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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No. : 1287/5/7/18

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

13 Wednesday 3 March 2021

14
15 Before:
16 THE HONOURABLE MR JUSTICE ROTH
17 (President)
18 TIM FRAZER
19 SIMON HOLMES

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

22
23
24 BETWEEN:

25
26 ASDA STORES LIMITED AND OTHERS

Claimants

27
28 v

29
30 MASTERCARD INCORPORATED AND OTHERS

Defendants

31
32
33
34 **A P P E A R A N C E S**

35
36 Jon Turner QC, Christopher Brown and Max Schaefer (instructed by Stewarts Law LLP
37 appeared on behalf of the Claimants)

38 Matthew Cook (instructed by Jones Day appeared on behalf of the Defendants)

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44 Digital Transcription by Epiq Europe Ltd
45 Lower Ground 20 Furnival Street London EC4A 1JS
46 Tel No: 020 7404 1400 Fax No: 020 7404 1424
47 Email: ukclient@epiglobal.co.uk

Wednesday, 3 March 2021

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(10.30 am)

(Proceedings delayed)

(10.35 am)

THE PRESIDENT: We're just waiting for the live-stream to be connected. **(Pause)**

Good morning everyone. I start as always with an explanation and warning this case is being heard remotely, but it is of course a full Tribunal hearing in just the same way as if everyone was here present in the courtroom at the Tribunal where two members of the panel are sitting, the third joining us remotely. An official transcript will be produced in the usual way, but it is prohibited for anyone to make an unauthorised recording, audio or video, of the proceedings and that is punishable as a contempt of court.

Thank you on both sides for your skeleton arguments. We've also received a very slightly revised draft amended pleading, amended defence, or defences I should say, in the three actions on 1 March. We thought that it seems to be common ground in the skeletons that it's convenient to work off the Morrisons defence so if that's convenient for counsel, that's the one we have before us.

There is, as it were, a combination of applications to make certain amendments and objections to existing pleas, but the approach in the skeletons following the Tribunal's direction was that the claimants should go first in indicating what they object to, and then Mastercard to respond, and it's probably right to follow that course today unless you have agreed something else. So that's Mr Turner, then, over you to and we will, I should say, take a short break mid-morning.

Submissions by MR TURNER

MR TURNER: I'm obliged my Lord. I appear today with Mr Brown and Mr Schaefer

1 for the three merchant groups claiming damages; Asda, Argos and Morrisons,
2 collectively called as AAM, and Mr Cook appears for the defendant, the
3 Mastercard payment scheme.

4 Just to check, the Tribunal should have a group of lever-arch files which are
5 numbered from 1A to 4B. The inter partes correspondence has kept trickling
6 in. There are a few letters over the last two days which I've slotted at the end
7 of file 3B. You may have them separately, but it may not be necessary for us
8 to run through that now.

9 **THE PRESIDENT:** Yes, we've had them. I haven't read them, but we have got
10 them. We also have, I'm not quite sure when this came in, a couple of
11 witness statements from the trial. No one in the skeleton has asked us to
12 read them and I haven't looked at them and they seem to contain some
13 confidential material. I don't know if anyone is going to be referring to them.

14 **MR TURNER:** What I have is five witness statements that Mastercard provided
15 before the aborted hearing in February, not two.

16 **THE PRESIDENT:** That's right, yes. Correct, five witness statements. And
17 an extract from the closing submissions.

18 **MR TURNER:** That's it, yes. I understand those do have marked confidential
19 material.

20 **THE PRESIDENT:** Yes. I mean, if anyone does really need to refer to confidential
21 material other than just asking us to read it, if that becomes necessary, then
22 you need to alert us to that because the live-stream gets suspended.

23 **MR TURNER:** We'll do that.

24 My Lord, the purpose of this hearing is to address the merchants' objections to parts
25 of the defence which Mastercard wants to rely on in the assessment of the
26 quantum of loss. In the main, as Mr Cook indicated at the aborted hearing in

1 February, this concerns points which are present in Mastercard's existing
2 defences. AAM's position is that those points have become unsustainable
3 following the adjudications on the liability questions in the case which have
4 been called Phase 1. For that reason, we are applying for those to be struck
5 out.

6 There are also certain proposed amendments to the defences that Mastercard has
7 recently indicated it wants to make, and those amendments overlap with the
8 first group of points we object to, and we object to them for the same reasons.
9 In those cases, we say that Mastercard's proposed amendments shouldn't be
10 allowed.

11 There are three main topics that need to be considered today and there is also
12 a fourth, smaller point which crystallised in the correspondence only on
13 Monday, and I will deal with that too.

14 All three of the main topics concern the same question: what would have happened
15 in the marketplace if Mastercard had been constrained not to impose
16 multilateral interchange fees, MIFs, as part of the scheme. I should say at the
17 outset that I'm conscious that two of these three points have already been
18 canvassed in the separate context of the Sainsbury's damages claim against
19 Mastercard at a hearing which the president chaired last week. I will,
20 therefore, aim to be sensitive to that in the way I develop my submissions.

21 To focus in on these three main topics Mastercard wants to argue at this quantum
22 stage of the case: first, that it should be assumed by the Tribunal that unlike
23 Mastercard, Visa would have been unconstrained in imposing MIFs as part of
24 its own scheme.

25 Second, Mastercard would have reacted to being constrained by changing other
26 rules of the scheme in ways that would have led to additional costs being

1 borne by the merchants. They say that that should be taken into account in
2 the damages.

3 Third, they want to argue that interchange fees have caused consumers to do more
4 business with the merchants, so that a loss of interchange fees would have
5 resulted in a world where there was a smaller overall volume of transactions
6 for the merchants. Those are the three main topics.

7 In the Phase 1 proceedings --

8 **THE PRESIDENT:** Just to clarify, it's not suggested that one is dependent on the
9 other, is it, and the reaction to the change in the scheme rules, Mastercard
10 said, would be the case even if Visa were similarly constrained. As
11 I understand it, it's not dependent on what's been called the asymmetric
12 counterfactual.

13 **MR TURNER:** That's right. There's a part of the pleading that suggests a change to
14 the scheme rules would have been made in the light of the asymmetric
15 counterfactual, but another part which I will show you is that it is independent.

16 **THE PRESIDENT:** That's true of the third point as well, is it?

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

18 **THE PRESIDENT:** Thank you.

19 **MR TURNER:** In the Phase 1 proceedings, which stretched over some six years,
20 one of the main questions which the courts had to decide, and it did decide,
21 was what would happen in the marketplace if Mastercard didn't impose
22 multilateral interchange fees. The court had to do that for at least two
23 purposes. The first was to allow a comparison between the degree of
24 competition between acquiring banks for the business of merchants with
25 interchange fees in place against the degree of competition there would have
26 been without interchange fees in place. That required the court to look into

1 what would realistically have happened in the market without interchange
2 fees, within the actual market context. That was the main question decided
3 under Article 101(1) of the Treaty.

4 The second purpose -- these are not the only two, but the second relevant for
5 present purposes was for the court to consider whether the removal of
6 interchange fees would also mean the also of economic advantages for the
7 affected merchants, which would leave them worse off overall. That was the
8 main question under Article 101(3).

9 There was a lengthy trial in the Commercial Court, it lasted between June and
10 October 2016. There was then an appeal to the Court of Appeal in 2018 and
11 to the Supreme Court in 2020. AAM won those appeals.

12 Our point now is that the three arguments Mastercard wants to deploy were already
13 adjudicated in the Phase 1 trial. Since those issues have been litigated to
14 a conclusion and Mastercard has lost, they shouldn't be re-argued
15 expensively at the stage of assessing the quantum of damages. It would be
16 abusive of the process of the court if that were to happen.

17 What does Mastercard say? In its skeleton, it says that these issues at the liability
18 stage were different, or at least the standard of proof required to deal with the
19 issues at that stage was different. So it's free to argue questions such as Visa
20 being unconstrained in its charging of MIFs and the changes to the scheme
21 rules again. Mastercard does not see that as re-arguing the points. It says
22 that these have been argued for the first time in a distinct new context. In
23 a nutshell, that is the central point dividing the parties today.

24 What I will do is take each of these three topics in turn, subject to any steers that
25 the Tribunal gives me, and I'll show you aspects of the proposed defence
26 pleading that we are objecting to. Before I do it, I need to cover two

1 preliminary matters quickly. The first is to remind the Tribunal of the key
2 propositions of law articulated by the Court of Justice which explain the nature
3 and the function of a counterfactual in competition analysis.

4 The second is to show you the defence that was relied on by Mastercard at the time
5 of the Phase 1 trial back in 2016 so you can see for yourselves the issues that
6 were in play in the Phase 1 proceedings at that stage. I'll start with the law on
7 how to go about assessing what would happen in the absence of a contested
8 measure. If I can invite the Tribunal please to pick up the Court of Justice
9 judgment in the Mastercard cross-border MIF decision. You will have that in
10 bundle 4B at tab 3.

11 In tab 3, which begins at page 61 of the bundle numbering, could you please go to
12 page 81. There is a heading at the top "Findings of the court" and there are
13 certain key points that emerge in this section. First is paragraph 108, halfway
14 down the page. The court points out that:

15 "Irrespective of the context or the aim in relation to which a counterfactual hypothesis
16 is used, it is important the hypothesis is appropriate to the issue ..."

17 Mastercard, I apprehend, will say that the issues now are different from those that
18 arose before. But then they go on to say:

19 "... and that the assumption on which it is based is not unrealistic."

20 It's always the case that a counterfactual must be a realistic matter.

21 On the same page at paragraph 111, the court says that when you are gauging
22 whether a measure is necessary to support a wider commercial operation,
23 essentially, then you may take account of realistic situations in the fourth line:

24 "... that might arise in the absence of the restriction". You are not "limited to
25 situations that [second line] would arise" when you are looking at that issue.

26 This is to be contrasted, because we're not now dealing with that question at all,

1 I must say, with the strength of the assessment which is called for when you
2 are considering whether the measures under scrutiny actually do restrict
3 competition. If you go forward in this judgment to page 89 of your bundle and
4 look at paragraph 161, from about three lines down:

5 "It should be noted the Court of Justice has repeatedly held that in order to
6 determine whether an agreement is to be considered as prohibited by reason
7 of the distortion of competition which is its effect, the competition in question
8 should be assessed within the actual context in which it would occur in the
9 absence of the agreement in dispute."

10 So you look to see what would have happened. And this proposition was then
11 applied in the context of Mastercard's MIFs by the Court of Justice a few
12 paragraphs down on that page in paragraph 164:

13 The court considered the impact of setting MIFs on prices and on the other
14 parameters of competition by comparing this with competition "within the
15 actual context in which it would occur in the absence of the fees".

16 Last two lines.

17 The next paragraph, 165, emphasises that it's necessary to take account of the full
18 economic and legal setting in which the undertakings concerned, fourth line --
19 and here that means the Mastercard undertakings -- operate.

20 And finally, the last paragraph I want to show you is the bottom of the page, 166.

21 The court states that the counterfactual must be realistic. From that
22 perspective, it's permissible to take account of the likely developments the
23 court says "that would occur on the market in the absence of those
24 arrangements". So those are the factors to be brought into account in
25 considering the counterfactual.

26 These statements of the law were crystallised and they were applied in the context of

1 these proceedings by the Court of Appeal in its judgment. You have that in
2 file 1B, first tab, at page 48.

3 **THE PRESIDENT:** Yes. Mr Turner, it's really for my benefit that I'm working off
4 a different copy of the Court of Appeal judgment. If you can give me
5 paragraph numbers as well as page numbers when you refer to it, and you
6 have been doing that with the Court of Justice.

7 **MR TURNER:** I'll do that. It's paragraph 185.

8 **THE PRESIDENT:** Thank you.

9 **MR TURNER:** It's under the heading "Our conclusions on the question of whether
10 the schemes' rules setting default MIFs restrict competition under
11 Article 101(1)". And you will see they say that their conclusions on --

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

13 **MR TURNER:** I'm sorry.

14 **THE PRESIDENT:** Do give the page number as well for the benefit of my
15 colleagues.

16 **MR TURNER:** Yes. It's page 48 in tab 1 of bundle 1B.

17 **THE PRESIDENT:** Yes. And 185 the subheading "Our conclusions".

18 **MR TURNER:** Yes. I'm taking it from the second line:

19 "The correct counterfactual for schemes like the Mastercard and Visa schemes
20 before us was identified by the Court of Justice decision. It was "no default
21 MIF" and a prohibition on ex post pricing (or a settlement at par rule). The
22 relevant counterfactual has to be likely and realistic in the actual context (see
23 the O2 Germany case ... and the Court of Justice decision at 169). But for
24 schemes of this kind the Court of Justice has decided that that test is
25 satisfied."

26 So that is the basic framework on the law on how one assesses what would have

1 happened but for the measures contested.

2 The second preliminary matter I need to cover is to then show you Mastercard's
3 pleaded case as it stood for the first phase of these proceedings. On this
4 second preliminary matter, may I ask the Tribunal to pick up file 2B and go in
5 that to the Morrisons defence -- and I'm following the President's steer to use
6 this, although the defences in the parallel Asda and Argos claims are
7 essentially the same. You see from the first page -- it's page 126 in the
8 bundles, 2B, tab 3 -- that there were a series of amendments since this claim
9 was filed, which was in 2012, and that the last, which is in gold, was
10 July 2016, a month into the trial which had begun in June 2016.

11 If you turn, please, to page 155 in Mastercard's defence --

12 **MR HOLMES:** Again, could we have the paragraph number?

13 **MR TURNER:** Yes. I'm not going to go on that page to a paragraph number, I'm
14 going to go simply to the heading which is F, "Alleged breach of competition
15 rules" on page 155 because the paragraph I'm going to take you to sits within
16 that section. So it's merely to show you that the section concerned, which
17 begins on 155, concerns the alleged breaches of the competition rules and
18 Mastercard's defence to the allegations.

19 In that, if you would then please go to page 164 in that section, I ask you to look at
20 paragraph 101A. Here, as you see from the introduction, Mastercard stated:

21 "In relation to the relevant counterfactual, it is denied that a "no MIF counterfactual"
22 or a "zero MIF counterfactual" is relevant for the purpose of the claimant's
23 claim."

24 If you go down to (b), you'll see they said:

25 "It is denied that a "no MIF" or "zero MIF" counterfactual is realistic, since Mastercard
26 would not have adopted such rules without making other corresponding

1 changes to the Mastercard scheme."

2 To answer the President's question earlier, this part you will see refers to the Visa
3 counterfactual implicitly, the asymmetric counterfactual, but you will then see
4 that other parts do not. It continues:

5 "MasterCard would not have adopted such rules without making other corresponding
6 changes to the MasterCard scheme since this would otherwise have led to the
7 demise of the MasterCard scheme (since issuers would switch to other card
8 schemes in order to receive higher revenues and it would not be commercially
9 viable for issuers to recover all their costs from cardholders in circumstances
10 in which other card schemes such as Visa and American Express were not
11 doing so)."

12 So there's the asymmetric counterfactual mixed in. It then continues at (c):

13 "Furthermore, in relation to what would happen in the "no MIF" or "zero MIF"
14 counterfactual, the defendants repeat paragraphs 129 to 132 and 135 to 137
15 below [we will look at those in a moment]. As set out therein, in order to allow
16 the schemes to work effectively or at all, MCI Defendants would have made
17 other changes to the default rules of the scheme which would either have
18 transferred additional costs on to acquirers to an extent which would have
19 compensated for [means cancelled out] the reduction in interchange fees or
20 resulted in bilaterally agreed interchange fees."

21 Which is not pursued now:

22 "In the premises, it is denied that competition would have been materially different in
23 the "no MIF" or "zero MIF" counterfactual."

24 And if you please go forward to pick up that reference in 101A(c) to page 173, you
25 see their proposition being developed in paragraphs 129 to 132.
26 Paragraph 129 refers to three particular rules of the scheme. These are the

1 crucial rules for the purpose of this topic. Those are rules requiring an issuer
2 to make payment to an acquirer even in respect of a fraudulent transaction, a.

3 b.:

4 "An issuer is required to make a payment to an acquirer even when the cardholder
5 defaults on the payment."

6 And c.:

7 "When the issuer is required to make payment" essentially prompt payment.

8 Those are summarised in paragraph 130. And then the plea begins at 131:

9 "The EEA and UK default rules in relation to each of those issues which were in
10 place for the periods of the claim were determined in the context of the EEA
11 MIF or the UK MIF then in force which provided a contribution to the costs
12 which issuers incurred in complying with these default rules. Had the Scheme
13 been required to operate with a substantially lower MIF, or a zero MIF [ignore
14 the gold type] the default rules in relation to these issues would have been
15 materially different since acquirers and merchants could not expect to receive
16 the benefit of services to which they were not contributing to and it wouldn't be
17 commercially viable for issuers to provide these services to merchants without
18 a contribution to the costs of doing so from acquirers and merchants."

19 So you will see the claim is resting on the causative nature of the MIFs, the
20 contribution they make to the costs of the issuers, and the finances of the
21 issuing banks.

22 Paragraph 132 simply draws out the alleged consequences of this causal
23 relationship, that there would be additional costs for the merchants which
24 would cancel out, they say, the financial gain from not paying interchange
25 fees, or else they would have reduced that gain.

26 We don't need to look at paragraphs 135 to 137 because you will see that those

1 have been deleted from the current proposed version of the defence that
2 Mastercard wants to rely on in the quantum stage of this litigation.

3 **THE PRESIDENT:** That's about the bilaterals, is it?

4 **MR TURNER:** Yes, and they have deleted from what they want to rely on. But if
5 you go forward to page 175 and look at paragraphs 138 to 139 at the foot of
6 the page, you have the third topic of the three which I'm concerned with, the
7 three main topics:

8 "To the extent that issuers did not receive interchange fees comparable to those in
9 fact adopted by the scheme, it is likely that some or all issuers would have
10 issued Visa and/or American Express cards instead or in greater volumes."

11 139:

12 "Further or alternatively, it is likely that some or all cardholders would have moved to
13 either Visa or American Express directly, since if issuers were recovering a
14 smaller percentage of their costs from the acquirers, they would have had to
15 recover a larger percentage from Mastercard cardholders."

16 Those two paragraphs are referring to the switching issues.

17 Then 140 is the overall volume of business point:

18 "Even if cardholders did not move to Visa or Amex, [so no switching], it is likely that
19 a reduction in interchange fees and a corresponding increase in cardholder
20 costs [which they say would have been the outcome] would have resulted in
21 the reduction in their Mastercard/Maestro card usage. While part of this
22 reduction may have been offset by an increase in transactions through other,
23 more expensive payment mechanisms [that is the alleged switch to, for
24 example, Visa unconstrained], it is also likely to have resulted in an overall
25 reduction in transactions, including cross-border transactions."

26 In other words, it's the claim that there would have been an overall loss of trading at

1 the merchants.

2 **THE PRESIDENT:** So 138 and 139 are the switching and 140 is the third topic.

3 **MR TURNER:** Yes. Now against those three introductory points, those points, I turn
4 to the main objections we have to Mastercard's intended defence at this
5 quantum stage. In each case, I'll show you that the point they wish to argue
6 has been litigated already in the lengthy Commercial Court trial and the
7 appeals up to the Supreme Court.

8 The first objection was dealt with, just to give you the reference in our skeleton
9 argument, at paragraphs 12 to 17. This is the switching point, as it's been
10 termed, Mastercard's intended allegation that if it was constrained not to set
11 MIFs, the issuing banks and the cardholders in their system would have
12 switched over to the Visa scheme because Visa would have continued to set
13 MIFs unconstrained. And now I must apologise because I have been working
14 from the -- let me see now if I'm working from the right one. If you go to
15 bundle 3A, the version of the current defences I have I been marking up are at
16 tab 23.

17 **THE PRESIDENT:** Yes. I think the change is very small but we have been working
18 off the other one. I think if you give paragraph numbers, there shouldn't be
19 a problem.

20 **MR TURNER:** This is in fact the Morrisons case, the defence in Morrisons' case. If
21 you go in it to page 74, paragraph 28d, Mastercard there says -- you see the
22 amendments that they want to make:

23 "In any event, if the Mastercard scheme had operated with zero MIF during the claim
24 periods, the reduced activities of issuers would have led to a reduction in the
25 number of transactions to which the zero interchange fee applied as opposed
26 to other more expensive payment methods (cash, cheques, American

1 Express ...)"

2 And now they wish to amend in order to add in Visa and PayPal. So this is by way of
3 a proposed amendment at this paragraph.

4 Then if you turn to page 114 in the same document, you have the paragraphs
5 beginning at 138 to 140, and you will see paragraph 138 -- this is the parallel
6 to the version we were just looking at -- they have kept the reference to
7 issuing Visa as well as American Express instead, 138. At 139, which is
8 again the switching point, what they want to do as you see from the red type
9 is to add some more narrative again referring specifically to Visa, as well as
10 American Express, in red type --

11 **THE PRESIDENT:** But it's still based, as I understand it, on the asymmetric
12 counterfactual.

13 **MR TURNER:** It is. It's the same one, but what they've done in the amendment in
14 these places is to boost or augment the pleading to give more references to
15 Visa. But it doesn't change the point, that's still what the point is about.

16 **THE PRESIDENT:** Yes.

17 **MR TURNER:** 140 is the increased volume of business point. And here, there is
18 an amendment you'll see in red to bring in the allegation that there would have
19 been a lower amount of Mastercard card usage and a relatively high amount
20 of Visa card usage, as well as American Express, PayPal and cash.

21 **THE PRESIDENT:** I struggled with that a little bit -- no doubt in due course Mr Cook
22 will enlighten us -- and it's partly the reduction in business but it seems to be --
23 it's a combination, isn't it, of switching and a reduction in business?

24 **MR TURNER:** Yes.

25 **THE PRESIDENT:** I'm looking at the last sentence:

26 "Part of this reduction ...may have been offset through other payment mechanisms.

1 It's also likely to result in an overall reduction in transactions."
2 Or is it really building to the reduction in transactions?
3 **MR TURNER:** I've read this as building to the reduction in transactions because the
4 last line-and-a-half are unambiguous.
5 **THE PRESIDENT:** Yes.
6 **MR TURNER:** It's certainly saying, referring back to what has already just been said
7 in the last two paragraphs, that they do anticipate more transactions through
8 the other more expensive payment mechanisms, which include Visa.
9 **THE PRESIDENT:** Yes.
10 **MR TURNER:** The --
11 **THE PRESIDENT:** I just found it problematic because of the first sentence, but it
12 seems to be the premise of most of it:
13 "Even if cardholders didn't move to Visa, a higher proportion of their transactions
14 would take place on other methods including Visa."
15 I didn't quite follow that. But ...
16 **MR TURNER:** I think there that they're simply referring to the relative proportions
17 rather than an active move by the cardholder so that if there are fewer
18 Mastercard transactions, as a matter of maths --
19 **THE PRESIDENT:** I see, yes.
20 **MR TURNER:** -- there would be more Visa transactions. I believe that that's the
21 distinction.
22 **THE PRESIDENT:** I see.
23 **MR TURNER:** Then you have 142, which draws the strands together on the
24 consequences of the alleged switching of business to Visa. For
25 completeness, if you would look at 143 and 144, the proposed updates in red
26 are on the facing page, page 116.

1 There you see through the proposed amendments, intended allegations that there
2 would have been a switch of business from Mastercard payment cards now to
3 PayPal. PayPal is an online service which the members of the Tribunal may
4 well know about. It has higher charges for merchants and I will deal with
5 PayPal shortly.

6 But you'll see from 143 and 144 that there's now a clear additional allegation of
7 switching of business to PayPal also in what they want to argue.

8 Standing back, and we can now close that, our --

9 **THE PRESIDENT:** Yes. 143 and 144 are about Amex only and now PayPal, yes?

10 **MR TURNER:** Yes. The part we object to, which I'm dealing with as an aspect of
11 this switching amendment, here concerns PayPal. That's what they're doing
12 in this proposed amendment.

13 **THE PRESIDENT:** When you say the part you are objecting to, are you objecting to
14 the Amex part at all?

15 **MR TURNER:** No, we're not. I have made that clear, we are not taking a point on
16 that. We are restricting this to Visa for the reasons that I'm about to develop,
17 which were to some extent traversed in the Sainsbury's hearing last week,
18 and to PayPal.

19 **THE PRESIDENT:** Yes. In the Sainsbury's hearing we dealt with Visa, as you
20 know, and you've no doubt seen the ruling. But we didn't consider PayPal at
21 all.

