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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1441-1444/7/7/22, 1266/7/7/16 & 1517/11/7/22

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9 Salisbury Square House
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Tuesday 22nd October 2024

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15 Before:

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17 Ben Tidswell

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20 **Merchant Interchange Fee Umbrella Proceedings**

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23 **A P P E A R A N C E S**

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26
27 Ben Lask KC and Thomas Sebastian on behalf of Allianz (Instructed by Pinsent Masons)

28
29 Matthew Cook KC & Owain Draper on behalf of Mastercard (Instructed by Jones Day and
30 Freshfields Bruckhaus Deringer LLP)

31
32 Tristan Jones KC on behalf of Primark (Instructed by Hausfeld & Co. LLP)

33
34 Daniel Jowell KC, Isabel Buchanan and Aislinn Kelly-Lyth on behalf of Visa (Instructed by
35 Linklaters LLP and Milbank LLP)

36
37 Rhodri Thompson KC and Flora Robertson on behalf of the CICC Class Representatives
38 (Instructed by Marcus Parker)

39
40 Philip Woolfe KC & Oscar Schonfeld on behalf of the SSH Claimants (Instructed by
41 Stephenson Harwood and Scott+Scott)

42
43 Mark Simpson KC and Jack Williams on behalf of Walter Merricks (Instructed by Wilkie
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(10.30 am)

MR TIDSWELL: Good morning, everybody. Some of you are joining us on a live stream on our website, 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 provision is punishable as a contempt of court. It is quite tight in here. I am sorry about that, I am afraid. Trucks seem to get court number 1, which I suspect they have just as many people in there, if not more, but I hope everybody has somewhere they can perch. Who's in charge this morning of the running order?

MR SIMPSON: Shall I rise, sir?

MR TIDSWELL: Mr Simpson, yes.

MR SIMPSON: Mr (inaudible) suggested to me that the expert shopping should be taken last and, subject to your views, I would agree with that on the basis that my time estimate for the expert shopping application as a whole is half a day. Now, a lot has been knocked off. So I do hope that can be accommodated, but that's our joint suggestion.

MR TIDSWELL: Thank you. The only thing I would say about that, and I have no objection to pushing it back down the agenda. I did think we might want to do the remaining Redfern items last, partly because it might not involve everybody although maybe people want to stay, and partly because it might be necessary to refer to confidential information. It might make it easier if we can do that. I don't have a strong view on that, and I don't think -- I am hoping that's not going to take too long, because there is now quite a small number. That is a possible way of dealing with it.

MR COOK: Yes. The other solution was going to be that we deal with CICC first, in

1 order to knock off points that have as many people involved in it early , which might
2 free up a bit of space on the front row and the seats behind.

3 MR TIDSWELL: I am certainly happy to do that if that is the consensus.

4 MR THOMPSON: I have the advantage of novelty. I am with CICC with Ms Robertson
5 who is here, we are obviously very interested in the dispute between Mastercard and
6 Merricks and the Redfern schedules, but it is not our primary area of interest. So,
7 obviously, if we could get our issues resolved quickly, then that would be probably
8 advantageous for everyone and give everybody a bit more space. As I understand it,
9 Visa is not pursuing any of its objections before the Tribunal today. So, I think the only
10 issue that's still live is the access to confidential information, which I don't know
11 whether it needs to be dealt with today, but I am aware that a new order was made
12 yesterday. I think it is really for Mr Woolfe to say what he is concerned about. Our
13 position is if we are admitted to the Umbrella Proceedings, then the obvious course
14 will be for us to be bound by that order. If there is any issue between the parties, then
15 that could be resolved in the future, but we would say that the default position is we
16 should have access to the confidential information on the same basis, but on the basis
17 that it is purely our legal teams. It seems to us that there is no prejudice to any party if
18 our legal teams are able to have access to the confidential information, and that will
19 make it easier for everybody, for example, in relation to Trial 2B if any of our people
20 attend as a matter of objection rather than to participate. So that's our position.

21 I don't think there is anything else particularly at issue, although obviously we would
22 notify probably yourself, wearing your other hat in the other proceedings, of the
23 outcome of today, and we have expressed the view that the most convenient course
24 will be if and when the judgments in Trial 1 and Trial 2A are available, then their
25 significance for the other proceedings should be a matter for guidance by that other
26 Tribunal in due course. I don't think that's particularly controversial. It just so happens

1 that because of the way the timing has worked, it has not been possible for us to
2 participate either in Trial 1 or realistically Trial 2A, and so, formally at least, we will not
3 be bound by them, but the significance of them in our individual proceedings or the
4 collective proceedings will obviously be a matter for debate if and when those
5 judgments are available, but that's our general position. So far as I understand it, none
6 of that is particularly controversial. So, I think there is only this issue about access to
7 confidential information, which I think only Mr Woolfe has raised.

8 MR TIDSWELL: Thank you, Mr Thompson. As a purely practical point, I think there
9 are some alternatives as to the form of order that we could make to bring you into 2B.
10 There is the Umbrella Proceedings, or we could just consolidate. I think the Umbrella
11 Proceedings are better, because that's what we did in the end with Merricks, as I recall,
12 and it is consistent. Also, I think it is probably a bit more forensic, because it is easier
13 to make it clear that it is demarcated for 2B only, which is obviously the position you
14 are in. Do you have any views on that?

15 MR THOMPSON: I think that's what we were understanding. I am not actually aware
16 of this, but I assume that there is an order in the Merricks proceedings defining the
17 scope of the impact of the Umbrella Proceedings on the Merricks collective
18 proceedings, if I can put it that way. I assume that that's the way it has been done,
19 and I was anticipating that something similar would be done in this case. Then it
20 ultimately would be for the CICC proceedings Tribunal to determine how that case
21 goes forward and give any directions. I think it is currently stayed at least in most
22 respects, but in due course, no doubt, it will be unstayed and then it will be a question
23 of on what basis.

24 MR TIDSWELL: I think we probably need to do a bit of research as to
25 precisely -- I think the history is probably that there were a number of ubiquitous
26 matters identified which were then in the original Umbrella Proceedings order. Then

1 I think Mr Merricks attached himself to that in relation to Trial 2 is what has happened.
2 We probably need to do a little bit of work on that and it may be that we can get help
3 from Mr Williams.

4 Before we do that, I should observe -- it has only occurred to me that the President is
5 probably required to make the order. I don't think that's anything other than a formality,
6 but just so you know that I probably need to go and see Mr Justice Roth and ask him,
7 in his acting capacity as President, to make the order. I think that is right.

8 MR THOMPSON: The Umbrella Proceedings order?

9 MR TIDSWELL: Yes, precisely. To bring you in in relation to the specific Trial 2B
10 points. Probably things I am thinking about as I speak to you rather than perhaps
11 having thought about them beforehand, so I apologise for that. They are not really
12 things you need to worry about, they are things I need to worry about. So you are
13 clear that's where I think we are.

14 I don't know, Mr Williams, whether you might be able to help us on that?

15 MR WILLIAMS: There is an original UPO order for the original merchant Claimants
16 and there is a second UPO order in respect of Mr Merricks which defines merchant
17 pass-on and acquirer pass-on as two separate issues. So I imagine there would be
18 an amended UPO order which identifies the issue that they are joining in on, which is
19 just the acquirer pass-on issue. I don't think that the order is defined by Trial 2A and
20 Trial 2B.

21 MR TIDSWELL: I think, Mr Thompson, what we will probably do is copy what we did
22 with Merricks and restrict it to acquirer pass-on and then ask Mr Justice Roth to make
23 that order. I think that's probably the right way forward.

24 MR THOMPSON: I am sure that Ms Robertson and I would be very happy to assist
25 the Tribunal, but it sounds like Mr Williams might be the expert. But if the Tribunal is
26 happy to take that forward, then obviously that is fine with us. If we can do anything

1 to assist with the drafting of the order, then obviously we are happy to do that.

2 MR TIDSWELL: That's very helpful. I suspect it might be quite helpful if you wouldn't
3 mind having a look at the order that was made in relation to Mr Merricks and maybe
4 adapting that so that it is confined to the acquirer pass-on issue.

5 MR THOMPSON: Ms Robertson can liaise and make sure everything is in proper
6 order.

7 MR TIDSWELL: I think that would be really helpful and if you assume that the
8 President would make the order rather than the -- that would be helpful.

9 MR THOMPSON: I don't want to delay things, but I think it is Mr Woolfe who --

10 MR TIDSWELL: I am getting slightly ahead of myself. Of course, we do need to hear
11 from Mr Woolfe.

12 MR JOWELL: May I just note that we don't pursue our objection to the joinder, but we
13 should note that we do so on the basis that there should be no disruption to the trial
14 timetable for 2B, and we believe there won't be on the basis that we have been given
15 assurances that they intend to instruct the same expert, Dr Trento, but of course if that
16 position were to change, the position may need to be revisited.

17 MR TIDSWELL: Of course, I understand. That's helpful. So it is clear, some of the
18 points you have raised may well be points that the Tribunal which is otherwise dealing
19 with the CICC claims might wish to address. I haven't got anywhere with that
20 discussion with that panel. For example, the question of costs and budgeting at some
21 stage, no doubt. Mr Thompson, you will be required to produce another budget of
22 some sort so those points have not been lost, Mr Jowell, so you know they have not
23 been lost. Thank you.

24 Mr Woolfe, I think this is over to you unless there is anything else about the mechanics
25 or indeed principle. It is just down to a question of how to deal with confidentiality
26 measures.

1 MR WOOLFE: Yes. (Inaudible) therefore, as we understand it, they need to have the
2 information relevant to acquirer pass-on which will largely be the acquirer data which
3 is coming in.

4 MR TIDSWELL: Sorry to interrupt you. I think the original material we have is the
5 historic PSR data, haven't we?

6 MR WOOLFE: Exactly. None of that is information over which my clients have
7 asserted confidentiality over and don't seek to do so. Clearly, it is confidential, but
8 that's for the acquirers. What we are concerned about is if we simply add CICC to the
9 Trial 2 confidentiality ring as it stands, they will be able to have access to all the
10 confidential information that my clients have put into Trial 2A. As we understand it,
11 they are not intending to participate. Mr Thompson may have slipped slightly when
12 speaking, I think they are intending to observe Trial 2A.

13 MR TIDSWELL: I think he meant 2A, not 2B --

14 MR WOOLFE: And participate in Trial 2B. What we are concerned about is if they
15 are fully in the confidentiality ring and allowed to see all Trial 2 confidential information,
16 then all confidential information relating to my clients passes into their possession. It
17 has been intimated there will be some further proceedings in the CICC matter beyond
18 ours. They are not proposing necessarily to accept the Trial 2A conclusions fully, as
19 I understand it, or Trial 1 conclusions. And therefore they may want to use my client's
20 confidential information further down the line. At this stage we may well have largely
21 dropped out of the picture, and yet, you know, they may be wanting to add witnesses
22 or some legal representatives to confidentiality rings in due course or so forth. We are
23 concerned that once this information passes out of our control in proceedings in which
24 we are not actively participating, it is sort of gone for all time, and we don't see that
25 they currently need that information.

26 Therefore what we have proposed at paragraph 9 of our skeleton for this hearing is

1 that they be added to the confidentiality ring but then the Tribunal makes a separate
2 order saying that only the information that's relevant to acquirer pass-on actually be
3 disclosed to their representatives who are in the ring and that you record in a separate
4 order that they are only entitled to receive that acquirer data.

5 MR TIDSWELL: Can you remind me what paragraph was that again?

6 MR WOOLFE: This is core bundle pages 4 to 5.

7 MR TIDSWELL: Which number was it? Para 9.

8 MR WOOLFE: Para 9.

9 MR TIDSWELL: Yes, I see. I guess it gives rise to a slightly different question which
10 I think we no doubt will come back to when we get the Trial 2B update, which is are
11 we expecting there to be anything else in relation to acquirer pass-on that goes into
12 the Trial 2B pot, because -- and I have no visibility at the moment as to whether
13 anybody is anticipating putting in, for example, any evidence of fact, a witness
14 statement from an acquirer, for example, or whether we are just simply going to be
15 dealing with data. Now maybe people aren't in a position to say anything about that
16 now, but --

17 MR WOOLFE: I am not currently aware of anything that is proposed to be put in other
18 than the acquirer data. It is not to say that there won't be. The principle we are talking
19 about is that they should be allowed to see what goes into Trial 2B rather than the
20 mass of material relating to the Claimant's downstream pricing of hotels, restaurant
21 meals, whatever it may be, which is not relevant to the subject of acquirer pass-on.

22 MR TIDSWELL: The difficulty I suppose is not knowing what exactly is going to
23 happen, though, isn't it, because it may well be that at Trial 2B somebody wants to
24 rely on something which is said in relation to Trial 2A material and it may actually have
25 nothing to do with your client's pricing or whatever. It may just be something that has
26 popped up in the course of the Trial 2 evidence. It may even be just a point of

1 economic theory that somebody wants to cross-examine an expert on by reference to
2 their Trial 2A expert report. The problem with setting these walls is that Mr Thompson
3 is then left with the difficulty that he has no access to that material and therefore is
4 unable to deal with it effectively.

5 I quite see the point you are making, which is that there must be quite a lot of material
6 in the Trial 2A confidentiality ring that is never going to be deployed in Trial 2B and
7 there is a bit of a sort of a sledgehammer and a nut point here, isn't there? I am
8 wondering whether the most efficient way might not be to proceed on the basis that
9 the Trial 2A information -- we don't make the distinction between 2A and 2B. So
10 Mr Thompson gets everything, but we do keep a close restriction on what he can do
11 with that. Now for starters he can't use it outside of these proceedings anyway.

12 MR WOOLFE: That raises the question of what these proceedings -- we disclose
13 them in our own proceedings against Mastercard and Visa and in a sense in the
14 Umbrella Proceedings. He is now being added into the Umbrella Proceedings, and
15 he has further proceedings that are in his claim --

16 MR TIDSWELL: I get the point. It may well be that we need a form of wording for the
17 order a bit like the way in which the amendment I made yesterday restricting the way
18 in which documents flow to internal counsel. We have something here which is similar
19 where we say that Mr Thompson and his team within the ring can access the material
20 but only for the purposes of the Trial 2B hearing without further order and with the
21 proviso that no further order should be made without notice to you and the other
22 Claimant parties who (inaudible). Now that may be a practical solution to it. I am just
23 conscious and really making the point I think that Mr Jowell's clients have made, which
24 is what we don't want to do is find that this introduction of CICC makes it much more
25 complicated and difficult for everybody. So I don't know whether that's something
26 which -- in a way I am suggesting that is perhaps the path of least resistance, albeit it

1 has to have the right protections I understand for you.

2 MR WOOLFE: I can certainly take instructions on that, and if we are broadly content
3 we can go and work up some particular wording to be made in due course --

4 MR TIDSWELL: Shall we just see if Mr Thompson would be comfortable with that?

5 MR THOMPSON: Sir, I think it is important to understand what it is and what it is not
6 that we are seeking. As I think Mr Jowell has mentioned, we are intending to instruct
7 a common expert on Trial 2B, who is also acting on Trial 2A and it is obvious that Trial
8 2A will potentially impact on our case. It does seem to me it would be extremely
9 cumbersome to have to worry about which precise documents we could or couldn't
10 see and to make a ruling as to what exactly the precise scope of 2A and 2B is, but
11 perhaps more importantly our proposal is quite modest and limited, which is that our
12 legal teams should have access to the documents. We are not, at least currently,
13 suggesting that even the class representatives let alone, for example, our opt in
14 Claimants, who might be the people that Mr Woolfe is concerned about, that they
15 should have access to anything at this stage. If that were ever to be an issue, then
16 that would either be a matter for this Tribunal or for the Tribunal in the CICC
17 proceedings.

