IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16, 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 21st September 2023

Before:
The Honourable Mr Marcus Smith
Professor Michael Waterson
Ben Tidswell

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Merchant Interchange Fee Umbrella Proceedings

And

Claimant

Walter Hugh Merricks CBE

v

Defendant

Mastercard Incorporated and Others

A P P E A R AN C E S

Kieron Beal KC & Antonia Fitzpatrick (Instructed by Humphries Kerstetter LLP, Scott + Scott (UK) LLP & Stephenson Harwood LLP) on behalf of the HSS Claimants
Brian Kennelly KC & Isabel Buchanan (Instructed by Linklaters LLP) on behalf of Visa
Mathew Cook KC & Owain Draper (Instructed by Jones Day) on behalf of Mastercard
Victoria Wakefield KC (Instructed by: Wilkie Farr & Gallagher (UK) LLP) on behalf of Walter Hugh Merricks
Richard Howell (instructed by the General Counsel, Payment Systems Regulator) on behalf of the Payment Systems Regulator

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Thursday, 21 September 2023

(10.30 am)

Case Management Conference

MR JUSTICE MARCUS SMITH: Mr Beal, good morning.

Before you begin, just my usual warning regarding the live stream. This matter is being streamed on our website. An official recording is being made, and a transcript will be produced, but it is otherwise prohibited for anyone else to make an unauthorised recording, whether that be audio or visual, or to photograph the proceedings or transmit them in any way. I'm sure that won't happen, but that's my usual direction.

More substantively, and I may be a couple of minutes, Mr Beal, so do sit down if you wish, can I thank the parties for their very helpful written submissions, which we've read with considerable care.

Normally we don't trouble ourselves about why one has got into a particular position; we are much more concerned with how to manage a case going forwards, and that is what we are going to be focusing on this morning. But it is helpful to have an understanding of why we are here, because it has focused our minds on the intractability that arises out of these very complex proceedings.

I appreciate that our Trial 2 evidential judgment is pending, that will be coming out shortly, but it's quite clear that the intractability and difficulty of issues arises not merely in respect of Trial 2 but also in respect of Trial 1, and we are today very much concerned to ensure that we don't lose Trial 1. Clearly it is at risk. But we are anxious to do what we can to get matters back on track. And it seems to us in that light we need to pretty comprehensively revisit the way in which these cases are

being managed, and what I'm going to say is specific to Trial 1, but will likely be read across to other cases where multiple claims are being tried together, including Trial 2. And certainly the points that we're raising today will need to be considered more broadly than just for today. But we have a number of propositions which we are framing, or going to frame, in the context of this case, but they may be of more general application.

So the first proposition, and probably the most important one, is this: infrequent case management conferences do not work. We consider that where there are complex proceedings like these, involving multiple parties and contentious questions, frequent tribunal involvement is a prerequisite. Accordingly, we will of course hear the parties, but this is a very firm provisional view that I'm articulating, we will have fortnightly procedural hearings before a chair alone, that will either be me or Mr Tidswell to my left, and we will liaise amongst ourselves as appropriate to ensure that you have one chair every fortnight available.

Of course that is going to cause problems in terms of diaries, ours as well as yours. These hearings will take place between 8.00 am and 10.00 am on a Friday, so as to avoid conflict with the court day. They will take place remotely, and they will be attended by junior counsel only and, as required, and we think it generally will be, the experts in the case, because we are going to be emphasising the importance of expert-led work in this case.

So that is the most important point that we are articulating. We don't want to have the kind of gap that exists between case management conferences, which is then filled by parties unhelpfully disagreeing as to what they should be doing in the future, instead of actually doing what is needed to get a trial on.

Just to have a short excursus in terms of the agenda for today, the plan, just so that you know, is this: we'll obviously expect and invite pushback on what I'm saying now,

but apart from that, we are going to spend the morning trying to sort out what disputes we can sort out, working out in respect of the issues that have been allocated presently to Trial 1, what are the dealbreakers that are holding up work, and we're going to want to resolve as many of those as possible in the order of importance of their hold-up to Trial 1.

We will have, just so that you are clear, the first procedural meeting at 8.00 am tomorrow. That can be a kind of sweep-up, or a catch-up, for what we can't deal with this morning. But I want to be very clear: we mean business in getting these cases back on trial, and I appreciate it's tomorrow, but tomorrow it is going to be.

At 2 o'clock we will deal with the PSR question. You will all have read the PSR's written submissions. It seems to us that there is very little that we can do about the PSR today. We'll obviously want to hear the parties with the PSR present at 2 o'clock, but it does seem to us that this is not a case of voluntary cooperation between the tribunal and a regulator, which is how matters have been proceeded with to date. It seems to us that there are significant statutory constraints on what the PSR can do to assist, willing though they are, and that it may be that if the PSR material is to be sought, an application will have to be made for third-party disclosure and it resolved on a formal basis. That's just an indication. We'll obviously want to hear Mastercard and Visa on that primarily, and the PSR in response, and that we will do this afternoon when the PSR attends.

After we have dealt with the PSR question, we will then consider, in light of what has been resolved this morning in terms of deal breaking issues, we will consider where we go from here. And in particular whether Trial 1 is sustainable. But I want to be quite clear that we are not, without very cogent submission, minded to abrogate Trial 1 in any respect.

I'm going to expand upon the approaches that we have thought about to make the

trial doable in a moment, and we're going to expect the parties to consider these approaches with some care either over the short adjournment or, if the parties wish, we can rise for 20 minutes or so for this to be considered, to see whether their present views, which we are not particularly amenable to, their present views regarding adjournment, whether they can be modified.

So how are we going to go from here in addition to the fortnightly procedural hearings that are going to take place?

First, decisions are going to be made by reference to the list of issues. We spent a lot of time articulating the list of issues, and when I looked at them this morning and last night, it seemed that column 4 was largely, and regrettably, unpopulated. Since column 4 was intended to be a granular articulation of what evidence would be produced, that is highly regrettable. We are going to convert column 4 into what the tribunal directs as to what is going to happen in respect of the evidence, in respect of each of the issues, and we expect that today and tomorrow column 4 is going to become rather more populated than it is at the moment.

Secondly, the perfect is the enemy of the good. A key about case management decisions is that decisions need to be made promptly and actioned by the parties. Obviously one does not want to make the wrong decision. But we consider that there will be a range of broadly right decisions, and we are not going to trouble ourselves about which is the most perfect solution.

For the parties' part, they should understand that even if they have a clear and distinct preference amongst alternative solutions, we would rather that that preference was shortly articulated, but alongside a clear indication of what other outcomes can be lived with. We are not interested in the articulation of the perfect way to try this case; we want an acceptable and reasonable way of trying this case that works and that means we move forward.

That means, relatedly, that we want the parties to be working on what is core to be done, and to leave the fringes to later argument. Let me give you an example of what I mean by that. Let us suppose that there is -- as clearly there is -- a dispute about the extent of disclosure. If there is a core of disclosed or to-be-disclosed material that is unequivocally necessary, then that should be disclosed. It should have been disclosed already. We do not want to have disclosure waiting for everything to be resolved. If we can do things in phases, then it should be done so that the party receiving the disclosure can begin considering it. So we are not going to have a process where everything awaits the final articulation of what's going to happen. We are going to have a process where things are produced when they can be produced, and that is what we want to have happen from hereon in. It clearly hasn't happened to date.

We anticipate that all parties will have worked on the core elements of this case over the last few months, no matter what the fringe uncertainty. And I want to be very clear that if the parties have not done so, then they should have done, and we are not going to be very sympathetic to those who say (audio distortion) go there from a standing start point. None of the parties should have been operating as of today from a standing start.

Related to that, we consider that it is likely that the process in relation to Trial 1 is liable to be defendant-led. It seems to us that the issues in Trial 1, and we'll want to hear Mastercard and Visa on this, can effectively be done with the defendants taking the lead, both in respect of witness statements and expert reports.

The defendants are not inexperienced in the area of interchange fee cases, and we consider that witness statements and expert reports ought to be capable of being produced chronologically first, and quickly by Visa and Mastercard, enabling the claimants to respond. I appreciate that is inverting the normal order, but it seems to

us that that is potentially a doable way of moving forwards a timetable that will enable Trial 1 to be done.

So, to be clear, if that is the aspiration and the way we are going to work, we would expect to have witness statements and expert reports from both sides in by the end of November, and that would, I think, mean that Mastercard and Visa will have to have their work done in the course of October, probably around 14 October. That is the sort of timeframe that we are thinking about, and that makes a January or February start for Trial 1 doable.

Next point, we are not very interested in disclosure. Now, that's overstating it. Of course, we are interested in disclosure, but the traditional order of disclosure, factual statements, and then expert reports, is not going to work in this case. Clearly, to the extent that disclosure has been identified as disclosable, it should be done and it should be done at once. But apart from that, we consider that Trial 1, and probably Trial 2, are somewhat characterised by asymmetries of information. Thus, it seems to us quite likely that Mastercard and Visa are going to produce witness statements that will have no equivalent from the claimants, and vice versa. We consider that in such cases the witness statements should be produced and that they should annex documents relied upon, together with known adverse documents. Thereafter, but not before, there may be further disclosure to enable this evidence to be tested.

Similarly with the expert evidence. The experts should get on with working out what they want to say, and assembling the evidence that they need. There is, of course, a huge amount of publicly-available data. If, and to the extent, that disclosure from the other side or sides is needed, then of course the experts should articulate a request and, if an expert makes it, identifying why, and subject to their obligations to the court, the parties can pretty much bank on that request being granted and ordered by the court if it is not voluntarily provided.

But we are disinclined to have disclosure as a separate and self-standing stage of the proceedings except where it is clear that such disclosure should be made. In short, we want the process to be witness and expert led. We also are keen to have orders made which, even if they don't work, can be corrected a fortnight later. The process that we envisage is one where things are done, and if what is ordered doesn't work, one doesn't have four or five months to the CMC to debate how it can be corrected; one has maximally a fortnight where the problems with the case management can be articulated and a decision made by the chair of the tribunal.

So we are, as is quite clear, anxious to get a grip. We are not particularly interested in a blame game. We are interested in Trial 1 proceeding, and we are very happy now to hear from any of the parties, either right away, in terms of pushback, or if the parties wish, we can rise for a few minutes to enable them to consider what the reaction is to what is very much a new dispensation.

Submissions by MR BEAL

MR BEAL: Sir, may I begin with the courtesy of introducing those before you. I appear with my learned junior, Ms Fitzpatrick, for the claimants. Mr Cook KC and Mr Draper appear for Mastercard. Mr Kennelly and Ms Buchanan appear for Visa. And Ms Wakefield KC appears for Merricks.

MR JUSTICE MARCUS SMITH: Thank you very much. You are all very welcome.

MR BEAL: I'm going to ask, if I may, for time to phone a friend by taking my client's instructions on the very helpful indication that the tribunal has just passed down. Before, effectively, taking instructions and making submissions, could I endorse, with respect, your proposition that this is, if we don't have a corpse, because the trial is going to go ahead, there is no point at this stage having a post-mortem. So I wasn't proposing to deal with the very detailed submission you have had as to where to pin

the tail on the donkey of fault.

MR JUSTICE MARCUS SMITH: No, to be clear, it has been very helpful to have that because we have had a very clear sense of the difficulties that the parties have laboured under. But we think that we're now, having got a sense of the problem, very much interested in the solution. So we're very grateful. We'll get to the blame game if we need to, but we are not keen to do so at the moment.

MR BEAL: Could I please pass up -- my first request, with your permission, is going to be for 20 minutes to discuss things with my clients.

MR JUSTICE MARCUS SMITH: Of course.

MR BEAL: If I could pass up in the meantime, so as not to waste time in the meantime, some documents, and I'll explain what they are. **(Handed)**.

First, we have a judgment of the Court of Appeal in Mastercard v Deutsche Bahn which was circulated to the other parties by email yesterday. We then have two further documents which weren't circulated yesterday but I'll explain what they are, if I may. I've got plenty of copies for everyone. I think I have just handed away my copy, which wasn't terribly clever. Thank you very much.

So Deutsche Bahn v Mastercard, if I can say in a nutshell what it is, because it goes to the key question for this morning of what can we do with Trial 1, and at paragraphs 42-52 in the judgment of Lord Justice Sales an issue arose in this case as to whether or not a claim based on the central acquiring rule arose out of the same facts as the scheme rules on MIFs, and Mr Justice Barling had found in my favour, appearing for the Deutsche Bahn claimants in this case, that the MIFs were part of the scheme rules, the central acquiring rule was an example of a scheme rule, therefore the relevant facts and circumstances arose from the same factual background, and I could therefore rely upon the relation back doctrine in order to bring the claims back to 1992.

The Court of Appeal disagreed with that approach, for the reasons set out at 42 through to 52, and in essence they accepted the argument from Mr Hoskins KC for Mastercard in that case that the critical issue was the restriction on competition in the relevant market, that necessarily involved an examination of the counterfactual, and at paragraph 46, Lord Justice Sales said this:

"That this is the form of analysis required is critically important in the present case. On the claimants' existing claim, the court will have to examine whether the relevant market or markets would have been significantly different and more competitive in a counterfactual world in which the Mastercard rules which are in issue on that existing claim were excised, but in which the CAR [the central acquiring rule] remained in place. By contrast, on the claimants' new claim, the court will have to examine whether the relevant market or markets would have been significantly different and more competitive (a) in a counterfactual world in which the Mastercard rules which are in issue on the existing claim were excised and the CAR was excised as well or (b) in a counterfactual world in which the Mastercard rules which are in issue on the existing claim remain in place but the CAR is excised."

Now, the complication that gives rise to is the counterfactual is necessarily predicated on which elements of the scheme rules are in issue, and if it's simply the MIF, then that isn't really a problem, because one can look at a counterfactual, whether that's the zero pricing for the MIF, whether that's the UIFM, whether that's bilateral arrangements.

When you have a challenge to other scheme rules, which we have in these cases, the indication from Lord Justice Sales was that as a matter of appropriate analysis you have to look at the counterfactual with those scheme rules in play and with them excised depending on whether or not a conclusion is reached as to whether or not they are unlawful, because obviously one can't have a counterfactual in which there

is an illegality in the essential premise of the counterfactual, see June, Court of Appeal.

So that does pose a difficulty in this case in trying to hive off MIF issues from the other scheme rules issues, and so I'm simply putting down that marker now, because if one is in a position where, for example, issues 9-12 were dealt with in due course and issues 2, 3 and 7, which are the candidates, were dealt with in February, we would have to re-do the analysis on the counterfactual with the scheme rules in place or not in place depending on where the conclusion came out on the legality of those rules.

And, of course, a lot of these scheme rules work like a jigsaw. There are overarching features to them so different bits of the jigsaw plug in and work in different ways.

MR JUSTICE MARCUS SMITH: This is really an attack, Mr Beal, on the Visa slicing of the Trial 1 issues.

MR BEAL: I'm getting my retaliation in first, that much is true, but I thought it important at least to draw this to the tribunal's attention so that when we come back after the 20-minute adjournment minds are focused on what can sensibly be sausage-sliced into the Trial 1 period.

MR JUSTICE MARCUS SMITH: Well, it's very helpful, and I'm very grateful for you making that point, because our starting point is that the issues that are presently allocated to Trial 1 remain in Trial 1, so I think you are talking about 1 through to 13.

MR BEAL: With the exception of 6, I think.

MR JUSTICE MARCUS SMITH: Yes, I think that's (overspeaking). I see there is a gap in my note where 6 should be.

MR BEAL: I should add, 13, I think, is effect on trade, which may or may not assume significance, but it is there.

MR JUSTICE MARCUS SMITH: That is, I think, what has been directed and clearly the point you have just made is significant if we are going to be slicing away at these issues. But the real question is the roadblocks to all 12 issues.

MR BEAL: Could I explain the other two documents?

MR JUSTICE MARCUS SMITH: Of course.

MR BEAL: These are geared towards my endorsement, with respect, of the tribunal's conclusion that the best should not be the enemy of the very good.

The first document is an annex to the Payment Systems Regulator report, which you do have in the bundle, but you don't have the annex, and the reason for showing this was to indicate to the tribunal a number of things.

Firstly, at page 45 there is an overview of the top ten acquirers by volume or by revenue, I don't know which, and the sort of documentary - the contractual options that they offer. This is quite important, because, as you will have heard from Mr Rabinowitz in the evidence pass-on submissions back in May, it's effectively common ground that IC++ and IC+ contracts don't give rise to an acquirer pass-on issue. That's broadly accepted.

Standard pricing needs an explanation, and it's given in 173, where it says:

"Over 95% of acquirers' merchants have standard pricing which typically consists of ..."

And to paraphrase, you can have an ad valorem contract which is a percentage, 1.5% for all cards, or you can have a flat rate, 0.01p per transaction, and that sort of pricing is very common.

It's highly likely that some claimants won't have realised that when asked about blending, what they're actually being asked is two things: firstly, do you have an IC++ or IC+ contract. That was a separate dropdown question on the survey, and if they didn't tick that then the inference is that they didn't have one, or they didn't think they

had one. Can you infer from that that they are all unblended? Well, if standard pricing had been put to them as an option, if it was being said to them do you pay an ad valorem rate or do you pay a flat fee per transaction, they may have been able to give a more meaningful response.

But the point is that the criticisms about the sampling responses necessarily be predicated -- what questions you ask depends on what answers you get. If, for example, the sample of survey responses is such that one can infer from that that everyone who isn't directly indicated as being on an IC+ contract is on standard pricing because of the unpopularity of fixed pricing, then the experts are in a very different position from the one that they think they are in, where they don't know what everyone else is on. So the inference can be drawn by reference to this sort of information.

The other reason I'm passing this up is just to show you by reference to the PSR material what sort of information was available to the PSR, and there is a sharp focus, in the light of the PSR's submissions, as to what the legal position is. And I accept, of course, that this tribunal will not feel comfortable about being bounced into a decision on that on the hoof. I do have some observations to make as to what the statutory construction process leads to, but that will be for this afternoon.

MR JUSTICE MARCUS SMITH: Indeed.

MR BEAL: The third document I've passed up, again, this is -- as part of my preparation, I've simply been trying to think about ways around the log-jam, and one of the issues that has come up is: well, your survey responses have not indicated the impact of cross-border acquiring. And the key factor here, and the reason why Visa are trying to chase down the cross-border acquiring information/data for a specific period, 2014-2015, is that their rules changed with effect from 1 January 2015.

And so whereas previously they had required everyone effectively to take whatever

the domestic merchants' MIF was for the domestic market on a cross-border acquiring claim, they then allowed cross-border acquirers to select either the intra-EEA MIF or the domestic merchant MIF in the home market, and that led to arbitrage. And what happened with the arbitrage was that World Pay, one of the top three acquirers, wasn't very happy and they lodged a complaint with the CMA about the differential impact of having intra-EEA MIFs being offered by competitors based in France, Netherlands, Germany, et cetera, and having to pay a higher rate, the domestic MIF charged by, in this case, Mastercard and Visa at that time. And so that was the subject of a complaint to the CMA and they sought interim measures.

If I could draw to your attention, please, to paragraphs 5-12, you will see that the complaint that is being made by World Pay, in broad terms, putting it very colloquially, they didn't want to see their large merchants competed away by a foreign acquirer able to get access to an intra-EEA MIF which was lower than the domestic UK MIF, because the large merchants would have migrated to an overseas acquirer in another member state. So that was what was driving their commercial concern.

What they did, and the reason they didn't get an interim measure from the CMA, was they relocated their operation to the Netherlands. And so they then became a cross-border acquirer with the domestic UK transactions and could leverage the EEA MIF.

Now, that's meaningful for two reasons: firstly, it gives some indication of the response of an acquirer in a public domain document to a very significant event, which is the rewriting of the CBA rules from Visa. Secondly, World Pay is in a position to give data and can explain that, and you will have seen from the correspondence that World Pay has been engaging with Visa in a proactive way to try and help. And, thirdly, it shows that actually when there's a complaint about not

having access to CBA material, cross-border acquiring issues on the relevant issue 8, and when, for example, the defendants' experts complained that the survey responses haven't really identified a great deal of thought being given to cross-border acquiring issues, there may be a workaround. And that workaround may be, if your acquirer was World Pay, then from 1 January 2015, World Pay was a cross-border acquirer. And so everyone was moving on to cross-border acquiring rates if they were large merchants sticking with World Pay, because that was World Pay's purpose in relocating to the Netherlands.

So it just shows that, with a bit of effort, one can find a different route to getting important data and data sources other than the survey responses which have proved to be controversial.

Beyond that, I think I will simply be at risk of saying things that I need to either rephrase or pull back on in the light of the Tribunal's very helpful indications.

MR JUSTICE MARCUS SMITH: No, no, Mr Beal. Thank you, we are very grateful for that.

We will obviously want to hear from the parties. Ms Wakefield, do you want to go next as the sort of claimant? I don't think you've got very much to say about this because your Trial 1 involvement is less, but we'll hear from you before we hear from the schemes.

MS WAKEFIELD: I don't have much to say at present, sir. If I could take instructions during the 20-minute pause that my learned friend referred to, I would be grateful.

MR JUSTICE MARCUS SMITH: Of course.

MS WAKEFIELD: Thank you.

MR JUSTICE MARCUS SMITH: That is, of course, understood.

Mr Kennelly?

MR KENNELLY: Sir, I will take that 20 minutes now, if I may, unless Mr Cook wants to say anything?

MR COOK: No; only 20 minutes is a good idea from my perspective as well, sir.

MR JUSTICE MARCUS SMITH: Well, I'm glad there is unanimity on this point.

Well, it's 11 o'clock. We'll resume at 11.20. Thank you very much.

(11.01 am)

(A short break)

(11.20 am)

MR JUSTICE MARCUS SMITH: Mr Beal.

MR BEAL: Well, sir, I think I can be mercifully brief. With the greatest of respect, we think this might work. We will need to deal with data on acquirer pass-on. We will need, probably, to rely on the kindness of strangers in the form of World Pay, Global Payments, et cetera. If that kindness is not forthcoming, one of the fortnightly CMCs may need to be pressed into action on disclosure issues, third-party disclosure orders, but we think we can get cracking on everything else and leaving that as a workstream to run in parallel. So, we would respectfully endorse the suggested approach.

I think that's probably all I need to say at this stage because I anticipate that not everyone will --

MR JUSTICE MARCUS SMITH: The devil is going to be in the detail, Mr Beal. Thank you very much.

MR BEAL: As an overall steer, that's our approach.

MR JUSTICE MARCUS SMITH: Very well.

Ms Wakefield, we'll do claimants and then defendants, even though you are a slightly curious claimant, if you don't mind me putting it that way.

Submissions by MS WAKEFIELD

MS WAKEFIELD: In terms of the Friday morning fortnightly CMCs, in our respectful submission that seems like an extremely sensible idea, it is important that there is intensive case management now, not just of Trial 1 but also of Trial 2. Obviously we won't be attending the Trial 1 CMCs but in due course we hope to bring ourselves into the fold of those fortnightly CMCs if we may.

One suggestion, perhaps, is that there might be some kind of standing order in terms of the preparation for those CMCs, so I understand that in the *Trucks* litigation there were weekly hearings on a Friday in relation to disclosure with a date by which one had to raise points in correspondence and then a date for applications and so on, and that would strike us as sensible in this case as well.

It won't surprise the Tribunal to hear that as to the substantial and the firm indication that Trial 1 must go ahead, that's of course music to our ears. I have no standing to speak as to Trial 1, I'm here just to protect Trial 2 and so of course I'm pleased and grateful to hear that Trial 1 should be going ahead.

Finally, the PSR, which I know we're coming to this afternoon, but just by way of early indication of my submissions in that regard, we share the views of the PSR set out in paragraph 27 of their skeleton argument that this is a short point of statutory construction, the gateway prior legal point, and that that is a point that everyone appears to be in a position properly to address today, and so I would urge the tribunal to grapple with that question, and I would also respectfully refer the Tribunal to paragraph 30 of the PSR's skeleton argument, in which they indicate that if that prior question were determined, it may well be possible for us between ourselves, between the parties, to agree the terms of a rule 63, and so we needn't trouble the tribunal any further.

And I would say that that sort of approach, grappling with that today, is entirely consonant with all of the indications which were made by you this morning, sir, in

terms of just really grabbing things by the scruff of the neck and making a bit of progress. Those are my submissions for the time being.

MR JUSTICE MARCUS SMITH: Thank you, Ms Wakefield.

Submissions by KENNELLY

MR KENNELLY: I'll go first, and then Mr Cook will follow me.

Thank you, sir, members of the tribunal, for the indication, and I will take the tribunal's points in order if I may. Some of these issues will require further instructions. In the 20 minutes it wasn't possible to get a definitive answer to each of the points raised by the tribunal.

