**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 16th September 2024

Before:

Ben Tidswell

# Merchant Interchange Fee Umbrella Proceedings

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## A P P E A R AN C E S

Thomas Sebastian (instructed by Pinsent Masons LLP) on behalf of Allianz

Matthew Cook KC & Owain Draper (instructed by Jones Day and Freshfields Bruckhaus Deringer LLP) on behalf of Mastercard

Tristan Jones KC & Tom Coates (instructed by Hausfeld & Co. LLP) on behalf of Primark

Daniel Jowell KC, Isabel Buchanan Aislinn & Kelly-Lyth (instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

Philip Woolfe KC & Oscar Schonfeld (instructed by Scott + Scott UK LLP and Stephenson Harwood) on behalf of the SSH Claimants

Jack Williams (instructed by Willkie Farr & Gallagher (UK) LLP) on behalf of Mr Walter Merricks CBE

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**Monday, 16th September 2024**

**(10.30 am)**

**CASE MANAGEMENT CONFERENCE**

**[In open session]**

**MR TIDSWELL:** Good morning, everyone. We are on the live stream, so I should start with the customary warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that is punishable by a contempt of court.

I should just check, can everybody hear me properly? Good. Thank you.

Thank you all for a lot of material which I have to say has not necessarily come in the easiest and most digestible form. That's not a criticism because I appreciate it is quite a messy and complicated exercise and it's all happened in a short period of time. Just so you know, I have had a chance to look at pretty much everything, but I certainly couldn't pretend to be an expert in much of it. So to the extent we are going to need to get into the detail, you are going to need to help me with that.

How are we going to do this this morning? Who is going to lead this discussion? I think -- I don't know, Mr Woolfe, whether you are in charge or whether it is Mr Jowell, I think. Visa have provided a lot of this. Who wants to kick off with it?

**MR JOWELL:** We are content to kick off, if that's a matter of great contention.

**MR TIDSWELL:** It is probably the best thing to do as I think it's probably your agenda, Mr Jowell; is that right?

**MR JOWELL:** We certainly did the first draft of it.

**MR TIDSWELL:** Thank you, that's helpful. Just before we jump in, can I understand the agenda a little bit more. Obviously, we have some questions and broader questions, if you like, of principle here, and maybe just my point about how much we need to get into the detail. I am not sure I understand really what the position is with the Redfern requests, save perhaps that it is obvious that we have an issue of principle about settled claimants. And we may need to get into -- depending where we go with that, we may need to get into those requests because they are blanket refusals.

I have also seen the helpful note from Willkie Farr, Mr Williams, in which you set out what your live requests are.

Apart from that, I am a little bit unclear, Mr Jowell, as to what is live on the Redferns. We needn't get into it now. The whole point of this and at the starting point of setting this hearing up was to be able to deal with the Redfern requests. I appreciate it has spun off some other things and we, clearly, have to deal with those. I didn't want to find we didn't have a clear resolution of anything that's in the Redfern schedules that should and could be determined today.

**MR JOWELL:** I think that's a very fair question, if I may say so. From Visa's point of view there is really nothing we want you to resolve on the Redfern schedules today, but there are issues that, if you like, arise out of the Redfern schedules really as to the adequacy of the disclosure, but we don't expect the Tribunal to be in a position to resolve those today. It may help you if I set the scene a bit and then I think it will all become clear, at least from our point of view.

**MR TIDSWELL:** That would be helpful. Before you do that, can I just check with Mr Cook, because that's probably the only other place I don't really have a sight line on that.

Mr Cook, obviously you have the points you make about the settled claimants; have you got a list of things -- specific Redfern requests you want to pursue today and, if

so, broadly how many of those?

**MR COOK:** Sir, I think, as Mr Jowell will probably come to develop in a moment, we are in slightly the same boat as him in the sense that documents have come in very much at the tail end of last week. You know, that's not a criticism particularly, that is just a statement of where we are. We have reviewed some of those and they don't seem to sort of meet our requests entirely. There are also various other promises about witness statements and about searches that have been undertaken. We would like more information on those. They are agenda items 1 and 3.

So, there is the difficulty which is, you know, we are not in a position to know exactly what the scope of the disputes are in the way we would like to for a hearing of this kind. You know, we and Visa have taken an entirely different line here in terms of whether the purpose of this hearing, as you alluded to, sir, was to deal with the Redfern schedules.

We are not at the perfect stage to do that, but that is what this hearing was about. We are ready to deal with matters the best we can. It doesn't help, as you alluded -- as is the point of principle between us, and particularly the SSH Claimants, the point of principle they say they have settled with us, that's the end of the story, and as a result have largely deployed that point of principle in response to our requests in general.

So essentially, if that point of principle goes in our favour, it is not clear to me what the position is in relation to our requests more broadly because they are often denied simply on that one line alone.

So in relation to the SSH Claimants, most of our requests are still live because they are denied on that point of principle. Some of them, the position is more murky than others for the reason I have said. If the Tribunal decides today is the right time to resolve Redfern requests, then that's what I am here to do, sir.

**MR TIDSWELL:** That's helpful. I absolutely get the point you have received

documents, as you say, in accordance with the way the thing was set up and you now need to decide whether or not they address the issues.

I suppose the point really is to -- I think the hearing was set up in order to resolve issues from the Redferns. I think the way it was originally set up was that I would look at the schedules and would have the hearing if it was necessary as I couldn't do it on the papers.

Now, I understand things have evolved and that's fine. I don't have a problem with that. Clearly, we are here, so we ought to make best use of it. It feels as if we are going to get to the point where there are going to be some things we can specifically look at, particularly settled claimants, if we get to the point where the point of principle does go in the requester's favour, as you say, Mr Cook.

What I would be keen to ensure was -- and we can come back to this at the end -- is that we have a process that resolves any remaining disputes that might come out of the review of the documents and so on. That's on the list your things, I am sure, Mr Jowell. Indeed it's our item 6, isn't it?

So, I don't think -- it is absolutely fine then. If that's the position that, subject to the points we have discussed, there is not a long list of Redfern issues to resolve, that's fine.

**MR COOK:** Sir, just to be clear, that wasn't where I came out on that, which is if we resolve -- you know, if the point of principle is resolved in our favour on settled claimants, there is a series of outstanding requests from us.

**MR TIDSWELL:** I understand that --

**MR COOK:** If the settled claimants then pursue disagreements of more granular detail, we would need then need to get into those.

**MR TIDSWELL:** I understand that. I put those to one side, it's the rest of them I am bothered about. Clearly, we will have to deal with settled claimants one way or

another.

Fine. Okay, let's jump into the other issues.

Mr Jowell, I have probably taken all of that out of your mouth.

**MR JOWELL:** Not a bit. Not a bit. You will have seen on the agenda, I intend to address you on issues 1 through 3 and briefly on -- touch on 5 and on 6, but I will not be addressing you on issue 4, which is really a Mastercard issue, which relates to the settled claimants.

**MR TIDSWELL:** Yes.

**MR JOWELL:** Now before I get into the weeds, I think it would be helpful if I just take a step back for a moment for a minute or two, just to explain how we see the potential relevance of this documentation and how it fits into the issues that are likely to arise at trial, just so everyone is clear about that.

Now, as the Tribunal will appreciate, our case -- or the approach of our experts, really, starts with the observation that MSCs and MIFs are variable costs that are felt industry-wide.

In accordance with conventional economic theory, the prediction is that for companies to remain profitable they will entirely, or very largely, pass-on costs of that nature in the price of the goods that they sell.

So to estimate the extent of pass-on, our experts propose to analyse data by way of regression analysis in each sector using the proxy of other costs that are also variable industry-wide costs.

So on that approach I should just make it clear, that's our primary approach. None of the qualitative evidence, the witness statements, or the documentation relating to them is really we say going to advance matters. It's not really going to assist the Tribunal in due course.

But, of course, we recognise that the defendants have a different view of the world,

and they say, "Well, we put forward our self-selected willing claimants that provided data on their costs and prices and some of them" --

**MR TIDSWELL:** You mean the claimants, Mr Jowell? You said "the defendants".

**MR JOWELL:** Forgive me. I meant the claimants. I misspoke. Forgive me. The claimants, of course.

Some of those willing claimants then put forward the witness statements that you will have seen, that typically attest to the fact when setting prices for their goods from day to day or week to week, they don't in the short run, they say, have regard to MSCs. And they assert also typically that MSCs are treated as part of overheads, most of which are fixed.

So on that basis their case is essentially either there is no pass-on or it should be calculated by reference to regression against overhead costs.

Now there are a number of difficulties we say with that approach and they'll need to be addressed in our negative case. One of them, of course, is how can you reasonably infer from these self-selected claimants that they are representative of their sector as a whole.

But another difficulty is, we say, the fact that prices aren't set directly by reference to MSCs day to day or week to week does not mean that changes in the level of MSCs would not be reflected in prices in the medium to long term.

We say that's because there are numerous other indirect means by which those variable industry-wide costs will find their way ultimately into prices. It may be, for example, people price by reference to their competitors' prices and those competitors take into account MSCs, or it may be they intermittently set prices by taking into account a target margin like EBITDA that incorporates MSCs or that those EBITDA targets form part of an executive incentive structure and so on and so forth.

There are many -- we say just when a river is blocked, the water will still flow downhill

by other channels and streams, so too will variable costs that are industry-wide ultimately be likely to seep their way into the prices charged.

That's the critical context in which we seek these requests for documentation in the Redfern schedules. We say that it will allow us to probe, to test the accuracy, or more importantly perhaps the completeness, of the assertions that are made in the witness statements.

Now this hearing was, as you've alluded to, anticipated with reference to resolving disputes in the Redfern schedule, which we understood to mean really disputes over the relevance of the categories of documents sought by Visa.

Now you will see from the Redferns that actually only, at least in Visa's case, very few of the requests have been contested on the grounds that the documents weren't potentially relevant. In a handful of cases where there have been disputes over relevance, we have tried to be sensible and we haven't pursued those requests.

So the question then is: what are we doing here today? The answer is that the responses are defective in a rather more fundamental way because the problem is although they don't contest in many cases the relevance of the documents, many of these claimants have just not come up with the goods. They have not produced any documents in the relevant category.

Now in the very limited time that we have had we, and particularly the experts, have been poring over these documents. It is clear in many cases they are materially incomplete. To take the example of one claimant -- I think who probably strictly should remain confidential, because the Redferns are themselves confidential -- but one of the claimants has literally responded by producing no documents at all in response to any of Visa's requests.

In the case of other claimants, we have nil returns in some categories and very slender and inadequate returns in other categories.

Now obviously we have worked very hard to try to analyse this in the time and we have produced a table, which I think you will find at the back of the bundle, where we have tried to identify the various inadequacies.

But the bottom line is that if they don't produce these documents, then that stymies our ability to test their case and it prevents us from establishing, conclusively at least at trial, that the alternative channels for pass-on exist.

The problem is exacerbated by the fact that we don't know what are the nature of the searches that the claimants have carried out in response to our requests.

Now in the case of some claimants, Primark, they have been candid, at least in general terms, in saying their searches are only of what they say are "readily available documents". In most other cases, the claimants assert that they have conducted what they call "reasonable and proportionate searches", but we have no real sense of what either of those phrases really means in practice. Did they identify custodians and apply key words in the conventional way, with the usual disclosure process and, if so, which custodians and which key words?

Or did they perhaps just ask the Chief Executive, "Have you got any of these documents in your top drawer?" We simply don't know. Although we have asked them to describe their searches, they have resolutely all refused to tell us.

So we say they must really remedy that by either providing a disclosure statement or at least a description of the searches they have carried out, attested by a statement of truth.

Now the claimants have raised a number of arguments in response to that and I should, I suppose, just briefly deal with the two main ones by way of anticipation.

The first is they say, "Well, the Tribunal always made it clear there would be no standard disclosure"; and the second point they make is they say, "Well, Visa didn't engage back in March and April of this year when there were the original document

requests".

We say neither of those points are good reasons not to provide this information. First of all, we are not seeking standard disclosure. These are carefully targeted, specific requests. It's specific disclosure we are asking for and we are fully entitled to ask for it. One can't judge the adequacy of a response to a specific disclosure request that just says, "Well, sorry, we haven't found the documents following a search of some form", unless one knows what was the nature of the search that was carried out.

As to the point about us not engaging in March and April of this year, well, we didn't engage in the process because at that point it wasn't established that there would be any qualitative evidence, and our position was that it wasn't necessary.

But one of the points that the Tribunal made -- the Tribunal made two important points really in its April ruling. First, it said that the claimants were obliged to give a warts-and-all full and frank presentation in their positive cases, which we understood also to include adverse disclosure; and second, the Tribunal stipulated that there would be a process after positive cases for us to seek further disclosure, and it was indicated that such requests as we made would presumptively be granted.

That's how really fairness to Visa was preserved, and it would undermine that approach in our submission if the claimants were able to provide inadequate disclosure and then refuse even to describe what searches they have carried out. That's an approach that is going to undermine the ability of Visa, and indeed of the Tribunal, to properly test their assertions regarding their pricing, which was the whole purpose of the warts-and-all approach and the Redfern process, as we understood it.

That leads us then really to the question of: what does the Tribunal do about this situation? Because obviously we are getting, we appreciate, very close to trial and there is little time for further disclosure.

It seems to us that there are essentially two proper approaches that the Tribunal could

fairly take. The one alternative is the Tribunal could say: the claimants have been asked for these documents; they have failed to provide them; they refuse to describe the searches that they have carried out to provide them, and so at trial we put you on notice that we are likely to draw the inference that the documents probably do exist and would demonstrate these alternative channels.

And the corollary of that is that the claimants' quantitative evidence about their price-setting processes will have to be given really no or very little weight.

That would be very consistent with the approach that the President raised at the April hearing, noting that there would need to be this warts-and-all presentation by the claimants.

So that's one possibility. We draw a line on further disclosure, but at trial we then are entitled to submit that where the disclosure has been adequate, the qualitative evidence should be given no weight.

The other alternative is to give the claimants the opportunity to remedy their ostensibly incomplete disclosure by engaging in further searches and providing further disclosure. That approach too, we have to say, could be said to be consistent with the Tribunal's approach in April when the President did indicate that, as I said, there would be a presumption that requests would be granted. I think his words were "ask and you will get".

Now, for our part, Visa, we are ultimately neutral as to which of those two routes the Tribunal takes, but we do say that what wouldn't be fair would be to proceed to trial and then treat this inadequate disclosure as in some way being complete, and thereby potentially disproving the existence of the alternative channels that our experts have posited as extremely likely.

Certainly, we are very keen to avoid a position where it could be said at trial, "Well, if you thought it was necessary to have more documents than the claimants provided in

response to the Redferns, then you should have complained about it at the interlocutory stage and asked for more disclosure; now we are at trial and the disclosure is what it is and Visa is shut out from complaining about this".

That is what we say would be clearly unfair.

So, to summarise, we say that the only fair routes are either to draw a line under disclosure now, but make clear we can make the point at trial. But if the disclosure has been ostensibly incomplete and inadequate, then that should mean no weight is given to the qualitative evidence. Alternatively, the Tribunal can engage in a process by which further disclosure and searches are made.

Now whichever of those --

**MR TIDSWELL:** Sorry, Mr Jowell, if I may -- sorry to interrupt -- just to try to crystallise this a little bit further, I am not going to make any statement today about what inferences can or cannot be made at trial. I mean, that's a matter for the full Tribunal, not for me. That's just not something we are going to do. So that's clear, that is off the table. It may well be that is the way you want to run it at trial and that's a matter for you and your client to decide. Of course, you will have to make a case on that.

So just so we are clear about that, that's not going to happen today.

As far as your second option goes, it sort of begs the question as to what you want. I mean, I don't think it solves the problem by saying there is an opportunity for them to remedy it, because clearly they have made a decision they want to do it the way they are doing it.

I think the question -- the ball is squarely in your court as to what you want.

Now, in your schedule -- I am afraid I only saw it before I came into court and have only had a quick look at it -- you have gone through it and as best you can have been able to make observations about what you think doesn't look right. It seems to me we are -- it's very familiar territory here. A party has given disclosure -- it doesn't matter

on what basis -- a party has given disclosure and you have reason to believe it is defective. The ball in your court means it's up to you to identify what it is that gives rise to the supposition that it is defective and that may be because you found documents or (inaudible) documents that have not been disclosed. That's of course the classic application.

But it may be you do say -- I am not sure it is a brilliant argument -- "We have not had any documents". The problem with that argument is it depends what the question was.

I don't think there is any way around that. There is going to be no general answer to what looks like a set of very different issues that might arise in the disclosure and the way in which you have put them in your schedule.

I think this comes back to the point we canvassed a little while ago, which is that it is pretty clear to me this process isn't finished and we are not going to finish it today. To the extent that you have a view that the disclosure is defective in some way, and you have some evidence of that -- I don't mean evidence in the formal sense -- but you have a decent reason to advance as to why something more needs to be done, that needs to play out, doesn't it?

I don't want to put you in a position where you have to identify those things today, because clearly you are still absorbing some of the documents -- and actually we would have some difficulty I think in dealing with it in that way today.

But isn't the answer here that one way or another you have actually put -- you have done your best as you can at the moment, I will give you some time perhaps to think about whether you want to say anything further in your summary document, but that's you putting the ball back over the net, isn't it, and then we will see what the claimants have to say about it. Isn't that the way we deal with this in the form of a Redfern schedule and we can --

**MR JOWELL:** Yes. If I may, that's perfectly acceptable, but there is a step that needs to be taken, which is, if you like -- you are right. We have knocked the ball back over the net by identifying the deficiencies in the disclosure.

But there is a crucial next step, which is that we need to understand -- the claimants need to explain what their searches have been, because ultimately an inadequacy in a disclosure is really the same as an inadequacy in a search. If we say -- take, for example, the one claimant who has literally provided no documents in response to our requests -- I mean, there are theoretically two possibilities.

One is that those documents don't exist; the other, which I submit is rather more likely, given that no documents have been produced, is they just haven't carried out adequate searches. But until --

**MR TIDSWELL:** Sorry, let's deal with that on your schedule. Can you show me where that is?

**MR JOWELL:** That is -- if you go to the Redferns -- do we need to go into private if we refer to the Redferns.

**MR TIDSWELL:** I think you can just do it by page numbers. I am in your summary document.

**MR JOWELL:** The claimant that has produced no documents, you will see that in response to the Redfern which is A/3 at 22 to 32.

**MR TIDSWELL:** You can't give it to me in your summary document, can you? That's easier.

**MR JOWELL:** In our summary document it is 108.

**MR TIDSWELL:** Which page is that? I have a hard copy of that. Someone said page 10. Okay.

**MR JOWELL:** It is page 7 I think -- is that -- no. 1053 in the electronic I am told.

**MR TIDSWELL:** 1053 in the electronic. It is the box at the bottom, is it?

**MR JOWELL:** It is the one that says -- I can tell you what every one of their responses say, I think the same thing. They all say --

**MR TIDSWELL:** I can see it here.

Mr Woolfe, are these names confidential? There is no reason why we shouldn't be referring to them, is there?

**MR WOOLFE:** I don't think there is no reason you shouldn't refer to the names. The concern about the Redfern schedules is the articulation of the requests, obviously in substance refers to the claimants' approach to pricing in some respects, and also to bits of the witness evidence which are also designated confidential. Hence as a whole they are confidential in the confidentiality ring.

Obviously, the name of a claimant who said "no" to things is not in a sense ...

**MR JOWELL:** I am very grateful. In that case Holland & Barrett, every single one of their responses simply say none on the basis that "reasonable and proportionate searches have not revealed any responsive documents".

Now, our problem is we can say until we are blue in the face that these are relevant documents, but unless and until it is explained what these supposedly reasonable and proportionate searches have been, we have nowhere really to go, other than to stamp our foot and say, "Don't be silly, of course you do have documents in these categories".

**MR TIDSWELL:** It depends a bit on -- a lot of that -- you identified the search and the disclosure as being points of risk, but also the questions as well, doesn't it? If you have asked questions about documents that don't exist and they have looked for them and can't find them, that's not surprising -- that's sort of the point of the Redfern schedule, isn't it? That's the way in which --

**MR JOWELL:** That's right, but they haven't -- if I may, they haven't contested -- they have not said -- they haven't said, for example, "These documents are not relevant". They have not said, "We never have documents in this category, they just don't exist".

They just say, "We carried out these 'reasonable and proportionate searches' and nil returns".

Now, you know, if they have just written to their client and said, "They are after these documents, do you have them?", and they have said, "No, sorry, can't find them, too difficult", well, that doesn't tell us anything. If they have actually done a proper disclosure process and identified custodians, done key word searches and so on, then that's a different matter.

**MR TIDSWELL:** Yes.

**MR JOWELL:** That is why it really is so critical, we say, that the next stage has to be -- for the next stage to be productive we need to have a description of what the searches were, because then one really needs a dialogue in which we say, "Well, I am sorry, but clearly you haven't done adequate searches".

**MR TIDSWELL:** It might be helpful actually -- I think you did initially seek to take me to the Redfern and when you go back to it, I think you are probably right, it is a more helpful document. Can we have a look at that? It is page 27 of the bundle where we can see your request -- and here we have to be -- as Mr Woolfe says, we have to be careful about what we say in open tribunal.

**MR JOWELL:** Yes.

**MR WOOLFE:** Perhaps if I can help on that, sir, generally speaking the bits that cause concern are in what I call "column 2", which is the explanations of the documents are requested and then sometimes in the next column, which is the response to the request. Obviously the nature of the request itself was set out in the original Redfern, which was not designated as confidential I don't think by the defendants, that their requests, as it were, were not confidential (inaudible).

**MR TIDSWELL:** That is helpful. Thank you. So, Mr Jowell, you have asked about documents which evidence how (inaudible) was set and documents evidencing how

they changed in relation to changes in costs. You have been given an answer which refers back to a witness statement -- sorry, you have based that on the witness statement, haven't you?

**MR JOWELL:** Yes.

**MR TIDSWELL:** They have come back and said, "We have had a good look and can't find anything". They have given up some extra explanation in there which may or may not deal with the point. We are not getting into -- I don't think we are trying to resolve -- we are not trying to resolve the Redfern.

**MR JOWELL:** No.

**MR TIDSWELL:** I am just trying to understand how this process is going to help resolve it, if I can put it that way.

**MR JOWELL:** The explanations -- well, you used the phrase -- you have used the expression "had a good look" and they used the expression "carried out reasonable and proportionate searches", but the crucial thing is we need to understand what those were because the explanations for the most part are very, very short and uninformative.

**MR TIDSWELL:** I am not sure I accept -- I think there's a step in the middle of all that, isn't there? Don't you need -- if they had come back and said, "We have carried out a reasonable, proportionate search and we haven't been able to locate any documents", then on the face of it, you know, normally that would be the end of it, wouldn't it? Unless you can point to something that suggests that that doesn't actually make any sense.