18 We don't currently see that there is any real substance in the concern that's being
19 expressed for the application that we are making. If in due course we were to make
20 another application or if Mr Woolfe identified some specific issue that he was
21 concerned about, then it seems to us that he could then raise it, but it doesn't seem to
22 us today that it is really necessary. Can I just confirm with my team that I have said it
23 right --

24 MR TIDSWELL: Just before you do, this may not be a very good example, but the
25 sort of thing Mr Woolfe is worried about is when this is all done and 2B is done, and
26 then we come to the CICC proceedings in isolation and, for example, we are trying to

1 decide what we are going to do about the finding that the panel in these Umbrella
2 Proceedings makes on 2A, then you might be at liberty in some way to deploy material
3 from the 2A proceedings without Mr Woolfe having any visibility of that and therefore
4 the ability to make representations about how he should do that. That's the sort of
5 thing I think he is worried about. That may be something that he need not worry about,
6 but I can see why he is concerned about losing control and therefore the ability to step
7 back in and say "Hang on a minute". We just need proper protections on that, which
8 is why I suggested that if we let you in in the way you have suggested, give you access
9 to everything, it is strictly on the basis that you are only using it for present purposes,
10 so that's Umbrella Proceedings purposes for Trial 2B, if you want to use it for anything
11 else you have to come back and ask. Hopefully that won't be cumbersome. You can
12 come back and ask me because I am obviously going to deal with both of them. Then
13 Mr Woolfe would have the opportunity or indeed Mr Jones or Mr Lask to turn up and
14 say "Well, actually we would like to have some conditions on what you do with that".
15 That's where I am suggesting we end up. I just want to make sure you are -- that
16 seemed to me to be a fair balance between the points. That is the point I would be
17 grateful if you would let me know if you are comfortable.

18 MR THOMPSON: I think from memory paragraph 2 of the existing order made
19 yesterday has some wording in relation to the interaction between the Umbrella and,
20 I think in that case, individual proceedings, but it may be that some wording in relation
21 to us might be appropriate in relation to that.

22 MR TIDSWELL: Do you want to take instructions?

23 MR THOMPSON: I will ask my solicitors. Mr Ross seems to be quite content with
24 that, so that is good enough for me.

25 MR WOOLFE: I am sorry to rise.

26 MR TIDSWELL: You are not happy with that, Mr Woolfe.

1 MR WOOLFE: As I understand it the concern remains which is they are joining in Trial
2 2B and acquirer pass-on and indeed we are cooperating with them on that. So we are
3 not at odds really. What we were concerned about is that a clear line is drawn,
4 because otherwise if it is an iterative process where they come later on and say can
5 we use it for this, can we use it for that when they have seen it all and gone through it,
6 my clients may have to be engaged and keep on coming back to be consulted on
7 issues relating to the confidentiality of their material that in a sense they are getting by
8 somewhat sort of fortuitously rather than -- they would not normally be entitled to it in
9 the course of their own case brought against Mastercard and Visa.

10 MR TIDSWELL: Well, the difficulty is, as I think Mr Thompson very fairly points out, if
11 he is going to be instructing Dr Trento alongside your clients, it puts everybody in
12 a very difficult position in relation to what the dividing line between 2A and 2B is, unless
13 you can tell me, and I don't think you can with assurance, that there is going to be no
14 2A material that's going to bleed into 2B, I don't see -- I mean, what is the answer?
15 What's the alternative?

16 MR WOOLFE: It is just at the minute I am struggling to see what material there is.

17 MR TIDSWELL: Well, I can think of an example which is that it may well be that
18 Mastercard or Visa want to cross-examine Dr Trento on something he says in 2A,
19 which is inconsistent with something he says in 2B. That's not impossible. I am not
20 saying they will, but it seems to me that's at least an example of it. It may be that
21 Dr Trento's opinion in relation to the 2A matter is (inaudible) which has come from your
22 clients or at least is thought to be confidential. I am not saying any of that is going to
23 happen. What I don't want to do is to find we have got into a position where we've
24 boxed Mr Thompson into a corner where he can't properly deal with the points that he
25 is turning up to deal with because of the constraints about the ambit of the ring. So
26 I am open to other suggestions, Mr Woolfe, but I think the one I have suggested

1 probably seems to me at the moment to be the most sensible and practical and does
2 leave you with perfectly proper protections about the use of the material. So unless
3 you have something better, I think that's what we will do.

4 MR WOOLFE: Is that the Tribunal's direction --

5 MR TIDSWELL: That will be the order I make unless you give me something better.
6 I want to hear from Mr Jones and Mr Lask as well. That's where I am at the moment.

7 MR WOOLFE: That is set out in our skeleton which is we have a separate order
8 delineating that material which they can see, which is what we understand to be
9 sufficient for Trial 2B and if an issue arises, then that can be amended.

10 MR TIDSWELL: But I don't see how you can make the delineation because we don't
11 know what in 2A might or might not be allowable for 2B. I don't think there can be any
12 assurance of that at the moment. I don't see how CICC can deal with that on
13 an ongoing basis because they don't know what's in 2A. We have the difficulty of
14 Dr Trento being left in the middle of all this which strikes me as being very unattractive.

15 MR WOOLFE: I think we are going from a different starting point which is we
16 understand the material in Dr Trento's report to be regression analysis of MIFs against
17 Merchant service charge information in a sense, which acquirers will be providing
18 won't be coming from Trial 2A disclosure and evidence.

19 MR TIDSWELL: I understand that. I think we are starting from the same place, but
20 I think I have asked you whether you can give me an assurance that that's going to be
21 it as far as the trial goes. I don't think you can do that. It seems to me the example
22 I have given to you is just one way in which 2A might bleed into 2B.

23 MR WOOLFE: I would submit that if there is an issue, it is one that can be managed
24 as the matter arises in due course. Now I can't give you an absolute assurance that
25 no information that's currently designated in Trial 2A confidentiality could ever be
26 referred to in Trial 2B. It seems to us unlikely but I am not in a position to see the way

1 in which Visa or Mastercard may put it.

2 MR TIDSWELL: Thank you, Mr Woolfe.

3 Mr Jones, do you have anything to say on this?

4 MR JONES: I was going to say the benefit of any order that is made, it is not a point
5 we have made.

6 MR TIDSWELL: Mr Lask?

7 MR LASK: Sir, we don't have any objections. Thank you. We are not proposing to
8 rely on data at Trial 2B in relation to acquirer pass on. We are proposing to adduce
9 our own qualitative evidence, whether that's documentary or witness evidence dealing
10 with that issue. It seems to me that that probably fits quite well with what the Tribunal
11 is proposing.

12 MR TIDSWELL: That's helpful. No doubt we will come back to that I am sure when
13 we get to that, Mr Woolfe.

14 The approach we will take in this matter is that the confidentiality ring will be amended
15 to admit CICC's legal team as described by Mr Thompson and no doubt in
16 correspondence to join the Trial 2 confidentiality ring. That will include Trial 2A and
17 2B material but that's to be made subject to provisos which your client's solicitors
18 should produce and seek to agree with CICC's solicitors that prevent CICC using the
19 material other than for the purposes of Trial 2B without further order from this Tribunal,
20 the Tribunal in the Umbrella Proceedings, any application for which will have to be
21 made on notice to your clients and indeed Primark and Allianz. That is where we are.
22 Thank you.

23 MR THOMPSON: I don't anticipate this will be controversial but I assume it also
24 includes our expert adviser on the basis our expert adviser will be Dr Trento. I can't
25 see that is going to be controversial. If we were to want anybody else, then we would
26 obviously have to come back to the Tribunal, but I think it must cover both our legal

1 and expert advisers.

2 MR TIDSWELL: Yes, exactly. I think I am proceeding on the basis that your expert is
3 already in the ring, and if it turns out that he is not, we will need to deal with that. I
4 think there will no doubt be other implications of that if you were to turn up with
5 somebody else.

6 MR THOMPSON: I am not suggesting that is the case. (Inaudible) in so far as we
7 want to have a direct relationship with Dr Trento, we shouldn't be constrained in that
8 respect.

9 MR TIDSWELL: Thank you. Good. Is there anything else in relation to the CICC
10 application that we need to deal with? That's it.

11 MR THOMPSON: I believe so. As I say, I am happy to work with Ms Robertson and
12 if necessary Mr Williams to assist the Tribunal in preparing a suitable order.

13 MR TIDSWELL: Yes. Good. Thank you very much. That's appreciated. Thank you.
14 We can move on to -- what do we have next? I think we then get to confidentiality.

15 MR LASK: That's the next item on the agenda.

16 MR TIDSWELL: You are going to take charge of that, are you?

17 MR WILLIAMS: It is essentially our application and points being made in our skeleton
18 argument and then the Merchants may wish to respond to the points that I make. In
19 relation to what I will be saying, there are a number of serious flaws with the
20 compliance with the confidentiality regime that we say should be applicable. I am not
21 quite sure what Mr --

22 MR TIDSWELL: Maybe I should go first. Maybe that helps to sort things out. What
23 I don't want to do, and I have seen the bit of paper that came in overnight from
24 Mr Merricks and I am afraid I haven't looked at it in any detail, but I am not sure -- there
25 may be some value in looking at some of it. I am not going to dissuade you if you want
26 to show me bits of it. What I am really more concerned about is this is still a lingering

1 | problem, because it is the sort of thing, being rather frank about it, that we would
2 | expect the parties to have sorted out by now.

3 | What I would really like to get to the bottom of is why that has not happened. It may
4 | be we have to go down the rabbit hole of some examples to deal with it but I would
5 | much rather not do that because I would much rather hear everybody saying "We are
6 | doing our very best to make it work". I am stating the blindingly obvious that it is in
7 | everybody's interests to get this right so we can have a sensible trial where we all
8 | know what we are dealing with and not tripping over vast quantities of material and
9 | also just to put down the marker, which I am sure you will all understand, which is that
10 | whatever your designations are may not survive a judgment. So when we get to the
11 | point -- if we get to the point of writing a judgment, then we are going to put in what we
12 | feel we need to put in in order for it to make sense in the public arena. You all
13 | understand that's yet another part of this.

14 | So what I am really most interested in is why is there still a problem and what are the
15 | blockages, and assuming everybody is doing their very best to make it work, what can
16 | I do to help resolve any issues of principle between the parties? So if we could start
17 | with that. Mr Williams.

18 | MR WILLIAMS: Perhaps I can provide an update on the position considering our
19 | skeleton argument at paragraph 21 sets out a lengthy explanation of the position --

20 | MR TIDSWELL: Why don't you tell us where we are, Mr Williams, and then we will
21 | see what Mr Lask can tell us about it.

22 | MR WILLIAMS: I think it is fair to say that with today's trial looming that things have
23 | improved but there are still unfortunately material issues remaining. If I can take it in
24 | stages as to where we are as of today.

25 | Firstly, all parties have now provided highlighted versions of their positive and
26 | responsive cases, that's both their wrappers and expert reports and their witness

1 statements. In respect, secondly, of the Redfern schedules, which, sir, you will recall
2 often contain information, responses and material akin to or in lieu of factual witness
3 evidence, Allianz and Primark have provided highlighted versions of the October
4 Redfern schedules for use today, but not the September Redfern schedules. The SSH
5 Claimants have, however, not provided any highlighted versions of any of the Redfern
6 schedules. That's either the ones that we used in September or for today's purposes.

7 MR TIDSWELL: Just tell me. The purpose of having those -- obviously they are useful
8 for the purposes today, but you are presumably wanting to deploy them at trial. Is that
9 the point?

10 MR WILLIAMS: That's right, sir.

11 MR TIDSWELL: If we get to trial when you come to this question of what has or has
12 not been provided and what's been said about -- there is quite a lot said about the way
13 in which costs are dealt with and so on. So your intention is -- you wish to be able to
14 use them on that basis.

15 MR WILLIAMS: That is exactly right, sir, and to interrogate any differences between
16 the witness statements and the contents of the Redfern schedules. You will remember
17 we pointed out one potential inconsistency that we may wish to explore. That's just
18 one example.

19 So that deals with the key documents, the positive cases, the responsive cases and
20 the Redfern schedules. That takes us to the underlying disclosure documents.

21 MR TIDSWELL: Just before you get there, because there is an intermediate point
22 which is really the trial bundles, isn't it, or maybe you are going to come to that. One
23 would assume that the same exercise needs to be undertaken in relation to any
24 document that goes into the trial bundle. Is that something that's agreed between the
25 parties?

26 MR WILLIAMS: That's exactly right, sir. There is some dispute on the timing of the

1 trial bundle. It is our position that this absolutely needs to be done in our submission
2 by the end of this month, because that gives us no more than 18 days before trial. At
3 present there is not a fully agreed index or a trial bundle. My understanding is that the
4 only documents that have thus far been uploaded to Opus, the electronic file
5 bundle system, are the judgments and orders. Underlying documents, positive case
6 wrappers, responsive expert reports, none of those core documents are uploaded at
7 the moment. That's because you need to agree the confidentiality highlighting in the
8 first place.

9 MR TIDSWELL: But you have agreed that and everybody has agreed that for the
10 positive and responsive cases. I assume that problem has gone away now, has it?

11 MR WILLIAMS: Not yet, sir. There has been provision of those documents, which is
12 my first point, but those confidentiality highlights themselves are under challenge
13 because they are excessive in our submission.

14 MR TIDSWELL: Okay. I understand that. I mean, there is a point at which you are
15 going to have to decide whether you want a trial bundle or whether you want -- I am
16 not sure you can't resolve the confidentiality points later, but it is obviously quite messy
17 and unhelpful and I quite understand why you want to do it beforehand but, I mean we
18 are dangerously close to trial and it may be that with all the distaste you may have for
19 the way it has been dealt with you just have to swallow that.

20 MR WILLIAMS: That's our concern. That's why we are hoping today to have some
21 indications on key points of principle and a very short ordered timetable. I will be
22 asking you to make a few orders of steps that need to be taken this week and early
23 next week so before the trial bundle is uploaded, there is an agreed and set process,
24 because at the moment the parties are not even agreed on key dates for that process
25 to take place. So I will not be asking you to go through line by line that table of
26 examples we have produced and you have seen overnight, sir.

1 I will instead be suggesting in a moment that we need a timetable over the next few
2 days and weeks that sets in process a chain of steps that need to be undertaken.

3 MR TIDSWELL: Okay. I understand. Perhaps just to dwell a bit further on the where
4 we are at this point, I understand you may want to challenge the designations in the
5 positive and responsive cases, but that's going to take -- however that is resolved, it
6 is going to take some time, isn't it? Is it really the right thing to do, to be going down
7 that rabbit hole when presumably you are now starting to have to write your skeletons
8 and without even trial bundle references for the positive and responsive cases, that
9 seems rather unhelpful.

10 Just to add a little bit of fuel to that fire, having discussed the timings with Mr Justice
11 Green yesterday, I think we are probably going to ask you for your skeletons a little bit
12 earlier than 11th, not massively earlier, but particularly because of his reading
13 availability. So it is more likely to be around about 6th, I think. So we are really, really
14 very tight on time. I am not unsympathetic to the points you are making because
15 I know we are all going to pay the price for it, Mr Williams, but the practical reality may
16 be that we are better just to accept the positive and responsive cases are as they are
17 and we put them in. I just put that out there for you to have a think about.

18 MR WILLIAMS: Sir, we do think that the timetable that I will come on to outline in a
19 moment is achievable this week and it is paramount to get it done immediately so that
20 the trial preparations can be done on a sensible footing so that the advocates, the
21 witnesses and the experts know exactly what's confidential and not in their
22 preparation, otherwise what's going to happen as a matter of practice is that all of the
23 documents will be uploaded in their current state to Opus. There will then be revisions
24 and different versions uploaded replacing them, which, firstly, may mean that
25 annotations are lost or potentially references are lost and, secondly, experts and
26 advocates will be preparing scripts and submissions, as you say, sir.

1 MR TIDSWELL: I agree, and I think you are absolutely right and I think when the trial
2 bundle goes up, it goes up, doesn't it? So I don't think we can have that sort of
3 messing around with it. Help me. Maybe you should come on to your timetable. The
4 bit I am not getting at the moment is if you are saying to Mr Woolfe's clients they have
5 to do a whole lot of work on their documents, they are not going to do that in a matter
6 of days. I mean they are substantial documents. Even with the best will in the world,
7 even if they agree to do it today, is that really going to work? That is the question I am
8 putting to you.

