IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1241/5/7/15(T)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13 May 2016

Before:

THE HON. MR. JUSTICE BARLING

Sitting as a Tribunal in England and Wales

BETWEEN:

SAINSBURY'S SUPERMARKETS LIMITED

Claimant

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Defendants

(1) VISA INCORPORATED
(2) VISA INTERNATIONAL SERVICE ASSOCIATION
(3) VISA EUROPE LIMITED
(4) VISA EUROPE SERVICES INCORPORATED
(5) VISA UK LIMITED

Applicants

Transcribed by Beverley F. Nunnery & Co.
(a trading name of Opus 2 International Limited)
Official Court Reporters and Audio Transcribers
25 Southampton Buildings, London WC2A 1AL
Tel: 020 7831 5627 Fax: 020 7831 7737
(*info@beverleynunnery.com*)

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H E A R I N G

(Applications for Documents)

APPEARANCES

Miss Sarah Love (instructed by MdR) appeared for the Claimant.

Miss Dinah Rose QC and Mr. Jason Pobjoy (instructed by Milbank, Tweed, Hadley & McCloy LLP) appeared for Visa International and Visa Inc.

Mr. Daniel Jowell QC and Miss Anneli Howard (instructed by Linklaters LLP) appeared for Visa Europe Ltd, Visa UK Ltd and Visa Europe Services Inc.

The First to Third Defendants did not attend and were not represented.

THE CHAIRMAN: Good morning, Miss Rose, are you kicking off?

MISS ROSE: I am kicking off. I appear today with Mr. Pobjoy, and I am for Visa Inc and Visa International, who are the first and second applicants in this application. Then Mr. Jowell QC and Miss Howard are for Visa Europe and Visa UK, and Miss Love is for Sainsbury's. MasterCard do not appear. You will have seen a short skeleton argument from them, and also a letter that they sent last night. I do not know if that was also copied.

THE CHAIRMAN: Yes, I have got that. That is about the exhibits.

MISS ROSE: That is about the exhibits, yes. Can I, first of all, take you to our application, which is at tab 1 of the hearing bundle. You can see from para.1 that we are applying under para.9.66 of the CAT Guide to Proceedings, and what we are seeking are copies of the non-confidential versions of the closing submissions, factual witness statements and the expert reports referred to or quoted in open court in the Sainsbury's v MasterCard case.

Just to deal immediately with the issue of the exhibits, you will see that we are not in this application seeking exhibits.

THE CHAIRMAN: That is what I thought.

MISS ROSE: That is correct. So it is fair, and I think this is what sparked the concern of MasterCard, that there was a paragraph in Mr. Jowell's skeleton argument which indicated that they might seek exhibits. I think that was probably triggered by the position of Sainsbury's saying, "On no account, shalt thou have any exhibits". I think that probably set that hare running. The position is this: at the moment we are only applying for the factual witness statements, expert reports and closing submissions.

THE CHAIRMAN: I think there are between 50 and 60 ring binders, none of which are marked up for confidentiality.

MISS ROSE: There are obviously issues of proportionality, as MasterCard rightly point out.

Our position is this: once we have looked at those materials, it may be that there are some underlying documents that we think we really need to see.

THE CHAIRMAN: Leaving on one side the question of whether it is party disclosure or non-party disclosure, there is no reason, is there, why that application would not be made to the Commercial Court. That is a matter for the future.

MISS ROSE: It is not a matter we need to deal with today. I just want to make it clear that we reserve our position in relation to the exhibits, but we are not seeking an order.

THE CHAIRMAN: Could I just put out a provisional thought on that? If, when you read everything, you or Mr. Jowell do form the view that you want to see some of the documents

that are exhibited, it is my current view that that application ought to be made by way of a specific disclosure application in the proceedings. That is a provisional thought.

MISS ROSE: We will bear that in mind, but I do not comment on it.

THE CHAIRMAN: No, of course.

MISS ROSE: Today we are only looking at statements.

THE CHAIRMAN: That narrows everything down quite dramatically.

MISS ROSE: It narrows it very dramatically, Sir, because the submission that I intend to make is that it is very clear from the case law that where witness statements have been referred to in open court, and witnesses have been cross-examined on them, and where the witness statements have been ordered to stand as evidence-in-chief, non-parties, members of the public, are entitled to see those witness statements. In the olden days, before people had witness statements----

THE CHAIRMAN: It was all read out.

MISS ROSE: Not even read out. Those witnesses would have been examined in chief, and anybody sitting in court would have been entitled to listen to what they said and write it down. Therefore, what the courts have done is to grapple with a situation in which, for reasons of efficiency and speed, instead of having full examination-in-chief, evidence-in-chief has been given by way of witness statement. We submit it cannot be the case that a member of the public, or a non-party, should be prejudiced by that change in practice which was done purely in the interests of efficiency. The intention was not to make matters secret which previously would have been dealt with in open court, and which are fundamental to the open justice principle. So that is the witness statements.

We submit that the case law establishes that exactly the same is true in terms of counsel's written submissions, because similarly until perhaps 15, 20 years ago there were not skeleton arguments, and people used to turn up in court and make oral openings and oral closing submissions. Gradually, over the past quarter century or so the practice of ever increasingly elaborate written open and closing submissions has come to complement and, in many places, partially supersede all openings and closings. Again, exactly the same issue arises that matters that are done for the efficient management of proceedings cannot be permitted to erode or subvert the principle of open justice which is that everybody has the right to hear what material is put before the judge, what arguments are being put before the judge and, therefore, better to understand the court's ultimate decision.

THE CHAIRMAN: And does it matter from your point of view, there are some nuances in some of the cases about what the reason is, why people want it, it seems legitimate journalistic reasons are fine.

MISS ROSE: Yes.

THE CHAIRMAN: And there are one or two *dicta* here and there that suggest that if you want them just to see whether you want to bring up the proceedings or for use in other proceedings then that is a bit more dubious. But the principle of open justice, the use of it, as I understand your skeleton argument, effectively indicates it does not really matter.

MISS ROSE: That is right and I will show you the case law in a little detail now because that issue has been raised by Sainsbury's, and my submission is that what the case law actually shows is that the question that has been controversial, and over which there have been different views expressed, is not about witness statements or closing submissions, all courts have accepted right from the outset that those go.

What has been a matter of debate is the question of exhibits or documents that are on the court file, and a case that my learned friend, Miss Love, has relied on in her skeleton argument, the *Dian* case, is concerned not with witness statements, or closing submissions but with a party that was seeking access to the whole of the court file. What you can see in the outcomes that they were ordered to be provided with materials that had been read out in court but not with affidavits that had never been read out in court, so that is the key distinction, and that is the context in which that issue of purpose becomes significant. On the other side of it, the *Guardian News and Media* case is a case where a document that had been used in criminal proceedings was being sought by the Guardian and there the fact that it was a journalistic purpose made it particularly important.

But, and this is important, even the older authorities, which I am about to show you, make it clear that witness statements and opening and closing submissions are in a different category, and in particular make it very clear that most people who want to know what is going on in court are going to be people who have a commercial interest because they are involved in related proceedings. The court says specifically, that is not a reason not to provide the materials. Can I just show you----

THE CHAIRMAN: Yes, I think Mr. Justice Moore-Bick, in that case you mentioned, he said open justice is not engaged if you are simply using it for that, but I am not sure that is really the view that has caught on much.

MISS ROSE: No, it is not.

THE CHAIRMAN: Indeed, it would seem a little odd if it did because if a member of the public, from idle curiosity, as it were, wants to know and it seems that would not be a hopeless application, although it might involve some proportionality questions. It is probably the most common reason apart from journalism, when people want things because it affects some proceedings that they have on foot or they have in mind.

MISS ROSE: Sir, that is right, and that is specifically addressed in the cases but, in any event, we submit that what Mr. Justice Moore-Bick (as he was then known) was saying was specifically in the context of an application for access to the whole of the court file, not addressing the question that is before you.

Can I just show you the relevant case law at a relatively rapid canter. First of all, the rule under which we are applying, if you take up the authorities bundle and go to tab 2, p.133, you can see the heading "Public access to correspondence and pleadings", and if you go to para.9.66, that is the application that we are making. You can see that the categories of documents that are specifically referred to there are pleadings, skeleton arguments, witness statements and expert reports that have been referred to or quoted in open court. We are not asking for pleadings, we are asking for skeleton arguments, witness statements and expert reports.

THE CHAIRMAN: You are not asking for the pleadings.

MISS ROSE: No, we are not asking for pleadings, we are just asking for the closing submissions, the factual witness statements and expert reports. The obligation is to make a non-confidential copy available to a non-party.

THE CHAIRMAN: Just pausing for a moment before we dive into the cases, Miss Rose, to some extent you have been pushing at an open door as it is not in dispute, as I understand it, that you can have these documents. There is a timing question, which I think is related to the fact that perhaps all of the other proceedings are split trials. Then there is a use point, which I have not fully grasped yet. In principle, it seems to be accepted that you should have them, because you are only asking for the non-confidential versions, in any event.

MISS ROSE: Sir, that does not appear to be quite right. I think, so far as the factual witness statements and expert reports related to liability are concerned, it would appear to be Sainsbury's position that they are content for us to have them, but not until the date in June when expert reports are to be exchanged, and I am going to come back to that point.

So far as the quantum documents are concerned, Sainsbury's are prepared to provide them to Mr. Jowell's clients, who are defendants to Sainsbury's claim in the Commercial Court, but at the moment are resisting providing them to us unless they are ordered to provide us

with their quantum documents in the Commercial Court. We say that stance is completely misconceived, and I am going to come back to it.

Can I first deal with the law, and then I am going to come to the actual areas of dispute in this case. I have just taken you to 9.66. I should very briefly flag up Rule 102 of the CAT Rules, which is at tab 1. I think this was raised with the CAT last week. We have had an opportunity to think about it a bit further, and, in fact, it does not seem to us to be entirely on point, because what Rule 102 is about is what used to be called the implied undertaking. Where there has been disclosure of documents in proceedings, the rule is that they may only be used for the purpose of those proceedings until they have been referred to in open court, at which point that restriction on use goes.

The point is that here we are not concerned about documents that have been disclosed at all. The documents that we want are witness statements created by parties and then, as it were, having the status of evidence-in-chief to the Tribunal, and the submissions of counsel. So those, we submit, are not actually categories of documents that fall within 102. They fall properly within 9.66 of the CAT Guide.

THE CHAIRMAN: There is also a slight curiosity as to whether there is a restriction in 102(1), which is what governs, so far as I can see, 102(1) to 102(4), as to whether that restriction applies to the documents. These are not documents, for example, supplied - the documents you want from Sainsbury's were not supplied to Sainsbury's.

MISS ROSE: Exactly, that is the point.

THE CHAIRMAN: They were supplied by Sainsbury's.

MISS ROSE: They are not even documents supplied by Sainsbury's. They are the evidence of Sainsbury's.

THE CHAIRMAN: They were created by Sainsbury's.

MISS ROSE: Yes, they are the evidence of Sainsbury's witnesses and submissions of their counsel.

THE CHAIRMAN: And MasterCard do not object.

MISS ROSE: MasterCard are not objecting.

THE CHAIRMAN: I am not sure whether that restriction is in play.

