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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1236/5/7/15

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24 March 2015

Before:

THE HON. MR. JUSTICE ROTH

(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) DSG RETAIL LIMITED
(2) DIXONS RETAIL LIMITED

Claimants

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SPRL

Defendants

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Official Court Reporters and Audio Transcribers
One Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

HEARING

(Permission to serve out of jurisdiction)

APPEARANCES

Mr. Meredith Pickford QC, Miss Julianne Kerr Morrison and Mr. Conor McCarthy (instructed by Wragge Lawrence Graham & Co. LLP) appeared on behalf of the Claimants.

The Respondents did not attend and were not represented.

1 THE PRESIDENT: Yes, Mr. Pickford?

2 MR. PICKFORD: Sir, as you are aware this is the hearing of Dixons' application for permission
3 in relation to its follow-on damages action to serve out of the jurisdiction on the first and
4 second defendants.

5 First, as a matter of housekeeping, you should have three volumes of bundles. There is a
6 bundle for the claim and two bundles of authorities.

7 THE PRESIDENT: Yes.

8 MR. PICKFORD: In connection with the authorities can I hand up additional authorities to be
9 slipped in at the back and a revised index.

10 THE PRESIDENT: Right, if you had done that when you arrived it could have been done.

11 MR. PICKFORD: As soon as we arrived we had to leave.

12 THE PRESIDENT: You were sent out by the alarm, were you?

13 MR. PICKFORD: Yes.

14 THE PRESIDENT: The alarm went at 10.30. (After a pause) It does not change vol. 1.

15 MR. PICKFORD: No, it is just at the end of vol. 2. (After a pause) I do apologise. We hoped to
16 slip it in just before we began and the alarm somewhat interfered with that plan.

17 THE PRESIDENT: Right.

18 MR. PICKFORD: I understand the Tribunal is keen to canvas a number of issues in particular.
19 First, the basis on which the first and second claimant each contend that they have suffered
20 loss; secondly, the jurisdiction of the Tribunal under s.47A of the Competition Act 1998 to
21 determine the claim in respect of an alleged infringement after the period of infringement
22 found; and thirdly, Dixons' position on certain authorities that the Tribunal has kindly given
23 us advance notice which it would like to consider, for which I am very grateful.

24 What I propose to do, subject to the Tribunal's views, is first to take the Tribunal through
25 the key elements of the claim, then address the first question raised by outlining the basis on
26 which each of the claimants contends that they suffered loss, then to address the second
27 question by outlining the basis upon which Dixons is claiming for the damages it has
28 incurred after the period of infringement found by the European Commission in its decision.
29 In that context I suggest the *Gerber* case.

30 THE PRESIDENT: The *Gerber* case goes to the second claimant's loss, not to the period of
31 infringement.

32 MR. PICKFORD: I am happy to address them in ----

33 THE PRESIDENT: Well, it is nothing to do with the s.47A point.

1 MR. PICKFORD: That may be right, Sir, I may have misallocated that in my notes. We certainly
2 come to it in the right context in the discussion.

3 I then propose to summarise the principles which apply to applications for permission to
4 serve out of the jurisdiction and, finally, to set out Dixons' case for service out in the light of
5 those principles and other applicable case law, and pick up in that context the *Dumez* point.

6 THE PRESIDENT: Yes.

7 MR. PICKFORD: Before getting drawn into the claim, if we could just begin very briefly with
8 the Decision on which it is based, you will find that decision behind the second unnumbered
9 tab in the claim bundle. If you go to p.209 you will find the operative part of the Decision.

10 We see Article 1:

11 "From 22 May 1992 until 19 December 2007 the MasterCard payment
12 organisation and the legal entities representing it, that is MasterCard Incorporated,
13 MasterCard International Incorporated and MasterCard Europe S.p.r.l., have
14 infringed Article 81 of the Treaty ----"

15 THE PRESIDENT: Yes.

16 MR. PICKFORD: And for a different period Article 53 of the EEA Agreement:

17 ". . . by in effect setting a minimum price merchants must pay to their acquiring
18 bank for accepting payment cards in the European Economic Area, by means of
19 the Intra-EEA fallback interchange fees for MasterCard branded consumer credit
20 and charge cards and for MasterCard or Maestro branded debit cards."

21 Then Articles 2 and 3 deal with the requirements on MasterCard to cease its infringement.

22 THE PRESIDENT: It is given six months.

23 MR. PICKFORD: Yes, it is given six months in Article 3. In Article 2 it is required to bring the
24 infringement to an end, it does not get six months for that, that is forthwith.

25 THE PRESIDENT: Yes, I see.

26 MR. PICKFORD: It is also, by the second paragraph of Article 2, required to:

27 ". . . refrain from repeating the infringement through any act or conduct as
28 described in Article 1 having the same or equivalent object or effect."

29 Then one sees at Article 8 that the Decision is addressed to MasterCard Inc., MasterCard
30 International and MasterCard Europe.

31 It is that Decision which obviously forms the basis for this follow-on claim. If one could
32 then go back to the claim, which is behind the first coloured tab. Initially there is a claim
33 form, but I propose to start at the particulars of claim itself, which is a couple of pages on.
34 Do you have that?

1 THE PRESIDENT: Yes, I have looked at it.

2 MR. PICKFORD: I am grateful, Sir, in which case we may be able to go through this relatively
3 quickly.

4 The position is that necessarily this is obviously the follow-on claim. Dixons has also
5 brought a claim in the High Court, and the way in which these claims map together is that
6 everything that we are permitted to pursue in the Tribunal we pursue here, and everything
7 else that we are not permitted to pursue in the Tribunal, but we could claim for in the High
8 Court, we claim in the High Court.

9 Our proposal, subject obviously to this application being successful is ultimately, under the
10 current rules as they are, to have this claim transferred to be heard in the High Court
11 together with the High Court claim so that they can sit alongside one another.

12 In section A we set out the introduction to the claim – I can probably skip over that, on the
13 basis that the Tribunal has read it already.

14 THE PRESIDENT: Dixons, as used in this document, as I understand it, refers to the two
15 claimants?

16 MR. PICKFORD: That is correct. We see that the defendants are all represented by the
17 worldwide organisation known as MasterCard.

18 THE PRESIDENT: Dixons Retail, which is the second claimant, is introduced in para. 7.

19 MR. PICKFORD: Yes.

20 THE PRESIDENT: Where is the first claimant introduced?

21 MR. PICKFORD: There is a typographical error, actually in relation to Dixons' Retail in that it
22 should say: "Dixons Retail Limited is the parent company of all the other claimants in the
23 two sets of proceedings" I think.

24 THE PRESIDENT: Yes, well, I presume it is not the parent of itself.

25 MR. PICKFORD: Dixons, the first claimant, is not expressly introduced other than through the
26 reference to it being part of the Dixons Group, and then the Dixons Group is explained.

27 THE PRESIDENT: It is not set out anywhere what it does.

28 MR. PICKFORD: At 2 it explains it is a "specialist electrical retailer selling consumer
29 electronics, personal computers, domestic appliances."

30 THE PRESIDENT: That is the two of them together.

31 MR. PICKFORD: That is the two of them, yes. The subsidiary company is the company that
32 actually operates and then it is held by the holding company which holds all of the various
33 subsidiaries. There is a minor amendment that needs to be made later on to make that clear
34 by way of amendment.

1 THE PRESIDENT: Where is that?

2 MR. PICKFORD: Sorry, where is the amendment that is required later on?

3 THE PRESIDENT: Yes.

4 MR. PICKFORD: There is a reference to "PLC" later on – "Dixons PLC" – which should be a
5 reference to the second defendant. The reason why that occurred is because it was
6 originally at one point a PLC, and then just prior to the claim being issued it became a
7 limited company.