9 MR WILLIAMS: I will go through where we are now and why that's achievable in due
10 course.

11 MR TIDSWELL: You go ahead and do that.

12 MR WILLIAMS: The third point is the underlying disclosure documents. By the
13 underlying disclosure documents what I mean is only those disclosure documents that
14 are referred to in any party's positive or responsive wrappers and their expert reports
15 plus any others already identified for inclusion in the trial bundle.

16 So what I do not mean is the full disclosure set, even though you will probably have
17 my point from previous CMCs that the full disclosure set in these proceedings is
18 absolutely tiny given the scale of the proceedings, close to around 5,000 documents.
19 What I mean is the smaller sub-set.

20 MR TIDSWELL: Just so I am clear, is there any difference? I thought we were just
21 talking about the trial bundle documents. Is there any difference between that and
22 what you call the underlying documents?

23 MR WILLIAMS: No. They will be the documents --

24 MR TIDSWELL: Would you please mind if we call them the trial bundle documents so
25 at least I understand what we are talking about?

26 MR WILLIAMS: Absolutely. Just to give you an example so you can see the limited

1 scale of the documents we are talking about here. Allianz, who has provided a very
2 large bulk of the documents, around 2,000 of the 5,000 in total, say it only has 117 trial
3 bundle documents as we have now just defined them. So we are not talking about
4 a huge undertaking to review all these documents that I have in mind here. In any
5 event, regardless of the size, just to give you an update of where we stand, the SSH
6 Claimants have reviewed theirs. They have kept 170 documents confidential in their
7 entirety. They have removed 72 documents entirely from the ring and they have
8 provided what they call a small sample of four documents which they have kept in the
9 ring but have specific highlighting applied to them for specific passages. It is not clear
10 whether some of the 170 currently entirely in the ring are also going to be reviewed for
11 highlighting and if so by when, but I am sure Mr Woolfe will update us on that.

12 In respect of Allianz, Allianz have stated that it's reviewed the entirety of its underlying
13 disclosure documents or trial bundle documents in respect of all parties' positive cases
14 and considers them to be confidential in their entirety. So no removals and no
15 highlights at all for any document. It claims that the burden is on other parties to
16 identify documents and passages that are not confidential and to challenge them.

17 It also says as of 8.30pm last night that a review of documents referred to in the
18 responsive cases is ongoing, but no indication is given as to when that will be
19 completed by, but there seems to be some suggestion by 29th October, which
20 supports the point that I have been making to you already, sir, that this is achievable
21 within the next week or two.

22 Finally, in relation to Primark it stated that it has already reviewed the trial documents,
23 the disclosure documents referred to in all parties' positive and responsive cases and
24 again considers them all to be confidential in their entirety. So, no removals and no
25 highlights. Like Allianz it appears to suggest that the onus is on the other parties to
26 identify specific passages that are not confidential. So, that's the documents.

1 Now, as promised in our skeleton at paragraph 27, despite the onus not being on us,
2 which I will come on to demonstrate when we look at the one authority that I would like
3 to show you, we have done two things. So, firstly, we have identified the previous
4 expert correspondence that we say was wrongly marked as without prejudice or
5 confidential. The parties have agreed to remove designations for all of our requests
6 in that regard and, so you will be glad to hear, sir, there is nothing outstanding for the
7 Tribunal on that topic.

8 Secondly, given the excessive confidentiality highlights, as we see them, that have
9 been made to date, we have produced a table, sir, that you will have seen overnight
10 with some samples - and I stress they are samples - of highlighted passages in written
11 cases, reports and the witness statements that we say are just obviously not
12 confidential and we say they are indicative of a much broader problem with the
13 markings that have been provided.

14 Late last night Allianz has agreed to remove in full 12 of the 19 challenges we made
15 to their highlights, and it is considering the other seven. So it has not rejected the
16 other seven. It is just considering them and claims to need until this Friday, that's the
17 25th, to review those seven rows. That is request numbers 14 to 21 and 23 to 26, sir.
18 They have all been agreed by Allianz. That's 14 to 21 and 23 to 26.

19 MR TIDSWELL: Just so I understand, is this table intended to be a sample of the
20 problems you have identified?

21 MR WILLIAMS: That is correct, sir. It's not an extensive review of everybody's
22 wrappers, positive cases, responsive cases, their expert reports and the witness
23 statements. We say it is not for any party to incur those costs.

24 MR TIDSWELL: So if you have persuaded Allianz that your samples are good
25 samples and therefore they should change their position, which they have, is your
26 expectation they are going back and looking at other documents that are of a similar

1 nature? Is that what you are saying?

2 MR WILLIAMS: It is not an expectation. Allianz have said last night that it is
3 re-reviewing its mark up of its positive and responsive cases precisely for that. So
4 identical ones that map across but also ones that are equivalent or similar to those.
5 As I say, this was not intended to be an exhaustive way forward. We just thought to
6 get the ball rolling it would be helpful to crystallise this issue so it can't be said that we
7 are not trying to be proactive.

8 My final update is that Visa has also written to the SSH Claimants with some issues
9 similar to those in our table. They identify, in particular, inconsistent confidentiality
10 designations. Again, they are on a sample basis.

11 Now with that update in mind I had in mind, sir, to refer you to one point of principle
12 which in our submission it would be helpful to articulate before moving on to my
13 proposed timetable which only has four steps, because that might have some
14 implications for the ordering of that timetable and who does what and by when.

15 Given all the authorities that are set out at length in our skeleton (which for your note,
16 sir, are at paragraphs 11 to 20 of our skeleton argument which is at C50 if you are on
17 the electronic bundle) I do plan to be brief and only take you to the one authority.

18 Essentially in brief you will have seen, as I have already alluded to in part, that it has
19 been suggested particularly by Allianz that we, Visa and Mastercard bear the onus of
20 identifying and challenging with reasons confidentiality designations that they have
21 unilaterally made and other merchant Claimants have made before they then have
22 a duty to justify their designation.

23 Now that point, if I may say so, is a creative one, but essentially reverses the burden
24 of proof into when a challenge has been made and only once a challenge has been
25 made whereas the burden apparently in identifying and reviewing documents is not on
26 them. Once they have put all their documents in the ring, that's it from their perspective

1 unless and until challenged.

2 Now, putting to one side that we have actually identified all of the documents in
3 question, that's the narrow trial bundle documents that we have been referring to, sir,
4 in my submission that's completely contrary to the well-established Court of Appeal
5 authority that I am about to take you to.

6 MR TIDSWELL: Yes.

7 MR WILLIAMS: It has led also in my submission to a wholesale misuse of the
8 confidentiality ring order in this case.

9 So if I could ask you, sir, to turn up Bundle A, tab 15 at page 410.

10 MR TIDSWELL: 410.

11 MR WILLIAMS: Sir, you should have there the *OnePlus* case from the Court of
12 Appeal, which is an IP case. The judgment for the majority is of Lord Justice Floyd.
13 His Lordship canters through the authorities and provides in my submission a very
14 helpful summary of the principles. If I could ask you, please, to turn up page A420,
15 starting at paragraph 37 about halfway down the page, you will see the authorities that
16 he considers includes a competition law one *Infederation*, made by the now acting
17 President, Mr Justice Roth.

18 If I could ask you to read out the quotation from Mr Justice Roth, he says:

19 "In my view the important points to emerge from the authorities are, one, such
20 arrangements are exceptional, two, they must be limited to the narrowest extent
21 possible, and, three, they require careful scrutiny by the court to ensure that there is
22 no resulting unfairness."

23 Now this in my submission is important when considering how to interpret narrowly the
24 confidentiality ring order in these proceedings and whether it is somehow meant to
25 override all the authorities, the legislation and the CAT rules which are referred to in
26 our skeleton argument.

1 In my submission it is clearly not, and that confidentiality ring order can be readily and
2 easily interpreted entirely consistently with all of the authorities.

3 Then at paragraph 39, which is at the bottom of this page, he begins to draw together
4 his summary of the case law.

5 If I could ask you to turn over the page to point 4 on this list, which is at A421, the
6 second of those points is the one I have essentially just referred you to:

7 "The court must be alert to the fact that restricting disclosure at any stage is
8 exceptional."

9 Then (v) is the key paragraph here:

10 "If an external eyes only tier is created for initial disclosure, the court should remember
11 that the onus remains on the disclosing party throughout to justify that designation for
12 the documents so designated."

13 Now I want to emphasise the word "throughout" there. It is not just when challenged.

14 Now that point is made even clearer when we look at three other paragraphs, the only
15 three paragraphs I am going to show you from any authority.

16 The first of those is at paragraph 40, at the bottom of that page, and it is worth reading
17 out in full and I will again emphasise particular words:

18 "To this list of summary principles I would add that the court must be alert to the misuse
19 of the opportunity to designate", I emphasise designate, "documents as confidential.

20 It remains the case that the parties should not designate such material as AEO", that's
21 confidential, "even initially unless they have satisfied themselves that there are solid
22 grounds for establishing that restricting them in that way is necessary to protect their
23 confidential content."

24 So I emphasise designate twice, initially, satisfying themselves and establishing.

25 This rather demonstrates that the onus or the burden being discussed in (iv) and
26 paragraph 40 is not just the question of who has the underlying burden of proof to

1 justify whether it is confidential or not but also the onus in practice and at all times to
2 justify the state of affairs including when putting documents into the ring in the first
3 place.

4 There is not an onus on the recipient, here Mr Merricks, Visa and Mastercard, to seek
5 to de-designate or apply to the court before any duty is on the disclosing party.

6 Now if that needs to be made any clearer, then we can go back to paragraph 33 on
7 page 491 of this authority and here we see the quotation from *TQ Delta* which is what
8 is referred to at (v) that we have just looked at. If I could ask you to read the last two
9 sentences from the quotation of *TQ Delta* from Mr Justice Carr. It states:

10 "It enables one party to decide to exclude all representatives of the opposite party from
11 access to any document it chooses."

12 Here is where I place the emphasis:

13 "And places the onus on the party seeking access to apply to court to obtain it. That
14 approach in my judgment is wrong in principle."

15 Then we return to what Lord Justice Floyd makes of this. He says:

16 "I agree that an external eyes only tier is exceptional. I also agree it is wrong to place
17 the onus on the receiving party to establish the document is non-confidential."

18 The only part where he goes on to disagree is that there is any prohibition in principle
19 on there being external eyes only, but what you can see clearly from this passage, in
20 particular that penultimate sentence of the quotation, is they are not talking just about
21 the onus in terms of the burden of proof but it is the onus on the party seeking access
22 to apply to the court. It is the practice of who the onus is on in principle to raise
23 problems in light of the confidentiality designations that are made.

24 We say that the Claimants in this case are seeking to reverse the burden, not just the
25 burden of proof, but the practical application of the ordering of who has to justify this
26 material going into the ring and staying in the ring throughout the proceedings.

1 MR TIDSWELL: So am I right in thinking that the ring sets out -- the order sets out a
2 process for challenge, so as a matter of mechanics the way it works I think is that the
3 parties claiming protection of the ring does so, designates it and then as a matter of
4 practicality if you don't like that, you can challenge that, but you are saying that doesn't
5 change the burden because they still have to justify their position.

6 MR WILLIAMS: Exactly. That's the second stage order of the process. That comes
7 after the initial designation on which there is a duty to the other side to actually justify
8 that, and we have just seen from the Court of Appeal that that obligation applies
9 throughout the litigation. If it were the case that the only way one could remove
10 a document from a ring is to wait for a designation request that would give rise to
11 a huge loophole issue whereby a party, as they have in this case, simply dumps all
12 documents in a confidentiality ring and then for all practical purposes and intents the
13 burden is on another party to provide with reasons according to the paragraph 7 of the
14 confidential order that you have in mind, sir, why that document or passage is not
15 confidential.

16 Now that's not the intention of the ring and that goes back to my point about how one
17 interprets the confidentiality ring order in these proceedings as narrowly as possible.

18 MR TIDSWELL: Just to apply that to where we are in the proceedings at the moment,
19 so as I understand it there's been a review of documents and a designation has been
20 made and then they have been re-reviewed we are told and the designation has been
21 maintained. Let's assume it has been maintained. Are you saying that the problem is
22 that you haven't been given proper reasons for the designation? Is that the sharp point
23 of this?

24 MR WILLIAMS: That's certainly one point but it is also this idea that the parties can
25 designate all of their documents, by which I mean the trial bundle documents (the
26 disclosure documents) in the ring entirely so they just put a whole document in and

1 they say "We are not even going to look at it", not about providing reasons, "but we
2 are not even going to look at it to identify passages which are clearly not confidential".

3 MR TIDSWELL: I think it has been the practice for proceedings in front of the Tribunal
4 for things to happen a bit like that. I am not a great fan of that, as it happens, and you
5 will have seen in the practice direction earlier this year some attempt to row back a little
6 bit from that, but as a matter of reality what tends to have happened, and there are
7 probably reasonable reasons for this, is at the earlier stages because people are just
8 getting stuff done, the designations get put on out of an abundance of caution often
9 and then as you get further to the point we are now at, people are much more realistic
10 about it and apply a much more focused lens to the question of designation. So
11 although you may -- it may be a little bit unfair to say that the broad approach is not
12 acceptable, it is only unacceptable if the narrower approach then doesn't follow. That's
13 the problem, isn't it?

14 MR WILLIAMS: It particularly becomes a problem this close to trial. These rings may
15 well work when the trial is two years away and gradually things can be removed from
16 the ring and there is time to do so. There hasn't because of the hearing set up and
17 what has been on the agenda for certain CMCs been an opportunity until today to
18 grasp the nettle on this. We have been trying in correspondence for months and that's
19 why we have ended up producing a table at great expense and time, providing some
20 examples, despite the onus not being on us. So I don't think it would be fair for any
21 party to suggest that we have not really tried --

22 MR TIDSWELL: No, I am not suggesting that. I think to be fair to everybody we all
23 know this has happened in a great hurry and it has been difficult for everybody.

24 MR WILLIAMS: To give some examples both in this Tribunal and other courts of
25 orders that have been secured, in the *Le Patourel v BT* case there was a staged order
26 for exactly this process but that was a few more months before the trial.

1 MR TIDSWELL: Well, the difficulty here is we were receiving -- the main documents
2 for trial were coming in in August and October. That's the difficulty with the trial starting
3 in November. So there is just a problem caused by the progression of the timetable,
4 isn't it?

5 MR WILLIAMS: I think that takes us to the way ahead.

6 MR TIDSWELL: Yes.

7 MR WILLIAMS: I have in my submission four steps which it would be helpful in my
8 submission, for the Tribunal to order now so the parties are not just running off their
9 own unagreed timetables, which is the case at present, sir, and clearly is
10 unsustainable.

11 So the first point in practical terms for what we are seeking is the missing Redfern
12 schedules. There's no reason why, given their length, they cannot be provided over
13 the next couple of days, especially given that in preparation for this hearing, sir, no
14 doubt the parties have been looking at those intently.

15 The second practical step that needs to be undertaken is the responses to our sample
16 table and the SSH Claimants to respond to Visa's similar letter. Again there is no
17 reason why at the close of play tomorrow for about 30 requests of individual passages
18 is not achievable, given that they were sent on Friday. There is no need to wait until
19 this Friday as suggested by Allianz considering it only has seven passages left.

20 We also need to build in time for potential Tribunal review, although we would very
21 much hope that is unnecessary, but to resolve any dispute. We have set this up in
22 tabular form like a Redfern schedule to make this as easy as possible if it needs to be
23 done on the papers, sir.

24 It is entirely possible that Visa and Mastercard may themselves wish to raise some
25 other samples or specific challenges too. Now, of course, in light of your indication,
26 sir, they will have to be made very promptly in order for them to be determined.

