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4 Tribunal's judgment in this matter will be the final and definitive record.

5 **IN THE COMPETITION**

Case Nos.: 1286, 1287, 1288/5/7/18

6 **APPEAL TRIBUNAL**

7
8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

13 Wednesday 16th December 2020

14
15 Before:
16 THE HONOURABLE MR JUSTICE ROTH
17 (President)
18 PROFESSOR ANTHONY NEUBERGER
19 ANNA WALKER CB

20
21 (Sitting as a Tribunal in England and Wales)

22
23 BETWEEN:

24
25 **SAINSBURY'S SUPERMARKETS LTD**

Claimant

26
27 -v-

28
29 **MASTERCARD INCORPORATED & OTHERS**

Defendants

30
31
32 AND BETWEEN:

33
34 **ASDA STORES LTD & OTHERS**

Claimants

35
36 -v-

37
38 **MASTERCARD INCORPORATED & OTHERS**

Defendants

39
40
41 AND BETWEEN:

42
43 **SAINSBURY'S SUPERMARKET LTD**

Claimant

44
45 -v-

46
47 **VISA EUROPE SERVICES LLC & OTHERS**

Defendants

1 **A P P E A R A N C E S**

2
3 Mark Brealey QC and Sarah Love (instructed by M&R and Morgan, Lewis & Bockius UK
4 LLP appeared on behalf of Sainsbury's)

5
6 Jon Turner QC, Christopher Brown & Laura Elizabeth John (instructed by Stewarts Law LLP
7 appeared on behalf of AAM)

8
9 Matthew Cook (instructed by Jones Day appeared on behalf of Mastercard)

10
11 Laurence Rabinowitz QC, Brian Kennelly QC, Daniel Piccinin and Jason Pobjoy (instructed
12 by Linklaters LLP and Milbank LLP appeared on behalf of Visa)

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(10.30 am)

(Proceedings delayed)

(10.40 am)

Case Management Directions

THE PRESIDENT: Good morning. Can I first of all just check that the legal representatives of the parties, whom we can all see on our screen, can hear me? Mr Turner, for the AAM parties, can you hear me?

MR TURNER: Yes, I can.

THE PRESIDENT: And Mr Brealey, for Sainsbury's, can you hear me?

MR BREALEY: I can, thank you.

THE PRESIDENT: And Mr Cook, for Mastercard, can you hear me?

MR COOK: Thank you, Sir. Yes, I can, Sir.

THE PRESIDENT: Mr Rabinowitz, for Visa?

MR RABINOWITZ: Yes, I can.

THE PRESIDENT: Thank you very much.

I should say at the outset, that while this is being conducted as a remote hearing and also being live-streamed, it is as much a court hearing as if everyone was physically present in Salisbury Square House, in the Tribunal courtroom, from which I am now speaking. Therefore, for anyone to make an audio or visual recording of these proceedings is a contempt of court and punishable as such.

There is an authorised recording being made by the Tribunal, and a transcript will be produced in the usual way.

I should also explain that the three Tribunal members, who are hearing this case

1 management conference, will not necessarily be the same constitution of the
2 Tribunal as may hear the eventual trials. That is particularly important if there
3 will be more than one trial in the different cases because, if that will be the
4 position, there will almost certainly be a different constitution for the different
5 trials, so that there is no risk of the evidence in one trial, so far as it is not
6 admitted in the other, influencing the mind of the Tribunal that hears the case.

7 The only other thing I should mention by way of preliminary observation is: if any of
8 you lose connection at any stage, I would hope we will see that through your
9 faces, as it were, disappearing from screen. But, if you have a problem,
10 please ring or e-mail the Registry and we will pause until you can reconnect.

11 We thought we would try, so far as possible, to deal with the AAM case first,
12 because if that can be resolved in a way that the representatives of AAM are
13 happy then if they wish they can leave the proceedings, that would be of
14 assistance to them.

15 So that is slightly out of order from the provisional agenda, which was, we thought, of
16 assistance in framing your skeleton arguments, which of course we have read
17 and for which we are very grateful. But we are going to take it, therefore, in
18 a slightly different order and think, first, about the AAM claims.

19 We have had a preliminary discussion as between the members of the Tribunal on
20 the various points that have been made.

21 Our provisional view -- I stress it is provisional, because of course we haven't heard
22 further oral submissions -- is that the starting point is that the AAM case
23 should be heard separately. That, as we understand it, is what is envisaged
24 by paragraph 5 of the order of the Supreme Court. However, if there are
25 certain common issues, as between the AAM case and either of the other two
26 cases involving Sainsbury's, possibly both of them, or possibly only the

1 Sainsbury's v Mastercard case, then we would be open to the possibility of
2 such a common issue being heard as preliminary issue, stretching to both
3 cases to assist a consistent outcome and also to avoid the whole argument
4 being gone into twice before the Tribunal.

5 So, both from the point of view of consistency for the parties and judicial economy,
6 that seems sensible.

7 That is a preliminary issue, not in the, if you like, traditional way of a preliminary
8 issue that is going to determine the case one way or the other, but
9 a preliminary issue for case management reasons, just as we did, as some of
10 you will know, in the Trucks cases, where that seemed to work, in terms of
11 case management, very successfully.

12 However, we think it will be very difficult, if not impossible, to decide that today. It is
13 clear from the various submissions that there are arguments as to quite what
14 issues are open to what parties at the moment, and the pleadings have not
15 closed, in the sense that there are applications to amend or there are
16 arguments that it is said a party wants to advance that indeed have not yet
17 been fully pleaded.

18 So, our present feeling is that we floated that idea of common issues or preliminary
19 issue, but that we should, first, have the pleadings closed in each of the three
20 cases and any applications to amend that are contested determined. Once
21 we see what the issues are on the pleadings in all three cases, at that point
22 we can consider, and ask each of you to consider, whether there is a sensible
23 preliminary issue that could be heard.

24 So, subject to that, we felt that, on the quantum case in general, the AAM trial should
25 go on a separate track. We have reached that view having obviously
26 considered what is said by the AAM representatives in their supplementary

1 note.

2 It may be that you would like to consider that with those instructing you and, if you
3 wish, we are perfectly willing to metaphorically rise for 10/15 minutes, or
4 indeed as much time as you reasonably need to discuss that with those
5 instructing you -- we of course appreciate you are probably not all in the same
6 room -- and then hear any further submissions you want to make. Because,
7 clearly, the question of what is going to be tried separately and what is going
8 to be tried together is fundamental to any case management directions we are
9 going to have to make.

10 But, subject to all that, we hope, on the AAM case, we can deal with the -- I don't
11 know if there is a formal application, but there certainly are some amended
12 pleadings by AAM, which I think Mastercard is objecting to, or objecting to in
13 one respect. We hope that is something we can sort out, and then we can
14 look at the other draft directions on disclosure and so on which apply, in any
15 event.

16 So, Mr Turner, it is, I think, for you in the first instance. What course would you like
17 to adopt? Would you like to discuss with your solicitors and clients the points
18 that I have just outlined, or would you like to go straight in and make
19 submissions?

20 **MR TURNER:** My Lord, would you give us ten minutes? I will speak to my
21 solicitors, and if we can resume at 10.55, I will then take the matter from
22 there.

23 **THE PRESIDENT:** That will apply, of course, equally to the other parties. It applies
24 particularly to Mastercard, and probably to Sainsbury's as well, most of all.
25 Mr Cook, would ten minutes suffice for you?

26 **MR COOK:** Sir, I'm sure it would do, yes.

1 **THE PRESIDENT:** Mr Brealey?

2 **MR BREALEY:** I believe so. We are all in different places, but I think we have set
3 up a system.

4 **THE PRESIDENT:** Yes. Mr Rabinowitz, I hope you can fit in with everyone else?

5 **MR RABINOWITZ:** Yes.

6 **THE PRESIDENT:** We will resume at, let's say, about 11.00, to give you that little
7 extra time. I should say that if you don't formally leave the courtroom, the
8 metaphorical courtroom, you will want to mute your microphone, otherwise the
9 recording will pick up any comments you want to make, saying what
10 a hopeless chairman you have for this hearing and other indications to that
11 effect, which I suspect you don't want on the transcript!

12 11.00.

13 **MR TURNER:** Thank you.

14 **(10.49 am)**

15 **(A short break)**

16 **(11.00 am)**

17 **THE PRESIDENT:** We are just waiting for our live stream to start.

18 Thank you.

19 Mr Turner?

20

21 **Submissions on behalf of AAM**

22

23 **Submissions by MR TURNER**

24 **MR TURNER:** My Lord, I'm grateful for the opportunity to take instructions. We
25 broadly agree with the Tribunal's provisional views.

26 We agree that for the AAM -- ASDA, Argos, Morrison -- parties, the non-common,

1 largely retailer specific issues of quantum should be heard separately.

2 A timetable in that regard has been agreed with Mastercard. For your reference in
3 our set of bundles, it is bundle 3, at tab 12, beginning at page 60.

4 **THE PRESIDENT:** Yes, we will come to timetable in due course, once we have
5 established the framework.

6 But I think that envisaged a trial in January 2023; is that right?

7 **MR TURNER:** It does.

8 **THE PRESIDENT:** So I don't think that should be disrupted if we have an earlier
9 hearing of a preliminary issue.

10 **MR TURNER:** We agree.

11 **THE PRESIDENT:** We certainly wouldn't want a trial any later than January 2023.
12 That seems a long way off.

13 **MR TURNER:** We agree.

14 There are potentially major common issues on what we have called "the shape of the
15 market".

16 **THE PRESIDENT:** Well, can I stop you, Mr Turner? Because our view is that, first
17 of all, we want to see if there is consensus of that as a possible framework,
18 and then the question of what the common issues might be, given the
19 somewhat tangled form that the remittals take because certain things in
20 certain cases have been conclusively decided, but are open in other cases. It
21 is a slightly complex situation. It is not a straightforward situation, where all
22 three cases are remitted.

23 We would really like to have the pleadings settled before we can identify the
24 common issues. For example, in your case, there is an amended defence
25 that has just been served. We don't know where we are on that, but that is
26 just an example of something that has to be resolved before we can actually

1 work out what the common issues are.

2 **MR TURNER:** I agree with that as well. At the moment, I'm just laying out how we
3 see the framework and what can usefully be achieved today.

4 **THE PRESIDENT:** Yes.

5 **MR TURNER:** Where, again, we are in accordance with the Tribunal's provisional
6 views.

7 Our view is that, subject to certain matters being cleared away -- and I will identify
8 what I think are the main ones -- there are potentially common issues on
9 shape of the market, which can and should be addressed as preliminary
10 issues much sooner than the beginning of 2023. We have circulated to the
11 other counsel, but not yet to the Tribunal, an indicative litigation timetable for
12 those, which takes you to late 2021 or beginning of 2022, so roughly a year.

13 The two main issues that would need to be addressed in that regard are, first, the
14 question whether Mastercard is allowed to run the shape of the market issues
15 at all in relation to the Sainsbury's case. You will have seen from their
16 skeletons that Mastercard says it can, and Sainsbury's objects.

17 **THE PRESIDENT:** Yes.

18 **MR TURNER:** Another issue --

19 **THE PRESIDENT:** That is not a common issue with AAM.

20 **MR TURNER:** No, but if there is to be a common trial of the shape of the market
21 issues, Sainsbury's is saying that, as regards them, Mastercard is not allowed
22 to raise those issues. They are done and dusted already.

23 So it is worth all to be in a common issues trial of those, it is a factor relevant to such
24 a trial going ahead or, if so, its form.

25 **THE PRESIDENT:** Yes, I would have thought that is something we have to
26 resolve --

1 **MR TURNER:** Yes.

2 **THE PRESIDENT:** -- as between Sainsbury's and Mastercard before we can then
3 decide what are the common issues.

4 **MR TURNER:** I agree. I'm putting this forward as a threshold matter that would
5 need to be touched on.

6 **THE PRESIDENT:** Yes.

7 **MR TURNER:** We agree absolutely that there are a number of these. Another may
8 be how the exemption issues in relation to Mastercard and Sainsbury's are
9 going to be addressed as well. Because, there again, Mastercard says
10 Sainsbury's must be held to what they say was a concession, similar to the
11 Visa case, and that is opposed.

12 Aside from all of those, there are the questions, as your Lordship rightly says, of the
13 pleading amendments.

14 Now, so far as we are concerned, we agree that the pleading amendments that we
15 have proposed for our particulars of claim should be addressed today. There
16 is only one narrow --

17 **THE PRESIDENT:** No, we are with you on that.

18 **MR TURNER:** However, so far as Mastercard's proposed amendments are
19 concerned, there is a cluster of matters which we have indicated in our
20 skeleton. Given the lateness of the hour and everything else, it seems to us
21 better that those should be addressed after the parties have had a breathing
22 space, as soon as possible in the New Year.

23 Then we have a sound footing on which -- your Lordship's right -- we can make this
24 decision, finally, about the shape of the common issues trial, if there is to be
25 one, and the timetable. In particular, disclosure will follow from that.

26 So, that is the way that we are thinking now.

1 I can develop our points on why it makes sense for there to be a shape of the market
2 preliminary issue trial on certain assumptions very briefly, if the Tribunal
3 wishes, or else I can proceed quite briskly to look at the question of
4 amendments and other issues.

5 **THE PRESIDENT:** I think what we want to do, Mr Turner, is this: I want to hear from
6 everyone with their response to the framework that we suggested.

7 Once that is clarified, if that framework is going to proceed, then we want to either
8 deal with pleading amendments today or set a timetable on which they will be
9 dealt with, early in the New Year; we would then have a further CMC
10 specifically to consider: are there any common issues now that the threshold
11 matters -- including the two you have identified regarding Mastercard and
12 Sainsbury's -- have been resolved? Are there any common issues and, if so,
13 can they sensibly be heard together?

14 Although, of course, there is an inconvenience and cost in having a further CMC, it is
15 as nothing compared to the cost of these trials. It is far better that people can
16 reflect properly once the issues have been determined, so we get this right,
17 because otherwise it will come back to haunt us in a year, or indeed two
18 years' time.

19 So, that is how we envisage proceeding, but not actually to address, today, what the
20 common issues are and whether they should be tried together or not.

21 **MR TURNER:** Yes.

22 **THE PRESIDENT:** As I said at the outset, there may be some common issues in the
23 AAM/Mastercard and Sainsbury's/Mastercard trial that are actually not
24 common to the Sainsbury's/Visa trial because they are Mastercard issues and
25 not Visa issues. I don't know, I'm just saying that is a possibility, so it is not
26 straightforward in this case.

1 **MR TURNER:** Yes. In fact, it is more likely, from my appreciation of the case, to be
2 the other way round, that Visa is raising certain additional issues. It has
3 a more intricate case, in some respects, than Mastercard does on the shape
4 of the market, at least at present.

5 **THE PRESIDENT:** Yes, but it may be that, equally, certain things have been
6 decided in certain cases in a binding way, but it is not necessarily binding in
7 one of the other cases, so it is all quite intricate.

8 Thank you very much. I think I want to go to Mr Brealey, if we take the claimants
9 first.

10
11 **Submissions by MR BREALEY**

12 **MR BREALEY:** Sir, we are happy with that framework and we agree that the
13 pleadings, the statements of case, have to be sorted, so that directions can be
14 made for the future. So we are happy with the framework and we would ask
15 that the pleadings get sorted out as soon as possible, with a fairly early CMC,
16 to determine whether there are any common issues and whether the parties
17 can make the averments that they seek.

18 **THE PRESIDENT:** Yes. Thank you. That is very clear.

19 Mr Cook?

20
21 **Submissions by MR COOK**

22 **MR COOK:** We agree with the proposition that the AAM case should largely be
23 heard separately from the other proceedings.

24 In relation to AAM's new proposal from yesterday, that there should be what has
25 been described as the "shape of the market", a preliminary issue trial on that.
26 We do consider that's a misguided question (audio interference) problems, not

1 if consistent judgment that AAM suggests is desirable. We would all like it if it
2 was (audio interference) judgment, and the reason for that, very briefly, is just
3 on the basis of those are different issues about different parties often dealing
4 with different evidence and, where the exemption rates (audio interference)
5 are part of the counterfactuals, are at the moment necessarily going to be
6 different between the different cases.

7 We think there are likely to be (audio interference) inconsistent in the sense --
8 because they are different questions for different parties with different
9 evidence. So, we think that is not going to be a desirable route and this
10 process will simply lead to unnecessary cost and delay.

11 We are alive to the preliminary view of the Tribunal, but, with respect, that is one --
12 you made it very clear it was preliminary, but it was in circumstances where --
13 until Mr Turner had developed his arguments in his submission yesterday,
14 nobody else knew about that, and we have not had the chance to address it in
15 writing.

16 I could develop, in detail, why we say this is a bad idea now. What we are however
17 content to do is put a marker down now that, as matters presently stand, we
18 are not persuaded that this is a good idea to any extent.

19 But we do see the sense in the Tribunal's suggestion that this is something that is
20 best dealt with once there is clarification of the pleaded issues, so we know
21 exactly what is going to be fought out, and it will be best dealt with in
22 circumstances where all the parties had proper warning of this issue and,
23 actually, we were doing something rather more detailed than would be
24 possible today. Where we actually had, you know, specific issues to be
25 considered, whether this issue should be considered as a preliminary issue
26 trial, rather than just the more generic analysis that is contained, with the

1 greatest of respect, in Mr Turner's note from yesterday.

2 I'm putting down a marker at the moment, we are unpersuaded, but we are
3 comfortable with the procedure that resolves the pleading issues and then we
4 come back for a CMC in the early course of next year, to then take this
5 forward. That CMC might be the appropriate time to resolve any pleading
6 issues, particularly on AAM at that point, and then deal with the common
7 issues point following those resolutions.

8 **THE PRESIDENT:** Yes, thank you. I absolutely understand your position. We were
9 not saying that there will be a trial of common issues.

10 What we are saying is that we would like to consider it. We think it might be helpful,
11 but it will very much depend on whether we can identify sensible common
12 issues and whether it is practicable. That is something we are certainly not
13 going to decide today. We would like to postpone.

14 We are keeping an open mind on it, but we think it is certainly a potential way
15 forward that we would like to address fully at a subsequent CMC.

16 We note Mastercard's also, no doubt, preliminary position because it has all come up
17 very shortly, and that would be the course that we would adopt.

18 We would like if possible, I should say, to resolve pleading issues before that CMC.
19 We don't want the CMC to be taken up with a later CMC with arguments
20 about pleadings, which relate necessarily to the particular parties to one of the
21 three cases. We would like all that to be dealt with, so we can come to that
22 CMC knowing in advance what are the issues open in each of the three
23 cases. So, it is just a question of mechanics, how we go about that.

