IN THE COMPETITION APPEAL TRIBUNAL

Case No 1054/1/1/05
1055/1/1/05
1056/1/1/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19th June 2006

Before:
SIR CHRISTOPHER BELLAMY
(President)

DR. ARTHUR PRYOR
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

MASTERCARD UK MEMBERS FORUM LIMITED

MASTERCARD INTERNATIONAL INCORPORATED and

MASTERCARD EUROPE SPRL

ROYAL BANK OF SCOTLAND GROUP Appellants

supported by

VISA (EUROPE) LIMITED AND VISA (UK) LIMITED Intervener

And

OFFICE OF FAIR TRADING Respondent

supported by

BRITISH RETAIL CONSORTIUM Intervener

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Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

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HEARING

APPEARANCES

Mr. Nicolas Green QC (instructed by Lovells) appeared for the First Appellant, MasterCard UK Members Forum.

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Jones Day) appeared for the Second Appellant, MasterCard International and MasterCard Europe.

Mr. Christopher Carr QC (instructed by Ashurst) appeared for the Third Appellant, Royal Bank of Scotland Group

Sir Jeremy Lever QC, Mr. Jon Turner, Mr. Meredith Pickford and Mr. Josh Holmes (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Stephen Morris QC and Miss Kelyn Bacon (instructed by Freshfields) appeared for the First Intervener, Visa Europe and Visa UK.

Mr. Aidan Robertson (instructed by Dechert LLP) appeared for the Second Intervener, British Retail Consortium.

THE PRESIDENT: Good morning ladies and gentlemen. The Tribunal has at this stage identified five issues, there may be others but provisionally the matters we have identified so far are:

(i) Should the Appeals continue?

(ii) If the Appeals do not proceed what order should the Tribunal make disposing of them?

(iii) If the Appeals do not proceed what, as a matter of practice, is it envisaged should happen next and over what timescale and so on?

(iv) The issue of costs.

(v) Any other matters including notably the question of disclosure of Tribunal documents to third parties.

There may be other issues, but perhaps we can take that as a working list for the time being. On the first question of whether the Appeal should continue, the impression is at this stage that with various degrees of reluctance, or enthusiasm, or lack of it, the position of the OFT, of MMF and the Royal Bank of Scotland, of Visa and the British Retail Consortium, is that the Appeal should not continue beyond this stage, but MasterCard International – at least in its latest observations to the Tribunal – has maintained the suggestion that it is possible for the Appeal to continue. I think I would like to establish first whether that is broadly speaking the position of the parties and if MasterCard International ("MCI") represented by Mr. Sharpe would wish to argue for these proceedings to continue in some way or other we will give MasterCard International an opportunity to advance that submission. Assuming I have correctly summarised the position of the other parties I think it then falls to you, Mr. Sharpe, to make a somewhat lonely submission to the Tribunal on this point.

MR. GREEN: Perhaps I could just clarify our position just to make sure that Mr. Sharpe is not completely lonely.

THE PRESIDENT: Yes, Mr. Green.

MR. GREEN: Our position is if the Tribunal had power to permit it to proceed, and that is an issue, if the OFT withdraws the Decision then as we have explained in our skeletons we would like an Appeal to go ahead.

THE PRESIDENT: Can we just check your skeleton, Mr. Green because that is not the impression I got.

MR. GREEN: We put it on the basis of an assumption that if there is a withdrawal then there would be no Appeal, and we understand that is a question ----

THE PRESIDENT: Just a moment, Mr. Sharpe, just let me sort out what Mr. Green's position is.

MR. GREEN: It is the second sentence of the first paragraph: "If and insofar as the OFT has the power to withdraw the Decision." The only reason I rise at this stage is because there is a lot of administrative law which governs the question of whether a Decision can be withdraw and we aver of at least one circumstance in ordinary case law whereby a decision maker's decision may not be withdrawn, and that confers a benefit upon somebody and a legitimate expectation arises. We may feel that we have to bow to what may be an inevitable situation but I simply wish to state that Mr. Sharpe is not 100 per cent. lonely, that is all.

MR. CARR: May I make an observation as well on behalf of Royal Bank of Scotland?

THE PRESIDENT: Yes, Mr. Carr.

MR. CARR: It seems to us that two questions need to be separated. One question is, is the Appeal not to go forward, and if it is not then what is the mechanism by which that is achieved? Is it withdrawal? Is it dismissal, and so on. That is the mechanical question how do you actually dispose of it on the footing that it is not to go forward. The separate question is "Ought it to go forward?" which is the question that Mr. Sharpe wants to argue. Our position briefly is as to the former question the Decision ought to be set aside rather than withdrawn ----

THE PRESIDENT: We are not on that at the moment.

MR. CARR: We are not on that, well can I come to the second question?

THE PRESIDENT: The two questions you posed I think I attempted to put the other way round. I think logically the question of whether anything should go on comes before the question of what mechanism it should cease if it does cease.

MR. CARR: On your second question, in principle should the case proceed? Our position is that with reluctance we are inclined to accept that you are unlikely to compel it to proceed, but we do believe that it could proceed and the massive commercial uncertainty that affects the acquirers and the issuers would best be resolved by it proceeding. We would like it to proceed but we are, with reluctance, accepting that you are not likely to be persuaded with respect to my friend, Mr. Sharpe, that that is the course that ought to happen.

THE PRESIDENT: Well, Mr. Carr, I think what we ought to do is to hear Mr. Sharpe and then we will hear all the other parties as to what the position is. Yes, Mr. Sharpe?

MR. SHARPE: I thank Mr. Carr for his confidence in my submissions. (Laughter)

THE PRESIDENT: Well you are faced with a very difficult situation, I think, Mr. Sharpe.

MR. SHARPE: I think we all are.

THE PRESIDENT: I think we are all faced with a very difficult situation.

MR. SHARPE: And just for clarification, we argue this as our first argument that the matter should continue, but in the alternative we want the Decision to be set aside.

THE PRESIDENT: Yes, that is understood.

MR. SHARPE: Let me say first, it is my privilege to open on behalf of the Appellants today. Of course, we put our submissions in writing so I am going to be as brief as I can.

THE PRESIDENT: Yes.

MR. SHARPE: First, we welcome very much the OFT's notice of its intention to withdraw and what lies behind it. For our part this is certainly not an opportunity for crowing. We are delighted that the Office now understands that its case against the MMF interchange fee was bound to fail. I will not dwell on the reasons the Office gives for seeking to withdraw the Decision, in our submission none stand up to scrutiny.

THE PRESIDENT: That may be so, but the question at the moment is whether we should go on and hear the substance and if you are congratulating them on recognising that their case is bound to fail why should we go on as Tribunal to hear a case that, on your submission, is bound to fail?

MR. SHARPE: For the very simple reason that we came to this Tribunal seeking specific positive relief in the form of one or two declarations, and I will get to it in just a moment.

THE PRESIDENT: Yes, all right – you will probably need to take us back to all that.

MR. SHARPE: Yes, I plan to. I will, I think, dwell a moment, because it has some bearing on other matters, on the reasons – and I will deal with them briefly – for the withdrawal of the Decision, and one specific aspect in which MasterCard is mentioned and, indeed, I am cited as the source of the change of heart, and that relates to the relationship between **this** Decision and **this** Appeal and the outcome of the proceedings which they have already embarked upon in relation to what I will call the current MasterCard scheme, which they have suspended until the outcome of this Appeal was known. It was suggested, in fact, that my statements before this Tribunal were instrumental, or one of the reasons, causing them to change their minds because it dawned on them that in fact we would be challenging the arguments they would put forward notwithstanding the outcome of this appeal, and they see fit in their written statement to have regard to the new MasterCard scheme, almost as if they had seen it for the first time. In fact, as you know, the President of MasterCard, Mr. Selander, wrote as early as 28th October 2004, eleven months before the Decision was made, setting out in terms the nature of the revised MasterCard scheme, why it was important, the fact that it involved substantial changes to the MasterCard enterprise in the UK and:

> "... if implemented should have an important bearing on the Office of Fair Trading's current interchange fee investigation, and therefore I wish to bring them to your attention. In particular I want to provide you with advanced notice now since I am

informed that the OFT intends to issue a further statement of objections. It is likely to render a Decision early next year."

Well that was optimistic. Then he goes on to say – and this is from the President and CEA of MasterCard:

"I hope you will agree that it would be better to seek solutions based on the likely future MasterCard business model and to avoid fighting over what may soon become largely an historical one."

Now, as we have seen they rejected that advice, issued the Decision and that is the Decision that they now seek to withdraw, ostensibly in order to concentrate on new arrangements. Secondly, there can never have been any doubt that by ending the collective fixing of interchange fees one of MasterCard's objectives was to end any dispute concerning the legality of the interchange fee. Moreover, if MasterCard prevails in this Appeal and the Tribunal holds that a collectively agreed interchange fee was legal there can be equally little doubt that the revised arrangements would be illegal. So I hope you are beginning to see why it is important for us to resolve the matter of the legality of the interchange fee now and not at some indeterminate time in the future. It follows that by seeking to withdraw the Decision the Office will be elongating an already overlong procedure. The reality is the Office recognises the strength of MasterCard's position and there can be no misunderstanding about what has happened. They have received since they issued the Decision robust replies, and convincing replies to their case, in all its forms and mutations – and not even recourse to two hit men from Chicago has dented MasterCard's and MMF's case.

Quite apart from the waste – the extra waste – if this case were terminated now, and the huge investment by the Office of Fair Trading which so far has come to nothing, in our submission it is important to proceed to resolve the matter, and I start with para.267 of our Notice of Appeal to which I ask you to turn, bundle 1B.

THE PRESIDENT: Yes.

MR. SHARPE: This is why we are here – "we", MasterCard International. We say at 267 that the case is fundamentally flawed, so we are inviting to set aside the entire Decision. Then at 268:

"Furthermore, the evidence available suggests that MMF, MIF is not a restriction and is objectively necessary so that Article 81, or Chapter I do not apply."

Here is the important point: "The Tribunal is therefore invited to give a declaration to this effect."

THE PRESIDENT: You are going to have to take us to our powers to do that in the light of the *Floe* Judgment last week, if we have already set aside the Decision.

MR. SHARPE: Well, if you have already set it aside. I am not entirely sure, and I am not alone, what the impact of the *Floe Telecom* Judgment is on these proceedings.

THE PRESIDENT: No, that is certainly so.

MR. SHARPE: It certainly appears to restrict your ability to lay down conditions on the matter of a remission. We are not seeking a remission, we are actually seeking the maintenance of the status quo. Now, do you need me to indicate what powers you need in order to ----

THE PRESIDENT: Anyway, you want us to make a declaration?

MR. SHARPE: Yes, and 269 is consequential on finding there is a restriction, but nevertheless one which would justify an exemption, and you will see there that we are seeking a conclusion that it qualifies for exemption.

THE PRESIDENT: So in relation to that latter point if we, for example, decided that Article 81(1) or the Chapter I Prohibition could, or did, or might apply we could, nonetheless you say go on and take our own decision as to whether it qualified for exemption.

MR. SHARPE: That is right.

THE PRESIDENT: And possibly a slightly different Decision may be to the one that the OFT had taken or perhaps the same ----

MR. SHARPE: Oh indeed, yes, you have full jurisdiction on that. The simple point is this, we have come to the court seeking one or other of those declarations and respectfully we have a legitimate expectation that the Tribunal will provide us with that remedy.

THE PRESIDENT: How does that arise, Mr. Sharpe – "legitimate expectation."

MR. SHARPE: Well it is part of our Appeal, we have proceeded on the basis that we would obtain such a declaration, or at least a Judgment indicating why we should not have one. What the office is trying to do here is call time on this action in order to avoid a defeat. They do not have the power unilaterally to withdraw the Decision, the Appeal having started. You, the Tribunal have the power to insist that they live with the error of their Decision unless and until you choose to dispose of it in the manner laid down in the schedule to the Act.

THE PRESIDENT: Why do they not have power to withdraw?

MR. SHARPE: In answer to that, there is no specific power of withdrawal in any of the legislation and we take comfort from that. One might argue that they have the power to make another Decision to withdraw if there were no Appeal, or if the Appeal had not been lodged, but once the Appeal had started a totally new legal process has begun. That legal process crystallises (as far as we are concerned) in the relief that we are seeking and, in our submission, it cannot be unilaterally frustrated at the whim of the Office of Fair Trading.

THE PRESIDENT: We have faced this now twice in the *Association of British Insurers'* case, and in the *Association of Convenience Stores*' case.

MR. SHARPE: Yes, and in both cases you recognised that if, for example, in the course of the proceedings the Appellant had received and obtained substantially all the relief it was seeking then there would be no injustice in allowing the withdrawal and termination of the Appeal, and note that in both cases – certainly in the case of *ACS* (the Convenience Stores) there was no argument that the Decision should be quashed, and the Tribunal was content that the Appellants had received all the relief that they were seeking. As I pointed out that is manifestly not the case here. We are seeking a declaration of legality of the interchange fee, that is why we are here.

THE PRESIDENT: If we could give you 267 that would be, would it not, the substantial part of the relief you seek?

MR. SHARPE: Well respectfully, no. 267 would simply quash, it would be grounds for the setting aside of the Decision, yes, that would be welcome. Equally, we are seeking declarations which, in many ways are much more important to MasterCard International than to perhaps any other Appellant. I do not think one can arbitrarily put greater weight to setting aside. If that were so we would not have bothered with seeking a declaration. Now, having proceeded on the basis of seeking such declarations we say we have a legitimate interest in having the Tribunal read that legitimate expectation and grant the declaration sought. Of course, it goes without saying that in the course of these proceedings it would have been possible – I am not aware of any third party action – for third party actions to have been brought. It seems very odd that the case can be unilaterally withdrawn. What would have happened if third parties had brought their proceedings during the course of this Appeal? We want to take a declaration to third parties who may well bring proceedings and indeed, to add insult to injury, have been invited to bring proceedings by the Office of Fair Trading in their correspondence. In fact, they are leaving the weight of enforcement of the historic MasterCard scheme, which unwisely they sought to pursue, to third party actions.

It may be worth reminding the Tribunal that of course we notified these agreements six years ago, and we notified them for a purpose, for confirmation of the legality of the interchange arrangements.

THE PRESIDENT: Unfortunately for you, perhaps, the law has changed in the middle.

MR. SHARPE: Oh, yes, we more than know that, but it does not change the duty of the Office of Fair Trading. Having started the process they now say, with impunity, that they can just leave us to the third party actions with no protection at all, having neither given us the notification

that we sought in 2000, or denied us the possibility of a declaration that we seek before this Tribunal.

THE PRESIDENT: Yes.

MR. SHARPE: That would be bad enough, but the Office indicates that it is going to proceed with its investigation of the existing MasterCard arrangements. Those arrangements, as you know, do not involve any collecting fixing of the interchange fee, but nevertheless they have indicated there are reasonable grounds to suspect, they want to ----

THE PRESIDENT: It is difficult for us to take any view as to what the new arrangements might or might not apply. First of all, we do not know what they are, but secondly there are, one would have thought, fairly obvious questions going as far back as cases like *Basic Slag* as to the extent to which you can buy this kind of unilateral manoeuvre.

MR. SHARPE: As I say, I am not asking you to come to a view on that. All I am doing is asking you to assess what the Office itself thinks. There is proof of that. Let me take you to their press release of 2nd February, which you will find, hopefully, appended to the skeleton of MMF, at the end. Would you kindly go to that?

THE PRESIDENT: Yes.

MR. SHARPE: At the end of the skeleton you will find a photocopy of a press release issued by the Office of Fair Trading on 2nd February 2006.

THE PRESIDENT: Yes, we are there.

MR. SHARPE: There are three points to note about this press release. First, you will see in the second paragraph – they think they have reasonable grounds for suspecting that the new arrangements infringe Article 81. That is fine. So that sets the ball rolling in this parallel investigation.

Then we take it down a couple of paragraphs below. The paragraph that begins: "The judgment to be made", will you look at that?

> "The judgment to be made by the Competition Appeal Tribunal in the Appeal proceedings against the OFT Decision on 6th September is likely to have a substantial and potentially decisive impact on the new investigation which has now been launched."

So, whatever our view may be today, their view is that the outcome of the current proceedings is going to be substantial and potentially decisive in relation to that.

THE PRESIDENT: Yes.