8 THE PRESIDENT: Is this in 115.1?

9 MR. PICKFORD: That is correct, yes.

10 THE PRESIDENT: So I am slightly puzzled, how should that read because I did not understand
11 115.1?

12 MR. PICKFORD: It should read:

13 "The application of the EEA MIF to transactions occurring outside the United
14 Kingdom resulted and continues to result in substantial losses for Dixons Retail
15 Limited through the reduced payment of dividends to Dixons Retail Limited by its
16 subsidiary companies."

17 THE PRESIDENT: I see, yes, so that is the same company. I may be quite wrong, but just
18 through reports in the press, with the merger with Carphone Warehouse that it became
19 "Dixons Carphone", but is that just a trading name?

20 MR. PICKFORD: As far as I am aware, my instructions are that that is the trading name.

21 THE PRESIDENT: Of Dixons Retail Limited.

22 MR. PICKFORD: The company name is Dixons Retail Limited. Then one sees at (2) the
23 defendants are introduced.

24 THE PRESIDENT: Yes, they are the addressees of the decision.

25 MR. PICKFORD: Yes.

26 THE PRESIDENT: Then you explain the two claims.

27 MR. PICKFORD: At "B" we set out the statutory provisions we rely upon. Section "C" ----

28 THE PRESIDENT: Before that, at 26, the claim of the second claimant: "relates to the losses it
29 has incurred as the parent company of the other twelve claimants in the High Court claim"
30 not, presumably, of the first claimant, is that right?

31 MR. PICKFORD: I think there may be an error. I think the first claimant should also be in that
32 list.

33 THE PRESIDENT: Then it is the other 13 claimants, is it not? I am a bit confused. I do not find
34 it very clear, I have to say, this pleading, because there are 14 claimants as I understand it in

1 the High Court, according to your para. 6, including the two here. I assume that the first
2 claimant is claiming the actual MIF that it has paid, or the excess of the MIF, the 'anti-
3 competitive excess' as you put it, or allege it . The second claimant is therefore not
4 claiming for the first claimant.

5 MR. PICKFORD: It is not claiming for the first claimant, but it is claiming for a consequential
6 loss. It is consequential upon, which I plan to come on to, the first claimant's loss because
7 of the way in which the monies of Dixons are held and pooled at the level of the second
8 claimant. It is at that level that we say that the consequential financial implications in terms
9 of being deprived of time value of money would occur.

10 THE PRESIDENT: It is put as "dividends" in the application to serve out.

11 MR. PICKFORD: It is claimed both in dividends and also the daily pooling of cash.

12 THE PRESIDENT: But if the first claimant pays a higher fee, and therefore pays lower dividends
13 to the second claimant, the first claimant cannot claim for the higher fee and the second
14 claimant claim for the lower dividend. It is the same loss.

15 MR. PICKFORD: Indeed, Sir, and we make clear that we are not claiming for the same loss
16 twice, but there is a consequential loss that is incurred by the second claimant that is
17 consequential upon the first claimant's loss.

18 THE PRESIDENT: Where is that spelt out in this pleading? Paragraph 26 at the moment does
19 not claim, but you say that is wrong?

20 MR. PICKFORD: Yes. Ms Morrison points out to me that the purpose of s.26 is to explain the
21 additional claims beyond those relating to Dixons as a group when Dixons is specified as
22 the first claimant and the second claimant. That was why the first claimant was not in that
23 paragraph. I agree, Sir, with you that that point could be clearer.

24 THE PRESIDENT: I am now confused. Is Dixons Retail Limited, the follow on claim, relating
25 to the losses it has incurred as parent of the first claimant or not?

26 MR. PICKFORD: Yes.

27 THE PRESIDENT: It is?

28 MR. PICKFORD: It is, and, in my submission, the best way of making that clear would be to
29 amend para.26.

30 THE PRESIDENT: That is not what it says. Indeed it says the contrary. So para.26 is to be
31 amended. We come on to a damages section later. Then you set out the statute, and then
32 you have a long ----

1 MR. PICKFORD: A section which effectively sets out the reasoning of the Decision in so far as
2 relevant to the claim, and explains the concept of the multi-lateral interchange fee being a
3 default, etc.

4 THE PRESIDENT: When in para.42 you say in 42.1, 2, and 3, that at all material times Dixons
5 has paid either a blended MSC or MIF plus charge rate, at 42.2 Dixons avers it paid. As I
6 understood it, and maybe I have misunderstood it, and this is where I am quite confused, the
7 second claimant has not paid?

8 MR. PICKFORD: No, it would be more accurate to say “the first claimant”.

9 THE PRESIDENT: It is quite important, Mr. Pickford, when you are seeking permission to serve
10 out to get this right, not only because of the duty of full and frank disclosure which, on a
11 without notice application, as you know, applies, but also so that one can actually
12 understand the basis on which the application is being made. It is all the subsidiaries, is it
13 not, who pay the rate?

14 MR. PICKFORD: That is correct.

15 THE PRESIDENT: The second claimant does not pay, does it, as I understand it?

16 MR. PICKFORD: That is correct. I think it is fair to say there are some drafting issues in relation
17 to that that pervade the documents, and I do apologise. That is for completion.

18 THE PRESIDENT: It is more significant when, as I say, there is a duty to set these things out
19 correctly when you are coming, as one does in these applications, without the other side
20 being here to point that out. Where do we go next?

21 MR. PICKFORD: We have then got the membership of the MasterCard organisation, explaining
22 the membership concept. That is 43 through to 46. One can then skip the Rules.
23 At paragraph 72 , we see:

24 “The EEA MIF was at all relevant times the product of a decision of an
25 association undertakings within the meaning of Article 101(1) TFEU.”

26 Then at 76 we see the essential restriction of competition, that the EEA MIF sets a floor
27 under the MSCs which is common to all acquirers and which they then can pass on to
28 merchants. That is at the heart of the competition problem.

29 THE PRESIDENT: It has a fairly immediate effect presumably, because if they change the MIF
30 and the sale gets made by a merchant it translates through in the charge pretty quickly.

31 MR. PICKFORD: That is certainly our understanding. There are a number of different ways in
32 which, as we explain later, MIFs can be passed on, because there are different protection
33 charging arrangements. You might have an MSC that is a blended rate, or you might have

1 an MSC that is a MIF plus rate. In Dixons' case, as we explain later, we went from blended
2 to MIF plus.

3 THE PRESIDENT: Either way, if MasterCard raises the MIF, whether it is a blended rate you
4 pay or a MIF plus in the MSC, you would feel the consequences pretty quickly, would you
5 not?

6 MR. PICKFORD: It depends on the precise nature of the agreement between the parties. What
7 often happens is that increases are felt more quickly than decreases in many industries. So
8 if there was no MIF plus arrangement, but merely a blended MSC, one might well see that
9 the MSC stays the same for a considerable period of time, even if the MIF originally that
10 underlay it is reduced.

11 THE PRESIDENT: Yes.

12 MR. PICKFORD: At 76.4, just to be clear about the ways in which the EEA MIF is felt, we
13 explain, firstly, at 76.4(a) and (b) the fact that it applies to certain cross-border transactions
14 where you have someone called a "Central Acquirer", which is an acquirer that acquires
15 outside of its area. Then it also has an effect in relation to underlying domestic MIFs, both
16 where there is an agreed domestic MIF as a fallback, and also where there is a bilateral MIF
17 that is agreed. Because it is a fallback and nothing else can be agreed, we say it necessarily
18 sets the floor under the level at which the domestic rate would be agreed. We explain that
19 in the following paragraphs.

20 Then at para.84 we explain there is no fulfilment of the conditions of Article 101(3) as set
21 out by the European Commission.

22 THE PRESIDENT: In this part - I have not read the Decision, which is very lengthy - you are
23 effectively reflecting what is in the Decision?

24 MR. PICKFORD: Yes. Then in section D, we deal with the application of the MIF so far as
25 within our knowledge since the Decision. In broad terms, as we understand it, nothing
26 initially changed. Then on 12th June 2008 the MIF was provisionally repealed and set to
27 zero until October 2008.

