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5 **IN THE COMPETITION** Case No. : 1306-1325/5/7/19(T) 1349-1350/5/7/20(T)

6 **APPEAL TRIBUNAL**

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

13 Tuesday 2nd February 2021

14
15 Before:
16 The Honourable Mr Justice Roth
17 Tim Frazer
18 Paul Lomas
19 (Sitting as a Tribunal in England and Wales)

20
21
22 BETWEEN:

23
24 Dune Group Limited and Others

25 -v-

26 Visa and Mastercard
27
28

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

30
31 Kassie Smith QC, David Wingfield and Fiona Banks (On behalf of Dune, Adventure Forest
32 Limited and Westover Group)

33 Laurence Rabinowitz QC, Brian Kennelly QC, Daniel Piccinin, Jason Pobjoy and Isabel
34 Buchanan (On behalf of Visa)

35 Matthew Cook and Hugo Leith (On behalf of Mastercard)

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1
2 (10.30 am)

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4 **Case Management Hearing**

5 **MR JUSTICE ROTH:** Good morning.

6 Can I just check the live-stream is on. Yes, it's just come on, which is why we
7 were waiting.

8 I must start, as always, by emphasising that this is a Tribunal hearing, although
9 remote, much as if it was held in the courtroom in Salisbury Square House.

10 It is being recorded officially and an authorised transcript will be prepared in the
11 usual way. It is strictly prohibited for anyone to make an unauthorised
12 recording, whether audio or visual, of these proceedings, and that is
13 punishable as a contempt of court.

14 We will, as usual, be taking a short break mid-morning and mid-afternoon, both for
15 the transcribers and indeed for all of us, because we know that just
16 concentrating on a screen gets very tiring.

17 Thank you all for your skeleton arguments. We've considered those carefully.

18
19 **Discussion re timetabling, disclosure and procedural matters**

20 **MR JUSTICE ROTH:** We'll follow a slightly different order from the agenda that
21 you've been sent. The first point I wanted to raise is case management. We
22 think it's sensible that there should be joint case management of all these
23 actions, and as we understand it that has been agreed by everyone. If not,
24 would someone please intervene. And we shall direct that now.

25 We're not now considering trial. But it's clear -- and we'll be coming on to that -- that
26 there will be in each case a summary judgment application. That can be

1 heard jointly in all the cases. There's going to be a preliminary issue. We'll
2 come on to that, and that can be heard jointly. And it will then be for
3 consideration whether all or part of the main trial should be heard jointly or
4 some stage of it heard jointly.

5 You will all be aware that the Supreme Court, in remitting three separate actions to
6 the Tribunal, expressly ordered that the exemption issue in the Sainsbury's
7 case against Visa and in the Sainsbury's case against Mastercard should be
8 heard together.

9 Now that's not going to happen, because, as you also know, the exemption issue in
10 the Sainsbury's case against Visa is no longer live. But if it had been, they
11 would have been heard together. And it does seem to us at the moment that
12 the exemption issues in these cases against Mastercard and Visa could be
13 heard together, but we're not going to direct that now.

14 And similarly, on pass-through, it seems to us that the pass-through of a MIF from
15 Visa by any particular claimant will be the same and certainly raise exactly the
16 same issues as pass-through by any particular claimant against Mastercard.
17 So that aspect could be heard together.

18 So these are matters we just wanted to indicate as our thinking, going forward.

19 It's quite clear to us that if cases on this scale are going to progress efficiently and
20 fairly they will need active case-management on an ongoing basis. That's
21 what we envisage, and we are for that purpose, therefore,
22 a case-management tribunal and we will continue to exercise that role.

23 We will not be the same constitution of the Tribunal that will be hearing the actual
24 eventual trial in these actions, because that will have an economist on
25 the Tribunal, and so the constitution will change.

26 We also propose -- and that emerges from some of the evidence that we have

1 read -- that the Article 101 issues concerning the MIFs should go forward first
2 and that the Article 102 claims and other aspects of the Article 101 claims --
3 what I think's been referred to at one point as the anti-steering rules,
4 something called Visa fees and so on -- should be stayed and parked. The
5 MIFs, it seems to us, give us quite enough for us all to get on with.

6 Can I ask Ms Smith, first of all, for the claimants, are you content with that course?

7 **MS SMITH:** Sir, we are. And I apologise if it wasn't clear from the various
8 submissions but I understand that we've always proposed that that be the
9 case.

10 **MR JUSTICE ROTH:** Yes, I'm just checking. That was my impression from the
11 submissions. And just before formally ordering that, I wanted to make
12 absolutely sure.

13 And Mr Rabinowitz, for Visa.

14 **MR RABINOWITZ:** Yes, sir. Again, you will have seen what we said in our
15 skeleton, and we are in favour of that as well.

16 **MR JUSTICE ROTH:** Thank you.

17 And Mr Cook, for Mastercard.

18 **MR COOK:** Again, sir, that's agreed.

19 **MR JUSTICE ROTH:** Yes.

20 So we will order that all other aspects of the claims be stayed.

21 Next, if we could jump to what I think are items 10 and 11 on the agenda, that is to
22 say the withdrawal of some claimants and the substitution of claims. We have
23 draft consent orders in the actions. I'm not sure how many there need to be,
24 because of the number of actions, but certainly this is in the Dune Group,
25 Adventure Forest and Westover Group proceedings. So I think that covers
26 everything. And those are, as I understand it, all agreed. So we shall make

1 those orders.

2 **MS SMITH:** Sir, yes. I'm happy to say that we have also managed, late yesterday
3 afternoon, to agree the various costs applications. Those are items 8 and 9
4 on your agenda.

5 **MR JUSTICE ROTH:** That's very helpful.

6 **MS SMITH:** And the costs relating to item 4. So we have prepared -- and I believe
7 it's now been agreed between all parties -- a revised draft order that covers
8 items 8, 9, 10 and 11, which I hope should be sent to the CAT during the
9 course of this morning. It literally was signed 10 or fifteen minutes ago or --

10 **MR JUSTICE ROTH:** That's very helpful. It did seem to us that the costs incurred in
11 arguing about those levels of costs are likely greatly to exceed the figures
12 we've seen.

13 Thank you. The next point, then, I wanted to come on to clarify is what's been
14 referred to as the fourth wave claimants. That's to say the claims currently in
15 the High Court.

16 Ms Smith, have they now been served?

17 **MS SMITH:** I'm afraid, sir, I don't know. I'm hoping I might get an email or a text
18 enabling me to answer that question. I know that we have sought instructions
19 from the card scheme solicitors -- well, we've asked that they indicate to us
20 whether they're instructed to accept service of those claims. I'm not sure
21 whether we've had a response to that. I will, if I may, come back to you within
22 a few minutes to update you on the position.

23 My latest understanding is that we've asked the card scheme solicitors whether they
24 have instructions to accept service, but that is the latest update I have on that,
25 I'm afraid, sir.

26 **MR JUSTICE ROTH:** Well, if you can update us in the course of the day. If not,

1 they should be served, if you want them to proceed. Normally --

2 **MR COOK:** We've just lost Mr Rabinowitz, before we proceed.

3 **MR JUSTICE ROTH:** Ah. Let's wait. Yes, you are back with us?

4 **MR RABINOWITZ:** Apologies. I had an Internet problem.

5 **MR JUSTICE ROTH:** Ms Smith is going to come back to us in the course of the day
6 with clarity as to whether they've been served. And I said, if they haven't
7 been, then they should be, if they're going to proceed.

8 Normally the practice in the High Court has been to wait for pleadings to close before
9 making a transfer order. It seems to me in this case it might be desirable --
10 unless there's any objection to transfer, and I didn't get the impression there
11 was -- if they are transferred straight away after being issued.

12 They could be transferred on the normal basis that the High Court rules of pleading,
13 the CPR pleading rules, will continue to apply. But if you let me know about
14 service. And it will be important then for the defendants. They will be asked if
15 they agree to transfer. But as I understand it, from what I've read, transfer is
16 not going to be opposed.

17 That's right, isn't it, Mr Rabinowitz?

18 **MR RABINOWITZ:** Yes, sir, that looks likely. That's very likely to be the position.

19 **MR JUSTICE ROTH:** Yes. And the same for your clients, Mr Cook, is that right?

20 **MR COOK:** Sir, firstly I can confirm that we haven't received them yet. They haven't
21 been served. That is the present position. It's likely that we will agree that
22 they should be transferred and it's likely we will agree they should be
23 case-managed with the existing claims. But the Tribunal will obviously
24 understand that until we actually see them we will be reserving our position.
25 It's probably a very unnecessary reservation but --

26 **MR JUSTICE ROTH:** No, I'm sure that is entirely understandable.

1 We saw from what we've read, Ms Smith, there are 207 claimants, I think, in that
2 group. Do you know how many are Italian?

3 **MS SMITH:** A small number of them, but I'm afraid I don't know exactly how many
4 are Italian. As I understand it, it's only UK claimants and Italian claimants. So
5 the existing question as to applicable law will arise. And the claims, I can say
6 now, are exactly the same and the pleadings will be the same, save for
7 quantum details changed for specific claims.

8 **MR JUSTICE ROTH:** Yes. Well, I don't think it's right to make the order you have
9 sought yet. But from what you've heard Mr Rabinowitz and Mr Cook say, it's
10 unlikely to be opposed in due course, but they do want to see the claims first,
11 which I think is fair, and we do envisage that they will be case-managed with
12 these claims. And they can catch up, because if the claims are the same, the
13 defences will be the same, one expects.

14 But it takes one, then, to the preliminary issue on Italian law. First of all, Visa has
15 applied to amend its defence to raise the Italian law argument. And as
16 I understand it, that part of the application is not objected to. That's right, isn't
17 it?

18 Ms Smith is nodding. So we give permission to make that amendment. It ought to
19 be in the order by reference to the paragraphs, which I don't have in my head,
20 but permission to Visa to re-amend the defence to plead Italian law. Which
21 paragraph, please?

22 **MR COOK:** Paragraph 4.

23 **MR JUSTICE ROTH:** Thank you.

24 I think everyone is agreed that a preliminary issue on that makes sense and that it
25 should take no more than a day. It will be important to have these fourth
26 wave claims here so that they also are bound in to the Italian law

1 determination.

2 And once we get them, we would have thought that a day in late March or early April
3 after Easter, after the Easter break -- Easter is very early this year, at the
4 beginning of April -- should be possible. We're not going to fix the date now
5 but we will be writing to the parties with some suggestions.

6 I should say, on dates, we do try to accommodate the convenience of counsel but
7 we cannot guarantee that, particularly where we have so much in the way of
8 so many counsel involved. There are two leaders, both for Visa and for
9 Mastercard, and to get dates when four busy silks can all manage, can lead, if
10 we're going to accommodate everyone, to even a one-day hearing being
11 pushed off for six months. And that's just not acceptable.

12 So we'll do our best. But if only one of your QCs can attend -- happily Mr Cook is
13 now in that category -- we'll have to live with that.

14 So that's the Italian law issue. Am I right in thinking that it primarily goes to
15 limitation? Is that correct? That's the main thrust of the Italian law point?

16 **MS SMITH:** As I understand it, sir, that is, yes.

17 **MR JUSTICE ROTH:** Yes. I mean --

18 **MS SMITH:** There is a proposed timetable for the Italian law hearing set out in
19 a draft order attached to Visa's skeleton argument, which sets out various
20 dates for exchange of evidence, so far as there is any, and exchange of
21 skeleton arguments. That is annexed to Visa's skeleton. We need to indicate
22 whether we propose to file any evidence by 10 February and file any evidence
23 by 17th.

24 **MR JUSTICE ROTH:** Yes, I have paragraph 5.

25 **MS SMITH:** That's right. We're happy with those dates, save that we don't think we
26 need to indicate whether we're going to propose to file any evidence by the

1 10th and then file it by the 17th. We just should file it by the 17th if we're
2 going to --

3 **MR JUSTICE ROTH:** Do you know now, by any chance? That would help.

4 **MS SMITH:** We may do. It may simply be --

5 **MR JUSTICE ROTH:** Well, you may do. If you are not sure --

6 **MS SMITH:** I don't know.

7 **MR JUSTICE ROTH:** I think to indicate by the 10th is helpful, so let's leave that in.

8 But 5(d) I'm going to take out, following what I've just said, subject to counsel's
9 availability, so we can make the order in this -- this assumes that the other -- it
10 says the Italian claimants in the Westover proceedings, but I think we can
11 amend the order in due course to encompass the transferred proceedings
12 once they've been transferred.

13 I think, even if defences haven't been served in the transferred proceedings, we can
14 assume that you'll be raising the same defence to the Italian claimants in
15 those proceedings as you are here, and we won't get hung up on the
16 formalities so that we don't have to revise the timetable.

17 Yes. Thank you.

18 The next thing I wanted to raise is disclosure and general trial management. We've
19 considered everything that's been shared in the various statements.
20 However, there are, with the transferred actions, almost 700 separate
21 claimants.

22 There is no way that we are going to have a trial where each of those claims are
23 argued out with relevant disclosure from each claimant. It's simply
24 unmanageable and not practicable to deal with 700 claims, or indeed even
25 480 claims, that way. And you can only imagine what would be the situation.
26 It would be perfectly imaginable that we would have 7,000 claims, because

1 every sector of commerce and every supplier of goods and services in the
2 country is affected by MIFs. And the only practical and sensible way to take
3 forward these claims is by selecting sample claimants whose claims will be
4 heard first, in the hope that the determination of the issues in those claims will
5 sensibly enable the rest to settle.

6 Even if they don't settle, we imagine the parties can then make offers under Rule 45
7 of the CAT Rules, which is the equivalent of Part 36 of the CPR, which will
8 protect them, potentially, from costs. And if there have to be further trials, so
9 be it.

10 But the experience of these mass claims generally -- not only in this field but in the
11 courts we've had a number of areas, the Lloyds litigation, for example -- is that
12 determining a number of sample claims results in the remainder settling
13 sooner or later. And that is the course we're going to follow.

14 We think that the right number of sample claims that one can manage together,
15 given the complexity of the issues that we have to deal with, is eight. And
16 there are two stages to this exercise: first to determine the criteria according
17 to which the sample claimants are to be selected and, second, then having
18 determined the criteria, to choose the individual sample claimants according
19 to those criteria.

20 As to the first stage, we can't expect you reasonably to make submissions now. This
21 is coming new and fresh to you, and even with a 20 minute adjournment to
22 take instructions, this is something you are going to want to think about quite
23 carefully, no doubt with not only your clients but your economic advisers. And
24 we well recognise that taking instructions is a little more complicated when
25 you are not all physically in the same place.

26 So what we propose is to give you a short period of time, and we have in mind three

1 weeks, in which you can discuss with your clients and experts what you think
2 the criteria for selection should be. But for example, we note there are about
3 100 local authorities within, I think, the Dune Group action. So one local
4 authority does seem to us a sensible criterion, which will give guidance then
5 to the other 98 or whatever. Perhaps one from the pub/sandwich/restaurant
6 sector, for example. We're not deciding criteria now but I'm indicating the
7 lines on which we are thinking and we would expect you to pursue.

8 So we hope that there can be discussions between you in a sensible way when you
9 have formulated your initial views, so that some if not all the criteria can be
10 agreed. For example, you may all agree that there should be one local
11 authority.

12 And we would direct that within three weeks you make submissions in writing to
13 the Tribunal, with your proposed criteria agreed where possible and
14 explaining your position where you can't agree. We will then determine what
15 the criteria should be.

16 The next stage is then choosing the actual claimants to satisfy them, choosing the
17 eight. If there are, as it were, eight criteria for the eight categories, we
18 envisage that the claimants should propose five that meet each of those
19 categories, and they should be typical of the sector.

20 And then the defendants will select one out of those five. Again, if the defendants
21 can't agree between them, we will have to make the selection. But that is
22 after the criteria have been determined, so we're not going to set a timetable
23 for that yet, but we would like to move swiftly so that one can start to narrow
24 down the scope of what we're addressing.

25 We'll give you an opportunity to comment on that proposal after we take a short
26 break. But before that, I want to go on to say how we envisage disclosure

1 then might go forward for the sample claimants.

2 First of all we would emphasise something that seems from the skeletons and
3 indeed the witness statements not to have been fully taken into account. And
4 that is the CAT's Practice Direction on disclosure in competition claims and, in
5 particular, paragraph 2 of the Practice Direction. And that reflects the
6 Damages Directive which governs and continues to govern as it has been
7 incorporated for English law and as retained EU law, but in any event it's our
8 practice direction: the application must include a description of the evidence
9 that's sought that is as precise and as narrow as possible, and the Tribunal
10 will limit disclosure to that which is proportionate.

11 Now, what we think would be helpful here is, once the sample claimants have been
12 identified, that there should be a witness statement from the CFO or other
13 appropriate executive officer of each of the sample claimants, explaining how
14 they deal with the recovery of costs in their business, differentiating between
15 central costs and individual costs.

16 We anticipate the MIF might be part of central costs. We think it's only once the
17 defendants see that statement that they will be able to formulate with
18 appropriate specificity what actually they say are the relevant documents they
19 want to see. And obviously different businesses go about this in different
20 ways.

21 So that will be a requirement on the claimants. After that's happened, we then
22 envisage that we should proceed by way of Redfern schedules -- which in our
23 experience in the Tribunal in the Trucks litigation has been extremely
24 helpful -- such that the defendants will specify as regards disclosure from the
25 claimants what specific categories they want.

26 There can be a separate column for Visa and a separate column for Mastercard.

1 They may have different views. The claimants will then fill out their column as
2 to whether they agree and, if not, a counter-proposal, and then we can
3 consider this category by category. And we'll have to have a disclosure
4 hearing to go through it.

5 So that is the process by which we think disclosure should be taken forward. And it
6 follows, of course, that we're not going to deal with disclosure now, quite aside
7 from any point about what happens on summary judgment.

8 It's still going to be burdensome litigation for everyone. There's no question about
9 that. The experience of the first wave has illustrated that. But we think it's
10 then a manageable set of claims for the Tribunal to deal with.

11 The other thing that I probably can mention at the outset is the summary judgment
12 application, which I directed was not going to be heard now. We think that
13 should be listed for two days, with one in reserve. Some say three days,
14 some say two days are required, but let's cover for three days, in, we hope,
15 early April. And again, we'll attempt to accommodate counsel but we can't
16 guarantee it particularly if one of the silks of the defendants is not available.

17 Is there a need for directions for further evidence on the summary judgment
18 application?

19 **MR RABINOWITZ:** There might be, sir. You'll have seen that we say that the way
20 forward is to have a set of directions for the claimants to serve whatever
21 further evidence they want to rely upon first, before the defendants serve their
22 evidence.

23 The position the claimants seem to take is to say, no, they don't want to. And that's
24 fine. But what we are concerned about, as this Tribunal will appreciate,
25 particularly having regard to the timetable Ms Smith has set forward, is that
26 the claimants effectively sit on the sort of evidence that you would expect to

1 see in chief, waits to see what the defendants say, and then produces a great
2 deal of evidence in reply, whereas the appropriate course is for the claimants
3 to, in the first round, set out all the evidence on which it considers it will need
4 to rely, and then for the defendants to know the target they have to meet. And
5 then for the claimants to respond.

6 As I say, I can't force Ms Smith's clients to serve further evidence. But if they choose
7 not to, then in our respectful submission that should go with a health warning
8 to them, or at least the laying down of a marker, that they should not expect to
9 be able to serve, in their reply evidence, evidence of the sort that one might
10 have expected to be served with their evidence-in-chief, because one is well
11 used to this happening: someone says, oh, maybe we should have said this.

12 And again, Ms Smith has a timetable which suggests that her clients' evidence in
13 reply is going to come two weeks before a hearing.

14 Again, the possibilities of things going wrong if they haven't properly considered what
15 they needed to serve in chief at the appropriate time is obviously enormous.
16 And as I say, I can't force her to serve her evidence. It is up to her. But if she
17 does not, then in our respectful submission that should come with
18 a health warning.

19 **MR JUSTICE ROTH:** So Ms Smith, we are looking, I think, at paragraph 3 of the
20 Visa draft order.

21 **MS SMITH:** Yes, sir.

22 **MR JUSTICE ROTH:** Ignoring the date for the hearing, because I've said it will be
23 after Easter, so after 13 April, which is, I think, the first day of term, what do
24 you say -- first of all, have you in any event an intention to serve further
25 evidence?

26 **MS SMITH:** Sir, we have discussed the matter again following receipt of Visa's

1 skeleton argument, and we remain of the view that we don't at the moment
2 need to serve any further evidence.

3 Our evidence on which we rely is contained in Mr Humphries' witness statement that
4 was put in in support of the application for today's hearing before the agenda
5 was set. And that sets out the basis of our application for summary judgment.
6 So we don't think that 3(a) is necessary.

7 In light of that, we were going to propose that the dates in (b) and (c) be brought
8 back by 21 days. So the defendants to file their evidence on 24 February,
9 which was the date given for the claimants to file further evidence, and we file
10 our reply evidence on 10 March. And then the skeleton arguments to be
11 exchanged four working days before the date of the hearing, which, sir, you've
12 usefully indicated will be set down for after 13 April.

13 That should give, I hope, all the parties time to address the evidence and to put in
14 whatever evidence they feel they need to rely upon.

15 **MR JUSTICE ROTH:** Yes. I mean, you've had an indication from what you've seen
16 already of the sort of evidence that the defendants might be serving. Some of
17 it is argument, really, not evidence. But insofar as it really is evidence -- and
18 you've heard what Mr Rabinowitz has said and you take that on board, as you
19 will be simply responding to any new points that are being raised rather
20 than --

21 **MS SMITH:** Yes.

22 **MR JUSTICE ROTH:** So Mr Rabinowitz, what do you say about the dates that are
23 proposed? You are muted.

24 **MR RABINOWITZ:** Thank you. As always.

25 You will have seen that Mastercard has suggested that the defendants be allowed
26 six weeks to produce their evidence. And we do think there is a fair amount of

1 evidence to be produced. I do appreciate Ms Smith has taken on board my
2 point. But if the Tribunal will allow us six weeks -- which, well, 17 March
3 I think may be five weeks, and we would be content with 17 March as the date
4 by which we have to serve our evidence in response.

5 **MR JUSTICE ROTH:** Well, 17 March is what you proposed.

6 **MR RABINOWITZ:** Indeed.

7 **MR JUSTICE ROTH:** And that's on the basis that the claimants are filing further
8 evidence by 24 February. Now they're not. So presumably the date of
9 17 March can come forward.

10 **MR RABINOWITZ:** The 17 March date was put there, not because no work would
11 be done between now and then, but 17 March was put there so as to enable
12 us a period of time during which we could do the preliminary work, and then
13 see whatever evidence they were going to produce further to what they've
14 already done, and produce our evidence.

15 **MR JUSTICE ROTH:** Yes.

16 **MR RABINOWITZ:** It wasn't put there on the basis entirely that it would be
17 responsive. There is, we think, a fair amount to be got on with here. That's
18 why we have the 17 March date for ourselves.

19 **MR JUSTICE ROTH:** Yes. But you've had the application since the end of
20 December, I think, so we've had a month already. And no doubt you've been
21 attending to it in the meantime. Speaking for myself, and I haven't, obviously,
22 talked to my colleagues, but I don't see why you should have any longer than
23 3 March, which gives you two months, effectively, to deal with it.

24 **MR RABINOWITZ:** We'd be content with that, sir.

25 **MR JUSTICE ROTH:** Mr Cook, 3 March?

26 **MR COOK:** Sir, if I can just pick up in support of Mr Rabinowitz. One of the things,

1 as we flagged in Mr Cotter's statement, that we will be serving is an expert
2 economist report. And the claimants should be very much alive to the fact
3 that if they consider they want to put in expert economic evidence, now is the
4 time, as the applicant, for them to do so.

5 We share Mr Rabinowitz's concerns: that we put in economic evidence, the
6 claimants having not chosen to do so; they then respond in reply, and
7 effectively we end up with no opportunity to address their economic evidence.