**MR JOWELL:** Well, I think the normal process is that a person that carries out a -- says -- wishes to establish there is not a document in a particular category and that they have carried out a reasonable and proportionate search describes what the searches are that they have carried out. That is these days the almost invariable

practice in courts because one has to -- there is normally -- indeed, in advance of disclosure there is normally a dialogue in which custodians are proposed and search terms are agreed.

**MR TIDSWELL:** You are talking about a general disclosure exercise. I understand that.

**MR JOWELL:** I think that's right, but I think even in relation to a specific disclosure exercise, one expects an explanation of the nature of the searches, otherwise the other side -- the other party is really in an impossible position because they don't know what is the nature of the search that has been carried out. So, they are not in a position to contest it. So there does need, in our submission, to be some explanation of what has been done by way of the searches, otherwise we are taking it as just an article of faith. One man's reasonable and proportionate search is another man's wholly inadequate search.

**MR TIDSWELL:** I have your submissions on that, why don't we move on.

**MR JOWELL:** Yes. So, we say that that is absolutely essential otherwise we are not really -- we are just getting self-selected claimants putting in evidence with only sort of self-selected disclosure, which is clearly not -- wouldn't be compatible with a fair trial. Now, the other aspect of this is one does have -- in a number of these responses one has these explanations, as they put it. Some of these are short explanations; some of these are really important assertions. These really relate to the operation by the claimants -- they are allegations about the operation -- effectively, the way in which the claimants operate their businesses.

**MR TIDSWELL:** Are you now moving to item 2 on the agenda?

**MR JOWELL:** Yes, I am.

**MR TIDSWELL:** Thank you.

**MR JOWELL:** The assertions don't identify the source of the information. They don't

state whether this is derived from a document, or from information provided by a person in the business or if a person -- the identity of the person.

Now, if the claimants want to rely on those statements at trial, then we say that that information -- those assertions should be placed in witness statements and the makers should be called at trial, at least if it is based on witness evidence rather than documentary.

**MR TIDSWELL:** Hang on a minute. Just so I understand that, isn't there a difference between the claimants seeking to introduce evidence which they want to rely on at trial, and I would have thought your entirely justified insisting that be done properly by way of a witness statement, and explanations given in response to requests for disclosure, which may or may not have some relevance to matters at trial, but are not things the claimant intends to rely on?

I mean, if the claimant wants to rely on evidence at all, then it has to put a witness statement in; that is fairly obvious, isn't it? If it doesn't do that, that doesn't preclude you from relying on the statement if you want to cross-examine on it. But, there sort of seems to be a little bit of an elision of, if you like, the substance of the claimants' evidence and the inadequacies in the disclosure.

Clearly, if you are asking me to order witness statements to be made in relation to inadequacies in disclosure, then you do have to reach a certain hurdle for that, I think. You don't just get that as a right. I am not sure which one of those you are referring to.

**MR JOWELL:** You make a very fair point, if I may say so. I think one can deal with it in two categories. Insofar as they wish at trial to point to any of this evidence -- any of these statements and rely on them as evidence, then they have to be in witness statements. And to be fair, some of the claimants have clearly recognised that. So Primark, for example, has offered to provide this information in the form of witness

statements and we, of course, said we accept they are entitled to do so.

Allianz have said, "We don't want to rely on it, we won't put in witness statements, so we are going to withdraw these explanations". Others, it seems, wish to have their cake and eat it, want to be able to come to trial and say, "As we told you in this schedule, this is the way our business operates". If they want to rely on that at trial, I think we were agreed, sir, that that has to be put in a witness statement. And I think there's nothing between us. I agree there is, if you like --

**MR TIDSWELL:** Just before you move on from that, I am talking about the substance of their case, but if, for example, you know, somebody is put in the witness box, Miss X is put in the witness box by the claimants and then you cross-examine Miss X about the adequacy of disclosure and put to them that certain documents have not been disclosed and they should have been, to undermine the assertions made in Miss X's witness statement, it seems to me that that does open up the question of what has happened in the correspondence, doesn't it? That's a different proposition, isn't it?

**MR JOWELL:** Yes. I think that's --

**MR TIDSWELL:** It seems to me it be entirely fair for the claimants at that stage -- indeed it would probably come out of your cross-examination -- what has been said in this process about why those documents exist or don't exist, will come out, won't it? Now, you may well say at that stage if Miss X is not able to speak directly to it, the Tribunal should not attach too much weight to what was in the letter, but I think it's quite difficult for you to shut out what's happening in this process if you are cross-examining about this process. That is maybe just one point we should be clear about.

**MR JOWELL:** Well, I think that's right, but if they want to -- as I say, there is no completely bright line between, if you like, the evidence that is -- the relevant evidence regarding the operation -- the way their businesses operate and these statements in

the schedule about responding to disclosure. Insofar as the statements in the disclosure statement go beyond a statement about the existence of documents, and become a statement of how the business operates and they are relying on that statement and wish to rely on that statement at trial, then clearly that should then be part of witness evidence. You can't, if you like, slot into your disclosure -- your response for disclosure requests lots of what is really witness evidence about the operation of your business, and then when we get to trial say --

**MR TIDSWELL:** Sorry to interrupt you, but it does rather depend on what is the purpose you are relying on it for, doesn't it? Because if it is being relied on for the purpose of showing what has happened in the disclosure process, then of course it would be helpful if it was in a witness statement, but it's not. And that happens all the time in litigation. If you are saying it has been relied on to prove a proposition that's an important issue in the trial, then of course you are right.

I don't see how we can deal with this -- I am not sure how, Mr Jowell, we can deal with this other than for us all to be clear that's the way it works. I think everybody seems to be nodding their heads. If you think that it is not being dealt with in a way that is consistent with that at trial, you are going to need to make that objection, aren't you? That's when you make your objection about the weight or indeed the admissibility of the evidence. I am not going to rule on that now.

**MR JOWELL:** Well, I think it would be useful -- two things. First of all, I should just go back and say one can divide this into the evidence, if you could call it that, in these statements in the Redfern schedules into two broad categories. One are statements which are really -- as I said, should properly be in witness statements because they are going to the operation of the business; the others are statements about the existence or not of documents. Those latter should, in our submission, also be attested to by a statement of truth.

**MR TIDSWELL:** I don't think you can distinguish them like that because if you look at the example, the one we were looking at on page 27, Holland & Barrett come along and say, "We haven't got any documents". And they say, "The reason we don't have any documents is we don't do it that way, that's not the way we do it". That's an answer to the question about the existence of the documents.

If Mr Woolfe or Mr Woolfe's client doesn't want to put in a witness statement making that part of his case on the substance of Trial 2, then that's a matter for him. I mean, I am not quite sure what you are asking me to order. I don't see how I can order Mr Woolfe to give evidence in the trial he doesn't want to give.

**MR JOWELL:** No, it's not that. What I am saying is if they wish to rely on the statement, the statement you see on page 27 in the last clause, then that should be in a witness statement.

**MR TIDSWELL:** Well, for what purpose? If they want to rely on it for the purposes of proving their case at trial, of course, but Mr Woolfe knows that and he's either got it in his witness statements or he hasn't.

**MR JOWELL:** You say he knows that, but what we are concerned -- Primark clearly know that, therefore they have said, "We are going to put in witness statements". But we are concerned what we will do is we will get to trial, and they will point to this in some way as evidence. We say this has zero evidential value. It's just a statement in a letter effectively which is not even --

**MR TIDSWELL:** What do you want me to do about it now, Mr Jowell --

**MR JOWELL:** We want to make it clear if they wish to rely on this for evidence of a true statement at trial, then it should be in a witness statement.

**MR TIDSWELL:** You are putting down a marker?

**MR JOWELL:** I am putting down a marker, indeed.

**MR TIDSWELL:** Obviously that is absolutely fine, and you have done it very clearly,

I don't see how I can make an order on this today.

**MR JOWELL:** Other than to agree with me. I think we were in agreement --

**MR TIDSWELL:** I am not sure I am agreeing with you because I am not sure that we -- I am not sure I can agree with you because it depends, doesn't it, it depends on what has been said and why it is being used? That will depend on -- that will obviously become apparent at the time and you will have to deal with it at the time. I don't think we can legislate in advance for this. The principles are clear, aren't they? Everybody nods their head when I say that. We will see if Mr Woolfe has anything contrary to say about it, or indeed Mr Sebastian, I think, who is in the same position.

But the principle is if you want the -- the evidence for the substance of the trial needs to be in a witness statement. We all know that. That doesn't stop Mr Woolfe relying on what's in the Redfern schedules if the question of the adequacy of disclosure comes up.

**MR JOWELL:** On that topic, we say that again these statements -- if they wish to rely on -- if we are now in our sort of narrower -- we are looking at this not at trial, but now for the process that you have indicated is going to be ongoing about scrutinising the adequacy of the disclosure, we say really these statements should be attested to by a statement of truth, because again in any normal disclosure process you have a disclosure statement saying -- explaining what searches have been carried out, giving explanations for why certain documents are not available. And that is then attested to with a statement of truth, normally from a solicitor or in-house legal in the relevant company.

**MR TIDSWELL:** We are now back on item 1, aren't we? Which is fine, but, I mean, I have been trying to draw the distinction between item 1 and item 2.

**MR JOWELL:** Yes. I think -- my point is simply this, that insofar as they wish to rely on these explanations as, if you like, to excuse their absence of disclosure, then those

statements -- it is particularly important those explanations should be attested to by a statement of truth.

**MR TIDSWELL:** So we are going back into item 1, but as I understood your item 1 submission, you are saying you would like to know what the searches are that have been done and you want those to be certified by a statement of truth. That's how I understand it. If that in some way goes into explanation, then fine. That's part of the statement of truth, if that's what we decide we are going to do, but I just don't think you can -- you know, I am concerned about you eliding 1 and 2. I mean, they are different things.

**MR JOWELL:** No, they are. I think this is, if you like, an issue that straddles them both because there is the question of setting out -- really issue 1 is we want them to tell us what searches they have carried out, what custodians are, what are the search terms, if any, so that we can understand what actually they have done to try to find and locate these documents, and to then attest that with a statement of truth.

What I am now on is a different aspect, which is in addition we say that if insofar as they wish to rely on these explanations they've given, those should also be attested to by a statement of truth. It can be in the same document.

**MR TIDSWELL:** I am not sure I follow that at all, Mr Jowell. It seems to me what has happened here is they have come back -- let's just stick with this example we have on page 27. Holland & Barrett have come back and said, "We have looked for them and haven't been able to find anything", and then they say, no doubt trying to be helpful, "This is the reason we think there are no documents", and you should be satisfied that's not an unusual outcome.

Now, if you reach the stage that the approach to this -- and it may be the stepping stone on that is an explanation of what searches have been carried out, and maybe that is subject to a statement of truth, but if you then manage to persuade me that that

all looks sufficiently defective that you need further investigation of it, that's when you would say to me, "Now I need a statement -- I now need a proper witness statement to explain what disclosure has taken place".

That's the way it would normally work. You don't jump to the witness statement just because they have given you an explanation to try to help you understand what they have done. I am not going to do that until you have been through the process of whatever it is we decide that's going to happen next. Just to be clear, you are not getting witness statements from people to verify things that have been said in Redferns to try and explain why the answer is what it is.

**MR JOWELL:** I wouldn't put it as a witness statement, I would simply say it should be part of the disclosure statement, which is entirely normal.

If I could put it this way, these statements have been made and these allegations have been made about how their businesses operate; why is it unreasonable for somebody to put their signature to it? I am not asking for a formal witness statement; I am not asking for them to be cross-examined at trial. I am simply saying this should be in a statement or at least there should be a statement of truth which is signed by someone, because there is something about having to sign a statement of truth that focuses the mind and ensures that statements are clear and properly accurate.

I am sure that they would say that these are complete and properly accurate, in which case why shouldn't somebody, either a solicitor or in-house counsel put this in a disclosure statement if they wish to rely on this for a failure to provide disclosure.

So we say what is the burden here? It is an entirely normal thing for disclosure statements to be signed by statements of truth, either by the solicitor or in-house counsel.

So that's all we are saying. So just to clarify, I am not asking for a witness statement as such, simply a disclosure statement, in other words, effectively a description of the

searches they have carried out and if they wish to include explanations, then they can include explanations, but all of that should then be attested to by a statement of truth. I think the only -- I have addressed you I think for some time and I have taken up probably more than my allocated ed time.

I just -- if I may, just to mention two final points. One is when the Primark witness statements are going to be provided, we think it is important these are provided promptly and we have proposed that the 18th really is the very latest that they can be provided without interfering the negative case date. I think Primark are asking for the 20th and we say that's just a bit too far out.

The other issue is this question of the -- the question of the Redferns themselves. You will have seen the document that we have produced where we identify the inadequacies in disclosure. We say that the next step is for them to provide, as I have said, disclosure statements and to engage with at the same time the complaints that we have made and the observations we have made, and to provide any remedial disclosure. Then we do need, we say, to list a further hearing, I am afraid, in which any remaining issues are to be resolved by the Tribunal.

**MR TIDSWELL:** Yes. Thank you.

**MR JOWELL:** Unless there are any further matters, I can assist you with, those are our submissions.

**MR TIDSWELL:** Thank you very much. I think we go now to Mr Cook.

**MR COOK:** Yes, sir, I think it is. Sir, as you will recall, Mastercard led the process of seeking qualitative documents back in March/April 2024, and the purpose of that process was to obtain from the willing claimants a sufficient basis from the documentary evidence for the other parties to test the assertions made by the factual witnesses being called by those claimants about how they set prices and the extent, if at all, to which MSCs figured in that process.

I don't want to oversimplify matters, but in general the thrust of the willing claimants' factual evidence is that MSCs are treated separately from cost of goods, for example, generally that they are lumped into some measure of overheads and that they are not taken into account in the price-setting process. It is that evidence that we need and seek internal documents from the claimants to test, in particular because, as Mr Jowell has just said, there are alternative routes by which overhead costs can and potentially -- and we say some of the evidence shows are brought back into the pricing process even if they are not treated as part of the price of goods, such as through a gross margin target. And we have just been looking on page 27 at requests that go to gross margin targets, or an EBITDA target -- you know, somebody produces a costs stack of overheads that includes MSCs, and as a result says, "Right, we need a margin of X percentage to ensure we can cover those overheads". Whether that happens or not, that is the critical question.

So we say there is step one, were they part of cost of goods which might be part of the immediate measure one uses in pricing, but then one can end up with other costs that might, you know, be treated for internal accounting purposes as overheads coming back in through margin targets.

So that's the nature of the issue and the evidence we say largely focuses on the first stage of that, and particularly when it comes to the documentary material, not at all on the second stage.

Now, of course, ultimately, as the Supreme Court held in *Sainsbury's*, once a passing-on defence has been raised by a defendant, there is a heavy evidential burden -- the Supreme Court's words -- on claimants to produce documents showing their pricing, how changes in MSCs were liable to affect prices, in order to avoid adverse inferences being drawn.

We very much engaged in the Redfern process to give the claimants one last

opportunity, because in most cases these are categories of documents we have been seeking since March/April, to address what we say are the deficiencies in their documentary evidence. And we are going to be saying it means they have not discharged that evidential burden.

I am absolutely clear, sir, I am not inviting you to -- you could not possibly rule on that today, whether they have or have not. I am just, you know, setting out what our position is in relation to that and will be at trial. Those are matters for trial.

Now the deficiencies we have identified are anchored very much in Mr Harman's expert report, which I can go to now. It is tab 15, page 135. The short point that he makes in summary -- and he has done this obviously by reference to each individual claimant -- is that the documents produced, in large, measure differences, as would you expect, between different claimants, but there is a lack of key documents that would shed light on pricing and related performance monitoring practices that will be that loop-back effect on gross margins, EBITDA, and that in his experience he would have expected merchants of this sophistication to have prepared, maintained and used to influence their pricing.

The inadequacies of some of the disclosure provided by some of the willing claimants could not be more stark. Wagamama, for example -- I know it's okay to mention that name -- produced only ten documents, three annual budgeting documents and three annual performance monitoring documents. We say on the face of it, that's obviously inadequate. It produced no evidence, no documents showing its actual price-setting process.

We have witness evidence that sets out -- says what that process is meant to be. We just don't have any documents to test that. For the most part we say, you know, it beggars' belief for most of these businesses that something as critical as pricing really just didn't have any form of material, whether those were formal documents, such

as minutes, whether those were informal documents, such as reports or e-mails, going to such a critical issue.

That is likely to be one of the big disputes, if documents are not produced, and largely it doesn't look like they will, about whether it is indeed credible there is that black hole there, that there weren't documents of that kind, or whether you know, proper searches have been carried out, which is one of the responses particularly Visa gets. We don't. We are told it's not for Mastercard to request material of this kind, and I will come back to that in relation to the settled claimant point.

But Mr Jowell has just shown you one of the examples, Holland & Barrett, which is basically saying reasonable and proportionate searches have been produced, carried out and there is nothing there.

I think it is just worth looking at that example. It is obviously Visa's request, but it's a very useful one to understand what we are talking about here and why we struggle to believe some of these answers. You know, if anyone thinks I am trespassing on matters that are confidential, I hope they'll say, but it doesn't seem to me that these are.

So the request is: documents evidencing how gross margin targets were set. I don't need to go into the detail, but we can see in the second substantive column it is clear that gross margin targets were set and they --

**MR WOOLFE:** Excuse me, Mr Cook, that does trespass a bit.

**MR TIDSWELL:** I can read it. I can read it, Mr Cook, I understand the point you are making.

**MR COOK:** Yes. So, you know, clearly Visa there, and its request is similar to Mastercard, it is asking about a process that exists to some level and then it says -- if there were targets produced, you would expect there to be some material that led to a number being produced. And I am now plucking numbers, so they are not

confidential. If somebody had said "I want a gross margin of 45%", that number just doesn't materialise from the air, it is going to come from some kind of, well, these businesses, have sophisticated processes of identifying costs. And we see what's said by Mr Troth in terms of what he said was or was not included in that process.

So Visa has quite reasonably said, "Right, show us how the documents evidencing how that target was set to test the assertions about how it was set".

And the response is:

"Holland & Barrett have carried out reasonable and proportionate searches and have not been able to locate any documents responsive to the request."

With respect, it is extraordinary to think that a business of this kind would carry out this process and not a single document can be found showing how they came to those numbers year after year after year.

So that immediately raises the question of that's a startling situation. It creates very serious doubts about what these reasonable and proportionate searches are, because it's a process that clearly does take place within their business, but we are told it produces absolutely nothing in terms of material that can be found.

**MR TIDSWELL:** I wonder, it is interesting if you look at the explanation. I do wonder if maybe there is a little bit of -- I don't know if "misunderstanding" is the right world, but it looks from the response as if the answer is: we don't take MSCs into account in the calculation.

**MR COOK:** Absolutely, sir, I was going to come on to the explanation. I was going to come on to --

**MR TIDSWELL:** -- I can see, if you're going to say there is a bit of a disconnect between that and the breadth of the question used, because they are answering different questions, aren't they? If the question was: do you take into account when setting your gross margins MSCs? Then obviously that was an adequate answer. If

the question is: how do you set the gross margin? Then that does not address the entirety of the question, that's the point you are making, isn't it?

**MR COOK:** Absolutely. The explanation goes to a critical question, but we would say whether that statement is right or wrong would be established by a document showing how the gross margin target was set. Either the gross margin is target with categories A, B and C or B, C and D, whatever it is, and either that would reveal that the explanation is right, that MSCs are not part of that process, or it is wrong and they are part of that process. Either way it must be the case with businesses of this kind that there are documents responsive to the request, which is just documents showing how gross margin targets were set and --

**MR TIDSWELL:** So what you are saying is you actually want to test the proposition that's given in the explanation, because if that's the answer, you want to see how it was done; that's what you are saying, isn't it?

**MR COOK:** Absolutely. What we have is an assertion in Mr Troth's evidence about what he says took place there. So we have a statement, and to some extent the explanation repeats what's said in the evidence previously, and this is all about testing, you know, that assertion, that he says gross margin targets are done in one way, there are no documents for gross margin targets, they must exist. These can't have been just drawn up with nothing behind them. So there must be material behind them, but we are told "Nothing to see here". So --

**MR TIDSWELL:** It is quite possible there are quite a lot of documents because one imagines -- and you do get a bit of a sense of this in the response -- one imagines in setting a number like that it wouldn't be just done by one bit of paper. There might be a lot of meetings and discussions and all sorts of budget planning that goes on, and you get a sense of that from the answer --

**MR WOOLFE:** Sir, if I may, I think this discussion may be under a bit of a

misapprehension because what it doesn't do is engage with the disclosure, the documents already provided by Holland & Barrett, because this is not the sum total of Holland & Barrett's response to the general requests that have been coming for some time from other parties for explanations or own explanations.

The easiest way of illustrating that is if you go to -- this is the analysis commissioned by Visa . It is page 842 of the hard copy bundle, I think 847 of the pdf. What you will see when you get there is they commissioned BRG, the Berkeley Research Group, to produce what was called a 'gap analysis'. This was back in July. This goes through the documents provided by the various claimant parties.

This table -- the codes you should be aware of, a green tick represents when they think they have got enough; a yellow box indicates where they have got something, but their judgment is it is not enough for the purpose they want it for; and an X means nothing. So it is only where there is an X that nothing has been provided.

You can see the Holland & Barrett column. You can see that they have provided monthly management accounts, management meetings, papers re financial performance. Jump down to 3(a), business plans; 3(b) budgets. They have also provided materials for management meetings re budgets and forecasts. That's 3(d). They have provided, one of the things Visa was asking for, 5(a) and (b), presentations to various kinds of investors. There is actually a green tick, a rare item in this table, so BRG was satisfied they had sufficient disclosure on item 7(a), which involves templates and toolkits.

Over the page in the third column -- they are not labelled -- we can also see pricing policies and competitive pricing indices.

**MR TIDSWELL:** Why doesn't it say that in your table? Why doesn't your table say "in addition to material already supplied"?

**MR WOOLFE:** There may be a (inaudible) table. We thought it was understood by

all parties, but (inaudible) documents already. These were requests for additional material going beyond that which has already been supplied. (Inaudible) Mr Cook's assertions it beggars belief we have would have no documents. We have provided a lot. For instance, management accounts will show you a great deal of what costs feature in which lines, etc.

**MR TIDSWELL:** So we are using it as an example. I think it is helpful. We are not going to obviously resolve the issue about it today, but I think it is -- Mr Cook (inaudible) perhaps unhelpfully as far as you are concerned, because he has jumped in, but the point he is making obviously is that this is not the entirety of it.

Doesn't this illustrate, really, that there is more work to be done; isn't that really what's clear here?