22 **MR TURNER:** I'm not sure the ruling has yet been published --

23 **THE PRESIDENT:** Ah.

24 **MR TURNER:** -- but I did see a note of it.

25 **THE PRESIDENT:** It should be -- we'll investigate that. It's short. It should be on
26 the website. But we'll investigate that.

1 **MR TURNER:** If I've missed it, I apologise.

2 **THE PRESIDENT:** It may be helpful to both sides if it were --

3 **MR COOK:** Sir, I checked this morning and it's not available on the website as yet.

4 **THE PRESIDENT:** Right. I don't know why that is and I'll make enquiries when we
5 have a break.

6 **MR TURNER:** Now our contention in a nutshell is the case which Mastercard wants
7 to run, that merchants would not have been better off without paying
8 interchange fees set by Mastercard, because Visa would remain
9 unconstrained and Mastercard's customers would have switched over to the
10 Visa scheme instead, it has already been dealt with by the court in these
11 proceedings. This is where I'm going to be overlapping with the content of the
12 discussion and the ruling given in the Sainsbury's case. If you turn to the --

13 **THE PRESIDENT:** Well, for our part on that point, we don't need to hear from you at
14 this stage. We've considered that and, as you say, there's been a ruling on it
15 as against Mastercard and in terms of what the Court of Appeal said about
16 an asymmetric counterfactual. So I think we'll hear from Mr Cook on it and
17 you can reply on that.

18 **MR TURNER:** I'm obliged. I'll turn then to PayPal. Mastercard wants to amend so
19 as to argue that if it couldn't impose interchange fees, the cardholders would
20 switch to using PayPal instead. Presumably this is for online purchases
21 because PayPal is an online facility.

22 Mr Justice Popplewell pointed out that in many cases, what PayPal amounts to is
23 just an indirect way of accessing an underlying payment card scheme and
24 triggering the payment of the interchange fees. We can see that, if you pick
25 up his judgment in bundle 1A at tab 1. Go in it to page 103, this is fairly short.
26 There's a paragraph with the heading in italics "Online sales". At the end of

1 that paragraph, the judge points out -- this is only one of the places where he
2 deals with it, that:

3 "Even secure payment methods such as PayPal are often backed by cards rather
4 than cash."

5 We wrote to Mastercard's solicitors when we received their proposed amendment
6 with the red type showing that they wanted to rely on switching to PayPal and
7 we made this point. We wanted to know whether Mastercard intended to
8 allege that customers would choose to pay by PayPal even where this was
9 just an indirect way of accessing Visa to benefit from the interchange fee
10 backed rewards. Our letter on this you'll find in bundle 3A at tab 22. In
11 bundle 3A, tab 22, you have a letter from AAM's solicitors, Stewarts, dated
12 29 January. If you look --

13 **THE PRESIDENT:** Sorry, tab 22 --

14 **MR TURNER:** 22.

15 **THE PRESIDENT:** Yes, sorry.

16 **MR TURNER:** Should have a letter from Stewarts, 29 January. Looking at the last
17 two paragraphs for the moment:

18 "Accordingly, to the extent Mastercard's new allegation is intended to suggest that
19 online purchasers would switch from using Mastercard cards to PayPal in
20 order to access the Visa system (still incorporating MIFs), then this will just be
21 another version of the forbidden asymmetric counterfactual ... Please would
22 you clarify at the latest by way of Mastercard's reply submissions for the
23 hearing on 11 February 2021 whether these amendments relating to PayPal
24 are intended to be limited to cases where the PayPal transaction is backed by
25 cases other than the scenario outlined above and, if so, which? If not, please
26 explain how the proposed amendment can be justified in view of the clash

1 with the Court of Appeal's judgment."

2 If you turn over the page, we have a printout which was referred to in that letter from

3 PayPal. You'll see at the very bottom of the page, they say:

4 "Mastercard and Visa may charge single interchange fees ... PayPal will always
5 charge you the interchange fee set by Visa and Mastercard and as passed on
6 by its Acquirer."

7 **THE PRESIDENT:** Yes.

8 **MR TURNER:** Mastercard did respond to this in its skeleton argument for the
9 February hearing, if you have that. Their skeleton argument dealt with it in
10 two paragraphs only, 20 and 21. They made two points, one in each of those
11 paragraphs. The first one in paragraph 20 is that it's legitimate to assume
12 Visa would be unconstrained in setting MIFs, inducing cardholders to switch
13 to this indirect way of accessing Visa. They say essentially, last paragraph:

14 "Mastercard disagrees with us for the reasons set out above."

15 And that is all of the reasons about why Visa unconstrained is a realistic
16 counterfactual.

17 **THE PRESIDENT:** Just a moment. **(Pause)**

18 So they're saying it's irrespective -- it doesn't depend on the asymmetric
19 counterfactual because there's always an additional cost for the merchant if
20 it's by PayPal; is that right?

21 **MR TURNER:** No, not entirely. That's paragraph 21 --

22 **THE PRESIDENT:** Yes.

23 **MR TURNER:** -- which I will turn to in a moment.

24 **THE PRESIDENT:** But paragraph 20 is just saying that they're saying -- they're
25 paraphrasing or implying that your position is that if there is a difference when
26 PayPal is linked directly to the bank account, but your position is where it

1 involves accessing Visa, they're seeking to paraphrase what your point is,
2 aren't they?

3 **MR TURNER:** Yes, they are. Last three lines, they say correctly that we dispute
4 that Mastercard can rely on the switch to PayPal insofar as this is essentially
5 an indirect way of accessing the Visa system because of the MIFs and the
6 Visa rewards. And they say:

7 "Very simply, Mastercard disagrees for the reasons set out above."

8 And those are all of the reasons why the asymmetric counterfactual is, in their
9 contention, justified. Those are the same reasons you dealt with in
10 Sainsbury's last week.

11 **THE PRESIDENT:** Is the first sentence of paragraph 20 correct?

12 **MR TURNER:** Yes.

13 **THE PRESIDENT:** So you do accept that a switch to PayPal where it goes to
14 a direct link, that is something they can rely on?

15 **MR TURNER:** Yes, because we are concerned with the point of principle that was
16 already decided in Phase 1. That point, as your Lordship knows from the
17 Court of Appeal, paragraphs 202/203, was that it is not realistic to assume the
18 asymmetric counterfactual. So we have picked up only on the point that
19 where they are saying the switch would occur because people want to use
20 Visa essentially and get the benefits, that that is only an indirect way of
21 switching to Visa.

22 **THE PRESIDENT:** Yes.

23 **MR TURNER:** And they say in the last line on that point:

24 "Mastercard disagrees for the reasons set out above."

25 So our submission is that their reasons set out above are wrong, and their first point
26 here on PayPal is therefore misconceived. But my Lord, you are right that

1 they then make a second point at paragraph 21:

2 "Further and in any event ..."

3 But this isn't an explanation of why cardholders would choose to move to PayPal for
4 the online purchases at all if Mastercard didn't impose interchange fees. Yes,
5 PayPal is an online facility, but all this is, is a statement that PayPal
6 transactions are currently more expensive for merchants than accepting
7 Mastercard payments. But why that means that the removal of interchange
8 fees would lead to this switch to PayPal, which is what we asked them about,
9 is not explained. This is merely a statement of the fact that one facility they
10 allege is more expensive than the other. And we are concerned with the
11 reasons why they want to amend to say that there would now be a switch
12 which would not have been there anyway, which would not have transpired in
13 any event.

14 Accordingly, the proposed amendments to the defences to introduce a new
15 allegation of switching from Mastercard to PayPal appear to us to be
16 unsustainable and should not be allowed.

17 I'll hear what Mr Cook has to say, if anything, in answer to this, but based on these
18 two paragraphs in their skeleton, the point seems clear to us.

19 **MR HOLMES:** Mr Turner, can I ask: does your point therefore where the customer
20 has a direct link to PayPal, your point isn't that that point has already been
21 decided, it's just that the argument that there would be switching to PayPal in
22 those circumstances is therefore unsustainable, rather than if it's been already
23 decided?

24 **MR TURNER:** We're actually limiting our objection to the case where the PayPal
25 transactions -- and it's about two-thirds of them -- are linked to the payment
26 card rather than the bank account. So I'm actually not attacking the case at

1 all when there's a link to the bank accounts, I'm being quite modest in my
2 submission here. It is true though as you say, Sir, that in paragraph 21, they
3 have not explained the mechanism by which even in their other case, you
4 would expect to see a switch to PayPal because of the loss of the interchange
5 fees, yes.

6 **MR HOLMES:** Indeed, and that would go to your reply to their defence rather than
7 to striking out?

8 **MR TURNER:** Yes. Well, in so far as they are saying this is explanation which also
9 applies to the case where PayPal transaction is backed by Visa cards, it's not
10 an answer.

11 **MR HOLMES:** Understood, thank you.

12 **MR TURNER:** So that is all then in view of the fact this has already been -- the main
13 principles were covered last week at the Sainsbury's hearing, that I have to
14 say about that first main topic.

15 I'll move to the change to the scheme rules. I notice the time. I don't know if it's now
16 convenient --

17 **THE PRESIDENT:** It probably would be a sensible time, wouldn't it, to take a break?

18 **MR TURNER:** Yes.

19 **THE PRESIDENT:** So we'll come back -- it's about 11.32, we will come back at
20 11.40.

21 **(11.32 am)**

22 **(A short break)**

23 **(11.41 am)**

24 **THE PRESIDENT:** Yes, we did make enquiries. The reason the rulings are not on
25 the website is because they were unreserved rulings. They were part of
26 a transcript and the transcript has gone to the parties for correction of other

1 parts of course, and the corrections either haven't been received or, if they've
2 been received, haven't been processed yet. So we are arranging for the
3 rulings to be extracted from the transcript, which have been corrected, to be
4 sent to both of you.

5 The first ruling I don't think is relevant. That was to do with the level of MIF,
6 exemptible MIF that Sainsbury's could argue for, given the way they put their
7 case at trial, and of course exemption isn't an issue in these proceedings. It
8 was the second ruling which concerned Mastercard's wish to argue
9 a switching point, really pretty much the same point I think as here, Mr Cook
10 will recall.

11 There was also a wish by Mastercard to argue a scheme rules change point, but that
12 was abandoned for particular reasons in that action.

13 So the ruling doesn't deal with that.

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

15 My Lord, we've dealt then with my first of the three objections, and that's
16 Mastercard's intended reliance on what's been called the asymmetric
17 counterfactuals for Visa. What we are saying is that that is either directly, or
18 as I've developed indirectly, insofar as the PayPal point bears on that.

19 **THE PRESIDENT:** Yes.

20 **MR TURNER:** The second objection is about the change to the scheme rules. We
21 say that this too is a situation where Mastercard is trying to re-open, at the
22 stage of the quantum of damages, an issue which was settled in the Phase 1
23 litigation. In a nutshell, the issue is what adjustments, if any, would
24 Mastercard have made to its scheme rules in response to being constrained
25 not to impose interchange fees.

26 It was squarely one of the issues at the Phase 1 trial. The four main questions were

1 really these, and I emphasise the first: the starting point was the court asking:
2 what would in fact have happened if Mastercard had been constrained not to
3 impose multilateral interchange fees, taking account of likely market
4 developments? The Court of Justice test.

5 The second question for the judge was: would that have meant more competition in
6 the affected market?

7 The third question was what's commonly called objective necessity: did this show
8 that MIFs were essential for the survival of any four party payment scheme,
9 like Mastercard's and Visa's, when one saw what would happen without the
10 MIFs?

11 And the fourth point, which was also important, formed a large part of the judgment
12 of Mr Justice Popplewell, was: would the removal of the multilateral
13 interchange fees have led to the merchants being no better off because of
14 other costs that they would have had to bear instead? The Article 101(3)
15 point, efficiency advantages tied to the multilateral interchange fees and
16 weighing the costs against the advantages.

17 **THE PRESIDENT:** Yes.

18 **MR TURNER:** The first of those four questions which the court did need to go into is
19 a straightforward factual inquiry into what would have happened without
20 interchange fees. It's a basic first step. It's applicable at the quantum stage
21 exactly as it is at the liability stage. There's no question of Mastercard holding
22 back counterfactuals in its pocket at the liability trial only to release them later
23 at the damages stage.

24 To make this point good, I'd ask the Tribunal to look at how Mastercard actually did
25 put its case at the Phase 1 trial on the issue whether removing MIFs would
26 cause Mastercard to make changes to its scheme rules and that that in turn

1 would mean merchants suffering disadvantages to be weighed against the
2 costs to them of having to pay these interchange fees.

3 May I ask the Tribunal first to take up Mastercard's pleaded case on the exemption
4 issues, which is in bundle 2A at tab 4. Their case on exemption was not
5 developed in the main pleading. There was a request for information, this is
6 the response to the request for information. In it, if the Tribunal would please
7 go to page 25 which you'll see from the bottom of the previous page, page 24,
8 is a response to certain questions about what the Mastercard case was on
9 exemption.

10 What I want to show the Tribunal is how Mastercard put its case. At (a) at the top of
11 page 25, they said --

12 **THE PRESIDENT:** Sorry, just a minute.

13 **MR TURNER:** Yes. **(Pause)**

14 **THE PRESIDENT:** Is this only about this short period? I'm looking at the request of
15 paragraph 100 on page 23.

16 **MR TURNER:** No. This is an answer as you'll see to question 6 and 7. You are
17 looking there at request 7.

18 **THE PRESIDENT:** Yes, I see. It's not -- I see.

19 **MR TURNER:** I apologise, I should perhaps have started -- you need to go back to
20 page 22 and you'll see there just above "Request 6", it refers to the two
21 paragraphs of the main pleading dealing with exemption, Article 81(3), as it
22 was then.

23 **THE PRESIDENT:** Yes.

24 **MR TURNER:** In the main pleading, Mastercard was saying, "It's open to us to
25 demonstrate that the conditions of exemption were met".

26 The request, as you'll see from request 6, was asking for a pleading, for the basis on

1 which they were going to say that there was exemption that was justified.

2 **THE PRESIDENT:** These are very short periods, aren't they? Paragraph 95:

3 "In relation to ... transactions in the Republic of Ireland, other transactions from
4 October 2007 to December 2007."

5 **MR TURNER:** Yes. They appear --

6 **THE PRESIDENT:** Presumably they relied on 81(3) generally, not just for those
7 limited periods.

8 **MR TURNER:** That is how I've read it too, but you are right to spot that. I've read
9 this also as their case on exemption, and indeed you'll see now that that's the
10 way it's put in the response. There isn't a limitation of it to those
11 two/three years.

12 **THE PRESIDENT:** Well, there must have been in the defence a more general 81(3)
13 plea, wasn't there?

14 **MR TURNER:** We can go back to it to look after to hunt through it, but it may be
15 most efficient for Mr Cook to correct me if I'm misspeaking. The case on
16 exemption was not developed in detail and there was a request for
17 information to tease out what it was.

18 **THE PRESIDENT:** Yes. But I mean, it was clearly from the judgment Mastercard's
19 case that the MIFs throughout the whole period were exempt.

20 **MR TURNER:** Oh, yes, absolutely. But the reasons they were relying on which the
21 judge then developed in his judgment are not to be found in the main
22 pleading, I believe, but Mr Cook can again pick up that if I'm wrong about that.
23 Here, they express themselves in general terms, looking at page 25 and reading
24 from letter (a) at the top:

25 "The claimants have failed to plead any case that there is a realistic and credible
26 counterfactual of how the MasterCard scheme would operate without default

1 Intra EEA MIF [that's the cross-border MIF]. Establishing such a case [they
2 say at (b)] is not only a necessary precondition before the issue of exemption
3 can arise [quite right], but also provides the counterfactual against which the
4 positive benefits and advantages of a default Intra EEA MIF set at any level
5 can then be analysed for the purpose of exemption."

6 Pausing there, we agree with that too. It's the necessary first step, it's a factual
7 inquiry. (c):

8 "In the absence of any pleaded counterfactual case by the claimants, MasterCard
9 can only set out its exemption case by reference to the likely features of such
10 a counterfactual if it did exist and reserves its right to update and/or amend
11 its exemption case once the claimants particularise the case on
12 counterfactual."

13 And then you have this at (d):

14 "While MasterCard denies that there is any such counterfactual [in other words, that
15 there is a realistic set of arrangements that would arise], the likely features of
16 such a counterfactual (if it did exist) are identified" in those paragraphs of the
17 HMV defence and they include at (i) "changes to the rules governing whether
18 an acquirer is paid by the issuer for fraudulent transactions and/or for
19 transactions in respect of which a cardholder defaults and changes to the
20 timing of the payments by issuers to acquirers so that roughly the same
21 allocation of costs between acquirers and issuers remained applicable."

22 **THE PRESIDENT:** Yes.

23 **MR TURNER:** So that's the general point. And then at (ii), something that looks like
24 the point dependent on switching, my Lord:

25 "Absent such a re-allocation, a reduction potentially down to zero in the number of
26 transactions undertaken on MasterCard's scheme, since cardholders (and

1 consequently licensees) would have no interest in cards which were more
2 expensive than competing products, such as Visa and American Express
3 cards."

4 And they develop their point on page 28 at (k) to (m). This is the point about the cost
5 causality that the allegation is that the MIF revenues received by issuing
6 banks are used to recoup, as they say in (k) at the top of the page, second
7 line:

8 "... part of the costs underlying the valuable services that they provide to the
9 acquirers and ultimately the merchants, such as swift payment, the payment
10 guarantee against frauds and the payment guarantee against cardholder
11 default."

12 You will see at (m) that they say those translate into benefits for the merchants which
13 are relevant for the purpose of Article 101(3).

14 **THE PRESIDENT:** Yes.

15 **MR TURNER:** So in essence, and we've seen this prefigured in the pleaded case
16 that we've already looked at for Morrisons, the main case that they were
17 running on no restriction, the same point is made. In the main case, they
18 were saying there wouldn't be a restriction of competition because acquirers
19 in their dealings with the merchants over merchant service charges would still
20 be faced with the same costs. But they wouldn't be in the interchange fee,
21 they would arise elsewhere because issuers would load them on to the
22 acquirers through a different mechanism because of changes to the scheme
23 rules. Here, they are making the same point but deploying it for the purpose
24 of exemption. They say, by the same token, these are benefits that the MIFs
25 bring to the customer merchants. So that was the pleaded case.

26 What then happened was striking. Mastercard abandoned this position and it

1 changed its stance at the trial itself. At the trial, Mastercard did not try to
2 make good its pleaded case that the no MIF counterfactual, essentially just
3 removing the multilateral interchange fees was unrealistic, on the grounds that
4 the absence of MIFs would, as you see pleaded, have triggered a significant
5 change in the other scheme rules.

6 What it did instead was to run a case that there were various other changes to the
7 scheme rules, or even its wider business model that it considered, but none of
8 them were likely to be adopted, that they all had inherent problems. This is
9 where I'll ask you please to look very briefly at Mastercard's closing
10 submissions, which are confidential and so I won't read those out but I'll direct
11 you to the relevant parts. Those you should find -- or you may find in
12 bundle 2B at tab 7, beginning at page 239.

13 **THE PRESIDENT:** Yes. This is obviously an extract, yes.

14 **MR TURNER:** This is just an extract, they were long.

15 The front page is at 239 and the relevant part of the extract I want you to look at is
16 on page 264. You should have text which is highlighted in blue, which is
17 confidential.

18 **THE PRESIDENT:** Yes.

19 **MR TURNER:** But around that, and it's not confidential, you'll see paragraphs 290
20 and 291 on page 264.

21 **THE PRESIDENT:** Yes.

22 **MR TURNER:** I can read those:

23 "As explained by MasterCard's witnesses, MasterCard carried out detailed analysis
24 on potential alternative business structures that MasterCard could try to adopt
25 in a zero or low MIF environment ... However, as Mr Lane explained when
26 questioned on the various models considered ..."

1 Then there's redacted part you need to read.

2 **THE PRESIDENT:** Yes, pause a moment. **(Pause)**

3 Yes.

4 **MR TURNER:** Then you pick up the non-confidential part in 291, the conclusion:

5 "As explained below, none of the alternative structures considered were shown to be
6 sufficiently viable. They, therefore, cannot be relied upon to suggest that the
7 MIF was not objectively necessary to the operation of the MasterCard four
8 party payment system."

9 There you see from that sentence what had happened at the trial. Mastercard's
10 position was that the collapse of the scheme was erasing certainty, if Visa
11 was unconstrained, that Visa would be unconstrained, and that none of these
12 alternative structures were viable and was an answer to it. So it was actually
13 the claimants at trial which were essentially saying there were other
14 approaches that could have been taken even if Visa was unconstrained,
15 which would not have meant the collapse of the Mastercard scheme. There
16 was --

17 **THE PRESIDENT:** It's unfortunate that the quotation from Mr Lane's evidence is
18 confidential -- I'm not sure why it is because it's quite pertinent. It's not clear
19 to me from that passage whether they were looking at alternative models that
20 could provide the benefits which the positive MIF model provided, whether
21 that's what they were looking at. And I don't know what these two projects --
22 what sort of proposed or model scheme Project Alhambra and Project
23 Porsche comprised, whether that's what they are looking at or whether they
24 were looking at "What might we have to do?"

25 **MR TURNER:** They were looking at, "What might we have to do?" Hence the
26 phrase "sufficiently viable" in 291 which is nonconfidential. I pause just to say

1 that I also find it puzzling that that quote in 290 is treated as confidential --

2 **MR COOK:** If I could possibly interject, Sir. I have just taken instructions on that
3 paragraph. The reason why it was in bold was it was a section that was in the
4 context of a confidential bit of the trial. So the cross-examination in that bit of
5 it was held in private because it was generally confidential and so every part
6 of that was simply included in the submissions as confidential. I have taken
7 instructions, there is nothing specific to those paragraphs for today's purposes
8 which is confidential, so we're happy to have that referred to in open court.

9 **THE PRESIDENT:** Thank you very much, Mr Cook. That's very helpful.

10 **MR TURNER:** That's very fair. May I just check whether that means that the
11 following parts of this short extract can equally be referred to in open or not?

12 **THE PRESIDENT:** Well, Mr Cook will need to probably get instructions on that.

13 **MR COOK:** Yes, I would need to get instructions. I'm afraid that is where we get
14 into much more specifics of Mastercard's alternative business planning, which
15 is something that is commercially sensitive. But it's just a general paragraph
16 about problems, which 290 doesn't cause any issues. The specifics are
17 rather more confidential, I'm afraid.

18 **THE PRESIDENT:** Yes, I can understand that, although it is at the same time quite
19 historic now. So it may be that you get instructions if they're important to this
20 issue that's being issued. If they're not important, it doesn't matter.

21 But I'm just looking then at the quotation. I see that they're saying, well, nothing else
22 really is going to work, other than the system we've got. That's 291. It may
23 be because they're looking at a system that delivers the same benefits to all
24 the parties. That's what I'm not clear about.

25 **MR TURNER:** That I will address and I can do that quite shortly without I think going
26 into the weeds.

1 As indicated in 291, they were looking at viability in the sense that this would be
2 a system that although it might not deliver exactly the same benefits to
3 everybody, would be sufficiently workable that it could be applied in practice
4 commercially.

5 What then happens in the following parts of the closings, each of the main options
6 was looked at exhaustively, this reflecting Mastercard's evidence on what it
7 might have done. In that material, there was only one option which concerns
8 changes to the scheme rules about the payment guarantee for fraud, or
9 default, or prompt settlement.

10 **THE PRESIDENT:** Yes.

11 **MR TURNER:** You can see that on page 268 at the foot of the page, the heading
12 above paragraph 300 and following. That was a system which as you see
13 from the top of the facing page, 269, they say, well, this wouldn't work either
14 and the concern that's expressed is not to do with anything other than the
15 operational difficulties and possible regulatory concerns.

16 Now, therefore at this trial, as one would expect, given the pleaded case and the
17 task of the court, Mastercard put forward what would happen if it was not able
18 to impose multilateral interchange fees. There was evidence and this is its
19 position in the closings on all of that. In its skeleton argument, Mastercard
20 says, or suggests, we think, that there were actually certain other
21 counterfactuals that it didn't put forward.

22 **THE PRESIDENT:** Can I just understand this. I mean it appears -- I'm reading
23 paragraph 305 --

24 **MR TURNER:** Ah, which is --

25 **THE PRESIDENT:** Which is not confidential, "Impact on merchants".

26 **MR TURNER:** Yes.

