

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be
2 placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to
3 be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive
4 record.

5 **IN THE COMPETITION**

Case No: 1287/5/7/18

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 13th June 2022

13 Before:

14 THE HONOURABLE MRS JUSTICE BACON

15 (Chair)

16 TIM FRAZER

17 SIMON HOLMES

18
19 (Sitting as a Tribunal in England and Wales)

20
21 BETWEEN:

22
23 **ASDA STORES LIMITED AND OTHERS**

Claimants

24
25
26
27 **MASTERCARD INCORPORATED AND OTHERS**

Defendants

28
29
30
31
32
33 **A P P E A R A N C E S**

34
35
36 Christopher Brown and Laura John (instructed by Stewarts Law LLP) appeared on behalf of
37 the Claimants

38 Matthew Cook QC and Ben Lewy (instructed by Jones Day) appeared on behalf of the
39 Defendants

40
41
42
43
44
45
46
47
48 Digital Transcription by Epiq Europe Ltd
49 Lower Ground 20 Furnival Street London EC4A 1JS
50 Tel No: 020 7404 1400 Fax No: 020 7404 1424
51 Email: ukclient@epiqglobal.co.uk

Monday, 13 June 2022

(10.35am)

MRS JUSTICE BACON: Good morning, everyone. These proceedings are being live streamed. I must start therefore with the usual warning that these are proceedings in open court. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Yes, Mr Brown?

MR BROWN: Madam, Members of the Tribunal, may it please you. I appear, together with Miss John, for AAM, Mr Cook QC and Mr Lewy appear for Mastercard today. Just some brief housekeeping before we get into the meat of the CMC. In terms of bundles, the Tribunal should have the core bundle both in hard copy and electronically, a series of electronic bundles numbered 1 to 6 and an authorities bundle which is likewise in electronic copy only.

MRS JUSTICE BACON: Yes, just a moment. Where is my core bundle? Thank you. Yes, would you mind repeating that? So we have got core bundles, yes, and then a series of electronic bundles and we have got an authorities bundle.

MR BROWN: Also electronic.

MRS JUSTICE BACON: Yes.

MR BROWN: Yes. Just one very small point to make on the electronic bundles, which hopefully will not annoy the Tribunal or inconvenience you, which is just that the pagination in the bottom right hand corner is ever so slightly out with the PDF numbering but we will endeavour to make clear which one we are

1 referring to as we go along, but hopefully it will not cause too much
2 inconvenience. I understand that that is not a problem with the authorities
3 bundle, but there we are.

4 MRS JUSTICE BACON: Right.

5 MR BROWN: The electronic bundle, as I understand it, was updated on Friday so
6 you should have the correspondence up to Friday. Now, happily over the
7 weekend there has been further correspondence. I say happily just because
8 peace has broken out on one major item and one minor item.

9 The major item is a disclosure - a disclosure application has been compromised at
10 about 10.25 this morning. So that should shorten proceedings today. I can
11 take you through that in due course when we get to it, or I can address it now
12 as you prefer, but the short point is that disclosure is now off the table.

13 MRS JUSTICE BACON: Why do you not tell us now what has been agreed because
14 I was going to start with that item.

15 MR BROWN: Oh, right.

16 MRS JUSTICE BACON: So then if we can just cross that off that would be helpful.

17 MR BROWN: Yes, certainly. We will not have settled text to present to you just
18 now, but essentially the proposal which was circulated by my instructing
19 solicitors to Jones Day on Saturday was that we would retrieve and search
20 the inboxes of a more limited number of custodians than those outlined in the
21 letter to the Tribunal on Friday, which I trust the Tribunal has seen, in which
22 we refer to a number of 24 custodians that would need to be searched.

23 MRS JUSTICE BACON: Yes.

24 MR BROWN: That has been --

25 MRS JUSTICE BACON: It would have affected which issue?

26 MR BROWN: In respect of the VAT issue. So essentially what we are proposing is

1 the Commercial Director, also known as the Vice President, by I think Asda,
2 his or her mailbox will be retrieved and searched and the VAT search terms
3 will be applied, in respect of certain of the product categories but that - sorry,
4 his or her mailbox will be searched generally for the VAT categories. It may
5 bring up potentially relevant documents which do not relate to the specific
6 categories that Mastercard were asking for. You will recall in the
7 correspondence that they had narrowed it down to a certain number of things
8 like confectionery ...

9 MRS JUSTICE BACON: Yes.

10 MR BROWN: ... crisps and snacks. We have said that we will not limit what we give
11 them to those products, we will give them anything that we see as potentially
12 relevant. What we have also agreed to do is run certain search terms in
13 relation to the cost shocks category, which was category 2 of the application.

14 MRS JUSTICE BACON: Same custodians.

15 MR BROWN: Same custodians. So it is Commercial Director/VP but also the
16 category directors for, in the case of Asda and Morrisons, grocery and
17 impulse, for Argos it is electricals. So those custodians are the ones in issue.
18 I think it comes to around eleven custodians in total.

19 In response Mastercard raised one or two queries, which we have, I think, addressed
20 satisfactorily in correspondence and then this morning, which go to points of
21 detail which we can incorporate into the order as necessary. But essentially
22 that is the compromise and, as I say, it has now been agreed.

23 MRS JUSTICE BACON: Good. So we should definitely be finishing today then.

24 MR BROWN: I should hope so. I will be astounded if not.

25 MRS JUSTICE BACON: Unless things go very badly wrong. All right.

26 MR BROWN: It may well be that we are done by the short adjournment.

1 MRS JUSTICE BACON: Good. All right. Then that was the major issue and then
2 you said there was a minor issue.

3 MR BROWN: There was a minor issue to do with an amendment suggested by
4 Mastercard on tax.

5 MRS JUSTICE BACON: Yes.

6 MR BROWN: To plead the tax point. That has now been agreed, and in fact it may
7 be useful for me to pass up a composite draft order which we prepared since
8 the one you have seen.

9 MRS JUSTICE BACON: Does that deal then with two issues, both the pleading of
10 the point and the question as to whether their expert evidence should be
11 permitted to address it?

12 MR BROWN: Yes, it ...

13 MRS JUSTICE BACON: Or does only deal with the pleading --

14 MR BROWN: Yes, and it deals with factual evidence as well. So if you look at
15 paragraphs 1 and 2, paragraph 1 says that Mastercard shall have permission
16 to amend their defences to take that point, and then under paragraph 2 we
17 have the right to make consequential amendments to our replies.

18 MRS JUSTICE BACON: Then the evidence?

19 MR BROWN: Then evidence is, if you go to paragraph 7, you will see 7(a): "...
20 addressing the incidence of tax, if so advised, by ..." and then "to be agreed."
21 The reason the words "to be agreed" are in there is that this issue has only
22 come up, or rather Mastercard's pleading amendment has only come up late
23 in the day. We are still to take instructions from our clients. We just do not
24 know at this stage how long that process is going to take. We do not think it
25 will take long but we are just not in a position today to commit to a particular
26 date, but we hope in short order we will be able to agree a date and have that

1 communicated to the Tribunal.

2 MRS JUSTICE BACON: Are you going to be able to do that today?

3 MR BROWN: Can I just take instructions? (Pause) I am instructed that it may be
4 difficult to do it today but this week we will be able to reach a view.

5 MRS JUSTICE BACON: The problem arises if you are not able to reach a view and
6 various members of the Tribunal then may not be available to reconvene, so I
7 think we are going to need to have an indication; if you are not able to agree,
8 then at least competing submissions as to what the date should be, by the
9 end of tomorrow.

10 MR BROWN: By the end of tomorrow.

11 MRS JUSTICE BACON: So that we can, if necessary, discuss between ourselves
12 before we then disappear.

13 MR BROWN: Right. I think there was just a difficulty with the availability of one of
14 those people today but hopefully if we are given until close of business
15 tomorrow then that ought to be achievable, Madam.

16 MRS JUSTICE BACON: So I will say by four o'clock tomorrow either an agreed
17 position - so this is the date to be put in paragraph 7(a) ...

18 MR BROWN: Yes.

19 MRS JUSTICE BACON: ... of the composite order. So by 4.00pm tomorrow either
20 an agreed position or you will each let the court know separately what your
21 submissions are as to when that date should be.

22 MR BROWN: Yes. I think that goes for paragraph 2 as well, Madam. There is a to
23 be agreed for the date of our replies, any consequential amendments to the
24 replies.

25 MRS JUSTICE BACON: Yes, absolutely. Just before you move on too quickly, the
26 colouring in the specific disclosure part of the order, does that reflect the latest

1 state of agreement? I presume it does not, and that you are going to be
2 giving the Tribunal, maybe by the end of the day, an updated draft with the
3 agreed text.

4 MR BROWN: I think that would be doable, Madam. Yes, you are correct, that this
5 does not reflect the compromise reached overnight because there was certain
6 movement on each side since this draft was produced yesterday evening.

7 MRS JUSTICE BACON: Yes.

8 MR BROWN: So, yes, we will produce a fresh draft reflecting the agreement
9 reached.

10 MRS JUSTICE BACON: Yes, and if you could send that by the end of today so at
11 least we know what the starting point is.

12 MR BROWN: Yes.

13 MRS JUSTICE BACON: Can you just confirm that there are no further issues for the
14 Tribunal to decide in respect of specific disclosure?

15 MR BROWN: Yes. When you say please can you confirm, do you mean in writing?

16 MRS JUSTICE BACON: Now.

17 MR BROWN: Just now, yes, I can confirm and Mr Cook can speak for himself.

18 MR COOK: Yes. My understanding is that there are no further issues to be
19 confirmed between the parties. Obviously what we had is an exchange of
20 correspondence, with the most recent bit of correspondence received at about
21 9.15 this morning, so we need to turn that into a minute of order. I do not
22 anticipate we are going to end up with problems on it but obviously until you
23 try and put something in a minute of order there is always the possibility of
24 some minor point of disagreement. If it is, it is going to be small and I do not
25 anticipate it is very likely.

26 MRS JUSTICE BACON: All right, so shall we do the same thing with that: you will

1 send the draft so far as is agreed by close of business today. If there are
2 certain points with a square bracket, you can leave them in, as you have done
3 with the tax point, and by 4.00pm tomorrow we will either have to have an
4 agreed position on that, if you have been able to reach agreement, or your
5 individual submissions as to what date or whatever else should be inserted.

6 MR COOK: One point at the moment that has not been discussed between the
7 parties is paragraph 6, which is in green, which is the time and date for
8 disclosure.

9 MRS JUSTICE BACON: Yes.

10 MR COOK: So we have not had a proposal. Obviously I appreciate that things have
11 moved fast ...

12 MRS JUSTICE BACON: Yes.

13 MR COOK: ... so we understand why the Claimants have not given us a proposal
14 yet, but that obviously is an important date and again if the Tribunal would like
15 to have a full order by tomorrow evening then the Claimants will need to move
16 fast in terms of giving us a date on that. Recognising of course that this is a
17 case in which, without wishing to be too rude, the Claimants have not hit a
18 date yet perhaps. So if there is a date agreed and they need a reasonable
19 extension, we would always agree to reasonable extensions, but it was
20 desirable to have a date in the diary to create at least some form of discipline.

21 MRS JUSTICE BACON: All right. So we will have where it stands by close of
22 business today, and then final positions from the parties, if not agreed, by
23 4.00pm tomorrow. All right. Thank you. So that, I think, leaves two issues to
24 be decided. I think we probably should be able to do that before the lunch
25 adjournment.

26 MR BROWN: Yes.

1 MRS JUSTICE BACON: The question of factual witnesses and the question of
2 expert evidence.

3 MR BROWN: That is right. Yes. May I just raise one small point on the agenda?
4 Item 1: pleading amendments. We have obviously discussed tax. There are
5 one or two other minor pleading amendments which have been canvassed in
6 skeletons. I do not propose to take you through them now unless you would
7 like me to, but just to say that tax is not the only one where there may be a
8 future pleading amendment.

