IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1306-1325/5/7/19
1349-1350/5/7/20
1369/5/7/20
1373-1374/5/7/20
1376/5/7/20
1383-1384/5/7/21
1385-1400/5/7/21
1406/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Hybrid Hearing)

Wednesday 2 March 2022

Before:
The Honourable Mr Justice Marcus Smith
Ben Tidswell
Andrew Young QC

BETWEEN:

H & H (Retail) Limited & Others v Mastercard Inc & Others
Coral Racing Limited & Others v Mastercard Incorporated & Others
Motor Fuel Limited & Others v Mastercard Incorporated & Others
Greene King Brewing and Retailing Limited & Others v Mastercard Incorporated & Others
Dune Group Limited & Others v Mastercard Incorporated & Others
Adventure Forest Limited & Others v Mastercard Incorporated & Others
(together, the "**Group 1 Claimants**")

Co-operative Group Food Limited & Others v Visa Europe Limited & Others
Moto Hospitality Limited v Visa Europe Limited & Others
Traveljigsaw Limited v Visa Europe Limited & Others
Nando's Chickenland Limited v Visa Europe Limited & Others
French Connection (London) Limited & Others v Visa Europe Limited & Others
H & H (Retail) Limited & Others v Visa Europe Limited & Others
Greene King Brewing and Retailing Limited & Others v Visa Europe Limited & Others
Hobbs Limited & Another v Visa Europe Limited & Others
JD Weatherspoon PLC v Visa Europe Limited & Others
Odeon Cinemas Limited & Others v Visa Europe Limited & Others
Coral Racing Limited & Others v Visa Europe Limited & Others
Motor Fuel Limited & Others v Visa Europe Limited & Others
Dune Shoes Ireland Limited & Others v Visa Europe Limited & Others
Adventure Forest Limited & Others v Visa Europe Limited & Others
(together, the "**Group 2 Claimants**")

Westover Group Limited & Others v Mastercard Inc. & Others
Westover Group Limited & Others v Visa Europe Limited & Others

(together, the "**Group 3 Claimants**")

Richer Sounds Plc v Mastercard Incorporated and Others
(the "**Group 4 Claimant**")

Furniture Village Limited v Mastercard Incorporated and Others
Caprice Holdings Limited and Others v Mastercard Incorporated and Others
Pendragon PLC and Others v Mastercard Incorporated and Others
J L and Company Limited & Others v Mastercard Incorporated & Others
(together, the "**Group 5 Claimants**")

Alan Howard (Stockport) Limited & Others v Mastercard Incorporated & Others
Alan Howard (Stockport) Limited & Others v Visa Europe Limited & Others
(together, the "**Group 6 Claimants")**

Soho House UK Limited & Others v Visa Europe Limited & Others
Pendragon PLC & Others v Visa Europe Limited & Others
Fattal Leonardo Royal Berlin Operation GmbH & Co. KG & Others v Visa Europe Limited & Others
MY Realisations Limited and FB Realisations 2017 Limited v Visa Europe Limited & Others
Furniture Village Limited v Visa Europe Limited & Others
Caprice Holdings Limited & Others v Visa Europe Limited & Others
GrandVision N.V. & Others v Visa Europe Limited & Others
Euromaster France & Others v Visa Europe Limited & Others
Firmdale Hotels plc & Others v Visa Europe Limited & Others
Globalgrange Ltd & Others v Visa Europe Limited & Others
Shiva Hotels Heathrow Limited & Others v Visa Europe Limited & Others
New World Hospitality UK Limited and My Bright Limited v Visa Europe Limited & Others
Grove F&B Limited & Others v Visa Europe Limited & Others
Baglioni (UK) Limited v Visa Europe Limited & Others
Edwardian Ltd & Others v Visa Europe Limited & Others
Melton House Investments Limited & Others v Visa Europe Limited & Others
(together, the "**Group 7 Claimants**")

A P P E A R AN C E S

Kassie Smith QC and Fiona Banks (On behalf of the Claimants in Groups 1-3 and 5-7)
Christopher Brown (On behalf of the Group 4 Claimant)
Brian Kennelly QC, Daniel Piccinin and Isabel Buchanan (On behalf of Visa)
Matthew Cook QC and Hugo Leith (On behalf of Mastercard)

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

Wednesday, 2nd March 2022

(10.30 am)

Housekeeping points raised by MR COOK

THE PRESIDENT: Good morning.

MR COOK: Before Ms Smith stands up, just a couple of housekeeping points from me, sir. Firstly, I referred yesterday to the Payment Systems Regulator's report of 2021. That has gone into the bundle and that is at tab 17 of the authorities.

THE PRESIDENT: I looked at that last night.

MR COOK: That's very helpful, sir. The second point is to say that I think the look on Mr Brown's face gave it away yesterday that while we have pleaded the point about passing on from acquirers to merchants in relation to all the other claimant groups, our defence in relation to Richer Sounds does not expressly at the moment plead that point. We will go away and check. It may simply be a timing point of when we pleaded that defence. I think it is the first in time in these cases and it may be before we had the idea. Unless there was any specific reason for that, we will produce an amendment and invite Mr Brown's clients to agree to it and, if necessary, take it from there thereafter, sir.

The third one I am afraid is I have been sick overnight with probably Norovirus. It is not COVID, but I was throwing up overnight. At the moment, at least, I seem to be up and around without any difficulties. Should there be a recurrence, I may have to leave the hearing very rapidly to avoid messing up the Tribunal's rather delightful new courtrooms. Simply so you are aware if I leave, that is nothing to do with anything my learned friend is saying and you will be in good hands with Mr Leith.