28 THE PRESIDENT: 12th or 21st?

29 MR. PICKFORD: 21st June - sorry, on 12th June there was a press release and it happened with
30 effect from the 21st. Then from October to July 2009 there were new acquirer fees. Then
31 from July 2009 the MIF was reinstated to the best of our knowledge.

32 THE PRESIDENT: I am just trying to understand this. The Commission's press release says it
33 would be reduced on 21st June. You say if that happened it was circumventing the
34 Decision, and in breach of Article 101 - is that right?

1 MR. PICKFORD: No, what we say initially is that we require MasterCard to prove that it was
2 repealed with effect from 21st June 2008. We then say that even if the MIF was set to zero
3 from 21st June 2008 to October 2008, from October 2008:

4 “... the MIF was no longer set to zero and/or MasterCard put in place fees with
5 the same or equivalent object or effect, circumventing the remedy ordered in the
6 Decision ...”

7 That is the period after October 2008. We are not saying that the setting of it to zero
8 circumvented.

9 THE PRESIDENT: Yes, I see. Then there is another press release saying that the fee that was set
10 in October 2008 would be repealed on 1st July, I think.

11 MR. PICKFORD: Yes.

12 THE PRESIDENT: Or in July. You say that for the period between October and July it was not
13 passed on - is that right?

14 MR. PICKFORD: Yes, to the best of our knowledge. We do not know exactly what went on
15 internally. We are at the receiving end, and as far as we were aware nothing was passed on.

16 THE PRESIDENT: You are a merchant.

17 MR. PICKFORD: Yes.

18 THE PRESIDENT: And you say what you paid did not change - is that right?

19 MR. PICKFORD: Yes.

20 THE PRESIDENT: That is October to July, you say Dixons experienced no change.

21 MR. PICKFORD: Then, Sir, if I could go on to section E, which is on p.37?

22 THE PRESIDENT: Just a moment. In para.92 you talk about the change that would be made
23 from July, and there was a new set of rates effective on 1st July - that is 2014. The other is
24 2009. It changed its fee arrangements from July 2009?

25 MR. PICKFORD: Yes.

26 THE PRESIDENT: Did that take place?

27 MR. PICKFORD: I would need to take instructions.

28 THE PRESIDENT: It is rather important. You explain the claim for damages for the period
29 October 2008 to July 2009 in 91.1, but where do you explain the claim for the period after
30 July 2009?

31 MR. PICKFORD: We go on to explain the nature of the claim further in section E. This is
32 effectively setting out the facts as far as we know them in terms of what changes happened
33 at the MasterCard end.

1 THE PRESIDENT: 91 is the effect on Dixons, because it was not passed on, but that is up to
2 July. Then you say in 92 there is announcement of the change in July. You do not suggest
3 that was not implemented, and it was not passed on.

4 MR. PICKFORD: No, and we come back to this later on in the claim, and it may be that 91
5 effectively is foreshadowing something that then comes back in any event later.

6 THE PRESIDENT: Yes. Then you discuss whether, from June 2009, this is still a decision of an
7 association of undertakings – is that right?

8 MR. PICKFORD: That is correct.

9 THE PRESIDENT: Because that is a likely issue, is it, as you understand it?

10 MR. PICKFORD: Yes, well, it is certainly a possible issue because MasterCard has continued to
11 make what we would suggest are minor alterations to the way it structures its business, but I
12 anticipate MasterCard will say they are significant alterations and there are legal effects ----

13 THE PRESIDENT: That is not considered in the Decision because that Decision only goes up to
14 2007.

15 MR. PICKFORD: That is correct, Sir, and we would accept that when we get to the stage of
16 material changes to the arrangements that are not addressed in the Commission's Decision
17 then at that stage, at the very least, even if we can go beyond the end of the precise period
18 found by the Commission, we cannot keep going on and on if there are new facts and new
19 infringement findings that need to be considered.

20 THE PRESIDENT: Because if it is not an association of undertakings then there is no
21 infringement.

22 MR. PICKFORD: That is correct. Well, no, that is not correct. No infringement on the primary
23 basis found for an infringement by the Commission, there is an alternative basis, which is
24 not developed in the Commission's Decision but it is alluded to at one paragraph in relation
25 to there being a vertical agreement between MasterCard and ----

26 THE PRESIDENT: Yes, but that is not a follow-on claim, is it?

27 MR. PICKFORD: There is a question about whether that could be a follow-on claim, because it
28 does form part of the Decision. It is certainly not the main basis on which the Decision is
29 advanced by the Commission.

30 THE PRESIDENT: Yes, well it has to be an actual finding of infringement on that basis, does it
31 not, for this to follow on?

32 MR. PICKFORD: We are not putting our case on that basis, because obviously we have our High
33 Court claim in any event.

34 THE PRESIDENT: No, you are free to argue it there.

1 MR. PICKFORD: I am simply not making a concession about precisely what it is that the
2 Commission says or the extent of its finding.

3 THE PRESIDENT: Yes, but that is not the basis of the claim here.

4 MR. PICKFORD: Yes.

5 THE PRESIDENT: So that is dealt with in 94. In 96 you say it is still a decision of an
6 association of undertakings.

7 MR. PICKFORD: That is correct.

8 THE PRESIDENT: Though that may be in issue.

9 MR. PICKFORD: Assuming, and obviously we have not got there yet, but assuming that
10 MasterCard makes the claim that it has all changed and the legal ramifications therefore are
11 different, then essentially para. 96 is there for completeness, because we accept at that point
12 that that cannot form part of the follow-on claim. In relation to the plea that the
13 infringement continues there is a separate issue about whether the effect of the infringement
14 continued.

15 THE PRESIDENT: But that is something the Tribunal would have to decide, whether it is still an
16 association of undertakings, unless it is conceded. Then you go on to deal with Article
17 101(3) in, as it happens, para. 101.

18 MR. PICKFORD: That deals with the fact that there has been no decision that the conditions of
19 Article 101(3) are met.

20 THE PRESIDENT: If Article 101(3) is met there is no infringement.

21 MR. PICKFORD: That is correct.

22 THE PRESIDENT: And you say in 102: "The European Commission has not carried out an
23 assessment of whether the MIF levels . . . since the Decision met or meets the conditions of
24 101(3) . . . it has not issued a decision to this effect."

25 MR. PICKFORD: Yes, insofar as they have changed. Obviously, the Commission's analysis
26 necessarily ended at the date in time it published the Decision because it did not know what
27 was going to happen in the future.

28 THE PRESIDENT: But I thought they had changed. I thought you said earlier from July, I
29 thought we had agreed they implemented a new arrangement.

30 MR. PICKFORD: Yes, exactly, they have not investigated, obviously in the Decision, the
31 arrangements from that point onwards.

32 THE PRESIDENT: Yes. And its memo deals with that, per 104, it is up to MasterCard "to
33 determine whether its new arrangements comply with" – yes, I am just reading your 104:

1 "The memo also explained that while MasterCard had adopted a new methodology
2 for calculating MIFs, whether or not Article 101(3) TFEU would be satisfied
3 depends on the specifics of the market . . ."

4 And you give some examples, yes?

5 MR. PICKFORD: Yes. So we then come to section E which deals with the breach of
6 competition law and the scope of Dixons' claims. Dixons' losses arise in two different
7 ways, either from the direct application of the EEA MIF via MSCs to the plusses that it
8 pays, so that would be an example of the cross-border transactions, or as a result of it setting
9 a *de facto* floor for the domestic MIFs which, again, feed through to MSCs.