24 Mr Rabinowitz?

25
26 **Submissions by MR RABINOWITZ**

1 **MR RABINOWITZ:** Thank you, Sir. I can be short. We respectfully see the sense
2 in the Tribunal's proposed framework for dealing with this, and we would be
3 very content to proceed in that way.

4 **THE PRESIDENT:** Thank you very much. That is very helpful.

5 That is what we will then do. We have noted, as Mr Cook described it, his marker on
6 behalf of Mastercard.

7 So, if we then turn to AAM, specifically, we have an application, I think -- I don't know
8 if it is a formal application, but certainly the AAM parties have served
9 amended particulars of claim. When I say "amended", I think they are re-re-re
10 however many times amended. But, in any event, it is an amended pleading,
11 which I think is in fact three amended pleadings, presumably Mr Turner,
12 because there are formally three separate claims; is that right?

13 **MR TURNER:** Yes.

14 **THE PRESIDENT:** Are they identical? I have only looked at one of them.

15 **MR TURNER:** They are materially identical for these purposes.

16 **THE PRESIDENT:** As I understand it, the amendment to the claim is not opposed
17 except on one point?

18 **MR TURNER:** That is right.

19 **THE PRESIDENT:** That is a point common to all three amended pleadings, is it?

20 **MR TURNER:** Yes.

21 **THE PRESIDENT:** So, if we look at that, the place I have it is in the AAM bundle 3,
22 at tab 12.

23 **MR TURNER:** Yes.

24 **THE PRESIDENT:** It starts at page 34.

25 **MR TURNER:** Yes. The language to focus on is on pages 48 and 49 in that tab of
26 that bundle.

1 **THE PRESIDENT:** It is subparagraph (b). These are particulars of the breach.

2 **MR TURNER:** That is right. To show you what is said, about eight lines from the
3 bottom of page 48, the retained text says that the claimant's case is that
4 absent the UK Multilateral Interchange Fee acquiring banks and issuing banks
5 would have settled relevant payment card transactions at par. On the basis
6 that issuing banks would not make any deductions from the amount of the
7 transaction price.

8 The remainder of that text is then proposed to be deleted. It referred to
9 an alternative case based on the findings of this Tribunal in 2016, in the
10 decision on the dispute between Sainsbury's v Mastercard, where the Tribunal
11 said that what would have happened without Multilateral Interchange Fees is
12 that there would have been a web or network of bilateral agreements made
13 between issuing banks and acquiring banks.

14 That was then a point that went to the Court of Appeal and the Court of Appeal said,
15 without opposition from any party, that the Tribunal's decision in that regard
16 was incorrect.

17 No party had been contending that such a situation would arise.

18 So, the text relating to that is now proposed to be struck out in red. In the last
19 sentence of (b), the words begin:

20 "In either version of the counterfactual~..."

21 That is intended to refer both to the idea of settlement of payment transactions at
22 par, and to the Tribunal's alternative approach from the Sainsbury's v
23 Mastercard decision.

24 There is no dispute that may be struck out, but the sentence continues:

25 "... the prices set by acquiring banks would have been lower to the benefit of
26 inter alios the claimant [the merchant] and subsequent purchasers."

1 The phrase "subsequent purchasers", was taken from the European Commission's
2 infringement decision, where it was used repeatedly, in general terms, to refer
3 to the groups that are harmed by Multilateral Interchange Fees.

4 I don't know -- if I can pause there -- whether the Tribunal received a copy of
5 an extract from the Commission decision that we sent across to the Registry
6 this morning, just to show you where that occurs? It hasn't reached you?

7 **THE PRESIDENT:** No. Just pause a moment.

8 (Pause)

9 No, we do not have that, but we saw that from your skeleton argument, where you
10 refer to it, and Professor Neuberger picked that up in our discussion before
11 the hearing, but we haven't actually seen the text. I doubt that is
12 controversial. But if you would like us to look at it, we can make sure we get
13 it.

14 **MR TURNER:** Yes, we --

15 **THE PRESIDENT:** Part of the issue is we have very limited physical staff in the
16 Tribunal at the moment, since we have gone into tier 3, so things are a bit
17 slower than normal.

18 **MR TURNER:** What we sent through was some very short extracts from what is
19 a long decision showing the way in which that phrase was used.

20 **THE PRESIDENT:** Yes.

21 **MR TURNER:** Essentially, it is to say that the harm resulting from Multilateral
22 Interchange Fees affects merchants and subsequent purchasers.

23 It is true that it was introduced into this pleading in a manner that is ambiguous
24 because it was intended to refer to the groups being harmed by interchange
25 fees, and not to be saying, as an admission, that there was a pass on of the
26 overcharge by the merchant in its prices set to its customers.

1 The pleading wasn't meant to refer to subsequent purchasers from the claimant. It
2 was meant to refer to subsequent purchasers from within the whole spectrum
3 of merchants of which the claimant, that merchant, was the relevant party.

4 Now, Mastercard objects now to the removal of that clause, the words 'and
5 subsequent purchasers', on the basis that, according to Mastercard, it is
6 a concession that the claimant has passed on the overcharge to its own
7 customers, and Mastercard says that this has been AAM's position -- it occurs
8 in all of the relevant particulars for each of the merchants -- for over seven
9 years.

10 We have explained in our skeleton that is incorrect. It is not the position, and we
11 made clear on the existing pleadings, straight away, that is not the right way
12 to read that phrase in the particulars.

13 If you would turn up the ASDA reply, which you have in our bundles at 2B, at tab 2,
14 this is illustrative. It applies for each of the others as well. I don't know if
15 you're looking at this on the PDF or in hard copy? It is in 2B, at tab 2, and you
16 go in it to page 66.

17 **THE PRESIDENT:** Yes.

18 **MR TURNER:** You will see that this is our reply to the defence that was raised by
19 Mastercard, that there had been a pass on of overcharges.

20 **THE PRESIDENT:** Sorry, can I just ask you to pause? This is a reply, as you say.
21 Is the defence in this bundle as well?

22 **MR TURNER:** Yes, it is.

23 **THE PRESIDENT:** Because paragraph 10 says:

24 "As to the first sentence of paragraph 28A."

25 Presumably of the defence.

26 **MR TURNER:** Yes.

1 **THE PRESIDENT:** Just to see what it is responding to.

2 **MR TURNER:** I apologise. If you go back to tab 1, go to pages 8 and 9.

3 **THE PRESIDENT:** Yes.

4 **MR TURNER:** You will see there -- and thank you for that -- that, at the top of page
5 9, Mastercard pleads:
6 "Even if there were excessive interchange fees the claimant has no claim for
7 damages since it expressly pleads that it passed on the loss to its customers.
8 Alternatively, the claimant had the option to do so."

9 **THE PRESIDENT:** So, that is presumably a reference, is it, to the bit of the pleading
10 that you took us to that you're now deleting?

11 **MR TURNER:** Yes.

12 **THE PRESIDENT:** Wishing to delete.

13 **MR TURNER:** Yes.

14 **THE PRESIDENT:** I see.

15 **MR TURNER:** Yes, it is.

16 **THE PRESIDENT:** Yes. And then --

17 **MR TURNER:** That is then dealt with in the reply at tab 2, page 66, paragraph 10. It
18 is the clearest statement of it.
19 "It is denied that the claimant has pleaded pass on", which is a compressed way of
20 saying that it is denied that we are saying that this is what we did, and that is
21 how the pleading is to be understood. "It is further denied that it has passed
22 on, and/or passes on, the overcharge, whether in whole or in part."
23 So, in short, what we now seek to do by removing the words "and subsequent
24 purchasers" is made in the context of our case on pass on having been
25 pleaded with perfect clarity in the reply to the defence. It is consistent with the
26 way that the parties have prepared to litigate this issue of pass on at trial from

1 the outset. The issue of pass on was treated as fully in dispute and extensive
2 disclosure was given on that basis. There is therefore no prejudice
3 whatsoever and nor is this a concession.

4 So, for those very simple reasons, the removal of this phrase is legitimate and
5 causes no prejudice.

6 My Lord, it is as simple as that.

7 **THE PRESIDENT:** Yes, I see. Thank you.

8 So, Mr Cook, first of all, is it right, this is the only point to which there is objection
9 taken in the draft amended pleading? Is that right?

10 **MR COOK:** That is correct, yes.

11 **THE PRESIDENT:** That is helpful. Would you like to address us on that, please?

12
13 **Submissions by MR COOK**

14 **MR COOK:** Yes, just to start with one point of correction -- which doesn't go to the
15 main point of my learned friend's submissions, but will be relevant later on
16 today in relation to the bilaterals counterfactual -- my learned friend said that
17 was not supported by anyone. That is in fact wrong. Mastercard appealed
18 against the Sainsbury's CAT judgment in relation to the bank CAT bilaterals
19 and Sainsbury's opposed that appeal, suggesting that the CAT was entitled to
20 reach the view it did on the bilateral. So, it was something that was fought out
21 before the Court of Appeal, and Sainsbury's supported the CAT judgment in
22 that regard.

23 That is just a point of detail. I didn't want to leave that uncorrected because it is
24 relevant for later.

25 Turning to the important point in my learned friend's submission, which is the
26 application to amend. There is, to some extent, one might say, a slight

1 surprising aspect to this entire application to amend here. On the basis, of
2 course, that they are amending the part of their pleading, or seeking to amend
3 the part of their pleading dealing with restriction of competition. That, of
4 course, is the issue that has already been determined in my learned friend's
5 favour.

6 We can see the heading at paragraph -- just on page 43, the heading "paragraph F",
7 in which this section relates. So, to ensure we are in the right bundle, it is
8 bundle 3 of the AAM bundles, which is where my learned friend took you to
9 the particulars of claim to start with.

10 On page 43 of that bundle, we can see the heading for this section. This is about
11 breach of the competition rules.

12 Sir, I apologise, there is some awful background noise here. I hope you can still
13 hear me, but I also hope it is very temporary.

14 In relation to the breach of competition rules, that's what they have done. They have
15 set out the various parts, subsection 1, which is particulars of the applicable
16 legislation. Subsection 2, particulars of the breach in relation to the EEA MIF.
17 We see that on page 46, and then subsection 3, particulars of breach in
18 relation to the UK MIF. So, this is all about an issue which has already been
19 definitively and finally determined in these proceedings.

20 So, I want to ask the question: why are there amendments being made to this at all
21 because it is all essentially ancient history?

22 I would like to start, in relation to the section in particulars of breach in relation to the
23 EEA MIF because this is one of the, again, surprising aspects of my learned
24 friend's application. If we look in that section on page 46, at -- I am afraid the
25 numbering here makes it terribly difficult, but under the bold heading:

26 "Particulars of breach."

1 We have subparagraph 1, and then (ii) below that. So, it is explaining why they
2 say -- and it has now been definitively found -- that the EEA MIF was a breach
3 of Article 81(1).

4 At (ii), they explain the decision restricted competition between acquiring banks. At
5 the end of that paragraph they say:

6 "In the absence of the said MIF, the prices set by acquiring banks would have been
7 lower to the benefit of inter alios the claimant and subsequent purchasers."

8 Which, of course, are the words that we will now come on to see in due course are
9 the words they are trying to remove in relation to the UK MIF, so they are
10 happy to retain the plea they have had since May 2012, so eight and a half
11 years in relation to the EEA MIF, but we will see they are trying to take it out in
12 relation to the UK MIF, which, as I say, doesn't really, essentially, make any
13 sense at all.

14 My learned friend then took you to the particulars of breach in relation to the UK MIF,
15 which starts in the middle of the page 47, and sets out, essentially, a similar
16 piece of analysis.

17 Then he showed you (b) on page 48, and the deletions that he was seeking to make
18 there. It is right to say the start of those deletions deal with the CAT bilateral
19 counterfactual and that was a deletion in relation to an amendment of the
20 pleading that was made during the course of the trial before
21 Mr Justice Popplewell. So, that new text came in, in 2016, during the course
22 of the trial. That was accepted because the CAT's judgment came out at that
23 time. But, at the end of the paragraph they are trying to delete, they say:

24 "In either version of the counter factual ..."

25 This was text that had been there, again, since May 2012. So, May 2012, the prices
26 set by acquiring banks would have been lower to the benefit of inter alios the

1 claimant and subsequent purchasers, which is the same language they are
2 happy to keep in relation to the EEA MIF and the only sort of addition to that
3 sentence, which came about as a result of the CAT bilaterals counterfactual
4 was the fact that sentence is now said to apply in two situations; both the
5 original no MIF counterfactual, which is the same basis for the EEA MIF
6 analysis, but also the new CAT bilateral counterfactual, so it applies in relation
7 to both now.

8 What we say in relation to this is: there is no reason why anyone should be
9 amending pleadings in relation to an issue which was resolved definitively by
10 the Supreme Court. My learned friend says that all this was doing was
11 intending to refer to the groups being harmed. With respect, that is
12 undoubtedly right. This was their case on harm, in the context of both the
13 EEA MIF and the UK MIF, that the groups being harmed were, as they said,
14 inter alios the claimant and subsequent purchasers, which can only mean,
15 despite my learned friend's attempt to say it is unclear, subsequent
16 purchasers from the claimant, which are of course consumers. The only way
17 they could be harmed is by pass on.

18 Pass on of the MIF in retail prices, or by some form of surcharging to those
19 subsequent purchasers.

20 So, their positive case on harm, which they maintained since May 2012, which they
21 succeeded on before the Court of Appeal, which they succeeded on before
22 the Supreme Court, was positively that subsequent purchasers from the
23 claimant were harmed. Now, that necessarily involves passing on having
24 taken place.

25 My learned friend says their position was pleaded with perfect clarity in the reply.

26 But, of course, while it is right he said he took you to the paragraph, they do

1 dispute whether or not they accepted there was pass on, or full pass on, they
2 did not at any point seek to remove the fact that their positive case on harm,
3 their positive case on restriction, was that the harm was being suffered by
4 subsequent purchasers.

5 Sir, we simply say in relation to this, this has been their pleaded case in relation to --
6 part of the case has now been resolved for a very extended period, they have
7 succeeded on it, and they should not be entitled now to resile from that. It is
8 clearly an important point that we want to pray in aid when it comes to the
9 hearing.

10 Of course, we can do so on the basis it has been on the pleadings for eight years
11 already. That is --

12 **THE PRESIDENT:** What slightly puzzles me is this: you say that has been their
13 positive case for years. The replies have equally been there for years. This
14 was the original reply, paragraph 10 that we were looking at, that is certainly
15 unambiguous. There is a firm denial of the allegation of pass on, so it seems
16 to me if this phrase stays -- I take your point it seems to say: subsequent
17 purchasers from the claimant, not from anybody else.

18 The most one has is an inconsistency between what is said in the claim and what is
19 said in the reply.

20 Because the reply is also very clear: they are disputing pass on.

21 Of course, pass on has not been decided.

22 **MR COOK:** Sir, that is absolutely right. If my learned friend wasn't fighting tooth and
23 nail to try and remove this plea, I might have been slightly less concerned
24 about the point, but he clearly is seeking to derive an advantage from the
25 amendment which removes this historic plea. We say, simply, there is no
26 reason to allow him to delete bits of a pleading which relates to issues that

1 have now been resolved, in circumstances in which -- and we are getting on
2 to what we will argue at the passing on trial -- we will say this has been the
3 public position of all sorts of organisations, these merchants, et cetera, that
4 there will be harm to subsequent purchasers and this is one part of the many
5 public statements to that effect.

6 **THE PRESIDENT:** Could you just clarify something? You say that this little bit that
7 we are looking at, at the end of (b), on page 49, has been there all along. In
8 the version I'm looking at, it is actually in red before the deletion, suggesting
9 that it was introduced at the same time as the sentences above, which you
10 said came in during the course of the trial before Mr Justice Popplewell.

11 I would have expected it to be in black if it had been there all along. Now, that could
12 be just a printing error in the way it was set up --

13 **MR COOK:** Are you looking at the version on page 49?

14 **THE PRESIDENT:** Yes.

15 **MR COOK:** It is in red on the basis that it has been deleted, Sir, so it is showing the
16 current amendments being proposed.

17 **THE PRESIDENT:** I see. But it was originally -- what I don't get a clear picture of,
18 from this, is what this particulars of claim looked like before the amendment
19 that was made during the trial before Mr Justice Popplewell; do you follow
20 what I mean?

21 **MR COOK:** Yes, my understanding, Sir -- and it is not clear I'm afraid on this
22 document, which is essentially a cleaner version with amendments then
23 shown -- was that the plea, which we get effectively after the words "in either
24 version of the counterfactual", the words:

25 "The prices set by acquiring banks would have been lower to the benefit of inter alios
26 the claimant and subsequent purchasers."

1 Which is exactly the same wording you get in relation to the EEA MIF. That was the
2 standing plea in relation to what has been called the "no MIF counterfactual",
3 which is the black text in (b), on page 48, that they are maintaining. The
4 change was simply saying: here are two possible counterfactuals. This
5 statement applies to both.

6 So, that has been the plea back to May 2012.

7 So, Sir, what we say in relation to this: yes, we recognise there is a limited amount of
8 assistance that we derive from this, in the light of what is said in relation to the
9 reply. But it's assistance my learned friend is trying to take away from us
10 because he recognises the assistance we get from the fact that their public
11 statement was that their subsequent purchasers were part of the group being
12 harmed.

13 We simply say that should remain on the pleadings in relation to an issue which has
14 been resolved already.

15 **THE PRESIDENT:** Well, I'm not sure, speaking for myself, that the limited
16 assistance you get from it is going to change whatever we do about the
17 pleading. It is open to you to say: well, until December 2020, this was your
18 case. Or at least this was your particulars of claim.

19 Whether it is now removed or not, you will be able to say: why were you saying that,
20 and you're now saying something different?

21 It is not going to be affected by whether it actually stays on the pleading or not, is it?

22 **MR COOK:** If you will give me one moment, Sir, I have been sent an e-mail which
23 confirms what the position was in relation to the original 2012 text.

24 **THE PRESIDENT:** I accept what you say. It makes sense that it was, and I'm sure
25 Mr Turner will tell me if that is wrong.

26 The point is open to you, anyway. You still have that pleading on the EEA MIF, as

1 you pointed out. That was your pleading on the UK MIF until long after the
2 trial. That fact is there. It seems to me to be a bit of a storm in a tea cup.

3 **MR COOK:** Sir, those were in fact the words I was thinking of using next in relation
4 to this. There is a certain amount of truth in relation to that, Sir. It is a bit of
5 a pleading in relation to a part of the case that has already been resolved.

6 **THE PRESIDENT:** Pass through hasn't been resolved. That is why everybody is
7 getting so excited about it.