1 **THE PRESIDENT:** Is this all on the premise that there's the asymmetric
2 counterfactual and that therefore Mastercard has to find a way of making its
3 scheme still as attractive to merchants, and therefore it's looking to see how
4 without a MIF it could still give them the same benefits and none of the ways
5 of doing that is realistic, which I can understand. It seems a slightly different
6 point from a situation where we have symmetrical counterfactuals, so contrary
7 to the other point Mastercard now wants to run, and saying well in those
8 circumstances, might one change the scheme rules?

9 I see the point was raised in the pleading through the response to the request for
10 further information. I'm not quite clear whether it's been abandoned generally
11 or whether it was put on a particular assumption.

12 **MR TURNER:** Yes.

13 **THE PRESIDENT:** Do you understand? I haven't expressed that very elegantly, but
14 do you understand the point I mean? I take that from 305.

15 **MR TURNER:** My Lord, I do. We're clear that this was not dependent on the
16 asymmetric counterfactual. You see that in fact from 305 and the way it's
17 expressed. Just to read it out:

18 "In any event, even if, contrary to the above, any of these options were considered
19 by the court to be viable alternatives to the MIF for MasterCard to survive, the
20 alternative scheme would have to be as attractive to issuers and cardholders
21 as the competing Visa and Amex schemes ..."

22 So in the way it's phrased, you see they are saying even if the court were to
23 conclude that these are viable alternatives, they still have to surmount the
24 hurdle of making them as attractive to issuers and cardholders as the other
25 schemes on the asymmetric basis. Then they go on from that to say:

26 "Therefore, in order to allow Mastercard to survive, the new business model would

1 have to produce a similar financial outcome for issuers and cardholders."

2 So in the language of 305, you see that that is not dependent on the asymmetric
3 counterfactual. It's also clear from the material in the witness statements that
4 they rely on. If I may just pursue -- I'm going to pursue this very carefully and
5 in a limited way.

6 **MR FRAZER:** Just before you do that, just to make sure I'm understanding the
7 point: the words on lines 5 and 6 where it's talking about being as attractive as
8 the competing Visa scheme, let's say, i.e. "Adjustments will have to be made
9 to offset the disadvantages in relation to the MIF differential" doesn't that refer
10 exclusively to an asymmetric world in that case?

11 **MR TURNER:** Absolutely, and that is what I'm saying. I read this paragraph to be
12 saying if -- just to take it from the start:

13 "Even if ... any of these options were considered by the court to be viable
14 alternatives for MasterCard to survive, it has to overcome the disadvantages
15 of the MIF differential."

16 If you see what I mean. Therefore, it is saying even if these options which the court
17 was looking at, regardless of the MIF differential, were considered to be
18 viable, still the court must overcome the issue of the MIF differential. That --

19 **THE PRESIDENT:** So it is in an asymmetric scenario.

20 **MR HOLMES:** Exactly.

21 **MR TURNER:** Ultimately, what they are saying is there are two parts to our
22 argument. The first is, you see from the first line, "Even if contrary to the
23 above any of these are viable alternatives", pausing there, their point is "No,
24 they are not viable in their own right". And they say if you overcome that, it
25 still has to be as attractive as the other schemes where there is a MIF
26 differential. So they're taking an argument that has two steps.

1 The first step is that, in its own right, we say it's not viable anyway. What I'm going
2 to do is I can show you that in the consideration of these schemes, for
3 example -- I'm not going to go through every one -- the evidence before the
4 court was not solely on the basis that there was a differential and
5 an unconstrained setting of MIFs by Visa at all. It was considering the point
6 more broadly, and that is the evidence that was before the court, and it
7 explains the first two lines with which this paragraph opens.

8 If I may just continue with the point I was about to make before we discussed
9 paragraph 305. In Mastercard's skeleton, what it says is on page 10 --

10 **THE PRESIDENT:** This is the skeleton for this hearing?

11 **MR TURNER:** For this hearing. I'm sorry, the skeleton for this hearing. You'll see
12 paragraph 38 and there they say there were options under consideration by
13 Mastercard and one of them here -- I don't believe this is confidential, it hasn't
14 been indicated as such -- was that Mastercard was considering becoming
15 something rather like American Express for certain kinds of cards, commercial
16 and premium cards. They said in the last four lines:

17 "Since this three party scheme would only have involved part of Mastercard's
18 business, Mastercard could not rely on this option to argue that the MIF was
19 not a restriction or that it was objectively necessary."

20 But they say it would have an impact on the damages case. This is why I've referred
21 to the fact that they are saying, essentially, that there were options which
22 weren't deployed or relevant to the Phase 1 trial, but which would become
23 relevant in the damages assessment. But this was an option -- let's take this
24 particular one that was put in evidence at the Phase 1 trial. If you still have
25 open the closings and go in it to page 267, you see the title above 297. It is
26 true that you don't get from that paragraph if you cast your eye over it -- look

1 at 297(a), for example. You don't get from that that this is dealing with
2 premium and commercial cards. You do see from the following sub-
3 paragraph that operational issues are referred to as reasons why it wasn't
4 affected.

5 But if I may invite you to look at the underlying witness evidence, it answers the point
6 the Tribunal has been interested in. That you will find I believe in 3B, these
7 are the five witness statements Mastercard has supplied for this hearing.
8 I have them in bundle 3B and the relevant one, which is of Mr Tittarelli, is on
9 page 30.

10 **THE PRESIDENT:** Yes.

11 **MR TURNER:** You'll see from page 39 -- this helpfully allows me to kill two birds
12 with one stone. You will see from page 39, paragraph 24, which is
13 confidential, an option 3. If you read both the title to that option 3 and look at
14 paragraph 24, the last three lines in particular, (i) in the third line down, you'll
15 see that this was limited in the way that Mastercard's skeleton suggests was
16 left out of consideration, somehow, at the Phase 1 trial.

17 **THE PRESIDENT:** I don't think that dramatic option is the one that's being put
18 forward on the scheme rules change, is it?

19 **MR TURNER:** My Lord, I'm glad you've raised that because we had understood the
20 scheme rules change to be about changes to the scheme rule rather than
21 dramatic changes like this. That's why we were surprised to see in
22 Mastercard's skeleton argument for this hearing at paragraph 38, this point, as
23 though this is somehow relevant to scheme rules.

24 **THE PRESIDENT:** Yes.

25 **MR TURNER:** We agree, my Lord, with the point you've just introduced, that the
26 pleading, including the proposed amended pleading, refers very clearly to

1 certain changes to the scheme rules and doesn't appear to cover this sort of
2 wider dramatic change at all.

3 **THE PRESIDENT:** Yes.

4 **MR TURNER:** We would actually say that we don't understand it to be covered by
5 the proposed case.

6 **THE PRESIDENT:** I mean, it seems that this is a change to the model of the
7 scheme, the whole structure of the scheme, and the scheme rules, as
8 I understand what was being said, was the fraud default guarantee, the points
9 that were actually identified in that paragraph in the defence that you took us
10 to, where they say that it brings these benefits.

11 **MR TURNER:** Yes. That's how we understood it too because that is the way their
12 intended pleading reads.

13 **THE PRESIDENT:** Yes.

14 **MR TURNER:** That reason, paragraph 38 in Mastercard's response skeleton, for us
15 struck a dissonant note because it seemed to be saying that actually their
16 intended case is much wider than what they have put in their proposed
17 amended pleading. I should say immediately -- I was going to make this point
18 in a moment -- that that is our first reason for saying that if that is what they
19 are really doing in the skeleton argument, it goes well beyond their proposed
20 amended pleading and should not be countenanced for that reason alone.

21 **THE PRESIDENT:** It might be helpful. Mr Cook, I don't read paragraphs 129 and
22 following in your draft defence, 129 to 133, as saying that they would have
23 changed the model of the scheme, which is what this is about. You set out
24 the benefits to merchants from the scheme rules at 129 and 130, and then
25 you say they would have had to be changed because it wouldn't be
26 commercially viable, the default rules in relation to these issues would have

1 been materially different. So your pleading doesn't seem to me to run a case
2 to say, well, we would have changed the whole model of the scheme. Is that
3 something you are seeking to advance?

4 **MR COOK:** Sir, it is right to say we are not seeking to advance a case in these
5 extreme terms. Paragraph 38 perhaps would have been clearer if -- it was
6 meant to be an illustration of how an argument that was considered can be
7 relevant or not relevant for restriction of competition, but potentially relevant
8 for damages. It is right to say we haven't advanced it and I don't seek to
9 advance it as a damages case here on the basis that in practice it adds
10 relatively little to the Amex switching point, which is simply on the basis that
11 Amex, being an existing powerful competitor, if Mastercard's main business is
12 going to lose the business to Amex, for the purposes of damages, it matters
13 little whether that's Amex or some proto-three party Mastercard scheme --

14 **THE PRESIDENT:** Whether it matters or not, it is not a case you are seeking to
15 advance and I can see why Mr Turner and those acting with him might have
16 thought from paragraph 38 you were. But it's clear, Mr Turner, that's been
17 clarified. So they're not putting forward a possibility of changing to
18 a three-party scheme.

19 **MR TURNER:** I'm very grateful, that's extremely helpful.

20 If we then keep open the evidence of Mr Tittarelli, we can look at the other point
21 you've raised. If you turn to the facing page, the fourth option, this is the one
22 that involved the changes to the rules. It begins at paragraph 26 and
23 following. You will see if you look at paragraph 27.1, 27.2 and 27.3 the parts
24 of the rules they were looking at there at the bottom of page 40.

25 If you would please look at page 42, paragraph 29 is important. You'll see the way
26 it's expressed in the introduction about why those changes to scheme rules

1 were not taken forward, which I won't read out, but look at the second and
2 third lines. You'll see from 29.1, and if you read the last part of 29.1 and
3 particularly the last two lines, it's very clear from that, that the asymmetric
4 counterfactual is not the premise for the entire analysis. 29.5 is the reason
5 which ties back to what you saw in Mastercard's closings as to the regulatory
6 concern that arose.

7 I can provide if necessary other examples, perhaps after the short adjournment, to
8 make it clear that the asymmetric counterfactual was not the essential
9 premise for all of this. But what you have here is a consideration of
10 essentially these changes to the scheme rules that was looked at and reasons
11 for rejecting it.

12 **THE PRESIDENT:** Can I ask what actually happened? The Commission took its
13 decision in 2007. Presumably the MIF did go right down then.

14 **MR TURNER:** They had to, yes they did.

15 **THE PRESIDENT:** Yes. But I mean, were the scheme rules changed?

16 **MR TURNER:** No.

17 **THE PRESIDENT:** So although one is dealing with this as a counterfactual world,
18 we have the actual world.

19 **MR TURNER:** We have an actual experiment.

20 **THE PRESIDENT:** Yes, if you put it that way, yes. But that may go to probability or
21 plausibility of the argument, which is a separate point.

22 **MR TURNER:** Yes. I apprehend that Mastercard would say -- it's not really my role
23 to speak for Mastercard, but I nonetheless do so -- they will say that the
24 Commission decision concerned the cross-border MIFs and those were not
25 a sufficiently large part of its business to warrant the sort of changes we're
26 talking about. That's the argument they have previously advanced.

1 **THE PRESIDENT:** Yes, I see. And we're concerned with domestic MIFs as well.

2 **MR TURNER:** Yes. So I --

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

4 **MR TURNER:** That would be their point. What one sees from this, if one stands
5 back, is that this issue of what would happen was a big issue at Phase 1. It
6 was gone into, it did consider the question of changes to the rules and, as I'll
7 show you in a moment, it was decided.

8 **THE PRESIDENT:** Well, it would be very relevant, if anything, apart from anything
9 else, to exemption because if they say as they did, the MIFs should be
10 exempted because it brings the various benefits that are necessary for
11 exemption, that must mean that if we have no MIF we can't give those
12 benefits. It's implicit, isn't it?

13 **MR TURNER:** Yes. And it's exactly for that reason that I wish to emphasise the
14 exemption side of this, whereas Mastercard's skeleton argument for this
15 hearing simply refers to restriction of competition and objective necessity. But
16 we had spotted the same point, and indeed you see it from the judgment of
17 Mr Justice Popplewell.

18 **THE PRESIDENT:** Yes. Is that where we should go now?

19 **MR TURNER:** Yes, we should. The point, my Lord, is that having received and
20 assessed all the evidence and all these submissions on likely market
21 developments if the MIFs were removed, including changes to the scheme
22 rules, the trial judge, Mr Justice Popplewell, rules that the appropriate
23 counterfactual is a simple no MIF scenario. If we then turn to the judgment,
24 it's in bundle 1A, tab 1, and we can pick it up at page 41.

25 **THE PRESIDENT:** Can we put away bundle 2B?

26 **MR TURNER:** Yes, bundle 2B is now not needed. I shall do the same.

1 **THE PRESIDENT:** And so we go in the judgment --

2 **MR TURNER:** In the judgment --

3 **THE PRESIDENT:** To page 41.

4 **MR TURNER:** Yes, paragraph 128.

5 **THE PRESIDENT:** "Counterfactuals", yes.

6 **MR TURNER:** The judge says:

7 "The following possible counterfactuals were canvassed during the Phase 1 trial."

8 And there's then a list. On page 42, you see the fourth numbered possibility:

9 "Some alternative restructuring which Mastercard would have adopted because it

10 would not have allowed the business to fail."

11 And that included changes to the scheme rules or the wider business model.

12 If you go to the immediately following paragraph, 129, you see that Mastercard's

13 advocate, Mr Hoskins, was submitting that if the court couldn't identify any of

14 those as a counterfactual which was realistic, then the damages claim must

15 fail. So there you see crystallised Mastercard's strategic or tactical approach.

16 It was saying that none of these would work without --

17 **THE PRESIDENT:** Not the damages claim, the whole claim must fail, yes.

18 **MR TURNER:** Yes, exactly, the whole claim must fail. That was the gist of their

19 case.

20 Then the court analyses what is the realistic and likely consequence of Mastercard

21 not imposing interchange fees. You see from paragraph 130 at the bottom of

22 page 42 that Mr Justice Popplewell makes clear that he's alive to the need to

23 reach a decision about what's both realistic and likely in connection with the

24 restriction of competition counterfactual.

25 Then he gives a provisional conclusion if you turn to page 51 in this judgment at

26 paragraph 155. And reading it:

1 "There are no counterfactuals which would or might arise and which are realistic
2 other than potentially zero MIF (which is the same as no MIF with the
3 prohibition on ex post pricing), alternatively a positive but lower MIF as the
4 maximum putatively lawful MIF."

5 And these now fall for consideration.

6 So the court ruled out other changes and if you go forwards to page 71 --

7 **THE PRESIDENT:** I mean, it doesn't actually in 128 ... the fourth alternative is not
8 I think the scheme rules change. That's the three-party model, for example,
9 which is not now at issue. And that's the restructuring.

10 **MR TURNER:** In fact, my Lord, it included all of the options, some of which I've
11 shown you, invited you to look at, and which it did include the one that was
12 the changes to the scheme rules which had been called "unbundling". You
13 saw them -- so he covers these in the narrative after 128. If you go to
14 page 50 under the heading "Some other alternative?", this is the part of
15 the judgment, just above the conclusion I took you to, where he talks about
16 an internal debate identifying a number of possibilities.

17 **THE PRESIDENT:** Yes. Those are the two projects, yes.

18 **MR TURNER:** Well, he -- yes, he refers to those two projects, for example, but
19 actually it comprised the group of options which had been put in evidence by
20 the parties, hereby Mastercard, about what was under consideration, and that
21 included the change to the scheme rules one which I've shown you.

22 I will search for it, somewhere here it also makes it quite clear that he was not
23 considering just changes to the model, he was also considering changes to
24 the rules as one of the options that was considered and which was put in
25 evidence before him.

26 Ah, I can help you on this. If you then go forward to page 71 at 218(1) at the foot of

1 the page, he articulates what the counterfactual he has found to be realistic
2 and likely is. He says:

3 "The counterfactual is of no MIF with a prohibition on ex post pricing or a zero MIF,
4 but otherwise with all of the existing features of the existing MasterCard
5 scheme."

6 **THE PRESIDENT:** Yes.

7 **MR TURNER:** So there it is:

8 "If one were to posit MasterCard adopting some new and different features for its
9 scheme which were present in the Visa scheme and relevant to the
10 lawfulness of the Visa scheme, that would involve choosing a different
11 fact-specific counterfactual which would require separate consideration on its
12 own terms. The claimants have not sought to identify or analyse any such
13 different counterfactual."

14 As I say, this arose in a peculiar way because by the trial, Mastercard's position was
15 that there was no other alternative which could be put in place to prevent the
16 scheme collapsing and it was the claimants saying that other things could
17 have been done.

18 Equally, if you go over the page to page 73 for completeness, at 221(2) at the top of
19 that page, the judge said:

20 "The focus is on survival of the MasterCard four-party scheme in its existing form,
21 adjusted only to change its MIF in the counterfactual world."

22 So again, it's very clear that this is the counterfactual that he thought was realistic
23 and likely. And towards the bottom of that paragraph 221(2), about seven or
24 eight lines up, you will see it begins:

25 "Similarly, if the survival of the Mastercard scheme depended upon significant
26 changes to the model or the scheme rules, that would involve a different

1 counterfactual which is not in play in these proceedings. The question --"

2 **THE PRESIDENT:** When you say it's not in play, doesn't that suggest that nobody's
3 putting it forward?

4 **MR TURNER:** Well, it was the -- you have seen from Mastercard's closings that it
5 was put forward in evidence and in their closings, but in order to rubbish it.
6 So they said this is -- by the time of the trial, contrary to their pleaded case,
7 their position was: yes, we considered various matters including changes to
8 the scheme rules, but those would not have been sufficient to be a realistic or
9 likely outcome if the MIFs had been removed.

10 And it's against that background that the judge did consider these, but it was
11 ironically by the time of the trial the merchants saying that these would have
12 been viable.

13 So when the judge says here, "which is not in play in these proceedings", what he
14 means is, as you see from the following sentence, he has chosen the no MIF
15 counterfactual as the correct counterfactual against which to consider all the
16 relevant issues in the case before him, those were three-fold: restriction of
17 competition, objective necessity and exemption. But his counterfactual, what
18 was realistic and likely, is now relevant for the damages part of the case on
19 causation.

20 So my point is that there is no real doubt that the Phase 1 proceedings, and the
21 litigation, and the decision considered the question: what would happen if
22 Mastercard did not impose the MIFs. Evidence was put forward, witnesses
23 were called. Those included material on changes to the scheme rules and on
24 changes to the scheme model. But by the trial itself, Mastercard's position for
25 its tactical reasons was to oppose a conclusion that any of them were viable.
26 And the judge, having heard all the arguments and received the evidence,

1 finds that the realistic and likely counterfactual is the no MIF counterfactual
2 with no other changes to the scheme rules.

3 **THE PRESIDENT:** Yes.

4 **MR TURNER:** Our submission then, to draw it to a close, is that against these
5 findings, it doesn't lie in the mouth of Mastercard at the assessment of
6 quantum stage, which is where we now sit, to pivot yet again and now argue
7 that the no MIF counterfactual is unrealistic after all, because it now wants to
8 say that yes, there would have been changes to these scheme rules, which is
9 exactly what, at this quantum point, it wants to do. It's a reversal of its entire
10 position before.

11 It's not entitled to run a case now on quantum that contradicts the Phase 1
12 determination about what the realistic and likely counterfactual is and which
13 contradicts its own position taken at the Phase 1 trial that the changes to
14 scheme rules it had originally pleaded were going to happen without a MIF,
15 were actually unviable. That is our first reason for reaching the conclusion
16 that they shouldn't be allowed now to advance in damages a fresh case that
17 they would have changed the scheme rules if the MIF had been removed.

18 There is a second reason that I've relied on too in the skeleton --

19 **THE PRESIDENT:** I don't know if that's it, but should we look at the -- as I said, it
20 was relevant to exemption as well --

21 **MR TURNER:** Yes.

22 **THE PRESIDENT:** -- that part of the judgment dealing with exemption.

23 **MR TURNER:** The part of the judgment dealing with exemption --

24 **THE PRESIDENT:** It starts on page 85.

25 **MR TURNER:** It does, but it doesn't -- it merely picks up the scenario of the no MIF
26 counterfactual and then what the judge sought to do in a very lengthy section

1 of the judgment, which was overturned by the Court of Appeal, is quantify the
2 benefits which he saw as arising from there being MIFs rather than a system
3 of there being no MIFs.

4 **THE PRESIDENT:** Well, the question is: did the judge see one of the benefits
5 arising from MIFs as being the scheme rules, the particular ones we're
6 concerned with, the fraud and the default rule?

7 **MR TURNER:** Yes, he did refer to that.

8 **THE PRESIDENT:** Because he says at 264:

9 "Relevant benefits must be causally linked to the MIF: it is not sufficient to identify
10 benefits which result from the use of cards generally or the Mastercard
11 scheme generally. Only benefits specifically produced by the MIF can be
12 taken into account ..."

13 Well, that must be right because otherwise how can it justify exemption of the MIF?

14 And then he looks at what Mastercard says were benefits, and isn't one of
15 them these rules?

16 **MR TURNER:** My Lord, you are absolutely right. In fact, what you have just done is
17 introduce my second reason.

18 **THE PRESIDENT:** Right, okay. If you are coming on to it, that's fine.

19 **MR TURNER:** No, I am. This is actually the second point.

20 **THE PRESIDENT:** Yes.

21 **MR TURNER:** The point is that part of Mastercard's case is exactly that the MIF
22 income causes these benefits. And the objection in a nutshell -- the second
23 objection we've taken on this issue, changes to the scheme rules, is that the
24 Court of Appeal overturned the trial judge on this issue of exemption because
25 they found that there was no evidence put forward by Mastercard showing
26 a causal relationship between the MIFs and any of these matters; the

1 payment guarantees, the prompt settlement.

2 Our second reason is exactly that the case Mastercard wants to run now depends on
3 the proposition that the MIF income, which would go in a counterfactual,
4 causes these benefits. We say the Court of Appeal has determined already
5 that although, as your Lordship says, Mastercard has to show a causal link
6 between MIF income and issuing bank behaviour, they utterly failed to do so.

7 **THE PRESIDENT:** Well, I can see you may say that about the Court of Appeal. My
8 point about the judgment at trial is if the trial judge found -- and I've looked at
9 his judgment, I haven't read it I'm sure anything like as carefully as you
10 have -- but he sets out at 308 what Mastercard say are the benefits, including
11 at 308, paragraph 4, the one we're concerned with:

12 "The claimants --"

13 Well, they challenged apparently the benefits but they also, 309:

14 "...disputed that any benefits to the merchants were directly caused by the MIF ..."

15 **MR TURNER:** Yes.

16 **THE PRESIDENT:** And there are various objections. The judge finds at 312:

17 "MasterCard's argument that charging positive MIFs led to an increase in the use of
18 cards and therefore an increase in the amount of the benefits."

19 May not be quite the point. And at 314, he says he turns to consider the various
20 benefits, and he looks at all of them and he concludes, at 335, that the MIF
21 contributes to some extent to the benefits in the form of guaranteed payment.

22 So what I'm trying to do is to understand how that squares with the point you've been
23 making, that the judge is saying the counterfactual is with the scheme rules in
24 the same form. Because if he's saying here that he's got to look at, as he
25 starts out, only benefits that are caused by the MIF and therefore wouldn't be
26 there if there is a zero MIF, isn't he saying: well, I find that this is one of them.

1 If he's saying that, isn't his counterfactual the one where these benefits don't
2 apply?

3 **MR TURNER:** Yes --

4 **THE PRESIDENT:** Otherwise there's an inconsistency between what he's saying
5 under 101(3) and what he's saying under 101(1).

6 **MR TURNER:** Yes. I believe I can disentangle that. The point is the scheme rules
7 require the issuers to do these things. They require the payment guarantee in
8 relation to fraud and cardholder default and prompt payment. And that if the
9 MIFs were to go, the point is, according to Mastercard, the income which is
10 used by the issuing banks to make it affordable for them to do this, to offer
11 these services, required by the rules, would go.

12 **THE PRESIDENT:** Yes.

13 **MR TURNER:** And the argument that was being raised by Mastercard, and which
14 they're seeking to run now, is that in view of the unhappiness of their issuing
15 banks in that situation, aggravated if Visa is unconstrained, Mastercard would
16 accordingly, they say, have taken steps to loosen the rules, thereby allowing
17 its issuing banks, should they not want to do so, no longer to offer the
18 payment guarantee against fraud and cardholder default, or to settle its
19 accounts promptly. If I may just remind you, if we can go back to that draft
20 Morrisons defence --

21 **THE PRESIDENT:** But isn't that what they were saying under 101(3)? And isn't it
22 consistent with what they were saying under 101(3) at trial, and which the trial
23 judge accepted, albeit one then goes to the Court of Appeal?