10 THE PRESIDENT: And when you say in 100: "Dixons is a Merchant that has paid and continues
11 to pay" again ----

12 MR. PICKFORD: That should be the first defendant.

13 THE PRESIDENT: The first claimant.

14 MR. PICKFORD: I beg your pardon the first claimant, and the subsidiaries.

15 THE PRESIDENT: And the subsidiaries of the second claimant.

16 MR. PICKFORD: Yes. As you see, we explain that we continue to pay the MSCs, explain the
17 domestic MIF and how there is an effect on it with the *de facto* floor. We say, to the best of
18 our knowledge, how it all works, albeit there are some issues that we cannot currently plead
19 to.

20 At para. 115 we explain the claim is relevant to the second defendant.

21 THE PRESIDENT: The second claimant.

22 MR. PICKFORD: The second claimant, I do beg your pardon, Sir.

23 THE PRESIDENT: Can you explain it? You say it has reduced payment of dividends, but I do
24 not understand how, even now including the first claimant – if the first claimant pays a
25 higher fee its dividend cannot be reduced by any more in a recoverable claim, than the
26 higher fee it has paid.

27 MR. PICKFORD: That is correct.

28 THE PRESIDENT: So if the first claimant is claiming the higher damages by reference to the
29 higher fee it has paid, how can the second claimant also claim for reduced dividends from
30 the first claimant?

31 MR. PICKFORD: It is not claiming for the reduced dividends. I need to break this out into
32 stages. The first point, and the main point on which we rely, is that where the first claimant
33 or, indeed, one of the subsidiaries, suffers a loss, which leads to two consequences

1 potentially, one is that on a day to day basis, as a result of cash pooling, there is less cash
2 available at the level of the second claimant ----

3 THE PRESIDENT: Just break it down further, please. Where a subsidiary suffers a loss, that is it
4 pays a higher MIF, or higher MSC, than it would otherwise pay?

5 MR. PICKFORD: Yes.

6 THE PRESIDENT: That is the loss.

7 MR. PICKFORD: That is the loss.

8 THE PRESIDENT: There is no other loss?

9 MR. PICKFORD: No.

10 THE PRESIDENT: So it suffers a loss because it pays more money, and then therefore it has less
11 money, less cash, and you say there is day to day cash pooling?

12 MR. PICKFORD: Yes.

13 THE PRESIDENT: Which means what?

14 MR. PICKFORD: What it means is that the second defendant ----

15 THE PRESIDENT: Claimant.

16 MR. PICKFORD: The second claimant had less cash that it was able to use ----

17 THE PRESIDENT: Can you explain how cash pooling – these are all separate companies in
18 different countries, are you saying that overnight their entire cash, everything in their bank
19 is transferred to the parent and they start with nil funds the next morning?

20 MR. PICKFORD: Our plea is not necessarily that it all is transferred, but our instructions are, and
21 the basis on which this was pleaded, is that there is a transfer from subsidiaries, including
22 foreign subsidiaries.

23 THE PRESIDENT: But it is not all of the funds that are transferred?

24 MR. PICKFORD: Not necessarily all. If I could go on to explain, and I might be able to clarify
25 the basis of this claim and possibly put your mind at ease, Sir, in relation to what we are
26 saying here. We are not claiming for the same losses twice, but there are ramifications –
27 essentially it is the interest on damages point that we then go into plead in para. 133.8.
28 What we tried to identify is the person within the group that actually is deprived of holding
29 money and therefore in terms of the interest that would be applicable, the right person to
30 focus on. You will be aware from *Sempra Metals* that if you are claiming compound
31 interest, that can be claimed as damages, it is not a claim under the ordinary rules, it is a
32 claim that, as a result of being deprived of money, you had less cash available to you and
33 therefore, would have either had to borrow more or were less able to invest. Therefore, the
34 value to you of the money is a particular interest rate that is different from the interest rate

1 that can be claimed potentially under the Court Rules or Tribunal Rules and, moreover, that
2 the effect of being deprived of that money is compounded.

3 THE PRESIDENT: So you are not claiming then - is this right – because you say in 115 that the
4 second claimant "claims for the losses it has incurred as a result of the application of the
5 EEA MIF in each of the other jurisdictions . . ." you do not, incidentally, include the UK in
6 that, contrary to what you told me earlier, that it includes money from the first claimant, but
7 apparently it does not here. This is the claim of the second claimant. You are not claiming
8 the amount by which the dividend was reduced. You are seeking to claim the loss of
9 interest that the second claimant would have earned had the dividend been higher.

10 MR. PICKFORD: Yes.

11 THE PRESIDENT: And you are not claiming the dividend itself?

12 MR. PICKFORD: Not again, no.

13 THE PRESIDENT: Well, not at all?

14 MR. PICKFORD: Not against the first claimant and not at all in relation to the other subsidiaries.

15 THE PRESIDENT: So there is no claim for the actual amount of the alleged higher MIF paid by
16 the subsidiaries in the other countries?

17 MR. PICKFORD: That is correct.

18 THE PRESIDENT: It is only the claim for loss of interest?

19 MR. PICKFORD: Yes.

20 THE PRESIDENT: I have to say that did not spring out from reading this pleading.

21 MR. PICKFORD: I think it is fair to say, Sir, in relation to that, that is, in part, a function of our
22 analysis of having come back to the issue and considered what the implications of the
23 various authorities are in relation to what is properly within the claim.

24 THE PRESIDENT: It makes a big difference – it makes, probably, a huge difference on quantum.

25 MR. PICKFORD: There is just one potential complicating factor ----

26 THE PRESIDENT: As I understand your schedule 1, is it only limited to that? Is that how those
27 figures have been calculated?

28 MR. PICKFORD: In my schedule 1 the damages calculations exclude all transactions with
29 customers who are not based in the UK or EEA.

30 THE PRESIDENT: But these subsidiaries are all in the EEA?

31 MR. PICKFORD: Yes.

32 THE PRESIDENT: I thought that calculation was based on the total MIF paid by all the
33 subsidiaries?

34 MR. PICKFORD: That is not ----

1 THE PRESIDENT: The EEA subsidiaries in these countries that you have identified, namely,
2 Ireland, Greece, Norway, Belgium, Denmark, Finland and Sweden.

3 MR. PICKFORD: My understanding is that that is the EEA line, but I would need to clarify.
4 Paragraph 1 deals with the data that covers Dixons Retail stores in the United Kingdom,
5 other entities in the Dixons Group were not included in the damages analysis at this point.
6 So they are not included in the figures.

7 THE PRESIDENT: I see, so that is just the UK – so is that just the first claimant? You may say
8 the interest on that is claimed by the second claimant?

9 MR. PICKFORD: Yes.

10 THE PRESIDENT: In that case there is a large part of the damages you are claiming that are not
11 included, contrary to para. 141?

12 MR. PICKFORD: It was the best estimate based on the information that was available at the
13 time.

14 THE PRESIDENT: Right, where do we go next?

15 MR. PICKFORD: Just returning to 115, what I have explained there was in the light of the
16 *Gerber* case what we see as the primary basis on which we would be entitled to claim in
17 respect of the foreign law subsidiaries. It is fair to say that when the claim was drafted, I
18 am not sure our attention had been turned as clearly to that issue, and so for that reason
19 there is a question about whether, in relation to the foreign subsidiaries, one could claim for
20 the foreign subsidiaries insofar as they are not able to do so.

21 THE PRESIDENT: I think you need to amend your pleading - and I think you have frankly
22 acknowledged when it was drafted that was not what was in your mind – to make clear that
23 Dixons Retail Limited is claiming for the loss of interest it would have earned on funds
24 remitted, which is I think what you are saying the claim is, and it is not claiming for those
25 funds and the people who actually paid the higher MIFs are not parties to this claim, other
26 than the English one.

27 MR. PICKFORD: Yes.

28 THE PRESIDENT: That is, as I understand, the way you put the claim now?

29 MR. PICKFORD: That is correct. We then have a section on applicable law which I think, for
30 current purposes, I do not need ----

31 THE PRESIDENT: That will be important also, obviously, to the basis of service out on the third
32 defendant as well, which you do not need permission for, which they are able to seek to set
33 aside.