8 But --

9 **MR COOK:** This was a plea in relation to restrictions, Sir, which has, of course,
10 been --

11 **THE PRESIDENT:** Yes, I know, but it is being relied on for pass through, that's why
12 people are concerned about it. No doubt you will rely on the bit on the EEA
13 MIF equally for that purpose. One is not saying we can forget about this bit of
14 the pleading.

15 Yes, that is just an initial reaction. Now, I understand the point.

16 Mr Turner, do you want to say anything in reply?

17

18 **Submission in reply by MR TURNER**

19 **MR TURNER:** Very briefly, my Lord.

20 It is important to draw your attention to our skeleton, if you have it. Page 4, footnote
21 2.

22 **THE PRESIDENT:** Just a moment.

23 (Pause)

24 Did you hear that? I think Ms Walker is saying: can you repeat the reference?

25 **MR TURNER:** Ms Walker, you're on mute on my screen.

26 I will repeat the reference: page 4 of our skeleton, at footnote 2.

1 **MS WALKER:** Thank you.

2 **MR TURNER:** We pointed out there, to Mastercard and everybody, that we had
3 simply forgotten to make the same change to the EEA MIF. There is no point
4 to be taken there. In the final version we would strike it out as well, the words
5 "and subsequent purchaser", so that is not a real point.

6 So far as the substance of this is concerned, we made clear, in the very first
7 sentence in our reply, from the outset, in paragraph 10, that this was not the
8 way to understand that sentence in the particulars of claim. As the Chairman
9 points out, we have made perfectly clear that we fully dispute pass on.

10 If that is the case that we are running, and are obviously permitted to run, then
11 removing those words as a tidying up exercise in the particulars of claim is
12 harmless and legitimate.

13 It simply brings the pleadings into line with what everybody knows is the statement of
14 the dispute. For that reason, we say that is why that should be done
15 immediately.

16 **THE PRESIDENT:** It will still be open to Mastercard, of course, to make
17 submissions at trial, to the effect that this was the case you put in originally,
18 before the reply, both as records EEA and UK MIF, and if they wish to so
19 argue, this suggests that there was a certain lack of either consistency of view
20 at AAM as to whether there was pass through or not, or confused thinking, or
21 whatever. They can still make that submission even if it is now deleted
22 because it has been there for all this time. You will say: no, it is not confused
23 thinking. Look at our reply.

24 So, the argument doesn't really get affected by whether it is deleted or not, does it?

25 **MR TURNER:** What we have sought to explain is -- and I apologise for you not
26 having those extracts from the Commission decision -- is that what we mean

1 in the reply, and what we clarify is our case, is that is not how the particulars
2 are to be understood.

3 **THE PRESIDENT:** I appreciate that, yes. But, I mean, you can have that argument
4 at trial anyway.

5 **MR TURNER:** Absolutely. But because it is not our case and we have made it very
6 clear, to retain something that says, "It is our case now", seems to be the
7 wrong approach to take. Whatever happened to be the historical position.

8 **THE PRESIDENT:** Yes, thank you. I think we now have -- at least I do, as I'm in the
9 Tribunal, and Professor Neuberger, who is joining us remotely, may not yet
10 have the copies that you sent of the decision, but I don't think we need look at
11 that. I think the argument is very clear.

12 I think we will withdraw for a few moments to confer.

13 **(11.50 am)**

14 **(The Tribunal withdraw to confer)**

15 **(11.53 am)**

16

17 **Ruling by the Tribunal**

18 **THE PRESIDENT:** Thank you, we shall allow the amendment on the basis that it is
19 made, both to the end of (b), on page 49, and to subparagraph 1(ii), on page
20 46, as indicated in footnote 2 of counsel's skeleton argument.

21 We don't think this in any way prejudices any argument Mastercard may wish to
22 advance at trial, on the basis that these words appeared in the original
23 particulars of claim and that the amendment has been made only now.

24 There is certainly no question of any estoppel given the nature of the reply. At best
25 there was an ambiguity, and we think it is much preferable that AAM should
26 have a pleading that reflects the case it is entitled to run.

1 So, on that basis, the amendment with that additional amendment, as indicated in
2 footnote 2, which I take it, Mr Turner, is just the deletion of the words "and
3 subsequent purchasers" in the passage on page 46 in our bundle --

4 **MR TURNER:** Yes.

5 **THE PRESIDENT:** -- can be made and served.

6 There is then an amended defence, which you have only just or very recently
7 received. As I understand it, you are not in a position -- we certainly have no
8 written submissions on that at the moment. So, we would like that to be dealt
9 with as soon as possible.

10 If there are going to be any objections to any part of it, we would like to know when,
11 sensibly, as we are coming up to Christmas, you can respond to that
12 application by Mastercard to amend its defence.

13 I'm not sure I have actually seen the amended defence, but it may be in one of these
14 bundles.

15 **MR TURNER:** You have the amended defence in --

16 **THE PRESIDENT:** The draft, as it were?

17 **MR TURNER:** Yes, the draft. In our bundle 3, at tab 13, looking at page 90.

18 **THE PRESIDENT:** That is probably why I don't have it because I haven't a tab 13
19 and I haven't a page 90, so that explains it.

20 I am working off physical bundles, so I haven't actually seen it.

21 But, in any event, I think you're not in a position to deal with it today; is that right?

22 **MR TURNER:** That is right. We put in the skeleton some indicative points of
23 concern, which you will have seen.

24 **THE PRESIDENT:** Yes.

25 **MR TURNER:** But our proposal is that we should have a breathing space to
26 correspond with Mastercard about these. We may narrow any dispute by

1 doing that, and that, subject to the Tribunal's decision, it would be right to
2 arrange for a hearing as soon as possible in the New Year, perhaps in late
3 January, to deal with any remaining disputes about it.

4 It will be a matter for the Tribunal whether that is a separate hearing from other
5 issues that may then need to be addressed or whether it will form part of
6 a wider mopping up exercise with some of the other issues that can't be dealt
7 with immediately today.

8 **THE PRESIDENT:** Yes. If it is purely an AAM issue, it may be easier if we are told
9 separately because it makes it much easier to get dates if we don't have to
10 involve all the parties. Equally, if it is a pure pleading point, you may not need
11 a full Tribunal. That can possibly just be done by a chairman.

12 **MR TURNER:** Yes.

13 **THE PRESIDENT:** So, I think having a date in -- you're suggesting in late January
14 or something like that?

15 **MR TURNER:** Yes.

16 **THE PRESIDENT:** Yes. Well, that seems sensible, Mr Cook, that you should -- that
17 AAM first corresponds with you, see what is agreed. I imagine there may be
18 things in the amended defence that are not opposed, anyway. Then see what
19 actually the issues are, and we will fix a hearing for late January.

20 Are you content with that?

21 **MR COOK:** Sir, yes, we are content with that procedure. I think it would be sensible
22 to have some kind of deadline in the diary for my learned friend to, you know,
23 identify the points he disagrees with and then --

24 **THE PRESIDENT:** Yes, absolutely.

25 **MR COOK:** -- a couple of weeks before a hearing, then perhaps at least a week for
26 the parties to try and narrow things down, if they can, for submissions prior to

1 a mini-CMC on this point.

2 **THE PRESIDENT:** Yes. Well, Mr Turner, when do you think, if we said that --
3 correspondence obviously doesn't need any direction, and it can go on, but if
4 we said that your final position of opposition to the proposed amendments,
5 written submissions in opposition by the -- if we said by 15 January, would
6 that be reasonable?

7 **MR TURNER:** Yes, it is.

8 **THE PRESIDENT:** So, by 15 January -- will be written submissions in response to
9 the proposed amendments, insofar as they are opposed.

10 **MR TURNER:** Yes.

11 It will be effectively then be a form of skeleton, and there will need to be a skeleton
12 from Mastercard, too, before the hearing. Shall we say 22 January? The
13 following week.

14 **THE PRESIDENT:** Yes, submissions in response by 22 January.

15 **MR COOK:** Sir, the only point I was going to suggest in relation to both those dates,
16 given the procedure you're suggesting should be adopted, would be we
17 should get a date in the diary, and then that will need to be done taking
18 account of availability issues, and then put those dates for submissions by
19 reference to that hearing date. So, AAM does it 14 days beforehand, and
20 Mastercard does it 7 days beforehand. Just on the basis -- otherwise we end
21 up getting on top of the issues and if it ends up the hearing being three weeks
22 later, then it is slightly less convenient than having done so just before the
23 hearing.

24 **THE PRESIDENT:** Yes.

25 **MR TURNER:** I have no objection.

26 **THE PRESIDENT:** Yes, that's sensible. We will do it that way. I'm not in a position

1 to fix a hearing date at the moment, and probably neither of you are either, but
2 we will try and do that over the next couple of days.

3 So, they are the pleadings issues. Again, working through AAM, a question about
4 a confidentiality ring order, I think, was raised; is that something that has been
5 agreed?

6 **MR TURNER:** My Lord, it has, I understand. Mr Cook's expression tells me that I'm
7 right on that. That was agreed late last night. There should be a draft agreed
8 confidentiality order with you. It ought to have come at the same time as
9 those extracts from the Commission decision.

10 **THE PRESIDENT:** Yes.

11 **MR TURNER:** I don't know whether it is necessary to read through it in fine detail
12 now, but --

13 **THE PRESIDENT:** If it is agreed, and if there is nothing in particular that you should
14 draw my attention to, or the Tribunal's attention to, as unusual or significant,
15 I think we can make that order.

16 **MR TURNER:** I am obliged.

17 **THE PRESIDENT:** On the basis that I'm just having a look here and having been
18 agreed between the parties, yes.

19 So, we shall make that order. Good.

20 Is it appropriate to deal, today, with any question arising from the request for further
21 information or is that something that can be dealt with at the late January
22 hearing as well?

23 **MR TURNER:** It is unlikely to cause a problem. We have had a chance to consider
24 Mastercard's response to our request for further information. By and large, it
25 is sufficient, but there are only a couple of points in it that we regard as
26 unsatisfactory. But we are quite sure that it is most efficient to take those up

1 with Mastercard offline.

2 **THE PRESIDENT:** Yes, and if there are any outstanding points that can't be
3 resolved, that can come on to the agenda for this late January hearing,
4 together with the defence.

5 **MR TURNER:** Yes.

6 **THE PRESIDENT:** Very good.

7 Then I think what remains is to look at your suggested directions. That is obviously
8 subject to any question of common issues. It is only a question of whether we
9 should deal with that now or whether we should deal with that later.

10 I think it may be helpful to fix a trial date because the sooner that is done, the better,
11 because it gets into people's diaries. Although I appreciate the trial length will
12 be affected by the fact that there might be a preliminary issue or several.

13 So, we have draft directions in bundle 3, at tab 12. It may be that all we should do at
14 the moment is fix a trial date for the quantum trial, and deal with other
15 directions after we have sorted out the question of whether or not there will be
16 any preliminary issue because that is going to affect things.

17 I mean, if you want directions on disclosure and you think it is helpful to have that
18 now, we can do that. Because you're suggesting that any supplemental
19 disclosure is by May, so that one will lose a month if we don't deal with what
20 now.

21 But it is going to be affected by, also by preliminary issues, isn't it?

22 **MR TURNER:** Our approach is that this essentially agreed timetable with
23 Mastercard will work regardless of the common issues that we are seeking to
24 have done separately and earlier, and that this full litigation timetable, which,
25 by the way, is quite similar in its end result, as you will have seen, to Visa's
26 proposed litigation timetable on the quantum issues against Sainsbury's.

1 They ended up ultimately with the proposal for a trial at end of 2022.
2 Beginning at the very end of November 2022.

3 **THE PRESIDENT:** Yes.

4 **MR TURNER:** We think that this essentially retailer-specific issue timetable, as it
5 would then be, remains good and we would be happy with a direction for
6 a trial to be listed in accordance with paragraph 19, on page 63, and for
7 disclosure in accordance with paragraph 6, on page 61.

8 **THE PRESIDENT:** Yes. It may be, because 2, 3, and 4 have really been dealt with
9 now and will be --

10 **MR TURNER:** Yes.

11 **THE PRESIDENT:** If we simply made the supplemental disclosure order in
12 paragraph 6, and the fixture for trial, paragraph 19, and I think a trial of that
13 length should involve -- it is generally preferable if the court doesn't sit on
14 Fridays, so an eight-week window. I think there was some suggestion it could
15 be six weeks or eight weeks, but if we say let's keep it at eight weeks, with
16 Fridays being a non-sitting day, be reserved for trial, and this is eight weeks,
17 Fridays being a non-sitting day and, in addition, how long pre-reading? One
18 week or two weeks?

19 **MR TURNER:** We were envisaging one week, but Mr Cook may seek to comment.
20 We think one week would be sufficient.

21 **MR COOK:** I would have thought one week would be sufficient in circumstances
22 where all the evidence is then going to be heard. So, that would be fine.

23 **THE PRESIDENT:** Yes, so we will order, if Mr Cook, he can come in and comment,
24 but what I'm proposing is we should order as per paragraph 6 and then,
25 an eight-week window with an additional week for pre-reading and on the
26 basis that Friday will be a non-sitting day, would be reserved for the trial

1 starting on 11 January 2023.

2 Mr Cook, are you content with that?

3 **MR COOK:** Thank you for the opportunity, Sir. Yes, we are content with paragraphs
4 6 and 19 with those amendments, yes.

5 **THE PRESIDENT:** Mr Turner, that is, I think, what you envisaged?

6 **MR TURNER:** Yes, yes.

7 **THE PRESIDENT:** Yes, we will make that order. Now, is there anything else then in
8 AAM?

9 **MR TURNER:** No, I don't believe so. I will hold back on points about the shape of
10 the possible preliminary issue unless your Lordship will want to hear from me
11 about that now.

12 **THE PRESIDENT:** No.

13 **MR TURNER:** In any way.

14 **THE PRESIDENT:** No, we don't.

15 **MR TURNER:** In that case, there is nothing further from AAM at this point.

16 **THE PRESIDENT:** We saw you raised a question about wanting to intervene in the
17 other trials, but I think that, in a sense, would be superseded if there is
18 a preliminary issue; if there isn't a preliminary issue, you can make that
19 application at that further CMC.

20 **MR TURNER:** Yes.

21 **THE PRESIDENT:** We certainly haven't decided that you have permission to
22 intervene, that is something to be considered.

23 Very well. In that case, I think the AAM parties -- though of course it doesn't relieve
24 Mr Cook -- can be released and we shall take a five-minute break.

25 **MR TURNER:** I'm obliged.

26 **(12.11 pm)**

1 (A short break)

2 (12.18 pm)

3

4 **Submissions on behalf of Sainsbury's**

5 **THE PRESIDENT:** Yes, so we turn to the two Sainsbury's cases. Aside from the
6 question of whether there may be common issues with AAM, the first
7 question, it seems to us, is whether these should be joint or separate trials.

8 The order of the Supreme Court, as we understand it, is that the two proceedings
9 should be heard together. We appreciate that since then Visa and
10 Sainsbury's have come to an agreement as regards exemption, and that for
11 the purpose of these proceedings, but not otherwise, Visa is not seeking to
12 argue for a higher level of MIF that would be exemptible, so that there is no
13 exemption issue now for the Tribunal to decide in the Sainsbury's/Visa case.
14 Whereas, by contrast, there is an exemption issue in the
15 Sainsbury's/Mastercard case.

16 But there are also, of course, quantum issues in both cases and that, it seems, is
17 what the Supreme Court order had in mind that they should be heard
18 together.

19 I say "had in mind" it seems to be expressly stated.

20 So, it may be, if they are heard together, that exemption questions in Sainsbury's
21 and Mastercard are heard first, so that Visa doesn't have to sit through that.
22 Maybe there is a gap between the two, or whatever. But, at the moment, we
23 would like to know why it is said, as it seems to be said in all the skeletons,
24 that actually they should be wholly separate.

25 So, I don't know, perhaps Mr Brealey, for the claimant, for both, would want to go
26 first on that?

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Submissions by MR BREALEY

MR BREALEY: I think, two reasons why they should be decoupled.
The first is, I think, that the philosophy behind the Supreme Court order was that the exemption was heard together, so there was a consistent level of MIF.
So, that is really the guiding light behind the order, that they would be heard together because the MIF levels would be the same, the same arguments would be run, and we didn't want three separate judgments like before.
So, the basis for the coupling has gone, certainly on exemption.
Secondly, on quantum, it is quite clear that the Supreme Court envisaged different determinations. In Mastercard, it is essentially an assessment of quantum; whereas in Visa it is a trial.
In my submission, it was not really anticipated that, if the quantum hearing in Sainsbury's v Mastercard was going to last, for example, one day, because there are no causation issues and it is just a question of calculating the level of damages, based on the level of MIF, that is a wholly different animal to the quantum exercise in Visa, where there is pass on, ex turpi causa, all the issues that were argued before the Tribunal, way back in 2016.
So, there are two reasons why they should be decoupled. I mean, the position has changed because of the exemption and, as I say, the philosophy behind the exemption was that the same arguments would be run to determine that there was consistency amongst the retailers and the schemes.
Given the way that the Visa and Sainsbury's agreement has panned out, there may be no consistency on exemption.

THE PRESIDENT: Just reading the order, it doesn't seem to be limited to exemption.

1 **MR BREALEY:** No, I --

2 **THE PRESIDENT:** Indeed, it says that part of the order comes immediately after the
3 direction that the Sainsbury's v Mastercard proceedings should also be
4 remitted for assessment of the quantum claim, the two sets of proceedings
5 will be heard together.

6 **MR BREALEY:** I, like you, Sir, read the words. It is just that the parties have
7 realised, as a matter of case management, that the basis upon which the
8 Court of Appeal, and then the Supreme Court, has ordered that has changed.
9 As I say, there will be an exemption hearing on the papers in Mastercard --

10 **THE PRESIDENT:** Well, you say "on the papers", I mean, yes, there will be no new
11 evidence, I think --

12 **MR BREALEY:** Well, there are no live witnesses.

13 **THE PRESIDENT:** Yes, but it will be a live hearing.

14 **MR BREALEY:** Of course, sorry. Yes, on the written evidence that has already
15 been adduced.

16 **THE PRESIDENT:** Yes, on the written evidence. Yes.

17 **MR BREALEY:** So, those are the two, those are the -- and really, again, from
18 a case management point of view, if it is the case that the Visa quantum
19 hearing is not going to be determined, we say until next December -- Visa
20 want it in two years' time -- then clearly there is a prejudice to Sainsbury's in
21 the Mastercard proceedings.

22 **THE PRESIDENT:** Yes.