On the question of whether the factual evidence and expert evidence can be ready by mid-October, as the tribunal indicated, from the position of the factual witnesses, it may be possible. It may be possible, and substantial work has been done. To the extent that it's not fully explained in our submissions, Visa is definitely not approaching this from a standing start and work has been done on the witness statements, as the tribunal would have expected.

The question of known adverse documents, however, is more difficult. We cannot say for sure now if those documents can be identified as adverse without a review of them. And so whether that can be provided alongside the witness statements submitted in October, I would have to revert.

On the expert evidence, the experts are in the ATM trial, and so there is a difficulty there in terms of the deadline that you have set, quite apart from the fact that they need disclosure and data, and I'll come back to that, but as a matter of just pure practicability, that is certainly going to be a problem for them, and we have contacted them and asked for their confirmation that they can move as quickly as the tribunal has indicated. But, again, I'll have to revert on that to you.

Turning to the procedural aspects the tribunal has raised, the idea of having regular early morning CMCs, we welcome wholeheartedly, and I understand from Ms Buchanan she's available for the first tomorrow morning, and the idea of active case management is something which we think the case badly needs, and we're very grateful for the tribunal's accommodation in that respect, and the inconvenience it causes you also we fully appreciate.

Turning to the question of the list of issues and the use of the list of issues, the tribunal raised the concern that column 4 must be populated, and the importance of that. Of course, the defendants, and in particular Visa, has populated column 4 in detail, and the tribunal has that behind tab 2. If you go in hard copy volume 1, the list of issues that you see behind tab 1 sets out the claimants' draft of the proposed column 3. But column 4, an extract of column 4 appears behind tab 2 in volume 1 and in fact we have populated column 4 to such a high degree that it requires a separate table.

The claimants, however, have not done so, and so -- to the same extent, I'm told, to be more generous, and that's something which --

MR BEAL: (Inaudible: off microphone).

MR KENNELLY: That's an extract. Sorry, that's an extract. I'm told that the defendants' completion of column 4 is very comprehensive and the claimants could do more in that respect.

The real issue, though, the core concern that we have with the tribunal's proposal, is in relation to proceeding with all of the issues that are currently designated for Trial 1 by the current Trial 1 window. And the tribunal itself has really indicated the problem, because, as the tribunal said, the defendants will in large part be leading disclosure in relation to Trial 1 issues. And that is certainly true of issues like issue 3, the UIFM issue. But for certain issues, it is critical that the claimants' disclosure is

provided, and the experts for the defendants cannot analyse the issues, cannot provide expert evidence without that data in disclosure, which the defendants do not have. And the tribunal said if the experts do need disclosure in data they can ask for it in relation to the issues 4 and 5, which are acquirer pass-on issues, and in relation to the steering rules issues, issues 8, 9, 11 and 12. Again, the defendants' experts have asked for those data and disclosure. And this goes directly to the concern about the survey and the sample. In relation to acquirer pass-on -- I'll put PSR to one side for the moment. We'll assume for the moment that we cannot get the PSR information on time. The claimants' experts accepted that each claimant -- not a sample, but each claimant -- had to complete the survey in order to choose a proper robust sample for the purpose of obtaining disclosure from the claimants in order to address the acquirer pass-on issue. That was common ground.

As the tribunal has seen from the documents before you, that simply hasn't happened. The surveys went out to the claimants, but the responses have been woefully inadequate. And this is not petty point-scoring. This is a critical matter of the proper and fair resolution of the issues under 4 and 5 before you, because the defendants' experts cannot, even on the basis of a common position between the experts, properly analyse whether acquirer pass-on has happened in relation to interregional MIFs and commercial card MIFs without a proper sample of claimants from the representative sectors and a properly randomised sample in order to analyse the issues.

The answer which my learned friend gives, which is: well, World Pay is an acquirer and they must have material, again gives rise to the obvious response that we have already, as the tribunal knows, contacted the acquirers. We have, in order to be proactive, and pursuant to the indications given by the tribunal, engaged with the acquirers, and they are not being forthcoming in a very rapid way. This is no

criticism: they are non-parties, they are being asked to produce data from some years ago, but there is no indication that they will produce sufficient information and data in time for the experts to analyse it and have issues 4 and 5 tried in the current Trial 1 window.

MR JUSTICE MARCUS SMITH: Well, just pausing there, and using the survey case as a nice example of a log-jam and how to resolve it, is the problem that one hasn't even yet identified from whom one wants information, in other words you have got a problem in identifying the producer of material, or would it be enough, subject to anything that Mr Beal would have to say, to say: look, we want the following person selected on, say, a randomised basis to adduce information by whatever very short deadline we would impose to get things moving.

Now, what exactly is the nature of the problem, apart from the parties can't agree the way forward?

MR KENNELLY: Well, to be clear, sir, the parties did agree a process. We'll hear what Mr Beal says about his alternative solution for this. However, what the parties had agreed was that all of the claimants would be surveyed, and the survey is not an onerous survey, the tribunal has it in the bundle, they can see its basic questions for acquirer pass-on: what kind of contract do you have, is it blended or is it MIF plus plus, and basic questions about the contract they have with acquirers, which acquirers they had and how that changed over time, and it was agreed that every claimant would respond and then there would be a proper sample produced.

So the problem is the first of the two identified by you, sir. We haven't even got a sample from which we can choose eligible claimants who would provide disclosure. Because the survey responses are so poor, it is impossible to identify a sample on the approach agreed by the experts.

The idea was that we would get a body of survey responses. From them we would

have a number more than the sampled number. The sampled number for blended contracts, which are the important ones, was supposed to be 90-95, we would have more than that, 120, for example, and then they can be subject to randomisation to try and mitigate the risk of self-selection, which is acknowledged to be a thing that has to be addressed, and to ensure that the sectors are properly represented, and then seek disclosure from the 90 or 95 with blended contracts.

But as things currently stand, we only have 56 claimants eligible for sample A, which is the main sample that we're looking at for issues 4 and 5.

So that's the problem. And it's not a log-jam, in the sense that it can be overcome with some robust case management; it just isn't possible for the defendants' experts fairly to do their job without that sample, without the sample giving rise to the disclosure, which they need in order to analyse acquirer pass-on, and the reason why 4 and 5 just aren't suitable for Trial 1 is that we just cannot see any mechanism whereby that disclosure could be obtained from proper claimants in time for the experts to do their work for a trial in February, since we haven't even got a sample from which to choose as things currently stand.

MR JUSTICE MARCUS SMITH: Well, you've got to 56 of interest.

MR KENNELLY: 56. 56 is a starting point.

MR JUSTICE MARCUS SMITH: But you haven't had disclosure from them?

MR KENNELLY: No.

MR JUSTICE MARCUS SMITH: So, again, I'm just trying to gauge the extent to which problems can be done on a shortcut basis. If we were to say disclosure from those 56 as a starting point, and then, let us say -- I'm not sure what size of ultimate sample you want, 95, I think is what you said -- another 44 randomly chosen, would that be a starting point? If necessary, it could be topped up further. In other words, side-step the survey, go for a genuinely random topping up, and see whether that

delivered sufficient data for the experts to move forward.

MR KENNELLY: There are two, when I say starting point, again, I mustn't lull the tribunal into the false sense that we can get going with that and that might be enough at the end of the day with some adjustments.

The gap -- what's so important is that we need 90-95 at the end of the randomisation process with blended contracts, and we need a process whereby we can identify in a way that avoids cherry-picking, self-selection, claimants with blended contracts which then can be selected with randomisation in the proper sectors, and then from them disclosure sought.

The problem with self-selection and cherry-picking is a real one, because if claimants simply decline to answer the survey, let's say, for example, a claimant had bad data or they feel their data is not very useful, they can decline to participate and exclude themselves from the process. So there is a self-selection and cherry-picking --

MR JUSTICE MARCUS SMITH: That's not right. It's been made very clear from the beginning that we are not permitting, as it were, voluntary disclosure on anyone's part here. If we are minded to direct one of the, in this case, claimants to provide disclosure to a specific person, then the order will be made against that person.

MR KENNELLY: And I'm very grateful to hear that. In fact what we seek from the tribunal is an order that the claimants do what they had agreed to do, which is to use the survey as it was intended to be used, get the claimants to answer the questions they're supposed to answer, in order that a sample can be selected and disclosure sought from them. So we want that process to work.

The problem we have is our experts don't think that can be done, that the claimants can do what they should have done before in time for the information to be provided and the work done in advance of February. That's the concern. There's a pure impossibility, we think, in, even if the tribunal orders the claimants to do what they

ought to have done, it won't be done in time, and there's no shortcut that ultimately that sample, the 90-95% of blended contracts, properly selected following randomisation, has to be the basis on which the work is done, and we don't think we can get the claimants to that point, providing disclosure and so forth, in time for the February trial.

The answer, to me, might well be: that's all very well, but the PSR could save the day, because of course the concern here is economy-wide acquirer pass-on, which is another reason why we already are looking at quite a narrow sample of claimants, the purposes of looking at acquirer pass-on for the whole economy, that 90-95 was the minimum that the defendants' experts felt they could agree in order to do the job to look at acquirer pass-on across the whole economy.

But the PSR, obviously, has a much wider view, the million data points we saw in their notice that accompanied the confidentiality ring, plainly a wealth of analysis and data. And if that could be provided in time, that might be sufficient.

But, again, we run into the problem of time.

I understand, sir, from you, this morning, that for the PSR a third-party disclosure order would be required, if it's appropriate at all.

MR JUSTICE MARCUS SMITH: Well, I mean we're certainly amenable to dealing with matters if they can be dealt with. What Ms Wakefield said was: well, my concern is that speedy resolution is not liable to solve the matter. But I'm very happy to be persuaded that I'm wrong about that, and we will certainly give it a go. But we'll see what the PSR says this afternoon.

MR KENNELLY: But the problem there is, even if you find a legal gateway, and there has to be separately and subsequently a third-party disclosure order, the PSR then says the order itself will have to be agreed. There's a dispute about relevance, and the PSR doesn't accept exactly precisely what ought to be provided, even if the

gateway is there and an order is made. And then the PSR says after the making of such an order, it can comply within about a month.

That brings us into, best case scenario, November. And our experts cannot do the work, cannot begin to do this important work without that information. So one sees right away, even in that extremely ambitious scenario, getting the PSR material in November, it would be impossible for the experts to produce reports by mid-October.

We were straining to accommodate the tribunal's concerns. Alone among the parties Visa has done the most, in my respectful submission, to try and save as much of Trial 1 as possible, and the tribunal has seen that from the submissions we've made. But we just do not see how this can be done without significant unfairness. And, perhaps more importantly, from your perspective, an erroneous outcome in the sense that the experts will not be able to produce reports that are worth anything without this information.

MR TIDSWELL: Mr Kennelly, what is it that you would get from the PSR that helps with the acquirer pass-on point? What do you need to move forward? Is it data, or more than that?

MR KENNELLY: It's data.

MR TIDSWELL: Because there are four things that have been asked for, I think, and the fourth was their data that they have received. Is it that that you are after?

MR KENNELLY: It's all four. One must recall right away what the issues are for which this material is relevant. It's obviously relevant to issues four and five: the interregional MIFs and the commercial card MIFs and whether they restrict competition, but acquirer pass-on is also relevant for the 101(3) analysis when one looks at whether the costs outweigh the benefits, and quantum. And the PSR material is useful, necessary, for two purposes: one, to check the PSR's own

conclusions, we need the underlying material and analysis to understand how they reach their conclusions. But, secondly, and perhaps more importantly, the experts, our experts, can, with the data, the raw material, what they call the disclosed information, the PSR calls disclosed information, they can then use that for their own modelling. It's not just to check the PSR's homework, it's also to do the modelling the defendants' experts wish to do themselves.

MR TIDSWELL: Because it did seem to me that the data might be the easiest material to anonymise, for which I think there's a separate gateway, isn't there?

So if we were to get you the data quickly from the PSR, then that would presumably help a lot in relation to the -- certainly in relation to issues four and five; is that right?

MR KENNELLY: It would. It would certainly help. Certainly. To be clear, as you said, sir, there are four categories: the first category is the confidential version of the PSR report, and if one looks at the annexes, the annexes are what's really important from our perspective. And the PSR accepts annexes 2 and 4, which concerns pass-through and scheme fees, are likely to be relevant and useful for us.

But annex 1 sets out the industry background, and I can show you when we come to it in the afternoon, all the redactions which we expect to contain information which would be extremely useful for our experts in understanding the product offerings, the large payment facilitators and their pricing.

Then annex 2 sets out the path to analysis, and the analysis.

Now, there are limited redactions there, but they go to data distributions and limitations, and again understanding the limitations and restrictions that informed the PSR's approach is also very important for our experts in understanding how they reached the conclusions they did.

MR TIDSWELL: Sorry to interrupt you, but just pausing there, how could that possibly be confidential? How could the PSR's own view of their limitations of the

data give rise to confidentiality?

MR KENNELLY: That's a question, if I may respectfully say so, sir, for the PSR, I don't understand --

MR TIDSWELL: Of course it is. But it's a curious proposition, isn't it? If it's a generalised observation about their data, it's quite difficult to see why it would be treated as confidential.

MR KENNELLY: In fairness to them, I think I'm not going into this in detail because Mr Howell will address you --

MR TIDSWELL: Fair enough, I understand, yes.

MR KENNELLY: But on annex 3, that's the financial review of the payment facilitators, it shows how the proportion of the different fees related to card turnover year by year and how the MIFs and MSCs changed, that's all redacted and that's really useful, indispensable for the experts doing this work if they don't have the claimant disclosure. And then annex 4 is the scheme fees information, also heavily redacted, which the PSR I think accepts is relevant.

Category 3 is the actual raw data itself, which is extremely important for the reasons that I've given.

MR TIDSWELL: The point I'm really trying to explore with you, if you take the President's view about focusing on the things that are the blockages and getting them out of the way, there may well be some things in there that are nice to have or indeed very important to have by the time you get to trial, but it would be very useful to understand from you what exactly you need in order to be able to do the expert report. What you have to have, rather than what would be nice to have, if one could put it that way. I'm not asking you to do that now, but clearly that, I think, needs to be a theme of some of the discussions we're going to have about the material we're going to talk about, no doubt.

MR KENNELLY: When we have the PSR discussion in the afternoon we will focus our submissions on relevance, as the tribunal has directed us, on the bits that are most important. And they're not all equally important. The internal report, for example, we accept is not as important as the raw data and the analysis which the PSR undertook. But we'll discuss that with the PSR.

But my key point on the proposal made by the President this morning was that without this information, whether it's from the claimants' disclosure or from the PSR, the defendants' experts cannot do the work on acquirer pass-on. Or, I should say, on the scheme's fee claims. Because we need disclosure from the claimants in order to address the claims under the scheme fees rules. That's a separate point, but we need their disclosure on that too for the counterfactual analysis.

But four and five are my focus for the purposes of this, and without that information we cannot produce reports of any value, and that means issues 4 and 5 could not properly be tried in February, which is why we ask the tribunal respectfully to move those two issues, at least, into Trial 2. And that's our application regardless of all the problems that we've encountered. We maintain that application in any event, because it's not just about a log-jam; it's also about proportionality and avoiding inconsistency between Trials 1 and 2, and you have my submissions on that, and I'm happy to address you on them when you want to hear about them.

But, right now, I'm focusing only on why it is in our respectful submission impossible to include issues 4 and 5 and the scheme fees issues in the current Trial 1 window.

MR JUSTICE MARCUS SMITH: Apart from issues 4 and 5 --

MR KENNELLY: And I've been asked to emphasise the point, on issues 4 and 5, I've been focusing on the log-jam for Trial 1, but that overlap risk is a substantive concern, and I hope the tribunal doesn't think I have completed my application under issues 4 and 5. I would hope to come back to that and develop it more fully.

MR JUSTICE MARCUS SMITH: You say that 4 and 5 arise also in Trial 2?

MR KENNELLY: Yes, they do. It is accepted they arise in Trial 2. And there is a real risk of inconsistency if they're heard in Trial 1 and then heard again with Merricks in Trial 2, because there are issues of principle that could be determined differently about how one approaches these questions. And the tribunal saw this in the pass-on trial, how these issues can come up, when one looks at the increase in the MIFs in the counterfactual analysis, or decrease. There are questions of principle on how one approaches acquirer pass-on that have yet to be determined. They would arise in Trial 1 if four and five stay in there and Merricks may well have points to make about them in Trial 2 if they are not heard at the same time.

MR JUSTICE MARCUS SMITH: Of course we are going to have to decide in both Trial 1 and Trial 2 what the case is, whether it's 100% passed on because it's accepted that there are a material number of cases where there was pass-on to 100%, because of the nature of the contracts in issue.

So that is something we are going to have to consider in both the context of Trial 1 and in the context of Trial 2, the 100% pass-on scenario, where there is no retention of the overcharge at that layer. Does that provide an argument for deciding the issues in Trial 1 on the assumption that there is 100% acquirer pass-on, and leaving the matters of the extent to which that was the case to a later date, that's what you're saying?

MR KENNELLY: That would be a very artificial assumption, and if they really -- in my respectful submission, it wouldn't be a good enough reason not to do the thing which we propose, which is to determine acquirer pass-on fully at the same time in both trials, because the key concern is, of course, in relation to the blended MSCs and the question of pass-on we know is a complex one.

Now, the point that's made against us, and it may relate partly to what the President

has just put to me, is that for the purposes of restriction it is simply enough to know that there was a flaw and the MSCs would have been lower absent the MIFs. But we know that the test for restriction is whether there's an appreciable difference, whether the MSCs are appreciably lower in the counterfactual, so that inevitably involves the tribunal asking to what extent would the MIFs have been lower in the counterfactual.

So you do need to look at the degree of acquirer pass-on even at the restriction stage, and true it is that in Trial 2 one might look at that same question with more granularity, but it's the very same analysis. The same principles are being applied, the same data is being crunched, the same experts are doing the work. As Mr Cassels said in his witness statement: it just makes sense for this to be done at the same time with the same dataset with the experts working on it once and for all, and carving it out in the first trial does give rise to inconsistency because those questions of principle will be determined in the absence of Mr Merricks, and findings will be made. I mean, the issue is there to be determined. It's not there for assumptions to be made. As things currently stand, it is to be determined in Trial 1 in the absence of Mr Merricks. And then the very same points have to be addressed in Trial 2.

There is a real risk of inconsistency there which can be so easily fixed by moving issues 4 and 5 into the second trial. We've more than enough to get on with in Trial 1. The tribunal can see how much trouble we're having getting to Trial 1, even with some of the issues that we have. Moving issues 4 and 5 into Trial 2 has a lot of merit in order to accommodate the tribunal's well understood concern to progress Trial 1 efficiently and effectively.

MR JUSTICE MARCUS SMITH: So we've got your point. We appreciate you haven't said everything you want to say on that, but is that the only log-jam that you

are drawing to our attention, or are there others?

MR KENNELLY: To be absolutely clear, the acquirer pass-on cannot be addressed in the expert reports absent the material which I've discussed.

MR JUSTICE MARCUS SMITH: No, no, I understand.

MR KENNELLY: And secondly and separately the steering rules challenges, they also require claimant disclosure, and our experts cannot do their reports on the counterfactual for those steering rules claims without claimant disclosure.

So, for example, if the tribunal needs to understand where I'm coming from on that, in asking if the steering rules restrict competition, you have to ask in the counterfactual what would they have done absent these rules, and that's why it's relevant to ask: well, when the claimants were free to surcharge, did they? In terms of the cross-border acquiring rule, did the claimants consider whether they would have used a foreign acquirer? What would they have done in the counterfactual if the cross-border acquirer rule hadn't been there, and what other steering practices did they use or wanted to use.

MR JUSTICE MARCUS SMITH: Well, what's the best articulation of what you want.

MR KENNELLY: The Redfern schedule. This is the disclosure we're seeking from --

MR JUSTICE MARCUS SMITH: Could you give us the page reference?

MR KENNELLY: I know where it is, it's the ... tab 64, volume 2.2. Our reference schedule is -- tab 63 are our requests. Sorry, I gave you the wrong reference: tab 63.

So we can skip ... the first point there is in relation to timing. There's a dispute between us as to whether the claimants should give disclosure in relation to --

MR JUSTICE MARCUS SMITH: Sorry, where are you?

MR KENNELLY: Sorry, at the very beginning.

MR JUSTICE MARCUS SMITH: The very beginning, yes.

MR KENNELLY: It may be easier if the tribunal looks at this. Because we have, pursuant to the tribunal's indication, limited our requests to the bare minimum. This is a very short Redfern schedule, and you can see what the requests are and the reason for them.

MR JUSTICE MARCUS SMITH: We're looking at request 1.

So we're at a stage where we're arguing about the survey in request 1.

MR KENNELLY: Yes, exactly. I don't want to take up too much of your time on this and I'm conscious that you do need to address other issues, so I'll summarise, if I may, rather than ask you to read the whole thing.

The first point is the period for our disclosure. The claimants, if you recall, number about 3,000. We've agreed that samples will be given, and of course that's appropriate and proportionate, but it is of great benefit to the claimants. But we still need the disclosure to cover the whole period, the whole of one period across all of the claims.

So where claimants give disclosure -- this is a point of principle -- they ought to give it for the whole of the claim period, not by reference to their individual claims. That's the first point.

Then if you go to issue 8, this is the point about the steering rules. It's on page 1690. Request number 7, issue 8.2, you see the request in relation to the cross-border acquiring rule, and the explanation as to why we want this disclosure is in that third column.

If the tribunal is interested in resolving this issue now, I can take you to our submissions, which are in the first volume, the first bundle, behind tab 8. These are submissions for the July CMC.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: And if you go to page 424, and we skipped over the period for disclosure, which is on the prior page. I have made my submissions in relation to that. But paragraph 35, you see the formulation of request 7. And you see that we seek disclosure from a sample of claimants and documents relating to the changes in the cross-border acquiring rule and merchants' responses. And you see the dispute between us. Our language is in green. It ought to be in different colours in your document. Theirs is in red.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: And the tribunal can see right away the difference between us, and at 36 we explain why we need the longer period, because we need documents from the period when they would have been aware of the possibility of acquiring services in other countries, and we need to know not just the documents that were presented to their decision-making bodies, but the analysis they did internally, even if not ultimately presented to the relevant decision-makers about whether foreign acquirers would be used or not. And that's critical for the construction of the counterfactual to understand that absent the cross-border acquiring rule, what would have happened? What would the claimants have done?

Our experts need that in order to assess whether the cross-border acquiring rule was a restriction of 101(1) or not in Trial 1, if it is to progress to Trial 1.

MR JUSTICE MARCUS SMITH: Mr Kennelly, you're looking for a large enough and a representative enough sample so that your econometrists can do a predictive analysis as to what the whole dataset says. Is that why we're so keen on surveys?

MR KENNELLY: No, I'm sorry, sir, they are quite different. Surveys are needed to present a representative sample for disclosure for issues 4 and 5. There's a different survey, surveys B and C, which were using the same survey, different sample, for this disclosure. Yes.

MR TIDSWELL: And are you at a stage where you can go ahead with B, or is there still a dispute?

MR KENNELLY: No, there's still a dispute.

MR TIDSWELL: So this is all subsequent to the question of the resolution of the dispute about --

MR KENNELLY: Precisely.

MR TIDSWELL: So you can't actually even get on with this, even if we resolve this today, you've got to resolve the survey question first.

MR KENNELLY: Exactly. Exactly. But bearing in mind what the tribunal is saying, focusing on what's really in dispute, we've made progress with samples B and C. For B and C the dispute is smaller, the problem is less serious. Sample A is where the major problem lies. I'm not --

MR JUSTICE MARCUS SMITH: Mr Kennelly, I must say I'm thinking that we need to put a line through the survey and say that you get a certain number of responses from a randomised group of the claimant representatives and you work on that.

MR KENNELLY: Sir, it will still be necessary to work out which of the claimants have blended contracts. The prior question about working out which claimants have blended contracts will have to be asked some way in order to make sure the sample is useful.

MR JUSTICE MARCUS SMITH: Well, that's to understand the distribution within the claimants' class of which contracts they subscribed to, is that right? And then to get enough data from the class you're interested in in order to do some kind of statistical analysis; is that right?

MR KENNELLY: No, sir**,** and it's important to recognise that this very question, how does one get a proper sample of useful material to produce the expert evidence has been addressed by the experts. This tribunal directed that this disclosure exercise

be expert-led and your order said so, and the experts tell us, all of them, that each claimant must produce what they call foundational information in order for a sample to be produced. And that's the expert-led process. And so --

MR JUSTICE MARCUS SMITH: You'd better take me to that.

MR KENNELLY: Well, it's in the order.

MR JUSTICE MARCUS SMITH: Well, no, I want to hear what the experts say.

MR KENNELLY: Ah, sorry. That is in the agreed experts' statement, same bundle. It's in same bundle 1, tab 15.