MR. SHARPE: So much so – this is the third point – they are not going to take the matter any further because they are relying on you to provide them with some guidance as to how to approach the new arrangements. If the matter is to be withdrawn ----

THE PRESIDENT: That suggests that there is considerable common ground between the old arrangements and the new arrangements despite the change that you have made – in their view.

MR. SHARPE: In their view, yes.

THE PRESIDENT: You say it is quite different, but they say it is similar.

MR. SHARPE: We are going to say it is radically different, but that is not an issue that needs to worry us today.

THE PRESIDENT: It is radically different?

MR. SHARPE: Yes – well, actually, Sir, I does not really matter what I say, it is what the Office says. Now, as you can see and probably anticipate, the key importance of this is that these two cases, as far as the Office was concerned, consisted of a seamless progression. It is their plain intention to use the facts, matters, findings of this Tribunal, based probably on exactly the same evidence and arguments that have been led in relation to the collective MIF in relation to the new scheme. Instead of fighting this case through and hearing it in September, we are weeks away, millions of pounds have been spent on preparing for September.

THE PRESIDENT: If we asked you, are you able to substantiate that figure you have just given?

MR. SHARPE: Yes, very easily, my Lord, I have a piece of paper **here**. I anticipated you might ask. But it does not require much imagination to think of my learned friends and those behind us as not exactly being 'free goods'.

What my friend for the Office of Fair Trading wants us to do is, as it were, to drop hands and say "Well, okay, we will start again." So the point we have reached, and the point – if I may put it this way – of some maturity in the arguments and the hard work we have all put in to identify what the real issues are between the parties must go to nothing and somehow or other we have to start again on exactly the same facts and evidence whenever the Office of Fair Trading get round to it which on past experience, it must be said, has been remarkably slow. We do not need to go down that road. We can keep this case on the road, have it fought and then my learned friend can make what he likes of what the Tribunal has to say. But I say this, if in the course of your Judgment in those proceedings in September you come to the view and grant us the declaration we seek, it is most unlikely – most unlikely – that the Office of Fair Trading would use those arguments again in tilting at the new scheme, because their attack is a fundamental one on the interchange fee and how it is established.

THE PRESIDENT: I think we probably do need to look at our powers, Mr. Sharpe, on this declaration point, to see what we could do. It is the only step, I suppose, is it? We can take any step the OFT could have taken?

MR. SHARPE: Yes, I would think it remarkable that a Tribunal of this sort did not have the power to grant the declaration sought.

THE PRESIDENT: We have decided in at least two cases – *Gisc* and *Burgess* spring to mind – that there was an infringement and substituted our own Decision for the OFT's Decision. I am not sure, however, that we decided that there was not an infringement beyond setting aside a Decision.

MR. SHARPE: Is there any reason in principle why you should not grant us the declaration that has been in our Notice of Appeal since November, and on which basis we have proceeded with this application.

THE PRESIDENT: Yes, we just need to look at the rules. It is Schedule 8 to the Act, para.3.

MR. SHARPE: Sir, you do not need me to remind you that you have the same powers as the Office of Fair Trading and to the extent that the Office of Fair Trading can make a finding that a particular set of circumstances are lawful, not illegal, it then follows that that power transfers to you.

THE PRESIDENT: So we set aside the Decision under para.3.2, the steps are apparently to confirm or set aside – in this case it is set aside ----

MR. SHARPE: Yes.

THE PRESIDENT: "... in whole or part", and then 2(e): "... make any other decision which the OFT could itself have made.

MR. SHARPE: Yes, Sir, that is it. And if, Sir, you take a different view you are not only denying yourself the power to make a declaration but by inference indicating the Office of Fair Trading has no such power, and that cannot be right in our submission.

I think you also take some comfort from various statements from the Court of Appeal in *Floe Telecom*.

THE PRESIDENT: Yes, but we have certainly not, as a Tribunal, had a chance to consider *Floe* yet.

MR. SHARPE: Could I take you to para.25 of *Floe Telecom*.

> "I think the key sentence is the one that begins: "It may feel able to decide itself what the correct result should have been, so that no remission or reference back is necessary."

The precise form in which you make such a Decision – I think it is irrelevant, but we say in the form of a declaration, which is the relief ----

THE PRESIDENT: And that would leave it up to us to decide if we felt able to decide ourselves.

MR. SHARPE: Yes, indeed, I cannot argue with that. So we say you have the power to grant a declaration. We have a legitimate expectation that you will, Sir, exercise that power and it is right, given the reliance ----

THE PRESIDENT: 'Who' has happened to give rise to a legitimate expectation in the classic sense of that phrase, that someone has led one to act in a certain way on an assumption that later turns out to be not the assumption upon which they acted? You may have a hope and desire that we decide it, but I cannot quite slot it into classic, legitimate expectation case law?

MR. SHARPE: Well the simplest explanation, we have put it in the Notice of Appeal, we have been working on the basis that we will get it; nobody has challenged it – nobody, not even the Office of Fair Trading have challenged your powers in order to do that, so we do have an expectation which we think is legitimate. The Tribunal will consider the relief that we are seeking.

THE PRESIDENT: Yes.

MR. SHARPE: It comes as a shock to learn that you actually doubt whether you have the power to do that.

THE PRESIDENT: It is not a shock, Mr. Sharpe, I just need to be sure that this submission hangs together in terms of what the powers are.

MR. SHARPE: Well we have that expectation and we link this – do you recall the paragraph in *Convenience Stores*, which I alluded to earlier?

THE PRESIDENT: Yes.

MR. SHARPE: If the case were terminated and we walked out of the Tribunal at the end of the case – in many ways a very welcome outcome – but we would be leaving the Tribunal with nothing like the relief that we are seeking. It was not just the negative finding, attractive though that is, but the positive finding that what we are doing is lawful, and in so doing we would then settle, I think, the Office of Fair Trading's slow progression in relation to the current scheme. By their own mouth, press mouth, they say it will have a decisive influence, and we agree. The only arguments they provide against that is "yes, they may be subject to the Court of Appeal", but everything is subject to the Court of Appeal, the Decision/Judgment in this case may well be appealed against.

THE PRESIDENT: On your case we would have to go on and hear Visa's application?

MR. SHARPE: Yes.

THE PRESIDENT: And we would have to rule in your favour ----

MR. SHARPE: You would.

THE PRESIDENT: -- and then carry on from there.

MR. SHARPE: You would, my Lord. We are in no worse position than we were before we received the OFT's letter. Though whether any of us want to hear Visa today I do not know, I cannot speak for others.

The arguments the Office of Fair Trading advance for allowing it to drop where it is do not make sense. Arguments based upon Appeal (their next Decision could be appealed) a reference that could go to the Court of Appeal and nobody has seriously suggested it. I must say, as for Visa's position today, we do find it somewhat eccentric because the Office have indicated that if they are allowed to get away with this and drop the case they will start proceedings not only against MasterCard, but against Visa. As I understand the Visa scheme it is four square with the old MasterCard scheme. In other words, if the case is dropped the very issue of principle, the legality of the interchange fee, which we are fighting for, which for us is an historical story, but for Visa it is very much ----

THE PRESIDENT: Why do you need to fight an historical battle. If it is just an historical battle why fight it, other than the risk of possible civil liability.

MR. SHARPE: For reasons I hoped I had explained. The findings of this Tribunal in relation to the historic scheme which is so well advanced, will bear a decisive influence upon any subsequent investigation by the Office in relation to the current scheme.

THE PRESIDENT: I thought you said the current scheme was so radically different that we could not ----

MR. SHARPE: That is my submission.

THE PRESIDENT: You cannot quite have this both ways, I think.

MR. SHARPE: I can. The Office of Fair Trading's view is that it is a precise figure, that is a point that has to be argued. The fact is, and it surely must be common ground that if this Tribunal finds that the interchange fee collectively agreed is lawful, then surely it follows that an interchange fee established by MasterCard must equally be lawful. Therefore, if this Tribunal finds in our favour at the end of these proceedings in September that will, for all practical purposes, in our submission, dispose finally of the proceedings which they are threatening to resume.

But if we turn it the other way around, and these proceedings drop when the self-same arguments that the have used against us now will be resurrected in several months' time, with all the continuing legal and commercial uncertainty that that indicates.

THE PRESIDENT: Can you help me on one side issue which I think we did ventilate at the last CMC, which is what is going on at the level of the European Commission at the moment?

MR. SHARPE: My instructions are that a supplementary Statement of Objection is imminent.

THE PRESIDENT: "Imminent" – you have had one Statement of Objection?

MR. SHARPE: Yes, and they have gone away and rethought it and that supplementary Statement of Objections is, my instructions are, imminent.

THE PRESIDENT: Only "imminent", it has not arrived yet?

MR. SHARPE: No, it has not arrived – "imminent" meaning "any day now." My understanding is that it has gone through all the Commission procedures. It is subject to arrangements regarding translation – "imminent".

THE PRESIDENT: So in any event there are going to be parallel European proceedings that will touch on similar issues?

MR. SHARPE: Well that is an issue that is hotly in contention, as you will know. The EC proceedings are confined to the international interchange fee, and in the last Commission Decision – the one Visa obtained, sought their exemption – that Decision made very careful reference to the differences between the domestic and international situations.

THE PRESIDENT: Yes, but there are some points in that Decision that bear on the present case to put Visa's submission at its very, very lowest.

MR. SHARPE: At its lowest I cannot contest that, but I am certainly not agreeing, and you would not expect me to agree with the extravagance of Visa's claim that you are obliged to follow it.

THE PRESIDENT: The basic point is that if this Appeal was going on there would be a parallel European Commission proceedings going on about the international aspects of the interchange fees.

MR. SHARPE: Indeed, that is no different, that has been the position for several years.

THE PRESIDENT: Yes.

MR. SHARPE: And there is no indication, it must be said, though my friend can answer for himself, whether the Office of Fair Trading are going to stay their hand in relation to the attack upon the new scheme, owing to the parallel proceedings against the international scheme. So the position really has not changed.

Sir, we come to the Tribunal to obtain certain types of relief. We do not want to leave it without that relief; and secondly, practically it would be inequitable to subject all the parties – in particular MasterCard, but also Royal Bank of Scotland and MMF – to the continuing commercial and legal uncertainty.

Sir, those are my brief submissions, together with my written submissions, as to why this case should be retained and why it is improper and inequitable for the Office of Fair Trading to walk away from this.

THE PRESIDENT: Thank you, Mr. Sharpe.

MR. SHARPE: Now I take it you do not want submissions on the second point in relation to the quashing of the Decision? I am happy to go on to that.

THE PRESIDENT: I am just wondering whether it would not be more sensible to take these two points together, because I think there is an interrelationship between the two of them.

MR. SHARPE: Our position on this is very simple and, I think, in accordance with all the appellants we want that in the alternative the Decision must be quashed in its entirety.

THE PRESIDENT: When you say "quashed" you mean set aside – to use the statutory language.

MR. SHARPE: Indeed, set aside, and that would avoid any lingering exposure to civil actions based upon the Decision itself. This is precisely what the Office sought in the C*onvenience Stores*' case and I am hard put to see any good argument against it, and I do have some submissions in relation to costs.

THE PRESIDENT: Yes, we will get to that later.

MR. SHARPE: Now unless I can help you further on those two points?

THE PRESIDENT: No, thank you very much, Mr. Sharpe. I think we will go around the Appellants first, then the Interveners, and then come to the OFT at the end, if we may, Sir Jeremy? Yes, Mr. Green?

MR. GREEN: Can I deal with it this way, what I would like to do is to tell you where we think your powers now lie in the light of *Floe*.

THE PRESIDENT: We did rather get the impression from your submissions that you were reluctantly going along with what the OFT suggested subject to ----

MR. GREEN: Well what I am going to put to you, it may not lead me to any fixed conclusion so that I will then say to you that if Mr. Sharpe persuades you that you should go ahead, then we will say "Thank you very much", but we will have to decide whether you have that power in the light of *Floe* and what I am now going to say to you is really how you should analyse this issue in the light of *Floe*, and it may lead me to a rather reluctant conclusion which I may not even express to you. (Laughter)

THE PRESIDENT: I think we would all be grateful to hear what conclusion you have yourself reached on this point.

MR. GREEN: It seems to us that in the light of *Floe* the analysis has to be performed in this way, that both Lord Justice Lord and Lord Justice Chadwick essentially asked themselves whether the position the Tribunal had arrived at stripped the case of its substance, and one finds that in para.28 (Lord Justice Lloyd) and para.57 (Lord Justice Chadwick).

THE PRESIDENT: You need to go a bit more slowly, Mr. Green, because we have not had a chance to take this on board.

MR. GREEN: No. It would seem, certainly on my reading of the Judgment, that both of those two Judges – Lord Justice Sedley did not disagree with either of those two – were saying that on the facts of the instant case the ruling of the Tribunal stripped the case of its substance.

THE PRESIDENT: The broad thrust, as I think we have understood it at a provisional level, is that once it is set aside that is the end as far as the Tribunal is concerned.

MR. GREEN: Well I do not think I go quite that far because they drew a distinction between different types of setting aside.

THE PRESIDENT: Yes.

MR. GREEN: For example, Lord Justice Lloyd (para.26), Lord Justice Sedley (para.53) both accepted that there may be circumstances where a setting aside still leaves the Tribunal with power to attach conditions on remission, but paras. 28 Lord Justice Lloyd and Lord Justice Chadwick (para.57) were on the basis of the facts of this case, the fact that the Tribunal had come to a Judgment ----

THE PRESIDENT: On the facts of *Floe* you mean?

MR. GREEN: Yes – was in fact, *de facto* substantively an end of the case and therefore there is nothing left for the Tribunal to do. Therefore, it seems to us that the question which has to be posed is "What will strip this Appeal of its substance?"

THE PRESIDENT: Yes.

MR. GREEN: And there are really two options only. First, the Office of Fair Trading withdraws the Decision.

THE PRESIDENT: Do you accept they have power to withdraw?

MR. GREEN: Well as a matter of administrative law a decision maker can withdraw its decision, and I do not think the fact that the Act says anything about it alters the administrative law position. A decision maker can withdraw the decision ----

THE PRESIDENT: It very often happens in the Administrative Court that that is exactly what does happen.

MR. GREEN: That is exactly what happens, but the Decision to withdraw has to be a decision taken lawfully, of course. There will be a Decision if the OFT go ahead with this proposed course of action there will be a Decision of an administrative nature, withdrawing **this** Decision. That Decision, I think one would be bound to say, is unlikely to be a Decision which is appealable. It is not a decision as to whether or not there is an infringement of the Chapter I or Chapter II prohibitions or 81 or 82. It would appear on the face of the Office of Fair Trading's skeleton,

and there may be some room for argument about this, but it would appear to be a decision of an administrative nature, as it were, closing the file. It is akin to that, it is withdrawing the Decision and it may, therefore, on the analysis in *Floe* be a decision susceptible to Judicial Review because it has to be a lawful decision, but there will be an administrative decision taken subsequently.

Now, if that decision is taken then, at least prima facie, it may be seen to strip this case of any substance and that is what concerns us. I should say, being quite candid about this, my clients do not want to end up in the Court of Appeal on a technical argument in this case. We have wanted to argue the merits very strongly throughout, but in the death knell of this case, we do not want to end up in a technical quagmire, and that is a conundrum which we face at the moment. But it does seem to us that if there is a withdrawal of the Decision that may strip the Appeal of its substance because there is nothing left for the Appeal to bite upon. If the Court of Appeal in *Floe* had asked themselves in an analogous situation "What was left of the case after that Decision" they may say "Nothing is left of the case" in the same way as in *Floe* the Judgment of the Tribunal had the effect of there being nothing left at the end of the day. So that is the first thing which could radically alter the landscape and strip the case of its substance. The other matter is, if the Tribunal were to set aside the Decision would that then, in the light of *Floe*, leave the Tribunal with some residual power to impose conditions, or to rule upon the reasons for setting aside the Decision along the lines that Mr. Sharpe has contended for.

THE PRESIDENT: Sorry, I am just following you; in relation to withdrawal we have a Tribunal Rule that applies to withdrawal of the Appeal.

MR. GREEN: But not of the Decision.

THE PRESIDENT: But not of the Decision, nor of the Defence apparently.

MR. GREEN: The powers of withdrawal of pleadings pre-suppose the continued existence of a decision, I think that is why there is a difference. One would not expect in the Act, necessarily, to see provision being made for withdrawal of the underlying Decision. But if there is an extant Decision and someone says "We have seen the OFT's Defence, we now recognise that we are going to lose our Appeal and we wish to withdraw" for whatever reason, and the Tribunal can supervise that under the Act, but there is still a Decision extant. Here we are contemplating the OFT pulling the rug from all of our feet.