23 **MR BREALEY:** We urge the Tribunal to grasp the nettle, and if the Visa quantum
24 hearing can be determined in December of next year, that is December
25 2021 -- we don't really see there is a necessity for the extra one year -- then it
26 may well be that we can give effect to the wording of the Supreme Court.

1 But, as I say, the basis upon which this order was made, we submit -- and I think the
2 other parties are agreed on this -- has radically changed.

3 **THE PRESIDENT:** Can you say that although it is an order of -- not just a court
4 order, but an order of the Supreme Court, we are at liberty to vary it given the
5 change in circumstances?

6 **MR BREALEY:** That is right. If the change -- if there are changes in circumstances,
7 then really the order can be departed from.

8 **THE PRESIDENT:** The other oddity, isn't it, is that there is no pass through issue in
9 the Sainsbury's v Mastercard trial.

10 **MR BREALEY:** That's right.

11 **THE PRESIDENT:** But there is very much a pass through issue in the
12 Sainsbury's v Visa trial.

13 **MR BREALEY:** Not only the pass through. Visa are going to argue ex turpi causa
14 because of the Sainsbury's Bank issue. That has already been dealt with by
15 the Tribunal.

16 **THE PRESIDENT:** Yes.

17 **MR BREALEY:** They will appeal on that. So, all the major issues that Visa are
18 raising have already been dealt with by the Tribunal in Mastercard.

19 **THE PRESIDENT:** Yes, I see. Yes. That I understand.

20 Mr Cook, do you want to add anything on that? I think you take the same position,
21 don't you?

22

23 **Submissions by MR COOK**

24 **MR COOK:** Sir, my position is perhaps a little different.

25 My starting position is this is an order of the Supreme Court. With respect, we don't
26 say that this Tribunal has a jurisdiction to depart from the procedure that has

1 been laid down by the Court of Appeal, by the Supreme Court, following
2 substantial argument between the parties.

3 So, we don't accept that jurisdiction exists.

4 That being said, when one looks at the wording of this paragraph of the order, or
5 paragraph 15 as varied by the Supreme Court, if one looks at the first few
6 sentences, actually what is being talked about -- you know, the reality is of
7 course this was drafted by the parties, rather than -- actually, one wouldn't
8 criticise the Supreme Court for it. It is the parties who are at fault -- is what
9 this paragraph is talking about. So, it says the claims in relation to exemption
10 are remitted for reconsideration, and the Sainsbury's v Mastercard
11 proceedings are also remitted for assessment of quantum, the two sets of
12 proceedings will be heard together.

13 So, the two things being talked about, in the first two sentences of this, are remitted
14 exemption and remitted quantum in Sainsbury's v Mastercard.

15 I would suggest the way to understand the reference to the two sets of proceedings
16 being heard together is that sentence is talking about the remitted issues.
17 Perhaps the language, you know, could have been drafted more clearly. It
18 was certainly something that nobody was ever envisaging, that a full
19 non-remittal trial in relation to Sainsbury's v Visa on quantum, which is not
20 part of a remittal, because it has never happened, it has not even been -- the
21 pre-trial stage as undertaken should be wrapped up in relation to that remittal
22 process.

23 So, we would say you understand the wording -- the two sets of proceedings, in the
24 light of the first two sentences, and that allows the separation, which we agree
25 makes case management sense, which is the reason why nobody had ever
26 anticipated something different.

1 **THE PRESIDENT:** So, we get to the same position, but by a different route.

2 **MR COOK:** We do, Sir, but it may be important later on, when my learned friend will
3 display an increased willingness to depart from the Supreme Court order
4 wherever it suits him elsewhere, which is the reason why we adopt a position
5 that the Supreme Court order is sovereign here.

6 **THE PRESIDENT:** Yes, that is true. Mr Rabinowitz.

7 You are muted.

8

9 **Submissions by MR RABINOWITZ**

10 **MR RABINOWITZ:** I was just saying how nice it is to go last. I respectfully adopt
11 the submissions of both Mr Brealey and Mr Cook. To the extent that there is
12 a difference, Mr Cook says what the Tribunal would be doing is not departing
13 from the language used in the order. I would respectfully adopt more of
14 Mr Cook's submissions.

15 But, in our respectful submission, my Lord, any other approach is going to lead to
16 a problem for the Tribunal in circumstances where there really are no real
17 overlapping issues, so far as one can tell at the moment, in circumstances
18 where their quantum case is a remittal, with Mr Brealey saying everything is
19 decided. Ours is a case on fresh evidence. I don't know how the Tribunal will
20 deal with that, but no doubt it could.

21 But, in our respectful submission, it is looking for trouble which can be avoided, if we
22 have (audio interference).

23 **THE PRESIDENT:** Yes. Well, I think we ought to resolve that straight away.

24 So, we will withdraw. There is always a slight pause when we come back because
25 of the live stream. It has to be reset, or switched back on. So, we will
26 withdraw briefly.

1 (12.31 pm)

2 (The Tribunal withdrew)

3 (12.33 pm)

4

5 **Ruling by the Tribunal**

6 **THE PRESIDENT:** Thank you for those submissions, which we found very helpful.

7 We think it is right, as Mr Cook submitted, that the order of the Supreme Court,
8 which remitted the claims by Sainsbury's against both Mastercard and Visa for
9 reconsideration of the exemption issue, that it is those proceedings, the
10 remitted proceedings that are to be heard together. Given that there is now
11 agreement on the exemption issue, in the Sainsbury's v Visa case, the order
12 no longer bites in that respect, and when we are considering a pure
13 Sainsbury's v Visa trial on quantum only, that is a separate matter. We see
14 the force of the submissions from all the parties that those two cases should
15 therefore be heard separately.

16 That is what we direct.

17 So, if we now turn to Sainsbury's v Mastercard, there is, I think, an application by
18 Sainsbury's, is it right, to amend your particulars of claim as regards the lawful
19 level of MIF?

20 **MR BREALEY:** Yes, Sir, can I just take you through that briefly?

21 **THE PRESIDENT:** Yes.

22 **MR BREALEY:** I think the first thing, if one goes to bundle B1, there is a draft
23 (coughing) amended particulars at page 49.

24 This is all on trying to get the issues sorted out between the parties. It is not just
25 a question of Sainsbury's trying to plead the case it wants; it is also relating to
26 the case that Mastercard wants to plead.

1 **THE PRESIDENT:** Yes.

2 **MR BREALEY:** It starts at page 49, B1. If one goes to page, internal page 70 --

3 **THE PRESIDENT:** Sorry, I'm~...

4 (Pause)

5 **MR BREALEY:** 49 is the start of the document. It should say "draft" on it really.

6 **THE PRESIDENT:** Yes.

7 **MR BREALEY:** This is the draft. Then the guts of Sainsbury's amendment starts at
8 page 70. I don't need to go through 46C, 46D, which is on page 70. Then it
9 goes over to page 71 and we get 46D.3. Those are averments relating to
10 what Mastercard will need to prove on exemption in the light of the Supreme
11 Court judgment.

12 I understand that Mastercard does not object to these amendments, I don't see how
13 it can. Actually, Mastercard says it is not necessary, but we feel it is
14 necessary to be as crystal clear as we can be as to what they --

15 **THE PRESIDENT:** Yes.

16 **MR BREALEY:** What the burden and standard of proof is on Mastercard and
17 exemption.

18 Then, when we go to page 72, 46E, I think this is the paragraph that Mastercard is
19 objecting to:

20 "Sainsbury's avers that the level of UK MIF set by Mastercard does not meet the
21 cumulative exemption conditions, no positive level of UK MIF that meets all
22 the cumulative exemption conditions. Neither the level of UK MIF set by
23 Mastercard, nor any level of MIF may benefit from any of the exemption
24 provisions."

25 We submit that averment we are entitled to make. This may have to be done at
26 a separate CMC, but we say that averment falls squarely within the paragraph

1 of the Supreme Court order, which says:

2 "The exemption proceedings in Sainsbury's v Mastercard shall be remitted for
3 reconsideration."

4 Reconsideration in accordance with the principles of the judgment.

5 What we are trying to do -- if that is consistent with the Court of Appeal, we say: well,
6 look, the principles have now been determined on the nature of the
7 exemption. Whether it is issue of pass through, always card, et cetera, level
8 and standard of proof, we fall within the terms of paragraph 4 of the Supreme
9 Court's order.

10 That is by way of background. Obviously --

11 **THE PRESIDENT:** Just to interrupt you, if I may. Looking at that paragraph 4, of
12 course, it goes on to say:

13 "It will not be open to any party to advance a new case or to adduce any fresh
14 evidence on the remittals for reconsideration, assessment of quantum in
15 Sainsbury's v Mastercard."

16 So, I suppose, one question: is this a new case?

17 **MR BREALEY:** If you read that as expansively, then it really -- there is nothing,
18 almost, to be reconsidered.

19 At some point, if you are reconsidering the exemption, you have to be advancing
20 something new that you didn't before. What that is going to, really, is that
21 you're not -- we are not going to have new evidence and brand new cases --

22 **THE PRESIDENT:** Well --

23 **MR BREALEY:** Can I --

24 **THE PRESIDENT:** -- I'm not sure that is quite right because the calculation before
25 was based on a bilateral counterfactual. That has gone.

26 **MR BREALEY:** Yes.

1 **THE PRESIDENT:** You put forward -- that wasn't actually put forward by
2 Sainsbury's, as I understood it. It was created -- came from the Tribunal.

3 **MR BREALEY:** It did.

4 **THE PRESIDENT:** Sainsbury's did put forward cases, and so one would look at the
5 case Sainsbury's put forward --

6 **MR BREALEY:** Correct.

7 **THE PRESIDENT:** -- on exemption, and one would see whether that -- and the case
8 that Mastercard put forward on exemption, and decide now, forgetting about
9 a bilateral counterfactual, which is right.

10 **MR BREALEY:** Yes. Can I just park that amendment? Because we were clearly
11 claiming damages based on a positive MIF of 0.15 for credit cards, for
12 example.

13 Can I just take the Tribunal to Mastercard's defence, which is at page 127 of this
14 bundle?

15 We start at paragraph 93.

16 **THE PRESIDENT:** Wait a minute. The same bundle?

17 **MR BREALEY:** This is the same bundle, so this is Mastercard's defence --

18 **THE PRESIDENT:** Yes. Is this the re-amended defence? Yes?

19 **MR BREALEY:** It is. It starts at page 98.

20 **THE PRESIDENT:** Yes. Yes, sorry. I thought, yes.

21 **MR BREALEY:** What I wanted to do is refer the Tribunal, essentially, to paragraphs
22 93 -- I think we only need to go to 93 to 98:
23 "Effect of the breach."
24 "As to paragraph 49, even if (which is denied) the level of interchange fee charged
25 was higher than it could lawfully have been, it is denied that this has resulted
26 in the MSCs paid by Sainsbury's being higher..."

1 Then 94:

2 "The effect of any breach is not properly to be measured by reference to the
3 difference between the interchange fee that was imposed and the interchange
4 fee which could lawfully have been imposed as the claimant contends since
5 the claimant would not have received the same Mastercard scheme if the
6 default interchange had been substantially lower or zero."

7 I emphasise the word "zero".

8 97:

9 "If the Mastercard scheme had operated with no or a lower UK MIF and was not able
10 to make corresponding changes to other default rules, then the number of
11 transactions to which the zero or lower interchange fee applied will have been
12 substantially lower and potentially zero."

13 Then we have a similar averment at paragraph 98. I refer the Tribunal to these
14 paragraphs for two reasons. First, that zero was in issue in Mastercard before
15 the Tribunal.

16 Secondly, these paragraphs in the defence are essentially Mastercard's -- what
17 Mr Turner calls the "shape of the market", causation points.

18 So, where does that leave us?

19 In my submission, the best thing to happen is that if the Tribunal granted Sainsbury's
20 permission to serve the draft re-amended particulars of claim, that would be
21 without prejudice to Mastercard to aver that it was not open to Sainsbury's to
22 run the zero MIF point. So, in its defence, it would say it is not open to
23 Sainsbury's. That can then be debated, and that would be debated at the
24 same time as Sainsbury's was arguing it is not open to Mastercard to run the
25 shape of the market averments because those were either dealt with by the
26 Tribunal or not appealed.

1 **THE PRESIDENT:** Yes, but clearly these matters should be dealt with sooner rather
2 than later.

3 **MR BREALEY:** Absolutely.

4 **THE PRESIDENT:** Because they will affect how people prepare for trial, length of
5 trial, all sorts of things.

6 **MR BREALEY:** Absolutely, and I would hope that even, if we could be -- sooner
7 than the mini-CMC for AAM, but it could be around about the same time as
8 the mini-CMC that the Tribunal has directed for the AAM proceedings.

9 **THE PRESIDENT:** It becomes a question of mechanics. Whether it is more
10 appropriate to give permission to amend and then say they can dispute that it
11 is open to you, or to reserve the question of permission to amend on the basis
12 you should only be allowed to make an amendment that is open to you. You
13 get to the same result.

14 **MR BREALEY:** Yes, it does. I thought it was neater if we had permission to amend,
15 but it was on the understanding that it would be open to Mastercard, in its
16 defence, to say an averment was not open to Sainsbury's, and then the
17 Tribunal can rule.

18 It doesn't matter, really.

19 **THE PRESIDENT:** I would prefer, for my part, not to grant permission to make
20 an amendment to raise a plea that is not open to you, but that is as -- you get
21 to the same result, and that argument is for another time.

22 This is, in a sense, taken us ahead to the points that Mastercard wants to raise,
23 which you say are not open to them, do they arise on this re-amended
24 defence, that starts at page 98, or are they points that Mastercard wants to
25 make by a further amendment?

26 I wasn't clear on that.

1 **MR BREALEY:** Well, we are not clear either. I mean, I will just float the point. If we
2 go to Mastercard's skeleton, at page 3, and this is why I said maybe if
3 Sainsbury's gets permission to amend, then at the same -- everything can be
4 determined, which includes this shape of the market point.

5 So, this is page 3. The paragraph is actually paragraph 3(g) and (h).

6 **THE PRESIDENT:** Page 3 of?

7 **MR BREALEY:** Page 3 of Mastercard's skeleton, and it is the subparagraphs (g)
8 and (h), which are the relevant ones.

9 You see there, Sir:

10 "In relation to quantum a number of parts of the CAT's quantum analysis were free
11 standing from the bilaterals analysis and are therefore binding on the parties,
12 this includes pass on, collateral~..."

13 **THE PRESIDENT:** Yes.

14 **MR BREALEY:** Then, at (h), Mastercard's "outstanding quantum arguments". I take
15 it that outstanding is not the quality of the argument, but the --

16 **THE PRESIDENT:** I expect they mean both.

17 **MR BREALEY:** Mastercard's quantum -- the remaining Mastercard quantum
18 arguments are summarised in the letter and then, (i), (ii), whether -- no
19 reference is made really to the pleading and we would want to know if these
20 are the pleaded cases in the paragraphs I have referred the Tribunal to. If so,
21 then we need to have an argument about going to the Tribunal judgment, we
22 need to have a look at what was argued, whether --

23 **THE PRESIDENT:** Yes.

24 **MR BREALEY:** -- essentially what we are saying is that this would be res judicata.

25 **THE PRESIDENT:** Let's just try and understand where we are.

26 Mr Cook, can you help us? Is what is said in your skeleton argument, this passage

1 on page 3, is that a reference to the existing passages in the existing
2 defence?

3 **MR COOK:** Yes, Sir. We take the very strict position, my learned friend knows, that
4 the Supreme Court order is absolutely clear here and says, quite explicitly,
5 that neither party is entitled to advance a new case.

6 We therefore say that the parties should be held strictly to their pleadings.

7 In relation to these paragraphs, or these points set out in my skeleton, these follow
8 from actually the paragraphs my learned friend has already cited to you, or at
9 least the start of them. It is paragraphs 93 to 109 of our defence, which, just
10 to clarify in case it is not clear, that is not a new document. We are not
11 seeking permissions to amend of any kind. Even though it is brightly
12 coloured, that is historic bright colouring, so the document at page 98
13 re-amended defence is the one that dates back to July 2015, we see from the
14 header of the document.

15 So, we don't seek to amend at all. That is our pleading, at paragraphs 93 to 109.

16 These points, which effectively can be summarised as "changes to the
17 scheme" and "switching", are set out in those paragraphs. We see the
18 changes to the scheme is addressed by reference to paragraph 96 onwards,
19 and then also the question of switching is paragraph 102 onwards.

20 **THE PRESIDENT:** Yes.

21 **MR BREALEY:** Obviously, foreshadowing, what we would be submitting is that the
22 Tribunal awarded Sainsbury's £68 million. In doing so it obviously dealt with
23 issues of causation. It had to, if it is awarding £68 million. The question is
24 whether Mastercard now is entitled to resurrect these arguments.

25 **THE PRESIDENT:** Yes, I understand that. Well, clearly there is a live issue on both
26 these aspects. One affecting what you want to say and one affecting what

1 Mastercard wants to say.

2 **MR BREALEY:** That's right, Sir.

3 **THE PRESIDENT:** Even if we might be able to resolve your point now, which would
4 no doubt take an hour, we won't be able to resolve it all on any view.

5 **MR BREALEY:** No.

6 **THE PRESIDENT:** As you say, we are going to have to look at the CAT judgment in
7 detail, and it will be helpful to have written submissions targeted at those
8 points in detail, so we can focus on those aspects of the CAT judgment before
9 a hearing.

10 I would have thought it is more sensible to deal with both sides of this together and
11 rather, as with AAM, to fix a hearing in January. It may be half a day is
12 enough, but, if necessary, we can set aside a day, where you can develop
13 written submissions on these points on both sides.

14 **MR BREALEY:** That's right, Sir.

15 **THE PRESIDENT:** And proceed that way.

16 Again, it is something that should be done sooner rather than later. I think you would
17 all agree with that.

18 I think that is effectively what you were suggesting. Mr Brealey, it is helpful to have
19 the clarification. There is no amendment to the pleading coming from
20 Mastercard. But, obviously, certain aspects of what Mastercard had put
21 forward before the CAT were resolved.

22 Pass through obviously being one. If other aspects were resolved and not appealed,
23 they remain binding, so it will be a question of working out whether these were
24 or not.

25 So, Mr Cook, are you content with that as a way forward, that we fix a hearing in that
26 case as well, for January, to deal with these points?

1 **MR COOK:** Sir, I had come to the hearing ready to argue these points, but it is right
2 to say that they certainly have not been developed in, essentially, the
3 procedural skeleton arguments that both parties submitted in the way that
4 would probably be most useful to the Tribunal, not least because what I'm
5 going to be taking you to is the section of the CAT judgment that I say dealt
6 with this, which is a mere 100 paragraphs long in its own right.