MISS ROSE: That is also my view. We are, I think, squarely within 9.66. Just to take you to the relevant case law, the first case is at tab 4A of your bundle, which is *GIO Personal Investment Services*. Before we come to the case, can I just summarise for you what we say are the four propositions that we get from this case law. First, the principle of open justice requires----

THE CHAIRMAN: Is this in your skeleton?

MISS ROSE: Not in these terms, so let me just give you these four propositions. First, the principle of open justice requires that the public should be able to scrutinise both the written and oral evidence and argument upon which the court has been invited to arrive at its decision.

Second, the achievement of that purpose requires that a public observer should be afforded access to the same written submissions and witness statements that have been furnished to the judge and referred to in open court.

Third, that the motive of a non-party for seeking access, and in particular where that motive is to inform itself for the purposes of other or related litigation, is not a reason for refusing the application.

Fourth, in order for there to be any restriction on the provision of witness statements and written submissions used in open court, the party seeking the restriction must show that there is some prejudice which would be caused by full disclosure which is sufficient to outweigh the normal considerations of open justice. We say that, typically, this would be the protection of confidential information or the privacy rights of vulnerable witnesses. This would generally be dealt with by redaction or anonymisation.

Those are four propositions.

Can we now come to the case law. The first case is *GIO Personal Investment Services Limited* at 4A. Can I just take you to the headnote, you can see the ratio of the case:

> "A person who is not a party to an action is entitled to inspect, in accordance with [the Rules of the Supreme Court] witness statements ordered to stand as evidence-in-chief, but the entitlement does not extend to documents referred to in such statements."

This is the origin of the controversy which you will see played out in the case law about underlying exhibits.

> "Skeleton arguments or trial bundles which are not required to be filed and which are returned to custody of the parties at the end of a case are not generally available for inspection or copying. However, where any member of the public …"

Note that, any member of the public -

> "… applies for a copy of counsel's written opening or skeleton argument which has been accepted by the judge in lieu of an oral opening, he is *prima facie* entitled to it."

If you then go to the beginning of the judgment at 986, you can see in the first paragraph that FAI General Insurance Company, who were seeking various documents including underlying exhibits, were seeking them because they were involved in similar proceedings. It says:

> "The contracts of reinsurance were made via a chain of brokers … The same chain of placing brokers was involved in placing a number of reinsurance contracts, the subject matter of the trial before Timothy Walker J."

So this was a situation of a commercial party involved in related litigation seeking witness statements, skeleton arguments and exhibits in order to deploy them in other litigation.

THE CHAIRMAN: Yes.

MISS ROSE: If you then go to p.988 you can see that provision of the witness statements was ordered by the first instance judge, that is between letters G & H, so the witness statements were no longer in issue when the case got to the Court of Appeal. What was in issue, as you can see at the bottom of the page was: (i) Documents referred to in the witness statements and (ii) any written opening skeleton argument or skeleton submissions to which reference was made by the judge, and exhibits referred to in the skeleton arguments, so that was what was concerned.

If you go over the page at 989 D, you can see the heading "Documents referred to in the witness statements" and there is a discussion about the application of principles for that, and that need not concern us.

Written openings, skeleton arguments and the documents referred to therein, that is towards the bottom of 991 and there is first a discussion about the status, it records Mr. Leveson (as he then was) his submissions and whether they are technically public documents.

Then if you go to p.994 , you can see it is recognised under A that his case had to be made on the basis of the inherent jurisdiction of the court to govern its own procedures, and in particular to give effect to the principle of open justice.

So the open justice principle is recognised as the underlying rationale for the application in relation to skeleton arguments.

Then there is a summary of all the classic authorities on open justice which I do not intend to detain you with, *Scott v Scott* and so on.

Then, if you go over to p.995 at F the court says: "So far as concerns documents which form part of the evidence or court bundle . . ." so that is talking about exhibits:

> ". . . there has historically been no right, and there is currently no provision, which enables a member of the public present in court to see, examine or copy a document."

So that is the approach taken in this judgment to documents. Then, at H:

> "On the other hand, the argument for such an exercise in respect of the written submissions of counsel, or skeleton arguments which are used as a substitute for oral submissions, seem to be a good deal stronger."

Then there is a discussion of the primary but limited purpose of the open justice rule, and then below A it is said:

> "The confidence of the public in the integrity of the judicial process as well as its ability to judge the performance of judges generally must depend on having an opportunity to understand the issues in individual cases of difficulty."

Then there is a citation from *Harman*. "This is particularly so" says Lord Justice Potter at C: "in a case of great complication where careful preliminary exposition is necessary to enable even the judge to understand the case."

Then at D:

> ". . . the introduction in the Commercial Court, followed by general encouragement, of the practice of requiring skeleton arguments . . . prior to trial was, as the name implies, aimed at apprising the court of the bones or outline of the parties' submissions in relation to the issues."

Then at E:

> "If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or skeleton argument treated as such) which is not read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case has, in fact, taken place in the privacy of his room and not in open court. In such a case I have no doubt that, on application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that they be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge.
>
> In exercising his discretion, Timothy Walker J seems to have regarded the particular interesting purpose of FAI in seeking to obtain copies of counsel's written submissions, namely, to obtain a full understanding of the issues and to

identify the documents going to those issues, and the possible subject for subpoena in parallel litigation, as a reason to refuse access which he might otherwise have been disposed to grant to a differently motivated member of the public. Yet, quite apart from the interests of the press (who are members of the public for this purpose) most persons who attend a trial when they are not parties to it or directly interested in the outcome do so in furtherance of some special interest, whether for purposes of education, critique or research, or by reason of membership of a pressure group, or for some other ulterior but legitimate motive. It does not seem to me the purpose of FAI in this case was in any sense improper."

So that is where the court says it is perfectly legitimate to want the material, so you understand the issues and see what documents might be relevant for other parallel proceedings.

"In my view, the appropriate judicial approach . . . in a complicated case is to regard any member of the public who for legitimate reasons applies for a copy of counsel's written opening or skeleton argument, when it has been accepted by the judge in lieu of an oral opening as prima facie entitled to it."

We say there is nothing in any of the subsequent case law that detracts from that basic proposition. If I can just rapidly take you through it.

The next case is the *Law Debenture Trust* case. This is also dealing with written openings and this is in the context of the case which had settled and where the written openings made serious allegations of fraud, some of which had not been pleaded, so there were interesting discussions about what happens if it is settled, and what happens if the opening goes beyond the pleaded case.

For our purposes, if you go to para. 22, this is another case where the motive was to seek information for use in parallel litigation, similar allegations of fraud. At para.22 you can see a useful summary of the principles derived from GIO, which we would gratefully adopt, save to say, of course, you do not need to worry about inherent jurisdiction because yours comes from the CAT Guide which has the status of a Practice Direction.

THE CHAIRMAN: No one is taking any point on jurisdiction.

MISS ROSE: No, indeed, in the *Guardian News and Media* case the Court of Appeal said that all courts, even statutory tribunals have inherent jurisdiction to do what is necessary for open justice. We say that is a useful summary of the principles. There is then a lengthy citation from *GIO*.

Then if you go para. 29:

"It is thus essential for a court invited to exercise its inherent jurisdiction to grant to a non-party access to written skeleton or outline submissions to investigate what part they are playing or have played in the trial."

i.e. that means the skeleton arguments not the party.

"For example, there can be little doubt, in my judgment, that if a case settles before the hearing commences but after the judge has read the submissions, the jurisdiction should not be exercised. In such a case no observer of a public hearing would have been denied knowledge of submissions made at that hearing by reason of their having been committed to writing.

Where, however, the hearing commences and counsel provides the judge with written submissions which are not read out in court or not fully read out and the hearing ends in a judgment, there can equally be little doubt that the court's discretion ought to be exercised in favour of access. The non-party observer will otherwise have been deprived of the whole or part of that which was submitted to the judge."

Again, this, of course, in the context of a party seeking for the parallel proceedings. Then at para. 34:

". . . it is clear from the authorities that the essential purpose of granting access to such documents is to provide open justice . . ."

It is said at the end of that paragraph:

". . . the public policy of openness requires that the outside observer should be given access to these materials in the course of the hearing before judgment . . . If such an order is appropriate before judgment in an ongoing trial, there is no logical objection to such an order where, as in the present case, the hearing proceeded for several days and then settled."

So whether or not it is during the trial the same principle applies. Then we come to the case on which Miss Love relies, the *Dian* case, at tab 5. If you look at the headnote, you can see that this was not an application limited in the way that ours is. The applicant, non-parties to an action, sought permission to inspect the whole of the court file and to take copies of documents which might be of assistance to any subsequent litigation. So they wanted to trawl through the whole of the court file where the documents had or had not been referred to in open court. That is the essential distinction between the *Dian* case and the ones we have just been looking at. If you look at the holding on the same page, the

applications were allowed in part. CPR 5.4 - that is the provision in the CPR that allows parties to inspect the court file with the permission of the court:

> ". . . did not entitle an applicant to seek the permission to search the whole of the court file to see what it contained and to copy anything it considered to be of interest; that the applicant must identify with reasonable precision the documents in respect of which he sought permission and lay before the court the grounds upon which he sought it; that in the case of documents read by the court as part of the decision-making process, the court ought generally to lean in the favour of allowing access in accordance with the principle of open justice, but it should not be as ready to give permission to search for, inspect or copy affidavits or statements that were not so read and should only do so if there were strong grounds for thinking that it was necessary in the interests of justice."

Although you are right that there is some *dicta* from Mr. Justice Moore-Bick in this judgment where he suggests it has not got much to do with open justice you will see that actually his decision is founded on the principle of open justice, and the orthodox notion that where material has been read in open court it should be provided.

If we then go to the relevant passages, you can see the application that was made at para. 12 being for the whole of the court file.

Then at para. 28 he recognises the importance of open justice and then at para. 29 he considers the authorities we have just been looking at, *GIO* and *Law Debenture Trust*, and he makes the point that:

> ". . . as the use of written rather than oral procedures have become more widespread, the courts have recognised that it is necessary to give the public access to documents that contain material that has been placed before the judge, but not read out in open court . . . The two most obvious categories are statements of witnesses who are called to give evidence at trial and advocates' skeleton arguments. Both were considered in the *GIO* case and the position of skeleton arguments was considered again in the *Law Debenture Trust* case . . . Without access to material of this kind a member of the public attending the hearing could not form any reliable view about the propriety of the decision-making process."

We say that is exactly this case, that is what this case is about. Then he says:

> "In my view, however, this has a limited bearing on the first of the two issues before me."

If you go back to para. 22, you can see what the issues were. The first issue at para. 22 is:

> ". . .whether a person who seeks permission to search the court record … is required to identify with some precision the document or documents he wishes to search for, inspect and copy, or whether he is entitled to ask the court for … the whole of the file to see what it contains."

It is in that context that he says that he does think that this principle has only a limited bearing. He says:

> "It could be argued that the principle of open justice demands that the court records be open to all and sundry as a right in order to enable anyone who wishes to do so to satisfy himself that justice was done . . . But that has never been the law."

Then, at G:

> "The principle of open justice is primarily concerned with monitoring the decision making process, not reviewing the process long after the event."

It is in that context that, at para. 31, this is the passage that is relied on by Miss Love, the action was in 1994, concluded in 1996.