THE PRESIDENT: That's very helpful, Mr Cook. In fact, that cedes helpfully into a point that I wanted to make. For reasons that I am not going to go into, because they are personal, I as a result of events last night would very much like this hearing to be kept to an hour or so, because I would want to be on a train to Cambridge at about lunchtime or before. So to the extent people can cut their cloth, I would be very grateful, but I don't want anyone to feel that they are getting short shrift from the Tribunal as a result. So it's an indication. Ms Smith.

Reply by MS SMITH

MS SMITH: Sir, thank you. I will try to keep my reply as brief as possible in light of what you have just said. First of all, I do need to make the point where I started yesterday and where I will end up today is that the purpose of the sampling exercise envisioned by the previous Tribunal, as you know, was to try to keep this process practical and manageable.

In response to submissions from Mr Kennelly yesterday on costs you stressed that your proposed common issues process was intended to be more streamlined and less costly than the previous process. We absolutely adopt that. We stress that your new process should not become an opportunity for the card

schemes to reopen everything or to seek to lead the Tribunal down a path which ends up making the proceedings more drawn out, more inefficient and more costly.

In that regard, yesterday Mr Kennelly suggested that the stay should be lifted on our claims under the anti-steering rules in article 102. We don't suggest the stay should be lifted and we don't think that it is a sensible or efficient course for the Tribunal to take. The claims are made in parallel to the claims we make under article 101 and the default MIF rule. They are alternative routes to the same loss and damage. If we succeed under 101, we say there is very likely to be no need for those claims. That's the reason why they were previously stayed and why they should continue to be stayed. There is no benefit at all on doing any further work on those matters before the October/November CMC that we have proposed.

That leads me to that topic. We maintain the suggestion we made yesterday that the next step in these proceedings should be the preparation of lists of issues by the lawyers, taking the list at paragraph 3 of Visa's skeleton as a starting point. The purpose of this list, this initial lawyers' list, would be to flesh out the issues and provide a framework for the Tribunal's subsequent consideration of how to address those issues.

Initially it can be used we suggest at the CMC, which we have suggested could usefully take place in October or November, which would hopefully be after we have received the Court of Appeal's judgment on the summary judgment applications.

Yesterday Mr Cook suggested that these lawyers' lists could take a form of a Commercial Court type list of issues. We think that's a sensible proposal and we agree with it.

Yesterday we suggested the Tribunal should order that we prepare the first draft of the list of issues within 14 days, but given that both defendants have indicated they would want to refine and develop the list beyond the summary of high level points set out in paragraph 3 of Visa's skeleton, and also given the fact that both parties have already litigated one set of Commercial Court MIF proceedings, presumably produced lists of issues in those proceedings, we now suggest that the order be reversed, that the Tribunal order the defendants produce refined lists of issues within 14 days and that the claimants can produce their suggested amendments to that list within a further 14 days.

We then also suggested that the Tribunal can subsequently deal with any disputes and order a final list of that initial list of issues. If the Tribunal is agreeable, we think that can be done and should be done on the papers without a further hearing.

As a next step yesterday, sir, you suggested that perhaps we could shortcut the process by just saying let's use the paragraph 3 as a list of issues and the next step should be to produce a refined list with input from the economists on evidence. We submit that it would be preferable and hopefully more efficient to produce the lawyers list we have suggested, the Commercial Court list type of issues first in order to frame the issues.

In October/November we should hopefully have a judgment from the Court of Appeal and we will know which article 101 issues survive that judgment and need to be tried by this Tribunal and which don't. It may be we hope, obviously from our side of the bar, that summary judgment will be given on a significant chunk of the article 101(1) issues, and if that's the case, the experts will never have to engage with them at all. So significant costs could potentially be

saved by the experts not engaging with those issues for the purposes of the more detailed granular list of issues on which the experts make input.

We submitted yesterday, however, that work can and should be done before the October/November CMC on issues which will need to be determined by this Tribunal regardless of the Court of Appeal's judgment.

Yesterday we submitted that the most productive and efficient way of proceeding in this regard would be for the Tribunal to order that following the settlement of the Commercial Court style list of issues, there should be sequential exchange or sequential production of expert reports, not exchange, sequential production of expert reports, first from the defendants and then from the claimants, and that those reports could set out the granular issues which the experts say need to be determined by the Tribunal and the data and material that the experts say they will need to consider in order to determine those issues.

Those reports we say should be produced before the CMC in October and November, and where there are any disputes on them, they can be resolved by the Tribunal at that hearing. We should also by then be in a position to know what article 101(1) issues might need to be added to the lists.

We maintain that proposal of the exchange of expert reports. Yesterday we suggested it be limited to issues arising under 101(3). However, we now suggest it should cover also quantum and pass-on. We take on board Mr Cook's submission yesterday to the effect, I think he said he is comfortable with the process of producing a high level Commercial Court type list of issues to be followed by the identification by the experts of the granular issues, but he's concerned that the latter, the granular list of issues, should not be limited to 101(3), because he said there may be an overlap with issues arising under

quantum and pass-on.

We take that on board and we suggest, therefore, that the expert reports be produced sequentially with a view to identifying these granular issues should cover both 101(3) and quantum and pass-on issues. We say again that can and should be done by the date of an October/November CMC. Both card schemes have already litigated those issues in the first wave of proceedings, if not all the way to trial -- cases have been settled -- at least far enough along we say for their experts to already -- or should already have a pretty good idea of what they require.

So far we have proposed that the Tribunal can and should make the following orders today. Those orders are as follows just to set them out clearly.

We say that a further CMC should be fixed for October or November. We think that's likely to need two days.