1 My third step is that there may then be, as you have alluded to, sir, some broader
2 consequences coming out of that process, given we have only challenged samples.
3 So equivalent or materially similar passages of the same sort ought to be removed at
4 the same time. As I have said, Allianz itself has acknowledged this and stated
5 proactively that it will re-review positive and responsive cases by 29th October. In my
6 submission that's too late, because it doesn't give enough time for the bundles to be
7 completed by the end of this month, which only gives us 18 days, or at the absolute
8 latest one would have thought the day before the PTR, which is on 5th November, but
9 I am concerned that that would not give enough time for any challenges to be brought
10 and resolved. As you may say, sir, we just have to get to trial and deal with any at that
11 stage but we really don't want to clog up the PTR if possible with confidentiality
12 granular minutiae details. It would be good to have resolved that in my submission
13 beforehand, but we do need dates now, sir, for when these revised positive case and
14 responsive case wrappers, at the very least, which are clearly core documents that
15 will then flow through into written openings, are to be provided by and finalised so they
16 are uploaded and can be cross-referenced into the bundle.

17 My fourth step and my final step, sir, is in relation to the underlying... what we are
18 calling now the trial disclosure documents. There needs to be, firstly, a date for the
19 SSH Claimants to confirm when they are reviewing the 170 documents remaining in
20 the confidentiality ring in their entirety for highlights by and for Allianz and Primark to
21 review all of their underlying disclosure documents.

22 In my submission it is just not acceptable for there to be a blanket label of
23 confidentiality. We are talking here about very few documents, 117 in total from Allianz
24 and Primark, I can't give you a precise number, but they have disclosed a total of 371
25 documents, not all of which are clearly referred to in the positive and responsive case
26 wrappers or expert reports. So, the true number of documents that need to be

1 reviewed will be considerably lower than 371.

2 My final point before I sit down --

3 MR TIDSWELL: What about the SSH Claimants?

4 MR WILLIAMS: The SSH Claimants 170 documents, they have 170 documents that
5 remain entirely in the ring. They have provided us a sample of four with highlighting.

6 MR TIDSWELL: Sorry, yes.

7 MR WILLIAMS: Allianz have 117 documents entirely in the confidentiality ring without
8 any highlighting or unredactions and Primark unfortunately I can't give you a number
9 of how many documents are in question. Perhaps Mr Jones can assist, but I can tell
10 you that they have a total of 371 documents, not all of which are in the narrow
11 category.

12 MR TIDSWELL: The numbers you have just given me, so I am clear, are those
13 documents which you say there's been no attempt to try to extract the confidential
14 information. Is that the point you are making?

15 MR WILLIAMS: That's my understanding.

16 MR TIDSWELL: Those are just universal claims of confidentiality?

17 MR WILLIAMS: That's correct.

18 MR TIDSWELL: Is that the extent of your complaints? Presumably there are lots of
19 other documents that have confidentiality designations where it's been more focused,
20 do you say anything about any of that? I am talking about trial bundle documents.

21 MR WILLIAMS: In the trial bundle documents only the SSH Claimants have
22 undertaken any highlighting or removal. We are very grateful for that. They have
23 actually removed documents entirely from the ring and highlighted some.

24 MR TIDSWELL: Do you have any complaints about the SSH population outside of the
25 170? Are we happy about that?

26 MR WILLIAMS: There are specific confidentiality markings that we think are over

1 | zealous and are highlighting and redacting too much. They are very much tallied to
2 | the sample documents I have challenged and I would hope they would flow through.

3 | MR TIDSWELL: They are in here.

4 | MR WILLIAMS: That's not an extensive and exhaustive list, sir, but one would hope
5 | that if that is determined by the Tribunal or agreed by the parties very sensibly knock
6 | on consequences can follow and I would hope as a matter of good form and manners.

7 | MR TIDSWELL: Okay. Thank you.

8 | MR WILLIAMS: Just the very final point then is just Allianz have suggested just
9 | reviewing the pages of the underlying documents that have been referred to by the
10 | experts. Now we can't work out whether that means that whole sections of the relevant
11 | document in question will also be reviewed, because we can't now work out whether
12 | you need the page before or the page after to actually see the context and make any
13 | sense of the specific page that an expert may have referred to.

14 | Now I do say, and this is potentially a frank submission, sir, but if they are in any
15 | difficulty, that is of their own doing, having got to this very late stage, and despite
16 | numerous requests in correspondence and my flagging it at mini CMCs over months
17 | now. I appreciate the documents have come in in August, but to get this close before
18 | trial and have such a wilful disregard of the principles of open justice is of grave
19 | concern to us.

20 | MR TIDSWELL: I understand that, and you may or may not be right. I am not
21 | venturing any view on that at the moment. There is just the practical point, isn't there?
22 | That is the point at that really worries me most. I mean that is the point that worries
23 | me the most. I absolutely get the point about open justice and clearly --

24 | MR WILLIAMS: I should say in fairness we have had some glib overarching
25 | comments that these are all about pricing decisions. What I really mean is there has
26 | not been a detailed review of clearly this paragraph or page of a document is non

1 confidential, or any specific articulated reasons on a passage-by-passage basis rather
2 than a just a glib "This document is about a confidential topic and may contain
3 confidential information". Whether it is a warning for future cases or can be applied in
4 this one, this is completely the wrong approach to take in confidentiality ring orders.
5 I have been in cases where we have got this close before trial and Mr Stuart-Smith,
6 as he then was, in a procurement case made an Unless Order that unless documents
7 were reviewed everything would be removed from the ring, because he was concerned
8 about the principle of open justice which overrides any of these concerns and said
9 "There is enough time for the parties to do this if they so want".

10 Now I am not seeking such an order but I am asking for a very tight timetable over the
11 next week or two so we can make real progress here, as otherwise there is a genuine
12 concern on this side of the bench at least that large portions of the trial will just not
13 simply -- will not simply be able to be done in public at all.

14 MR TIDSWELL: Thank you. Mr Lask -- I am sorry. Do you want to pile in?

15 MR COOK: I rise on the basis of a party concerned about confidentiality as well.
16 Three points to make. I mean we echo very much Mr Williams' comments that this is
17 something that everybody needs to get on with. For the sake of accuracy, Mr Williams
18 took you extensively through *OnePlus*. *OnePlus* is actually not an authority that is
19 actually directly relevant here. *OnePlus* concerns what is referred to as an external
20 eyes only confidentiality ring. It is where just external lawyers get to see the
21 documents and actually the Tribunal changed that by allowing named people from
22 clients access. So 'AEO' in that case is attorneys eyes only. It is a case that is dealing
23 with an extreme kind of confidentiality ring where only the lawyers get to see things
24 and we are not in that territory. The principles there probably can be read across to
25 should things be in a confidentiality ring or not, but the quotations are about
26 an exceptional thing that is not about open justice. It is about the fundamental principle

1 that a party needs to know the case against it. If you have nobody from the client that
2 can see things, how can they give advice, how can they make views on settlement,
3 things like that. (Overtalking).

4 MR TIDSWELL: I think we are broadly -- it is what I want I think which it does put the
5 onus on the party claiming the application of the Schedule.

6 MR COOK: (Overtalking).

7 MR TIDSWELL: That is helpful.

8 MR COOK: (Overtalking) I think Mr Williams read over a number of times without
9 referring to external eyes only and actually that is critical wording for that case.

10 MR TIDSWELL: I appreciate the clarification. Thank you.

11 MR COOK: The second point is from the perspective of Mastercard, having reviewed
12 what's come from the other side, there are two sort of main headline categories where,
13 at the moment, the potential issues are. The first one of these is secondary work
14 product. By that I mean the experts have analysed a lot of data. A lot of that data is
15 confidential and at the end of it they say business A has a pass-on rate of 74%.

16 MR TIDSWELL: Yes.

17 MR COOK: Now the SSH Claimants take the view that those numbers are
18 confidential.

19 MR TIDSWELL: That's the first example in Mr Williams' schedule.

20 MR COOK: I am just saying in relation to that that is a category where -- and the other
21 category I am going to deal with is pricing practices, the kind of way in which
22 a business thinks about pricing, looks at its competitors and matters like that. Those
23 are, when stepping back, two particular categories that are going to cause issues.
24 Largely everything else will then sort of wrap around whether those are acceptable or
25 not.

26 If we can't refer to the specific pass-on numbers, that is going to make

1 cross-examination on these issues and submissions quite difficult. There are times
2 when you don't need to look at the detail of a number but, you know, when we are
3 going to be dealing with so many numbers, so many sectors, so many specific figures
4 to be constantly saying "Can you look at the number on page 75", particularly it must
5 be said in this case where closing submissions are going to be dealt with in March, it
6 is very unhelpful to have in the transcript a paragraph on the transcript that says things
7 like "Can you look at page 75?" without actually the bit that says "The number is 74%".
8 It is just going to make all the referencing hard work.

9 That's the position where the SSH Claimants have taken a different approach. Allianz
10 and Primark have taken the view that those numbers are acceptable to be disclosed
11 and we with respect say the Tribunal should rule on that as a matter of principle and
12 we say it should be public.

13 MR TIDSWELL: That is really my point about the judgment. It is almost inconceivable
14 that we are not going to produce a judgment that doesn't say what the numbers are.
15 I find that quite difficult to see. Obviously they could be treated as confidential. I don't
16 want to be flippant about it but as a matter of open justice, and utility to other
17 proceedings, including related proceedings, it seems to me to be a highly unlikely
18 outcome. I don't want to foreclose it, but it seems highly unlikely.

19 On your second point, the pricing, obviously pricing is more sensitive, isn't it? I can
20 understand why there is some sensitivity.

21 MR COOK: Absolutely. We understand why pricing has some sensitivity. I think there
22 is a difference between sometimes people say things are sensitive in circumstances
23 where they are actually common sense and the idea that a business will look at some
24 categories of costs, take account of what its competitors are doing, look at demand or
25 the knowledge that, you know -- let's use a historic example so that I am not
26 trespassing on anything in these proceedings -- the knowledge that Sainsbury's views

1 Tesco's and Asda as its main competitors. These are matters that are firstly so
2 common sense almost anybody can reach those conclusions. Secondly, absolutely
3 known to anyone relevant within the industry, because what one also found from these
4 cases is all too often you are cross-examining Mr A from a business and it turns out
5 that previously he used to work at one of the main competitors, because they have
6 a tendency to hire from each other and it is incestuous. You get told this is incredibly
7 sensitive, but actually you have half a dozen people around the table who used to work
8 at competitor A and competitor B. Therefore, I am sure they are taking confidentiality
9 seriously, but the idea that nobody knows that you benchmark against or that you are
10 price comparing against whoever the competitor might be is in reality within that
11 industry very well-known.

12 So we do suggest that there has to be an element here of saying a lot of these points
13 are just common sense, well-known within the industry and, you know, confidentiality
14 has to really look for something which is unusual and something you really don't think
15 your competitors know about you, and if in reality you are doing something that, you
16 know, I might be able to have guessed at the start of this case how an insurer broadly
17 prices its products, then that's not confidential. If there is some specialist kind of
18 internal sort of computer system they have used to do it and the mechanics of that,
19 then one can see that gets into a real business secret, but a lot of the broad sweeping
20 how they do it is just common sense.

21 The reality about this point is unless a very narrow view is taken of what is genuinely
22 a trade secret, we are going to end up with all the factual cross-examination, which is,
23 of course, all about pricing practices and that's not the core of this case in the sense
24 that time-wise it is going to be a small proportion, but, you know, it will be very
25 unattractive from an open justice perspective.

26 What we are really concerned about is, I suspect the moment it is raised it will be very

1 unattractive to the full Tribunal, if it is suggested we are going to sit in private for the
2 full factual evidence, for example. So that is something we need to anticipate now the
3 Tribunal is going to say "That's not acceptable for so much of this to be heard in
4 camera" and therefore the confidentiality -- when we are preparing it is much better for
5 us to prepare now knowing the one or two truly sensitive things that need protecting,
6 not things that are common sense.

7 MR TIDSWELL: Thank you. Thank you, Mr Cook. That's helpful. Just to make sure
8 there is nobody else who wants to pop up to support Mr Williams.

9 MR WILLIAMS: To clarify, sir, until yesterday the confidentiality ring order in this case
10 was external eyes only. So the principles apply exactly right the way through and are
11 much broader than simply --

12 MR TIDSWELL: I think Mr Cook was making a slightly different point. It doesn't
13 matter. I don't think anything turns on it. I think we have a very clear position of what
14 happens under the rules and under the ring, so that's fine. Thank you.

15 I am conscious we should take a break for the transcriber. Obviously, we will need to
16 hear from the Claimant firms' counsel on this, but we might just take that break first.
17 If it helps, I wonder whether I might just give you a couple of thoughts. I am conscious
18 of the practicalities, and you have heard me press Mr Williams on the timetable and
19 the difficulty that comes with it. I understand all that and I understand there may be
20 some real practical constraints that have applied in relation to this. I am sure I am not
21 telling you anything you don't know, but just so you are clear, I am confident that the
22 Tribunal will be very resistant to sitting in private in closed session. We will not want
23 to do that unless it is absolutely necessary. Obviously, we will want to make sure that
24 there's proper cross-examination and people have the ability to do that properly. So
25 those two things are going to collide if we are not careful, but I don't think you should
26 be working on any assumption that the Tribunal is going to respond positively to

1 repeated requests to sit in a closed session if it won't.

2 Secondly, and I am sure you will all have had experience of this, the Tribunal is going
3 to be very, very grumpy if we have endless presentations of documents and bits and
4 pieces which are on the face of it obviously not confidential and don't pass the test in
5 the Schedule and yet have been claimed and are therefore causing disruption in the
6 proceedings. I think Mr Cook's point on common sense is well made. I think you need
7 to be mindful of what's ahead if this issue isn't resolved in a way that at least gives you
8 a proper defensive position on it, if I can put it that way.

9 The third thing is that I am very conscious that we are very close to these trial
10 bundles being finalised. So I would like to hear from you about a positive solution to
11 try and do your best to resolve whatever issues there are, appreciating there may be
12 some limits to that. I don't really want to have an argument about burden of proof or
13 hear about why things are terribly difficult, but I would appreciate some sensible
14 practical solutions that are feasible within the timeframe that will at least alleviate the
15 problems that might exist. And you might say they are not as bad as Mr Williams says,
16 I don't know. I am not really interested in a great big debate about whose fault it is.
17 What I would like to know is that we have the best possible outcome we can for
18 a sensible trial with a very, very tight timeframe and recognising that it is going to put
19 quite a lot of pressure on your teams.

20 Can I leave it for you to think about that for 10 minutes and come back at 11.50?

21 MR THOMPSON: (Inaudible) This will give people a bit more space. Do you require
22 us to be present for the rest of the day?

23 MR TIDSWELL: Not at all. It is entirely up to you. You are welcome to stay but if you
24 wish to go, you will probably not be missed on the front row.

25 MR THOMPSON: I don't think there is any outstanding in relation to the costs or the
26 schedule of 2B that needs to be decided today unless I misunderstand it.

1 MR TIDSWELL: We will be talking a bit about the shape of Trial 2B, so you might
2 want somebody here to pay attention. I am expecting an update on it and I have some
3 observations to make about the timetable. If possible, the timetable, there may be
4 some discussion, but I don't think we will be making a firm order about anything, if
5 that's any help.

6 MR THOMPSON: I am grateful. I think Trial 2B is slightly ambiguous, because I think
7 it includes closing submissions in relation to Trial 2A as well as the UPO and clearly
8 we are not concerned particularly with the closing submissions issue.

9 MR TIDSWELL: I think you can assume -- I don't think we are going to be dealing with
10 the closing submissions really at all today. What we might be dealing with is the
11 timetable for responsive and positive cases for Trial 2B acquirer pass-on issues.
12 That's probably the bit we get to. As I say I suspect we will probably not be making
13 an order about that, just discussing what the landscape looks like at the moment.

14 MR THOMPSON: I am grateful. As I say, there is obviously no discourtesy intended.

15 MR TIDSWELL: None taken.

16 MR COOK: I think you said come back at 10 to 12.

17 MR TIDSWELL: I meant to say come back at 5 to 12, which I think we should still do
18 if that gives you enough time to get through. Thank you.

19 (Short break)

20 MR TIDSWELL: Mr Lask.

21 MR LASK: Thank you, sir. I am going to come very quickly on to the matter of positive
22 solutions. But I want first to make three overarching points that bear emphasis.