> "Alfa has no interest in the performance of the judicial function in that case . . . It simply seeks permission to use the court file as a source of potentially useful information to assist it in other litigation. That does not in my view engage the principle of open justice."

So what is said not to engage the principle of open justice is a request to search the whole of the court file including materials that were never read out in court. That, we say, has no bearing on this case.

Then, when you come on to the actual decision that Mr. Justice Moore-Bick made, you can see that that distinction is made by him. At para. 56 he says:

> "In the present case, although Alfa is not interested in whether justice was properly administered in the Dian case, I think it does have a legitimate interest in obtaining access to documents on the court record insofar as they contain information that may have a direct bearing on issues that arise in the litigation in the Caribbean. I did not accept the submission that the link is too tenuous . . . Moreover, I think that in the case of documents that were read by the court as part of the decision making process, the court ought generally to lean in the favour of allowing access in accordance with the principle of open justice as currently understood . . ."

He specifically acknowledges and relies on open justice in relation to documents that have been read out. Then at para. 57 he takes a different view in relation to documents that have not been read by the court. This was a case where there had not actually been an open court

hearing, there had only been hearings in chambers and the matter had settled, and one can see that the judge's approach in that context and in the context of a request for the whole file, but it does not in any way detract from the basic principles laid down in *GIO* and the *Law Debenture* case, both of which are cited.

Tab 6 is the well-known *Binyam Mohamed* case, which I do not need to take you to. It is, of course, a classic statement of the overwhelming importance of open justice as a principle. What it reflects is how, in recent years, in cases like *Mohamed* and (*Guardian News and Media*) and also *Al Rawi* in the Supreme Court, senior judiciary have given increasing importance and prominence to the principle of open justice, as the Government has sought to erode it by invoking national security. Indeed, five or ten years ago courts would often have acceded to requests from the parties for hearings to be heard in private which they now would not accede to because of the interests of the public and the press, so there has been a general shift, a cultural shift in favour of open justice, but it does not concern us here because what we are asking for is completely orthodox.

If we then go to tab 7, this is another case relied on by my learned friend, Miss Love. This is the *British Arab Commercial Bank* case. We can see that this was an application, again a party involved in related litigation seeking access to copies of witness statements and exhibits.

If you then go to para. 13 we can see that *GIO* is relied on and the judge finds on that basis that the witness statements must be provided. Then he takes a different approach to exhibits at paras. 18 and 19, which, again, need not detain us.

Then if we go to tab 9, *Nestec*, another case my learned friend relies on.

THE CHAIRMAN: You are skipping *Guardian*?

MISS ROSE: Yes, *Guardian News and Media* again is a classic restatement of----

THE CHAIRMAN: That seems to me to be perhaps the most helpful of all, it is set out in considerable detail.

MISS ROSE: It is. Again, in the context of an application for a document and not for a pleading, the passage goes from para. 69 down to para. 88. The particular passage I would draw your attention to is at para. 85:

> "In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons . . . should not look for a standard

formula . . . The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

Absolutely, but, caveat, that is not talking about witness statements or skeleton arguments, it is talking about underlying documents. So that is actually moving the law in relation to underlying documents forward, but again it is further than I need to go.

THE CHAIRMAN: It is helpful, para. 69, it indicates the scope of the principle to all tribunals exercising the judicial power of the State and so on.

MISS ROSE: Yes, and at para. 70 it applies to all Tribunals. Then tab 9, *Nestec*. This is another case of a party seeking documents for litigation, but in the----

THE CHAIRMAN: Mr. Justice Birss' case, yes.

MISS ROSE: Another non-party.

THE CHAIRMAN: That is really an exhibit case.

MISS ROSE: It is an exhibit case. At para. 3:

"The documents in issue are documents which were exhibits to evidence or were documents which were put to witnesses during the course of cross-examination at the trial . . . DEMB wish to run the same prior use attacks in the EPO. They want the documents in order to bolster and assist them in that attack."

At para. 5 you can see that:

"DEMB has copies of the skeleton arguments and witness statements and experts' reports from the proceedings. Some of them were produced as a result of an order I made today. The reasons for that order were given at the hearing this morning and there is no need to elaborate in this judgment."

Then he comes back to that question of the skeleton arguments and witness statements as opposed to exhibits, and if we turn to para. 27:

"It seems to me that obtaining copies of documents of the kind in issue in this case raise different questions from access to witness statements, experts' reports and skeleton arguments, as Potter LJ explained in the *GIO* case. Third parties are given access to documents like skeletons, witness statements and experts reports because the idea is that the trial is in public and a person could sit in court and hear what is said -- they could write it down and they could quote and reproduce it. The modern

paper-based approach to proceedings should not provide a fetter to that open justice."

We say that is a very good summary of the principle in relation to those documents. "But copies of other documents raise different considerations". That is, as it were, the *GIO* approach to other documents. That is controversial, partly because of (*Guardian News and Media*) and partly because of the following case *NAB*, which is also about underlying documents. In *NAB* there is a finding that *GIO* is no longer good law in the light of subsequent case law.

THE CHAIRMAN: Is that in relation to documents again?

MISS ROSE: Yes, that is in relation to documents, and there is a full discussion of the case law. If you go to para. 28 you can see the citation of GIO on the issue of documents, and at para. 29 he says he does not think they are good law. We may have to have an argument about this at some future date and I just flag it for that reason, but it is not relevant to what we are dealing with today.

THE CHAIRMAN: I hope it is not going to be in this Tribunal.

MISS ROSE: I hope not, no. Sir, we say the law is extremely clear and that these are core documents which would originally have been dealt with orally because of procedural developments they are now submitted to courts in writing, but that cannot be a reason for impeding public access to them. That, we say, is the heart of the fallacy of Sainsbury's approach in this case, because Sainsbury's made a choice. First, they made a choice to bring proceedings against MasterCard in 2012 and against Visa Europe in 2013, a year later. They have pursued those proceedings in separate courts. The Visa proceedings were commenced in the Chancery Division and then transferred to the Commercial Court. The MasterCard proceedings commenced in the Chancery Division and transferred to this court. There was never any attempt by Sainsbury's to argue that those two separate sets of proceedings should be case managed together. Sainsbury's, therefore, chose to engage in litigation in a situation where it knew that it would be dealing with issues that were not identical but similar to the issues that arise in the Visa proceedings on a faster timescale and in public.

It, therefore, does not lie in Sainsbury's mouth now to seek to constrain the normal consequences of that conclusion which are that the hearing was in public, we were able to attend and it is no secret we did have a representative in court throughout who took notes. We have access to the transcripts of those proceedings, so we already have access to the cross examination of the experts on both liability and, to a limited extent, quantum, though

much of the quantum cross-examination was done confidentially, and we have heard the oral closing submissions of counsel.

THE CHAIRMAN: As a matter of interest, you have all the transcripts?

MISS ROSE: Yes, we have all the non-confidential transcripts.

THE CHAIRMAN: So those, presumably, you get from the parties, MasterCard or somebody?

MISS ROSE: Can I just seek instructions?

THE CHAIRMAN: Yes.

MISS ROSE: (After a pause) Yes, they were provided to us by MasterCard. We have the transcripts and we were in court and were able to hear what was going on. The difficulty is that, of course, people were being cross-examined on witness statements we have not seen, and the closing submissions, in particular, were obviously highly truncated by reference to what I would guess were very substantial documents, having been scarred myself by the preparation of some of these documents, I would imagine they were not short. Therefore, our understanding of the issues, as they were ventilated before your Tribunal is very partial. In that situation we submit there is a real prejudice to us if we are not provided with these materials.

Sainsbury's position, with respect, is wholly inconsistent because Sainsbury's could have taken the position where it thought it was prejudicial to it in the Visa proceedings for us to have notice of the line taken by its expert in advance of exchange of expert evidence in the Visa proceedings. If it was going to do that, it should have come to your Tribunal and argued that all of the expert evidence should be dealt with in a private hearing for that reason, to avoid prejudice to it in the Visa proceedings.

THE CHAIRMAN: Just remind me, sorry, are you a party - I get mixed up between you and Mr. Jowell's clients.

MISS ROSE: We are not being sued by Sainsbury's. Mr. Jowell has the privilege of being sued by Sainsbury's.

THE CHAIRMAN: You are being sued by other people----

MISS ROSE: Sadly, though not personally!

THE CHAIRMAN: -- in cases which are effectively joined.

MISS ROSE: Yes, I am being sued by Arcadia, Marks & Spencer and Tesco, and various other people. Mr. Jowell is also being sued by Sainsbury's - again not personally!

Sainsbury's could have argued that all of its expert evidence should have been dealt with in camera to avoid prejudicing its position in the Visa proceedings, but it did not do that.

What it cannot do, having not done that----

THE CHAIRMAN: It would have got a dusty answer, if it had done, I think.

MISS ROSE: Sir, that is exactly the point, is it not, it would have got a dusty answer----

THE CHAIRMAN: It might have done.

MISS ROSE: -- for obvious reasons.

THE CHAIRMAN: I am not judging it, because the problem will probably arise next week.

MISS ROSE: It is not a legitimate reason for having a hearing in private. If it is not a legitimate reason for having a hearing in private, it is not a legitimate reason for withholding or delaying the provision of documents which are to be treated as if they were part of the oral record because they are substitutes for materials that would originally have been dealt with orally in open court.

THE CHAIRMAN: Even if it is a factor, you argue it would not be a sufficient factor?

MISS ROSE: No, not in those circumstances. As the case law establishes, the reasons we want the material, which are indeed to inform our own conduct in these proceedings, are entirely legitimate, as the courts have repeatedly said in the cases that I have just shown to you.

Can I show you the position of Sainsbury's and explain where we take issue with it.

THE CHAIRMAN: This is your skeleton?

MISS ROSE: Yes. Could you take up the skeleton argument of Sainsbury's. Their submissions start at p.7. At para.18 they, seek to make something of the fact that the documents were originally disclosed into confidentiality rings. I have to confess, I do not understand what point they are seeking to make, and I will wait and see how it is developed. It seems to me to have no relevance to this whatever, because we are only seeking non-confidential versions referred to in open court. Sir, as you will be aware, para.9.66 itself makes it clear that there is a duty on parties to prepare non-confidential versions of their witness statements and skeleton arguments so they can be provided to non-parties. That is what 9.66 says. That, we say, takes them nowhere.

Then at 19, they say that the open justice principle has little or no bearing, and they rely on *Dian*, and you have already got my submissions on that. We say that is a misunderstanding of *Dian*.

Then at 21 they say we are motivated by the desire to use the documents sought in other litigation, and again you have my submission on that. They can see that that does not make it illegitimate.

They say at the bottom of 22 that our interests must be weighed against other legitimate interests, including fairness to Sainsbury's. Of course, the mischaracterisation in that paragraph is treating it as if it were simply the weighing of two private commercial

interests, whereas in fact it is weighing the public interest in open justice against what they claim to be unfairness.