24 **MR TURNER:** Yes.

25 **THE PRESIDENT:** That's what I'm trying to understand. Because your main point
26 is, as you said, there's an inconsistency, there's a volte-face, between the

1 position they adopted at trial on the scheme rules and the position they wish
2 to adopt now. And I am just trying to understand that in terms of what is
3 recorded in the judgment was Mastercard's case under 101(3).

4 **MR TURNER:** Yes. It's an interesting point. I think we will need to look at the
5 Court of Appeal.

6 **THE PRESIDENT:** Well it may be the Court of Appeal said this was all wrong, but
7 that's a different point.

8 **MR TURNER:** Quite. The point is that your Lordship has picked up on an implicit
9 inconsistency which was not examined by the trial judge and reasoned
10 through. Because your Lordship's absolutely right, the trial judge's point was
11 that without the MIFs the scheme rules would not be changed. He said this
12 was the realistic and likely outcome. And yet, when it comes to 101(3) he
13 does say that the basis for the issuers to continue to want to provide these
14 services falls away because the income has been removed -- sorry,
15 I shouldn't say that. He puts it rather differently. The mechanism by which it
16 leads to the MIFs is not that. But you are right that -- it's an absolutely fair
17 point that that raises a wrinkle, because on the one hand the judge is saying
18 that this is the realistic counterfactual, and yet when he comes to exemption
19 he says that the MIF is needed to support these matters.

20 **THE PRESIDENT:** Yes.

21 **MR TURNER:** To the extent that you can resolve that tension I would suggest -- and
22 it wasn't fully thought through -- it lies in the fact that there's a difference
23 between the readiness of the issuers to provide these services and
24 Mastercard's rules which require them to be provided.

25 **THE PRESIDENT:** But it does mean, doesn't it, that at least Mastercard was running
26 that case at trial.

1 **MR TURNER:** Well Mastercard --

2 **THE PRESIDENT:** Because they were saying: here's a benefit, it comes from the
3 MIF, it's a grounds for exemption, i.e. if no MIF the benefit won't be there
4 because the scheme rules will have to change. And the judge accepted that,
5 along with other things. So it does seem that that was part of Mastercard's
6 case.

7 **MR TURNER:** Yes it was. I must --

8 **THE PRESIDENT:** That's the point I'm getting at.

9 **MR TURNER:** I agree with that point because it is our second reason for objecting
10 to this. If I may say so, your Lordship's absolutely right to point out that
11 implicit tension between the first part of the judgment and the exemption part.
12 But if you focus on the exemption part of the judgment it is absolutely clear
13 that Mastercard's case was that the MIFs caused these benefits, and
14 therefore that the loss of the MIFs would mean the absence of these benefits.
15 And this is exactly the point that now we are at the damages stage that they
16 want to run again.

17 **THE PRESIDENT:** Yes.

18 **MR TURNER:** And that is the basis for my second submission, which is that when
19 you focus on what the Court of Appeal decided had been shown at the trial,
20 they held that Mastercard brought forward no concrete evidence at the
21 Phase 1 trial, despite that being their case, to show any connection between
22 the MIFs and these functions:

23 "Mastercard adduced no evidence at the lengthy Commercial Court trial to show that
24 the MIF income received by the issuing banks was spent in any particular way
25 or else was simply pocketed as profit."

26 In its skeleton argument Mastercard ripostes to our saying this. They say that the

1 Court of Appeal's criticism was directed at the fact that they didn't have
2 supporting evidence that the issuing banks spend the MIF money on
3 cardholder rewards and other incentives to encourage more usage of the
4 cards. And they say the Court of Appeal was not pointing to a lack of
5 evidence that issuing banks see the MIF revenues as a contribution to costs
6 of the payment guarantee against fraud or cardholder default or prompt
7 settlement. So that without the MIF revenues the issuing banks would not
8 have a basis for providing those services.

9 And our answer is that in a nutshell, as you will see in a moment, the
10 Court of Appeal's point was a perfectly general point that Mastercard at this
11 Phase 1 trial produced no concrete evidence at all about issuer finances.
12 There was no evidence to show the causal link between the MIF income and
13 any other matters.

14 **THE PRESIDENT:** Yes.

15 **MR TURNER:** I'm conscious of the time, my Lord. If I may, I'll take five minutes to
16 finish this by showing you the Court of Appeal judgment and then I've finished
17 on this second topic, subject to anything that the Tribunal has.

18 It's in bundle 1B, the Court of Appeal judgment, at tab 1, page 59, paragraphs 242
19 and 244. This concerned our appeal against Mr Justice Popplewell's order.

20 **THE PRESIDENT:** This is the part of appeal dealing obviously with the 101(3), not
21 the asymmetric.

22 **MR TURNER:** Yes. It begins at 242:

23 "Despite the obvious care and detail devoted by the judge to the article 101(3) issue,
24 there are a number of flaws in Popplewell J's approach. First, in considering
25 the first critical stage in the causation analysis; namely, whether the issuers
26 were incentivised to increase card usage to a greater extent than they would

1 have been anyway, the judge has noted towards the end of his analysis the
2 absence of any factual evidence from the issuers but he paid insufficient
3 regard to that absence of evidence."

4 Then it picks up at 244:

5 "This was a matter on which only factual evidence from the issuers could have
6 remedied an obvious gap in Mastercard's evidence. We were unimpressed
7 by arguments on behalf of both schemes that such evidence would have been
8 difficult if not impossible to obtain, given that, as the judge found, MIF income
9 was not an isolated pot of money. Issuing banks receive MIF income and
10 they must know what they do with it in broad terms."

11 Then they go on to talk about the kind of material which you would have expected to
12 see showing how MIF income was treated by the recipients, the issuing
13 banks.

14 And they conclude at the end:

15 "It was not suggested that Mastercard had attempted to obtain such evidence from
16 issuers but had been unable to do so, it simply did not attempt to obtain any
17 such evidence."

18 And our point is that this was a point of general application and relevant to the
19 current issue before this Tribunal.

20 Insofar as Mastercard now wants to run a case at the damages stage that removing
21 the MIF would mean removing the money that's used to pay for these
22 services, it refers to a causal link and evidence on how the money is treated
23 by the issuing banks and what it does. And at the Phase 1 trial it was equally
24 relevant for the reasons, my Lord, that you've given and canvassed with me,
25 and the Court of Appeal points out that there is no evidence that was provided
26 by Mastercard.

1 And based on that, our submission is that Mastercard should not be allowed to
2 re-open this entire issue at the quantum of damages stage, seeking to lead
3 evidence that both could and should have been led at the Phase 1 trial;
4 namely, evidence on how the MIF income was treated by the issuing banks.

5 My Lord, those are, if I pause there, my submissions on the first two of the three
6 main topics.

7 I should say the remaining topics are much shorter. The third is really just
8 an extension of this and the fourth is a small point that's arisen. So I should
9 be quite quick.

10 **THE PRESIDENT:** Yes. Very well. So let's say 2.00.

11 **(1.05 pm)**

12 **(The short adjournment)**

13 **(2.00 pm)**

14 **THE PRESIDENT:** Yes, Mr Turner.

15 **MR TURNER:** I'm grateful, my Lord.

16 I have only two short points of clarification to pick up before I continue. The first was
17 the point, my Lord, that you noticed on the further information about the
18 limited temporal ambit of the response to the information request. If you
19 recall, you pointed out that that covered exemption in relation to a period from
20 2005 to December 2007 and you expressed curiosity.

21 **THE PRESIDENT:** Yes.

22 **MR TURNER:** The answer is that there are three types of MIFs which are the
23 subject matter of these proceedings: the cross-border MIFs, and those were
24 dealt with by the Commission in its decision, and also domestic UK and Irish
25 MIFs. The reason for the limited period of the MIFs that we were looking at
26 this morning is that those were the cross-border MIFs which the Commission

1 decision brought to an end in December 2007.

2 We perhaps don't need to open up the same document -- we can do so if the
3 Tribunal wishes -- but later on, and I will give you the references, in the same
4 document, the information request response, the parallel answers are given
5 for the United Kingdom MIFs and the Irish MIFs and those are not limited
6 temporally. So those just for your note, you will want request 19 on pages 40
7 to 41 and the response, and that's the UK MIF; and request 31, which is on
8 page 48 of that document, which is the Irish MIF.

9 **THE PRESIDENT:** Request 31 was it, did you say?

10 **MR TURNER:** Yes, request 31, which is the Irish MIF.

11 **THE PRESIDENT:** That's on page 48, is it?

12 **MR TURNER:** Yes. That sorts out that incongruity that you had picked up.

13 The second is, very briefly, the question that was raised about whether all of the
14 alternatives and scenarios that Mastercard had been considering and which
15 were put in evidence at Phase 1 hinged on the asymmetric counterfactual.
16 The idea that this is what would happen if Visa could continue to set MIFs
17 unconstrained in the same way as Mastercard. I said to you that I could give
18 you references to show you that that was not what was going on and that the
19 alternative business scenarios being considered and which were assessed in
20 the Phase 1 proceedings were general. If I may give you -- perhaps on this,
21 it's a good idea to open it up. In bundle 3B, if you go to the evidence of a man
22 called Mr Lane, that begins on page 94 and he is one of the individuals who
23 considers these various options. You'll recall that two project names were
24 mentioned -- the names are not confidential in themselves -- and on page 95
25 in file 3B, you'll see a heading for one of those, "Project Porsche". If you look
26 on the facing page, page 96, if you read paragraph 8 to see what they were

1 considering, you will see from that that it was a generalised environment, and
2 9.2 makes it very clear. If you have a look at that, it's directly on point.

3 **THE PRESIDENT:** Yes.

4 **MR TURNER:** It goes to this issue. I can give you other references, but I think that
5 covers it.

6 So I turn to the third main point and last of them, which is Mastercard's intended
7 case for the damages part of the case that the MIF income should be said to
8 be causative of an increase in the volume of sales at the merchants, Asda,
9 Argos and Morrisons. This is a point that was expressly raised at the Phase 1
10 trial. It ultimately failed, the Court of Appeal found that it failed and it should
11 not be re-argued as part of the quantum litigation.

12 **THE PRESIDENT:** So it succeeded at trial at first instance but then that was
13 overturned on appeal; is that right?

14 **MR TURNER:** That's right. I'll show you this now. The trial judge accepted that the
15 MIFs caused an increase in business, and increase in the volume of sales at
16 the merchants. The Court of Appeal reverses the trial judge. If you pick up
17 the judgment of Mr Justice Popplewell in bundle 1A and go in it to page 99,
18 my Lord, these are some of the paragraphs you were referring to before the
19 short adjournment. On page 99 above paragraph 308, the judge is dealing,
20 as you see from the title, with "the benefits requirement: identifying the
21 relevant benefits to merchants". You will see from subparagraph (6) that one
22 of the benefits is increased as well as earlier spending:

23 "Where the availability of the credit causes a customer to make a purchase they
24 wouldn't otherwise have made or would not otherwise have made then."

25 Then you have the title above 310 --

26 **THE PRESIDENT:** Sorry to stop you, but (1) may be relevant as well, "the avoided

1 cost of other payment methods; namely, cash." So that's increased use of
2 card spend, isn't it?

3 **MR TURNER:** Well --

4 **THE PRESIDENT:** Which I think is a point they seek to make as well, isn't it?

5 **MR TURNER:** That's right. It's not directly the point that I'm across now because
6 what is said in 308(1), as I understand it, is that the customers would still have
7 paid for these goods at the merchants but they would have used other
8 payment methods which were more expensive. And at (6), part of the point is
9 that there would have been increased spending overall so that the merchants
10 would have benefitted from sales taking place that would never actually have
11 happened, irrespective of the payment method.

12 **THE PRESIDENT:** Yes. And I suppose they need -- AAM, the first one wouldn't
13 affect your level of damages, would it?

14 **MR TURNER:** No --

15 **THE PRESIDENT:** It's only point 6 that would affect your level of damages.

16 **MR TURNER:** Yes, that's right, although my Lord rightly pointed out before the short
17 adjournment that the changes to the scheme rules point is there at (4).

18 **THE PRESIDENT:** Yes, the other point. (6) is there, yes.

19 **MR TURNER:** So he saw that as the benefit that was contended for by Mastercard.
20 He then asks at paragraph 310 and following, if you see from the heading,
21 whether these were benefits caused by the MIF. And you see at 310(3) on
22 page 100 that he is finding -- well, here he's setting out the case that
23 Mastercard is submitting that these are all benefits to merchants to some
24 extent caused by the MIF and he explains the mechanism that was relied on,
25 the higher MIFs allowed issuers to do these things --

26 **THE PRESIDENT:** Yes, we see that.

1 **MR TURNER:** You then go to 312 on the same page and you'll see in the second
2 sentence, fourth line down, the judge says that he's essentially accepted
3 Mastercard's case, that:
4 "Because cardholders received benefits from issuers which were funded by the MIF,
5 the benefits to merchants of card use are to some extent directly caused by
6 the MIF."
7 And he --
8 **THE PRESIDENT:** So it's the benefit to cardholders that is the linchpin of this.
9 **MR TURNER:** Yes. That's the mechanism that --
10 **THE PRESIDENT:** That's the mechanism, yes.
11 **MR TURNER:** The MIF income, they use it to incentivise people who use cards to
12 spend more.
13 **THE PRESIDENT:** Yes.
14 **MR TURNER:** Apart from anything else, as you recall from their paragraph 140 in
15 the pleading, they maintain this would have led to overall a higher volume of
16 sales.
17 The Court of Appeal --
18 **THE PRESIDENT:** That's the conclusion the judge reaches at 335(6), isn't it?
19 **MR TURNER:** Yes.
20 **THE PRESIDENT:** Increased spending.
21 **MR TURNER:** Yes. I'm sorry, I should have taken you to that conclusion. That's
22 exactly it.
23 **THE PRESIDENT:** That was his finding and the Court of Appeal said there wasn't
24 any evidence for that because it depends on issuer pass through --
25 **MR TURNER:** If I may, I'll --
26 **THE PRESIDENT:** -- a failure of evidence on that and they go into that in some

1 detail.

2 **MR TURNER:** Yes. I won't show you anything extensive but if I may, I'll show you
3 the two main paragraphs. It's in 1B at tab 1, the Court of Appeal judgment,
4 and there are only two paragraphs you need for this. The first is on page 61
5 at paragraph 249 where it could hardly be clearer at the top of the page:

6 "Although the judge said at [312] that the increase in card usage and so the benefits
7 enjoyed by merchants from the charging of MIFs was made good on the
8 evidence before him, it is entirely unclear to what evidence he was referring,
9 let alone whether it was the cogent factual and empirical evidence which
10 European law requires."

11 Then on the facing page, paragraph 257:

12 "The judge should have concluded that in the absence of any evidence as to the
13 actual extent of the pass through [that means the money that was spent on
14 cardholders], MasterCard had failed to establish by robust analysis and
15 cogent evidence or otherwise a sufficient causal link between the default MIFs
16 and any net benefits.

17 So their claim for exemption under article 101(3) failed. "

18 Now in short, this issue was therefore decided in the Phase 1 litigation against
19 Mastercard.

20 **THE PRESIDENT:** Yes.

21 **MR TURNER:** We say there should be finality and the same issue shouldn't be
22 raised again at the quantum stage where they now want to say again --

23 **THE PRESIDENT:** We understand that, yes.

24 **MR TURNER:** In this regard finally, it's worth the Tribunal noting that what the
25 Court of Appeal did by way of remedy was decide to remit our case to this
26 Tribunal on the whole issue of exemption so that Mastercard could essentially

1 have another go of these matters, this time with the benefit of evidence from
2 the Visa case and the other Sainsbury's v Mastercard case. That was the
3 point we took to the Supreme Court and said the Court of Appeal had got
4 wrong. We won on that. The Supreme Court judgment, if you still have 1B
5 open --

6 **THE PRESIDENT:** Just a second.

7 **(Pause)**

8 Even when the Court of Appeal proposed to remit it so that they could have another
9 go, that was not to be on the basis of any fresh or further evidence.

10 **MR TURNER:** That is true.

11 **THE PRESIDENT:** It wasn't to remedy the evidential deficiency.

12 **MR TURNER:** My Lord, that is quite true. There was to be the possibility of
13 evidence cross-fertilised from the parallel sets of proceedings and, my Lord,
14 you are quite right to point that out.

15 But then as your Lordship knows, the Supreme Court was firm that that was the
16 wrong thing to do and they relied very forcefully in their judgment on the
17 general principle of finality in litigation, which is the same principle I am now
18 obviously relying on again in a different context. Their judgment is at tab 3 in
19 this bundle 1B and if you turn in it to page 189, at the very foot of the page in
20 paragraph 239, the last two lines is the general proposition of law that I rely
21 on:

22 "Further, parties are generally required to bring forward their whole case in one
23 action and attempts to revisit matters that have already been the subject of
24 a determination, even if not formally a matter of cause of action estoppel or
25 the subject of an issue estoppel, are liable to be barred as abuse of process
26 (Henderson v Henderson)."

1 And we have drawn the attention of the Tribunal also on the Henderson v Henderson
2 rule to an extract from the White Book, which is my final authority on this in
3 bundle 4B -- you can put away 1B now. In bundle 4B at tab 5, we have
4 reproduced the relevant section on power to strike out a statement of case.
5 But the important point is on page 122, which is part of the notes of the
6 White Book dealing with the particular feature of the Henderson v Henderson
7 rule. That feature which is relevant to this application is picked up about six
8 lines from the bottom of page 122 and it is that it applies in a case such as
9 this where there are two stages to the same litigation and not merely two
10 separate pieces of litigation. You'll see picking it up seven lines up from the
11 bottom:

12 "The rule in Henderson has usually been applied where a claimant starts fresh
13 proceedings which could and should have been brought in earlier proceedings
14 which were pursued to judgment. However, it is not conceptually impossible
15 for it to apply also in relation to separate stages of the same litigation."

16 Then there is the quote which we put as the epigraph of our skeleton from the
17 judgment of Mr Justice Coulson, as he then was, in Seele:

18 "The court should be astute to prevent a claiming party from putting its case one
19 way, thereby causing the other side to incur considerable expense only for the
20 claiming party to lose and then come up with a different way of putting the
21 same case so as to begin the process all over again. The rules are designed
22 to avoid the litigation equivalent of death by a thousand cuts. I have now no
23 doubt that on the basis of the facts as I have summarised them, it would be
24 wrong and unfair ..."

25 **THE PRESIDENT:** Seele was a case where there were different stages, is it?

26 **MR TURNER:** I don't believe that Seele was, no -- I should --

1 **THE PRESIDENT:** It's cited as authority for the previous sentence:
2 "However, it is not conceptually impossible to for it to apply also in relation ... the
3 same litigation."

4 **MR TURNER:** My Lord, I will check that. I had looked at Koza, which is immediately
5 above that, in the Court of Appeal as an authority on that point. I will need
6 to -- Seele is also on that -- cases I find.

7 **THE PRESIDENT:** Yes.

8 **MR TURNER:** That is the point, it's a short one. What is Mastercard response to
9 this objection in its skeleton? They deal with it at page 13 at paragraphs 50 to
10 52 in a very short part of their written answer at the end. But if you turn that
11 up, you will see that what they say to justify proceeding with this --

12 **THE PRESIDENT:** Just a moment. Their skeleton at page?

13 **MR TURNER:** 13. The last page -- sorry, penultimate page at paragraphs 50 to 52.
14 Their point is that they say the reason their case on the MIF causing
15 increased sales was rejected by the Court of Appeal was that it all depended
16 on a heightened standard of proof beyond the normal standard of proof, the
17 normal civil standard. So what they say is they can now re-argue the point
18 aiming to meet the normal civil standard of proof. We say, smartly, that that is
19 doubly wrong. First, it's wrong because the Court of Appeal plainly did not
20 hold that the normal civil standard of proof was inapplicable, the
21 Court of Appeal said the normal civil standard of proof applied.

22 **THE PRESIDENT:** Yes, it's the same standard but the evidence to satisfy it -- higher
23 threshold, isn't that what they said because the evidential and the Supreme
24 Court explained it?

25 **MR TURNER:** That's correct, your Lordship has the point. I'll simply give you the
26 reference then.

1 **THE PRESIDENT:** Yes.

2 **MR TURNER:** It's the Supreme Court, if you look at paragraph 115 of their judgment
3 on page 145 of bundle 1B. This is what the Court of Appeal found and it's
4 exactly as your Lordship has summarised it.

5 **THE PRESIDENT:** Yes.

6 **MR TURNER:** The second point is more important perhaps --

7 **THE PRESIDENT:** Sorry, did you say 155 or 115?

8 **MR TURNER:** 115.

9 **THE PRESIDENT:** Thank you. Yes, the second point.

10 **MR TURNER:** Mastercard's submission that it all turned on a different standard of
11 proof is actually wrong. I have shown you this: there was simply no evidence
12 produced in the trial to show that the MIFs were causative of increased sales,
13 and I have taken you to the Court of Appeal saying that. This is therefore
14 a paradigm case of what Mr Justice Coulson referred to in Seele. It's the
15 litigation equivalent --

16 **THE PRESIDENT:** Thank you, yes.

17 **MR TURNER:** Those are the three main points. There's a very short fourth point,
18 which is what emerged from Monday in the correspondence --

19 **MR COOK:** I'm afraid I do have to interject. My learned friend has been going for
20 nearly three hours now. If we are going to get any opportunity for me to make
21 a fair response to his submissions today, we do have to guillotine him at some
22 point, Sir.

23 **THE PRESIDENT:** Yes. You've finished your objections. This is to do with the RFI
24 responses, is it?

25 **MR TURNER:** It's a point that's cropped up. It will take literally five minutes.

26 **THE PRESIDENT:** Well, no more.

1 **MR TURNER:** It arose from a request for clarification of an allegation in
2 Mastercard's defence in November last year. It remains live. It concerns
3 a point in their defence which was an apparent plea that some of the
4 merchant payment transactions don't attract an interchange fee, a multilateral
5 interchange fee. We asked what categories of transaction they were relying
6 on and Mastercard's response was that the multilateral interchange fee didn't
7 apply where there are bilateral agreements in place between issuing and
8 acquiring banks. They said this will be a matter for future disclosure. To give
9 you the reference without going there, that's at bundle 3A, tab 7, page 26.

10 Now that they've said that, we do object because that is reopening territory clearly
11 covered by the Phase 1 trial because the trial judge found very simply that
12 there are no material bilateral agreements on interchange fees in the UK. The
13 reference for that, which perhaps you can look at in a minute, is in his
14 judgment, paragraph 9, bundle 1A, tab 1 on page 6. The judge found there
15 are no material bilateral agreements.

16 **THE PRESIDENT:** Sorry, what's the paragraph reference?

17 **MR TURNER:** Paragraph 9, page 6. Four lines down:

18 "In practice, there are no material bilateral agreements."

19 His finding was based on the disclosure, the information, the witness evidence of all
20 parties.

21 **THE PRESIDENT:** I just want -- this business about some categories which don't
22 attract MIFs, what paragraph in the pleading is it?

23 **MR TURNER:** Paragraph 121 of their defence.

24 **THE PRESIDENT:** But 121 in my copy is deleted.

25 **MR TURNER:** Let me see.

26 **THE PRESIDENT:** Someone is typing with the microphone on, so if they could

1 please mute their microphone.

2 **MR TURNER:** I will just check. I'll have to give you the right reference --

3 **THE PRESIDENT:** That's a different reference.

4 **MR TURNER:** I will have to give you the right reference. Essentially, they do
5 propose to say that there were bilateral --

6 **THE PRESIDENT:** We have the point, but at some point --

7 **MR TURNER:** I will give that to you. We say the judge said there were --

8 **THE PRESIDENT:** We've got that, yes, in paragraph 9 and that's been determined.
9 Yes.

10 **MR TURNER:** That's our point.

11 **THE PRESIDENT:** That's your point. Right, thank you very much. Mr Cook.