23 MR TIDSWELL: Yes, of course.

24 MR LASK: First, the very nature of the pass-on issue means that much of the evidence
25 adduced by Allianz, and I suspect the other Claimants, is indeed commercially
26 sensitive. Addressing the pass-on defences has required Allianz to provide detailed

1 witness and documentary evidence on how it sets its prices and how different types of
2 costs are taken into account in the pricing process. So my clients are genuinely and
3 understandably concerned that disclosure of that sort of material to the world at large,
4 including its competitors, might cause significant harm to its business interests. As
5 Primark has pointed out in its skeleton argument, the Tribunal's recent practice
6 direction does recognise that documents of that sort may need more elaborate
7 confidentiality arrangements.

8 The second point is that Allianz has been keen to, and has taken, a pragmatic
9 approach wherever possible on this issue. So, as the Tribunal is aware, Allianz agreed
10 that certain internal lawyers for the Defendants as well as Mr Merricks himself could
11 be added to the confidentiality ring so as to enable them to give instructions to the
12 external legal teams and obviously the Tribunal amended the order yesterday. So I do
13 say that that ought to remove or at least significantly mitigate many of the practical
14 difficulties that might otherwise arise for the parties from confidentiality designations.

15 MR TIDSWELL: Well, it deals with some of them. It doesn't deal with the point that
16 Mr Cook makes, which is that when we get to cross-examination of the factual
17 witnesses it just gets very difficult. I appreciate there may just be a necessary problem
18 there. I am not suggesting that your first submission is wrong. I completely understand
19 that, but really this is about trying to reduce the scope of that to the absolutely
20 necessary, isn't it, and I know you know that. I am not telling you anything new, but
21 I suppose what I need is the assurance that your team has adopted what Mr Cook
22 I think fairly calls a common sense approach to getting to that absolutely necessary
23 irreducible minimum. That's what this is about.

24 MR LASK: We absolutely hear that concern. We agree that there is a balance to be
25 struck. I do emphasise it is a balance, because there is going to come a point when
26 the material is too confidential (Overtalking).

1 MR TIDSWELL: Of course. I think we all understand that.

2 MR LASK: The point I am going to come on to is we have proposed a way forward
3 which involves reconsidering some of the confidentiality designations and the team
4 will, of course, have the Tribunal's observations well in mind when conducting that
5 process.

6 Before I come on to that, the third point I wanted to make was this.

7 MR TIDSWELL: Yes, of course.

8 MR LASK: Those sitting behind me have already reviewed the vast majority of the
9 relevant documents in this case: the positive cases of all the parties, the expert reports,
10 the Allianz witness statement and the underlying documents and that has involved
11 a huge amount of work. Where we are now is dealing with a re-review of those
12 documents and I think that has to be borne in mind when we are talking about
13 timetabling, because a huge amount of work has already gone into this. It is
14 a significant exercise that we have now agreed to undertake. It is a significant
15 compromise on our part, and we do ask that to be borne in mind when dealing with
16 timetabling.

17 MR TIDSWELL: Just on that point, in a sense it is only as good a point as the first
18 review was and I don't mean that unkindly. I am very sympathetic to the difficulties of
19 this exercise and indeed the sensitivities of your client and the protection -- the proper
20 protection of their confidential information and I wouldn't want anybody to think that
21 is -- that any of the parties sitting on your side of the court would think that that is not
22 understood and is put at risk, because clearly the confidentiality ring here is there for
23 a purpose and this Tribunal of all courts understands the sensitivity of particularly
24 pricing material, but if the lens through which the initial review has been conducted
25 has been too conservative, in other words, it doesn't strike the balance right, inevitably
26 that's what leads to it having been done a second time. I am not making any judgment

1 on that other than, of course Mr Williams has produced a schedule, which he has not
2 taken me through, but tells me that you have actually stepped back a little bit from,
3 which suggests that there may be at least a degree of conservatism in some of the
4 first review, which is understandable. I am not criticising anybody for that.
5 I understand why that happens.

6 MR LASK: If I may say so, it illustrates the merits of the process provided for in the
7 confidentiality ring order which is that challenges are not advanced by way of broad
8 allegations of over-designation but challenges to confidentiality are advanced by way
9 of specific identification of documents or passages that have been designated with
10 which the challenging party disagrees together with reasons and that's what
11 Mr Merricks has now done, albeit by way of a sample exercise, that came in on Friday.
12 We looked at the first raft of challenges yesterday and replied to Mr Merricks on that
13 yesterday. So we engaged with it constructively and we replied rapidly, but the benefit
14 in that exercise is it allows my clients to actually see where Mr Merricks is coming from
15 and see what the concerns are and why he thinks that these designations shouldn't
16 apply.

17 So there is a benefit in hearing from the other parties why they disagree and we have
18 been inviting them to identify those disagreements for weeks now. Now, we can move
19 forward because now there's been some positive engagement, we say, from
20 Mr Merricks.

21 May I turn to what we have proposed because we did write yesterday to propose a way
22 forward?

23 MR TIDSWELL: Yes, indeed.

24 MR LASK: There are essentially three aspects to it. Firstly, as you have said, sir,
25 Allianz has agreed to de-designate a number of the extracts challenged by
26 Mr Merricks. As I mentioned, those challenges came in two rafts, one on Friday and

1 one yesterday. So we looked firstly at the ones that came in on Friday. We have
2 agreed to de-designate a number of those and we intend to look at the remainder by
3 the end of this week. That is the 25th.

4 Second, we propose more generally, as you have heard, to re-review the positive
5 cases and review the responsive cases in light of the reasons now given by
6 Mr Merricks. That is a substantial task, but we have said that we will complete the
7 review of Allianz's positive case and all of the parties' responsive cases by the 25th,
8 that's Friday. Then we will complete the re-review of the other parties' positive cases
9 by the 29th. That's next Tuesday. This really is the best we can do in the time
10 available. These are substantial exercises and they do take time.

11 That's underlined by the third aspect, the third element of what we have proposed,
12 which is a practical way forward as regards the underlying documents and there has
13 been a deadlock in relation to these documents and we have sought to break it in this
14 way.

15 Just to be clear, these are the documents referred to in the parties' positive and
16 responsive cases. Now Allianz has disclosed something like 2,000 documents, but
17 only a small number, a small proportion of those have been referred to. So we are
18 only concerned with the ones that are referred to. It is about 120, I believe. The
19 practical difficulty is that those documents are very large and cumulatively they run to
20 nearly 10,000 pages. That's the practical difficulty. They have been reviewed already.
21 They have been designated as confidential, because they do contain large amounts
22 of confidential information, but they haven't been highlighted on a line by line basis.

23 What we are now proposing to do is look again at those documents, but look only at
24 the specific pages or sections of those documents that are cited in the expert reports,
25 because what one sees in the expert reports is only very small extracts are actually
26 relied on. So it seems to us it would be wholly disproportionate to do a line by

1 line review of 10,000 pages worth of underlying documents. We have tried to propose
2 a pragmatic way forward and that's the approach that we think works best.

3 So we will look at the pages or the sections that are referred to by the experts. We
4 will consider the confidentiality designation of those and we will inform the parties of
5 our position by next Monday, the 28th October.

6 If it helps, sir, I can give you an example by taking you to one of the expert reports and
7 showing you --

8 MR TIDSWELL: I think I have a good sense of how it all works. That's helpful. I mean,
9 I suppose the exercise of reviewing the positive and responsive cases in some way is
10 going to overlap with that, isn't it?

11 MR LASK: It will be done at the same time.

12 MR TIDSWELL: That will flow through. Presumably some of the objections in the
13 expert reports, some of the objections to the treatment of the expert reports is because
14 the underlying document has been designated completely and therefore the expert
15 has followed that designation.

16 MR LASK: There is certainly an overlap. It needs to take place in parallel, and
17 because there are a number of different components to the exercise it is going to take
18 some time. Like Mr Merricks, we are very keen to get the trial bundle sorted. We
19 certainly don't want that held up, but we are where we are. This does take time.

20 MR TIDSWELL: I understand.

21 MR LASK: We have sought to propose the most realistic timetable that we can.
22 Just to give you one example -- I will not take you to it -- in Mr Harman's report in one
23 of the footnotes he cites a particular Allianz document. The document is
24 129 pages long. He cites one page. So in that situation we say it is not necessary or
25 proportionate to review the whole document and apply line by line confidentiality
26 highlighting.

1 MR TIDSWELL: Just so I am clear in Mr Harman's report it doesn't actually -- how is
2 it treated in Mr Harman's report? Does he refer to the content of the page or just -- let's
3 have a look at it.

4 MR LASK: It is in the positive case bundle at page 756.

5 MR TIDSWELL: Yes.

6 MR LASK: Sorry. I may be behind you, sir.

7 MR TIDSWELL: I think it is footnote 52 or 47.

8 MR LASK: Footnote 47.

9 MR TIDSWELL: There is no confidential treatment here at all, am I right in thinking?
10 There is nothing in highlighting on this page?

11 MR LASK: I am not sure. I think it looks from the heading as if this document had
12 been -- I am sure there is a highlighted version of this document.

13 MR TIDSWELL: Yes, but are we not seeing -- my question was really --

14 MR COOK: I think what happened at that stage was that everything was designated
15 confidential rather than it being highlighted given the timescale. When the information
16 is or is not designated by the Claimants, the highlighting --

17 MR TIDSWELL: Disappears. I understand. I suppose my question was simply
18 whether anybody was suggesting that footnote 47 should be highlighted because
19 clearly it shouldn't be.

20 MR LASK: The footnote itself --

21 MR TIDSWELL: There is nothing confidential in that, is there?

22 MR LASK: I don't have the highlighted version. You might be right. The only point
23 I was seeking to make is you will see from paragraph 4.2.5, which is where footnote 47
24 appears.

25 MR TIDSWELL: Oh, I see. It is a reference back. So that quote might be highlighted
26 in 4.2.5. It will depend on the treatment of the underlying document, but the underlying

1 document is designated, isn't it?

2 MR LASK: That's right. From a practical perspective when the Allianz team goes to
3 look at that document, it will be looking at page 34, which is the page cited in footnote
4 47, not at the other 128 pages.

5 MR TIDSWELL: Yes, I understand that. It makes perfect sense. I am just trying
6 to -- yes. That's helpful. Thank you.

7 MR LASK: I am not sure if Mr Williams was objecting to that approach, but I do say
8 that given where we are it is the only realistic and proportionate approach on the table.

9 MR TIDSWELL: Yes.

10 MR LASK: And that's what we propose to do.

11 There are some instances and you will see an example at footnote 53 of Mr Harman's
12 report, where an expert does not give a specific page number but just cites
13 a document.

14 MR TIDSWELL: Yes.

15 MR LASK: In those circumstances what we propose to do is take a common sense
16 approach, look at the point being made in the main body of the expert report and work
17 out which pages or sections of the document need to be looked at, because what you
18 have -- I can give you another example, if it helps, in this same bundle at page 3466.

19 MR TIDSWELL: Yes. This is Mr Holt, is it?

20 MR LASK: Yes. It is Holt 12, para 365, footnote 496. You will see in the penultimate
21 sentence of paragraph 365 Mr Holt refers to a specific decision by LVIC. It is not hard
22 to find the relevant page because it is clear from the main -- from the paragraph and
23 from the penultimate sentence what Mr Holt is taking about. So it is pretty
24 straightforward to find the page in the underlying document that needs to be reviewed.

25 MR TIDSWELL: Yes.

26 MR LASK: We have also said that if any party considers that there are further specific

1 pages that need to be reviewed or other documents they wish to add to the trial bundle,
2 then they will be re-reviewed too.

3 What we don't propose to do, sir, in relation to the underlying documents or the
4 re-review of the positive and responsive cases, is provide individual justifications
5 where we maintain confidentiality designations. The reason for that is, firstly, it is not
6 the process set down in the order, which provides for a challenge in paragraph 7, as
7 you are aware, but also it would be disproportionate in circumstances where those
8 designations may not be controversial. So we think the right way forward -- as I say,
9 we have made a significant compromise we say in agreeing to do these re-reviews.
10 The right way forward is for us to do the re-reviews, explain to the other parties where
11 we are maintaining designations and if there are still concerns, then they need to come
12 back to us in the way Mr Merricks has in his schedule and explain where those
13 concerns are and what the reasons are for them and then we will consider them.

14 I am not sure if I need to deal with the *OnePlus* case.

15 MR TIDSWELL: No. That is helpful. Unless you want to say anything about it.

16 MR LASK: The essential submission is that *OnePlus* does not render unlawful
17 an order in the form that the confidentiality order was made in this case. The order
18 provides for a process. *OnePlus* doesn't preclude that kind of process. That is clear
19 from the case of *Kelkoo*, which is also in your authorities bundle, paragraphs 17 - 24.

20 MR TIDSWELL: Yes. I think you heard me say to Mr Williams and Mr Cook that the
21 rules in the order provide a framework that is very clear and we all understand.
22 *OnePlus* is a good caution about the perils of the approach, but it doesn't really help
23 us work out how we deal with the problem I don't think.

24 MR LASK: Indeed. Let me just check. Nothing further.

25 MR TIDSWELL: Thank you very much.

26 Mr Jones.

1 MR JONES: Sir, Primark is closely aligned to Allianz on this. However, there are
2 a few Primark specific points that I would like to emphasise. Sir, as you have pointed
3 out already, the disclosure exercise did follow a rather compressed timetable. The
4 emphasis earlier on was in getting the materials into the ring and to the experts in
5 particular who were looking at it. Primark was on the front foot in taking a more
6 targeted approach. It circulated highlighted versions of the positive case and the
7 witness statements and the expert report on 24th September, and Primark also said
8 in that letter of 24th September, which we don't need to look at, but it is at page 2596,
9 that it had re-reviewed the underlying documents referred to in those positive case
10 materials and it considered that it needed to maintain confidentiality claims over them
11 and it explained in broad terms why that was.

12 The redactions which were made, the highlights which were made to the positive case
13 documents as in the written legal wrapper and the related witness statement and
14 expert report were very targeted. So, for example, the positive case legal wrapper
15 runs I think to 21 pages and if you added up all of the redactions they would fill about
16 half a page. So, they were targeted, and the process under the Order would have
17 been that any of the other parties under paragraph 7 of the Order could have
18 challenged any of those redactions or asked for justifications for any of those
19 redactions.

20 We would have had seven business days to respond. If we didn't respond within seven
21 business days, confidentiality would have been lifted automatically. If we did and if we
22 contested it, it could have been brought before you for a contested hearing. We have
23 done the same, of course, with the responsive cases and the materials that came with
24 that later on.

25 I will not labour this point, but I will make the point that the table that Mr Merricks
26 circulated on Friday of last week alongside heavy complaints about the merchants'

1 approach to this could have been circulated four weeks earlier. That was, in fact, the
2 process that was put in place. So it is not the case that we have dragged our feet and,
3 as it were, we are only here because they have raised it before the CMC.

4 In relation to the next steps, though, sir, the position is as follows. Primark can
5 essentially fall into line with Allianz on the first three steps which Mr Williams has
6 suggested. So, that is providing, step one, the September Redfern I think is the one
7 which Primark has not yet provided in highlighted form. That was Mr Williams' first
8 point. That could be done by this Friday.

9 Secondly, the answers to the specific challenges which have been made, which on
10 the current timetable would be due next Tuesday under the Order -- these are
11 challenges under paragraph 7 of the CRO given to us last Friday -- but we could
12 answer those by this Friday.

13 The third step from Mr Williams was looking at the broader consequences for our case
14 and whether other similar redactions should be lifted. That could be done by this
15 Friday and I am saying "could" because I am going to come at the end to ask whether
16 it really needs to be done at this break-neck speed, but, sir, that could be done by
17 Friday.

18 The fourth step is the difficult one, because the fourth step is the underlying
19 documents, where again we are willing to look again at these. Sir, we have heard
20 what you have said and, of course, it is the case that the more targeted one is, the
21 more possible it is to lift certain aspects of the redactions. We think there are around
22 60 documents in question for Primark. In total, they run to around 3,500 pages. It is
23 important to underline a point which Mr Lask has made, that large chunks of those
24 documents are just not relevant to these proceedings.