We then come to what they say is the unfairness. Sir, there is no evidence provided to assist you as to precisely how they say they will be prejudiced. The only details we have are what they say at 23 and 24. First of all, they say that the claims are similar; and then say that it will be readily apparent that if we now are given the documents we seek, first of all, we would otherwise have had to file our witness statements and expert reports without knowing in advance what Sainsbury's witness statements and expert reports will comprise. So we will get a preview of their evidence. That, we say, is the natural consequence of the course which Sainsbury's chose to take in the MasterCard and Visa proceedings. In any event, that bird has already flown. We already have a preview of the evidence because we have the transcripts, and they never sought to argue otherwise. We say that is a bad objection in principle, and in any event it carries no weight in these proceedings because it is too late to shut the stable door, the horse has bolted.

Then (b) in relation to quantum, they say, that we will have this information more than a year earlier than we have done otherwise. What they are seeking to do is to hold back until the summer of 2017 submissions and expert reports dealing with quantum. As a matter of fact, even then they are not saying they will provide them to us, they are only suggesting that they would provide them to Visa Europe, subject to an order from the Commercial Court.

THE CHAIRMAN: Can you just help me on one thing on that. There is some order which I have not completely mastered yet in the Commercial Court which provides for a certain amount of cross-pollination of documents disclosed in one or other of these proceedings?

MISS ROSE: That is right.

THE CHAIRMAN: Does that not apply to the quantum?

MISS ROSE: Not yet. The issue of cross-disclosure of documents in the quantum proceedings is live between the parties. What has happened is that an order was made by Mr. Justice Phillips requiring mutual disclosure as between Sainsbury's and my clients of all documents on liability.

In relation to phase 2, there is an order for a joint trial involving Sainsbury's and a number of other claimants, and also involving MasterCard. So there is going to be a joint trial on quantum of the Arcadia claims against both Visa and MasterCard and of the Sainsbury's claims against Visa Europe.

THE CHAIRMAN: You are involved in those?

MISS ROSE: We are involved in that because we are being sued by Arcadia. That is the shape of the phase 2 trial. The question of mutual disclosure in the phase 2 trial has not yet been resolved. There was some debate about it at the last CMC and the parties are seeking to agree it, but have not done so. That is the current position on quantum.

What they are seeking to do is to hold back their expert evidence from us until 3rd June, which is the date of exchange of expert reports, which will prejudice our expert because it means they will not have the benefit of the material before the expert reports are produced, and to hold back the quantum evidence either indefinitely or at the very least until the summer of 2017.

They say at 25, "Patently" - it is always a giveaway, Sir, when you see "patently" or "clearly" or "self-evidently", because it means that there is not actually any reason for the conclusion being given:

> "Patently, the effect of the foregoing would be to place Sainsbury's at a significant disadvantage …"

That is baffling. It does not place Sainsbury's at any significant disadvantage.

THE CHAIRMAN: I did, I am afraid, put a question mark against that.

MISS ROSE: Sir, we have had fairly extensive correspondence with Sainsbury's on this issue.

THE CHAIRMAN: If anything, it could give your side something better than they would otherwise have had.

MISS ROSE: Yes, but that is the result of Sainsbury's choice.

THE CHAIRMAN: That may be the binary point they are making, I do not know.

MISS ROSE: But that is Sainsbury's choice, because they chose to advance this case and have both liability and quantum dealt with on a different timescale.

THE CHAIRMAN: If anything, I would have thought it would be a huge disadvantage. It means that your side is going to have a vast amount more stuff to look at and read.

MISS ROSE: Exactly, very late in the day.

THE CHAIRMAN: Most of it would probably not be of any disadvantage.

MISS ROSE: Sir, that may be one reason why at the moment we are not seeking underlying exhibits. That is that.

Then if you look at the draft order that they are seeking, it goes even further than that. You can see the dates that they are suggesting. If you look at para.2, you can see they are suggesting a delay in the expert reports until the date for exchange of expert evidence. That is only in relation to liability.

Then they are suggesting witness statements in relation to quantum far into the future. As you can also see, they are saying that they should only be served on my clients, who are applicants 1 and 2, subject to a determination by the court in the Sainsbury's v Visa proceedings.

THE CHAIRMAN: Sorry, where do you get that from?

MISS ROSE: This is para.3, it is very hard to understand, I am afraid.

THE CHAIRMAN: I have to say, I did find this order a bit difficult to understand.

MISS ROSE: What it comes down to is they are proposing that their materials as they relate to quantum, first of all, should not be served until a date next year; and secondly, should only be served on Visa Europe, and should not be provided to us unless we get an order from the Commercial Court saying that there should be mutual disclosure between VI and Sainsbury's of quantum documents. That is what they are saying.

Sir, we say that is wholly inappropriate, because the basis on which we are seeking these documents has nothing whatever to do with the circumstances in which we are entitled to documents in the Visa proceedings. It is a category error. They are confusing our right as members of the public and observers of the judicial proceedings with our status as parties in related proceedings being heard jointly. That is the second flaw.

The next extraordinary proposition at 6 is that they are proposing that these documents should be served on confidentiality terms, and that they cannot be used for any purposes other than this litigation.

Sir, with great respect, it is impossible to see the basis for any such provision. How could there be properly any confidentiality restrictions on documents which, *ex hypothesi*, are non-confidential documents referred to in open court?

THE CHAIRMAN: I think we had better hear from Miss Love on that point.

MISS ROSE: Sir, for those reasons we say that their objections are wholly misconceived.

THE CHAIRMAN: Just before you close, your interpretation of para.,6:

> "… this means that they are disclosed under the same terms that exist at any given time in relation to closing submissions, witness statements and expert reports defined as Phase 2 … .and cannot be used for any other purpose."

Just give your interpretation of that again?

MISS ROSE: It is not totally clear to me what terms they mean exactly, and no doubt Miss Love will be clear, but she is clearly saying that there should be a restriction on their use, and we say that is wrong in principle.

There is a further objection, Sir, which is that, in fact, Sainsbury's have reached agreement with the Arcadia claimants on more generous terms than they are now seeking to provide documents to us. Of course, Arcadia are suing us. Sir, if you take up the hearing bundle, if you go to the correspondence section at tab 4, you will see a letter from my solicitors, Milbank, at p.50, to Stewarts Law, who act for the Arcadia claimants. They act for the Arcadia claimants in both the MasterCard proceedings and the Visa proceedings. Sir, as you may know, the Arcadia v MasterCard proceedings are due to commence in the Commercial Court in June, and the Arcadia v Visa proceedings, to which we are a party, also in the Commercial Court, in October. The same solicitors, the same counsel, and it is our understanding it is the same expert in both sets of proceedings acting for Arcadia. I should say that our understanding about the expert comes from the schedules we have seen to the confidentiality orders, which give names of the same teams and the same economic consultants in both sets of proceedings.

Sir, we in this letter raised with the Arcadia claimants the question as to whether Sainsbury's had agreed to provide materials to them. We were concerned that they were refusing to tell us. At the top of p.51, we pointed out that the same solicitors and counsel are representing the Arcadia claimants in both MasterCard and Visa:

> "The suggestion that any meaningful distinction could be made can be made between the use by your legal team of the documents from Sainsbury's v MasterCard hearing in either set of proceedings is, in the circumstances, fanciful."

We said you cannot suggest that this is being disclosed to the same solicitors and counsel, and, we would say, *a fortiori*, the same expert who is acting in both the MasterCard and Visa proceedings, that they are somehow going to put them out of their mind when preparing their expert reports for the purpose of our proceedings.

They have narrowed it into a consent order which they sent us yesterday - this came yesterday from Stewarts Law, it is at 52F - if I can just show you the order first.

THE CHAIRMAN: This is the one that has settled?

MISS ROSE: This is one that has settled, so this is the consent order that the Arcadia claimants have entered into with Sainsbury's. They were not seeking the Sainsbury's factual witness statements, but only the MasterCard factual witness statements. You will see at 52I that those are to be provided to them by 4 o'clock on 20th May.

Then at para.2:

> "The claimant shall by 4 o'clock on 20th May, serve on the applicants a copy of the following documents:

(a) its written submissions; and

(b) its expert reports, save for elements relating to quantum."

So Sainsbury's have agreed to provide all of their closing submissions, both on liability and quantum, and their expert reports on liability by 20th May, which is three weeks before the exchange of expert reports in the proceedings to which we are a defendant. So the Arcadia claimants will be provided with those materials, but we will not.

We say there is clear and demonstrable prejudice to my clients if Sainsbury's are permitted to get away with that. Essentially, they are providing to the claimants in the closely related proceedings a procedural advantage over my clients.

Then at 3 we see the same for the defendants, the whole of the defendants' written submissions and their expert reports on liability by 20th May.

THE CHAIRMAN: I am sorry, Miss Rose, I missed that last point.

MISS ROSE: Paragraph 2 is the claimant's written submissions and expert reports on liability by 20th May, and para.3 is the same in relation to the defendants' closing submissions and expert reports on liability.

THE CHAIRMAN: I see, yes.

MISS ROSE: Then at 4, provision of expert reports on quantum, when there is exchange of expert reports on quantum in the Commercial Court.

THE CHAIRMAN: That is not going to be until next year?

MISS ROSE: No, that is not until next year. Sir, you will note that that does not apply to the closing submissions.

Then redaction of confidential material - that is not controversial at all.

Then para.7, all documents served, and look at this:

"Any notes taken by the applicant's representatives of the Tribunal hearing may be used for the exclusive purpose of the Commercial Court proceedings."

The Commercial Court proceedings are defined at the beginning of this order as case number 2012/669 to 703, and 1305 to 1311. Those are only the MasterCard proceedings, not the Visa proceedings. So the fig leaf behind which they are hiding to say we are not prejudiced is to say, "Oh, well, they can only use this expert report and these submissions in the MasterCard proceedings, not the Visa proceedings". These are going to be read by the same counsel, the same solicitors and the same experts. That is what we described as 'fanciful'.

Also, Sir, quite extraordinary, Arcadia have apparently agreed that notes taken by them at a public hearing are only to be used for the purposes of a particular legal proceedings. That is

remarkable. It is up to them if they want to agree, but it is an indication of how far the parties are removed from any normal concept of open justice. Also, you will see at 8, that they are being disclosed into a confidentiality ring, even though they are non-confidential documents.

This is obviously not an order that this Tribunal would ever countenance or make.

MISS LOVE: Sir, I rise reluctantly in case it assists in relation to that particular provision on notes in the proceedings. Sir, as you will recall, Stewarts Law representatives did attend some of the MasterCard confidential hearings.

THE CHAIRMAN: I see, so that relates just to the notes in the confidential hearings? It does not say so. It includes those notes.

MISS LOVE: On its face, that would cover the notes that were made in the MasterCard private hearings.

MISS ROSE: It certainly is not limited to them, but I hear what Miss Love says.

So, Sir, that is the position on Arcadia, and we say that that is really the final nail in the coffin of their resistance to this application, because it is clear that we are the ones who are prejudiced by the agreement that they have now reached with Arcadia. In order for that prejudice to be lifted it is imperative that this court orders forthwith the disclosure to us of the factual statements, the expert reports and the closing submissions that we seek.

Unless I can be of any assistance, those are my submissions.

THE CHAIRMAN: Thank you. Mr. Jowell?

MR. JOWELL: My Lord, I gratefully adopt Miss Rose's submissions, and I do not intend to detain your Lordship except very briefly on one point, which is specific to my client, and that is this: we are, as Miss Rose observed, defendants to Sainsbury's claim in the Commercial Court. It is important to appreciate that in the Commercial Court the dates for standard disclosure have passed, both in relation to the phase 1 proceedings and----

THE CHAIRMAN: You made this point in your skeleton.