**MR COOK:** Sir, from my perspective -- certainly I want to show up this example, because this was not my cherry-picked best example -- you know, to understand the nature of what we are talking about here, this is a specific request. Mr Woolfe says there's pricing toolkits, but this is a specific request in relation to how you actually calculate gross margin targets. The answer is: nothing following searches.

As you rightly say, sir, it would be -- we would expect there to be quite a substantial process which would generate pieces of paper, electronic pieces of paper probably, but in large measure leading to this, and any form of search would find material.

Now there is an element of proportionality, do you do it for one year, two years or whatever, but there would be a corpus of material. That's why we say, you know, there does need to be an explanation of what these searches are if it is being suggested that, you know, as is the constant answer we get on -- or Visa gets on Holland & Barrett that, you know, they constantly search and find nothing, when we are talking about things which just must exist for businesses of this kind, and we know from Mr Troth there is clearly a process they went through.

Then in so far -- you know, the explanation. You have already been over that with Mr Jowell. You know, we agree that there is a question of when we come to say inferences should be drawn at trial, either the material is in witness statement form, in which case, fine, we will cross-examine on it; or if it is not, then essentially if it is in a table of this form unsupported by anything, we should be saying it is essentially given no weight. That is really a matter for Mr Woolfe, how his clients -- I do accept that -- want to proceed.

But if these are designed to be answers to give an explanation of why there is a nil return, the explanation here does not answer the point because it should not be a nil return. Either there is a document showing it -- you know, the document may not prove a party's case, but it should be produced in any event.

But from our side we do say there needs to be a process. There is unpacking that needs to be done here. And that's what is very much the universal process in the courts today, the near universal process, is whether you're dealing with specific disclosure, and to some extent in most court cases now almost everything is specific categories of disclosure, not just a general sweeping "do disclosure", or something more general, there is an explanation of what searches have been undertaken, by whom, key words and matters like that, because that's the only way for another party to say, you know, "We do or do not accept you have done this properly".

And that is going to be a critical question when we come to look at adverse inferences. They will say they have done searches, we will say, "Well, the searches can't have been very good because there must have been material. What are the searches?" And that needs to be unpacked, but to that extent --

**MR TIDSWELL:** Just in terms of timing, I am right in thinking responsive cases are 7 October; is that right?

**MR COOK:** That is correct, sir.

**MR TIDSWELL:** That's about three weeks away more or less -- a bit more. That is exactly three weeks away, I think, isn't it? If we let this process play out, and I am -- I am not sure I am that enthusiastic about disclosure statements. I would prefer to stick with a Redfern-type process, and we can see when and if in that process the statement of truth needs to be attached to anything. But if we were to do that, it is going to take a little bit of time. So you are not going to get this material, assuming you are effectively closing off your reports a few days before the 7th -- you are not going to be able to get it and use it, I would have thought to any great extent, other than material you already have, of course.

I think that applies no matter which path we go down, frankly. But I think what I am hearing from you and what I heard from Mr Jowell was this really has -- I am sure you would like to put any material you found in your responsive cases, but it does have -- it is most potent for the purposes of cross-examination at trial when you want to challenge the way in which this is done. Is that right? It is still useful to you, indeed it is probably as useful, after 7 October if you receive it later?

**MR COOK:** I think -- well, there is a different point. There are certain categories where we have already said we recognise that, essentially, the boat has sailed, and supplier pass-on is a point in relation to that, that would require a significant exercise. We are either right or wrong enough has been done on that and that is going to be a matter for trial.

So with a number of these points we are very much at the stage where, you know, unless there is -- you know, a sort of Damascene change of heart by Mr Woolfe overnight and we get all the documents tomorrow, then it is very likely -- it is just not going to be realistic to carry out real reasonable and proportionate searches, provide the results to us and have our experts take them into account, certainly for 7 October, but any other time that would allow it to be sensibly done in accordance with trial.

It may well be what we are fighting about primarily is a question of what material will be in front of the Tribunal to deal with the arguments on adverse inferences, rather than whether material is going to actually come because we are getting -- we are very much up against it timewise.

You are right to say, sir, the explanations of why they say these are reasonable and proportionate, you know, can trickle in, but not vast swathes of new disclosure coming in in two or three weeks' time.

**MR TIDSWELL:** Thank you. That is helpful. Margin targets makes sense. I am conscious of the time. We should take a break for the transcriber. I don't want to hurry you, but are you done with 1 and 2 and you are going to go on to 4, I think, is your item?

**MR COOK:** Yes.

**MR TIDSWELL:** Shall we take a short break and do that after that?

**MR COOK:** Certainly, sir.

**MR TIDSWELL:** We will come back at 11.55.

**MR WILLIAMS:** Sir, if I may very briefly ...

**(Short break)**

**MR TIDSWELL:** Yes, Mr Cook.

**MR COOK:** Sir, during the break Mr Williams suggested it might be sensible for you to hear from him for Mr Merricks on those issues 1 and 2, that way we have all the submissions from the parties seeking disclosure on those topics before I move on to the different topic of the settlement issue; would that be acceptable?

**MR TIDSWELL:** I am not sure if that is helpful. I am sorry, Mr Williams, to disregard your offer. I think I would rather hear you finishing, Mr Cook, and then Mr Williams can speak. How long are you going to be on this point? Is it long?

**MR COOK:** It is not a very long one.

**MR TIDSWELL:** Why don't you jump in and do that and then we'll go back to Mr Williams.

**MR JONES:** Sir, I apologise to jump in. It may just be my screen, we don't see that Mr Woolfe has rejoined.

**MR TIDSWELL:** I think you are right.

**MR WOOLFE:** My video was stopped. I have been here and I have been listening.

**MR TIDSWELL:** We have now lost Mr Sebastian. Mr Cook, carry on.

**MR COOK:** This is the point of general application. The claimants say in short, parties that have settled with Mastercard should not have to provide further documents in response to requests from Mastercard. They say that is the end of the story, regardless of how appropriate they are and regardless of how easy the documents are to produce.

So, the critical starting point is that all of the willing claimants, with the exception of Marks and Spencer, are still live parties in the Umbrella Proceedings since they still have live claims against Visa.

So, these claimants will be putting forward factual and expert evidence which will form part of the body of evidence to be tested at trial, and on the basis of which findings will be made by the Tribunal.

Significantly those findings will not just relate to those claimants, which I agree is no longer relevant to Mastercard now we have settled with them, but they are intended to and are likely to feed into the Tribunal's findings in respect of pass-on rates in relation to claims against Mastercard which are still live.

So the reliance on settlement with Mastercard misses what we say is the basic and key point, that these willing claimants are not just providing data and evidence solely in relation to their own claims, but in order to inform the Tribunal's assessment of pass-on rates for other claimants in other sectors, and potentially in other time periods, and

their data and evidence is being relied upon by other claimants on the issue of pass-on in Trial 2 when those are still live claims.

So we say -- and we accept in the somewhat unusual circumstances of Trial 2 it would be fundamentally unfair for Mastercard to be deprived of a proper opportunity to challenge the evidence of a willing claimant, where it is being relied upon as showing the right pass-on rate for the hotel sector, for example, in the case of Hilton, merely because we have settled with Hilton.

So we say that where the evidence is part of the overall process, a lot of references to triangulation from multiple sources of evidence, Mastercard should have the opportunity to participate fully in the evidence gathering process and test that evidence at trial. So, the fact of settlement in relation to those claimants, with respect, we say does not alter the need to test whether or not this material is relevant, can be produced in a reasonable and proportional way, and if the answer to both of those is "yes", it should be produced.

**MR TIDSWELL:** Just help me. We have Hilton who are providing more information in relation to the Visa request, but not in relation to yours; is that right?

**MR COOK:** Yes -- so what we have done in a number of cases we have had blanket responses that have come through saying "not answering, we settled with you"; in some cases our requests overlap with those of Visa or Mr Merricks, in which case the point doesn't become particularly live, but I don't think it is the case that for any of the claimants that is sort of the perfect -- there is a perfect overlap.

So we do have somewhat different requests. Sometimes those are points of, you know, no relevance, in which case we are happy to fall behind Visa or Mr Merricks, but in many cases they are, you know, different requests reflecting the holes we have identified.

**MR TIDSWELL:** So if you look at -- so if you look at Wagamama -- and I am looking

at page 122 of the electronic bundle -- they say in relation to the first request they are going to give you a whole lot of documents, and in the second request they say, "We have settled with you and we were not giving it to you". Is that because the first request overlaps with the Visa or Merricks claim?

**MR COOK:** I believe that was the case, sir.

**MR TIDSWELL:** I am trying to make sense of how it all works. Then University of Manchester is the same and then Travix. So those are the -- actually it's -- yes, so that's Three, University of Manchester, Travix ...

**MR WOOLFE:** Sir, rather than you go through all of them, perhaps I can clarify. All of the -- I obviously represent two firms of solicitors with different claimants behind them. The Stephenson Harwood Claimants fall into two categories: there is Marks and Spencer, who instructed them on their own, and then there is a funded group of the others. Both of those have now settled with Mastercard.

As it happened, during the process for the selection of claimants, although Scott+Scott, who have not settled with Mastercard, had various claimants in contention earlier on in the year, all of those for one reason or another, which experts liked, which claimants, fell by the wayside. I think all these SSH Claimants who have given evidence, who have given disclosure, are all, in fact, Stephenson Harwood clients.

Therefore for all of them, what you will see in the Mastercard schedule is insofar as the Mastercard request is perceived to overlap with requests made by Visa or Merricks, it has been answered, and where it is perceived to be a point that Mastercard is perceived to be ploughing its own furrow on, they have been refused on that basis. But you don't need to work out which this doesn't apply to --

**MR TIDSWELL:** That's helpful, thank you very much.

Mr Cook, what about Marks and Spencer; that's different, isn't it?

**MR COOK:** I do acknowledge Marks and Spencer is in a slightly different category. The issue in relation to Marks and Spencer here is while it settled before positive cases went in, the Stephenson Harwood Claimants, the claimants who are still live in these proceedings, put in a positive case that was based and Marks and Spencer's evidence, even though Marks and Spencer was out.

Now, that could have been, you know, taken out entirely, but as long as they are pursuing that, we say there should be the scope to make additional requests. If, sir, you don't think that's appropriate, then ultimately we will be making submissions based on the fact that there are holes in Marks and Spencer's disclosure that were not filled, and you know, that begs the question about the accuracy of the material that is relied upon.

But I do acknowledge that Marks and Spencer is the one that is different because it is no longer a live party in the proceedings at all.

**MR TIDSWELL:** And it may be that it is partly dependent on what you are asking for, because in a way it is not perhaps exactly analogous because it is very similar to third party disclosure, that they are now a third party but they do have material that's relevant, a potentially important matter in the proceedings, but in order to get there, you would have to persuade people, wouldn't you, it really was important? It wasn't just something you would like to have, but it does really make a difference to the way in which the Tribunal is likely to view the outcome of the case.

**MR COOK:** Yes.

**MR TIDSWELL:** I am not putting that as a test, just I am indicating to you there might be a slightly higher hurdle you will need to meet, because it seems to me in relation to the others -- I think what you are saying is all the others are still parties to the proceedings and it's all the same Umbrella Proceedings and it's all going into mix. I understand that -- Marks and Spencer, you can't say that. There may be a different

limb to be applied to it, mustn't there?

**MR COOK:** There has not been a point taken that the Tribunal does not have jurisdiction to do it, and it does for the reason you say, sir. The problem is there is an attempt to have its material included within the mix. Primark, for example, relies upon it in relation to pass-on rates for clothing, for example. So the material is going to be there. So you might say the legal position is that it is a third party to the proceedings, but it's in the position of a party that has been heavily involved and a large body of its material will be before the Tribunal at Trial 2 in any event.

But that probably becomes more a matter of practical importance in terms of meeting your hurdle. Jurisdictionally, the Tribunal does have that power, as you say, sir.

**MR TIDSWELL:** The entities that supplied data and settled, the position we'd got to was that their data could be used, but they would not be asked for further material; isn't that how we ended up? Why is this different?

**MR COOK:** Sir, that was in relation to parties who were engaged in providing quantitative data and then dropped out of the quantitative process. So that was not a question -- that was about the fact they were willing claimants and they stopped being willing at a certain stage.

The difference here is these are live parties who are going to trial on the basis of a corpus of material that the Tribunal was making findings on --

**MR TIDSWELL:** Sorry. We are at cross purposes. It is my fault. I am still just talking about Marks and Spencer.

**MR COOK:** Well, sir, the answer to Marks and Spencer is going to be whether the Tribunal considers it is viable to carry on doing so. Where parties have provided quantitative data, I was less involved with the detail of that process, and I hope I am not inaccurate when I say it, it was often the case where the material was in a very incomplete stage and a lot of additional work would have been done and it wasn't

justifiable to do so. The Tribunal would have to be satisfied there was a need to do more in relation to Marks and Spencer where we are much, much further down the track and the full body of its quantitative body and a lot of its qualitative data will be in front of the Tribunal at trial.

**MR TIDSWELL:** It really comes back to the point -- I am talking still about Marks and Spencer only -- they are no longer parties -- they have no doubt an expectation they are not going to have to spend any more money on this and that's part of the basis on which they settled with you, you've not put in any settlement agreement any right to access further documents. So that for whatever reason -- there may be lots of good reasons for that, but that's where we are. So the question is: have you got something which is sufficiently important in the case to justify an order that they go off and spend more money and do more things. That is really what we come down to, isn't it?

**MR COOK:** It would be, sir, but obviously in circumstances where the Tribunal could then make orders in relation to those costs.

**MR TIDSWELL:** Yes. That's a fair point too. Do you want to address me on the specific requests? I wonder if this is somewhere we might have to get into the detail. Maybe it depends on what Mr Woolfe is going to say. I don't want to go round in circles on this.

**MR COOK:** Could I suggest in relation to that one, sir, you have set out to some extent the target I would have to aim at. Could I look at Marks and Spencer over the short adjournment and then we could come back on the detail of those requests -- it might potentially be narrowed down, given the indications you have given.

**MR TIDSWELL:** It may be we should do that in relation to any -- I know Mr Williams wants to have a go at some specific requests. It may be we should do those after the short adjournment. Let's get the point of principle sorted out next and then we can come back, and everybody is welcome to come back. If they don't feel like they need

to, they don't have to.

Mr Williams is nodding he is happy to deal with that in that way as well. Okay, that's helpful. Anything else, Mr Cook?

**MR COOK:** Not from me, sir.

**MR TIDSWELL:** Good. That's really helpful.

Mr Williams.

**MR WILLIAMS:** Sir, I am grateful. I will address agenda items 1 to 3 in that case and then we can come back to items 4 and 5 after any short adjournment.

I would like to start with agenda item 2 because I think it is quicker and I think in light of the indications you have given, sir, it would be helpful to disentangle what agenda item 1 is supposed to cover versus agenda item 2.

If I can proceed on that basis then, agenda item 2 is concerned with asking for factual witness evidence in response to the factual explanations given in the schedule. In that regard it would be helpful for me to deal with specifics. I would like to turn to the Redfern schedule in relation to the SSH Claimants and Mr Merricks. In particular I would like to start at bundle page 313, which I understand is at the pdf bundle 318. You should see there Holland & Barrett at the bottom of page, item 7.

Sir, what we are asking for here, if you look at the third column -- and I will not read out the substance, I will just read out the introduction, is:

"Holland & Barrett says by way of explanation that ..."

and this is a phrase that the Redfern schedules are replete with, and we are asking here for those statements and explanations to be given in witness statements.

Now, that's particularly important in relation to Holland & Barrett because as you'll see in the final column, second paragraph, the particular statement which is given in the column here of this Redfern schedule is inconsistent with that which is stated in a witness statement.

Now, that leads to two points that I am asking for in practice. One is an order that the statements that are given in the third column there are put into a witness statement if they are to be maintained, because they are factual explanations, as you alluded to earlier, sir. They are not about the disclosure process. That's the distinction you drew with Mr Jowell earlier.

Secondly -- we will come back to this after the break in relation to agenda item 5 -- this gives rise to a concern we don't have disclosure because we need to interrogate this inconsistency on its face between a statement which is now made versus a statement which is in a witness statement. So that gives rise to a chain of inquiry as to what the actual answer is which we wish to interrogate in cross-examination which needs underlying documents.

But in relation to agenda item 2 I am asking for an order that Holland & Barrett provides a witness statement that provides those positive statements, which Holland & Barrett presumably will be relying upon at trial because they are substantive factual matters.

**MR TIDSWELL:** I am not sure we are on the same page, Mr Williams, that is not where I ended up in my discussion with Mr Jowell. I think you are, if you are like, rehearsing what Mr Jowell argued and I was not prepared to accept. It seems to me I am not in a position, I don't think, to make Mr Woolfe put in a witness statement if he doesn't want to put one in. If he doesn't want to give evidence, then that's fine. It doesn't go into the record, and he can't rely on it. I don't understand him to be saying, as far as I can tell -- and obviously we will see what he has to say, but I don't understand the position to be that the claimants are relying on this as being a matter of substance going to the issues at trial, all they are doing is trying to provide an explanation as to why they haven't come up with any documents.

Now, that is -- in the world of the disclosure process and the adequacy of it that might at some stage justify you asking for a witness statement in which that was contained,

but I think we are a way off that. That's item 1, not an item 2 point. I am very keen to keep the lines clear between the two of them. So, if you are suggesting to me that because in a schedule or a letter or somewhere the claimants have set out something which they could rely on substantively at trial, therefore they have to put a witness statement in, I don't think I can do that. I don't see how -- I would like to know what authority you think I would be able to force Mr Woolfe to give evidence on something he doesn't want to give evidence on.

**MR WILLIAMS:** Well, perhaps that's one for Mr Woolfe in due course as to what are the statements he does rely upon. If I identify them by flagging them, so over any short adjournment he can take instructions on that. It's item 6, Hilton; Sony, item 8; the one we've just been looking at, Holland & Barrett, item 7; and Travix, item 9. They are all ones where the client states in the Redfern schedule by way of further explanation and then gives some substantive material. If and to the extent that Mr Woolfe confirms any of that is to be relied on positively, then I think that does fall on the right side of your line. If not, sir, these explanations give rise to matters we will come back to for agenda item 5 as to why we seek documents in relation to them, for example, because the inconsistency between a statement in the Redfern schedule without a statement of truth against a witness statement that is signed with a statement of truth, that gives rise to a suspicion and a request for underlying documents, so we can actually make good at trial what the actual position is.

**MR TIDSWELL:** Yes. That's item 1, isn't it? We will come back to go that. Just so we are clear, you know, I don't think there's any basis again on which I can ask Mr Woolfe to confirm now what his position is in relation to the substance of his evidence at trial. He's the one in jeopardy here, not you, and if he chooses not to put the evidence in, then he hasn't got the evidence. It is as simple as that. If he tries to put it in, then you will object, and Mr Jowell will object and Mr Cook will object, and

Mr Woolfe, although he has some difficulty in persuading the Tribunal that's how trials are managed because it is not.

I am not sure it is very helpful to seek some crystallisation of Mr Woolfe's position on this at the moment. I am certainly not pushing for that. It seems to me to be entirely straightforward, which is if Mr Woolfe knows if he wants to rely on this for the purposes of the substance of the trial, he needs to put in a witness statement. And he's had some difficulty with that already, because witness evidence is more or less closed. So if he is going to do it, he had better jolly well get on with it. But I don't think he is saying that, therefore it seems to me the issue is a non-issue for the purposes of today, item 2.

**MR WILLIAMS:** In which case we can move on in reverse order to item 1 of the agenda and wait for Mr Woolfe's confirmation on those matters, if any is to be given at all today.

Sir, I think it is worth my starting at the end as to what exactly we are asking for and the punchlines here in relation to agenda item 1.

So we have two asks here. The first is since we don't know what searches were conducted by the claimants in relation to each request or what standard has been applied in practice and by whom, it is therefore not possible for us to test or properly consider the responses where a claimant has said it doesn't hold any responsive documents or it only has a limited number of documents.

So we therefore ask for a description of the searches that have been undertaken signed by a statement of truth in short order, and if there are any issues, we will, of course, need a quick process for any resolution.

I think we will turn to such process and that process is in agenda item 6, but my overarching point is we are very keen to avoid parties deploying any procedural skirmishes, any sort of tactic which jeopardises the trial date. Our consistent position has, of course, been to get this trial on and to vindicate the rights of millions of

consumers in the class as soon as possible. So any process for extra rounds of disclosure hopefully in advance of the responsive case needs to be got on and brought on very quickly. So that's out first ask.

The second ask is for all the responses to the requests that have been made by all of the parties to be done by reference to a reasonable and proportionate search basis insofar as they have not already been, rather than a readily accessible documents approach, so we can be comforted that at least some search has been done rather than a glib, "It is not on my desk or not on my desk top", and so forth, "and therefore it is not readily accessible". Therefore we do want to make sure --

**MR TIDSWELL:** This is the Primark point, is it? This is a point taken by Primark, I think.

**MR WILLIAMS:** That's my understanding as well, sir. The reference to accessible has also been taken by Allianz in some correspondence, but it's primarily a Primark point, sir, yes.

Now the reasons for that I can unpack in short order because Mr Jowell and Mr Cook have already made some key points, so I will make some additional footnotes.

The first is two contextual points. The starting point is that extremely limited disclosure has been provided by the merchant claimants prior to and as part of their positive cases.

Sir, that can be seen in the extract from the Coombs report, which is copied in the annex of the letter that my instructing solicitors sent to you on Friday. You can see there, for example, that there are some parties who have provided no documents; 12 documents from Wagamama; 17 from Sony; 19 from Travix; and only 28 from Marks and Spencer.

Now these, as my learned friends have already indicated, are surprisingly low numbers in a case of this magnitude where the Supreme Court has held merchant claimants in

their claims bear a heavy evidential burden, as all the information is in their hands, not the end users I represent or Visa and Mastercard. That is my first --

**MR TIDSWELL:** Presumably Mr Coombs in compiling this has covered the same ground as BRG have in the extract we just looked at; is that right? He would have incorporated all that material as well?

**MR WILLIAMS:** That's my understanding. It is all of that material that was provided up to and inclusive of positive cases. Nothing that has been provided in addition in response to the new requests.

**MR TIDSWELL:** Fine. Thank you.

**MR WILLIAMS:** That's my first contextual point.

The second contextual point is the process of how we have got here. What we have is self-selected documents from self-selected merchants via a very limited process without, firstly, any sufficient records of what searches have been conducted, how and exactly by whom; and secondly, without any disclosure statements or reports from supervising solicitors.

What do we have? What we have been told suggests that the disclosure process has been conducted largely by the clients themselves rather than solicitors, and in any event subject to self-selection by undefined standards, such as readily accessible documents without any explanation of what that actually means, and also by sampling without any explanation of what that means.