THE PRESIDENT: And in both the *Association of British Insurers*' case, and the *Convenience Stores*' case, the Tribunal was rather concerned about the 'pulling the rug' point.

MR. GREEN: Yes.

THE PRESIDENT: They were both solved by the OFT Decision being set aside.

MR. GREEN: Yes, but at the moment there is a Decision because the Office of Fair Trading has indicated that they will not act until such time as the Tribunal has expressed a view. We are sure that there is going to be no unholy rush to see who can either set aside the Decision or withdraw the Decision first.

THE PRESIDENT: That would be most unseemly.

MR. GREEN: That would be most unseemly, but at the moment the Tribunal has the power as of today to set aside the Decision, which is the basis it seems to us of Mr. Sharpe's submission that you have that power at the moment, and then one is into Schedule 8 powers to see whether or not there is then something left of the Decision, either on a remittal or permitting the Tribunal itself to take its own Decision which would clearly be within the scope of Schedule 8(3)(2)(e) and that would be quite distinguishable from the *Floe* case where the Tribunal did not, in the Judicial Review circumstances there prevailing, contemplate taking its own decision, and that is a legal and material difference. That pre-supposes the Tribunal would go ahead, take its own decision and, at the moment, that may be a route which is open to the Tribunal.

THE PRESIDENT: But on your submission it would not be open to us if they just stood up and said "We withdraw"?

MR. GREEN: We have difficulty with seeing that there is anything then left of an Appeal. Applying the *Floe* test, what is there then left? There is no Decision.

THE PRESIDENT: The *Floe* test is?

MR. GREEN: Has the substance of the Appeal disappeared and by what means? In the *Floe* case it was the Judgment and the Court of Appeal in paras. 28 and 57 came to the conclusion that after Judgment there was in effect nothing left for the Tribunal to bite upon.

THE PRESIDENT: Well that is talking about once the Appeal has been determined.

MR. GREEN: That is right.

THE PRESIDENT: The Appeal has not been determined if the Decision is simply withdrawn.

MR. GREEN: That is the equivalent, I think, in this case, asked what has stripped the Appeal of its substance, it ----

THE PRESIDENT: Where do you get the "... stripped of its substance phrase?"

MR. GREEN: I think it is the inference of para.28, Lord Justice Lloyd, where he says: "... there was nothing left of the appeal."

THE PRESIDENT: He says that once the Appeal has been determined "... there was no longer a subsisting appeal."

MR. GREEN: Yes, it is the third sentence: "However, with respect to the CAT, it seems to me that, in the present case ..."

THE PRESIDENT: "... once it had set aside the decision ..." that is the key to it, is it not?

MR. GREEN: That is right.

THE PRESIDENT: And then later in the passage, about six or seven lines up: "Once the appeal has been determined ..."

MR. GREEN: That is right.

THE PRESIDENT: And Lord Justice Chadwick at para.57: "The appeal had been fully determined."

MR. GREEN: That is right, but again they were referring to the facts of this case and both Lord Justice Lloyd and Lord Justice Sedley contemplated at least the possibility that there may be circumstances where, even after a setting aside, there was a residual power to impose conditions attached to a remission.

THE PRESIDENT: A setting aside in part would be one example there.

MR. GREEN: A setting aside in part.

THE PRESIDENT: Possibly.

MR. GREEN: It is almost invariably going to be the case that once a decision is set aside there is nothing left of an appeal within the meaning of the *Floe* Judgement.

THE PRESIDENT: Yes, but can we for this purpose equate withdrawal to setting aside?

MR. GREEN: Well our concern is that the legal effect of withdrawal is *de facto* at least the same.

THE PRESIDENT: Yes, anyway this is, as you say, something of a procedural quagmire.

MR. GREEN: It is certainly a procedural quagmire.

THE PRESIDENT: Which is a very long way away from what the legislator intended, the way the legislator intended this legislation to work.

MR. GREEN: So where do we get to? First, if the OFT withdraws ----

THE PRESIDENT: That is it.

MR. GREEN: -- we think that is it. They have not withdrawn and if the Tribunal, as it were, were to invite them not to we doubt they will do. I am sure they would co-operate with the Tribunal. So at the moment there is an extant decision and all I would say is that if you are persuaded by Mr. Sharpe that you should go down the route he poses then we will be followers with enthusiasm, for the reasons we set out in both of our skeletons.

Can the OFT be prevented from withdrawal? That seems to us to be a question which theoretically might arise. We have not had time to do the detailed research, but there are cases where a decision maker has, for legitimate expectation reasons, been prevented from

withdrawing an act, and there should not be any surprise about the court's power to do that. All I would pose are these two possible questions.

THE PRESIDENT: What are the legitimate expectations here?

MR. GREEN: There would be cost implications that we have all proceeded on the basis that we would argue about a changed case, and we have made a concession.

THE PRESIDENT: We can deal with costs under the jurisdiction of costs.

MR. GREEN: Indeed we can.

THE PRESIDENT: What legitimate expectation would there be beyond ----

MR. GREEN: The desire for legal certainty, which is a powerful principle, and that we had made a concession in order to facilitate that that we would not take a procedural point which prevented the legal certainty being established. I am not urging the Tribunal that it should take this at all costs ----

THE PRESIDENT: Well I think we would need quite a lot of authority on the circumstances in which a decision maker cannot withdraw a decision before going down that particular route.

MR. GREEN: We would not be submitting that it is a power which a court would easily or rapidly exercise and I think I am bound to put the proposition: does this Tribunal have that power, or is it an administrative act which would have to be supervised by the Administrative Court? It would be preventing the OFT taking a new decision which at least arguably might not be a decision appealable to this Tribunal and again we do not want to find ourselves in a procedural quagmire; I feel I need to raise that point at least as an issue which will need to be grappled with. It may not arise because the OFT may simply say "We will do whatever is the proper thing to do in the circumstances.

Where we therefore end up is that if the OFT withdraws, we do not see that there is, in real term, anything left of this. If you are persuaded by Mr. Sharpe that you should pre-empt that decision for reasons that he has given then we will obviously not oppose that because we wish to see legal certainty for much the same reasons as Mr. Sharpe has given. If you conclude that the matter should be set aside today then we submit that it should be made clear that the setting aside is to render the decision void *ab initio* then we would submit that that naturally follows, as night follows day, and we would seek clarification from the Office of Fair Trading that they would not be proceeding with any future case in relation to the agreement which was the subject of the withdrawal decision – that again that appears implicit from their skeleton argument, and we doubt there can be any reasonable scope for doubt. As a matter of administrative law they would be into abuse of process grounds if they sought to take the same decision again.

THE PRESIDENT: So on the second of the interrelated points, if we came to the conclusion the appeal should not proceed, you say we should formally set it aside on the basis that at the moment it is extant and has not yet been withdrawn?

MR. GREEN: Yes. Can I mention one other matter, to which again there is possibly no clear answer, just in relation to the question of residual jurisdiction to grant a declaration that again, as a matter of ordinarily Administrative law, for a court to exercise a declaratory jurisdiction there has to be *lis*, there has to be a dispute between the parties. There is at present a dispute between the parties. If the decision is withdrawn it is difficult to see that there is a *lis* or a dispute between the parties. There is authority on that in relation to the Director General of Telecoms, I think there is the House of Lords' Judgment, I think in 1995, brought by *Mercury Communications* some 10 years ago.

Over and above that I am not certain there is a great deal more that it is sensible or practical for me to say on behalf of my clients.

THE PRESIDENT: Thank you, Mr. Green. Yes, Mr Carr.

MR. CARR: First the question: withdrawal or set aside? It probably would have been desirable to have researched this question a little more deeply than we have done so. There has not been much time, it has all happened very quickly, but at first dig into the Administrative law authorities suggests to me the following three propositions: first, a court cannot withdraw its own decision once it is *functus*, it can only be corrected by appeal. Secondly, a statutory Tribunal cannot withdraw or modify its own decision unless it is given statutory power to do so. Thirdly, an administrative body exercising prerogative powers of course can withdraw an administrative decision because it faces no statutory circumscription of the scope of its powers. It may well be true as a matter of practice that Government Bodies, administrative bodies, all the time withdraw decisions and I would not want to be too confident of the set of circumstances in which that occurs, but I suspect they are cases of Government departments – the Crown exercising prerogative powers. There is definitely a body of case law – I did not look it up but there are half a dozen cases in the footnotes to raid on Administrative law – which says that a statutory Tribunal may not withdraw or modify its own decision, unless it is given statutory power to do so.

THE PRESIDENT: So that would raise the question of what category we slotted the OFT into? Are they like an employment Tribunal or similar body against which there is an appeal and once you have signed it you are stuck with it? Or are they essentially an administrative agency ----

MR. CARR: Yes.

THE PRESIDENT: -- which is not circumscribed in any way as to what it can and cannot do.

MR. CARR: Quite. As to the classification I would respectfully suggest that it is plain they are a statutory body, they are not a body exercising prerogative power like the Secretary of State for whatever particular Department it may be.

THE PRESIDENT: Are they a statutory body in the sense that they are a Tribunal within the meaning of this kind of case law?

MR. CARR: Well that would have to be looked at more carefully, with respect. I quite accept that one has to look at that.

THE PRESIDENT: It is quite a good point, is it not, potentially?

MR. CARR: Well potentially important, but the essential distinction seems to be: are they a body whose powers are defined and hence circumscribed by statute? Or are they a body with potentially unlimited power save within the scope of the raw prerogative itself. Government bodies exercise prerogative powers which potentially have no limit on them, save and so far as they are eroded by statute of course. But within the ambit of the prerogative there is nothing to limit the way in which the Crown can conduct itself in exercising a prerogative power, and hence it is easy to deduce that an administrative body exercising prerogative powers can modify or withdraw a decision that it has previously made. There is simply nothing to stop it. I quite appreciate that one may need to think are there different types of statutory bodies for this purpose, but in principle a statutory body can only do what statute permits. We haven o principle in our law which says that you can deduce from the existence of a power to do something, the existence of a similar power to undo it. There is no such principle in the law. A statutory power to do a certain thing does not imply or carry with it a statutory power to undo that thing – no such principle is part of our law and, indeed, the cases concerning statutory tribunals depend upon the absence of any such principle of law.

So without wanting to be definitive, because as I freely admit I have not researched this to the bottom, it is by no means clear that a body such as the OFT, whose powers are statutory only, has a power to withdraw a decision once made.

THE PRESIDENT: So you would submit that a statutory body such as the OFT, against whom incidentally there is a clear statutory right of appeal ----

MR. CARR: Yes, quite.

THE PRESIDENT: -- if it reaches the appeal stage and decides for one reason or another that the decision it has taken is not one it wishes to defend, its only course is to submit, as it were, to Judgment ----

MR. CARR: Quite so.

THE PRESIDENT: -- and agree to it being set aside, rather than unilaterally withdrawing it?

MR. CARR: Yes, I would suggest that ----

THE PRESIDENT: That is your submission?

MR. CARR: -- is probably the law. That is my submission.

THE PRESIDENT: "It is probably the law."

MR. CARR: I would not want to be held to it without ----

THE PRESIDENT: No.

MR. CARR: But that on the face of it seems to me to be the law, and that is my submission.

Obviously the OFT can, if it wishes, by consent, agree or accept that the appeal should be allowed. But an ability unilaterally to withdraw a decision is a more doubtful proposition.

THE PRESIDENT: Yes, well I think we expressed doubt as to what the position was, at least in the *Association of Convenience Stores*' case, without as it were, going into this particular point.

MR. CARR: It is important to get this right, one does not want to proceed down a course which is the legally improper course, but one also wants then to ask the practical question what turns on this? What consequences at the end of the day will be affected by a view one way or the other. It seems to me that the two principal matters that are likely to be affected by which course is taken mechanically are, first, cost – does it have an implication as to costs? Are we in some sense better off in an application for costs if the Decision has been set aside, rather than if the OFT has unilaterally withdrawn it? So that is one area where arguably there could be a practical significance.

The second area where there might be concerns the area of *res judicata*, abuse and the like. If, for example, the OFT were in the future to commence or pursue a further investigation in which it depended on precisely the same arguments and evidence as those which it had abandoned in this present appeal. One is not suggesting that the technical doctrine of *res judicata* applies here, but in all legal proceedings there is a concept of abuse whereby public authorities and, indeed, litigators must be controlled from taking unreasonable measures, and there must be some scope for application of that doctrine in the context of competition law.

So those seem to me to be the two areas – costs and abuse of power for the future. Now, does it actually matter whether what happens is withdrawal or set aside for the purpose of those two questions, costs and abuse. These days in general, when we are considering a cost position or protecting a party from abuse, we tend to look at substance and reality rather than form, and my own initial suggestion to you would be actually neither the issue of costs, nor the issue of abuse should be materially affected by the question whether the right answer is withdrawal or whether the right answer is set aside?

THE PRESIDENT: I think provisionally we would be with you on that.

MR. CARR: Yes, so my approach to it is from a practical point of view it probably does not matter which happens, whether it is set aside or withdrawn, but obviously one wants to get the thing right.

If indeed the conclusion you were to come to was that either course were possible – withdrawal or set aside – and in addition to that, if you felt you had a power to control withdrawal, in other words it is not simply a unilateral act which the OFT can exercise of its own motion without constraint, if it is not that, if you have a power to control the ability of the OFT to withdraw then we would urge you to exercise that power and say "no", we are going to set this one aside. Setting aside is a clear, simple, familiar concept in the field of decision making. Withdrawal, what exactly does that mean? One hesitates to go down this road but one can slightly see the possibility that if the OFT were allowed to withdraw unilaterally and then start again or proceed afresh one can see that the OFT might feel more encouraged to think that in the future, having simply withdrawn it might feel that in the future it could embark on any process free from the constraint of abuse. The OFT itself would recognise that if it is compelled to have its decision set aside, albeit by consent, but nonetheless set aside, and I pause to draw the analogy with ordinary litigation where a claimant discontinues his action and the court imposes on him the condition of doing so that he will not bring future action relying on substantially the same matters. That is a normal part of any litigation.

THE PRESIDENT: But in normal litigation, subject to costs, can you discontinue unilaterally?

MR. CARR: You can discontinue up to a certain stage of the litigation unilaterally without the permission of the court. Beyond a certain stage of the litigation you require the permission of the court and at that stage the court invariably refuses that permission save on an undertaking not to recommence fresh litigation relying on the same facts and matters.

THE PRESIDENT: Some of this came up in the *BCCI* litigation, did it not, I think, at a late stage?

MR. CARR: Yes. Again, I must say I have not checked what the position is under the CPR ----

THE PRESIDENT: The Civil litigation field is probably a different field from the one that we are in.

MR. CARR: It is different because obviously we have got the public interest concern. Nonetheless, I am just drawing on the analogy here and the point I am making is that one can see that the OFT itself might readily accept that if the decision has to be set aside then it may well accept that constraints on its future freedom of action which look potentially abusive would be real concerns for it. If, on the other hand, it is simply allowed to say "We have changed our mind, we are taking our ball and going home", one may feel well we are free to do anything we like in the future. We would like them to feel constrained by the ordinary concepts of abuse which form part of the concept of any legal system and they will more readily have that brought home

to them if they are told "I am sorry, you cannot just walk away unilaterally, this is a system with an appellate structure, you feel unable to support your position, the necessary consequence of that is that the appeal must be allowed and your Decision set aside, and therefore you must accept whatever abuse of process consequence is attached to such a decision and we would therefore much prefer the cleaner, simpler and more familiar and better understood idea of setting aside a decision rather than the parties simply unilaterally withdrawing.

Thank you, Sir.

THE PRESIDENT: Thank you, Mr. Carr. Yes, Mr. Morris?

MR. MORRIS: I would like to make a couple of observations on power to withdraw first. I hesitate slightly because I envisage that some of what I may say may be said by the Office of Fair Trading. Can I draw to your attention two points? We say that there is a power to withdraw. The statute is silent. I should remind you that, of course, in *Nap* at para.134 this Tribunal indicated or seemed to indicate that there was a power but of course I entirely accept that you probably did not go into it ----

THE PRESIDENT: I do not think that we had that point in mind at that early stage.

MR. MORRIS: Two points on this: one is to remind you, Sir, of old s.47 of the Competition Act, which I understand Sir Jeremy will perhaps address you on in a little more detail. Old s.47 was the old regime of third party appeals and, as you will know ---

THE PRESIDENT: You could ask them to withdraw it.

MR. MORRIS: You could ask them to withdraw. My short submission on that is that s.47 itself did not contain an express power to withdraw. It worked on the assumption that there was a power ----

THE PRESIDENT: Implicit in that on request you could re-examine and withdraw.

MR. MORRIS: Yes, vary or withdraw, so that is the first point.

THE PRESIDENT: Vary or withdraw, yes.

MR. MORRIS: The second point is to remind you, Sir, of the practice in Community law in this area, where as I understand it there are cases, and not infrequently cases, where the Commission withdraws a decision. Two recent examples are *Bristol Myers Squibb* and *IMS Health*. They withdrew a Decision following the commencement of Article 230 proceedings before the CFI, and in those circumstances, as I understand it, where there is a withdrawal the CFI then orders that there is no need to adjudicate on the appeals. I understand we have a different statutory regime here, but insofar as one might be looking at s.60, you might bear that in mind. So those are two points on the power to withdraw.

The third point is that if you are not satisfied then you should go ahead and set aside, and in those circumstances it makes no difference. Now, on the question of whether the appeals should be terminated I make a number of points just to remind you.

First, appeals here are against Decisions, you will be well familiar – everybody is familiar – with s. 46 in the Schedule.

THE PRESIDENT: Yes.

MR. MORRIS: Secondly, the Tribunal's jurisdiction here is appellate, and we would submit that on withdrawal there is no Decision and nothing to appeal against. To allow matters to proceed in the way advocated by Mr. Sharpe would, we submit, be tantamount to this Tribunal turning itself into a Court of First Instance with original jurisdiction – declaratory relief jurisdiction.

Again, if I may remind you of certain paragraphs of previous Judgments of this Tribunal: in *Nap* at para.134 where you say: "The function of this Tribunal is not to try a wholly new case." In "*Aberdeen Journals* at para.177, where you say: "This Tribunal is essentially an appellate Tribunal and not a court of trial", and similar observations in *Argos*.

Turning to the reasons advanced by Mr. Sharpe, looking first to the future, the first point is, of course, as you already have, the future arrangements of MasterCard are different and MasterCard will argue that they are not within Article 81 for other reasons.

The whole of Mr. Sharpe's argument is premised on the assumption that he is right on his argument of principle. We invite you to consider what happens if MasterCard's argument of principle were to be rejected.

THE PRESIDENT: Sorry, his argument of principle that 81(1) does not apply?

MR. MORRIS: Yes, his argument is that there is a fundamental principle here, 81(1) does not apply and he wants you to determine that now. He is so confident of that that he only sees that as a possible outcome.

Now, if one considered what would happen if you went ahead, ruled that he was wrong on that point of principle, and this Tribunal rejected that point, where does that leave everybody? In those circumstances MasterCard will then come back again and will go around the houses again and argue that the new arrangements do not fall within Article 81(1) for other reasons. In other words, his point is not dispositive.

THE PRESIDENT: And you submit, among other things that the Visa Decision does not support him on that first point?

MR. MORRIS: That is right. Our first point is consistency, plainly, if this Tribunal takes a view and we lost on consistency then we have said effectively that we would be free to argue with 81(1), but we are not arguing that as our main ----

THE PRESIDENT: If your first argument is right, the 81(1) argument is closed off.

MR. MORRIS: It is. Of course then the question arises, there are also other aspects of 81(1) which arise which would not necessarily be determined on his points of principle.

Can I then turn to the question of importance internationally?

THE PRESIDENT: Before you do that, Mr. Morris, could I just use you to expose one general point that has occurred to us, which is that post-modernisation should one be drawing the same kind of sharp distinction between 81(1) and 81(3) that has hitherto been drawn, because it seems to us the legal question now is whether a given set of rules infringes Article 18 having taken into account both 81(1) and 81(3).

MR. MORRIS: Subject only to burden of proof.

THE PRESIDENT: The burden of proof may at some point shift, depending in which pigeon hole you categorise something, as to whether you say it is not a restriction because it is objectively justified, in which case it may be that the burden of proof is one place, or it is a restriction and has to be justified under 81(3), which may involve some shift in the burden of proof. But in principle is it not contra-indicated these days to proceed with a case without looking at all parts of the Article.

MR. MORRIS: Well it was the next point on my list. I actually just skipped over it, but we would submit that it is very difficult for the Tribunal to decide the 81(1) point that Mr. Sharpe wants to be decided without actually deciding all the points in the case including 81(3) and further of course, we do not really know what the OFT's position is on 81(3) now, because it sort of says: "Well, we have slightly changed our mind and our position in the Decision was *obiter* and we are not really going to go there, but we think broadly it is debit card costs. We would submit that we would adopt your observations -----

THE PRESIDENT: Well we have no view about it, it is just a reflection that has occurred to us.

MR. MORRIS: I am reflecting it back and saying that "that would cause a difficulty and you would have to deal with the 81(3) issues as this is post-modernisation" is my note.

THE PRESIDENT: Yes.

MR. MORRIS: Can I then just make a couple of observations about importance. MasterCard make an enormous amount of the importance of a Ruling from this Tribunal to set the tone in other jurisdictions, in that they want a Ruling here because it is very important. Quite apart from the fact that it does not sit well with their argument that our consistency argument is devoid of legal merit – I will leave that to one side. I am picking up on the observation that you have just made about the fact that the European Commission is about to enter this territory, regardless of any distinction between domestic and inter-regional, which Mr. Sharpe makes a great deal of

and which we certainly do not accept. It must be the case that his argument of principle, which he seeks to establish in this Tribunal is going to be the very same argument of principle he is going to be making to the Commission in the current proceedings. That argument does not depend upon the distinction between domestic and inter-regional. So in those circumstances we would say that MCA can establish its principal position in those current and imminent proceedings before the Commission and other national competition authorities. That is the impact on future arrangements.

As far as the past is concerned, we would say that the only issue about the past is damages' actions potentially, the have not happened, there is no indication that they will. But again, Mr. Sharpe's argument of principle can be equally determined and decided in the context of any such damages' actions which may arise – he is ready to go, no doubt he is so confident he would get the damages' action struck out on a summary Judgment basis if his case is as strong as that. All I am saying is that that can be dealt with as and when it arises.

THE PRESIDENT: Sorry, just let me make sure I have got the point you made immediately before that, that in the pending European proceedings, whatever the distinctions between domestic and international interchange fees may be, the argument of principle is likely to be the same?

MR. MORRIS: The core argument of principle about whether there is a restriction of competition under Article 81(1) Mr. Sharpe no doubt will tell me if it is different, and of course I have not seen the detail of those proceedings, but I would imagine that the same argument is an interchange fee collectively set, or on their new basis does it constitute a restriction of competition falling within 81(1). That is a question that arose in the *Visa* EU Decision and it is not dependent, we would submit, on any distinction between domestic and inter-regional and he can put his case there.

I think for the time being – I say "for the time being" because if there are points that Sir Jeremy does not pick up on I may want to say something else, but can I just finish on this note which is not perhaps a note that the Tribunal or anybody here wants to hear, but it is this – and I think you have it already, Sir – if you were minded to accept Mr. Sharpe's position I would then stand up and wish to make my application -----

THE PRESIDENT: You want to move your application. We would have to hear your application first.

MR. MORRIS: Well we would say, because in those circumstances presumably the OFT's prospective withdrawal would be withdrawn because presumably they would want to defend the claim for a declaration by what is in their defence, and at that juncture I would stand up and say "Well actually you cannot do that anyway, because the case and the Defence for all the

reasons put in our Reply really cannot go ahead in these proceedings at this time. Indeed, we would submit that the ----

THE PRESIDENT: No, we have to go on and if we were still contemplating the possibility of these proceedings going on we would have to hear your application that they should not go on before we reached any final view on anything.

MR. MORRIS: I am grateful for that, Sir.

THE PRESIDENT: That is fairly clear, to our mind anyway.

MR. MORRIS: Thank you. Those are my submissions.

THE PRESIDENT: Yes, Mr. Robertson?

MR. ROBERTSON: Sir, there is really only one additional submission that the BRC wants to make at this stage.

THE PRESIDENT: In your written response you were reluctantly accepting that these proceedings do come to an end?

MR. ROBERTSON: It looks to us as if the OFT has the power to withdraw the Decision and therefore the matter goes back to the OFT. Now, whether that is by way of withdrawal or formal setting aside of the Decision we are agnostic and I am not going to address any submissions on the OFT's powers or the Tribunal's powers on that point.

The additional point that I did want to make was that whichever way it does go back to the OFT, assuming it does go back to the OFT, we want it to be clearly understood that there is no question of the OFT being precluded in some way from reaching a fresh Decision as to the issue of infringement prior to November 2004 by MasterCard.

THE PRESIDENT: It is not precluded, but the impression we have at the moment is that that is not something they are thinking of doing.

MR. ROBERTSON: Well, as I say I am standing up in advance of the OFT, but I will explain the reason why this is of concern to retailers. As I think we have already explained, no one from the retailers' perspective noticed any difference in November 2004. Retailers were not even aware that there had been a real change in November 2004. So from the retailers' perspective the harm that they were suffering continued post-November 2004 in the same way that it was being imposed prior November 2004, so you cannot look at the position post-November 2004 without a proper understanding of what was happening prior November 2004. The mechanism may have changed but the anti-competitive impact of the MIF remained the same. That is the point that the BRC wants to place firmly on the OFT's agenda and, indeed, the Tribunal's agenda. Obviously the BRC is concerned ----

THE PRESIDENT: What can we do about it, Mr. Robertson?

MR. ROBERTSON: If you are going to make an order setting aside the decision not to impose in that order any formal constraint on the content of a fresh decision by the OFT. That might be a point for a subsequent appeal against a subsequent decision by the OFT, but it is not a constraint that should be placed on the OFT *ex ante* at this stage by the Tribunal.

THE PRESIDENT: Yes, thank you. Yes, Sir Jeremy?

SIR JEREMY LEVER: May it please the Tribunal, I am not going to rehearse at this point all the considerations that have led the Office to tell you that, subject to any observations of the Tribunal, the Office would intend to withdraw this decision. I just want to remind you that in the Tribunal's written observations in its order of 9th May it drew attention to certain highly pertinent points. It emphasised the important legal status and consequences attaching to the decision and the fact that it is the decision that forms the subject matter of the appeal.

It referred to the Tribunal's case law, according to which it is not open to the Office to advance a new case or introduce new evidence in support of a decision already adopted. It described the Office's approach and defence as advancing, and I quote, "a new case". Again I quote: "In several respects materially different from the case made in the Decision" and that indeed followed from a concession that I made to the Tribunal at an earlier case management conference.

The essential problem as far as the Office of Fair Trading is concerned is the procedural problem that would arise for the Tribunal when the Office, as it would need to do, applied to the Tribunal for leave to file further evidence in response to – I have to say – contentious expert and factual evidence put in by the appellants and Visa in their replies, specifically on the viability of the counterfactual situation posited in the defence.

The joint submissions of MMF and RBS for today's hearing do not address the procedural problem with regard to the finding by the Office of Fair Trading of any further such evidence.

THE PRESIDENT: What is the procedural problem that we move further and further away from the original decision?

SIR JEREMY LEVER: And, as I apprehend it, the reason why, for example in *Napp* at I think para.133 said that the Office of Fair Trading cannot make a new case; if it finds that it needs to do so the right course is to withdraw its decision. That was not, as I understand it, to punish the Office of Fair Trading. It was recognition that the Tribunal really could not substitute its own procedure for the administrative procedure and, if unfortunately it turned out that there is something missing and it could not be put right just by a referral back of some limited issue under the Rules – 19(2)(j) I think it is – if it could not be dealt with like that unfortunately this

Tribunal could not be an adequate substitute for the administrative procedure. It is that problem that we now face.

THE PRESIDENT: That was the view we came to in *Napp* which was the first case that we did, and we have had the problem in several subsequent cases and we all know what we have done in those subsequent cases, but as I understand it you are not inviting us to review that approach or suggest that it was wrong?

SIR JEREMY LEVER: No, because we can see the procedural problem that would arise, we say that we need to file for further evidence in order for you to reach a decision. In the public interest you need to swear that further evidence and then where are we? So that is why the Office, having originally hoped that those problems could be avoided has now recognised, partly in the light of the very helpful and well-focused observations of the Tribunal both at the second case management conference on 31st March and the written observations that came with the written order of the 9th May 2006, but unfortunately the proper course was to withdraw the decision.

I will come to the mechanics of the withdrawal. The Office is not ideologically completely set on one form rather than another. As my learned friend, Mr. Morris, has pointed out when the Act was drafted the draftsman assumed that the Office had power to withdraw decisions because that was in s.47, that was an assumption underlying s.47.

THE PRESIDENT: On receiving a request to that effect?

SIR JEREMY LEVER: Yes, and it is true that it assumed that that was so before proceedings had been commenced, and we are talking about after proceedings had been commenced, but it is by no means evident what is the essential difference which is in the power of a decision taker to withdraw a decision before proceedings have been commenced against it and after proceedings have been commenced against it. Indeed, one can think of cases where the time for proceedings have expired, no proceedings have been brought and it is then for a decision to be withdrawn because new facts have come to light on the basis of which it is clear that the decision was wrong. In any event we would submit that if one is looking to see that Parliament believed that there is a power to withdraw in the case of an Office of Fair Trading decision, unless the draftsman of the Act pre-supposed that that was so, there is clear evidence of it, and once s.47 was removed from the Act, that was done not in order to deprive the Office of the power to withdraw decisions it was done to get rid of the procedural obstacle in the case of third party appeals.

With regard to what my learned friend, Mr. Sharpe, was submitting to you, my first point which echoes something Mr. Morris said, is that as I would submit the Tribunal is not in the

business of making declarations. It is in the business of hearing appeal against decisions. What my learned friend Mr. Sharpe is really seeking is not a determination of the appeal, which will be determined on the basis that the decision falls away – whether because of withdrawal or because it is set aside – he is really seeking a negative clearance or a declaration of inapplicability, an exemption under Article 81(3). That is something that even the Office of Fair Trading can no longer do at the request of a party since modernisation. It is not a power that any longer exists. When my learned friend, Mr. Sharpe, referred to Articles 3(2)(d) of Schedule 8 to the Act one needs to look at what was said by Lord Justice Lloyd in the *Floe* case at para.40:

> "For those reasons, it seems to me that the CAT was wrong to hold that it had power to direct the time within which the new investigation was to be carried out following the setting aside of the DGT's decision by its order of 1 December 2004. It could certainly express its own view as to the urgency of the matter. But by that order it had disposed of the appeal and could not impose time limits under rule 19. Nor could it give such a direction under Schedule 8 paragraph 3(2)(d), which is limited to directions or other steps which could be the subject of an appeal, being decisions within the meaning of section of 46 of the Act."

The Office of Fair Trading itself can no longer give declarations of the kind that Mr. Sharpe would like.

THE PRESIDENT: Is that right, Sir Jeremy? You can surely still take a decision not making the distinction that Mr. Sharpe makes between 81(1) and 81(3) but you could take a declaratory decision under 81, could you not?

SIR JEREMY LEVER: But it will not do that any longer on an application of a party.

THE PRESIDENT: No, but it could *ex officio* could it not?

SIR JEREMY LEVER: Sir, it will no longer give a party the equivalent of a negative clearance or declaration of inapplicability, and that is really what Mr Sharpe wants.

THE PRESIDENT: The situation I think is as follows: prior to modernisation you could apply to the OFT for negative clearance and/or exemption. Indeed, as I recall it there was a provision in one of the Schedules to the Act saying that the OFT had to react within a reasonable time to such a request. Post-modernisation with the abolition of that whole procedure a party can no longer call upon the OFT to make either declaration. However, *ex officio* in a proper case, for whatever reason – perhaps because it is a point of general importance – the OFT could in fact make such a decision. It would be doing it *ex officio* and not in response to a request but it could do it.

SIR JEREMY LEVER: It could certainly do it on a complaint, that it can do. It can take a non-infringement decision on a complaint, for example, by the BRC. Of course, the only thing I would say is that pre-modernisation the Office of Fair Trading could not have done either of those things under Article 81, it would have done it under Chapter I, but leave that aside. When one looks at the modernisation regulation one finds that the idea of *ex officio* decisions – non-infringement decisions being taken under Article 81 is confined to the Commission, that is Article 10 of modernisation.

THE PRESIDENT: I think you had better just take us briefly to the modernisation regulation, Mr. Lever. I have Article 10 in front of me,

SIR JEREMY LEVER: I do not know whether you have it in **Butterworths**?

THE PRESIDENT: Yes, it is in **Butterworths** at p.982.

SIR JEREMY LEVER: Absolutely.

> "Funding of inapplicability". "Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement …" etc. "… either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied."
>
> The Commission may likewise make such a finding with reference to Article 82 of the Treaty."

THE PRESIDENT: Where are the powers of the Member States in this regulation?

SIR JEREMY LEVER: The powers of the Member States are partly in Article 5:

> The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative on a complaint, they take the following decisions –
>
> - requiring that an infringement be brought to an end,
> - ordering interim measures,
> - accepting commitments,
> - imposing fines, periodic penalty payments or any other penalty provided for in their national law.
>
> Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part."

THE PRESIDENT: I thought you had had a complaint from the British Retail Consortium in this case?

SIR JEREMY LEVER: We did have a complaint. We took the decision in response to the complaint.

THE PRESIDENT: So why does that power not continue now?

SIR JEREMY LEVER: We now take a non-infringement decision. I suppose it would be feasible for the Office because of the complaint.

THE PRESIDENT: I see, but none of this would prevent you taking a decision under s.2 and s.9 of the 1998 Act, would it?

SIR JEREMY LEVER: Well except that we cannot apply Chapter 1 otherwise than alongside Article 81. That is to be found in ----

THE PRESIDENT: Yes, it is Article 3(1).

SIR JEREMY LEVER: Yes, alongside. So we would have to apply Community Law alongside national law in a case such as this.

THE PRESIDENT: Yes, well you could apply it alongside in the sense that you say "We have taken into account everything under Article 81(1) in interpreting s.2, etc., but we take a decision under s.2 and s.9."

SIR JEREMY LEVER: Well we would suggest to you that it would be inappropriate for you in this case to try to do that on a wholly abstract basis.

THE PRESIDENT: Yes. Just a moment, I just need to get this down. First of all so far you have drawn our attention to a procedural difficulty for you to take, and then consequently us to take, any declaratory decision of non-infringement under 81 because that is reserved to the Commission. That would only leave the 1998 Act and you are about to tell us that it would be wrong to do that *in abstracto*.

SIR JEREMY LEVER: It would be very difficult for you to do it *in abstracto*. It certainly would not be in any normal sense a preliminary issue, because since the decision is bound to fall by the wayside it cannot be preliminary to a resolution of the appeal. It has to be quite independent of that. Then one says again precisely what background is one being asked to decide the declaratory question? Let me just put to you – I am not saying that MasterCard's new arrangements, about which I know much less than my learned friend, but let me just put to you a possible alternative arrangement under which an interchange fee of 2 per cent. was payable to big banks, and only ½ per cent. to small banks. One might say that that is grossly distortive of competition. You would be asked to declare that irrespective of the content of the arrangement no interchange fee rule that MasterCard adopted, whether collectively or the

result of a number of …. Could infringe and could attract the operation of Article 81. That is what you would be asked to decide without it being necessary to decide it for the purposes of the appeal. That is not something that this Tribunal is really in the business of doing in my submission.

That is the essential reason why we would suggest to you that unfortunately it does not make sense for these proceedings to go on, and it certainly does not make sense for them to go on, not for the purpose of deciding the appeal, but for the purpose of deciding something else and that the statement by Lord Justice Lloyd in *Floe* at para.26 of his Judgment applies *a fortiori* where he said:

> "It does not, for example, require the CAT to investigate the rule on every point taken in the notice of appeal, if they do not all need to be decided in order to determine the outcome of the appeal, namely whether the relevant decision is to stand, to be varied or to be set aide."

THE PRESIDENT: Yes.

SIR JEREMY LEVER: That is basically the situation that has arisen. Now, I entirely accept the point made by my learned friend, Mr. Green, that it is extremely undesirable that the proceedings should be terminated in a way that gives rise to a rather pointless and without substance procedural appeal about whether we could withdraw the decision or not, and whether it ought to have been set aside. To the point where I would say that if any of the parties is saying that they reserve the right to take that to the Court of Appeal then it is only fair and proper for the protection of everybody, that instead of our withdrawing the decision – and we have deliberately waited until the conclusion of this hearing – it would be better to set it aside. If, on the other hand nobody takes that, as I would submit, empty procedural point, then I would suggest that the appropriate course is for us to do as we have said and to withdraw the decision.

In our submission there is not going to be any difference in substance between withdrawal and setting aside, both at *ab initio* as I understand it both mean that it is as if a decision had not been taken. It will have no bearing on any of the consequential orders that the Tribunal will be called on to take.

There is only one other thing I need to say, I think, before the short adjournment. We have made it clear that the Office does not think that it would be right to bring fresh proceedings in respect of the now old, discontinued MasterCard arrangements.

THE PRESIDENT: When you say "now discontinued", I am not entirely sure that the essence of what is occurring has been discontinued. There has been a change in one aspect of those arrangements.

SIR JEREMY LEVER: Well the contested decision, the appealed decision related to the arrangements that were in force up to November 2004. The Office would not think it right to take a decision in respect of the arrangements that were in force before November 2004. That is partly on the basis – I believe we are still allowed to use Latin in the Tribunal?

THE PRESIDENT: You are, definitely. We may not be able to understand it, but you can use it!

(Laughter)

SIR JEREMY LEVER: There is a very old maxim *ut sit finis litium* ----

THE PRESIDENT: Yes, we can get that far, I think.

SIR JEREMY LEVER: Good. It would not be right for us to go back to the position before November 2004, so in that sense I am afraid we disappoint the British Retail Consortium. On the other hand, the treatment of the arrangements as they have been operated since November 2004, which are said to be materially different, as I understand it, they will not be in some way chained, hampered, prevented, somehow affected by the proceedings. We will have to apply the law as we understand it subject to the review by this Tribunal. If we get it wrong this Tribunal is there to put it right. One hopes that, as a result of what has occurred before the Tribunal, great care will be taken and whatever the final decision is, if it comes to this Tribunal it will not be a new case that will need to be made.

Now, I do not know whether I can help you further on -----

THE PRESIDENT: Well there is one question in our minds, Sir Jeremy, you may want to come back to after the short adjournment. Without in any way getting into the *Floe* question of what our powers are, can you give us any indication of how long you think these new administrative proceedings might take, and whether they are going to be proceedings in which you deal with the Visa and MasterCard proceedings together, or not? The second part of the question is what, if any, relationship do you see between any further proceedings by the OFT and the current apparent proceedings by the Commission in relation to MasterCard?

SIR JEREMY LEVER: I will answer both those after the short adjournment.

THE PRESIDENT: Yes, that would be helpful. Very well, 5 past 2.

(Adjourned for a short time)

THE PRESIDENT: Yes, Sir Jeremy?

SIR JEREMY LEVER: You were asking me first whether it was the Office's intention that the MasterCard and Visa cases should be examined in tandem or in parallel. Yes it is that

intention. It will not be a single procedure but the two procedures will proceed alongside each other so far as practicable in parallel.

You then asked me about the timetable, and I can of course only give you the best expectation. The best expectation is that a statement of objections in each of those two cases can be delivered, if the Office decides to deliver one after examining the matter afresh, within the first quarter of next year. You will bear in mind that the MasterCard arrangements are not new and evidently in certain respects are different. The Visa arrangements may have features that have not been examined before, that will have to be looked at.

As you were told this morning by Mr. Sharpe, the European Commission is about to deliver an amended statement of objections in relation to MasterCard and the Office of Fair Trading will need to ensure that there is no inconsistency, although because different situations are being examined there may be differences, but that there is not an inconsistency of approach or thinking, and that the modernisation regime with the European competition network system works as intended. At the moment I have no instructions as to how soon a decision of the Commission might be expected about the cross-frontier arrangement. If it appeared that there was going to be a decision very soon there might be advantages in delaying delivery of a statement of objections until one had seen the decision. But if, on the other hand, that was simply going to hold things up then the Office would need to press ahead without the benefit of such a decision.

The replies and further evidence served in these proceedings will call for careful consideration by the Office, precisely for the reason that I explained to the Tribunal this morning when I was saying that we did not think one could satisfactorily substitute the proceedings before the Tribunal for the administrative procedure, and it may well be therefore that we will have to collect and use in the administrative procedure further evidence to deal with points that have been raised in the Tribunal. That is to be expected, indeed, rather than just a possibility.

Of course then the two separate statements of objections will have to be drafted. But that is what leads the Office to expect at present that it will be in the first quarter of next year that the Office will deliver a Statement of Objections if so advised in the light of the work that has been done by then.

As to the speed of the administrative procedure after the statement of objections, that is difficult to foresee because it is to some degree outside the control of the Office. It would depend in part on the time needed by MasterCard and by Visa to respond, and they must be given a fair opportunity to do so – a fair time. One understands the point made, usually I think by Visa, that it is a problem for it, and MasterCard also, they have a large number of different

members who are differently placed and so on. It is difficult for us to know how fast it will go after the statement of objections. It also would depend in part on the speed with which the Commission reaches its decision because absolutely without any doubt the Office will need to have regard to that decision, given that greater or less weight, according to all the relevant circumstances, but that it is under a sort of duty under s.60 of the Competition Act to have regard. I say "a sort of duty" because on one view s.60 bites only in relation to Chapter 1 and Chapter II but it would be quite extraordinary if one did not apply it by analogy.

THE PRESIDENT: Probably Community law of itself now requires one to do that?

SIR JEREMY LEVER: Absolutely.

THE PRESIDENT: Does that imply that any further decision by the OFT will, in practice, await the Commission's decision so that you cannot really have regard to it until you know what it is presumably?

SIR JEREMY LEVER: That is absolutely right, but we do not expect that to delay things, because at the moment they are slightly ahead of us in relation to the new procedure. But that is absolutely right and just as a national court has to wait upon a Commission decision in the same case, and this is not the same case, this is a case that raises similar issues, we will undoubtedly want to be satisfied before we take a final decision in these two cases that we are not going to be doing something inconsistent with the Commission's final decision. As at present advised I am told that is not expected to delay things.

I am also instructed that given all the work that has already been done in this area in relation both to the first administrative procedure and to these proceedings before this Tribunal the learning curve that has been gone through we are looking at a much shorter time frame than last time. We are certainly not looking at anything like five years, we are looking at a much shorter time than that, and the Office is well aware of the desirability from the point of view of the public and the point of view of the parties, that this matter now be satisfactorily resolved one way or another, as soon as practicable. There are all sorts of considerations that go in favour of that. Sir, I think that deals with the first of your questions, and effectively the second question was what could I tell you about the EC Commission's own procedures?

THE PRESIDENT: Yes.

SIR JEREMY LEVER: There I am afraid I am not in any position to dissent from anything that Mr. Sharpe said, he seems to be very well informed about it all – I can neither add nor subtract to what he said.

THE PRESIDENT: On this point can I just ask you one last question? You may not know the answer to the question, but perhaps you can take instructions in the course of the afternoon. It

is whether, in the new phase, the OFT is aware of the Commission's interim report in its sector inquiry on payment cards published on 12th April 2006?

SIR JEREMY LEVER: I am much obliged to you, Sir. No, it is well aware of that and it is going to have to think very carefully about what implications, if any, that I interim report has for the new administrative procedure.

THE PRESIDENT: That report, it seemed to us, contained a certain amount of background information about this industry that one does not necessarily find in the present decision as it stands.

SIR JEREMY LEVER: Absolutely. I do not want to anticipate what goes into the new statement of objections, but yes, that is so and under s.60 of the Competition Act, that is a statement by the Commission to which the Office of Fair Trading can have regard, and the courts can have regard to it.

I have not gone through all the considerations that have led the OFT to the decision that it has taken. I hope the Tribunal will accept that the Office has behaved very responsibly. I did, at the last case management conference, make it clear that very careful thought would be given when replies were delivered as to where the public interest lay and I hope the Tribunal will conclude that we have in this matter acted in the public interest. We had hoped that the proceedings could be used fruitfully but in the end have had to recognise that that is not going to be practicable.

THE PRESIDENT: Yes, thank you. Yes, Mr. Sharpe, I think it is for you to reply on those various points?

MR. SHARPE: First, Sir, I am not wholly insensitive to judicial mood, so I shall be brief.

THE PRESIDENT: Yes.

MR. SHARPE: This is a matter of some very considerable importance, not just for this case but for …cases. Does the Office have the power to withdraw a decision at any time, or one which is under appeal? In my respectful submission once an appeal has been launched it is locked into the consequences of that appeal and the new judicial procedure which covers it.

Sir, even if such a power did exist there is no logical link between the withdrawal or purported withdrawal of a decision and the duties of the Tribunal to conclude an appeal once launched.

THE PRESIDENT: Sorry, say that again – no logical link between?

MR. SHARPE: The withdrawal – or purported withdrawal – of a decision and the duties of the Tribunal to conclude an appeal once that appeal has been launched. Now we take comfort from schedule 8(3)(1) though in terms it is stated that the Tribunal must determine the appeal

on the merits. We say that is a duty to determine the appeal on the merits embracing a duty to determine the appeal, by reference to the grounds of those appeals.

In addition, as you will be very much aware, the powers of the Tribunal are found in 8(3) and I take you to (2), it may confirm or set aside the decision, remit the matter, impose or revoke, or vary the amount of a penalty, give such directions or take such other steps that the OFT could have taken, or make any other decision that the OFT itself could have made.

Those are the exclusive powers vested in the Tribunal once an appeal has been launched.

THE PRESIDENT: Sir Jeremy submits that the power to do that under 81 has now been lost as a result of modernisation.

MR. SHARPE: No, we say "no". The root of that observation I think is a confusion between what we are asking you to do and maybe I am at fault for using the word "declaration" in the pleading. "Declaration" means a great deal – you know exactly what it means in most contexts – but here I could substitute "come to a view", "arrive at a decision" in relation to the legality, or rather the application of 81(1) or 81(3). When it is expressed in that general form, if we strip away the technical nomenclature of 'declaration' we say not only do you have the power, but the office has the power to arrive at a conclusion that an agreement or a conduct does not infringe the prohibitions in the Competition Act, or does not infringe Article 81 or 82.

THE PRESIDENT: He says he needs a complaint on that latter point.

MR. SHARPE: It seems very extraordinary – he has one, that is the disposal of the point, so we need say no more. It seems very extraordinary that the Office's powers should be so limited. It has a general duty to make observations about assertive competition, the legality of conduct.

We are comforted to some extent by the Judgment of the Court of Appeal in *Floe*. May I take you to just one or two brief points? This is Judicial Review proceedings in *Floe*. Paragraph 25, this simply sets out, I think in uncontroversial form, the powers that you have. "It may feel able to decide itself what the current result should have been …" If you can come to a view, and we say you should come to a view, as to the legality of 81(1) or alternatively replication of 81(3).

I think Mr. Morris is slightly confused as well. We are not confining our argument to what I will call the "no restriction" point, although we believe that is a powerful point, but we have never lost sight of the applicability of exemption if it should arise. So you have the power to look anew, *de novo*, at the conduct or agreements before you and come to a view.

Then we go to 28 quickly. I think I took my friends to say that once the decision had been withdrawn, or once it had been set aside or remitted that is the end of the matter, there is no lis, nothing to bite on, whatever form of words you heard. That is not the view of the Court of

Appeal. You see: " A case may occur where the setting aside of the decision and remittal of the matter to the regulator does not dispose of the appeal entirely …"

THE PRESIDENT: Yes, there are some circumstances where you could.

MR. SHARPE: Yes, and they probably are exceptional, and the facts would have to be unusual. I do not recall a situation where the Office has withdrawn a case which has been so advanced. So we are certainly in unusual territory. But read on ----

THE PRESIDENT: Yes, in both the earlier cases the appeal was withdrawn at the first opportunity.

MR. SHARPE: Absolutely, yes, and here we are – to paraphrase – we are at the church door.

THE PRESIDENT: It has been a long engagement anyway, as it were! (Laughter) It is a secular jurisdiction. (Laughter)

MR. SHARPE: A civil ceremony perhaps. However, read on:

I draw attention to "… nothing left of the appeal". You, Sir, anticipated precisely that point in *Convenience Stores*. We said plainly there is so much left in this appeal for MCI. I laboured the point this morning, but we are seeking perhaps rather more than MCI, we put the declaration request there because it is very important to us. It is very important to us not just for the international dimension, but because at the very least our reputation has been harmed and continues to be harmed, as somebody orchestrating taxation of the consumer, some such nonsense as that.

Nor are we, in response to Sir Jeremy, asking for something in the abstract. How can that be said? Our appeal is focused on the Office of Fair Trading's decision which itself is focused upon the MMF MIF. It is that and that alone which we are seeking Judgment and guidance on. We do it for the reasons I have given, but we do it also because it must be common ground – unless the Office have changed their case on this as well – that the Judgment you offer on the collective interchange fee will inform, and I put it no higher than that, their proceedings in relation to the new MasterCard arrangements. As we have now been told that we are going to be locked in administrative proceedings – well if the estimates of the Office of Fair Trading are to be believed, and then quadrupled, which would accord with our experience – for several years, and so ----

THE PRESIDENT: At least two by the sound of it.

MR. SHARPE: Oh at last two and if I were a betting man, which I am not, it would be far more.

Then in addition that it seems now to be contingent, or at the very least hanging upon the proceedings against the international interchange fee brought by the Commission.

THE PRESIDENT: Can you help me when those proceedings first started, Mr. Sharpe.

MR. SHARPE: They were the product of, if you will allow me a moment to take instructions?

THE PRESIDENT: (After a pause) The question is: when was the first statement of objections in the current MasterCard proceedings?

MR. SHARPE: September 2003.

THE PRESIDENT: So there was already a statement of objections against MasterCard when this decision was taken - the present decision?

MR. SHARPE: Oh yes, indeed. It had not been withdrawn but we have always been aware in the currency of these proceedings before this Tribunal that the Commission were seeking to make, I think, significant changes.

THE PRESIDENT: But the two proceedings have been going on in parallel?

MR. SHARPE: They have. You will recall also that the Commission indicated to us that they were 100 per cent. behind the Office of Fair Trading in this case. The trouble is it was the OFT's first case they were behind, we do not know where they are in relation to the second case. I have to confess to you they probably do not know where they are in relation to the OFT's future case.

THE PRESIDENT: We did ask the Commission whether they had any observations to make, but they did not and it is, at first sight, a little surprising that both jurisdictions, albeit with the distinction that one is domestic and one is international, should be going on at the same time, is it not?

MR. SHARPE: Sir, I have just been instructed that it is our understanding that the Commission are observing these proceedings very closely and I do not think they are awaiting an outcome, but we do not know. That is the comment we have had and I am reluctant to take it further without express instructions. They have not held back or indicated they were holding back, but of course at the moment we have no sight, no real judgment as to what sort of argument they are going to deploy. As I said, they were very much in favour of the OFT's version one, but we have no idea where they are in relation to version two, and probably nobody has any idea in relation to what case is going to be advanced in future. So there is everything to be said for not just dropping hands and leaving this and kicking it into the ether, but actually to resolve all the terrible uncertainty under which we have been labouring, and we can do so very quickly. If it means surmounting Mr. Morris and his remission case we are more than comfortable to do that, we are ready to do it today.

THE PRESIDENT: Yes.

MR. SHARPE: I hope that confidence is not misplaced, because if it is he will be the first to cheer, but we are reasonably confident we can deal with that, and that is no more than we would have done anyway.

Unless my learned Junior instructs me to say something else, which he is not, those are my submissions. Thank you.

THE PRESIDENT: That is very helpful. Does anybody else wish to add anything?

MR. GREEN: Just a couple of points in reply. First of all dealing with the question of whether the OFT has jurisdiction. It seems to me the matter should not be left without pointing out that under Article 5 of the modernisation ----

THE PRESIDENT: Sorry, page?

MR. GREEN: 981, national authorities plainly have the old-fashioned negative clearance style jurisdiction and this actually chimes with s.25 of the 1998 Act. Article 5, the last sentence: "Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part". "Likewise" clearly refers back to an authority acting on its own initiative or on a complaint. So it can be done on an own initiative investigation or a complaint. Had he complained it could be done as part of a rejection of a complaint, or as address to a party seeking a declaration of non-infringement. It is not limited in that sense. It is the other side of the coin ----

THE PRESIDENT: Yes, thank you for drawing that last sentence to our attention.

MR. GREEN: So far as MMF is concerned, I think we have made our position very clear. In sentiment we share the concerns of Mr. Sharpe. If the Tribunal is not with us on that then we believe that this matter should be set aside. The truth of the matter is the OFT has quite plainly seen the writing on the wall and insofar as it is relevant at all to the manner in which you address this, we strongly take objection to the manner in which the OFT have sought to justify their decision to either withdraw or bow down in front of a setting aside decision of the Tribunal. It was put to you today that the real problem for the OFT was the need for the OFT to seek permission to serve what was in effect rejoinder evidence. But this was manifestly obvious to all concerned from the very moment the defence was first served because the defence moved into new territory and, as I checked the OFT's skeleton this morning for the last CMC the OFT were very happy for the appellants to put in reply evidence, and it must have been manifestly obvious to them at that juncture that they may wish to put in rejoinder evidence themselves. If push had come to shove and we had had to put back a September hearing, well so be it, that happens. There is no procedural obstacle to the OFT advancing this case if they so wished. The reality is that they have simply seen the writing on the wall and they have decided to throw the towel in. It is as simple as that. They have decided and they must be taken to have accepted that it was a bad decision and moreover they would not have been able to sustain the defence at a hearing, and we have lost the opportunity of Judicial

guidance. For the OFT to say that throwing the towel in now saves time and cost is simply ludicrous. Judicial intervention, cathartic for one side or another, would certainly have expedited matters and created a far more rational, logical way forward for all concerned, and I certainly echo the submissions on behalf of all the banks, apart from Royal Bank of Scotland, who have made their own position clear, but the lack of certainty has had a chilling effect upon the entire industry's strategic planning. Five and a half years of uncertainty. It is now going to be seven or eight years and judging by Sir Jeremy's observations we do not know whether the new proceedings are going to be slow, medium paced or very fast, or if there is going to be anything at all. There is no guarantee there will be any further proceedings given the Commission's intervention and we will have suffered eight to ten years of procedural merry-go-round by the time this is finished, and that is why everybody has been so concerned to ensure that the Tribunal intervened at this appropriate moment and we may well have lost that opportunity. That is all I wish to say at this stage. Thank you.

THE PRESIDENT: Thank you, Mr. Green. Yes, Mr. Carr?

MR. CARR: Nothing, thank you, Sir.

THE PRESIDENT: Mr. Morris?

MR. MORRIS: If I may make three short observations? The first is in relation to the central inquiry, which you, Sir, raised a moment ago, just to point out that my understanding is not only does it make general observations about the state of the payment card industry, but it does specifically address domestic interchange across all the Member States including the United Kingdom.

THE PRESIDENT: Among other things, yes.

MR. MORRIS: Among other things. Secondly, just by way of ----

THE PRESIDENT: Where does that take one?

MR. MORRIS: It is just that must be a factor, we would suggest, as well as the current Commission investigation in relation to MasterCard, that the OFT will no doubt take into consideration in considering how they go forward. I just wanted to point out – you were obviously aware of it – that it was not just a general inquiry ----

THE PRESIDENT: It has quite a lot of information in it as far as one can see?

MR. MORRIS: It does.

THE PRESIDENT: Whether the information is right or not is another matter, or relevant, but there is quite a lot there.

MR. MORRIS: Yes, exactly, but I was really reinforcing your point in saying that this would be a matter which the Office would obviously wish to take into consideration.

The second point is just to remind you for your note, in riposte to Mr. Sharpe's reference back to paras. 25 and 28 of *Floe*, to invite you to look at para.26 as well, in particular the words which Sir Jeremy took you to, the passage which refers to the outcome of the appeal, being "… namely whether the relevant decision is to stand, to be varied or to be set aside." We submit that is the ambit of an appeal.

Finally, just to add I also Visa now very much welcomes the remarks that Sir Jeremy makes about its need to ensure that whatever it does next is consistent with what happens before the Commission, and also to remind you, Sir, as I am sure you are aware that we are currently awaiting also the Judgment of the House of Lords in the *Crehan* case, and one does not at this stage know what the outcome of that case is going to be. There is still, I think, the possibility of a reference on that issue from the House of Lords.

THE PRESIDENT: Just remind us, Mr. Morris, on what issue and how does that bear on this case?

MR. MORRIS: It goes to this, Sir, if you were to decide that you were to press ahead in September we would still be running the consistency argument, and we would be running it now with added force in the light of what Sir Jeremy has said. We would suggest that this Tribunal might wish to be informed of the outcome of the *Crehan* case in circumstances where it is going to be considering that in September. If there were to be a reference, or if the Judgment was not yet out, that may be a further factor to throw into the pot as to whether or not proceeding with this case in September is the appropriate course. That is why I mention it to you as one of the factors going along with all the other factors that Sir Jeremy pointed out. Those are my submissions.

THE PRESIDENT: Thank you. We propose to rise for a few minutes and consider this first question we have to consider. In the event that we decided that this appeal should come to an end, I think we would want today to see how far we can get with the question of costs. So we will just rise for a few minutes and consider the position.

THE PRESIDENT: Mr. Sharpe, not without regret we are against you on your submissions. Our decision is that these appeals must be brought to an end, and we propose to set aside the decision and there will be an order to that effect. We will give a reasoned Judgment as soon as possible, but we did not propose to take up time this afternoon – rather expensive time – in giving an extemporary Judgment on the interesting arguments that we have heard.

That being the situation we would like, if at all possible, to address the issue of costs insofar as we can, since everybody is here, and it is very expensive to get everybody here again to have further submissions.

MR. SHARPE: Sir, in relation to the setting aside of the decision we would very much wish that you would attach a condition in the order which reflected Sir Jeremy's undertaking that no further proceedings would be brought against the MMF, MIF.

THE PRESIDENT: We note what you say, thank you, we have your submissions on that.

SIR JEREMY LEVER: Sir, might I just say a word or two about costs. All the applicants asked that costs be reserved. I have come with a note of a number of authorities on costs, but I have only the one copy for myself, I am afraid, because everyone asked for costs reserved. I entirely accept your concern about keeping costs down. I wonder whether I might suggest that you receive written submissions on costs; if anybody then asks for an oral hearing you have an oral hearing, otherwise you deal with the question of costs on the paper. There are a number of relevant authorities to which I think you would want to have your attention drawn. That was the way we had assumed it would go, given that all the appellants had asked for costs reserved.

THE PRESIDENT: Well they did not ask for costs reserved.

SIR JEREMY LEVER: My learned friend tells me I am wrong. I thought MCI para.8 they asked for costs reserved.

THE PRESIDENT: Our position on this, Sir Jeremy, is that provisionally ----

SIR JEREMY LEVER: I may have been given a wrong reference, somebody will tell me, but \i was told MCI as well as the others. In para.54 for MMF, para.11 for RBSG, and I will be told the correct reference for MCI.

THE PRESIDENT: Sir Jeremy, it is perfectly true that in para.54 and para.11 of its submissions MMF invites us to adjourn because they would want to make full submissions on costs, that is perfectly true, but at the moment we are not persuaded that we need any more submissions from the appellants on the question of costs. The issue of costs is rather, I think at this stage, for you to persuade us that there should not be any order for costs or that it should be limited in some way.

SIR JEREMY LEVER: I would certainly want to make submissions to the Tribunal as to limitation. In one respect the Office accepts that a costs' order should be made, that is of today's hearing, that an order should be made in favour of Visa.

THE PRESIDENT: But you have already made some submissions to the effect that the costs should lie where they fall, have you not?

SIR JEREMY LEVER: And I would hope to persuade you that that was the proper course here, where on the authorities this is a case where we have, as it were, discontinued, let me let me leave it like that, on the basis that we saw there was an insuperable procedural obstacle to the Tribunal proceeding, but it by no means follows, on the authorities, that in those circumstances

an order, that would have very serious consequences for the Office given its limited budget, should be made.

THE PRESIDENT: Can you just indicate briefly what authorities we are talking about?

SIR JEREMY LEVER: Give me a moment, Sir. (After a pause) In the first instance, this Tribunal has itself repeatedly indicated that it has established no general or inflexible rules on costs ----

THE PRESIDENT: Yes.

SIR JEREMY LEVER: -- rather that each case must be decided on a case by case basis, and that one finds in *Hutchison 3G UK Limited*. It has also stressed that cases may stand only as helpful illustrations of principle. The Tribunal has the widest discretion as to costs under Rule 55(2) of its rules.

We also believe that it is appropriate at the outset to call the Tribunal's attention, it comments in its Judgment as to costs in the *Institute of Independent Insurance Brokers*' case. The Tribunal there stated at para.60 that relevant factors may include:

> "However, with respect to the CAT, it seems to me that, in the present case, once it had set aside the decision and remitted the matter to Ofcom … there was nothing left of the appeal."
>
> (The hearing adjourned at 2.35 p.m. and resumed at 2.45 p.m.)
>
> "… whether the appellant has succeeded to a significant extent on the basis of the new material introduced after the Director's decision but not advanced at the administrative stage; whether resources have been devoted to particular issues on which the appellant has not succeeded, or which were not germane to the solution of the case; whether there is unnecessary duplication or prolixity; whether evidence adduced is of peripheral relevance; or whether, in whatever respect, the conduct of the successful party has been unreasonable."

Now, as I have stressed, Sir, the Office believes that at all times in relation to these proceedings it has acted responsibly and in the public interest in seeking to uphold before the Tribunal the conclusions contained in the decision, albeit on the basis of the reasons set out in the defence.

It has not been shown to be wrong in that respect, rather it has acted responsibly to ensure that public resources are allocated to the best possible effect. I would submit with all the force at my disposal that the Tribunal should be slow to make a costs' order against the Office. The Office is not in the same position as a private litigant. It is concerned with upholding the public interest. There is no prima facie rule, unlike the position under the CPR (Civil Procedure Rules) where the unsuccessful party pays. One must bear in mind that in this case

much of the work that has been done by the appellants would have needed to be done in any event in respect of the inevitable proceedings that will be brought in respect of the operation of the MasterCard Rules after November 2004, and that indeed was a point made by the Tribunal in the *Bettercare* case. It is a strong point. I am sure the Tribunal has itself cited in the past the decision in the House of Lords in *Bradford Metropolitan District Council v Booth*, Lord Bingham (at that time the Lord Chief Justice) commented that in cases where a complainant is challenging a decision of a regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appear to be sound, in exercise of its public duty, the court should consider in addition to any other relevant fact or circumstances, both (i) the financial prejudice to a particular complainant in the particular circumstances if an order for costs is not made in its favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable, and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.

In this case I have said nothing to indicate that the conclusions reached in the original decision were wrong. I have accepted that they could not be sustained without our making a new case and that it had become clear in these proceedings that we could not make a new case without subverting the procedures of this Tribunal.

THE PRESIDENT: What is it that became clear in this case that was not clear at any earlier stage?

SIR JEREMY LEVER: What became clear, after the filing of replies, was that it would be necessary for us to file further evidence and that became crystal clear. We could not allow the evidence filed in reply simply to stand.

THE PRESIDENT: Was that not always a foreseeable result of the change of case in the defence?

SIR JEREMY LEVER: It was not foreseeable. We made it clear at the last case management conference that until we had seen the replies we did not believe that it was possible to form a properly reasoned view as to whether these proceedings could responsibly be kept in existence or not. After that had happened the Tribunal, perfectly reasonably and correctly pointed out the consequences of continuing the procedure, whether it would be satisfactory or not, at that stage the Office considered very carefully whether, even at that stage and before seeing replies, it should decide that this was an unsafe course to follow, but we concluded that the Tribunal had been right in saying "Yes, let it go for replies, and with evidence."

I think the Tribunal needs to understand that it is very difficult for the Office, even when it gets it right, to write decisions that are unappealable when they are picked over by very clever people, especially in novel cases. If the Office is then going to be penalised because three appellants come along and two interveners, and it is going to be told what to pay out – sums

vastly in excess of anything that you yourself incur in costs within the Office operating as a public body – it will have a very severely deterrent and damaging effect on the administration law in this country.

The Tribunal will also bear in mind something which the Tribunal itself drew attention to at an early stage and that is that MasterCard's rules were drafted in a way which strongly suggested that you could not have a credit card system like MasterCard without having agreements between each issuer and each acquirer, and that one therefore needed because of all the problems associated with making the bilateral agreements it was a practical alternative to have a rule in default, something where they had not agreed bilaterally could be used instead. Unfortunately the Office of Fair Trading accepted that in the administrative procedure. I am not saying they should have done.

THE PRESIDENT: That is what they did not accept in the administrative procedure. What they thought in the administrative procedure was that in the decision that it could all work on a system of bilaterals with arbitration as a fall back.

SIR JEREMY LEVER: But they accepted that it was reasonable to have a default rule and that at an appropriate level of interchange fee, by avoiding the problems of making bilateral agreements ----

THE PRESIDENT: As I understand it their line of thinking was that it could all work with a system of bilateral agreements supported by arbitration as a fallback. It could work, but for the purposes of applying the first requirement of Article 81(3) they were prepared to accept that a default limited to payment transmission costs would be justifiable to avoid the disadvantages notably for new people applying to the scheme. That is what they accepted.

SIR JEREMY LEVER: And unfortunately it turns out that a system of bilaterals being impracticable, if you have arbitration ----

THE PRESIDENT: But they always submitted in the administrative procedure that it was impracticable.

SIR JEREMY LEVER: That unfortunately was not perceived by the Office. They got it wrong. They got it wrong and people do get things wrong. One great difference -----

THE PRESIDENT: Yes, but when other people incur expense as a result, Sir Jeremy, it is rather difficult, it puts the Tribunal in a very difficult position.

SIR JEREMY LEVER: But one great difference between the position of the Office of Fair Trading and the position of a High Court Judge, when the High Court Judge gets something right but gives wrong reasons the Court of Appeal always says "We are concerned with his decision and not with the Judgment." The Office of Fair Trading is expected to write unappealable

decisions, and unappealable in the sense of whether they are right or wrong, if they find it necessary to make a new case in this Tribunal then the decision has to be set aside.

THE PRESIDENT: That is not completely right, is it? We have over the years bent over backwards in this Tribunal to accommodate developments of various kinds in the OFT's case as it went along, but there comes a certain point where the change is so fundamental that it is rather difficult to do it. That is what has happened here, is it not?

SIR JEREMY LEVER: Absolutely what has happened here, and that is why we have to accept this is a new case to the point at which it was necessary for us to, as it were, submit to Judgment, and that is what we did as soon as we came to the conclusion that it was unavoidable.

THE PRESIDENT: Yes.

SIR JEREMY LEVER: The problem was exacerbated as well because there was undoubtedly a change of position by the appellants about payment transmission costs, as between their submission in the administrative procedure and when it came here. That presented the office with a very serious problem, because even had we succeeded in upholding the decision it might have been a completely pyrrhic victory.

THE PRESIDENT: But that could have been accommodated. A new argument raised for the first time on appeal is something that we will allow the Office to put in new evidence on, we always have.

SIR JEREMY LEVER: It required again fresh evidence and it would have been extremely difficult to handle in this Tribunal.

THE PRESIDENT: Is it not fair comment that there was not a great deal of study in the decision of what the costs actually were, who bore them and what t he heads of expense we are talking about were, and where the flow went and all that sort of thing?

SIR JEREMY LEVER: Well the Office's position was in this Tribunal that if you could run a payment transmission system in the form of a debit card, with a very much lower interchange fee, it is extremely difficult to see why one needed a much higher fee just because there was in itself a profitable activity attached to it, namely, the advancing of ----

THE PRESIDENT: I know that was its position but if you look at the Commission's payment study there is a great deal of empirical evidence about where the costs fall and where the profits flow and all the rest of it – none of which, as far as we could see, was actually in the decision.

SIR JEREMY LEVER: It was not in the decision ----

THE PRESIDENT: The decision was largely an almost theological debate between two sides as to what should happen, rather than a study empirically what was happening. I do not know if you would accept that that was fair comment or not?

SIR JEREMY LEVER: I think I probably made to you a number of points which you will want to take into account ----

THE PRESIDENT: Yes.

SIR JEREMY LEVER: -- as to why it would be quite wrong to impose on the Office the costs of three appellants and two interveners in a case where it is not that we took a decision either in bad faith or that having been investigated the conclusions were seen to be wrong. We have had to abandon and have done so responsibly because of the new case problem. Much of the work that has been done would have had to have been done in any event for the administrative proceedings that will follow – inevitably follow.

THE PRESIDENT: Yes, thank you.

SIR JEREMY LEVER: One moment, Sir, if you would? (After a pause) As I have said, there is really quite a lot of case law which I would have wanted to put before you; I do not think I can sensibly try and do it this afternoon, on costs where proceedings have become academic general principles, case law about multiplicity of parties which was not necessary, as well as the case law of this Tribunal itself, and if we were going to have a costs' order made against us I would have wished to have had an opportunity to make submissions to the Tribunal in writing.

THE PRESIDENT: Yes, thank you.

SIR JEREMY LEVER: Thank you very much, Sir.

THE PRESIDENT: Thank you, Sir Jeremy. Mr. Green, if we take the appellants in order now. I think the first question is whether we can deal with costs this afternoon, or whether we should have a round of written submissions. We are not very keen on the idea of having another hearing on this order. I think it would certainly help us to have some indication of what the costs are and of any supplementary points that you would wish to make beyond those fairly self-evident points already made.

MR. GREEN: I will deal with all those points and if at the end of it you feel that a brief – and I would emphasise 'brief' – round of written submissions from everybody within a short timetable was helpful to you then we will oblige.

THE PRESIDENT: Yes. If you feel able to give us your submissions this afternoon – if the appellants feel able to give us your submissions this afternoon then at least the OFT will be in a position to hear what they are and we may feel it appropriate to give them the chance to respond in writing that Sir Jeremy seeks. That would at least avoid another round upon round of submissions from the appellants.

MR. GREEN: I do not know if Sir Jeremy did want to do that, or was going to refer to a series of cases of which we have no notice.

THE PRESIDENT: He may want to reply, we will see get on, and we will tell you whether ----

MR. GREEN: You can assume that the costs are substantial. When the Office of Fair Trading takes on the banks, with City firms and economists and they take them on in spades the costs are going to be substantial, there is no doubt about that. The question is: in principle should the Office of Fair Trading pay the costs. The starting point, and the first point which Sir Jeremy overlooks is the context, but as we have emphasised throughout the entirety of these proceedings we have been going around the houses for five and a half years before we ever got here, and within weeks of the OFT decision coming out they decided they had yet again made a mistake. There can be no doubt about that. When we served our notices of appeal it was apparent to them, because they had to change their case, that they had got it wrong yet again.

THE PRESIDENT: When you say "yet again", what do you mean?

MR. GREEN: Yet again, two Rule 14 notices, one full blown statement of objections, a supplementary statement of objections on Sweden and, in each of these rounds, quite fundamentally different cases were advanced to the banks and to MCE, MCI and to the parties. It constantly changed. The decision reflected yet another theory about the case which was in double quick time abandoned.

Sir Jeremy says he has not been shown to be wrong. If he believes he is right then he should proceed to a hearing and we can fight this out. We have made every concession under the sun in order to get legal clarity. It is not often the parties come to the Tribunal and forgo the pleasure of a quick victory. Here the banks are desperate for guidance and if Sir Jeremy says he is not to be shown to be wrong then it presupposes he thinks he can be shown to be right, in which case he should have fought on. Having not fought on, having deliberately given up that opportunity it cannot be said that they have not thrown in the towel.

"Throwing in the towel" is an expression which usually reflects what happens in the Administrative Court when the respondent says: "Hands up, I got my decision wrong, I pay the costs. The *Bolton* case, as I recollect it because it is a well known case which when you intervene in the Administrative Court is always cited against you when you have won, is that there should - as I recollect – be one set of costs against each appellant and each applicant and the third party intervener does not get its costs. As I recollect that was a planning case and there are often third parties involved, and the third parties do not generally get their costs. But the parties, the applicants do get their costs and the House of Lords as I recollect – not having

the Judgment in front of me – in *Bolton* emphasised that if the decision maker goes on to defend the decision that may be a factor which the court can take into account. But here the decision is not being defended, they are not standing by their decision so we can get the clarity that everybody so badly sought in this case.

As to Sir Jeremy's point as to what became clear, which was the need for some reply evidence, well I made the point a moment ago that there was no obstacle to that, that was transparent from the moment the notices of appeal were served and a defence was served, that there may be the possibility or the requirement for further pleadings and this was always foreseeable. But as to his point that they are a public body, in the Administrative Court the fact that the respondent is a public body confers no immunity from costs. How the OFT organises its finances and is relationship with the Treasury cannot ultimately be a guiding factor – deterrent effect, yes. One can well understand the argument that arises after there has been a contested hearing with a decision being fully defended and the respondent loses some points but wins some points, but the public interest is served by the law being clarified and in those circumstances, of which *Hutchison* may be one example, the Tribunal takes the view there has been a benefit which, in a sense, the applicant has paid for.

But when the point is not defended and we do not get the public interest benefit that we were bargaining for, namely, some degree of certainty then the deterrent effect operates the other way. We have simply been subject to very substantial costs' burdens, and there is no countervailing benefit to the public interest and there is no reason why the public respondent should not pay.

The fifth point: we have bent over backwards to accommodate every change in the OFT's case for the realisation of this public interest benefit that we sought. We have made concessions to the OFT, we have not taken procedural points that we did not have enough time and, importantly, we have not taken the point that we would, as it were, plead the rights of defence argument. We have been prepared to take the merits on the chin so far as bilaterals, the new par counterfactual, the new triangular par counterfactual, the payment transmission costs' arguments, we have responded to them in due time, as laid down by the timetable of the Tribunal.

The final two points I wish to make are these: we think the OFT's conduct verges on the unreasonable. We pray in aid a number of factors, in particular you will see that they have used strong and pejorative language against the banks. In their defence they accuse us of "lining our pockets", "making excessive margins". They have accused us throughout of attacks on merchants, and they put these in their defence and exacerbate and heighten these

pejorative statements in their defence, knowing at that point that they were engaged in a profound change of case, and that they were at risk of having to abandon their case, and yet they upped the ante. To start making allegations such as – and I do not have the precise phrase in front of me – "Lining one's pockets" is a very serious allegation when they never advanced an excessive pricing case against us. There is an implicit threat, an implicit criticism throughout the whole of the defence that the parties are engaged in excessive margins with not a shred, not an iota of evidence anywhere in any of the pleadings which sustains that.

So a very strong and aggressive approach ahs been adopted, and all of that in the context of a pleading which post-dated our notices of appeal. We have seen even more recently, particularly in the skeleton which was served on us just last week, an attempt to – what we would describe – as cast the blame elsewhere. My clients feel quite strongly that the OFT could quite easily have simply said "Yes, we got it wrong". Sir Jeremy has come close to saying that today, "We got it wrong, we throw our hands up in the air" and that is all there is to it. Instead, to start making the sorts of points that have been made, that everything turned upon the fact that my client did not go far enough with the concession is really just adding insult to injury. So we do believe that what makes this case almost worse is the way in which the OFT have conducted themselves.

The final point I would like to make is that if no costs are ordered in a case like this then the power which the Tribunal has to award costs might as well be otiose. It is hard to think of a case in which the principle of costs should not be exercised in favour of the appellants. There is no public interest reason which should mitigate the operation of the exercise of the Tribunal's power in that direction. If it is not exercised now, when will it be?

THE PRESIDENT: What do you say, Mr. Green, to two points made by Sir Jeremy: (i) that we have three appellants and it would be unreasonable to award three sets of costs; and (ii) that a certain amount of this work would have had to have to have been done anyway for the administrative proceedings in which you would not get your costs in any event.

MR. GREEN: If I can take the latter point first. The work that my clients have done in reply and in the notice of appeal are not going to stand us in good stead in relation to the new proceedings, it is quite plain from the nature of the arguments and submissions that we put forward, in particular in Dr. Jenkins' report, that it was a critique of where the OFT had gone wrong. It is not a substantive response to a new statement of objections. The reason we felt able to put in evidence within the timetable laid down by the Tribunal was that we recognised that were not going to have to put up a case other than that which simply said "The limited case of the OFT was deficient in the following ways". The OFT have now indicated that they were going to

go away and have to do a great deal of homework. The case we will face next time around, if it happens, will be quite different. We are entitled also to rely upon the fact that the OFT have, so it seems to us, dragged these proceedings out in order to get our replies, in order to strengthen their position - next time around getting an early sight of our case. We have pointed out to them the many deficiencies ----

THE PRESIDENT: For very understandable reasons you were anxious to go on with the appeal if possible and it was only Visa that said "Really these proceedings should not go to the stage of replies.

MR. GREEN: We were very anxious to go on but that is a point that we submit is very strongly one in our favour.

THE PRESIDENT: Yes.

MR. GREEN: Of course, there may be no proceedings. The cagey way in which it has been put on behalf of the Office of Fair Trading, and I do not criticise them for this, and they are so cagey; there is a real problem for them because the European Commission may simply come in and, as it were, trump the whole proceedings.

THE PRESIDENT: Well there may not be any administrative proceedings.

MR. GREEN: There may not be any administrative proceedings in which case all of this will be wasted and one can well imagine that the Office of Fair Trading may take that view and a number of us have spent the last two weeks arguing in the House of Lords about the risk of concurrent proceedings, and everybody is acutely aware – we are even more aware now having argued about it for two weeks – of the law when authorities can and cannot continue with proceedings. We do not know whether there will or will not be any proceedings at all. So far as multiple appellants are concerned, the Office of Fair Trading took a decision against, as it were the network operator MC, MCI and against all of the banks, and so it was inevitable there were going to be two camps. There would be one legal team acting for the majority of the banks, and Royal Bank of Scotland had dovetailed with us, and we had between ourselves sought to avoid duplication. They had dealt with a number of very limited issues and we have dealt with the residue of the case, and there has been no overlap – a minimum overlap – between Royal Bank of Scotland's position and that of MMF. But it was always inevitable that when you take on, as it were, the supply and the demand side of the same equation that there were going to be at least two teams.

I cannot, of course, speak for Visa, Visa will have to speak for themselves, but the *Bolton* case that Sir Jeremy referred to is not one which is helpful to us; it is helpful to them, but it has no impact on us.

There is a real politique here which is if the Office of Fair Trading, as it is bound to do, takes on big institutions, again as it is its duty to do in appropriate cases then it has to be prepared to fight and bear the consequences if it simply throws the towel in.

THE PRESIDENT: Thank you. Mr. Carr?

MR. CARR: Sir, I would wish to adopt all of the submissions which Mr. Green has so convincingly and powerfully advanced; I do not want to trespass over his territory. I should address particularly the question of multi-parties, and the issue of costs since we are one of the banks. Royal Bank of Scotland is the largest MasterCard issuer in the country. As Mr. Green rightly said we have gone to particular lengths to ensure there is no duplication between the general case advanced on behalf of the banks by MMF, and the particular case advanced by the Royal Bank of Scotland.

THE PRESIDENT: Yes.

MR. CARR: You will also recall that the Royal Bank of Scotland was in a position to tender particular evidence on a highly confidential basis – it has not been seen by any of the other parties – which could not have been done but for the intervention of one of the banks in possession of that evidence particularly and that was us. So we had not just a unique, but a necessary role to play in providing that evidence and supported by submissions to the Tribunal without duplication of the role played by the other bank representatives. The way to deal with this problem of duplication is this: if it is obvious that a party is duplicated and need not have been there and has built up costs unnecessarily, then you deprive him of his costs at that stage. If it is not obvious that that has occurred and if, on the face of it, it seems likely or credible that a separate, distinct, and appropriate role has been played by a party without duplication then the costs' order should be made in his favour, save that if it can be shown by the other parties that there is some particular duplication then he is entitled to a disallowance of costs on that front.

The overwhelming position here is that there has been no duplication on behalf of the Royal Bank of Scotland. If Sir Jeremy wants to make particular arguments or produce particular material in respect of what he says there has, then so be it, we will address it, but one starts from the position that there has not been duplication. That is the main point where it is appropriate that I should address you in particular.

There is nothing that I can say to improve or enlarge upon sensibly any of the other points that Mr. Green has developed, so I will leave it there.

THE PRESIDENT: Thank you, Mr. Carr. Yes, Mr. Sharpe?

MR. SHARPE: Well, Sir, I feel much the same way. We endorse fully the submissions on costs from MMF and also from Royal Bank in their entirety. May I just add from our own particular perspective at MCI?

THE PRESIDENT: Yes.

MR. SHARPE: With so much of the misfortune of the OFT they were essentially the authors of their own misfortune. I simply remind you of the letter from Mr. Selander in October 2004 which, in a sense, predicted where we are today. Would it not have been sensible to forget about the historic situation and address the current situation; they chose to ignore that. They were on notice that that was a distinct possibility. Why we should have to bear any of the risks of that gross misjudgement I cannot understand.

Secondly, their conduct has been egregious. I can so easily respond to much of Sir Jeremy's submission about the role of a public body but it is a two way set of obligations. The quality of the work and the slowness of understanding of the Office. The need to repeat, the indulgence we have given them with repeated statements of objections and Rule 14 notice has really been quite marked. We are running the most expensive correspondence course in history I should think, and why we should have to bear the costs of that I know not, and we should not.

THE PRESIDENT: Well we are talking about the costs of the appeal at the moment, not the costs of the administrative side.

MR. SHARPE: Well we are having to bear those administrative costs, and perhaps you would care to bear that in mind. But in relation to the distinct contribution of MCI and the so-called duplication argument which we anticipate will be ventilated more fully by Sir Jeremy. We have attempted throughout to plough our own distinct furrow. We are the network operator, as Mr. Green describes it. Following consolidation we made every effort not to duplicate, we took considerable steps to ensure that we did not. When it came to the reply stage you will have noticed we adopted a very different perspective from the expert evidence based approach of my friend and the more ----

THE PRESIDENT: You just put in submissions effectively.

MR. SHARPE: We did, yes. We did not duplicate, I think, at all, and we hope it assisted the Tribunal, it certainly assisted the Office in making their final decisions, I think. On that basis we think there are no grounds at all to resist quite a severe order for costs.

THE PRESIDENT: Thank you. Yes, Mr. Morris? You have a special position costs?

MR. MORRIS: We have a special position and our positin is this, as you have seen: we ask for our costs but only our costs from the date of receipt of the defence, which was 1st March. We do

say that we could have legitimately asked for our costs of these proceedings as a whole. I do not need to expand that proposition further but I just ask you to note that at the very first case management conference in the case Visa did raise the proposition that the best course forward was effectively to put a stop to the appeals in relation to the historic arrangements, and for Visa and MasterCard current arrangements to then be investigated in tandem going forward. That is a position which we have put both to this Tribunal and to the Office of Fair Trading consistently since last October or November. But I do not need to make that point any further because we do not ask for all those costs, partly because we also recognise that we are an intervener and we are aware of the Tribunal's jurisdiction in relation to costs of interveners. However, we do ask for all our costs since the date of the defence. We say that there has never been any justification for the advancing of the new case in the defence from day one, from the date that the defence was put forward; that it was known and accepted at the case management conference in March that it was a new case. In the skeleton argument for that case management conference we put forward options to the Tribunal as to what should happen, but we said it was a new case and, as you will recall we were the only party at that stage which said "Time to stop now and for remission".

I should also add that immediately following that case management conference, and I can hand **this** up if you wish, but I can tell you that Visa wrote to the Office of Fair Trading on 6th April inviting the Office once again – and, as you will recall, Sir Jeremy referred to having discussions with senior people at the Office of Fair Trading – they would look at it again. On 6th April we invited the Office to withdraw the decision on the basis that we then put in our reply document, and I should add specifically that in that letter we expressly drew attention to the problem that arose in relation to third parties – in other words, non-appellant addressees. That point, which I think it is fair to say the Tribunal picked up in its order, or implicitly certainly referred to the problem about a decision being a decision which is out there binding on everybody and we put that point to the Office of Fair Trading as early as 6th April. We do suggest and submit that that factor has played a very significant part now in the decision to withdraw, if you look particularly at para.2(5) of the Office of Fair Trading's submissions where they fairly accept – I am not looking at it immediately – they accept many of the representations now made by Visa.

It is also accepted now that the decision to withdraw is based on there having been new reasons. For those reasons we submit that the new case in the defence should never have been advanced at all. It should have been withdrawn at the time of the case management conference in March or, at the very least, following our letter of 6th April. Had those things

happened Visa would not have incurred the costs it has incurred since 1st March. In those circumstances we submit that a fair order, as far as Visa is concerned is for an order for its costs from that date going forward.

We would add one further point to that, which is a point picked upon by, I think, Mr. Green that the majority of our costs or a large part of them have been concerned with the application to disallow the defence, but Visa has also incurred further other costs, in particular a responsive expert report.

THE PRESIDENT: Which we have not got?

MR. MORRIS: I think you have.

THE PRESIDENT: Oh, we have got, yet.

MR. MORRIS: It is attached to our reply document.

THE PRESIDENT: Yes, it is.

MR. MORRIS: We also incurred costs in seeking to obtain factual evidence on the at par position.

We do submit that included in our order for costs those costs should be included, for the simple reason that it is now far from clear what the OFT's position will be going forward. It is far from clear and there is no certainty (a) whether the case will go ahead; or (b) the manner in which it will go ahead if it does, particularly in the light of the indication now that they would want to go back to the drawing board to get further evidence, and an indication from Sir Jeremy that they would be looking perhaps to use their own investigatory powers.

So just to make clear, our application for costs is an application for all our costs from 1st March.

THE PRESIDENT: Thank you, Mr. Morris. I think it would be useful if you could lodge that letter of 6th April.

MR. MORRIS: I have most of it here.

THE PRESIDENT: Just hand it in to the Registry. Did you have a reply to that letter?

MR. MORRIS: We had no reply.

THE PRESIDENT: No reply.

MR. MORRIS: Can I hand those to the Tribunal? (Documents handed to the Tribunal)

THE PRESIDENT: I do not think that we need look at it now, so long as we have it. Thank you.

Yes, Mr. Robertson, are you applying for any costs?

MR. ROBERTSON: We are not, as we indicated in para.86 of our statement of intervention.

THE PRESIDENT: Yes, thank you.

MR. GREEN: If I could just mention one point, it is simply to say this: there is an outstanding costs' issue in relation to the BRC's application for disclosure. Can I simply leave it this way? We

do not want to be seen, at least at this stage, to have waived or abandoned that matter, but we would like to review it in the light of any Judgment you might arrive at in relation to costs. It is still an outstanding issue.

THE PRESIDENT: Just hang on. We had better just know what all the outstanding issues are. You have an application against them?

MR. GREEN: Well you will remember they made an application for disclosure against us which then was aborted and failed ----

THE PRESIDENT: Well we did not rule on it at that stage.

MR. GREEN: There is no ruling on it at that stage.

THE PRESIDENT: Okay, so you seek your costs as against ----

MR. GREEN: I just want to put down a marker at this stage, that we do not want to be seen to abandon it. We may do in due course, but if there is going to be a compendious Ruling in relation to costs, the problem is that since we certainly did not contemplate we were going to deal with costs vis-à-vis the BRC today, we are not really in a position to ----

THE PRESIDENT: I see.

MR. GREEN: I do not want to trouble the Tribunal with it, but I do not want to completely abandon it at this stage. That is all.

THE PRESIDENT: Thank you.

MR. SHARPE: I think the only marker of BCI is that we seek our costs. That application was adjourned and it was a total waste of time.

THE PRESIDENT: Thank you. The Tribunal just wants to consider the position.

(The Tribunal confer)

THE PRESIDENT: First of all the Tribunal's position is that if we were to make an order for costs we would not contemplate taxing the costs ourselves, it would probably be a matter for detailed assessment. However, the Tribunal would find it helpful to have from each of the parties that are seeking costs a very short schedule of the main heads of costs – I do not mean a schedule as prepared by a costs' draftsman, but enough for us to identify what the total sums are and how they break down. I am sure the parties know the kind of thing we have in mind, and we would be glad to have that, if we may within seven days' of today.

What we propose, Mr. Lever, is to give you 14 days thereafter to put in any further written submissions that you would like to put in on costs, so you will have the time to develop your argument as you wish. We will then decide thereafter whether we need to give the appellants yet a further opportunity to reply to any points the OFT has made, or whether we feel in a position to deal it without that final round. So I think that is where we are on costs.

SIR JEREMY LEVER: I am much obliged. There is just one point for the record, that Mr. Green waxed lyrical but we did not say in the defence that the interchange fees had stuck in the linings of the pockets of the banks. What we did say was that it was not clear to what extent that was so. Just for the record ----

THE PRESIDENT: Well we can go back and read the defence and see what was said, yes, thank you very much.

Having disposed of that, there may be other points that other people have. The last point that is in our mind is that, from time to time in this case, there has been somewhat contentious correspondence about how far either pleadings or written submissions to the Tribunal should be disclosed to third parties, including in that context the disclosure of the OFT's defence to another competition authority. It may well be that in the events that have happened, and we need not go into that in any detail, but I think in general if I may give an indication and see whether there are any comments? The Tribunal's primary responsibility is to see that the proceedings before the Tribunal are fair. That is the general origin of the *sub judice* rule which has stood for many centuries now. It seems to us that if, as far as pleadings are concerned, (which are obviously not public documents) any party who wishes to disclose its pleadings it is at the very least prudent to inform the Tribunal of what is proposed, first so that a check can be made as to whether there is in fact no issue as to confidentiality, but more particularly as well so that the Tribunal can satisfy itself that there is no prejudice to the case going on before it if such disclosure were to take place. So we would hope that if a similar point arises in future we would at least be informed before anything was done so that those points can be dealt with.

Similarly, in relation to statements in the Press, or statements that appear in the press regarding matters that are pending before the Tribunal, at present we take the view that the rules that apply to Civil litigation in general should apply equally to this Tribunal and that if any question of a breach of those rules were to arise our appropriate course would be to refer the matter to the High Court for such further considerations as might be appropriate.

I do not know if anyone would wish to comment on either of those points, or whether you wish to take the matter really any further.

SIR JEREMY LEVER: I think, Sir, the primary concern of the Office is that it should not be placed in a very difficult position in relation to other members of the European Competition network. We cannot be sure that we will not receive an urgent request for information from another member of the ECM, and one which they are very, very anxious to have kept completely secret because they are going to make a dawn raid and the Office does not want to be in the

position in which it cannot comply with its Community law position of supplying information to another member of the network which is expressed in the modernisation regulation in general terms, without risking giving grave offence to this Tribunal. I think the OFT's reward – I was thinking about Article 12 of the modernisation regulations.

THE PRESIDENT: Yes, I am finding it somewhat difficult to imagine the relevance of a pleading before the Tribunal to a potential urgent dawn raid.

SIR JEREMY LEVER: Well we cannot foresee all the circumstances in which we may receive requests from other members of the Competition network: "Please let us have as a matter of great urgency … somebody has referred to this we need to see it immediately." The Office believes that under Article 12 that is what it should do.

THE PRESIDENT: Well we hear what you say, Sir Jeremy but we have very serious reservations about the procedures before this Tribunal being used as a means of prosecuting people in other countries without the Tribunal being in formed about it.

SIR JEREMY LEVER: Well it may be that we should not comply with those requests, but I think there is a substantial public interest in that position being clarified, by actually a decision.

THE PRESIDENT: It is very difficult for the Tribunal and the Tribunal would not normally rule in the abstract on particular circumstances that may or may not arise in the future. All we have said, and we have said it very guardedly, is that it would normally be prudent to consult the Tribunal if these circumstances were to arise.

SIR JEREMY LEVER: Well I can certainly make sure that those at the highest level within the Office are aware of that *dictum*, that statement by the Tribunal, that in a case where there is no reason not to inform the Tribunal in advance with time in which it can express a view. I would point out, Sir, you know the circumstances in which the Polish Competition Authority asked to see ----

THE PRESIDENT: Well in this case that authority have purported to make some sort order requiring the appellants before us to produce all the documents that have been lodged before this court under pain of serious financial penalty within a five day period in a matter that prima facie involved some kind of interference with these proceedings?

SIR JEREMY LEVER: All that we did was that we were asked by the Polish Competition Authority – "… reference had been made by MasterCard to your [the Office's] defence, can we see it?"

THE PRESIDENT: That I know, but to show them the defence without showing them the notice of appeal and the circumstances in which the thing had arisen, might have been not to give them the full picture.

SIR JEREMY LEVER: You know how this arose?

THE PRESIDENT: Yes.

SIR JEREMY LEVER: It was not we who instigated this. It was a reference by MasterCard and I am not criticising MasterCard at all in this connection. I am simply saying MasterCard said, and you have seen exactly I have quoted the words.

THE PRESIDENT: Well we are not criticising anybody either, we are simply saying that we need to develop a procedure for ensuring that this kind of slightly awkward position is handled in an appropriate way.

SIR JEREMY LEVER: All I have to say on behalf of the Office is this: if the Tribunal believes that there may be circumstances in which the Office will be acting improperly, knowingly, by providing information to another European Competition network, then we really do need a decision from this Tribunal, a formal statement, that enables the Office to consider its position.

THE PRESIDENT: Well we cannot say in the abstract whether the Office would be acting improperly or not, all I am saying is that it would be prudent for the Tribunal to be informed so that we can take a view; and that view is only expressed with a view to protecting the integrity and fairness of the proceedings in front of the Tribunal, not for any other reason.

SIR JEREMY LEVER: I can ensure that those passages of the transcript are drawn specifically to the attention of the Office at the highest level, but I am sure that equally the Tribunal understand that as Members of the European Competition Network with Community law responsibilities we sometimes, the circumstances may be such that we are unable first to come to the Tribunal.

THE PRESIDENT: Well that is as may be but I think we have probably taken the discussion as far as we can.

MR. GREEN: Can I make a brief observation on behalf of MMF? We are obviously not so directly involved in this issue but we were concerned to ensure that if any of our member banks were even in theory exposed to proceedings and, because an incomplete documents was passed to another NRA, that is a matter of the gravest concern, and it did seem to us that under Article 12 of modernisation regulation there is no duty imposed upon a competition authority to disclose information, simply a power. That being so, if it is only a power then it must be subject to national procedural rights and Article 6 rights. No obligation is on the competition authority to pass over information. Therefore there is nothing in the regulation which can t rump national procedural rights. Our concern is simply to ensure that where there is an issue in one Member State which is going to be similarly enforced in another Member state that we do not get a domino effect.

On the basis of incomplete pleadings and they are highlighted in this case because the incomplete pleadings were then subsequently abandoned.

I think that is all I wish to say.

THE PRESIDENT: There is a more general issue – again I do not think it is fruitful to go into it in the events that have happened – how far the apparently general principle under the modernisation regulation that proceedings at any one time should be carried on by one lead authority applies in a case such as this, where the subject matter is domestic but the legal basis is ….

MR. GREEN: Sir, yes.

THE PRESIDENT: That seems to me to be potentially a rather difficult issue. That is for the workings of the network which no doubt will work its way out in due course.

MR. GREEN: Indeed, we endorse that. Can I make just one point, which I am reminded of, that we would invite the Tribunal in perhaps an appropriate way possibly in any Judgment in relation to the setting aside, to ensure that the Polish Authorities and the Commission are informed of what has happened, because it is plainly important that other Member States are aware of the procedural history, aware that the allegations against the banks and MasterCard have been abandoned because of the obvious ripple effects that maintaining the decision and those pleadings in force can have.

THE PRESIDENT: Yes, it probably comes within our obligation under the regulation to inform the Commission anyway, does it not?

MR. GREEN: Well we would have thought so and possibly since the Polish Authority is interested and is – if I might put it indelicately – interfering in the proceedings possibly it is the Polish Authorities as well.

THE PRESIDENT: Yes, very well. Are there any other points that anybody wants to raise?

MR. MORRIS: I would like to make one additional point which is that in the events which have happened, and on the basis that the material has already gone to the Polish Competition authority, Visa itself would wish that its pleadings the statement of intervention and the reply in these proceedings were sent to the Polish Competition Authority and was proposing to do so for completeness of picture reasons only. But I wish to inform you, the Tribunal, that that is something that we would wish to do and ask your permission if that were appropriate.

THE PRESIDENT: Well we have already said that MasterCard can do it so we cannot object to you doing it.

MR. MORRIS: I just wanted to make that clear. I am grateful.

THE PRESIDENT: Thank you. Very well then, we will hear from the appellants on the amount of costs they claim within 7 days and from the OFT on its costs' submissions in 14 days thereafter. Very well, thank you all very much.

(The hearing concluded at 3.45 p.m.)