MR. JOWELL: Indeed, and indeed phase 2. We say that it must surely be the case that a large number, perhaps even the majority, of the documents exchanged between the parties in the MasterCard proceedings - by that I include not just the documents that we seek today on this application, but also the exhibits and indeed the other underlying documents that will have been exchanged between the parties - will surely fall within standard disclosure that Sainsbury's is obliged to provide.

Of course, there may be exceptions to that. One is that there may be documents that are relevant to the MasterCard proceedings, but not relevant to the Visa proceedings. I think that would be a minority, but there may be some.

The other special situation may be where there are MasterCard confidential documents - in other words, documents that are confidential to MasterCard, and that have been provided to Sainsbury's which would be governed by 31.22, or Rule 102. In respect of those documents, they should be disclosing their existence to us, but they may be entitled to resist inspection unless MasterCard consents or the court orders.

Other than those two classes, these are documents that should have been provided to us already in----

THE CHAIRMAN: For all we know, they have been.

MR. JOWELL: Sir, there is no sign of them. Certainly we have not received the witness statements, the documents that we are seeking today.

THE CHAIRMAN: I see, you mean the documents you are seeking today. I thought you were now moving on to an exhibits point.

MR. JOWELL: Sir, we assume, if we have not seen the witness statement, we probably have not seen the exhibits either. I do not mention that to you, Sir, because I do not invite you to make any order in respect of that. Indeed, we fully agree that that is not a matter for you, Sir, it is a matter for the Commercial Court in due course. I mention it for two reasons: one, because it does, I think, scotch the suggestion in Sainsbury's skeleton argument that we are somehow getting an unfair advantage by jumping the queue in the Visa proceedings and getting these documents earlier than we would otherwise be entitled to them in the High Court, because we are certainly not. We are getting these documents late, in fact.

THE CHAIRMAN: Would you include in that the quantum aspect?

MR. JOWELL: Yes.

THE CHAIRMAN: Have there not been specific orders about quantum?

MR. JOWELL: There have. Quantum is phase 2, and standard disclosure has passed on phase 2, so we should have received that. Sainsbury's witness statements in relation to quantum should have been disclosed to us.

THE CHAIRMAN: I see, yes.

MR. JOWELL: Even the confidential ones should have been disclosed, albeit perhaps within the confidentiality ring.

The second reason I make that point is to put on record that we do require this wider class of documents to be reviewed and to be disclosed in the Commercial Court, and we will in due course apply to the High Court for the specific disclosure if we are forced to do so.

THE CHAIRMAN: In relation to?

MR. JOWELL: In relation to all documents exchanged in the MasterCard proceedings that are relevant to these proceedings and that have not been provided as part of standard disclosure. We wish to put on record that we regard those documents as part of standard disclosure, and that Sainsbury's are in breach of their standard disclosure obligations by not having provided them to date, but we will, if necessary, make an application for specific disclosure if we are forced to.

THE CHAIRMAN: Thank you very much. Miss Love? You have a particular raid against you.

MISS LOVE: Sir, I believe that you and Miss Houghton next to me and Miss Boyle in front of you possibly have the rare privilege and distinction among those here today of having actually sat through all of the evidence and submissions.

THE CHAIRMAN: Yes, it has been wonderful fun! It is so nice to have this little re-run of part of it!

MISS LOVE: I was going to apologise, Sir, that you are hearing from me and not from Mr. Brealey or Mr. Spitz. I am afraid you may not hear terribly loudly from me, but I shall do the best I can.

THE CHAIRMAN: You are suffering, are you?

MISS LOVE: I would like to structure my submissions as follows: firstly, I do want to make a few points about what this application is and is not about. Secondly, I want to touch very briefly on the Rules position, the legal position. Thirdly, I would like to go into a few aspects of the Visa litigation, and hopefully, in the course of that, pick up some of the points that were made against me. Then I want to address this question of prejudice to Sainsbury's. I was then going to go to exhibits, but it turns I do not need to do that. I will put down a marker, not necessarily before you, Sir, but if that issue is raised there is likely to be a trawl through. I hope to be brief. I am mindful this was down for an hour originally.

THE CHAIRMAN: Do not worry, things often escalate a bit.

MISS LOVE: Miss Rose spent a great deal of her written submissions and her submissions to you this morning talking about fundamental constitutional principles and the principle of open justice. Sir, as I think you observed, there really is not very much between us. We agree that open justice is an important principle. We agree with what will ordinarily, and I emphasise the word ‘ordinarily’ be consistent with the requirement of open justice.

Ordinarily, if a document is read in open court, one would expect it subsequently to be available. Ordinarily, if skeletons are used to, in effect, stand for or supplement oral submissions, one would expect them subsequently to be made available. Sir, I am not standing in front of you trying to turn back the tide to *GIO Personal Investments* and the pre-CPR position.

Another point, Sir, that I am afraid may have been a bit of a hare running from the skeleton, is that we are not taking a point about motive. We are not being 'sniffy' about the fact that the Visa entities want these for their own reasons.

Sir, I do respectfully still say that one gets something useful from the *Dian* case. Could I turn very briefly to tab 5 of the authorities bundle, and go to internal pagination 2958, para.30. One sees there, Sir, the sentence:

> "The principle of open justice is primarily concerned with monitoring the decision-making process as it takes place, not with reviewing the process long after the event."

Sir, that does not mean that open justice goes out of the window if there are commercial reasons for going for the material, but it does rather put in context Miss Rose's submission that is not weighing our interests against theirs, there is a weighty public interest that falls on her side of the scales. There is no suggestion here that these materials are needed to check that you and Mr. Smith and Professor Beath are discharging properly your judicial function. They have transcripts, they have had note takers, this is about filling in the blanks for them. It does not make it wrong, it does not make it inappropriate to ask, but it is relevant.

Sir, the fourth point that we are agreed on is that open justice is not an absolute trump card, it is only a starting point. I think even Miss Rose accepted that there were circumstances in which there was sufficient prejudice that would outweigh the interests of open justice, and I have not heard the suggestion that the forms that prejudice could take are closed.

I had another case which I am not actually going to hand up because it went primarily to the exhibits question but it is, I think, rather a nice way of putting it by Mr. Justice Roth, in *Eurasian Natural Resources*:

> "Although the authorities demonstrate that when a judge has read, or is presumed to have read documents for the purpose of a hearing that proceeds in open court those documents may thereby enter the public domain. They also show that this is only the prima facie position."

So that is the starting point but one does have to look at the parties' interests.

Sir, the fifth point that I do want to emphasise very much is that we are actually agreed that Visa should get access to these documents. We accept that they can have copies of the documents they are seeking, that is a point that we have made on correspondence. It is a point that I have also made in para.22 of my skeleton argument, and I want to emphasise it again here. As far as Mr. Jowell's clients are concerned, we are willing for them to have it all. As far as Miss Rose's clients are concerned there is a question mark around quantum, but there is no denial of access here. We accept they can use the documents. We accept they can use them including in proceedings against us. The timings we have suggested would actually allow for that are that if Miss Rose and the other counsel for Visa Inc. thought that some aspects of our closings on liability was useful, they could take that into account in their submissions in the hearing which is set down for this autumn.

THE CHAIRMAN: Can you just help me, I have just taken a note, you said Mr. Jowell's clients can have them all, and Miss Rose's clients can have them all apart from quantum in principle. Just explain to me again because I have been rather slow on the uptake on understanding why that should be, why the distinction?

MISS LOVE: Sir, it might be helpful in that case if I turn to the points that I wanted to make in relation to----

THE CHAIRMAN: If you are going to deal with that?

MISS LOVE: I intend to deal with it in the course of these proceedings.

THE CHAIRMAN: I am sorry, then take it in your order.

MISS LOVE: Sir, we do say that this is not about a denial of open justice. You are doing a weighing exercise of the parties' private interests. Miss Rose and Mr. Jowell are basically saying "I want it all, and I want it now". We are saying: "That would harm our position in the Visa hearings" and it is a weighing exercise of that nature.

Sir, if I could touch very briefly on the position under the Rules. You have already, I think, seen Rule 102 and expressed some observations on that. We had proceeded on the basis that these materials were caught within Rule 102(1) which is the restriction. It is set out for convenience at p.6 of my skeleton argument.

We had thought that to be the case, and we had thought that subpara.2 to, in effect, put the ordinary case position of the restriction being lifted when the documents were referred to at a public hearing, so this is, in a way, the analogue of CPR Rule 31.22.

THE CHAIRMAN: I suppose if you were seeking MasterCard's documents from Sainsbury's, and MasterCard were out of the picture you might say that 102(1) was in play, but because

you are actually only seeking documents that Sainsbury's have produced themselves, and obviously handed around to everybody, including the court, it does not seem that it can bite.

MISS LOVE: Sir, I hear what you are saying. Certainly, just by way of context, we had assumed that the 102(1) restriction remained in force that part of these documents were confidential, and that is why you never received an application from us under 102(6). It is not that we had some ingenious tactical manoeuvre, or just were not bothered, that is what we honestly thought the position was. If the fact is that instead we are outside 102(1) we say that, given the inherent jurisdiction and given the 102(5) provisions, it actually makes little difference. The substantive question you are grappling with is the same.

I do confess, Sir, we do have some difficulty with this proposition that para. 9.66 of the Guide confers, I think Miss Rose said it was 'a duty', a sort of freestanding duty for us to start running off non-confidential versions of all of our documents. We note it is the Guide, not the Rules. The Rules take precedence; it would be rather surprising if that duty had not found its way into the 100-odd pages. We also note in this case, I am told it is irrelevant, we disagree, that our documents are covered here by two confidentiality rings, most of them were originally disclosed in their entirety into a High Court confidentiality ring.

THE CHAIRMAN: That was simply because at that stage nobody had done the exercise and therefore----

MISS LOVE: A happy day awaited, Sir. That happy day came when we transferred to the CAT, Sir.

THE CHAIRMAN: Exactly.

MISS LOVE: And your own order of 27th January.

THE CHAIRMAN: By then the exercise I think had more or less been completed of the 'yellowing' and the 'blueing' had it not? It was then possible, as it were, whether you call it 'supersede', 'replace' or simply 'overlay' the CAT order from that point on there were confidential and non-confidential bits, and that is how the documents were treated.

MISS LOVE: I think we take the language of 'overlay' given that your order of 27th January did expressly acknowledge and keep in force the High Court order. I am not going to invite you, Sir, to turn it up, behind tab 12 of the hearing bundle, but we are slightly nonplussed that we can have these two overlaid confidentiality rings, and yet find ourselves subject to some duty to start running up and handing out non-confidential versions if Miss Rose is right, but I will leave it there, because----

THE CHAIRMAN: I do not think that is going to be a real issue, frankly. We know of the documents that they want, and you are in principle willing to give, there are versions which

can very quickly be turned into non-confidential. They are not actually non-confidential at the moment because they are not redacted, are they? So there is an exercise there, is there not, which is, albeit, relatively straightforward will take some time.

MISS LOVE: If we were here talking about the exhibits I would be telling you a lot more, Sir, about that exercise, but we are not, happily.