7 So, I say "dealt with it", I say all these points were wrapped up in the bilateral
8 counterfactual, which has, of course, been struck down. I do need to show
9 you how the threads of that are tied up inextricably into the CAT bilateral
10 counterfactual and therefore goes with that being knocked down by the Court
11 of Appeal. But that is certainly something that will take some time, and it
12 undoubtedly will assist you in due course to have pre-read some of those
13 sections, rather than coming to them entirely cold.

14 So, yes, procedurally, we are content with an approach that pushes this off to be
15 dealt with as soon as possible next year, Sir.

16 **THE PRESIDENT:** Then I would suggest we make the same form of direction that
17 this, the -- and I think, Mr Brealey, it is more satisfactory if we only give
18 permission to amend on points that you can run --

19 **MR BREALEY:** Of course, yes.

20 **THE PRESIDENT:** -- that your application to amend and your opposition to
21 Mastercard's reliance on certain aspects of its defence in the light of the Court
22 of Appeal's order, and the CAT judgment, are adjourned to a separate
23 hearing, and that each of you put forward your positions by written
24 submissions 14 days before that date and respond 7 days before that date,
25 adopting the frameworks that Mr Cook put forward of working back.

26 Again, we will try and fix a date which may be very close to the date of the AAM

1 hearing in January.

2 **MR BREALEY:** Of course.

3 **THE PRESIDENT:** Clearly, we will seek to read the relevant part of the CAT
4 judgment. We have pre-read the Court of Appeal and Supreme Court
5 judgments for this hearing, but I don't think, speaking for myself, I haven't read
6 the three first instance judgments. So, it will certainly be helpful to look at the
7 CAT judgment.

8 We will deal with it that way.

9 Good.

10 Then, in the light of that, what is the next point that we should deal with on this trial?

11 There is a question on the exemption issue that is being run about the evidence and
12 whether the case on exemption advanced in the evidence from the
13 Sainsbury's v Visa case on, dealing with exemption, can be relied on in the
14 Sainsbury's v Mastercard proceedings.

15 As far as I understand it, that is not agreed.

16 **MR BREALEY:** Well, it is -- we deal with this at paragraphs 19, 20, and 21 of our
17 skeleton, on page 8.

18 **THE PRESIDENT:** Yes. And --

19 **MR BREALEY:** And --

20 **THE PRESIDENT:** -- you say that it should not be. It no longer applies.

21 **MR BREALEY:** Well, obviously, we recognise the last sentence of the Supreme
22 Court's order.

23 **THE PRESIDENT:** Yes.

24 **MR BREALEY:** But, again, because exemption has been decoupled, the
25 Mastercard exemption and the Visa exemption has been decoupled, the utility
26 of all the evidence being adduced at the same hearing, to reach a common

1 judgment, has essentially gone.

2 So, in many respects, it is the same argument as I submitted before. Circumstances
3 have changed and that would allow Sainsbury's, and indeed Visa -- I think
4 Visa are in agreement with Sainsbury's on this -- that we would depart from
5 the last sentence of the Supreme Court's order because there is no longer
6 Visa exemption being determined at the same time as the Mastercard
7 exemption.

8 That is, in essence, what we have submitted at paragraphs 19 and 20.

9 **THE PRESIDENT:** Yes. Thank you.

10 Mr Cook, what do you say about that?

11 **MR COOK:** Sir, I am afraid I take a different position on this.

12 We say the Supreme Court order says explicitly exactly what it does, which is it
13 makes clear that the parties to each set of Sainsbury's proceedings may rely
14 on evidence from the other set of Sainsbury's proceedings, if to the extent it is
15 relevant to the case on exemption advanced in the proceedings in question,
16 that is the order that has been made by the Supreme Court. Or essentially
17 the order made by the Court of Appeal following argument and consideration
18 of how the remittal should work, and then modified by the Supreme Court.

19 With respect, Mr Brealey hasn't set out any legal analysis showing how this Tribunal
20 has the power to overrule a Supreme Court order. With the greatest respect,
21 I say again: the Tribunal doesn't simply have the jurisdiction to do so.

22 This was something that was argued out by the parties before the Court of Appeal,
23 and an order was made. The parties could have made -- you know, the Court
24 of Appeal could have left it open, to allow the CAT to manage its procedure as
25 it thought fit. That was certainly one of the approaches available, and the
26 Court of Appeal decided not to take that approach.

1 Equally, the parties could have, you know, suggested that the order should include
2 different results depending on whether one of the cases settled and what that
3 should be, or not, as the case might be, but the order was made in the terms
4 in which it was.

5 With respect, Sir, I would say it is largely a package that has been reached by the
6 Court of Appeal and ultimately endorsed by the Supreme Court. It is
7 a package of measures for remittal. What was considered to be essentially
8 a fair process. This goes with the idea that no party can advance a new case
9 or adduce any fresh evidence, but recognising that the result of the Court of
10 Appeal's judgment has been to clarify, modify, certainly in relation to the
11 Competition Appeal Tribunal proceedings, Sainsbury's v Mastercard, modify
12 the approach that Sainsbury's was suggesting should be adopted there, and
13 the balance was a recognition or an acceptance. Therefore we should be
14 entitled to rely upon evidence from the Sainsbury's v Visa proceedings.

15 In circumstances as well, Sir, where much of the material in question, the key
16 material in relation to the exemption issue, was part of the combined bundles
17 before the Court of Appeal because there was a great deal of argument about
18 whether that material, you know, was sufficient to justify Mr Justice Phillips'
19 order, or contradicted it. The issues on that were ones that all the parties
20 made submissions about to a greater or lesser extent, so there is
21 a convenient repository of material that Mastercard had already seen. It was
22 subject to a confidentiality ring.

23 But, as my learned friend's skeleton rightly notes, at paragraph 18, there were no
24 confidentiality problems with that. So, Mastercard has largely seen the
25 relevant material in any event. Given the overlap of the material is obviously
26 very substantial, and its exclusion would, with respect, lead to absurd

1 contradictions, we would have a situation, for example, to give one, where
2 Mr von Hinten-Reed, who was Sainsbury's' expert, accepted in the course of
3 the Visa proceedings that certain amendments were needed to be made to
4 his calculations. It would be absurd for us not to be able to point to the fact
5 that when we say his calculation was wrong in certain respects, we can't point
6 to his admission, only a few months later, that those amendments are
7 required, which is the reason why these points become so heavily intertwined;
8 with Sainsbury's it is often the same evidence on the same points which in
9 parts lead to slightly different outcomes, which is the reason why it is
10 important.

11 But we simply come back to: this is the Supreme Court order, it is binding, and with
12 respect it should be followed, Sir, because it simply doesn't have the
13 conditionality that my learned friend would require to say that this Tribunal
14 can, you know, divert from it, simply because it considers it is appropriate to
15 do so.

16 **THE PRESIDENT:** Yes. I think on the Mr von Hinten-Reed point, given that he is
17 going to be called by Sainsbury's as a witness, of course it is always open to
18 put to him in cross-examination: "Well you said this in the other trial~..."

19 **MR COOK:** No, Sir. With respect, this is the remitted Sainsbury's/Mastercard case.
20 There is not going to be any live witnesses in relation to that. So it is not
21 a live trial, as you picked up Mr Brealey in relation to this --

22 **THE PRESIDENT:** Yes, you're quite right, it is in the Visa one. I got confused, yes,
23 I understand.

24 **MR COOK:** That is the reason why we say that there were points here that were
25 recognised, that there was relevant evidence in relation to these points, that
26 everyone had already seen, that had already been fought out on hearings

1 about, and that it was appropriate that we should be able to make reference to
2 it for those kind of points. But in the broad terms that were set out in the final
3 sentence of paragraph 15, had varied.

4 In terms of the practical effect of this, you know, the practical reality, Sir, is that most
5 of this material is already in the Court of Appeal bundle. We have already
6 seen it. So some of the confidentiality concerns raised about whether we
7 should see Visa material has gone, those issues have already gone, that ship
8 has already sailed. We have seen the material. In many respects large parts
9 of it have been deployed in open court anyway, and the Supreme Court order
10 is clear.

11 **THE PRESIDENT:** Yes. Thank you.

12 Well, Mr Rabinowitz, I'm not sure if this is directly an issue for you, because this is
13 a trial you're not -- following an earlier ruling -- involved in. But it is, in
14 a sense, concerning evidence from your case so I think it is appropriate that
15 you should at least be entitled to address it.

16 **MR RABINOWITZ:** I'm grateful my Lord.

17
18 **Submissions by MR RABINOWITZ**

19 **MR RABINOWITZ:** We take the same position -- as the Tribunal will have seen --
20 that Mr Brealey takes.

21 Mr Cook relies on the order of the Supreme Court. In our respectful submission, the
22 order made by the Supreme Court has, as a predicate, that there will be two
23 sets of exemption proceedings coming before this Tribunal, for a remittal at
24 the same time.

25 You can test it this way. Assume that, rather than there being no agreement
26 between ourselves and Sainsbury's in relation to UK lawful MIFs, we had

1 settled entirely with Sainsbury's.

2 The logic of Mr Cook's position, of course, is that in those circumstances it would still
3 be open to Mr Cook and Mastercard to be relying on either (audio frozen) in
4 those proceedings, even though there was no other set of Sainsbury's
5 proceedings, which is what the predicate of the Supreme Court's order
6 involves.

7 It does contemplate, there is another or other set of Sainsbury's proceedings dealing
8 with the exemption issue. In circumstances where there isn't that, then in our
9 respectful submission the basis upon which there was going to be a sharing of
10 evidence goes.

11 And in a way the logic of that position is, in my submission, obvious. If we were all
12 sitting together in the same exemption proceedings, arguing before the same
13 Tribunal about the same issues of exemption, or overlapping issues of
14 exemption, it would with respect be extremely difficult, if not perhaps absurd,
15 for some parties to be able to make points against Sainsbury's by reference to
16 some evidence, whilst the other party, Mastercard -- it doesn't matter who --
17 couldn't do so by reference to that evidence. But that is not the position.

18 The position is: there is now only one set of exemption proceedings and that is the
19 one that takes place between Sainsbury's v Mastercard. Visa's exemption
20 proceedings do not exist anymore because, in a sense, there has been
21 an agreement about them.

22 And one can further test the position by looking at the position of AAM. And in this
23 regard, perhaps if I can invite the Tribunal to follow the progress of this
24 paragraph as it applied to AAM.

25 By looking at the position on the Court of Appeal order -- because this in a sense is
26 just an adoption of the Court of Appeal order -- and seeing what happens

1 when the court said that AAM is not going to be heard at the same time.

2 If one starts by going to C2, tab 18, page 191. Right at the bottom of the page one
3 has the beginning of paragraph 15, if the Tribunal has it:

4 "Each of the Appeals shall be remitted to the Competition Appeal Tribunal for
5 re-consideration, not retrial, in accordance with the Judgment, of Mastercard's
6 and Visa's cases advanced in the Courts/Tribunal below that the MIFs subject
7 to these claims satisfy the conditions for exemption pursuant to Article 101(3)
8 TFEU, section 9 of the Competition Act 1998, Article 53(3) EEA, and/or
9 section 4(5) of the Irish Competition Act 2002. The Appeal in Sainsbury's v
10 MasterCard shall also be remitted to the Competition Appeal Tribunal for
11 assessment of the quantum claim, based on the principles set out in the
12 Judgment."

13 So far so good, and pretty much identical to what you have in the Supreme Court.

14 Now we have this:

15 "The three proceedings [at this stage there is also AAM] will be heard together, by
16 a Tribunal chaired by a High Court Judge. It will not be open to any party to
17 advance a new case or to adduce any fresh evidence on the remittals for
18 reconsideration [et cetera].

19 "However, the parties to each of the proceedings may rely on evidence from the
20 other two proceedings."

21 AAM drop out because the Supreme Court said the AAM remittal exemption point
22 has been decided. And you then get the Supreme Court referring only to the
23 two proceedings, because the AAM proceedings is not there.

24 Of course the logic of Mr Cook's point -- which is: all of this documentation was
25 before the Court of Appeal, so really how could anyone have expected any of
26 this documentation not to be available on remittals? -- would apply equally to

1 the AAM material, but that is plainly not what the Supreme Court had in mind.
2 And just as when AAM dropped out and the sharing of its material disappeared, in
3 our respectful submission, in circumstances where we are not going to have
4 any exemption proceedings with Sainsbury's, precisely the same logic applies
5 to our position as well.

6 I ought just perhaps to make one further -- so Mr Cook's point about the Court of
7 Appeal and what was in the bundle there, with respect, is not a good point.

8 It is perhaps interesting to look at how the Supreme Court was thinking about this by
9 reference to a point which arose, albeit in a slightly different context, where
10 I think Lord Reed was asking a question of Mr Turner.

11 Perhaps I can just invite the Tribunal to go in bundle C3, to tab 21A, and page 125.

12 It should be a transcript of --

13 **THE PRESIDENT:** C3, tab?

14 **MR RABINOWITZ:** Tab 21A, page 125.

15 **THE PRESIDENT:** This is within a transcript of the Supreme Court hearing --

16 **MR RABINOWITZ:** That you can see on page 89.

17 We can tell it is the Supreme Court because it is Lord Reed who is asking Mr Turner
18 something. It is really just for this point.

19 At line 4 on internal page 142, Lord Reed says -- albeit in relation to whether the
20 Court of Appeal did or didn't go wrong in ordering a remittal of all points -- this:

21 "Normally, if you wanted to be able to take all the evidence into account you can --"

22 **THE PRESIDENT:** Just a moment, I'm trying to -- internal page 142, which starts at
23 the bottom?

24 **MR RABINOWITZ:** Yes.

25 Line 4, Lord Reed says this:

26 "Normally, if you wanted to be able to take all the evidence --"

1 **THE PRESIDENT:** Just give me a moment, something has gone -- 141 is Mr
2 Hoskins, submissions by Mr Hoskins; that continues on 142.

3 **MR RABINOWITZ:** I have submissions by Mr Turner on 141.

4 **THE PRESIDENT:** 141 is Mr Turner. And then line 15 -- this is 141 -- says:
5 "Well, Mr Hoskins, what is the answer?"
6 Do we have a different pagination or something?

7 **MR RABINOWITZ:** My Lord is right, you're on 142 where he says that.
8 Before you get to that point, at line 4 --

9 **THE PRESIDENT:** On what page?

10 **MR RABINOWITZ:** The same line --

11 **THE PRESIDENT:** Oh I see, the pagination is at the bottom. I'm sorry, I was taking
12 it from the top. Yes, I'm with you.

13 **MR RABINOWITZ:** Yes, thank you.

14 **THE PRESIDENT:** "Maybe I can be told. But normally if you wanted to be able to
15 take all of the evidence into account you can join the trials."
16 Is that it?

17 **MR RABINOWITZ:** That is it. If you're not doing that, then each case has to be
18 determined on the evidence heard in that trial. That is plainly what Lord Reed
19 imagined would be the ordinary course.

20 Now what Mr Cook is suggesting is that, even though there isn't going to be a joint
21 trial, the evidence which should be relied upon will not just be evidence from
22 that trial, but evidence from the Visa trial.

23 So we say, reading the Supreme Court order -- in our submission -- carefully, in
24 circumstances where the predicate for the parties sharing the evidence was
25 that there were going to be two sets -- in other words, another set of
26 proceedings, which is what they are referring to -- if that predicate falls away,

1 then so does the part of the order, plainly intended by the Supreme Court,
2 dealing with the sharing of evidence. Just as it did when the Supreme Court
3 amended the order made by the Court of Appeal.

4 When AAM's proceedings fell away we suddenly got three to two, exactly the same
5 logic applies here.

6 **THE PRESIDENT:** Yes, thank you.

7 **MR BREALEY:** Sir, if I could just expand on that.

8 If one goes to paragraph 234 of the Supreme Court's judgment, bundle C3, page 80.

9 This is the paragraph of the Supreme Court's judgment, paragraph 234.

10 Essentially, to pick up the point just made, the parties were consenting on the basis
11 that -- this is all about consent, and the parties were consenting on the basis
12 that there were two exemption hearings. And if there is only one exemption
13 hearing for Mastercard and one for Visa -- they are separate -- the basis upon
14 which the consent was made falls away. I think that ties in with the point.

15 **THE PRESIDENT:** Yes, I see.

16 **MR COOK:** Sir, if I may come --

17 **THE PRESIDENT:** Yes, I think because you're effectively applying for this, you have
18 a right to reply, briefly.

19 **MR COOK:** Sir, I'm very grateful.

20 I start by saying that neither Mr Rabinowitz nor Mr Brealey, nor the very large teams
21 that both of them have, at least metaphorically behind them on this occasion,
22 have managed to identify any legal principle which allows this Tribunal to
23 depart from an order of the Supreme Court.

24 I'm grateful to Mr Brealey in pointing the Tribunal's attention to paragraph 234 of the
25 Supreme Court judgment, which of course makes clear that, in essence, this
26 was in part a consent order, which doubly makes it difficult for the Tribunal to

1 depart from consent orders -- what essentially is a consent order -- but
2 obviously the imprimatur of the Supreme Court is most significant in relation to
3 that.

4 In relation to Lord Reed's question, with respect, that was a question raised in the
5 course of argument by one of the Supreme Court justices, and the order that
6 was made was then one that was made in the terms in which it was.

7 So to suggest, therefore, that one can depart from the Supreme Court's order
8 because of a question raised in argument, with respect, simply doesn't stack
9 up.

10 So, we say in relation to this, Mr Rabinowitz said the predicate of this is the idea that
11 there will be two hearings, that is quite clearly not the case. There are two
12 sets of proceedings, there remain two sets of proceedings, and there would
13 have been two sets of proceedings even if one had settled recently. And the
14 order explicitly says what the position is in relation to the two sets of
15 proceedings.

16 It does not include either the option for this Tribunal to decide on the best route for
17 the procedure of these hearings, which was something that Mastercard did try
18 and seek to persuade the Court of Appeal at the time. We suggested that
19 was the right way of doing it. The Court of Appeal rejected that proposal and
20 laid down its own orders, and the Supreme Court likewise.

21 In relation to the removal of AAM and the reference to AAM evidence, this is one of
22 those areas where Mr Rabinowitz, being a relatively new boy to this case at
23 least, and not having been involved in the Supreme Court process, perhaps is
24 less aware of some of the background to this.

25 In the sense this was not an order that was fought out by the parties. The
26 amendments to the order were agreed by the parties reflecting the ruling that

1 AAM was removed. At that stage neither Sainsbury's, Visa nor Mastercard
2 suggested they would like to be able to rely upon evidence from the AAM trial.
3 So they were content with the order in the terms in which it was made, or the
4 terms in which it was drawn up between the parties.