25 So you will have, for example, a presentation to some committee which has certain
26 pricing elements which are of interest but then will have something like a chapter about

1 opening a new store in Lisbon or somewhere and how successful that was and what
2 lessons were learned and so on and so forth, which no-one is relying on.

3 Now here there is a difference, as Mr Lask says, between doing the re-review of the
4 pages which are referred to, which we also think we could do by next Monday if that
5 were necessary, versus looking at the documents where there is simply a reference
6 to a document. That is much more complicated, because even if we take the
7 suggestion that Mr Lask just made of trying to work out what is the relevant part of the
8 document, that step itself is not a straightforward step. One needs to spend a bit of
9 time looking at that.

10 My team have said they think they could do that by next Friday for that wider category
11 where documents are referred to, but, sir --

12 MR TIDSWELL: You could do -- Monday you can do the specific pages referred to.
13 By next Friday you could do the whole lot are you saying?

14 MR JONES: No. By next Friday we could also have looked at the cases where whole
15 documents are referred to and worked out which we think are the relevant bits.

16 MR TIDSWELL: I see. Like the example Mr Lask gave.

17 MR JONES: Like Mr Lask gave. We would not be proposing to do the entire document
18 because that would not be proportionate, but working it all out we think by next Friday.

19 This is the point where I am going to circle back to my earlier comment about the
20 break-neck speed. These different issues are interlinked in various respects. So, one
21 does find that you look at one confidentiality claim and realise that it has implications
22 for another document you looked at the day before and so on. It may be that it would
23 be more efficient for a lot of this to be pushed more towards the back end of that
24 timetable so that it can be done more thoroughly and more sensibly, because the
25 quicker we do this -- this is just a statement of the practical reality of this -- the quicker
26 we do this, the more scope there is going to be afterwards for people to say "Well, that

1 is inconsistent with that, and your decision here does not quite correspond to your
2 decision there". Having a little more time to do it thoroughly and properly is likely to
3 be beneficial in the long run.

4 It would mean that in the event that the bundle is actually put together before next
5 Friday, and I am not sure that it will be anyway, but if it is put together before next
6 Friday, parties would need not to do things like make markings on their versions of the
7 bundles until the fully unredacted or highlighted, however you want to put it, versions
8 are uploaded thereafter. It seems to us that would be a trade-off worth taking, but, sir,
9 I have explained to you, if you don't agree, the quickest we think we could do those
10 various steps.

11 What is impractical, and I think this is clear from what Mr Lask said, is the idea that we
12 are going to be able to go line by line giving a positive justification for each one. It is
13 just not possible.

14 Sir, those are my submissions.

15 MR TIDSWELL: Mr Lask, I think I did not ask you about the Redfern. Where are you
16 with that? Have you done that already?

17 MR LASK: Sir, I think we have done one version.

18 MR TIDSWELL: But not necessarily the second.

19 MR LASK: The final one that was submitted to the Tribunal had been highlighted.
20 I think what Mr Williams referred to as the September Redfern hasn't. I think that is
21 different, because that goes wider.

22 MR TIDSWELL: Oh, I see because there were other things on the agenda.

23 MR LASK: As the requests narrowed some of the entries were removed and those
24 entries may be relevant because they contain explanations, answers to questions that
25 were asked. So, that is the September Redfern. I understand that could be done by
26 the end of the week.

1 MR TIDSWELL: That's helpful. Thank you.

2 Mr Woolfe, just before you get going, on the trial bundle, because I think it may well
3 drive some of the decisions here and I assume you are in charge of that at least
4 notionally, what is the plan for that? When is the current expectation that a trial
5 bundle is going to be made available to the parties?

6 MR WOOLFE: As I understand it, the bundle is being held up by the confidentiality
7 point. I understand that a trial bundle index has largely been agreed as regards the
8 content. I think it has been through multiple rounds of review and is largely settled.
9 Essentially once the confidential -- once the confidentiality claims have settled down,
10 we will start uploading the documents. I think there is about 1,000 documents a day
11 to be uploaded. I am not exactly sure of the speed at which the fully functioning
12 bundle will be done.

13 My real concern personally is the kind of process that Mr Williams is proposing for us
14 replying to these sample confidentiality concerns, there being a round of objections to
15 those responses, then there being somehow some settled principles from the sample
16 emerging over the course of the next week or ten days and then at that point we have
17 to start doing a line by line re-review of our positive and negative cases is not going to
18 get us a trial bundle for --

19 MR TIDSWELL: I don't think it is going to work, is it. Where I think we are, and I am
20 grateful for the way that Mr Lask and Mr Jones have dealt with it, is I really need to
21 know what the best is you can do which is consistent with having a trial bundle that is
22 going to be workable for trial. As I indicated, opening submissions are likely to be due
23 on 6th November. That, in a way, is more -- I am in your hands rather than being able
24 to work out myself what that means practically, because you all know exactly where
25 you are with the preparation of those but, as I said to Mr Williams, you know there is
26 a point here at which there may be a counsel of imperfection perhaps, but at least

1 | some aspiration towards some imperfection of outcome, but at the end of the day we
2 | want to have a trial bundle more than have perfect outcomes.

3 | MR WOOLFE: Sir, that's the point I was going to make because in a sense in a perfect
4 | position that would be arrived at by a senior partner from a city firm sitting down in
5 | consultation with a client and with counsel over a line-by-line review of the document
6 | and one could produce a perfectly redacted document. The reality is in these
7 | thousands and thousands of pages that's not how it gets done and can't get done if it
8 | is going to be workable. So people are trying to do their best to work out what
9 | confidentiality should be claimed on these documents at quite high level principles.
10 | That is how it happens and then --

11 | MR TIDSWELL: Mr Williams has a question as to what extent can we be confident
12 | that you are going to apply a rigorous approach in a short period of time to get the best
13 | outcome.

14 | MR WOOLFE: Shall I update you on where we are now? We have just finished
15 | a re-review of the positive and negative cases. Those have been given to Mr Merricks
16 | and indeed that's the foundation of the specific examples he has come forward with.
17 | We are reviewing the Redfern schedules and those will be done by around the end of
18 | this week. The trial bundle documents, the documents that have been identified for
19 | inclusion in the trial bundle, as I understand it, they have been re-reviewed internally
20 | by my instructing solicitors and then certain points of instruction have gone to the
21 | clients for confirmation of certain points. So it is likely those will be done and ready to
22 | share with the other parties by around the end of this week.

23 | MR TIDSWELL: Yes. Just to understand that re-review of the trial bundle documents,
24 | is that on the basis you have looked at all of the pages or is that on the basis you have
25 | done what Mr Jones and Mr Lask have been talking about, which is focused on the
26 | relevant bits? Do you know?

1 MR WOOLFE: Just give me one moment.

2 MR TIDSWELL: Of course. It's difficult.

3 MR WOOLFE: So, sir, I understand it has been done on the basis of the
4 documents -- the pages that have been referred to.

5 MR TIDSWELL: Similarly to the way Mr Jones and Mr Lask described it. So that has
6 been done. Sorry to stop you there for a moment. Clearly there are still some
7 challenges to the work you have done. So you have done or are about to do your
8 re-review. If we are left then with some challenges and the obvious one that has been
9 put up against you is the pass-on rate, Mr Cook's notional 74%. What do you say
10 about that? How are we going to deal with the pushback on this? Because essentially
11 what's being said is you may have done a re-review, but it is still too conservative. Are
12 you anticipating doing some more work on that?

13 MR WOOLFE: Sir, I think -- in terms of process before coming to the specific example
14 raised by Mr Cook, which I will come to in a second, in terms of process we are aligned
15 with what Mr Lask said, which is if specific points are raised, that's why you have the
16 mechanics that are in the confidentiality order. If specific challenges and concerns are
17 made, then we can look at those specific ones and (overtalking).

18 MR TIDSWELL: They have been -- (overtalking).

19 MR WOOLFE: As appropriate. What I am concerned about and argue against is the
20 idea that this is a sample. There is going to be -- and then having identified some
21 principles in all of this, there then has to be a line-by-line re-review of all of the
22 remainder of the documents to apply these principles because that is what is
23 unworkable. The specific examples here, if these specific examples are resolved, then
24 we can -- it won't be a big job to un-redact a particular page and so forth.

25 MR TIDSWELL: I mean, I am just anxious to get away from the idea that this is some
26 question of whose responsibility it was to raise it and so on because we are past really

1 being able to argue about that.

2 MR WOOLFE: It is a matter of practicality. It is not to do with who the burden of
3 persuasion is on that some of these are confidential. Clearly, we are the ones who
4 have to explain why something is confidential. However, your question is what
5 exercise can be done in the time that is available. If we're requested to look at this
6 particular example, we can do that. If we are requested to re-review large volumes of
7 material to solve issues of the type highlighted by X, that is not what we can do, if we
8 are starting in a week or so's time once Mr Williams' proposed process has run its
9 course to identify the principles.

10 MR TIDSWELL: The (inaudible) is not somehow that I make an order that makes you
11 do a whole lot of work that you don't have time to do. The thing here is that we have
12 a very badly set up situation for trial that's going to make the trial very uncomfortable
13 for everybody and is going to produce no doubt a lot of the ire from the Tribunal which
14 is probably going to be directed at you. That is really what this is about now, isn't it?
15 The reality is we are not going to be doing -- you know, Mr Williams has sensibly not
16 asked for an Unless Order, because he wouldn't have got one, because that's not
17 going to solve the problem. The problem we have is how do we make sure that the
18 balance is as close as we can get to common sense, bearing in mind that you have
19 already done a lot of work, but inevitably, no doubt with the best will in the world you
20 may well have been too conservative in that and there may be some things that
21 shouldn't be, like the example given, the 74% example.

22 It would be very good to find a way to get rid of those problems, the most obvious of
23 them as quickly as possible, provided you can do it within a timeframe that works for
24 the trial bundle. That's what we are trying to achieve here. I think what I am hearing
25 from you is a little bit too much "I will wait until I am told there is a problem" and a little
26 bit less of "We are very committed to making sure we deal with this as a problem".

1 Without being unkind, I see this as being your problem. It is everybody's problem, but
2 it is also your problem in relation to your documents because you have to do the best
3 job you can. I am asking and expecting you to find ways to do that without being
4 asked, if there are obvious things you should be looking at again. That is the point
5 I am making.

6 MR WOOLFE: Sir, absolutely, and we understand that.

7 MR TIDSWELL: Which I think, unless I have misunderstood it, is what Allianz and
8 Primark have said. They have said they are going to go away and have a good look
9 at it, bearing in mind there have been some criticisms made, but they are not just
10 containing themselves to the specific criticisms. They are saying "We are going to try
11 to do the best we can to make sure we are confident that these are all justifiable".
12 I appreciate you have just been through that exercise and in a way it may be a bit
13 unfortunate that having done it, you have had some box chucked at you.

14 At the end of the day the only way this is going to be sorted out is by somebody on
15 your team taking a view as to whether that exercise that has been carried out is
16 sufficiently robust to be defensible at trial when things start going wrong (inaudible) is
17 a better way of putting it, or whether you feel you need to be looking at these things
18 again.

19 MR WOOLFE: In a sense we are going to have to take a view on this. On the specific
20 examples that we have been given we can go away and look at.

21 MR TIDSWELL: That's really the point I am making. You can take the specific
22 examples and say "Oh here are three things we have wrong and we can fix them" but
23 if the specific examples illustrate that you have taken too conservative an approach as
24 a matter of generality, then are you taking some responsibility for thinking about that
25 more generally? That's the question that I am asking you. I don't think it is good
26 enough for you to say if somebody comes along and pokes holes in the work I have

1 done, I have just completed a review and somebody has poked holes in it, you are
2 going to fix the holes without worrying about other holes that going to be exposed later
3 on. I think to the extent you can in the time available, you do need to take some
4 responsibility for thinking beyond the specific criticisms as to whether the overall
5 approach taken has been too conservative to confidentiality.

6 MR WOOLFE: Sir, absolutely. I can certainly say that between now and the filing of
7 the trial bundle, as it were, whenever that may be, we will do what we can to address
8 the concerns arising.

9 One thing that may help would be to reach a resolution on points 1 and 2, which I think
10 Mr Cook also stood behind. That is one general cross cutting issue whereas a lot of
11 the rest of these, one looks at them and in reality it looks like somebody had a certain
12 idea in their mind and they may have been a bit too enthusiastic with the highlighting,
13 whereas this is a more specific point where you can say either the Tribunal thinks this
14 should be confidential or it shouldn't.

15 MR TIDSWELL: I am very happy to look at those. I should tell you that I am struggling
16 to see how it can be a particular merchant's confidential information for there to be
17 a sector pass-on rate which is expressed as a percentage rate. It strikes me as just
18 being a very difficult proposition that that is so commercially sensitive that it would risk
19 serious substantial damage to the merchants.

20 MR WOOLFE: Shall I explain what this is and then you can decide? I think that's
21 something of a misapprehension. You are going to have to reach a decision in the
22 judgment about the pass-on rate of the MSC. The one thing we know about the MSC
23 is that it is quite a small proportion of everybody's costs as a whole. So the pass-on
24 rate of a small cost is going to be not hugely important in the grand scheme of things
25 and we know this. However, what Dr Trento has done is he has worked out a pass-on
26 rate for most of the Claimants of their total overheads.

1 MR TIDSWELL: Yes, I understand.

2 MR WOOLFE: Or some of the much, much larger -- (overtalking).

3 MR TIDSWELL: I understand your point but it doesn't really deal with the point that
4 that's not -- there may be all sorts of variation within the sector on that. There may not
5 be. I don't know. Is that really confidential information?

6 MR WOOLFE: Let me explain what the logic behind designating it as confidential was.
7 This is an estimate obviously that was worked out by an economist on the basis of
8 access to confidential internal information of the business, of their internal
9 management accounts of prices and costs. The actual underlying information is stuff
10 which nobody is saying we should just hand that to our competitors, and on the basis
11 of that highly privileged access to internal information the economist has worked out
12 that these businesses are passing on this large chunk of costs at X amount -- call it
13 76% or a range between whatever it may be. That is information which there is some
14 sensitivity, it having been created. If they had created it internally and then they said
15 "We have worked out we pass-on at these rates" that would also look like the kind of
16 information you would want to keep confidential, because it is information as to what
17 you are doing with your prices.

18 The fact someone externally has worked it out on the basis of internal information we
19 thought did not change matters, and that is why it is designated as confidential. Now,
20 that's the full explanation, sir.

21 MR TIDSWELL: I completely understand --

22 MR WOOLFE: Having a steer one way or the other would be helpful because that is
23 one that can be taken and can be dealt with.

24 MR TIDSWELL: I completely understand how one may get to that point, but I think if
25 you asked any (inaudible) looking at it in the context of what we have to do, firstly it
26 strikes me it is going to be very laborious and difficult to deal with at trial. Secondly, it

1 is almost inevitable that these numbers are going to go into the judgment in an open
2 version, because the whole point of doing this is to create some clarity around what
3 pass-on rates might be in these situations.

4 So I think it is highly unlikely the Tribunal is going to be very susceptible to pleas for
5 confidentiality of these sort of numbers in the judgment.

6 Thirdly and most importantly, once it is expressed as a sector-wide number, is it really
7 commercially sensitive in the way in which the Act and the Schedule requires? Is it
8 really going to cause substantial damages to a particular merchant to have that sort of
9 range made public?

10 MR WOOLFE: Well, there is the range point and then there is the sector-wide point.
11 Obviously, although they are sector-wide estimates, they are derived from information
12 derived from particular Claimants and that doesn't really assist --

13 MR TIDSWELL: It may be apparent there was a Claimant.

14 MR WOOLFE: The range point in a sense reflects -- this is not a case where a range
15 has been put on it to, as the CMA would often do when they publish versions of their
16 decisions -- they often put a range around something in order to slightly hide the
17 amount of market share, which is indeed something one can do in a judgment, for
18 example. That is not like this. These are where there is an uncertainty in the
19 calculation but they are the calculation.