THE CHAIRMAN: Mercifully, we are not.

MISS LOVE: I then want to turn on to my third point which you have already touched upon which is the background to the Visa proceedings. That is summarised in paras. 8 through to 12 of my skeleton argument, and as you have, observed, Sir, with the thinking of Mr. Justice Phillips, this is going to take over a year to get between the two stages of liability and quantum.

One point that I do want to pick up here is one that Miss Rose made orally and Mr. Jowell, I think, echoed in his skeleton argument about the fact that we issued proceedings against MasterCard and then Visa, both in the Chancery Division originally, one diverged. The suggestion seems to be that because of that we have basically given up on any right to ask this Tribunal to do anything that would prevent Visa from having any kind of advantage in trial preparation.

First, there is a limit in the circumstances about how far this 'you started it' point will go, because, yes, we did issue proceedings against one card scheme and then the other, but we did not suggest or request this jointly managed consolidation, I think that was at the request of Visa, or this two stage split which is what is imposed – it is going to be a gap of about two years between this Tribunal's hearing of the MasterCard proceedings and the quantum trial. So, fair enough, there is a limit to where it takes one.

The second point is I do take issue with the reasoning of 'you signed up for some risk of some prejudice, so you cannot object to a racing certainty of lots of prejudice'. Some things have happened that will cause some asymmetry, they had a representative. Miss Rose suggested in her skeleton argument that more things might happen. I think she said it was likely that the judgment would be available in these proceedings. It may be, it may not. I am not asking that in a questioning tone of voice – let the transcript record – but we are still entitled to ask this Tribunal to take steps to limit the prejudice, it does not become----

THE CHAIRMAN: Just explain the prejudice to me. It could be that there is some advantage in Visa's experts, and so on, seeing the material earlier than they might have seen it, or subject to Mr. Jowell's disclosure point, obviously.

MISS LOVE: Which I will come on to.

THE CHAIRMAN: Which you will come on to. But, leave that to one side for the moment. Okay, it might be nice to see it, or it might be a huge disadvantage to see it because people spend an awful lot of time looking at it, and wondering, scratching their heads about it and then find it does not take them anywhere; that is possible too, so it could be an advantage or disadvantage, but why is it a prejudice? Why is it actually a prejudice to your clients?

MISS LOVE: That is the nub of it, they get given more than what they would otherwise have had and they get given it earlier. They are basically going to see pretty significant chunks of our case on liability and quantum. They are going to see our evidence. They are going to see our submissions based on that evidence. They are also going to see the MasterCard side of it, so what MasterCard were saying in response. So they are going to see what we are arguing, what the factual basis for that argument was, what the experts said in support of that argument, and what MasterCard make of it, and they are going to see that over a year before they are going to see, in the case of quantum, the analogue evidence in the Visa proceedings.

I apparently, other than being taken to task for the use of the word "patently" I am told that there should have been a witness statement put in to explain basically what happens in trial preparation.

THE CHAIRMAN: What is this, para. 20-something, is it not?

MISS LOVE: Yes. There is a limit to how much one can say here because we say this is pretty obvious. They have a year's head start to think about these things, to think about what they are going to say about them, to think about how they might respond. This is a lot of time. This is not an extra fortnight to finalise your expert report. This is not having a weekend to go over your skeleton and dot i's, and cross t's. There is a lot of people, you are seeing only a fraction of their combined counsel teams. There are solicitors, there are economists, who are ready to start poring over this material, however fun or productive we may think it is, and they will have a year to do it.

THE CHAIRMAN: They will have a year to look at the transcripts too, and they will get quite a lot out of the transcripts, will they not, anyway? It is not as though they are not going to be able to know the drift of quite a lot of this.

MISS LOVE: Not necessarily on quantum, Sir. As you will recall, there were chunks of the hearings in private.

THE CHAIRMAN: There were chunks that were not in private, even on the quantum side.

MISS LOVE: Sir, I submit it is an instinctive point, it is a point that one can readily grasp. You have had the privilege of seeing this material and you may have your own thoughts about

what you would do if you had it for a year longer, but one can see readily that there is a lot of it, and it makes a difference to trial preparation. One can see that there is a year's head start and the very fact they may or may not have transcripts, Sir, that cuts both ways; why compound it by letting them fill in every single blank.

THE CHAIRMAN: Is it so bad? Sometimes there are delays, as in this case, with quantum. I am not sure the quantum delay in the Commercial Court was designed, as it were, to keep people in the dark. It was probably to limit the amount of work and possibly to save some money, depending on what happened in the liability trials, and so on. What is wrong with having material sooner rather than later in litigation, is that not often quite a good thing because it might help settlements, it might get people on the right track quicker, and might save costs later? I am just not totally convinced that it is such a bad thing. After all, they will not be finding out anything that your side do not know, so it could be said to be putting it on a more even playing field.

MISS LOVE: They will see what we are saying and what MasterCard had to say in response to it. Do they like that response? Can they formulate other responses? Can they formulate better responses? We do not know what their response is going to be.

THE CHAIRMAN: It could be an advantage to them, I agree. It could be an advantage to them, and I suppose, by the same token if the other side of that coin is disadvantage to you then, okay, it could be an equivalent disadvantage to you but I am not sure that is a terribly powerful factor in the context of this case, the fact that they have the transcripts and so on.

MISS LOVE: Sir, that is the concern. We could flip as easily and say that if that is the case, and there are other case management considerations that have caused this timing then what exactly would the prejudice be in waiting, it really was intended to streamline matters and to stop everyone doing more work than they needed to, but it is a pretty simple and intuitive point, Sir, which is, for what it is worth, there is a year's head start. I do emphasise it is not just a year's head start about what we are saying, it is a year's head start of seeing what MasterCard had to say about what we are saying and having a chance to think about that.

THE CHAIRMAN: While you are on it, did I misunderstand what you said – you said that you were agreeable to them having these documents, Mr. Jowell's client will get all the documents. I was not quite sure, I am still struggling with how it is that their clients are being put in a different position.

MISS LOVE: Sir, at this point it might be helpful to circle back on your previous question about the Commercial Court proceedings. There are very different arrangements for phase 1 and phase 2, affecting the very different nature of what is at stake, and I have discussed this in

my skeleton argument at paras. 10 and 11. I do think it might be helpful for us to turn up briefly to turn up the orders of Mr. Justice Hamblen and Mr. Justice Phillips. Could I ask you, Sir, to start at tab 8, p. 99, Mr. Justice Phillips made an order in the Phase 1 proceedings. You asked about whether there was some sort of mutual disclosure arrangement in place. You see, first, at para. 15, in essence provision for exchange of material as between us and Miss Rose's clients, and in essence everyone gets what everyone else has had, and will get at the same time future material.

One further sees in 16 any pleading further information, witness statement, expert report or written submission served or to be served in connection with the Phase 1 trial, to be served on the parties. Any evidence stands as evidence in all other claims for the purposes of Phase 1.

It may also be worth looking at the confidentiality order of Mr. Justice Hamblen and your Lordship will find that at tab 5, p. 58, I think it begins. That is where the confidentiality order starts. The critical part is then over the page to p.60, and one sees there the contrast between para. 3, which deals with permitted use in Phase 1, saying it:

> ". . . shall not apply to prevent any Party from using documents disclosed in relation to the Phase 1 Issues in any one of the Proceedings . . . in any and/or all of the other Proceedings."

Then in 4:

> "CPR 31.22 shall continue to apply in relation to Phase 2 disclosure pending further discussion between the Parties."

And liberty to apply. Miss Rose's answer, when you asked whether that had been addressed was "not yet", whether there had been an order? "Not yet", and the answer is "No", there has not been. That is an issue between us.

The position overall, Sir, as you have seen, is that basically in Phase 1, we are "all in this together" as Mr. Osborne would put it, because the evidence in everyone's claims is standing as evidence in everyone else's, and even though they are not a party to the claim against us Visa Inc. is going to get all of our evidence.

THE CHAIRMAN: Do not go too fast. Yes?

MISS LOVE: In Phase 2, as things stand, the evidence that we put forward is going to Visa Europe only, or Mr. Jowell's crew of clients, and it is going to be for use only in the Sainsbury's and Visa claim only, and the same will apply to their evidence to us. I do say, Sir, that that rather underlies the difference between the issues – I am sure I do not need to

remind you that the liability stage focuses largely on issues of relevant market, the MIFs, why they are there, how they are set, level, what would happen if they were not set.

THE CHAIRMAN: There is more confidential material in the Phase 2?

MISS LOVE: The quantum stage the figures that pass on are very focused on the individual claimant, on its pricing and, Sir, you recall it was specific to Sainsbury's, a lot of it was very highly sensitive, and I would add that even if one takes into account the possibility of confidentiality redactions, there is still a lot of information there about the inner workings of our business. Phase 2, as we perceive it, has been more analogous to a series of discrete one to one mini-trials – I am not sure that that is not a controversial description but that is how we see it on our side.

That does have a bearing, I do respectfully say when one is asking with reference to Miss Rose and her clients, who are not parties to the claim, who are not going to get this material through the Commercial Court, about what the interest is and what the balance between our interest and theirs is and them having it. Indeed, what use the non-confidential version will be to them in these claimant sensitive issues.

THE CHAIRMAN: I suppose, subject to any applications that are made for specific disclosure and all the rest of it----

MISS LOVE: They can make applications to the Commercial Court, they can raise it again.

Sir, just to round out on a couple of points here. First, Mr. Jowell and our apparently deficient disclosure. We do not necessarily agree, it will not surprise you to hear, that our standard disclosure in the Commercial Court proceedings has been deficient, bearing in mind that these documents were produced for use in other proceedings, and the confidentiality rings. The short answer to this is even if Mr. Jowell has a point it is not a matter for this Tribunal. The adequacy of our disclosure in the Commercial Court proceedings is a matter for the Commercial Court, and Mr. Jowell, I think, tacitly accepted that when he put it on record that they might make this, that or the other application.

There is, obviously, an irony here in that when it comes to timetable Mr. Jowell and Miss Rose are saying that this Tribunal should not take into account the Commercial Court proceedings and the Commercial Court issues, and if that is right the same must apply to disclosure. Even if he had a point it is a point that he can make in front of Mr. Justice Phillips.

The second point is the one about prejudice to them because of others having received our documents. That is said to be discriminatory and to show that what we are hiding behind is essentially a fig leaf.

You have copies of the two consent orders in relation to the other matters, the Arcadia application and the Ocado one.

THE CHAIRMAN: I was shown one by Miss Rose in the bundle, but I am not sure I have seen the other one. Perhaps it is in very similar terms.

MISS LOVE: I think behind tab 12 you will see the Arcadia order at p.148.

THE CHAIRMAN: One is behind tab 4, is it not, and one, as you say, is behind tab 12.

MISS LOVE: The final version that is signed by everyone is behind tab 12.

THE CHAIRMAN: So that is the only one one needs to look at, is it?

MISS LOVE: There is also an Ocado one but that is rather different because they were only seeking written closing submissions but that is at p.151.

THE CHAIRMAN: So the one I was shown at tab 4 is not a final – it is signed.

MISS LOVE: It is but it is not signed by everyone.

THE CHAIRMAN: It is signed by Stewarts Law, MdR and Jones Day.