12 **Submissions by MR COOK**

13 **MR COOK:** Yes Sir. My learned friend's overarching submission is it's inappropriate
14 for Mastercard to raise arguments now because related issues arose in the
15 Phase 1 trial. We say in a nutshell that that submission ignores the very
16 different nature of the issues that were before Mr Justice Popplewell and
17 variously the Appeal Courts to a more limited and nuanced degree in the
18 Phase 1 proceedings, and as compared to issues that will be dealt with by the
19 trial Tribunal in these proceedings in due course in Phase 2. Obviously what
20 was happening in Phase 1 were the particular issues of restriction of
21 competition, ancillary restraint and exemption.

22 Those of course involve distinct legal tests. In the context of exemption, you have
23 rightly picked me up on, Sir, it is not strictly a different standard of proof but a
24 different evidential requirement to meet the standard of proof, but overall
25 different legal tests.

26 So consequently, that is a situation where different arguments and different evidence

1 were relied upon or accepted by the courts as relevant in relation to different
2 issues. We say in essence that what we're looking at now, Sir, are arguments
3 that have been on Mastercard's defence in substantively unchanged form
4 since 2012 as being quantum arguments. There's been no challenge or
5 objection to them being available as quantum arguments, and Mastercard
6 should now be permitted to continue to be able to rely on them for quantum
7 arguments and they're not debarred by the analysis of different arguments in
8 relation to legally distinct tests.

9 Sir, that's by way of introduction. Before I address you on the arguments, I thought it
10 would assist just to walk the Tribunal through our pleading on some of these
11 issues since you indicated that you found parts of them to be unclear. The
12 version of the defence I've been looking at is in bundle 2C, that was the
13 Morrisons defence. As you say, Sir, some very minimal changes have been
14 made more recently on 1 March. But this is the version that's been there and
15 none of these points we're concerned with today relate to any of the minimal
16 changes that have been made.

17 So bundle 2C, the defence starts at page 88. It's a very lengthy document
18 particularly with deletions now, and it's paragraph 138 onwards that I want to
19 take you to, which is at page 138. Just simply to walk the Tribunal through
20 what we say are the various different switching arguments of one kind or
21 another which arise here.

22 138 first, and these arguments are conditional firstly on the scheme rule point, so the
23 scheme rule point logically comes first, potentially. But now we are saying to
24 the extent there weren't sufficient changes to the scheme rules, it's likely that
25 some or all issuers would have issued Visa cards or American Express cards
26 instead or in greater volumes. So that is switching by issuers of entire

1 portfolios of cards and that obviously includes essentially two arguments, one
2 my learned friend accepts I'm allowed to run, which is potential switching to
3 Amex; and one he objects to, which is switching to Visa. But on the pleading,
4 they are combined in that one paragraph.

5 Then at paragraph 139, we make essentially a similar argument but at the
6 cardholder level. That is rather than issuers switching entire portfolios,
7 individual cardholders would simply get a Visa or American Express card
8 instead on the basis that they would be more attractive. Again, that has the
9 switching -- the two arguments, one which is switching to Amex, one which is
10 switching to Visa within that.

11 Then paragraph 140, which I think was one you particularly raised some concerns
12 about what it meant, which is even if cardholders don't move to Visa or
13 American Express, it's likely that a reduction in interchange fees would have
14 resulted in a reduction in their Mastercard usage and a higher proportion of
15 their transactions taking place in other payment methods.

16 This reflects the fact that the vast majority of people have a variety of payment
17 methods in their wallet. You may have an Amex card, a Visa debit card,
18 a Mastercard credit card, and some cash. So the switching argument isn't
19 dependent on the fact that you cancel your Mastercard and go and take out
20 a Visa or an Amex card instead. You may simply keep them all in your wallet
21 but stop using the Mastercard because it no longer has benefits and use the
22 Amex card you already have.

23 **THE PRESIDENT:** I have no idea, Mr Cook, whether the majority of people who
24 shopped at Morrisons over this period, which is a while ago, had several
25 cards or not. They may or may not.

26 **MR COOK:** You don't need to --

1 **THE PRESIDENT:** A lot of people don't. I'm not sure that members of the bar are
2 necessarily representative of those who shop at Morrisons. But the point
3 being made there is for people who have multiple cards might have still
4 another one, to paying with another one.

5 **MR COOK:** It's multiple payment methods. Cash of course is again part of that
6 equation, that people may simply pay by cash and in the online context pay by
7 PayPal instead. So it's a reference, not everyone will necessarily have every
8 single form of payment method, but many people will have more than one and
9 it's simply that there will be switching essentially within your own wallet
10 without being due to the interchange at the high level, which is why it might
11 look like it slightly contradicts the earlier paragraphs dealing with that internal
12 wallet switching.

13 What's important about paragraph 140 as well while we're looking at it is to
14 recognise what is explained as being the rationale, the mechanism for this,
15 which is a reduction in interchange fees -- this is the second line -- and
16 a corresponding increase in cardholder costs or reduction in cardholder
17 benefit. That's the motivation for this, that people will simply be less
18 interested in using a card which is less beneficial and more interested in using
19 other payment methods. My learned friend criticised us in relation to PayPal
20 for not having explained the mechanism, but that's where the mechanism is
21 explained here. It also goes on then to say in the final sentence:

22 "While part of this reduction in Mastercard/Maestro transactions may have been
23 offset by an increase in transactions through other, more expensive, payment
24 methods, it is also likely to have resulted in an overall reduction."

25 So this paragraph is dealing with two things: switching to other payment methods,
26 but also an overall loss in transactions. So it is doing two things in there, Sir.

1 **THE PRESIDENT:** Yes, I understand.

2 **MR COOK:** Then briefly just to go on beyond that, paragraphs 143 and 144 are
3 simply dealing with the next point that switching nonetheless leads to costs. If
4 you switch to other payment methods, there are costs and higher costs
5 associated with that, so there's the financial effect of that switching, which we
6 get at 143 and 144. 143 is Amex and PayPal, 144 also deals with Amex and
7 PayPal, and then 144A is the financial effect of switching to cash. Again,
8 those are dealing with the financial consequences of the basic switching
9 argument there, Sir.

10 **THE PRESIDENT:** Yes.

11 **MR COOK:** That's how that section -- as you will see, that obviously makes
12 a number of arguments of which I take my learned friend's particular objection
13 to be in relation to the Visa issue and also to the narrow point in relation to the
14 PayPal issue, which is actually largely as a proxy for the Visa issue, which
15 is -- we come back to that at the end of those submissions.

16 Starting with the Visa issue, I'm of course conscious that the question of whether the
17 quantification of damages should proceed on the basis that Visa MIFs would
18 also have been set at zero, it's a point you, Sir, although not your colleagues,
19 have very recently heard submissions on from Mastercard, and a differently
20 constituted Tribunal reached a firm conclusion that damages should be
21 calculated on the basis that Visa's MIFs would be set to zero. So we're
22 currently considering that judgment and for the purposes of today, I'm not in
23 a position to concede that point.

24 What I'm going to do is try and deal with it quite briefly and then invite the Tribunal to
25 make a ruling which can then be taken further if Mastercard wishes to do so
26 having given the issue further consideration.

1 **THE PRESIDENT:** I quite understand.

2 **MR COOK:** Yes. Sir, Mastercard's arguments on this issue haven't changed since
3 the original pleading, so this is an application to strike out our pleaded case,
4 and the familiar test for strike out is of course whether or not the argument
5 has any real prospect of success, which for present purposes means
6 essentially my learned friend has to satisfy you there is no possible
7 circumstance in which account can be taken of competition from Visa,
8 regardless of what the evidence subsequently shows. Essentially, it's so
9 hopeless in all manner and respects that it shouldn't be allowed to be run at
10 all.

11 This point's been oversimplified perhaps as being whether Mastercard can argue
12 that transactions would switch from Mastercard to Visa. The position is a little
13 bit more complicated than that. A substantial proportion of the transactions
14 which are the subject of the present claims were carried out by cardholders
15 who would have been Visa customers at the start of the claim period but
16 switched to Mastercard during the claim period. We say that switching -- and
17 these are obviously factual points which one will need to make good in due
18 course -- we say that switching simply would not have occurred if Mastercard
19 had set its MIFs at zero.

20 To put the scale of that point in context, Mastercard's market share rose during the
21 claim period from under 40 per cent to nearly 60 per cent, and most of that
22 shift involved portfolios of cards being shifted wholesale by banks from Visa to
23 Mastercard. We say the reason for that change in market share was that
24 Mastercard had introduced a premium credit card with higher interchange
25 fees predominantly to protect its business from the threat of Amex. We say
26 for the moment just ignoring Amex, if Mastercard had not set those higher

1 interchange premium fees, these transactions would have been Visa
2 transactions, incurring Visa's MIF. So a large part of the costs would have
3 been incurred in any event by AAM on these kind of cardholders.

4 Now subject to all the other arguments Mastercard makes, including switching to
5 Amex, Mastercard may be in difficulty or have some difficulty defending
6 a claim in relation to the differential interchange fees, the fact that our
7 interchange fees were higher than they would have been if these cardholders
8 stayed with Visa. But we do say by way of example why should Mastercard
9 be liable for the interchange fees that AAM would have had to pay in any
10 event in relation to those customers? Again, Sir, just an explanation of --
11 some of these points are going to be very much factually dependent on what
12 happened at the time.

13 With that introduction, Sir, I want to turn to the Visa argument. The starting point in
14 considering this question is to ask: what is the exercise which the Tribunal at
15 the Phase 2 trial will be undertaking? We say in the context of an assessment
16 of damages, there's a well established and easy answer to that question. The
17 starting point, an award of damages under English law is compensatory, and
18 the general principle -- that's the oft-quoted words of Lord Blackburn in
19 *Livingstone v Rawyards Coal Co* -- the court should award that sum of money
20 and should put the party who has been injured or who has suffered in the
21 same position as he would have been in if he had not sustained the wrong for
22 which he's now getting his compensation or reparation. The focus is on the
23 effect of the wrong in question, and that's done by adopting the but for
24 causation test which asks: would the damage of which the claimant complains
25 have occurred but for the wrongdoing of the defendant?

26 Therefore, what the Tribunal's going to need to do at the Phase 2 trial is to determine

1 the extent of the loss to these merchants caused by Mastercard's MIFs. AAM
2 are not entitled to claim damages from Mastercard for loss caused by wrongs
3 by any other party. They can only claim damages for loss caused by
4 Mastercard's wrong. They can't claim the loss caused by Visa's wrong to the
5 extent that it happened.

6 **THE PRESIDENT:** And they aren't trying to, are they?

7 **MR COOK:** Well, with respect, Sir, they are.

8 **THE PRESIDENT:** They are not claiming for Visa. They are not saying Mastercard
9 has to pay them for an excess MIF they paid for Visa purchases.

10 **MR COOK:** What we say is as soon as you start to assess damages on what AAM
11 says is the correct approach, which is to assume both Mastercard and Visa
12 are low, you are looking at what is the effect on these merchants of both
13 Mastercard's wrong and Visa's actions. You are no longer at that stage
14 looking at loss caused simply by Mastercard's wrong.

15 So we do say that that is a situation where while it's right to say they're not trying to
16 claim for Visa's MIFs, they are trying to claim for sums of money which would
17 in all likelihood, partially or in whole, have been paid in any event even if
18 Mastercard had set its MIFs at zero. You cannot assess the consequences of
19 Mastercard's wrong by taking but for causational tests that apply by reference
20 to excluding both Mastercard's wrong and the actions of Visa.

21 That's the reason why we say the causation issue here is the critical point, that you
22 are looking to determine what is the causative effect of Mastercard's wrong.
23 And if you start assuming away Visa's actions, you start to look at the
24 causative effect of two wrongs, but Mastercard is only liable for one of those.

25 With respect, it's no part of that but for damages assessment to consider whether
26 there's some realistic set of hypothetical circumstances, such as regulation, in

1 which Mastercard would have voluntarily set its MIF as zero during the claim
2 period and then to consider whether that hypothetical regulatory intervention
3 might also have applied to Visa as a similar scheme. That may be, and the
4 Court of Appeal thought it was a necessary exercise for objective necessity --
5 and I will come back to the Court of Appeal's findings on this point -- but trying
6 to identify some realistic situation in which Mastercard would voluntarily not
7 have committed the relevant wrong as a result of internal intervention is
8 simply no part of the but for test of causation. It doesn't matter whether it's
9 realistic or not to suppose that Mastercard would have voluntarily done this.
10 For damages, the Tribunal is simply asking the question: what would the
11 financial effect on the claimants have been if Mastercard had not committed
12 a wrong, i.e. if Mastercard had set its MIF at zero? That's not an exercise of
13 determining that causative effect which can or should be based on whether
14 an independent third party, Visa, should also -- I emphasise the word
15 should -- also have acted differently.

16 So that's the reason why we say it's absolutely critical to focus on the specific issue
17 that the court will have to determine and to recognise that as soon as you
18 start hypothesising away the actions of a third party, you are no longer looking
19 at the consequences of Mastercard's wrong.

20 My learned friend says effectively this point has been decided against us by virtue of
21 the Court of Appeal judgment and, with respect, we say that's simply wrong.
22 What the Court of Appeal held is for the purpose of the ancillary restraint
23 issue, no account should be taken of competition from Visa. The Court of
24 Appeal simply didn't address the question of what is the right way to
25 determine damages to apply the causation quantum issues in this context.
26 They are different issues with entirely different legal tests.

1 My learned friend relies upon the Court of Justice decision, but the critical bit we
2 would say is the Court of Justice's paragraph 163, which is the same
3 counterfactual hypothesis that is not necessarily appropriate to conceptually
4 distinct issues, which is why it's critical to focus on what is the contextually
5 distinct issue, which the Tribunal at the Phase 2 trial is going to have to
6 determine because ancillary restraints and causation are conceptually very
7 distinct points.

8 Of course in the context of ancillary restraint, the Court of Appeal held that the
9 relevant test was the Metropole test, the objective necessity, (1) must be
10 assessed on a relatively abstract basis; (2) it didn't involve considering the
11 competitive situation of the specific operation in question -- so it ruled out
12 considering competition inherently as part of that relatively abstract test -- and
13 (3) it involved looking at the type of main operation rather than the specific
14 operation in question. It's inevitable once you realise that that is -- once the
15 Court of Appeal has held that that is the right way to look at ancillary restraint
16 of objective necessary that do you so without considering the competitive
17 threat from Visa, another four-party scheme, because that is not part of
18 the abstract test which excludes the competitive situation faced by
19 Mastercard, and it's not part of looking at the type of main operation rather
20 than specific operation in question.

21 But that's a conclusion based on the specific legal test for ancillary restraint. And the
22 Court of Appeal made clear its findings on ancillary restraint were not a finding
23 for all purposes, since the Court of Appeal specifically noted that survival of
24 the Mastercard scheme in view of competition from Visa could be considered
25 in the context of Article 101(3), and that is paragraph 198 of the
26 Court of Appeal's judgment.

1 So essentially, you have a narrow finding on one particular point -- the
2 Court of Appeal acknowledged it wasn't a finding for all purposes and simply
3 was never asked to consider how you should approach the issue of causation
4 in damages. We say simply in relation to that the Court of Appeal is just
5 nothing to the point at all. The fact that the Court of Appeal held that looking
6 at an asymmetric counterfactual would essentially be unrealistic for objective
7 necessity again we say is nothing to the point. You already have my
8 submission that approaching causation on the basis of assuming Visa would
9 also set its MIF to zero is simply the wrong conceptual approach because it's
10 not asking the relevant legal question.

11 **THE PRESIDENT:** Yes, I understand.

12 **MR COOK:** That's the point, Sir. My learned friend also relied on paragraph 108 of
13 the Court of Justice, talking about how counterfactuals must be realistic. But
14 again, that was the Court of Justice looking at Article 101 and how you apply
15 that. It was not considering damages, and my learned friend hasn't taken you
16 to any English case that suggests a similar logic applies, or even though the
17 end result would be to exclude -- or rather to look at damages based on the
18 effect of wrongdoing by a third party.

19 **THE PRESIDENT:** Yes.

20 **MR COOK:** That's the Visa point.

21 Then in relation to the PayPal point, at some point my learned friend acknowledges
22 that insofar as there a direct link to a customer's bank account, we're entitled
23 to make the switching to PayPal point. He accepted that.

24 Insofar as it's switching to use Visa cards within that, the starting point for that as he
25 says is essentially the asymmetric counterfactual and that stands or falls at
26 that initial level with my earlier submissions. There is an additional point in

1 relation to this about the fact that switching to PayPal is relevant to the
2 assessment of damages in any event because by making a payment through
3 PayPal, whether or not you are using -- even if you were still continuing to use
4 your credit card, PayPal is more expensive than direct card transactions.

5 My learned friend's challenge in relation to that point was a factual one of we haven't
6 explained the mechanism. As I've said, the mechanism is explained at
7 paragraph 140 of Mastercard's defence, which is the reduction in interchange
8 fees makes Mastercard less attractive in those circumstances. PayPal, which
9 has higher revenue equivalence, is in a position to make itself increasingly
10 desirable compared to Mastercard.

11 Now --

12 **THE PRESIDENT:** Sorry, I don't quite follow that. I can see the switching to cash,
13 and if you are right about Visa, then of course there's the switching to PayPal
14 to pay through Visa. But if you are wrong about Visa and so it's the same
15 zero MIF for both, why would people -- why would anyone switch to paying on
16 PayPal through Mastercard? They wouldn't do that. Why would they switch
17 to paying on PayPal through Visa if you are wrong about the approach to
18 calculating damages?

19 **MR COOK:** Sir, my case is that they might potentially switch to also using
20 a Mastercard on the basis that PayPal has greater revenues in those
21 circumstances as a result of its higher MSC and as a three-party scheme, it
22 can encourage people to move to it as a result of those higher revenues in
23 circumstances where Mastercard issuers simply don't have any equivalent
24 money to encourage them to use the card directly.

25 **THE PRESIDENT:** Is it -- then we have to say an issuer saying we now calculate
26 damages by what a third party might possibly do, which I thought is not the

1 approach you've just been urging us to take. Is there any evidence that
2 PayPal at the moment is encouraging people to switch from paying by
3 Mastercard to paying by PayPal? You are not saying that anywhere, I don't
4 think, it's not been pleaded.

5 **MR COOK:** Sir, in relation to this, firstly -- you have made a couple of points there.

6 Sir, I think I -- if you could perhaps ask your question again because I think
7 I misunderstood your first point.

8 **THE PRESIDENT:** I'm saying I think if the Mastercard MIF is zero, are you
9 suggesting that then Mastercard holders would switch to pay by PayPal when
10 it is linked to their Mastercard?

11 **MR COOK:** Sir, I think I've -- Sir --

12 **THE PRESIDENT:** That's the first question.

13 **MR COOK:** Yes. I think you asked two points, which is the first one was saying
14 I was suggesting that one should not take account of third party actions. With
15 respect, Sir, that is not my submission in relation to how you consider
16 quantification of damages.

17 Obviously in the quantification of damages, the legal point is the Tribunal has to
18 consider how the real world or counterfactual world would evolve with
19 Mastercard setting a zero MIF. And obviously we are thinking about what
20 third parties will do there. Our case depends on third parties switching to
21 Amex, third parties using their Amex card more than Mastercard. So you do
22 have to look at how the market evolves. That's just simply looking at what
23 people will do factually. That's very distinct from assuming away inherently
24 actions that people would in fact realistically take simply on the basis that that
25 is something you should assume for a legal test. So that's a distinction --

26 **THE PRESIDENT:** I thought you were saying that PayPal would then start offering

1 additional inducements which it's not offering now.

2 **MR COOK:** Sir, that is an evidential issue. That is something we will need to make
3 good at trial. The mechanism is that they have additional funds, they're in the
4 position to do so. We haven't put in factual evidence on this point because
5 that is a matter for trial and we will need to make it good, and if we can't
6 produce that evidence the point will not stand. But the mechanism --

7 **THE PRESIDENT:** Are you saying that if the Mastercard MIF is a zero MIF,
8 Mastercard holders would switch to paying for a transaction through PayPal
9 that's linked to their Mastercard?

10 **MR COOK:** We're saying that that is one of the possible switching points --

11 **THE PRESIDENT:** You are.

12 **MR COOK:** -- and that will lead to higher costs for merchants, and that is a factual
13 point we need to make good at trial by reference to the way in which PayPal
14 would be motivated to act in those circumstances, Recognising that's
15 a hypothetical in those circumstances because Mastercard has never in fact
16 operated with a zero MIF.

17 **THE PRESIDENT:** No, but you say we have to look at a realistic counterfactual
18 world, see how the market would evolve.

19 **MR COOK:** Yes, you have to look at how the market would in fact evolve, Sir.

20 **THE PRESIDENT:** Yes.

21 **MR COOK:** Sir, that's the PayPal point.

22 The next point then turns to the change in the scheme rules. I've explained in the
23 opening parts of my submissions on this point at paragraph 23 onwards what
24 we're talking about in practice. If you've obviously had the opportunity to read
25 that, I don't need to go through that section again, but just to give the example
26 of fraud rather than going through each one of the possible levers that

1 Mastercard has here.

2 **THE PRESIDENT:** Yes.

3 **MR COOK:** In relation to fraud, the default rule was one that said in most
4 circumstances, issuers would pay even if there was a fraudulent transaction. I
5 emphasise most circumstances only because actually there are
6 circumstances in which the rules historically provided basically you could
7 charge back transactions and the acquirer and internal merchant would end
8 up not getting the money, would have to pay it back. So it's never been
9 a blanket position which again shows the realism of what we are saying
10 without leading to the detail of this point. So one very obvious way of
11 reconsidering or looking at the viability of whether or not that rule makes
12 sense was in circumstances where Mastercard's interchange fees were based
13 in part on the cost of fraud, so our calculation of interchange fees took
14 account of those cost elements in setting them.

15 If you take away the interchange fees, then one alternative for Mastercard is to
16 change those default fraud rules to make clear that wherever there's
17 a fraudulent transaction or it's some more circumstances, there is simply
18 going to be a greater right or a full right for issuers to get charge backs and
19 therefore effectively not have to pay the money.

20 So that was essentially the argument that an illustration by reference to fraud --

21 **THE PRESIDENT:** Yes, I think we all understand the scheme rule change point and
22 similarly about default, and so on --

23 **MR COOK:** Yes, absolutely.

24 **THE PRESIDENT:** -- there are all sorts of ways you can change it.

25 **MR COOK:** And for present purposes, we want to advance that as a quantum
26 argument. For the purposes of a quantum argument, the point applies even if

1 the change is a relatively small one, even if it only partially offsets the loss of
2 the MIF -- and the evidence has shown the MIF was about 90 basis points at
3 the time and in broad terms Mastercard's MIF. So even if a change only
4 added 10 basis points or 20 basis points to acquirer's costs, what we say is
5 there is a need to give that partial credit for that limited change in the scheme
6 rules. That's the reason why we say this is essentially a completely different
7 issue to the one which Mr Justice Popplewell was faced with and was argued
8 out before him in the Phase 1 trial.

9 Because while it's right to say, as my learned friend does, that changes in scheme
10 rules were something that were potentially relevant to restriction and ancillary
11 restraints and were initially pleaded as such by Mastercard, we say those
12 essentially are all or nothing issues, restriction and ancillary restraints, and
13 they simply don't work in the same way as quantum. And in the context of
14 quantum, as I said, I could take advantage of saying there's going to be a ten
15 basis point change. That wouldn't get me anywhere for the purposes of
16 restriction or ancillary restraint, it is relevant for quantum.

17 And that's a distinction which is restriction -- it's very much a binary test, either there
18 is more competition or there is not, and if there's more competition in the
19 counterfactual, then the relevant restraint is restricted.

20 Similarly for ancillary restraint, again it's binary. If the four-party scheme can't
21 survive without the MIF, the MIF is not objectively necessary, and
22 Mr Justice Popplewell said at paragraph 221(1) of his judgment if the scheme
23 would have survived but with a much smaller share of the market, the
24 ancillary restraint doctrine would not be engaged. Equally, it would not
25 prevent there being a restriction of competition because it would leave intact
26 a Mastercard acquiring market, albeit a smaller one.

1 So that shows what we say is essentially the black and white binary test that in order
2 to be a good argument in the context of objective necessity, and similarly in
3 relation to restriction of competition, we would have needed to show that the
4 scheme would cease to exist completely, not that it would have been smaller,
5 less effective and lost market share. Whereas in the context of damages, any
6 form of reduction is something, even if it's limited, even if it's partial, can be
7 relevant for the assessment of damages without needing to justify the MIF in
8 its entirety. That's what we say is the distinction here, Sir.

9 **MR FRAZER:** Sorry to interrupt you. Would you also characterise the exemption
10 analysis as being a binary issue or not, or would you say that's more
11 associated with the kind of approach for quantum?

12 **MR COOK:** Sir, if I can come back to exemption when we come to it.

13 **MR FRAZER:** Of course.

14 **MR COOK:** But yes, in the context of exemption, there is at least the possibility of
15 showing an exemptible level of -- certainly what was moved to the exemptible
16 level as opposed to exemption per se as being one where we could potentially
17 have shown exemption of 10 or 20 basis points. So there is a scaling issue
18 which arises, the possibility of scaling in that context.

19 **MR FRAZER:** Thank you, that's helpful.

20 **MR COOK:** My learned friend took you to Mastercard's pleading in relation to
21 ancillary restraint and restriction and that pleading I was going to pick it up at
22 bundle 2B, page 164. This I believe was the Morrisons pleading that was
23 present at trial in this tab and it was paragraph 101A of Mastercard's defence
24 at that stage. My learned friend rightly pointed out it was our pleaded case
25 that paragraph 101A that we denied that the no MIF counterfactual is
26 a relevant counterfactual for the purposes of the claimants' claim, or that it

1 demonstrates a UK MIF was not objectively necessary, various points on that.
2 For present purposes, 101A(b), it's not realistic because Mastercard would not have
3 adopted such rules without making other corresponding changes. Then
4 subparagraph (c):

5 "In relation to what would happen in a "no MIF" or "zero MIF" counterfactual ..."

6 Then:

7 "... in order to allow the scheme to operate effectively or at all, Mastercard would
8 have made other changes to the default rules of the scheme which would
9 either have transferred additional cost on to acquirers to an extent which
10 would have compensated for the reduction in interchange fees."

11 So it's important to note there that the scope of the argument, and this reflects the
12 legal nature of these issues, was that there would have been such substantial
13 changes as to fully compensate for the reduction of interchange fees. The
14 reason for that we will come on to develop a little bit is obviously, if you only
15 partially compensate, you are still ignoring immaterial differences, you are still
16 at a substantial disadvantage, and there would still be switching.

17 So our case for present purposes would have depended upon showing that there
18 would have been such substantial changes as to fully compensate for the
19 reduction in interchange fees, and that's the all or nothing nature of the issue.

20 Now of course as apparent from the judgment --

21 **THE PRESIDENT:** That encapsulates, does it not, two points? One, you would
22 have changed the scheme rules; two, the effect of those changes would have,
23 in financial terms, would have compensated for the reduction in interchange
24 fees.

25 **MR COOK:** In terms of our reasons for saying it was not a realistic counterfactual,
26 Sir, yes. We were saying that in order for the no MIF not to be a realistic

1 counterfactual, the changes would have needed to be so substantial in order
2 to offset, which is the second point there, on the basis that if they were not
3 sufficiently substantial, then we wouldn't be in a position to say that the
4 scheme would have survived, which is the objective necessity argument in
5 that context.

6 **THE PRESIDENT:** Yes.

7 **MR COOK:** Sir, we are flagging the possibility of changes but saying for these
8 purposes they would have to have been effectively offsetting the entire
9 reduction in interchange.

10 That was of course -- as I was saying, as my learned friend accepted by the time of
11 the trial itself, we are no longer contending that the no MIF counterfactual was
12 unrealistic on this basis, on the basis that we would have made such dramatic
13 changes that the scheme would have survived without a zero MIF. And as
14 I will essentially show you by reference to Mastercard's closing submissions
15 on this point, we took this position because we accepted on the evidence that
16 there was no way that Mastercard could make such substantial changes that
17 it would be able to compete against an unconstrained Visa. We simply
18 weren't saying that it was a realistic counterfactual that Mastercard could have
19 done this when Visa was unconstrained.

20 My learned friend complains that we didn't advance alternative more nuanced
21 counterfactuals of limited changes, and of course for the purposes of showing
22 objective necessity, it wouldn't have helped us to say there is the possibility of
23 more limited changes because even if that was factually correct, it wouldn't
24 have an impact on the argument because those limited changes would still
25 have left Mastercard completely exposed as a result of the differential. So it's
26 not a case of us holding back counterfactuals, it's a question of us only

1 advancing arguments which are relevant to the issue the court actually has to
2 determine. You don't put forward arguments which don't in fact alter the
3 analysis.

4 I will show you that all of the argument in relation to this at trial was in relation to the
5 asymmetric counterfactual and whether or not there was a way that
6 Mastercard could have survived in the asymmetric counterfactual. The
7 distinction of course when it comes to damages is that depending on the first
8 point, there may not be an asymmetric counterfactual, and that limited
9 changes would be relevant to reduce damages even if they wouldn't have
10 allowed Mastercard to fully survive.

11 My Lord, turning then to Mastercard's closing submissions which we find in
12 bundle 2B, they start at page 239. We see how the point was developed by
13 Mastercard in its closing submissions. We can start with the heading before
14 paragraph 214, that's at page 240 --

15 **THE PRESIDENT:** Just one minute. I have the wrong ...

16 **MR COOK:** Bundle 2B starts at page 240, I think that's tab 7, and it's extracts from
17 Mastercard's closing submissions.

18 **THE PRESIDENT:** Ah, yes, 240.

19 **MR COOK:** Mastercard's heading is "Submissions on Restrictions". The section
20 actually encompasses both restriction and objective necessity, so it's
21 restriction in the wider 101(1) sense rather than purely the narrow point. We
22 can see what Mastercard was arguing about at paragraph 225 and what was
23 our case, which is:

24 "The evidence in this case establishes that, in a counterfactual in which Mastercard
25 have a low or zero MIF while Visa's MIF remains unchanged (or was
26 materially higher than Mastercard's), Mastercard would have been forced out

1 of the debit and credit markets in the UK or Ireland (or, at the very least,
2 substantially weakened)."

3 It may be said that substantially weakened wouldn't have been good enough on the
4 full test as held by the Court of Appeal in any event.

5 So the thrust of this submission is all about would Mastercard have been able to
6 survive in the asymmetric counterfactual? The reason why it was put in these
7 terms is it was no part of Mastercard's case that Mastercard would have failed
8 if the symmetric counterfactual had been assumed. Mastercard recognised
9 that if Visa was also down with a zero MIF, then while Mastercard might lose
10 a substantial part of its business to American Express, it was never going to
11 be sufficient to result in Mastercard no longer having a viable business. I will
12 take you in a moment to the judgment of Mr Justice Popplewell in which he
13 records exactly that position being adopted by Mastercard.

14 So all these sections are to deal with the asymmetric counterfactual because we
15 acknowledge if we are wrong on that legal point, then we don't have argument
16 on objective necessity.

17 **THE PRESIDENT:** But did you argue, I think, that even though you didn't have
18 an objective necessity argument, it's still not a restriction of competition.

19 **MR COOK:** We do, Sir, and that was a -- well, the argument on that is a very
20 different one. It's about whether or not there's a change in competition, that
21 was a different point in those circumstances. I am not sure it's particularly
22 helpful to explain. The argument there was whether or not if the competition
23 is only ever in relation to the small slice of cost on top of whatever the MIF is,
24 whether that is zero or any other number, whether actually competition is any
25 different in the market. And that's a completely separate argument which has
26 nothing to do with any of these issues at all for these purposes.

1 So the question of -- and again, none of the change in the scheme rule arguments
2 would have altered that position because for those purposes, it didn't matter
3 whether the cost to acquirers was zero or 10 or 20. The argument was -- the
4 way in which AAM were putting the argument was essentially any lower level
5 of starting point for that negotiation was one that involved greater competition,
6 which essentially is what the Supreme Court accepted. So it was a very
7 distinct argument from these purposes.

8 But in terms then of the objective necessity case, it was entirely dependent on the
9 asymmetric counterfactual. So what we are looking at is whether there was
10 some route that would have been sufficiently effective to allow Mastercard to
11 survive against an unconstrained Visa. Among the issues looked at here was
12 the alternative counterfactuals, and we can pick up those at page 248 in the
13 bundle, that's the heading there dealing with these points. There's a lengthy
14 section then dealing with a variety of them which we needn't concern
15 ourselves with, including the CAT's counterfactual from Sainsbury's. Then we
16 come to paragraph 287 under the heading "Other options considered by
17 Mastercard".

18 At this stage, Mastercard was not suggesting, it was no longer pursuing its pleaded
19 case, that there were magical alternatives that were so effective that
20 Mastercard would be able to survive against an unconstrained Visa. And if
21 Visa was not unconstrained, if Visa was also at zero, we simply weren't
22 making the argument at all on the basis that we recognise we would be able
23 to survive in those circumstances.

24 The point is firstly picked up at paragraph 289 that with some of these points,
25 Mastercard's witnesses gave evidence on the question of whether Mastercard
26 as a business could have survived, they didn't give evidence that

1 Mastercard's system would have continued, and that was evidence
2 Mr Justice Popplewell accepted. That was the point about whether or not
3 survival of a business of some kind is good enough. It was a question of
4 whether the four-party scheme would have survived that was critical for these
5 purposes.

6 We saw paragraph 290, which I can now read out, which is the evidence of Mr Lane
7 explaining that interchange is a very effective system:

8 "It is very hard to find another sort of system to replicate it that delivers the benefits
9 to all the parties in the system."

10 So he's explaining there that essentially the difficulty that Mastercard would have
11 faced in trying to find something that is as effective or sufficiently effective,
12 and we see then the language at paragraph 291, which is that none of the
13 alternative structures considered were shown to be sufficiently viable, so they
14 can't be relied on upon to suggest the MIF was not objectively necessary.
15 The language there is sufficiently viable because one's dealing with
16 a question of competing with Visa, and essentially you might have something
17 that you can implement and go so far but unless it gets you basically within
18 shouting distance of Visa, you are going to collapse anyway.

19 We then go through the detail of the various options, but the critical paragraph is
20 paragraph 305 which explains the main point here. We say:

21 "Even if ... any of these options were considered by the court to be viable
22 alternatives to the MIF, as Mr Dryden accepted in cross-examination, for
23 MasterCard to survive ..."

24 So even if they were viable in the abstract:

25 "... for MasterCard to survive, the alternative scheme would have to be as attractive
26 to issuers and cardholders as the competing Visa and Amex schemes (i.e. the

1 adjustments to be made would have offset disadvantage that Mastercard
2 would have been under in relation to the MIF differential) otherwise issuers
3 (and cardholders) would simply have switched. ... Therefore, in order to allow
4 Mastercard to survive the new business model would have to produce
5 a similar financial outcome for issuers and cardholders."

6 And that's the all or nothing aspect of the test, that we have to show the changes
7 would be so substantial that they would fully offset the interchange fee
8 differential. We also see there that's premised entirely on the asymmetric
9 counterfactual.

10 It's right to say we are alluding to both Visa and Amex, but that's because in the
11 asymmetric counterfactual, there's a twin competitive threat. You don't only
12 look at Visa in those circumstances, you recognise there's both Visa and
13 Amex, so Mastercard can be squeezed from both sides in those
14 circumstances. But the critical bit for current purposes, which is different from
15 where the argument may be on quantum, is the fact that it was considering
16 Visa being unconstrained, what we were saying was the point which was
17 critical for the legal test because if Visa was not constrained, we weren't
18 advancing this argument.

19 So it's all premised on the asymmetric counterfactual.

20 My learned friend looks at various sections here of the different arguments,
21 particularly the sections under paragraph 300 in dealing with the various
22 options under consideration there. But as we've already seen from the
23 explanation at paragraph 291 of what Mastercard is analysing here is whether
24 they are sufficiently viable to compete with an unconstrained Visa. We see
25 that picked up in relation to the specific model which is most closely
26 analogous to some of the changes in the scheme rules we're looking at. At

1 paragraph 301, the Mastercard witness explained that those changes would
2 make it uncompetitive as against Visa's products.

3 So we are immediately sort of focusing on the asymmetric counterfactual competing
4 against Visa, and it identifies some practical problems and objections to the
5 model, but again explains why these are not sufficiently viable to compete
6 with an unconstrained Visa. That doesn't mean, because we are not
7 addressing in any way whether there is scope to make some limited changes
8 or whether some changes will be possible if it's just Amex, rather than both
9 Visa and Amex. So we are simply not addressing in any way at all here the
10 symmetric counterfactual, it's simply not being argued about, and that is
11 reflected as you will see in a moment in the judgment. My learned friend took
12 you to various parts of Mastercard's evidence --

13 **THE PRESIDENT:** Could I just interrupt you. I am not quite sure why 300 and 301
14 are confidential, and they're making pretty high level points.

15 **MR COOK:** Sir, if you give me a moment to --

16 **THE PRESIDENT:** If you could get instructions on that -- you can do that after the
17 hearing, but it would be helpful.

18 **MR COOK:** Yes, I will do so, Sir.

19 You were also taken to some of the evidence of Mr Tittarelli and Mr Lane in relation
20 to these points. Those witnesses were of course dealing simply with the
21 factual explanation of what Mastercard had done at various times in the past
22 to consider various options. The short point in relation to that is that the legal
23 issue Mastercard was arguing about was whether or not there were changes
24 that were so substantial that they would allow us to survive in an asymmetric
25 world. And simply none of that evidence alters the basis of the legal
26 argument we were making and Mr Justice Popplewell was being asked to

1 address.

2 One point just very briefly to pick up out of those bits of evidence was the point in
3 relation to Mr Tittarelli and whether or not the EEA MIF was a natural
4 experiment for what would happen. As my learned friend rightly anticipated,
5 what we do say in relation to that is the EEA MIF only applies to cross-border
6 transactions, and that is a tiny proportion of revenues. Put in context, the
7 figures I've seen suggest it's about 1 per cent of issuer revenues that come
8 from the EEA MIF. So that's the reason why effectively you can have a zero
9 EEA MIF and that's not going to damage the viability of the scheme in and of
10 itself.

11 **THE PRESIDENT:** Anyway, it was just a slightly irrelevant question from the bench
12 out of curiosity. It doesn't affect what we have to decide.

13 **MR COOK:** It's also right to say we were actually at zero for only a period of a few
14 months, about nine months, and we were then able to negotiate higher levels
15 of EEA with the Commission which were acceptable to it. So it was very
16 temporary and it was only in relation to the EEA MIFs. With respect, it's not in
17 fact a natural experiment. That was the point which triggered Mastercard
18 thinking more widely about what it would have to do if domestic interchange
19 fees had to be set at zero.

20 My learned friend then took you to the judgment to try and show that these points
21 were decided against Mastercard. That's in -- if I can take you to
22 Mr Justice Popplewell's -- that's at bundle 1A, tab 1. Sir, that might be
23 a convenient point for an afternoon break.

24 **THE PRESIDENT:** Yes. If we return at 3.30.

25 **(3.22 pm)**

26 **(A short break)**

1 (3.31 pm)

2 **MR HOLMES:** We'll commence in a moment. The president is just having problems
3 with the audio system. **(Pause)**

4 **THE PRESIDENT:** Can you hear me now?

5 **MR TURNER:** Yes.

6 **THE PRESIDENT:** I'm so sorry about that. Mr Cook.

7 **MR COOK:** Sir, I hope you can hear me Sir.

8 **THE PRESIDENT:** I can hear you very well, yes.

9 **MR COOK:** Sir, I was going to take you to Mr Justice Popplewell's judgment. It's in
10 bundle 1A and if we could pick it up at page 41 in the bundle, which is
11 paragraph 128, in which Mr Justice Popplewell starts by enumerating the
12 possible counterfactuals that were canvassed during the course of the
13 Phase 1 trial. The point I simply start by saying in relation to this is that you
14 only canvass matters before a judge where you are actually suggesting that
15 they may make a difference to the point he has to decide. We didn't, for
16 example, canvass under objective necessity and analyse how the symmetric
17 counterfactual would play out in any detail because we accepted that any
18 analysis of the symmetric counterfactual was not going to establish that
19 Mastercard would fail. So you don't put before the judge detailed analysis on
20 issues that ultimately are not going to be determinative or even capable of
21 being determinative of a point the judge is being asked to decide.

22 So those at paragraph 128 were those the parties were putting forward as potentially
23 being ones that -- or in one or two cases that Mr Justice Popplewell himself
24 suggested that might impact on the analysis.

25 128(4) is some alternative restructuring which Mastercard would have adopted as it
26 would not have allowed the business to fail. In relation to that, by that stage

1 that was something the claimants were putting forward by reference to
2 Mastercard's evidence because Mastercard had accepted that in its
3 asymmetric counterfactual, if that was the right one, there was simply no
4 restructuring that could take place that would have saved Mastercard in
5 competing with Visa.

6 Then if we go to paragraph 153, this was the analysis by Mr Justice Popplewell of
7 some other alternative. That's subparagraph (4) which by this stage the
8 claimants were putting forward and Mr Lowenstein QC, who was counsel for
9 AAM at that stage, and others, was identifying various bits of Mastercard's
10 evidence that he was suggesting establish essentially that Mastercard could
11 have found some route to survive.

12 My learned friend --

13 **THE PRESIDENT:** Sorry, which paragraph?

14 **MR COOK:** It's under the heading "Some other alternative" at paragraph 152 it
15 starts, and it's 153 my learned friend took you to. Those are by way of
16 introduction to that paragraph, so we see at 152 it's Mr Lowenstein, so it's the
17 claimants actually seeking to rely upon this -- Mastercard wasn't saying it
18 could have survived by making these changes, and 153 is
19 Mr Justice Popplewell explaining why he doesn't think the claimants can do
20 this, can rely upon some general alternative based on the evidence. At
21 paragraph 153(1), it's the fourth line, he says:

22 "The internal debate had identified a number of possibilities but rejected each of
23 them as a viable solution and it had all been put to one side."

24 But as is clear, and we go to paragraph 153(2), this was all in the context of the
25 asymmetric counterfactual. It says the evidence was not that the Mastercard
26 four-party scheme would have been preserved come what may, but that

1 Mastercard would have done anything it could to stay in business. The
2 evidence of Mr Douglas, for example, which Mr Justice Popplewell accepted,
3 was that:

4 "In a no MIF environment, any response to an unconstrained Visa would have
5 resulted in Mastercard having a very different business."

6 So the focus is on the unconstrained Visa and that's what's being looked at here.

7 Then turning on to what then is the detailed analysis of some of these issues. Again,
8 my learned friend took you to it at paragraph 218 onwards, and then at 220,
9 which is the death spiral point, which is the consideration in relation to this.
10 Starting off with 218 explaining that the counterfactual is a no MIF with
11 a prohibition on ex post pricing or a zero MIF but otherwise with the existing
12 features:

13 "If one were to posit MasterCard adopting some new and different features of its
14 scheme ... that would involve choosing a different fact-specific counterfactual,
15 which would require separate consideration on its [merits]."

16 The point is you actually have to canvass, you should put forward a specific
17 counterfactual if you are going to try and argue for it. Mastercard was not
18 saying at that stage that there was some counterfactual that was relevant, i.e.
19 that was potentially going to allow Mastercard to win on these issues and the
20 claimants haven't managed to identify anything specific on these terms in any
21 event.

22 We then see at paragraph 220 onwards what is being -- what essentially is the
23 argument, the objective necessity argument, the death spiral language as it's
24 dramatically come to be known as. Then you see the explanation:

25 "The evidence strongly supported the conclusion that if MasterCard had applied
26 a zero MIF throughout the claim period, both Visa's MIFs and Amex's

1 merchant fees would have remained at or near their actual levels. It is the
2 Visa MIFs which are here relevant because although MasterCard contended
3 (correctly in my view) that its demise would have been hastened by such
4 competition from Amex, it is not suggested that competition from Amex alone
5 would have caused such extinction unless the competition from Visa was
6 sufficient to do so."

7 That's the point that while we are relying upon Amex as basically being present in
8 the asymmetric counterfactual as well, we were never suggesting that in
9 a symmetric counterfactual that competition from Amex alone would have
10 been enough to lead to the demise of Mastercard. That's why I say simply
11 that the symmetric counterfactual simply hasn't been considered evidentially
12 at all. We didn't put forward evidence on it, it wasn't one of the
13 counterfactuals canvassed, and it's not something that's been given any
14 consideration to at all.

15 So if you are -- whether you are against me or not in relation to the Visa argument,
16 I have already said there's some argument that's arguable there and we
17 should be allowed to maintain, the quantum trial will undoubtedly have to
18 consider the symmetric counterfactual and that simply hasn't been touched,
19 and that wasn't touched before Mr Justice Popplewell, and we should certainly
20 be free to pursue those quantum arguments for those purposes.

21 If we then go to 221 --

22 **THE PRESIDENT:** Sorry, which quantum arguments?

23 **MR COOK:** The quantum arguments in relation to scheme rules that --

24 **THE PRESIDENT:** Oh, the scheme rules, yes. It's a separate point.

25 **MR COOK:** Yes, that's what I'm addressing now.

26 **THE PRESIDENT:** Yes.

1 **MR COOK:** I'm in paragraph 221, the real battleground is whether the Mastercard
2 scheme would have survived. It starts with 221(1) which is not about being
3 less commercially successful, it's whether it would have existed at all, which is
4 the black or white nature of the argument. And then subparagraph (2):

5 "The focus is upon the survival of the Mastercard scheme in its existing form,
6 adjusted only to change its MIF in the counterfactual world."

7 Then seven lines from the bottom:

8 "Similarly, if the survival of the MasterCard four party scheme depended on
9 significant changes to the model or the scheme rules, that would involve a
10 different counterfactual which is not in play in these proceedings."

11 You see there the emphasis upon "significant changes" and that simply was not in
12 play because Mastercard was not suggesting there was such significant
13 changes that could be made that would allow the scheme to survive. Again, it
14 simply reflects the fact you only put forward before the judge those
15 alternatives which potentially impact on the decision, not other alternatives
16 that simply don't.

17 So we say with respect in relation to this when we now come to the quantum stage,
18 the fact that when there were different tests involved in relation to restriction
19 and objective necessity and Mastercard chose not to pursue the argument
20 that it was capable of making such dramatically large changes to the scheme
21 which would allow it to survive even against an unconstrained Visa, there's
22 nothing inappropriate about Mastercard pursuing the more limited argument
23 that it would potentially make limited changes for the scheme rules in
24 a symmetric counterfactual world in order to prevent the loss of business to
25 Amex, or to mitigate the loss of business both to Amex and more generally.

26 So there's nothing that offends against the principles of finality in judicial economy

1 about allowing Mastercard to pursue the more limited argument, the partial
2 argument about changes to scheme rules in the Phase 2 trial, given the very
3 different issues that were relevant at the Phase 1 stage.

4 **THE PRESIDENT:** Yes.

5 **MR COOK:** I turn then to exemption. My learned friend took you I think in an earlier
6 part of his submissions to Mastercard's case in the further information of
7 April 2015. That's in bundle 2A, tab 4 and if we could turn to that, Sir. You
8 were right to alight in relation to this on the facts at page 22 that some of the
9 specific questions that were asked were at least narrowly initially in relation to
10 rather more limited time periods, but similar pleas arise and are set out in
11 relation to the period more generally. So the similar material is relied upon for
12 these purposes.

13 If we then turn to page 25, we see what Mastercard says in relation to the
14 counterfactual position in these circumstances and identifies a whole series of
15 possibilities and arguments under this heading. One my learned friend
16 referred to was paragraph 6/7 d(i), which suggested that:

17 "Changes to the rules governing whether an acquirer is paid by the issuer for
18 fraudulent transactions and/or for transactions in respect of which a
19 cardholder default; any changes to timing of payments by issuers to acquirers
20 so that roughly the same allocation of costs between acquirers and issuers
21 remained applicable."

22 Again, that is being put in terms of essentially the same financial outcome, not in
23 terms of potentially more limited changes.

24 Then my learned friend also referred you to "so that roughly the same allocation of
25 costs between acquirers and issuers remained applicable." So it's focused on
26 essentially the same financial outcome. So such substantial changes, not

1 potentially more limited changes, which is the relevant issue for quantum
2 purposes.

3 Then at subparagraphs (k) --

4 **THE PRESIDENT:** I'm just trying to understand that. "... acquirers for fraudulent
5 transactions." But if -- "allocation of costs between acquirers and the issuers".
6 If the acquirer is not giving any guarantee to the -- the acquirer's guaranteed
7 to the merchant, it might be the same allocation of cost between acquirers
8 and issuers, but it's clearly going to be to the detriment of the merchant, isn't
9 it? It's going to be the same allocation of costs, isn't it?

10 **MR COOK:** It's going to produce a similar financial position as with the interchange
11 fee.