In some cases we are told that the clients, not the solicitors, have, and I quote "carried out reasonable and proportionate searches and have not been able to locate any documents responsive to the request". But we have not been told what those searches are for this Tribunal or us to make any judgment as to whether they were reasonable or proportionate searches.

Then, as you say, sir, in particular in respect of Primark, we have been told it has

limited its searches in response to our requests to what are readily accessible documents, but we were not told either, firstly, that's the standard by which it searched for the documents supporting its own positive case, so that gives rise to a potential inconsistency problem; and secondly, we have not been told at all what "readily accessible" actually means.

From what we can work out, sir, it seems to be a lower standard than even the most confined and least onerous disclosure models in the CPR under model A, so known adverse documents approach, and model B, limited disclosure.

Now why do I stay that "readily accessible" appears to be a lower standard than even “known adverse documents”? Well, despite the name of known adverse documents, it is a bit of a misnomer.

Sir, I hope you will have received an authority and covering letter from my solicitors over the weekend. This is the Qatar case.

**MR TIDSWELL:** Yes.

**MR WILLIAMS:** It is at page 55 of the pdf of that authority or paragraph 235, which has been summarised in the covering letter. In summary, what that case does in citing Mr Justice Stuart-Smith, as he then was, and his judgment in Castle Water, it states:

"The known adverse documents approach also imposes obligations on a party to undertake reasonable and proportionate checks to see if it has or has had known adverse documents and to undertake reasonable and proportionate steps to locate them, including checking with persons with accountability or responsibility for relevant events."

Then at paragraph 239 of the judgment it also imposes an obligation on solicitors to educate the clients on the issues in the case, so that everybody knows that the obligation has some bite as to what's known and what could be an adverse document.

Now, on its face, we don't know whether either of those two obligations has been

complied with in this case. As I say, at least we have not been told what "readily accessible" means or what searches have been done.

In my submission, if disclosure is limited to its present form and we don't receive explanations of searches that have been done, that will lead to an unworkable position where neither the Tribunal nor the parties can properly test the disclosure or the witness evidence, and no safe conclusions can be drawn on the qualitative evidence that has been provided - the very limited qualitative evidence.

So those are the two reasons why I seek the two orders today in relation to a description of the searches that have been undertaken, and perhaps it could be added as a column to the Redfern schedule, the next turn of it, by the claimants, so we actually see in relation to each request what searches have been conducted in relation to that.

And secondly, confirmation that it is a reasonable and proportionate search that is right as a matter of principle, not readily accessible.

Insofar as the standard that has been applied is different and lower, the order should be that the searches and the requests that we have made are done by reference to a proper standard.

**MR TIDSWELL:** Yes. Thank you, Mr Williams.

Mr Woolfe. You are on mute, Mr Woolfe.

**MR WOOLFE:** I am covering the issues in the order set out in agenda for the hearing --

**MR TIDSWELL:** Just to help you a bit -- unless you have anything else you want to say about item 2, I think I have made my position clear on that.

**MR WOOLFE:** Thank you, sir. I think I haven't much to say, perhaps a sentence or two.

Sir, beginning on item 1, which is -- as it was put in correspondence it was as a request

for a disclosure statement. I think that way of putting it has perhaps generated rather more heat than light because what emerged between the parties was something of a ding-dong between -- certainly what we saw Visa to be saying, which they wanted something very much like a CPR disclosure statement, which follows in a sense the format of setting out what keyword searches have been applied and what document custodians have been identified and so forth.

We say -- and I think we are supported by this in the other claimants who are here -- that that simply doesn't fit what the Tribunal was envisaging by way of a process of document production.

Sir, you recall at previous hearings, I think at the April hearing in particular, the President rather forbade the word "disclosure" because he said it wasn't a disclosure process at all. Sir, that's how the issue in a sense has emerged.

Now you touched on the subject of inferences at trial. You very rightly said, sir, that's not something you can say today what inferences would or wouldn't be given. That's absolutely right because what inferences can ever be drawn at trial require one to assess, in the round, the supposed absence of certain material against the totality of material that is there, both witness evidence and expert evidence, and the documentary evidence that has been produced, and then to assess if an argument is put as to the absence, the reasons that have been given for that absence and then one can assess the weight of the evidence in the round at trial. That is the proper role for that. It is not something which can be pre-judged today.

My second point, sir, was to say that one has to put the responses in the context of the material that's already been provided. I think I already made that point, sir, by reference to Holland & Barrett. You can see this was about quite a tight process that was taking place during August and early September, following positive cases in which further of the documents were being sought by the defendants and Mr Merricks for the

purpose of working out their response to the positive cases.

It was undertaken in quite a tight timescale and does not represent the totality of the material that has been provided.

Now, sir, with all that said, we can see that if the Tribunal is trying to assess the meaning of the documents that have been produced and any inferences -- any argument that is being made by Visa and Mastercard that inferences should be drawn from the absence of material, that it may be assisted by having some more granular explanation of the searches that have been conducted, going beyond merely the assertion that reasonable and proportionate searches have been conducted.

And we are content to provide further detail and explanation of what searches have been conducted. If it proves helpful in due course to provide that under a statement of truth, then that can be done. What we would resist, sir, is that being done in short order now simply because the teams are very heavily engaged on preparation of negative cases, and the evidence and arguments in response on that.

As you identified, sir, this is really a matter going to arguments that may or may not be advanced at trial, and therefore what matters is that the Tribunal has the relevant material to judge that at that stage.

This is really a matter of in a sense attesting to a procedural document of quite a well known type, a Redfern schedule, and this is not a matter of giving substantive -- the parties' substantive case. Therefore we say it is something that can be done in due course down the line, but we can see, sir, giving some explanation beyond the assertion of reasonable and proportionate searches may be of assistance to you.

That, in short, is our position.

What we would resist is the insistence on the part of the defendants and Mr Merricks that those explanations should take a particular form and should include X, Y and Z, and failing X, Y and Z, it is not a sufficient explanation or the absence of X, Y and Z in

some way indicates that the searches done were insufficient.

We particularly do reject Mr Merricks' suggestion that there should be some further attestation as to the nature -- as to the standard by which searches have been conducted. We think what would be of assistance is you having a narrative explanation of what was, in fact, done, sir, rather than some further assertion given as to whether or not it met some standard set by Mr Merricks.

Mr Merricks could have engaged further earlier on in the process and I think is now in a position of trying to seek standard disclosure effectively, or a standard disclosure-type level of search at a very late stage of the process when the time is not available to do that.

**MR TIDSWELL:** Presumably that explanation would explain who did what, because one of the points being made is what was the level of supervision from your instructing solicitors in this process.

**MR WOOLFE:** Yes.

**MR TIDSWELL:** I expect that probably differs depending on the client. No doubt there are some very competent in-house counsel who may be have been involved in this and may be perfectly capable of understanding the obligation and explaining it to -- maybe in some circumstances you have been involved. But some clarity around that, is that something would you expect, obviously not going so far as to waive privilege but to give some indication of who's been involved in the supervision of it.

**MR WOOLFE:** Sir, I think what we would be envisage is my instructing solicitors can give an explanation -- from their own knowledge, what they did in terms of bringing matters to the clients' attention and explaining what was required to them and so forth, and any step that they themselves took. Insofar as what then followed was steps taken by clients, then my instructing solicitors can collate that information and give it on instruction.

**MR TIDSWELL:** I am not inviting -- I may disappoint Mr Williams -- I am not inviting a long explanation of this, but I do think some sense of where the point of control has been in this, because I think it is fairly being said and the reference to Mr Justice Stuart-Smith's judgment in Castle Water is entirely fair, in that there ought to be a control mechanism in here, so we know that somebody who understands the importance of the exercise.

And particularly the framework in which this has been made is a point you validly make, somebody who understands all that, has made sure it's been done properly and we can get some comfort from that. Because in a way that is actually your defensive position against Mr Williams' request that you produce a witness statement.

So if you've given us a proper explanation of the control mechanism and what has been done, then obviously the next question is: what's wrong with that? That puts the ball back firmly in their court. So I think it might be to your advantage if you are able to do that.

**MR WOOLFE:** Sir, I think sat here right now, I am not in a position to tell you exactly what the explanation will say in respect of Mr X at company Y.

**MR TIDSWELL:** Of course.

**MR WOOLFE:** However, we have very much heard what you say about that. As you have identified, it is very much in our interests, come trial, to have sufficient explanation in relation to the disclosure process. So we hear what you say in that respect, sir.

**MR TIDSWELL:** Good. Thank you. So what I think you are offering effectively is another round of the Redfern.

**MR WOOLFE:** No, sir, I am not, because I think the difficulty -- perhaps this is where we do part company rather more from the defendants -- because what they are envisioning is there should be some further explanations given. They can then try to pick holes in those explanations and come back to yet again their requests in the

Redfern schedules, and there should be some further hearing at which some further orders will be made for disclosure, and they should all happen in advance of the deadline for negative cases.

The issue, sir, is we faced extremely broad and rather unfocused requests from the defendants again over the summer, some of which largely reiterated requests that had been made by Mastercard, in particular some way back and indeed which we had considered when formulating our evidence, for instance, in relation to pricing policies and so forth.

Simply having a further round in which we explain what was done, and Mr Jowell's submissions in this respect are rather revealing. He said there were two possibilities: either no documents exist or inadequate searches have been done. He left out the third possibility, sir, that adequate searches have been done and have failed to reveal any relevant documents because they are not obtainable by means of a reasonable search.

So we are seeing them as inevitably setting themselves up to come back to ask for more. They seem to be probably pressing the same requests again, and this is not getting anyone anywhere and is sucking up a great deal of valuable time.

Really what their points are about are -- in Mr Jowell's formulation is ensuring they are able, come trial, to make any points they want to make about adverse inferences. And we can make any points we want to make about the submissions in the disclosure process.

We would say, sir, further explanations can be given, but we don't think having a further turn of the Redfern schedule with a further set of responses thereto is really going to get the parties much further forward. Insofar --

**MR TIDSWELL:** Let me push back a bit on that, Mr Woolfe, because in a way I don't see the Redfern schedule as anything other than the vehicle. And Mr Jowell is saying

"I want a disclosure statement -- this was a disclosure exercise, I want a disclosure statement". I think you are saying -- I think, as I can best understand, "We will write a letter and explain some things". Both of those things are just vehicles for getting across a proper understanding of what the issues are and how they need to be dealt with. I would much prefer to see them in a Redfern schedule than either in a correspondence or in a disclosure statement.

So, my firm preference at the moment is for another turn of the Redfern schedule. I don't mean that in the sense of people relitigating points that are already been dealt with. What I would like to see is some real clarity about what matters, and I think probably the first step is actually to give the defendants and Mr Merricks an opportunity to consider further the material they already have, because I think what we have in column 4 strikes me as being unnecessarily short form because they have not had a proper chance to consider it.

So what I would like them to do is focus and formulate their position, what I think is called the reply to the response, and then we would like you to tell us what you have done. The reply to the response is mostly going to be, "Please tell us what the search was", as far as I can tell so far. It is as good a place as any for you to write that down, I would have thought.

Is there any reason why that is not a sensible way forward?

**MR WOOLFE:** I think on a very -- sir, two things. One is a sensible way forward for the defendants to articulate in more detail than (inaudible) and us to provide an explanation of what they have done, and then for any more focused requests to be brought forward and considered on that basis. That's one issue. The other is narrowly does it fit -- should that be done within the Redfern schedule?

On the latter I do think, sir, us giving an explanation in the Redfern schedule is likely to be rather cumbersome because it is going to clutter up the Redfern schedule with

quite a lot of detail that's not really necessary, and therefore I would suggest that when we give it, it would be better in another document.

**MR TIDSWELL:** I suppose where I am getting to with this, Mr Woolfe, there is no ducking this. You make the point that this is -- there is a world in which this is just dealt with at trial, but I don't think that's where we are going with this. I think you need to accept that you are going to have to do some more work here. Whether that's work to justify the nil returns or whether it actually is "on further consideration we have had another look and found some stuff", I don't know.

I don't think I am -- in Mr Jowell's formulation, if you recast the first bit as being not I am going to tell you there is a problem now with inferences, but you may have one, and we just wait and see if that happens, that's not something I am going to be comfortable with.

**MR WOOLFE:** In which case --

**MR TIDSWELL:** Let me just finish. At some stage, in this process you are going to have to deal with the rocks they want to chuck at you. What I want to do is make sure that is done in as controlled and focused a way as possible, particularly since it is going to end up back on my desk and I would much prefer it ended up back on my desk so I have a single schedule, not the 15 we have, so I can tell what's outstanding and what the real issue is. If that means you have to do that without creating a 500-page document, you need to cross-refer back to some correspondence in which you have set out what the proper searches was, I don't have a problem with it. You know, "We have explained it in the letter of such and such". But I would like to preserve the continuity that's offered by the Redfern schedule, so we don't lose track of what we've started here, which has to be finished. It is going to have to be finished some way or another, either by the defendants and Mr Merricks deciding they don't want to pursue -- and Redfern schedules do have a remarkable way of leading people to that

conclusion -- or by you deciding you want to do something different, either hand over documents or explain something different, or by me saying, "Okay, now we have got to the end of this and this is what's going to happen".

I would much rather do that with a Redfern schedule for the purposes of the management of it. That's where I think we are going. But I take your point, not everything that is material has to go into the Redfern schedule. The Redfern schedule is a vehicle for me to understand what the live outstanding issues are and what their significance is.

**MR WOOLFE:** Thank you, sir. I think I should take certain instructions. Perhaps I can do that over the short adjournment.

Perhaps I could make one further point at this stage, sir, which is timing is a real issue, because we are producing negative cases or responsive cases by 7 October and time is extremely tight and teams are thinly stretched.

Insofar as what is really desired is to put my learned friends in possession of material which they can deploy for cross-examination at trial, which is what I understand Mr Jowell to be largely referring to, one would hope that any further process could be uncoupled from having to be done in advance of the filing of negative cases. Perhaps I can just put that.

**MR TIDSWELL:** I made that observation I think to Mr Cook, and Mr Williams has made a half-hearted attempt to link it to that. But I think the reality is even if I were to order you now to go away and do things, the chance that you would be able to do that and come back with any sensible selection of documents that could then be used in the responsive reports seems somewhat unlikely.

But that's not to say you are going to get a free pass until 7 October, Mr Woolfe, because we are not that far away from trial and people need time to prepare properly for it. If one accepts this may not be tied to 7 October, that doesn't mean -- it is still

going to have to be done with some urgency.

**MR WOOLFE:** I understand that.

Perhaps with that, I will move to item 2, which I can deal with fairly briefly I think in light of the indications you have given.

As we say, the Redfern is a procedural document of quite a well-known type going to a procedural issue, which is disclosure. It is not usual for those kinds of documents to be turned into witness evidence to be used at trial.

Insofar as there are substantive points which one party or the other will be relying on at trial, it is normal for those to be provided in the form of witness evidence. As you say, sir, it is for us to judge whether we have the evidence on which we want to run our case at trial.

I will respond on the detail of the point Mr Williams was making about Holland & Barrett when we come to that point under the Redfern schedules.

I should flag up, sir, at this stage, sir, we are intending with our responsive case to put in a small amount of witness evidence because criticisms were advanced in the positive case filed by my learned friends of assertions made by various witnesses.

This is not about the content of what's in the Redfern schedule, but simply the criticisms that were made about careful language, for instance, being used, things that were not said, interpretations being placed on what was there. We are going to file witness statements in the form of reply statements dealing tightly with those points.

There may be by coincidence an overlap with some points in the Redfern schedules -- I am not saying there is, but it would be a coincidence if there was. The explanations in the Redfern schedules are largely, as you say, sir, going to the existence or non-existence of certain documents. Insofar as there are points that go to substantive questions, then those will indeed need to be witness evidenced.

Moving to issue 4 then, sir, I think, as you well put, there is a distinction between Marks

and Spencer, on the one hand, and all the other claimants on the other.

As regards Marks and Spencer, they have reached a settlement and I think a consent order was filed by the Tribunal but not yet made, withdrawing the proceedings early in September, and therefore we say they are effectively third parties to the proceedings. Now, documents have been disclosed and a witness statement been given and those are in no way being withdrawn from the proceedings. That is consistent, I think, with what happened earlier in the process, but also it is something that is certainly not being contested by any party.

They are in a sense third parties. I think if Mr Cook wants to pursue disclosure against them, he has to do it as a form of third-party disclosure, as indeed my clients would. This is not the -- when he makes reference to the Stephenson Harwood Claimants and Scott+Scott Claimants continuing to rely on Marks and Spencer, yes, we are, but the fact that Marks and Spencer have settled is not within the control of the remaining Stephenson Harwood or Scott+Scott Claimants, and the fact that they may refuse to provide any further documents is not within their control either. Therefore, it will be the case that the Tribunal has a certain amount of material. And unless third party disclosure is sought, it will stop there.

But for the avoidance of doubt, this is not a case where active claimants are refusing to provide material that is within their control, because we simply don't have it, sir.

**MR TIDSWELL:** Mr Woolfe, I am just not sure whether you are suggesting a point about your instructions here. Are you not instructed by Marks and Spencer for the purposes of today?

**MR WOOLFE:** I hadn't thought of it -- no, I think I am not, sir. Marks and Spencer have settled and they are no longer a party to the proceedings, save in the formal sense that an order has not yet been made withdrawing the claim.

**MR TIDSWELL:** I can see -- it only just occurred to me. It is somewhat unhelpful,

because Mr Cook wants to have a go after lunch at explaining why we should be making that order, but if you are suggesting you are not in a position to argue that, then that is not really --

**MR WOOLFE:** Sir, that was not quite my intention, sir. What I was trying to make the point just now, was to say that I represent a number of different clients --

**MR TIDSWELL:** I am not criticising you, Mr Woolfe, I understand the point entirely. What I don't want to do is to find we have a discussion this afternoon, Mr Cook persuades me that Marks and Spencer should provide the document and then they come along and say, "Hang on a minute, we weren't represented". It's not just about whether you think you are instructed by them, it's about whether they think they have instructed you. I think someone needs to clarify that before we come back after the short adjournment. If they are going to take the position, which I emphasise would be extremely unhelpful, if they are going to take the position they are now a third party effectively, then we need to know about that before we have the argument about handing over the documents.

**MR WOOLFE:** I perhaps I should clarify the exact nature of my instructions. There is a distinction between them saying they are a third party and whether or not I'm instructed on their behalf to say --

**MR TIDSWELL:** I understand that. I want to make sure we don't get ourselves into a muddle after lunch. That's what I am doing. Maybe part of this is because we have not made the order, therefore they are formally still a party albeit they don't think they are because they have settled. Maybe that's the practical answer.

No need to discuss it further now, but if you wouldn't mind before we resume at 2 o'clock, which we are now inevitably going to be doing, making sure that you are comfortable that you are entitled to argue the case and that Marks and Spencer will therefore comply with whatever the outcome is, that would be helpful.

**MR WOOLFE:** Thank you, sir.

Turning then to the remaining Stephenson Harwood Claimants, in a sense the origin of the problem is one about costs and this is one that has been flagged to Mastercard. So Jones Day in their letter of 21 August -- and that's page 859 of the hard copy bundle, so it will be 864 I think of the electronic bundle -- say at paragraph 4 of their letter, second sentence, they accept that in normal circumstances the settlement would preclude it from making an application to seek disclosure against those claimants.

Then they go on to make the point that these claimants are advancing claims against Visa and (inaudible) the assessment in the round.

Now, one point that my instructing solicitors flagged with Mastercard was what happens about the costs of any disclosure exercise in response to Mastercard's requests? That was put in particular in an e-mail which you have, sir, at page 871 of the bundle, so 876 of the pdf.

You will see there, sir, in the large paragraph:

"Our position remains as set out previously, namely we do not intend nor do we consider it appropriate for our clients who have settled with Mastercard to be required to incur the time and expense of responding to these requests which are not supported more widely."

That was their position. It goes on to say halfway down the paragraph:

"We also note in this regard that you have failed to provide any substantive views on how the costs of responding to your requests would be met."

I think they have been invited to give an indication at an earlier stage.

One of the difficulties is that if these claimants incur the costs of responding to a Mastercard request, which has not been specifically supported by Visa or Merricks and which doesn't overlap with requests by Visa or Merricks, those are obviously not

costs attributable to their claims as against Visa, and therefore would be in a sense irrecoverable by them if and when they win, or they will be forced to bear them if and when they lose in any event.

Mastercard had not actually grappled with that central problem. In a sense, it is like a sub-set of the issue with Marks and Spencer, sir, which is as between Mastercard and these claimants it is effectively like a third party disclosure order, notwithstanding they are all part of this overarching umbrella proceeding, but the umbrella proceeding is not a claim, sir, it's a procedural envelope the Tribunal has chosen to use. And Mastercard should undertake, we would say, to pay the cost of any such disclosure in the first instance, and those would then be subject to being dealt with as costs of the litigation in due course, but they are not something which these clients should be left to bear and face having to bear in a sense irrespective of the outcome, which will be the result if we simply incur the time and cost of doing so.

**MR TIDSWELL:** Doesn't that really bring into focus the significance of the Umbrella Proceedings? I mean, you say notwithstanding them, but isn't that the whole point, that the Umbrella Proceedings has the effect of consolidating for the purposes of at least the issues in Trial 2 all of the proceedings that are extant against both defendants and therefore it is all one proceeding? I mean, it seems to me to be the most unattractive proposition that at the end of all of this, regardless of who wins or loses, there will be some sort of costs exercise and that's going to have to be dealt with by some dissection of the case by reference to whether claims were made against Visa, Mastercard or both, and that will be dealt with, and no doubt all sorts of arguments about success and failure about different bits in it.

That's not the game we are in, Mr Woolfe. I think the whole point of the Umbrella Proceedings is to avoid that problem, and just as Mr Merricks turns up and says, "I would like documents from all sorts of people in order to pursue my case" in

circumstances where, absent the Umbrella Proceedings, he has no relationship whatsoever with any of these claimants apart from Mastercard, that's the position Mastercard is in against the remaining Stephenson Harwood Claimants, is it not?

I mean, I don't think the costs point really takes you anywhere, because unless you are suggesting that the Umbrella Proceedings don't give jurisdiction for the Tribunal to award costs against any party in the Umbrella Proceedings on any issue that's covered by it, which I don't think is the way it is set up.

**MR WOOLFE:** Sir, I am not intending to suggest that they don't have jurisdiction to award costs per se. This is a novel issue and various -- you will recall, sir, earlier on in the year there was a hearing in relation to costs and trying to give a more -- ask the Tribunal to give some forward guidance on costs earlier on in the year. The result of that was a judgment which is necessarily quite broad brush. What that didn't do was give any satisfaction that costs which my clients incur in response to Mastercard requests would actually be recoverable, because we will face an argument from Mastercard down the line as and when we win, where they will say, "Sorry. Your claims against us have been settled and we are not accepting any liability for costs incurred after the date of that settlement"? We have had no response.