MISS LOVE: Sorry, it is the signed one. First, we do say that you just cannot equate the question about whether we would be prejudiced in adversarial proceedings by giving the other side an extra year to polish their case on quantum with the implications of giving another retailer sight of our evidence on liability a couple of weeks before the deadline for the exchange of expert reports. All that there really is by way of difference is, first, this two-week wrinkle in timing of 20th May, and secondly, the closing submissions, the fact that the closing submissions will be provided in one piece in the Arcadia application----

THE CHAIRMAN: They will get all the quantum stuff too?

MISS LOVE: No, the expert evidence, which I think is the real meat of it here, the Crown Jewels here, that is in two stages. They do not get that until the quantum hearing.

THE CHAIRMAN: Arcadia do not get that in Phase 2?

MISS LOVE: Arcadia do not get ours, they do not get ours at all. They do get MasterCard's but only at the relevant time, Phase 2.

THE CHAIRMAN: They do not get yours at all under this order?

MISS LOVE: Under this order, no.

THE CHAIRMAN: So just explain to me again what they will get. You say the only difference in timing is they get a couple of weeks earlier?

MISS LOVE: They will get the expert reports on liability from both sides.

THE CHAIRMAN: They get both sides?

MISS LOVE: On liability, non-confidential, of course.

THE CHAIRMAN: Yes. On 20th May?

MISS LOVE: On 20th May.
THE CHAIRMAN: Whereas you want me to order it after the experts have reported?
MISS LOVE: At the same time, we want it in parallel. We are talking about I think two and a half to three weeks - two weeks. So there is the two weeks of timing on liability.
THE CHAIRMAN: But they are only getting experts' reports on liability?
MISS LOVE: Yes.
THE CHAIRMAN: And then you say----
MISS LOVE: They are getting the written submissions at the same time for all of it.
THE CHAIRMAN: Everybody's written submissions, both sides?
MISS LOVE: Yes, but non-confidential, they do get the quantum part so there is generous yellow ink on that.
THE CHAIRMAN: Yes, but they will not get that?
MISS LOVE: They will get the full set of closings, non-confidential.
THE CHAIRMAN: Including quantum?
MISS LOVE: The non-confidential part.
THE CHAIRMAN: Then what is it they do not get?
MISS LOVE: They will not get at any stage either confidential or non-confidential sight of our quantum evidence. They will get MasterCard's.
THE CHAIRMAN: MasterCard's but not----
MISS LOVE: Not ours.
THE CHAIRMAN: But not Sainsbury's quantum, expert quantum evidence.
MISS LOVE: Expert evidence, yes. They have already got MasterCard's witness statements except for Mr. Abrahams', they are not asking for ours. I would also add, Sir, in relation to timing on the quantum expert evidence, they are actually going to get it within seven days of the exchange of the quantum expert evidence in the Commercial Court proceedings, so they are not going to get a timing advantage, they are going to get it after they have already got the expert evidence from the Commercial Court.
THE CHAIRMAN: It is only MasterCard's that they get.
MISS LOVE: It is only MasterCard's that they get, that is the critical point.
THE CHAIRMAN: They will get this only seven days after – what was it again you said? After the exchange of?
MISS LOVE: Expert evidence on quantum.
THE CHAIRMAN: So they will get it some time in the autumn of 2017, or something like that? I cannot remember the timing, but anyway.

MISS LOVE: A distant date. It is not the case that we are handing everything over to them in a way the evidence where this whole issue bites most acutely, which is our expert evidence on quantum, is not being given to them at all, and we are really talking in relation to liability.

THE CHAIRMAN: You say they are getting it two or three weeks earlier and that is it, yes.

MISS LOVE: Sir, this is not the fig leaf, this is not giving the lie to us, and this is not us selling the past about it going to someone in proceedings against us.

Sir, unless I can be of further assistance?

THE CHAIRMAN: Just on this: can you make sure I have understood? I am not sure what your limitations are entirely. Are you saying that they should only get – the limitations are exactly, and should be exactly what you have given to Arcadia, is that a shorthand for saying what you are asking for, by way of limitation in this application?

MISS LOVE: I was addressing the question whether these were fig leaves and we were prejudicing them grossly. If I may, Sir, I am going to take some instructions on that. (After a pause) Sir, I am informed that in relation to the closing submissions----

THE CHAIRMAN: Yes, I am going to have to take a note of this to make sure I have understood. What we are dealing with now is what you are saying the CAT should do today.

MISS LOVE: In relation to the closing submissions, we are happy to offer the whole non-confidential version of those at the same time as the non-confidential of our expert evidence on liability.

THE CHAIRMAN: Hang on, "We are happy to offer the whole non-confidential version" - this is closing submissions - "to both Visas", at the same time as what?

MISS LOVE: The non-confidential versions of our expert evidence on liability.

THE CHAIRMAN: When is that though?

MISS LOVE: In relation to timing, we are sticking to 3rd June.

THE CHAIRMAN: I am not going to worry about "at the same time", I am just going to say by 3rd June.

MISS LOVE: I am informed that there are also, given the need to redact different things and the non-identical nature of what we are already dealing with in the Ocado and Arcadia applications, logistical issues here. As you have said, Sir, someone has to go through these.

THE CHAIRMAN: I know. The thinking behind that is that that is the date for exchange?

MISS LOVE: Yes, Sir.

THE CHAIRMAN: Therefore, it cannot be taken account of in their evidence. That is the thinking, I suppose, is it, behind 3rd June?

MISS LOVE: That was the consideration for going for that date.

THE CHAIRMAN: Does that not just push it forward to when they put in their supplementals? Why is that such a concern? Why should they not take account of it earlier if they want to?

MISS LOVE: Sir, now there is a logistical issue, as I have just said.

THE CHAIRMAN: We will come on to that. How long do you think it will take to redact the bits that are yellow?

MISS LOVE: We are dealing with the transcripts as well in relation to the Arcadia application. My instructions are that 27th May would be the earliest that we would be able to get this material.

THE CHAIRMAN: I am a bit confused, what is the transcript point again? Miss Houghton, I do not know, you are doing something with the Arcadia transcripts?

MISS HOUGHTON: (no microphone) We have agreed with them that they can have the MasterCard confidential aspects of the transcripts, but the obligation is on us to create them and give an example of confidential information. So we have to go through the 23 days and thousands of pages worth of transcripts by next Friday, to create all----

THE CHAIRMAN: You are doing that for Arcadia?

MISS HOUGHTON: For Stewarts, so we are going to be very busy over the next week.

THE CHAIRMAN: I see, so you have got another big job.

MISS HOUGHTON: And given their trial is imminent, three weeks away, it is more urgent to provide Stewarts.

THE CHAIRMAN: But you still could do it by 27th May - is that what you are saying?

MISS HOUGHTON: If pushed, we could probably get it done by the 27th.

MISS LOVE: Sir, I think, to answer you, there was originally a feeling of parity with the timings for exchange, but there is now a very acute logistical consideration, as you have just heard.

THE CHAIRMAN: That is closing submissions. That is the easy one, is it?

MISS LOVE: Yes.

THE CHAIRMAN: Then we have got witness statements of fact - that is one of the categories, as I understood it?

MISS LOVE: Sir, that is a category that I do not believe Arcadia has sought, or not on our side. They have got the MasterCard ones, so this is new territory.

THE CHAIRMAN: You do not object to supplying them, as I understand it, it is just a question of timing? That might be an easy one too.

MISS LOVE: I think what we had in our draft consent order was that within seven days of the date of the order we would serve a copy of the factual witness statements relating to

liability, redacted to remove confidential information. That is what they were going to get anyway on our offer.

THE CHAIRMAN: Right, so you are offering----

MISS LOVE: For liability.

THE CHAIRMAN: -- witness statements of fact, "We are offering", and therefore you want the CAT to order, the statements so far as they deal with liability, because there may be some that deal with both. I am trying to remember, but maybe not. You are offering statements on liability----

MISS LOVE: Within seven days of the date of the order was what we had offered.

THE CHAIRMAN: Within seven days. What about the statements on quantum?

MISS LOVE: We had offered to mirror the date for exchange of the witness statements quantum in the Commercial Court proceedings.

THE CHAIRMAN: Mirror the Commercial Court proceedings - that means next year?

MISS LOVE: Yes, Sir, and also it goes to whoever would have had the Commercial Court information. So as things stand that would be Mr. Jowell's clients, but not Miss Rose's.

THE CHAIRMAN: So you are not offering it to Miss Rose's clients, right. "Mirror Commercial Court timing in relation to Visa Europe".

Then we come to expert reports. I think that is the third and last.

MISS LOVE: We have dealt with the liability stage.

THE CHAIRMAN: You have dealt with it - how do you mean?

MISS LOVE: That leaves expert reports addressing issues of quantum.

THE CHAIRMAN: That is the same as closing submissions, is it? They can have it----

MISS LOVE: By the 27th.

THE CHAIRMAN: -- by the 27th at a pinch. So liability, 27th May at a pinch. Quantum?

MISS LOVE: That is, Sir, I say where the real prejudice and the real issue of principle bites. The offer remains as we had in para.4 of our proposed draft order, which is to parallel the date for the exchange of the expert reports for phase 2 of the Commercial Court trial. So the same date----

THE CHAIRMAN: The same date as exchange for phase 2 expert reports.

MISS LOVE: In the Commercial Court trial.

THE CHAIRMAN: In the Commercial Court, i.e. some time next year.

MISS LOVE: I think the more neutral way of putting might be, "To whomever the Commercial Court will be giving the parallel information in the Commercial Court proceedings".

THE CHAIRMAN: You assume it is not at the moment Miss Rose's clients as things stand?

MISS LOVE: Yes, Sir. That is what is on the table from us, Sir.

THE CHAIRMAN: That is your best and final - that is what you think we should do?

MISS LOVE: That is my position, Sir. I have explained the prejudice point, Sir, and I have also explained the different nature of the phase 2 issues. I am not sure that we can take matters much further.

THE CHAIRMAN: Thank you very much.

MISS ROSE: Sir, with great respect to Miss Love, the prejudice point has actually evaporated. The reason it has evaporated is because Sainsbury's are no longer maintaining the position as a matter of principle that their closing submissions or their expert report on liability should not be provided to us until the date for exchange of expert evidence in the Visa proceedings. What they have just said to you is that they are prepared to do it earlier, by 27th May, and that the only reason they cannot do it sooner than that is logistics.

THE CHAIRMAN: That is the whole closing, quantum and liability?

MISS ROSE: That is the whole closing, Sir, and the expert report on liability. They have also offered the factual witness statements on liability within seven days. So the whole of the prejudice argument related to us getting advance notice of their expert report has gone.

THE CHAIRMAN: On liability?

MISS ROSE: On liability. Can I just focus on liability for a minute. Sir, the only point now on liability is in relation to logistics. I want to say a number of things about that. The first thing is that we raised this with them on 4th April - that is well over a month ago. We have been making it clear to them ever since in correspondence that the provision of the material was urgent.

THE CHAIRMAN: How urgent is it really?

MISS ROSE: The reason it is urgent is because we want it to be available to our expert before our expert finalises the report. Sir, you will have had an inkling - more than an inkling, I suspect, from the MasterCard proceedings - that these are substantial pieces of work. Therefore, to receive it on 27th May, when the reports are to be exchanged on 3rd June, is going to be of very limited use, particularly as you will bear in mind that 1st June is a Bank Holiday. So that period includes a three day weekend. That is going to be of very, very limited use to us.

Just dealing with the logistics point, first of all, we made the application on 4th April. We have been in correspondence with Sainsbury's since that date, and the objections they have taken have been based either on confidentiality, which is wholly unmeritorious, because we

have only ever asked for non-confidential material, or on this alleged prejudice point, which has now been surrendered.

At no stage until Miss Love was on her feet today has it ever been suggested by Sainsbury's that there was any logistical reason why the documents could not be provided by the date that we were asking for them, 16th May. No evidence has been put in on behalf of Sainsbury's to explain why it would take them so long simply to redact documents which already exist in both confidential and non-confidential versions, and indeed must do given the presence of clients who are in the confidentiality ring in the MasterCard proceedings.

What makes this point even more extraordinary is that Sainsbury's have agreed to provide their whole non-confidential closing submissions to Arcadia by 20th May. What is the basis on which they contend that they can provide that document to Arcadia by 20th May, but cannot provide exactly the same document to us until 27th May? We can see it is the same document because if you go back to the consent order at p.149, you will see that they agree at para.2, by 4 pm on 20th May to provide their whole written submissions. We see at 5, "all documents served on the applicants pursuant to this order shall be redacted to remove information identified in these proceedings as confidential to the claimant". So if they can redact their closing submissions by 20th May and provide them to Arcadia, why can they not provide them to us on the same date? That is totally incomprehensible.

The same is true of the expert evidence in relation to liability. As you can see from para.2(b), they have agreed to provide that as well to Arcadia by 20th May. That is the critical material that we need by 20th May. It is the expert evidence in relation to liability and the closing submissions.

If they are saying they want another week to deal with the redaction of the expert evidence on quantum, we might be prepared to consider it, but it does not make any sense at all. We are asking for exactly the same material.

If Miss Love has got something else to say, I would like to hear it before I sit down. So if she has got something to say perhaps she could say it.

MISS LOVE: It may be my fault for not clarifying earlier, but Miss Rose's suggestion that they are one and the same documents that are being provided to her clients, Mr. Jowell's clients and the Arcadia ones, is not quite right, because, as I understand it, there are slightly different sets of redactions. Arcadia will be able to see the MasterCard confidential aspect. It is our confidential material that will be black lined in the closings, whereas the version that would go to the Visa entities will have the Sainsbury's and the MasterCard information

that is confidential redacted. Just to address this point that we have got the document and we sit with it for a week for fun is not right.

THE CHAIRMAN: This is something on which you will have to liaise with MasterCard presumably?

MISS LOVE: Yes, Sir.

MISS ROSE: On that basis there is simply no factual basis on which they can say to you that it will take them an extra week.

For this to be raised in this way, it never having been raised in correspondence, during the hearing, unsupported by any witness evidence and in the absence of MasterCard, is wholly unsatisfactory, given that we have throughout stressed the urgency of this and our need to have this material well in advance of the exchange of expert reports. It is completely unjustified. Indeed, it is impossible to see why it would take them so long. The date is 13th May. All of the confidential passages must already be identified. All they have to do is go through it and redact it. It will take them an afternoon.

They find that very amusing, but the fact is that we have all done these tasks, and once the passages have already been identified as confidential, that is what takes the time, it is simply a mechanical job to redact them from the document.

If the real issue here is simply the MasterCard confidential information, then that could, at a pinch, be dealt with by disclosure into a confidentiality ring as a fall-back position.

THE CHAIRMAN: I do not think we want to get too complicated.

MISS ROSE: My principle position is that this has just not been justified. It has never been made out.

So far as quantum is concerned, with great respect the position of Sainsbury's is totally incoherent. We are asking for these materials on the basis that we are observers of the trial and we cannot understand what happened at the trial without seeing the submissions of counsel and the evidence that was put to the judge. What on earth has that got to do with the procedural directions for the conduct of a different set of proceedings? Nothing whatsoever. Why does it make any difference to whether we have a right of access to that material on that basis whether or not Mr. Justice Phillips ultimately rules that we should exchange disclosure documents with Sainsbury's in the phase 2 trial? It is simply irrelevant.

THE CHAIRMAN: I think what it boiled down to, Miss Love's main point, was the prejudice because they get it sooner than they would.

MISS ROSE: That point, as I have already indicated, is no longer being maintained in relation to liability because they have agreed we can have it sooner. In relation to quantum, that point

makes no sense at all because, as you know, Sir, they are not suing my clients. Indeed, it is Sainsbury's position, and you have just heard it enunciated by Miss Love, that the issues on quantum are self-contained as between each claimant individually and the defendants they are suing, because it will depend on their individual figures for the amount of MIF paid and the position on----

THE CHAIRMAN: I do not know what the relationship between Visa Europe and Visa Inc, but I am not thinking of you as totally separate for the moment.

MISS ROSE: Sir, we are totally separate entities unless and until that situation should change.

THE CHAIRMAN: I take your point. It is a slightly technical point.

MISS ROSE: The point goes further, Sir, because they are refusing to provide this material to us at all. They are not simply refusing to----

THE CHAIRMAN: Exactly, so it does not matter. Timing is not their point at the moment.

MISS ROSE: Exactly, and there is no justification for that whatsoever, for the reasons I have already given.

So far as what on earth is the prejudice, it is impossible to understand how they say they will be prejudiced if we understand what their case is on pass-on sooner rather than later. One can see why that might be highly advantageous to them.

There is a further point I want to make, which goes back really to the way that these cases have been managed. They contend that applying the normal rules here, which is publicly cited witness statements should be provided will prejudice them because of them because of the subsequent proceedings. You have already had my submission that if that was their position they ought to have asked for the proceedings to be heard in private. Having not done that, they cannot say, "It is okay for the proceedings to be heard in public, so you have heard the witnesses cross-examined, but you are not allowed to see the witness statements on the basis of which they were cross-examined". That is an incoherent position. You could say that, in fact, we are the ones who are prejudiced by the way these cases have been managed in a way that has been wholly outside our control, because the effect of what Sainsbury's have done is that we, Visa, have been excluded entirely from the Visa MasterCard case, which is going to be the first occasion on which a domestic court rules on issues such as, in principle, what are the effects of a MIF in terms of competition.

THE CHAIRMAN: You mean Sainsbury's v MasterCard?

MISS ROSE: Yes, we have been excluded entirely from a hearing before you, and therefore we have had no input at all into the arguments that you have heard which are going to inform your judgment. You could say that is a serious matter of prejudice to us, because a

judgment will eventually be produced by this Tribunal into which we have had no input, but which is likely, almost inevitably, to be read by the judge who is hearing our proceedings. So what Sainsbury's have done is to seek to take for themselves the advantage of going first, but then also to seek to exclude us entirely even from understanding what happened in those proceedings and what issues were raised and what evidence was before the court for the purpose of then defending ourselves in the subsequent case that comes in the slipstream. We say that, actually, the prejudice is all the other way and that this court ought not to entertain the submissions that are being made.

The order that is being proposed is absurd in its complexity. The simple truth is that all the documents we are asking for are documents that are always provided by courts unless there is a very good reason why not. There is no such good reason here and they should be provided as soon as possible, and we say as soon as possible is 16th May, or, at the very latest, 20th May, which is the date on which they have agreed them to Arcadia. Any later than that is indefensible.

THE CHAIRMAN: Thank you.

MR. JOWELL: Very briefly, Miss Love says that they are not in breach of their standard disclosure obligations, but the only basis on which she says that is that she mentions confidentiality rings. Confidentiality rings are not a basis for resisting disclosure, and certainly not when they concern your own confidential documents, and certainly not when there is already a confidentiality ring in these proceedings into which they can disclose those documents. Now, we accept that it is not a matter for you, but it is a matter that does completely scotch, as far as my clients are concerned, Ms Love's suggestion that we are somehow getting these documents early. We are not getting them early, we are actually getting them late.

THE CHAIRMAN: Yes?

MISS LOVE: I am not rising to reply to anything that you have heard, just a point of clarification following Mr. Jowell's reference to confidentiality rings. I am aware of exactly how popular this is likely to be, but I do have to reiterate that our offer that you have recorded was subject to the documents being disclosed into the confidentiality rings in the Visa proceedings.

THE CHAIRMAN: What possible justification can there be for that when they were heard in open court? It is only non-confidential aspects of them that are sought. I cannot understand why they should be disclosed into a confidentiality ring.

MISS LOVE: Sir, a couple of points. The first is that the equivalent documents will be going into confidentiality rings in the Commercial Court proceedings in any event. That does reflect that largely, even with redaction, they do contain a lot of information about our business.

The second is that those instructing me see the ring as supporting the use restriction in that, once the documents have gone, we have lost control of any meaningful way to police their subsequent use. We do not understand what subsequent use there would be other than in other MIF related proceedings, but the confidentiality and the use is flip sides, mutually reinforcing sides of the coin.

Sir, I have heard what you have said. I do not think I can press it further, but I think it is right to record that that is part of our offer.

THE CHAIRMAN: Does that apply to everything, all those categories of documents? Your submission is that they should all be into----

MISS LOVE: The offer we have made is that for phase 1 the documents go on the terms of the phase 1 confidentiality ring; and the phase 2 in relation to the phase 2 confidentiality ring.

THE CHAIRMAN: That applies to witness statements, closing submissions and expert reports?

MISS LOVE: It does, Sir. I thought I should record for completeness that that aspect of our offer has not been dropped.

THE CHAIRMAN: All into the relevant confidentiality rings existing in the Commercial Court?

MISS LOVE: Sir, yes.

MISS ROSE: Sir, can I very briefly respond to that?

THE CHAIRMAN: Yes.

MISS ROSE: It is quite obviously wrong in principle that any court should order that non-confidential documents should be disclosed only into a confidentiality ring. There is no basis for any such order.

THE CHAIRMAN: I think you have said it now. Is there anything else to say on that point?

MISS ROSE: Very little. What Miss Love says is that equivalent documents in the Commercial Court proceedings will be disclosed into confidentiality rings. That is nonsense. Non-confidential submissions----

THE CHAIRMAN: I am not going to study the Commercial Court order.

MISS ROSE: Sir, the Commercial Court judgment----

THE CHAIRMAN: We did it at the early stage.

MISS ROSE: Before they had been redacted?

THE CHAIRMAN: Yes, because they would not yet have had time----

MISS ROSE: Then you take them out. What you then do is you take out the bits that are not confidential. So there may be an initial provision of a whole document into a ring where you cannot distinguish between the parts of it that are and are not confidential. Then you refine so that by the time you get to the trial the non-confidential bits are in open.

That has already happened here, so we know this is non-confidential. That being so, there is no basis at all on which it could be subject to confidentiality restrictions.

The restriction on use is also misconceived for the reasons you have already heard me give. It is not appropriate to restrict the use of a witness statement or submission that has been made in open court.

THE CHAIRMAN: I will try and give judgment now. If it goes on a bit too long so that tummies rumble, then we may have a short break. Does anybody mind if we sit a bit after one o'clock.

Judgment (sent for approval)