8 Again, of course, we can't force them to serve evidence of any particular kind if they
9 don't wish to do so. But we do consider it is going to be problematic if we do
10 reach a situation where they put in evidence from an economist in reply and
11 we don't have the opportunity to deal with it.

12 In terms of the deadline for our evidence, assuming that Ms Smith maintains the
13 position that her clients are not going to put in further evidence, I was going to
14 suggest 10 March as being our preferred deadline.

15 Sir, if you consider 3 March is a more realistic one, then there's only so far I can
16 push back against that. But 10 March, sir, we'd say is realistic.

17 We are dealing with a lot of different areas here. We're dealing with Italy. We are
18 dealing with consumer cards. We are dealing with inter-regional. All of which
19 are essentially new areas. One can at least say in relation to the MIFs
20 whether it's before or after the IFR. Pre-IFR, it has obviously been at issue.
21 But the UK MIF nonetheless is a matter of which we are very familiar with,
22 the UK market for consumer cards.

23 The other three are essentially areas from scratch. We've done some work, of
24 course, because we've put in defences. But nonetheless those are distinct
25 and different areas that raise different issues. And we do consider that those
26 are complex points.

1 So I would invite you to say 10 March, sir. But as I said, there's only so far I can
2 push on that.

3 **MR JUSTICE ROTH:** Yes. I mean, speaking for myself, without, obviously, having
4 seen what evidence was put in, if there were to have been contested
5 economic evidence, I fail to see how the Tribunal could give summary
6 judgment in that area. So it may be a question of the relevance of what the
7 evidence goes to, rather than actually meeting it by disputing it with an
8 expert's report the other way. That is probably not going to help us at this
9 stage.

10 So I wouldn't be anticipating an expert's report in reply. But it's a matter for the
11 claimants.

12 Ms Smith, if it were to be 3 March, could you do your reply, then, by 31 March?

13 **MS SMITH:** Yes, sir. Subject to anyone jumping up, I think that -- sorry, 10 March
14 and then we have three --

15 **MR JUSTICE ROTH:** No, 3 March and then --

16 **MS SMITH:** Yes, sir, we are happy with that.

17 **MR JUSTICE ROTH:** Yes. Well, what I will do is, I think, sensibly, although it is a bit
18 early, we'll take our break now, and that will give you a chance to speak to
19 those instructing you.

20 I said quite a lot about samples, disclosure and so on, how we're going to proceed.

21 So if you want to give any initial reaction to that, because we would like to
22 direct that the exercise of working towards samples, namely that the criteria
23 should be put forward within three weeks, is something that we would like to
24 order now.

25 So perhaps you'll want a bit longer to talk to those instructing you, as it doesn't seem
26 to be something that has been considered, certainly on the basis of the

1 evidence we've seen.

2 If we say 20 minutes, would that be adequate? Or if you would like longer, we're
3 open to that.

4 **MS SMITH:** Half an hour I think might be useful, sir, just getting everyone together.

5 **MR JUSTICE ROTH:** I understand. We'll come back at 11.40. And that will enable
6 me to consult Mr Lomas and Mr Frazer just on the dates point, so that we can
7 firm up the direction on evidence for summary judgment.

8 So we'll rise metaphorically until 11.40.

9 **(11.11 am)**

10 **(A short break)**

11 **(11.47 am)**

12 **MR JUSTICE ROTH:** Can you hear me now? Apologies for that. It's not clear what
13 went wrong with the headset.

14 Ms Smith, I was about to ask you whether you've had an opportunity to take
15 instructions.

16 **MS SMITH:** Yes, sir, I have. Thank you very much. And thank you for the
17 suggested way forward.

18 We've discussed it and we think it's an extremely sensible way forward, and we're
19 happy with the Tribunal's proposal in that regard as regards the sampling
20 process, the disclosure witness statements and then the process of Redfern
21 schedules for disclosure for those sample claimants. So effectively we agree
22 with it all.

23 As to the process, we are happy with the proposed three weeks to seek to agree the
24 criteria for the eight categories, and then, failing agreement, to make written
25 submissions to the Tribunal.

26 We also very much take on board your comments earlier, sir, about tight case

1 management of these proceedings, and we are aware that disclosure
2 schedules can -- in my experience in other commercial litigation -- become
3 potentially drawn out and lead potentially to delay as the exchange can take
4 months between the parties.

5 So it may be a point for now or it may be a point for later in the process, but we do
6 think it would be helpful to have some indicative timetable and some control
7 over the timetables for not only the sampling process. Obviously there will
8 then be some timetable for the submission of the witness statements once the
9 sample claimants are identified. And then we would also just put down
10 a marker to say that it would be also helpful to have some timetabling and
11 some control over the process of the exchange of the Redfern schedules
12 as well.

13 But subject only to that, we are very happy and are able to agree with the Tribunal's
14 proposals.

15 **MR JUSTICE ROTH:** Thank you.

16 Mr Rabinowitz, have you had sufficient opportunity to take instructions?

17 **MR RABINOWITZ:** Yes, sir, I have, sufficient to make the following submissions.

18 We see the sense in having sampling, and we entirely take on board what
19 the Tribunal has said about this otherwise being unmanageable. We do have
20 concerns about the particular details that the Tribunal has identified, both in
21 terms of how many would be an ample sample size, about how many criteria
22 would satisfy and make this representative, and indeed about the selection
23 process whereby the claimants identify the five from which we have to
24 choose.

25 Now, I don't want to make detailed submissions about that, because a lot of this is
26 complicated and I think warrants very careful thought and very precise

1 submissions so that the Tribunal understands exactly what we have in mind.

2 So what we were proposing -- and I'm very happy to expand on this -- is that
3 the Tribunal allow a period of time for the parties to actually put in
4 submissions as to the matters that are identified. That's to say -- I can see
5 Ms Smith shaking her head, and I am not surprised by that.

6 As to what would make an ample sample size and how many criteria are likely to be
7 relevant, we are talking about very substantial numbers of parties. And I'm
8 not saying that that necessarily means that you are going to have to have a
9 bigger sample size. So I am not talking about a huge sample size. I am just
10 saying whether eight is the right amount.

11 But there may be many more categories. If you want this to be properly
12 representative, it does, in our submission, warrant some careful thought being
13 given to how that is best done and how one best identifies the criteria which
14 make this representative.

15 And certainly a proposal which allows the claimants simply to cherry-pick the five
16 that they like, and then we have to choose from those five, for all of the eight,
17 in our respectful submission may not work in the best possible way.

18 And I'm not saying that that necessarily won't work, but in our respectful submission
19 the Tribunal will be assisted, I think, by proper submissions as to how best to
20 go forward on this.

21 **MR JUSTICE ROTH:** Yes. Thank you.

22 **MS SMITH:** I hear what Mr Rabinowitz says. Could I just clarify one point, sir.

23 My understanding of your proposal as to the numbers was that there would be eight
24 categories identified pursuant to the criteria. And there would in due course
25 be one sample claimant for each of those eight categories. The claimants
26 would propose five claimants for each of those eight categories, and the

1 defendants would then choose one of the five, resulting in the eight sample
2 claimants.

3 Is that a correct understanding of the proposal?

4 **MR JUSTICE ROTH:** That was what I suggested, yes.

5 **MR RABINOWITZ:** And that is partly what we find at this stage a little difficult to
6 accept, that the claimants in a sense cherry-pick. I'm not trying to use that in
7 a pejorative way.

8 **MR JUSTICE ROTH:** We understand the point.

9 I should ask, Mr Cook, have you had sufficient opportunity to take instructions?

10 **MR COOK:** Sir, yes, I have. In terms of Mastercard's position, Mr Rabinowitz has
11 put it, as has become a pattern here, rather better than I suspect I was going
12 to be able to do so.

13 **MR RABINOWITZ:** (Inaudible) has to do with Nick(?).

14 **MR COOK:** Our concerns very much mirror those of Visa, for similar reasons. We
15 do think at this stage, sir, firstly we understand the sampling process is
16 essentially a sensible one, and we agree with it.

17 We are concerned with the number eight, which, with respect, sir, is one that, at the
18 moment at least, is not the product of analysis, certainly not the detailed
19 analysis the parties would seek to do.

20 We recognise the Tribunal, you know, is not going to welcome the idea of 20, 25 or
21 large numbers like that. But it may well be that when the parties delve into
22 this the right number is seven or nine or 10.

23 So at this stage we simply say that one should keep that number flexible to allow the
24 parties to actually carry out the analysis to see what is the right number,
25 recognising essentially a very strong indication that upper single digits is
26 where the Tribunal would like to come out on that, and we would have to have

1 some very good reasons to deviate from that. But seven or nine might well be
2 a better number when we come to carry out that analysis.

3 And also, sir -- and the word I had written down was "cherry-pick" as well -- we are
4 extremely concerned by a process whereby the claimants, who obviously
5 have an immense amount more detail and knowledge about their own
6 position, are the ones who essentially get to decide which claimants are going
7 to be part of this process.

8 And taking the local authority, for example, sir, as you said, there are roughly 100
9 local authorities here, and to allow the claimants to decide which five out of
10 that 100 we are allowed to choose from would be extremely problematic.

11 So we are concerned in particular that there are points in relation to surcharging, for
12 example. We understand a lot of the local authorities do surcharge. It might
13 be the case, for example, that the claimants would select ones who didn't
14 surcharge. Obviously the passing-on arguments are a lot easier in
15 circumstances where there is surcharging.

16 That information may well simply not be available to us at all at this stage. It would
17 be available to the claimants. And one can come up with similar kinds of
18 issues. They have a number of claimants who are insolvent. They would no
19 doubt wish to steer clear of all of those claimants, because one can well
20 imagine that they may have particular issues in producing disclosure and
21 witness evidence about what happened eight/nine/ten years ago, or even
22 a couple of years ago.

23 And again, that was something that, given that there are a number of claimants here
24 who are insolvent or who have been through some insolvency process, again
25 we would like potentially one of those claimants to be included. The claimants
26 would wish to steer clear from them dramatically.

1 So sir, we would agree with Mr Rabinowitz that the right way to deal with this is
2 that -- you suggested there should be a procedure which involves
3 submissions in three weeks' time. We agree with that, but that process of
4 submission should encompass both the number -- although recognising the
5 very clear indications that you've given, sir, and also what's been suggested in
6 terms of how to select that sample number.

7 And at that stage, one of the proposals we might propose at that stage, sir, would be
8 that the defendants pick the five and the claimants get to pick from that, and
9 ultimately the situation where the defendants are less informed and are less
10 likely to be in a position to cherry-pick in the most selective way, is more likely
11 to give a fair, representative sample rather than a cherry-picked
12 representative sample.

13 **MR JUSTICE ROTH:** Yes.

14 Thank you, all. Let me consult my colleagues. So we will rise and withdraw to our
15 separate teams for discussion.

16 **(11.58 am)**

17 **(A short break)**

18 **(12.01 pm)**

19
20 **RULING**

21 **MR JUSTICE ROTH:** Can I check you can hear me? Yes.

22 We found this most helpful. We see the force of what Mr Cook and Mr Rabinowitz
23 have said, and it doesn't involve anything being pre-determined.

24 So we'll direct that by 24 February all parties shall make written submissions
25 regarding the appropriate criteria for selection of a manageable sample
26 of claimants, and secondly their proposed size of the sample, and thirdly the

1 method of selection of individual claimants according to those criteria. We
2 shall then consider what's appropriate in all three respects.

3 And we note and re-emphasise what Mr Cook said, so that we have given a clear
4 steer, that it is not going to work to have 16 claimants going forward. The
5 number eight was based not on an analysis of the claimants but on
6 a consideration of what's practical and manageable in terms of the trial.

7 So yes, maybe it could be pushed to nine. But it cannot be doubled. And I think you
8 appreciate that. There is going to be something rough and ready, inevitably,
9 about the determination of the criteria.

10 If there is one message from the Supreme Court's judgment that is loud and clear, it
11 is that in these cases an element of estimation and a lack of precision is
12 inevitable.

13 Good. That deals with that aspect.

14 **MR RABINOWITZ:** Sir, can I just come back on a couple of points.

15 First, I think Ms Smith said something about disclosure. I would also like to say
16 something very briefly on what the Tribunal has said about disclosure.

17 **MR JUSTICE ROTH:** Yes.

18 **MR RABINOWITZ:** Secondly, I don't know whether the Tribunal was going to say
19 something about the summary judgment directions.

20 **MR JUSTICE ROTH:** Oh, yes, we've not dealt with that, have we? I'm so sorry.

21 **MR RABINOWITZ:** Perhaps before you do, just in terms of the timetable, I wonder
22 whether I might ask for a slightly longer period than three weeks for the
23 identification of relevant criteria and the like. Just because it is the sort of
24 thing where it's going to be necessary to consult with economists as to what
25 criteria are most likely to be useful to make this representative and the like,
26 that may take a little bit of time.

1 I'm not asking for months and months, but perhaps four weeks, certainly from our
2 point of view, would be better than three weeks, by a third.

3 **MR JUSTICE ROTH:** I think if it were to be -- I said the 24th, did I not? If it were to
4 be 2 March, I don't think that would have grave consequences for the total
5 timetable in the case.

6 Ms Smith, I think 2 March, do you agree to that?

7 **MS SMITH:** Yes, sir, that's fine.

8 **MR JUSTICE ROTH:** It might assist everyone, particularly if there is the opportunity
9 for discussion between you to try to narrow any dispute over the criteria,
10 which I would strongly encourage.

11 **MR RABINOWITZ:** Thank you, sir.

12 Would now be a good time to make my comments about disclosure or does
13 the Tribunal first want to say something about summary judgment?

14 **MR JUSTICE ROTH:** Let's just deal with the summary judgment directions, which
15 we parked, having heard you on that. The claimants are not seeking to file
16 further evidence.

17 So the defendants file their responsive evidence by 3 March, and the claimants file
18 any reply evidence by 31 March. Skeleton arguments, four working days
19 before the hearing. And the hearing on the first available date after 13 April.

20 No reference to counsel availability. Time estimate of three days.

21 **MR RABINOWITZ:** Sir, I wonder if I can come back on that.

22 **MR JUSTICE ROTH:** Yes.

23 **MR RABINOWITZ:** I would like to make comments on that.

24 **MR JUSTICE ROTH:** On the timetable?

25 **MR RABINOWITZ:** On the timetable.

26 **MR JUSTICE ROTH:** Yes. Would you do that now, please.

1 **MR RABINOWITZ:** Indeed.

2 What you have done is to adopt our paragraph 3, and what you've done is to take
3 out (a), for reasons the Tribunal has already given. You then brought forward
4 the defendants' evidence from the 17th to the 3rd. That's two weeks earlier.
5 But you've left the claimants' reply evidence where it was, effectively giving
6 them just under a month, I suppose, for evidence which is going to be, one
7 imagines, incredibly short since it's only going to be reply evidence.

8 We'd allowed two weeks, and effectively the consequence of moving us forward but
9 leaving theirs where it is, is that you've doubled the period of time that they're
10 allowed.

11 **MR JUSTICE ROTH:** But you are not doing it from a standing start, Mr Rabinowitz.
12 Now that you know there's no new evidence, you've had two months.

13 **MR RABINOWITZ:** Well, with respect, neither are they, because -- and they have
14 seen what we've said in Mr Stait's witness statement. And if Ms Smith is right
15 that this is simply going to be responsive evidence, and indeed as you,
16 Mr Chairman, noted, one imagines it's going to be very short.

17 **MR JUSTICE ROTH:** I didn't say it would be short. I said I'm not sure we would be
18 helped by an economist's report, which is a different thing. So what are you
19 suggesting should be for the claimants?

20 **MR RABINOWITZ:** Well, perhaps 24 March, or even 17 March. 24 March, in the
21 spirit of compromise.

22 **MR JUSTICE ROTH:** I mean, Mr Cook, do you want to add anything?

23 **MR COOK:** Sir, I hadn't planned to come back on this point, only to note I think the
24 claimants' proposal had been that they would have two weeks. So their
25 timetable had been that we should serve evidence four weeks before the
26 hearing and they would then serve evidence two weeks before the hearing.

1 So two weeks is actually what they'd suggested would be sufficient. Just to
2 note that, sir.

3 **MR JUSTICE ROTH:** Well, let's deal with this immediately.

4 I'll consult Mr Lomas and Mr Frazer.

5 **(12.08 pm)**

6 **(A short break)**

7 **(12.09 pm)**

8 **MR JUSTICE ROTH:** Thank you. We note what you say. It will be 31 March for the
9 evidence in response, for a reply.

10 We then wanted to turn to the exchange of costs information, which I think is item 14
11 on the agenda. This is the claimants, who are seeking exchange of costs
12 information. I think that is not objected to as regards incurred costs or past
13 costs, but it is as regards estimated future costs.

14 So Ms Smith, this is your application. That is, I think, the scope of the dispute.

15 There's also a question of how often. I'm not sure whether that is still in dispute. I've
16 seen reference to quarterly cost information. That doesn't seem to me to be
17 the main issue. There's an issue as to whether it's past or future as well.

18 **Application by MS SMITH**

19 **MS SMITH:** Sir, we see what the defendants have said about the burden imposed
20 on them by providing prospective costs information. We take that on board.

21 The purpose of this process was simply to make sure, in the interests of all parties,
22 that our ATE insurance remained adequate. We agree, in light of that, that
23 they don't have to provide prospective costs information. However, we would
24 ask that the information as to incurred costs be exchanged every
25 three months, to make sure that we are adequately covered during
26 that period.

1 We'll obviously hear submissions from the defendants on that, but we anticipate that
2 parties such as these with solicitors such as these should be in a position to
3 know what costs are being incurred, one would assume, monthly for their
4 clients.

5 We hope that the proposal that we get an update on past costs every three months
6 would be reasonable.

7 **MR JUSTICE ROTH:** Thank you. Let's reverse the order this time.

8 Mr Cook.

9 **Submissions by MR COOK**

10 **MR COOK:** I think that has slightly come out of the blue to me, the change my
11 learned friend is suggesting now. I'm just taking WhatsApp instructions in
12 relation to that. So if I could take a moment.

13 **MR JUSTICE ROTH:** Yes, we will give you time to do that.

14 Mr Rabinowitz, do you also want to take instructions?

15 **MR RABINOWITZ:** No, no, I think we saw this flagged in the skeleton.
16

17 **Submissions by MR RABINOWITZ**

18 **MR RABINOWITZ:** We are content, in principle, to provide information every
19 three months. But we do ask that we be allowed a period of time so that, for
20 example, quarter 1 we would provide in quarter 3 and so on. Just to give us
21 time to collect the information, collate it and put it forward. But subject to that
22 timing point, we are perfectly happy to try to assist the claimants in this way.

23 **MR JUSTICE ROTH:** Yes.

24 If Mr Cook takes instructions.

25 Ms Smith, will that be satisfactory?

26 **MS SMITH:** Yes, sir, we're happy with that.

1 **MR COOK:** Sir, I have taken instructions and we are comfortable with that position
2 as well, sir.

3

4 **Discussion re disclosure, numbers et cetera**

5 **MR JUSTICE ROTH:** Good. Thank you.

6 So information. I think there's a draft order somewhere but you may have to help me
7 in finding it. I think it's in the core bundle, is it, at tab 4? Yes.

8 It's paragraph 16 of the draft in the core bundle at tab 4. "They have incurred" and
9 delete "expect in the following six months".

10 "In the event of a costs order being made in their favour every three months as
11 regards the ..."

12 Well, we know what is wanted. The costs period, six months previously. Is that
13 right?

14 **MR RABINOWITZ:** We have that also at paragraph 12 of the Visa draft, which just
15 require --

16 **MR JUSTICE ROTH:** A little bit of tweaking, yes.

17 **MR RABINOWITZ:** -- a little bit of tweaking.

18 **MR JUSTICE ROTH:** Yes, well, we'll produce a draft. We'll send you it in draft, and
19 if there's something that's not satisfactory you can come back on it.

20 **MR RABINOWITZ:** Sir, before you go on to the next agenda item --

21 **MR JUSTICE ROTH:** Yes, the next point you wanted to come back on is, I know,
22 comments on disclosure.

23 **MR RABINOWITZ:** Indeed. It is clarification as much as anything else.

24 You indicated that the way you saw this going forward was that once we had
25 identified the representative sample claims it would be a witness statement
26 made by the chief financial officer providing certain information about how

1 they dealt with costs. And then as a next stage you identified the creation of
2 Redfern schedules.

3 The Tribunal will be aware that the costs -- I think the starting point for the Tribunal
4 was to refer to the damages regulation to say that this was a way of dealing
5 with this, certainly in terms of the passing on data.

6 Obviously the Tribunal will be conscious that that's not the only thing that may need
7 to be disclosed. There's the Article 101(3) material. Plus obviously the
8 benefits foregone, if I can put it that way, the countervailing benefits.

9 The statement from the CFO, as we understood it, what the Tribunal was suggesting
10 was only going to passing on, and so therefore in a sense only part of
11 the damages quantum part.

12 Now, that is all fine and makes sense, provided that the Redfern schedule that
13 the Tribunal had in mind wasn't limited in that way and would extend to all
14 categories of disclosure that the Tribunal considered was going to need to be
15 provided. Otherwise, one has a sort of funnelling down and missing out two
16 thirds of potentially disclosable material.

17 It was really just that point of clarification.

18 **MR JUSTICE ROTH:** Yes. We did not envisage the Redfern schedule only dealing
19 with pass-through.

20 The witness statement deals with pass-through, because of course that's information
21 you don't know. As regards the claimants' benefits, that is something you will
22 be fairly well aware of. So that's the reason.

23 So no, the Redfern schedules will cover all aspects of disclosure.

24 **MR RABINOWITZ:** Thank you.

25 **MR JUSTICE ROTH:** And indeed, insofar as disclosure is sought from you, if it's not
26 clearly identified, we may need an exact process the other way.

1 **MR RABINOWITZ:** Thank you.

2 **MR JUSTICE ROTH:** Good.

3 Well, that takes us, then, to the major outstanding issue, which is the application by
4 Visa to amend its defence to raise --

5 **MS SMITH:** Sir, apologies. Before we move on to that, just to close off absolutely
6 every other item that's on the agenda, you have not mentioned item 3, but
7 I think that we have made the concession. But we made it clear in our
8 skeleton that we're happy that this issue be delayed until after the summary
9 judgment on the Article 101(1) hearing has taken place and is determined. So
10 that deals with item 3.

11 There was just one point I should make clear on the fourth wave claimants. You
12 indicated, properly, that we should wait to make any order as to how the
13 fourth wave claimants' cases should be managed until after we had served
14 the particulars for those claimants on the defendants.

15 As I indicated, we'd asked the claimants to confirm that they were instructed to
16 accept service on behalf --

17 **MR JUSTICE ROTH:** The defendants.

18 **MS SMITH:** We requested that last Friday -- sorry, yes, the defendants. We haven't
19 yet received that confirmation. Obviously the quicker that confirmation is
20 given the quicker we can serve. I'm not sure what's holding that up.

21 But in any event, the other point, sir, is what needs to be served. We've followed
22 a practice so far of serving with our Particulars of Claim indicative quantum
23 schedules for each.

24 Those quantum schedules I'm instructed are being prepared at the moment, but the
25 deadline that we've given to the experts who are preparing those -- to the
26 accountants who are preparing those was based on the four-month period

1 that we are provided under the rules to serve particulars once the claims have
2 been lodged.

3 If the defendants would be happy to accept particulars with quantum schedules to
4 follow, we can obviously serve the particulars much more quickly, if that were
5 the case.

6 **MR JUSTICE ROTH:** Yes. I mean, technically we don't have jurisdiction over those
7 claims because they're in the High Court. I could switch to wearing my court
8 hat or wig or whatever if necessary. But I think this is a practical question.
9 I would have thought we could leave it sensibly for the defendants to consider
10 outside this hearing.

11 We will not look kindly on unnecessary formalistic delays that means that a hearing
12 of either the preliminary issue or the summary judgment application is put
13 back. And one way would be to require the defendants to undertake in the
14 High Court that they will accept the rulings on the summary judgment and
15 preliminary issue in these claims.

16 So there are various ways to deal with this. One is to say the quantum schedules
17 will follow. The other is to get such undertakings in the High Court.

18 I don't know if either Mr Rabinowitz or Mr Cook can offer any comfort, as it were, to
19 the claimants on this question?

20 **MR RABINOWITZ:** The only comfort I'd offer is, we've heard what you've said, and
21 obviously we will not delay things for the purposes of being in some way
22 (inaudible) anything. That's not what we are going to do.

23 **MR JUSTICE ROTH:** Yes, well, not on this point, anyway. So whether you need
24 quantum schedules before transfer -- I can see why you would want quantum
25 schedules, but I fail to see that it's going to make much difference when the
26 case is going to come here, as long as you know when you're going to get

1 them.

2 So you might consider that suggestion from the claimants, that they can serve
3 without quantum schedules --

4 **MR RABINOWITZ:** Yes.

5 **MR JUSTICE ROTH:** -- and with a period in which they follow.

6 Is there anything else, Ms Smith, you wanted to raise before we turn to the
7 amendment?

8 **MS SMITH:** No, sir. Thank you.

9 **MR JUSTICE ROTH:** Mr Cook, do you have anything else?

10 **MR COOK:** No, I don't, sir. I mean, just to rise to the criticism levelled at my
11 solicitors by Ms Smith in terms of delaying confirmation that we're willing to
12 accept service, it arises, I'm told, because there are 200 claimants and we
13 have to check that my solicitors are not conflicted in relation to all 200 of those
14 before we can properly accept service.

15 So that is simply a process of a number of claimants. And that's a process that's
16 undergoing. I'm told it's pretty close to being completed. Our position will be
17 confirmed as soon as that process is completed.

18 But like Mr Rabinowitz, we see little desire to hold up this case formalistically simply
19 so that we get quantum schedules. The important thing is that all the parties
20 are bound by the outcome of the Italian preliminary issue, or all the relevant
21 parties are bound by it.

22 **MR JUSTICE ROTH:** Yes. I am sure no one wants to have the Italian law argument
23 twice.

24

25 **Discussion re application to amend by Visa**

26 **MR JUSTICE ROTH:** Right. I think then we turn to the application by Visa to

1 amend. Before we get into that, we have considered, really, what is the most
2 sensible thing to do. There might be a certain procedural economy in dealing
3 with this together with a summary judgment application, because some of the
4 same points -- well, it's the same test, essentially, issue that arises.

5 On the other hand, we are all here. We've made very good progress so far. You are
6 prepared to deal with this. So there may be some sense in getting on with it.
7 And it may assist the argument on summary judgment if you know what's
8 happened with this amendment.

9 So our feeling is that it is better to hear it now, and that we should do so, unless
10 somebody wishes to say, "No, we think it should be put off." But if no one
11 jumps up on that invitation, and we think we've now got time, we hope to
12 conclude it tomorrow, with a day-and-a-half. So we'll proceed with it.

13 Before I start on that part of the agenda, Mr Cook, this is of course not an application
14 by or against your clients, you indicated, I think in the skeleton, you might
15 want to, as it were, listen and make brief observations if appropriate. So you
16 are welcome of course to stay, and if you want to be heard at some point we
17 can consider that. But it's I think primarily -- well, not primarily, it's entirely
18 Visa's application. So it's for Mr Rabinowitz to make it and for Ms Smith to
19 respond to it.

20 **MR RABINOWITZ:** Thank you very much.

21 I am not here to speak for Mr Cook. He is (inaudible) by someone else.

22 But you will have seen, just on Mr Cook's role here, that Mastercard have a very
23 similar allegation in their pleadings to the one which is involved with our
24 application. It will be for Mr Cook to decide how he wants to deal with this.
25 But I would say near identical arguments are going to arise in relation to
26 Mr Cook, and so you are going to be dealing with this one way or the other at

1 the summary judgment hearing.

2 Mr Cook may want to just sit and listen or he may feel that he doesn't want that to
3 happen and then he's locked into a position by the time of the summary
4 judgment application. And again, this is for Mr Cook to decide. I'm ready to
5 make my submissions.

6 **MR JUSTICE ROTH:** Yes. But you agree that we should sensibly proceed now?

7 **MR RABINOWITZ:** Well, with respect, I mean, the only reason I raise that is-- and
8 my point to Mr Cook is -- I'm very happy to proceed. There is a very
9 substantial overlap with the summary judgment application, but you are going
10 to have to deal with us at some point. My slight queasiness is about the
11 position of Mastercard, who are not a party to this. And the Tribunal are going
12 to hear submissions and form a view and it will be a settled view, whatever
13 one wants to think about it, about these issues, possibly without Mr Cook
14 having the opportunity to make submissions on it. And that's my queasiness.

15 **MR JUSTICE ROTH:** Yes.

16 **MR RABINOWITZ:** I'm absolutely ready to go ahead, but I am slightly concerned
17 about the position of Mastercard.

18 I hadn't realised just to what extent their position is analogous to ours until I'd read
19 Mr Cotter's statement paragraph -- I think it's 22 or 24 -- and looked back on
20 their pleadings, in paragraph 53(h) and I think paragraph 71, where it's not
21 an identical counterfactual, but it does raise almost identical points, about
22 whether Ms Smith is right to say that the essential basis is the same, whether
23 Ms Smith is right to say that as a matter of law there has been determination
24 as to the counterfactual, whatever the evidence. All of those points arise in
25 exactly the same way.

26 **MR JUSTICE ROTH:** Yes.

1 **MR COOK:** Sir, if I may.

2 **MR JUSTICE ROTH:** Yes.

3 **MR COOK:** It's right to say that there is some similarity. It won't surprise you to
4 know that I suggest that Mr Rabinowitz is perhaps over-egging the pudding to
5 say it's very similar and near-identical. And I say that because I do think that
6 there are somewhat different issues that arise.

7 But nonetheless it is right to say that we have a bilaterals counterfactual, and
8 Mr Rabinowitz also has a bilaterals counterfactual, albeit with certain different
9 features which may or may not be of legal significance.

10 And certainly from Mastercard's perspective we saw a considerable economy to
11 having the Tribunal hear a single set of submissions once on all the issues
12 arising from alternative counterfactuals on these points on a single occasion,
13 rather than essentially hearing half the set of submissions, Visa's submissions
14 now, not hearing my submissions in relation to -- because I haven't put in
15 evidence and I would put in economic evidence to support my argument on
16 my bilaterals in due course -- not hearing those submissions on our second
17 set of bilaterals counterfactual, and then the Tribunal making a ruling at this
18 stage, and me essentially coming back and saying, "This is my different
19 counterfactual; these are the points I say are different", or, "In the light of my
20 economic evidence I now put forward, with respect, the Tribunal got it slightly
21 wrong last time", obviously I wouldn't personally mind about that, other than
22 the fact that I would be saying you should now adopt a slightly different
23 position in the light of Mastercard's somewhat different but, you know, related
24 counterfactual.

25 So sir, certainly from our perspective we did see a considerable advantage in having
26 this all heard on a single occasion and in circumstances in which there is

1 going to be that second hearing.

2 If this hearing could potentially obviate it, one would see the point in getting on with
3 it. But there are certainly going to be a number of other issues: Italy,
4 commercial cards and inter-regional happening in any event of that. And our
5 bilaterals will happen in any event, with respect, sir, whatever you say in
6 relation to this. We will put in evidence and be saying the position is
7 somewhat different.

8 So sir, on that basis we do say the sensible thing is to have one hearing on these
9 issues, rather than running the risk of, to some extent -- you know, the issue
10 we had with Sainsbury's and AAM previously, of conflicting judgments by
11 different tribunals or a situation where you end up with potentially slightly
12 conflicting judgments by the same tribunal, just simply because you hear
13 different submissions. And more importantly, sir, we are going to be putting
14 forward different evidence. And our application is not -- or the application we
15 are a party to is not before the Tribunal today, so we hadn't filed that
16 economic evidence. You know, we will be doing so, sir.