34 MR. PICKFORD: Yes.

1 THE PRESIDENT: So I think it will need amendment.

2 MR. PICKFORD: Yes.

3 THE PRESIDENT: Then you come to applicable law, which is somewhat complicated, as you go
4 into detail explaining. I do not think we need, perhaps, to spend time on that.

5 MR. PICKFORD: Sorry, I misheard?

6 THE PRESIDENT: I said it is somewhat complicated, as you carefully explain, and I know you
7 would say it was governed by English law. Yes.

8 MR. PICKFORD: We then have a section on jurisdiction, which I propose to come back to at the
9 end. There is then causation and loss in section H.

10 THE PRESIDENT: Again, "Dixons" you mean the first claimant, and the other subsidiaries who
11 paid?

12 MR. PICKFORD: That is correct. There is an issue that runs throughout in terms of that, that is
13 the way that it has been defined, but I quite appreciate it would be clearer to separate out.
14 Sir, that, for present purposes, takes us through the claim.

15 THE PRESIDENT: I did not quite follow the section on limitation, starting at 144, your reference
16 to the Damages Directive, which leads up to 153: "to the extent that Dixons' claims would
17 otherwise be time-barred", but a s.47A claim, do you not have two years from the
18 conclusion of the European appeal proceedings?

19 MR. PICKFORD: Yes, this is anticipating that there may be a possible argument by the
20 defendants that, notwithstanding the domestic rules, that somehow we need to apply foreign
21 law limitation in relation to aspects of the claims, which would somehow cut down the
22 scope of what was permissible. In that context we would get drawn into an argument about
23 whether those foreign law limitation rules were necessarily compliant with Community law.
24 We say, and we assert, our case is that the limitation period is the s.47A limitation period,
25 and that is where it ends. To the extent that we are correct about that then none of this, I
26 think it is fair to say, matters. So it is in the alternative and anticipatory.

27 THE PRESIDENT: Yes.

28 MR. PICKFORD: If we could then go on to the question of the basis on which each claimant
29 contends it has suffered loss.

30 THE PRESIDENT: Yes.

31 MR. PICKFORD: The first claimant, as you have seen, is a retailer operating in the UK.

32 THE PRESIDENT: Yes, that is straightforward, is it not?

33 MR. PICKFORD: Yes.

34 THE PRESIDENT: For the second claimant, if you can give it to me again, the claim is?

1 MR. PICKFORD: The second claimant is, obviously, the parent, and as the parent it is the
2 ultimate party that suffered the indirect losses sustained by its subsidiaries arising from
3 reduced payment of dividends, and reduced available cash for daily pooling, which will, in
4 turn, have affected the funds available to it and therefore impacted on its commercial
5 borrowing and/or ability to invest.

6 THE PRESIDENT: I thought you were not pursuing that claim. I thought you said you are not
7 pursuing a claim for the indirect loss of funds but you are claiming only the interest on that
8 fund?

9 MR. PICKFORD: Yes, if you are deprived of holding money, it is the time value of the money,
10 so it is the interest part, but that is the route by which one gets to the interest.

11 THE PRESIDENT: Yes, I see. Have I understood this, you say the subsidiaries could not make
12 that claim to the extent they did not hold the money?

13 MR. PICKFORD: That is correct.

14 THE PRESIDENT: So they did not lose any interest?

15 MR. PICKFORD: That is correct. There is a factual issue which will need to be considered at
16 trial, which is the extent to which they held some of the monies and could have claimed
17 interest, and the extent to which it was passed over. Our understanding is that ----

18 THE PRESIDENT: That will have to be gone into in detail.

19 MR. PICKFORD: Indeed. That is, in essence, the basis on which the second defendant claims its
20 losses. In relation to that ----

21 THE PRESIDENT: So it is a *Sempra Metals* claim?

22 MR. PICKFORD: It is a *Sempra Metals* claim, yes. Would it be of assistance, Sir, in relation to
23 that if I then addressed you on the *Gerber* case and how that is consistent with this?

24 THE PRESIDENT: No, because I think, having clarified or maybe amended the way the claim is
25 put, and on the assumption that it will be amended, I now see that it is then not caught by
26 the principle. As you will have gathered from reading that case, I had understood the
27 pleading, as perhaps it may have been originally intended, that you were, on the basis that
28 the dividends were reduced, claiming the amount by which the dividends were reduced,
29 which was the higher MIF, or higher MSC paid by the subsidiaries, which it seems to me
30 would have run into the *Gerber* problem, because the subsidiaries could claim themselves.
31 I think you have dealt with that, but, as I say, I think the pleading will need to be amended.
32 That short-cuts that point. I do not think you need say any more about that.

1 MR. PICKFORD: I am very grateful. The next issue in that case is the period in respect of which
2 damages may be claimed. It may just be helpful for us all to begin that by going to the
3 authorities bundle 2, tab 17, which sets out s.47A. It says:

4 “(1) This section applies to -

5 (a) any claim for damages ...

6 which a person who has suffered loss or damage as a result of the investment of
7 a relevant prohibition may make in civil proceedings brought in any part of the
8 United Kingdom.”

9 Then ss.(6) deals with the decisions that may be relied upon for the purposes of the
10 proceedings:

11 “(d) a decision of the European Commission that the prohibition in
12 Article 101(1) or Article 102 of the Treaty has been infringed.”

13 (9) In determining a claim to which this section applies the Tribunal is bound
14 by any decision mentioned in subsection (6) which establishes that the
15 prohibition in question has been infringed.”

16 So those are, for present purposes, the key parts of s.47A.

17 The effect of it is, therefore, to enable a person who has suffered a loss as a result of an
18 infringement to make claims for damages relying upon the decision establishing that the
19 prohibition in question has been infringed.

20 We say we are entitled to recover damages representing what we have defined as the
21 ‘overcharges’.

22 THE PRESIDENT: You have no problem, as far as I can see, on that basis for present purposes,
23 given that this is only a permission application, in showing a good arguable case on the
24 period up to the period covered by the Decision, namely December 2007. That seems to me
25 very clear.

26 MR. PICKFORD: In the light of that, could we then turn to the next relevant authority, but just as
27 a precursor just before going there, there are a number of cases prior to the *Enron* cases
28 where the Tribunal has recognised that one can claim for losses arising after the
29 infringement as found in the decision, and from those cases there are suggestions that that is
30 because the infringement is continuing and/or the effects continue thereafter. That is the
31 first instance decision in *Enron*, which was obviously overturned on a related but not
32 actually that precise issue, and also *Healthcare at Home v Genzyme* [2006] CAT 29.

33 THE PRESIDENT: I have not looked at those recently. On which basis was it? It is one thing to
34 say, “The infringement came to an end, but we continued to suffer losses”, and it is another

1 thing to say, “We suffered losses because the infringement continued”. Which of those do
2 the authorities deal with or is it not clear?

3 MR. PICKFORD: Arguably, it is not entirely clear. What I wanted to say in relation to them is,
4 we accept that those authorities pre-date the Court of Appeal’s decision in *Enron*, and they
5 pre-date the decision in *Newson*, with which, Sir, you will obviously be familiar.

6 THE PRESIDENT: Yes, and you cite that helpfully in your skeleton and that seems to be the
7 main authority.

8 MR. PICKFORD: Indeed. I simply wanted to draw to your attention that there are some
9 arguably relevant authorities, but given that they pre-date an important recent authority I do
10 not want to labour them because I think it is preferable simply to turn to *Newson*.

11 THE PRESIDENT: I think so.

12 MR. PICKFORD: In relation to *Newson*, that can be found at tab 13 of volume 2 of the
13 authorities bundle. The key passage in the judgment of Lady Justice Arden begins at
14 para.20 where her Ladyship says:

15 “In my judgment, the question whether a claimant can bring a conspiracy claim
16 under section 47A is one of statutory interpretation and it turns on the meaning
17 of the words ‘any claim for damages’ in section 47A(1). The starting point is
18 that these words contain no restriction on the type of cause of action on which a
19 claimant may rely. However, while those words of themselves are cause of
20 action neutral, they have to be interpreted in the context of section 47A read as
21 a whole.