So if we go to tab 15, page 654, we see the joint expert statement on sampling.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: And if we go to page 658.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: Summary of agreement between all experts, 658, and you see that at the first row. And sample size required, 100. And the purpose of the sample you see in the shaded box above it:

"The sample of claimants that will provide merchant service agreements and detailed monthly MSC data if the claimants agree or the tribunal awards that the MSC data will be provided."

And then the sampling frame, what set of claimants should be considered for the sample by reference to the survey responses, the main sample that accounts for the majority 90-95 of claimants should be claimants that, and you see, had a blended contract, could provide MSC data for every year of this contract, unless this means the sample sizes below cannot be achieved, in which case a less strict condition, which the experts would then agree and then they had a non-zero turnover.

Then, in addition to the 90-95, a smaller number that had the interchange plus, interchange plus plus contract, and that would satisfy (ii) and (iii) above.

Yes, and my learned friend reminds me to go back to page 600 to give the tribunal the reference to where the claimants agreed, as I said, that each claimant would, in answering the survey, give foundational information. Page 600, and that's behind tab 13, summary of agreement, the experts agree that:

"To undertake the analysis of various issues identified as relevant to Trial 1, certain claimant foundational information is needed from each claimant [each claimant] at the legal entity level and it's agreed that this would include at least the claimants' legal and, where different, trading name, country location and a description of the claimants' sectors."

And then this:

"Whether the merchant paid or pays MSCs under the terms of IF plus, IF plus plus or blended rate MSA [critical information] and during which time periods if this is charged. ...(Reading to the words)... branded transactions by scheme, year, card type, cardholder region, i.e. separately for domestic intra-EEA and intra-regional transactions."

Then two paragraphs down:

"All experts agree the CFI [the claimant foundational information] should at least include 1-5 above. And Mr Dryden ...(Reading to the words)... set out additional information [but I'm focusing on 1-5]."

So with that in mind the expert-led process directed by this tribunal led the experts to produce the document that I had gone through first.

MR JUSTICE MARCUS SMITH: No, no, I understand that the experts are likely to be very much in agreement as to what constitutes a sample that is workable. But where we're at at the moment is that we don't have the material to produce the work or sample because you've got unhelpful survey responses.

So what I'm pressing you on is, that being the case, I'm not at this stage prepared

simply to jettison issues because inadequate surveys have been produced.

What I'm saying is, that being the case, there being an inadequate, or what you say is an inadequate survey response, what do we do to move things forward if we're not going to be adjourning certain issues?

So what I'm saying is, if you can't get a sample in this way, if we are going to say we're just going to be ordering disclosure, let us say, from a group of purely randomised claimants, how do the experts deal with it in that way? That's not a question they've been asked here. The question they've been asked is what sample do they need in order to do the analysis.

Now, I quite understand that they will say that there are certain parameters that have to be met, but we are late in September, dealing with a situation where that hasn't happened.

Now, if we were to say, I don't know what Mr Beal would say in response to this, but if we were to say you are going to get disclosure from a random selection of, let's say, 200 claimants, and you don't know what they've signed up to, whether it's a blended contract or something else, but that's what you're going to get, can you do something with that? And can we shortcut this argument, which has been going on for months, about the adequacy or inadequacy of a survey, because all we're doing is building in a delay which is, as I hope I've made very clear, something of an anathema to this tribunal.

MR KENNELLY: Sir, yes, of course. And perhaps Mr Beal can address you on that point and I'll respond.

MR JUSTICE MARCUS SMITH: Well, I'm sure he will have something to say. But does that meet your concerns? It's not what you want, I understand that.

MR KENNELLY: Well, it's not my concern, it's all the experts'. This is not all the experts deciding what they would get in an ideal world, this tribunal directed two

things: first of all, you directed that the approach to disclosure, which this addresses, had to be streamlined and had to be efficient, which led us to sampling, and then the experts were to drive the process. Bearing in mind the need for a streamlined efficient process.

That's what they did here.

MR JUSTICE MARCUS SMITH: Mr Kennelly, there's no criticism at all. But, if anything, the criticism should be directed to us. It hasn't worked. We've got survey responses which don't deliver. But we are where we are. I'm not particularly keen to carry on as if what we have previously ordered was right. It may be that what we have previously ordered was terribly wrong, and, I must say, the pudding that we are at the moment consuming is rather suggesting that we have got it terribly wrong.

So I'm not particularly keen in continuing in the trajectory that we have previously ordered. So obviously prior orders of the tribunal have been quite rightly respected by the parties, but they haven't worked. We are in a situation where all parties are actually saying you've got to adjourn, and that is something which we are unkeen without testing to do.

So what I'm really going back to is the perfect is what we've already ordered, it's not worked, we're not there. What can we do to move things along, because at the moment what you're telling me is, we haven't got enough data to establish a set of claimants from whom disclosure can be sought. It is a precondition to that that we have a survey that enables us to establish such a set.

Well, I'm pressing you on how far we can find a second-best solution by saying the survey hasn't worked, let's try something else. Let's do a randomised sample, I don't know.

MR KENNELLY: I entirely understand the frustration the tribunal has. But my concern is this: that in the tribunal's haste and eagerness to address this problem

you will miss an important point that you identified at the beginning of this process, which is that the experts are best placed to work out what they need in order to do the reports that you require, and the tribunal, in my respectful submission, should not simply settle on some second-best solution today without giving the experts an opportunity to reflect on what the plan B could be. Because my concern is this: if the tribunal today says: let's just order the claimants to do a randomised sample and we'll just crack on with it, it could well end up giving us something which lacks critical elements or contains critical flaws that the experts themselves identified when they formulated this proposal.

That is why the tribunal should be slow to throw out this approach, which was settled upon by the experts, and, in my respectful submission, correctly, for something which contains serious problems, that will contain flaws that will end up derailing these issues at the trial, which will be even worse than having to push them off to Trial 2.

So I am not in a position today to say to you that the tribunal's proposed alternative would work or not.

MR JUSTICE MARCUS SMITH: No.

MR KENNELLY: And in my respectful submission neither is Mr Beal, and the tribunal should be slow to accept any opportunistic agreement to something which ultimately won't work in anyone's interests.

So we have to reflect with the experts, perhaps at short notice, with great speed, as to whether an alternative, a less perfect alternative can be achieved.

But this solution was not perfect. This was already produced in order to do something quick and rough, rather than what one would do in a normal trial, which is to get disclosure from a much wider sample, each of these claimants is suing us, ordinarily they'd be producing disclosure themselves. This is already designed to be

rough and ready. And so I hesitate to see how something else can be produced by the experts that will do their job properly. That's my concern. And I'm sorry to not give you a ready-made solution. That's the concern I have.

MR JUSTICE MARCUS SMITH: To be clear, Mr Kennelly, we're not going to be making an order as to an alternative course today. But what we are doing is we are framing the sort of debate that we will be having tomorrow and the hearing a fortnight hence. Now, this may be a fortnight hence point. What I'm trying to articulate as the message that needs to go to the experts, is they have a finite amount of time, and they need to fashion what they need in order to do their work with that in mind, and once they have done that, then Mr Beal's clients, to the extent disclosure is required, can expect a regrettably fast obligation on his clients to produce the material.

Now, it may be that if that is the way we are going, and provisionally that seems to me necessary in order to rescue the trial, one ought, even if one is not methodologically committed to what one is doing, one ought to say we perhaps ought to get Mr Beal's team to start producing a randomised sample of, let's say, 100, so that we at least get some disclosure into your experts' hands that can then be topped up by whatever alternative approach the experts agree if a survey isn't going to work. And it seems clear, if nothing else, that a survey is not going to work, because you have tried it and it has not worked.

MR KENNELLY: May I add one thing before I sit down?

MR JUSTICE MARCUS SMITH: Of course.

MR KENNELLY: Which is don't give up on your survey so quickly, sir, because that survey did work in part, and if the claimants were ordered, as we ask you to do, to go back to their own clients and get them to do it properly, it's not a huge number, and then require all of us to move very quickly to examine the responses and then get the disclosure from the claimants, we may be in a better place, it may be premature

to throw the survey out entirely and ask them for a plan B, but that is the order we're currently seeking from you, which is that the claimants go back and obtain that information which Mr Holt said on 20 July is necessary. That's behind tab 16 of the first bundle but I won't take you back to that, you have seen that letter.

MR JUSTICE MARCUS SMITH: Well, if it could be done quickly then, of course, fine. But the point that you are making is that it can't be done quickly enough.

MR KENNELLY: Yes.

MR JUSTICE MARCUS SMITH: And therefore the material portions of Trial 1 cannot be heard, and it's that, that's why I'm pressing you, Mr Kennelly, because that's not the way in which the very careful schedule is intended to work. We were intended to have a trial that was moving forward in an orderly way.

Now, we all agree, at least, that that hasn't worked. So its not having worked once, I'm slightly reluctant to have it not work again. And that's why it seems to me that there is an importance in thinking of alternatives. Because you're not saying, and quite rightly so, that Mr Beal's clients haven't tried to complete the survey, it's just been trickier than one might have expected, and that's because classification is a difficult thing.

So it does seem to me that the experts shouldn't be beguiled into thinking that that which the tribunal has ordered is that which must be done at all costs, no matter what, because that is what the tribunal has ordered. Because, as I hope I have made very clear, we are quite prepared to unorder anything that we have said in the past in order to substitute something that is workable in order to achieve a proper trial.

But of course you're right, achieving a fair trial is, at the end of the day, the fundamental question that we need to approach. All I'm saying is, is this the only way to doing it?

MR KENNELLY: I think at this stage we need to hear from Mr Beal, because my position, as I've said to you, is our experts have explained what is the bare minimum. Mr Holt said in his letter that it was the bare minimum that's required for them properly to do their acquirer pass-on analysis.

If that bare minimum can be produced very rapidly in some other by the claimants we'll wait to see. And I'll see what he says. But what we cannot have is what's currently available to the experts and just muddling along with that. In my respectful submission, that cannot work. The experts will simply not produce anything of value, and that's what they've said to you clearly, bearing in mind the duties of the tribunal. If there's a different solution, we'll obviously consider it, but we haven't got one before us currently.

MR TIDSWELL: What's your estimate of how long it would take to try issues 4 and 5?

MR KENNELLY: About three weeks. Which is about half of the current Trial 1 window.

As you have seen in our submissions, we're happy to have the other issues that the claimants suggested, I think it was issues 2 and 7, to be tried in that trial window also. Which, again, adds to the useful material that can be covered in the trial window that you have.

Of all the parties, we are proposing something that uses up more of that time than anyone else. We don't want to see that trial window lost either, and Trial 3 is a very important issue, it's not going to determine the whole case by itself, although we think it's such an important issue it could well expedite settlement, and I could make submissions about why issue 3 in Trial 1 would be extremely useful for you.

But I think at this point there's a prior question on the question of issues 4 and 5, and I think that needs to be addressed first before the tribunal goes on to examine those

other issues.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Kennelly.

Mr Cook, I believe it's you next, and then we will hear from Mr Beal.

Submissions by MR COOK

MR COOK: Thank you, sir. For the purposes of my submissions, and also I would invite the tribunal for the purposes of analysis today, I would suggest you should look at it as being issue 3, issues 4 and 5, and then issues sort of 8 or so onwards. There are a smattering of other points. Issue 6 is about Visa and whether it's an association of undertakings and market definition points. But those are sort of the core points the tribunal is going to be deciding at the trial, and I suggest analytically you can and should look at it like that for today's purposes.

Obviously Mr Beal has his point that it all needs to be looked at together and in the round, but they do give rise to very different practical and evidential issues, which is the reason I'm going to tailor my submissions by reference to those three categories now.

So issue 3, that is the post-IFR consumer MIF and that's obviously something where the tribunal dealt with that by way of a summary judgment, or the claimant has applied for a summary judgment, it was refused. So we've got a shape of what that case is about, and that is a case that deals with the counterfactual in a world without MIFs, consumer MIFs, following the IFR, what would have happened, and they said there were three candidates: the zero MIF, the UIFM, or the bilaterals.

Now, that is something where it's probably right to say the burden, not formally, formally the burden of proving a restriction is on the claimants, which I'll come to say is very important, but in terms of where the focus lies, it lies upon the defendants, because we're looking at, in the counterfactual, what would the defendants have done in order to preserve their business.

Now, in terms of that, issue 3 is relatively simple. It focuses on us, Mastercard and Visa, and it's something we've certainly done a fair amount of work on, because partly we've been through a summary judgment process, and that is something that within a shortish period, I am afraid not quite as short as perhaps the tribunal was suggesting, and particularly not 14 October, which, by the way, happens to be a Saturday. But certainly by, you know, the end of October, from our side we don't see a problem with Mastercard and Visa going first on the factual and expert evidence there, and doing it in a time period measured in something like, we would say, five weeks, not three weeks. But that makes logical sense to us, and then the claimants following suit. And, to some extent, that was Visa's proposal that issue 3 could come earlier and we understand that's perfectly -- to that extent we are in agreement with Visa: that is an issue which can be dealt with in that order in accordance with the tribunal's proposals.

So on issue 3, you will be pleased to know that I'm not disagreeing with what the tribunal is suggesting. I am afraid that will not, unfortunately, be where I come to in relation to some of the other issues.

Issues 4 and 5, so that deals with the interregional MIFs and the commercial card MIFs. The core of the issue there, as you understand, is the pass-on issue. Now, in relation to that, the fundamental problem that is faced at the moment is there is no grist to the mill. That until there is some data, there is nothing that can be done by the experts other than simply say this is what the PSR report says, and just to remind you, we say that the PSR report shows zero pass-on for blended contracts. You don't need to decide, you are obviously not deciding that point or anything, but we say that is what it shows, that it shows zero pass-on of the reductions. There's a legal argument about whether we're looking at reductions or increases as being the relevant test, but nonetheless that's what we say it shows.

But, at the moment, other than simply looking at the report and analysing what it says, and those bits are in the publicly-available version, that is the sum total of what the experts could do. And it's not analysis, in all honesty. It's simply saying that's what the report says.

Beyond that, for the experts to actually do anything, they need some data, and there are three possible sources of the data that goes to the acquirer pass-on issue. Either, I think, everyone agrees, the PSR as being the best source of the data with the million data points. There is the issue of whether there is the statutory power to produce the data. The acquirers, who are obviously non-parties, are being asked to produce data which is confidential, and we've engaged with them but, you know, my learned friend puts it as we're dependent on the kindness of strangers.

MR JUSTICE MARCUS SMITH: Well, you are dependent on third-party disclosure.

MR COOK: But that's nonetheless going to be, whether it's the PSR, if there's a statutory power it's a month-long process. You could potentially make a third-party non-party disclosure application, but it's going to take time for any third party to produce that kind of data, of the sort of quality, particularly since we are focused on quite some time ago, the best example everyone agrees is the pre- and post-IFR period, so we're back to 2015, so it's not something that's necessarily going to be readily available data. Or that the claimants should produce data of their own and we get into, then, some of the sampling issues.

But in terms, then, of can Mastercard and Visa do expert reports some time in October, the answer is we have not done work on this, and cannot do work on this, in any timescale until at some point the data comes in from somebody. And those are the three possible sources.

So to that extent, we say 4 and 5 raises particular problems just because there is a lot of material which is going to need to be produced at some point, and then when

it comes in, that's when the gun gets fired in terms of the experts doing the analytical work, which will be a substantial process on both sides.

So 4 and 5 raises, perhaps, you know, the most considerable problems in terms of when we'll get the data, how, and --

MR JUSTICE MARCUS SMITH: There's the acquirer layer that is the real problem.

MR COOK: Sorry, it's the acquirer?

MR JUSTICE MARCUS SMITH: Layer**.**

MR COOK: Yes, it comes down to the fact that Mastercard doesn't have any visibility, and the same is true of Visa, I think, of what goes on between acquirers and merchants. So we have nothing useful to provide in relation to that, or nothing substantive.

MR JUSTICE MARCUS SMITH: I understand.

MR COOK: And then individual claimants have a snapshot of their own relationship, and obviously one small silver lining of having so many claimants is there is quite a lot of it.

MR JUSTICE MARCUS SMITH: Some, of course, and I think last time you said it was the majority, or a significant number, are simply subject to agreements which involve everything being passed on.

MR COOK: Yes. Some of them are, certainly.

MR JUSTICE MARCUS SMITH: Really talking about the minority, I think, but a substantial minority that are subject to different contracts that are not cost-plus, and are capable of involving a less than 100% pass-on of the interchange fee; that's right, isn't it?

MR COOK: In terms of the claimant, that's right. I think what we get for the PSR's report is 95% of merchants are on that. So when we're looking at restriction issues, it is quite important to bear in mind that that's the 95%. So, yes, the number of

claimants, the proportion of claimants is much smaller than that. But if we're looking at was there a restriction across the market as a whole, that's a whole-market question, not a subset based on these claimants.

But the fact that it's a minority does become particularly important, and the reason why we've sort of gone down the survey approach and the reason the experts have agreed that we need to go down the survey approach, is if we select the random 100, given that we're trying to get data in relation to exactly this issue, we run the risk of getting 80 of them saying: here's a copy of our acquirer contract, we're on interchange plus plus, we run the risk of five of them then being bust and not having the data or simply not having the data because it's 7 or 8 years out of date, and then we might get 8 of them that are hotels, or whatever it might be. That's the problem with the random example, is that we know that we are looking in this claimant group at a smallish subset, which is why the purpose of the survey was to identify that subset to select from them with the intention of, firstly, picking claimants that are relevant to this issue, because obviously if they are IF plus plus that is not relevant at all and then, secondly, getting a selective number that are spread across a sufficient number of sectors that do business primarily in the UK and these kind of points so we get something useful.

So in relation to that there is a process of needing to gather data and I am afraid, you know, everyone agrees that is a process that's going to take a significant period of time and that is a particular block. So we simply cannot do any work on our side, other than simply waving the PSR report, unless and until data comes in from somewhere else.

MR TIDSWELL: It may be a question for Mr Beal, but I take the point you say there's some sense of what the proportion of the blended contracts is as against plus plus or plus, where does that come from? Does Mr Beal have that information in

broad terms? How do you know that?

MR COOK: I think, and it's right to say of course there are three sets of claimant groups and I think in the past some of the information we've been provided may be for some of the easier claimant groups rather than --

MR TIDSWELL: Yes, so for some of the claimant groups there may be better information, because I did note in the material that Mr Kennelly took us to, there was a paragraph that Mr Kennelly didn't go to, but there was a mention, of, I think, Dr Frankel saying that there were other ways of getting to the blended contract claimants.

MR COOK: Yes. I mean, in relation to that it certainly appears that the claimants' experts had at various times to a lesser or greater degree depending on the claimants in question gathered some of the information.

MR TIDSWELL: Yes.

MR COOK: And to the extent that, of course, some of the information was available, but it doesn't look like it's anything like complete, is the problem.

MR TIDSWELL: And so the position is that you have got 50 something where you have managed to identify the pool that's interesting, the subset. But that's not a big enough pool, because of the spread across the sectors, and just generally because the experts say -- there doesn't seem to be any particular science. There's not a scientific sampling basis for this. It's just a number that they seem to have come up with, isn't it?

MR COOK: In relation to that I suppose our concern is twofold and this comes down to the survey and with respect I should say we're not complaining the claimants haven't done it properly. With respect, sir, I am afraid we do say that the claimants haven't done this sufficiently, not in a blame-throwing sense, but simply a large proportion, a large number, perhaps not a large proportion of claimants have not

answered the survey at all, and that many of those who did answer it did not answer enough of the questions to give us the data. The figure we have quoted is only 35% of the responses, no doubt there's a disagreement about that number, but only 35% of the responses had the sort of claimant foundational data that our experts thought was necessary to identify the relevant selection, and of course the problem is many of those 35 say things like: I'm on interchange plus plus, so we immediately for sampling purposes say: fantastic, we've got an answer, we now know you shouldn't be in our sample, but that doesn't help us find the sample.

So one is there hasn't been, with respect, we say, enough engagement in relation to that. But the problem then that leads to, one is it leads to perhaps not a very good sample, but it leads to the self-selection bias problem, which is we have the group of people who have not responded or have responded but have responded in a way that is just simply not good enough and there is always the concern that those are people who know that there is unhelpful material and by not coming forward, by sort of providing information that would allow us to identify them -- and I appreciate, sir, you made the point that if the tribunal says they must give disclosure, then they must do so, our problem is we don't know how many of that group are necessarily -- we don't know which are the ones hiding within that who are potentially unhelpful.

So the problem, the worry is that when a large number of people have chosen not to participate, we would say properly, that we're concerned there might be a reason for that.

MR TIDSWELL: If the question was simply if you are on a blended contract, I appreciate there are other questions as well, but it is quite difficult to gainsay that, isn't it, either you are or you aren't.

MR COOK: If they had answered it, and that's one of the problems, is quite a lot of them answered the survey and didn't answer those questions and my learned friend

has come up with a reason why he thinks it could have been phrased differently but in many cases they simply didn't answer that question or in some cases they don't answer a lot of other questions which are useful to make that answer -- other questions like, for example, do you have data going back to 2015? If you don't, it doesn't matter what kind of contract you were on, you're not very useful to us. So that's why I said there were several pieces of information that the experts agree are needed to actually allow them to evaluate the sample. From our perspective, sir, you asked my learned friend the question should we essentially just throw out the survey? Our position is absolutely not. It has been valuable. It hasn't been as valuable as it should have been but we would say the right thing to do is not to throw that away but to take what we have got from it but also that, you know, you should be saying to the claimants: no, it is not acceptable if you are bringing a claim before this tribunal to not answer a survey.

Now, if it's the case, and again these are points in my learned friend's skeleton, that the answer is, and somebody says: I'm a liquidator, I have taken on this company, I am afraid I simply cannot tell you what happened eight years ago. Fine, that's an answer. At least then we know that there's a reason why somebody is giving a null response. Or that somebody answers and says: I'm sorry, we had a data problem and everything pre-2022 was wiped. Again that's an answer.

But for the moment there's just a lot of non-answers.

MR JUSTICE MARCUS SMITH: No, that's very helpful, Mr Cook.

You've identified this particular log-jam a Trial 1 has envisaged. Moving on from that in a moment, and I know you haven't articulated your submissions fully on these issues, but you identified, I think, the log-jam sufficiently for present purposes.

Are there any others that we ought to be aware of?

MR COOK: Well, yes, so let's put it down. So issue 3 said we're broadly aligned

with the tribunal. Issues 4 and 5, this is the log-jam. Our solution to it is a relatively tight period is given to say: claimants, do better. Then there's got to be a certain point where the tribunal says: well, that's as good as you're going to get, now select the sample and press on with what everyone agrees is the disclosure required from them, and we say that's by far a better solution than just picking a randomised sample because a randomised sample we know is going to be on the whole useless to the questions we're trying to decide here. So we should at least pick ones that are known to be better, and we could end up with a better sample in a week's time, say.

They only had two weeks to complete the questionnaire in the first place. They haven't improved it for a couple of months. But if the tribunal were to give another 7 days, we would hope there would be quite a lot more responses. So it could be done very rapidly to try and improve matters.

That then brings me to the other third category of issues, which are sort of issue, I think, 7 or 8 onwards. To keep it simple, those are the rules issues. It's important to explain, of course, that the rules issues have not been litigated previously. There's an aspect here with some of the interchange fees where certainly Mastercard and Visa had been litigating interchange fees for quite some time. That's not the case, that they haven't been substantively dealt with by a court previously, so we are to some extent starting from scratch.

What the claimants compendiously describe those as, or most of them, is the anti-steering rules. And what that means is that they complain that various rules, honour all cards rule, surcharging rules, prevented them from steering customers to do different things, whatever those might be, to use other kinds of cards, to use in-store credit or those kinds of points.

From our perspective, sir, the concerns we have about what the tribunal is suggesting, is that we say as a matter of principle, it's legally right, the burden is

upon the claimants to establish the restriction of competition. In relation to that bit of the claim, issues 8 onwards, it's very much the case that the claimants are going to be the ones who are -- what we're talking about is in the counterfactual the claimants say that they or merchants like them would have done different things in different kinds of ways.

MR JUSTICE MARCUS SMITH: Yes.

MR COOK: So we say from our perspective that, with respect, the tribunal is -- the unconventional approach of making the defendants go first makes no sense at all in relation to those rule-based arguments, and that is something where what we've got at the moment is a very bare-bones pleading of the kind of things prevented --

MR JUSTICE MARCUS SMITH: (Overspeaking) from whichever side? What do you need to break this log-jam?

MR COOK: Yes, in relation to that, that is something, sir, where again the experts have a measure of agreement that because the focus there is what do the claimants do and what could or would they have done differently, the focus at a large measure is on the claimants' side of the aisle, and that is something where -- I was going to take you to bundle 1, which is the experts' statement, you have already seen with Mr Kennelly, and take you to 63(6), which deals with --

MR JUSTICE MARCUS SMITH: Bundle 1, which tab?

MR COOK: I am afraid I'm working electronically, it's page 636, which is probably tab 14 or 15, sir. Tab 13, I'm told.

MR JUSTICE MARCUS SMITH: Yes.

MR COOK: And this is the example, I think this is the honour all cards rule, but it's a point that flows through into a lot of allegations of anti-steering rules. To be clear, it's not a term we like because we don't think they have that effect but it allows you to understand the nature of the allegation that's fundamentally being made.

We see in relation to the first row that's properly populated evidence from the claimants:

"The experts all agree that the following information is required. Information on the claimants' factual acceptance portfolios, type of steering practices undertaken and how they might have differed in the counterfactual without the relevant rules. Three of the experts agree it could be part of a screening survey followed by more detailed documentary and witness evidence from a sample of claimants. Dr Frankel also considers witness evidence from a sample would be helpful."

So when we come to the anti-steering rules my submission in relation to that is, one, the burden really is upon the claimants to make good their case because the focus is upon what they say they would have done and would have done differently, and that is something that, again, it's a slightly different sampling approach, but we need to have a representative sample, it can't just be cherry-picked by claimants who particularly have a good story to tell, and that then needs to be a process of some disclosure and evidence from them, and also we need to understand what their economic case is. So that's a situation where for our experts to rebut this, they are going to be looking fundamentally at claimants' evidence of what they did and would have done.

So there we say the conventional approach of claimants first, and we say claimants' evidence and that can be done with disclosure sort of following, perhaps, but it should be a representative sample of claimants and then their experts and then us following suit.

MR JUSTICE MARCUS SMITH: Pausing there, though, let's really try to understand what it is that you are hoping will be produced. You've got a range of different rules that were applicable to different claimants, which will have caused them to react in different ways.

MR COOK: Well, yes, they are making allegations against a number of rules.

MR JUSTICE MARCUS SMITH: (Overspeaking).

MR COOK: Yes.

MR JUSTICE MARCUS SMITH: And what you are saying is that in order for them to make good their case, you are going to have to look at documents produced from a representative sample of claimants in order to discern from those documents and possibly factual witness statements what they would have done differently had the rules been different.

MR COOK: Well, what they in fact did, and then what they might have done differently, yes.

MR JUSTICE MARCUS SMITH: But what they in fact did was informed by rules of a certain colour versus what they counterfactually would have done had those rules been coloured differently.

MR COOK: Indeed.

MR TIDSWELL: How does that fit into the current survey plan? Because obviously this isn't going to be sample A, is it? Sample A won't tell you the answer to this because it has no IC plus or plus plus.

MR COOK: No, that's dealing with something different, it's one of the other samples.

MR TIDSWELL: Is this what B and C is?

MR COOK: Yes.

MR TIDSWELL: So B and C are dealing with this. I understood that B and C was a much less significant problem in terms of the sample sizes being smaller and the gaps being smaller and there might be an expectation that you could get there more quickly than perhaps with A. Is that a fair --

MR COOK: Yes, that's certainly fair in terms of where we lie in terms of position but what I'm struggling to deal with is the tribunal's suggestion that this is an area where

the defendants should go first (Overspeaking).

MR TIDSWELL: But you are saying, I think, that subject to that point, which you would structure the other way around, but you're saying -- because the point here is that -- well, firstly there's a selection point, isn't there? We've got to work out who these people are who are going to give evidence, what the right way to do that is, and then obviously you're going to want to see their documents to test their evidence, but in the meantime there's no need for you to have that if they can be getting on doing their witness statements and producing them. So the real problem is the selection problem, isn't it?

MR COOK: The selection problem is the first step. We can't do anything until the first step.

MR TIDSWELL: Yes.

MR COOK: But the analysis that our experts will do is entirely because this is about what the claimants would have done differently is going to be much more analysing the documents and material and evidence that comes from the claimant, not a freestanding piece of analysis.

MR TIDSWELL: Yes. Yes, we don't really have any sense of -- we've talked a little bit about what the problem with sample A is. Are these samples -- I don't know whether it's B and C or B or C, but are they more susceptible, is this an area where we could follow the President's suggestion and actually just say if we haven't got enough people in there we're going to pick some people and add some numbers, why would we not do that?

MR COOK: I think largely, with the exception of some points about cross-border acquiring, that we do have enough people for the sample already because, as you say, issues like interchange plus plus, take out a lot, that's not the issue when one comes to some of these later points.

MR TIDSWELL: So what is the problem with dealing with all these issues in Trial 1? Why is that now a problem?

MR COOK: The problem is only that the survey has not been fully and properly answered, we say, and as a result we have the self-selection problem, which is, you know, the people who filled it in have chosen to do so, others have chosen not to. Now, if you basically said at some point you have to lump it, that is somewhere that we could, because we now have enough of a sample we consider in general, particularly given we say the right approach is to complete the survey more comprehensively in order to deal with the original sample point on the acquirer pass-on, that as a result of doing that process we will end up with better information and could then end up with a better sample, but that's something that could be done relatively speedily.

MR TIDSWELL: There is a point here, isn't there, that it is, as you have said, the claimants' evidence and I completely understand the point you have made about selection, but if that is where we have got to with selection, you don't have to concede the point about it not being representative because that is obviously a point you could make and indeed you could seek further information, so in terms of just getting on with it now, there would be something to be said for just getting on with it, wouldn't there, and you've reserved your position on that point and that's where we are? Does that not deal with it?

MR COOK: It would be better to agree a representative sample now than have a situation in which the tribunal is at trial with a certain amount of evidence there and us saying: well, that evidence isn't good enough because it's not representative and it would be better for the tribunal to have, given we can get there fairly rapidly, a representative sample that everyone agrees is reasonable in the circumstances. Rather than --

MR TIDSWELL: Well, I certainly -- objectively that must be right, but if it's at the risk of not being able to try this in the Trial 1 window then I'm not sure it is right and it might be better -- it is the claimants' problem, essentially, isn't it? If they've not managed to produce a sample that is sufficiently representative and you can poke holes in it later, that is their problem with their case. I appreciate that is not ideal, we would not normally want to do that.

MR COOK: Certainly I'm not suggesting on this that this is not something that could be resolved within a reasonably tight timescale because I'm saying another week for surveys, you know, that should be sufficient for most of these claimants to get on with it. So for the sake of -- another week is not going to be the derailing factor here in relation to that and then disclosure goes ahead and evidence in relation to these issues. I suspect Mr Beal will say doing it in three or four weeks is unrealistic. That might be right. But nonetheless, that is a process that could then be started and got on with relatively rapidly, and then, you know -- but, you know, you know, the ball would be in his court to start the sort of substantive process and then we will be responding to it.

But our experts, you know, it's primarily at this stage going to be the claimants' evidence and our experts analysing the evidence and documents and evidence and so for that reason I'm saying it doesn't work for the defendants to go first on this.

MR JUSTICE MARCUS SMITH: No, no, I've got that point at least.

Is there a danger in overegging the representative sample case in circumstances where we don't actually know because we haven't decided the issues how material that which will be disclosed pursuant to a representative sample will be to the issues that we have yet to decide? In other words, are we putting the cart before the horse in even talking about representatives samples at this stage?

MR COOK: With respect, sir, I'd say it's sensible to head off down the route which

makes most sense rather than heading off down a route which has a significant risk associated with it. And if we're looking at a sample -- if we decide now that we can come up with a representative sample then we're looking at the right people to give evidence and the right people to give disclosure.

MR JUSTICE MARCUS SMITH: All right. How about putting it exactly the other way around. We proceed on the basis of what is the strongest case, the unrepresentative case, most in favour of the claimants, so we assume certain rule sets, and we work out what effect that would have on a counterfactual scenario, and we assume, to go back to the acquirer pass-on case, we assume 100% pass-on and decide the issues on the basis of these assumptions, work out what we end up with, and then, having established on these extremes, what the position is, we later on in the process, around about Trial 3, let us say, work out how far the outcomes that we have determined on those assumptions are invalidated by the fact that we are picking, quite deliberately, an unrepresentative body of evidence to decide the issues in principle.

At least in those cases we would have a decision, an outcome, where we would know what mattered and what didn't matter in order to decide matters. Is that actually the way we ought to be proceeding? In other words, we jettison the whole argument about what is and what isn't representative. We say, look, park up later, let's work out what matters, what metrics decide the issues in play, and then we decide way after the event what surveys are needed in order to ascertain how wrong the assumption is and how material the assumption is in terms of the error it builds in because it's not implicitly representative.

MR COOK: With respect, sir, the problem with that approach, is it pretty much guarantees we have a Trial 3.

MR JUSTICE MARCUS SMITH: Well, we're going to have a Trial 3 whatever.

MR COOK: Well, I'm not sure that follows, sir. A huge number of these cases have settled in the past. Interchange litigation has, for the most part -- in fact I don't think actually there is any final judgment on interchange fee litigation in the sense that even the cases that had final judgments were then overturned on appeal and remitted and settled before they reached final judgment. So the evidence here is these cases do settle at a certain point in time, it's about money.

MR JUSTICE MARCUS SMITH: Yes, they might settle a second time around. Sainsbury's did that, I agree.

MR COOK: Absolutely. So everything has in due course settled.

The problem with a Trial 1 which either doesn't decide anything or decides things on an assumption that everyone recognises is at the very least doubtful and where the defendants are saying it's fundamentally wrong is I don't see how that helps us in any way, shape or form at all, and acquirer pass-on is a good example, sir, that if it's the case that there is 100% acquirer pass-on of all of these interchange fees, then, speaking off the top of my head, without having thought about it very much, I suspect we're not going to have very much to say in answer to the suggestion that commercial card MIFs are restrictions of competition. Our argument is that's not the case. So deciding it on the basis of an assumption which fundamentally assumes away the point which is in dispute doesn't help us. And the same with --

PROFESSOR WATERSON: Unless there are certain areas where you can say with confidence: this is at maximum, say, 1% of the claim. And then the claimants may simply say: well, let's ignore that bit of the claim, and go on to the more cogent points that they want to make. I mean, I think that's the potential benefit, in some areas, of looking at the maximum possible.

MR COOK: To some extent, of course, if Mastercard and Visa win in circumstances where everything's assumed against us, that's potentially very valuable. It's also

a very difficult thing to do. Because the reason why some of these points are contentious and evidence-heavy is precisely because they are seen as being areas where they are contentious and where we think the evidence will show something that will undermine the case.

MR JUSTICE MARCUS SMITH: Let's stick for the moment with the rules that we were talking about. Why can't we say: let us analyse what would have happened by reference to an assumption as to how many rules apply to the different classes, decide what in the counterfactual case would have been the case, and then when we worked out whether it makes a difference or not, move on to saying: let's see if we can invalidate that particular assumption, because it matters.

I mean, it may be that all of these rule questions just don't matter whatever they are. In which case you don't need to get into the representative case. And, similarly, to go back on your point about the extent of pass-on. Well, why can't we say, well, let's assume on one scenario a 100% pass-on. But let's assume for the sake of schemes' case, that there is a pass-on that is abrogated, that is less than 100%, to an assumed extent across the market; something which is not right, but realistically useful. So, say, 25%, and a certain amount of pass-on on that basis, and say: let's decide the case on that basis. If it's materially wrong, or if it matters, then it may matter that it's materially wrong on the representatives, but let's do that later on.

In other words, why can't we, as I was suggesting, but on different grounds, with Mr Kennelly, put a line through this survey issue? I mean, there's a reason that 30 years ago we wouldn't be having this debate at all because we wouldn't be permitting survey evidence at all.

MR COOK: I mean, this isn't survey evidence. This is a way simply of identifying a sample, in the first place.

MR JUSTICE MARCUS SMITH: No, but the survey is a necessary start to that, and

the reason courts were extremely hostile to the notion of surveys and evidence arising out of surveys was because they contained inherent within them precisely the sort of uncertainties and difficulties that we are debating now. Because you are saying, and I understand exactly why you're saying it, we need a representative example in order to get it right. And what I'm putting to you is why don't we invert the process, decide the question, and then when we've worked out what facts actually matter, ensure that we calibrate the class afterwards and adjust the outcomes in that way. Because it's clearly not working this way around.

MR COOK: With respect, sir, we wouldn't say it's not working this way around. Subject to agreeing a representative sample, no one suggested there was a problem going down this route.

The problem to some extent, sir, is, one, I understand the tribunal is very keen that Trial 1 should be effective. In practical terms this is actually suggesting Trial 1 is not effective because all of the complex substantive bits of it are going to be shifted off to a Trial 3, which we say to some extent is the worst of all possible worlds, and on these points, the points that you are putting off is that is the meat of the issue. The meat of the issue on interregional and commercial cards is the extent, if anything, of pass-on, the meat of the anti-steering is what different things, if anything, would have happened.

So, you know, of course at one extreme on anti-steering, if there is a dozen different things their business would in fact have done differently, my learned friend has a strong case. Our position is, there's not very much they'd have done differently, hence our case, almost certainly right in that scenario.

But that's the problem. The disagreement between us is what, if anything, would be different. So, sir, putting it off is putting off essentially -- unless, sir, there is the possibility of an outcome where you say even if you assume everything in my

learned friend's favour he loses. But that is a very, with respect, unlikely position, and if it was thought that that was the case, that is partly what the summary judgments were about, is trying to find neat cut-throughs and on those points the neat cut-throughs were rejected because there isn't a neat cut-through and you do have to go to the evidence.

MR JUSTICE MARCUS SMITH: You do. Let's suppose, sticking with the scheme rules point, one has five different applicable scheme rules and five different counterfactual scenarios and Mr Beal says it makes a difference and you say actually it wouldn't make any difference at all. We decide that. We don't know the composition of the claimant class in respect of those variant scheme rules, but we have decided whether it makes a difference or not. Why can't we do the working out who is in which camp when we know what matters?

If, for instance, in cases 1, 2 and 3 it makes a difference and Mr Beal wins, and in cases 4 and 5 it makes no difference and Mr Beal loses, well then we do need to understand --

MR COOK: I've now understood your point, sir. I had been answering slightly at cross purposes. I am afraid, with respect, that is a slight misunderstanding of actually what the issue is.

This is not a case of saying, as you might in some cases, where a wrong has happened who has in fact suffered loss from it. At the restriction stage, what we're looking at, and again it's a whole market question.

MR JUSTICE MARCUS SMITH: Yes.

MR COOK: Measured looking at the whole market, did these rules have an appreciable effect on what the claimants could and would do, or merchants could and would do.

Actually, identifying, you know, particular claimants who it did and didn't have

an impact on isn't the relevant issue. They are just a vehicle to actually deal with the point of would this make a difference by looking at claimants as being illustrative of the market to test whether, in practice -- I mean, surcharging is a good example. It's just being would your average retailer impose surcharges or not is just one of those things that one can't theoretically -- a non-surcharging rule prevents surcharging, but does it in fact have that impact if no one is going to impose them in any event.

MR JUSTICE MARCUS SMITH: You're making my point for me though, I think. Because if you go down this route and you say we need to extrapolate from a representative class what the market effect was, you are going to have to acquire a statistically relevant group of people so that you can do the extrapolation. Otherwise we're just holding our finger in the air and guessing.

MR COOK: And on those the experts have agreed what are relatively small, narrowly confined samples, as being good enough. And I think we are talking numbers that are measured in sort of -- one is 20, I think. Yes. So you're talking quite a small number of claimants there.

MR JUSTICE MARCUS SMITH: You're saying that if you get a representative sample in the way you're talking and get disclosure on that sample, that is going to be evidentially helpful to resolve these questions?

MR COOK: And the experts have agreed that that is a good enough sample to actually analyse this and on the basis of that agreement --

MR JUSTICE MARCUS SMITH: That's not my question.

MR COOK: Sir, with respect, the experts have agreed that, we're not going to be able to go behind the fact that the experts have said that's a good enough sample. So that will be the material and the tribunal will then decide on that material.

MR JUSTICE MARCUS SMITH: We're not deciding it by reference to the sample, we're deciding it by reference to the disclosure that's produced by the sample.

MR COOK: Yes, sir.

MR JUSTICE MARCUS SMITH: So actually the experts' opinion on this point is only one stage towards obtaining an outcome. The outcome that we are going to be obtaining is that from the disclosure produced by that so-called representative sample, we will be making certain conclusions which will have a market-wide effect in the sense that we will be making a market-wide conclusion on the basis of that disclosure.

MR COOK: Yes. But, with respect, without actually having some material to address that, we're at the level of saying we have no idea what would in fact happen because there is no material.

So that is the reason why it's been agreed. The tribunal may say it's the wrong agreement. But it's been agreed between the experts that you look at a sample, you get some material to see what they do in fact do at the moment, what would in fact happen and see if the world would be materially different.

MR JUSTICE MARCUS SMITH: We talk about the disclosures sort of shedding light on this but actually do you think there are going to be documents that will in fact assist on this? What sort of documents are you thinking about?

MR COOK: Well, to some extent, of course, we don't know.

MR JUSTICE MARCUS SMITH: I know you don't. But what are you going for?

MR COOK: Well, sir, if you look at what the experts have suggested is appropriate, it's looking at how potentially they may change their practices. If they are talking about, for example, would they have a store card? Who actually has store cards now? Have they considered internally running a store card previously and said: until we can do this, it's not worth it, or have they done it internally and said: listen, it's doomed anyway, it's just not worth the costs. And partly what it comes down to is what are they actually realistically suggesting they would have done differently,

which is where the case is relatively undeveloped at the moment. Shall we say that has to come first in the process, which is partly why the burden is on the claimant to make that good but it's what would they have done differently and then analysing do they do it at the moment. If they don't do it at the moment, why not and it may be nothing to do with anything to do with the rules. So, you know, those are exactly the kind of points, sir, that we think the experts agree. You know, there is likely to be material from claimants about what they do and why they do or don't do different things already.

MR JUSTICE MARCUS SMITH: I think if you want to go on for 15 minutes, that probably would be very helpful.

Submissions in reply by MR BEAL

MR BEAL: That's exactly what I was about to suggest, with respect, sir.

Sir, you have heard a lot about the problems, I'm going to try to give you solutions. Can I just put the usual marker down that where something is said to be accepted, and there's going to be a transcript about that, it clearly isn't for a number of things that are said to have been accepted. So that's just the usual, I'm afraid, weasel words on my part.

Solutions. Please could you look in bundle 4, volume 2, tab 216. It should be a letter from Stephenson Harwood to the defendants' solicitors. The important point is it has a list of our witnesses, scheduled witnesses. 3831, we've identified a series of people from 20 separate claimant entities covering different sectors where these people are prepared to give evidence. So we've already got 20 people outlined. They can give evidence to prove the claimants' case.

I should add, for example, that Marks & Spencer as a claimant has a claim going back to 2007, and the concern that my learned friend Mr Cook raised about are they

going to cover the entire period, well that one will by itself.

What else do we have? We have the recognition in bundle 1, tab 15, which is the expert's sampling statement. We have the acceptance by the experts of a number of points. So if we start, please, at page 656. Left-hand column, Dr Frankel, in the second paragraph down, says:

"There appears to be a consensus that interregional and commercial MIFs have the effect of setting a floor under MSCs for merchants operating under interchange plus or interchange plus plus MSAs and MSCs".

So the problem that's been identified for issues 4 and 5 is the tail wagging the dog because the statistic that was given at the evidential pass-on hearing was 75% by value of these claims are encompassed within IC+ and IC++.

So that is the majority by value of these claims. So references to 95% of acquirers in the PSR report not being on an IC+ is because that encompasses your newsagents, your corner shops, your low value retail businesses.

The evidence from the PSR in that annex, which is one of the reasons why I passed it up, and confirmed in annex 3, which I haven't wearied you with, is that there is a predominant effect of large retailers being on IC+ or IC++ contracts. Why? Because they are able to negotiate what is at face value a more transparent pricing system and therefore niggle away at the margin which is the acquirer revenue and that's where the gain is, at the acquirer stage in terms of competition.

So everything that is being said about issues 4 and 5 posing questions, posing a log-jam, is the tail wagging the dog. So your solution, sir, with respect, of simply assuming that we're in the position which covers the majority of the cases is one way forward.

I can go better than that. I can say, actually, we now have enough to encompass the concerns about the blended, so-called blended issue. Blended is not the right term.

You've got standard pricing and you've got standard pricing that applies to different cards, and then different cards on standard pricing will produce a blended rate across different categories of cards. So it doesn't matter, it amounts to the same thing.

Anyone who hasn't ticked IC+ or IC++ on the survey is almost certainly going to be on a standard form of pricing and then it's a question of what has that person paid? Best evidence, what have they paid? They will have been invoiced by their acquirer, and that invoice will indicate whether it's ad valorem, whether it's a pence per transaction basis or fraction of a pence per transaction basis. That will be cold hard evidence, as will the merchant service acquirer agreements that they have with their acquirer, as will what they've been doing, what they've been paying over the years.

Now, all of that data is being collated as part of sample A. Sample A, if we then turn, please, to page 659, and bearing in mind the purpose behind sample A as such is to try and get a predominant blended contract situation, we then see in the right-hand column, second paragraph down, there are 57 claimants who passed the filters they have set for having adequate responses. If you relax the requirement to have a complete set of data so you get partial data but it's for a year, that leaps up to 73 claims. And this was evidence, or an acceptance that was given by Dr Niels on behalf of Mastercard.

So with the greatest of respect, we're already at 73, so long as you can work with the fact that you won't have a full set of data for every year but you will have one for one year and you will then be able to compare that with something else. If you wanted the full set of years, there's 57. If we then look at what Mr Dryden says on behalf of the claimants:

"Given that the hundred sample size is not an absolute requirement, I consider it's possible to obtain meaningful insight based on disclosure from a smaller set of

merchants than 100 including around the level 73 that Dr Niels identifies above."

Now, interestingly, and for your note this is -- there's an email from Mr Holt early on in the process, and I can find the reference and dig it out for you after lunch. There's an email from Mr Holt where he recognises that he would want a sample of 50. So we're already above his initial pitch. We're at 73. We've got the 20 witnesses that are going to be given as well. If the tribunal wished to say generate another 20, 30, whatever, at random, we'll do it. If you want a completely random selection not derived from the sampling process, that can be done.

MR JUSTICE MARCUS SMITH: To provide disclosure?

MR BEAL: Yes, to provide disclosure. The problem with the random approach, if I may say so, is you could end up with a hotel subsidiary that is a property-owning company that owns Birmingham not Wolverhampton in terms of a hotel chain and that won't add much.

MR JUSTICE MARCUS SMITH: No, but let's assume we get a perfectly representative sample to provide disclosure, what do we think that disclosure is going to demonstrate?

MR BEAL: That depends on the issues. You would get, I hope, a merchant service agreement, so the contract between that merchant and the acquirer.

MR JUSTICE MARCUS SMITH: Right.

MR BEAL: You would get details of what they've paid. What you won't get is anything that's acquirer-facing, because of course they don't have access to that. Nor will they know what any other particular merchant has been given, and nor should they, because of course that would be price sharing from the acquirer to different merchants. So that shouldn't happen. In terms of what we can get from the merchants, if you would be kind enough, please, to look at bundle 4(2), tab 205. Page 3809.

MR JUSTICE MARCUS SMITH: Sorry, which page?

MR BEAL: 3809.

MR JUSTICE MARCUS SMITH: Ah yes, thank you.

MR BEAL: It's a letter from Messrs Linklaters to Global Payments, who are one of the big three. And we see Linklaters had written to a bunch of acquirers, including World Pay, and Barclaycard, I think:

"Thank you for your response and offer to produce these sample set of data to assist in the proceedings. As mentioned, the Competition Appeal Tribunal asked the parties to request data, so we will therefore liaise with other parties and get back in touch."

They are willing to help. World Pay have scheduled a meeting with Visa to work out what they can do. These people are willing to come forward and help and they can provide data that we've got no visibility of.

You have the PSR. Annex 3, just for your note, is not heavily redacted. There's a table where it gives some figures. Again, like my learned friend Mr Kennelly, I don't want to foreshadow submissions of this afternoon. The aggregated data won't have a confidentiality issue and annex 3 appears to rely on aggregated data. So it's unclear to me why it's being said that there's a confidentiality issue there. But we can find a way around it, there's publicly-available material out there that deals, for example, with historical blended rates.

Disclosure, what we can offer is disclosure on a rolling basis. So the ones who are the 20 that we already have can get cracking on things immediately. The ones that come out of the experts working pragmatically with what they already have and selecting the 73, we can get cracking with those as soon as the experts say those are the 73 we can go with. If you wanted us to perform a random number generation exercise and then do a cross-check for sense, again between the parties we can do

that, we can get out a calculator and press the random number.

MR JUSTICE MARCUS SMITH: Yes, that's why I pressed you on what the disclosure is likely to show. Sure, we can get the agreements, but we will probably get a range of those agreements anyway and know what they say. It's not actually useful disclosure for this exercise.

MR BEAL: Yes.

MR JUSTICE MARCUS SMITH: What are we going to get that's going to assist the tribunal to decide these matters?

MR BEAL: Well, it depends on the issue. In terms of counterfactual analysis, that's largely, as I understand it, going to be an expert-driven analysis.

MR JUSTICE MARCUS SMITH: Counterfactual, by definition we don't have any evidence.

MR BEAL: No, we do have some disclosure requests on issue 3, for example, but those can be dealt with as part of the Friday seminars, or Friday mini CMCs. That needn't derail things at the moment. We can, again, simply crack on with things.

In terms of acquirer data, we recognise that there will be a need to find the acquirer data and we will need to expedite the process of getting that either from the PSR or from the acquirers themselves. But if we get, and this is the key point, really, if we get the acquirer data for a sufficient breadth of data --

MR JUSTICE MARCUS SMITH: You're now looking at disclosure that isn't produced by your class?

MR BEAL: Well, because it's not in our control.

MR JUSTICE MARCUS SMITH: No, okay. Let's stick to the stuff that you're supposed to be producing. That is what is the log-jam, apparently.

MR BEAL: Well, it's not, with respect.

MR JUSTICE MARCUS SMITH: Well, I know, but that's what I'm, if I may, trying to

test with you.

MR BEAL: The position we've reached -- sorry.

MR JUSTICE MARCUS SMITH: We are getting an enormous amount of submission which is saying: we need a representative sample in order to produce a representative disclosure. That's why the sample matters, apparently. What is the disclosure going to bring to the party? Because if it's a big fat nothing, then why are we bothering?

MR BEAL: Well, in my submission, we're in a position where you have the ruling from the Supreme Court and from the CJEU on the effect of MIFs in general.

For issue 3 there's a discrete expert-led disagreement about counterfactual. For issues 4 and 5, this essentially turns, as my learned friend Mr Cook said, on the extent to which you can say regardless of whatever may have been decided about the restrictive effect of consumer interchange fees, everything changes as soon as you are into interregional, i.e. UK to US, or commercial cards. To which our answer is: why? That doesn't make any sense. The rules are effectively the same, they're essentially doing the same thing, they're setting a minimum floor.

And if you would be kind enough, please, to take out our submissions on issues 4 and 5, which is bundle 2, number 1, tab 23, page 1459.

MR JUSTICE MARCUS SMITH: Bundle 2?

MR BEAL: Bundle 2, number 1, tab 23. It starts at page 1459 but if I could invite, please, the tribunal to pick it up at page 1461. What these submissions identify is what is the distinction between consumer MIFs where liability has been determined and there's no going back to see the summary judgment, but what is the difference for inter-regionals and commercial cards and the issues that have been alighted on are II and VI in the synthesis at paragraph 93.

So II is:

"Is there going to be shown for these particular cards an effective setting a minimum price floor for the MSC?"

And then VI is:

"In the counterfactual world of the MSC would the MSC be lower?"

So those are the two issues that are said to be different here.

What we then do at paragraphs 15 through to 21.4, is explain why that can all be done without having the everything of disclosure. So all one needs to do is see paragraph 15, work out whether or not there is an appreciable effect as a general matter, and looking at contractual analysis, contractual construction, economic theory, and so on, is there an appreciable impact on MSCs from the MIFs for commercial cards. Let's just deal with commercial cards. It's easier.

And that does not involve working out what the extent of the pass-on from the acquirer to the retailer would be. That's for Trial 2. So all you have is a sort of binary decision, is this going to change the dynamic of the MSC or not. And putting it round the other way, are you going to end up in an evidential position where the acquirer has simply swallowed all of the MIF and borne that economic cost and not passed any of it on to the MSC charge. And that's what we will be looking for. That doesn't require a representative sample. What it requires is an analysis of the framework and of course in that it would be helpful to have different sectors to the extent it might be thought there may be sectoral differences, I don't know, but that's covered by the selection of witnesses we already have and it can be covered by a randomised sampling process where you look at the different claimant groups amongst the different claimant firms because they tend to cover different sectors.

MR JUSTICE MARCUS SMITH: That's very helpful, Mr Beal, I'm going to put this out there and Mr Waterson will, I think, over the short adjournment tell me that it was an idea that was too silly to be stated, but I'm going to put it out there and we can

talk about it after the short adjournment. This tribunal and courts generally do not order disclosure when they can't understand how it will help a case. At the moment, and I've asked the question, I think, four or five times, I've asked for some indication as to what the representative disclosure will bring to the party if it's ordered. And I don't know. No one has answered that question. That's not a criticism, because you don't know what there is. It does seem to me that that is a fairly good indicator that starting with disclosure in the context of this case is a mistake.

Question, then, how do we enable the parties to ensure that there is proper evidence to decide the issues before the tribunal, and clearly we can't do that without evidence. But it does seem to me that this is actually a question of having witness-led evidence, each of those witnesses providing disclosure so we can work out what their disclosure indicates in terms of what matters and what doesn't.

So let's suppose we have witnesses produced by your clients falling within each of the areas that matter. One or two, but absolutely not a representative class, simply an instance of each of the categories that matter. Those people provide statements which explains what difference, if any, the counterfactual scenario made or what the effect of a partial pass-on was, what the effect of a 100% pass-on was, all of these variants have statements going to these issues, and disclosure, so that we can see actually what disclosure assists, probatively, and what disclosure doesn't.

Now, if we suddenly discover that there is a form of document that a business tends to run which enables us to draw conclusions as regards what's going on in the market or what goes on in a particular case, why then, we'll press on. But let's work out what bits of documentation actually matter before we press the button on disclosure, which, incidentally, is the thing that is causing the delay. So we've got something which is holding everything up, when we don't even know whether it's going to help.

Now, that, it seems to me, is a step forward where we can at least articulate the shape of the very intractable problems that we are doing. The problem I think we've got now, we've been around the houses this morning several times on this, is that in contrast to the usual case where you can say this is the point of fact on which I need material, give me what is in your, the defendants', cupboard so that I can decide what actually happened. That's not the question we're asking here. The question we're asking is what, in a range of extraordinarily broad claimants, happened? You want a representative sample so that you can work out what happened across the board, but we've got no assurance that disclosure along these lines will actually produce anything useful at all.

Now, I'm not saying no disclosure. What I am saying -- and I'm saying it so that everyone here can push back and we can discuss it ourselves over the short adjournment, what I am saying is that let's provide some disclosure, yes. Let's jettison the sampling for the moment. Let's get some witness statements up so we can see actually the quality of the evidence that exists, whether it is, in fact, going to be probative or not. Because many of these people may say: actually, I can't help you. It's going to be a question of imagination, not anything else, because these charges are, in the scheme of things, quite small. We're not going to have retailers focusing on interchange fees, they're going to be focusing on other things. So it's going to be hugely important to work out what evidence actually helps us decide, rather than having a vast pool of material, which may ultimately prove to be useless.

And so that's my thought. It was, I think, inherent in the thoughts that I presented to the parties right at the beginning, so I'm explicitly proposing a reverse engineering of this, and I would be grateful if the parties could think about this as a way of moving the matter forward rather than debating in the abstract what we should do in order to produce a corpus of documentary evidence that may or may not be completely

useless.

I have put it rather tendentiously but that is the concern that is running through my mind at the moment.

MR BEAL: In terms of disclosure, obviously the defendants have been through this process on several occasions so they know exactly what level of disclosure to pitch it at, and where we have identified 20 claimants from a variety of different industrial sectors, prima facie they can be representative of the sectors that they are in; if there's a concern that a sector isn't covered, then we're open to listening to getting another claimant in from that sector. But once we've done that factual exercise, produced that witness evidence, seen what they've done, seen what documents they've been able to produce to make good what they're saying then of course we'll be in a much better position to deal with any requests for specific disclosure which will therefore be more tailored, more structured and which will be less burdensome for the claimants and everyone will have a better idea of what we're dealing with.

MR JUSTICE MARCUS SMITH: When, if we pushed you, could the witness statements that you showed us attached to that letter be produced?

MR BEAL: Could you give me a moment?

MR JUSTICE MARCUS SMITH: Of course. **(Pause)**.

MR BEAL: I'm asking for four to five weeks on that one.

MR JUSTICE MARCUS SMITH: And that would be accompanied by the disclosure that those witnesses could give?

MR BEAL: We would make that happen.

MR JUSTICE MARCUS SMITH: Okay, and it would be disclosure on a wide basis not a narrow basis; in other words, we would want a reasonably broad brush set of documents rather than a narrow set because we are, after all, talking about an extraction of documents from a representative witness who is not actually

a representative witness because they're not representative; they're just a witness.

MR BEAL: The disclosure would be appropriate for proving our case.

MR JUSTICE MARCUS SMITH: Yes.

MR BEAL: So it would be what we thought was necessary.

We would obviously need to have the defendants' disclosure, which I understand they're sitting on, they can give it to us subject to a review, we would need that as well, because of course our witnesses would need potentially to comment on any documents or any disclosure that was being given by the defendants. If, for example, they are being asked for their views on what would your impact be about a particular scheme rule, then we would need to know when those scheme rules were put in place, the point at which the defendants are saying that that scheme rule first arose, for example.

So we do need some defendants' disclosure as well, but it seems to me, at least, that that process ought to happen in parallel but that the claimants are given the opportunity to respond to the defendants' disclosure before committing themselves to a final version of the witness statement.

MR JUSTICE MARCUS SMITH: Well, you are pushing at a pretty open door in terms of us requiring all of the jobs that can be done to be done at the same time. So that far, I accept what you're saying.

Can I just push back a little bit on why, if the question is what did and what would you have done on certain assumptions, why defendant disclosure is particularly relevant there?

MR BEAL: But that doesn't necessarily go to that particular point but we do actually have to prove the restriction of competition for the scheme rules. And there is no previous finding in relation to commercial cards or to inter-regionals. So we would need the suite of disclosure that not just goes with the Sainsbury's Arcadia, here's

one we made earlier.

MR JUSTICE MARCUS SMITH: That, I think, subject to what is being said, is not a problem. Just in terms of the production of the witness statements going to the points that we've been discussing.

MR BEAL: Yes.

MR JUSTICE MARCUS SMITH: That would be based on those witnesses' documents because it's what those witnesses did that matters.

MR BEAL: Yes, query if I may to what extent a hypothetical as to what a witness would have done is going to be massively helpful to the overall counterfactual analysis.

The defendants, for example, say we didn't actually consider introducing a unilateral model, because it was never an option because we thought the MIFs were lawful.

MR TIDSWELL: I think there's a real danger here of mixing these issues up. I thought we were talking about the rules issues, not issue 3. I don't think it's helpful to bring issue 3 into this at the moment because issue 3 we, I think, accept has to be dealt with, everybody has accepted it has to be dealt with by the defendants leading on it and that process will no doubt give you all sorts of information and you may be on disclosure but I think if we just leave issue 3 to one side.

MR BEAL: I think my submission was the parallel to that, which is yes one needs to analyse the counterfactual, that's primarily a matter for legal submission and expert analysis of the market and what was possible. Asking a given witness: did you consider what the position would have been if you hadn't been bound by the honour all cards rule is a bit forlorn because the witness may say: well, no I didn't consider that because I never thought that there was an option of not having the honour all cards rule.

MR TIDSWELL: Yes, that's precisely the point. As I understand it, what the card

schemes are seeking, what the defendants are seeking, is evidence of any consideration that either establishes that the scheme rules had an effect on the decision-making or that -- and there are other reasons why decisions weren't made and I would have thought there would be documents of that category certainly among the more sophisticated retailers and I'm sure a newsagent isn't going to have a document recording whether they've thought about that or not but it seems pretty obvious that there are some things, I think Mr Cook gave the example of a store card. So I think what we're talking about here is those sort of documents that might come out of a disclosure exercise and if -- there does seem to be -- there's a question, isn't there, which is now emerging, which is in relation to these rules and the question of the counterfactual, whether we do that by you putting forward your best case and/or whether we do it by way of a sample, and it may be that you do both, and it may be that the sequencing is part of that as well and particularly given that as a claimant you are entitled to put in whatever evidence you want within limits of course and so if you wanted to put in your best case then it would be quite difficult for us to stop you doing that but I am sure the defendants will then say: but we want the opportunity to test that and we want to test it in a representative way, which is effectively, I think, what the exercise is designed to set out.

So I think if I may ask you just one other question in relation to the sample. Why is it that you can't go back in relation to sample A and ask some more people to complete it within a week? Why is that a difficult thing to do?

MR BEAL: We have. There have been some more sample responses that have come in in the meantime and no doubt some more will dribble through the email filter in due course.

We're up already, as I've said, at 73. They only wanted 100. To the extent that we've got more, we can provide more to the extent it's necessary to do so. But

concentrating on sampling will simply continue to allow obstacles to be raised rather than pushing ahead with this litigation.

MR TIDSWELL: Again we just need to think about this separately in relation to issues, don't we, because sample A, as I understand it, largely goes to the question of issues 4 and 5.

MR BEAL: And issue 1.

MR TIDSWELL: And issue 1. But in terms of the problem we're confronting, it's issues 4 and 5, and as Mr Cook explained, you've got the PSR, you've got the acquirers and you've then got the claimants and the potential risk of that. So maybe we don't need it because we made progress with the PSR and the acquirers but maybe we do, in which case you could be pushing that sample size up. That's the question. Is it not worth pushing harder on that? Is there anything you could do to push harder on that?

MR BEAL: What we could do in parallel is go back to the experts and say here is the responses you've got, do the best with what you've got, don't let the perfect be the enemy of the very good. We don't, with respect, accept that the survey responses weren't good. They were good, it's just in some cases they weren't complete and they weren't complete either because the data wasn't there or because the respondee didn't understand the question.

PROFESSOR WATERSON: If the respondee didn't understand the question, that suggests there's something wrong with the question and that presumably you can go back to these people and say you didn't answer this question on whether you have a blended contract but what was the nature of your contract?

MR BEAL: I think we can do better than that. If the experts are willing to assume in the absence of any better evidence that anyone who didn't select IC+ or IC++ was going to be de facto on some sort of blended arrangement then we can go back to

those -- once they've selected the ones that they want to treat as representative, we can go back to that representative samples and say give us your contract. That is even better because then you know exactly what it says and you don't have to worry about people's perception of what blended means.

I am being asked to -- obviously the tribunal will have this well in mind, that litigation is a two-way process and not a one-way process and of course the defendants will also need to provide their witness statements at the same time.

MR JUSTICE MARCUS SMITH: I think we have that point.

MR BEAL: Yes, of course.

MR JUSTICE MARCUS SMITH: You said it this morning and we don't need reminding of it. I understand that, but what has been exercising us most is the sampling log-jam and that is why we have been pressing you on that.

MR BEAL: I hope I have provided a number of ways that that can be dealt with, addressed, and overcome.

MR JUSTICE MARCUS SMITH: We have stressed, strayed, beyond the transcriber's patience. We'll resume at 2.10, I apologise for the abbreviated luncheon adjournment but it has been very helpful. Thank you very much. Until 2.10 pm.

(1.38 pm)

(The short adjournment)

(2.10 pm)

Directions

MR JUSTICE MARCUS SMITH: Good afternoon. We, as I'm sure the parties have done, have been doing some thinking about what we can appropriately direct. Let me be clear that what I'm going to articulate is subject to any pushback that anyone

wants to undertake tomorrow morning at 8 o'clock.

But here is what we are minded to direct for the future conduct of these proceedings. So, first, the Trial 1 will go ahead as directed. As matters stand, we are not minded to adjourn any issue that has been allocated to Trial 1.

Secondly, the defendants are to produce all factual evidence, in particular regarding issue 1 and issue 3, but also on any other issue on which they wish to adduce evidence, by no later than 26 October 2023. That witness evidence is to be accompanied by all documents relied upon and all adverse documents in relation to that particular witness statement. We would like that by 26 October as well, but we would be receptive to pushback that that material could be provided two or three weeks later, if that would assist. But ideally, 26 October is the date for that as well.

Claimants to produce by the same date, 26 October, the factual witness statements identified by Mr Beal in his solicitor's letter regarding the claimants, to be accompanied by disclosure by issue, and in relation to that issue on a Peruvian Guano basis, if I can use the old currency.

Again, that may be something you wish to push back on, Mr Beal, tomorrow, but that is our provisional and fairly firm provisional view.

Disclosure by the claimants of the sample B documents on a Peruvian Guano basis by 26 October. Disclosure of the sample A documents on a similar basis, again by 26 October.

We make clear that nothing is to prevent the further articulation of disclosure later on down the line. We are quite understanding of the fact that we have gone through the problems in this case at a fairly brisk pace, and we are entirely open to adjusting the process going forward. That is one of the reasons why we are keen to opt for these fortnightly hearings that we have indicated.

Regarding the fortnightly hearings themselves, Ms Wakefield's point is well made.

Notice of points arising Tuesday before the Friday, 4.00 pm. Confirmation of what is and what isn't live, what's dropped off, by Thursday, 1.00 pm.

We want the claimants to improve the survey responses for sample A within a fortnight. We're not making any order as to number, but we want a responsive number well above 100 and we can work out what to do with that response.

We're not going to say anything more about that, save that the claimants should be aware that this is an order that the survey be completed, and there is a risk -- I'll say no more than that -- there is a risk of sanction if the court orders are not complied with, and that is particularly the case as regards those nil returns to which Mr Cook adverted.

We are not going to say anything more about experts, except this. It seems to us that in order for the trial to be effective, we are going to need expert reports in by the end of November, the last week of November. We are open to working out how to structure the issues in Trial 1 so as to make certain expert reports perhaps later deliverable than that date, but the parties should, at the moment, work to that date, and that is something that we would like to consider further in the course of tomorrow.

We would be grateful if the parties could think what else can be done and can be directed tomorrow in order to move things forward, and I would stress that it is in the parties' interests to do so, because if you want an order and you want compliance with it, or if you think something needs to be done and it needs to be directed, well, sooner is better than later, because we really are, I want to stress this, extraordinarily reluctant to lose Trial 1, and we are therefore going to hold the parties' feet to the fire from hereon in, and therefore the sooner you articulate a problem or something that is needed, the sooner we can think about it and work out how matters can be directed. This morning's hearing has been extraordinarily useful in working out how

we can rescue this hearing, and I would like to put on the record our gratitude to all of the advocates in how they have assisted us putting a sticking plaster over the gaping wound that we were presented with in the skeleton arguments.

So those are provisionally what we're minded to direct. Is there anything on that that requires further clarification in the sense that I haven't been clear enough about what we want? Obviously we can discuss it further tomorrow, but if there's something that needs nailing right away, do let me know.

MR KENNELLY: Thank you, sir. Just very quickly, I may not have heard you properly, the sample A survey.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: You said that was to be completed by at least 100 claimants within a fortnight?

MR JUSTICE MARCUS SMITH: We would like at least 100 claimants within a fortnight. In other words, we want responses on the survey within 14 days, which will get the number up from, I think it's 57 at the moment, to 100 plus.

MR KENNELLY: One infers, and this is the clarification, completed in full within a fortnight?

MR JUSTICE MARCUS SMITH: What do you mean by "compliance"?

MR KENNELLY: I mean in order to understand who is eligible for the purposes of disclosure, the survey needs to be completed in full.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: Now, as Mr Cook said earlier, if someone can't complete it in full and they have a reason, fine. But one infers from the tribunal's suggestion that when you say "completed within a fortnight", you mean completed in full.

MR JUSTICE MARCUS SMITH: Yes, I mean effective completion.

MR KENNELLY: I'm very grateful.

MR JUSTICE MARCUS SMITH: All I'm saying is that if there is ineffective completion, that is something which we will consider going forward, and we will expect Mr Beal's team to indicate, when this request is renewed, that it is a serious request from the Tribunal, and that there are consequences, or potential consequences, if the matter is not dealt with. And I'm thinking about removal of a claimant from the proceedings, is what I'm thinking of.

MR KENNELLY: I'm obliged. That was the only clarification I needed, thank you.

MR JUSTICE MARCUS SMITH: Mr Beal.

MR BEAL: If it's not simply possible to give a meaningful response because, for example, again, a gaming company doesn't have a concept of turnover, then that can be explained, but I infer that you would want incomplete in that sense survey responses to have an explanation?

MR JUSTICE MARCUS SMITH: To be clear, if a non-response is inevitable because of the circumstances of the party providing it, we would regard that as a responsive response not a non-responsive response. You can't give what you can't give. It's the nil returns with no consideration being applied that is the case.

And I want to keep this reasonably light a touch, because surveys are intrinsically quite difficult, and we appreciate that the interface between the legal team running the show and the very large claimant pool can't be straightforward. So we want something that is useful. We are baring our teeth a little bit in terms of a future threat, but we would like the parties to be sensible about this, we want Mr Kennelly to have an effective response, but we don't want you sweating about producing responses that your claimants simply can't produce.

MR BEAL: Sir, you also directed disclosure of sample A and sample B documents.

MR JUSTICE MARCUS SMITH: Yes.

MR BEAL: Who is it that it's intended to be producing those? All of the sample B?

MR JUSTICE MARCUS SMITH: All of the sample B people.

MR BEAL: And all of the sample A people?

MR JUSTICE MARCUS SMITH: And all of the sample A people.

MR BEAL: And you used an expression I'm afraid I didn't quite catch. Was it prudent and wide?

MR JUSTICE MARCUS SMITH: Oh, Peruvian Guano.

MR BEAL: That's fine, I just misheard you.

MR JUSTICE MARCUS SMITH: Not at all.

MR BEAL: Peruvian Guano is quite a wide test.

MR JUSTICE MARCUS SMITH: It is a wide test.

MR BEAL: And I had anticipated that we would be providing documents that supported our case.

MR JUSTICE MARCUS SMITH: By issue.

MR BEAL: By issue. Obviously issue 3 there won't be any documents from us.

MR JUSTICE MARCUS SMITH: Indeed. So the disclosure, as is usual, is by issue first, and then one has the standard.

MR BEAL: No, Peruvian Guano is perfectly understandable as a standard. I misheard what you said.

MR JUSTICE MARCUS SMITH: But clearly you don't need to provide disclosure either in respect of matters where you can't disclose, or in respect of matters which are not listed as in issue in the list of issues.

MR BEAL: We had rather anticipated that the Redfern responses would delineate what was perceived to be the requests for disclosure of the other 20 witnesses that I identified. I'm simply saying that out loud in the hope that I haven't misunderstood.

MR JUSTICE MARCUS SMITH: No, and again we are quite conscious that an awful lot of work has been done and we don't want to throw that away.

MR BEAL: No.

MR JUSTICE MARCUS SMITH: What we have really done is short circuited the survey log-jam by simply cutting to the production chase.

MR BEAL: Yes.

MR JUSTICE MARCUS SMITH: But for the moment, for today, it seems to us that what has been offered is a good starting point. If and to the extent that doesn't meet the expectations either side, then we expect that to be articulated in correspondence and then raised with the tribunal.

MR BEAL: Yes, I'll need to take instructions because I hadn't, I confess, understood that the Peruvian Guano test was being applied. I'm not sure it makes a huge difference because, of course, as the tribunal has indicated, the bulk of the documents expected for liability are going to come from the defendants but I would need to take instructions on that and obviously if there is an issue then the breakfast club tomorrow morning would be the point at which to --

MR JUSTICE MARCUS SMITH: I do want to stress that this is a set of firm provisionals and we hope that the parties will come back with constructive improvements, and to the extent -- well, agreed constructive improvements, you can expect the tribunal to row in behind them. If there is a dispute, then we will obviously deal with it tomorrow.

MR BEAL: Thank you very much, and the final point, if I may, the 100, at least 100, I understood to necessarily encompass the fact that we already have 73.

MR JUSTICE MARCUS SMITH: Yes.

MR BEAL: So we're three-quarters of the way there.

Finally, just on tomorrow, you had indicated that leading counsel wouldn't be encouraged to attend.

MR JUSTICE MARCUS SMITH: That's right.

MR BEAL: I'm actually due on a plane tomorrow morning so I am afraid I may need to excuse myself but let me discuss with my team what can be done about that and who might be here but it may be that Ms Fitzpatrick is taking over holding the baton for tomorrow, as envisaged.

MR JUSTICE MARCUS SMITH: We welcome, and I think it's an excellent step in professional development, that we excise leading counsel from this matter and move to the --

MR BEAL: I suspect my wife wouldn't agree. Mortgage outstanding.

MR JUSTICE MARCUS SMITH: I'm very glad that there is a degree of consensus there. It goes without saying that we understand that tomorrow's 8 o'clock hearing has come on extremely quickly and all junior counsel and all solicitors can appreciate that we will be giving a considerable degree of latitude to those who say "I don't know the answer to this question". That goes without saying. We just want to enable the parties to articulate problems with what we have ordered and what we see as issues going forward, we want the parties to be proactively considering a few weeks ahead what problems will arise so that we can start addressing our minds to it and giving an appropriate steer. So I'm not necessarily expecting to make an order tomorrow going beyond what I've articulated now, but I would like the opportunity to have the parties say: we're worried about this, we're worried about that, what does the tribunal think by way of a steer? And if that results in an order, so much the better. But we're not going to try and blindside anybody, or indeed allow anybody to be blindsided by a request that's come out of the blue.

So please expect a sympathetic response to "I simply wasn't prepared for this point" and we will move it to a later date to consider finally.

MR BEAL: Thank you very much.

MR JUSTICE MARCUS SMITH: Now, before we proceed, Mr Howell, to you, and

thank you very much for attending, we are really very grateful to the PSR for attending.

MR HOWELL: We are very grateful to the tribunal for accommodating us this afternoon.

MR JUSTICE MARCUS SMITH: That goes without saying. We appreciate that you are a third party here, and the courtesy of your very helpful written submissions is greatly appreciated. We found them extremely helpful.

I'm going to hand over, I think, to the advocates to articulate the questions, because this is an instance where the tribunal has been acting at the behest of the parties to short circuit the important need for documents in the PSR. But the misapprehension that I think I, certainly, was under, and I think I speak for my colleagues, was that this was, in a large extent, a voluntary exercise rather than one that was statutorily constrained. And it's quite clear that there are a number of statutory constraints which you, Mr Howell, have very carefully articulated in your written submissions. And it may be, we will see how we go, that those are matters that simply cannot be resolved today. I'd like to try, but we will see where we go.

The one point that I do want to stress, though, is that an awful lot of what your written submissions turn on is the disclosure of confidential information, and it does seem to us, at least arising out of the submissions that you heard this morning, that there may be a collection of aggregated data that is so anonymised and so detached from the party who has provided it, that it can fall out with the definition of confidential information, and then it will be something that is capable of disclosure without the statutory constraints that you have so carefully articulated.

So I put that out there. I don't know who is going to take the lead in terms of framing what it is that the parties would like to have produced and why it is that you are able to produce them.

Mr Kennelly, or Ms Wakefield. I don't know who is taking the lead on this.

MS WAKEFIELD: Mr Kennelly is addressing relevance and Mr Beal is addressing the legal test and I'm sweeping up.

MR JUSTICE MARCUS SMITH: You are sweeping up.

Mr Howell, I think it's probably best if you hear what the parties have to say and then respond. They know exactly where you are coming from because your skeleton was, if I may say so, extremely clear, so we'll let you respond to what the three of them have to say, and don't worry, I'm sure you are not outgunned.

MR KENNELLY: I think Mr Beal should begin ...

MR BEAL: I know a poisoned challice when I hear one.

Submissions by MR BEAL

MR BEAL: The legal regime, in my respectful submission, boils down to a question of statutory construction which focuses on two provisions of some delegated legislation. May I please endorse the President's observations, that Mr Howell's submissions were admirably clear, and I can therefore cut to the chase, because it is recognised that disclosure is not sanctioned by statute unless it is within the scope of these regulations.

Can we pick it up, please, in the supplemental bundle of authorities that the PSR has disclosed. Tab 7, page 128. And applying the standard Supreme Court in our approach to statutory construction, which essentially says what do the ordinary and plain meanings of the word mean in context -- I'm sorry, it's a bundle that was served electronically last night.

MR JUSTICE MARCUS SMITH: Electronically. I'm grateful.

MR BEAL: Page 128.

I'm going to focus first, because context is relevant, on disclosure for the purposes of criminal proceedings. And so we see that:

"A primary recipient of confidential information or a person obtaining such information directly or indirectly from a primary recipient is permitted to disclose such information to any person — (a) for the purposes of any criminal investigation … or (b) for the purposes of any criminal proceedings which have been or may be initiated, whether in the United Kingdom or elsewhere."

And then subparagraph (d):

"[F]or the purpose of initiating or bringing to an end any such investigation or proceedings or of facilitating a determination of whether it or they should be initiated or brought to an end."

So rather strange language, but in context it is designed to secure an appropriate level of disclosure to enable, in our submission, disclosure for the purposes of criminal proceedings being satisfactorily resolved. And I'm implying that because it's either for the purposes of bringing them to an end or facilitating a determination of whether or not they should be either initiated or brought to an end.

So I accept it's an unusual choice of expression, but in context what one sees is that it's designed to secure the necessary disclosure of material for the purposes of criminal proceedings.

Now, in contrast, civil proceedings is not subject to that wide, open-ended approach. What one sees for civil proceedings in regulation 5 is a similar use of language in 5(1), and under 5(1)(b), either -- so we have either to the regulator or to the Secretary of State. So disclosure to a regulator for the purposes of bringing effectively public law enforcement proceedings against a payment service provider would be one aspect caught by subparagraph (a).

In relation to subparagraph (b) it also encompasses:

"[A]ny person, for the purposes of proceedings to which this regulation applies and which have been initiated for the purposes of bringing to an end such proceedings or

of facilitating a determination of whether they should be brought to an end."

So we see the same use of language. Again, I accept it's not typically usual language, but nonetheless it's designed to capture civil proceedings that are defined not by reference to a particular form of proceedings but by reference to a venue in which they take place, and that's clear from regulation 5(3) where it says:

"The proceedings to which this regulation applies" are either proceedings arising under Part 5 [not here] or "proceedings before the Competition Appeal Tribunal."

Now, why, logically, would you have that? Well, we know that the PSR has concurrent regulatory obligations as a competition regulator in the financial services sphere and therefore it's entirely foreseeable that the PSR as a public enforcement body would bring proceedings before this tribunal.

But it's not categorised as being limited to proceedings in which the PSR initiates or seeks to terminate a particular set of proceedings. It's broader than that, because we have the reference in 5(1)(b) to any person for the purposes of proceedings to which this regulation applies.

Then the definitions section, crucially, is 5(3), and that is a venue-specific definition. So it's civil proceedings, criminal proceedings but civil proceedings are constrained by reference to the venue hearing the particular proceedings.

And when we turn to the explanatory note at pages 132-133, we see that clearly the intention behind these regulations is to allow disclosure for limited persons defined by these regulations, contrary to the statutory prohibition that otherwise applies.

MR JUSTICE MARCUS SMITH: Yes.

MR BEAL: But when we see the description of both regulation 4 and regulation 5, regulation 4, page 133, says:

This "permits disclosure of confidential information for the purposes of criminal proceedings and investigations."

And we have like confirmation with regulation 5:

"Permits disclosure for the purposes of certain civil proceedings."

And the statutory draftsman has chosen to define civil proceedings by reference to the forum in which they are being entertained.

And I do pose this question: if it would be right that the PSR on a regulatory application to bring a public law enforcement of competition provision against a financial services provider could properly rely upon disclosed information given to the PSR for the purposes of enforcing competition law provision against, say, a payment services provider, a payment scheme, given that we know private litigant enforcement is another useful and meaningful way of ensuring that competition law provisions are adhered to, what is the rationale for applying a different approach to the treatment by specified venues, specified forums, of that confidential information? What's the distinction between public and private law enforcement? And if that were to be a proper distinction, you simply would not have the wording in regulation 5(1)(a) and (b) because that recognises that it isn't simply public law enforcement that is within scope.

MR JUSTICE MARCUS SMITH: No. I suppose what is troubling me is what you've touched upon, which is the oddity of the language. So it doesn't say for the purposes of enabling a proper determination of the proceedings. It's for the purpose of bringing to an end such proceedings, or of facilitating a determination of whether they should be brought to an end.

What I'm getting from this, it does seem very curious, is that it almost seems to be directed to an end that is not a judicial determination of the proceedings, but something anterior to that by way of settlement or withdrawal or something like that.

Now, I fully acknowledge that that's an odd reading. But it does seem to be almost compelled by this notion that proceedings have an end and you can only disclose in

order to facilitate the bringing of an end.

MR BEAL: Well, it's for facilitating a determination of whether they should be brought to an end.

MR JUSTICE MARCUS SMITH: Yes.

MR BEAL: I accept it's not the language one would usually use, but I think it was designed across two different areas of proceedings, i.e. criminal and civil. It's designed to cater for the fact that documents that are obtained by the PSR may well be relevant for a variety of different stages in the procedure. So it's catering for both the beginning and the end of the process, or facilitating a determination of whether they should be brought to an end. So what, in my respectful submission, this best captures, is a relevance test. So it's trying to make sure that just because it would be nice to have a particular set of data from the PSR, doesn't mean you can ask the PSR for that data and get it. You have to actually show that it would be necessary to have that data for the purposes of facilitating the determination by which they will be brought to an end.

And there are no words of limitation in the explanatory note beyond identifying the types of civil proceedings that will be caught by it, and if there were to be some sort of additional calibration of the circumstances in which disclosure would be given, you would have expected it to be found in the reference section as to which proceedings are within scope.

So in my respectful submission, the bulk of the definitional exercise here is in regulation 5(3) where it says:

"which particular proceedings before which particular fora will be caught by this disclosure obligation."

And it's identifying specifically proceedings before the Competition Appeal Tribunal, before the CMA, and before the Upper Tribunal, because they will typically be the

scenarios in which, for example, the concurrent exercise of powers by the PSR will be exercised. But it's not ruling that out because it's recognising, for example, that relevant issues concerning competition law enforcement against people within the scope of the PSR's regulatory framework will necessarily be coming up against litigation in that fora.

Now, in contradistinction, you don't have that limitation for the criminal proceedings. Why? Because criminal proceedings are more significant, the liberty of the subject is at stake, therefore there's a wider disclosure regime encouraged by this.

But in my respectful submission, the fact that this tribunal has specifically identified, no doubt with parliamentary knowledge, that this tribunal is capable and does exercise frequently restrictions on the use of material before the tribunal in the form of confidentiality rings and so on, it's recognising that disclosure is possible, providing you meet the relevance threshold of it must be material that will be capable of facilitating a determination of the end of proceedings, and that in the ordinary meaning means if the tribunal needs this data in order to be able to determine a dispute, that will bring about the end of the dispute because the tribunal will then rule on what relevance the data has and apply it to the facts of the case.

Unless I can be of any further assistance, those are our very short submissions.

There are some strange consequential observations on my learned friend's submissions where it looks as though he is drawing a bright-line test between whether or not something is relevant for the proceedings and whether it specifically brings it to either a beginning or an end and that would just lead to such practical anomalies that it is difficult to think that that must have been the intention of the parliamentary draftsman because it would lead to a very strange situation in which, if, for example, the materials needed to, take a case before the CMA where the CMA have a light-touch filter on a statutory appeal deciding whether or not the case is

going to go ahead, that material would be relevant for a statutory appeal before the CMA. But once they've recognised that the case could go ahead, it would immediately fall out of the relevance category because it wouldn't, strictly speaking, then be necessary for the putting the case to an end at the end of it. So you would have this interim period where suddenly the material couldn't be referred to at all and then presumably when the CMA was drafting its final conclusions it could look at it again because it would then be proximate to the determination of the case.

MR JUSTICE MARCUS SMITH: It's also, though, very difficult to work out whether the information has that characteristic. One can quite easily say whether information is going to be relevant to the determination of proceedings. But whether it's going to be of a quality that will bring the proceedings to an end in and of itself raises rather difficult predictive questions for the tribunal to apply.

MR BEAL: Well, if that's read as the bright-line test then it does become borderline unworkable. Whereas if one gives it the overlay of relevance, i.e. it's necessary for the proper determination of the dispute, then you don't have that issue. It's what a court does all the time.

MR JUSTICE MARCUS SMITH: It doesn't directly arise out of your submissions but I think it is a point of legal quality.

Ought it to follow, given the protection that is accorded to the PSR's material, that as a matter of almost automatic course any disclosure that is ordered ought to be ordered into a specific confidentiality ring so as to ensure that the intention to keep the material under close confinement is respected?

MR BEAL: So I have two points if I may on that, firstly yes, to the extent that the confidentiality issue remains. Secondly, you can probably deal with confidentiality for quite a lot of this material. Annex 3 to the PSR report, for example, has only one table redacted and it looks as though it's aggregate data. So once you have

aggregated the data and there's no identifiers for the underlying supplier of the information, it's difficult to see why that would be problematic.

Dealing then with merchant data, I think you've been given the additional materials on the survey responses that went out to merchants. It's in the supplemental bundle which contains the various submissions, and there was a market review -- I may be trespassing on Ms Wakefield's submission, so let me make it very briefly. When the market review into acquiring services went out, this is tab 6, page 96 of the supplementary bundle --

MR HOWELL: Sir, I hesitate to rise. It's only because I don't have the hearing bundles.

MR JUSTICE MARCUS SMITH: I am so sorry.

MR HOWELL: We have never been served with them.

MR BEAL: Feel free to borrow mine. I'll make the point simply.

There were protections put in place for merchant data coming in, as you would expect. And the merchant data coming in was therefore protected by the PSR through pseudonymisation or anonymisation techniques typically in the GDPR world. This happens all the time. You make sure that there are no identifiers by which anyone who has been provided that information can be given. All you need to do is get rid of the unique identifier to the particular merchant and the merchant data is protected. There are wider issues about how you anonymise or pseudonymise the merchant acquirer, but that can be dealt with through pseudonymisation so long as you wouldn't have a jigsaw identification of the merchant acquirer.

MR JUSTICE MARCUS SMITH: I'm so sorry, had you finished?

MR BEAL: That's it, yes.

MR JUSTICE MARCUS SMITH: Confidential information is not defined in these rules. Just looking at regulation 2. Or have I got that wrong?

MR BEAL: Ms Wakefield is going to leap to my rescue.

MS WAKEFIELD: You can find it in section 91(4) of the Act.

MR JUSTICE MARCUS SMITH: I'm grateful, thank you.

MR BEAL: I think you have heard enough from me.

MR COOK: Sir, if I can just add to that point, I think it's worth seeing the explanatory notes, which includes a very helpful clarification that confidential information, if it is material -- I think it's page 102, I think it was. Let's get that up.

So it says:

"Information is not confidential information if it has previously been lawfully made available, is not relevant or is in the form of a summary or collection of information which is so framed that it is not possible to ascertain from it information relating to any particular person."

And that may very well be the vast majority of the information here either exists in that state or could readily be rendered into that state because none of us need to know the identity of individual merchants nor do we need to know the identity of individual acquirers.

So certainly in terms of the underlying data one could readily imagine that this can be anonymised quite easily in a way which would then stop it being confidential information.

Submissions by MS WAKEFIELD

MS WAKEFIELD: Sorry, we're chopping and changing up and down the row today, sir.

So if I may just quickly sweep up on the law in the way that I indicated earlier. If the tribunal has open regulation 5 again, which I think you had electronically, in the bundle which Mr Howell helpfully filed last night. That's tab 7 at page 129, and we

see at the top of the page (b), the provision which we're discussing, Mr Beal suggested that in these proceedings we're within bringing an end to such proceedings or facilitating a determination, those two sets of words. And if I might respectfully suggest a third way, which is the way proposed by my learned friend Mr Cook in his skeleton argument, namely that the prior words, the words "for the purposes of proceedings to which this regulation applies, and which have been initiated", those words in themselves constitute a gateway.

And I rely in particular in that connection on regulation 4, which is on the previous page. And in regulation 4, we see regulation 4(b) has a near identically framed gateway, for the purposes of any proceedings, plural purposes, and there were proceedings in that case, which have been or may have been initiated, in our case they have to have been initiated. Then we have a separate gateway in 4(d), which has this slightly curious language of bringing an end to proceedings.

So I say applying the conventional principle, that when we see the same words or the same construction in the same instrument, it should be interpreted the same way every time we see it. Just as 4(b) can't be redundant, so those words in 5(1)(b) can't be redundant either. So rather than reading them as my learned friend Mr Howell does for the PSR as scene-setting or circumscribing the scope of the two gateways to do with bringing an end to proceedings, in my submission the better reading is to read gateway 1, purposes, plural purposes of proceedings, and then the gateway purpose of bringing an end to proceedings or facilitating the bringing -- the determination of the bringing to an end of such proceedings.

And so I say that's supported by conventional principles of statutory construction, consistency, the presumption against redundancy and so on. And I also say that it immediately answers all of the practical concerns which the tribunal was raising in the exchange with Mr Beal because it is, of course, relatively difficult to say the

information, could it bring to an end to proceedings, and naturally one is put in a dilemma, trying to give a practical, sensible, purposive construction to that.

But as soon as one understands that that prior formulation means relevance, it means using them for the purposes of proceedings, one no longer has the same bind about construing practically the statutory language bringing to an end such proceedings.

So if I could just proffer that alternative way through by reference to reg 4 and practicality.

MR TIDSWELL: There's a difference, isn't there. 5(1)(b) talks about unlawful construction proceedings which have been initiated and 4(b) talks about which have been or may be initiated, and actually, I think on your construction, that would make sense, wouldn't it, because, as Mr Beal said, in the criminal context you might expect there to be a broader application, but in 5(1)(b) you've got to have the proceedings on foot. You can't use it until you've got the proceedings.

MS WAKEFIELD: Absolutely, and one sees in (a) immediately above (b) at the top of that page, 129, we're in reg 5 and one can only disclose the information to a regulator or the Secretary of State for the purpose of initiating proceedings when they are civil proceedings. So again one sees one needs a degree of publicness for initiation.

I should note that's actually entirely consonant with the statutory regime because in section 92, that's the section that establishes the exemptions to the section 91 prohibition, there are twin requirements for disclosing confidential information, one is that you're within regulations but two is that it's for the purpose of exercising a public function. So, of course, a private party contemplating suing another private party isn't exercising a public function. The moment we sue them you are involved, if I can put it that way, and the tribunal is exercising a public function. So, again, it entirely

explains the way that initiation is dealt with in regulation 5(1).

So I say that my construction, I hope, provides a readily explicable and practical approach to the disclosure regime which respects the regulations and also the empowering Act, section 92 of the Act.

MR JUSTICE MARCUS SMITH: So 5(1)(a), dealing with initiation, as you rightly say, has a public element because it's limited to the regulator or the Secretary of State.

MS WAKEFIELD: Yes.

MR JUSTICE MARCUS SMITH: But otherwise is quite broadly framed, namely for the purposes of initiating proceedings or facilitating a determination of whether they should be initiated. So that's actually quite a broad test. First of all consideration of whether we should press the button to initiate, the latter part, and secondly to enable you to do so. So it's actually going to the consideration of whether you do so, and the ability to do so should you choose to do that.

So apart from the narrowness of the public actor involved, it's quite a wide test.

MS WAKEFIELD: It is.

MR JUSTICE MARCUS SMITH: But it only applies to initiation. So if the Secretary of State or regulator wants to bring proceedings to an end, they are going to have to rely upon 5(1)(b). And it would be slightly odd if a regulator, having got a broad brush ability to initiate, couldn't, in the public interest, similarly have a broad brush ability to bring the matter to an end.

MS WAKEFIELD: That's right. That's right, I think, sir. I mean, I think that 5(1)(b) would allow any person including the regulator --

MR JUSTICE MARCUS SMITH: No, obviously it's wider than that (overspeaking).

MS WAKEFIELD: Absolutely, I take that point. I agree it helps me.

MR JUSTICE MARCUS SMITH: My point is if you were the Secretary of State and

you wanted to terminate proceedings in the public interest, you couldn't rely upon 5(1)(a) to do so.

MS WAKEFIELD: No, absolutely.

MR JUSTICE MARCUS SMITH: Of course the wide construction in (b) also benefits any person.

MS WAKEFIELD: It does. It does.

MR JUSTICE MARCUS SMITH: But one might be inclined if (a) referred to just initiation and determination or termination, then you might read (b) narrowly, but (b) is as important to the public body as it is to the private body.

MS WAKEFIELD: It is, absolutely. I would entirely endorse that formulation, respectfully, if I could.

MR TIDSWELL: If you read 5(1)(b) so widely then it does cover a very, very broad range of possibilities, doesn't it, because it means actually any person, itself very broad, and the range of proceedings is quite significantly broad, is the answer to that that there is still a filter because does this really play into the rule 63 override and so then you would expect the regulator to say: I'm not going to do it unless I'm satisfied that the protections -- you then engage, if you like, the public function, and you go into a confidentiality ring, or whatever it is.

So that's at the outset why it can be read so broadly.

MS WAKEFIELD: Absolutely, that is the answer. This gives statutory permission but obviously doesn't oblige disclosure and one has to move forward with those other tests of proportionality, relevance, paying their costs, everything else that one would do. Yes, of course.

MR JUSTICE MARCUS SMITH: And I probably should have put this to Mr Beal, but just to put it to you, normally that which is disclosed or to be disclosed is articulated by reference in civil cases to pleadings.

MS WAKEFIELD: Yes.

MR JUSTICE MARCUS SMITH: Now, that can be an extremely wide function, because parties assert arguable claims in the pleadings and it's right that that should be the case. But when one is looking at material that needs to be more closely protected, as here, the reference to the proceedings, rather than the pleadings that have generated the proceedings, is that significant in that it is actually rather substantially narrowing the relevance test in that one can't actually look in the civil case to the pleadings in a regulatory case, say, the decision, one has to look at the matters that are actually articulated in the proceedings before the tribunal?

MS WAKEFIELD: I think that the difficulty with that concern impacting the proper construction of the statute is it may create a degree of uncertainty in what is essentially after all a penal statute. As Mr Howell says in his submission, it's an offence for the PSR to disclose in breach of this gateway.

And so perhaps a more easily discernible interpretation of the gateway is helpful, and then exactly those concerns, I would respectfully say, would sound large when one is deciding the sort of disclosure to order under rule 63, or by way of agreement between the parties.

MR JUSTICE MARCUS SMITH: Thank you very much.

MS WAKEFIELD: I'm grateful.

MR JUSTICE MARCUS SMITH: Mr Kennelly, are you going to address relevance?

MR KENNELLY: No, sir, I spoke to Mr Howell and I think it's better for him to respond on the law and then I'll deal with relevance after that.

Submissions by MR HOWELL

MR HOWELL: Sir, I'm grateful, and given what has been said so far, there's a large degree of common ground about the basic way in which the statutory regime works

here. So it's not been suggested by any of my learned friends that if there isn't a gateway for giving this disclosure under FSBR of confidential information, and I am going to come back to that because it's a point you raised, sir, in your remarks at the outset ,that the tribunal can compel the PSR in the exercise of its powers to produce that confidential information.

So the two issues really are one and the same side of the coin. So the focus is properly on the gateways under FSBR.

And of course as Mr Beal says, and I think Ms Wakefield accepted as well, it's also common ground that regulation 5(1)(b) is not the easiest provision to apply, and that's obviously why we're all here today.

Just at the outset in response to a point Mr Beal made, he made a point about competition law functions, both of the PSR which exercises concurrent competition law functions with the CMA in this sector, and that's dealt with by way of different provisions. So this market review was carried out under the powers of the PSR under Part 5 of the 2013 Act, and that's what engages this disclosure regime.

As I'm going to show you in a moment, the regime for disclosure of competition information, so that's gathered under the Competition Act powers or the Enterprise Act powers, is regulated by a separate scheme. It's Part 9 of the 2002 Act, with which the tribunal will be familiar.

Can we go very briefly to the primary legislation, because I accept we've been very focused on the regulations. That's behind tab 4 of the authorities on page 49.

MR JUSTICE MARCUS SMITH: Yes.

MR HOWELL: Just to make good the point I just made, if we just briefly go to subsection (6) over the page on page 50, and I just would invite the tribunal to just read that. **(Pause)**.

So this regime is simply not dealing with information that's gathered under Part 1 of

the Competition Act or under Part 4 of the Enterprise Act. That's just dealt with by separate statutory provisions, so Parliament was aware of those provisions and chose not to incorporate them.

So turning to 91(1):

"Confidential information must not be disclosed by a primary recipient."

And that includes the PSR, see 5(a), without consent, and then you see the two consents that have to be given.

Confidential information is then defined in extremely broad terms in the next three subsections, which need to be read together. So it's information that (a) relates to the business or affairs of any person (b) was received by the PSR in the discharge of its functions under Part 5, which all the information from the market review was, and (c) it's not prevented from being confidential information by virtue of section 91(4).

There's then subsection (3), which makes clear that certain matters are immaterial. So you give things voluntarily to the PSR, that doesn't matter.

And then you see at (4)(a), and that was the provision Mr Cook summarised in the explanatory note, and so that is a negative part of the definition, and again it's stuff that's been put into the public domain otherwise than in breach of section 91. So that has no relevance here.

And then (b), which is important:

"In the form of a summary or collection of information that's framed in such a way that it's not possible to ascertain from it information relating to any particular person."

And I do stress the words "not possible". So if there is a possibility, it doesn't have to be a likelihood, that information relating to any particular person could be identified, then that information remains confidential information. It's not possible to rely on section 91(4)(b).

Now, I don't think I need to take you to section 93, which establishes that it's

an indictable offence to disclose material in breach of it. That's common ground.

But section 92.

MR JUSTICE MARCUS SMITH: Just pausing there, Mr Howell, and going back to 91(4)(b).

MR HOWELL: Yes, sir.

MR JUSTICE MARCUS SMITH: Information, not confidential information. If it is in the form of a summary or collection of information, I understand that. But does 91(4)(b) extend to the reframing of information by the PSR that would be confidential information but for the reframing of what has been done? In other words, if you do work to material that would be confidential, but that work turning, you would say, into a collection of material that loses the confidential aspect and turns it into something that is not confidential, because it's aggregated data, let us say, does that work BEcause that which was confidential information to cease so to be?

MR HOWELL: It may do so. And the tribunal has alighted on a point that's made in the Aberdeen case, I'm not going to take you to that bit of it, I will go to it in due course, but that these provisions deal with information, not documents. So if you have got a document that contains confidential information, you can use that document if you are the PSR to create a different document which no longer has that quality.

But the test by which you judge that is, again, a very, very broadly defined general rule and a very narrow exception.

So if it's possible, possible to ascertain information relating to any particular person from a summary or collection of information then you can't rely on 91(4), and I think that's of importance as concerns some of the particular material, and I think that's probably best addressed after Mr Kennelly has addressed you in due course.

So going to section 92, this is the only exemption from the prohibition other than, of

course, consent.

So the two limbs are, made for the purpose of facilitating the carrying out of a public function, common ground that's satisfied, because anything that facilitates your public function of trying these claims will fall within that. But also it has to be permitted by regulations made by the Treasury under this section.

So that's important, in my submission, because it's very clear that there can be no presumption in construing such regulations that they are to be construed widely to catch a number of things because the statutory policy is firmly no disclosure at all unless authorised by the Treasury.

Now, just to --

MR JUSTICE MARCUS SMITH: The buttressing of criminal sanctions rather supports that. You don't need to take us to it, but you would expect carve-outs from a regime that is buttressed by criminal sanctions to be both tight and clearly comprehensible, because you obviously don't want to put yourselves in even arguable breach of a very serious sanction.

MR HOWELL: That's precisely right, and it has made in the House of Lords case Rowell which is in the bundle, that's the best way of making clear that disclosure isn't permitted, is by making it an offence, and it's serious offence.

So very briefly just to see what the courts have said about the policy of these provisions because it's relevant to construing the exceptions --

MR TIDSWELL: Just before you do so, can we just look at subsection (3) in here.

MR HOWELL: Of course.

MR TIDSWELL: Which talks about:

"Regulations made under this section ...(Reading to the words)... "

It's quite a wide range of types of regulation, and particularly (d) seems to suggest quite a broad expectation about what the regulations might cover.

MR HOWELL: Well, it's a broad enabling power, sir.

MR TIDSWELL: Yes.

MR HOWELL: But of course whether or not that is able to be exercised and to what extent is a question of policy for the Treasury. And it's useful just while we are looking at 92(3)(d), with a view to or in connection with specified proceedings, over the page is specified in regulations. So the Treasury has the choice of both the proceedings and the extent to which it's authorised. And it's certainly not my submission that if the regulation said, which I'm going to submit they don't, for the purposes of any civil proceedings, we wouldn't be here today. That would clearly have been intra vires the Treasury's powers under section 92.

So if we could go to Aberdeen, it's behind tab 12 on page 211, and the issue in this case was whether or not in circumstances where the information was already in the possession of a third party, but it had then been made available to the FCA, that was information caught by the equivalent provisions in the Financial Services and Markets Act, and the Court of Appeal held it didn't, and that might be of some relevance, for instance, to the material that's been redacted in annex 4 to the report, which is nearly all concerned with Mastercard and Visa, so that's an issue for them just as much as it is an issue for us.

But there are some important remarks about the policy of these provisions. Can I take you to paragraph 31 on page 220. And I would just invite the tribunal to read paragraph 31 and then paragraph 32 as well, and then it's the point the President made at paragraph 34. **(Pause)**.

So that really sets the context, and I apologise it's taken a little time to get there, but for how you construe the gateways. As I say, there really can be no presumption of any form of liberal construction.

So I think it would be helpful to go to that, and they're behind tab 7.

Now, regulation 3 doesn't apply, but it essentially allows the PSR -- this is 3(2) -- to disclose confidential information to any person for the purpose of enabling or assisting the person making the disclosure to discharge any function of it in the schedule, and that's all of the PSR's functions. I'm not going to take you to the schedule. So 3(2) is a broad provision about the PSR's statutory functions, which is relied upon, for instance, to have the confidentiality rings, which Mr Kennelly took you to.

Regulation 4, Mr Beal and Ms Wakefield took you to. So I'm not going to repeat what's said there. Save to say you'll see very clearly that (a), (b) and (c) are used in separate limbs to (d), which goes to the point Ms Wakefield made, which I'm going to come on to now.

So Ms Wakefield's submission about 5(1)(b) was there are three sub gateways, if I can put it that way, rather than two.

Now, in my respectful submission, that simply isn't a correct reading of the language, and just looking at the language of 5(1)(b), one can see that the introductory words in the comma, beginning with "for the purposes of", govern the remainder of what's there, and that is illustrated by the contrast between "for the purposes of" plural, and then when you get to the remaining bits "for the purpose of" singular. Now, if Ms Wakefield's submission was correct, the words "for the purpose of" singular would be wholly otiose.

So it's just not a proper construction of the words, and we can test that in two ways. First of all, if that really was what the Treasury had meant, it would simply say any person for the purposes of proceedings which have been initiated, and that formulation would catch everything, it's obviously what would have been done if it was intended to do that, and you saw the criminal provisions where the liberty of the subject is at stake, that did precisely that. They are broadly drafted as Mr Beal said.

So, in my submission, it's necessary that it be for the purposes of proceedings that have been initiated, but not sufficient. You would then have to go on to address the two further limbs of 5(1)(b). And those are the rather curious language for the purpose of bringing to an end such proceedings, or of facilitating a determination about whether they should be brought to an end.

Now, just about what helps you here, you were taken to the explanatory note by Mr Beal, and that really is in such short form that it really sheds no light, in my submission, whatever, on the meaning of the words. You unfortunately have, as is sometimes the case, simply the words in their context and you've got to try and give effect to them in accordance with the preceding policy of these regulations, but I don't think the background material really assists at all.

Now, Mr Beal's submission was essentially that bringing to an end the proceedings meant determining them, and in my view there's a fundamental difficulty with that. Clearly a simpler formulation could have been used. But if we just read in "determination" for bringing to an end, the sentence would read as follows:

"For the purposes of determining the proceedings or facilitating a determination of whether they should be determined."

So it just can't naturally mean that, because bringing to an end and determination are being used in contrast to one another in the second limb.

So the extremely broad construction advocated for by Mr Beal, because I think he squarely accepted it is simply an intention with the statutory language, and we've seen what Parliament might wish to do if it wants to authorise a broader liberal provision, and I don't think I need to, but I could take you to section 24(1)(A) of the Enterprise Act, which does allow in the case of specified proceedings, general use for the purposes of those civil proceedings, and this made in full knowledge of provisions of that nature, simply doesn't.

Just focusing on the facts of this case, and I have to be a little careful given the remarks I made earlier ago as I'm rather distanced from them as is my client. But if one actually asks what's happening at Trials 1 and 2, it is neither bringing the proceedings to an end, nor will the tribunal actually be making a determination of whether they should be brought to an end. The understanding of the PSR is Trial 1 comes first in the Umbrella Proceedings followed by Trial 2, possibly with Trial 3 or not. And it's far from clear that the collective proceedings would even be ended by Trial 2.

The fact is that the proceedings are brought to an end when all the issues have been determined whether or not this disclosure is given. It may be helpful, and that's something which there's a measure of common ground, there may be a question about particular categories. But that simply isn't the test and the disclosure isn't going to affect the result of the proceedings, or the ending of them, quite independently for other reasons.

So we do say you've got to be very cautious indeed about acceding to this submission that you can simply construe this as allowing you to have any disclosure which might help you at the trial.

Of course, one of the points made here is that the experts want it, they don't quite know what it is, they think some of it might be helpful, but it's not facilitating a determination of whether the proceedings should be brought to an end. And it's not my case that the construction I'm advocating for necessarily is entirely satisfactory in all of its results. But in my submission, it is closer to the statutory language, which is what you've really got to go on here, and for that reason the PSR isn't satisfied that it has the power to give disclosure here.

PROFESSOR WATERSON: Can I just come back on this issue about confidential information. So you said it was non-confidential information where it was not

possible to determine the position of any one firm, or any one person.

MR HOWELL: That's correct, sir.

PROFESSOR WATERSON: So aggregate information is anything that includes a set of players, presumably. And so there should be no exception for supplying some aggregate information, is there?

MR HOWELL: That rather turns not on a question of principle, in my submission, but on a question of fact. The tribunal will be very familiar from merger reports which are often produced in confidential and non-confidential forms --

PROFESSOR WATERSON: I thought you said "murder", but merger.

MR HOWELL: Merger, and if I didn't I will articulate myself more clearly, the tribunal hasn't yet acquired a criminal jurisdiction. But in that context it is often the case that an aggregate figure can to particular people because of other information they know allow you to calculate things like market shares or things of that nature.

So simply because of the fact it is in an aggregate or collective form, doesn't necessarily mean it's not confidential information. The test is fact-specific. You have to then go on to ask yourselves is it possible to identify information relating to any particular person.

PROFESSOR WATERSON: If we take the example of censuses of production, there the information on less than three players is not allowed, the idea being that any one of them can't determine what any other one has in terms of its share, or whatever.

MR HOWELL: Precisely. So if you can't make any determination about a particular person, and that's what the provision in section 91(4) says, then that's fine, it's not confidential, and this regime, the rather more complex regime, doesn't apply, you're in the realm of general public law powers and the tribunal's power under rule 63.

But, again, it is a very narrow exception. It's a test of possibility.

PROFESSOR WATERSON: Yes. I'm just making the point that information can be made non-confidential and that may well be of use to the parties.

MR HOWELL: Yes, but at this stage again, and the PSR is in a difficult position on that front, because it's not as if it's been put to us, what's been put to us -- and again it's not a criticism of the tribunal or the parties, but what was put to us is produce the information into a confidentiality ring, and in the absence of the statute one might say: that's a very sensible idea because an external eyes ring offers a suitable level of protection.

But no one has come forward to us and said: if you anonymise this bit or redact that in perhaps a different way to what you've done, it wouldn't be confidential. So we simply don't have on the facts particular proposals of that nature before us.

PROFESSOR WATERSON: But you would be sympathetic to such a proposal?

MR HOWELL: I would have to take instructions on the particular proposal, but broadly speaking, if it were a very simple exercise which could be done with limited time and resources of the PSR, which obviously it's very happy to assist the tribunal, but it does have limited time and resources and has other public interest responsibilities. So if it's a limited and focused exercise that might well be one thing. But if it's an exercise, for instance, of re-doing the entire confidentiality considerations that were done two years ago by members of staff, many of whom have now left the regulator, that would be a rather different task.

So I can only really address you in those high-level terms, I am afraid, but I think that's the answer.

PROFESSOR WATERSON: Thank you.

MR TIDSWELL: I think we might be particularly interested in what I think is described as item 4, which is the dataset, and you may not be able to answer this now and you may need to take instructions but we would be very keen to know

whether you think that is something that is either already anonymous or capable of being anonymised reasonably efficiently.

MR HOWELL: Well, just on that point, I don't have the numberings of the bundle, but this was a matter which was actually considered by the PSR when it had the confidentiality ring during its market review.

Now, there's two different categories. I think there was a set of categories used in some of the skeleton arguments, there's the set of categories which we've tried to address, which the tribunal use.

For the avoidance of doubt, this data and code we consider falls within the fourth category of what the tribunal asked for, calculations and analysis underlying the final report. And the reason for that is there may be some minor differences around sort of scrubbing the data and version control between what was disclosed into the confidentiality ring and what was finally used. Again, subject to the issue of principle, we're not against the million items, if I can put it that way, being disclosed, subject to the issue of principle.

But the question of redaction was considered in the notice, which discusses the 1 million observations, and the PSR first said that:

"For the raw changes of the data ...(Reading to the words)... The data includes the names of acquirers indirectly via merchant IDs. We don't propose to redact these merchant IDs, nor do we propose to anonymise acquirers in the code, see below. This is for reasons of fairness and we expect those granted access to the disclosed material to be able to determine the identities of some but not all of the acquirers even if we redact or change these IDs."

So that's the merchant IDs. And there's over the page a further consideration of precisely that point.

So what the PSR thought at the time, and of course it hasn't and isn't able to go back

in time and rethink this, but the analysis it did at the time is let's assume you redact all the merchant IDs, it will still be possible from that to identify the acquirers, and it specifically found that, as above, "because we expect those granted access to the disclosed material", again, some of whom are parties before you today, "to be able to determine the identities of some but not all of the acquirers even if we remove these names, we do not propose to remove them for reasons of fairness and so they are treated equally."

So the PSR did think about this at the time and I can't really assist you more on what they thought.

MR TIDSWELL: Is that saying that the merchants are connected to particular acquirers? That's the way the data works, is it?

MR HOWELL: So the IDs do indicate that. So my understanding is they're something like, and this isn't precisely correct, World Pay, followed by a five-digit number or something like that.

MR TIDSWELL: And if you took those away you're saying that it might still be possible if you knew enough about the merchant to work out who that merchant was and therefore to identify the acquirer.

MR HOWELL: Exactly, and the point may not be -- of course there could be a hypothetical world, I don't believe we're in it, where you have before you letters from the five relevant acquirers saying: no problem at all provided this is put in a confidentiality ring and it can just be used for the purposes of these proceedings. Our understanding from the skeleton arguments is the parties have been trying to discuss this with the acquirers but I'm really not privy to how far they've got.

But we would say there could still be an issue at that point with the merchants, because the granularity of this data, it's a million observations, thousands of lines of code, and the industry codes of particular merchants are indicated. At this stage,

anyway, we simply don't have the confidence that that isn't confidential information because it may well be possible from at least some of it to identify the merchants, but that's a second order issue. As I've shown you, the primary question arises about the acquirers and the PSR formed the view at the time that even if you redacted the merchant IDs it was still possible to identify them.

MR JUSTICE MARCUS SMITH: If I can just encapsulate what I think you are saying, and you can tell me if I've got it wrong. "Possible" is a somewhat hair trigger test. We're not talking about easily able to identify the party providing the material, we're talking about whether it's possible and all sorts of things are possible with effort, so you've got to tread very carefully and what you're saying is that you are concerned that it is possible, even in relation to the aggregated data that we're talking about, such that it would require quite considerable effort either to redact this material or to satisfy yourself that unredacted it was not possible to render it into non-confidential information.

MR HOWELL: Precisely so. So that really raises the question of principle, I've essentially addressed that, but Parliament might have said likely, real possibility, the summary judgment test, some other formulation, but possible is obviously just about the lowest thing it could have used. Perhaps slightly higher than fanciful. But I'm not going to labour the point.

MR JUSTICE MARCUS SMITH: No.

MR HOWELL: As for the second one, the President has encapsulated the concern, which is the views were expressed at the time, and there would have to be then the analysis, no doubt quite a chunky bit of work for PSR, of thinking: well, even if all these acquirers and merchant IDs were redacted in some way, could this still be useful? I might just take instructions very briefly just to make sure I've got that precisely correct.

I'm further instructed that simply the act of creating the new document, given the size of this data, is also a very substantial one which would require significant input of resources.

MR JUSTICE MARCUS SMITH: Yes, I'm grateful.

MR HOWELL: I think unless on the law I can assist further.

MR TIDSWELL: I had one other question. I had a question for you about 5(1)(b), I'm just trying to think of circumstances in which it would apply and I was struggling a little bit. I don't know if you are able to identify a factual hypothetical situation in which it would actually have any effect.

MR HOWELL: Yes, of course the words have to be given effect and if their true effect as I've put them before you would be to render the provision incapable of any application, that would be a very strong reason for favouring a different construction. But in my submission, there are circumstances in which on the natural and ordinary meaning of the words someone does make a determination about whether proceeding should be brought to an end. An obvious one is the withdrawal of proceedings, settlement of proceedings, matters of that nature. And in those circumstances the statutory words would be fulfilled.

Now, there may be a range of different scenarios, many of which are not before you, but in my submission there are situations which fall squarely within the statutory words, and there are those here which don't, which are simply assisting the determination of the proceedings.

MR TIDSWELL: Well, I struggle a little bit with that because on that analysis, if facilitating a determination of whether they should be brought to an end would encompass settlement considerations, that would apply here, because it may well be the case that if this data is made available, the parties, depending on what it says, of course, may decide that they want to go ahead and resolve the proceedings.

Now, obviously, you get into that catch-22 that you don't know whether that's going to be the case until you have seen it, but I don't really understand how you can distinguish that from this situation.

MR HOWELL: Well, for the reasons that it imposes a purpose test. So if what the parties came to us and said was we're looking at a settlement but there are arguments either way and we want this for us to determine whether or not the proceedings might be settled or be withdrawn, then the purpose test would be fulfilled, but it would of course be another question altogether, that would simply get you over the gateway. The PSR would generally not expect the facilitating determination of settlement discussions to be something that it might give disclosure to. So the regulator would then be given a discretion but of course here there's no suggestion at all that's what the documents are sought for, and even if I'm now told that that's some ancillary purpose, two points arise. First of all, you clearly have to look at the dominant purpose, and secondly the documents could then be used for that purpose.

MR TIDSWELL: That does strike me as rather artificial because all civil litigation is always about resolution through settlement -- at least you hope it is in some respect -- and it seems to me to be very artificial to try and identify a request that goes to a particular settlement that someone might have in mind, and the more general expectation that parties will always be thinking about it, and a bit of information that might make a difference to their risk analysis would cause a settlement. I find that quite difficult to reconcile.

MR HOWELL: That's for the reason I did try and emphasise at the outset to the tribunal. There isn't, in my submission, a construction of these words which accords in any way with the language that is used which gives them a sensible effect.

Now, Ms Wakefield's construction was one that was essentially so broad, provided

they had been initiated they could be used for anything. But that does not accord with the words.

So there is no solution before you which enables them to be given something which as a matter of policy looks something that is a sensible one. And I take those points.

MR TIDSWELL: You did say that. You are absolutely fair to point that out.

MR HOWELL: The PSR's difficulty, sir, is that breach of this provision isn't an offence.

MR TIDSWELL: Yes. No, I completely understand.

MR HOWELL: And it just can't be the case that they are to be construed as broadly as allowing anything. Very different language would have been used, and one sees that from the other provisions.

MR JUSTICE MARCUS SMITH: That's a very helpful peg on which to put my question. I wonder if we could start with 5(1)(a). So we begin with a much narrower conception of who may receive this information -- so in (a) it's the regulator or Secretary of State -- for the purposes of initiating proceedings to which this regulation applies, and of course these are undoubtedly proceedings to which this regulation applies, see below.

The words that I'm interested in are the twofold purposes that exist. We've got an ability to disclose for the purpose of initiating proceedings, or of facilitating determination as to whether they should be initiated. So there are actually two purposes for which information can be disclosed to a regulator or Secretary of State. One is when the -- I'll just use "Secretary of State", rather than say "regulator".

One is when the Secretary of State is debating whether proceeding should or should not be initiated. So you mightn't actually use the information within the proceedings as framed, but because you're deciding whether or not to commence them, to initiate them, it's material that assists in that case. So that's sort of the converse of the

settlement case that we're seeing.

But you can also, even though you may have decided to initiate proceedings, say: I really want to go for it, I'm going to initiate it. But you need the material for the purpose of doing the initiating. That means you can then take the information and, as it were, incorporate it in your originating document.

So we've got two purposes very clearly articulated in 5(1)(a), and we see that 5(1)(b) tracks 5(1)(a) quite closely. You start by who is the person, and it expands from the regulator, or the Secretary of State, to any person, including the parties before us today; and, indeed, anyone else. Then we get, for the purposes of proceedings to which this regulation applies, which tracks (a), the additional words, "and which have been initiated", because you need initiation in order to bring them to an end. So you obviously need those words, they have to be on foot.

And then we get the similar duality of purpose. The facilitating a determination of whether they should be brought to an end, which seems to me Mr Tidswell's point about settlement. In other words, you're saying: look, I'm deciding about whether they should come to an end. If I've got in my mind a desire to end the proceedings, and this information will help me decide it, then I can seek to obtain it.

Now, I quite accept that that is not this case. We are absolutely not in the realm of a settlement here, at least not to my knowledge. What we are in the realm of is progressing proceedings that have been initiated.

But looking at that disjunction, when one sees the earlier words, and the first purpose, "for the purpose of bringing to an end such proceedings", doesn't that mean that the end in those circumstances means any end, including a determination judicially by the tribunal? And, on that basis, why can't the fact that the material is going to be helpful to the tribunal in resolving the proceedings, in determining them, why can't that be enough to satisfy this first purpose in the regulation 5(1)(b)?

MR HOWELL: Well, that really goes back to the point I made in response to how Mr Beal put it.

Now, what I'm not saying to you is that that is a completely impossible construction. But it is a very strange one and the reason is, you are reading in those circumstances "bringing to an end" as determining the proceedings, in the sense of a judicial determination being made.

But then "determination" is used elsewhere in these regulations. So if you are reading it in that way, it would be for the purposes of determining the proceedings, or finally determining, because you've got the reference to an end. For the purposes of finally determining the proceedings, or facilitating a determination of whether they should be finally determined.

And that, as soon as you start reading "bringing to an end" as a judicial determination, the second limb becomes very difficult indeed to operate, because who is making a determination as to whether or not something should be judicially determined? It does seem very difficult. As I say, it's not free from ambiguity. That's certainly not my submission.

But it is not one, either, that's a natural reading of the provision.

MR JUSTICE MARCUS SMITH: It may be that the difficulty resolves itself because it's actually not completely straightforward to bring proceedings that have been initiated to an end without some form of court resolution. And the fact is, the parties can agree a settlement in proceedings before the tribunal, but actually that settlement will not end those proceedings until the tribunal has made an order. And that then begins to make the outcome, the order, rather similar as to whether you've got a judicial determination or whether you've got a settlement that leads to a judicial determination without embarking upon a consideration of the merits.

MR HOWELL: Well, that determines to some extent which forum it's being litigated

in, because this doesn't simply apply to the CAT. Permission or consent is required to withdraw a claim under part 4. So it's not necessarily the case there would be a judicial determination before a settlement.

But, again, the question you have to ask yourself, and I don't want to labour the point because I think we've canvassed the competing constructions very well between the submissions, but the question is simply: is determining issues between the parties in trials, the outcome of which is not suggested will bring the proceedings to an end, or even involving the determination of whether they should be brought to an end, something that you can reconcile with these words. And that's all, really, we've got to say.

MR JUSTICE MARCUS SMITH: I'm very grateful.

MS WAKEFIELD: I wonder if I might have a very short reply in relation to my proposed construction?

MR JUSTICE MARCUS SMITH: Of course.

Submissions in reply by MS WAKEFIELD

MS WAKEFIELD: It was suggested by Mr Howell that were I to be correct in my reading of the words "for the purposes of proceedings to which the regulation applies", then that would render the remaining words otiose because they would be swept up in "purposes of proceedings". But, of course, that is the reason why I took you to regulation 4, and in regulation 4, as you saw, there's 4(b), "purposes of proceedings", and 4(d), "purpose of initiating or bringing to an end proceedings". So the fact that the draftsperson used "bringing to an end" in 4(d) and didn't take it to have been swept up into 4(b) shows that my reading does not render those words otiose. They can mean something different, in the same way that they do in regulation 4.

It was also said by Mr Howell that my reading renders the words "for the purpose of

bringing to an end such proceedings", the words "for the purpose of" otiose, because one could have just started with "for the purposes of" and that would have covered all subsequent purposes. And I say that that's best explained by looking again at regulation 4, "purposes" plural, "purpose" singular, and that the draftsperson just lifted the language from 4 and used it in 5.

And I also say that in fact it's Mr Howell's construction that fails properly to take account of the fact that "for the purposes" and "for the purpose of" both appear in 5(1)(b), because Mr Howell's construction I think would say that the words "for the purposes of proceedings" the first time it's used doesn't mean purposes at all; it just means "in", essentially. It's not a permissive part of the regulation at all.

And so for all those reasons, I would respectfully submit that mine is the better and the more sensible construction. And I think the test of that, in a way, may be the exchange that was taking place between the Tribunal and my learned friend, seeking to find a sensible construction of those words at the end. Does it mean dispositiveness, does it mean judgment, does it mean settlement? And if one adopts my approach, then of course one reaches a world where one has "purposes of proceedings" disclosed, and then it's used in proceedings in a conventional sense. And then "bringing to an end proceedings" can have a narrower meaning, in the sense that it presumably does in reg 4(d). It can mean settlement, it can mean withdrawal, it can mean discontinuance, all those narrow things which Mr Howell was urging upon the tribunal, that's fine. Those words can have that meaning. And it makes sense functionally, provided one respects the breadth of the prior words.

And I also gratefully adopt the observation of the President that otherwise one has the use of the materials by the regulator to initiate proceedings, and then use at the very end, but one puts the materials from one's mind in the middle bit, which does seem a rather strange way of organising any kind of regime. That's all I wanted to

say on the legal point. I appreciate we're on the legal point at the moment.

We did talk about confidentiality in passing, and I would just add one thing. In terms of Mastercard and Visa being the consent holders, if I can put it that way, for some of the data, I confess that I hadn't appreciated that at all. It was Mr Howell's submission which made that plain to me that some of the redacted information is from the schemes. If that were to be right, obviously they should consent, because they are parties to these proceedings. If it's not right, then that's fine. But that's my final point. I'm grateful.

MR COOK: Before my learned friend -- we are doing the reply on the law; please can I just make four short points, because my learned friend --

MR JUSTICE MARCUS SMITH: I think we will make them after we have risen. I've just had an indication that the shorthand writer would like a break.

MR COOK: Of course.

MR JUSTICE MARCUS SMITH: So we will resume at 4 o'clock.

But can I say this: in terms of replies on statutory construction, keep them very short. I think we've got the points. They're not straightforward, we've got them well in mind, and we will think them over. I mean, do obviously push back if there's anything appropriate, but I don't think we need much more.

We do, however, want something on relevance. Again, I think shorter, perhaps, than I thought this morning, because it does seem to me that the critical thing is one of the construction of the statute rather than the question of how relevant things are.

I must say, Mr Kennelly, you will want to think quite carefully about how hard you press the confidentiality point, because I do think the combination of the size of the data we're talking about in the fourth category, the possibility to reconstruct the material, and the extent to which redactions would have to be made and then tested to see if they rendered that which was confidential or not confidential, do make this

quite a tricky proposition given the criminal sanction that exists.

But we'll leave you to think about how hard you want to press that in light of the really determinative question of the statutory construction.

But we'll rise until 4 o'clock.

(3.52 pm)

(A short break)

(4.04 pm)

MR JUSTICE MARCUS SMITH: Mr Beal.

Submissions by MR BEAL

MR BEAL: A very short point, if I may deal with it. It was the suggestion that the existence of the concurrent powers of the PSR was irrelevant. When the PSR acts as an investigatory body or a regulator under the Enterprise Act 2002 or under the Competition Act, of course the disclosure obligations would be governed by that statutory regime.

However, it's also common ground -- see my learned friend Mr Howell's skeleton at paragraph 12 -- that FSBR draws very heavily on FSMA, so the 2000 Act. Could I just take you to that 2000 Act, because it's, we say, telling that the statutory language deviates to a modest extent. So starting, please, tab 2, page 9, just for your note, section 348, parallel restriction on disclosure by the FCA or PSR.

Page 10 of my learned friend's bundle -- sorry, page 12, 349 contains a power to make exemptions by regulations under section 349(2) and that includes (d):

"By any recipient if the disclosure is with a view to or in connection with prescribed proceedings."

So that's the vires.

And then the equivalent of regulation 5 starts at page 71. Page 71 has exactly the

same wording as found for regulation 7 in our regulations.

In contrast, though, it then defines in page 72, subparagraph 3, the context of the people who are referred to as regulators or the Secretary of State. And then in regulation 5(6), it says:

"The proceedings to which this regulation applies are civil proceedings under this act."

And then under various other acts.

So it's much more apparent that it's dealing with civil proceedings of a generic nature within the statutory regime.

But then, and this is the key point, under 6(c), it's:

"Any other civil proceedings to which one of the regulators is, or is proposed to be, a party."

And so that's the point. Even if you are exercising powers under FSMA, there is a concurrent jurisdiction for the FCA or the PSR to be involved as a regulator in proceedings which are therefore within scope.

And we say, therefore, PSR's position as a concurrent regulator is also relevant because it is also, therefore, going to be coming before this tribunal under a FSBR power, which is necessarily implicit in having the Competition Appeal Tribunal listed as one of the fora that are acceptable for conferring jurisdiction. That's the very short point.

MR TIDSWELL: There's a difference in the drafting, isn't there? The provision that follows under regulation 5, or regulation 5 equivalent under FSMA, has an "or" after the first clause, after the "which has been initiated". So the wording is slightly different, isn't it?

MR BEAL: Are you, sir, in 5(1)(b)?

MR TIDSWELL: Well, can you give me the page reference again, please?

MR BEAL: Page 72 is 5(1)(b), but I was actually relying on 5(6).

MR TIDSWELL: No, I know. But the wording in 5(1)(b) on page 72 tracks the wording in --

MR BEAL: Well, it does track the wording I think identically.

MR TIDSWELL: Well, no, it doesn't, because it has the word "or".

MR BEAL: I think the other one has "or". The "and" is between "for the purposes of proceedings and which has been initiated".

MR TIDSWELL: Well, I didn't see that.

MR BEAL: To the extent it's different, I'm sorry, I hadn't appreciated that.

MR TIDSWELL: Yes, I think there's a small difference. I'm not sure what the significance is, but I think there is a difference.

MR BEAL: You are right. The first "or" here should be a "for" in the other one.

MR TIDSWELL: Well, it's got an "or" and a "for".

MR BEAL: Yes. Whereas our one, I think, doesn't have the "or".

MR TIDSWELL: You've got the "or" and then there's a typo at the end of the second subclause, because it says "or of facilitating", rather than "or for".

MR BEAL: Yes.

MR TIDSWELL: I'm not quite sure who it is going to say that favours.

MR BEAL: I think probably substantively it shouldn't make a difference because they can be construed on a par.

Unless I can help, those are my submissions.

MR JUSTICE MARCUS SMITH: No, I'm grateful, Mr Beal.

Mr Howell, if you want to come back on any of that, I'm not saying you must, but if you do want to, then do have a go.

Submissions in reply by MR HOWELL

MR HOWELL: Just two points very briefly.

Mr Beal said that "regulator" wasn't defined in the 2014 regulations. It is; it's just defined in regulation 2, and it's the financial regulators you would expect. And there is an instructive difference, as Mr Tidswell pointed out, which isn't replicated. One is "or for the purpose of bringing to an end proceedings", and that "or" is simply omitted, so they are differently drafted.

MR JUSTICE MARCUS SMITH: Thank you very much. Mr Kennelly?

Submissions by MR KENNELLY

MR KENNELLY: Sir, I'm addressing you on your own jurisdiction under rule 63(3)(b) of the Tribunal Rules -- I'm not going to take you back to those, the tribunal is very familiar with them -- to show that the PSR disclosure that is sought is necessary to dispose fairly of the claim, or to save costs. And our short point, as you have seen, is that this disclosure, these data, go directly to the issue of acquirer pass-on, which is central, absolutely central to the disposal of the claim. And you have my submissions this morning about the various issues to which acquirer pass-on goes.

As I said this morning, and I'll repeat this, I appreciate Mr Howell wasn't here so I'll repeat it very briefly. That obtaining the relevant information from the PSR would achieve two objectives: first, it would allow the experts to assess the robustness of the analysis conducted by the PSR and assess the applicability of its findings in the present case, and for that the experts need access to the econometric analysis and calculations of the PSR; and the second objective is to allow the experts in these proceedings to build their own econometric models to quantify acquirer pass-on. So it's not just testing the PSR's conclusions, it's also using the data to build their own models. And for that the experts agree, broadly, that they require data on MSCs, the MIFs themselves, and scheme fees.

So I'll turn, if I may, to the categories, and the categories are listed in the tribunal's own letter to the PSR and I'll just give you the reference. In bundle 2.2, tab 44, page 1622, it's just a handy list of the categories that we're discussing.

MR JUSTICE MARCUS SMITH: Yes.

MR KENNELLY: The first, as you can see in your own letter, is the November 2021 report itself, and we see it's the confidential version of the final report, and in particular the annexes to that final report.

The first annex sets out the industry background, and you can see the redacted parts relate to the pricing structure and fees of the different acquirers, and in the supplemental bundle, very recently, I think Mr Merricks' extracts to the authorities were added to the supplemental bundle, and the tribunal should have that. And it's useful to go to it to see the redactions.

Annex 1 is at page 115 of the supplemental bundle, and if you go over to the next page, you see the redactions, and at 1.180 the PSR describes the standard pricing options used by the seven acquirers, and then for the acquirers sets out what we understand to be the pricing structure and the fees of the different acquirers.

We understand from our experts that understanding the product offerings of the large payment facilitators as well as their pricing is important, because with the underlying data, this would inform the experts' modelling assumptions as well as their evaluation of the PSR's own analysis.

If you move on, then, to annex 2, that begins at page 125, the PSR I understand accepts that this is likely or could be relevant in these proceedings. And that sets out the pass-through analysis, the data and sampling which the PSR undertook.

Now, here, as I said this morning, the redactions are very limited. But those redactions go to data distribution and limitations, and we understand from the experts that they need to understand the distribution of data and the limitations when

evaluating the findings of the PSR. And it's impossible for me to understand or justify the basis for the redactions themselves, but, as Mr Tidswell said this morning, it's hard to understand why those points on data distribution and limitations should be confidential. But I'm sure Mr Howell will address you on that.

I'll move on, if I may, to annex 3, and this sets out the financial review of the payment facilitators from page 132, and you see them listed in 133, and the redactions are significant. And you can see straightaway that the redactions relate to the proportion of the different fees relative to card turnover as well as the year-to-year changes. And you can see through those tables the weighted average MSC and its components, amounts in table 1, changes in table 2, over the years from 2014 to 2018, and shares across the same years in table 3. That's the very analysis which the experts are undertaking, examining changes in MIFs and MSCs. And so this type of analysis we say is clearly relevant and important for their work.

And then annex 4, again, as I said this morning, the PSR accepts that this could be relevant. This deals with scheme fees, and from 135 and 136 you see the statistics listed, the total fees for scheme and processing services, and the redacted parts we see relate to the volume and value of transactions of the schemes, and their evolution over time, and distribution by location and channel.

If you go over to page 138, you see it's broken down by "Channel", "Card present", and "Card not present" also. And data relating to the volume and value of transactions that are central also to the acquirer pass-on analysis.

MR TIDSWELL: And could you not consent (inaudible: off microphone). Mr Cook seemed to think that there wasn't any issue about consent here, but this does seem to be material that comes from the defendants. Is that not correct?

MR KENNELLY: We anticipated your question, sir, and we are taking instructions on that. On the face of it, one would ask why not. Since this appears to be our

confidential information, why would we not consent. But I am taking instructions. We can, yes. So at least that can be fixed for the PSR's benefit.

MR TIDSWELL: (Inaudible: off microphone). I mean, one way or another, Mr Cook, if you don't consent to it, I presume then someone will make a disclosure application against you and you will have to provide it.

MR COOK: Yes. I mean, having checked, there obviously are some things that are listed as Mastercard material. The reality is, it seems slightly unnecessary for us to contend to a third party to provide it since we already have it, or should already have it. So one way or another, if it's relevant then clearly it needs to be provided.

MR KENNELLY: That's the first, really, of four categories. The tribunal saw from your letter that the second category back on page 1622 in volume 2.2 is the interim report of the PSR, and as I mentioned this morning, and I think it's the point that Mr Howell raised, this is obviously less important than the other categories for which we contend. These are not all equally important, and we accept that the interim report is less relevant than the other categories.

Category 3 is the disclosed material, the disclosed material as defined in the notice of the PSR's intention to operate a confidentiality ring, and this is very important. And you see the nature of it from the notice itself, which is in the supplemental bundle behind -- it's on page 92. Page 92, "The market review into card acquiring services", the notice of the PSR's intention to operate a confidentiality ring, and you can see under "A. Data":

"The randomly drawn samples of 2,000 merchants and five acquirers in response to the PSR's information requests. For the period of 2014-2018, over 1 million observations."

And the data is broken down by the categories listed at the bottom of page 92 and over the page in 93. And to see the value of this material, if you go to page 96, this

refers to the IFF research conducted by the PSR on its behalf, and about halfway down 96, under "Material to be disclosed", the raw data file contains the responses of 1,037 small and medium sized merchants, then two questions in the merchant questionnaire.

This is gold for the purposes of the acquirer pass-on analysis. It's extremely important for the work that the experts would do if we can get it. It would allow the experts to build their own models and study the extent to which changes in MIFs are passed on to MSCs.

Now, the tribunal has the point that we laboured at length this morning about the difficulties in getting that from the claimants, and the uncertainty we still face in getting it from the claimants for the purposes of Trial 1. And that highlights the necessity of getting it from the PSR, that this material is there, subject to the gateway being satisfied, and the tribunal's own jurisdiction. It's of central relevance to the acquirer pass-on issue.

Finally, category 4, this is the analysis conducted by the PSR itself through the pass-through and scheme fees material. Again the PSR I think recognises this is relevant to our case. It would allow, as I said this morning, the experts to understand the approach of the PSR, to understand the PSR's modelling assumptions, to identify any limitations, and to assess how applicable it is to our case. And Mr Cook made the same point to you this morning, and that's central to points that will for sure be raised before you when acquirer pass-on comes to be debated.

I'm not going to address you on the legal thresholds, that's been addressed in detail.

On confidentiality, save for what I've said to you already, I'm not pressing at the moment that it is possible to redact the information in time for it to be anonymised. We understand what the PSR said about the fact that it has found, at least at the time, that even removing the merchant IDs still allows acquirers to be identified, and

we're not in a position to go behind that for the purposes of our submissions to you today, and so we have to take that at face value. I'm not in a position to contradict it. Of course, and I'm sure it goes without saying, that any consent from Visa to disclosure material goes into a confidentiality regime which protects it from Mastercard. Obviously Mastercard can't see this material coming from Visa, and so provision would have to be made for that in the event that the disclosure is ordered.

MR JUSTICE MARCUS SMITH: That's a detail we'll think about if we get there. Mr Howell.

Submissions by MR HOWELL

MR HOWELL: I'm very grateful, sir, and I want to say at the outset of my submissions on this point, that the PSR, assuming you hold there is a gateway, wishes to be as cooperative and constructive as possible, subject to questions of reasonableness.

In addition, because of its very limited visibility over the proceedings to date, and I've made the point I don't have the bundles, but my client simply doesn't have the pleadings, the same knowledge, it really is very firmly in the tribunal's hands today as to what the tribunal thinks is really needed, if you consider you've got power to require the production of it.

Clearly this is not a formal application for non-party disclosure. It's not a question of something being ordered today, but the PSR would take any indication provisionally by the tribunal as to what's needed with the utmost seriousness. And certainly from the PSR's perspective, it's much better for us to have guidance from the tribunal now, which is intimately familiar with the proceedings, than it is for us to be served with some formal application later down the line with, no doubt, thousands of pages of material to justify this and for us to have to incur the costs of doing that. So I want

to emphasise those two points at the outset.

Turning to the specific categories, and Mr Kennelly's submissions, there isn't a lot I can say on some points, but I do want to emphasise that any disclosure that should be ordered, the tribunal should form the view that it's necessary. And so it is important to note, in certain respects, Mr Kennelly didn't attempt to really say there was anything in the main body of the report that was really necessary. His focus was on the annexes. And even then it was on particular annexes. For instance, he said nothing at all about annex 5.

So, in my submission, it boils down as to the first category, to annexes 1-4, and as you will have seen from the written submissions -- and I'm not going to address you on 2 and 4, save to emphasise the point that certainly this doesn't require any engagement of the statutory regime, because under the Aberdeen case, the material in annex 4 is the parties' material. So under the statutory regime, it's not a question of giving consent or not; it's their information.

So I don't want to dwell on the categories particularly. The redactions, for instance, to annex 2, there was some suggestion they had been done in a manner that was excessive. Mr Kennelly didn't take you to a particular paragraph, as far as I was aware, but all that can be said is the regulator at the time, in 2021, did go through this carefully and formed a judgment about that. There are clearly things about the limitations of data in annex 2 where the PSR says one acquirer, under scissors, had this issue, and that's clearly within the statute. So I don't want to sort of make submissions on the detail of that, save to say it is not an issue you can address by, I think, carving bits out.

So that's category 1, and really my submission is the tribunal's focus, and our focus, should be on the actual annexes said to be relevant, 1-4, on which you were addressed. And we are in the tribunal's hands as to 1 and 3.

On category 2, that raises a rather different point, and Mr Kennelly really didn't press it very hard. But we do object, unless the tribunal were really convinced it was essential to the production of annex 2. And the reason for that is annex 2 is an interim report, it's the CMA equivalent of provisional findings, and it's inherent in such a report and provisional findings that it's superseded. And if the relevant bits of the final perfected analysis are handed over -- and there's no dispute about that -- we really don't see the justification for them saying: would you like to have some other stick, a provisional stick, to mark the PSR's homework with. We just don't think that's appropriate.

Category 3 forms two different things. Now, the first is the data and the strata code. Now, as I mentioned in an exchange with the tribunal in my submissions on the law, there's no objection in principle to that, but we do think it forms part of category 4 rather than the material that was disclosed. And that's because it may be, and I can't confirm submissions on this because it's so long after the event, but the data was cleaned up in certain respects. The final data may be somewhat different to that which was disclosed at the time. So we're simply saying not what was disclosed at the time into the ring, but the final version that took into account all of the PSR's views. And you will see in annex 2 -- I don't propose to take you to it -- there were submissions made about the quality of the data and responses from the PSR. So it's not an issue of principle. It's just which category it falls into.

As to the survey, Mr Kennelly described this as gold, but it is difficult for us to understand that, because on the basis of what he says, the results of the survey itself -- of course it's a survey of a number of businesses, as you saw -- have been published in really quite exhaustive detail in 2020. I don't know whether it is in the bundle, but it runs to many, many pages. I think it's around 90. So there is already in the public domain very useful material from this survey, and what I didn't

understand from Mr Kennelly's submissions was why the raw data, in addition to the published results, were needed. But I leave that to the tribunal.

As to category 4, that's the calculations and matters underlying the final report and, again, in our view that includes the strata code and the data, and there's no objection in principle to that, assuming you are satisfied as to vires.

I should mention one further point which was suggested to me by my clients over the short adjournment, and Mr Kennelly didn't press this, but just for completeness. If the data were modified, I'm instructed that that would have consequential effects on the code that was used, so it's not simply a question of modify the data and you've got the same code: modifying one may have unintended consequences on the other.

Can I just check if there are any further points arising?

MR JUSTICE MARCUS SMITH: Yes. **(Pause)**.

MR HOWELL: Thank you, sir. Those are the PSR's submissions on the questions of relevance.

MR JUSTICE MARCUS SMITH: I'm very grateful to you.

Just a question as to form in terms of the deliverable that will enable you to discharge your duties. You've rightly made the point that you are not a party, and you don't want to be, and we don't want to go down the route of having to issue an unnecessary application. I take it that a ruling -- and we will reserve our judgments, I want to be clear -- a ruling setting out our construction of the relevant PSR regulations, together with an articulation of why, if we think so, rule 63 is engaged, will be enough to enable the PSR confidently to discharge voluntarily its functions. You won't need anything more from us than that, and if you do need something more, do let us know and we will --

MR HOWELL: Yes, so that very helpfully sets out the framework, and of course it may be you construe the provisions in a way that renders the next bit redundant.

MR JUSTICE MARCUS SMITH: Well, indeed.

MR HOWELL: Or it may be you don't.

But we would like that ruling, and we're very grateful to the tribunal for that, and the indication. What we would then do is use our best endeavours, if it is appropriate in light of the tribunal's ruling on the issue of principle, is to agree an order for non-party disclosure, and then to submit that later down the line to the tribunal.

So although there's no opposition in principle, for reasons of good order and clarity -- and there are other questions of data protection I'm not going to trouble you with -- we would seek the cover of a formal order. But, again, if the tribunal gives the helpful indication, then really with sensible parties on all sides -- and we've taken a cooperative approach -- I'm confident, and unless my learned friends say anything else, I'm confident this could be the subject of agreement.

MR JUSTICE MARCUS SMITH: I'm very grateful. I expected that. I just wanted to make sure we were framing our response to this non-application application in the right way. So I'm very grateful.

I see the time.

MR BEAL: Sorry to stretch your patience, I've been asked to raise three points of clarification on the ambit of disclosure: what's expected of the claimants; who will be making that disclosure; and a subsidiary point on the defendants' disclosure.

On ambit, I had understood, and therefore I'm simply saying out loud what my understanding was, that the claimants were expected to give Peruvian Guano style disclosure relevant to issues 1-5 and 7-13, which are the issues for Trial 1.

There's then the second issue, is who gives that disclosure. I had understood that to be the 20 claimants that we'd identified in the letter.

MR JUSTICE MARCUS SMITH: As giving witness statements, yes.

MR BEAL: As giving witness statements.

And then the 100 sample claimants within sample A, as defined by the joint statement from the experts. The disclosure those people give, however, is the same as the disclosure given by the 20 that we have put forward as witnesses. That was my understanding.

MR TIDSWELL: There's also, I think, sample -- I think I may have been responsible for some confusion here, but there's sample B and C, isn't there, and I think I may have got B and C mixed up.

But on issues 7-12 I think we need disclosure from that sample as well.

MR BEAL: I think it was sample A and then sample B.

MR TIDSWELL: I don't know whether I have got them back to front or not but I think sample C is the one that goes to honour all cards rules and I can't remember what B goes to and maybe it's B and C, I don't know, we may need to work that out.

MR BEAL: A as defined, B and C, but the point is we're identifying people to give disclosure but the disclosure they give is still by reference to the issues under Peruvian Guano.

MR JUSTICE MARCUS SMITH: Oh yes, and we're not expecting any general unfocused disclosure or anything that is -- well, I'm not sure how you do it. You've got to start with the issue and then you define the standard of disclosure in respect of documents in relation to that issue.

MR BEAL: We can form our own view on what our disclosure obligations are by reference to pleaded issues.

The next practical issue is we don't actually know who are the 73 claimants that Dr Niels has identified.

MR JUSTICE MARCUS SMITH: Sorry, I missed that?

MR BEAL: We don't know who the 73 claimants are that Dr Niels has referred to. If we could be told who they are by reference to a list. Because this took place in an

experts' meeting, we didn't get the data. So if we could be given a list by Dr Niels of who the 73 are, then that would be very helpful.

MR JUSTICE MARCUS SMITH: Yes.

MR BEAL: And the same with, I think, the six and six that are referenced in sample C and B. So we would just need to understand who they say are within that sample. Because we can then obviously go to the individual entities and say: right, give us the disclosures that's envisaged.

MR JUSTICE MARCUS SMITH: I hope that these are details that can be cooperatively ironed out. I think you know where you are going, but if you don't have the granular detail to respond, then clearly you need to ensure that you have that.

MR BEAL: I'm trying to use 4 minutes this evening to spare what could be longer tomorrow.

MR JUSTICE MARCUS SMITH: No, I'm very grateful.

MR BEAL: And then finally just on defendants' disclosure, you've, as far as I know, directed that they disclose the documents that they want to rely upon plus known adverse documents.

We just wanted to be clear that that would encompass matters such as the scheme rules as they varied over time because that's one of the building blocks of the entire case, and if we have misunderstood that, then that may have to be resolved tomorrow with what is within the ambit, but I simply wanted to put the marker down.

MR JUSTICE MARCUS SMITH: That's helpful. Perhaps the schemes can consider what their response to the marker is and we can resolve that tomorrow morning if it's contentious.

MR BEAL: Thank you very much. And thank you for bearing with me. I appreciate that, sir.

MR JUSTICE MARCUS SMITH: Not at all. This is how, I think, at least for the next

three weeks, we envisage it working. There's a lot of detail, and what we don't want is for that to be not hammered out in correspondence between solicitors that costs money that goes nowhere and rather is raised with us so that we can say what should be done and what shouldn't be done, and we may get, then, into a frame of mind for all the parties that what we're really interested in is forward motion, rather than just communications that litigate without getting to an end.

MR BEAL: Solutions, not problems.

MR JUSTICE MARCUS SMITH: Solutions, not problems.

MR BEAL: Thank you very much indeed.

MR JUSTICE MARCUS SMITH: We're very grateful to you all.

We will, subject to one further point, rise until tomorrow. The one further point is, I don't want submissions on this, but the PSR really oughtn't to be put to expense on this. Has that been resolved by agreement, in terms of your costs?

MR HOWELL: Sir, our position is that the ordinary rules should apply. I didn't hear anyone pushing back on that --

MR JUSTICE MARCUS SMITH: No, good.

MR HOWELL: -- or our other point about confidentiality, so now is the moment because that is obviously quite important to us.

MR JUSTICE MARCUS SMITH: It is quite important. Well, I don't think there will be any ... no. We'll make sure that's included in the order.

On that basis, thank you all very much. I'll see some of you, hopefully the non-KCs, tomorrow at 8 o'clock. Thank you very much.

(4.37 pm)

(The hearing concluded)