5 So the idea that the Supreme Court made some explicit consideration of this point
6 and decided to adopt the removal of the AAM evidence, with respect, simply
7 isn't what happened here.

8 It was agreed by the parties when nobody wanted that evidence, and so it wasn't
9 argued or fought out. But the end result is an order and, with respect, we say
10 the Tribunal should apply that order.

11 **THE PRESIDENT:** Yes, thank you.

12 At this point we will adjourn and we will resume at 2.20. We will consider this over
13 the adjournment.

14 **MR COOK:** Thank you.

15 **THE PRESIDENT:** 2.20.

16 **(1.22 pm)**

17 **(The short adjournment)**

18 **(2.25 pm)**

19 **THE PRESIDENT:** Thank you.

20
21 **Ruling by the Tribunal**

22 **THE PRESIDENT:** The question we have to decide is whether, under paragraph 15
23 of the order of the Court of Appeal as varied by paragraph 4 of the order of
24 the Supreme Court, the evidence relevant to the case on exemption that will
25 be heard by the Tribunal, in the forthcoming trial of the
26 Sainsbury's v Mastercard proceedings, can also include and have admitted

1 the evidence that is relevant to that question from the Sainsbury's v Visa
2 proceedings.

3 It arises in circumstances where Sainsbury's and Visa have reached agreement on
4 the level of an exemptible MIF and therefore no further issue on exemption is
5 to be heard by the Tribunal in that set of proceedings.

6 The starting point is the wording of the order in the paragraph to which I have
7 referred. There is to be incorporated in this short ruling the text of that
8 paragraph and I shall not, therefore, read it out.

9 It is to be interpreted not like a statute, but in the context in which the order was
10 made.

11 It was, as it declares at the outset, a variation of the order made by the Court of
12 Appeal at the end of the hearing of the appeals in these three cases.

13 The Court of Appeal had held and directed that the Sainsbury's v Mastercard, the
14 Sainsbury's v Visa and the AAM v Mastercard proceedings should all be
15 heard together and concluded in paragraph 15. However the parties to each
16 of the proceedings may rely on evidence from the other two proceedings if
17 and only to the extent it is relevant to the case on exemption advanced in the
18 proceedings in question.

19 The Supreme Court reversing the Court of Appeal in this respect held that the
20 question of exemption in the AAM case had been conclusively determined
21 and, therefore, there was nothing to go forward in that action on the
22 exemption issue.

23 It was in those circumstances that the wording of paragraph 15 was varied to provide
24 in the amended version of the same sentence:

25 "However the parties to each of the Sainsbury's proceedings may rely on evidence
26 from the other set of Sainsbury's proceedings if and only to the extent it is

1 relevant to the case on exemption advanced in the proceedings in question."

2 If, as the Supreme Court envisaged, the two sets of Sainsbury's proceedings were
3 heard together then such a ruling was essential.

4 It would be difficult for any court or Tribunal to hear two cases together with evidence
5 coming on one side from the same party, if what the party said in the one
6 case could not be taken into account in the other case.

7 Now, they are not being heard together because there will be no such hearing in the
8 Sainsbury's v Visa case.

9 The imperative for that direction, therefore, no longer applies, but it is not simply
10 a question of the imperative as we interpreted the paragraph of the order, that
11 was the intention of that particular provision. It was to enable those
12 proceedings to be effectively conducted.

13 We do not interpret it as meaning that this should still be allowed when the only
14 ongoing proceedings on exemption are in Sainsbury's v Mastercard.

15 Moreover, we think that the fair position is that the evidence from another set of
16 proceedings that are no longer ongoing should not be admitted in that way.

17 We can test it in this sense: in the AAM proceedings there had been a trial on
18 exemption. Mastercard will have put in, no doubt, significant evidence on
19 what level of MIF would be exemptible.

20 It was never suggested that Mastercard's evidence on the exemption issue, that it
21 had put in the AAM proceedings, should be admissible in the Sainsbury's
22 proceedings, going forward, under the Supreme Court's revised order.

23 No doubt some of that evidence might be highly relevant, but those proceedings
24 were no longer live before the Tribunal going forward.

25 We think that the same logic must apply to the interpretation of the critical sentence
26 in paragraph 15, when it comes to the Sainsbury's v Visa proceedings, even

1 though in other respects those proceedings are continuing. We would only
2 observe that the same comment could be made about the AAM proceedings,
3 and they are also continuing in other respects. Accordingly, we see nothing in
4 the Supreme Court order, when properly understood, which requires the
5 admissibility of the evidence on exemption from the Sainsbury's v Visa
6 proceedings, nor do we think that would be justified, as the Supreme Court
7 observed at the end of its judgment on the three appeals before it, at
8 paragraph 246. When there are separate trials and separate proceedings, the
9 normal position is that each of the claims has to be determined in each case
10 on the basis of the evidence in that case.

11 The direction in paragraph 15 was a very limited exception from that principle and it
12 is an exception that, as we understand paragraph 15, was specifically tailored
13 for the circumstances where the cases on exemption in
14 Sainsbury's v Mastercard and Sainsbury's v Visa were to be heard together.
15 That is no longer the position and, therefore, that ruling does not apply to the
16 Sainsbury's v Mastercard case on exemption going forward.

17 So, Mr Brealey, the next issue on the Sainsbury's v Mastercard case is what we
18 have, the pleadings to sort out in the way that has been agreed. There will
19 have to be a date in January.

20 The question is whether we should, as with AAM, sensibly fix a trial date. I would
21 have thought that would be appropriate.

22 **MR BREALEY:** Yes, Sir, I --

23 **THE PRESIDENT:** Even if we can't make all the directions, the sooner one gets
24 dates for a long trial in the diaries of all the parties affected, the better.

25 **MR BREALEY:** On that basis, Sir, and in the light of the ruling that the Tribunal has
26 just made, as you will have picked up, we had originally sought a hearing in

1 around about April/May. To accommodate Mastercard we pushed that back
2 to June or July 2001.

3 But Mastercard --

4 **THE PRESIDENT:** 2021, I hope.

5 **MR BREALEY:** 2021. A Space Odyssey, yes.

6 Mastercard have said October 2021. But given the ruling the Tribunal has just
7 made, and the fact that Mastercard have said it needs the extra time in order
8 to consider the Visa evidence, we would suggest that a trial is fixed for Trinity
9 term, June or July 2021.

10 **THE PRESIDENT:** Well, if I can interrupt you --

11 **MR BREALEY:** Yes.

12 **THE PRESIDENT:** -- there are two problems. One is that we are going to possibly
13 have some preliminary issue, in which case one needs time for that to be
14 heard and a judgment delivered.

15 Secondly, although it may be possible to change the composition of the Tribunal,
16 certainly I'm not available in Trinity term.

17 So, I think I have to say that October is more realistic, even if it is a shortish trial.

18 **MR BREALEY:** Then obviously we must -- I can't push back against that if for those
19 two reasons there is going to be a hearing on a preliminary issue, but also if
20 you, Sir, are not available. Then early in October would be preferable.

21 **THE PRESIDENT:** Yes. I have to see if I'm even available then. But, if not, there
22 can be another chairman. That would be probably also difficult for June and
23 July. But, for Michaelmas term 2021 I'm sure it is possible.

24 So, if we go to October 2021, that is the time, actually, that Mastercard wanted,
25 I think.

26 **MR BREALEY:** That is --

1 **THE PRESIDENT:** I assume Mr Cook is not going to resist that.
2 Are there any further directions?
3 Obviously, there is no disclosure, there is no further evidence. What other directions
4 should we make, in terms of -- and trial length is going to be affected by
5 whether there is a preliminary issue or not.
6 **MR BREALEY:** Whether AAM comes into that 2021 hearing, indeed whether Visa
7 does.
8 **THE PRESIDENT:** Yes. At the moment, what has been suggested is -- I'm not sure
9 I picked it up, what trial length did you envisage for this trial?
10 **MR BREALEY:** I am not sure we have actually, or Mastercard have actually ...
11 We have debated it, and it should not be more -- if it is just on the papers again -- if
12 I can call it -- on the papers again -- on the written evidence that is already
13 adduced, we see no reason why it can't be done within a week.
14 **THE PRESIDENT:** Yes. I mean, it is -- it is, no new evidence. On that basis, it will
15 be on the papers, won't it, and oral argument?
16 **MR BREALEY:** That's right. If there are detailed written submissions -- which
17 I anticipate there will be -- then there will probably need to be some reading
18 time because it is going to be quite voluminous.
19 **THE PRESIDENT:** Yes. It may be, rather unusually, a case with two weeks'
20 pre-reading and one week's hearing.
21 **MR BREALEY:** Yes, the reverse way round, yes.
22 **THE PRESIDENT:** That is my instinct at the moment.
23 Mr Cook, what did you think about length of the hearing?
24 **MR COOK:** Sir, we thought it would be more like a two-week hearing. The reason
25 for that had been -- I mean, it is certainly a case where there is going to be
26 voluminous pre-reading, and two weeks pre-reading seems sensible.

1 The invidious position which the Tribunal hearing this is going to find itself in is, in
2 certain parts, you may be asked to reach conclusions on whether or not you
3 should accept the evidence of particular individuals or not without having the
4 benefit of having heard from those individuals.

5 That is of course a difficult issue. But, equally, you're going to be coming to this cold,
6 in the sense of, you know, only on the benefit of reading things, in relation to
7 exemption, which has a great number of complexities to it.

8 In the context of the first instance trials, that was a situation in which the judge or
9 Tribunal in question was effectively educated over the course of a number of
10 weeks with the benefit of hearing -- particularly on some of the complex
11 economics -- you know, weeks of evidence from economists on these issues,
12 and teasing it out and asking questions.

13 We certainly see that this is something where, in the course of a normal trial, closing
14 submissions, would not be anything like the duration we are suggesting, but in
15 a case like this, where we are effectively opening, closing and informing the
16 Tribunal throughout the process, we do think that ten days would be
17 a sensible estimate to include at the moment.

18 Ultimately, if the Tribunal feels that it has enough material at the time, we can always
19 go short. But, it is always very difficult to extend a trial once you have a short
20 period of time in the diary. So, we do stress ten days, Sir, for the moment.

21 **THE PRESIDENT:** It is your position as well, is it, that it is entirely on the papers?

22 **MR COOK:** Yes, Sir, there is nothing else that either party is allowed to put in terms
23 of documents --

24 **THE PRESIDENT:** Certainly nobody can put in anything, so the evidence adduced
25 stands.

26 What was going through my mind -- I'm just thinking aloud -- is: does it preclude any

1 questioning of a witness on the evidence they have put in?

2 No party can adduce fresh evidence, but does it, I mean, to take the point you have
3 just raised, I don't know if there really are questions of, probably not questions
4 of whether a witness is lying, but, in terms of, say, conflicting expert evidence,
5 testing the evidence by some questioning, is that something that is open to
6 the Tribunal or not?

7 **MR COOK:** In terms of the Supreme Court order, I don't see any reason why the
8 Tribunal is not master of its own procedure at that stage, Sir.

9 **THE PRESIDENT:** Because if there are divergences between the expert evidence,
10 speaking for myself -- and we haven't had a chance to consider it between the
11 three of us -- it may be that we would want to ask some questions, the
12 Tribunal itself, and it may be the parties, of the experts.

13 I don't think that is precluded, is it, by a direction that this is not a retrial and that
14 there is no fresh evidence -- fresh evidence cannot be adduced? I'm not sure
15 that precludes the Tribunal from saying: well, we see the answer you gave
16 last time, as found on the transcript here, can you just clarify what that means
17 or how does that fit with this, and so on?

18 Would that not be within the scope of the order to do that?

19 **MR BREALEY:** For my part, I haven't taken instructions on this, but I am not going
20 to push against that.

21 I mean, my first reaction was that the expert may have to be on oath and give the
22 evidence to the Tribunal in answer to the questions, and that could be fresh
23 evidence.

24 But, certainly, I see the contrary argument and, if the Tribunal was minded to go
25 down that road, I, as I say, haven't taken instructions, but I certainly don't
26 resist it.

1 **THE PRESIDENT:** The most important thing is that there should be a fair hearing.

2 **MR BREALEY:** Correct.

3 **THE PRESIDENT:** Clearly neither the Court of Appeal nor the Supreme Court were
4 directing an unfair hearing; that is self-evident. What they are saying is that
5 neither of you can come up with any supplementary witness statements or
6 supplementary expert reports. We have the evidence that was put in for trial
7 and it is there. We will have the transcript of what is put in. But if there are
8 some additional questions to be asked, and the Tribunal feels that it needs to
9 ask, to determine the matters that are in issue, it seems to me we should be
10 able to ask them.

11 It would be very odd to say: no, you are stuck with just having to choose between
12 these, say, conflicting -- or "contrary", I should say, rather than "conflicting" --
13 expert reports, and whatever answers the experts gave last time.

14 **MR BREALEY:** If the Tribunal is minded to do that, Sir, and I say I don't resist,
15 I think Mr Cook's ten days is more realistic.

16 **THE PRESIDENT:** I think let's go for ten days because, I mean, whether we want to
17 do that and whether that will be necessary, I have no idea because, of course,
18 I haven't looked at any of the material, but I can see that might be possible.

19 I think ten days, as Mr Cook suggests, is sensible.

20 **MR BREALEY:** Can I just make one further observation on that?

21 Hopefully, we are going to persuade the Tribunal, in March, that Mastercard can't
22 advance certain causation issues upon which it hasn't appealed. But
23 assuming we lose on that, just on the basis, Mastercard, as I remember, had
24 various witnesses of fact -- and this is really a question for Mr Cook because
25 I'm thinking aloud here -- the same principle might apply to Mastercard's
26 witnesses of fact.

1 **THE PRESIDENT:** Well, they certainly can't adduce additional witnesses.

2 **MR BREALEY:** Whether they have to make themselves available for the Tribunal to
3 ask any questions, and we can park that --

4 **THE PRESIDENT:** Let's park that. I think these are quite difficult issues to resolve,
5 and it will be clearer when we know what actually the issues are.
6 I think all we need for present purposes is to say ten days, so a two-week hearing,
7 and two weeks pre-reading.

8 **MR BREALEY:** Yes.

9 **THE PRESIDENT:** It is the first available date after the -- I don't know when.
10 I haven't checked when that term starts, but the first available date after the
11 start of the Michaelmas term. We can put in the date in the order of 2021.

12 **MR BREALEY:** Then --

13 **MR COOK:** Just quickly on that, Sir. Just to check, first available date will be taking
14 account of convenience of counsel, please, Sir.

15 **THE PRESIDENT:** Yes.

16 **MR COOK:** I appreciate the Tribunal is often reluctant to do this, but with a remittal
17 hearing --

18 **THE PRESIDENT:** I fully understand that, taking account of convenience of counsel,
19 yes. You can put that in the order, yes.

20 **MR BREALEY:** Again, maybe we can try and agree the timing for the lodging of the
21 written submissions. Clearly, if it is two weeks' reading, it is October, that is
22 September --

23 **THE PRESIDENT:** Yes, let's see when we get a date. Then we will make some
24 directions, because we want the written submissions quite a bit before, and
25 we might impose page limits, so that we don't get 300 pages from each of
26 you, which is not helpful.

1 **MR BREALEY:** No.

2 **THE PRESIDENT:** We will have enough to read in the evidence itself.

3 **MR BREALEY:** Correct.

4 **MR COOK:** I would say, in relation to all of this, Sir, we are best leaving those kind
5 of points of detail until the shape of that trial is clear. The issues that are
6 going to be in it, in terms of Sainsbury's concession rates, my quantum
7 arguments, and whether there are going to be some common issues before
8 that. It may be that a ten-day hearing become a five-day hearing because we
9 have narrowed the issues in some respects, or not, Sir. Again, that will feed
10 into how much pre-reading to do and when the submission should be filed.

11 **THE PRESIDENT:** Yes, that makes good sense.

12 Yes, thank you very much. Is there anything else that we need to decide now?

13 **MR BREALEY:** Not on Mastercard I don't think. We obviously have Visa, whether --

14 **THE PRESIDENT:** Of course, I appreciate that, but that means that, Mr Cook, if he
15 wishes to be, is released.

16 We move to the Visa trial, which, subject to common issues, is going to be
17 a separate trial, we have decided, and what, of course, includes pass through,
18 unlike the Sainsbury's v Mastercard trial.

19 **Submissions on Visa**

20 **THE PRESIDENT:** So, Mr Brealey, on Sainsbury's v Visa, what is there then that we
21 can sensibly do today?

22 **MR BREALEY:** What I would like to do, Sir, if possible, is to also set a trial date for
23 Sainsbury's v Visa.

24 **THE PRESIDENT:** Before we get to that, if there is not now going to be
25 this cross-supply of evidence, do we need a new confidentiality ring?
26 Because that was mentioned in the skeletons, but I think it was to deal with

1 the evidence from the other cases; is that not right?

2 **MR BREALEY:** I think it is Visa/Mastercard's nervousness about the others seeing,
3 but, no, it all falls away.

4 **THE PRESIDENT:** Just to check, is that right, Mr Rabinowitz, we don't need another
5 confidentiality order?

6 **MR RABINOWITZ:** Sir, I think that is right.

7 If I'm wrong about that, someone will pull my gown and tell me.

8 **THE PRESIDENT:** In any event, that can always be dealt with in writing and, if the
9 parties agree the form of orders, as they generally do, and submit it, then the
10 order can be made without anyone needing to attend for anything.

11 Good. So, then it is a question of trial dates. I think there has been quite
12 a difference. I think Sainsbury's has suggested -- am I right? -- December of
13 2021, and Visa has suggested November 2022.

14 **MR BREALEY:** Yes.

15 **THE PRESIDENT:** Is that right?

16 **MR BREALEY:** So, on that, can I essentially go to a few documents?

17 We probably need to go to the annex to Visa's skeleton, where its timetable is set
18 out.

19 It is page 16 of Visa's skeleton. We don't disagree with paragraphs 1 and 2. We
20 think it is quite important that the parties set out the issues relating to the
21 calculation of the overcharge, and Visa produces its statement of case
22 relating to the calculation of the overcharge. Indeed, it pleads out its
23 causation and quantum case.

24 Because, as you may have picked up, a claim for, in excess of 100 million on Visa's
25 case seems to disappear on the basis of the causation and the quantum
26 arguments, therefore it is imperative that they are pleaded out, so the parties

1 know the issues.

2 **THE PRESIDENT:** This is Visa's proposed timetable?

3 **MR BREALEY:** If I'm looking at paragraphs 1 and 2 --

4 **THE PRESIDENT:** Yes, so you agree with the principle of statements of case. Are
5 you content with the dates?