20 MR TIDSWELL: I understand that, but nonetheless it is a range. In a way how useful
21 is that to a competitor? Not very useful I would have thought. Taking Mr Cook's
22 example and expanding it, if the number is between 80 and 95%, is anybody really
23 going to gain anything from knowing that some time -- presumably everybody would
24 expect something like that, particularly if they are a competitor, because they
25 presumably have some similar experience. It just seems inherently unlikely that that's
26 so really commercially sensitive as to cause damage. That is just an immediate

1 reaction.

2 MR WOOLFE: I think it is a point on which it would be helpful to have a decision from
3 the Tribunal, if I am honest, because then we can take it away and implement it one
4 way or the other. I have set out why we would say these are confidential
5 issues -- competitive concern issues perhaps more accurately. If somebody else could
6 respond to my right, then we can have the point resolved.

7 MR TIDSWELL: Maybe what we should do --

8 MR WOOLFE: It won't help to say we'll go away and think about it generally, because
9 I don't think that is going to get the issue resolved.

10 MR TIDSWELL: Why don't we tack it on to the Redfern discussion this afternoon or
11 whenever we get to that. It will be this afternoon. Let's deal with it then. I am happy
12 to give you a ruling and hear argument on it.

13 MR WOOLFE: Thank you, sir.

14 MR TIDSWELL: Just coming back to what you are going to do, I think I am inviting
15 you to adopt at least in spirit what has been said by Primark and Allianz, which is to
16 have a look again. I appreciate you have just done your review, but to ask yourself
17 the hard question as to whether you have done that with too conservative a lens,
18 bearing in mind some of the challenges that have been made, rather than just saying
19 "We will deal with the challenges", to reapply yourself -- I am not saying review every
20 document and go back through them all again. I am saying ask yourself the hard
21 question as to whether you have done this in a proper way to reflect the right balance.

22 MR WOOLFE: I notice we are coming towards the short adjournment. There's a
23 difference between me saying "Yes, we will ask ourselves the hard question" and
24 being slightly more concrete and saying "We'll adopt the timetables Mr Lask and
25 Mr Jones have set out". I would be more in a position to do that I think after the short
26 adjournment.

1 MR TIDSWELL: I understand that. Why don't we -- I don't know whether, Mr Williams,
2 you have much more to say about this.

3 MR WILLIAMS: One extremely brief remark to narrow the issues. We quite appreciate
4 reviewing whole documents where an expert has referred to only a page is excessive.
5 However, we do think that only looking at one particular page may miss out other parts
6 of a section which are needed to understand that one page which is being referred to.
7 So we would ask for a section which has been referred to by an expert to be reviewed.
8 That may be one or two pages on either side of that particular page that's quoted, just
9 so there's no issues when we get to cross-examination, where you may need to go to
10 a paragraph before that happens to fall on a previous page.

11 MR TIDSWELL: Yes. I think, you know, to some extent -- and I don't want this to be
12 taken as letting anybody off the hook that they may have been put on in relation to
13 this -- I think I am less bothered frankly about some of these underlying trial bundle
14 documents than I am about the positive and responsive cases and clearly the way
15 they flow through is important. We all know we are going to spend an awful lot of our
16 time looking at expert reports and trying to ask people questions about them and
17 navigate them whereas it is easier to go to an underlying document and say "Will you
18 just read the page before and the page after before you answer a question about this
19 slide?" I take the point and I do think it's a matter of common sense. Perhaps we can
20 leave it on the basis that if it was just a sentence that was unredacted on the page,
21 that might not be that helpful, and perhaps leave it on that basis, if you are happy with
22 that, Mr Williams.

23 MR WILLIAMS: Yes, sir.

24 MR TIDSWELL: Does anybody else have anything else to say on the subject?

25 MR WOOLFE: I just have two short points.

26 MR TIDSWELL: I am sorry if I cut you off.

1 MR WOOLFE: First of all, on the subject of -- Mr Williams said that 170 documents
2 have been claimed to have blanket confidentiality. I would like to assure you that most
3 of those are spreadsheets on which it makes sense to claim in a blanket way. What
4 we think we can do is look at those which are not spreadsheets --

5 MR TIDSWELL: I picked up there are definitely lots of spreadsheets involved.
6 I understand that.

7 MR WOOLFE: That was the more positive proposal.

8 Then the last point, sir. Simply on the idea of sitting in private, we understand it is
9 undesirable. However, we are in a situation where when we do come to a highly
10 sensitive pricing situation, we are not even in the situation of Mr Lask, who was an
11 insurance company, and there are no other insurance companies involved in the
12 proceedings. We have Vodafone and Three who were part of the same Claimant
13 group. We have hotels. We have Hilton and we have other hotels that are involved
14 as well, who are actively involved in being aware of the issues and looking at them.

15 If it is necessary to protect confidential information to sit in private, it is something we
16 will have to ask for and to happen. It is indeed largely what happened I think in the
17 *Sainsbury's* trial when we came to the pass-on function. I am not suggesting vast
18 swathes should be in private, but I want to push back on the degree of resistance to
19 that if it is necessary, because it may be it is necessary to get the trial to proceed
20 efficiently, sir.

21 MR TIDSWELL: I think, to be absolutely clear, if it is necessary and a proper case is
22 made for it, then, of course, the Tribunal will be open to doing that, and has done so
23 in the past and no doubt will do so in the future. That's not really the point I am making.
24 The point I am making is that if we are in a situation -- let's take the 75% as
25 an example. It wasn't 75%, was it? Whatever it was.

26 MR WOOLFE: A fictitious number.

1 MR TIDSWELL: It's a fictitious number. It's obviously far too high for some parties'
2 purposes. Let's just stick with the 70 something per cent. That is dotted around in
3 numerous expert reports, and it is going to be almost impossible to run a trial with that
4 sort of material in open court without there being lots of mistakes and people referring
5 to it or the numbers made up or other things that are said in witness statements and
6 so on. We all know the practical difficulties, and we can and will work around it as best
7 we can, but the reason for going into closed session is that it becomes simply
8 impossible fairly to allow people to cross-examine when there is so much material that
9 the cross-examination is ineffective -- becomes ineffective because of that or at least
10 can be said to be. That's the main reason for doing it at least for present purposes.
11 If you can make the case for some of the things that we have been talking about, I can't
12 see how we are going to differentiate between, for example, days and days of factual
13 evidence where people are going to be asked about detailed pricing policies and then
14 days and days of expert evidence where these numbers are going to be popping up
15 again and again and again and people are going to be asked particularly in relation to
16 the econometric analysis around particular numbers and particular relationships
17 between numbers. So inevitably, what happens is the whole thing starts falling into
18 a closed session rather than bits of it.
19 So I think there's quite a big distinction between the Tribunal's willingness to accept
20 that there's a particular point or sequence of points that can only be dealt with in that
21 way and the slippery slope that will come if we have an overly conservative approach
22 to it, which means that people can't cross-examine properly. That is my concern.
23 What I am saying to you is we are absolutely not going to conduct the bulk of this trial
24 in any closed court. That is what's going to happen if we have far too much material
25 which is designated confidential, because what we can't do is to have these sorts of
26 discussions in the middle of the trial or else the trial blows to bits, as you know. That's

1 the point I am making.

2 MR WOOLFE: We are grateful to you for articulating that so clearly. I think the
3 concern I was expressing was really about the factual evidence. There is a number
4 of days at trial and (inaudible) we don't know how that evidence is going to pan out.

5 MR TIDSWELL: That's a fair point and we will come on to the trial itself and the
6 conduct of it and the timetable for the trial. One of the things I do want to get people
7 thinking about is what is the cross-examination going to look like? How much time do
8 they need and how is it going to be structured to deal with some of the points you
9 make. I am not closing down the possibility that some of that might need to be dealt
10 with in closed session, but what I am saying to you is we are not going to be
11 sympathetic about going into closed session because we have a situation where the
12 balance is wrong. In a sense that's the jeopardy for you. The jeopardy is not I am
13 going to beat you up next week about something on this table even though Mr Williams
14 might invite me to. The jeopardy is you end up with a really messy trial and your client
15 is going to be very, very unhappy about it because we are not going to go into closed
16 session for things that are -- you might think should be treated as confidential and as
17 a result of that inevitably people make mistakes or things will come out or whatever it
18 is. It is just not a good place to be for anybody.

19 MR WOOLFE: I have nothing else to add on confidentiality.

20 MR TIDSWELL: I think probably it is sensible to rise rather than start anything else.
21 Sorry, Mr Lask.

22 MR LASK: Just very briefly, I have taken you through the proposal that we articulated
23 in the letter yesterday. If it would be helpful to you to have that in black and white,
24 I have a copy of the letter.

25 MR TIDSWELL: What I was going to say was -- I think you and Mr Jones have given
26 us a helpful template as to where we are going with this. What I would quite like to do

1 when we come back after the short adjournment is to have an agreement from you all
2 about how those dates are locked in and just to be clear I think that what you
3 suggested, Mr Lask, and Mr Jones has adopted more or less, seems to me to strike
4 a sensible balance between getting things done and improving the situation without
5 putting too much pressure on the trial bundle, but I don't know whether that is right,
6 and I think the counsel team in the room need to sort that out themselves.

7 I don't think I can answer the question as to when is the sensible date for the trial
8 bundle to appear. I think what I need from you is on the assumption that I am
9 approving the approach you have suggested, I would like some firm dates that are
10 agreed which are consistent with a trial bundle that is workable for opening
11 submissions that will be due at 4.00 pm on 6th November. I am obviously not
12 specifying that as an absolute. We can come back to that, but that was certainly my
13 starting point following my discussions with Mr Justice Green. So can I leave you with
14 that.

15 MR LASK: Yes, absolutely.

16 MR TIDSWELL: Then on the assumption that you can reach some agreement -- if
17 you can't I will arbitrate the difference -- then I am expecting the order to be along the
18 lines -- I am not sure it is an order really -- I am not sure it is even worth wasting the
19 time drafting an order.

20 The direction, if I can put it that way, is going to be we proceed on the basis you have
21 outlined with the timetable agreed over the short adjournment. Can I leave it with
22 everybody on that basis? Good. In that case we will -- I am conscious we have not
23 made a huge amount of progress. You are going to need a bit of time, aren't you,
24 Mr Simpson?

25 MR SIMPSON: Yes, I am. I wonder if you might be prepared to start again at 1.45.

26 MR TIDSWELL: Unless anybody objects, let us do that. The other things on the

1 agenda we can probably move through fairly quickly, I would hope. Then we have to
2 deal with that and also some Redfern and a short point I hope on confidentiality. So
3 we will resume at 1.45. Thank you.

4 (12.55 pm)

5 (Lunch break)

6 (1.45 pm)

7 MR TIDSWELL: Mr Williams.

8 MR WILLIAMS: As the famous joke goes: "how many barristers does it take to agree
9 a timetable?" We have not agreed. So we obviously need more on the front bench.
10 This is Mr Merricks' position. So we originally had four steps: the Redfern schedules,
11 responses to our table, the positive and responsive cases in full and then, four, the
12 underlying disclosure documents.

13 Our position is we can get rid of step two. All parties agreed to that. There is no need
14 to respond to our table line by line so long as those examples are taken into account
15 when the positive and responsive wrappers are reviewed.

16 So in terms of the now three steps, Mr Merricks' position is as follows. The Redfern
17 schedules by the end of this week, 25th. We were originally asking for them tomorrow.

18 MR TIDSWELL: That's certainly I think what Mr Jones suggested, unless I have
19 written it down wrong.

20 MR WILLIAMS: I think there is broad agreement on that. There are certainly different
21 proposals. Other counsel will pop up to correct me if I have totally missed that.

22 MR TIDSWELL: Is everybody agreeing with that? I want to know what's still live.
23 Everybody is agreeing with that? That's agreed then. That's 25th. Yes. Thank you.

24 MR WILLIAMS: Then in relation to the positive and responsive cases, that's parties'
25 own wrappers and expert reports, etc, plus the review of others, we are suggesting
26 doing that in one hit, bearing in mind your consideration that they are the most

1 important and key documents to come up, by close of play on Friday 25th again,
2 bearing in mind that more time has been given in response to the Redfern schedules,
3 and bearing in mind that we have dropped a specific step in response to our tables.

4 MR TIDSWELL: Just in terms of where the dispute is there, what's --

5 MR WILLIAMS: There are various different alternatives. It may be easier on this one
6 to park until we come to the end. Essentially, Allianz I think are proposing to split
7 positive against responsive. So they will provide some by 25th and some by 29th.
8 The SSH Claimants have a much more complicated timetable of various steps going
9 all the way up to 1st November. I should say I think it is fair to say that all parties are
10 agreed that the trial bundle, the absolute cut-off deadline for that to be agreed is that
11 Friday, 1st November.

12 MR TIDSWELL: So everything that we are talking about needs to be done by 4 o'clock
13 on Friday.

14 MR WILLIAMS: By then. Then Mr Merricks' position that is sending other parties
15 anything on 31st or 1st November, as I think the SSH Claimants propose, is
16 unsustainable, because it is just too short a turnaround to then upload a final trial
17 bundle.

18 MR WOOLFE: Can I jump in? I think the starting point is to talk about when the
19 positive and responsive cases be reviewed. To be clear, our timetable was not going
20 to give those on 1st. It was to give some this Friday and some on Wednesday, 30th.
21 So that's when that -- talking about the step of positive and responsive cases, those
22 would be the dates for those.

23 MR TIDSWELL: So basically we are looking at the difference between either getting
24 it done by 25th (inaudible) or either 29th or 30th.

25 MR WILLIAMS: (Inaudible). Of course it is the lowest common denominator that wins
26 the day eventually, because even the (inaudible) wrapper refers to multiple parties'

1 material. So if the SSH Claimants were only to review by a day later than everyone
2 else, then everyone is held up uploading that document, because it may refer to Allianz
3 data as well.

4 MR TIDSWELL: Yes. So are you suggesting -- if we do say a single day, that means
5 you're going to get everything next week rather than this week, doesn't it, inevitably?

6 MR WILLIAMS: That's 25th. So the end of this week.

7 MR TIDSWELL: Yes, but on the assumption they are saying they can't do that, which
8 is what they are going to say. If they are offering you it in bits, some on Friday and
9 some the following week, and they are saying, "We can't do it all by Friday", would you
10 rather have some on Friday or set a date the following week? I know that's not what
11 you want, but if that's where we end up.

12 MR WILLIAMS: Bits. Then in relation to the underlying documents we recognise that
13 they need to come after the more important key documents I have just outlined. So
14 we suggest 29th for the underlying documents. That gives the parties a couple of days
15 to actually upload the documents, which I am told does take time to instruct Opus,
16 provide spreadsheets and then Opus upload them.

17 MR TIDSWELL: With common sense it is going to be the underlying documents as
18 referred to in the other documents.

19 MR WILLIAMS: We still say common sense rather than the narrow (inaudible).

20 MR TIDSWELL: Common sense encompassing, yes.

21 MR WILLIAMS: I think that is largely agreed between us and Primark and Allianz with
22 a few nuances. The SSH Claimants are more of the outlier.

23 MR TIDSWELL: Thank you. That's helpful. Just so I'm clear on that, do you have
24 any difference -- it is quite easy to lose track of this, but that is more or less what you
25 are happy to do, isn't it?

26 MR LASK: The key difference is we can't do it all by this Friday, which is why we

1 suggested the split in our letter.

2 MR TIDSWELL: So your outside date is?

3 MR LASK: 29th.

4 MR TIDSWELL: Tuesday, 29th. Yes.

5 MR JONES: Sir, I am content with Mr Williams' proposal, but with this caveat, which
6 is that if all documents are done by next Tuesday, 29th, we literally won't able to, and
7 I've made this submission earlier, especially where there are whole documents
8 referred to. We will do our absolute best. The reason I am happy with the suggestion
9 in broad terms is that we need to lock down the bundles so that, as Mr Williams said,
10 by Friday we have the references, but it is also true that if after 29th my clients or
11 someone else comes along and says, "Here is a much less redacted version", it would
12 make obvious good sense either to swap it in, or if someone does have a point about
13 having made markings on their version of the bundle or something, possibly, although
14 this seems very much second best, possibly to put it in another tab in the bundle.
15 I don't apprehend there to be any pushback on that. It's just a point about the reality
16 here. We are not going to be able to do everything by 29th, but we will certainly do
17 our best and in broad terms it seems like the right timetable.