22 Of particular importance are the decisions of this court in *Enron 1* and *Enron 2*.
23 In *Enron 1*, this court, having examined the structure of section 47A, concluded
24 (on a purposive interpretation) that a section 47A action had to be based on
25 express infringement findings in the Commission’s decision. The CAT could
26 not draw inferences or make further findings of infringement. Its function was
27 limited to determining quantum and causation. Thus Patten LJ held:

28 ‘It is not open to a claimant such as ECSL to seek to recover damages
29 through the medium of s.47A simply by identifying findings of fact which
30 could arguably amount to such an infringement. No right of action exists
31 unless the regulator has actually decided that such conduct constitutes an
32 infringement of the relevant prohibition as defined. The corollary to this
33 is that the Tribunal (whose jurisdiction depends upon the existence of
34 such a decision) must satisfy itself that the regulator has made a relevant

1 and definitive finding of infringement. The purpose of section 47A is to
2 obviate the necessity for a trial of the question of infringement only where
3 the regulator has in fact ruled on that very issue.... The task of the
4 Tribunal [...is] to identify the findings of infringement and award
5 damages for any loss or damage which they have caused.' (paragraphs 31
6 and 60)

7 In *Enron 2*, this court followed *Enron 1* ...”

8 THE PRESIDENT: This is a sort of *Lynn Trust* point, is it not? In that sense:

9 “The purpose of section 47A is to obviate the necessity for a trial of the
10 question of infringement only where the regulator has in fact ruled on that very
11 [point]...”

12 So you cannot have a trial on the question of infringement under s.47A. It is not that you
13 can have it if the regulator has not ruled on it.

14 MR. PICKFORD: Then para.22, the concluding paragraph:

15 “In *Enron 2*, this court followed *Enron 1* and so it is not necessary to cite from
16 it. It follows that whether section 47A extends to other torts or not the
17 ingredients of the cause of action must be ground in the Commission’s
18 infringement findings.”

19 We say those are the applicable principles.

20 THE PRESIDENT: Of course, the issue there was whether one could have a different cause of
21 action.

22 MR. PICKFORD: That is correct, but nonetheless we say that one can infer from them, and one
23 sees explained in them the relevant test to be applied more generally, even though that was
24 obviously the specific context in that case.

25 As, Mr. President, you have identified, there are obviously two ways, and they are distinct
26 ways, in which one can claim after the end of the formal finding of an infringement in the
27 decision, if I can put it that way. Firstly, there are ongoing effects, and we say that there are
28 such ongoing effects in the present case, and that, therefore, the claim in relation to those
29 ongoing effects is grounded in the Commission’s finding that Article 101 TFEU was
30 infringed.

31 THE PRESIDENT: Until when?

32 MR. PICKFORD: Sorry?

33 THE PRESIDENT: Ongoing until when? Suppose the infringement came to an end in December
34 2007. Your claim is for fees paid up until today, I think, or until the issue of proceedings.

1 MR. PICKFORD: Certainly the interest as damages would take us up today. There is a question
2 of fact as to precisely where the dividing line is.

3 THE PRESIDENT: You are not saying, or are you, that, yes, of course the interest runs, but apart
4 from that in other respects the first claimant is not claiming the interest, it remitted to the
5 second claimant.

6 MR. PICKFORD: Just to be clear, it is not claiming interest in so far as it remitted the money to
7 the second claimant. I was explaining the basis on which the second claimant had a claim.
8 It may be that there is some element of the interest that still remains.

9 THE PRESIDENT: Yes, you have a continuing claim for interest on earlier funds. On that basis,
10 one does not need to look at any MIF after December 2007.

11 MR. PICKFORD: That is not the extent. To be very clear, that is not the extent of the continuing
12 nature of the claim. We also claim for the effects of the EEA MIF as, we say, establishing a
13 floor for the UK MIF, effectively a focal point as far as acquirers were concerned that they
14 could all include MSCs at a certain level in the knowledge that they had all done it together
15 through this multi-lateral arrangement based on the MIF that was in place.

16 THE PRESIDENT: Until when? The EEA MIF was changed in, they say, June 2008, and from
17 October 2008 it was done in a different way.

18 MR. PICKFORD: Yes. The bulk of our claim is, in fact, in relation to the knock-on consequence
19 of there being a fall-back on the level of the UK MIF. So there is a difficult and detailed
20 factual issue which will need to be considered on the claim in relation to the question of
21 causation. We quite accept that there may come a period when the court may conclude that,
22 as a matter of causation, the original infringement ceases to have effects, but we cannot
23 decide precisely when that would be at this current stage, because it depends on a complete
24 factual analysis, it depends on disclosure and ----

25 THE PRESIDENT: Where do I find that in your pleading of loss?

26 MR. PICKFORD: Starting with 91.1.

27 THE PRESIDENT: That is the MIF set after the period of the decision. You are talking about the
28 effect of the EEA MIF up to December 2007.

29 MR. PICKFORD: No, sorry, Sir. I understood this was common ground, but up to December
30 1997 there is no issue about what we can claim. The point is after 1997, how is it that we
31 are entitled to claim then?

32 THE PRESIDENT: 2007.

33 MR. PICKFORD: 2007, I beg your pardon.

1 THE PRESIDENT: You are saying one way is that the UK MIF was still set by reference to the
2 level of the EEA MIF before 2007 - is that right?

3 MR. PICKFORD: We do not at this stage know the precise details of exactly how the UK MIF
4 was set factually. That is obviously something that we will have to get to from disclosure.
5 Our essential argument as a matter of economics and based on the Commission's decision,
6 is that the UK MIF will have been influenced by the EEA MIF because it provides a floor,
7 effectively.

8 THE PRESIDENT: The infringing EEA MIF is the EEA MIF up to December 2007, and you are
9 saying that - is this right - continued to provide a floor for the UK MIF after December
10 2007?

11 MR. PICKFORD: That is as far as we can see, pending further disclosure, yes. As I explained,
12 there are two ways in which the point can be put. The first way I am putting it, which is our
13 primary basis, is the effects point.

14 THE PRESIDENT: That is your primary basis.

15 MR. PICKFORD: Assuming that the infringement - and to be very clear, this is the assumption -
16 that the infringement came to an end in December 2007, we say even if that is correct - let
17 me put it this way, I should be more precise, assuming that the decision on which we can
18 rely, the infringement on which we can rely in this claim, comes to an end in 2007, we say
19 nonetheless, that will have had continuing effects in relation to the UK MIF and, most
20 importantly, UK MSCs, because those MSCs will have been set at some point, in the light
21 of the understanding of MasterCard acquirers that they can set MSCs as long as they reflect
22 the MIF is going to be common to all of them, and will naturally, therefore, be able to be
23 passed on to merchants. There will need to be a factual investigation as to how far those
24 effects continue. We cannot say precisely at this time.

25 That is the first basis. The second basis is that we do say that, notwithstanding that the
26 Commission was not in a position to make findings concerning MasterCard's conduct
27 subsequent to the date of the decision for obvious reason, because it did not have foresight,
28 we do say that the infringement as found by the Commission did not come to an end on that
29 date. We say that the same conduct in relation to there having been a decision of
30 association undertakings which was then left in place continued after the date of the
31 Commission's decision.

32 THE PRESIDENT: You accept, as I understand it, that in July 2009 quite different fee
33 arrangements were put in place?

34 MR. PICKFORD: That is correct.

1 THE PRESIDENT: They may infringe. One, there may or may not be a decision of an
2 association undertakings, that has not been decided. Two, they may or may not satisfy
3 101(3), as the Commission, itself, said. So there has been no decision that they infringed.