17 **MR JUSTICE ROTH:** Yes. Well, you don't need an application. You'll be resisting
18 to some degree.

19 **MR COOK:** Indeed.

20 **MR JUSTICE ROTH:** Yes.

21 Ms Smith, what do you say about that? I should say, before inviting you to address
22 us, we have been a bit troubled by this, the three of us, in considering really
23 what's the most sensible way to proceed.

24 And of course, if we did put it off we would avoid tomorrow's hearing. So there is
25 some efficiency saving as well.

26 Yes, Ms Smith.

1 **MS SMITH:** Sir, if I could ask you to look at what Mastercard's case actually is.
2 Perhaps if I could ask you to have that in front of you, if I could. It's at
3 core bundle, tab 5, Mr Cotter's second witness statement.

4 **MR JUSTICE ROTH:** Yes.

5 **MS SMITH:** It is important, I think, that you see what that is. It's paragraph 24 on
6 page 102 of the core bundle. Mr Cotter addresses it in subparagraphs 24.1 to
7 24.3. And what was pleaded -- and I won't take you to the pleading, but
8 obviously I'll refer to that in due course -- is that the Court of Appeal and
9 Supreme Court judgments do not determine that the MIFs, the post IFR UK
10 and Irish domestic and intra-EEA MIFs, restricted competition after the IFR
11 came into force, because the basis of the pleading in the pleading
12 amendment is because the introduction of the interchange fee caps imposed
13 by the IFR led to a significant change in the economic context.

14 So it's not characterised as a new or different counterfactual, although obviously I
15 accept that it bears some similarities to Visa's proposed new counterfactual,
16 although Mastercard's argument is that the economic context would be that
17 Mastercard would not set any default settlement rules and instead leave
18 issuers and acquirers to negotiate bilateral agreements. And the result would
19 have been that interchange fees would have been agreed bilaterally.

20 So there are similarities, although it's not presented as a counterfactual.

21 We do say, however, that there is sense and efficiency in the Tribunal's dealing with
22 Visa's proposed amendments now. We say their proposed amendments are
23 unarguable. We hope that that can be considered by the Tribunal by the end
24 of tomorrow. Our points are relatively short.

25 We say that if Visa's proposed counterfactual is unarguable, then we should know
26 that and that they should know that now, and a decision should be made by

1 the Tribunal now. That will lead to efficiencies. It will not then have to be
2 covered in evidence or the summary judgment application.

3 As to whether there is a risk of different judgments by different tribunals, obviously
4 the Tribunal's judgment on Visa's application to amend will allow the parties
5 then to consider whether Mastercard's pleadings should continue in the form
6 that they currently are, or whether the basis of the tribunal's decision as to
7 whether or not Visa's application should be able to proceed -- Mastercard's
8 pleadings also should or should not be considered at the summary judgment
9 stage.

10 So there is not a risk of conflicting judgments by different tribunals. This Tribunal will
11 be considering the issues and then will subsequently be able to consider the
12 best way to deal with these issues.

13 It may very well be that if, as we say, Visa's proposed counterfactual is unarguable
14 and should be stopped now, then it will be necessary to make an application
15 similarly to strike out Mastercard's pleadings in this regard, insofar as if it is
16 the same as Visa's counterfactual. Mr Cook was very careful to say it's not
17 exactly the same.

18 But we say that this is not a reason not to consider Visa's application to amend
19 today, because it will be efficient and sensible to address it today. We say it
20 is unarguable. That point can be dealt with in the hearing tomorrow. We
21 should be finished by tomorrow. And we say that therefore the Tribunal
22 should consider the issue now and decide whether or not it is arguable now.

23 **MR JUSTICE ROTH:** Yes. I think we want to consider that, so we shall --

24 **MR COOK:** If I could come back on one point, sir, just to make clear that we do
25 plead it as being the relevant alternative counterfactual. Mr Cotter described
26 it as such and it is clear in the pleadings. He describes it as such at

1 paragraph 24.3, just leaving --

2 **MR JUSTICE ROTH:** I see that.

3 **MR COOK:** Yes, pleaded by Mastercard as the relevant counterfactual. So we do
4 plead this as the relevant counterfactual. It has somewhat different features
5 from Visa's but they are at one level both bilaterals counterfactuals.

6 **MR JUSTICE ROTH:** Yes. I see that. Thank you. We will rise briefly.

7 **(12.35 pm)**

8 **(A short break)**

9 **(12.41 pm)**

10 **RULING**

11 **MR JUSTICE ROTH:** As you may have realised, we have a slight delay, from
12 coming onto Teams and the live-stream coming on, which is why we have this
13 short wait whenever we resume.

14 **(Pause).**

15 As I mentioned, this is something that had troubled us before the start of the hearing
16 and we are grateful for the brief but clear submissions we have had from all
17 three leading counsel.

18 We can see that it is very attractive to go ahead when everyone is here and Visa and
19 the claimants are prepared. But we do feel there is a strong overlap with
20 some of the issues that we would have to confront on summary judgment, not
21 of course on the relevance of the New Zealand evidence and the specific
22 counterfactuals as formulated, but more on the question of what is the effect
23 of the Supreme Court judgment and what is precluded for the card suppliers
24 and card schemes to put forward. We are going to have to face that on the
25 summary judgment with argument from Mastercard, and there is a risk,
26 therefore, that there could be some inconsistency in the outcome, and that

1 would be deeply unfortunate, to say the least, on actions of this significance.

2 We do not see that there would be any real gain in dealing with this bit of the
3 proposed Visa amendment now over a hearing on summary judgment
4 application in April or early May -- probably April -- if they are dealt with
5 together, and we do not think that dealing with them together will risk
6 a problem over a three-day estimate. We are confident that they can be
7 accommodated within the three days.

8 So having reflected on it and listened to what is said, we are satisfied that the better
9 course is to adjourn the application to be heard with the claimants' summary
10 judgment application. So we will not hear it now, which means we do not
11 have to sit tomorrow.

12 We will in the course of I hope this afternoon be sending suggested dates, both for
13 the preliminary issue and for the summary judgment application hearing,
14 together with the Visa re-amendment application as regards the
15 counterfactuals to all three representatives, so that those can be fixed
16 fairly quickly.

17 Of course we have the written arguments on the amendment and we do not need
18 any further written arguments on that for the summary judgment hearing.

19 **MR RABINOWITZ:** Sir, I suppose there are two ways of dealing with the
20 amendment application: one is to just adjourn it, and the other is to say the
21 amendment is allowed but without prejudice to any application the claimants
22 intend to make in relation to the summary judgment application.

23 **MR JUSTICE ROTH:** I think we'll adjourn it to be heard with the summary judgment
24 application. I don't think it makes any difference.

25 **MR RABINOWITZ:** Any difference.

26 **MR JUSTICE ROTH:** But we will say, we've allowed the amendment on Italian law,

1 and I think, unless Ms Smith is deeply concerned by this, I would say that you
2 don't need to re-serve your pleading with the Italian law amendment in and
3 this bit out, only then to potentially re-serve it yet again if we'd allowed your
4 application. That starts producing a rather cumbersome process of pleading.

5 We know that the Italian law is in. So Ms Smith, I don't think that causes any
6 problems.

7 **MS SMITH:** No, I cannot see that. But my Lord, I am grateful for the indication that
8 you will simply adjourn the application because we do oppose the amendment
9 as a matter of principle.

10 **MR JUSTICE ROTH:** Yes. We understand that.

11 **MS SMITH:** And amend to put in a counterfactual which effectively has the same
12 effect and works in the same way as the current default rule. We will make
13 that argument anyway.

14 **MR JUSTICE ROTH:** Yes, you will make that argument in due course.

15 So then I think all that remains is, we would think the appropriate order -- and it's
16 been a very constructive CMC for taking these cases forward -- is that it
17 should be costs in the case, it seems to us. Unless anyone is seeking
18 a different order. No.

19 So costs in the case. We will draw up a draft order. It will be sent to those
20 instructing you. And if there are any comments on it we will take them on
21 board and then the order will be drawn up.

22 Thank you all very much.

23 **MR RABINOWITZ:** Thank you.

24 **(12.47 pm)**

25 **(The hearing concluded)**

26