**MR TIDSWELL:** Maybe I will ask Mr Cook the same question and see what he says, but it seems to me, unless he is taking a point on it, then the working supposition has to be that at least the Tribunal has the discretion to make an award of costs in favour of your clients in relation to this material against Mastercard. I mean, the Tribunal's discretion as to costs is very, very broad, and unless Mr Cook is going to suggest that somehow the Umbrella Proceedings doesn't give us a sufficient basis to do that, then the issue goes away, doesn't it, because you are not going to get any assurance about the cost, because obviously it depends on if you are successful.

**MR COOK:** Sir, was that an opportunity for me to jump in there?

**MR TIDSWELL:** If you are able to answer the question put to you, that probably would be helpful, yes. Thank you.

**MR COOK:** Certainly I think you made exactly the point I was writing down in my notes when you made it, sir, in relation to Mr Merricks' position, that Mr Merricks is making requests for disclosure which are not against the claimants, which had not been met with, "You are not a party to our proceedings". That is because we are all party to in this regard at least one umbrella set of proceedings. I don't see how it could be said on our side that the Tribunal has anything other than a broad discretion on costs in the same way that if Mr Merricks forces the claimants to incur massive costs for no good reason, in due course they can make that application against him. It is all part of the whole process. We are cross-responding to each other, sometimes in relation to people we are not directly litigating with and sometimes with parties we are litigating with. The Tribunal has, as you say, a very broad discretion, sir.

**MR TIDSWELL:** Yes. Thank you. I think, Mr Woolfe, maybe that resolves it. I am conscious we are coming up to 1 o'clock. Maybe you want to take some instructions on that. I think where we are getting to with this is I can't see any reason why those particular claimants, putting aside Marks and Spencer, which we will obviously come back to after lunch, but the remaining Stephenson Harwood Claimants, I can't see any reason why they shouldn't be entitled to the benefit of a costs award if it is justified in the Umbrella Proceedings and I can't see any reason why they shouldn't be providing disclosure if the basic threshold test is met and the threshold test is going to be of material assistance to the Tribunal and indeed the experts or indeed you in presenting the case in Trial 2.

I don't think that's the way you dealt with the requests in the Redfern schedule. I think probably the answer therefore is that you need to go away and assume you are going to have to do it and answer them on their merits.

**MR WOOLFE:** Thank you, sir. Can I take that indication away and come back to you with a concrete proposal after the short adjournment?

**MR TIDSWELL:** I think that would be helpful, because then I think we are reasonably clean on the after lunch. Obviously, I have to hear from others, Mr Sebastian and Mr Jones, as well and any reply observations, but just in terms of trying to narrow down what we are dealing with, that leaves us really with settled claimants only with Marks and Spencer, which, subject to anything you learn over lunch, over the short adjournment, we can deal with. So why don't we do that?

We are inevitably going to go into the afternoon. I am sure everybody has realised that. Mr Jones and Mr Sebastian, you will definitely get your time, so don't worry about that, but I would ask you to the extent you can focus -- I know you will -- try to keep it as short as we can after the short adjournment. So I will rise unless, Mr Woolfe, there is anything else you want to say before.

**MR WOOLFE:** Simply one other thing, sir, perhaps for all parties. On Mr Merricks' point in relation to Holland & Barrett, I think for my response to that it may be handy if you have to hand, sir, the copies of the witness statements filed by Holland & Barrett back in -- it would have been the end of May, which have been filed with the Tribunal.

**MR TIDSWELL:** Are they in the bundle or not in the bundle?

**MR WOOLFE:** They are not in the bundle. They have been filed with the Tribunal. We can make sure they are with you if that's necessary. Everybody else should have them.

**MR TIDSWELL:** If somebody could just let the Registry know precisely which statements you would like to refer to, we will dig them out.

**MR WOOLFE:** The ones by Mr Troth and Mr Dixon referred to in Mr Merricks' request.

**MR TIDSWELL:** Just to be clear, Mr Woolfe, I mean I don't want to curtail any of that. We are not going to resolve the Holland and Barrett dispute today I don't think. That's

going to go back into the loop we have been talking about. By all means take me to them if you think it is helpful, but the whole point of Holland & Barrett was it was an interesting example as to the difficulties of this and where things are going right and where they're not. If showing me the statements helps me understand all that, then I am absolutely fine with that, but I am not expecting you to make good on the argument about inconsistencies that Mr Williams has dealt with. We're not dealing with it today.

**MR WOOLFE:** Thank you. I had understood Mr Merricks was being pressing for a decision by him at this hearing. That was my response. There is no inconsistency when one looks at it in the round, but if you don't want to get into the detail of that --

**MR TIDSWELL:** I think Mr Williams is pressing on that, and obviously I will hear him again on reply, but my current view is it should be dealt with in relation -- in the same way as all the other questions the Redfern outstanding questions are dealt with. It may be you need to come back to it if Mr Williams persuades me otherwise.

When we have finished with this bit, we might have to put it into the small number of things we are going to deal with specifically, and Mr Williams has one or two others that we have parked, Holland & Barrett is one of them, of course.

**MR WOOLFE:** He is pressing Marks and Spencer, but the only basis for the refusal is the not a party point which you are dealing with anyway, sir. Holland & Barrett and Travix is the other one, I think -- Mr Williams is nodding. Those are the three which he is --

**MR TIDSWELL:** Let me see where we get to. He (inaudible) but if we do that, we will do it as part of the wash-up with Marks and Spencer as well, the specific requests. Let's do those at the end.

**MR WOOLFE:** Thank you, sir.

**MR TIDSWELL:** Let's work out what we are doing in principle with the rest of it and

then we will come back and deal with any outstanding requests that we can.

**MR WOOLFE:** Thank you, sir. I notice it was coming up to 1 o'clock. I think I have dealt with points 1 to 4.

**MR TIDSWELL:** So are you done, Mr Woolfe? That's it for you for now?

**MR WOOLFE:** I think that's it for me. I will have more to say on the detail of the Redfern requests if and when we get there, sir.

**MR TIDSWELL:** So Mr Sebastian and Mr Jones will be on after lunch.

**MR WOOLFE:** Thank you. I am going to come back to you with a quick answer and then be straight on to you, sir.

**MR TIDSWELL:** Mr Sebastian.

**MR SEBASTIAN:** I was just saying "thank you".

**MR TIDSWELL:** Your hand went up. Good. Thank you. I will rise and we will re-commence at 2 o'clock. Thank you.

**(1.02 pm)**

**(Lunch break)**

**(2.00 pm)**

**MR TIDSWELL:** Yes. Good afternoon. Who is going to go first, Mr Jones or Mr Sebastian -- sorry, Mr Woolfe. You were going to come back with -- I can't hear you, Mr Woolfe. Mr Woolfe, I can't hear you. Can you all hear me? I think there's a problem with your -- you are on mute, Mr Woolfe. That's not helping either. I am sorry, Mr Woolfe. We can't hear you. There must be something wrong with the sound I think at your end.

He's gone. Who is going to go first, Mr Jones or Mr Sebastian?

**MR JONES:** It is going to be me, sir. Should I wait --

**MR TIDSWELL:** Why don't you start, get going. Who knows how long it will take Mr Woolfe?

**MR JONES:** Oh, I see Mr Woolfe is back and talking again.

**MR WOOLFE:** Can you hear me?

**MR TIDSWELL:** Yes, we can hear you. Off you go, then.

**MR WOOLFE:** Sir; I think there were just two outstanding points. One was to confirm the status of my instructions by Marks and Spencer, and the other was to come up with a more concrete proposal responding to Mastercard's outstanding requests on behalf of the other Stephenson Harwood Claimants.

To deal with the first one, I am not instructed by Marks and Spencer here today. I confirm they are not paying my fees to be here, so they are in that sense unrepresented before you today.

**MR TIDSWELL:** It is not your fault, but it is not particularly helpful, Mr Woolfe. Anyway we will have to deal with it. That's a situation we will have to deal with.

**MR WOOLFE:** I can see it is not helpful. If it is not helpful, that can't be landed at the door of my other clients who are equally -- have no control over what Marks and Spencer do or don't do, just as none of the other parties do. They are genuinely independent, as it were.

**MR TIDSWELL:** I think probably the point Mr Cook will make in due course is it would have been helpful if your instructing solicitors had made it plain this wasn't going to be a live issue unless they were present. Maybe it was overlooked; and people do overlook things. I am not going to kick it any harder than that, Mr Woolfe, but actually that is a problem for us, isn't it, because we are not going to be able to deal with that today and we are going to have to convene another hearing by the sound of it. That's going to waste some costs, but that's just how it is.

**MR WOOLFE:** I can understand that, sir.

Turning to the second point about concrete steps in relation to Mastercard's proposal, we propose we can respond to Mastercard's request that we declined to answer on

behalf of the other Stephenson Harwood Claimants by the end of next week.

**MR TIDSWELL:** Okay. We will put that in the pot for -- basically you are accepting then, Mr Woolfe, that they are valid requests that need to be answered; that's the position?

**MR WOOLFE:** Yes. We are accepting that we shouldn't refuse them on that basis and therefore we should respond. It is therefore a question of some of them, there will be more a substantive response to some -- the response may be more a negative one depending on the circumstances.

**MR TIDSWELL:** That's very helpful. Thank you. I think that's definitely the right answer. You are suggesting next week. What I suspect is we will come back and talk about timing more generally when we get to that. That is sort of your bid on that. That's understood. Thank you.

**MR WOOLFE:** Thank you, sir. With that I think I can hand over to the other claimants, I am not sure in what order.

**MR TIDSWELL:** Mr Jones.

**MR JONES:** Thank you, sir. I want to spend what I hope is just two minutes on the point about Primark's own disclosure. It is a side issue, but a lot of energy was spent on it and I do need to correct some of the things that were said. Then I will turn as swiftly as I can to the meatier question of where we go from here.

Primark has disclosed more documents than any claimant apart from Allianz. If you look at the BRG table you were shown earlier, Primark has disclosed documents in more categories than any other claimant by a long way. It is not a promising start for the criticisms which Mr Williams made of Primark. The error in Mr Williams' approach seems to be that he thinks "readily accessible", which is a description we used, means something less than proportionate and he thinks that because he also thinks Primark has not explained its approach.

Both of those things are wrong. Primark has explained its approach in more detail than any other claimant. It has explained that "readily accessible" means proportionate, but that what it is trying to convey is that it is not doing an electronic search, such that you would get in traditional disclosure where you download large volumes of material and then carry out relevant reviews normally at the solicitor end. As far as I am aware, no other claimant has done that either, but in any event this was all made clear by Primark very early on. The reason Mr Williams may be unfamiliar with all of this might be because the relevant correspondence took place in the spring when his client and Visa were deliberately sitting out the discussions.

I will just give you a few quick references. We don't need to turn them up, but the phrase "readily accessible" was first used and explained in the way I have just explained in the letter at tab 35.

The fact that there had been no cherry-picking, which goes to the known adverse documents point, among other things, was in my submission obvious and clear from the outset, but in any event was reiterated in the letter at tab 39.

Further detail was given about, for example, how inquiries had been made with various teams across the business to find relevant documents in the letter at tab 48.

Sir, that is a side issue, but I do emphasise that Primark, in fact, compared to the other claimants has done significantly more by way of what it has disclosed and by way of the explanations it has given. That's my first point.

Sir, the meat, the more important question: where do we go to here? I listened very carefully to the schemes' submissions -- I am on agenda item 1, of course -- whether there ought to be an explanation. There were two broad objectives behind the schemes' positions, as I understood them.

The first was to enable them to obtain a more detailed explanation of the searches that have been done, so that the Tribunal at trial can decide whether the disclosure is

adequate. And if the Tribunal at trial decides it is not adequate in some respect, then that will impact on the weight to be given to the claimants' evidence. The claimants have the evidential burden.

We entirely accept that that is a legitimate objective. The Tribunal made clear from the outset of this disclosure exercise back at the qualitative evidence hearing, that if a merchant claimant did not provide adequate disclosure, then that may count against them at trial.

From Primark's perspective, we do intend to provide an explanation -- a more detailed explanation than has been given, not least because criticisms were made within the positive cases put forward by the schemes and we need to respond to those in our responsive case. So, we do intend to do that for that purpose, and we also intend that it will be attested by a statement of truth.

The second objective, though, that the schemes have been pursuing is a very different one, and it is one which we are concerned about. The second objective was to obtain the explanation quickly, but importantly, so that they can then enter into a further process whereby they criticise the searches that have been carried out and they ask the Tribunal to order a different process to be adopted.

We contest that. From the outset of this process, the Tribunal made clear that it was not adopting a traditional disclosure exercise, and that had a few different strands to it. One was that the Tribunal emphasised it would not be open to hearing debates around relevance. There would be a "warts-and-all" approach to disclosure.

We, on the claimants' side, at least on Primark's side, have stuck to that and we have not been here before you, arguing about relevance.

On the other hand, the process was not traditional disclosure in the sense that it did not involve the usual exercise of discussing things like search parameters, custodians, terms and so on. Instead, as I have already alluded to, what was said was that issues

regarding the adequacy of disclosure would be for trial.

The reason why we have not been engaged in that exercise was timing. From the outset, it was not practical to go through a traditional disclosure process which involves those kinds of arguments.

Just to be clear, it wasn't that the Tribunal at the qualitative evidence hearing said only, "We are not going to follow standard disclosure", which is what Mr Jowell suggested when he spoke, it wasn't that it said, "We are not going to follow a standard disclosure". The Tribunal said repeatedly it is not a disclosure exercise. One important aspect of that was we were not going through this exercise of explaining and debating search terms.

Ordinarily, if one does follow that traditional approach, arguments over the adequacy of search, arguments over search terms and so on happen early on in the process, ideally before disclosure has been done, before the search has been done, because otherwise it is impractical, you have to come back to it afterwards.

Ordinarily, these are extremely time-consuming arguments. The reason for that is it doesn't only involve a disclosing party explaining what they have done, which, as I have said, we do intend to do, it involves a further argument about what more might be done and what the costs would be of that further step, and that then involves a court hearing.

Now, that was not the approach followed in spring. All parties have known since spring that that was not the approach that was being followed by this Tribunal. They have all known that inadequacies in disclosure would be matters for trial.

Visa and Mr Merricks sat out the discussion in the spring, but, sir, even if you fast forward to July when they came back to the Tribunal with their requests for what they call "targeted disclosure", all they asked for at that stage and all we have given them was documents.

They did not at that stage say, "We also need a further explanation, and we need an opportunity to challenge and to question that explanation".

The first time that seems to have arisen is when they have looked at the documents that have been provided, and you will have well in mind, sir, that they are on the hunt for these indirect mechanisms. That's what Mr Jowell explained to you. They have a theory, which is that is there must be some sort of indirect mechanism whereby the MSCs impact on price. They have not been able to find it.

So they have looked at the evidence which has been disclosed and the documents which have been disclosed responsive to their requests following proportionate searches. They still can't find it in lots of cases. They are not happy, so they are now trying to hijack the entire process with a completely different process, which has not been followed from the start and which it is simply too late for, because we are now in the process of preparing our responsive case and once that is done, we are going to be very firmly in preparation for trial.

So, sir, question 1 on the agenda does, in my submission, hide various nuances, which, of course, have been discussed before you, but the simple answer from Primark to question 1 is that the claimants ought to be entitled if they wish to explain in more detail what they have done, and Primark does indeed intend to do that.

That is going to take Primark -- it has been planning to do it with the responsive case. It is going to take some time because one needs to go into quite a lot of detail explaining who was involved, what was searched for and so on. Timing-wise we have been planning to do it by 7 October. I heard your indication, sir, earlier it might need to be a bit before then. It would be very difficult to do it much before then.

More important is the question of what comes next. We, as I have been emphasising, are very, very concerned by the idea this should be used not at trial, which is what it has always been intended for, but as a springboard for more diversions, more

hearings, more arguments.

**MR TIDSWELL:** Mr Jones, I have a little bit of a difficulty with the way you are putting it actually because I don't think it is right. It is entirely fair for you to say that the Tribunal has made it plain that the sanction for failure to provide a proper warts-and-all case, and indeed the disclosure supporting that, is going to be in front of us at trial. So thus far I think we agree, but it seems to me there is a logical inconsistency in your position that there isn't going to be an opportunity for the disclosure you do provide, which was always contemplated to be subject to requests from the schemes and indeed Mr Merricks, that that wasn't going to be subject to any scrutiny.

That can't be right, because otherwise there would be no control on the way you do this, other than inferences at trial, and that would be a very, very unattractive position for both the Tribunal and indeed the parties.

So if you turn this around, I mean it's not actually the way I look at it at all. From my point of view and the Tribunal's point of view, if there are documents which will help us resolve the issues in front of us, they should be before the Tribunal if they can be provided within the framework of the way this has been set up. And that's very important, I emphasise: within the framework of the way it's been set up.

To that extent, I don't think your departure is in the end perhaps as significant as you might fear, because I think the position is you are going to have to be accountable for the way in which you have carried out this exercise, and I had thought you would accept that.

If it is apparent, on the face of it, that it isn't an exercise which is fit for purpose within the framework of the way this is set up, then you are going to have to do some more work -- I can't really understand any submission that you are making that wouldn't have that intermediate step and would just then default to some inference at trial. Inferences at trial, you know as well as I do, are not particularly helpful things to be

engaged in discussions about. And I think we would much all rather have the documents, if they exist and are readily accessible, in the framework which we set up. If they are not, everybody understands that, and that probably disposes of the inferences at trial point as well, because the inferences are all about cherry-picking, aren't they?

So, I think there is a bit missing in your analysis, which is a little bit of the cart before the horse. The horse here is if you get the documents and they can be got sensibly in the framework of the structure we have, then that should happen. And what people are trying to do is assure themselves that you have done something that delivers on that.

**MR JONES:** Yes. Sir, it may be that the way I put it rather exaggerated the difference between what I said and what you just said, because what was important in my submission in the way that you just put it was within the framework of what has been set up.

I accept that we will be providing an explanation, and that explanation will go in, I have suggested, by 7 October. I have also indicated I can see it may need to be a few days before then, sir. You have made a remark to that effect.

But what comes after that, it may be there needs to be a further hearing if someone is going to say this disclosure exercise that has been done is not, as you put it, sir, within the framework of what's been set up, in other words it's completely inadequate in some sense. It is not going to provide the kinds of documents that were asked for.

That is a bit different to what you'd have in a normal disclosure exercise where one has debates about very targeted things, like particular search terms and whether they have been used, particular individuals' inboxes, whether they have been looked at.

That, what I am calling a traditional approach seems to me to be what Mr Jowell has in mind, and that's the kind of approach which is going to lead to enormous satellite

litigation.

Sir, it may be the point I am making goes no further than to say we will have to see where we get to, but if we are back in a month arguing over the search parameters, the Tribunal will need to keep in mind this is a point that has arisen at the very end of a very long process which was never intended to go into the kind of detail you get in traditional disclosure battles, if I may put it that way.

**MR TIDSWELL:** If I may say, I think that's a much more attractive way of putting the point and I think there's a lot of force in that, Mr Jones. The difficulty we have is we are two steps away from that, aren't we? There is not a lot of clarity. Perhaps you are in a different position, but certainly in relation to some of these claimants in the Redfern schedules there is not a lot of clarity about what has actually been done, and therefore there has been no ability for the requesting parties to say, "This is wholly inadequate". Even on your test. So I do think there has to be an exercise that allows that to wash out.

Now, I absolutely take the point you make. You have made it very clearly. You have put down your marker that this is not normal disclosure and it needs to be viewed in a different lens. And that is obviously going to be a submission you will make, if need be, if the requesting parties come back with more forensic requests and an approach which is much more akin to traditional document-heavy litigation. That's all understood.

I do think, though, and I just want to test this with you, because I think this is certainly where I am at the moment, that we are going to have to let that process play out for two more rounds -- just simply because -- well, for two reasons, really. One is that it may be that that process does provide -- I would be quite surprised if it didn't provide some further documentation and some searches that could be sensibly undertaken proportionately that either the requesting parties point out, or indeed that the claimants

themselves realise when they look at what they have done, they say, "We could do this as well". I would like that pressure to be applied so people have that thought process and do it.

The second thing is that to the extent this process can reduce a long list of points on which inferences are going to be waved like red flags at trial, that must be a good thing as well for everybody, I would have thought.

**MR JONES:** Yes.

**MR TIDSWELL:** That's why I think we need to do these next two steps.

**MR JONES:** Yes. Sir, do I not push back on that and it is fair one could characterise what I have said as a flag for the future hearing, as it were, but I think at these hearings it is important to know where we are going and some of the things which some of my learned friends have said have caused us some alarm about what the next steps will be. But, sir, I entirely agree in the immediate term that the steps you just outlined are the appropriate ones.

Could I make two final comments just on this issue 1 directed at some of the nuts and bolts? The kind of description which my client will need to give will be a description that explains from the outset how they decided what relevant issues were, who from my solicitors liaised with individuals at my client, who at the client's end was involved, what searches they then undertook. It is not an entirely straightforward document to put together. That has two consequences. One is just on the timing point again. Again, we will do it as quickly as we can, but 7 October was a date which we initially thought was necessary for us to work towards. Over lunch we have been asking ourselves if it could be done a bit more quickly. We cannot do it a lot more quickly than that.

It also, though, goes to this question of presentation and the inter-relationship with the Redfern. Sir, I think there we entirely see the benefit in having cross-references on

the Redfern to the document I have just described. I think it would be cross-references rather than having a complete answer in each of the boxes in the Redfern. The exercise we have done is not going to precisely match on to the Redfern because some of the answers will be, "We had already done this search when Mastercard asked us back in spring, please see para 5 of the description". If you are happy with that, that's how we would intend to do it.

**MR TIDSWELL:** You can see, I hope, why I don't want to chuck the Redfern in the bin, otherwise you lose your frame of reference for what has happened so far. I completely understand the point you are making. As far as I am concerned, that would be fine.

**MR JONES:** Sir, I think the only other question I need to address you on is item 3, when Primark's further witness evidence will come. The context to this is -- I think may be slightly different to some of the tables you have looked at. When Visa's requests came through following your 30 July order, they included requests for "explanations", not just documents. I think the order envisaged documents, the request also referred to explanations.

I don't think I need to show you an example of that. Broadly speaking, Primark has been cooperative with these requests for explanations, as indeed it has with all requests for explanation.

However, it has taken a bit of time for Primark to find individuals who can give answers. One example is the individual who knows about the particular models that were being asked about has been on leave, so Primark has had to find someone else, and that person has had to dig into it.

Sir, I don't think I need to really show you all of that unless there is much push-back on this. It just goes to the date. We can do it by this Friday. We said that from the outset. Since we offered this Friday, we have offered to give more explanations on

even more things which have been raised. None of this is Primark trying to avoid any disclosure. It's Primark saying: we've given you what we've got, but we can see that an explanation would be useful.

Two days between Wednesday and Friday is what we are arguing over. I think it has been said by some of my learned friends unless they get it Wednesday, they can't possibly deal with it in their responsive case.

Sir, on one view this is material I could put in with my own responsive case, but we are prepared to do it on Friday.

**MR TIDSWELL:** Thank you. We will see. No-one has said very much about that yet, Mr Jones. We will see what they say about it in reply. Thank you.

**MR JONES:** Thank you.

**PRESIDENT:** Mr Sebastian.

**MR SEBASTIAN:** Sir, in the time available I want to just put forward our position on issues 1, 2 and 3 and then focus a bit on issue 6, which is how we go forward from here.

In terms of how we take things forward Allianz is opposed to any requirement to serve a disclosure report. It is opposed to any requirement to serve a witness statement that supports statements that have been made for the purposes of resolving the Redfern schedule, so that's issue 2.

We see in light of what has transpired that there is now a need for possibly another Redfern round in the form of further columns, but we would want that round to be as confined as possible. In particular, it cannot involve novel requests. It has to be within the scope of what the defendants and Merricks commenced with their initial Redfern requests.

Secondly, any attempt to impose a different search methodology will need to meet an extremely high threshold.

Let me explain both points.

First, just in terms of the point on the disclosure report, issue 1, I think it is just sufficient to highlight that what the Tribunal ordered was a Redfern process, and that is distinct from anything that happens under the CPR. It has a very well understood meaning in international commercial arbitration, and in the practice of international commercial arbitration there is no recourse to disclosure reports or statements of truth in connection with Redfern schedules.

Visa's counsel referred several times to what is normal, but not once did we get any submissions possibly from an academic or other authority about what is normal in the context of a Redfern schedule process.

Now, I completely appreciate that everyone needs clarity on the content of the searches that were carried out. As far as Allianz is concerned -- and I will take you to that in a moment -- we have given in our view quite a bit of that clarity and it was incorrect to say that we have said nothing or what we've said is unclear, but the point I want to make is that in the normal context of an international commercial arbitration, this sort of matter would have been handled routinely in a Redfern process. The vagueness of the explanation or the complete absence of an explanation would have been given weight by the Tribunal and they would have taken it into account when deciding on the request.

So, in order to make progress, there's no need to paralyse this process by saying we need disclosure reports. The process can and should continue without that particular formality, and it is up to the parties to explain what they have done, and they bear the consequences when the requests are decided upon in the ordinary way.

That's our position on that. There was really no need for this and there is no advantage in asking for a further formal document with a statement of truth. There is no real advantage in that. So that's our position on issue 1.

If I can just make good the point that Allianz had explained how it was going about doing searches and I am going to take you to the bundle for that. I am not going to read it out, but it would be useful if the Tribunal could see the impression that there is just a complete void of information about how we have gone about this process. That is completely incorrect. There was material about that. I will give you a couple of references.

The first one is in tab 70, electronic bundle I think it should be page 910, the electronic page.

**MR TIDSWELL:** This is a letter from Pinsent of 11 September.

**MR SEBASTIAN:** Yes.

**MR TIDSWELL:** This is last week.

**MR SEBASTIAN:** Yes.

**MR TIDSWELL:** Yes.

**MR SEBASTIAN:** You can see paragraph 6. There is a footnote there that refers to prior correspondence. That's letters of 2 May 2024 and 20 June 2024. If I can take you just to two more references to see how this has played out before these Redfern schedules.

If we can just go all the way back to Mastercard's proposals, and that's going to be electronic bundle page, I think it should be 1090.

**MR TIDSWELL:** Letter from Jones Day, 15 April.

**MR SEBASTIAN:** Right. If you scroll down to the next page and have a look at paragraph 7, electronic page 1091, you can see this is Mastercard explaining:

"As set out in paragraph 19.1 of Mastercard's submissions, given the nature of the documents there should be no need to conduct the sort of document search collation and review exercise associated with standard disclosure. One would expect these documents to be stored in specific locations and not to be easily identifiable and

retrievable by the appropriate person within the business with relevant responsibility."

Now this is Mastercard. I am not going to take you to similar documents which follow on from this approach, but the important thing to appreciate is from the outset the parties were operating in a distinct context. To point to normal CPR disclosure, even specific disclosure, or the rules relating to known adverse documents, that's not how this was set up. This is not how this unfolded, and it is important not to forget the history at this late stage when Redfern requests are being refined.

I think it is fair of us to say that this is the approach we have taken so far, and suddenly to be negotiating key words with the schemes and Merricks is inappropriate. If that sort of demand is being made at this late stage, that should be resisted or there should be quite a high threshold if we were going to get into that. That's why I am labouring this point. That's basically what I have to say on issue 1.

Nothing really went wrong from our side for this to be derailed. There was no fundamental failure of explanation here. We just operated in a normal Redfern way, but nevertheless we are where we are, but that's no justification to impose novel and completely distinct procedural obligations on us. That's issue 1.

If I can move on to the witness statements, I think there's a large degree of congruence on this, but I have to nevertheless clarify one thing. Visa's counsel mentioned that Allianz's position was that we would withdraw all of the explanations we made in the Redfern schedule because somehow we are concerned about giving a witness statement to back that up.

That isn't our position. We don't withdraw anything we have said in our Redfern schedules, and I am not quite sure where that came from.

In terms of the notion that statements in a Redfern schedule have to be backed up by witness statements, so for the purpose of the Redfern exercise I think the Tribunal has seen and everyone has seen that that is completely novel and makes very little sense.

These are statements made by London solicitors. It is not as if they have no weight whatsoever, which is one of the proposals -- one of the things that was said here, and in the correspondence there are statements to that effect as well. That is just the normal way in which Redfern processes unfold. There's no requirement to have a witness statement in that context.

Now, on the separate question of whether witness statements of substantive points we wish to rely on at trial, that is obvious -- that is something we will have to do.

Allianz initially stated at that time we had no proposal to introduce that sort of witness statement, a supplemental one. Our position has since changed as we -- and we would like the opportunity to introduce that sort of supplemental substantive statement, but that is completely distinct from the process for replying to a Redfern. We just don't see why the Redfern process needs to be complicated by witness statements.

**MR TIDSWELL:** Yes. So, Mr Sebastian, just so I understand where you are going with that, I entirely understand the distinction point which I think is clear, but you are now saying you think you will put in some supplemental witness statements.

**MR SEBASTIAN:** Yes.

**MR TIDSWELL:** Those are not going to be responsive witness statements because they are effectively new evidence from you; is that the position?

**MR SEBASTIAN:** They are new evidence that has come out in the context of replying to Redfern requests. There was one specific point which was when we saw that point, we thought that is a substantive point we would like to rely on at trial.

**MR TIDSWELL:** Yes, I see. Okay. I mean, I think the current regime doesn't provide expressly for that therefore you will need permission to do that. Before we get to that point, obviously you are going to need to ask the parties whether they object to that. Now, I take the point. I think it is not dissimilar to -- well, you may not need permission for it if it is in the context of -- it is not dissimilar to the point I think Mr Jones was making

about putting together, if you like, a further statement which concludes the disclosure process, but I think you are very much saying this is something you want to rely on for the purposes of the substantive hearing, aren't you?

**MR SEBASTIAN:** Yes.

**MR TIDSWELL:** So this is raised effectively as a supplement to your primary case, isn't it?

**MR SEBASTIAN:** It is. My understanding was there is no objection to this from the schemes, but I may be wrong about that, but we can explore that.

**MR TIDSWELL:** I suppose what I don't want to do is to have the argument now if it hasn't been properly canvassed with the parties. So if it is raised for the first time and nobody knows what the answer is, then let's not do that. If there is going to be an argument about it, we can deal with it, either now if it is crystallised or we can deal with it some other time, but I just wanted to understand where that was.

**MR SEBASTIAN:** Understood. Just for the benefit of others when considering their position, it will be a witness statement that goes no further than statements that have already been made in the context of either a Redfern schedule or in correspondence connected with a Redfern schedule.

**MR TIDSWELL:** Yes. Okay. I will put that aside and see what everybody has to say about that. I suspect it's something we will have to come back to once the position has been dealt with. Of course, that is something I can deal with on the papers if need be.

**MR SEBASTIAN:** I am grateful. That's pretty much what I have to say on issues 1, 2 and 3, which are connected.

**MR TIDSWELL:** Yes.

**MR SEBASTIAN:** I say nothing on issue 4. We haven't had the time to deal with issue 5 and that is going to be parked for a later process. In terms of how we will go forward, I would simply lay down the marker that Redfern processes are simply

supposed to have three columns and a hearing. We can't indefinitely do this. I understand we are going to probably have two more columns. It seems the sensible thing is the next stage will be for the schemes -- we don't have any issue with Merricks, as I understand it, but I can be corrected if I am wrong -- to explain precisely what further explanations or disclosure they need and then for us to come back after that. That would seem to be the sequence. Although it is unorthodox in Redfern terms, we are where we are.

So my final submissions are just going to lay down a few markers about some concerns we have about how we reached the stage we did in this hearing, not purely backward looking, but just to lay down some markers about some implications that might have for arguments about adverse inferences or procedural unfairness at trial. If I can finish off with that, it won't take very long.

**MR TIDSWELL:** Yes.

**MR SEBASTIAN:** Early in counsel for Visa's submissions, there was a suggestion that today's hearing was only meant to be about resolving disputes about relevance. That wasn't my understanding of how this hearing was supposed to unfold when one looks at the order. This hearing was meant to wrap up all issues that would arise in connection with the Redfern schedule and allow for documents to be produced in advance of the responsive cases.

That isn't where we have ended up today. We haven't even considered a single specific request in item 5. Instead, what we have had is effectively a fait accompli where we have been debating how to take things forward through a modified Redfern process.

And if one looks at how this was derailed, at the bottom of it are two requests. One was for disclosure reports and the second was for witness statements. Neither of those requests were well founded. There was no order to that effect originally, as

I have said. They are incompatible with the Redfern process and there is no real substantive justification for them.

The position was only this morning did Visa fully review the material we had provided to them and reply to Allianz's points in a document that was presented shortly before the hearing.

Mastercard still hasn't told us what its position is in respect of our -- the disclosure we gave or how we responded. And the justification for that has been entirely on the basis that we didn't provide adequate explanations, a disclosure report or witness statements. That, we say, isn't a proper justification.

We have further concerns about two things that have arisen during the hearing today. One was Mastercard's explanation that it has taken away the issue of supplier pass-on, unilaterally removed it from the Redfern process and will deal with that at trial on the basis that adverse inferences are warranted.

Mastercard's position was that all parties, including Allianz, had not given any documents in response to supplier pass-on. Now, that's factually incorrect. Allianz had given documents in response to supplier pass-on.

But I want to lay down the following marker. If any attempt is made to obtain adverse inferences against Allianz on the basis it has been non-cooperative, the fact that no order has been obtained from this Tribunal pursuant to the Redfern process will be something that we invoke to resist such an adverse inference.

The making of adverse inferences is highly contextual, and it depends on whether we have genuinely been non-cooperate at this point in the procedural context that we find ourselves. And Allianz so far, we see no basis to criticise what we have done and the sort of criticisms that have led to the derailing of this hearing, disclosure reports, and witness statements and statements of that type we say are simply inappropriate and we will resist them strongly. I am just putting down the marker on that point.

Unless there are further questions, that's all I wanted to say at the moment.

**MR TIDSWELL:** Thank you, Mr Sebastian, that's very helpful. Thank you very much. Right, I think we are back to you, Mr Jowell.

**MR JOWELL:** Thank you, sir. If I may, I would like to respond in three matters. First, to put down a note of general concern about the nature of the approach of the claimants to disclosure; second, I would like to discuss the issues relating to the content of the next documents that are to be produced; finally, I would like to deal with timing.

Starting with the issue of content, from Visa's perspective it's obviously essential for any fair trial of this matter that it is able to scrutinise the underlying documents that relate to what one might call "indirect pass-on". Absent those documents, we are unable to test or to probe the veracity or completeness of the witness evidence that the claimants have put in. And there can be no fair trial unless we obtain that disclosure.

The procedure that we understood that the Tribunal had put in place in April is a little unusual in that it doesn't provide for standard disclosure, but it did provide for two essential safeguards to ensure that we would obtain that disclosure.

One was the requirement for the claimants to make a full and frank presentation, putting the burden on them to give disclosure as part of their positive cases; and secondly, there was what was called the Redfern process, whereby we would be entitled after positive cases, when we could see what use was made of the witness statements, we would have an opportunity to ask for documents and we were assured by the Tribunal that the presumption would be: ask and it will be given unto you. Therefore based upon those two essential safeguards, we have gone forward.

What we listened to with some concern to counsel for the three sets of claimants is that they perhaps have taken something rather different from this process, and that

they may be under the impression that they are able to proceed to trial somehow skipping over the essential requirement of providing us with disclosure.

We hear that first from Mr Woolfe, where we obtained a sort of hint it seemed that they may have been proceeding on the basis that they could really delegate -- that the solicitors could delegate the disclosure process entirely to their client.

We heard that also to a degree from Mr Jones, who seemed to assimilate reasonable searches to readily available documents. And we heard that with even greater clarity from Mr Sebastian, who seemed to think that he's in an international commercial arbitration, where of course completely different standards apply to the provision and disclosure of documents --

**MR TIDSWELL:** Mr Jowell, I am sorry to stop you. I am just not sure -- I am not entirely sure how helpful this is really, because it is quite plain, isn't it, that the two procedural safeguards you identify we now know -- we don't know how the first of them has turned out, at least I don't, because part of the answer to that is: what happened to the second one?

The second one certainly has played out. We have had a Redfern schedule. You have asked for documents. You have had a whole bunch of documents. You are not sure whether you have all of them, and you are now seeking more clarity about how they have been assembled, so you can pursue them.

Put aside whatever the standard might be or whatever regime it might be. We are just talking about the very simple concept here, which is that you have the ability to (inaudible) and seek some documents, so that all of us -- not just you, but the Tribunal and all the parties -- have in front of them the material that is important for the resolution of these issues.

**MR JOWELL:** Yes.

**MR TIDSWELL:** Now that process is still playing out and I think where we've got to,

unless you're going to tell me something different, is that we're going to have (inaudible) in which you're going to be told what has happened and you can chuck some blocks at it if you like.

**MR JOWELL:** Yes --

**MR TIDSWELL:** Go on.

**MR JOWELL:** I accept that, but I think it is important that I should make clear, put down a marker as we always say in these types of hearings, that we don't regard it as somehow -- we didn't -- we have not been proceeding on the assumption and we do not regard it as acceptable for them to give -- to simply delegate the whole process of disclosure to their lay clients, if that is what is being done.

**MR TIDSWELL:** I am not sure that is what's being said. We will find out, won't we, because they were going to tell you. In a way having an argument about it now is not terribly helpful.

**MR JOWELL:** I accept that, but I do think it is important I should make that clear so that our position is clear going forward, that we don't regard that as having been consistent with the procedure that was ordered or with a fair procedure.

**MR TIDSWELL:** Well, let's see what they say about it, Mr Jowell. If they say something you can criticise legitimately, then I am sure you are going to do that.

**MR JOWELL:** I think you can be fairly confident of at least that.

I think the point I am simply making is we don't -- if that is what they have done, then it is not, in our respectful submission, consistent with what the Tribunal ordered or with a fair procedure.

The second point I should make is what should be -- I think it is agreed, or broadly agreed, there should be some form of statement now from the claimants about the nature of the searches that they have carried out or their clients have carried out that have led to the production, or more importantly, non-production of these documents.

**MR TIDSWELL:** When you say "statement", do you mean witness statement or do you mean explanation?

**MR JOWELL:** I mean an explanation. I think at least in Mr Jones' case, he doesn't cavil with the notion there should be -- and I think also Mr Woolfe -- don't really cavil with the idea there should be a statement of truth at the bottom of that explanation.

We certainly don't -- we are relatively -- as long as there are those features of there being an explanation and there being a statement of truth, the precise format is really a matter for the Tribunal. If you find it more convenient for it to be in a Redfern, of course that's entirely fine.

And equally, if you go with Mr Jones' suggestion that it should be in a letter that cross-refers to the Redfern, which does have the advantage perhaps of being more manageable. But what it does need to contain is a description, both of what the solicitors have done to obtain these documents, but also insofar as they have delegated these searches to their clients, to be meaningful it needs to describe what the client has done. By that I mean whose documents have been looked at or which custodians have inquiries been made of, which of their documents -- which of their sets of documents, and if there have been search terms, as we would have hoped and expected to be run on electronic documents, what those are.

That is really as a minimum for a meaningful explanation to be given of what searches have been conducted. So that goes to the second point I wish to come back on.

**MR TIDSWELL:** Yes.

**MR JOWELL:** Finally to timing, yes, to a degree these documents can be deployed in cross-examination, but it is also the case that these documents may need expert input for their analysis. Therefore if they are not to be -- if they are to be provided after negative cases, then we do at least reserve the right to say: well, we will have to put in a further document from our experts dealing with any of these new documents.

Similarly, insofar as it is intended that new further rounds of witness statements will come in negative cases or in advance of negative cases, again we will -- our experts will need to have an opportunity to scrutinise those and, if necessary, put in a further report to deal with them.

The process was intended to be one where the experts would have, as is usually the case, the final word, and if this evidence comes in afterwards, we have been denied an opportunity properly to address it in that expert evidence.

**MR TIDSWELL:** Yes.

**MR JOWELL:** As regards timing generally, we do not see any reason why the claimants need so long to put in these explanations of the searches they have carried out. They should know that already if they have been doing their job properly and they should be able to provide it within a week, and certainly not wait until after positive cases. We think that's far too long and threatens to derail the whole trial, because if we only start having a debate about this and then we start getting documents right up against the hearing, it is going to be impossible to conduct cross-examination because we simply won't have sufficient preparation time.

Again, if experts are to be given an opportunity -- a fair opportunity to look at these additional documents, again they need to be provided promptly.

So we do say that there's a danger here that the claimants are running down a clock, so that it will be impossible for us to use this material and that is to be avoided.

**MR TIDSWELL:** Mr Jowell, I have in mind I would ask you -- not you personally -- maybe you personally but I doubt it -- I would ask the requesting parties to look again at their column 4 because what has happened I think is column 4 has been populated very quickly after you received the claimants' documents. Quite a lot of column 4 is we're not sure yet because we haven't looked at it. And we now have looked at it.

I think the first step, just in terms of cleaning the Redfern schedule up -- I appreciate, I think Mr Sebastian is disappointed it is unorthodox but I like to think of it as innovative -- basically I want to get this thing as focused as possible, and that is going to require some discipline from the parties, both in terms of the approach, but also in terms of their appetite to have a fight about some of this material, because you are going to have to be realistic about what you are going to get as well.

And, you know, there's a sort of a tension in all of this that sits between: are you doing this so you can correct a platform to make your inference points or because you really want the documents?

As far as I am concerned, I am just focused on whether there are documents that should be in the pot and are easily accessible, and not coining a phrase that Mr Jones has put forward, but are available in a way that means they should be in the pot and we should all have them.

Now that's my focus. You can worry about your inferences later and as far as I am concerned that is a matter for trial. So in terms of your fair process, top of my list is we identify what you sensibly need -- emphasis on "need" -- and then see whether we can get it for you. That is what the Redfern should be delivering, not arguments that set you up for inference. If you do that, then I am not going to have very much patience for it when I see this thing again. That's not a criticism. I just want to be plain with you about what I think is going on here, which is as far as I'm concerned we're trying to get the documents out.

**MR JOWELL:** If I may assure you, we very much approach these requests on the basis of whittling it down, and whittling it down to those documents we regard as genuinely needed. We have been very disappointed to find we are simply met in some cases, such as Holland & Barrett, with a complete stone wall and no disclosure of any further documents. And in many other cases also very, very poor -- a great paucity of

documents disclosed.

So it is not correct to say that we have somehow been given some great haul of documents. On the contrary, there are very few from most of these claimants.

**MR TIDSWELL:** You have been given an awful lot of documents by Primark and Allianz and indeed by all of the parties in the initial round of disclosure, so I think you have to be a bit careful about that. In response to your questions, it may well be fair you have not been given documents you should have. We are going to find that out, but in order to do that you are going to have to be focused.

**MR JOWELL:** We have that well in mind, and it is not our intention to set up some kind of phony fight here to try to set up a procedural argument. We want the documents. We made that clear. They are the ones who are declining to provide it completely in some cases, and on the basis -- and then until we reached this hearing refusing to even explain what searches they have carried out.

**MR TIDSWELL:** Just on your general point about timing, I mean, clearly we were going to have to -- not a surprise I suspect to anybody -- we are going to have to look at how we deal with the spillover from this exercise and the timing of negative responsive cases. But I suspect that the answer to that is probably we have a CMC in the diary for 22 October -- and that was your call, a little bit of a compromise because we had hoped to have a PTR then, but now it is not possible to assemble the panel for the PTR on that date. That is going to have to happen a bit later.

What I suspect is we will spend some time on the 22nd trying to work out what other material we have got and whether it should go in or not.

Now, that may require people to do the work and then present it rather than the other way round, but that is probably a good thing in the context of the timetable.

I absolutely take your point, Mr Jowell, it may well be you are given some documents that do require your experts to look at them and we all want that to happen. There will

be some facilities for that. Obviously you will have to make a case for that, but I wouldn't be surprised if that were the case.

**MR JOWELL:** Yes, but if we are to be ready for that debate on the 22nd, then they really have to improve their offer in terms of when they are going to provide these documents.

**MR TIDSWELL:** Let's come back to that. We need to take this a step at a time so they understand the point.

**MR JOWELL:** Just one point. Allianz did say -- it is in the bundle at E70, electronic page 910, at the regular page 905 -- they did say in their letter that they didn't consider that they needed to rely on the explanations that they had given.

Now it seems from Mr Sebastian's submissions they wish to change that and they do now wish to put in -- they do wish to rely on and they do wish to put in witness statements, so that they can rely.

Again, we do say those witness statements have to be provided promptly. We asked for the Primark ones by the 18th. Primark are still, I think, suggesting the 20th of this month. But that it seems to us, if anything, is too late really for us to be able to deal with these adequately in our negative cases. But we say if Allianz wish to change their position, they must serve those witness statements --

**MR TIDSWELL:** Primark is slightly different -- as I understand what Primark are doing is they are responding to requests you have made or Mr Merricks has made, and they are saying: we are doing our best to explain where there are documents what the position is, and it has taken us some time to do that. And they say not much difference between the 18th and the 20th, for which I have some sympathy with them. Is it really going matter whether it is Friday -- what is today -- rather than Wednesday?