4 MR. PICKFORD: That is correct, and, therefore, the alternative basis, I quite accept, does not
5 take us through the entire period of the claim. That much must be clear. What we do not
6 accept is that the infringement, as found, necessarily comes to an end on the very day of the
7 Commission's decision, if, in fact, there is no material change. Essentially, if nothing
8 happens thereafter, because there was a decision - let us just assume for the sake of
9 argument - that was taken in 2006, and that the crucial decision of the association of
10 undertakings which established the MIF, and then nothing, therefore, happens after the end
11 of the decision in December 2007, we say that that is the same infringement.

12 THE PRESIDENT: I can see that if they are ordered to do something but they do not do it, you
13 will say that that has been decided.

14 MR. PICKFORD: Yes.

15 THE PRESIDENT: All I have to decide is whether, as it were, there is a good arguable case or a
16 serious issue to be tried in this respect, even though it is a jurisdictional question. I can see
17 that that might apply then up until July 2009, which you say is a serious question of what
18 they did, first of all, between December 2007 and June 2008. It is not clear that they did
19 anything, and you basically rely on the Commission press release saying it is only being
20 repealed from late June 2008, so that takes you beyond the decision for a start.

21 Then you say that actually it was not put down to zero. I do not at the moment see how it
22 can apply beyond July 2009 when you have got a very different arrangement, and the
23 Commission itself says whether or not that satisfies 101.3 is something we have not
24 decided.

25 MR. PICKFORD: We are not saying it does, Sir. As I explained, we have two bases on which
26 we continue to claim the losses. The one I advanced first which will obviously need to be
27 subject to a factual analysis, but I suspect may be the most far reaching is the simple effects
28 point.

29 THE PRESIDENT: Then you do not need to rely on anything, which is not the way it is pleaded,
30 in relation to what happened to the MIF after July 2009, because you are not basing your
31 claim on that?

32 MR. PICKFORD: That will be relevant to the question of causation. We accept that, in so far as
33 there are facts that are affecting matters after 2009, we will need to consider those.

34 THE PRESIDENT: Yes, but you are not relying on the 2009 MIF as being an infringement?

1 MR. PICKFORD: Well, the way it is ----

2 THE PRESIDENT: In this action. You can in the High Court.

3 MR. PICKFORD: It depends, Sir, what we need to rely on in order to be able to get us as far as
4 we can in relation to our damages. The best way of putting it is probably this: if one starts
5 with an analysis of the infringement and how long it continues for, if that goes on, let us say
6 for the sake of argument, until July 2009 and it is then determined, that is the end of the
7 original infringement, as found. Up to that point, we are simply within the rubric of the
8 infringement, itself. Then we have to look at the infringement at that point and say, what
9 were the continuing effects thereafter of the infringement by that point in time. It may be
10 that focusing on that point in time for the end of the infringement takes you further out in
11 terms of continuing effects than if you had stopped in December 2007 and looked at the
12 effects thereafter. Until we get drawn into the factual analysis we are not going to be able
13 to say precisely how it all works out.

14 THE PRESIDENT: What you are claiming is that MasterCard is continuing to infringe. That is
15 your claim. That is what is pleaded. I do not know why it matters to you so much, because
16 the reason you have come here clearly is that you want to claim back to 1992 and you could
17 not do that in the High Court because of limitation. If we are looking at what happened
18 since July 2009, presumably you can claim that in the High Court because you issued your
19 claim in June 2014, so you are well within time.

20 MR. PICKFORD: Yes.

21 THE PRESIDENT: You are at the moment seeking to claim here, while we have this straitjacket
22 of s.47A, continuing infringement, continuing, I think, up until today.

23 MR. PICKFORD: That is essentially a formality, Sir. We cannot say precisely where we should
24 draw the line, because, as I said, it is a matter of fact and would need to be decided from
25 disclosure, but it is ----

26 THE PRESIDENT: No, sorry, if ----

27 MR. PICKFORD: Sorry, the facts.

28 THE PRESIDENT: But that is not an infringement. You can say, "We claim damages up to
29 today", but the plea which you are seeking permission to serve is for a continuing
30 infringement, and looking at para.100.1.

31 MR. PICKFORD: That is true, Sir, and it is conceivable that that arises out of a possibly
32 misplaced desire to attempt to ensure consistency between the Tribunal claim and the High
33 Court claim that was brought prior to it. Obviously the CAT claim was derived from the

1 High Court claim. We would accept that there is very likely to become a point before now
2 when the infringement as found stopped.

3 THE PRESIDENT: I do not at the moment see any basis for saying that the infringement
4 continued beyond July 2009, even arguably. I am not saying it did not continue. It might
5 have continued, but there is no decision ----

6 MR. PICKFORD: Yes, that we can rely upon ----

7 THE PRESIDENT: -- that there was an infringement beyond 2009, and therefore not a basis upon
8 which you can claim here.

9 MR. PICKFORD: Sir, may I just take instructions for one moment?

10 THE PRESIDENT: Yes.

11 MR. PICKFORD: (After a pause) Sir, our position obviously is that a material change in the
12 arrangements sufficient to take them outside the scope of the original decision would mean
13 that we could no longer rely on the infringement as found. I think we would accept that it is
14 likely that the changes that you, Sir, refer to would constitute such material change, but until
15 we have had disclosure and a full understanding of exactly what MasterCard did. Our
16 preference would be not to formally concede that point, albeit we can well see that that may
17 well be the backstop date so far as the decision on which we can rely is concerned. As, Sir,
18 you rightly point out, ultimately this debate is somewhat academic because we have the
19 High Court claim in any event.

20 THE PRESIDENT: Yes. You have to satisfy me under the merits test that there is a real question
21 as to whether, notwithstanding what the Commission said, you are relying on the
22 Commission Decision, you are very familiar with their Decision, that the new fees in 2009
23 are covered by their Decision – not whether it infringes, because that is something you can
24 allege ----

25 MR. PICKFORD: Indeed.

26 THE PRESIDENT: -- but that, as you pointed out in the citation from Lady Justice Arden, is
27 something we have no jurisdiction to decide under this rather circumscribed position which
28 we currently operate in.

29 MR. PICKFORD: I apprehend that this is the direction of travel in relation to this, if, in order to
30 satisfy the court and the Tribunal that we have a sufficiently pleadable case to serve out, we
31 need to curtail and amend that part of the pleading so it makes it clear it does not go beyond
32 July 2009, we would be content to do that on that basis.

33 THE PRESIDENT: Yes, other than your interest claim?

1 MR. PICKFORD: Yes, to be clear, that is simply saying that we do not rely upon the
2 infringement found by the Commission being an infringement itself beyond that period,
3 beyond that date in July 2009; that is not to say we cannot claim the continuing effects of
4 that infringement thereafter.

5 THE PRESIDENT: Yes, thank you.

6 MR. PICKFORD: Just for avoidance of doubt, as it were, but I do not think this is actually
7 relevant to the particular point you just canvassed, that potential concession in relation to
8 the extent of this claim is not one that there was not a continuing infringement, it is simply
9 an issue about what was found by the Commission.

10 THE PRESIDENT: Yes, I fully understand that, yes. You are certainly free to make the
11 allegation but not under s.47A. Right, where do we go next?

12 MR. PICKFORD: We then go to the principles to be applied for service out of the jurisdiction.

13 THE PRESIDENT: Those are set out in your skeleton and are well established.

14 MR. PICKFORD: There is one minor qualification to what is set out in our skeleton on the issue
15 of good arguable case. I can take you to the passage from **Briggs**, if it would be of
16 assistance. We have noted that the **White Book** refers to effectively a gloss on the 'good
17 arguable case' point, which is that you have to have much the better of the case. The
18 commentary offered by **Briggs** in relation to that is that that is an inappropriate gloss. It is
19 not what *Seaconsar* says, which is the leading authority which actually deals with the
20 relevant test, it is a gloss that comes from an earlier case prior to *Seaconsar*. Would it help
21 if I took you to it?