12 **THE PRESIDENT:** But as between acquirer and issuer --

13 **MR COOK:** The end result would be a similar allocation of the --

14 **THE PRESIDENT:** But the merchant's going to be a lot worse off, isn't he? Isn't that
15 the point?

16 **MR COOK:** It depends what it is you are comparing it to, Sir. What we're
17 suggesting is that the changes --

18 **THE PRESIDENT:** At the moment, the existing -- that was the whole point, you were
19 saying that the merchant gets a benefit under the MIF because of these rules
20 and that's a benefit that results from the MIF because they won't get the
21 benefit absent the MIF. So these changes to the rules will reduce the
22 guarantee or remove it -- limit it to the merchant, hence the merchant benefit.
23 That must be, otherwise no benefit --

24 **MR COOK:** Yes, Sir, but in terms the same allocation, it would produce the same
25 financial allocation between issuer and acquirer as operating with the MIF and
26 the previous -- and the existing --

1 **THE PRESIDENT:** That's the default again but because there won't be a guarantee
2 to the merchant so there's nothing for the acquirer to pay and there's nothing
3 for the acquirer to recover from the issuer. So as between acquirer and
4 issuer, nothing's changed, but the merchant's a lot worse off. That's the point
5 you make.

6 **MR COOK:** No. Compared to a situation in which there was a MIF, it would actually
7 be the same financial outcome because the objective is to produce --

8 **THE PRESIDENT:** For the merchant -- there's no merchant benefit. I thought the
9 whole point is, your Article 101(3) case is it should be exempt because there
10 are benefits to the merchants which offset the additional cost of the MIF, that's
11 what you were saying. And take away the MIF, the merchant won't get that
12 benefit. Yes, he won't have to pay the costs of the -- there will be a low
13 merchant service charge but he won't get the benefit of the guarantee.

14 **MR COOK:** You are absolutely right there, but what we're saying is essentially that
15 the scale of the changes that will be made will be designed to produce roughly
16 the same allocation of costs --

17 **THE PRESIDENT:** Only as between acquirer and issuer.

18 **MR COOK:** Yes, as between acquirer -- what we're saying is we're not going to
19 change the rules to such a dramatic extent that it ends up with merchants
20 being so dramatically worse off financially compared to operating with the
21 MIF.

22 **THE PRESIDENT:** I thought you are because that's the benefit you are relying on
23 that the merchant gets through the MIF, and therefore the MIF should be
24 exempt. All this is saying is it's not going to be a situation where under the
25 rules the acquirer still has to give a guarantee to the merchant but the
26 acquirer cannot get reimbursement from the issuer because that would

1 change the allocation of costs.

2 At the moment, the allocation, whatever it is at the moment, if you have a fraudulent
3 card use, a fraudulent purchase, so the issuer doesn't get paid by the
4 cardholder, ergo as between the issuer -- and the acquirer has to pay the
5 merchant in full, there's some allocation of the costs between them. I don't
6 know what it is, but it will be in the rules. All this is saying that allocation is not
7 going to change. But the merchant is going to lose a benefit and that's the
8 whole point you are making, isn't it? You are relying on that.

9 **MR COOK:** Sir, it might be best to put it in terms of they are going to lose a benefit
10 of equivalent value.

11 **THE PRESIDENT:** Well, they're going to lose these guarantees whether in whole or
12 in part or there would be more exceptions or whatever.

13 **MR COOK:** Yes, and the simple point is we say in whole or in part, the in part will
14 be -- the level of reduction will be designed to ensure that they're not
15 dramatically worse off, the changes are not going to go beyond what is
16 necessary to preserve the financial position.

17 **THE PRESIDENT:** Sorry, the merchant will be worse off, significantly worse off. It's
18 as between acquirer and issuer there won't be a change in the balance.
19 That's what's being said, as I understand it, isn't it? I mean, if the merchant
20 will be just as well off, it's not a benefit that can get you exemption for
21 a restrictive agreement because there is no benefit compared to the
22 counterfactual.

23 **MR COOK:** Sir, I'm afraid we're slightly at cross-purposes. The argument in
24 essence here is: yes, it's right to say if you simply look at the position of the
25 merchant with paying a MIF of zero and the merchant then -- these changes
26 will take away guarantees that they otherwise would have had. So yes, to

1 that extent the merchant is worse off, but the scale of the changes is
2 something where the end financial position for the merchant will be the same
3 as though they were operating with the MIF.

4 **THE PRESIDENT:** That's what you were saying, yes, would be -- and therefore the
5 fact that he doesn't have to -- the merchant doesn't have to pay any MIF will
6 be counterbalanced by the fact that the merchant is not getting any guarantee
7 for fraudulent transactions.

8 **MR COOK:** Exactly, Sir. But it's just simply saying the change is going to offset
9 rather than being one that's -- we're not saying it's going to be a lot larger.

10 **THE PRESIDENT:** Well, it's not necessarily this change will offset, the whole series
11 of changes together will offset. That was your case, I think.

12 **MR COOK:** Yes.

13 **THE PRESIDENT:** Not that this particular one will.

14 **MR COOK:** Indeed, Sir.

15 **THE PRESIDENT:** I think the point about allocation of costs between acquirers and
16 issuers is a bit of a red herring.

17 **MR COOK:** It's not a red herring, with respect, Sir, because the motivation for
18 Mastercard to do this is to produce the same allocation of overall cost
19 between acquirers and issuers to ensure that issuers are not at a financial
20 disadvantage. That's the motivation here because if issuers are at a financial
21 disadvantage, that is the reason they have a tendency or a desire to switch to
22 Amex, for example.

23 **THE PRESIDENT:** Yes. But they're not financially disadvantaged because they
24 don't have to pay so often for fraudulent transactions.

25 **MR COOK:** Yes. Nonetheless, the point was basically it's designed to produce
26 roughly the same financial outcome. And then the paragraphs I wanted to

1 look at were paragraphs (k) and (m), which is the argument then in relation to
2 how -- another mechanism for benefits. We see there at paragraph (k) talking
3 about that the EEA MIFs were designed to have the effect of allowing issuers
4 to recoup part of their costs, maximise the efficiency of the Mastercard
5 scheme in various ways. Then paragraph (l),

6 By giving them a fund of money [which is step 1, paragraph (l)], "the EEA MIF
7 enabled the fees borne by cardholders to be lower than would otherwise have
8 been, increasing card ownership and usage to the benefit of merchants."

9 That was the next step, which is the idea therefore that fees to cardholders will be
10 lower. Then step 3 is thereby increasing card ownership and usage to the
11 benefit of merchants resulting in merchants receiving certain benefits on
12 a larger volume of transactions.

13 So at that stage, you have the argument that it's going to be lower costs to
14 cardholders and that's going lead to higher usage.

15 **THE PRESIDENT:** Yes.

16 **MR COOK:** And that's the --

17 **THE PRESIDENT:** That's the higher usage --

18 **MR COOK:** That's the mechanism -- in that regard for establishing a causal link
19 between the MIFs and particular kinds of benefits to merchants.

20 I just simply wanted to take you to those points. We now see what
21 Mr Justice Popplewell did in this regard in his judgment. Again, if you go to
22 bundle 1A, we can pick it up at paragraph 308 in the judgment.

23 **THE PRESIDENT:** I think that's on page 99.

24 **MR COOK:** It is, yes. I apologise, I will make sure I give the page references. It's
25 paragraph 308, Mastercard had identified what are essentially six categories
26 of benefits which it suggested arose in these circumstances. Subparagraph

1 (4) is important for present purposes, which is the guarantee both against
2 fraud and cardholder defaults. So that was one of six benefits that had been
3 identified. Then under the heading "Benefits caused by the MIFs?" --

4 **THE PRESIDENT:** While we are on 308, then (6) is the other one, the increased
5 spending, "To make a purchase he wouldn't have made." Yes.

6 **MR COOK:** That's fair, Sir.

7 **THE PRESIDENT:** Then you go on, "Benefits caused by the MIFs"?

8 **MR COOK:** Yes, Sir. And 308(1), I think you asked my learned friend something in
9 relation to that paragraph. That does to a certain extent mirror some of the
10 points my learned friend does have no objection to us running, and that is
11 a switching point in relation to Amex.

12 **THE PRESIDENT:** Yes. I haven't seen it down as Diners club card for a long time
13 then, 310. Do they still exist?

14 **MR COOK:** They very much do still exist, Sir, and you certainly still see the logo
15 generally certainly throughout this period.

16 **THE PRESIDENT:** 310 "Benefits caused by the MIFs"?

17 **MR COOK:** As I have just explained, Sir, 308(1) shows one of the points we were
18 making there, that also there was an avoided costs to the merchants
19 category. My learned friend accepts that even though that was something we
20 were saying was potentially part of the mix in relation to exemption,
21 nonetheless these are quantum points that we are entitled to pursue, with
22 respect entirely rightly, he acknowledges that fact. The same point arises in
23 relation we say the payment guarantee as well.

24 So turning to paragraph 310, introductory section by Mr Justice Popplewell, which is
25 whether or not there were benefits caused by the MIF. At paragraph 312,
26 Mr Justice Popplewell makes two general comments which were those which

1 particularly upset and were found to be objectionable by the Court of Appeal:

2 "Mastercard's argument that charging positive MIFs led to an increase in the use of
3 cards and therefore an increase in the amount of benefits enjoyed by
4 merchants as a result of the use of cards is made good in the evidence before
5 me."

6 So I took you through paragraphs (k) and (l) from the further information, and that is
7 that argument which is interchange fees lead to an increase in the use of
8 cards and therefore benefits on more card transactions. So that was the first,
9 that's the cardholder benefit argument there.

10 Then so too is his case that because cardholders receive benefits from issuers which
11 were funded by the MIF, the benefits to merchants of card use are to some
12 extent directly caused by the MIF, which is really tying the same point
13 together, which is that it might be the other way round. But the first point is
14 that cardholders receive benefits as a result of the MIFs and that -- and the
15 first point, really the second, is that that then leads to an increase in the usage
16 of cards, which were two points Mastercard had made in paragraph (k) and (l)
17 of the further information as being the two stages of that argument: benefits to
18 cardholders leading to higher usage.

19 That was by way of general point. Mr Justice Popplewell then went on to consider
20 each of the individual arguments in relation to various specific benefits and
21 paragraphs 330 to 331, as you pointed out, with respect are important
22 paragraphs here because if Mr Justice Popplewell dealing as a matter of fact
23 with this issue and making a finding that says the point I want to make for
24 quantum is factually correct, albeit at this stage should be looking at it more in
25 the context of asymmetric factual and not the symmetric counterfactual. So in
26 that context, the guaranteed payment, he says at 331:

1 "In relation ..."

2 I don't need to read the entire paragraph out to you, Sir. Effectively, having heard
3 from the Mastercard witnesses, he's accepted Mastercard at the end of the
4 paragraph in the final line:

5 "MasterCard would have to make changes to allow the scheme to remain
6 competitive such as changing the scheme rule providing for a payment
7 guarantee."

8 So the factual finding is one that is made in favour of Mastercard, and now here this
9 is simply nothing to do with issuer behaviour, pass through of benefits to
10 cardholders, higher usage of cards. This is simply a question of what
11 Mastercard would have had to do in order to maintain the viability of its
12 business or to try and protect its business. So that's what Mastercard would
13 have made in terms of changes to the scheme rules, such as a scheme rule
14 providing for payment guarantee. So the factual point is accepted by
15 Mr Justice Popplewell.

16 Importantly, there was no appeal against that factual finding by AAM. That one was
17 not challenged.

18 **THE PRESIDENT:** When you say no appeal against the factual finding, we haven't
19 actually seen the grounds of appeal, the appeal was of course to his
20 conclusion on Article 101(3). Was it a specific appeal to this factual finding,
21 that factual finding?

22 **MR COOK:** I will -- [overspeaking] --

23 **THE PRESIDENT:** -- therefore to the conclusion.

24 **MR COOK:** What I'm going to do, Sir, is show you the judgment of the
25 Court of Appeal and take you through that, which among other places lists out
26 the points that have been made by AAM. They were essentially fairly narrow

1 confined points on the basis that if you knock out a number of aspects of the
2 edifice, effectively the building comes crashing down, they didn't have to
3 successfully challenge every aspect of it. So they didn't challenge this bit of it,
4 so that factual finding was not one that was challenged. I say I will make
5 good that on the Court of Appeal --

6 **THE PRESIDENT:** Do we have the notice of appeal or grounds of appeal --

7 **MR COOK:** We don't in the bundle, Sir, but that can be readily be produced if it
8 would assist.

9 **THE PRESIDENT:** I think it -- speaking for myself, I think -- this is AAM's appeal of
10 course -- I think it might be helpful if that could be supplied afterwards.

11 **MR COOK:** Yes, we will do that.

12 **THE PRESIDENT:** The only question I have is in that last sentence, "To allow the
13 scheme to remain competitive such as changing the scheme rule", which is
14 exactly what you are talking about here in addressing us, is this in the context
15 of the asymmetric counterfactual or not?

16 **MR COOK:** Sir, I think logically it must be on the basis there had been no -- or
17 Mr Justice Popplewell had already confirmed that the asymmetric
18 counterfactual was the correct counterfactual.

19 **THE PRESIDENT:** Yes.

20 **MR COOK:** So that's what he'd held. That factual finding, it was probably right to
21 say it's implicitly premised in that earlier conclusion, and certainly there was
22 no separate evidence about what would happen in a symmetric counterfactual
23 at that stage.

24 **THE PRESIDENT:** Yes.

25 **MR FRAZER:** Sorry, Mr Cook, before you go on, and not doubt I'm being slow here,
26 but just reading paragraph 331, what findings of fact are you saying are

1 made? The paragraph talks a lot about education to reduce fraud et cetera,
2 but it also says that:

3 "It was never put to Mr Willaert that MasterCard would or could continue to honour
4 the fraud guarantee. Indeed, Mr Willaert, while accepting anti-fraud
5 technology could still be deployed, maintained in his evidence that in a
6 hypothetical world without interchange, MasterCard would have to make
7 changes to allow the scheme to remain competitive such as changing the
8 scheme rule for providing for payment guarantee."

9 So it's actually -- the judge there is reciting what was put to the parties. Did he make
10 a finding of fact in that respect, do you think?

11 **MR COOK:** Sir, I think the right analysis is this is a situation where Mastercard is
12 saying that -- we saw that at paragraph 308(4) -- the guaranteed payment is
13 a benefit. This is the judge at 330 and 331 dealing with that factual point and
14 simply saying the evidence from Mr Willaert on this point was not challenged
15 and his factual finding is that Mastercard would have to make changes to
16 allow the scheme to remain competitive, such as changing that rule.

17 Then we pick it up at paragraph 335 as being his conclusion, which is the MIF
18 directly contributes to benefits to merchants in the form of, and subparagraph
19 (4) "guaranteed payment in the case of fraud or default". So I suggest one
20 should read paragraphs 330 and 331 as being a factual conclusion by the
21 judge that Mastercard would in that asymmetric counterfactual change the
22 scheme rule to provide payment guarantee such that it's a benefit.

23 **MR FRAZER:** I see, thank you.

24 **MR COOK:** I acknowledge that that was in the context of an asymmetric
25 counterfactual.

26 I think there was a question raised about whether there was some contradiction here

1 between some of the analysis Mr Justice Popplewell carried out in relation to
2 his basic or his counterfactual analysis in relation to 101(1) and the two
3 aspects of that, restriction and objective necessity. His analysis here of
4 101(3), my answer to that is that the same counterfactual would not
5 necessarily be appropriate for conceptually distinct issues, and in
6 circumstances where it wasn't being suggested that such dramatic changes
7 could be made to save the scheme in the asymmetric counterfactual simply --
8 there wasn't a need to consider these kind of points. In the context of
9 exemption, it was a situation where the judge was considering this kind of
10 change. So it's simply -- it's a conceptually distinct issue and that's why you
11 do end up with slightly different analyses of what would happen in the
12 counterfactual.

13 **MR FRAZER:** This phrase "in the hypothetical world without interchange", is that
14 without interchange for anybody or is that just in your submission an
15 interchange available to Mastercard in relation to an unconstrained Visa?

16 **MR COOK:** In relation to that, it must be in relation to the asymmetric counterfactual
17 because that is what Mr Justice Popplewell had held earlier was the right way
18 of analysing article 101. But that's why I say the factual finding is actually in
19 a slightly different context from the way it might arise in the quantum trial,
20 though it establishes broadly that the factual point is a good one but it may be
21 something that needs reconsideration because it arises differently potentially
22 when the threat is a different one.

23 So I do say there's a factual finding on that but specific to that particular basis and
24 there's no inherent contradiction between having slightly different
25 counterfactuals for distinct purposes.

26 So what we then see at paragraph 335, having gone through each of the various

1 different categories, the judge identified or accepted there were a series of six
2 benefits that did arise in relation to this. Then at paragraph 336, the judge
3 went on to conduct a quantification analysis under exemption of these
4 various -- of the way in which you quantify the benefit and carried out the fair
5 share analysis for 101(3) purposes. What he ultimately chose to apply was
6 the merchant indifferent test to try and work out what would be an appropriate
7 MIT MIF as it's come to be known, and that was the approach he adopted.
8 What I say in relation to that is when we come to look at the Court of Appeal,
9 as we will now do, it is primarily that quantification analysis which the
10 Court of Appeal decides was essentially fundamentally flawed because it
11 failed to take account of two particular factors arising from paragraph 312,
12 what the court described were assumptions being made by the judge about
13 that two-stage step, which is step 1 higher cardholder benefit; and step 2
14 leading to greater usage of cards.

15 Now if we go to the Court of Appeal's judgment, which is in bundle 1B, if we pick it up
16 at page 57 in the bundle, paragraphs 230 to 235. This sets out what were
17 actually some fairly limited and narrow grounds of appeal by AAM, as I say,
18 limited. What they were doing was they were trying to knock enough holes in
19 Mr Justice Popplewell's exemption analysis that the whole structure came
20 tumbling down. But they did so by focusing on some rather narrow points. If
21 we pick it up at paragraph 231, we say there that Mr Turner's argument was
22 that Mr Justice Popplewell fell into error because at paragraphs 312 and 313,
23 which we've just looked at, he started from the assumption that default MIFs
24 always bring benefits to merchants, all he needed to do was quantify it. He
25 held that Mastercard's argument that positive MIFs benefitted merchants was
26 made good on the evidence before him. There's no indication what that

1 evidence was.

2 Then paragraph 232, my learned friend submitted the judge paid insufficient regard
3 to certain concerns. Then in the sixth line:

4 "By assuming that positive MIFs led to increased card usage which in turn benefitted
5 merchants, without considering properly the disadvantages in relation to
6 transactions where the cardholder would always have used the scheme card
7 anyway irrespective of the MIF ..."

8 And that's come to be known as the "always card" point you see picked up again at
9 paragraph 234, so the idea that there will always be some transactions that
10 take place in any event, even without the MIF.

11 Then at paragraph 233, again the specific point that:

12 "The judge erred in his approach to pass-through because he ignored need for
13 cogent factual evidence as both the extent to which MIF income was passed
14 through to cardholders and the extent to which such MIF revenue passed
15 through did stimulate additional card usage."

16 Again, that's the argument we see in paragraphs (k) and (l) of the further information,
17 which is cardholders are better off and so they use the card more.

18 **THE PRESIDENT:** Didn't he say there was no evidence of that?

19 **MR COOK:** Yes, the argument was there was no evidence in relation to that.

20 Paragraph 234 is then the always card point, which is I think picked up in 232
21 already, and 235 was an entirely separate point about business stealing,
22 which is whether you get business from other merchants taken into account.

23 You can see what -- we will get you the notice of appeal, but you will see those fairly
24 summarised some very narrow focused lines of attack. None of them are
25 an attack upon paragraphs 330 and 331, and in particular the finding that
26 Mastercard would change the scheme rule with the objective of trying to

1 protect the viability of the scheme against competition.

2 Then we come to paragraph 242 onwards. This is the discussions and conclusions
3 on AAM's appeal. Then you see the basis on which the Court of Appeal
4 concluded that Mr Justice Popplewell had gone wrong. It says,
5 paragraph 242:

6 "In considering the first critical stage in the causation analysis whether the issuers
7 were incentivised to increase card usage to a greater extent, the absence of
8 any factual evidence from the issuers but he paid insufficient regard to that
9 evidence."

10 So again, that's the (k) point which is whether or not there was actually an increase
11 in card usage. The Court of Appeal says essentially that
12 Mr Justice Popplewell was wrong to proceed with that specific evidence from
13 issuers. That's in relation to what we see is essentially the pass through
14 analysis: would benefits to issuers of cardholders have gone up in a way
15 which would incentivise card usage? Then 245:

16 "The judge hardly addressed [what the Court of Appeal described as the] second
17 critical stage of the causation analysis, namely the extent to which card usage
18 actually increased."

19 So step 1 is there was an increase in cardholder benefits and step 2 did that actually
20 or to what extent did that actually increase usage of cards. The third point
21 then was whether he carried out a proper balancing exercise in those
22 circumstances.

23 You see at 247, repetition of essentially the conclusions:

24 "The judge's analysis overlooked or ignored these disadvantages and failed to carry
25 out the relevant balancing exercise. Even on the judge's assessment, issuers
26 do not pass through 25% of the MIF income on credit card transactions and

1 60% of the MIF on debit card transactions but retain it."

2 So again, the criticism is that a failure to take account of passing on and a failure to
3 take account of always card, which you see picked up again at the end of
4 paragraph 247.

5 So those are the reasons why Mr Justice Popplewell's quantification of the
6 exemption issue failed and there was simply nothing in the Court of Appeal's
7 judgment which was directed to what we say is conceptually a very distinct
8 point about whether or not, admittedly in analytical terms in the asymmetric
9 world, Mastercard would have changed the scheme rules in order to preserve
10 its ability to compete with competitors. These are dealing with entirely
11 separate arguments about an alternative argument from Mastercard, or a
12 further argument Mastercard was running, about improved benefits to
13 cardholders leading to higher usage of the scheme.

14 With respect, we simply say in relation to this there is nothing in the
15 Court of Appeal's analysis here which suggests it would be -- firstly which
16 addressed that argument that Mastercard would have made changes or which
17 indicates there is anything inappropriate about Mastercard doing as it has
18 always indicated it intends to do, which is run that point as a quantum
19 argument in any event.

20 We say simply that is entirely distinct from the issues they were addressing, the
21 issues the Court of Appeal addressed, because our damages case doesn't
22 depend on pass through of MIF revenues to issuers or the idea that lower
23 charges or higher benefits to cardholders would lead to more usage of cards.
24 It's simply saying Mastercard itself is going to take steps, i.e. change in the
25 scheme rules, in order to prevent it losing or mitigating the loss of business to
26 competitors and if that's in the symmetric counterfactual, we are looking at

1 Amex Diners Club, PayPal as being some of the competitors Mastercard
2 would be worried about.

3 But the counterfactual situation would then be: what changes would Mastercard have
4 made in order to protect or try and mitigate that loss of business to those
5 competitors?

6 **THE PRESIDENT:** Yes. I mean, I think they do make -- I think the third point which
7 you haven't come on to yet, namely decline in card usage, decline in number
8 of transactions, is that does relate to pass through of benefits to cardholders.

9 **MR COOK:** That's correct, yes.

10 **THE PRESIDENT:** Your point is: well, the attack -- as you said, they attack certain
11 elements in the edifice, as you put it, and therefore brought it down, the result
12 was the whole balancing exercise was flawed. But they didn't -- there's
13 nothing focusing on the question of scheme rules and what might have
14 happened to scheme rules as a benefit to merchants.

15 **MR COOK:** Sir, that is a much neater encapsulation of the proposition I have
16 managed so far.

17 **THE PRESIDENT:** I understand that point, yes.

18 **MR COOK:** The simple point is the Court of Appeal didn't address that issue. Even
19 though Mr Justice Popplewell did, and to the extent he did he found in our
20 favour on it, albeit perhaps in the asymmetric rather than the symmetric world
21 because he didn't address the symmetric world. Therefore, there is nothing in
22 terms of the argument before the Court of Appeal or in terms of the fact that
23 Mastercard was running this as one brick among many in the edifice --

24 **THE PRESIDENT:** We've got the point, yes.

25 **MR COOK:** -- which prevents us running it for quantum purposes.

26 **THE PRESIDENT:** If you come on -- it's probably helpful we have the

1 Court of Appeal open to the third point, third objection, because that is
2 dependent, I think, on pass through by issuers to cardholders to encourage
3 greater use of more transactions. That's something they do address, there
4 are passages you've been taking us to.