It is hard to see how it could make any difference. I do wonder why we are having a fight about that. That's a bit different. I think Mr Sebastian is acknowledging it is

a change of view and he accepts he might have to make some argument about that if need be, about why he should be entitled to do that.

Yes, I think the way to do this probably, which I think is consistent with everything we have done so far, is that if people want to do things like Mr Sebastian suggested, they should do them and then we will have a look at them. That is probably the way to do it.

As you say, Mr Jowell, the longer this goes on, the harder it is going to be to deal with it on the 22nd, so there is some imperative for that. I don't know if Mr Sebastian has even thought about a timetable to produce his document, but he will say you have had (inaudible).

**MR JOWELL:** Forgive me. In relation to Mr Sebastian's witness statement, he did acknowledge that it would simply be a recitation of what has been already said --

**MR TIDSWELL:** Exactly. Exactly.

**MR JOWELL:** -- (inaudible) so shouldn't take long.

**MR TIDSWELL:** Also you were not being taken by surprise, because you know what it is as well.

**MR JOWELL:** Yes, assuming it doesn't change between --

**MR TIDSWELL:** I think we are assuming it doesn't change so it shouldn't take long, so it cuts both ways, doesn't it? Anyway, I think that's probably the way forward on this.

**MR JOWELL:** Those were the only points I wished to make. I suppose you will probably wish to hear from others. I can't see -- in reply.

**MR TIDSWELL:** I think that Mr Cook and Mr Williams may or may not wish to say something. I am not going to encourage them if they don't, but I rather suspect they will.

Mr Cook.

**MR COOK:** Sir, I'm going to try to resist spending time laying down markers or responding to other people's markers. As I understand it, there are effectively four processes of one kind or another we need to talk about in terms of timing.

Firstly, each of the claimants -- I don't mean, Mr Merricks -- merchant claimants -- have indicated they intend to make some kind of substantive statement -- by "substantive" I mean going to the substance to the issues of the litigation rather than the process by which disclosure searches were carried out. So substantive witness statements.

I absolutely agree there is an issue with why material wasn't provided months ago, but we can only take that further once we actually see them, but those do need to be provided in short order and I suggest they should be this week, but I am not going to press you on any earlier date than this week.

So substantive witness statements do need to come in, so we are aware of the target we are aiming at for responsive cases, if nothing else.

Second --

**MR TIDSWELL:** Sorry, I missed the beginning of that. Is that aimed at Primark and at Allianz? Because Mr Jones' position is you or somebody asked him for this stuff and now he is delivering it. So that's a slightly harsh criticism of him if that's aimed at him. It seems to me Mr Jones should have until Friday to put his statement in because he is doing his best to fill in the gaps to people who have asked him questions.

If you are telling me that creates an insuperable problem for you, I would be interested to know why, but I can't see really -- with sufficient time and given the nature of the material, I can't see why that doesn't give you plenty of time.

**MR COOK:** My position was I was saying Friday would be fine. I wasn't pushing you for an earlier date than that. So on substantive witness statements I was saying we will need to see what's in them, but they should come in on Friday to allow the timetable

to work going forwards, no later than Friday.

**MR TIDSWELL:** Just to be clear, Mr Cook, just so we are on the same page -- when you talk about substantive witness statement, it is the case, isn't it, that Mr Jones and Primark are providing a statement to fill in gaps in requests for information from them. That's not part of their positive case. They have been asked, as I understand it, to respond to requests which have led to them preparing a statement, because that's either easier or in the absence of documents, the only way of telling you what the answer is; isn't that right or have I got that wrong?

**MR COOK:** I understood from Mr Jones' submissions there were two kinds of material he was planning to put forward, some kind of substantive witness statement and some kind of disclosure explanation, and he was offering different dates for the two of them -- in relation to the substantive document which would deal with the price-setting process in some way is in relation to issues which have been -- you know, they are the core of the pass-on issues for Trial 2. So, you know, those go to the core of what we will be addressing in our responsive cases. So the timing of that, I would suggest, needs to be in good time so we have seen that long before --

**MR TIDSWELL:** Well, I think it is going to come on Friday, but I am not talking about the timing. I just want to make sure I understand what Mr Jones is doing. Maybe I will ask Mr Jones.

Have I got that wrong, Mr Jones? Am I right in thinking that your statement is responsive to the requests or a further iteration of your positive case?

**MR JONES:** No, sir, you are right, it is responsive to requests, although, sir, since this discussion has evolved, I think I should just raise another point so there is no misapprehension here.

I think some of my learned friends have hinted at the notion that they may need to put in witness statements in order to support their responsive case, and we have also, of

course, been thinking about that. We have not yet corresponded with my learned friends on it because we have not reached a firm landing, but that's a different category of statement. We are conscious that also will need to have permission. So we need to get moving on it and we will need to come before you, we think. And we can also see doing that quickly is going to be important.

So I don't mean to set hares running with that, I am only mentioning it because I see there is general discussion about witness statements. We had wondered at our end whether this statement we are doing this Friday, which provides the explanations, should be merged with the other statements that I just mentioned and we have decided that wouldn't be practical because we want to get the explanations in as quickly as possible, since they have been asked for.

So this other category of statement will be, for example, principally about correcting things that have been said in the schemes' positive case. So we look at that. They have described Primark's approaches. There's a few occasions where they have just got it wrong, so we need to respond to that.

Sir, I don't mean to over-complicate this, but I think I should be clear --

**MR TIDSWELL:** It's helpful. I think the difficulty is presumably there is just inevitably an overlap between the questions you're answering because you've been asked them and some of the things you're going to want to say later. The bright lines are quite hard to draw. I suspect that's the problem.

**MR JONES:** Yes.

**MR TIDSWELL:** I must confess I am not sure there is anywhere a clear description about what the responsive cases should contain. Clearly, they should contain the expert responses.

Mr Woolfe.

**MR WOOLFE:** If I may come in on it, paragraph 4 of the Tribunal order made on

30th January in relation to responsive cases said that by a date, which has now been postponed:

"Each party shall insofar as it thinks it necessary set out its responses to the other parties' responsive cases and they should be set out by way of:

(a) a position statement, and

(b) the totality of the evidence (documentary, witness and expert, subject always to the control of the Tribunal) as will be relied upon at trial in support of the same."

So our understanding was that the deadline, as it were, for any evidence which is necessary to support the responsive case is the date of the responsive case.

Now that is subject to the control of the Tribunal for whatever reason if it thinks this evidence is not helpful for trial. That we understood was the position.

That was also the case in the order for the positive cases. We voluntarily gave our witness evidence early. The reason for that was because our experts needed the evidence put together in order to work out which proxies they were going to analyse. Therefore in practice it was ready earlier and we thought it wasn't fair for us to have it and sit on it without providing it to other parties.

However, we were never ordered or at least at that stage -- there was not a general process set up that everybody shares witness evidence in advance of the positive and responsive cases. That's how we've been approaching this evidence.

**MR TIDSWELL:** That's helpful. I mean, it still begs slightly the question as to what is proper factual material to put into a responsive case. That was the bit that lacks some clarity. It's pretty obvious what the economic expert's case should be because it is clearly going to be responding directly to: are we in a position where only reply -- strictly reply evidence should be properly included in a responsive case? I must confess I don't know what the answer to that is. I suspect that may be tested by the sort of material you want to put in, which is why we are going to have to talk

about how we'll deal with it, and I suspect if there's the proviso in there about the control of the Tribunal. Anyway, we are going off at a bit of a tangent. Hopefully, it is not unhelpful.

Mr Cook, sorry --

**MR COOK:** So substantive statements, I was rising to Mr Woolfe's comments -- indications that his clients were planning to put in substantive statements and there did seem to be this overlap between statements, as Mr Jones' client might be intending to put in, which are putting in bits of the Redfern statement responses into witness statement form versus a broader substantive element.

Ultimately sir, we are concerned if they are going to be --

**MR TIDSWELL:** Sorry to interrupt. I think there's a lot of confusion about what these statements are. As I understand it, that's not what Primark's statement is doing. It's not recording their responses in the Redfern. Mr Sebastian says he's going to do a bit of that. Mr Jones is not doing that. Mr Jones is giving you factual evidence that responds to requests which are more generally dealt with or only can be dealt with by witness evidence.

So that's quite different from -- it is a response to the Redfern in a sense, but it's not recording, if you like, the responses in the Redferns as witness evidence. That's not why he is doing that. He's nodding his head, so I think I have that right.

**MR COOK:** Sir, I am concerned, but I'm not sure I understand the distinction between if what a witness is doing is factually describing what they say happened in practice at that business during a certain time period, then I'm describing that as sort of substantive evidence whether it's provided directly in response to a question or whether it's provided arguably in reply form or as a freestanding additional correction to what comes earlier, but --

**MR TIDSWELL:** I don't think that's fair, Mr Cook, because if you ask -- if you load the

Redfern with questions that can be asked --

**MR COOK:** Sir, I didn't -- well, that's a situation where Visa are the ones I think who asked for information here, so I am concerned about --

**MR TIDSWELL:** If somebody populates their Redfern with a request, and I seem to recall there was a discussion about whether people would provide witness statements if that was the helpful thing to do, and someone helpfully decides to provide a witness statement in order to answer the question on the Redfern, you can hardly criticise them for that. That seems to me to be entirely in accordance with the process we set up. In a way, it is an extension of the earlier witness statements that have been ordered and permitted.

That's quite different from either a witness statement which records the answers as to why things can't now be disclosed or aren't being disclosed, which are the reasons that are given in the Redfern schedule for the disclosure decisions. That's quite different. And then it is also quite different from what people may choose to put into their responsive statements by way of precise reply to the positive statements.

So we have at least three different categories of statement here. I think it is important to keep them distinct.

**MR COOK:** Sir, I am happy with that distinction between the three categories. I was addressing at the first stage the substantive responsive points, which I suggest should go in this week. The disclosure explanation, I think the suggestion was that was going to take Mr Jones' clients until 7 October. We suggest that's far too long and that should also be provided this week. So whether they're going to say: we've carried out the following searches in the following ways, that is something that should be capable of being dealt with within a few days, absolutely. That is absolutely critical to allow the next stage of the Redfern process to take place. So that's the second category --

**MR TIDSWELL:** You heard me say to Mr Jowell that I thought it might be helpful to

ask you to have another look at the Redfern schedules, with the benefit of all the documents you have and see whether you want to change column 4 before we ask the claimants to respond again. So that is my current inclination.

**MR COOK:** Well, sir, I was just going through the different steps. The next step I was going to suggest should be in terms of Mastercard that the SSS -- SSH Claimants provide their substantive response to our requests because if you recall, with the exception of those ones which overlapped, the response to Mastercard was always "No, we have settled". So in relation to those --

**MR TIDSWELL:** Mr Woolfe has offered those, hasn't he? I think he said the end of next week for those.

**MR COOK:** That's what I am addressing, sir, is that statement -- Mastercard I think is in a different category when you talk about the next step should be for the defendants and Mr Merricks to think about which requests they are pursuing, that in order for Mastercard to do that, unusually, certainly in relation to the SSH Claimants, we need to know what their position is because to the extent that they are basically acknowledging --

**MR TIDSWELL:** I understand that. I think Mr Merricks is in the same position on some of them as well -- because I think isn't that right, that Mr Merricks can't have things because they have settled with you as well --

**MR COOK:** Only in relation to Marks and Spencer, on the basis Marks and Spencer are out entirely.

**MR TIDSWELL:** I thought Travix had said the same thing to Mr Merricks as well about that -- forgive me, I may have that wrong.

In a way, Mr Cook, maybe we just need to carve that category out and run a slightly different timetable because what I don't want to do is find we now have to wait until Mr Woolfe gives you those answers before you do anything further, before anybody

else has to do anything further.

Let's take that small group out. Put Marks and Spencer to one side, but the rest of them, the five or six or so you have said that were not given to you, let's tweak them on a separate timetable I think is probably the answer.

**MR COOK:** Absolutely. That's what I am addressing, a separate timetable. Respectfully, sir, I would say that should be done more quickly than essentially two weeks because, you know, that is the next step before we can then put forward our responses. And in order to allow this process to actually move forward, I suggest that should and could be done rather more quickly than the end of next week.

Then in relation to Allianz and Primark we have, to some extent, already given an indication. I think Mr Sebastian had not alighted particularly on our response, which did narrow it down in relation to three outstanding requests, but obviously we have had a look at more material since then and that can be reflected in an updated column 4 or whichever column it turns out to be.

**MR TIDSWELL:** Yes. Thank you. Mr Williams.

**MR WILLIAMS:** Sir, I am grateful. I adopt in large part what Mr Jowell has already said. We are particularly concerned about the timing of all of these future steps in both respects of the disclosure request process that we were now embarking upon with the Redfern schedule, and also new witness evidence we are being told about for the first time today.

Taking those points in turn, in respect of the disclosure requests, in light of the procedural safeguards which Mr Jowell has already discussed that were set up, they all envisage steps being taken prior to the responsive cases, so that the issues could be resolved prior to those responsive cases.

Now that's clearly important because we need to be in a position to test the positive cases. All of these disclosure requests that are being made are not to support

Mr Merricks' positive case, they are to ensure that we can challenge and test the responsive cases and not have to get into the realms of having to make submissions that we have already in our positive case, because then there's an insufficient, self-selecting disclosure process by self-selecting merchants that can't be safely be relied upon because they can't be trusted.

We are trying to avoid that process. The only way that can be avoided in full is if this process makes material progress before the responsive cases, because otherwise in my submission there will be new facts, new disclosure and it transpires even new factual evidence that neither we nor Mr Coombs, our expert, will have had any opportunity to assess or comment upon in our responsive case or in our reply report.

Now that gives rise to all sorts of inequality of arms issues whereby the merchants' experts, it seems, will have had that evidence, but not us. So we are very concerned that this process is going to be delayed yet further because from our perspective --

**MR TIDSWELL:** Mr Williams, as a matter of practicality, we have three weeks until responsive cases are done and they will obviously have to be put to bed a few days before that anyway, so we are probably only talking about, two, two and a bit weeks. You are not going to get more documents on any timetable with any order that's done. If you've got your disclosure statements and your statements of truth, and everything you have asked for, you are not going to get documents before 7 October, are you? That is not a realistic request.

**MR WILLIAMS:** Well, in practical terms, the two points that I would make is that, firstly, we don't want to set up a process that ends up jeopardising the trial date. That is our absolute long stop. We have to be in a position not to jeopardise that.

**MR TIDSWELL:** Understood.

**MR WILLIAMS:** That's been our consistent submission over many months, if not years.

Secondly, in respect of our requests, we have three very specific granular requests. We have done exactly what was ordered in respect of the Redfern schedule process --

**MR TIDSWELL:** We were going to come to those, aren't we? I absolutely accept if we can make progress with those, we should. I think that's the next step once we reach some of the principal stuff. Let's park those who. M&S is I think one of those --

**MR WILLIAMS:** Yes, sir, that's correct. I am grateful for that. I was just addressing the point before lunch that we might not be dealing with those today, but it sounds as though we are dealing with Mr Merricks' responses -- requests today, which I am grateful for, because we were concerned about obviously (inaudible).

**MR TIDSWELL:** If there are specific points we can deal with other than because it is necessary to have an explanation of the process before they can be advanced, then, of course, we can do those.

**MR WILLIAMS:** I am grateful.

**MR TIDSWELL:** We will see about the Holland & Barrett point. Mr Woolfe I think has sent us some references to witness statements he will no doubt want to have a look at. We will come back to those in a minute. As I understand it, M&S is going to be very difficult because we had a message to the Registry that says they don't want to provide any further disclosure or to be further involved in the proceedings, given the full and final settlement with Mastercard. So I think it is going to be quite a difficult thing to deal with this afternoon.

Anyway, let's put that to one side.

I don't want to hurry you, Mr Williams, but we do need to take a break for the transcriber. Have you got a lot more to say or should we take that break now?

**MR WILLIAMS:** No, we can take that break now. That brought me to the end of my submissions, you will be grateful to hear, sir. I was going to move on to asking you whether you wanted me to address you on the specific granular points or whether they

were going to be heard today, but it sounds like we have resolved them.

**MR TIDSWELL:** That's very helpful. Thank you. So look, let's take a break. When we come back I will rule on the question of the process going forward -- I will rule on items 1 and 2, then we should talk about timing and then we will deal with anything we can deal with, which I think is probably limited to your two requests, Mr Williams, unless anybody has anything sensible to say about Marks and Spencer.

Is there anything else we need to deal with today? I am assuming that that discussion will wrap up item 6. I am also assuming that -- I mean, the position I think in relation to Primark's witness evidence is that it will be sent on Friday. I don't think there is any basis to suggest there should be anything otherwise. If that's helpful, I can make that ruling now. It seems to me it makes no difference whether you get them on Friday or Wednesday.

So that is -- hopefully that is clear.

Is there anything else we need to deal with this afternoon? Right. Mr Sebastian.

**MR SEBASTIAN:** If I can just clarify that in terms of the supplemental witness evidence I was describing which would merely replicate an explanation, we would be in a position to provide that hopefully by Friday, just to confirm that. So if we could have the ruling along with Primark for that.

**MR TIDSWELL:** That is very helpful. I don't think anybody was seriously suggesting anything faster than that. I'm sure it would be helpful if it was on Friday. We will do that as well then, Mr Sebastian.

Good. Let's take a break. We will come back at 3.40. I will then give the answer to items 1 and 2 and then we can deal with any specific requests at that stage. Thank you.

**(3.28 pm)**

**(Short break)**

**(3.40 pm)**

**RULING**

**MR TIDSWELL:** So the parties have been engaged in the Redfern schedule process to manage document requests made by Visa, Mastercard and Mr Merricks. That process concluded on 11 September with the provision of a number of documents by the claimants and the response to various requests by which further documents were not forthcoming. Visa and Mastercard are still reviewing the documents provided, but are not satisfied that the response has disclosed proper searches for the requested documents. They seek orders to the effect that the claimants should provide explanations of the searches for documents they have conducted in the form of a disclosure statement verified by a statement of truth. The claimants should provide witness statements recording explanations given in the responses in the Redfern schedule on the basis that it would be unfair to allow the claimants to deploy those explanations at trial without having them recorded in the witness statements.

I can deal shortly with the second point. The approach taken by Visa, Mastercard and Mr Merricks conflates the requirement for the claimants to record the factual basis relating to the substance of their cases in witness evidence in the normal way, on the one hand, and on the other hand, the potential for the court to order the explanations and disclosure processes be explained and verified by a witness statement from a person who has knowledge of what has been done. That's usually the solicitor with the conduct of the case.

I see no basis on which I should, or indeed can, order the claimants to provide witness evidence on specific matters which go to the substance of their case. What evidence they choose to put in is a matter for them and they take the risk that by not properly adducing the evidence in the normal way, they will be prevented from relying on it at trial.

As far as requiring statements to explain the disclosure process, we are not at the stage where that is, in my judgment, appropriate, as will be clear from my ruling on the first point, to which I now turn.

Mr Jowell KC invited me to choose between making it clear that inferences would be drawn in the absence of proper disclosure, or giving the claimants the opportunity to correct the deficiencies.

The making of inferences is one for the Tribunal at trial and it would be inappropriate to give any indication about that now. It would also be unfortunate if the disclosure issues were dealt with by arguments about inferences or weight when there's time to resolve them before trial, if not, before responsive cases which are due on 7 October. It is already unfortunate that the focus of this hearing seems to have been more to facilitate the making of those inferences rather than actually to obtain the documents that might be available, which is obviously the right focus for such a hearing.

Plainly, the Redfern process has not fully played out and there remain questions which the claimants need to address, and which the requesting parties, Visa, Mastercard and Merricks, should be entitled to pursue further.

The Redfern process conveniently summarises the various points and I direct that it should remain for the meantime the vehicle for crystallising the disclosure issues.

As the claimants point out, this is not a conventional disclosure process. I will not, therefore, order the making of disclosure statements or require a statement of truth at this stage, although the claimants should proceed on the basis that a statement of truth in relation to the contents of the Redfern schedules may well be required in due course.

Instead, I direct that the requesting parties should have the opportunity once they have had a proper opportunity to consider the disclosure actually given, to revise column 4, which contains their replies to the responses.

That exercise is not to go beyond or out with the initial request made in the Redfern schedule. The claimants should then populate a further column with their further observations. This should include or cross-refer to a document which includes an explanation of the searches which have been carried out in relation to each entry where further searches are said not to have produced documents.

This should also include or cross-refer to a document which includes information about the nature and extent of supervision of the search exercise carried out by the claimants' solicitors, without, of course, disclosing privileged material or waiving any privilege.

The requesting parties will then need to decide whether and on what basis they need to pursue any outstanding request. That should be done in the first instance by submission on the papers in the form of the Redfern schedule. I will then decide whether a further hearing is necessary.

A separate timetable will need to apply to the Stephenson Harwood Claimants, who have not answered Mastercard’s requests previously, but have now agreed to do that.

I do urge the parties to reflect on what has been said previously in case management discussions about the nature of this process. There were some observations made by Mr Sebastian about the nature of the process which I largely agreed with. I think it is important that the parties recognise that this is not a conventional disclosure process, as has been well described on a number of occasions, and it would be helpful for people to refresh their memories of that before making final decisions about pursuing requests.

We can now discuss the dates for those steps to be taken. Timing is tight and the parties will need to get on with the exercise promptly, but I am conscious that responsive cases loom on 7 October and no doubt serious efforts have been directed towards that.

I did have in mind that step 1, that is the requesting parties reviewing their column 4, should take a week, that then the claimants should respond within a further week, which effectively gives them two weeks to provide their explanations of searches and the supervision, and then the requesting parties should by the end of the following week, that's three weeks' time, decide whether they want to pursue any outstanding requests and, if so, populate the Redfern to that effect.

That would take us through to 7 October. That would then allow an opportunity for me to look at the papers that week and decide whether a hearing was necessary on some or all of it. If we were going to have a hearing on them, then I think we would probably do that on the 22nd at the CMC we have in the diary already. Those are my thoughts on timing. You may have different thoughts.

Anybody want to jump in on that? Mr Jowell?

**MR JOWELL:** May I briefly take instructions?

**MR TIDSWELL:** Yes, of course.

Mr Cook, anything to say about the timetable?

**MR COOK:** Only, sir, that you did refer that there needed to be a different timetable for Mastercard and the SSH Claimants, so I don't know if you were dealing with that separately.

**MR TIDSWELL:** In a way, I suppose we will see what Mr Woolfe says about -- I think he offered the end of next week. You are pressing him to do it a bit faster. I think we would press him to do it a bit faster. What you might do is just insert an extra week in there, so they would run a week behind, that Mr Woolfe would need to tell you by this time next week what the answer was for those. I will come to him in a minute.

Mr Williams, anything you want to say about that proposed timetable?

**MR WILLIAMS:** Sir, there is one potential addition. So in paragraph 3 of the July order, you had a direction that the responding party shall produce any requested

documents that it agreed to provide as soon as possible on or after a particular date on a rolling basis, with all documents to be produced by a long stop date.

Now, I am wondering whether in response to stage 2, when the claimants respond, we could have a firm date by which disclosure is to be given. Hopefully, by that stage, of course, I think we get to 30 September, so the claimants will know what documents they agree to provide and any statements they are planning to submit, so that we might be able to get documents of such a nature before the responsive cases.

Now, I just add one final footnote to that. In response to that order from last time, paragraph 3 of the directions order, that specified to provide documents as soon as possible on a rolling basis, we actually only received the documents no earlier than 24 hours before the longstop date. Now I recall at the time --

**MR TIDSWELL:** (Inaudible) picked that up. Yes.

**MR WILLIAMS:** It didn't particularly work. I felt like I was being a bit pedantic at the time asking for the rolling basis, but this is exactly why, because each and every time we have the disclosure order, the deadline is pushed and pushed and pushed to the very latest possible, and in some cases even after the date the Redfern schedules were proposed by. And we get all sorts of rosy pictures about how disclosure is going so well and then it never actually comes until the last moment and we have lots of delays.

I would ask for a firm date as best as possible, so there is an order that disclosure comes as soon as possible.

**MR TIDSWELL:** That is entirely fair and I think, again subject to anything that the claimants might say, I think it would be very helpful -- I am not anticipating there is going to be a lot more coming in this process, Mr Williams, because at the moment they have told you there are no other documents. They may find some. On that basis one would hope when they respond, they would be able to provide you with any

documents, so that would be at the end of the second week. That would be consistent with the timetable.

Mr Woolfe, that is quite tight if there were a lot of documents, but we were not expecting there to be a lot of documents.

**MR WOOLFE:** Sir, that timetable you set out of a week for them to review, so that's by the 23rd, and then us to provide our responses by the 30th and then indications we were not pursuing them on the 7th, we can comply with that timetable, sir.

**MR TIDSWELL:** Mr Williams was suggesting you should commit to a time to producing any documents you do find, and I was suggesting you might do that by the 30th as well. So if you find any more documents, let's have them by the 30th when you come back with your response.

**MR WOOLFE:** Sir, can I just double check that.

**MR TIDSWELL:** Yes, of course. It may be you will want to say 1st October or something like that, but I think there is a point -- and Mr Williams quite fairly has made it consistently today -- that if there is anything that can be produced before the responsive cases, which really means at the beginning of that week of the 30th, then it should be produced; in other words, if you find documents, you ought to be getting them across to the parties in that timeframe rather than waiting until closer to the 7th when they are going to be useless for the responsive cases.

**MR WOOLFE:** Let me just take instructions on that point.

**MR TIDSWELL:** While you're doing that, Mr Woolfe, do you think you could sharpen your position in relation to the Stephenson Harwood Claimants, who have to respond to Mastercard, so could you do that by next Monday?

**MR WOOLFE:** Let me take instructions on that as well, sir, and I will come back with an indication on both points very shortly.

**MR TIDSWELL:** Thank you.

Mr Jones, anything you want to add to that?

**MR JONES:** Sir, we can certainly respond within two weeks, which is 30 September. We can certainly provide any documents. If we have looked for more and found more by then, we can provide them by then. I am just slightly thinking on my feet that I wouldn't want to say that we can commit to providing any documents by then because of course the nature of what we are debating includes whether we might carry out further searches. So, of course, if we are saying we will do further searches, that is where this ends up, it rather depends on the searches we have agreed to when we can provide it.

**MR TIDSWELL:** That's fair. You are right that the order can only ask you to provide documents you have located, but equally I think Mr Williams will say if you are going to provide further searches, we are going to have to have a fairly tight timetable on that.

I am not sure it is possible to legislate for that now, Mr Williams, because we don't know what they are going to be. But so everybody is absolutely clear, then if further searches are going to be conducted, they need to be conducted with lightning speed is the short point, and the documents provided.

**MR JONES:** Yes, that's all --

**MR TIDSWELL:** Those are searches conducted voluntarily if I can put it that way, as opposed to the ones that then fall out of the Redfern. The same principle will apply when they fall out of the Redfern, but that's obviously a slightly different process.

Yes, Mr Woolfe.

**MR WOOLFE:** Thank you, sir. Sir, as regards the responses to the defendants' further request, as it were, by the 30th and the documents being provided by then, we can provide the documents by then, but this was quite late on in the process. Either we are finding documents, in which case we have them and we will hand them over,

or we don't, in which case we will say we don't have them or can't find them. That's fine. We can give those by the 30th.

As regards Mastercard's requests, we can undertake to respond to the Redfern schedule by Monday, so a week today. Disclosure of any documents we say we are going to produce may need to take a little bit beyond that, say again still the end of that week because we are in a slightly different stage in the process in respect of those requests.

**MR TIDSWELL:** Yes, that makes sense. I think if you come back -- subject to anything Mr Cook says, that seems sensible. If you then come back and say, "We are not going to give you disclosure" or anything else for whatever reason, then Mr Cook should have a look at that and we fall back into the week behind for anything else for those parties; does that make sense?

**MR WOOLFE:** I think it does, sir, yes --

**MR TIDSWELL:** In other words, once you have come back and given your answers, Mr Cook will then have a week to decide what he wants to pursue, then you are going to have to provide your searches and so on in relation to those, which probably you will be doing in relation to the other aspects of the Visa requests anyway, for most of these. I suspect a lot of this will end up being washed up with the same thing. We run the same regime, three-week regime a week later because you have taken a week to come back with the answers on those Stephenson Harwood Claimants.

**MR WOOLFE:** Thank you, sir.

**MR TIDSWELL:** Yes. Mr Sebastian, I think you are next.

**MR SEBASTIAN:** Sir, just to say that timing works for us and I just wanted to confirm that these are descriptions of searches that are linked solely to the Redfern process, and including any broader statement about solicitor supervision would be in that context.

**MR TIDSWELL:** Yes. That's fine. This was all within -- I think you have made the observation earlier, we don't want this thing to be expanding. This was all within the current framework of the Redfern. I don't want it getting bigger, I want it getting smaller. Mr Jowell.

**MR JOWELL:** Thank you. Just two points and a third more general point. First, we for our part can produce the additional column of the Redfern faster than seven days. So if we were to do that, say, by the close of business tomorrow, then we would very much appreciate it if we could then get the further statement of the nature of the searches a week after that rather than wait until the 30th.

**MR TIDSWELL:** Well, I am not going to put that in the order. I think Mr Woolfe has the point and if he can do it any faster -- if you do it faster, then obviously he may be able to do it faster, but part of the point is I do have some sympathy for Mr Woolfe's point that everybody is very busy producing these responsive cases. You know, he has two weeks if he needs it to do all that.

The benefit of you doing it earlier is he is more likely to be focused and that's going to be better, so I would encourage you to do that. Anyway, that's your first point.

**MR JOWELL:** Thank you. The second one is this, that this does mean, of course, we will not have any of this in advance of negative cases.

**MR TIDSWELL:** You might get some of it because, as Mr Williams has helpfully pointed out, if anything is going to be voluntarily provided in the context of the Redfern, then it will come on 30 September, so you might get something, you might not.

**MR JOWELL:** It's possible, but it would be very --

**MR TIDSWELL:** I think the reality is, as we have discussed a number of times, as far as the contested material is going I don't see any basis on which that is going to happen anyway, other than perhaps the specific points that Mr Williams is going to address me about in a minute, because -- as Mr Sebastian points out, we are not at

the point where we are really resolving Redfern schedule disputes. Subject to a small number of them, that is not the position that you have put me in today. If you wanted the material -- you know, I am not being asked to resolve -- other than Mr Williams and the Marks and Spencer one I have not been asked to resolve a Redfern schedule dispute today.

**MR JOWELL:** If I may, I think there may be a misconception there. We are not in a position to push for a document to be disclosed if it is --

**MR TIDSWELL:** That's what I mean, Mr Jowell. You said to me -- I wrote it down. You said to me -- I can't find it. I will find it somewhere. You certainly told me that's not what we were doing today.

**MR JOWELL:** Yes, but I think, if I may, sir, if I may explain the reason for that, because I think perhaps I was not very clear about it to begin with. The reason is this, that we have received, first of all, the documents incredibly close to the date of this hearing and we --

**MR TIDSWELL:** I understand all that, Mr Jowell. I am not blaming anybody for it. It is a statement of fact. I understand all that. I don't think we need to rehearse all that, but the simple fact is we are not in a position, and, you know, if we go back in time, this was originally a hearing that was supposed to happen on 31st July and didn't because the parties wanted to shift the date for responsive cases. So, you know, that is (inaudible).

**MR JOWELL:** Forgive me, sir. Some of the parties wanted to. We did not want to for precisely this reason.

**MR TIDSWELL:** Fine. Obviously that was a matter I dealt with in an order. I am not blaming anybody for it, but as a simple fact apart from a small selection there are no Redfern requests that are being pursued for documentation today. The logical conclusion of that is you were not going to get the documents before 7th on any other

sensible timetable. I don't want to be difficult about it, Mr Jowell, but that's just the way it is, isn't it? It is just the timing of it.

If you want to contest points and you are asking for people to go off and provide detail about searches and what you were going -- what you initially sought is probably more time-consuming and would take longer, the reality is that is unlikely as things wash out, as we have just seen from looking at this timetable, to produce very much by 7th October. That's just where we are.

**MR JOWELL:** Well, it is where we are as a result of orders that have been made to date, some of which we have opposed. I am afraid I have to say that.

**MR TIDSWELL:** That's all fine, Mr Jowell, and that's all on the record. We don't need to argue about it now. It is not going to help any of us to argue about it now. We are where we are and we need to make the best of it.

**MR JOWELL:** I fully accept that. If I may, there is one point I need to make and it is this.

**MR TIDSWELL:** Of course.

**MR JOWELL:** A conventional Redfern dispute is over relevance and there are, as I thought I said in opening, no outstanding disputes over the relevance of these documents.

**MR TIDSWELL:** Sorry. I am sorry to interrupt you again. I am not sure any of this is really very helpful and we have some other things we have to do before 4.30.

Just to be clear, Mr Jowell, I don't accept that a conventional Redfern process is over relevance. Quite often they are about proportionality, quite often. In fact, I suspect they're as often about proportionality as they are about relevance. That's simply not right. What this is all about is about proportionality. That's what this is all about and that's why it has been set up in the way it has been set up, which is not a conventional disclosure process either. There is nothing conventional about any of these

proceedings, Mr Jowell, and the longer you are in them, the more you will realise that that is the way it is.

**MR JOWELL:** I accept that that is so, that Redfern processes are often disputed on proportionality grounds, but what the claimants have said here is they say, "We have carried out a proportionate search and there are no such documents". So how do we respond to that? We can't say, "Well, find the documents anyway".

**MR TIDSWELL:** Honestly, Mr Jowell, this is not helpful. We have resolved that issue. We have decided how we are going to deal with it. There is no -- unless you are telling me there is some other way we can do this that is going to produce a sensible answer before 7th October with lots of documents, which I don't think you have done -- nothing you have said today has made me think that's the case -- then this is where we are. I don't see any point in arguing about how we got here or indeed about whose fault it is that you are in the position you are in. That's just where you are. I don't think there is anything unfair about the way in which it now proceeds, because you have plenty of opportunity to explore whether or not these documents exist. That's what you are getting out of this hearing. It is what you asked for in substance and that's what you are getting.

**MR JOWELL:** We are grateful for that and we appreciate the fact that we are getting explanations of the searches that have been carried out, which will enable us to then take this forward.

The next issue, if I may, is the question of the 22nd and whether that -- what you envisage taking place on the 22nd. You mentioned that there would be disputed -- there would potentially be the resolution of outstanding disputed disclosure requests on that occasion, and my question is would you also expect the parties to put in applications in relation to witness statements or further -- the need for further expert reports in the event that they need to -- on that occasion?

**MR TIDSWELL:** Well, yes I think is the answer to that. So the agenda for the 22nd is something that you will all have to turn your minds to. It is an opportunity for you to deal with things in advance of the PTR, which has now been pushed back because of the availability of the remainder of the panel. You have an opportunity to put anything you want on the table that you think would be helpful.

What I am concerned to achieve on the 22nd is as much tidying up of things that are difficult and are potential impediments to a clean PTR and clean trial as we can possibly do by then. So this would certainly involve -- this would certainly involve the Redfern schedule. It would certainly involve any questions about further documents or processes that need to be followed in order to make sure that the PTR can be effective and the trial can start, but that's really a matter for all of you to work out what needs to be done. I am afraid I am going to push the ball back to you on that and say, "You tell me what needs to be done, what needs to be sorted out".

**MR JOWELL:** Is that also the occasion on which the so-called car crash hearing will take place or is that envisaged -- in which one will consider whether the trial can proceed fairly in light of any further disclosure?

**MR TIDSWELL:** Firstly, I am not sure that is a proper characterisation of the car crash hearing. Secondly, I think we need to dispense with that reference, because I don't find it helpful.

So we are having a CMC on the 22nd. At that CMC I would like to know -- certainly one of the things that will be on the agenda is I would like to know what your views are on the shape of the trial, and in particular how we are going to try this case within five weeks and what it looks like.

Now normally we would talk about that probably at the PTR, but because the PTR is later than it perhaps might otherwise be, I think we should have at least a preliminary discussion about what it looks like and I can brief the rest of the panel so that we know

where we are at the PTR. I'm sorry?

**MR JOWELL:** Forgive me. I interrupted you. I am sorry.

**MR TIDSWELL:** No. I had finished.

**MR JOWELL:** On that, the third point was a matter of clarification. I saw in a previous transcript that it was mooted that the trial date would be moved from 11th to 18th November.

**MR TIDSWELL:** That has now happened. I think that was in the order made in July, wasn't it? Certainly that is our position, that the trial starts on 18th November.

**MR JOWELL:** On 18th. Does that include a reading week prior to that or is that --

**MR TIDSWELL:** No. Well, if there is going to be a reading week, it will need to be the week before because -- well, I mean, it comes back to the question of what you tell me the trial is going to look like, but my working assumption is that we don't have an extra week to play with if we are going to try to get something sensible done in the five weeks, six weeks, whatever it is we have from 18th till Christmas. So I don't think we are going to be adding extra reading weeks into that space unless you are telling us it can all be done in four weeks.

**MR JOWELL:** No, I am certainly not. I think, though, the one point I should mention is that, of course, the time between the 22nd October and if the reading week is 11th November is a very short period, and I have to say I do -- it is going to be very difficult to see how disclosure could take place in that window.

**MR TIDSWELL:** Well, Mr Jowell, it may be a perfectly fair point, but I am not sure what you expect me to do about that.

**MR JOWELL:** No, but I think that it may be something that needs to be -- that needs to feature -- it may feature in the submissions on -- as to the shape of the trial.

**MR WILLIAMS:** Sir, I am very concerned about the time that is left for issues that are on the agenda for today and have crystallised and need to be resolved.

**MR JOWELL:** I understand. I have made my points, if I may.

**MR TIDSWELL:** Thank you. All right. I assume that someone will take carriage of an order. I think we have agreed the dates. Hopefully that is all clear and somebody will provide a draft order -- agreed draft order to the Registry in relation to what is effectively item 1 on the agenda.

Mr Williams.

**MR WILLIAMS:** Sir, there was one final point just for clarification so we are all certain. There have been various witness statements which are now being voluntarily provided. I understand that the date for the Primark and Allianz ones which are related to the Redfern schedule that they are voluntarily offering -- substantive witness statements -- are being offered up by 20th, this week. I am seeing nods from Mr Sebastian.

That then leaves over a question in relation to the new witness evidence that we have heard about today, the new substantive witness statements, which have been canvassed in relation to the responsive cases.

Now, as I understand it, if a party is relying upon factual evidence in their responsive cases and their experts are commenting upon it, it must, therefore, have been produced in advance. You will have heard earlier my submission about equality of arms and experts having access to all of the same factual material. So I would ask in relation to those witness statements that they are provided in advance of 7th October insofar as possible. I imagine if their experts are looking a week before -- but I just wanted to seek clarity on that.

**MR TIDSWELL:** I am afraid I think that's just a hopeless submission at the moment, Mr Williams. That's not the way the order is set up. The order is set up in a different way. It may well have been a good idea, but I just don't think three weeks before that deadline you can launch that in and say "We are going to do something different". I'm

sorry. I just don't think that's -- it is not a runner.

**MR WILLIAMS:** Understood. It was the first point it has come up today, so I hope I am forgiven for raising that in response. Understood.

**MR TIDSWELL:** No criticism at all for raising it, but it is not going anywhere. You have twenty minutes, Mr Williams. I am sure you can deal with it.

Marks and Spencer I think, unless anybody is going to tell me otherwise, is going to have to come off the list, because you are going to have to deal with it in a different way on the basis of the position they are taking. I am sorry I don't think there is anything I can do unless you tell me otherwise to circumvent that. So you will have to work out how you want to deal with that.

**MR WILLIAMS:** It seems in light of the e-mail received at 3.00 pm today that we now know the M&S position, which is that they don't wish to provide any further disclosure at all. I'm not sure whether additional representation would take matters forwards. In the Redfern schedule the only reason given is that they have settled and I can address that point now.

**MR TIDSWELL:** Well, you will have to decide -- I think there are two problems. One is that's their position and the second is that Mr Woolfe is not authorised to appear for them and they are not represented. I can't see any point in you making any submissions about their position. If there is any prospect of me making an order against them, which is what you want, then they are going to need to be represented. You are going to have to find a way to manage that.

I am very happy for you to try to arrange for this matter to be dealt with on the papers, if they would agree to that. I suspect they might not. If they won't, Mr Williams, then you should explore with the Registry where we can find an hour to do it remotely at another time and I will do my best to accommodate that.

**MR WILLIAMS:** I am incredibly grateful for that genuinely, sir. I think on the papers

would be helpful. The point has crystallised. We can seek in correspondence with M&S via their solicitors what their position is and crystallise it that way, but whether that can be done on the papers or at a quick hearing, I am grateful for that. Essentially we have made our point and it is crystallised from our perspective and therefore this can be determined and we shouldn't be shut out from getting responsive documents before the responsive case just because of the representation issue which has only arisen today.

**MR TIDSWELL:** I think it comes out in the Redfern, doesn't it, as a separate stream and you're going to have to deal with it. The same applies to you, Mr Cook, if you want to pursue it that way. I don't think we can do it on the papers unless they agree to it, but if they do agree to it, then I have to do that, otherwise if you can find a time to get it on notice to them, then we will deal with it.

**MR WILLIAMS:** I am grateful. We will take that forward.

That takes us to Holland & Barrett. That, sir, is item 7, which can be found at bundle page 313, or if you are in the pdf version, it is 318. I am slightly ham-strung in what I can say in open court. I have been warned in advance this weekend that everything in the Redfern schedule is confidential. We don't accept that position, but in light of the time there is not the practicalities to go into private.

So if I could perhaps ask you, sir, to take note of two key points.

**MR TIDSWELL:** Maybe we -- I can't see any reason why we -- if we are going to do these two items, I can't see any reason why we can't switch off the livestream. Let me just check and see whether we can do that swiftly, but I can't see any reason why we shouldn't. Why don't you keep going and I will be able to confirm if we can do that and when we have done it.

**MR WILLIAMS:** I am grateful for that. I would be grateful for an indication or a direction, sir, that the transcript is reviewed afterwards for whether this really is

confidential and the transcript can be released publicly. That's because Mr Merricks himself is not within the confidentiality ring and neither are the class members he represents. So just in terms of open access to justice there hasn't been any inclination to go into private.

**MR TIDSWELL:** Well, if you don't want to, Mr Williams. I was doing it to help you. If you don't want to do that, let's not do it.

**MR WILLIAMS:** If it can be done quickly, sir, I am very happy to keep going.

**(In Private session see separate transcript)**

**[In open session]**

**MR TIDSWELL:** That's helpful. Thank you. So when this all comes back, can I please have one schedule, not eight, nine, ten of them, however many you have? I am not interested in things that are not active. So anything that you have resolved you can take out of the schedule or at least take out of the version you give me. I just want to see a list of the things that you want me to rule on and the reasons for that and anything you can do to make that navigable would, of course, be appreciated. Somebody is going to produce an order for the thing we discussed earlier. Is there anything else that we need to discuss today?

**MR WOOLFE:** Sir, there is one point I have been asked to raise. It is really a question for the Tribunal, and the answer is going to be a simple "yes" or "no", which is is the Tribunal in any position to give an indication as to when the trial 1 judgment might be available?

**MR TIDSWELL:** I was wondering if I could get through the hearing without somebody asking me about it. I almost did, Mr Woolfe. I'm afraid the answer -- I should say by the way we are back in live session.

The only thing I can say about that at the moment is there is no reason to think at present that the judgment is not forthcoming and on its way. I am afraid I can't tell you

when that is going to be at the moment.

**MR WOOLFE:** Thank you, sir.

**MR TIDSWELL:** I am afraid that's probably not very helpful, Mr Woolfe, but it is all I can say at the moment.

**MR WOOLFE:** Totally understand, sir. Thank you.

**MR WILLIAMS:** Sir, whilst we are on other housekeeping, conscious of the time, may I ask if there is any other diary availability or plans for a mini-CMC before the 22nd October? I ask in particular, and I won't go into the details of it now, but confidentiality has very much reared its ugly head. So there might be a number of procedural points the parties can resolve so that the hearing on the 22nd October really is the big issues that you, sir, have identified earlier. There might be a stepping stone in between, if possible. I raise that with some caution, because obviously not all parties may want a mini-CMC and it might be one where we need directions, sir, but there might be a useful interim hearing.

**MR TIDSWELL:** I am perfectly happy to set a mini-CMC if you would like one and it would be helpful. If we were to continue doing it on Fridays, I could do one on Friday, 27th and I could also do one on Friday, 11th, if need be. Why don't I leave it with you to discuss among yourselves? If there's a majority that thinks it is going to be productive, then we will do it. If there's not, then perhaps you might just summarise the positions and I will make a decision as to whether we do it or not.

**MR WILLIAMS:** Thank you, sir.

**MR TIDSWELL:** Anything else? Good. Thank you. That has been really helpful from everybody. Thank you very much for your help and we will no doubt see each other shortly. I will now rise. Thank you.

**MR WOOLFE:** Thank you, sir.

**(4.36 pm)**

**(Hearing concluded)**