6 **MR BREALEY:** I'm content with the dates, so that we produce a statement of case.

7 I think it can be a clean statement of case because, if you take the old
8 version, and then you have to red line it. I'm open to that, but it would be my
9 submission that the most fruitful way is it being a clean statement of case.

10 There are undoubtedly exemption issues because they impact on quantum. I don't
11 think anybody would disagree with that. Because the exemption and the
12 quantum are so closely linked.

13 But I think it is neater if we produce a statement of case on what we say is the
14 overcharge, and we can do that by 8 January, and Visa responds in full on
15 22 January.

16 **THE PRESIDENT:** Yes.

17 **MR BREALEY:** It is set out in some detail in its skeleton, its causation issues, it now
18 has to plead them out.

19 **THE PRESIDENT:** Yes. Well, I think that is Visa's proposal and, I think, a clean
20 statement of case now, with the 2 per cent and the 0.19 per cent having been
21 agreed for these purposes is sensible.

22 **MR BREALEY:** Sir, can I --

23 **THE PRESIDENT:** If either party thinks the other is impermissibly departing from
24 their previous pleading, of course they can take objection. But I think we will
25 start with a clean statement of case. It is just much more convenient for
26 everyone.

1 **MR BREALEY:** Yes. So, can I then just make five points, really, on the one-year
2 gap between Sainsbury's v Visa, because essentially there is a one-year gap
3 between the parties.

4 The first point I would like to make is that we say that Visa has to give credit for the
5 time that has elapsed.

6 Mr Justice Phillips' first judgment was delivered on 30 November 2017. That is
7 almost two months after the consent order was agreed. Now, I need to take
8 the Tribunal to the consent order, which is --

9 **THE PRESIDENT:** Well, can I interrupt you. Of course, before Mr Justice Phillips
10 Visa won.

11 **MR BREALEY:** My point was: if I can just take you to the order, which is C2, page
12 4.

13 **THE PRESIDENT:** Just a moment --

14 **MR BREALEY:** We refer to this in the skeleton and~...
15 So, C2/4.

16 **THE PRESIDENT:** Yes.

17 **MR BREALEY:** So, Sir, as the Tribunal will be aware, contrary to what we wanted
18 the trial was split, liability and quantum. So, you will see there,
19 11 September 2017, that is the date of this order. This is on page 4, top
20 right-hand --

21 **THE PRESIDENT:** Yes.

22 **MR BREALEY:** So, this was the parties agreeing to the terms of what was called
23 the phase 2 trial, basically the causation and quantum.

24 And the --

25 **THE PRESIDENT:** Just so I'm clear, phase 2 was quantum, it wasn't exemption?

26 **MR BREALEY:** No.

1 **THE PRESIDENT:** No, that came later.

2 **MR BREALEY:** Phase 1 was restriction of competition and exemption.

3 **THE PRESIDENT:** And later on you split it into two? Because, of course, there
4 were two trials before Mr Justice Phillips.

5 **MR BREALEY:** What he did was, on phase 1, he gave two judgments.

6 **THE PRESIDENT:** Oh, it was two judgments, sorry, one trial. Yes, I see.

7 **MR BREALEY:** This is his first judgment, where he said there was no restriction of
8 competition, that was on 30 November. This was two months -- so, basically,
9 what the parties were doing, they were concerned at the delay of the
10 judgment and they were trying to finalise the terms of the causation,
11 quantum --

12 **THE PRESIDENT:** Yes.

13 **MR BREALEY:** The parties came together, and there was correspondence to this
14 effect, that Visa referred to, but you see there:
15 "By consent it is ordered that ..."
16 I will come to it in a moment, but I want to mention why I'm talking about this. It is
17 because I want to say that there is an eight months, potentially, wasted time
18 that should not prejudice Sainsbury's.
19 So, in other words, there was an order here that the parties get on with the quantum
20 trial. So, we have two months, at least, of Phillips J's judgment.

21 **THE PRESIDENT:** He was envisaging a trial of, what, two weeks, isn't it?
22 11 February to 28 February. I don't know how many trial days that is, but it
23 is ...

24 No, sorry, it is probably three weeks, isn't it? There or thereabouts, yes.

25 **MR BREALEY:** Two weeks.

26 **THE PRESIDENT:** Yes.

1 **MR BREALEY:** Two weeks, is it? Two weeks.

2 On my first point, Visa says -- you know, where is the one-year gap between the
3 parties?

4 **THE PRESIDENT:** No, no, I understand. I was just noting that he also considers
5 trial length, which we will come to.

6 **MR BREALEY:** Yes, sure, two weeks.

7 We have the first judgment on 30 November. Even assuming that the parties then
8 down tools after his first judgment, we have the Supreme Court judgment of
9 June of this year. Visa cannot have been under any illusion that it had to get
10 on with phase 2, the quantum trial.

11 So, in my submission, it can't just sit on its hands and wait for a CMC to come along
12 in December now, and say it needs a lot of time in order to prepare for its
13 quantum trial.

14 These issues, the causation and quantum issues, have been kicking around for
15 a considerable amount of time.

16 So, that is my first submission on the one-year gap.

17 This eight months is not dead time.

18 The second point I want to make is on disclosure itself.

19 Visa has been in possession of the guts of disclosure for about five years now.

20 Again, if they required top-up disclosure, they could have made the
21 application after June of this year. We are not shutting them out, but they
22 have to make a measured application for disclosure, which will relate to
23 top-up disclosure, if they so wish. But, again, when one looks at the timetable
24 for disclosure in their annex, we submit that there doesn't need to be another
25 six months for supplemental disclosure. It can be done far more
26 expeditiously.

1 So, that is my second point on disclosure. They have had -- their experts have had
2 our pass on disclosure for about five years now. The extent to which it wants
3 some top up disclosure, well, we are not going to shut them out, but it has to
4 be necessary and proportionate, and it doesn't have to be given by
5 23 June 2021.

6 **THE PRESIDENT:** What I'm not clear about, I mean, it says, "serve a disclosure
7 report"; why would you now be serving a disclosure report? You basically did
8 disclosure for a quantum trial, didn't you?

9 **MR BREALEY:** Correct, correct.

10 **THE PRESIDENT:** So the only disclosure now is supplemental disclosure, isn't it?

11 **MR BREALEY:** Yes.

12 **THE PRESIDENT:** We will hear from Mr Rabinowitz, obviously, but I'm not sure
13 what the point is of paragraph 4. It is really a question of what further
14 documents are wanted.

15 **MR BREALEY:** Precisely. That essentially feeds into my point, these issues. This
16 disclosure exercise has been going on for over five years.

17 **THE PRESIDENT:** Is the disclosure, the previous orders of Mr Justice Phillips, what
18 you showed me was the order on trial, but where is the previous disclosure
19 order on quantum?

20 **MR BREALEY:** I'm not sure it is in the -- it is not in the bundle. These are --

21 **THE PRESIDENT:** There must have been one.

22 **MR BREALEY:** Yes, yes, yes. There were lots of case managements with
23 Mr Justice Cooke, maybe Mr Justice Hamblen, as he then was. So, there
24 have been lots of orders.

25 There is a letter that Visa relies on, saying that the disclosure is incomplete. But,
26 again, we say that, you know, that can be dealt with fairly expeditiously. You

1 don't need six months in order to complete the disclosure exercise.

2 **THE PRESIDENT:** Yes.

3 **MR BREALEY:** I'm told that the last CMC on disclosure was October 2016, which

4 leads me to the third point on the one-year difference between the parties.

5 This is paragraph 8 and 9 of Visa's proposed timetable.

6 So, they are saying that the witnesses of fact should be -- the statements.

7 November -- so 21 -- almost a year away.

8 Again, to the extent Visa have known for some considerable time, we would say at

9 least five years, what their story is on the state of the market, which they now

10 want to run.

11 They have known since June that they have to serve these statements.

12 **THE PRESIDENT:** So, again, if I can interrupt you because I don't know the history

13 of what happened before.

14 We have this order that you have just shown us, setting the phase 2 trial for

15 February 2019, you tell me disclosure was covered by orders, but witness

16 statements were not exchanged on quantum; is that right?

17 **MR BREALEY:** No. So, if one goes to page 6 of C2. Bundle C 2, page 6.

18 **THE PRESIDENT:** Oh, yes. I see.

19 **MR BREALEY:** It is slightly strange, but on page 4 and 5 you get the trial timetable,

20 and then you get the actual timetable over the page, in schedule 1.

21 So, signed statements of witnesses of fact were 6 March.

22 **THE PRESIDENT:** Yes.

23 **MR BREALEY:** Basically, six months.

24 **THE PRESIDENT:** Yes.

25 **MR BREALEY:** So, it is not clear why they need a whole year now.

26 Also, one would have assumed that they would have started to prepare after

1 11 September order. It is just, in our respectful submission, unacceptable for
2 them to say: we are starting this afresh now and we want a whole year.

3 Taking us to, well, the reply witness statements, January 2022.

4 So, it is just too long, and that is one of the reasons for the gap between Visa and
5 Sainsbury's on this issue.

6 Then, my fourth point is on experts. Again, the schedule at page 6 had made
7 provision for the exchange of experts, 8 June, 2018. I make the same point
8 again: they have had six months to consider it from the Supreme Court
9 judgment but they want a, until March 2022, this is paragraph 11 of Visa's
10 timetable --

11 **THE PRESIDENT:** Well, it is all a knock-on, isn't it? Because if the witnesses of fact
12 come in January, then~...

13 **MR BREALEY:** It is.

14 **THE PRESIDENT:** So, we get your general point, that this is not starting afresh.

15 **MR BREALEY:** That is right. Can I then just make my last point on that? Which is
16 that when one looks at the proposed timetable, so one looks at the experts,
17 we get the rebuttal experts at paragraph 12, 13 May, but then, for some
18 reason, we get almost a six-month gap until the trial.

19 I understand there is memoranda, but a six-month gap between the rebuttal reports
20 and the date of the trial, 28 November, we say is too long.

21 So, when one takes all these considerations together, that we have said December
22 2021, maybe there is a compromise somewhere, but it should not be, in our
23 respectful submission, Monday 28 November 2022, which is their
24 paragraph 23.

25 **THE PRESIDENT:** Yes. Can I also say that I note paragraph 10, and this was
26 a copy out, I think, of the previous order, of Mr Justice Phillips:

1 "The party shall seek to agree the nature of expert evidence~..."
2 And so on.
3 Of course, I would ask you to try and agree.
4 **MR BREALEY:** Yes, Sir.
5 **THE PRESIDENT:** But, ultimately, in this Tribunal, it will be for us to decide what
6 expert evidence can be adduced.
7 So, I think it may be that you already have your proposals on expert evidence.
8 I think you say, somewhere in your skeleton, that you want one economist; is
9 that right?
10 **MR BREALEY:** That's right.
11 **THE PRESIDENT:** And that you're not seeking an accountant on this one, as I see it
12 here. You say you have two factual witnesses and one expert economist.
13 **MR BREALEY:** It may well be that if -- we just don't know, but it seems, reading
14 Visa's skeleton, they are going to have a whole army of witnesses of fact and
15 experts. If they are going to seek to have a market expert, I just don't -- it
16 seems that they may do, we may have to deal with that.
17 **THE PRESIDENT:** Well, we would like to know from both parties what experts they
18 are asking for permission to call, and on what issues, and we will then decide
19 whether to allow that.
20 **MR BREALEY:** Yes.
21 **THE PRESIDENT:** I'm sure that we will agree that it is appropriate -- well, no, I don't
22 know what we will agree. But I would like you both to consider that and to
23 come up with proposals for experts, so that can't be done today --
24 **MR BREALEY:** No.
25 **THE PRESIDENT:** -- but you will need to do that. Maybe it will be done after you
26 have done your cases.

1 But we get your general point, that you say 28 November 2022 is much too late.

2 This is not starting from scratch. There is quite a history, and there was going
3 to be envisaged a quantum trial years ago. In any event, there is
4 an unexplained, as it were, five-month delay in this timetable, and even if it is
5 not December 2021, it should be early 2022.

6 **MR BREALEY:** Yes. In a nutshell Sir, that is my submission. Thank you.

7 **THE PRESIDENT:** Yes. Yes, Mr Rabinowitz, we have agreement on paragraph 1
8 and 2 of your draft order. Number 3, you think you have, in fact, the
9 necessary confidentiality order, but, if not, you will put it forward.

10 So, I think we go to look at disclosure and the overall timetable.

11 **MR RABINOWITZ:** Yes, indeed. Can I just put this into some context? I hope it will
12 assist the Tribunal.

13 Of course, my learned friend's timetable doesn't have any provision for statements of
14 case and a lot of other steps. His timetable doesn't allow for the possibility of
15 common issues and preliminary issues in relation to common issues to take
16 place.

17 That really leads me into a further overriding context point, which is this: the Tribunal
18 has already approved the timetable for the AAM/Mastercard case. Our
19 timetable is actually shorter than the AAM/Mastercard case.

20 AAM/Mastercard -- and we can compare the two, and perhaps it is useful to do
21 that -- envisages a trial beginning January 2023. We are envisaging a trial
22 November 2022. The steps which both sets of proceedings contemplate are
23 almost identical. The number of experts, issues, again, almost identical.

24 There is a reason why the AAM/Mastercard proceedings and these proceedings
25 bear a similarity in terms of timetable, which is not equally reflected in the
26 Sainsbury's/Mastercard proceedings.

1 That is because, as the Tribunal knows, those are remittal proceedings, whereas the
2 other two sets of proceedings are fresh proceedings.

3 Whereas it is possible that one might get to remittal proceedings in eight months, the
4 relevant comparator, for present purposes, is not how quickly you can do
5 Mastercard v Sainsbury's, but how likely, how long it is likely to take having
6 regard to AAM v Mastercard.

7 Let me say this in terms of context, because this, in our respectful submission, is
8 another important point of context. We, of course, won at first instance.
9 When we went to the Supreme Court -- and so all the suggestion that is
10 made, that there was an order made in September 2017, about six weeks
11 before the judgment was delivered, which contemplated a timetable, with
12 respect gets my learned friend nowhere. Is he suggesting that we, in those
13 two months, whilst waiting for the judgment, should have spent time which
14 actually having regard to the decision which was made by Mr Justice Phillips
15 would have been time wasted, since we won on a quantum trial which was
16 never going to take place? I cannot think that is what he says.

17 Then, let me compare our position to AAM. AAM knew, as from the Supreme Court
18 decision, that it was moving straight to quantum. We, on the other hand, until
19 about two weeks ago, had in mind that there was going to be exemption
20 proceedings. Now, again, is it suggested by my learned friend that,
21 notwithstanding our very different position to AAM, in that we had
22 contemplated extension proceedings, we should have started on producing
23 work in relation to quantum, where the issues could not have been known or
24 indeed really started to be developed, because we didn't know what the UK
25 lawful position would be.

26 So, with respect to my learned friend, the suggestion -- of course we are not starting

1 from scratch in the sense that this case has a history. It has come back after
2 preliminary issues, or certain issues, have gone to the Supreme Court. But
3 the suggestion that we should somehow be denied, or that an appropriate
4 period of time should be adumbrated because of the history, in my respectful
5 submission, is, with respect to my learned friend, not a tenable suggestion.

6 **THE PRESIDENT:** Well, I think the one thing -- leave aside the order of
7 Mr Justice Phillips, and take what you say, that one wouldn't really go head
8 long into disclosure with a pending judgment about to come, but disclosure
9 here in fact on quantum has, as I understand it, taken place.

10 **MR RABINOWITZ:** With respect it has begun -- there has been disclosure. If I can
11 invite the Tribunal to go to our skeleton argument, there has been some
12 disclosure. But, as my learned friend, I think, or as the Tribunal drew out of
13 my learned friend, the last occasion on which disclosure was looked at was in
14 September 2016. The last time that Sainsbury's made any disclosure was
15 in July 2015.

16 So, it is true that a start has been made on disclosure. In a sense, the disclosure is
17 going to be largely from Sainsbury's, but the reality is they have started on
18 disclosure. My learned friend's skeleton doesn't even contemplate
19 a disclosure stage, as you will recall. It literally goes straight to fact
20 witnesses. He has completely overlooked the fact that there is still disclosure
21 to be made.

22 **THE PRESIDENT:** What I'm trying to get at is this: there were orders for disclosure,
23 which we haven't seen. Some disclosure took place. I don't know if the
24 deadlines for disclosure under the orders that were made on quantum
25 disclosure in fact were reached, in which case disclosure was supposedly
26 complete.

1 Do we need disclosure reports and ED questionnaire? Isn't it a case of just going to
2 look at what further documents are seeking?

3 **MR RABINOWITZ:** My Lord, Sir, you are right. We don't need it. We thought it
4 might be a convenient vehicle in which the parties could identify what
5 disclosure they considered was still to be given, and therefore could frame
6 any issues which needed -- the Tribunal could then consider, to see whether
7 that was an appropriate approach or not.

8 **THE PRESIDENT:** So, wouldn't it be sensible then, Mr Rabinowitz, to avoid this sort
9 of adversarial argument about whether there has been delay or not, and leave
10 aside AAM? Because AAM, they agreed that timetable. We didn't have to
11 consider whether it is unnecessarily late because AAM, as claimants, were
12 content with the trial in 2023.

13 Sainsbury's are not. But if we look at your proposed directions, as attached to your
14 skeleton, we have agreed 1 and 2. We don't think we need 3 at the moment,
15 but, in any event, that doesn't really interfere with the timetable. We don't
16 need 4. We can go straight to 5, and further categories that they are seeking,
17 I think we should have a date for that.

18 Can that not be the 8 February? They identify the categories that they are seeking
19 by the 8 February, and seek to agree those categories, by -- even if you want
20 a bit of extra time on that, so that you get more time, that you were seeking for
21 the agreement, so that it is, say, two weeks later, 22 February.

22 Supplemental disclosure, why does to have to be 23 June? It seems to me, when
23 we are talking about supplemental disclosure, surely that can come in April,
24 can't it? Early April.

25 **MR RABINOWITZ:** Well, perhaps --

26 **THE PRESIDENT:** Well, as you say, it is mostly from --

1 **MR RABINOWITZ:** It is.

2 **THE PRESIDENT:** -- Sainsbury's anyway.

3 **MR RABINOWITZ:** It is, but my concern about Sainsbury's is that they didn't think
4 they would have to give any disclosure.

5 So, we are going from them thinking they had to give no disclosure, to a situation
6 where it is plainly obvious that they are going to have to give further
7 disclosure and that it may be material.