We think that the Tribunal should order that the defendants produce a Commercial Court stye list of issues within 14 days of today's date. The claimants respond with an amended list within 14 days of that date and then the Tribunal resolve any disputes on the papers and order a final list of issues. That takes us I think to about mid-April.

We then suggest that the defendants have, say, four weeks to produce an expert report on the granular issues to be determined as regards article 101(3) and quantum pass-on and the data and material that they require.

The claimants then, say, have a further four weeks to produce expert reports in response. Then there should be provision for the experts to meet and seek to agree their list of granular issues. Also, after the exchange of expert reports we suggest the parties should liaise to seek to agree what information that the experts have requested they are willing and able to provide.

We suggest that 30 days before the CMC is listed the parties should serve an agreed list insofar as they can agree, an agreed list of disclosure or information and make any applications for categories of disclosure that might be in dispute. When I say disclosure, I mean within that data information seeking by way of interrogatories along the lines you indicated, sir.

That way we get to the CMC in October and November with a clear idea of what's in dispute and where the disputes lie around the scope of disclosure and the issues. If possible, we should take steps, in our submission, to avoid having dead time between now and the next CMC and avoid having dead time between the exchange of the expert reports and the CMC, and in our submission to the extent possible the autumn CMC should be about resolving any disputes about the scope of disclosure in light of the expert reports, not to set a timetable to run into the next year, into 2023 to resolve any such disputes.

Sir, those are our proposals. I think they are pretty much on a line with what we suggested yesterday, but with some nuances and changes in light of what the card schemes said.

I have two further points on which I wish to make submissions which I submit can and should be addressed by the Tribunal today.

The first goes to the evidence required to prove exemption under 101(3). It is I think accepted by the card schemes -- it certainly seems to be what's on the face of their skeletons -- that the test set by the appellate courts for whether MIFs should be exempted under 101(3) is whether they generate benefits for merchants which outweigh the harm they cause. The Supreme Court called this the ‘fair share’ test.

In our submission, proving just that a MIF is set at the merchant indifference level, a

MIT MIF, does not answer that question alone. In fact, a MIT MIF does not necessarily generate any benefits for merchants. I will not develop that point, but that is the point we will be taking, but in any event I think it is also agreed from the submissions that were made yesterday that whether or not a MIF is set at the merchant indifference level is just one element to be considered by the Tribunal under 101(3). So, however, bearing all that in mind, Visa's expert, Mr Holt, has already done, as you have seen, a substantial amount of work and, in fact, produced two expert reports on what he says he needs to provide an acceptable estimate of the MIT MIF.

He said, and Mr Kennelly stressed yesterday that that was only done in the context of the sampling exercise. Fine, but he has done that work. He has said this is what, within those confines, I say to the Tribunal is necessary in order to prove the MIT MIF and he said I need responses to our exercise from 37 sample claimants.

Now if I may ask you just to compare what he asked for in those reports with what was available to Visa in the previous trial where they did argue MIT MIF. If I could ask you to look at Visa's skeleton at paragraph 16 in Visa's skeleton. At paragraph 16, Mr Kennelly refers to the approach that Visa took in the *Sainsbury's v Visa* proceedings in the High Court in producing a MIT MIF. They say in those proceedings they relied on evidence from a range of different sources. The Commission survey which we say provides a much better overview of the market as a whole, RFI responses from 16 different claimants that were in front of the proceedings in the High Court, and the BDRC survey that Visa carried out, which again we say provides more of a broad overview.

Now, in light of that we certainly -- that we submit was seen by Visa at that stage as

being the evidence that they wanted to put in front of the High Court on the MIT MIF. We certainly in light of that, and that's a lot less than what they are asking now, we certainly in light of that resist the suggestion made by Mr Kennelly yesterday that Mr Holt should now be allowed to extend the exercise even further that he wants to carry out, extend the exercise beyond the 37 sample claimants, I think was the suggestion that Mr Kennelly was making yesterday. Effectively now all bets are off. We want more. We certainly resist that suggestion.

On the contrary, we maintain the position that was set out in our skeleton argument for yesterday's hearing that a sample of ten claimants responding to Visa's RFI is adequate for the purposes of producing a MIT MIF, particularly when any sample is unlikely to provide an overview of the market as a whole and the publicly available sources of data are likely to provide a better picture of the economy as a whole, but we maintain the position that a sample of ten is adequate, and extending the onerous exercise of data collection and disaggregation that's required by what Visa have perhaps rather hopefully called an RFI but really is a data collection exercise, would be wholly disproportionate and is not necessary, particularly when you compare it with what was available to the experts in the Visa interchange proceedings in front of the High Court set out in paragraph 16.

THE PRESIDENT: Ms Smith, just so that you have an indication as to where our direction of thinking is going, we are absolutely not going to sanction without proper argument a wider exercise than is necessary. What that exercise is we really don't want to decide today. So, you absolutely have -- going forward we are envisaging a process where precisely these points can be made, because I want to be clear we are going to exercise -- we ordinarily exercise

pretty rigorous control over the evidence we hear, but that rigour is going to be rather more extensive in this case.

So, your points are entirely well made and we will want to hear from you in due course. If that's the reason you put the marker down, then it is well made. If, on the other hand, you are inviting us today to say the evidence needs to be shaped in a particular way and we should on this issue order the sampling that you suggest, then we are very much not with you, simply because we don't want to make orders in relation to these extraordinarily difficult to manage proceedings until we have got a very clear idea of the shape of the proceedings. That is the sort of order we are going to be making today, but, to be clear, what we envisage doing is going to have a point in time at which each side will say what they want for the resolution of a particular issue, but I want to be absolutely clear what each side says they want does not mean they are going to get it.

So, if that's enough comfort, then that's absolutely fine, but if you want to go further and argue that we today lay something down, then I think you have quite a lot of hard work to do.