5 **MR COOK:** Yes, Sir. That's paragraph 249 in the judgment and you see what it
6 says there.

7 **THE PRESIDENT:** Yes.

8 **MR COOK:** What I say in relation to that is it is a point which is quite clearly being
9 knocked down by the Court of Appeal by reference to I describe
10 as heightened standard of proof-- I accept that is the wrong term, it's
11 a heightened evidential standard to meet than the ordinary balance of
12 probabilities standard. So it is a different evidential standard here which
13 would not apply to quantum. And where a point is being rejected by reference
14 to a heightened evidential standard, to say that we're not in a position to be
15 able to run the point to a different evidential standard in quantum purposes,
16 we would say is simply unjustifiable.

17 **THE PRESIDENT:** I can see that in bold terms. But the finding of
18 the Court of Appeal was actually there was no evidence at all on this point.
19 It's not that you didn't meet some high standard. You didn't have any. The
20 evidence would have to come from issuers and there was none. So it's not
21 that you want to say: well, take the evidence we had at trial and now assess it
22 according to a lower evidential standard, which would apply to quantum, here
23 is the Court of Appeal saying that failed because there was just no evidence
24 on it. And now you say: right, we want to have another go and bring a lot of
25 evidence on it.

26 **MR COOK:** Sir, that is an encapsulation of the position and our position on that is

1 simply in circumstances in which a point can be put in more than one way,
2 and where it's always been clear that Mastercard was planning to run this
3 point and as part of quantum, to say that we are debarred from doing so
4 because we failed to make it good in another part of the case where we could
5 also have deployed it, we simply say that is not an appropriate indication of
6 some kind of abuse of process rule, because we were always making clear
7 that we were going to do so at this stage. And if we made a mistake earlier,
8 which the Court of Appeal considered we did, then so be it. But to say that
9 when we indicated we were going to do it at this stage we are debarred from
10 doing so, I would simply say is not an appropriate or fair approach to adopt.

11 **THE PRESIDENT:** Yes.

12 **MR COOK:** That is the point in relation to the third issue.

13 **THE PRESIDENT:** Yes.

14 **MR COOK:** The final point is the question of material bilaterals in relation to this.

15 Now my learned friend took you to paragraph 121 of the defence which
16 actually makes a somewhat different point, and that is paragraph 121 is
17 talking about "on us transactions", as they are called, where the same bank is
18 both the issuer and the acquirer so the interchange fee doesn't in fact arise.

19 **THE PRESIDENT:** There was a problem about the paragraph he took us to,
20 because it's actually been struck out in your amended defence, so ...

21 **MR TURNER:** Can I clarify that --

22 **THE PRESIDENT:** Yes.

23 **MR TURNER:** -- just to save time.

24 The reference is right for one of the three defences. There was a muddle. It's
25 paragraph 121 in the Argos defence. In the defence you are looking at it's
26 119. It's the same paragraph. Sorry, it's a --

1 **THE PRESIDENT:** No, no, that's all right. Let me just read it because I haven't ...
2 objection "did not apply ..." Yes, I see. So where there was no MIF -- yes.
3 And the question is: what transactions were there, where you have the same
4 banks? Is that the point?

5 **MR COOK:** No Sir. I don't think my learned friend takes issue with the 'on us' point.
6 And this is something he gets from the correspondence. He's lying behind
7 that, maybe, we say, including where in particular transactions where the
8 acquiring bank and the issuing bank were the same legal entity.

9 **THE PRESIDENT:** That's the jargon 'on us', is it?

10 **MR COOK:** That's the jargon 'on us', it's an on us transaction. It's including that. It's
11 an example of that. And the correspondence has teased out the fact that
12 Mastercard is keeping open within this paragraph the possibility that there
13 were bilaterals out there. And in relation to that my learned friend say: no,
14 Mr Justice Popplewell found there were no material bilaterals at paragraph 9
15 of the judgment, and so we should be prevented from effectively doing the
16 work to check whether there are bilaterals which have any impact on the
17 quantification of damages.

18 And with respect, in relation to that we would say -- Justice Popplewell very carefully
19 made quite a nuanced finding that there were no material bilaterals, material
20 for the purpose of what he was looking at.

21 **THE PRESIDENT:** I see. The whole point is the word "including", is it? So the 119,
22 the two banks are the same on us transactions, as I've just learned to call
23 them. No problem about that. It was accepted by the claimants, they can't
24 seek damages for those.

25 **MR COOK:** I don't think it's right that conceptually we can argue that. I'm sure that
26 he'll deny that we can --

1 **THE PRESIDENT:** It's where the including is not the totality, and you are saying
2 there are -- in addition to those on us transactions, there may be some other
3 transactions where there is a bilaterally agreed fee. That's the point.

4 **MR COOK:** It is. And my learned friend says Mr Justice Popplewell has effectively
5 made a finding which rules that out by saying, at paragraph 9 of the judgment,
6 there were no material bilaterals. And we simply say in relation to that that is
7 dealing with -- that's a sort of general description of what is going on at a point
8 where he's talking about them not being material, you know, the scale of
9 bilaterals that would have an impact on an Article 101(1)/101(3) judgment,
10 and that is absolutely not the kind of finding which is designed to prevent
11 Mastercard identifying bilaterals which might be of limited value, but in the
12 quantification of damages, and given the multimillion pound claims being
13 advanced here, may have an effect upon the numbers that's significant.

14 **THE PRESIDENT:** The sensible thing, it seems to me, to argue about that in the
15 slightly hypothetical way is that you give particulars of the bilaterals that you
16 are referring to.

17 **MR COOK:** Yes. And that's something -- that is the practical answer that we
18 essentially will do, go away and do the work and make sure if there are
19 bilaterals that we disclose them as part of the additional quantum disclosure
20 it's accepted should have been made.

21 **THE PRESIDENT:** And if it turns out some of them actually appear to be very
22 material, one can then revisit it and see whether it is then inconsistent. But it
23 may well be that you do not actually have any major bilaterals but there are
24 some and you want to bring them into account.

25 **MR COOK:** Yes.

26 **THE PRESIDENT:** If there is a very major bilateral agreement, affecting a large part

1 of the claim it might be inconsistent, but at the moment we just don't know. It
2 would seem a sensible way to proceed with that at the moment. And it will be
3 open to the claimants then to object, it seems to me.

4 Right. It's not quite 4.30, we will come back at 4.35.

5 Mr Turner, before we do that let me just have a word with the two other members of
6 the Tribunal. So if you pause a moment we shall metaphorically rise.

7 **(4.27 pm)**

8 **(A short break)**

9 **(4.30 pm)**

10 **THE PRESIDENT:** Mr Turner, we don't need you to address us on the first point,
11 except we would like some clarification on the position on PayPal which is
12 a small part of it. We don't need to hear from you on the third point. We'll
13 deal with the material bilaterals in the way I've proposed unless you strongly
14 object. That seems to me sensible. And you will reserve your position to
15 come and object subsequently when you see actually what it is that is at issue
16 when you've had the particulars. But we would like to hear from you on the
17 scheme rules, in particular what basis Mastercard should be prevented from
18 raising an argument that in a symmetric counterfactual it would have changed
19 the scheme rules'.

20 If we give you ten-minutes to gather your thoughts and come back at 4.42, I would
21 hope that you can deal with that in 15 minutes.

22 **MR TURNER:** My Lord, I'll deal with that quickly. I will have something to say about
23 the bilaterals which I can deal with in a couple of minutes, but I would like to
24 explain why it is that that's not the efficient way to go forwards.

25 **THE PRESIDENT:** Very well. That's fine. We will be back at 4.42.

26 **(4.32 pm)**

1 **(A short break)**

2 **(4.43 pm)**

3 **MR FRAZER:** We can't hear you Peter.

4 **MR HOLMES:** It sounds as though we are resolving a microphone issue again.

5 We'll be with you shortly. **(Pause)**

6 **THE PRESIDENT:** Can you hear me now?

7 **MR TURNER:** Yes.

8 **THE PRESIDENT:** So sorry, Mr Turner, nobody seems to know what the problem is.

9 You will get an extra five minutes to make up for that. So now you have 20
10 minutes.

11 **Submissions in reply by MR TURNER**

12 **MR TURNER:** I will be I hope quite brief, given the limited number of points to
13 respond on. Starting with PayPal. It's necessary to recall that our objection is
14 to Mastercard raising a switch of business to PayPal, being a supposedly
15 more expensive payment method, insofar as the allegation is that this switch
16 would happen, because indirectly the customer is taking advantage of the
17 Visa system where Visa is unconstrained.

18 In his submissions Mr Cook referred at certain points to this as a proxy for the Visa
19 issue, and that people would switch because of the increased benefits.
20 Insofar as this is their case it seems that there is no answer to the point that it
21 is another indirect way of tapping into the asymmetric counterfactual; if the
22 asymmetric counterfactual is impermissible, and we say it is, then that
23 argument in relation to PayPal falls away. That's all I need to say about that.

24 Changes to the scheme rules.

25 **THE PRESIDENT:** Pausing there, as I understood it, as a separate argument, which
26 is in a symmetric counterfactual there'd still be changes to PayPal,

1 presumably from Visa and from Mastercard, even where the payment
2 mechanism through PayPal is on the customers' Mastercard, because PayPal
3 would offer greater inducements to the customer to use PayPal than
4 Mastercard or Visa could when they no longer get a MIF. That's how
5 I understood it.

6 **MR TURNER:** This was speculation through counsel; it was not evidence.

7 **THE PRESIDENT:** Yes.

8 **MR TURNER:** As to which there has been no prefiguring whatsoever in any papers.

9 It's not something that we object to on any other basis because our concern
10 has been the indirect use of the asymmetric counterfactual. All I would say
11 about that point made by Mr Cook is that that is a pure speculation, and it
12 refers to evidence which he may or may not seek to adduce, but it is purely
13 hypothetical and nothing of that was seen before.

14 **THE PRESIDENT:** The question arising is whether he should be allowed to plead it.

15 At some point you will have to bring up evidence to make it good. Whether to
16 rely on amendment that -- I think it is an amendment in that case --

17 **MR TURNER:** It is.

18 **THE PRESIDENT:** -- to let that in. And it would be made clear it's on the symmetric
19 basis.

20 **MR TURNER:** Yes.

21 **THE PRESIDENT:** And whether you can object to it. And whether it has any legs or
22 not I've not the slightest idea.

23 **MR HOLMES:** It's a point, Mr Turner, you and I had an exchange on earlier. I think
24 the conclusion was you didn't object to it being an amendment on that limited
25 basis, but you thought it was a poor point without symmetric evidence.

26 **MR TURNER:** That is right. The only qualification I would make is the reference

1 back generally to Henderson v Henderson, that if there is something which
2 could and should have been raised first time around then you shouldn't raise it
3 at the second stage.

4 And by the way, on that point, if I may interject, my Lord, you asked about the Seele
5 case. That is in fact a case referring to two stages of the same litigation. It's
6 in Bundle 4A tab 4 paragraph 27.

7 In answer to Mr Holmes that's absolutely right. The question would be whether --
8 because we hadn't seen the way that they propose to develop it now and
9 therefore I cannot deal with it concretely. If and when some point arises on
10 PayPal it's something that could and should have been raised before.

11 **THE PRESIDENT:** Yes.

12 **MR TURNER:** I cannot deal with it in the abstract.

13 **THE PRESIDENT:** No. Well that's fair enough. But it's most unlikely to have
14 carried much weight on the big Article 101 issues. Whether 101(1) or 101(3)
15 it's a limited point on any view.

16 **MR TURNER:** Yes. It would be more appropriate in relation to 101(3) as part of the
17 tapestry of questions of benefits and the loss of benefits.

18 **THE PRESIDENT:** Yes. So scheme rules.

19 **MR TURNER:** Changes to scheme rules. I emphasise again the fundamental point,
20 which is that -- the question to start with, both at the liability and the quantum
21 stage, is the same one for the court: what would have happened if there had
22 not been MIFs imposed by Mastercard? It's a factual enquiry and it applies at
23 both stages.

24 So although Mr Cook began his submissions by a submission that if the calculation
25 of the MIFs were, for example, based on the costs of the frauds guarantee,
26 then if there was no MIF income he said Mastercard could choose to change

1 the scheme rules on that account. That's irrelevant. The question is what
2 would have happened had there been no MIFs? And that was covered in the
3 Phase 1 proceedings. You see it at the level of Mastercard's pleading, of
4 Mastercard's argument and the internal assessment, the evidence, which form
5 the basis for Mastercard's argument.

6 The level of the pleading, without opening it up again, as we said at the outset of this
7 hearing their pleading on this issue is not limited to the asymmetric
8 counterfactual; it has a separate strand 2 as you see from 101(a), (c) and the
9 forward reference in that paragraph. It also concerns the question of the
10 benefits that are supposedly brought by these scheme rules as they currently
11 are to the merchants in its own right, without the point being reliant on Visa
12 continuing to be able to charge.

13 So far as Mastercard's argument at trial is concerned it sought to argue at the trial
14 that it would not have implemented any of a series of changes that it said
15 were considered as applicable to, and I quote, "a zero or low MIF
16 environment". That was the scenario: a zero or low MIF environment. And it
17 was not limited, with respect, to the asymmetric counterfactual. That became
18 a crucial part of Mr Cook's submissions. His case essentially is that the
19 Phase 1 trial was concerned with a particular scenario where Visa continues
20 to be able to impose MIFs, but the other scheme, Mastercard, cannot.
21 Therefore he says he's not treading over the same ground if he now considers
22 the situation symmetrical counterfactual. In fact that was not the case at all,
23 and here I must, if I may, go back to the material that he took you to. Pick up,
24 please, the closings in bundle 2B and go to page 264. You have the
25 important paragraph 290:

26 "As explained by MasterCard's witnesses, MasterCard carried out detailed analysis

1 on potential alternative business structures that MasterCard could try to adopt
2 in a zero or low MIF environment."

3 Then two example projects are given.

4 **THE PRESIDENT:** Yes.

5 **MR TURNER:** And then:

6 "As explained below, none of the alternative structures considered were shown to be
7 sufficiently viable. They therefore cannot be relied on to suggest that the MIF
8 was not objectively necessary to the operation of the Mastercard four party
9 system". The key question is what is meant by 'could try to adopt in a zero or
10 low MIF environment'.

11 And the reference there to what Mr Lane explained. Mr Cook did not deal, even with
12 the example evidence that I showed you before I finished my submissions,
13 which makes it perfectly clear that the symmetrical counterfactual was indeed
14 part of the consideration. If you go back at bundle 3B, please, to Mr Lane,
15 and turn in it to page 96 and keep open, if you would, the closing submissions
16 so that you can see this. The closing submissions at 290 had referred to
17 these two projects, Alhambra and Project Porsche. I shall not read out what's
18 in 3B because this is still maintained as confidential. But if you look at
19 page 96 at paragraph 8, which refers to the low interchange environment; and
20 9 which does the same thing, you see very clearly, from 9.2, that this is not
21 considering only the asymmetric counterfactual. And similarly over the page
22 I draw your attention again for the Project Porsche to what is said at the end
23 of the main text in paragraph 13. You can read that for yourself.

24 **(Pause)**

25 Please, Sir, keep this file open but then if you return to bundle 2B and the closings
26 and go in it to pages 268 and 269 there you have --

1 **THE PRESIDENT:** Just one moment. **(Pause)**

2 268 and 269, yes.

3 **MR TURNER:** 268 and 269, there you have at the foot of 268 and over the
4 reference to the model which was called the unbundling model which I shan't
5 read the detail of, which was a change to the scheme rules. And if you look at
6 the top of page 269 at the first full sentence. It talks first about moving to
7 Visa, but then read the next sentence which begins "There was also concern
8 that even with ..."

9 **THE PRESIDENT:** Yes.

10 **MR TURNER:** You see that it is not limited to the asymmetric counterfactual; it is
11 a wider point. And you can see this if you look back at Mr Tittarelli in 3B,
12 which I hope you still have open, at page 42. At page 42 in bundle 3B you'll
13 see the way it is introduced in paragraph 29, not referring to the asymmetric
14 matter. Indeed at the end of 29.1 a sentence which is discussing that in
15 context. And you see at 29.5 the reference to the regulatory objection, which
16 is not limited in that way at all.

17 And so I say that the key point that was made in answer by Mr Cook is wrong, that
18 the judgment did -- the argument and the material used for the deployment of
19 the argument did rely on the symmetric counterfactual, as well as
20 a consideration of the asymmetric situation.

21 We then turn to the judgment of Mr Justice Popplewell which you have in bundle 1A,
22 and there again the claim that was made in argument by Mr Cook was that
23 the entirety of the judgment focuses on the asymmetric counterfactual.

24 If you go to page 41 you have the reference in paragraph 128 to the possible
25 counterfactuals that were canvassed during the course of the trial. Those
26 included the material that I have shown you which were not limited in that

1 way. And if you go forward to page 50 -- Mr Cook took you to paragraph 153.
2 He should have taken you to the paragraph before that, 152, immediately
3 under the heading "Some other alternative?" Because that refers specifically
4 to, four lines down, "none of the internal project discussions between
5 Mastercard which addressed what it would do in ..."

6 And you see the same language:

7 " ... a zero MIF or low MIF environment, including [those projects which were not
8 limited in that way] specifically contemplated the business failing."

9 **THE PRESIDENT:** I think to be fair Mr Cook did take us to that paragraph.

10 **MR TURNER:** I see.

11 At all events, that makes it clear that the zero low MIF environment and what it
12 comprise was covered in the Phase 1 trial.

13 **THE PRESIDENT:** Yes.

14 **MR TURNER:** Finally then I would emphasise that although Mr Cook says that
15 Mastercard wasn't at the Phase 1 trial seeking to rely on changes to the
16 scheme rules that didn't matter for the purpose of an objective necessity
17 submission, that is to put the cart before the horse. The question is not
18 a tactical one. The question, the starting point, is the factual premise: what
19 would have happened? That was covered by the evidence, and based on the
20 finding as to what would have happened the submissions are made on the
21 matters of law.

22 That's all I have to say about Mr Justice Popplewell.

23 On the Court of Appeal we will make sure that the Tribunal receives not just the very
24 brief notes of appeal but if the Tribunal is content, our skeleton, so you can
25 see the way the point was put for the Court of Appeal.

26 **THE PRESIDENT:** I think we would like to see on that basis both yours and

1 Mastercard's.

2 **MR TURNER:** Yes. We shall both arrange that.

3 The short point is that our appeal was not focused on a narrow question or narrow
4 issues, it was squarely on the point of causation. Mastercard argued that the
5 MIF income caused benefits and the trial judge agreed. Now they want to
6 argue at the quantum stage that the absence of the MIFs will mean the
7 removal of benefits enjoyed by the merchants.

8 Causation, the causal link was the common factor. The point that we drew to the
9 attention -- and we made the basis of our submission in the Court of Appeal --
10 was that that causal link had not been shown. In a general sense there was
11 no evidence to show how the issuers used the money. Therefore there was
12 no evidence to show how the MIF income translated into the provision of any
13 services or else was pocketed as pure profit. It was not something that could
14 be sealed off and treated as a separate point.

15 Finally, I'll deal very briefly with the bilaterals question. That's all I have to say on the
16 change of the scheme rules, bearing in mind the time constraint.

17 **THE PRESIDENT:** Yes.

18 **MR TURNER:** On that bilaterals point, first I would say that Mr Cook was right to say
19 this is not about the "on us" transaction arguments, and no, we are not
20 accepting that point. This is simply about the question whether there should
21 now be an expensive exercise of further disclosure and investigation of
22 bilaterals relevant to these merchants. And the point is this, that I hadn't
23 completely made in opening: the court received disclosure, information and
24 witness evidence on the question of the prevalence of bilaterals. AAM
25 provided all their relevant correspondence with their acquiring banks in
26 disclosure, and Mastercard's rules provides specifically that it has to be

1 notified of any bilateral interchange agreements in the market between its
2 banks. That was the subject of the last letter in the Tribunal's bundle which
3 I would briefly show you. Our point is that this has all been covered. There
4 has been a disclosure exercise and that what we have said to Mastercard is
5 that if you are intending to run this again it's essentially just a waste of time
6 because there has been an investigation of the very point.

7 **THE PRESIDENT:** Sorry, perhaps I missed the point. It's been covered, they were
8 disclosed, you don't need any more disclosure apparently. All that the judge
9 said is there weren't any bilateral agreements, so generally the MIF applies.
10 So for the restriction of competition analysis he didn't pay any attention to
11 bilaterals. And as I understand what Mastercard are saying: well we are not
12 suggesting this in any way undermines the competition analysis, but when it
13 comes to quantum of what you actually lost, one should leave out of account
14 any transactions that were governed by these bilaterals, which apparently
15 have already been disclosed to you. Because that's not loss flowing from the
16 MIFs.

17 **MR TURNER:** Yes. I'm not sure -- I can check whether any bilaterals have been
18 disclosed, because Mastercard is not itself a party to those bilateral
19 agreements. What it does have and has always had is information on which
20 bilateral agreements there are, which may be relevant to this issue. Our point
21 is simply that that information is already there. And we have said to
22 Mastercard in the correspondence, essentially anticipating what your Lordship
23 said to Mr Cook at the end of his submissions, before the hearing takes place,
24 today, tell us, you know, are there any such bilaterals? And they've said this
25 is still to be investigated. So it's actually a narrow point that we have said: tell
26 us, tell us before the hearing, and they have not done so.

1 **THE PRESIDENT:** Sorry, I don't see how it affects this hearing at all. The pleading
2 we've seen, the pleading is largely about on us transactions but it says
3 "including". You've established that including means that there are also some
4 not on us but bilateral transactions. You can ask for further information about
5 it to get details of actually what they are and they'll be provided and if they're
6 not you can no doubt strike it out.

7 But what does it have to do with the permission to amend? It's not even
8 an amendment, I think, to maintain the plea. (Inaudible) but I can't remember.

9 **MR TURNER:** Yes. It had two dimensions. The first is that we do read that
10 judgment as saying there aren't material bilateral agreements which are
11 relevant to this case, and yet they want to say now there might be.

12 **THE PRESIDENT:** Well I don't think they're necessarily saying -- I mean material to
13 the competition issue, but they might have some significance for the quantum
14 issue. It won't be huge because they aren't very material agreements, but it
15 might have some effect, and given the scale of the quantum even some effect
16 is one they are entitled to put forward, aren't they?

17 **MR TURNER:** My Lord, to keep proportionality, in view of your remarks and views
18 on this I shan't pursue this one any further.

19 **THE PRESIDENT:** No. I mean serve a formal request for further information, see
20 what you get, and if you think that what's been produced is therefore
21 something inconsistent with the way the case was put before, or inconsistent
22 with the finding in paragraph 9, then I think you will have liberty to apply to
23 strike out that part of the -- that allegation. Which is at the moment not terribly
24 clear anyway, it's only through this enquiry that anyone's discovered that it
25 actually includes a reference to bilaterals.

26 But I don't see how we can deal with it at the moment. I mean it's that one

1 paragraph, isn't it, which in the pleading, as you've now shown it to us in the
2 pleading we were looking at -- I can't now remember what the paragraph is.

3 **MR TURNER:** 119 in the --

4 **THE PRESIDENT:** 119 in the Morrisons defence.

5 **MR TURNER:** Yes.

6 **THE PRESIDENT:** So it's not an amendment at all. So you want to know, well what
7 else does it include, apart from what's specified as being in particular, and
8 what are they. Then you will see whether there's any ground to make
9 an application that they shouldn't be allowed to rely on, and it may be it's not
10 really all of the agreements, there may be some fairly small agreements which
11 on any view would not have surfaced, particularly in the previous argument.
12 But we're all in a vacuum at the moment.

13 **MR TURNER:** Yes. My Lord, the practical way to deal with this here is that we will
14 take up that suggestion. We had asked in correspondence whether they
15 could identify these bilaterals. We will serve a request for information and
16 take it from there.

17 **THE PRESIDENT:** I think so. I mean the trial's a long way off.

18 **MR TURNER:** Yes.

19 **THE PRESIDENT:** So it can all be dealt with. It's not a major part of the case, that's
20 quite clear from the way the pleading is put in paragraph ...

21 Right. We have to stop, and you've had a long run. Obviously we are going to
22 consider these issues and produce a written ruling in due course.

23 Thank you both, and those assisting you, very much.

24 **(5.12 pm)**

25 **(The hearing concluded)**

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