

1 Friday, 11 March 2016
 2 (10.34 am)
 3 HOUSEKEEPING
 4 MR JUSTICE BARLING: Morning, Mr Brealey.
 5 MR BREALEY: Morning.
 6 MR JUSTICE BARLING: Morning, all. You have had a busy few
 7 days.
 8 MR BREALEY: I would say that.
 9 MR JUSTICE BARLING: Caught up on sleep, I hope? No?
 10 MR BREALEY: No, that is next week.
 11 MR JUSTICE BARLING: Just a couple of points on the
 12 timetable. I am afraid we need to rise at 4 today. If
 13 you feel you would like an extra quarter of an hour, we
 14 can easily take a shorter lunch.
 15 MR BREALEY: I am sure we have time.
 16 MR JUSTICE BARLING: Then the other thing, I think, just to
 17 make clear, is that at the moment we are sort of
 18 pencilled in, I think, to Wednesday, aren't we?
 19 MR BREALEY: Yes.
 20 MR JUSTICE BARLING: If we did have to sit on Thursday, we
 21 could only sit until lunchtime, just so you know, and we
 22 can't sit Friday.
 23 MR BREALEY: I would have thought the four days should be
 24 sufficient.
 25 MR JUSTICE BARLING: I would have thought so, but just in

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1 case, that is the position.
 2 Closing submissions by MR BREALEY
 3 MR BREALEY: Just reflecting on that, what I would like to
 4 do in my final slot, as it were, is highlight certain
 5 points of principle that may not have been so clear to
 6 the Tribunal, and then I think I would quite like to
 7 follow the logic of our closing. Obviously I am not
 8 going to read it out but drawing, you know, attention to
 9 the main points, but at the same time responding to
 10 Mr Hoskins and MasterCard's skeleton.
 11 I will not go to too many documents. As you have
 12 requested, we have tried to put it in the text.
 13 MR JUSTICE BARLING: Yes. Thank you. Thank you for that.
 14 MR BREALEY: We will go to a few, and with all promises,
 15 sometimes they just get postponed for a moment. The
 16 very first issue I want to go to is regulatory context.
 17 I would like to go to a few documents, but after that
 18 I will kind of basically go through the closing.
 19 MR JUSTICE BARLING: Yes. Right.
 20 MR BREALEY: But there is one point, one quite important
 21 point, that I would like to nail at the beginning which
 22 does involve going to just a few documents.
 23 MR JUSTICE BARLING: Okay.
 24 MR BREALEY: So this point is the issue of credit write-offs
 25 which is quite a big chunk of MasterCard's MIF, credit

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1 write-offs and debt collection. It is relevant,
 2 obviously, to debt collection, but it is also relevant
 3 to the regulatory context.
 4 What I would like to do -- and I will be flipping
 5 between our closing and MasterCard's closing -- I would
 6 just like to refer the Tribunal to how MasterCard put
 7 this credit write-off, or the set of costs at
 8 paragraph 350 of its closing, that is page 116.
 9 Just to flag where I am going, I am going to have
 10 a look at paragraph 350 of MasterCard's closing, and
 11 paragraph 15 of ours. This is in the regulatory context
 12 section, but it is important for the exemption.
 13 I want to flag the issue and then I want to go
 14 through certain documents.
 15 This is paragraph 350 of their closing, their
 16 skeleton. In section 5 of this first report, Dr Niels
 17 conducted a cost-based analysis which he referred to as
 18 the "adjusted benefit cost balancing approach". We have
 19 called that the "issue as cost approach".
 20 This is important:
 21 "This uses the same subset of costs used by the
 22 Commission in 2002, and by MasterCard throughout the
 23 claim period, and considers the extent to which
 24 merchants should contribute to costs associated with
 25 credit. Dr Niels concludes it would be reasonable but

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1 conservative to attribute at least a quarter/half of
 2 those issues as costs to merchants."
 3 But the bit I want to take issue with, and I will
 4 come on to it, is that it is simply incorrect to say
 5 that the same subset of costs were used by the
 6 Commission in 2002. That is the bit that I want to
 7 highlight.
 8 So if we just put their skeleton away and go to our
 9 paragraph 15, this is where we deal with the -- so what
 10 MasterCard are referring to there, obviously, when it
 11 says, "the Commission in 2002", is the Visa exemption.
 12 As we did before, we referred to the Visa II exemption
 13 decision, so, paragraph 15, we set out the background.
 14 It allowed Visa, until 2002, to base its MIF on three
 15 categories of cost: the cost of processing transactions;
 16 the cost of providing a payment guarantee; and the cost
 17 of the Free Funding Period funding period.
 18 Now, it is quite important to define what we mean by
 19 the cost of the Free Funding Period funding period.
 20 These three categories of costs were, at the time,
 21 perceived by the Commission as a proxy for the cost of
 22 issue as to providing credit. Then we go on, as we did
 23 in opening, that this exemption decision should have put
 24 MasterCard on notice that its four-party system would
 25 not be a joint service, that it was likely to be

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1 unattractive argument for MasterCard to say, "We need
 2 these costs to compete with Visa", and Visa saying, "We
 3 need these costs to compete with MasterCard", lo and
 4 behold we both win.
 5 MR JUSTICE BARLING: But it would be -- I mean, the OFT
 6 appear to be possibly, here, falling into the trap
 7 that Mr Smith mentioned earlier, which is that --
 8 assuming that something is unlawful. If you assume it
 9 is unlawful, of course, it is very undesirable to
 10 have -- but if you --
 11 MR BREALEY: Or do you assume it is lawful? That is what is
 12 being said. But, on that point, that is why I pray in
 13 aid what the court says in British Airways, where it
 14 talks about a suspicion of anti-competitive conduct. In
 15 our closing we have referred to the suspicion.
 16 And as I said earlier on, if one applies the British
 17 Airways case, so you have a sector, and everybody is
 18 operating the same practice in this economic sector, and
 19 there is a suspicion of anti-competitive conduct, then
 20 you can go against one, and, as I say, it is no
 21 justification to say, "Well, others are doing it, others
 22 are pursuing this same conduct", if that is a suspicion.
 23 You know, that is the words in the judgment, hence,
 24 "suspicion". You don't have to assume, you don't have
 25 to prove. I am just taking the words that the European