8 The Tribunal will take its own view as to whether or not this has been thought
9 through.

10 But if they only want two months to give disclosure -- and you know from the
11 Supreme Court that they have a very heavy evidential burden in relation to
12 pass on documents, and --

13 **THE PRESIDENT:** Yes.

14 **MR RABINOWITZ:** -- with all due respect to my learned friend, it is not clear to us
15 that they have properly understood the extent of the disclosure that they are
16 going to have to give.

17 For example, their view apparently seems to be that because they are limiting their
18 claim to damages up to November 2015, it follows that no document after
19 November 2015 will have to be produced.

20 In our respectful submission, not a great deal of thought has gone into the question
21 of what disclosure has to be given and how substantial it is going to have to
22 be.

23 But, if my learned friends are content with a date, for example, in May or April, it is
24 going to be their burden. But, in our respectful submission, they may be
25 making a rod for their own back, but it is their back and their rod.

26 **THE PRESIDENT:** Yes, I would have thought 23 April, if it is 22 February and, on

1 8 February, they get your categories, and people have been working on
2 disclosure before, should be ample. If people need to apply for extra time,
3 they will.

4 **MR RABINOWITZ:** Can I just -- again, I don't mean to cut across, one thing that,
5 again, my learned friend completely overlooks in his analysis is the possibility
6 of common issues and preliminary issues.

7 I need, therefore, just to go back. Before we go too far forward, it is right that my
8 learned friend agrees with what we say about 1 and 2, and suggests that we
9 respectfully adopt the suggestion there ought to be fresh pleadings, and in so
10 far as they are new points the parties want to plead, this is a new hearing,
11 they can be put in there and the Tribunal -- the parties can consider them and
12 take objection to them.

13 With the other two sets of proceedings, the Tribunal has built in a process whereby
14 there is a date by which that will happen, so the parties know the cases that
15 they are going to have to meet.

16 That is also a point after which the Tribunal will be in a better position to assess
17 whether there are any preliminary common issues or indeed any preliminary
18 issues, which may not necessarily be common, which are worth identifying.

19 Again, before one gets into disclosure, it may be as well to build that into the
20 timetable because that has the potential to disrupt the timetable, certainly to
21 disrupt a tight timetable.

22 Our view was that this timetable certainly had enough flex to accommodate that.

23 One is going to -- as I understand why the Tribunal is doing it, shorten the
24 times, we may run into trouble with that.

25 That's why, in my respectful submission, I would push back a little bit on bringing
26 dates forward in a way which may create a problem if there is going to be

1 a common issue or preliminary issue taken.

2 **THE PRESIDENT:** Yes. I think the supplemental disclosure on quantum as is
3 required, quite a bit of it is going to have to happen anyway. I think it can go
4 on in parallel with any question of common issues.

5 **MR RABINOWITZ:** Perhaps. It may be that there is an efficiency to be lost,
6 depending on whether --

7 **THE PRESIDENT:** Until we know whether there will be common issues and what
8 they are, it is slightly difficult. But I think to have, at this point, a timetable
9 going into next year and a trial date is useful.

10 We can always review it later. It can be amended.

11 But, what I am looking at is to see -- basically, what I have in mind is that, it seems to
12 me, it ought to be possible to get the witness statements by next summer, the
13 expert evidence coming in the following autumn, and a trial sometime in early
14 2022, as a broad outline.

15 **MR RABINOWITZ:** Can I respond to that? Before I do, I just had a message to say
16 that we may have lost Professor Neuberger. He is back.

17 The point about witness statements is this -- I think my learned friend makes two
18 points about this: (1) he says, "Well, you have already had time. You know
19 what the case is that you had to meet". I expect that is not right, certainly
20 insofar as he is going back to September 27. I have made the point about the
21 Supreme Court and the exemption proceedings. So, certainly as far as we
22 are concerned, there may have been time, but that time has not been used to
23 put together witness statements in circumstances where the shape of the way
24 this matter is going to be going forward, with respect, has only become clear
25 in the last day or so. So, there hasn't been work done on witness statements.

26 That being so, one does then start from a situation where, if there is supplemental

1 disclosure in late April, having regard to the summer, in our respectful
2 submission, a proper period, a sufficient period of time needs to be allowed
3 for that.

4 I ought just to make this point. My learned friend says there is an army of people. It
5 is not an army; it is 8 to 10 people, dealing with all the issues that we have
6 identified in our skeleton argument.

7 We have actually taken the trouble to identify, for the Tribunal, what areas these
8 people are going to be covering in their evidence. I don't know whether the
9 Tribunal wants to be reminded of that, but if you go to our skeleton argument,
10 and we deal with fact evidence at paragraph --

11 **THE PRESIDENT:** 26 is it?

12 **MR RABINOWITZ:** Yes, 26 and following, page 9.

13 Now, again, a lot of this evidence is predicated upon a position which begins with
14 identifying what the lawful MIFs were. If that is the position, that is another
15 reason why this evidence wouldn't have started beforehand. But we are, as
16 we say there, anticipating 8 to 10 statements from people many of whom will
17 no longer be at Visa. Therefore, in our respectful submission, an appropriate
18 period of time will need to be required, having regard to the disclosure.

19 Now, my learned friend can criticise us for not having been through the disclosure
20 after we won, and not having gone through the quantum disclosure when we
21 thought there were going to be exemption proceedings, but the reality is that
22 disclosure, even that which has been given, hasn't been gone through with
23 a view to see what witnesses need to deal with. That is a process -- and if my
24 learned friend wants to criticise us for it, so be it. It is a process which is
25 starting now, once we know what the shape of the case is.

26 We will get further disclosure in April and, in our respectful submission, allowing for

1 a period of --

2 **THE PRESIDENT:** Can I just interrupt you? The further disclosure from
3 Sainsbury's, looking at the factual matters that your factual witnesses are
4 intending to give, and paragraph 26, I'm trying to see, really, how much of that
5 really depends on disclosure from Sainsbury's.

6 Because it seems to me to be very much based on Visa's business. What Visa's --
7 what issuers may have done, and so on. The only bit that doesn't is 26.3,
8 which is the Sainsbury's Bank.

9 But there is quite a lot of that evidence that can be prepared without disclosure from
10 Sainsbury's, because it is all based on what happens at Visa.

11 **MR RABINOWITZ:** Well, with respect, it may be what happens at Visa, but some of
12 it depends on the position at Sainsbury's. Look, for example, at 26.1(c):

13 "Countervailing benefits to Sainsbury's of Visa's MIF."

14 We are going to see some evidence from Sainsbury's in its disclosure, which these
15 witnesses will have regard to.

16 26.2 the benefits of, as you see:

17 "Visa anticipates producing evidence from its co-branding and former retailer
18 engagement teams as to discussions between Sainsbury's of Visa and
19 Sainsbury's co-branded cards." Again, that will involve evidence from
20 Sainsbury's.

21 Then, you make the point about ex turpi causa, and the point in 26(iii). So, it is fair to
22 say, as you have said, that some of this relates to Visa evidence, but,
23 certainly, some of it also relates to Sainsbury's evidence.

24 So, we have that, plus we have the difficulty of getting statements from people no
25 longer employed by Visa.

26 We have, against -- in a sense we will know what the pleaded cases are by the end

1 of January, I suppose. I'm not sure I can say very much about witnesses of
2 fact.

3 So, we would urge that it isn't a deadline before the summer. But if the Tribunal
4 wanted to make it earlier, in our respectful submission, it should certainly not
5 be earlier than September.

6 **THE PRESIDENT:** Yes. If it were September, the autumn, then October,
7 November, December ought to be time, should it not, for experts? What you
8 have envisaged is January to March for the initial report, that is two months,
9 and then going forward.

10 So, even if one were to plug that in, I would have thought one could get to a position
11 where all the expert reports are done by certainly something like March 2022,
12 even if it were September.

13 **MR RABINOWITZ:** March 2022 is when you say they are all done by --

14 **THE PRESIDENT:** I mean the whole expert process is completed. So, looking at
15 paragraph 14, not 10 June, but early March. That can take one to a trial, even
16 Mr Brealey may say that is too late from his perspective, by something like
17 Easter, straight after Easter, 2022.

18 **MR RABINOWITZ:** Can I just take it a little more slowly? I do hesitate to do so
19 because the Tribunal clearly has the position well in mind.

20 If we had witnesses of fact -- let's say there were -- again, we are looking at rough
21 estimates, as I understand it -- first witnesses of fact in September. Reply
22 witnesses of fact, let's say late October, to allow a proper period of time to
23 look at reply witness statement of fact. If one were to allow four months for
24 experts, that would take you to February for the first reply, for the first
25 exchange, rather than March.

26 If you then allowed -- we have allowed two months for a reply or rebuttal expert

1 reports, in our respectful submission, that is not an unreasonable period of
2 time given the complexity of the issues here. So, even if one were in
3 February, that would be an April date.

4 Again, to some extent all of this is contingent upon whether there are common
5 issues and preliminary issues, but let's assume that there aren't because all
6 this goes off on the basis that there are not. You then have an April date for
7 experts.

8 My learned friend's timetable didn't contemplate at all a joint memorandum of
9 experts, but if one is going to have a joint memorandum of experts -- which in
10 our respectful submission would be useful -- then we have allowed from May
11 to -- well, really a month for that. In our respectful submission, that is not
12 unreasonable.

13 But, if one were to take this forward, so that the rebuttal reports were in April, then
14 the joint memorandum would be in May, not the June date we have gone for.

15 Then what we actually have is a period from June/July, which really -- late June to
16 July, to deal with the production of bundles, PTRs, and the like, indeed
17 September for there to be a pre-trial review. The Tribunal may not want to
18 take that into account.

19 But, even if there was, say, a joint memorandum in May, in our respectful
20 submission, one would then want to allow a proper period of time for outline
21 arguments to be produced. I think my learned friend allowed two weeks and,
22 in our respectful submission, that is plainly inadequate.

23 We have allowed, I think, two and a half months from exchange of the joint
24 memorandum. In our respectful submission, that is not an unreasonable
25 amount either. That would take us to, I think, mid-August, so that might take
26 you to September 2022.

1 I have no doubt that weeks and perhaps even a month or so can be shaved off of
2 this. But, again, I would urge the Tribunal not to make a timetable that we
3 come to regret because of the possibility of preliminary issues.

4 So, I can quite see that rather than a quantum trial sometime after November, one
5 could have a quantum trial after -- I don't know -- September, October. But
6 that may run into trouble if we are going to have preliminary issues.

7 As I understand it, that is part of the thinking for the AAM approach. In our respectful
8 submission, that is very sensible flex to allow for the timetable.

9 **THE PRESIDENT:** Yes. Mr Brealey?

10 Sorry, Mr Rabinowitz, you have not finished.

11 **MR RABINOWITZ:** I was going to say something about the time for the trial. I think
12 in Mr Justice Phillips's timetable, he allowed three commercial court weeks.
13 We have suggested three weeks. Although if we are not going to sit on
14 Fridays, it may be better to make it a four-week period. Our three weeks was,
15 I think, on the basis that we would be sitting five days a week, which is
16 probably not a good idea.

17 **THE PRESIDENT:** It does not matter so much on a shorter trial, but
18 Mr Justice Phillips had three weeks also not sitting on Fridays, presumably.

19 **MR RABINOWITZ:** He had from the 11th until the Thursday, so --

20 **THE PRESIDENT:** Yes, I didn't quite follow. I think that is on the basis that they are
21 not sitting on Friday.

22 **MR RABINOWITZ:** I think it was three weeks --

23 **THE PRESIDENT:** Yes.

24 **MR RABINOWITZ:** I don't know if they were sitting on Fridays or not because
25 I obviously wasn't there.

26 **THE PRESIDENT:** But I think it may have been a 12-day trial with not sitting on

1 Fridays. I haven't worked it out on the calendar, what he did, but three weeks
2 does seem to me a sensible length of time to put in. Three weeks plus.

3 **MR RABINOWITZ:** We have allowed a week's reading time.

4 **THE PRESIDENT:** There won't be that much, will there, from the evidence in the
5 previous trial to read, now that exemption has been agreed, because quantum
6 wasn't gone into, was it?

7 **MR RABINOWITZ:** Not in our case, no.

8 **THE PRESIDENT:** So I think a week's reading is probably enough. So three weeks
9 plus one week reading, I think that is sensible.

10 Can we go back to Mr Brealey on --

11 **MR BREALEY:** Sir --

12 **THE PRESIDENT:** -- on any suggestions.

13 **MR BREALEY:** Three points Sir.

14 On the length of the trial, of course we are happy with that. We agree with that.

15 On the timetable, working backwards, we do submit -- and we were trying to be
16 pragmatic here -- we do consider that a three-week trial, sometime in the
17 Easter term, is appropriate. Because that will allow the experts to be
18 completed by March, witnesses of fact -- that is March 2022, is still some 15
19 months away -- and even if witnesses of fact are September, that is ten
20 months away, and in our submission a pragmatic timetable would have the
21 three-week trial in Easter.

22 And my last point is that the preliminary issues should not really be determinative of
23 this. As you have said, Sir, things can change. But my impression is that the
24 preliminary issues would bring many of these dates forward, not delay them,
25 because we have the Mastercard v Sainsbury's trial date now. If Visa are
26 going to muscle in on that in December, it has to get its act together on these

1 common issues. So it actually brings forward some of these dates.

2 So, in my submission, a date in Easter 2022 is a realistic timetable and a pragmatic
3 one.

4 **THE PRESIDENT:** Yes. Thank you.

5 We will take a few moments to consider that. Sensibly, if we come back at 4.00.

6 **(3.43 pm)**

7 **(A short break)**

8 **(4.00 pm)**

9
10 **Ruling by the Tribunal**

11 **THE PRESIDENT:** We have looked at calendars and dates and borne in mind the
12 points you have both made.

13 We think that a trial before the summer in 2022 is quite possible. We have looked
14 both forwards and backwards in determining that we think the trial can
15 commence on Monday, 20 June 2022, with one week's pre-reading. So the
16 week's pre-reading being the week of the 13th and the court hearing and the
17 Tribunal commences on 20 June, for a period of a three-week trial.

18 The question of whether the Tribunal will sit on Fridays or not need not be
19 determined now.

20 And then, having worked back from that, now going to the beginning, we have
21 paragraph 1 of the Visa proposed draft with statement of case from
22 Sainsbury's by 8 January. Visa statement of case by 22 January.

23 We say the parties' proposals for expert evidence, identifying the experts they wish
24 to call, and the issues which those experts are to address, should be
25 submitted to the Tribunal by 8 February 2021.

26 On disclosure -- this is adapting paragraph 5 of the Visa draft -- the specific

1 categories of further documents to be identified by 8 February and the parties
2 seek to agree those categories by 22 February. Insofar as they cannot agree,
3 they will be dealt with at a CMC to be, as in existing paragraph 25, first
4 available date in March 2021. Supplemental disclosure by 23 April 2021.

5 And keep paragraph 7.

6 Witnesses of fact, signed statements of witnesses of fact and hearsay notices by
7 4 pm on 17 September 2021. Reply witness statements, if any, by 4 pm on 5
8 November, 2021.

9 Expert evidence -- we have dealt with the admission and identification of experts
10 already. The experts of like discipline from each party are to meet on
11 a without prejudice basis and without the presence -- I'm sorry, I have skipped
12 a stage.

13 The parties shall seek to agree a list of questions to be asked of each relevant expert
14 by -- and we have in fact thought that could be rather later. It has been
15 suggested that it should be 30 July 2021. We can come back to hear you on
16 that because if that can be achieved, that is helpful.

17 We have in fact envisaged doing it after all the factual evidence is in. That is to say,
18 by 17 December 2021.

19 We said that the experts of like discipline should meet on a without prejudice basis
20 and without the presence of lawyers to consider the nature of the evidence
21 that they will give and the methods used for any quantification by 14 January
22 2022.

23 Signed reports of experts to be exchanged by 4 pm on 4 March 2022. Any rebuttal
24 supplemental reports by 13 April 2022.

25 13: we don't think we need the first phrase. The experts shall meet on a without
26 prejudice basis by 27 April 2022 to reach, to identify issues in dispute and

1 where possible reach agreement.

2 Joint memorandum of experts by 9 May 2022. And paragraph 15 to stand. And then

3 we haven't done the pre-trial review bundles, and so on, for the purpose of

4 this order, but that takes us to a quantum trial on 20 June.

5 There will need to be provisions obviously about bundles and skeleton arguments to

6 fit in with that and we hope the parties can then agree on those steps, working

7 towards a 20 June trial date.

8 And we think between the joint memorandum of experts on 9 May, and 20 June trial

9 date, is perfectly adequate for a case of this scope.

10 Now the only thing I wanted to revisit on that is whether you feel it is sensible to try

11 and agree the questions for the experts before the witness statements are in.

12 That was Visa's proposal in paragraph 10 of the Visa draft.

13 We wondered if it is not better to seek to agree the questions after the factual

14 evidence is in but, Mr Rabinowitz, are you thinking that it is better the other

15 way around?

16 **MR RABINOWITZ:** No, Sir, I'm content to adopt the Tribunal's suggestion.

17 **THE PRESIDENT:** Thank you.

18 And we do think that there is a great benefit in the experts meeting before they write

19 their reports. It also means that the reports then are less of a surprise, it can

20 avoid ships passing in the night. And it will enable them to prepare rebuttal

21 reports more quickly.

22 So if that can be turned into a draft order, and then we shall proceed accordingly.

23 Now, there is of course liberty to apply and it may be that certain amendments need

24 to be made if there is a common issues trial. But we think everyone should

25 start working to that timetable.

26 **MR RABINOWITZ:** I'm grateful.

1 **MR BREALEY:** Thank you, Sir.

2 **THE PRESIDENT:** Is there anything else that we should sensibly do today, from
3 either of you?

4 **MR BREALEY:** I don't think so, Sir. I think we have done quite a lot.

5 From our perspective, no, Sir.

6 **THE PRESIDENT:** Mr Rabinowitz?

7 **MR RABINOWITZ:** Again, we are grateful to the Tribunal for this. I don't think there
8 is anything else we would ask you to deal with now.

9 **THE PRESIDENT:** Very well, that means we can conclude at 4.10 which is very
10 satisfactory.

11 We don't need to resume tomorrow but we shall be in touch regarding dates for
12 a CMC, to consider common issues.

13 Thank you both and, indeed, the teams behind you, metaphorically behind you.

14 **MR BREALEY:** We wish you a very good break.

15 **THE PRESIDENT:** And we wish everyone a happy Christmas so far as possible and
16 we look forward to a rather better 2021 than 2020 has been.

17 **MR RABINOWITZ:** Thank you.

18 **THE PRESIDENT:** Goodbye.

19 **(4.12 pm)**

20 **(The case management conference concluded)**

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