22 THE PRESIDENT: Yes, *Seaconsar* - there is now the Privy Council case, is there not, where
23 Lord Collins sets it out, which is post *Seaconsar*. I have not looked at how he expressed it
24 because I did not know that was an issue.

25 MR. PICKFORD: I do not think it is actually going to be a determinative issue.

26 THE PRESIDENT: Do you want me to look at something?

27 MR. PICKFORD: Yes, if we could go to the new authorities, which should be no.21.

28 THE PRESIDENT: This is the *Canada Stolzenberg* case.

29 MR. PICKFORD: That is right.

30 THE PRESIDENT: The standard of proof, is it p.525?

31 MR. PICKFORD: That is correct, Sir. You may find it convenient to read the first paragraph ----

32 THE PRESIDENT: Let me just read it quickly. (After a pause) Yes, this is 2009. I do not know
33 how important this is ----

34 MR. PICKFORD: Nothing turns on it in relation to my submissions, so ----

1 THE PRESIDENT: This is before the *Kyrgyz Mobil* case where Lord Collins set out the
2 principles which have since been approved, and I do not know how he put it, but that is
3 obviously not considered in this passage, because that ante-dates that which is relied on in
4 the **White Book**, because you said there is a gloss on what is said in the **White Book**, but
5 the **White Book** bases itself on Lord Collins' Judgment in the *Kyrgyz Mobil* case.

6 MR. PICKFORD: Sir, I am happy, for present purposes, to leave it at the commentary in the
7 **White Book**, and draw to your attention that there is some minor dissent from that in one
8 quarter.

9 THE PRESIDENT: Yes.

10 MR. PICKFORD: I take it, Sir, in the light of your comments that I do not need to go through
11 that test in any detail. As you say it is well understood.
12 Similarly, in relation to the *forum conveniens* test in the *Spilliada* do I need to address you
13 on that in general terms?

14 THE PRESIDENT: No.

15 MR. PICKFORD: In which case we can turn to the application itself, and the application of those
16 tests to the present facts.

17 THE PRESIDENT: Yes.

18 MR. PICKFORD: Dealing first, essentially for completeness, with the third defendant. The third
19 defendant is domiciled in Belgium, and we rely upon Article 7(3) of the Regulation 1215
20 2012, which replaced the Brussels Regulation.

21 THE PRESIDENT: Yes, you plead the other one, do you not?

22 MR. PICKFORD: We plead the other one. That arises because we pleaded the claim; there was
23 then some time before the claim was ultimately approved and filed ----

24 THE PRESIDENT: Another amendment, I think.

25 MR. PICKFORD: It is another point that we can tidy up, Sir. In any event, there is obviously no
26 difference between the provisions in terms of substance.

27 THE PRESIDENT: As regards the first claimant there is obviously no problem.

28 MR. PICKFORD: Yes.

29 THE PRESIDENT: As regards the second claimant, that this *Sempra Metals* claim falls within
30 Article 7(2) – is that right?

31 MR. PICKFORD: That is correct.

32 THE PRESIDENT: And is different therefore from what would have been a claim for just
33 dividends.

34 MR. PICKFORD: That is correct.

1 THE PRESIDENT: That is not something that I have to decide because you do not need
2 permission to serve out, it is something that either the third defendant seeks to challenge and
3 argue or not.

4 MR. PICKFORD: I am obviously content with that, Sir. I raised it in part just to explain,
5 obviously for completeness, how the claims fitted together, and the different bases on which
6 we rely. Also, because, Sir, you raised the case of *Dumez* but that was in the next context in
7 relation to the bit we are about to come on to.

8 THE PRESIDENT: No, that is because I had understood the second claimant's case as being a
9 claim for loss of dividends, which seemed to me arguably precluded by *Dumez*, but you do
10 not need permission for that, and so you just can serve the third defendant.

11 MR. PICKFORD: In which case, Sir, shall I move on to the first and second defendants?

12 THE PRESIDENT: Yes.

13 MR. PICKFORD: They are obviously domiciled outside of the EEA and we therefore need the
14 Tribunal's permission to serve out. In relation to the three part test that we need to satisfy,
15 subject to the points that I have canvassed with the Tribunal, we say our claim satisfies the
16 merits test in terms of having reasonable prospects of success, in particular it is obviously a
17 follow-on claim, so subject to some elucidation of the precise parameters of it, it is plainly a
18 good case in that sense.

19 We also say that we have a good arguable case that the claim falls within the jurisdictional
20 gateways provided for by para. 3.13 of Practice Direction 6B in that the first and second
21 defendants are necessary or proper parties for the claim, and/or under para. 3.19(a) that the
22 claim is one for tortious breach of statutory duty where damage was sustained within the
23 jurisdiction. Finally, we say that the claim is a proper one for service out of the jurisdiction
24 applying the principles of *forum conveniens*. So, could I take you through those?

25 THE PRESIDENT: I have read your skeleton on that. Your skeleton is also not written - apart
26 from the fact that it also refers to the replaced Brussels Regulation, although it is a skeleton
27 dated, I think, yesterday - on the basis that this is a claim for loss of interest on the money. I
28 am looking at para.45, "the damage sustained arises from the effect of the EEA MIF on its
29 subsidiaries due to reduced payments which are felt", but you have made clear to me that
30 what you are actually claiming is the interest that the second claimant would have earned on
31 that money, and not the reduced amount of money itself. Therefore, that is an effect in the
32 UK. That is right, is it not?

33 MR. PICKFORD: Yes. In our skeleton we did explain, obviously not sufficiently clearly, but
34 what I have articulated to you today is indeed what we were trying to explain in our

1 skeleton where we said that it was the knock-on consequences for the second claimant's
2 financing requirements, but obviously I have elucidated that and expanded on it somewhat
3 today to explain what we really meant by that.

4 THE PRESIDENT: Yes. That, I think, covers it, does it not?

5 MR. PICKFORD: Unless there are further points, Sir, that you would like me to address you on,
6 or any concerns in relation to those issues. Obviously, I am very happy to take you to our
7 analysis of how we satisfied the test, but you have the essence of it in our skeleton. I
8 obviously have oral submissions that expand upon it. If there are concerns I would
9 obviously like to address you on them, but if there are not ----

10 THE PRESIDENT: No, I think not in the way you have now put your case.

11 I will deliver a reserved judgment, not only because this is the first time that this Tribunal
12 has had to address an application for permission, but also because there are some important
13 issues in the actual basis on which both the loss of the second claimant, as now limited, and
14 the s.47A point needs to be dealt with.

15 The only thing I would say, Mr. Pickford, is you are under an obligation on a without notice
16 application to draw to the court's attention the arguments that the defendants would be
17 likely to make if they were present. That was not something that I think you really did in
18 the skeleton on these particular points. I think that is something to bear in mind for the
19 future.

20 MR. PICKFORD: Sir, in relation to what arguments ----

21 THE PRESIDENT: In relation to the subsidiary point that the second claimant cannot claim for
22 actual reduction in the dividends it has received or the cash it has received, and in relation to
23 the jurisdiction point, on which you have now said, if necessary, you would be content to
24 limit it, but they would be likely to say, "This is a s.47A claim, it cannot possibly go beyond
25 the period alleged and cover any further infringement or continuing infringement". What
26 one normally has is a section dealing with the points the defendant might take and an
27 explanation perhaps as to why you think they are unfounded, but at least to draw one's
28 attention to the problems. It is not as serious as in a case with a freezing order, but it does
29 apply, that obligation in relation to an application of this kind as well.

30 MR. PICKFORD: Sir, can I just very briefly address you on those points? In relation to the latter
31 of them, we certainly did endeavour to address that. I will have to find the precise
32 reference, but we did say that we anticipated that there might be an argument from the
33 defendants about the extent to which we could continue to claim. For instance, in footnote
34 9, we say:

