Given that the location of the type of pricing is the Netherlands and it's in euro, it's likely to be the relevant entity with its Dutch entity.

THE CHAIR: If you look at page 107, for example, the United States, it necessarily follows that it would be -- either one of the named entities would've (overspeaking).

MR BEAL: I mean, if these points of detail were to become important, then I'm sure we could drill down into what the answer was by asking specific queries to this

particular merchant. But it's just another example, really, of a different way of doing the MSA with a well-known acquirer. If we could then perhaps move on --

THE CHAIR: Sorry, I think the answer is actually on page 118.

MR BEAL: Yes, they've got different signatories, I'm sorry. Page --

THE CHAIR: They've listed them all. Because actually the --

MR BEAL: -- 137 and 136.

THE CHAIR: (Overspeaking) identifies the --

MR BEAL: Yes, I should have gone straight to the signatories at 135.

THE CHAIR: Well, they're all listed 118, I think.

MR BEAL: Yes. You're absolutely right, sir. I'm sorry.

THE CHAIR: Yes. So that's the way they've done it there.

MR BEAL: Even though you've only got two entities that are actually technically the counterparty, it's clear from this that these parties are signing up to be an authorised signatory.

Then the separate way of doing it at page 139, which I confess I'm more familiar with, is where the parties are listed in a separate schedule 1. One sees that schedule 1 is at page 143. You have five specific subsidiaries of that retailer, so subsidiaries 1 to 5 of that retailer, all with a registered address in the UK. They are identified as the signatories to the contract. In my experience, that's quite a common way of doing it, but I don't want to give evidence because Mr Cook will hoist me with my own petard.

The invoice that you referred to is at page 150.

THE CHAIR: Yes. Of course, the invoice is addressed to somebody who's not in that list, isn't it?

MR BEAL: I don't know the answer to that. I would need to take instructions on why the invoice is made to that particular entity. But it doesn't appear to be the entities listed at page 143.

THE CHAIR: I mean, it may be this is completely wrong, but if one just were to speculate for a minute that someone had omitted to update this document to include this particular merchant the invoice was sent to, then you're going to say, presumably: well, if someone sent them an invoice then that's pretty conclusive about a contractual arrangement, so it doesn't really matter if someone's not dotted the i's and crossed the t's.

MR BEAL: I don't know whether this invoice is submitted to that particular entity, because it's a treasury company that doesn't actually --

THE CHAIR: It doesn't look like it from the name of it, but one never knows.

MR BEAL: I agree with you. I think it's unlikely. But yes, if I'm wrong about that, then the MSA doesn't evidence the contractual arrangement. What evidences the contractual relationship is the standard practice of processing transactions from that entity and then charging them through the invoice.

THE CHAIR: Yes.

MR BEAL: But you could end up with a position where you have no evidence whatsoever and no invoices, but all that's happened is the acquirer and the individual entity have a long-standing arrangement lost in the mists of time, whereby transactions are settled by that acquirer and the fees are deducted at source, the charges are deducted at source. The MIDs, then, are what is essential to identify the transactions in question, because those are the MIDs that the acquirer is agreeing to process, and the course of conduct necessarily establishes the contractual agreement to do so. Because if the MIDs weren't acceptable to acquirer, the acquirer would say, "Get lost. I'm not settling these for you."

THE CHAIR: Am I right in thinking that generally the merchant would have the acquirer's terminal in the premises, wouldn't they? Is that correct?

MR BEAL: Yes. They pay a separate fee for that.

THE CHAIR: Yes.

MR BEAL: Of course, it's right that the Schemes have data that is MID-related data, that will go to these individual MIDs. It hasn't been suggested they provide comparable disclosure from their end of what they know, and they can track down through the data. That's the point that was made in paragraph 80 of your CPO Judgment.

That gives an example of the type of contracts that can be out there. There was a final one that was circulated from the travel company, which is at tab 16. I've got the wrong bundle. I've done what I said I wouldn't do and opened the original, not the updated. So the updated is --

THE CHAIR: 17.

MR BEAL: 17, thank you. Fair to say we can begin the voyage of discovery together. This is with a well-known travel company. One sees that it's of some vintage, it's a 1997 agreement. At page 214, there's a definition of "agent". It means:

"... any of the travel company's duly appointed travel agents. All agents shall be deemed to be agents of the travel company in carrying out the provisions of this agreement, provided they are acting within the scope of and in accordance with their appointment." [as read]

You then have cards identified and so on, settlement values, chargebacks and so on. Then at 217, acceptance of cards. Essentially, the travel company is agreeing to accept cards. The travel company agrees under 2.2:

"... to use all reasonable endeavour to ensure its agents, wherever located throughout the world and as agreed with the bank, permit cardholders to purchase travel services through the use of a card." [as read]

Those travel agents are never, ever, identified in terms because, frankly, there were so many of them. But the suggestion where you have an express agreement from the travel company, we will let these agents process our supplies using your cards, or

rather using cards within the payment scheme. And given the identity of the acquirer in this case, which my understanding is subsequently was sold to a different entity which is now a well-known merchant acquirer. I don't really want to say too much.

THE CHAIR: Of course.

MR BEAL: But because it was both an issuer and an acquirer at the time of this contract, one can see that the dual obligations are to accept those cards and also to have them processed.

The point I'm making is you end up with a position where the travel company is settling the bill on behalf of the various travel agents. It will then have a process whereby if there's a subsidiary, it will need to internally allocate anything through -- if that subsidiary is making the transaction. If it's a travel agent, then the travel agent is making the transaction on behalf of whoever the principal is.

Now, I mean, in a sense, there's not much point in me going through my learned friend's submissions, joint submissions, because I've covered off many of the points in advance and it's really for them to explain what their position is. I would just like to refer to two pieces of law. First is the textbook definition of undisclosed principal, which one finds in Bowstead & Reynolds 23rd Edition. It's in your paper bundle, tab 16, and we can pick it up, please, at page 208.

THE CHAIR: Well, that's the thing you've just given me, the clip, again.

MR BEAL: Yes, the so-called clip.

THE CHAIR: Yes.

MR BEAL: Page 208 has article 76, Bowstead. Please would you read paragraph 8-068. (Pause)

The learned authors then cite, at 8-069, the Privy Council case, the judgment of Lord Lloyd in *Siu Yin Kwan*, the insurance case I referred to. I would invite you to look at the actual case itself, which is behind tab 15. The facts are pretty much as I set out.

There was a tragic accident in one of the Hong Kong harbours and two employees of a ship owner lost their lives. Contracts of insurance had been procured by a shipping agent rather than the employer directly. The question was, whether or not the benefit of the insurance, because the employer, i.e. the ship owner, entered into insolvency, the representatives of the individuals who tragically lost their lives wanted to enforce the insurance contract directly to get the employer liability insurance. They were permitted to do so on the basis of the undisclosed principal issue.

It starts internally at page 206, which is page 200 of your clip. And if we could pick it up, please, from letter F at page 200. If you would be kind enough to read down to letter F on page 202. So it's F-200 to F-202.

THE CHAIR: Yes.

MR BEAL: So we're at the position, by F, whereby the comparator here would be you, the head merchant, as it were, or the head company, the treasury function company, you're the one that is the contractual counterparty. But, in context, we know it's not simply limited to you because MIDs for the others are being processed. We then see in G, their Lordships would have gone even further. Even if there'd been no indication of who these services were actually being provided for. Because if Richstone had been named as the employer, expressly or by implication, that would not have prevented Axelson intervening to show that they were the true principals.

Cutting down to H:

"The employer was entitled to intervene as undisclosed principal and enforce the charter party against the owners in the case that cited. The same reasoning would have applied in the present case if Richstone had been named as employer. If courts are too ready to construe written contracts as contradicting the rights of an undisclosed principal to intervene, it would go far to destroy the beneficial assumption in commercial cases." [as read]

So there we are. We say that even if the contract on its face seems to be with one particular merchant rather than anyone else, it's still open to the true principal, i.e. the person whose transactions have in fact been processed through services provided under that contract, to show through evidence that they are the undisclosed principal who is the beneficiary of the contractual arrangements.

Can I then just, in the two minutes, perhaps before we deal with the transcriber break, if I could just very quickly make some headline points in response to points that are taken against me. I don't propose to do more than simply tell you what our answer is. So it's suggested that we're trying to relitigate CPO certification. We're not. Our primary case is the amendment is not needed because of this allegation, or the Morton's fork. Because the Morton's fork has been deployed, we have sought to cure the ambiguity through a short-circuiting process of saying, "Well, if you amend the class definition, then any ambiguity which we deny exists, is addressed.

THE CHAIR: Is there a problem, though, that if you amend the class definition, is there any risk that you are expanding the class?

MR BEAL: No, because the class is closed.

THE CHAIR: Well, that's the question though, isn't it? Because if you change the class definition, then arguably people who would have been excluded previously have now the potential to be included, and then presumably one should be -- we're re-opening the process?

MR BEAL: We're not suggesting reopening the opt-in process.

THE CHAIR: Well, I suppose I'm questioning whether I can change the class definition in a way that might allow people who previously couldn't opt in to be able to opt in, in which case we'd have to issue a new notice, wouldn't we?

MR BEAL: Well, in our respectful submission, no, because the class is closed, and all that this amendment is doing is clarifying the true intention of the original notice.

Nothing has changed, we say on our case. You get that with the original wording. If you're with me on my primary submission, then we don't need to change it at all, so the problem goes away.

THE CHAIR: No. Yes, I understand.

MR BEAL: It's only if the Morton's fork is at risk of being deployed successfully, for what one might describe as a chancery lawyers' point, at best: that we would need to cure any alleged ambiguity by saying, "Well, actually what this meant all along was x". That's how we have understood it, and this is simply reflecting the opt-in process that was in fact adopted.

THE CHAIR: I suppose there's also the possibility, isn't there, that if I were to agree with you about the construction point, you might find at a later stage you failed on the evidence. It's at least conceivable, isn't it? Which you could cure if you amended the class definition. Now, I can't think of a particular circumstance, but ...

MR BEAL: But we would still need to show an indirect payment or an indirect contractual arrangement by which we meant effectively the agency relationship I've just described, and the form of recharging that is commercially common.

THE CHAIR: Yes.

MR BEAL: If we can't show the recharges, then we lose.

THE CHAIR: Yes.

MR BEAL: We say the amendment does not allow the new claimants to join the claim. Then there's some points taken about the wording that's used, which I think largely focus on changing, or what "typically" meant in context. We've used "typically" because it was always present in the original definition, and we've used "evidenced by" to avoid the implication that one needs to have a specific MSA for a specific claimant entity.

There's then some issues about what the provisions of MIDs can or cannot do. But all

of that argument has become somewhat sterile given that we are now growing behind 4A and 4B, and we'll be providing schedules of loss in keeping with the other merchant class.

I think that's probably a convenient moment.

THE CHAIR: Yes.

MR BEAL: I'll look through my notes, and if there's any particular glaring points I need to deal with in advance of my learned friend's submissions, rather than by way of reply, I can make them very shortly.

THE CHAIR: Yes. Thank you. Okay, we'll take ten minutes. Thank you.

(11.49 am)

(A short break)

(12.02 pm)

THE CHAIR: Nothing further? Okay, thank you.

Mr Cook.

Submissions by MR COOK

MR COOK: Mr Beal spent a great deal of time in his submissions giving evidence about how groups operate their VAT and payment cards arrangements, which is no doubt very interesting and may even be right, although it will be a matter of evidence, not Mr Beal's assertion.

But the critical point here is the Tribunal certified a set of collective proceedings, opt-in collective proceedings, based on a particular definition of the class, which is set out in the CPA. If someone is within that class definition, they are eligible to opt in. If someone is not within that class definition, they are not eligible. If an entity, and there are many of them, tried to opt in, which does not meet the class definition -- I say there are many of them because it's been acknowledged that many of those that did try to

opt in are invalid, and they've now been removed from the list -- then someone who tried to opt in, who did not meet the class definition, that was not a valid opt-in. They were not represented persons and they needed to be removed from the list.

What we have been trying to do since we received the original class register back in March 2025, 18 months ago, is get an answer to the very simple question: which entities are actually represented persons in the opt-in collective proceedings? If there are entities, and there's been this long process of removal, that are not valid, they need to be identified and excluded, so everyone has clarity and certainty who's actually in these proceedings.

We've had this constant drip as we've pressed the point, pressed the point throughout 2025, which led to the opt-in judgment. We've been pressing the point this year in relation to who actually meets the class definition. We've had this drip, as we've set out in our application, of, as we keep pressing, more and more entities, the CICC Class Representative accepts that they need to be removed, and that included most, you know, that was throughout the process of this year. But as recently as ten days ago -- my learned friend took you to the letter of 16 October. That letter glossed over the bit where as recently 16 October, two more entities, and to be (inaudible) recognise that we're now down to 72. So when I say two entities, we're actually talking about, you know, significant numbers. It's not out of a cast of thousands, as we are in the proceedings as a whole. As recently as ten days ago, two more entities, it was acknowledged, had no entitlement to be part of the claim, and so needed to be removed. But they've been on that class register for 18 months. They should never have been there.

So what we seek, what we've been trying to do, is a process that will provide that certainty, that clarity, about who is actually within these proceedings properly and validly, not who's on the register improperly and wrongly. As I said, the Tribunal has

certified collective proceedings with a class definition. The start and the end of this bit of the application -- there's obviously an amendment application which does something different, and I'll come to that in due course -- is that class definition.

Remarkably, in 75 minutes of submissions, my learned friend did not take the Tribunal to the definition of the class at all. With respect sir, he says it's a construction issue, but he hasn't told you, actually shown you the clause which he says should be construed. It's quite apparent why. Because actually this ends up not being a construction issue at all. That was a fig leaf. The reality is here that it's quite clear what the class is defined as being. What he's now doing is trying, through a variety of devices to, to try and argue about entities that meet that class definition, the construction point. There is no uncertainty here at all. The clause says there needs to be a contractual relationship.

So I will, if I may, take you to that class definition.

THE CHAIR: Yes.

MR COOK: I'm going to take you to it in our application of 19 May 2026, which is bundle A, page 297.

THE CHAIR: Sorry, bundle A?

MR COOK: A bundle, page 290.

THE CHAIR: What is bundle A? Core bundle, is it?

MR COOK: Yes. I'm sorry. Yes. Page 297.

THE CHAIR: Yes.

MR COOK: Which is our application of 19 May 2026.

THE CHAIR: Yes.

MR COOK: Which, as I say, it started all of this. It actually repeats what my solicitors had already said on 31 March, which is exactly this issue. So my learned friend, you know, went through his archaeology of all of this. The archaeology is actually that our

case has set out the class definition interpretation, or what it absolutely clearly says, for six months. It's been absolutely clear. What we now get is, six months in, arguments that came in yesterday morning about undisclosed principals, matters like that.

But, sir, if that's our application, that's the application itself.

THE CHAIR: Yes.

MR COOK: Of 19 October. But it's a useful way, if we go to page 299, paragraph 10, it's just a useful place to see where we've done the underlining, which just emphasises the words we say should be emphasised.

THE CHAIR: Yes.

MR COOK: There's never been any criticism it's incomplete or inaccurate.

So the class definition, which comes from the CPA -- well, it was their proposal in the claim form. It obviously got modified, but it was their proposal in the claim form. It then goes into the CPO. It's important to recognise that, other than the interregional point, the sort of the bones of this have been clear right back since 2022; the contractual requirements, those elements that have been there all along. So this has not shifted. It's been there for four years.

We start with the class includes. It's only merchants who paid a merchant service charge in respect of one or more commercial card transactions during the claim period in the UK. So the merchant needs to have paid the MSC.

THE CHAIR: So that's the loss point, isn't it?

MR COOK: Well --

THE CHAIR: Is it? I mean, maybe you preferred not to describe it like that but the dialogue I was having with Mr Beal was if you start by thinking about where has the -- assuming overcharge and liability and so on.

MR COOK: Certainly if somebody has paid the MSC, then that's, I mean that's

according to the Supreme Court, is a very good, you know, prima facie basis for loss.

THE CHAIR: Yes.

MR COOK: But then merchant is defined as a person which accepts payments --

THE CHAIR: I'm sorry, Mr Cook, just before we move off that first bit, are you taking a point about it being MSC as opposed to being a MIF? Is there a point there?

MR COOK: No.

THE CHAIR: No.

MR COOK: It's not. I mean, it's just -- it's been recognised.

THE CHAIR: Yes.

MR COOK: What is actually paid by the merchant is always a merchant service charge.

THE CHAIR: Yes.

MR COOK: How it's calculated -- and we obviously now know a lot more about that -- you know, will often be, particularly for larger merchants, MIF plus, plus. But how it's calculated is an irrelevance. Ultimately, it is always a merchant service charge, however it's broken down.

THE CHAIR: Yes. Okay, fine, fine. That's helpful, thank you.

MR COOK: So it incorporates it as either an explicit element or it's a charge, 85 per cent of which is included.

THE CHAIR: Yes.

MR COOK: That's the effect of the Trial 2B judgment. So yes. I mean, it's nothing to do -- we're not taking points about how it's broken down or not broken down within that.

THE CHAIR: I think it's apparent from the discussion with Mr Beal, which you might say is both of us trying to give evidence, but that you might have a situation where there were some charges that passed between, say, a treasury company and it's just

assumed this is one that's identified in the contract and I think you would accept is therefore entitled to the contractual relationship. You might have a situation where it wasn't a complete coincidence between what was charged by the acquirer and what actually was paid by a trading company, albeit that one would expect the trading company to pay, at the very least, the value of the MIF transactions it had carried out. But I mean, that is a point for evidence, really ultimately, isn't it?

MR COOK: That would be a point for evidence, provided that that trading company meets the definition of loss.

THE CHAIR: That was the reason why I said, let's assume that situation where there's effectively part of the contract by specific reference. You'll come on to deal with the alternative, I'm sure.

MR COOK: Yes, yes. We'll deal with the internal chargeback point. But I mean, there may be an issue about whether the internal chargeback is relevant, at least for these purposes, because that's a question of if that trading company, that's where we come to now, which is a situation where what is defined as being the person, the merchant -- so the person who can be in the class -- the merchant is a person who accepts payment by means of payment cards and which has a contractual relationship, typically known as a Merchant Services Agreement, with an acquirer; provide services to merchant, enabling the acceptance of Mastercard payment card by the merchant.

I'm just going to pause there in relation to that half of the definition.

THE CHAIR: Yes.

MR COOK: Now, my learned friend made various comments about what we said about typically, known as typically. But of course that's typically known as. I mean, that's just the label name. Of course, it might be described in all sorts of ways. It might be called a merchant agreement. It might be called a payment services agreement.

That's nomenclature. That's an irrelevance.

What is the critical definitional bit of this is that there needs to be a contractual relationship with an acquirer. The person -- so the opting-in entity -- needs to have a contractual relationship with an acquirer. That is just a simple contract point of does the relevant opting-in entity have a contract with an acquirer or not?

Now, that contract may possibly be formed in a variety of ways, and I'll come on to some of those ways. But the simple point is, unless it has a contract with an acquirer, it does not meet the class definition. With respect -- and essentially that is something that, you know, my learned friend's arguments have sort of moved on from what was said previously in writing because he expressly conceded today there needs to be a contractual relationship.

Now, to some extent, he said that concession doesn't go far enough. The important bit is there needs to be a contractual relationship with the acquirer, is the additional extra element of that. But in terms of the class definition, unless the merchant or relevant individual entity has a contractual relationship with the acquirer, they don't get off the ground in terms of being within the class.

THE CHAIR: Just in relation to contractual relationship, are you saying that it is not possible for there to be a contractual relationship if a person is not expressly a party to the contract? Is that your submission? Because --

MR COOK: That becomes a matter of law in terms of whether somebody is a party to a contract.

THE CHAIR: Exactly, and I'm sure we'll come on and deal with it. We've just looked at the Privy Council case, where I think it would be hard pressed not to say there was a contractual relationship between the insured and the insurer.

MR COOK: (Overspeaking). I mean, they were ultimately a party to the contract. I mean, that's what one gets to with undisclosed principal situations, is it's

a recognition they are, in fact, a party, albeit not named.

THE CHAIR: Yes, but the question I think I asked you was about -- yes, exactly. That's the question I asked you: whether they were named in the contract. They obviously weren't in that case. That was the whole point of it. I'm asking you whether you're limiting contractual relationship, as it's referred to here, to situations where people are expressly named in contractual documentation. Whether you accept it can go beyond that?

MR COOK: Well, as a matter of contract law, there are some situations -- they are in fact, very, very rare -- but there are some situations in which someone can be an undisclosed principal, which means they are not named, but they are in fact the true contracting party. I mean, that's what one gets with undisclosed principals. Somebody is the true -- Obviously, if somebody is indeed the true contracting party, then they are in fact a party --

THE CHAIR: Yes.

MR COOK: -- that is in fact a contractual relationship.

THE CHAIR: Yes. Okay. Well, I suppose that answers my question. I think I was trying to flush out whether you were saying that contractual relationship means anything other than its ordinary meaning, that is that someone has a contract of some sort with somebody else.

MR COOK: Yes. I mean that's ultimately the touchstone here; there needs to be a contract between A and B.

THE CHAIR: Yes, but it doesn't have to --

MR COOK: A merchant and the acquirer.

THE CHAIR: But it doesn't -- yes. Sorry. Carry on.

MR COOK: Now, that can be formed bilaterally.

THE CHAIR: Yes.

MR COOK: It can be part of a multi-party -- I don't want to use the word multilateral but, you know -- a multi-party contract where there are five merchants party to one contract with the acquirer or within their signing it. It could in theory be a situation where there was an undisclosed principal. Obviously, the mere fact that somebody cannot find a signed copy of a contract ten years later doesn't mean that there is no contract, because the mere fact you can't find the signature page, doesn't mean there is or is not a contract, necessarily. You could evidence a contract without necessarily needing to produce the signed version of it. That's still a question of: is there a contract?

THE CHAIR: Well, there might not be a signed version at all. It might be a contract that's created by conduct, mightn't it?

MR COOK: Yes, indeed. I mean, those are all just simple standard contract law questions of: was there a contract?

THE CHAIR: Yes. We're working on the basis the contractual relationship just means any relationship recognised as a contract by law. That's the point we should --

MR COOK: Contract law between those two parties.

THE CHAIR: Between those two parties. Yes.

MR COOK: This is probably where we end up with sort of the big issue here in terms of the disagreement between me and Mr Beal, where the rubber really hits the road, because there will be situations -- essentially, there are two possibilities here. Either the merchant has a contract in whatever way or they don't.

Now, one scenario in which a merchant would not have a contract is because they didn't do the right kind of contract transactions, in which case that's relatively easy. There may also be a situation in which the contracting party who entered into the relationship with the acquirer is one group company, but that is a contract they enter into themselves. The fact that they then pass-on payments to other group companies,

if there is no contractual relationship under the terms of this, it is absolutely clear that the other operating company in the group -- if there's no undisclosed principal, there's no, you know, signatories that have acceded to the contracts or anything else, if the contracting party and the only contracting party is the treasury company and the group. Other subsidiaries simply cannot meet the definition of having a contract with the acquirer.

THE CHAIR: Well, that begs the question, doesn't it? Because if you take the position of a merchant who has got a terminal, is undertaking transactions, is having them acquired, and that process is all happening, the question becomes, does that amount to a contract? That's the whole point of the -- that's just a circular point, isn't it? You need to lance that boil, don't you, and decide whether or not in those circumstances, a contract exists?

Mr Beal is saying, well, there's a pretty strong inference it does, because otherwise, why would an acquirer be entitled to take charges? Why would the merchant be entitled to be using the acquirer service? There's quite a strong indicia of a contract. But he accepts that, of course, as a matter of fact, he's going to have to prove.

MR COOK: Well, I mean, to some extent, there's a question of whether you prove there was a contract. But it is not uncommon at all in situations where -- and we get also the historic contract cases. I mean, the classic one is: I buy plane tickets for my family to go on holiday. It's quite clear that the only person who's a party to that contract is me, not my 8-year-old son. He benefits from that plane ticket, but just as a matter of recognised contract law, the contracting party is me. So the mere fact that he benefits from being able to fly on that plane doesn't make him a contracting party.

THE CHAIR: Well, I'm not sure that's right, is it? Because surely he has some rights, doesn't he, if he gets on the plane? And surely the airline is concerned to ensure that if the plane crashes, he doesn't have a claim that exceeds the limitation set out on the

ticketing. I wonder whether it's a particularly helpful analogy. It may be a little more complicated, I think, than you're suggesting.

I mean, in a way -- you obviously are going to be suggesting that undisclosed principal is a sort of curious and rare beast. In some ways, whether or not we're in disclosed or undisclosed principal territories is a matter of fact, isn't it? We just don't know for a lot of these.

The thing you're going to need to do, I think, to get round Mr Beal's submissions is to show that that is not a feasible position for him to be able to prove, isn't it? If he says, "I'm confident I've got people on the list who have suffered a loss, and I'm confident that the law allows me to present them as being, at least disclosed, if not undisclosed principals, and I'm taking on the burden of having to prove that later on", really the bit of that that you have to tilt out is the middle bit, isn't it? You have to be able to say, "Well, he can't do that."

MR COOK: I'm not going to tilt at the prospect of undisclosed principals today, on the basis that ultimately that is going to be something that's going to depend on the facts in terms of whether he can actually advance that case. With respect, I think it's vanishingly unlikely we're going to end up with many of these situations where you end up with undisclosed principal. The reason why undisclosed principal is not going to help my learned friend greatly is what one gets to in terms of that case law is the requirement that the undisclosed principal has given his agent authority to enter into a contract on his behalf.

THE CHAIR: Yes. Well, you would assume that in a group situation, wouldn't you? I mean, that must be the case, isn't it? It would be --

MR COOK: Well, in fact, in terms of company law, that's very rare that you would, in the context of company law, require in general terms. But this is actual authority, not ostensible. Actual authority. You would need a grant of specific authority by

a company to another group company to enter into a contract on its behalf. That would be something that would be -- you know, there would actually need to be resolutions or a specific authority for that. That's a rare situation.

THE CHAIR: Well, that's --

MR COOK: That's a factual point as to whether that happened (overspeaking) --

THE CHAIR: Well, I mean --

MR COOK: -- to show a specific grant of authority or a general grant of authority for a company to enter into contracts on their behalf, by which I mean in a way that bound them as a party to contracts.

THE CHAIR: Well, you may or may not be right about that; I don't know. I have to say, it doesn't appear to me to be entirely obviously right, but you may well be. But really all that, that doesn't take us anywhere, does it? I think you're accepting that's a factual point. It may be that if you're right about it, Mr Beal's list at the end is going to be rather shorter than he intends. If you're wrong, then it'll be (inaudible).

I suppose, just standing back from it, Mr Cook, the real point here is, isn't it, if we're in a position where it is obvious there are people who are on this list who shouldn't be on it, and they should come off it? I absolutely accept that that's a fair and proper point for you to be making. But if you're not in a position to establish that they should obviously come off it, then it's no different from any other of these proceedings where one might end up at the end with class members turning out not to be class members, and that's baked into the system. There are certainly references to -- mostly in the opt-out context, but generally references to that being just one of the features and risks of the proceedings. We recognised that at certification; I think there's some discussion about that from the judgment for certification of these proceedings.

Now, that doesn't mean that there's a licence for people to turn up and put people on lists who shouldn't be there. So I have no objection at all to you coming along and

saying, "These people shouldn't be on here." You've been doing that for 18 months, as you say, and with some success, because it is apparent there are some people who shouldn't have been on there that are no longer on there. But perhaps we have reached the point where I think you're going to have to deal with this point about agency if you're going to get any further with that. If Mr Beal's got a legal justification for them being there which is dependent on facts we can't deal with today, I mean, how am I going to resolve that?

MR COOK: The issue is, of course, this is a Disclosure Application.

THE CHAIR: Oh, of course.

MR COOK: All of this has come as a result of our Disclosure Application. Ultimately, that's the reason why we sought the disclosure because, you know, on the sort of a priori basis, we can't identify -- you know, some of them we could point to indicia that said probably they weren't the right ones in the first place, but the starting point was, for most of them, just a, "We don't know." That was the reason for seeking disclosure, was to allow us to be in a position to challenge them.

There may very well be a proportionality point, if we get disclosure, about what exactly the fight might be in those circumstances, about would it be appropriate to have a sort of specific trial on two or three of them? Probably not. Absolutely not. But that's a different point.

So, I'm starting with, "What does the clause mean?" It was said there was a construction issue. (Inaudible) there is no construction issue. There's then a separate point about when we should get that disclosure. Once we've got the disclosure, if you agree with me, there's then a question about whether it reveals some easy wins for us. If there are easy wins, absolutely they should be dealt with. If there are really complex points, then I'd agree; those probably would be matters for trial, rather than ones we would deal with in a mini-trial beforehand.

THE CHAIR: Yes. Well, I think --

MR COOK: It's the basic material disclosure. Once we've got the disclosure, we then see where we take it, I would say.

THE CHAIR: Yes. Well, I think Mr Beal has more or less, I'm not sure promised the disclosure, but he's certainly indicated that he knows he needs to provide you with data which will give you the volume of commerce and information which will allow you to progress the question as to whether or not he can meet, as a matter of fact, the legal proposition that he advances for the definition.

I mean, I don't think there's any question -- there may be an argument about whether that's something that should wait till May, and we can come back to that. But I suppose the point I'm just sort of pushing you on at the moment, I'm really asking you whether you are in a position to challenge his interpretation of the meaning of contractual relationship as a matter of law. That's really the point, I think, that he's put on the table. The question is, are you actually in a position to deal with that?

MR COOK: Well, it depends what you mean, sir. I mean, we've been saying it has to be a contractual relationship for six months.

THE CHAIR: Well, he's acknowledged --

MR COOK: And he disagreed about that, and they've come back today and said it has to be a contract.

THE CHAIR: Well, I think --

MR COOK: So we're in agreement at last that it has to be a contract --

THE CHAIR: Well, I agree --

MR COOK: -- between the two entities.

THE CHAIR: Yes. No, I agree; I think that is where you are. But I think his version of what might amount to a contract and his expectation about what he's going to be able to establish is perhaps different from yours. That's really the point I'm making. I think

you are in agreement. As far as I can tell, Mr Beal is saying he accepts that as the wording has expressed there, there needs to be, somewhere in the factual pattern, something which creates a contractual relationship between the person who suffered the loss and the acquirer.

But he's saying that that can happen in a bunch of different ways. That could include, for example, there not being a written contract at all and just simply based on the fact of clearing of the -- of the acquiring of the transactions and some of the documentation that might come with it.

Now, you know, I don't know to what extent he's going to have to rely on that. That may well give rise to all sorts of arguments about, if that's where he's got to go, matters of fact supporting those arguments. I'm not trying to stop you from running any of those arguments. I suppose I'm just trying to slightly shortcut the discussion. I don't want to stop you doing anything you're going to do, but I'm just intrigued to know whether now that you appear to be in agreement, you think you can take it any further. That's the question, I think.

MR COOK: (Inaudible) we spent six months (inaudible). You were told there was a construction issue. There isn't. In the first instance (inaudible) trying to demonstrate there isn't a construction issue at all, in the sense that there is and can be no uncertainty, which is now conceded, that there needs to be this contractual relationship between the opt-in entity and acquirer. It does not show that that's the end of the story.

THE CHAIR: Maybe it's not a construction issue, but certainly my reading of some of the letters your solicitors have written, and indeed the submissions you've gotten have suggested a narrower meaning of contractual relationship than Mr Beal is advancing. So I think he's saying there is a construction issue here, which is what that means.

To the extent there's now agreement, I think it involves both him accepting that there's got to be a contract in there somewhere. And maybe -- I don't know if you are; I think

this is what I'm pushing you on -- you accepting that that contract could be, in the ordinary course of contract law, take all sorts of different forms that wouldn't just necessarily be a written contract directly between a merchant and an acquirer.

I'm not really that interested in how we got here. I appreciate it's painful for all of you and a little bit painful for me. But actually, what I'm most interested in is making sure that if we're not in a position to progress it today, we don't waste any further time on it. I understand absolutely that you will reserve and want to take a tilt at things that you see in due course that you think don't meet any definition of contractual relationship. I'm not trying to suggest you can't do that. I'm just not sure that there's -- I mean, we can go through all the laws of agency, we can look at company law and things like that, if you think it's helpful. But I'm not sure how helpful it's going to be, given that he is prepared to put his position as saying, "I can come up with the goods on that."

MR COOK: Then that's the position. Certainly, step 1 for us was always: let's get the documents, and then see if there are arguments, let's have the arguments on the documents. We've finally seen a couple of documents.

Now, I don't think there's any particular value in me going through those specific ones to try and identify the position very much. I don't agree with my learned friend with some of the points he makes by reference to those documents, but those are, kind of, points of detail submissions about what those contracts require in terms of -- say, for example, the first one, which was in relation to -- he described as a utilities company, for example. A point of interest, the specific utilities company that entered into that agreement is one of the ones that dropped out ten days ago. So the actual named party on that is no longer -- it's recognised not to be a member of the class. They did have an MSA, but they are no longer a member of the class. That's acknowledged.

There is another group company which has opted in. The question then is, do they have a contract? There is a point in relation to that. Certainly my reading of that

agreement is under the contractual framework, they needed to enter into an accession agreement in order to be bound by that. No accession agreement has been signed, but I mean, these are points of detail.

THE CHAIR: Yes.

MR COOK: I'm very happy just to address you on why I say that.

THE CHAIR: Well, if you want to. I mean, I think Mr Beal's submission was that there were two layers of subsidiary who could get the benefit of it. He says that's a question of construction of the merchant service agreement, which is yet another complicating factor. But, you know, I'm not sure that -- well, I mean, if you, by all means.

MR COOK: (Overspeaking) my reading of that that's wrong.

THE CHAIR: Yes.

MR COOK: As I said, it's not something that I'm going to be inviting you to decide today.

THE CHAIR: No, I mean, I understand --

MR COOK: I think the definitions end up being ones where there are two definitions, but --

THE CHAIR: Let's have a look at it. I think I understand the point you're making, but let's have a look at it.

MR COOK: If you do, sir, so page 18 we have the definition, so the starting point of this contract is entered into on behalf of the particular utility group, and in relation to -- so background page 17. The company wishes to appoint in relation to the company and certain affiliates. So we're interested in what affiliate means. Then we have this slightly odd definition of "associated companies" which is on page 18.

THE CHAIR: Before you get to that, it does define "affiliate" doesn't it, on page 18. So if the combination of the background is that the company wants the acquirer to provide processing services to the affiliates, and "affiliate" is defined very broadly to

include anyone in the group, as I read it. Then, what Mr Beal says, is when you get to "associated company", that is a particular adherence to the agreement that doesn't exclude the other affiliates. Now --

MR COOK: We go to clause 2.3, page 26. In the event an affiliate of the company wishes to receive the services, such affiliate must execute a letter of adherence.

THE CHAIR: So you say that in order to satisfy the background objective of receiving the services, you actually have to become an associate company?

MR COOK: Yes.

THE CHAIR: That's the submission? Yes.

MR COOK: So that's the way contractually it works. I mean, it was simply a submission that glossed over the fact that there is that additional step of entering into a letter of adherence. So "affiliate" is a wide term, but it's only those affiliates that wish to become associated companies. And in order to do that, they need to execute the deed of adherence. So certainly in terms of that framework structure, this is not a contract on behalf of everyone in the group. That's only those entities who actually execute the additional points. But, you know, it only takes you so far.

THE CHAIR: What would be your view then if, let's say the acquirer started to provide services to a company that was not an associated company, but was an affiliate, and did so over the course of five years, and there were multiple transactions and there were statements provided, and if the acquirer was aware that it was providing those services to the affiliate? How would you characterise that, and by reference to the class definition? Would you say there's a contractual relationship there or not? I mean, I appreciate it would depend on the facts. But, I mean, you see what I'm saying?

MR COOK: Well, I mean, there are two possibilities in terms of how the facts might show out in that situation.

THE CHAIR: Yes.

MR COOK: There may be many more, but the ones that struck me immediately were the two possibilities, would be option one, that the utility company in question is the one that sends in the batch files. They're the ones that have the -- my learned friend is very keen on MIDs. They're the ones who send in all the information.

THE CHAIR: Yes.

MR COOK: And, you know, essentially like we saw with the travel company that was dealing with situations with travel agents, saying they were their agents, if it's the case that in that situation, it's quite clear the travel company is the contracting party.

THE CHAIR: Yes.

MR COOK: So if what happens is the utility company is the one that sends in all the batch files, gets all the payments; it's quite clear in those circumstances, we would say, the only contracting party is the utility company. Whether some internal process later goes on of transferring funds is neither here nor there in terms of the contractual relationship.

THE CHAIR: Yes.

MR COOK: So if that's the case, there is no contract between the related company and the acquirer. Option two is it's basically, at a certain point in time, it's recognised there's an additional entity set up, and you have a situation where you get direct invoices being sent, batch files being sent from that subsidiary, direct to the acquirer. Payments are made directly. Then at a certain point you'd say, yes, it's been recognised that effectively there is a direct contractual relationship between those two. So we absolutely see you can get a contract through conduct in certain circumstances, but it has to be a direct contractual relationship.

THE CHAIR: So is the inference in your first situation, that the acquirer is unaware of the affiliate using their terminals; is that ...

MR COOK: It's not a question of awareness or otherwise. Again, it's the situation. My analogy is not very helpful but, as I said, buying plane tickets, they're aware of the existence, but it's quite clear the contract is by, you know, so as long as the contractual relationship, the person who is liable to pay and liable to be paid is the treasury company, then who actually operates the terminals, which could be acting, operating as an agent for the treasury company or on its own account. In those circumstances, it's a question of who has the contractual rights? (Inaudible) the contractual rights are exclusively by the treasury company. But again, it's going to be a question of fact and degree in relation to those. The ultimate question has to be: is there a contractual relationship?

In most circumstances, where somebody sets up a framework which says the contracting party is B, particularly if you know there are already a bunch of other subsidiaries, but you've specifically not included them. In those circumstances, you say it was deliberately intended the contract was between just those parties.

THE CHAIR: And what about in your first scenario, where's the loss in that situation?

MR COOK: With respect, that's not for me to try and make submissions about (overspeaking).

THE CHAIR: Well, you see where I'm going with this. I'm sure you see where I'm going with this. So if, let's say that in the first situation, as you say, all the hard work is done by the parent company.

MR COOK: Yes.

THE CHAIR: But, it does actually seek to recover from the trading companies the value of the MIFs, so would you then say in those circumstances that the parent company didn't have a claim because it hasn't suffered the loss? Would that be your submission?

MR COOK: Well, I mean, there are two separate questions, which is firstly,

who -- I mean, it may well be the parent company might have its own claim for its own transactions in any event.

THE CHAIR: Yes.

MR COOK: But ignoring that for the moment, there are two separate questions: who meets the class definition (1), and the value of the claim that any particular entity has in relation to that.

THE CHAIR: Well, yes, but you see the point I'm making, don't you? I mean, it's a very unattractive position for you to advance, that you can split these. Maybe it's a function of the drafting. I mean, I appreciate that's not your fault, but it's not really where we want to end up, is it? It might be where you want to end up, where your client wants to end up, but it's not actually where the Tribunal want to end up, because then you're not fairly adjudicating claims, are you?

You've got a collective proceedings regime in which it's been rendered ineffective because there are undoubtedly losses that have been suffered on the premise. But because of an aberration, if you like, in the way the class definition is described, the person who's got the loss can't claim for it. I mean, that can't be the right answer, can it? You're not seriously suggesting that is something that we should accept as being a proper outcome of this debate, is it?

MR COOK: With respect, I'm saying -- well, in terms of what is a proper outcome, there is a class definition which is the approved basis on which the Tribunal did this.

THE CHAIR: Well, I understand --

MR COOK: The Tribunal did this on the basis of, also one of the very, you know, the issues that Mr Kennelly sort of feels very strongly about is he spent a lot of time making submissions about the need for identifiability of the class in this regard.

THE CHAIR: Yes.

MR COOK: One of the key answers, which you ultimately accepted in terms of

identifiability of the class, was CICC put forward one of the really strong points in its favour, is that it had a class definition that was based upon who actually had the MSA with the acquirer. And that was said, you know, we set out the quotations in our submissions, but that was said to be it's a really simple point; everyone will know who has the contract. Very simple, easy. It creates very simple identifiability.

THE CHAIR: Yes, but if I may --

MR COOK: So in terms of what the class definition is, so now, what you're asking is: should the class definition four years ago have been drafted in different terms? Well, that was a matter for CICC. See what the Tribunal approved, based on specific submissions about identifiability was there must be a direct contractual relationship between the opt-in member -- the opt-in individual and the acquirer --

THE CHAIR: I don't think I quite see it like that, Mr Cook. I think the point you make is absolutely right, about identifiability, but that was really a point about the opt-out class, wasn't it? Because there's no -- we don't have the problem with merchants who turn over more than £100 million a year, of them being unsure as to whether they've transacted these sort of MIFs. I mean, that's not really the problem we were dealing with there.

I mean, it's an entirely fair point in the generality; I'm not saying it's not right. But actually the reason that it really mattered in the certification process was because we had an opt-out class of merchants down to market traders. And, as you recall, we were very concerned about the possibility they would have no way of working out whether they fell within the class definition or not. So I'm not saying you're wrong; I'm just saying when it comes to be looked at this through the lens of the opt-in claim for very, very large entities, we're now down to 72 of them. We're not really worried about that anymore.

So I mean, I completely accept the class definition, on your argument, if the class

definition is wrong, then that's what drives the problem. I'm not suggesting you've caused the problem. All I'm saying is that it does rather seem like quite a bold submission to say that we should be unconcerned. The Tribunal should be unconcerned that that leaves a black hole in the collective proceedings that mean that people can't recover if on the assumption they have suffered a proper loss. It's not very attractive, is it?

MR COOK: Well, a couple of points to make in relation to that, sir. Firstly, it was an identifiability point that was specifically made, because obviously there are separate claim forms in relation to opt in and opt out. So this was a point that was specifically made in the opt-in claim form. It was designed to basically say there shouldn't be a problem with groups identifying who should be opting into the class and issues like that. Because obviously, while we have different points, and as you're rightly referring to, there was a question of who has had a commercial card transaction or an inter-regional transaction? Will a small business know? That was a separate issue. But in terms of who should opt in, the point was being made, identifiability, that you did have that specific identification of who is the contracting party. So that was a specific submission being made in support of the opt-in class definition as put forward. So I do say that that --

THE CHAIR: Yes. Okay.

MR COOK: So that is a feature of --

THE CHAIR: I stand corrected.

MR COOK: And then once we then have -- so yes. It is a feature of the class definition. We say there's no possibility of wriggling around what the class definition actually says. It's been there in these terms; proposed for four years, approved for two years. The issues that have been identified in terms of who within groups might or might not be the right claimants has obviously been very much a live one in CICC's

mind for 18 months. They're finally now trying to change the class definition.

We'd say it's simply too late on any grounds, but it does cause, when we come to considering the amendment application, there are sort of fundamental problems with it. The most fundamental one of all is the limitation problem, because, as you rightly put in your questions to Mr Beal, the effect of this is if you have an entity which doesn't meet the contractual definition test, contractual test, and it's also right to say that, of course, there is a second half to that definition, which I got sort of tugged away from, which is also paid an MSC to an acquirer. So again, it's very much put in terms of it's the person who paid the MSC to the acquirer. Again, if the payments are not going to the acquirer, that is a problem for these purposes.

If you have a situation which you have a company that cannot meet that class definition, then they are not within these proceedings, validly within these proceedings. If the class definition is modified in a way that allows them to be in these proceedings now, that is essentially adding -- that is adding new parties to the claim.

The case law is clear that if you're going down that route, the effect of changing the class definition to add new parties moves us into the territory of: is limitation a problem? And if limitation is an issue, there is a very much a specific set of rules laid down in the CAT's rules in terms of how you deal with situations where there is a limitation problem. Where there's a limitation problem, other than essentially in a tiny subset of cases where there was an error about the name in the first place, bankruptcy, a very short list like that, the Tribunal simply does not, under its rules, have the power to allow amendments of that kind.

We are in a situation where -- and we say under the Tribunal's rules -- making an amendment which adds new claims, new entities to the class, is that is what you would be doing, because these are entities that have time-barred claims because they are not part of the proceedings at the moment. Therefore, they are joining the proceedings

afresh and therefore limitation is continued to run in relation to them. They have time-barred claims. And they are not allowed -- with respect, under the Tribunal's rules, we say that's simply a full bar to allowing an amendment of that kind which has that effect.

THE CHAIR: Yes, I have that point. Can I just take you back, please, to the construction argument? I appreciate I'm taking you back in time, but I hadn't picked up this point about -- well, I had picked it up, but I want to make sure I'm clear about what you say about the last phrasing: in consideration of payment of a merchant service charge by the merchant to the acquirer. Are you saying that that in itself requires -- I hadn't understood you to be saying this because I thought you'd accepted that an intermediary payment through an agent, like a treasury company, would be sufficient. Are you saying that's not sufficient?

MR COOK: Well, I think, sir, there's a difference between -- there needs to be a payment going from the merchant to the acquirer.

THE CHAIR: I mean, if we're working on the presumption that the person who -- the entity in the list has suffered the loss, then that must just be the case, mustn't it? I mean, is there really any issue about this?

MR COOK: Well, the problem is, with respect, it depends what the sort of nature of the payment is. If somebody makes a payment as my agent on my behalf, then of course, that would recognise that that would be a payment by me to the acquirer.

THE CHAIR: Yes. But you'll pick up the point that if the commercial arrangement between the trading company and the treasury company wasn't back-to-back like that, then you say there might be an issue.

MR COOK: But also if the relationship is simply, you know -- the simple way to look at it is if there are two sets of contracts. You can have a situation where, however it's created, however it's multilateral, bilateral or anything else, there are direct contractual

relationships between the acquirer and the relevant group company.

THE CHAIR: Yes.

MR COOK: In which case that's fine and the flow of funds may not matter too much in that regard, because there would be -- if the direct contractual relationship is between them, then the funds will be being made effectively on behalf of and therefore by the merchant.

The other possibility is you effectively have two sets of contractual relationships. You have the treasury company has the relationship with the acquirer. And then there is, possibly informally as part of the company group, the treasury company has a relationship, possibly contractual, possibly corporate-based, with another group company. In which case, if that's the situation, you know, there is no direct contractual relationship.

THE CHAIR: No, no. But you're jumping back to the earlier (inaudible). I'm asking you about the last phrase, not the second line. Obviously, I understand your point about contractual relationship and either you're right about that or you're wrong. Let's assume you're wrong about it, just for the sake of this construction exercise. Do you still say there's a point about -- so there is a contractual relationship. Mr Beal's right that there's an undisclosed principal relationship, whatever. I know you don't accept that, but let's just assume that he's got over that hurdle. Are you then saying that there is a further hurdle for him, that is the payment by the merchant service charged by the merchant to the acquirer in a direct way? Or are you saying you would be satisfied by, for example, in this case, undisclosed principal paying agent paying acquirer? You're not taking a point on that, are you?

MR COOK: If a payment is made by my agent on my behalf, then legally that's my (overspeaking).

THE CHAIR: Fine. So if we're in a contractual relationship world, you're not going to

be taking a further point on the payment, subject to it being back to back in terms of value?

MR COOK: If it's on behalf of the principal, then, indeed, that would be the case.

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

MR COOK: Thank you. It does fundamentally come back to: is there a direct relationship or not?

THE CHAIR: Yes, I think that's the point, isn't it? It's all about what contractual relationship means. Yes.

MR COOK: Yes.

THE CHAIR: Yes. Okay. Thank you.

MR COOK: I mean, that is a matter just of general law. I think we're all in agreement that that's a matter of general law. It's just a question of what is the evidence. I think we're basically now in agreement that this is a contractual test. It then becomes a question of when is the right way, what is the right way to deal with it? With respect, we do say that, you know, this has been something that's been going on for a very long time, trying to get the basic answer to who's in the class and who's not. Effectively, we do say it is sensible for there to be disclosure in short order of the basis on which it is said -- we're down to 72 of them so it's not a tremendously arduous task. Realistically, one rather expected that most of these would be pretty simple; rather expected most of them just -- there would be an MSA in their name. We've of course seen one of them for a luxury retail group somewhere in the west London area, where of course we do have an MSA in relation to a --

MR BEAL: It is well known that confidentiality issues can arise with jigsaw identification and making that sort of comment is really quite unhelpful.

THE CHAIR: I don't think that was necessary, Mr Cook.

MR COOK: Luxury group.

THE CHAIR: Well, I think we've got -- the samples we've got are "utilities", "publishing", "retailer", and "travel".

MR COOK: Okay. I'll use "retailer". But in relation to the retailer, of course, we have an MSA. It's in relation to -- specifically has -- four of the opt-in entities identified in the list. They are identified as parties. They are signatories and have signed. We still need to see the second bit of that, which is whether or not -- proof that they actually paid an MSC, had transactions of the relevant kind, but in terms of the contractual point that's already been established for four of them.

THE CHAIR: Is it? I'm not even sure that this is one of the opt-in claimants, is it?

MR COOK: Yes.

THE CHAIR: Well, I thought that it was something that had come up in the Trial 1 disclosure.

MR COOK: No, these are all --

THE CHAIR: These are all opt-in claimants, are they?

MR COOK: These are all opt-in claimants.

THE CHAIR: Yes.

MR COOK: So yes, these are all opt-in contracts.

THE CHAIR: Yes.

MR COOK: But on behalf --

THE CHAIR: Well, I mean, I take your point. I mean, it's the point I raised with Mr Beal myself, isn't it? But then he says, "Well, look, if you've got the invoice to a subsidiary and that invoice is addressed to the subsidiary and it includes Merchant Service Charges and that's a pretty powerful indication of a contractual relationship". I'm not inviting you to accept that, but I have to say there is some force, to my mind, in what he says on that. We don't know quite how that works and it's clear there is some discrepancy.

MR COOK: There are five entities from that group that have opted-in. Four of them are specifically named in the MSA.

THE CHAIR: Yes, but not the one we've got an invoice for.

MR COOK: Not the one we've got an invoice for.

THE CHAIR: Yes.

MR COOK: So in terms of that group, what I would be saying in terms of the right disclosure would be, fine, we've got four that are named. They need to provide some kind of invoice which says they actually had commercial card transactions.

THE CHAIR: Well, that's a different --

MR COOK: But that's the --

THE CHAIR: Well, hang on a minute.

MR COOK: That's the second part of the --

THE CHAIR: Well, hang on a minute. That's a different point, isn't it? If I may say so, you're jumping from the question of who should be in the list as to whether they've got a loss or not. I think that is quite a different point in terms of the time at which you're entitled to be pressing for that sort of information. Mr Beal is saying he's going to give that to you in what does seem to me to be a reasonable time frame, because he's got a bit of work to do. So I just think if you're saying -- so if you've got a bit of paper now for that retailer that tells you that those four entities are contracting parties, that's the end of it, as far as that's concerned, isn't it? As far as the contractual relationship point goes.

MR COOK: As far as the contractual, they clearly have a contract.

THE CHAIR: Yes. Fine. You don't need anything further. That's 72 down to 71 then, because you don't need anything further from -- actually, 72 down to 68 -- because you don't need anything further, for the purposes of the contractual relationship point.

MR COOK: Well, the reason why I would say that's important is the utility company

that we have seen -- so the first contract there is the utility company.

THE CHAIR: Yes.

MR COOK: As I made the point, that utility company has dropped out in the last ten days.

THE CHAIR: Okay. But that's a different issue. I'm just --

MR COOK: The terms of the disclosure I seek is two things.

THE CHAIR: No, no, I understand that. I'm sorry, Mr Cook. I don't want you to change subjects. I want to pin you down on the retailer. We now have a retailer who has got five entities; four of them are expressly named in the contract with an acquirer. As far as the contractual relationship point, that appears to me to go away. You say not. I'm not forcing you to concede anything. I'm just saying that your case for disclosure from those four is looking pretty thin at the moment, as far as the contractual relationship point goes.

For the fifth one, we've got an invoice which names them expressly and has a merchant service charge, which does again seem to me to be pretty good evidence of a contractual relationship. I think you would quite fairly say at some stage you're going to need more detail about that to understand how that's happened. I don't think Mr Beal's pushing back on that. But it does seem to me that you're not really -- none of us are really gaining very much by you accelerating disclosure against that entity, are we?

MR COOK: In terms of the disclosure we've sought, for present purposes, we've put it in simple terms of two things. Class definition has essentially two elements: (1) that you have the contractual relationship, and; (2) that you have paid an MSC in relation to a commercial card transaction.

THE CHAIR: Well, I think I -- yes, exactly. I would put them the other way around, but yes, you're right. Because it seems to me the first is actually the most important

because it's the one that we're trying to deal with in the proceedings. I said to Mr Beal I'm not entirely sure why it's so important to have a reference to the Merchant Services Agreement. I don't know if you have any views on that.

MR COOK: Well, it was intended to be -- as I said, it was put forward as an identifiability in the characteristics.

THE CHAIR: Yes, but beyond that there's no particular reason why it matters, is there? I mean, obviously it matters to you because you want to know at the end of the day that there's a claim, but I mean, in terms of -- absent the identifiability point, you could have had a perfectly sensible class definition which just had the first -- what you've got in paragraph 10, the payment of merchant service charge.

MR COOK: You have all sorts of different ways of advancing claims, certainly, in terms of the class definition we have, as that's my focus. But in terms of the disclosure we seek, it falls into, for these purposes, two categories: (1) the contracts, and; (2) evidence of a payment of any kind. That's different from wanting to know all the payments. As you rightly say, in relation to the fifth of those entities, we have an invoice. Now, that evidence is, on the face of it, that it certainly has had a commercial card transaction.

THE CHAIR: Well, then also --

MR COOK: And I recognise that that very much creates certainly an arguable case of contract. If that's the case my learned friend wants to put and he says that is his case, that's fine. It may well be not sensible to fight beyond that until we get to, sort of, deeper stages of the litigation.

But in terms of the Disclosure Application that I seek before you today, push before you today, I would respectfully say it would be sensible for there to be production of whatever contract is said to be good enough and evidence of payment of a commercial card transaction, because that is part of the definition. We have, in fact, seen with the

utility company that there are people who have MSAs who don't, in fact, have commercial card transactions.

So what we've been saying is we need to see evidence of both, identify those. That is very different from evidence of the entire claim, thousands of transactions, tens of thousands, whatever it might be. If they can produce evidence of one, then they're within the class. For present purposes, that is what we're focused on, is: have they shown they're within the class? So we see the two categories, and as you've said, one invoice showing payment of one commercial card transaction is enough to be within the class.

THE CHAIR: But really all that is saying is that you want to -- that has nothing really to do with the problem with the contractual relationship interpretation. You're just saying, "We want to know these people have suffered a loss", aren't you? That's what you're saying.

MR COOK: Well, that they meet the class definition. And the class definition involves two things, which is contractual relationship and having paid an MSC in relation to a commercial card transaction.

THE CHAIR: Yes. Well, except it's actually, I think expressed -- I think (inaudible) expressed it the other way around, because you start with the loss, don't you?

But just on this point. I do understand that you're entitled to be clear that there is a loss, and absolutely you need to get that in due course. Why do you need to know that now, when we've got a process which is going to deliver that in the next six months?

MR COOK: Well, there's obviously a timing point of how quickly that's produced.

THE CHAIR: Yes.

MR COOK: We do say that for those threshold questions of who is not within the class, it is sensible to resolve those now. That's different from -- I mean, what happens

in --

THE CHAIR: But why does it make any difference to you? Because you're not being asked to do anything in the meantime that's going to alter the course of that activity by knowing that there are 65 or 50 or whatever it is, are you?

MR COOK: The desirability is to know who's in and who's out of this process, for all sorts of reasons.

THE CHAIR: Mr Beal has said -- and I'm not expressing this on the basis that I think he should be held to it, because he may turn out to be wrong -- but he has said that his understanding is that the list has been constructed by reference to entities that have suffered a loss.

Now, he's obviously going to have to make good on that. But I mean, there's no real reason to think that this is any different from -- I appreciate the history may well lead you to be suspicious about how this has been done. But now we've got to this point, it's just like any other collective proceeding, isn't it, when we'd say, well, there would be a process, it's possible some people might not have suffered losses in the end and we'll find that out in due course? I'm just not quite sure why forcing a process in advance of the process you've been offered, which is not very far away, really makes much difference to you.

MR COOK: I mean, there's a timing point. But there's a difference between getting a schedule of loss, which is just simply an assertion, in terms of getting disclosure of the basic documents which will identify those matters. If those are going to be produced in relatively short order, ultimately I'm not going to make strong submissions about whether that's produced in three months or four months or five months. That's a different point.

THE CHAIR: But that's how the process works, isn't it? You know, they're going to give you the -- that's how we've agreed to run this case: that you're going to get

a schedule of loss and then you're going to have the ability to test that. You know, we've set that up as a process. Why are we departing from that with this now?

MR COOK: Well, with respect, I'd say the reason -- well, we've set it up as a process. I mean, it's something that's been in front of you as a suggestion, and obviously we're suggesting in relation to CICC, there is a prior threshold question. The schedule of loss is going to tell us, do they have a claim for £500 or £5 million? That's obviously important information which we do of course seek as well.

But the threshold question of, "Do just people come out of the list?", with respect, we say that that is an immediate threshold question that should be dealt with as part of that process. Simply getting a pleading that says they have a claim, is very different from being able to test the basic, "Can they tick the boxes?"

THE CHAIR: Well, I think the schedule of loss --

MR COOK: It's likely that with a number of these, as indeed the four entities where it's quite clear the MSA, if we get four -- we know those four entities. If we get equivalent invoices from the four of them, then they're all tick, tick, tick; we know they're in.

THE CHAIR: But, Mr Cook, you're going to get a schedule of loss with a statement of truth on the bottom that says, this is the volume of commerce that this entity has incurred through MSC charges. I mean, you know, are you really saying that that's not a helpful step forward? I don't know if it'll tell you the answer (inaudible) and you might be right that some Disclosure Application will show that they've got bits of it wrong. But it's quite unlikely, isn't it, that at that stage you're going to be given a whole lot of information which is wrong, isn't it?

MR COOK: Well, with respect, the problem is that we do have this threshold disagreement issue about whether or not they are actually within the class. Because somebody may, in fact, be able to say -- and we have this threshold point, which is

somebody may have a perfectly good theoretical commercial card MIF claim, but they don't meet the class definition. So if we have the numbers which show us (overspeaking) --

THE CHAIR: No, but you've been promised -- no, no, no, no. I'm afraid to say you're shifting the ground again. That's a different issue, isn't it? You've been promised material that will give you the ability to understand on what basis, factually, it is said that they meet the class definition. That's quite separate.

I'm talking about the volume of -- the value of commerce and why you need to know now whether someone has suffered a loss or not. Let's assume they're in the class. The answer seems to be you're going to get that in detailed schedules of losses in seven months' time, and I'm not quite sure why you need it any earlier.

MR COOK: Sir, I'm afraid we have been at cross purposes in terms of -- there is a difference, in terms of how we've identified this, between evidence that shows that somebody has incurred an MSC on one commercial card transaction -- they are then within the class -- and separately, a question of what is their total claim.

THE CHAIR: Well, conceptually there is, but if they produce a schedule of loss that's got a value on it, then it answers both questions, doesn't it?

MR COOK: Well, I'm afraid it doesn't, because we still then have the question which is, are they in fact within the class or not?

THE CHAIR: No, that is the bit that is separate, because you have been promised details of why that test is satisfied. That's a completely separate point. They're not completely separate, but it's not the point that we're talking about; it's not the point I'm talking about.

So Mr Beal has said, "I'm going to come along and give you details that will tell you whether or not -- we'll give you the reasons why I say there was a contractual relationship." Once he's done that, you, of course, can interrogate that. But that's not

going to be just, I assume, a bare statement. He's said he's going to give you documents and witness statements, if it's appropriate. He's going to have to come good on this. We all know he's going to have to come good on it.

So just assume at some stage, in May or before, you've got a set of material, a bit like what we've got for the retailer, and possibly, hopefully more that will allow you to test that proposition. Of course, if you think you need more information, you can always ask for further disclosure. But that's all just there. Then the question I'm asking you about is, well, why do you need to know any more about loss than what is going to be given to you at the same time in the schedule? That's the question I'm asking you. And why do you need to know that earlier than getting it in the schedule of loss with a package of stuff that'll tell you about contractual relationship?

MR COOK: Sir, I'm afraid we have been at cross purposes. So on the (overspeaking) --

THE CHAIR: Well, that's (overspeaking) -- yes.

MR COOK: -- I understood Mr Beal's, you know, (overspeaking) --

THE CHAIR: Well, it is complicated. I'm sorry. It may well be my fault.

MR COOK: If what we're doing is getting a package of documents which says that's their case on a particular bit and a VoC number separately, whether at the same time or not, then those are the two things that I'm asking for. The only question is then a matter of timing.

THE CHAIR: Well, that's quite -- exactly. That's the question I was asking. Well, look, I think we ought to take a break. I don't know -- have you got much more?

MR COOK: It really depends on how far you want me to go through in detail the amendment application (overspeaking).

THE CHAIR: Well, I mean, Mr Beal didn't really address it. I think probably, perhaps in the expectation that you were going to recognise that he and you were agreeing on

the construction point, at least insofar as the law goes. So I'm not sure that I -- you tell me. It's really up to you. You tell me whether you think I need to address the amendment application.

Because at the moment, my understanding is I don't, because I think my understanding is that Mr Beal is saying, "Well, I'm going to take my chances on proving that I can fit it within an established category of contract formation under the law." And you're saying you can't do anything other than wait until he does that. I mean, that's my understanding of where we are.

In which case, I'm not planning to address the amendment -- I mean, I'm not going to give you an answer on this today because I'd like to -- I think we've reached a pretty clear answer, but I'd like to make sure it's recorded properly, because I think it is quite a tricky point and it may well have some further value. So I'm anticipating giving you a reserved ruling of some sort. But I don't anticipate at the moment I'm going to need to get into amendment, unless you're telling me you think I do need to.

MR COOK: I'm obviously not going to tell you you should --

THE CHAIR: Well, on the basis of the discussion we've had, I mean, my understanding is that I don't need to because you're accepting that there's at least, as a matter of legal principle, a possibility for him to come good. But you're sceptical about whether he's going to be able to or not.

MR COOK: I'm not pressing upon you to decide an application that would assist my learned friend, obviously.

The only other point I was going to deal with was my learned friend relied a lot upon MIDs.

THE CHAIR: Yes, I was going to ask you about that.

MR COOK: (Overspeaking) the disagreement.

THE CHAIR: Let's do that at 2.00 pm. I think that would be better. Thank you.

(1.06 pm)

(The short adjournment)

(2.01 pm)

THE CHAIR: Yes, Mr Cook.

MR COOK: So the point I had left over to deal with was merchant identification numbers, MIDs.

THE CHAIR: Yes.

MR COOK: The proposal the claimants have made, it's paragraph 31 of their skeleton, is to provide the MIDs associated with the undertakings which have provided the specific opt-in claimants listed in the register. So what's being offered is to provide MIDs at the undertaking level. The problem with that is that just is totally useless to us, and not in any way informative at all. Because what we were being provided, and in many cases the impact of the opt-in judgment, or the impact of, in fact the opt-in was done often by only one group entity, and then the opt-in judgment kept that at strictly within who had opted in, is we've ended up with one group entity being part of these proceedings. There are one or two examples where there are more, but often it's one group entity, when there are other group entities who wanted to join, didn't do so in time.

Of course, the whole undertaking issue, which we had the fight about in relation to the opt-in judgment was about exactly that issue. So yes, a MID at the undertaking level will tell you what level of transactions the group did, that's just wholly uninformative. What we want to know is, in relation to the claim by this specific legal entity, what that legal entity did in terms of transactions. Did it do commercial card transactions insofar as being said this was a VoC substitute.

So telling us what happened in a group is just meaningless. It might very well show us that there was another company in the group which had commercial card

transactions. If one goes back to the information, so the first set of contracts in relation to the utility company, if they provided us the MIDs for that utility company, it would have shown us that, one imagines, that somewhere within the group, there was a company that entered into commercial card transactions. But we now know that that utility company itself had no commercial card transactions. So it's just simply information that is missing the target because it's telling us something that is of no use at all for these purposes. So that's the reason why we say it's just not good enough.

Now, the problem is, the reason why we're being offered MIDs at the undertaking level is, my understanding is that quite often MIDs are not limited legal entity specific. So, you know, that is a problem, and it's a problem that's sort of been there all along, but it's the reason why MIDs have never been an easy cut-through.

So we understand to some extent why they've not offered us to say, "We can give you the MIDs for this entity alone", because there aren't necessarily MIDs for that entity alone. But what they're offering is therefore -- I mean, unless it's the case, I mean, there are obviously situations where the point is made in relation to some of the universities that they are single entities. So they don't have a corporate structure. Obviously if you've got an entity which is a standalone business with no corporate structure, every MID is in relation to that standalone business.

But when we're at the group level, and we have more than one company in a group, any set of MIDs which is at the group level tells us nothing about the specific entity. That's often the situation that has successfully opted in class.

THE CHAIR: Yes.

MR COOK: But that's the sort of the short point is the reason why that just simply doesn't help anybody at all. So they can't just push the burden back onto us and say, "This will tell you the answer". With respect, it doesn't.

THE CHAIR: Yes.

MR COOK: Is there anything else that I can come back on further, sir?

THE CHAIR: I don't think so, no. I think that covers it all, I think. Thank you.

Yes, Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: (Audio distortion) a point on the discussion that you were having with my learned friend Mr Beal about giving the documents that would allow us to investigate whether the merchants came within the class definition or not.

THE CHAIR: Yes.

MR KENNELLY: It's a potential wrinkle for Trial 3. As you know, sir, disclosure has been given by the claimants for Trial 3 and the long-stop date of 27 November. The Tribunal will recall, there was a base group of merchants, about 36 I think now with two of them dropped out, and a lead set of 15. Of them, 13 I understand are opt-in class members. The concern we have is that if it turns out in May, when we review the documents, that some of these are not properly covered by the class definition and they fall out, that's quite late for the purposes of knowing who is in the lead and base sample for Trial 3.

THE CHAIR: So you're not necessarily saying they would be inappropriate for the sample just because they cease to be class members; you're saying that if they fell out as class members and we lost, if you like, their active cooperation, then that might be a problem as we got closer to the trial?

MR KENNELLY: Precisely. Because, in principle, and I spoke to Mr Beal about this, we could continue to use the disclosure that they provided.

THE CHAIR: Yes.

MR KENNELLY: But we wouldn't get a witness statement from them.

THE CHAIR: Yes.

MR KENNELLY: And the whole point of the experts choosing these particular merchants was because of their utility to the resolution of Trial 3.

THE CHAIR: Yes.

MR KENNELLY: So the proposal I had, and I'm sorry I haven't discussed this with Mr Beal, is for these 13 named merchants that have been chosen, which have now been already investigated quite thoroughly by the parties for the purposes of choosing them, that they could tell us by 27 November, the long-stop disclosure date, or give us the documents necessary to demonstrate that they are within the class definitions, so that we know that we've got the right class members.

THE CHAIR: Yes.

MR KENNELLY: Thank you.

THE CHAIR: Thank you.

Mr Beal.

Reply submissions by MR BEAL

MR BEAL: The deadline for witness statements for Trial 3, I think has been set. I'm just trying to find out what the date is. So Trial 3 directions, there was a letter from the CAT. Forgive me. This point has only just been raised with me.

THE CHAIR: It's in the bundle somewhere, isn't it? It's the core bundle, the first item in the core bundle, actually. Directions to Trial 3.

MR BEAL: I think some of the Trial 3 deadlines were amended, weren't they?

THE CHAIR: You may be right. That's right. It probably has the amendments in there as well. 45? Thank you. Page 45. Thank you very much.

UNIDENTIFIED SPEAKER: The original order of the core bundle is out of date(?).

THE CHAIR: Yes, exactly.

MR BEAL: The expert directions weren't changed. The disclosure directions were

changed. Then, paragraph 11, I think, was the witness statement.

THE CHAIR: That's right.

MR BEAL: 29 January, I think is the initial witness statements. And then the reply witness statements is 26 February.

THE CHAIR: Actually, your witness statements. So Mr Kennelly's point then is resolved, provided the witness statements. But of course, if they have given the witness statements, I suppose at that stage we would expect them to turn up, would we? How do we deal with that?

MR BEAL: If you recall in Trial 2, there were quite a lot of settlements, which then meant Visa, ironically, objected to those witness statements going into evidence for the Tribunal.

THE CHAIR: Yes.

MR BEAL: I couldn't do anything about that because the witnesses weren't turning up. They weren't within my control. That's just the run of the litigation game, if I can put it that way.

But the Defendants know full well who the lead claimants are. They know that they are going to be getting witness evidence from them. If they then want to raise this issue of class eligibility ahead of that witness evidence being given in Trial 3, when they don't actually need to, it's a matter for them.

THE CHAIR: Well, I think Mr Kennelly's not objecting so much to the fact that you might have a witness who turns up, because we won't -- sorry, just to step back a bit. We won't actually necessarily resolve the eligibility question in its full scope until Trial 4, I would have thought.

MR BEAL: Precisely.

THE CHAIR: So I don't think Mr Kennelly's complaining that we might get people turning up and being the samples in Trial 3 and then finding out they're not actually

class members. He's more worried, I think, about them not turning up at Trial 3, when we need the evidence, and we want to have as good evidence as possible.

MR BEAL: It's entirely within their gift as to when they want to pull the trigger on an objection to them being class members and saying they have to be struck off the register. So they can't very well apply to strike these people off the register saying, "You're not a class member anymore", ahead of October 2027, and then say and rely on that decision that they've taken strategically to bring the application then, to say, "Oh, well, we're now deprived of their evidence".

THE CHAIR: Except I think he's saying they couldn't do that without you giving the disclosure. So he's saying, "Can you tell us what the basis is on which the 13 are --"

MR BEAL: Yes, but the disclosure is being given for all of them at the same time, we would hope, because this is a class --

THE CHAIR: Sorry, just to be sure we're on the same page, we're talking here about disclosure --

MR BEAL: The VoC and the class eligibility.

THE CHAIR: Yes, as to the class, contractual relationship. Yes.

MR BEAL: He's opportunistically seeking an acceleration of the timetable for these 13.

THE CHAIR: Yes.

MR BEAL: Presumably on the basis that no good deed goes unpunished.

THE CHAIR: Yes.

MR BEAL: And they are volunteering to be -- or not volunteering -- they've been selected. The claw has come down and picked them out to say, "You are going to be a lead claimant". In return they have to, uniquely amongst the claimant class, accelerate the very difficult VoC process and the disclosure process, it's going to take some time, precisely because they've been selected to be in Trial 3.

The point is that class eligibility doesn't impact on their ability to give evidence, meaningful evidence in Trial 3, which is the issue. All that class eligibility goes to is whether or not they can claim loss at the end of the day, in the same way that any generic claimant bringing a claim, if ultimately they show they've in fact suffered no loss, loses the case. So it's a Trial 4 issue. They can carry on giving evidence in Trial 3. It's in with the defendant's gift, once they've analysed the information in May and June or July, they've analysed it, at what point they pull the trigger and say, "In fact, you're not an eligible claimant".

THE CHAIR: Yes. So you're saying, if they want to act on that information and in June next year, they'll suffer the consequences when it comes to the trial.

MR BEAL: Absolutely.

THE CHAIR: They could leave it until (overspeaking) 2027, and still have time to take the point.

MR BEAL: Yes. In the same way it's not in our gift in Trial 2 to determine at what stage the scheme settled out with other people who were giving meaningful evidence in the insurance sector.

THE CHAIR: I suppose the other thing is I am assuming that you are either going to turn up with evidence which you say is credible, or you're not going to have any evidence, in which case you'd have to concede they shouldn't be in the list.

MR BEAL: Yes.

THE CHAIR: So, we're not going to -- unless the evidence is so incredible that they felt they could strike it out.

MR BEAL: Well, that would have to be the next step. I mean, obviously, if we take the view that, like -- I mean, as matters stand, the entities that have come out since the 2 March judgment have been treasury companies where we've identified that even though they were a counterparty to the MSA, in fact, they had not conducted any

commercial transactions themselves, and that therefore they had been the agent.

THE CHAIR: (Inaudible).

MR BEAL: Exactly. The agent for the principals who were the subsidiary operating companies. That's why they've come out. But what that means is that we're in a position where, if we're right on the law, the fact that they've come out simply proves that the proper claimants for the class are the operating companies who have suffered the loss because it's their transactions that have generated the commercial MIFs.

Can I just make the only other point in reply? I've got one small point in reply and then I'm done.

We accept that we will need to deal with evidence of payment and we say MIDs do do that. My learned friend Mr Cook said, "Well, MIDs for the group undertaking don't tell you anything about the individual subsidiaries". In the example I've just given with the utility company where it's been withdrawn because it didn't have any commercial transactions, the MIDs wouldn't have been associated with that company for the very reason that it wasn't actually conducting any commercial transactions. What prompted that company to be identified as an eligible claimant was the fact that it was a counterparty to the merchant service agreement.

THE CHAIR: Presumably, there are all sorts of different -- I think the example Mr Cook was giving was where you've got a group and a set of MIDs associated with that group and we know that some of that group has fallen out of the register because of the Opt-In Judgment.

MR BEAL: Yes.

THE CHAIR: So we know that there are people who shouldn't be or who aren't on the list but will have MIFs. But we can't identify MIDs to go with -- we can't segregate the commerce associated with all of the MIDs to remove that. That's the point he was making.

MR BEAL: So if, for example, you've got four entities of whom only two have actually been validly opted in.

THE CHAIR: Yes.

MR BEAL: Then the MIDs would have to be the ones associated with those two.

THE CHAIR: Exactly. You need to know the (overspeaking).

MR BEAL: The number of circumstances where that is true is very small.

THE CHAIR: Yes. Well, I assume that there must be at least some -- we know that there are at least some, aren't there? I think, if we take the example of the universities, for example, I think you indicated that they're generally just a single entity and so presumably the MIDs for them, as I think Mr Cook acknowledged, would be useful.

MR BEAL: Exactly. I understand we've taken a special care where the subsidiary group is split in that way. I'm not sure how many actively are split in that way. I mean, I'm allowing that there might be one or two. I think we've taken a special care to make sure that the MIDs in question are properly attributed to the right companies.

THE CHAIR: Yes.

MR BEAL: We've looked through the data to the extent we can. The true issue with separating out the individual MIDs by individual entities is because sometimes, as Mr Cook has indicated, the same MID will be used by more than one company. That's the problem. But all of these MIDs represent transactional data of a transaction which has borne a commercial card MIF. And -- and this is an important point -- disclosure is not a one-way street. These are MIDs that are contained in data that the Schemes hold and which are associated with those MIDs precisely because they need to have an accurate record of the transactions that they are settling, so that they can charge both scheme fees and the MIF.

They have a complete suite of transactional data generated by reference to MIDs, because it's the MIDs that are identified in the batch files Mr Cook's referred to and

I referred to earlier, and therefore we say disclosure will be a two-way street. I'm putting down a marker that the Schemes will also need to be giving disclosure of their data for three reasons.

Firstly, we then have the widest range of data available. Secondly, we can ensure that the Schemes are happy that the data is accurate. And the third point follows on from that, which is to the extent that there are any discrepancies, those discrepancies can then be reconciled.

THE CHAIR: Yes.

MR BEAL: Going back to the split point, I'm helpfully reminded by those who sit behind me that we have filed separate protective claims in the High Court, which will itemise the specific claims in relation to those who are excluded entities from the Opt-In Judgment from March this year.

I don't propose to make any other submissions by way of reply because you have my submissions already.

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

Well, I will reserve my judgment on it and let you have a ruling on it. You will have guessed, I think, where we're going, but I think it's quite helpful just to set it out clearly as it's developed and actually particularly, Mr Beal, I do want to make sure there's a clear record of what our expectations are about what's going to happen in May, which I think I've got very clearly from you on the transcript. So I hope there's going to be no licence taken with that. But it does seem --

MR BEAL: I won't be backsliding.

THE CHAIR: No. Well, it does seem that --

MR BEAL: If I can't produce the goods, then I'm sure that the Defendants will be the first to tell me.

THE CHAIR: Yes. I mean, it does seem to me that it is important to get the description

of the contractual point right because actually it may have implications in other ways and also just to make sure we're clear about what's going to happen next.

There's a further reason why I think it's important to get it down clearly in writing and that is I will not be sitting in Trial 4. At the moment, I think the indication is Mr Justice Richard Smith will chair Trial 4, sitting with other panel members who, by that stage at least, will have some experience of interchange fees. So that's the way that's panned out.

MR BEAL: Thank you very much.

THE CHAIR: I think it'll be helpful for that panel to have a clear understanding of what's happened here because they'll have to deal with it in Trial 4.

Good. Okay. What else have we got? We need -- sorry, Mr Kennelly.

Further submissions by MR KENNELLY

MR KENNELLY: On the AOB point, I'd like to put to (inaudible).

THE CHAIR: Yes, yes.

MR KENNELLY: Just two points. Very briefly, just because I was a bit concerned that Mr Beal might not have understood the point I was making about Trial 3. We're not asking for early VoC data or anything. It's just about making sure -- this is a matter for us to reserve -- that these class members who are currently in the frame for giving disclosure are properly within the class, which is the need to show an MSA or a payment to an acquirer.

Of course, it's about the orderly progress of Trial 3 that concerns us. The idea was that there'd be disclosure and then witness statements, ideally from people who'd given disclosure. If it turns out that in May, they're not properly in the class, Mr Beal says, "Well, you can waive your right to object". That's not really appropriate. If they're not in the class --

THE CHAIR: I don't think he's quite saying that. I mean, I take your point. I think you're right. And I rather assume that, as a result of this conversation, someone's going to go and have a good look at how the 13 are configured and what the background material is. But I mean, that's something that obviously it's in their gift to go away and do or not do as they wish at the moment.

I think all he's saying is that it's a question of timing. No one's saying you would waive your right to challenge. It's just that you don't have to exercise that before Trial 3. That's what he's saying.

MR KENNELLY: Indeed. But the problem we'll have is that if it turns out in May, they're not, and then we substitute new class members in, it's not just a question of getting the statements, it's also disclosure.

THE CHAIR: Oh, of course. No. Well, I think he's got the point that if -- what I don't think would be at all helpful would be for Mr Beal to turn up in May and say, "Oh, we've now worked out that some of the 13 are not in the class." I mean, that's why I say rather assume someone's going to go away and have a good look at that.

MR BEAL: I thought I'd made clear over the short adjournment to my learned friend that the data and documents and so on, once that's in, that's in. The witness evidence is harder because the example in Trial 2 was that witness evidence was pulled and we weren't able to rely on it because the Schemes objected.

THE CHAIR: Yes, but I think all he's saying is that, as I understand it, all he's saying is if you haven't had a really good look now at the 13 you need to do so, because if it should transpire on your thorough review of it now, if it hasn't been done already, that some of them are questionable as to whether they are going to meet the test when you come to give all the stuff in May, then it might be sensible to at least put your hands up on that now rather than then.

Now, I mean, I'm rather assuming you've done enough to know that the people who

are on the list now -- sounds like you've been doing quite a lot of work -- you believe the people who are on the list, you're going to be able to prove have suffered a loss and have a contractual relationship. If that's the case, then I think Mr Kennelly's point goes away.

MR BEAL: The reason why we've had a rolling process of withdrawals is because we're very alive to the issue and we react to the issue as and when we find it.

THE CHAIR: Yes. Well, sorry, just one last go at this. I think the point of Mr Kennelly's last observation is it would be quite helpful if you had looked at the 13 sooner rather than later, if you haven't looked at them already.

MR BEAL: I anticipate we've already looked.

THE CHAIR: Quite. Exactly. Yes.

MR KENNELLY: Thank you, sir. My last point is you asked us for a draft order from yesterday by today.

THE CHAIR: Yes.

MR KENNELLY: Unfortunately, we're not in a position to give you it. We're still writing a draft (overspeaking) ...

THE CHAIR: No, sure. I can understand. Well, I think the only thing that matters for that is the dates.

MR KENNELLY: Of course.

THE CHAIR: I don't know whether there has been a discussion about the dates and whether there's anything that needs to be dealt with. I mean, I --

MR BEAL: It's been going on in a sense behind our backs --

THE CHAIR: Yes.

MR BEAL: -- through other members of the team who aren't present. I agree with Mr Kennelly that we're not in a position sensibly to address you on that today. What I'd suggest is we try and agree a draft order, say within seven days and in default of

agreement, both parties submit drafts with a decision on the papers if possible. If one party feels particularly aggrieved about something, we would have to request a short further hearing, but hopefully not, on that point.

THE CHAIR: Well, that's fine. I think my concern on this is one that you will share, which is that there's not a lot of time. It seems like there's a lot of time but there's not because there are quite a lot of things that need to be done. If you're thinking about the quantum process and, you know, this process of we talked about the time producing the schedules, if they don't turn up until May but seven months on and we're suddenly an awful lot closer to March 2029. So the timetable does need to involve a degree of tightness where it can have sensible tightness. I suppose that applies equally to the non-UK EEA MIFs as well. I mean I wouldn't want to see that process drifting out too far. I appreciate it's difficult and there's some hard work to do on it but on the other hand if it is left to drift too long, then it's going to be a real problem at some stage.

MR BEAL: I saw some draft directions, which, in my submission, look sensible last night and I commented on them, but I haven't seen the response from the Defendants, which is why I'm not in a position to assist the Tribunal.

THE CHAIR: I understand. I appreciate everybody's got lots of things -- many things going on at once. I understand that.

MR KENNELLY: Thank you, sir. That was the last point I had.

THE CHAIR: Yes, Mr Cook.

Opt-Out Disclosure

Submissions by MR COOK

MR COOK: I'm afraid there is one --

THE CHAIR: Yes, I'm happy to --

MR COOK: -- outstanding application we still need to deal with.

THE CHAIR: Yes, I'm happy to deal with anything else that's on the agenda.

MR COOK: The outstanding point, I think, from the agenda was the opt-out disclosure. That's in relation to Trial 3, which is the reason why we're here, why we're coming to (inaudible) now. I think it's the --

THE CHAIR: This is the questionnaire, as of Friday, the 40-odd responses; is that right?

MR COOK: Yes, so the basic numbers are: there were 120 represented persons that were sort of selected by the experts as being potentially of interest. Harcus Parker were directed to write to all 120 of them by 13 October. They complied with that. The latest update as of Friday -- and I don't think we've had anything more since then; I'm looking behind me -- no -- was that we'd received 45 responses. So, just --

UNIDENTIFIED SPEAKER: (Inaudible) 47.

THE CHAIR: 47.

MR COOK: Okay. In which case, I was going to say just over a third; I think that probably still stands as a number. It might be slightly more over a third, but still roughly, 47 out of 120, it's still significantly less than half in terms of responses we've received. Unfortunately, while we've had responses back, quite a lot of those are seriously incomplete.

Now, there will no doubt be disagreements about the specificity of that. I'm not in a position to go through the granularity of those responses and I think a letter has been sent in relation to them. But there are really important gaps within them in terms of things like what information they actually hold. That was one of the key questions that were identified as being ones we wanted answered in order to identify if people are the right ones to provide disclosure, on the basis if somebody doesn't hold relevant data, then clearly they wouldn't be a good person to ask, in any event. Even if they're,

you know, delightfully representative, if they don't have data, they don't have data. So that's where we stand at the moment: effectively a 40 per cent, perhaps, response ratio, but a lot of that being inadequate.

THE CHAIR: Just to remind me, the 120 was selected on what basis?

MR COOK: The way it worked was that a significant number of merchants registered their interest in the proceedings, even though, and as it turned out, they were the size where they were opt-out rather than opt-in. But nonetheless, they stuck their heads above the parapet, which I'm sure some of them are regretting now. So they were ones that were of interest. I think there was something like 500 or so of them.

Then there was a process of the experts looking through that, effectively trying to remove the ones which weren't appropriate. So looking at the ones that were a sensible size. I think a point was made in correspondence about, you know, whether these were appropriate to force, sort of, one-man bands to provide these kind of things. But these are all, you know, significant medium-sized enterprises, so we're talking about multi-million turnover businesses. They're not the micro-business, the individual corner shop or the (inaudible).

But the experts basically did a process of winnowing to identify entities that seemed like reasonable ones to ask these kind of questions that might have data of right kind. I can't speak to the detail of that beyond that, really. But that was a joint process. Identified 120, but the response rate has been, frankly, exceptionally poor.

THE CHAIR: We're now two weeks after the questionnaire; is that right?

MR COOK: Yes, I think it was -- yes, it was the 13th. So we're exactly two weeks after it was sent out. The questionnaire was always designed to be one that -- views may differ about how easy it was -- but it was designed to be something that could be done by a business on its own in a relatively short period of time, measured in hours, not days, in terms of answering it.

THE CHAIR: Have the experts seen any of the 47?

MR COOK: Well, they have, and that's the reason why I say that we've identified all of these problems. So our experts have looked at them and we've come back and said no -- and in many cases, it's obvious that simply questions haven't been answered. In some cases, questions have been answered, but quite clearly the answers don't seem to make a great deal of sense to the experts. That's what we've gone back, in terms of saying there are all these problems with that.

THE CHAIR: What's the ultimate goal here? Am I right in thinking that there's actually a relatively small number that the experts want to add?

MR COOK: It is a relatively small number they want to add.

THE CHAIR: About four or five, or am I mistaken?

MR COOK: That kind of level. But equally, it isn't a case where simply getting back a number of responses -- you know, as long as the number's above that, that's good enough; the goal is to try and identify ones that sort of filled the gaps, essentially.

THE CHAIR: Gaps in what?

MR COOK: The starting point was we have the disclosure from the claimants and the opt-in class members, the ones that were identified as being sort of inner and outer group in the level of disclosure they provide. That was the expert process which led to the claimants who are giving disclosure, and that process is ongoing. Effectively, this was the experts saying there's a paucity of smaller merchants in that data. The way that was done was they identified clusters of particular kinds of businesses that they wanted to look at.

So the goal here is essentially to try and find some smaller businesses that would complement the existing clusters of disclosure that are being sought. Because you want to say, well, if you've got a -- and I have no idea if this is right at all -- but if you had a big hotel chain, you might want a small hotel chain to compare and contrast the

two.

So it's not good enough that we get some responses -- as long as we get five responses, it's not good enough because what they wanted was enough responses to actually be able to go through and say, "Ah, we've got a small hotel chain", whatever it might be. The fact that we're getting a very incomplete set of responses and it's far smaller than the group is likely to be a problem, although at the moment, until we complete that process, the scale of the problem is essentially unknown.

THE CHAIR: Yes. Your focus at the moment is on an order in relation to the questionnaires as opposed to anything else; is that right?