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1 Court has said, which is, "If you have a suspicion, then
 2 it would be no justification".
 3 If you are not with me on that, then we have delved
 4 into the facts which we are going to go through and have
 5 a look at in a moment.
 6 Essentially, it is a matter of impression, whether
 7 the impression that one gets is, "Can this really be
 8 right? Visa and MasterCard have -- are the only
 9 four-party -- they have both been investigated, both
 10 been found to have distorted competition on the
 11 acquiring market, both given undertakings, both
 12 commitments, both been regulated in the same way. When
 13 it comes to someone claiming damages, they are told,
 14 "Well, you just forget Visa". And if my respectful
 15 submission it would be wrong, as a matter of principle,
 16 simply to assume -- assume -- that Visa is acting
 17 lawfully, where there is clearly a suspicion that it
 18 would not be.
 19 Again, I come back to the cartel. We all know
 20 that -- you know, you have ten people in a cartel, I am
 21 the claimant, I sue one person in the cartel, the other
 22 nine are not party to the private proceedings, is it
 23 right for the one cartelist to say, "Well, if you find
 24 me guilty of an infringement I would go out of business
 25 and therefore there is no restriction of competition".

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1 The other nine are not bound, they are not bound by any
 2 judgment. The same argument can be made. How can you
 3 possibly assume that the others are guilty? They are
 4 not before the court. And yet it happens all the time
 5 that, in a stand-alone action, you are suing one alleged
 6 cartelist, but then it becomes a bit of a cartel's
 7 charter to say, "Well, I actually need to be in this
 8 cartel to compete". Or, you know, not to go out of
 9 business.
 10 MR SMITH: But that is the same cartel, whereas Visa, of
 11 course, is separate.
 12 MR BREALEY: Yes, and I am trying to work out where this
 13 goes, because, again, why is it that MasterCard are
 14 saying, "You can ignore Visa"? You are telling me,
 15 well, you cannot assume that Visa is acting unlawfully.
 16 Well, you could say the same in the cartel situation.
 17 MR SMITH: But -- no, because the test is one is attempting
 18 to ascertain the effect of an allegedly anti-competitive
 19 agreement, so you blue-pencil the pernicious, or
 20 allegedly pernicious, agreement to work out what the
 21 consequences are. And if you are blue-penciling it out
 22 in a single cartel, then obviously the blue pencil apply
 23 to say all members of the cartel.
 24 The issue we have here is that there is the
 25 MasterCard scheme and, let's assume, a Visa scheme that

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1 is, to all intents and purposes, the same, but it is
 2 separate. And what you are asking is: you are saying,
 3 "Well, assume an anti-competitive effect in the
 4 MasterCard case, and apply your scalpel to severance to
 5 see what the consequences are, but do exactly the same
 6 in respect of a similar but completely independent
 7 scheme".
 8 MR BREALEY: Well, all I am doing, actually -- I actually
 9 don't think I am doing that much. I am asking the
 10 Tribunal, in a counterfactual, to realise that Visa
 11 operates an identical scheme and has already been found
 12 to have infringed Article 101. And one has to remember
 13 that this is in a competition counterfactual. All I am
 14 doing is bringing Visa into it to show that it is
 15 exacerbating the restriction of competition, making it
 16 worse, rather than better.
 17 MasterCard are using Visa as saying, "Look at Visa
 18 over there, I need this cartel. Competition is better
 19 if I have this cartel". So they are using Visa as
 20 a mechanism to say there is no distortion of
 21 competition, and I am using Visa, with all the bells and
 22 whistles and all the baggage that Visa have got, to
 23 say --
 24 MR JUSTICE BARLING: Ignore Visa in the counterfactual,
 25 because -- assume they are the same.

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1 MR BREALEY: Assume they are the same. And I am not asking
 2 the Tribunal to find Visa guilty of anything. It is
 3 just that in the economic context they operate the same
 4 system.
 5 When one is looking at a restriction of competition,
 6 my alleged restriction of competition, are you allowed,
 7 or should you be looking at the Visa scheme and seeing
 8 how that Visa scheme impacts on the MasterCard?
 9 MR SMITH: The trouble is, how far does one take the
 10 assumption? Let's say we are with you and say: okay,
 11 well, let's assume for the sake of argument that Visa is
 12 in breach of 101(1). Do we then assume an exemption
 13 under 101(3)? If we assume an exemption under 101(3),
 14 at what level do we assume it to be?
 15 Then one has a kind of feedback effect. Because --
 16 let's suppose we assume that Visa is subject to, yes,
 17 a regulatory regime. 101(1) bites but there is a 101(3)
 18 exemption which puts the Visa MIF at a level that is
 19 materially higher than MasterCard at zero? On
 20 Mr Hoskins' case, as I understand it, there will be
 21 a flood of banks moving Visa's way.
 22 MR BREALEY: Absent the evidence in the case.
 23 MR SMITH: Of course. I am putting to you Mr Hoskins'
 24 argument. I fully accept that you say he is wrong on
 25 the facts. You can take that as read. The difficulty

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1 is, when one starts making these assumptions, I am not
 2 sure where we stop.
 3 MR BREALEY: Well, it may be that this is a matter for the
 4 evidence, but clearly I put to the witnesses the scheme
 5 is the same, or similar.
 6 MR SMITH: Yes.
 7 MR BREALEY: We know that the Commission has said there will
 8 be no discrimination between MasterCard and Visa, so we
 9 know that the exemption -- so, to answer, squarely, your
 10 point, that what MasterCard would be exempted would
 11 broadly be the same with Visa, because there would be no
 12 discrimination.
 13 Now, I don't know what Visa is going to do in autumn
 14 of this year but, you know, I can only go so far. What
 15 I can say is that all the evidence in the case has been
 16 the Commission saying to MasterCard, "We will treat you
 17 equally, no discrimination", and I will come in a moment
 18 to it, because I will come on to the damages
 19 counterfactual very quickly, but MasterCard itself
 20 saying, "Well, we see there should be a level playing
 21 field".
 22 And once you take stock of that type of evidence, it
 23 is not a great leap to then say, "Well, am I really
 24 going to reject the claim for damages on the basis that
 25 I can just ignore -- I can assume" -- I mean, this is