9 MRS JUSTICE BACON: Right. Is that encompassed in - that is all wrapped up in
10 paragraph 1, or not? Because paragraph 1 only refers to paragraph 12 of the
11 --

12 MR BROWN: Yes, it is all in paragraphs 1 to 4 under pleadings.

13 MRS JUSTICE BACON: Yes.

14 MR BROWN: So the third paragraph relates to Mastercard's position on supplier
15 pass on.

16 MRS JUSTICE BACON: Yes.

17 MR BROWN: The short point is that some time ago we wrote to Mastercard to point
18 out that their pleadings were extremely sparse on that issue. We then had
19 some correspondence about that and the resulting position is that we have
20 agreed - and this is agreed - Mastercard will have some further time following
21 further disclosure in which to consider their position and plead further to it,
22 and thereafter if we are still unhappy with the position then we take it from
23 there. But that is the position under paragraph 3 and 4, so that is addressing
24 supplier pass on.

25 MRS JUSTICE BACON: Yes, and did you intend to suggest that there are other
26 pleading points not referred to in those paragraphs.

1 MR BROWN: No, those are the only outstanding pleading points.

2 MRS JUSTICE BACON: I see.

3 MR BROWN: For completeness, I was going to mention very briefly the consent
4 order that ...

5 MRS JUSTICE BACON: I have already made.

6 MR BROWN: ... you have already made.

7 MRS JUSTICE BACON: Yes.

8 MR BROWN: And one very small point which was raised in correspondence:
9 Mastercard has agreed to remove a sentence from one paragraph in its
10 pleading to do with a point that we all agree was dealt with by Roth J and the
11 Tribunal at the strike out hearing back in May, but that is a small point; they
12 have agreed to take it out and we are not going to spend any more time on it
13 now.

14 MRS JUSTICE BACON: No, and that was not in the consent order, or ...?

15 MR BROWN: No, it is not, it is not specifically in the order. No, it is not addressed in
16 your consent order of last week, no, that is right.

17 MRS JUSTICE BACON: And it is not addressed here either.

18 MR BROWN: It is not addressed in here. We were content to accept MasterCard's
19 assurance that they would make the amendments and it may make sense for
20 Mr Cook to make that amendment as part of the --

21 MRS JUSTICE BACON: I think you should probably just include it in paragraph 1
22 but perhaps you can just tell us what it is that we are giving permission to
23 then.

24 MR BROWN: Yes, if we go to CMC6 you will see it there, so CMC6 page 131 at the
25 bottom ----

26 MRS JUSTICE BACON: Is that in the core bundle?

1 MR BROWN: This particular point is not in the core bundle, no.

2 MRS JUSTICE BACON: It is not in the ----

3 MR BROWN: I am sorry, I think I have got the numbering wrong. I think it is in

4 CMC4. It should be page 131 of the pagination and page 134 of the PDF.

5 MR COOK: This is the letter of 6 June, is that correct?

6 MR BROWN: That is correct.

7 MRS JUSTICE BACON: So CMC bundle?

8 MR BROWN: Bundle 4.

9 MRS JUSTICE BACON: The correspondence?

10 MR BROWN: Yes, the correspondence and it is page 134 of the PDF, 131 of the ----

11 MRS JUSTICE BACON: I have not got the latest one. Yes, paragraph 145 ----

12 MR BROWN: Yes, paragraph 145 of the Asda defence, so the words that are in bold

13 and underlined, those ought to have been taken out and Mastercard agrees.

14 So that is the amendment that is going to be made.

15 MRS JUSTICE BACON: So perhaps add in to paragraph 1 of the order ----

16 MR BROWN: Yes.

17 MRS JUSTICE BACON: -- so "in the terms set out in paragraph 12 of their skeleton

18 argument for the CMC" and by the removal of the offending sentence, the

19 offending words in paragraph 145.

20 MR BROWN: Yes, I am grateful. That was all I intended to say on item 1 and so I

21 think item 2 is for Mr Cook to open.

22 MRS JUSTICE BACON: Yes, so there is the factual witness point and then the

23 experts' evidence point, which one do you want to take first?

24 MR BROWN: I assumed you were taking the factual witnesses first but I am in your

25 hands.

26 MRS JUSTICE BACON: That is fine.

1 MR COOK: Yes, Madam, the point that arises in relation to factual witnesses that
2 the Tribunal will be alive to is the position of witnesses who gave evidence
3 during the Phase 1 trial, gave witness statements, were cross-examined by
4 the Claimants and have nothing further to add but their evidence is also
5 relevant to issues in Phase 2 and that is distinct from the position of Mr
6 Willaert and Mr Douglas, who gave evidence during the Phase 1 trial and
7 were cross-examined but now have something extra to add and have done so
8 in supplemental witness statements and are being called to be cross-
9 examined again and of course I rely upon their presence on the basis that in
10 many cases what has happened is, partly as a result of the fact that the claim
11 covers a ten year period, witnesses dealing factually with particular points
12 which Mastercard considered under a variety of names, its response to --
13 contemporaneously its response to a zero or a low interchange world, they set
14 out factually what Mastercard was looking at, at that particular time but
15 essentially the issue now is what would have happened in a counterfactual
16 world -----

17 MRS JUSTICE BACON: Yes.

18 MR COOK: -- and we say that to some extent we are putting forward two witnesses
19 who address those points, that is more than enough to cover those issues and
20 there is really no need to go back and bring back witnesses who essentially
21 have nothing further to add to what they have already said on the same
22 points.

23 MRS JUSTICE BACON: Just to confirm, the disputed witnesses are Mr Tittarelli and
24 Mr Perez and Mr Lane.

25 MR COOK: That is correct, yes, Madam, yes, so we have three witnesses who are
26 in that category; they have already given evidence and said all they need to

1 say or want to say on these points and then it is Mr Douglas and Mr Willaert
2 who are adding something more.

3 So I mean that is broadly where we - it's simply disproportionate and wasteful of the
4 Tribunal's time and costs and unfair for the witnesses themselves to recall
5 them once they have been cross-examined once on the same material, to
6 have them come back to be cross-examined again on the same material
7 when we have got two witnesses who are giving live evidence who can be
8 asked questions about any of these two points and their evidence covers the
9 same matters.

10 MRS JUSTICE BACON: Yes, but do you want to respond specifically to the
11 Stewarts' letter of 10 June?

12 MR COOK: Absolutely, Madam, and what I have to hand up is a note which, more
13 than anything else, sets out the cross-references in relation to what I am
14 going to be saying. So this responds, as you say, Madam to the points made
15 in the response on Friday at 10am from Stewarts and the starting point,
16 Madam, is that it is important to recognise that it was agreed at the Phase 1
17 trial that the parties did not need to cross-examine every witness on every
18 single point raised in their witness statements, because, as I have said,
19 because of the sort of factual time periods covered by different witnesses,
20 essentially multiple witnesses often covered essentially the same subject
21 matter but their walk on the park was that they might have walked on it in
22 2008 and 2009 and somebody else walked on in 2010 and 2011 when
23 Mastercard was grappling with the same issues and so they had points to
24 make about when they were thinking about it but fundamentally it was the
25 same core issues and that was dealt with on the basis that it was accepted
26 that a party did not need to have formally challenged the evidence of every

1 single witness on every single point provided that they had cross-examined a
2 witness on those issues and what we get then is situations where it may be
3 the case - and as I accept - that Mr Perez, for example, was not asked
4 questions on a particular topic that he covered but that was because, as was
5 accepted as being perfectly acceptable, they had asked, you know, the full
6 gamut of questions on the same issue to another witness. In many cases
7 that was either Mr Willaert or Mr Douglas who went into some more detail,
8 which is partly why they are coming back but in any event, the questions were
9 asked in further detail to somebody else. So we do say that it is a situation
10 where there has been detailed cross-examination on these issues in the
11 Phase 1 trial and if there are further issues to be addressed in the context of
12 what is further evidence being put forward by Mr Douglas and Mr Willaert,
13 then they are available to be cross-examined. So turning then to the various
14 issues identified by Stewarts in their letter of Friday ----

15 MRS JUSTICE BACON: Just before you do, just pausing there before you go on,
16 are you essentially saying that all of the issues that are referred to in the letter
17 will be capable of being put to Mr Douglas and Mr Willaert?

18 MR COOK: Those are matters which they are addressing in their supplemental
19 witness statements ----

20 MRS JUSTICE BACON: Yes. There is going to be no point taken at the trial, for
21 example, that there are some issues that are not dealt with by Mr Douglas or
22 Mr Willaert which then cannot be put to any of the witnesses.

23 MR COOK: Certainly in terms of the issues, the examples they have given -- I do
24 not want to commit myself to something that I have not thought about or heard
25 about ----

26 MRS JUSTICE BACON: No.

1 MR COOK: There is in relation to the PayPal point, a point that I need to deal with
2 on that because that is not actually dealt with independently in any of our
3 witness statements really. It is dealt with sort of ----

4 MRS JUSTICE BACON: Do not worry about that.

5 MR COOK: Yes.

6 MRS JUSTICE BACON: It is a single sentence.

7 MR COOK: It is a single sentence which does not really advance matters but
8 actually it is in paragraph 9 of this note and that is something where we say it
9 is compendiously dealt with by reference to switching to other schemes and
10 Amex was dealt with in detail but the same considerations arise in relation to
11 other payment matters including PayPal. So certainly I would not say that
12 because there is a -- the only person who used the word PayPal was -- I think
13 it might have been Mr Perez -- he might have been the only person who
14 actually used the word -----

15 MRS JUSTICE BACON: Yes.

16 MR COOK: I do not say that that has -- because that word has not been specifically
17 mentioned that they are debarred from asking in the context of the evidence
18 that is being given about switching from addressing anything specific that they
19 want to say in relation to PayPal.

20 So what we do in relation to the note is go through the various issues identified.

21 There is an initial point which is picked up at paragraph 2 and 3 of the note
22 which is the suggestion that effectively the alleged changes to the Mastercard
23 scheme were not a live issue by the end of the trial -- by the end of the
24 Phase 1 trial is the phrase, and I am afraid, with respect, we do not agree that
25 that is right.

26 The paragraphs of the judgment cited simply do not support that contention. That

1 issue was live throughout the evidence phase of the trial and that is the
2 reason why there was extensive cross-examination of Mastercard's witnesses
3 on this issue.

4 It is probably right to say that the point had faded away by closing submissions but
5 during the course of the live evidence phase it was undoubtedly a live issue
6 and was extensively raised in cross-examination of these witnesses but that --
7 and that is the important point, that because insofar as there was relevant
8 cross-examination on the points that the Claimants thought was relevant, they
9 have done it already.

10 So then stepping through the various allegations, allegation 1, Mr Perez was not
11 cross-examined about Mastercard needing to change its scheme rules but
12 that is one of those examples. Mr Douglas was cross-examined on that. Mr
13 Lane was also cross-examined on that at times and so there is evidence on
14 those issues and insofar as there are additional points to make, Mr Douglas is
15 obviously there giving evidence again to be cross-examined on them and we
16 set out the detail on those.

17 In relation to unbundling, that is paragraph 5, Mr Tittarelli was not cross-examined
18 particularly on unbundling. Mr Willaert was cross-examined on that point at
19 some length and we set out the references on two separate occasions
20 because he gave evidence twice, because the *Sainsbury's* Tribunal judgment
21 came out midway through the trial and so we came back to it, which is the
22 reason why it looks like it is sort of two days -- but that is the reason why it
23 was dealt with twice.

24 Mr Willaert, therefore, was cross-examined on unbundling at some length and
25 obviously he is one of the witnesses who is coming back. Mr Douglas also
26 did briefly address it and I accept that that was a relatively brief bit but if there

1 is really something significant and new, again he can be asked questions
2 about that in the Phase 2 trial.

3 MRS JUSTICE BACON: You are not contending that there are going to be any
4 restrictions on what the witnesses can be asked?

5 MR COOK: Only in the sense that obviously the Tribunal will case manage that trial
6 -- will case manage the trial as it sees appropriate and if it is the case that
7 there is a situation where they are simply duplicating what they were asked
8 first time around, then there may be a point where the Tribunal says, "We
9 have just spent 15 minutes asking about material that has been gone over in
10 detail already," but ----

11 MRS JUSTICE BACON: Yes, I think we are not expecting at that point that the
12 Tribunal is going to sit there with the transcript of the previous cross-
13 examination and of its own initiative raise points that were not cross-examined
14 on the first time because I think that is perhaps an unrealistic expectation.

15 MR COOK: Exactly, I am not suggesting that the Tribunal would be expected to
16 raise anything of its own initiative. I was more simply wanting to ensure that I
17 was not tying my own hands but we might stand up and say, "Wait a second,
18 this is a duplication of everything that has come before." The concern at that
19 point is about simply duplication ----

20 MRS JUSTICE BACON: Yes.

21 MR COOK: The way it works is because they have provided -- because Mr Willaert
22 and Mr Douglas are providing supplemental evidence on issues, we accept
23 realistically that we cannot draw this sort of clear bright line between, "You
24 said this in your first witness statement, you said this in that witness
25 statement, you can't ask about the first"

26 MRS JUSTICE BACON: No.

1 MR COOK: There is inherently the potential, it is accepted, for them to say, "You
2 said this last time, now you are contradicting yourself," ----

3 MRS JUSTICE BACON: Yes.

4 MR COOK: "--- and you said it differently ..." that is inherent in cross-examination a
5 second time.

6 MRS JUSTICE BACON: Yes, in principle their evidence is there at large. You are
7 relying on it in its totality and subject to your point about potentially raising
8 points as to duplication of cross-examination, you accept that in the Phase 2
9 trial they may be cross-examined on their evidence at large without drawing a
10 distinction - a clear distinction - between their previous evidence and this
11 evidence.

12 MR COOK: Yes, subject to the extent of duplication, that would be something that
13 the Tribunal would always want to avoid and in turn of course we rely upon
14 the answers they gave in the transcripts of their cross-examination and indeed
15 the Claimants will as well, so there is the core material in relation to them.
16 Then we come to American Express and this was something that again was
17 contrary to what was said by the Claimants in Stewarts' letter on Friday. It
18 was very much a core issue certainly on the evidence during the Phase 1
19 trial. Now we agree that the issue in Phase 1 was whether Mastercard could
20 have survived a no MIF scenario and to some extent that is a black and white
21 survive or not; however, in practice that was not that kind of black and white
22 issue because what we were saying was that we had lost certain types of
23 business in a lesser or a greater measure to American Express and certain
24 types of business to a greater or lesser measure to Visa, so we identified, or
25 Mastercard witnesses identified, and analysed Amex as a threat to particular
26 parts of Mastercard's business and they were, correspondingly, cross-

1 examined on the extent to which that business might be lost to American
2 Express. Again we set out a series of examples of cross-examination that
3 went essentially to that degree point which is the point that is being made
4 against us, that this was just "would Mastercard have survived?". It was not
5 about how much of the business would have been lost but that how much
6 would have been lost to Amex was an important part of whether we would
7 have lost the whole. If it was the case that we would have only lost five
8 percent to Amex and five percent to Visa, clearly we would not have lost the
9 whole, so degree was an important part of that.

10 We set out where witnesses were cross-examined in detail, so Mr Perez was cross-
11 examined on these issues. Then Mr Tittarelli at subparagraph (c) provided
12 extensive evidence on switching to Amex and was cross-examined on these
13 points in detail and Mr Lane was a sort of third category witness of who was
14 also cross-examined on the various points.

15 MRS JUSTICE BACON: Am I right in thinking that although there was some, let us
16 say, higher level evidence that the business that might be lost, none of those
17 three witnesses gave specific detailed evidence of, for example, percentages
18 of business that would be lost.

19 MR COOK: It is right to say that they do not provide the percentages in the sense
20 that -- I mean, what they talked about -- and, I mean, there are American
21 Express and Mastercard documents on this, is which bits of Mastercard's
22 business were (the phrase was) in the Amex sweet spot, but those witnesses
23 do not descend into saying, "I, therefore, think that we would have lost 40
24 percent of the business."

25 Certainly the way that that was done in the *Sainsbury's* trial was the sort of detailed
26 quantification of what those kind of losing premium business would equate to -

1 - it was done and we anticipated that it would be done again by Dr Niels
2 actually just analysing the data and saying, "We consider from this that
3 premium represents 10 percent in 2007 and 20 percent ..." so it is right to say
4 that they did not -- you know, at no point did any of those three, I think,
5 mention percentage of business being lost. They do mention a category of
6 business being lost which you can identify in Mastercard's disclosure what
7 that actually translates to.

8 So they were cross-examined about which bits of the business might be lost to
9 American Express but not specific numbers but then again their evidence
10 does not go into those specific numbers. So that was Mr Perez, Mr Lane and
11 Mr Tittarelli ----

12 MRS JUSTICE BACON: But then you said that Mr Douglas and Mr Willaert can also
13 give evidence so to the extent that this arises again they can be cross-
14 examined ----

15 MR COOK: Absolutely and ----

16 MRS JUSTICE BACON: -- at large at the Phase 2 trial.

17 MR COOK: Yes, and again this is something which they develop in their evidence,
18 in their supplemental evidence, but in any event this has now become one of
19 the key issues for the Phase 2 trial, so, yes, Mr Douglas and Mr Willaert both
20 address these issues and can be cross-examined on those and have been in
21 the part already.

22 MRS JUSTICE BACON: From your perspective, is there any respect in which the
23 evidence does not overlap; i.e., a specific topic that is addressed by either --
24 any of Mr Perez, Mr Lane and Mr Tittarelli which is simply outside the scope
25 of the evidence of Mr Douglas and Mr Willaert?

26 MR COOK: Without having done a line by line analysis I would not want to commit

1 myself to that. There is not some significant area of evidence where I would
2 say that is the case. There will be background explanations that differ
3 between points like that and, as I say, because of the sort of temporal point,
4 each witness provides sort of explanations of what Mastercard was thinking
5 about at different times, nearly all of which, it must be said, is that it is largely
6 a question of saying, "As can be seen in the attached slide presentation, this
7 is what Mastercard was thinking about at the time." But, you know, ultimately
8 we are focused here on the counterfactual, what would we have done in 2006
9 and those only provide illustrative matters.

10 It is fair to say that relatively little cross-examination was spent in Phase 1 about sort
11 of saying, "Well, Mastercard was not thinking different things, it was taking
12 those slide presentations and saying that it was clear that Mastercard was
13 considering this action, but, as you can see, bullet 3 says that it is a problem
14 because ..." and that is the reason why you would not have done it, so ----

15 MRS JUSTICE BACON: No, that is why you are going to be cross-examining -- well,
16 your witnesses will be cross-examined at all on this issue because these
17 specific issues were not directly addressed or may not have been directly
18 addressed in Phase 1 but the question is whether there is going to be any
19 sense that Mastercard will -- that Mastercard will not be -- well, that
20 Mastercard's evidence is siloed and I think you are saying that there was not.

21 MR COOK: Certainly at the moment I can say that from my recollection there was
22 no part of this evidence that I think, you know, that is something -- you know,
23 we needed Mr Tittarelli's evidence, without that we did not have anything on
24 the point. These are overlapping for time based reasons but the subject
25 matter of it, you know, everything is covered by multiple witnesses ----

26 MRS JUSTICE BACON: As far as you are aware?

1 MR COOK: -- as far as I am aware.

2 MRS JUSTICE BACON: Yes. Then PayPal?

3 MR COOK: And then PayPal; as I said, that is the point where the point can be
4 made against us and is that there is a single reference to it in -- I think it is ----

5 MRS JUSTICE BACON: Paragraph 18 of Mr Perez's witness statement.

6 MR COOK: Yes, but it is a single word where he says, "And PayPal."

7 MRS JUSTICE BACON: Yes.

8 MR COOK: I mean, the reality is that I am not going to get much out of that in any
9 event and what we rely upon is all of the detailed evidence that is given,
10 particularly by Mr Willaert and Mr Douglas, about switching to alternatives,
11 about how cost effective it is, the advantages, the competitive pressure.
12 Those have been analysed in detail in relation to Amex but essentially exactly
13 the same considerations apply so we say, "Look at that evidence, and say
14 *mutatis mutandis*," but those points are -- you know, that is how we approach
15 that evidence for trial. For quantification purposes it will be in the expert
16 reports but certainly the fact that there is a couple of words mentioning PayPal
17 which -- there is more than enough material on switching to alternative
18 payment methods in Mr Willaert and Mr Douglas but if there are any points
19 specifically in relation to PayPal that need to be put, then they undoubtedly
20 can be, if only on the premise of, "Well, that's your evidence in relation to
21 Amex but the same would not apply in relation to PayPal, would it?" So, that
22 will be something that they can be cross-examined about but we are not -- we
23 do not advance any substantial body of freestanding evidence in relation to
24 PayPal or at all.

25 MRS JUSTICE BACON: So you accept that insofar as questions are put about
26 PayPal, they do not have to be put to Mr Perez just because he was the one

1 who mentioned PayPal but can be put in the context of questions about
2 alternative payment methods to the witnesses you are putting forward, Mr
3 Cook?

4 MR COOK: Yes. It is right to say that a number of our witnesses talk
5 compendiously about switching to alternative payment methods and I think Mr
6 Perez simply happens to be the one person who, you know, added a -- in
7 some cases it was including Amex, he was the one who possibly said
8 including Amex and PayPal essentially. That is simply a point of detail that is
9 compendiously covered when somebody talks about switching to alternative
10 payment methods. I mean, there is Diners Club out there as well, which is a
11 fairly minor player in the UK market, but there are people beyond simply
12 Amex out there and they have talked about alternative payment methods but
13 Amex is the one that is the biggest threat to our business or is perceived to be
14 the biggest threat to our business.

15 MRS JUSTICE BACON: Yes.

16 MR COOK: So when someone talks about alternative payment methods, clearly
17 they can be questioned about any of the alternative payment methods that are
18 a credible possibility out there. That includes the more sort of recent entrants
19 to the market, the various delay payment companies that sort of allow you to
20 pay in three and pay in four, that is for the recent entrants to the market in
21 recent months and recent years.

22 So what we say overall is simply that we are calling two witnesses who deal with all
23 these issues. These witnesses have already been asked what was
24 considered to be enough questions about their evidence previously and there
25 is no need to drag everyone back simply to be asked further questions again.

26 MRS JUSTICE BACON: Yes, thank you very much. Yes, Mr Brown.

1 MR BROWN: Mr Cook's submissions have moved on slightly orally from what we
2 saw in writing. He accepts now that there are points which are addressed or
3 will address either in writing or orally by Messrs Perez, Tittarelli and Lane.
4 They can now be put to Mr Willaert and Mr Douglas. That is good insofar as it
5 goes but there is a risk, in my submission, that that will not be sufficient. It
6 may be -- I cannot say for sure because we just do not know at this stage, but
7 it may be that Mr -- that there are certain questions that have to be put to -- or
8 that we would like to put to one of the other witnesses because we feel that
9 they will be able to deal with those matters in more detail. Likewise, it may be
10 that the responses we get from Mr Willaert or Mr Douglas on particular points
11 to do with the extent of Amex switching, or Mastercard scheme rule changes,
12 will be somewhat unsatisfactory and unclear and what we do not want to then
13 find Mastercard doing is saying, "Well, this was dealt with Mr Perez or Mr
14 Tittarelli at Phase 1 and we are entitled to rely on those," or at least to the
15 extent that they do that, it must be open to us to say that the fact that we were
16 not able to -- that we were not able to cross-examine them on Phase 2, on
17 these specific issues -- and I am going to come on to whether these issues
18 were dealt with at Phase 1, but the specific Phase 2 issues that were dealt
19 with, I want to address Mr Cook's submissions on that but what we do not
20 want to find is that we are shut out from saying, "The weight that you must put
21 on Mr Perez's evidence or Mr Tittarelli's evidence is more limited because you
22 have not heard -- you have not had the benefit of them being cross-examined
23 on specific Phase 2 issues before you."

24 Can I just take the question of whether there is an overlap or at least the extent to
25 which the Phase 2 issues were the subject of so-called comprehensive cross-
26 examination which Mastercard contends is the case?

1 The Tribunal has got the point that at phrase 1 the issue to which Amex switching in
2 particular and Mastercard scheme rules -- the scheme rule changes went was
3 the question of objective necessity otherwise known as ancillary restraints.
4 You may have seen reference in the judgment to the death spiral arguments
5 that Mastercard ran. That is to say that in a zero interchange world, i.e., a
6 world in which there are no default interchange fees set by Mastercard, the
7 scheme would have withered on the vine, it would have collapsed in the face
8 of pressure from Visa, the asymmetric counterfactual as it is referred to. I see
9 some nodding, so I assume that that expression is a familiar one. In any
10 event, even if Visa is assumed to be constrained in the same way as
11 Mastercard, that issuers and card holders would have switched *en mass* to
12 Amex in particular. We can put PayPal to one side for the moment because
13 that is a more minor issue.

14 So that is the issue for Phase 1, would the Mastercard scheme simply have
15 collapsed and there is a legal argument about the extent to which
16 competitiveness - competitiveness of the scheme - was a relevant factor for
17 objective necessity. We know from the Court of Appeal's judgment that it was
18 not and that was what we argued at Phase 1 but for the purposes of the trial,
19 that issue was live and so we needed to run our case on both bases; in other
20 words, we had to cross-examine on the -- at least catering for the possibility
21 that Mastercard was right on that competitiveness issue, that that was a
22 relevant consideration for objective necessity.

23 By contrast at Phase 2, the question is the extent of any switching and the precise
24 rule changes that may have eventuated or would have eventuated on the
25 balance of probabilities in the counterfactual, in the zero MIF counter factual.

26 MRS JUSTICE BACON: So you are looking at both causative evidence as to the

1 type of purchases that would have switched and the quantitative evidence
2 which Mr Cook says is likely to come from the experts.

3 MR BROWN: I suspect it will be a combination of -- yes, it will be a combination of
4 different types of evidence, that is right, but there is -- the question is how
5 much of Mastercard's business would have been lost if anything.

6 MRS JUSTICE BACON: Yes.

7 MR BROWN: Whereas in Phase 1 it was a binary question, would Mastercard have
8 collapsed or not, would it have survived. Mr Cook is suggesting that -- I will
9 come on to it in a moment, but Mr Cook has suggested that at Phase 1, that
10 extent issue, the question of the extent of Amex switching, was the subject of
11 cross-examination. I am going to address that head on but that is, in my
12 submission, not correct.

13 Perhaps we can just turn to our letter of Friday because I want to take you through
14 the evidence or the points that they raise, so if we go to CMC4, page -- it will
15 be page 142 of the PDF, 139 of the pagination -- I am conscious, Madam,
16 that your version may be ----

17 MRS JUSTICE BACON: No, I have got the letter of ----

18 MR BROWN: You have got the letter in front of you, thank you. So at page 140, we
19 provided examples of matters which were not the subject of any cross-
20 examination before and we have addressed those at -- in the -- in the bullet
21 points. We also gave examples of matters where there was some cross-
22 examination on the general topic but it was not cross-examination directed to
23 Phase 2 issues. So if you go down to issue 4(1) to 4(2), alleged loss of
24 business to Amex, and the Tribunal, I am sure, has read this quite carefully --

25 MRS JUSTICE BACON: Yes.

26 MR BROWN: The point is that, as I have said, the question of competitiveness,

1 Mastercard said that was relevant to object of necessity, and if you need any
2 confirmation of that we see it in Popplewell J's judgment at paragraph 119(3)
3 that that was their case.

4 MRS JUSTICE BACON: Yes. We had read the letter carefully.

5 MR BROWN: Yes.

6 MRS JUSTICE BACON: And we have now got the submissions from Mr Cook on
7 this in his hand-up.

8 MR BROWN: Yes.

9 MRS JUSTICE BACON: Do you want to respond to what Mr Cook is saying?

10 MR BROWN: Yes, I can specifically respond to the points he has made today, which
11 go beyond - first of all I am going to address the extracts in the annex to
12 Mastercard's letter of 31 May, and then move on to Mr Cook's submissions
13 this morning if that is ...? Yes?

14 So if we go to Mastercard's letter of 31 May, that is at page 84 of the pagination in
15 the same CMC bundle, 87 of the PDF. At paragraph 5, over the page, you
16 see towards the end:

17 "By way of example, we set out in the Annex ... some extracts ... of the Phase 1 trial
18 which demonstrate the extensive and detailed cross-examination on these
19 issues..."

20 The annex is on the next page. The first three pages of the annex are given over to
21 exchanges between Mr Lowenstein and Messrs Lane and Perez on the topic
22 of Amex switching, and we see at paragraph 2 it is said that Mr Lane, his
23 evidence was comprehensively tested by Mr Lowenstein. The only point put
24 to Mr Lowenstein in the excerpt to which the annex refers was that his
25 evidence of Amex being a great threat to Mastercard, a great threat and the
26 words existential threat, was inconsistent with a survey conducted by Ipsos

1 MORI.

2 That is hardly a comprehensive exploration of the likely extent of switching in a zero
3 MIF world in my submission. Paragraphs 3 and 4 are given over to cross-
4 examination of Mr Perez on the Amex switching issue. It says that he was
5 cross-examined on this at length, again in my submission that is not correct.
6 We are talking only a very limited bit of the transcript, a page and a half. It is
7 clear that the focus of Mr Lowenstein's cross-examination is on whether there
8 would be a collapse in Mastercard's business. You see this at the bottom of
9 page 88 of the bundle. You see towards the end of the cross-examination
10 passage:

11 "But there has been no large collapse in the level of Mastercard's business, has
12 there?"

13 MRS JUSTICE BACON: Can you tell me which paragraph of the annex you are
14 looking at?

15 MR BROWN: Yes, I am sorry, so I am on page 88 of the pagination, page 91 of the
16 PDF.

17 MRS JUSTICE BACON: I have got different pagination.

18 MR BROWN: Oh, I am sorry, I am sorry. Yes, paragraph 4.

19 MRS JUSTICE BACON: It is ... And which line are you --

20 MR BROWN: So I am looking towards - yes, Madam, I am looking towards the very
21 bottom of the passage, the very bottom of this page.

22 MRS JUSTICE BACON: "There is still a big differential."

23 MR BROWN: Yes, it is just below that.

24 MRS JUSTICE BACON: All right.

25 MR BROWN: And he says:

26 "But there has been no large collapse in the level of Mastercard's business, has

1 there?”

2 MRS JUSTICE BACON: Yes.

3 MR BROWN: So clearly getting at the Phase 1 object of necessity issue. If we just
4 go over to the next page, paragraphs 5 and following, are on the other
5 Phase 2 issue that has been raised, which is the question of whether
6 Mastercard would have changed the scheme itself, changed the scheme rules
7 in the absence of MIF revenues flowing to issuers.

8 At paragraph 6 Mastercard say that this evidence was tested by Mr Lowenstein at
9 the Phase 1 trial. Then there is an extract from the cross-examination of Mr
10 Perez, and once again it is clear that the focus is on the Phase 1 issue,
11 namely whether Mastercard would have survived in a no MIF counterfactual.
12 If you look at the bottom of that page ...

13 MRS JUSTICE BACON: Yes.

14 MR BROWN: ... you see that.

15 MRS JUSTICE BACON: So you are saying it was a binary question.

16 MR BROWN: It was a binary question. There is no question of the extent being
17 raised at all. The same goes for Mr Lane, if I could just very quickly take you
18 to that - you need to scroll through a couple of pages to page 91 of the
19 pagination, at least on my copy. Again, it is said that he was cross-examined,
20 not just exploring the details of the options but also how the options were
21 developed and tested, and you can see just below Mr Lane’s comment that
22 that would be fair, Mr Lowenstein asks:

23 “There was never going to be any real lose, if I could put it in that language. There
24 was never any question of Mastercard just stopping, was there? It was going
25 to carry on come what may ...”

26 So again it is clear that the cross-examination is focused on the Phase 1 issue. So

1 in my submission those extracts do not help Mastercard.

2 Can I now turn to what Mr Cook canvassed with you this morning. So if we can have
3 a look at - sorry, I may not be quite as quick as this because it has been given
4 to me at the last minute but if we have a look at the transcript of Day 8, page
5 130 to 140 on Amex.

6 MRS JUSTICE BACON: Bundle?

7 MR BROWN: Sorry, you have not handed this up, have you?

8 MRS JUSTICE BACON: This is in the supplemental bundle?

9 MR BROWN: It was handed up, I think, loose this morning.

10 MRS JUSTICE BACON: Yes.

11 MR BROWN: Yes. Oh, sorry, you have put it in your supplementary bundle. Thank
12 you.

13 MR COOK: Which page of the transcript are you taking us to?

14 MR BROWN: This is Day 8, I want to look particularly at page 133. This is cross-
15 examination of Mr Willaert on the question of Amex switching. Page 133, I
16 want to zero in on lines 11 and 12. Again you can see that what Mr
17 Lowenstein was getting at with Mr Willaert was again this question of whether
18 Amex switching would result in a collapse in Mastercard's business. In my
19 submission it is just not right to say that any of the three Phase 1 only
20 witnesses or Mr Willaert has been asked about the extent of Amex switching
21 at Phase 1.

22 Then as regards unbundling, as I think Mr Cook put it this morning --

23 MRS JUSTICE BACON: Just before you move on, is that because they did not
24 really address in detail in their evidence the question about the extent, they
25 address it at a fairly high level of generality?

26 MR BROWN: When you say is that the reason, do you mean is that a reason for Mr

1 Lowenstein's cross-examination?

2 MRS JUSTICE BACON: Is that part of the reason?

3 MR BROWN: The reason for Mr Lowenstein's focus on the question of collapse was
4 that that was the only issue at Phase 1, the question of whether Mastercard
5 would have survived, because that was the object of necessity issue. It was
6 not for us to start lines of cross-examination on the extent of switching. Mr
7 Cook or Mr Hoskins, his then leader, would have been entitled to jump up and
8 say: "This is irrelevant at Phase 1."

9 When we come on to unbundling, in the same transcript Mr Willaert is asked
10 questions about this. I should say, by unbundling I mean Mastercard scheme
11 changes. Mr Willaert is asked about certain questions to do with the anti-
12 fraud benefits or alleged benefits to retailers at pages 161 and following of the
13 transcript. You will see at paragraph 5(a) of Mr Cook's note that he handed
14 up this morning it is said that Mr Willaert was cross-examined on scheme
15 rules, including unbundling, at pages 161 to 169.

16 Can I just draw your attention first to the top of page 161, which refers to paragraphs
17 61 to 77 of Mr Willaert's first statement. Mr Lowenstein points out that it is at
18 this stage of his first statement that he deals "with some of the benefits that
19 you say are generated by Mastercard scheme". Now, translating that into the
20 language of Article 101, that is getting at the Article 101(3) question, the
21 extent to which benefits for merchants arise from the restrictive agreement.
22 Of course, what Mr Lowenstein is putting to Mr Willaert here is that it is
23 benefits that he says are generated by the scheme rather than by the
24 restrictive agreement itself, the MIFs. But my point is that this line of cross-
25 examination, and I am happy to take you to the witness statement just to
26 show you it - I can do that in a moment - but this bit of the cross-examination

1 again has nothing to do with the Phase 2 issues, this is all about the Article
2 101(3) issue.

3 The point that is then explored with Mr Willaert in cross-examination is anti-fraud
4 technology, such as chip and PIN, was not related to the MIF because, so it
5 was put to Mr Willaert, issuers would have been incentivised to deploy that
6 technology in any event, for reputational reasons among others. I do not
7 propose to weary the Tribunal by taking you through the whole transcript
8 extract, but that is the point that Mr Lowenstein is exploring with Mr Willaert. It
9 has nothing to do with the Phase 2 issues. It certainly has nothing to do with
10 which rules may have been changed by Mastercard in a zero MIF world.

11 So my short point is that the Phase 2 issues were not explored with the witnesses at
12 Phase 1, and in my submission AAM is entitled to explore them at Phase 2
13 with the witnesses who have given evidence on those matters. Now, it may
14 be put to me by the Tribunal and, as I understand it, it is Mr Cook's case, that
15 all the Phase 2 points can be simply explored with Mr Willaert and Mr
16 Douglas, and there is no need to bring back Messrs Perez, Tittarelli and Lane
17 for any further examination, and that it would be somehow unfair on them and
18 a strain on the Tribunal to do so.

19 My responses to those points are: one, if, as I say, none of this has been tested yet
20 by AAM at all, none of the Phase 2 issues have been tested, why does
21 Mastercard seek to rely on those three witnesses? Why does it not say: "We
22 no longer place reliance on them for Phase 2, we simply rely on Mr Willaert
23 and Mr Douglas." That is not Mastercard's case. They say in terms they want
24 to rely on these three witnesses, they just do not want them to turn up and
25 answer questions. We say that there is a contradiction there. Either they rely
26 on those three witnesses, in which tender them for cross-examination or ask

1 for them to be treated as hearsay evidence, at best, or - yes, those are the
2 two options: tender them or do not. But you cannot have your cake and eat it,
3 you cannot have it both ways. So that is what we say about that.

4 In terms of the burden on the Tribunal and on the witnesses, we have taken a look at
5 how long these three witnesses were cross-examined for altogether at
6 Phase 1, and it comes to seven hours, that is all, for the three witnesses.
7 That was across the whole of their Phase 1 evidence. So the suggestion that
8 the trial timetable will be put under pressure if we elect to cross-examine any
9 of these three witnesses is in my submission fanciful. It can reasonably be
10 expected that cross-examination would be relatively short. It is not going to
11 add days to the trial timetable. So that in my submission was also an answer
12 to the argument that it places an unreasonable strain both on the witnesses
13 and also on the timetable.

14 MRS JUSTICE BACON: If you were only limited to cross-examining, say, one or two
15 of those witnesses, which of those witnesses would you pick?

16 MR BROWN: I am not sure I can answer that immediately. Can I - of the three, if
17 we had to choose one of them?

18 MRS JUSTICE BACON: Yes. Put another way: if the Tribunal, and I am not saying
19 this is what we would do, but if we were to make an order requiring some of
20 the witnesses to be cross-examined, which of them is likely actually to be
21 giving the most useful evidence? Because your point was that you are afraid
22 that Mr Douglas and Mr Willaert might not be able to give useful evidence in
23 relation to some of the points so you would like to be able to cross-examine
24 one or more of the other three, in case. So my question is: which of those do
25 you think is likely to be most useful? Because it seems to me that your letter,
26 Stewarts' letter, seems to focus mainly on Mr Perez and Mr Tittarelli rather

1 than the evidence of Mr Lane.

2 MR BROWN: Yes.

3 MRS JUSTICE BACON: That was the impression that we got, and so your answer
4 to that might be you would be content, if you did not get to cross-examine
5 them all, to cross-examine Mr Perez and Mr Tittarelli.

6 MR BROWN: Yes. I will need to just discuss that briefly with my team. My first
7 reaction is that that is likely to be the case, but I need to take a slightly closer
8 look and discuss it with my - I may need more than just a moment to peruse
9 the witness statements in a bit more detail. But if we could have - if that is the
10 direction of travel, if that were the direction of travel, it would be helpful for us
11 to take a moment to consider that carefully.

12 MRS JUSTICE BACON: All right. (Pause) Yes, so I think it would be helpful for you
13 to consider that and I think it would also be helpful for you to consider what
14 amount of time you realistically would like with those witnesses, because I
15 think part of the concern would be that witnesses are recalled and then cross-
16 examined up hill and down dale in a manner which, as I have already
17 indicated to Mr Cook, it may be quite difficult for the Tribunal of its own
18 initiative to control.

19 MR BROWN: Yes.

20 MRS JUSTICE BACON: It is unrealistic to expect that we will have internalised in
21 detail everything that was said first time round. Equally what I do not want, if
22 we were to go down that route, is a situation where Mr Cook has to be
23 jumping up and down to say this was already traversed extensively first time
24 round. So I think that if we were minded to order that certain witnesses were
25 recalled it would be subject to some quite strict time restraints, and also I
26 would want to know which witnesses are going to be most useful.

1 MR BROWN: Yes.

2 MRS JUSTICE BACON: Before we do rise, I would like to give Mr Cook an
3 opportunity to come back, so that we can take away what you have said and
4 then you can take instructions and, if necessary, discuss between you. Is
5 there anything else that you wanted to say before you sat down?

6 MR BROWN: No, I think that covers everything I intended to say.

7 MRS JUSTICE BACON: All right. Mr Cook.

8 MR COOK: Yes, Madam. I suppose what I was going to do just briefly, and it is in
9 light of the question you asked, which is how far these witnesses were not
10 cross-examined in tremendous detail on some of these points reflects how far
11 their evidence went. That is, with respect, a very fair point and we dealt with it
12 in relation to the Amex point, that none of these witnesses did go into
13 percentages - just to be clear, I think actually looking through the transcripts I
14 noticed one question where one of the witnesses, I think it might have been
15 Mr Tittarelli, had talked about losing premium business, and he was asked a
16 question: "What was your premium business?" and he said something like
17 about 60 percent, for example. So at that level of generality numbers were
18 talked about, but certainly not in any form of specifics. Of course that was in
19 response to a direct question: what percentage does premium represent?

20 But if one looks, for example, on the point my learned friend was just asking about,
21 which is Mr Tittarelli's evidence on unbundling, which is in CMC bundle 5, I
22 think it is going to be in tab 1 and it is page 12 in the bottom right hand corner
23 - that is probably page 13 of the PDF, unfortunately. Unbundling, what he
24 was doing there in that section was simply setting out by reference to a
25 particular set of presentations, the options that Mastercard was considering.
26 Option 4, so it was a menu of various different options, option 4 was

1 unbundling and he eventually said that this is what Mastercard was looking at,
2 these were the options and these were some of the concerns that were
3 identified. So it is being done by reference to particular contemporaneous
4 documents and recording some of the considerations taking account at the
5 time.

6 So these are not sections that are hugely detailed about necessarily how Mastercard
7 would have dealt with things in the counterfactual, which is why when we
8 come to the sections of cross-examination on some of these issues in turn
9 they were not necessarily focused on exactly what Mastercard would have
10 done, to some extent.

11 MRS JUSTICE BACON: Yes. The questions that can be asked of them are rather
12 limited, which is one reason why I was thinking that if this were to be allowed
13 it would need to be strictly time limited and confined to the witnesses who did
14 give the most useful information, which did not seem to be all of them.

15 MR COOK: Madam, there is a certain measure of truth in the fact that certainly the
16 way in which it was done certain witnesses could provide more evidence, both
17 in terms of their commercial background, the period that they were sort of
18 dealing with or had responsibilities that cover these matters, and in turn how
19 much information they could provide. So, yes, there is certainly a gradient of
20 how much evidence they could give. But, and what we are concerned about,
21 is to some extent an approach which is: bring everybody back and we will
22 deal with this in the course of the trial.

23 MRS JUSTICE BACON: I have already indicated that it is not realistic to expect that
24 that can be rigorously case managed off the Tribunal's own initiative, and I do
25 not want counsel popping up and down like a yoyo to tell us what was dealt
26 with first time. So we have to grapple with this to a certain extent now.

1 MR COOK: Yes. The problem to some extent, and it is a weak submission to make
2 at the end of an hour of submissions from the parties, is there is an aspect
3 perhaps - we are a little bit ahead of ourselves dealing with these points now.
4 Certainly some of the detail of these points may be something that needs to
5 be dealt with at something like the PTR, but what we wanted was an
6 indication at this stage that in general there should not just be: bring
7 everybody back, cross-examine free-for-all. It may be that - I appreciate my
8 learned friend is in difficulty now with deciding who one of his leaders will want
9 to cross-examine in a year's time, which in part may depend of course upon
10 expert evidence and where points have crystallised by then, but we were
11 trying to put a marker down that free-for-all should not be the approach taken
12 here.

13 MRS JUSTICE BACON: Yes. I do not think anyone is minded to - Mr Brown is not
14 asking for a free-for-all --

15 MR COOK: I am sure he would say that, but yes.

16 MRS JUSTICE BACON: ... is not very much inclined to give one. Can we then rise
17 for - do you want ten minutes? Is that sufficient?

18 MR BROWN: Yes. Madam, can I have ten minutes to liaise with my team? I was
19 actually going to endorse Mr Cook's suggestion or tentative suggestion at the
20 end there that we could - we hear loud and clear what you have been putting
21 down to us, that it certainly cannot be a free-for-all and we are not asking for a
22 free-for-all, we want it to be a focused exercise. I was going to suggest that
23 we go away and give this matter some serious thought, more than just ten
24 minutes - as Mr Cook says, it is likely that our thinking will crystallise in the
25 light of the expert evidence and in light of our own detailed trial preparation -
26 and that we come back, one option would be to come back at a later stage,

1 not leave it necessarily to the PTR but certainly at the very latest at the PTR,
2 to be able to say: "We do not need to cross-examine Mr Lane," bearing fully in
3 mind the steer you have given the parties already this morning. That would
4 be one way of doing it, and it may be more satisfactory than having ten
5 minutes now where there is a chance I am going to come back in ten minutes
6 and say: "I still cannot tell you that we do not want to call Mr Lane."

7 MRS JUSTICE BACON: Yes, all right, let us do that. We have had a useful
8 exploratory discussion. You have heard out initial thoughts. Any recall of
9 those witnesses should be on fairly strict limited terms, both as to who is
10 called and the length of time for which they are to be cross-examined. We will
11 leave it with you to discuss further, having heard those comments, being
12 aware that this will not be a free-for-all, that all three of them get recalled for
13 as long one wants to spend with them.

14 MR BROWN: No.

15 MRS JUSTICE BACON: I think the way forward would be that in so far as they are
16 recalled that the majority of the cross-examination should be directed at Mr
17 Douglas and Mr Willaert, and any of those witnesses should be cross-
18 examined for a strictly limited period of time in relation to any supplemental
19 issues that you are not able to put to Mr Douglas and Mr Willaert. So with
20 that, then this can come back later, either on papers if you are not able to
21 agree ...

22 MR BROWN: Yes.

23 MRS JUSTICE BACON: ... or at the - or do you want an order before the PTR, or at
24 the PTR.

25 MR BROWN: I am grateful, thank you very much.

26 MRS JUSTICE BACON: Then does that leave - we could rise, but on the other hand

1 if there is only then the question about Mr Harman and Dr Niels ...

2 MR BROWN: Yes.

3 MRS JUSTICE BACON: ... we might be able to deal with that fairly shortly.

4 MR BROWN: We may well be able to. My learned friend Ms John is going to

5 address the Tribunal on that particular point ...

6 MRS JUSTICE BACON: Yes.

7 MR BROWN: ... because we divided up the submissions.

8 MRS JUSTICE BACON: All right.

9 MR BROWN: So, yes, we are in your hands.

10 MRS JUSTICE BACON: Would everyone, including the transcribers, like us to rise

11 anyway for five minutes?

12 Yes, so we will rise for five minutes and then we will come back on the issue of Dr

13 Niels and Mr Harman.

14 MR BROWN: I am grateful.

15 (11.49)

16 (A short adjournment)

17 (12.01)

18 MR COOK: Madam, before my learned friend starts, in relation to what we were

19 dealing with before the short adjournment, I would suggest it would be

20 sensible for the Tribunal to include some provision in the order for a date for

21 the Claimants to write saying: "We would like to recall Mr A to cover these

22 topics that we think we could not deal with with Mr Willaert and Mr Douglas in

23 accordance with the Tribunal's guidance on what type of cross-examination

24 would be acceptable", and that would be sensible for our purposes particularly

25 so that witnesses do not need to be kept on tenterhooks indefinitely whether

26 they need to come back before trial. We do not need to sort of spend time

1 preparing them, going back through the materials, etc.

2 MRS JUSTICE BACON: Yes. What date are you suggesting?

3 MR COOK: We are suggesting the end of September on the basis that certainly the
4 expert evidence will have happened by then so we will have the first round of
5 it, so the whole idea of the division between factual and expert material in
6 terms of qualitative and quantitative, that distinction, and we should have a
7 fair idea of where the shape of the case is emerging by that stage. So that
8 would be my suggestion, Madam.

9 MRS JUSTICE BACON: Yes. We will have had the first round of expert reports and
10 be well advanced with the second round of expert reports, so you will be
11 aware of what issues really are in play by then and what we do need to
12 address to the points. Does that seem to be a sensible timetable, Mr Brown.
13 Do you disagree?

14 MR BROWN: I do not have any objection to the principle. I would suggest that the
15 date be a little later just to take into account the second round of expert
16 reports which will still leave plenty of time for the witnesses to be taken down
17 off the tenterhooks. So perhaps some time in mid-October.

18 MRS JUSTICE BACON: The second round reports are due on 7th October.

19 MR BROWN: That is right.

20 MRS JUSTICE BACON: So what about putting it on 14th October?

21 MR BROWN: Yes, the 14th or the 21st.

22 MRS JUSTICE BACON: I would suggest 14th October.

23 MR COOK: Yes, Ms John.

24 MS JOHN: Yes, Madam. So the final area of dispute between the parties about
25 whether Mastercard should be able to adduce evidence from two experts on
26 the issue of pass on, if the Tribunal still has our composite draft order to hand,

1 paragraph 12 includes our suggested wording highlighted in green. I should
2 make clear at the outset that the objection is not to Mastercard having
3 permission to rely on a forensic accounting expert per se. We understand
4 that Mr Harman is going to be addressing the compound interest of the claim,
5 so the concern is specifically with him addressing pass on in addition to that.

6 Our starting premise is that it is Mastercard who wants permission to rely on this
7 evidence and it is for Mastercard to satisfy the Tribunal that it should have
8 permission, and in my submission that means two things. First of all, showing
9 that there is an area of the pass on dispute that needs input from a forensic
10 accountant and, second, showing that there would be a substantial benefit in
11 having that evidence available in addition to the evidence of the economists,
12 given that a proliferation of experts should be avoided and that at the end of
13 the day the Tribunal is going to be wielding a broad axe when it comes to
14 assessing pass on. Just to give you our paragraph in a nutshell before I
15 develop the detail, we on our side do not see that a forensic accounting
16 exercise is there to be done at all, but even if there is, we do not see that it is
17 going to add sufficient value to what the economists are already doing that it
18 justifies opening up an additional expert front.

19 I am going to start by addressing the principle of Mastercard's proposal and then I
20 will move on to the practicalities, which is where Mastercard's points appear
21 to be focused.

22 On the question of principle, we have some difficulty in working out exactly what
23 Mastercard's proposal is, but from what we have seen we do have objections
24 to it. It seems to us that there are several layers of work that Mr Harman
25 could be doing. It seems to us there are four. The first of those would be a
26 number-crunching exercise, so something purely numerical, taking the

1 percentage pass on that Dr Niels calculates, feeding that into a calculation
2 and telling the Tribunal what that means in terms of pounds, shillings and
3 pence, so essentially a quantification exercise. We have no objection to Mr
4 Harman doing that sort of work and we have made that clear in our early
5 correspondence on this topic. So that is not in contention.

6 The second thing that he might be doing is a survey of the facts, so that would be
7 reviewing the statements that our witnesses have given, reviewing our clients'
8 disclosure, looking at other documents in the public domain and building up a
9 picture of things like how budgets were set, how prices were set. That in itself
10 is a factual exercise. Now, it is an exercise that the experts can draw upon for
11 certain purposes, and I will come to that in a moment, but just focusing on that
12 exercise itself, reviewing the factual matrix does not require any particular
13 expertise. Now, we would have hoped that that was not a controversial
14 proposition but, in fact, there is a suggestion in Mastercard's skeleton
15 argument that it might be. There is a new suggestion made in paragraph
16 42(c) in particular of their skeleton argument. It is helpful to turn it up. It is in
17 the core bundle at tab B2, page 26, and the point that is made here is that if
18 we do not get to put in Mr Harman's evidence you will have no forewarning of
19 Mastercard's case. So the suggestion that seems to be made here is that Mr
20 Harman's report is going to be a vehicle for setting out Mastercard's
21 challenges to the evidence our witnesses have given, that he is going to be
22 put forward as some sort of counterpoint to them, or that he is going to be a
23 vehicle for setting out Mastercard's submissions on documents.

24 Now, insofar as that is what is envisaged, we say that is not appropriate, that is not a
25 forensic accountancy exercise. If Mastercard want to challenge our
26 witnesses' evidence, of course, they will have a chance to do that in cross-

1 examination and they will have their opportunity to make submissions on our
2 documents, but we do not need to open up an additional expert front for that
3 purpose. That is not a reason for them to have permission.

4 The third area that Mr Harman may be looking at or that is potentially available would
5 be to feed into the econometric emphasis. So, having surveyed the factual
6 matrix, there is a piece of work to be done in using the results to construct the
7 econometric analysis, and the facts might be relevant in three ways. They
8 might inform how the model will be constructed, they might inform what inputs
9 are fed into the model and it might be used as a cross-check. So looking at
10 the outputs that come from the model and then comparing that with what one
11 sees on the facts and seeing whether they are broadly consistent with each
12 other.

13 Now, that exercise we agree is one that does require expert judgment identifying
14 which elements of the factual matrix are actually relevant to feed into the
15 econometric analysis. Now, if Mr Harman were doing that, or something that
16 feeds into that process, we would have no objection to that because we agree
17 that the econometric analysis is going to be key on the pass on issue and if
18 Mr Harman is helping to construct that, if Dr Niels needs some additional
19 support then we would have no objection to it. The problem is it does not
20 appear to us that that is what Mr Harman is going to be doing. There has
21 been no suggestion in correspondence that Mr Harman's report is going to
22 feed into Dr Niels's work. There is no suggestion in Mastercard's skeleton
23 argument to that effect. We also do not see anything in the version of Dr
24 Niels's report from the *Sainsbury's* case that suggests that that is how the two
25 reports were fitting together.

26 If we just briefly turn that up --

1 MRS JUSTICE BACON: Perhaps the best thing to do is to wait and see what Mr
2 Cook says about that and you can come back to that in reply.

3 MS JOHN: I am quite happy to proceed on that basis. The point is that as far as we
4 can see,

5 Dr Niels's report is self-contained. Mr Harman is not a support for it; he is not
6 essential, so there is no need to allow his report in on that basis.

7 The fourth potential area of work is that there is a proposal for Mr Harman to conduct
8 some sort of separate analysis using a separate methodology based on his
9 forensic accounting expertise. Unfortunately, in spite of all of the
10 correspondence flying around, the position on this is still not entirely clear but
11 we think we understand that Mastercard are proposing something separate
12 and additional, although we struggle to understand exactly what it is and why
13 they need Mr Harman to do it. So in their skeleton argument Mastercard talk
14 about Mr Harman assessing pass on – that is the word that they use in
15 paragraph 36(b) – which suggests a layer of additional analysis based on his
16 expertise. What does that look like? We have now been given a copy of his
17 report from the *Sainsbury's* proceedings. If the Tribunal will bear with me, I
18 will turn that up briefly. It is in bundle 6 tab 1.

19 MRS JUSTICE BACON: Which page would you like us to look at?

20 MS JOHN: We start at page 64. Now, I am not going to go through this in detail, not
21 least because it is so heavily redacted that it is not actually possible to do that.
22 But from what we can see, the key sections are sections 7 and 8. In section 7
23 the opening passages are redacted. From what we can see there is then a
24 survey of publicly available documents, so he is looking at the retail prices of
25 Asda, Tesco, looking at the position of the British Retail Consortium – that is
26 over on page 66. On page 67, he refers to comments from the Competition

1 Authorities. We have a redacted section. In paragraph 7.25, we come on to
2 references to Euro Commerce and some documents from them. And at the
3 end of another block of redacted text on page 75 we have his conclusions
4 which are largely redacted but we can see the headline conclusion is that
5 Sainsbury's is likely to have passed on any interchange fee overcharge.

6 MRS JUSTICE BACON: But the body of his analysis is redacted and there is a
7 comment about the European Commission, the ERRT, which is presumably
8 not the major point that he is making. The rest of his analysis is not available
9 for us to see.

10 MS JOHN: No indeed, and hence the difficulty that we find ourselves in that we do
11 not really know exactly what is being proposed. All I am saying at this point is
12 that based on what we can see from this document that we have been given
13 and what we have had in correspondence, we cannot see anything that is
14 calling upon his expertise as a forensic accountant.

15 MRS JUSTICE BACON: It is because the stuff that calls for on his expertise as an
16 accountant seems to be redacted from this.

17 MS JOHN: Mr Cook may tell us that in a moment. If he does, then I will respond to
18 that. While we have it open, section 8 is the next section that appears to be
19 relevant, and again we have a survey of publicly available documents coupled
20 with redacted texts. Paragraph 8.55 on page 90 is his conclusion, "...that
21 Sainsbury's is likely to have passed on a reduction in the MIF to its customers
22 through lower prices. This is because ..." – and the reason is redacted.

23 MRS JUSTICE BACON: Yes. Perhaps we cannot tell anything really from this as to
24 what he is going to be actually doing because of all the - the matters on which
25 you would expect his expertise to be called into issue are redacted, so we
26 only have the innocuous bits about the survey of other statements of other

1 authorities.

2 MS JOHN: Yes indeed, and Mr Cook may tell us – it has not been explained to us in
3 correspondence – what he is doing that does call upon his expertise. Mr
4 Cook may do so in a moment but the point I am simply making is we cannot
5 see any of it as things currently stand.

6 If we turn back to Mastercard’s skeleton argument, paragraph 43, this paragraph is
7 dealing with the practicalities, and I just invite the Tribunal to note the
8 following sentence which ends “Dr Niels would have to re-do work which Mr
9 Harman has already done.” The implication of that appears to be that this is
10 not a forensic accounting exercise at all, it is something that can be picked up
11 by Dr Niels in the same way that we have an economist doing this exercise on
12 our side.

13 MRS JUSTICE BACON: Yes. It is not really for us to dictate which part of the
14 evidence is dealt with by Dr Niels and which is dealt with by Mr Harman. It is
15 all ultimately an expert’s task.

16 MS JOHN: Well, Madam, in principle one should only have Mr Harman, a forensic
17 accountant, giving evidence on this if there is an identified area of the pass on
18 issue that does require forensic accountancy expertise. Now, if there is such
19 an area then we would like to know that because we will consider whether we
20 also need a forensic accountant in order to meet that evidence. The difficulty
21 that we have is we do not see what that area is at the moment.

22 MRS JUSTICE BACON: Shall I just hear from Mr Cook then and then you can
23 respond to that, because it seems to me that there is some clarification to be
24 done.

25 MS JOHN: Certainly.

26 MR COOK: Yes, Madam. I am slightly surprised at the level of confusion. We

1 thought we had provided a lot more clarity to the other side than appears is, in
2 fact, the case. There is obviously a single question in relation to pass on. It
3 gets a bit more confused than that but in general how far would the reduction
4 of MSCs arising from the relevant MIFs being set at zero have been passed
5 on. There are two possible candidates. Passed on in terms of lower retail
6 prices, passed on in terms of reduced supply and costs, and those are the two
7 possibilities.

8 Now, in broad terms there are two types of evidence that is going to be relevant to
9 the Tribunal's consideration of that question: what I refer to as qualitative and
10 quantitative. Qualitative here is looking at the budgeting and price setting
11 processes adopted by the four separate businesses who are the claimant
12 companies in order to identify the extent to which the MSCs played a role in
13 those budgeting and price setting processes and what effect different MSCs
14 would have had on those processes and the end results of it, and that is
15 quantitative analysis and we are not looking at – particularly in terms of
16 analysis of sort of economic empirical analysis of prices, it is about the
17 processes that were being adopted there. The second one is then
18 quantitative, and that is empirical analysis, and whether it is going to be
19 econometric, of how prices for these businesses or similar businesses
20 changed in response to changes in costs. Those are the two types of
21 evidence the Tribunal is going to be presented with, and it is clear from
22 paragraph 216 of the Supreme Court judgment in *Sainsbury's* that we very
23 much do need to focus on the qualitative as well as the quantitative because
24 we have been told that the burden having raised the issues, the Claimants do
25 need to provide – in the Supreme Court's words there is a heavy evidential
26 burden on the merchants to provide evidence of how they dealt with the

1 recovery of their costs in their business. So it is looking at actual processes
2 for how they recovered their costs generally but obviously with the focus
3 eventually getting into the question of whether the MSCs were being
4 recovered in prices or not.

5 MRS JUSTICE BACON: Ms John suggests that some of this is simply factual
6 evidence and what you are going to be doing with Mr Harman is not a forensic
7 accounting exercise but rather putting forward your own version of the facts.

8 MR COOK: The distinction that we draw here is that we intend to have Mr Harman
9 do the qualitative side and Dr Niels do the quantitative side, and our starting
10 point for this is the Claimants as well are indicating that their expert evidence
11 is going to cover both qualitative and quantitative, and it is Stewarts' letter at
12 CMC bundle 4 tab 11 page 41 paragraph 8, page 42 of the PDF, and they say
13 Dr Friederiszick – and I apologise for mangling his name hideously --

14 MRS JUSTICE BACON: We have read the paragraph.

15 MR COOK: So they are identifying the fact that it is appropriate for the experts to
16 look at both what is described as the regression analysis, quantitative, and
17 also assess the evidence in relation to price setting processes, so the
18 qualitative side of it. So as far as we can see, they are intending to do exactly
19 what we are. The only distinction is that we want to split it between two
20 experts, and in any event we are going to have those two experts giving
21 evidence on other topics because Mr Harman is going to be in with compound
22 interest which remains an issue in relation to Morrisons' claim at least. They
23 say they have no objection to us sort of spitting it out differently; in fact, they
24 cannot do, but that is simply the distinction we see between us.

25 Now, in terms then of my learned friend's submissions on should we be looking at
26 qualitative, that rebounds on her because it appears her expert is going to be

1 dealing with an assessment of the processes, so she seems to be saying
2 what they are planning to do goes too far, but, with respect, I say what both
3 parties are planning to do is a perfectly sensible and appropriate process. We
4 are dealing with four large complex businesses. We are dealing with what is
5 likely to be – and I have not focused on the disclosure but I am familiar with
6 the type of documents from *Sainsbury's*, often very detailed internal
7 spreadsheets evaluating with many, many line items all the different cost
8 entries, and things like that, how that is then used and implemented into
9 setting prices and budgets, how those change during the course of a year.
10 That is an analytical process of drawing those threads together to understand
11 how four complex businesses set prices and set their budgets on an ongoing
12 process over a lengthy period of time. That is something where having
13 somebody who is a specialist in analysing accounts, which is what a forensic
14 accountant is and does – that is undoubtedly something where Mr Harman
15 has expertise but he can bring to bear on that analytical process, and that is
16 something where we say it is desirable for an expert to carry out that
17 analytical work, and this is simply in part a question of Mr Harman has more
18 appropriate expertise than Dr Niels does, but in any event there is, from our
19 side, a question in part of resources, which is having one expert focusing on
20 the qualitative and one on the quantitative, and in terms having their teams,
21 because the volume of information we are talking about here is something
22 where you have teams that very much work behind the --

23 MRS JUSTICE BACON: Dividing up the work.

24 MR COOK: It is dividing up the work.

25 MRS JUSTICE BACON: Are you proposing that that should feed into the
26 econometric analysis because I assumed that that is at least in part what

1 would be happening.

2 MR COOK: Certainly what happened in *Sainsbury's* – and I appreciate a lot of that
3 is redacted and it is redacted, of course, because what it deals with is the
4 detail of Sainsbury's business in a situation in which Asda and Morrisons are
5 on the other side of the courtroom and Argos matters less because it is now
6 owned by Sainsbury's, but obviously Morrisons and Asda are serious
7 competitors of Sainsbury's and so Sainsbury's would not want their internal
8 pricing analysis information handed to their competitors, even if it is a little bit
9 out of date, which is the reason why it is redacted.

10 MRS JUSTICE BACON: When I noted it was redacted, it was not by way of any
11 criticism, but just to note that we could not draw very much from what we have
12 got in front of us as to what Mr Harman is proposing to do.

13 MR COOK: Yes. What I can do in terms of explaining what was done there is -- I
14 mean, to some extent looking at the table of contents which are at page 5 of
15 the PDF of bundle 6 -- what Mr Harman does do, and it is really looking at the
16 chapter headings, is he starts off at Chapter 4 and looks at and analyses the
17 budgeting process that Sainsbury's uses, in that case here it will be the four
18 claimant companies. He looks then at the price setting process and analyses
19 that. Then he is basically looking through how those processes would have
20 been different, the counter-factual, when you actually have different MSCs. It
21 is that causative question of saying "how far does the MSC feed into these
22 processes at different stages because, certainly from previous experience,
23 these businesses are ones that dynamically changed their budgets and prices
24 on very much an ongoing basis; how do these costs feed in?

25 MRS JUSTICE BACON: Insofar as it draws conclusions about it, are those then
26 going to be fed into Dr Niels's econometric analysis? Because typically one

1 would calibrate econometric analysis by some qualitative analysis of the facts.
2 Is it proposed that Harman's analysis will do that? Or is Dr Niels going to go
3 off and do his own analysis of the facts which duplicates of that Mr Harman? I
4 think that is probably one of the concerns of Ms John that we are going to
5 have duplicative evidence here, rather than actually the evidence addressing
6 different issues.

7 MR COOK: Certainly the way it worked in *Sainsbury's*, essentially, they both carried
8 out separate analysis, but that is not duplicative, that is essentially looking at
9 different categories of evidence, so Mr Harman looks at the qualitative
10 evidence, Dr Niels looks at the quantitative evidence. Again, if we look at --
11 and considerably more of this is visible at least in relation to Dr Niels's report
12 --

13 MRS JUSTICE BACON: You are confirming they will be looking at different things?
14 It is not the case that Dr Niels is going to repeat what Mr Harman has done in
15 the exercise that he does to calibrate the model?

16 MR COOK: Yes, they are going to be looking at different things, qualitative verses
17 quantitative, and, in particular, if we go to what Dr Niels did and the summary
18 of his evidence, which starts at page 194 in this bundle. If we look at
19 page 196 in the bottom right, the summary of the 'pass on analysis' that Dr
20 Niels is doing. We can see the focus of that is the word "empirical" is
21 repeated on multiple occasions in section H "pass on analysis", so he looks at
22 empirical analysis of pass on literature, empirical analysis based on
23 Sainsbury's disclosure, the aggregate pass on to Sainsbury's total business,
24 the cost of the whole empirical analysis, category level costs, and costs of
25 goods sold, and response to cost schedules. That is all looking at the
26 quantitative kind of data.

1 MRS JUSTICE BACON: Yes, but in other words to construct your model, you need
2 to decide what variables to put in and how to calibrate those variables, so it is
3 difficult to see how he can do that without doing some kind of quantitative
4 analysis to decide how the model is to be constructed. Is that going to simply
5 be repeating what Mr Harman does, or is he going to do his own analysis?

6 MR COOK: My understanding of these comparisons is what is being done, the
7 econometric analysis is looking at, for example, would a VAT change -- you
8 have a VAT change on a particular date, does the price of those
9 corresponding products that the VAT change affects, does that then change
10 over the future two/three months, the time period that one would be looking
11 at? That is, in many cases, looking at what are similar costs, and we also
12 look at cost shocks, again, what we say is similar, there is going to be a fight
13 about that, we are looking at how changes in other costs feed through into
14 prices, and that is taking place at the level of Sainsbury's total business, so
15 you look at from its accounts, the information about what Sainsbury's total
16 costs were, and what happened in terms of their total prices, profit margins, *et*
17 *cetera*, that kind of analysis, and the same with category level of revenues
18 and costs, specific areas, the cut-off for cost shocks like VAT, or the examples
19 we have given of particular prices of coffee beans that went up by a particular
20 margin.

21 MRS JUSTICE BACON: Yes.

22 MR COOK: With respect, I do not think that is something where Dr Niels is going to
23 need to actually be looking at, or considering, certainly not duplicating the
24 work that Mr Harman has done of actually saying "when I follow through the
25 way in which prices were set, I can see that in fact this was taken into account
26 at line/entry number 6 on this date". Econometrics is testing whether or not

1 that follow through happens.

2 MRS JUSTICE BACON: Yes.

3 MR COOK: Based on the external numbers.

4 MRS JUSTICE BACON: If you are not saying that they are going to be duplicating
5 the analysis in different ways, do you have a problem with the green wording
6 in paragraph 12: "...methodologies proposed by a party for addressing the
7 same issue"? Because it is understood that, in order to look at pass on, you
8 will be necessarily looking at qualitative evidence, as you described looking at
9 price setting and budgeting, and you will then be conducting an empirical
10 analysis. Do you regard that as being "multiple methodologies", or potentially
11 caught by the same powers?

12 MR COOK: The problem is it is wording that has been proposed by the Claimants in
13 circumstances in which they were saying what you were doing was not
14 permissible. If that order was made, and we argued that as a matter of
15 terminology, I might not say that is problematic, but it is wording that the
16 Claimants are suggesting does cut across what we are doing, and you have
17 heard submissions of Ms John to that effect. In the abstract, I might not have
18 a problem with that wording, I have a problem by virtue of the fact that the
19 Claimants think it challenges what we are doing based on what we have
20 explained, and we have explained the distinction in correspondence between
21 the work, the quantitative and qualitative types of work that we are doing. If
22 they acknowledge that it does not cut across it, then I have no problem with
23 the wording per se. It is that they think it does have some impact on that.
24 That is the distinction we draw, and we simply say how we cut our cloth in
25 terms of experts really should not matter here. If the Claimants feel that they
26 can do this with one economist, that is a matter for them, but a large part of

1 this is resource allocation and having an accountant who is able to work
2 through what are a lot of very lengthy spreadsheets often to analyse these
3 kind of points.

4 MRS JUSTICE BACON: What you are suggesting, if I pick up Ms John's
5 categorisation, you are saying that he is going to be doing the second of those
6 things, looking at the evidence on the price setting and budgeting, but you
7 take issue with the question as to whether it requires the evidence of an
8 expert? She says these are all factual, and you say these are heavy sets of
9 data and will require proper analysis by somebody who is appropriately
10 qualified.

11 MR COOK: Well, we say several things on that point. We certainly do say that, that
12 this is simply analysis that we need assistance with, it is not something that,
13 as lawyers, we are best suited to be doing, but actually having someone who
14 can do the hard work on it, that is what we need an expert for, somebody who
15 has those capabilities. Secondly, we say, in any event, what a lot of what
16 forensic accountants do, the process is as important as much as anything
17 else, by which I mean the process of having a report produced that clarifies
18 those issues and potentially then the experts meeting to try and create some
19 kind of agreement is a terribly important process because it often reduces the
20 scope for disagreement prior to trial, and one would hope there would be
21 large measures of agreement reached which would allow the Tribunal to say
22 "we see it is common ground, A, B and C, therefore we can focus on D". We
23 say it is necessary to have that expertise, it is desirable to have that expertise,
24 and it is going to narrow the issues before trial, rather than the first time we
25 set out any form of case on exactly how the price setting process would have
26 taken account of MSCs being in our opening submissions or our closing

1 submissions. It is better for everyone that there is clarity on these issues well
2 in advance of that process.

3 MRS JUSTICE BACON: Thank you. Ms John.

4 MS JOHN: Thank you, that is very helpful. The first point is we are of course not
5 saying that Mastercard cannot conduct a qualitative exercise, and he is quite
6 right that, on our side, there will be some work done on the processes. It is
7 going to be done by our economist, and the work is going to fall into the third
8 of the categories that I explained earlier. Our expert is going to be looking at
9 the underlying documents, the underlying processes for the purposes of
10 feeding that into and supporting his econometric analysis.

11 MRS JUSTICE BACON: You are saying that you would be doing a version of two
12 the object of three leading to the econometric analysis?

13 MS JOHN: Yes.

14 MRS JUSTICE BACON: That is also supporting, so alongside them, and the word in
15 the letter was used "alongside".

16 MS JOHN: Yes, precisely so. What emerges from Mr Cook's description just now is
17 clearly something over and above that. It is something additional. He talked
18 about "unpicking the accounts". I think he referred to line by line analysis,
19 working through lengthy spreadsheets. That really underlines that if this
20 particular front is opened up, we will need a forensic accountant to respond to
21 that. Our concern is not so much, Madam, the issue about duplication, which
22 you voiced, in fact Mastercard have agreed to wording in paragraph 12 that
23 says there will be no duplication between the experts. That is not so much
24 the concern, the concern is about the cost implications of all of this, the
25 practical implications, weighed against what value the exercise is actually
26 going to add at the end of the day because, as I have just shown you in Mr

1 Harman's report, and I think it was clear also from Mr Cook's explanation that
2 what it is proposed the forensic accountant is going to do to reach a
3 conclusion about whether pass on is likely. It is possible he will have
4 something to do with the degree of pass on, but, at the end of the day it is not
5 being suggested that he is going to come up with a percentage estimate,
6 which is what we are going to get from the economists, so there is a question
7 about how much incremental benefit this is actually going to lead to at the end
8 of the day.

9 On the points about costs, obviously we appreciate there is a balance here to be
10 struck about the costs implications in either direction, but, from our
11 perspective, if Mr Harman is allowed in to do the sort of work that has just
12 been described, we are going to incur costs in dealing with that additional
13 expert front; we are likely to need an accountant in reply. And of course it is
14 going to increase the costs of preparing for the hearing, and potentially
15 increase the length of the hearing at the end of the day; we are going to have
16 additional sets of experts who will need to be cross-examined or hot-tubbed,
17 we will have additional submissions being made on both sides about that
18 evidence, both in writing and orally, we have a longer trial for the Tribunal to
19 accommodate, a lot more paperwork for the panel to process at the end of the
20 day.

21 Given those implications, we say that has to be balanced against what incremental
22 benefit we are going to get from having that additional expert front opened up
23 and in circumstances where we are not going to get an additional percentage
24 estimate of pass on, and, at the end of the day, the Tribunal is just going to be
25 applying a broad axe to arrive at a percentage for pass on that is going to
26 apply. We say these costs are simply not justified. Obviously there will be

1 some cost implications for Mastercard, if they cannot rely on Mr Harman, we
2 do acknowledge that. But it is not going to be the case that whatever work Mr
3 Harman has done already is going to be lost; it can still be used to feed into
4 Mastercard's preparation of its cross-examination, it can still inform their
5 written submissions, and it can still be used by Dr Niels who, we are told,
6 could do the exercise, so he is not going to be starting from scratch if he has
7 to take this on instead.

8 MRS JUSTICE BACON: Thank you. Were those all of your submissions?

9 MS JOHN: Unless it would be helpful, Madam, to look at the rulings in *Air Cargo* and
10 *Trucks* where the Tribunal has considered this issue previously, but I
11 appreciate you may have looked at that as part of your pre-reading.

12 MRS JUSTICE BACON: Yes. That might be helpful.

13 MS JOHN: Certainly. The authorities bundle we have electronically the *Air Cargo*
14 judgment is in Tab 4 and we can see the context of this particular ruling from
15 Tab 1, so this was a ruling given by Rose J (as she then was) in a case
16 management conference, where various disclosure issues were being
17 canvassed, and the relevant parts of this ruling are in paragraphs 12 and 13.
18 In particular, in paragraph 13, she indicated that the concern was that if there
19 are very different approaches being taken by the experts ahead of trial, then
20 there is a risk of the exercise being done twice, and only at the end of the day
21 does the -- in that case the court -- come to decide which exercise was
22 actually useful, and which was wasted.

23 MRS JUSTICE BACON: Yes. What different approaches was she actually talking
24 about? She says at paragraph 10: "... mixing and matching of evidence".

25 MS JOHN: Yes.

26 MRS JUSTICE BACON: "If everyone chooses the econometric method of

1 determining whether overcharge existed, this replaces ... any role in the trial
2 for the examination of 23 sets of internal airline communications ...”, but there
3 is no dispute here, in this case, as to whether there is going to be an
4 econometric model.

5 MS JOHN: What she records in paragraph 12, and I am afraid I do not have
6 information about what lies behind this, but what she records in paragraph 12
7 is that she wants to be sure there is sufficient agreement between the experts
8 about what method is appropriate.

9 MRS JUSTICE BACON: Yes. That assumes that once there has been a decision to
10 use an econometric model, she does not want two econometric models
11 crossing like ships in the night.

12 MS JOHN: Yes, price regression and margin analysis, something like that. She did
13 not want to order large scale disclosure for two separate exercises in
14 circumstances where ultimately one was not going to be accepted.

15 MRS JUSTICE BACON: That is not what is in issue here.

16 MS JOHN: No.

17 MRS JUSTICE BACON: Perhaps you ought to be making a different point.

18 MS JOHN: The more close analogy is the *Trucks* ruling. If we move on to that in
19 Tab 9, and the judgment from Roth J on expert evidence and amendment. If
20 we start in paragraph 5, there is a record that Mr Bezant intends to use a
21 forensic accounting exercise in that particular case, and paragraph 6, Mr
22 Harvey, who was on the other side on that occasion, who is an economist, not
23 an accountant, nonetheless “intends to use a broadly similar form of analysis
24 to address” the particular pass on issue that they were concerned with in that
25 case. The second part of paragraph 6, the Tribunal records that: “As a result,
26 the Tribunal should be able at trial to focus on a single methodology to assess

1 the strength and robustness of the respective evidence of these two experts
2 ...” Paragraph 7, it is explained DAF, who were the party relying on Mr
3 Bezant, had made an application to adduce an additional expert on pass on.
4 In that case they wanted to introduce an economist, so a similar context to
5 today, albeit the expert disciplines were reversed.

6 Paragraph 8, the Tribunal records that it was going to require additional disclosure if
7 the additional expert was allowed in. Paragraph 11 records the claimant’s
8 argument that the additional analysis was not likely to lead to a large increase
9 in the precision of the results.

10 MRS JUSTICE BACON: Is it suggested here that there is going to be a large
11 amount of disclosure needed to allow Mr Harman to do his work? I do not
12 think that is the point that is being made. On the contrary, it is simply
13 suggesting that Mr Harman will simply be analysing the disclosure that has
14 already been given as regards the price setting and budgeting processes.

15 MS JOHN: That we do not know, Madam, because we have not had a discussion of
16 the specific disclosure application today, so we do not know how much of that
17 was being asked for, for Dr Niels, and how much was being asked for, for Mr
18 Harman. One assumes that is going to be looked at. I cannot say very much
19 more on that point. You are right that there was a point of distinction there in
20 that case.

21 MRS JUSTICE BACON: Yes.

22 MS JOHN: If I could invite you to continue reading to yourself, I will not read it out,
23 paragraphs 12, 13, 14 and 15.

24 MRS JUSTICE BACON: The confusion is at 17 --

25 MS JOHN: It is.

26 MRS JUSTICE BACON: -- that the additional disclosure of that analysis would be

1 substantial, the extent of disclosure already provided is vast, and that point
2 had already been made that they thought that this was not likely to
3 significantly advance matters, it might achieve some greater precision, but it is
4 all only an estimate. That is not the point that is being made here. It is not
5 said that everything Mr Harman is doing is not going to be really relevant and
6 is going to have very minimal additional benefit because your own expert is
7 going to do at least some of the same analysis.

8 MS JOHN: With respect, Madam, it is not quite the same analysis because we do
9 not have a forensic accountant. I anticipate in due course it is going to be
10 said the Tribunal should attach weight to the fact that this exercise has been
11 done by a forensic accountant, otherwise why would one rely upon him. So,
12 what we are doing is not the same exercise. Yes, it is a qualitative exercise
13 that will be done for the purposes of supporting the econometric analysis.
14 What Mr Cook has made clear is they are doing something additional to that,
15 something different, his wording, "running through lengthy spreadsheets and
16 conducting line by line analyses". That is something additional that is going to
17 require additional cost, and I refer to the *Trucks* ruling simply to point out that
18 the Tribunal there was asking itself "what additional benefit are we going to
19 get for the costs of this exercise?" We say the same approach applies here.
20 We ask: what benefit are we going to get? What will the cost implications be?
21 And, where does the balance lie at the end of the day? We say the balance
22 lies in favour of requiring Dr Niels to do this work, and not opening up this
23 additional front.

24 MRS JUSTICE BACON: Thank you. Did you want to say anything about the cases?

25 MR COOK: Madam, with respect, I think you have made my points for me; neither of
26 these are addressing the subject matter we are dealing with here. The first

1 one deals with a situation where effectively it was an either/or econometrics.
2 It is common grounds we are doing both here, not least because there are 15
3 factual witnesses from the Claimants, from their Finance directors, who are
4 doing that kind of factual material, and the second point here is a very -- the
5 *Trucks* case is a very extensive massive new exercise involving a lot of new
6 disclosure with doubtful results; it turns on the facts. Here it is disclosure that
7 has already been given that needs to be analysed. But, all those results in a
8 sensible fashion.

9 MRS JUSTICE BACON: All right. We will just retire for a few moments and come
10 back and give our ruling on this.

11 (12.50)

12 (A short adjournment)

13 (12.57)

14 MRS JUSTICE BACON: The Tribunal is going to allow the evidence of both Mr
15 Harman and Dr Niels. We are not inclined to insert the green text in the draft
16 order. We think it is liable to give rise to confusion, and it already turns on
17 what is meant by multiple methodologies. The wording agreed is that the
18 evidence of the experts shall not be duplicative, which we think is appropriate.
19 It seems to us that there is a qualitative exercise to be done, and there is a
20 quantitative exercise to be done, and the parties are agreed that both of these
21 exercises will need to be done. The issue here is, unlike those in other
22 previous cases, not whether a regression analysis should be done, because it
23 is agreed that is going to happen. The question here is to the extent to which
24 a different expert is required for the qualitative aspect of the analysis, which
25 will inevitably have to be done and we consider if Mastercard wishes to have
26 a separate expert dealing with that, then that is open to Mastercard.

1 Whether or not AAM instructs its own separate analysis is then a matter for AAM,
2 but, to date, it seems to us that AAM has suggested that its single expert, Dr
3 Friederiszick, is able to deal with that, but, of course, if AAM considers in the
4 light of this decision they would like to engage a forensic accountant then that
5 would be a matter for it. Both parties will be, as provided in the order, limited
6 to a maximum of three experts, which we consider to be sufficient.

7 MR COOK: Thank you, Madam.

8 MS JOHN: Madam, on that final point. I appreciate the limitation to a maximum of
9 three experts. Just to explain how that is working on our side, we already
10 have three experts, so we have one expert addressing overcharge. We have
11 one expert addressing pass on. And we have another one addressing
12 compound interest. If we are to be able to rely additionally on a forensic
13 accountant, we will need to increase that number to four in the draft order.

14 MRS JUSTICE BACON: It is for the parties to decide how they are going to allocate
15 their experts. You have already said that you consider this is a matter that Dr
16 Niels could do on his own. I have not had any submissions on why your
17 expert is not able to do both of those if you want. Mastercard obviously
18 divided up its experts in a different way.

19 MS JOHN: At this stage we are quite happy that our expert can do the exercise that
20 he has proposed. It may be that once we have seen what lands from the
21 other side that we will need to consider a forensic accountant in order to reply
22 to that. I can either do it on the basis that we make an application for
23 permission later for that once we have seen what Mastercard produce. In my
24 submission, it would be more efficient simply to recognise now that was a
25 possibility, given what has been said today, that that is what we are going to
26 need to do in due course in any event.

1 MR COOK: Madam, I am slightly concerned. At the moment there is permission to
2 adduce expert evidence in essentially two disciplines, competition economics
3 and accountancy. To some extent one might say it does not matter greatly if
4 the claimants wish to call expert one to deal with one issue, and then another
5 economist to deal with the second issue, but, nonetheless, those are the only
6 two disciplines. One would have thought three experts should be enough
7 already within the two disciplines.

8 MRS JUSTICE BACON: Yes. We are not going to make any provision now for
9 further experts. We are inclined to think that three experts should be sufficient
10 in the two disciplines identified, but, of course, we are not making any ruling
11 as to what we would decide if an application were to be made at a later date.

12 MS JOHN: Thank you.

13 MRS JUSTICE BACON: Are there any other matters that we need to consider now?

14 MR BROWN: Madam, I am just conscious that Item 5 is on the agenda. I just want
15 to make sure that there is nothing we have missed, as it were.

16 MRS JUSTICE BACON: That is really timetable.

17 MR BROWN: Yes.

18 MRS JUSTICE BACON: That seems to be agreed in the composite directions that
19 we have had.

20 MR BROWN: Yes. I just wanted to check that paragraph 8 of the draft composite
21 order, dated 15 July, I understand that that is agreed. I am seeing a nod from
22 Mastercard's solicitors, so I am grateful for that. We will amend paragraph 11
23 to reflect the steer given by the Tribunal in relation to Item 2.

24 MRS JUSTICE BACON: Yes.

25 MR BROWN: I think everything else has been agreed. On Item 5(c) of the agenda,
26 "likely duration of the trial", at the moment it is down for eight weeks, and we

1 think it would be sensible to leave it like that. Obviously by the time of the
2 PTR, it may be that the experts have reached such wonderful agreement that
3 we can reduce -- we think that the scope of the issues in dispute on the
4 experts' side are much reduced, and likely potentially on the facts, so it may
5 be that we may be able to shorten the trial timetable.

6 MRS JUSTICE BACON: Yes, as long as it is in the shorter direction and not longer.

7 MR BROWN: Yes.

8 MRS JUSTICE BACON: That is understood. In terms of where we are going to go
9 now, we will get a revised composite draft order by the end of today, so far as
10 agreed. We appreciate there are some further issues upon which you may
11 need some further discussion, so the long stop for any final position on the
12 non-agreed issues is for 4 o'clock tomorrow so we have time to decide that
13 before other members of the Tribunal are otherwise committed.

14 MR BROWN: Yes, understood. I am grateful.

15 MRS JUSTICE BACON: I think that is everything. Thank you very much to
16 everyone for the time and their submissions.

17 (13.04)

18 (The Tribunal adjourned)

19

20