MR COOK: Absolutely. At the moment, we're just saying -- you know, we've embarked on essentially a voluntary process, voluntary with the Tribunal in the background, making clear the Tribunal is encouraging this process. With respect, voluntary hasn't worked.

THE CHAIR: Well, I suppose that's the challenge, isn't it? I appreciate there are some timing points here, but I suppose the question is, firstly -- I mean, I take it that there's nowhere written down anywhere, and certainly not in the bundle, what it is the experts are trying to achieve. Presumably, they've got a note somewhere of what they're trying to get.

MR COOK: I don't think it's clearly spelled out -- and I can point you to something particularly. I mean, what they're trying to achieve is, effectively, they have the disclosure from what are largely large merchants, and they want to complement that by smaller merchants that are of similar clusters, similar businesses, types.

THE CHAIR: I thought you were taking it a little bit further than that, saying there was some attempt to fill -- you know, even at that, once you'd got -- it wouldn't be good enough to have just five smaller merchants, was the point I think you're making. I'd quite like to understand a bit more about that before I made an order.

I'm not saying no to the order, just to be clear, but I just am a little bit concerned about launching into making people do things in an opt-out class when I don't know anything about who they are. So it seems to me what I'd like to do at the moment, just to test this with you, is just to make it plain to the Class Representative that we need to get the right evidence for the experts. If the experts aren't satisfied fairly shortly about this process, then I'm going to have to make some orders. I can see that. But in order to do that, I think I would need to understand a bit more clearly exactly what they need as opposed to what they might like, if that makes sense.

MR COOK: Yes, yes. It's very helpfully pointed me (overspeaking).

THE CHAIR: No, of course. Something to show me. That's good. I think it's useful to know what it is they need as opposed to want. Secondly, I'd like to know who it is that I'm making an order against, so presumably there's a list somewhere that I could see. Thirdly, I'd like to be confident that the experts as a group, rather than just your experts, have reached the conclusion that the 45 don't deliver what they need.

I mean, those are not necessarily hard-edged conditions, but it seems to me -- I don't really feel very comfortable about making orders against people I haven't yet identified, when I'm not entirely sure how necessary it is. That's the bottom line. But having said that, I can see where you're coming from. If we're not going to make much more progress pretty quickly, then I'm not going to have much choice, I think.

MR COOK: What I can point you to, I think it's the first -- it's bundle A. (Pause)

So, this is core bundle. It's page 314, which sets out an extract from the joint expert statement. This is joint expert; it's not just our experts saying it.

THE CHAIR: Yes. It's paragraph 9, is it?

MR COOK: Yes, paragraph 9. The quotation which is from the joint -- I'm told the joint expert summary is in the bundle as well, but we have the relevant extract.

THE CHAIR: Yes, let me just read that. (Pause)

So does it tell us a summary about what a cluster is?

MR COOK: I'm afraid it -- basically, there was a set of expert reports that went in originally in terms of proposals in relation to this. I mean, that was -- certainly I don't think this document explains clusters.

THE CHAIR: I mean I suppose, Mr Cook, I guess, in a way, I don't think it matters. I'm sure it's all perfectly sensible and the experts are trying to do something sensible. I think we're probably still at a stage which is a little bit before I think it's the right time to make the order, if one can put it that way.

You know, as I say, I'm not closing the door at all on it. Indeed, I think, on the contrary, it seems to me that if we're not going to get the evidence the experts say they need, then we're going to have to be a bit firmer with some of the claimants, but I think I'm a bit reluctant to make the order today without those three things, a clearer understanding about what they actually need. I appreciate this may tell me most of that.

But I would like the experts to be really clear jointly about what they can live without and what they can't live without, sensibly. Secondly, I'd like to know who it is that I'm making an order against. Thirdly, I would like the experts to have reviewed, you know, if we were to say, for example, what is it, Tuesday today, we were to give everybody another couple of days with a firm chaser from Harcus Parker, then the experts should see what has come in by the end of the week, and they could report back with a statement of whether they think they are, what's missing and why they need it, in short form. I don't need pages of it, just something like this. And a list of the people against who the order would be made. Then I could deal with that on the papers.

I mean, I'll see what Mr Beal has to say about that, but I think that probably feels like the right way forward at the moment.

MR COOK: No, certainly. I mean, time is of the essence. I certainly can't say that

delay of three or four days is going to be a big issue in this regard.

THE CHAIR: No. Let's see what Mr Beal says about it.

Submissions by MR BEAL

MR BEAL: I mean, the short point is their experts haven't spoken to our experts about these 47 questionnaires yet.

THE CHAIR: Sure.

MR BEAL: What the experts have engaged in is an attempt to replace Swansea City, which was a defined small merchant because it had turnover of less than £50 million per annum, and Linklaters in their letter of 8 October sought to replace Swansea with Christian Aid, which is a charity, but whose turnover is greater than £50 million per annum, therefore isn't a small claimant.

So the point behind these questionnaires is to try and find the four or five data points that the experts jointly want. Now, four or five data points from a sample of 47 questionnaires is not an unreasonable level of detail. If their experts speak to our experts and they, both of them having gone through those 47 questionnaires or however many it is by the end of the week, and say, "None of these are any good", then of course, we're in a different position.

But if they say actually three or four of these are perfectly fine, then I'm not sure really what more the Defendants could reasonably ask for at this stage, because this is gap filling. It's a nice-to-have, the joint expert statement, which is cited in that letter. It says in terms:

"We therefore agree further disclosure would assist us in addressing the limitations of the evidence available."

Well, we're happy to comply with their willingness to try and get more data that will be useful. But it does come at the cost of seeking relatively stringent requests for disclosure from very small businesses who are probably busy making money rather

than worrying about being an opt-out class member, and all of the usual strictures that go with the controls over communications with opt-out class members that the Tribunal looked at in the *Amazon* case in the judgment handed down only yesterday. So, that's the context.

What I'm very willing to subscribe to, with respect, is a suggestion that the experts speak to each other, look at the extant number of questionnaires, which I'm told is 47. Any more arriving by the end of the week, they can look at those on a rolling basis, come back with a suggestion on a joint expert basis. They've done that before. They can gap fill to the extent possible. Then we can work out with visibility what more, if anything, is needed.

THE CHAIR: Yes. Well, I mean, I think, yes. That's helpful. I think we're more or less agreed on that. I think obviously there may be a little bit of disagreement if we find the experts have got a problem, but I'm not sure we -- it's only going to be if it's a --

MR BEAL: Cross that bridge.

THE CHAIR: Well, exactly. So I would hope that with at least supplementing the 47 by something else, we might find enough. But if we haven't, then, as I said to Mr Cook, if the experts say they need it, I think I'm going to have to push a bit harder on it.

MR BEAL: Yes. It would be useful for the experts to indicate why they think a particular entity would be ...

THE CHAIR: I agree, I think it needs to be not only that they need it, but why they need it. Of course, you know, there's obviously a difference between need and want, which I hope I've made clear.

MR BEAL: Yes. The comment that was made by Mr Justice Roth the other day to me was, "experts always want more data".

THE CHAIR: Yes.

MR BEAL: And that's a universal truth, I think.

THE CHAIR: Yes. Good. Okay. Thank you.

In that case, Mr Cook, if we leave it on the basis that application is alive. Let's see what happens by the end of the week. If you want to --

MR COOK: You did mention, sir, the possibility of there being a chaser email from Harcus Parker (overspeaking).

THE CHAIR: I'm assuming that's going to happen. I think Mr Beal --

MR BEAL: To the questionnaire class?

THE CHAIR: I think so. I think it would be very helpful for those who haven't replied to receive a communication, telling them that --

MR BEAL: They've already been chased on a rolling basis.

THE CHAIR: Yes. Well, the opportunity of being told there was a grumpy judge who is saying something might happen if they don't respond.

MR BEAL: I don't think we'd say that, sir, but we're happy to say that we've been encouraged to reach out to them again.

THE CHAIR: Yes. Thank you. That's helpful.

Then, Mr Cook, we'll see what happens, and if you need to renew your application, you can do so on the papers.

Is there anything else on the agenda? Have we covered everything that is live?

There are some sort of Trial 3 points, I'm sort of assuming they've fallen away. There's a point about effect on trade in Trial 3. What's happened to that?

MR BEAL: That's agreed to be gone, gone into Trial 4.

THE CHAIR: I thought that had happened, yes.

MR BEAL: We sensed that that was the direction of travel with the Tribunal.

THE CHAIR: Yes.

MR BEAL: The only other issue was there was a suggestion that Dr Trento needed

to change his methodology.

THE CHAIR: Yes.

MR BEAL: I apprehend that Mr Kennelly's skeleton's gone rather lukewarm on the suggestion of making that application now. I'm not encouraging him to make the application now. We say, obviously, it's ill-founded, but I'll let him explain whether or not he wants to push that.

THE CHAIR: You did say you had nothing else, Mr Kennelly. I am going to give you the opportunity to add to the pile, if you want to, but ...

MR KENNELLY: No, no, no, I'm not adding to any pile. We reserve our rights in relation to the decertification application, which really is the focus, I think, that's going to have to be made.

THE CHAIR: So, forgive me, have you made it yet?

MR KENNELLY: We haven't made it. We reserve our rights to deal with this --

THE CHAIR: I see.

MR KENNELLY: -- in a decertification application.

THE CHAIR: Yes, I see.

MR KENNELLY: We threatened; we haven't made it.

THE CHAIR: Yes. If it's any help, I have to say, I wasn't entirely sure that you could expect an awful lot more from Dr Trento in the circumstances, given that -- we all know an awful lot about MIFs as a result of Trial 2, and obviously the legal issue is on appeal. It did seem to me that, there were lots of reasons why it might be difficult for him to say an awful lot more than he does. But I'm sure you would have a very persuasive argument in your decertification application, should you choose to bring it. That's just my off-the-top-of-the-head indication, if it's helpful.

MR KENNELLY: We'll take it into account. But we have mentioned, we've already explained why we think this might be appropriate for decertification. And, that is --

THE CHAIR: Yes, of course, it's entirely up to you. I'm not saying you can't do it; I'm just saying when I read the general background to it, it didn't strike me as being -- he didn't strike me to have put himself in the position where he had failed the process test, not obviously so.

MR KENNELLY: This is not the time or place for me to engage with it. The marker is down and we will see what we do.

THE CHAIR: Yes. Good. Okay. Thank you.

I think we've sent you an order on 102. We've dealt with that.

MR KENNELLY: Yes.

THE CHAIR: I'm not sure I can say anything much about the scope of claims being transferred from the High Court to the Tribunal. It's really a matter for the High Court, isn't it?

MR KENNELLY: It is. Yes.

THE CHAIR: I mean, obviously, you know, we did canvass the question as to whether it is possible for claims to be transferred here that we don't have jurisdiction for. We've got a workaround for that for Trial 4.

MR KENNELLY: Yes.

THE CHAIR: I'm not a huge fan of the workaround, if I can put it that way, because it strikes me as being a somewhat clumsy process. But, you know, we do what we have to do. But anyway, I don't think there's anything else we can do about that.

MR KENNELLY: Not today, no.

THE CHAIR: No.

There's one other point I had, a very small point, which is about the Trial 3 expert reports. Just an indication that, consistent with the practice direction, it would be quite useful to agree some page-length restrictions on those reports. I appreciate that we're doing this on a sequential basis with one report each, aren't we, as I recall, the

timetable?

MR KENNELLY: Yes.

THE CHAIR: So, I am conscious there's an awful lot to cover in a single report by the experts. But on the other hand, just thinking about the Tribunal faced with hundreds of pages from three separate experts, I think. So it would be quite helpful to keep the volume down. I wasn't going to put a number on the table now, but I was going to ask you to suggest some page lengths. I think you ought to go and speak to the experts about it and get a sense of what they think they can manage. But, I would like to have an order in place restricting the length, at a suitable stage, and wanted to give you warning of that.

MR KENNELLY: Thank you. We'll discuss that with them.

MR BEAL: I don't think either of us have instructions from the experts as to what they'd like and what they'd live with.

THE CHAIR: No. Exactly. I assume you'd (overspeaking). Good, okay. So you'll have the order in due course, and we can look at that. There's nothing else then.

MR BEAL: Just in terms of the order, could I suggest a deadline for a draft to be with you, of a week from today?

THE CHAIR: Yes, that would be helpful.

MR BEAL: Just because otherwise the disagreements can drag on.

THE CHAIR: Yes. I think that sounds like it's --

MR KENNELLY: (Overspeaking) the Tribunal suggested, that seemed (inaudible) from our perspective.

THE CHAIR: Yes, good. Okay. Let's do that then. Right. Thank you very much.

(2.46 pm)

(The hearing concluded)

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?