MS SMITH: Thank you. Can I take a moment?

THE PRESIDENT: Of course.

MS SMITH: We hear what you say, sir. If I can just move on from that point then and if I could very briefly address my second issue.

THE PRESIDENT: Of course.

MS SMITH: Which is the approach to quantum. It appears now that all parties agree, although there may be some generic issues regarding quantum pass-on, it is also inevitable that there will also be claimant specific issues.

As regards generic issues I would just like to take back up one point made by

Mr Cook yesterday. He said yesterday that the December PSR, the December 2021 Payment Services Regulator Report showed, and he will argue, that there was little or no passing on of the MIF --

THE PRESIDENT: We looked at that and it doesn't quite say that.

MS SMITH: It doesn't quite say that.

THE PRESIDENT: We can see the area for debate there.

Can I give you another indication of our direction of thought on pass-on in particular? Your submissions yesterday I think served the very helpful purpose of making clear to us that the issue is an extraordinarily difficult one and we have in mind a form of process where special treatment is allocated to pass-on with a view to resolving pretty early on not only the legal issues that you say you need resolution on but also the practical issues which at least we believe in how this sort of issue is going to be resolved.

So, we entirely understand the difficulties of pass-on. We think you are right that there needs to be some kind of articulation of just what it is that we are dealing with before one goes into the market and gets the evidence for it, but we envisage something rather more than simply legal submissions on pass-through. We have in mind a kind of hybrid process where we receive submissions, which will include legal submissions, but submissions which will be essentially, how on earth does this issue get tried, given its nature? That's not putting it very well, and I am sure the order we make will put it more clearly, but we have that in mind. I hope that will address the concern you have regarding the clarity or otherwise of the points that arise, but I think you can take it that, apart from finding that this is an extraordinarily hard issue, we are not going to say anything more about pass-on in our ruling, because frankly I don't think anyone in this courtroom actually has articulated with

sufficient clarity what it is that we are trying to do. I say that without intending to be critical of anyone. I think this is just a terrifically difficult issue.

MS SMITH: Thank you very much, sir. Thank you for that indication. In light of that I think what I was going to say I will keep it extremely brief and it may be it is in the nature of a marker rather than any suggestion for what the Tribunal does today, but it is clear Mr Cook yesterday said that as regards claimant specific issues which he accepted there probably would be on pass-on that it is likely there will need be to be some sampling on those claimant-specific issues.

We agree with that and we are extremely keen not to waste the work that has already been done on sampling, and the agreement that, in fact, has already been reached with the card schemes in the context of the sampling process proposed by the previous Tribunal as to the ten categories of representative claimants, and we think that the fact-specific issues on pass-on can be determined by reference to a sample of ten claimants taken from those categories, and that there is -- if we are using those sample claimants for the purposes of pass-on only, not for the purposes of 101(3), then there is no need for the survey proposed by Visa. If that survey was designed for the purposes of ensuring the claimants were represented as far as possible of the economy as a whole for the purposes of 101(3), they wanted small, medium and large and they wanted people who had blended MIFs, etc.

For quantum and pass-on, in our submission, the sample claimants just need to be representative of the claimant groups, so before the Tribunal, and it has already been agreed between the parties that the ten categories are representative in that regard in my submission.

THE PRESIDENT: Yes. Again can I give you an indicator as to where we think we

are going on this?

Speaking for myself, and I think that view is shared by my colleagues, we see a great deal of force in what you say, but we are again uncomfortable about making a direction today, given what I articulated about the uncertainty of what we are dealing with. So, we have in mind that there will be a process of scrutiny of how the parties are going to address and enable the Tribunal to resolve pass-through. That is going to be before we determine how conclusively that is going to be proved.

If after that process both parties say it is sampling and what was previously ordered is the way to do it, then I suspect you will get very little push-back from the Tribunal. The Tribunal places enormous weight on the agreement of opposing parties, because it usually means that the proposal is a sensible one, but putting down our own marker, I would be very uncomfortable in saying today that sampling is the right way to go. By sampling I mean picking selected claimants as representatives of other things. Clearly, given the volume of claimants, some kind of exercise in terms of limiting the evidence is going to have to be undertaken and that's a given, but whether that limitation is in the form of sampling as you are proposing or whether it is some other way of doing it, that is where, again, if you want the Tribunal to indicate we will listen very carefully to argument in the future, that indication we will give you, but if you want us to commit today to a way of doing it, then I really don't think we are willing to do that.

MS SMITH: We hear what you say, sir, and we are grateful for that indication. In light of that I think that's all that I have to say in reply. I know that Mr Brown has one or two points that he wants to make as well in reply.

THE PRESIDENT: Thank you very much as well, Ms Smith.

Yes, Mr Brown.

Reply by MR BROWN

MR BROWN: I am grateful. Sir, in light of your indication I will keep this as brief as I can. I intend just to be a few minutes.

I just want to make the point that we have made throughout the course of these, as it were, conjoined proceedings that we are in a unique position on the claimants' side. We are separately represented and we have just one claim. We are not part of a group. We don't have the benefit of whatever cost sharing arrangements they have and other arrangements that the groups will have.

Our claim is a small one in the grand scheme of things. I appreciate it is a claim we decided to bring, but it is a small one in the grand scheme of interchange claims. It is limited to UK and intra EEA MIFs. It is limited to an article 101claim. We don't have an abuse of dominance claim, like Ms Smith's Humphries Kerstetter clients. We don't have an inter-regional MIF claim and so on. Of course, we have only sued one of the two schemes, Mastercard, so we have no personal skin, as it were, in the Visa game.

Our position up until yesterday when we thought we were going down the sampling line was that -- leave us out essentially. Now we recognise that the Tribunal is not attracted to the sampling approach. I am certainly not going to be pushing back against that. I heard what you had to say about sampling, sir, even in respect of quantum. I am not seeking to reopen that today.

The point I wanted to make is that we were concerned about it before. We are even more concerned about it, having heard from Mr Kennelly about the possibility of opening up the Humphries Kerstetter claim to encompass the abuse of dominance and the anti-steering rules aspects of those claims to make this

an even larger, more sprawling piece of litigation and with all of the additional complexity and cost that would entail.

So, this is really just to lay down a marker or just an indication of our thinking. We are going to go away and think about whether we ought to be, depending on what the Tribunal rules, either today or shortly following the CMC, and also in light of any costs' correspondence. Mr Kennelly mentioned the possibility of correspondence on costs and there will presumably have to be a debate among the parties as to, for example, whether costs exposure should be on a several basis. Mr Kennelly mentioned a joint basis. We will have to look at that and get into that discussion, but subject to all of that we will be considering whether, for example, to apply for a stay on the basis that we would be bound by the outcome of the generic issues trials or whether some other sort of arrangement can be put in place.

I am certainly not advancing or making that application today, obviously not.

THE PRESIDENT: No.

MR BROWN: But those are matters we may wish to bring back before the Tribunal.

THE PRESIDENT: That is very helpful. It ties in with the point that I made yesterday regarding the consent order stay that was sought, and the issue is I think exactly as you have articulated it, namely where one has got someone who wants to be, as it were, at the back end of the queue rather than the front end of the queue, the process that we are envisaging doesn't sit with that, and we were explicit yesterday and we are going to be even more explicit in the ruling we will in due course hand down, that one of the things we are thinking about very, very carefully is the extent we can make -- appropriately make the bindingness of these matters as comprehensive as possible.

Now I am not going to say very much about that today, but it is something which is

obviously very much on our mind. That means that the sort of decision that your clients have to make is exactly that. Do we file for a stay on the explicit basis that you are bound by what happens, it being fully acknowledged that we will at all times have in mind the fact that the generality of decision-making will have to stop and move into individual matters, and so the stay will be on those terms?

We won't be able to draft anything along those lines today, but we do think that provision needs to be made in the order, so that what you have effectively is a cookie cutter form of stay which articulates exactly what I have said, the fault line between the general and the individual, so that if anyone wants a stay on those terms, they simply need to write in to the Tribunal and say "Please can we have it". I don't think there would even be need on that basis for consent between the parties. I think it would simply be an opt-out, which anyone is entitled to exercise, the price being a degree of commitment.

So, I hope that at least in principle resolves the point you are quite rightly articulating.

MR BROWN: It does, sir. On that basis I don't need to say anything more. I simply adopt what Ms Smith has said on the other matters. Thank you.

THE PRESIDENT: Thank you very much.

Reply by MR KENNELLY

MR KENNELLY: Sir, can I come back very briefly on three points and I heard the Tribunal on the time issue?

The first goes to Ms Smith's point on lifting the stay on the part of her claim, the steering rules and the article 102 abuse of dominance claim. She said that if she succeeds in the process that the Tribunal is outlining, those parts of her case should fall away. What she didn't say is that if she fails --

THE PRESIDENT: Mr Kennelly, you don't need to trouble us on this. We will be lifting the stay.

MR KENNELLY: I am very grateful.

My second point, sir, goes to the time that she suggested for the granular issues list and request or suggestions for the provision of data and disclosure. We are content with her earlier suggestion about the time for a Commercial Court type list of issues, but on the granular exercise drawing up the full list of issues, which includes pass-on, which is a complex question, four weeks is insufficient in our submission. Six weeks will be needed for that both for the claimants --

THE PRESIDENT: Mr Kennelly, I am going to cut you short. We have a process in mind, which I anticipate we will get a push from everyone about the aggressive nature of the dates, that we are going to float, but we will float them nonetheless and you can all tell us whether we are being over ambitious, as I suspect we are. So I put that marker down now, but I don't think, given that the process we have in mind is largely what -- it's a synthesis of what the parties have been submitting to us, but I think it is probably better if we discuss timing when you know what we have in mind rather than punting, as it were, at an object whose shape is as yet unknown to you.

MR KENNELLY: I am grateful, sir. I will move on to my third and final point. The last suggestion made by the Tribunal respectfully canvassing the option that parties to the proceedings could opt out in some way from giving evidence. I appreciate that's an entirely provisional view and one the Tribunal is simply considering. We would have real concerns about that. If somebody is a party to the proceedings, they ought prima facie to be required to give evidence. The kind of data and disclosure they give would entirely be within the

Tribunal's discretion and we respectfully agree and endorse the proportionate expert-led approach, but we couldn't have a situation where parties could simply opt out of giving data or disclosure which could be vital for the just resolution of these issues.

THE PRESIDENT: That I think is an interesting question about exactly how the stay is framed. It is obviously not going to be an unconditional stay for the reasons that I was articulating with Mr Brown. I can also see that it would be appropriate to have a form of contingency in order to draw someone back in if they have had a stay, but for my part I think that where one has got someone who says "Look, I want to be at the back end of the queue. Please don't require me to do all this work on list of issues and things like that. I am happy to be bound by what the other parties do", then that I think is an appropriate order to be made, save that if when you identify an issue and identify the evidence that is necessary to determine that issue one of the opted out persons has critical evidence, then the stay should be on such terms that you can oblige that party to provide that material.

Now cards on the table. I would be quite reluctant to make that sort of order and deprive the parties of the benefit of the stay unless it was very clearly indicated that evidence from that particular party was necessary, and one of the things that we anticipate having in this process is a CMC at which exactly the evidence that the parties wanted to adduce is determined before they go out and get (inaudible).

So it will be at that point that you would say to Richer Sounds hypothetically "I am terribly sorry. I know you want to be out, but you can't be. We want you in", and then there would have to be a hearing at which Mr Brown would say "Well, you have got it wrong. The evidence is not necessary. You can easily

get it from somewhere else".

So, I hope that squares the circle between the interests of a claimant not wanting to incur costs and the defendants' interests in having the evidence that they need to resolve the issues.

MR KENNELLY: Sir, we are very grateful for the indication. There may be an issue -- it is not for now -- as to how we know enough about the particular claimant as to whether that claimant is one that ought to be giving evidence or not, which is the purpose of the initial questionnaire that we were suggesting in the sampling exercise but that's for another day. Your indication is well understood. I have nothing further.

Reply by MR COOK

MR COOK: Sir, I had also planned to rise and say that Ms Smith's suggestions were somewhat too tight on timing. It sounds like I had better say that your suggestions sir, are massively excessively too tight on timing.

DIRECTIONS ON MANAGEMENT OF PROCEEDINGS

THE PRESIDENT: I suspect I am going to be hearing a lot of that. I will press on nonetheless. If you take the dates that we are suggesting as ones that can appropriately be discussed, I think when we have a draft order up and running, because I am very conscious that drafting on the hoof is not a good idea, but I do want the parties to leave the courtroom with a very clear idea of where we are going so that the drafting can be done over the next couple of days.

So, with that in mind we had done some work overnight as to what the shape of the order should be. I am glad to say that Ms Smith's submissions didn't change

our thinking, but I think that's largely because it is actually quite close to what Ms Smith was suggesting.

So, we are going to set out our thinking in greater detail in a formal ruling, because we consider that our thinking regarding case management and in particular the extent to which persons not before the court can or should be bound is going to require extremely careful articulation if we choose to say anything on the point at all, which is by no means a foregone conclusion.

We have very much in mind Ms Smith's point that, where a party has brought a claim, that claim should be resolved as a claim as expeditiously as possible, and it is wrong in principle and at least without careful thought to hold up an action to allow other claims to catch up. So, we want to think very carefully about how proceedings such as this can most effectively be managed and set out our thinking so that market expectation can be managed for this and future cases.

It is, however, necessary that we state our directions for the immediate management of these proceedings.

As I indicated in argument, we are not satisfied that we should order sampling at this stage. Indeed, we are quite satisfied that to commit to a particular method of resolving an issue or issues in advance of understanding how precisely the true nature of these issues shape up would be an error. So, we are not saying no sampling. We are saying in the manner of Saint Augustine, "Lord make me good, but not yet". No sampling yet.

We stress that we have fully taken on board the point made by all of the parties that some form of sampling is likely to be necessary, and at the most abstract level that's clearly right. The volume of potential evidence in this case is vast and there's going to have to be an exercise of selection, and it may well be that

that selection is a claimants' sampling process. It is just that we think that it would be premature to make that decision. It may well prove to be right, but we are not going to commit to that yet and we think that is the fairest course for all of the parties.

So, to go to the order, this is, I want to stress, an extremely rough draft, and the dates certainly are writ in light pencil rather than hard ink, but we consider that the stay in relation to all claims should be lifted. However, just to sweeten the pill for Ms Smith, we are not anticipating more than the minimum of work on the issues that are presently stayed and the issues that are before the Court of Appeal. We do consider that some work needs to be done, but really to ensure that everyone, the parties and the Tribunal, understand the shape of what is being tried.

So, moving on to paragraph 2, we want the proceedings to be tried by reference to a series of issues which we call the issues, and we have set out the table that we want to be used in annex 1 to the draft order.

Issues we are defining widely. They are, as I indicated a moment ago, inclusive of issues that have been stayed and also issues that have been determined by way of summary judgment but which are on appeal to the Court of Appeal. It is all in.

The way that those issues are articulated are then set out in the following paragraphs, and I am not going to read them out, because the parties can read them for themselves, but essentially by mid-March each party will produce its own version of the issues in play. We think that that is better than a sequential approach, because we want everyone to think from the get-go how they are going to prove their case, come trial. It is to our mind absolutely critical that we have a synthesis of both sides' thinking in terms of how these

issues are created. So, we want both sides to do this job.

In due course, of course, the issues will be synthesised so that one gets one set, but we want both sides to apply really quite active thought to this, because -- let us be clear about this -- the issues will in due course inform the evidence that each party is going to be permitted to lead at trial. So this is a list of issues with teeth. So if there is a mistake at the early stage and you have left something out of account, you can always have an application to amend and add to the list of issues but you will be at real risk of not being able to deploy that which you want to deploy.

So that's why we have adopted what might at first sight be a more cumbersome process than the parties had envisaged. In any event, a synthesised list is produced. It will mark up areas of agreement and disagreement, and we will then rule on the papers as to which formulation we should adopt. That is the process that is set out in paragraph (c) of the draft on page 2.

The next stage will be to move on from the framing of the list of issues to what we call method of determination, which is column 3 on the exemplar table in annex 1. We envisage that by no later than 19th April each party will populate its own version of column 2 -- column 3 -- I beg your pardon -- setting out the manner in which each issue identified in the second column will be determined by the Tribunal. We don't expect -- we certainly won't require and we probably don't want -- a detailed statement of methodology at this stage.

Rather, without being prescriptive, what we would want is each party to identify the method of determination under one of the heads that we described in (d)(i). So broadly speaking it is legal argument, expert evidence, ideally identifying the discipline of the expert, factual evidence stating how it is envisaged that the relevant witnesses are proposed to be identified, so we feed into

Mr Kennelly's point about working out who you want and the methodology defining it, and similarly whether it is done by documentary evidence, there stating how it is proposed that the relevant documents are going to be identified.

So, what we want is not the list of documents at this stage. What we want is -- we know there are documents that are going to be going to this issue. We propose to find them in the following way. That will then be in broad brush terms articulated. At this stage the parties may well be saying "Well, in order to work out what documents we need, we are going to have to send out a questionnaire". We will hear the parties on whether that happens or not. We will control this process, but that is how we envisage this next stage to operate.

I said in argument that pass-on would get special treatment. It does in (ii) of paragraph (d). We want each party to provide detailed submissions, excluding submissions in relation to the burden of proof, as to how we resolve the issue of pass-on at trial.

I say excluding submissions in relation to burden of proof not because we regard burden of proof as unimportant, but because we regard it as extremely important. We anticipate that it may be the case that, unlike most issues, the issue is of such difficulty that the burden of proof question could be determinative. Certainly listening to Ms Smith yesterday that seemed to us to be a real potential. If that is right, then we want the parties, first, to focus on how they prove it, absent the burden of proof, so that that overlay can be applied later on at trial. In other words, what we want the parties to grapple with is not the technical questions of who bears the burden, but the substantial and difficult questions of how it is that this issue is litigated in order

to get to the best correct answer.

So we will obviously want to hear you on the law. Equally obviously we will want to have some meat on the skeletal bones of the law. What we have proposed is that the parties address ourselves by reference to a particular example. What we picked with no particular intent was the example that we were taken to yesterday, Soho House UK Limited, paragraph 62 and 63, where one has got a pleading regarding pass-on, and what we think we would be helped by is by the parties saying "Look, here is one instance. This is how we would propose to resolve it".

We make clear that we would be very happy for limited expert evidence to be adduced at this stage explaining how one would propose to do it if a party is so advised. Now it is at this stage that the parties will be saying "Look, we do it by way of sampling", but you would explain how the sampling process would work and what you would expect to extract from the sample claimant by way of information in order to make this point good, because we frankly think that this is something which is extraordinarily difficult to prove. It is a very difficult issue to nail. The more the parties think about this before we get down the process of adducing the evidence, the more we understand exactly what we are talking about. That is the point of (ii).

We should say that we are very conscious that pass-on arises in multiple guises, including whether the MIF was passed on to the claimants themselves, Mr Cook's point. We have picked 62 and 63 of the reply just as something to enable the parties to get their teeth into. It shouldn't be read as in any way suggesting that we accept or don't accept Mr Cook's point. That is a matter that will come later on.

We will then have a one-day hearing on the first convenient date after 19th

April 2022 at which the precise method by which the pass-on issue to be determined will so far as possible be determined by the Tribunal. We stress so far as possible and as far as the Tribunal is advised because we are acutely conscious that we may not be in a position, even at this stage and even with the benefit of parties' material, to actually resolve how it is going to be done. We hope to be able to, but we want the parties to understand that we are sufficiently concerned about the articulation of pass-on that we may not be able to resolve the question as we would like to. So the order makes that explicit.

Then (f), we move on to the final column in annex 1, which is the precise articulation of the manner in which the issue is to be determined. So it builds on the method of determination, and what we will expect in relation to all issues, save those issues that are on appeal in the Court of Appeal, and given we are talking about a post-19th April matter, the issues on which this exercise can be done can be topped and tailed by reference to what is going on in other proceedings, but in relation to most of the issues the parties will populate their own version of column 4, setting out with precision the manner in which the party will seek to persuade the Tribunal that the issue in question should be resolved by the Tribunal.

Now we expect a high degree of precision in this part of the form. Where there's legal argument obviously nothing further need be said, but where, for instance, the method of determination includes the adduction of documentary evidence, each party is at that stage going to have to state precisely what disclosure it will be seeking from the other party or parties and what disclosure it will itself be making.

Equally where there is a factual set of witness evidence in play, each party must

identify the witness or witnesses it will be minded to call, and the same goes in relation to the experts.

Now I said earlier that what the parties say they want they may not necessarily get. It is at this point we think we will be having a debate with the parties about the extent of sampling, and it is at this point that we will hear Ms Smith on the Holt point, if I can call them that. We would expect Ms Smith to be saying in her schedule that the only evidence that is required is what Mr Holt has produced so far, and that may be right. We would equally expect Mr Kennelly to be saying, "No, Mr Holt is part of the picture, but we are going to need on certain points rather more". At that point we will work out who is right and who is wrong and the parties get on their way and do the job.

It follows that we are going to need a pretty hefty case management conference, we thought two days before the summer, at which we could approve or disapprove the parties' proposals under rule 4(5) of the Tribunal's Rules, which gives us really extremely wide case management powers as to the inclusion and exclusion of evidence and the manner in which a trial is to be conducted, and we intend to exercise those powers with a high degree of liberality and rigour.

So that's what we want to do. We are more than happy to debate the details with the parties. For personal reasons I would be inclined to encourage the parties to do that on the papers, but I think it's right that I invite any of the parties to sort of push back on the timetable in particular, because I think the parties ought to be given a reasonably clear idea of where they want to go in terms of timing.

So, Ms Smith, I put an accelerated timetable in, because I want the claimants to understand that if they want to go fast, we will go fast, but if you are saying

that you think it is more sensible to structure this so as to take more account of the Court of Appeal hearing and decision, then we would see force in that, and if everyone is of that mind, then we would certainly adjust the timetable in that way.

MS SMITH: Sir, thank you very much for that indication. I don't want to make any submissions on the specific dates now. I think I need time to take this away to consider the detail of this and to take further instructions.