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1 essentially what Mr Hoskins is asking, asking the
 2 Tribunal to assume there is absolutely nothing wrong
 3 with Visa.
 4 I get criticised for saying, "Assume there is
 5 something wrong". Is it really realistic to assume that
 6 there is nothing wrong with Visa? If I could go to
 7 section H, because I just have a little bit more
 8 evidence that I would like to -- this is the damages,
 9 the compensatory damages, where we are starting to look
 10 at the evidence.
 11 So this is at page 205. I thought that I would deal
 12 with compensatory damages under Maestro stuff and the
 13 Amex stuff because it all fits into the counterfactual
 14 window all in one go.
 15 Well, we are starting to get to the evidence, but --
 16 so this is the damages Counterfactual -- so just to flag
 17 what we have done in this section, we deal with the
 18 damages calculation postulated by MasterCard, loss of
 19 Visa to Amex, so A should be just Visa, not Amex:
 20 "Damages calculation, loss of business to Amex."
 21 Then we have got two other points on Mr Harman's
 22 Section 9 and the credit. But A and B, 604 A and B, are
 23 the Visa and the Amex counterfactual.
 24 At paragraph 6.10 -- so we start with the Visa
 25 counterfactual -- Dr Niels reduces Sainsbury's damages

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1 on the basis -- lower MIF than Visa, lost market share:
 2 "The only evidence relied on is the factual decline
 3 in MasterCard's debit card transaction. It takes the
 4 debit card decline to 3 per cent and simply applies this
 5 analogy to credit cards, and, on this simple basis,
 6 MasterCard effectively wipe out the claim for the
 7 overcharge".
 8 We say it is wrong for four reasons, so we are now
 9 on damages, and to a certain extent they overlap with
 10 the previous. The first one, again, is my suspicion of
 11 unlawful conduct by Visa. Maybe this quote should have
 12 been earlier on, but again, we rely on the OFT v British
 13 Airways case at 612. At 613, Mr Perez and Dr Niels both
 14 accepted in cross-examination it was common knowledge
 15 that Visa was being investigated:
 16 "Same three anti-competitive vices...(Reading to
 17 the words)... same damages counterfactual would apply".
 18 Then we have got Dr Niels, you know, which
 19 assumption are you going to make:
 20 "Yes, I think...(Reading to the words)... forced to
 21 set its MIF lower".
 22 So again, this is from Dr Niels saying, well, his
 23 analysis would apply equally to Visa. Yet somehow there
 24 is trouble with my assumption that you cannot just
 25 assume -- or you cannot just assume that Visa is --

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1 there is nothing wrong with Visa.
 2 MR SMITH: Well, isn't there also an assumption that
 3 merchants like Sainsbury just sit back and let it all
 4 happen? We have mentioned on a number of occasions this
 5 week the possibility of a bilateral negotiation, and we
 6 put it to Dr Niels that there might be such negotiation
 7 in this case, and he suggested that that was wrong
 8 because Sainsbury's would take a short-termist view and
 9 stick, as it were, to a MIF of zero. But then it is
 10 reasonably obvious, is it not, that if one does that,
 11 there will be such a migration to Visa, assuming they
 12 keep their MIFs heartening. Wouldn't that incentivize
 13 a large merchant like Sainsbury to think: well, sticking
 14 to a zero interchange fee might be very good for us in
 15 the short run, but in the medium run we are going to be
 16 left with the very high MIF of Visa.
 17 I am obviously assuming that Visa are unaffected and
 18 untrammelled by what is happening to MasterCard.
 19 Doesn't that analysis, the commercial interests of
 20 Sainsbury, have some sort of place to play in this
 21 counterfactual?
 22 MR BREALEY: Absolutely. It is a point, I think, we make at
 23 625. What, sir, you are doing, is taking me to the
 24 facts, and I totally agree, the position of retailers
 25 cannot be ignored. It cannot simply be assumed that

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1 retailers will sit quietly back and will be prepared to
 2 pay higher fees.
 3 MR JUSTICE BARLING: You mean higher fees from Visa in the
 4 counterfactual?
 5 MR BREALEY: Yes.
 6 MR JUSTICE BARLING: Because what the retailers are faced
 7 with, then, they have -- you know, they have
 8 a substantial MSC to pay when people use their Visa
 9 cards, and they have a very considerably lower MSC when
 10 people use their MasterCard on this counterfactual,
 11 don't they?
 12 MR BREALEY: They will vote with their feet.
 13 MR JUSTICE BARLING: Well, you would have thought it would
 14 be odd if, in that situation, there weren't rumblings
 15 about, ultimately, surcharging, and/or refusing, even,
 16 if -- I mean, you would have thought that the size of
 17 that differential then, or the starkness of it, would --
 18 MR BREALEY: Well, one sees what happened with Amex.
 19 MR JUSTICE BARLING: Well, yes, in the Amex negotiation.
 20 Yes.
 21 MR BREALEY: As I think Mr von Hinton Reed said, you know,
 22 in the real world -- and I think this is what you are
 23 putting to me -- in the real world, if you are going to
 24 have a scheme that one is a 2 per cent MIF, on
 25 a bilateral, say, and one is a 9 per cent or 8 per cent,

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1 that you are not going to be very happy when,
 2 historically, it was basically similar, and you are
 3 going to start choosing the one that is cheaper.
 4 MR JUSTICE BARLING: You are going to start looking around
 5 for ways in which you can --
 6 MR BREALEY: Do it. Yes.
 7 MR JUSTICE BARLING: And equally, though, there may be some
 8 pressure on the retailer to -- you know, to do something
 9 for the -- in a bilateral negotiation. So you might see
 10 Visa, as it were, taking a more realistic view, and you
 11 might see Sainsbury's and Tesco and others saying to
 12 their acquirers, you know, "Okay, we are prepared to pay
 13 something".
 14 MR BREALEY: And I endorse all that. This is what we try to
 15 do in this section here. All I am trying to urge on the
 16 Tribunal at the moment is a deeper point, and the deeper
 17 point is, where you have two four-party schemes in the
 18 UK, both have been investigated, both have been found to
 19 infringe Article 101 because the MIF is fixed
 20 competition, and in a claim for damages, one of the
 21 schemes says, "I need that restriction of competition to
 22 compete with my rival", is the Tribunal going to ignore
 23 the history relating to Visa? That is a judgment call,
 24 obviously, for the Tribunal.
 25 MR SMITH: I quite see that, Mr Brealey. I suppose what is

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1 troubling me slightly is that if one looks at the
 2 position of Sainsbury in this counterfactual world, and,
 3 again, contrary to what you are urging us to do, we
 4 ignore the effects of Visa and just assume they carry on
 5 as before, there are a number of possibilities in the
 6 counterfactual world which suggest themselves
 7 to Sainsbury.
 8 Just looking at the figures that you helpfully
 9 provided us yesterday, we see that the Visa debit card
 10 transactions, even accounting for a lower interchange
 11 fee, amounts to 250 million over time, whereas the
 12 credit card transactions with a Visa are 88 million, so
 13 they are much smaller, and the position is the exact
 14 reverse in the case of MasterCard. And that reflects
 15 the market share information that MasterCard provided us
 16 with.
 17 MR BREALEY: Yes.
 18 MR SMITH: So one option, I simply put out there as
 19 something which springs out from the figures, is that
 20 Sainsbury could say unless Visa are realistic about the
 21 MIF they are charging, they will continue to accept Visa
 22 debit cards but they will not accept Visa credit cards,
 23 and they will negotiate something else with MasterCard
 24 that reflects the commercial realities.
 25 MR BREALEY: Absolutely.

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1 MR SMITH: So there are a number of factors which seem to
 2 come into play which don't necessarily drive one to the
 3 conclusion that MasterCard is going to go out of
 4 business, even if one doesn't make the assumption that
 5 Visa follow MasterCard down to a zero MIF.
 6 MR BREALEY: Correct. I would accept that.
 7 Basically, what is being presented to the Tribunal,
 8 as we have just seen, is that you can just look at the
 9 Maestro story and that is it. Same curve, same
 10 everything. What, hopefully, the evidence -- at least
 11 as has come out -- is to support that very thing, which
 12 is that it is a lot more complicated than that.
 13 Mr von Hinton Reed says that you cannot ignore the
 14 position of the retailers. It is not just that downward
 15 curve to 3 per cent on the basis of Maestro. And
 16 I fully endorse that. That is how key -- I have
 17 probably left that until last, but we do endorse that.
 18 But I still urge the more nuclear option, which is that
 19 you cannot assume that Visa ...
 20 Just to emphasise a few more points on the factual
 21 side of it now. I suppose we have looked at the
 22 retailers, which was our fourth point -- it went
 23 slightly out of ...
 24 If one goes to paragraph 619, "Other factual
 25 considerations", where we are essentially looking at the

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1 facts now. So, "Other factual considerations", the
 2 first point -- so it is slightly out of order, but if
 3 I can take 619 and 621 together, so 621:
 4 "In the damages counterfactual, MasterCard's MIF
 5 would be exempted at ...(Reading to the words)...
 6 counterfactual world ..."
 7 We don't have to prove beyond doubt this is going to
 8 happen; it is a counterfactual at the end of the day.
 9 But we rely on 619, where MasterCard wrote to the
 10 Commission marking-up the draft undertaking to include
 11 the following:
 12 "In view of the Commission's policy to treat ..."
 13 Is this confidential?
 14 NEW SPEAKER: Sorry, it is from "On 13 March 2009", yes.
 15 MR BREALEY: Okay, so if I can just ask the --
 16 MR JUSTICE BARLING: We will read it.
 17 MR BREALEY: Basically it matches the ...
 18 (Pause)
 19 Looking at the other factual considerations, in my
 20 submission you can, realistically, conclude that Visa
 21 and MasterCard would be broadly the same when it comes
 22 to an exemption. And that is exactly what has happened
 23 in the actual world.
 24 It is not as if it is even in the real world. The
 25 real world is they have been treated exactly the same:

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1 they are 0.2, they are 0.3. They were -- as a result of
 2 that from the competition investigations and as a result
 3 of regulations. That is the real world.
 4 The second point I rely on is this, "The greater the
 5 perception, the less risk of loss", which is teased out
 6 from what MasterCard knew, what they thought, and -- so,
 7 basically, I don't know if the Tribunal is familiar with
 8 this, but I asked the question:
 9 "My question is, you referred before the Commission,
 10 you referred to it as a ..."
 11 That is confidential?
 12 MR JUSTICE BARLING: We will just read it.
 13 MR BREALEY: It is the last four lines of Mr Perez' quote of
 14 his evidence.
 15 MR JUSTICE BARLING: Yes.
 16 MR BREALEY: "The greater ..."
 17 And that is entirely consistent with what Dr Niels
 18 said about Amex. I don't think this is confidential:
 19 "I consider that the constant threat of being
 20 designated could have affected Amex's incentives such
 21 that it did not pursue a strategy to increase its market
 22 share considerably in Australia, as being designated
 23 would have led to its charges being capped in a similar
 24 way to MasterCard and Visa."
 25 That evidence from him is absolutely consistent with

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1 what Mr Perez was saying. Again, it comes back to the
 2 debate we have been having, that if there is
 3 a suspicion, a risk, whatever it is, a likelihood, of
 4 your main competitor being designated, treated in the
 5 same way, it makes it more unlikely that you are going
 6 to lose business. It is more unlikely that the issuing
 7 banks are just going to change the name of the card from
 8 MasterCard to Visa if they know they are going to have
 9 exactly the same problem.
 10 The third point is the question of damages. You
 11 can't ignore the fact -- it is the British Airways
 12 case -- that even if -- is Visa really, realistically,
 13 going to accept all this when there is a damages claim?
 14 So, all this regulatory, private enforcement, in
 15 circumstances -- and again, one has to ask the right
 16 question. This is a competition case. It is not just
 17 Mr Perez waking up on a Monday and saying, "Boys, we are
 18 going to go down". One is looking at a counterfactual
 19 in a competition case. One has to look at the
 20 regulatory context. So we know that you look at it in
 21 the economic and legal context, and that must include
 22 the regulatory context, it must include the private
 23 enforcement context, the legal context.
 24 I don't know whether we are going to take a break or
 25 we are going to take a break? I know we are finishing

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1 at 4 o'clock.
 2 MR JUSTICE BARLING: We will have a short break.
 3 (3.25 pm)
 4 (A short break)
 5 (3.35 pm)
 6 MR BREALEY: What I intend to do before 4 is I will just go
 7 through the rest of the damages, the counterfactual,
 8 look at Maestro, look at Amex.
 9 If I could just make two points before we go on to
 10 that. We are in the damages counterfactual at the
 11 moment. The damages counterfactual, just to highlight
 12 the point, forgetting Visa for the moment, the damages
 13 counterfactual will be based on any exemption that
 14 MasterCard would have, so assuming that the Tribunal
 15 considers it a restriction of competition, and assuming
 16 the Tribunal considers there is sufficient evidence of
 17 an exemption, when you get to the damages
 18 counterfactual, that is the difference.
 19 I am going to come on to Mr Hoskins' broad axe
 20 probably on Monday, but certainly on our case, if you
 21 accept Mr von Hinton Reed's evidence on exemption, when
 22 you are looking at the damages counterfactual you are
 23 looking at MasterCard being exempted on our basis,
 24 possibly on their basis, and Visa untainted.
 25 MR SMITH: But if we are putting it in terms of a general

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1 legal test, I think it was in MasterCard's pleadings
 2 where they said that the damages is the difference
 3 between the interchange fee actually paid by Sainsbury
 4 less the highest lawful interchange fee that MasterCard
 5 could have levied.
 6 MR BREALEY: Correct. All right, but I will deal with the
 7 broad axe point now, which is that that doesn't mean to
 8 say that -- for example, it doesn't mean to say that
 9 MasterCard are not under an obligation to adduce robust
 10 and convincing evidence of exemption. There is still an
 11 obligation for them to do that. You cannot just say,
 12 "Because that is relevant to our final quantum ..." that
 13 you can adopt broad axe on exemption. Maybe I will
 14 come to that on Monday. We certainly disagree with any
 15 notion that a broad axe can be wielded at exemption.
 16 The first point is that if there is a restriction of
 17 competition, there has been an unlawful demand, and it
 18 would be -- so forget exemption, so let's assume the
 19 Tribunal says, "I don't like Dr Niels, I don't like
 20 Mr von Hinton Reed, I see there is a restriction of
 21 competition, no exemption", we would still have a claim
 22 for damages, obviously. That might be the difference
 23 between what we actually paid and what the Tribunal
 24 concluded was to be paid on a bilateral basis.
 25 MR SMITH: I suppose it is a different question in the sense

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1 that what we have to do is to determine whether -- and
 2 I am on the exemption question here -- as a matter of
 3 fact, looking at all the evidence, the MIF either as
 4 set, or as it might have been set, is exemptible or do
 5 we take it at one remove and say, "Well, suppose, in the
 6 counterfactual world, the MIF had been scrutinised, what
 7 are the possibilities of a regulator exempting the MIF?"
 8 It is the former rather than the latter.
 9 MR BREALEY: It is the former. Absolutely. Otherwise you
 10 are taking -- you are assuming an exemption when they
 11 haven't met the strict conditions for exemption.
 12 MR JUSTICE BARLING: We are not exempting it, we are just
 13 arriving at what the level is.
 14 MR BREALEY: I think you are --
 15 MR JUSTICE BARLING: I have only just thrown that out
 16 because --
 17 MR BREALEY: I think you are exempting it. You have
 18 a situation where -- well, since 2007 someone has been
 19 charging a price which is, on one view, unlawful, and
 20 now -- but the person who is charging the unlawful price
 21 says, "Well, actually, it could have been exempted at
 22 roughly the same price or a lot lower". So I think the
 23 Tribunal does have to conclude -- in order to save
 24 MasterCard from paying the difference, for the sake of
 25 argument, between zero and 0.9, it has to arrive at

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1 a conclusion that the MIF was exempted, and therefore
 2 lawful.
 3 MR JUSTICE BARLING: I mean, if we grant an exemption, we
 4 grant it against all the world then, don't we, the
 5 UK MIF --
 6 MR BREALEY: Well, it doesn't bind the world, it only binds
 7 MasterCard.
 8 MR JUSTICE BARLING: Yes.
 9 MR SMITH: I suppose that was the question I was groping at,
 10 and the Chairman put it much better than I did. We are
 11 not actually talking about exemption here -- unless we
 12 exempt the rates actually charged -- but we are talking
 13 about what is the highest level that would be
 14 exemptible, looking at circumstances in the past. So it
 15 is not quite a --
 16 MR BREALEY: Well, I do disagree with that, with respect,
 17 and the reason I disagree with it is because we are
 18 coming to court -- or Tribunal, court -- and we are
 19 saying that there has been a breach of Article 101(1),
 20 and the breach of Article 101(1) has led to an
 21 overcharge. Full stop. Don't even get to exemption.
 22 Now, the burden of proof is on MasterCard to say,
 23 "Well, hey, that overcharge is not the difference
 24 between zero and 0.9, because, actually, I charged
 25 a lawful price because it would have been exempted

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1 at X". 0.3, for example, so actually, the lawful price
 2 was 0.3.
 3 MR JUSTICE BARLING: Is that a quantification damage point
 4 or causation quantification, in which -- or is it --
 5 I mean, I suppose there is a distinction -- whether it
 6 makes any difference I don't know -- between actual
 7 grant of an exemption retroactively for that period, and
 8 actually just calculating damages on the basis of
 9 a figure which we consider would be exemptible.
 10 I suppose there is a distinction in law between those
 11 two because one is just a concept of quantification of
 12 damage.
 13 MR BREALEY: I can half understand that, with respect, as
 14 long as it is not accepting Mr Hoskins' point which is,
 15 for us, in some way, to prove exemption. Or in some way
 16 it is for him not to meet the rigours that the European
 17 Court has set down for a person in his position to prove
 18 an exemption.
 19 MR JUSTICE BARLING: Because, as I understand it, your
 20 answer to his point is, you have gone as far as you have
 21 to go once you have proved the overcharge.
 22 MR BREALEY: Correct.
 23 MR JUSTICE BARLING: So, prima facie, you say that is
 24 your --
 25 MR BREALEY: I can go home.

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1 MR JUSTICE BARLING: That is your measure of loss, you say,
 2 prima facie. And if they want to go further than that,
 3 they have to show either that they either did charge
 4 a lawful -- because there was an exemption, it was
 5 exemptible, or can be exempted now, or the overcharge
 6 isn't as big because there was a level between the two
 7 points, extreme points, which was exemptible, or can be
 8 exempted now.
 9 I am just not sure whether it is, which can be
 10 exempted or is exempted. I don't know whether it
 11 matters.
 12 MR BREALEY: I mean, we have come to the Tribunal in kind of
 13 a spirit of co-operation, saying that -- we could have
 14 just had no evidence on exemption at all, but that would
 15 have been -- we would have nothing to rebut, we would
 16 have had a lot shorter hearing. But it is quite clear
 17 the burden of proof is not on us, and we realise, as
 18 a matter of practicality, that MasterCard are going to
 19 come to court, to the Tribunal, and say, "Hey, it should
 20 have been exempted at this level", and so we have come
 21 to match that. And we realise that it may be exempted,
 22 but, equally, the Tribunal -- I mean, I squarely put to
 23 Dr Niels, "Are you prepared to accept that what
 24 Mr von Hinton Reed, which is based on what the
 25 Commission has said, is in the range of possible

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1 exemptions?" and he says, "No", so it is technically
 2 possible for the Tribunal to say, "I am afraid there is
 3 no evidence -- I am not certain of any level of
 4 exemption".
 5 MR SMITH: I suppose what I am grasping at is this is not
 6 a regulatory situation where we are determining whether
 7 there has been a competition law infringement, and, if
 8 there has been, formally exempting it. What we have
 9 got, instead, is a claim for breach of statutory duty,
 10 where you are asserting that the statutory duty that has
 11 been breached is Article 101(1). There has been an
 12 infringement which you have to establish on the balance
 13 of probabilities.
 14 Now, if you succeed on that, then there is
 15 a question of what damages flow from that established
 16 infringement, and what I am getting at is: why isn't
 17 this a Chaplin v Hicks situation? Sorry, it is the
 18 beauty contest case.
 19 MR BREALEY: We had this in Enron. Yes.
 20 MR SMITH: Where what we do is we actually assess, not on
 21 the basis of balance of probabilities, binary, zero/one,
 22 but on loss of a chance; and how far does that feed into
 23 the question of, for instance, exemptability? So it may
 24 be the case that you say, "Well, in a quantification
 25 exercise you are not actually asking is it exemptible or

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1 is it not", a binary question, but you are looking much
 2 more at the one in ten chances of the lady in the beauty
 3 contest.
 4 MR BREALEY: Well, in my respectful submission, that would
 5 be a wrong approach, and the reason it is a wrong
 6 approach is because if I succeed in proving an
 7 infringement of 101(1), the charge that we have paid has
 8 been unlawfully demanded. It is an unlawful price. We
 9 are entitled to damages based on the -- what we should
 10 never have paid, which is that MIF. That MIF, that
 11 price, that has been set by reference to the
 12 price-fixing arrangement, should never have happened,
 13 and it is unlawful. It is just like the Hans Justu San
 14 Giorgia: I am entitled to that money back. It would be,
 15 in my respectful submission, a very retrograde step in
 16 that situation to say to the person who has infringed
 17 competition law in a claim for damages, "Well,
 18 I understand that you have to prove on a balance of
 19 probabilities, by reference to cogent evidence,
 20 exemption, but I am going to excuse you from that
 21 because the claimant has got a Boyes and a Hicks, a
 22 beauty parade loss of a chance". And I am not sure what
 23 the loss of a chance is. It is a breach of statutory
 24 duty, we have suffered loss, and if MasterCard want to
 25 cut down our loss by saying, "Well, the difference is

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1 not between zero and 0.9, the difference is between 0.7
 2 and 0.9", then they can do it, but they have to do it on
 3 the balance of probabilities by reference to the
 4 standard required of an exemption.
 5 MR SMITH: Does it perhaps operate at two levels? So, for
 6 instance, if Mr Hoskins is saying, as, indeed, he is,
 7 that the MIF actually charged by MasterCard was
 8 exemptible, then that is something where he bears the
 9 full burden, and if he succeeds then you recover
 10 nothing, but if he is saying the maximum lawful
 11 interchange fee was whatever level it was, that is
 12 something which moves into the area of quantification of
 13 damages, and, therefore, is much more on the
 14 Chaplin v Hicks basis than the balance of probabilities,
 15 or would you say that was wrong as well?
 16 MR BREALEY: Yes. The prima facie measure of Sainsbury's
 17 loss is the overcharge, just as in a cartel case. The
 18 parties have got together and increased, inflated,
 19 a price. All my three anti-competitive vices now have
 20 come home to roost, and there is a judgment saying there
 21 was an infringement of 101, Sainsbury's has paid an
 22 inflated price. That should never have been charged.
 23 If there was no question of exemption because, for
 24 example, just no one bothered to adduce any evidence,
 25 that would be our measure of loss.

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1 MR JUSTICE BARLING: Well, subject to, you know, other
 2 issues like whether, had that MIF not been charged, as
 3 it shouldn't have been, not a penny of MIF should have
 4 been charged on that scenario, because it was all
 5 unlawful, there was no exemption, then the question is
 6 what would have happened, and if, for example, there
 7 would have been a bilateral somewhere, then that would
 8 affect your measure of loss, wouldn't it?
 9 MR BREALEY: Yes.
 10 MR JUSTICE BARLING: Which is what you said.
 11 MR BREALEY: Absolutely right. So if you conclude that,
 12 under a system of bilaterals, it would have been at
 13 0.2 -- for the sake of argument, our difference is
 14 between 0.2 and 0.9.
 15 MR JUSTICE BARLING: Yes.
 16 MR BREALEY: Now, if MasterCard want to say, "Actually, that
 17 is not the right measure of loss because I recognise it
 18 was an infringement of 101(1), but it was not unlawful",
 19 why is it not unlawful? Well, because it was exempted.
 20 I don't mind whether it is exemptible or exempted,
 21 but -- I think the better analysis is that it was
 22 exempted. In the past, the level would have been
 23 exempted. It would have been exempted at this level.
 24 MR JUSTICE BARLING: At this level. I think Mr Smith, with
 25 great respect, is right in his distinction, isn't he,

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1 because if we can give him an exemption, it can only be
 2 an exemption for what actually happened.
 3 MR BREALEY: Yes.
 4 MR JUSTICE BARLING: We can't give an exemption for some
 5 notional -- not give an actual exemption for some figure
 6 that is different to the MIF. I am thinking aloud.
 7 I know it sounds like a proposition but I am just
 8 thinking aloud. But we clearly can give an exemption,
 9 even in a damages case, I think we can, for something
 10 that has -- you know, for something that is
 11 a restriction. Maybe it is a distinction without
 12 a difference, but if, for example, we didn't give an
 13 exemption for the MIF that was actually charged --
 14 MR BREALEY: Which I don't think you can because no-one has
 15 actually -- well, maybe that is --
 16 MR JUSTICE BARLING: Well, I think they do actually, I think
 17 they do. I think MasterCard said that that was -- but
 18 we can, nevertheless, presumably, either as
 19 a quantification exercise, quantification of damage or
 20 as a -- whichever way you put it, partly the burden of
 21 proof, we can state at what different figure than the
 22 one actually charged it could have been exempted.
 23 MR BREALEY: My big caveat is it would be fundamentally
 24 wrong as a matter of principle to accept Mr Hoskins'
 25 point. And he might be quite happy with this exchange

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1 because he says that exemptible is a loss, and
 2 therefore, the vagaries of the exemption applies just as
 3 equally to us as to him, whereas they don't. We know
 4 that in order to get an exemption, the burden is on the
 5 person who has infringed Article 101, and the burden is
 6 to prove by cogent and convincing evidence, so it would
 7 be extremely unsatisfactory if a claimant seeking
 8 damages because of an unlawful demand was -- somehow,
 9 then, the burden of proof was shifted onto the claimant,
 10 whether the burden or a standard of proof.
 11 MR SMITH: Sorry, I am groping for the answer here, so do
 12 please take it as a grope rather than an attempt to
 13 articulate what the law is, but if Mr Hoskins is saying
 14 there is no breach of statutory duty because, although
 15 Article 101(1) has been breached, the MIF, as it was
 16 charged in the past, was exemptible, ergo no breach of
 17 statutory duty, then I would suggest rather tentatively
 18 it is simply a question of burden of proof on MasterCard
 19 to establish that, because that is what the rules are
 20 under Article 101. But let's suppose that battle is
 21 lost, and, therefore, an infringement of 101 is found,
 22 because the interchange fees, as they were charged, are
 23 not exemptible. What MasterCard then say is it was
 24 exemptible at a certain level, and there is then debate
 25 about what that level is, and both parties have their

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1 submissions on that. Isn't the approach that we have to
 2 take this, that recognising that, in order to achieve
 3 exemption, one has got to meet the four criteria of
 4 101(3), which are stringent, where the burden rests on
 5 the person alleging that the exemption should pertain,
 6 these are all factors that we feed into the question of
 7 assessment of probability, but at the end of the day it
 8 is all a question of probability rather than binary,
 9 one/zero, balance of proof.
 10 MR BREALEY: Personally I am finding it very difficult to
 11 see how you can have a claim -- you are looking at the
 12 probability where you haven't come to a -- if the
 13 Tribunal hasn't come to a conclusion that the MIF is
 14 exemptible at a certain level, so they haven't satisfied
 15 their burden, how that impacts on Sainsbury's' claim.
 16 I mean, Mr Hoskins says you can wield -- we are all in
 17 the realm of damages now, broad axe, everything is up
 18 for grabs, you can almost kind of possibly, it could be
 19 exempted at this, possibly it could be exempted at that,
 20 you are talking about something that is -- they have got
 21 to make something which is unlawful, lawful, because 101
 22 has the two bits, 101(1) and 101(3) and if we succeed on
 23 101(1) there is an illegality. There is a degree of
 24 unlawfulness, and the only way they can show there is no
 25 unlawfulness -- forget about probability of damages --

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1 is to establish that the MIF would have been exempted at
 2 a certain level. That is the only way they can
 3 eradicate the tag of unlawfulness.
 4 MR SMITH: Yes, that is true, but that is what applies to
 5 the MIF as it was actually charged, and yes, if
 6 MasterCard show that there was an exemptible level at
 7 the charged at level, then your claim fails in total.
 8 What we are talking about here is the situation where
 9 you have succeeded on liability, and what we are trying
 10 to establish is what, in the counterfactual world, where
 11 it is accepted that there has been a breach by
 12 MasterCard, what the maximum lawful interchange fee
 13 would have been, so in a hypothetical world --
 14 MR BREALEY: In the hypothetical world, and in my submission
 15 you can only delve into that hypothetical counterfactual
 16 world if MasterCard has, in fact, produced robust
 17 evidence and discharged its burden of proof that at
 18 a certain level the MIF merited an exemption.
 19 MR JUSTICE BARLING: I mean, I suppose it would be odd,
 20 wouldn't it, if they had failed to prove an exemption --
 21 I think it might be helpful to talk about exemption when
 22 we talk about the actual charge, so they haven't --
 23 assume for a moment they haven't established an
 24 exemption for what they have done, and the question then
 25 is what could have been exempted. It would be odd if

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1 they, as it were, had a lesser burden when they have
 2 failed to prove an exemption, and therefore they have,
 3 in fact, acted unlawfully, but they wish to mitigate --
 4 well, it would be odd, I know they say that that is in
 5 fact the case because they say, "We are now, then, in
 6 the realm of you proving your loss", but it is perhaps
 7 slightly counterintuitive that the burden should shift
 8 at that stage.
 9 MR BREALEY: And my answer to that is; my loss is -- you
 10 take 101(1) and that is my loss, and if you want to come
 11 to court, to the Tribunal, and say that it is less than
 12 that, then you jolly well have to prove it.
 13 MR SMITH: Suppose this, it is a purely hypothetical
 14 question, where one has got the as charged for
 15 interchange fee, one obviously has a whole wealth of
 16 data as to how the market is operating, but if one is
 17 dealing with a hypothetical saying, "Well, okay, the
 18 interchange MIF at 0.9", or whatever it was, "Was
 19 unlawful, but actually at 0.5 it was lawful", but
 20 unfortunately we don't have all the wealth of data
 21 because that interchange fee was never charged, does
 22 that mean that when there is an evidential gap like
 23 that, such that, let's say for the sake of argument we
 24 can't, on the balance of probabilities, establish
 25 exemption, that means that there is no deduction from

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1 your damages at all, even though the Tribunal might
 2 think on the probabilities that there is somewhere in
 3 the scale an exemptible interchange fee.
 4 MR BREALEY: Well, again, I come back -- I don't think there
 5 is any concept, or the Tribunal should endorse any
 6 concept of a vague exemptible charge. To use your
 7 phrase, sir, it is a binary -- because otherwise, they
 8 are -- as my Lord says, they can't prove the exemption.
 9 They can't prove an exemption, so -- and they have the
 10 opportunity to come to court with all the data, they
 11 have got their economists, they have got their team, and
 12 all they then say is, "Well, we don't have to prove an
 13 exemption to eradicate the lawfulness", it is all
 14 a question of quantum and a possible exemption, so there
 15 are two possible exemptions, and you can go for that
 16 one.
 17 Come back, if they -- this is about them discharging
 18 a burden of proof to eradicate the unlawfulness, and you
 19 shouldn't be confusing the exemption and the probability
 20 of damage.
 21 The probability of damage must be based on them
 22 satisfying a correct level of MIF. it may well be that,
 23 you know, they were only 1 per cent off. I don't know,
 24 but as we know, no one has come to the Tribunal to
 25 defend the way that it was set. The way that MasterCard

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1 set the MIF was based on competition between two schemes
 2 plus Amex, and a certain element of cost which is
 3 completely and utterly outdated, and Dr Niels has not
 4 come to court to justify the way that the MIF was set.
 5 He has come up with two other methodologies to justify
 6 ex post facto the level, one of which is 0.7 as opposed
 7 to 0.8, and I would submit that that exercise has to be
 8 done on the basis that MasterCard have a burden of proof
 9 by reference to cogent evidence. It can't be laid at
 10 our door to say, "Well, all they have to do is, on the
 11 balance of probabilities save whoever, two or three
 12 exemptible MIFs and then you calculate the damages on
 13 that basis".
 14 MR SMITH: Right. So to absolutely clear, let's suppose we
 15 reach a view that the MIT-MIF that you are contending
 16 for comes within sniffing distance of exemptability, but
 17 we put its chances at 49 per cent of exemptability,
 18 rather than 51, on that basis, at 51, it is exemptible,
 19 at 49 it isn't, and you recover everything without
 20 deduction.
 21 MR BREALEY: I don't believe that the right approach to
 22 exemption is a loss of a chance, you know, a kind of one
 23 in ten. Where I think I could assist is that it is
 24 clearly open to the Tribunal to say exemption is very
 25 difficult, I have listened to a lot of data, it could be

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1 a range, I don't believe the range is huge, but I could
 2 see the range of exemption is this, because there is
 3 some doubt about the figures, and maybe that is, to
 4 a certain extent, where you are coming from, so, you
 5 know, the exemption would be, for the sake of argument,
 6 between 0.5 and 0.7 on their view.
 7 MR JUSTICE BARLING: You should get the lower part of that.
 8 MR BREALEY: Well ... well I think that is a question for
 9 the -- it is still -- well, actually, I think if they
 10 prove -- well, I don't know.
 11 MR JUSTICE BARLING: I am just reminding my colleagues of
 12 the time. But these are deep questions, anyway, and --
 13 MR BREALEY: You are telling me.
 14 MR JUSTICE BARLING: We have the weekend to cogitate over
 15 them.
 16 MR BREALEY: What I will try -- I mean, I will -- I am in
 17 the Tribunal's hands. I mean, we have only got a day,
 18 really, on Monday. I think the Tribunal knows the
 19 MasterCard and the Amex story quite well.
 20 MR JUSTICE BARLING: I wouldn't spend -- you know, we have
 21 got it in there, set out.
 22 MR BREALEY: Maybe it is better, because I have got three
 23 big topics, I have got exemption, pass-on and ex turpi,
 24 and Mr Spitz has got interest and benefits, so we have
 25 quite a lot to do.

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1 MR JUSTICE BARLING: There is a lot to do in one day. We
 2 have taken up a lot of time today, I am conscious of
 3 that, with our questions.
 4 MR BREALEY: The pass-on, and again, maybe the Tribunal
 5 could mull this over the weekend, it is in writing in
 6 some detail. Clearly it is confidential, and I can take
 7 it short by reference to various headings. I don't want
 8 to downplay the pass-on, obviously. It may well be that
 9 I will have to come back on it a little bit, but
 10 certainly on the pass-on thing that is the only area
 11 where there is deep confidentiality, and it may well be
 12 that one has read the pass-on section, then I can get
 13 a steer as to what maybe you need assistance on.
 14 MR JUSTICE BARLING: Take it for granted that we will read
 15 the pass-on section again.
 16 MR BREALEY: It is pretty straightforward.
 17 MR JUSTICE BARLING: Yes. Then you have always got reply.
 18 MR BREALEY: Not long.
 19 MR JUSTICE BARLING: Okay. Do you think there is any need
 20 for us to sit earlier or not on Monday?
 21 MR BREALEY: I probably wouldn't think that is bad idea.
 22 MR JUSTICE BARLING: Are you okay with that?
 23 PROFESSOR BEATH: I am fine with that. Start at nine if you
 24 want.
 25 MR BREALEY: Nine? Half nine? I really don't mind.

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1 MR JUSTICE BARLING: We could do 9.30 but I wonder, there is
 2 a limited -- you know, it comes to a point when everyone
 3 gets very tired if you have too long a sitting day, but
 4 if you think it would be helpful, we are happy to sit
 5 then.
 6 MR BREALEY: 9.30?
 7 MR JUSTICE BARLING: Is that all right? Okay.
 8 (4.09 pm)
 9 (The hearing adjourned to 9.30am on Monday, 14 March 2016)

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