I don't know if, sir, you want to make -- give an indication or make an order as to when we should put those written submissions in to you on dates, etc, or at least send a letter in to you on dates, etc, but I think we do need time to take this into account and to think about the dates and think about what's going to be required by each of those dates.

THE PRESIDENT: I think that's only fair, because we have since yesterday morning thrown an awful lot at the parties.

Can I suggest this, that in the first instance the parties should have the rest of this week to debate matters amongst themselves and work out which bits in terms of the timing need further articulation, and indeed which bits of the order need further articulation to make it work properly. I mean, the fact is this is an overnight draft. It undoubtedly can be improved, and I would invite the parties to seek to do that improving exercise *inter se* in the first instance.

Then I think if we said by no later than 4.00 pm on Tuesday next week the parties put in an order that is, as it were, a joint order identifying areas of agreement and disagreement, we can then proceed on that basis and work out what order should be made.

Does that make sense, Ms Smith, in terms of going forward and timing?

MS SMITH: Yes. We will do our best.

THE PRESIDENT: Do you think you need more? I take it yes.

MS SMITH: If there is going to be a sensible and helpful process of going backwards and forwards between the parties, possibly we do need more time.

THE PRESIDENT: Let's say -- let's err on the other side and say why don't you submit -- have discussions until -- submit an order -- would end of next week work?

MR KENNELLY: Yes, the end of next week. Could we have this document in Word as well? That would be very helpful for us.

THE PRESIDENT: We will certainly send that through.

MR KENNELLY: I'm very grateful.

MS SMITH: There is one point that immediately occurred to me -- I haven't had the chance to consider this in any detail -- but one point that immediately occurred to me, which is you indicated at the outset, before you handed this to us or when you handed this to us, that there would be a minimum amount of work on the issues that are presently stayed.

However, as I read it at the moment, the definition of issues includes those that have been stayed and at the moment as I read this draft the stayed issues, 102, will need to populate the table both columns 2, 3 and 4 for that issue.

THE PRESIDENT: Not 4.

MS SMITH: Not 4, because they are not on appeal. (f) just doesn't say --

THE PRESIDENT: Let me try and put this -- this may be a drafting point. What we want is we want columns 2 and 3 to cover everything, because we take on board the point about overlap and we take on board the difficulty of understanding the shape of the action without looking at everything. So we want 2 and 3 to be as complete as possible.

So far as 4 is concerned, we want to reflect very clearly the fact that some issues are

already in play. So we did exclude the matters that are subject of the Court of Appeal. It may be what the order should say is that we have a provision in the timetable for deciding which particular issues should be subject of the more precise articulation in column 4; in other words, we build in an extra stage which says although you have to do the work for all issues for the purposes of columns 2 and 3, for the purpose of column 4 the parties should in the first instance try to agree and the Tribunal in the second instance orders which issues are going to be the subject of precise articulation as to how they are going to be determined, because that's where the work is going to lie. That's the thinking that we had, that 2 and 3 are to an extent low hanging fruit in terms of costs. 4 is very much hard work.

MR COOK: Sir, just one point from my perspective that I would like to flag up at the moment, which is paragraph 3, the idea of a CMC at the end of the summer term. The Court of Appeal hearing is listed I think on 26th and 27th July. So those last two weeks are going to be very busy on this case, and that may be something that simply, you know, ends up pushing that after the summer vacation in any event.

THE PRESIDENT: Well, we certainly appreciate that the Court of Appeal throws an additional difficulty in terms of timing, and we are minded in this to be claimant-led, and the reason I say claimant-led is because we do think that a claimant has an entitlement to have cases tried as quickly as is feasible. Sometimes this court will require a claimant to do so, but normally we think that if a claimant indicates for good reason that a more relaxed time frame is appropriate, then we will listen to that and, if possible, accommodate.

We will, of course, listen to the defendants' positions as well, but we do think that there is an overarching sense that the default is as quickly as fairly possible,

but we hear exactly what you say. We anticipate that the parties are likely to come back with an agreed timetable that shunts rather more to the far side of the summer, and if that is the agreed approach, then you will not get very much push-back from us.

MR BROWN: Sir, just one very short point from me, which goes back to the question of the stay. I don't see any reference to that at all.

THE PRESIDENT: No. There are a number of things which we have not included in the order. The stay will need to be included.

MR BROWN: I am just conscious there is a lot of detailed work to be done according to this.

THE PRESIDENT: There is a lot of detailed work to be done. This was simply intended as a tool to work out the shape of where we are going. There are some things that we consciously did leave out. So for obvious reasons we have not said anything about number of experts, because that's going to be a column 4 exercise. We have obviously said nothing about sampling or other matters proving the case, because we don't want to. We also have not said about hearing things in segments and controlling the appeals between segments. Frankly we think that these are matters that are appropriately dealt with at the case management conference when we have a more filled-out form of table and we actually know where we are going.

So we have those points very much in mind, but we don't see much point in including those in the order. On the other hand, the point about the stay, that absolutely needs to come in.

MR BROWN: I'm grateful.

THE PRESIDENT: Well, I think I am reading equally high levels of unhappiness amongst all parties, which probably means we have done a very good job.

So, unless there's anything more, we will proceed on the basis that there will be a formal order as agreed possibly by Friday week. If you need more time, of course say. Correspondingly, if the drafting proceeds more quickly, put it in earlier, but we will work to Friday week as the aspirational deadline and I am sure the parties will keep us informed as to any changes.

Unless there's anything more, can I simply express my thanks to all of the parties for their very considerable efforts before us yesterday and today. We are really very grateful. Thank you very much.

(11.38 am)

(Hearing concluded)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?