18 MR TIDSWELL: Yes. Okay. Thank you. Mr Woolfe.

19 MR WOOLFE: So in terms of what we can do by when, by this Friday, which is I think
20 Mr Williams' suggested timing, the Redferns to be reviewed, which is fine.

21 The other thing we can also do by this Friday is review our redactions for all other
22 parties' responsive cases where they refer to ours. That is not redoing a job. That is
23 doing the job for the first time. We can do that, taking into account the points that have
24 been made by Mr Williams. That is something we're aiming for anyway and we can
25 do that.

26 Then in terms of re-reviewing our positive and responsive cases, the date we came

1 up with was 30th. We can try to aim for 29th, but we can't guarantee hand on heart it
2 will be done by 29th.

3 MR TIDSWELL: I think for the sake of simplicity I am not making an order. In a way
4 I have to depend on you all to try your hardest to do your best, if I can put it that way.
5 So let's make it the 29th as the target date for just getting everything done. That's just
6 easier I think. We all know where we are working to. It does have the merit, as
7 Mr Williams says, we are leaving a little bit of space, particularly if there is some
8 overspill.

9 MR WOOLFE: Thank you. Then in terms of the underlying documents, again we
10 have taken into account Mr Williams' complaints generally. So we can do those
11 bundle documents where specific pages have been identified, expert reports and the
12 like, by early next week. So that will be within that deadline anticipated, by 28th/29th.
13 So fine. That can also come in at that stage.

14 The thing we can't get done in that same timescale by the 29th is those trial
15 bundle documents where no specific page has been identified, but they have been
16 identified at large. That is a bigger job to re-review. That we think will take up until
17 the 1st.

18 What we would propose is a similar variant to what Mr Jones has proposed, which
19 is -- let me update you on the bundles. There is already a functioning bundle running
20 that solicitors have access to, but it has not been populated yet. What we would
21 propose is we instruct Opus to start uploading documents from the end of this week,
22 and so, for instance, when the Redferns come in, they can simply be uploaded and so
23 forth.

24 Those documents that are coming in after 29th instead of -- if they are just uploaded
25 in their current form, then in a sense people will have a functioning trial bundle they
26 can use and look at. It will be -- in the case of a subset of documents that haven't yet

1 | come in in a re-reviewed form by 29th, one would have to simply not mark up those
2 | documents.

3 | MR TIDSWELL: Yes. Look, I understand exactly the point. I think the difficulty is it is
4 | very inconvenient for everybody I'm sure to have documents coming in like that. I think
5 | probably in relation to the underlying documents the chances of them being marked
6 | up in that way is certainly not as high as the positive and responsive cases. I think
7 | I will just say to you if you can do what you can as quickly as you can, that's obviously
8 | the message. To the extent you can get any more of that done by the 29th, obviously
9 | the earlier the better.

10 | MR WOOLFE: Thank you, sir.

11 | MR TIDSWELL: So I appreciate the difficulties and I'm not going to suggest that -- if
12 | you are telling me you can't do it by the 29th, you can't do it by the 29th. Leaving it to
13 | the 1st is leaving it very late for everybody, but, as you say, everybody will have
14 | a version of the document. Is that right?

15 | MR WOOLFE: Yes, sir. As I understand it, there was a sort of disagreement between
16 | myself and Mr Williams outside about whether or not it is worthwhile having a version
17 | of the bundle that works in advance of the date when everything has been perfectly
18 | redacted in its final form -- I say "perfectly" -- everything has been redacted in its final
19 | form.

20 | I, for one, simply as a matter of preparing for trial, would rather have a version that's
21 | functioning sooner rather than later. If some sub-set of it is identified as being "There
22 | will be some change to these documents", but the positive and responsive cases, the
23 | expert reports, the witness statements are all done and are not changing, but some
24 | subset of the underlying documents may change the version and we're asked to hold
25 | off using the internal mark-up function there.

26 | From my point of view, sir, that is manageable. What one has to be careful of is in

1 preparing cross-examination, if you're doing your notes, noting which questions may
2 or may not be confidential. That I agree is slightly more awkward, but I would have
3 thought for the sake of a few days most of us would rather have some sort of
4 functioning bundle from the middle of next week onwards than be left so nothing can
5 be uploaded until the final version.

6 MR TIDSWELL: The page numbers won't change, will they?

7 MR WOOLFE: No. The document gets uploaded, but the markings change.

8 MR TIDSWELL: Mr Williams, I think that's probably where it is unless you have
9 anything else to say about it. So, as you've suggested, the 29th is the longstop date.
10 The Redferns will already be dealt with on 25th, and there is a round of positive and
11 responsive cases, however people are doing it, they'll give to you on the 25th or give
12 each other on that 25th. Good. Thank you. Anything else on that? We are done?
13 Good. Thank you very much.

14 MR COOK: Can I stress the importance of getting some guidance on the first two
15 categories from Mr Williams? I don't think this needs to be done in camera itself.

16 MR TIDSWELL: Let's get everything else done and then we will come back and do
17 that and the Redferns, if that's convenient, because it is all much of a piece, and
18 hopefully we can move fairly quickly. Good. Thank you.

19 The next item on the agenda, which I have now lost, timetable to trial. We have sort
20 of dealt with this, haven't we? Is there anything else that anybody wants to say about
21 that?

22 MR COOK: Sir, we obviously understand the importance of ensuring the Tribunal has
23 time to read written opening submissions. Everyone had been working towards
24 11th November as being an agreed date. I appreciate all those dates are agreed
25 subject to the Tribunal's approval. I think everyone feels that 6th November is quite
26 tight, with respect. If there was any latitude on that, we would ask the Tribunal to give

1 us that latitude. That is a plea from the entire front bench.

2 MR TIDSWELL: I understand. I was surprised that, when I mentioned it, I didn't get
3 more of a visceral reaction.

4 MR COOK: I am now the visceral reaction.

5 MR TIDSWELL: Yes, exactly. Maybe if I can just explain a little bit what the position
6 is. So Mr Justice Green has another commitment at the beginning of the week
7 of -- whatever the following week is. It must be the 11th. So if you don't get it to him
8 before then, he is not going to read anything until -- he is going to read things but he
9 is not going to have your opening submissions. He will not get to those until 13th. He
10 didn't think that was optimal. I think he is probably right. As it happens, I have
11 a commitment on the 15th and I may well have a commitment here on the 14th as well.
12 So that week is just a bit of a mess. That's the reason why we have indicated the
13 earlier you can get them to us, the better. The 11th would be helpful.

14 Now I think we both recognised when we had that discussion that it wouldn't be
15 a popular decision or indication -- shall I put it that way -- and there might be some
16 pushback. Really in a way I am not going to be -- I don't want to be difficult about it.
17 If you really think that that's actually very unhelpful and you would like to have another
18 day or two, then you should have it. You need to recognise every day you take is
19 another day less we are going to have for reading it. It is a bit unfortunate, but I am
20 afraid that's where we are. Does it make a difference if we were to say the 7th instead
21 of the 6th? Is that helpful? Every day helps presumably.

22 MR COOK: The 7th would certainly assist.

23 MR TIDSWELL: Whereas if you get it to us on Thursday, there is a decent chance he
24 has some time on Friday and he can get through some of it. I think he has a two-day
25 hearing I think on 11th and 12th and he'll have to do some preparation for that as well.
26 So that's the difficulty. I am afraid it is not optimal at all. I understand that it is not very

1 helpful.

2 Mr Lask.

3 MR LASK: I did not want to push back necessarily on the 7th. Just to -- no-one needs
4 reminding, but we do have a PTR on the 5th. It may be that in light of the slightly more
5 truncated timetable for the skeletons -- well, the timetable for the PTR can be modified
6 insofar as there is one, if there is one yet, just to take account of the pressure on the
7 teams for producing the skeleton.

8 MR TIDSWELL: Yes. Let's talk about the PTR. As you say, it is on the 5th. I am
9 hoping it is not going to be a very heavy lifting hearing, because I hope we have done
10 a lot of the heavy lifting today. That is subject to Mr Simpson's point and the extent to
11 which that is dealt with today and not dealt with then. I will come back to that. It is
12 possible some of it may end up there rather than here.

13 Subject to that point, I think we are mostly going to be focused on the trial
14 timetable and making sure we have agreement on that. I have some things to say
15 about that as well. I don't think we need any set of bundles or anything like that.
16 I would imagine the skeletons can be quite short. I don't know when you would
17 suggest we can have them. If we were to get them -- I am not sure it makes a
18 difference to you -- certainly if we were to get them comfortably in the week of the 28th,
19 you know, the 31st or something, that would be fine I think.

20 Mr Lask, does that help? Is that the point you were aiming at? I think we should have
21 a PTR.

22 MR LASK: Certainly, but if there was some latitude so we could get the skeletons out
23 and the 31st sounds reasonable. I think that's the Thursday. The PTR is on the
24 Tuesday, isn't it?

25 MR TIDSWELL: That's right.

26 MR LASK: So I think that --

1 MR TIDSWELL: I mean, if anyone wants to make a bid for anything different --

2 MR LASK: Perhaps we could have Friday, 1st for our skeleton.

3 MR TIDSWELL: It depends whether you have a time on Friday, 1st. If you are going
4 to give it to us by 10 o'clock, that would be helpful. I don't know what Mr Justice
5 Green's diary is like, but I don't think I can guarantee he has Monday free. I don't know
6 what his diary is like. I think he is sitting in the Applications Court. So I don't know
7 what time he is going to have to look at things. The skeletons will be short I'm
8 assuming.

9 MR LASK: I imagine so. (Inaudible).

10 MR TIDSWELL: If we make it 10 o'clock on Friday, 1st.

11 MR LASK: I am grateful.

12 MR COOK: In terms of dates, it would also help if we can talk about length as well.

13 MR TIDSWELL: I was going to say let's move on to length.

14 MR COOK: Both length and reading time.

15 MR TIDSWELL: I've seen the difference of view on that. I come from a clear
16 instruction from Mr Justice Green, which is he would like decent opening submissions
17 but he thinks 80 pages is enough, and that's not splitting the difference just in case
18 you are wondering, because it clearly isn't numerically, but he wants there to be a limit.
19 So no exceptions, please. 80 pages maximum.

20 I think, just so you understand and in case anybody wants to push back on that, the
21 problem for us is there are quite a lot of parties. So actually five times 20 pages,
22 100 pages delivered is 100 pages of reading. It is a question, particularly given the
23 other commitments we have, whether we are going to get through those things before
24 we start. That seemed to us to be a reasonable compromise to make it work. So is
25 there any pushback on that?

26 MR WOOLFE: Sir, no. (Inaudible) it is a round figure.

1 MR TIDSWELL: We noticed that Mr Simpson had managed 33 pages for the CMC,
2 which (inaudible), but nonetheless it did seem to make me wonder whether you could
3 do the openings in 50, but anyway. I'm gently tweaking your tail on it.

4 MR WILLIAMS: I am not rising to it.

5 MR TIDSWELL: Right. So on that basis I mean it's really --

6 MR COOK: One would hope that at least Allianz and Primark could come in much
7 shorter, but Mastercard obviously has the most to address. It is often said against us
8 we are facing two directions. We are basically concerned about it, because we have
9 the most targets to aim at.

10 MR TIDSWELL: I have to say I was advocating for a smaller number. Just so you
11 understand it, that's partly because I think the legal wrappers around the Positive and
12 Responsive cases are very good and they are very helpful, but I am rather anticipating
13 you are not going to have an awful lot more to say. I may be wrong about that. It may
14 be it would be helpful to have it all in one place and have it summarised, but you can
15 assume I have read them all already and they are very helpful documents.

16 MR COOK: From our perspective the goal would be to rather than provide a partial
17 document, which cross-refers to legal submissions which have already been done, is
18 to bring it, as you say, into one document.

19 MR TIDSWELL: Yes, which would be helpful.

20 MR COOK: Obviously there are targets that we now have which we didn't have when
21 we did the Positive cases or Responsive cases.

22 MR TIDSWELL: Understood. I think on that basis what I am going to suggest, and
23 this is not -- I am going to fix I think Thursday, 7th at 4.00 pm for the opening
24 submissions. We obviously have a PTR. If for any reason that causes a dramatic
25 problem, we can revisit that at the PTR. It will not be welcome. I am conscious that's
26 a very tight timetable for everybody. That's what we will work on for present purposes.

1 Can I just pick up on a couple of other things -- one other point? It is not on the
2 agenda, and I only thought of it last night. I am concerned that we have disagreements
3 between the experts apparently in relation to, for example, the methodology of
4 econometric analysis for different merchant Claimant data, which I wonder -- as
5 opposed to, for example, what I might say are the points of principle, so this question
6 of what is the proxy? Is it overheads? Is it consequence or whatever it is?

7 All of that seems to me -- the points of principle seem to be lined up quite clearly and
8 obviously and I feel quite comfortable that we are going to be able to manage those
9 with the experts and so on.

10 What I am nervous about, and I say this with some ignorance, because I have not read
11 the expert reports in any detail, is this question of how are we going to cope with
12 a multiplicity of disputes about much lower-level points which may turn out to be really
13 quite important?

14 I think my challenge to you for observation and thought is whether we need some other
15 process, some further process, between the experts to try to refine that. Now if we
16 are going to do that, I am conscious the time is very tight. I don't think we can wait for
17 the PTR to resolve that, but I did wonder whether asking you to get the experts back
18 together to discuss particularly those points and produce, if possible, some further
19 expert joint statement at least identifying where the real issues were -- I don't mean
20 every single matter, but the issues that really matter -- whether that might be
21 a productive exercise for us all. I have not given you time to think about that. If
22 anybody wants more time to think about it, I'm happy to suspend it until later in the
23 hearing.

24 Mr Jones.

25 MR JONES: The reason I am rising is it is a point that is concerning us and I have
26 a few observations on it. There's been a bit of discussion between the parties about

1 the division between cross-examination and hot tub at the final hearing. This feeds
2 into that, but it does raise some wider questions.

3 Sir, I think, if I may say, you have put your finger on it in the sense that there are these
4 wide debates of principle between the experts about, for example, choice of proxy and
5 the economic principles, which they have been debating for years now, and where
6 their reports engage directly with each other's arguments, as you would expect,
7 because of that process.

8 Now it may be that the Tribunal would welcome some hot tub on those points. I myself
9 will not be pushing for that, because they seem to me to be points which have been
10 well dealt with in their reports and we can all cross-examine on them.

11 The point where it does become more difficult is because there hasn't been a process
12 of sequential expert reports, you get in the second reports all of the experts criticising
13 the detailed econometrics in the first reports and at the moment there is no response
14 to that.

15 The difficulty which that creates for the Tribunal is that if you simply go ahead on the
16 current timetable into cross-examination, you are setting up a process where those
17 disagreements are only resolved through cross-examination by counsel, but
18 without -- for example, the first counsel cross-examining the first expert without that
19 expert knowing what's behind it and what the party cross-examining has to say about
20 it, without the party cross-examining knowing what the response is going to be,
21 because they have not yet heard it, and that in broad terms does not seem sensible
22 to us. It does seem like a real problem.

23 I was going to raise it under the heading of "arrangements for trial", because one
24 solution is to deal with that more in hot tub. That's one potential solution, so that it is
25 not so intermediated by counsel, but experts themselves are discussing the criticisms,
26 and the Tribunal would need to take an active role, of course, and so it is very much

1 a question of preference for the Tribunal whether that's a sensible way to proceed.
2 Another idea which we had been thinking about, and I say with some trepidation,
3 because we have not yet ourselves reached a landing on this and therefore suggested
4 it -- it would be a point for the PTR if we went down this route -- the other alternative
5 would be reply reports very quickly and very briefly, and I am talking a handful of
6 pages, to deal just with these econometric points.
7 Sir, the alternative would be, as you have just suggested, some process of the experts
8 engaging with each other and producing some kind of combined work product, which,
9 to be frank, we have not considered, but it is addressing the same problem. I can see
10 that may be a way round it, although it is going to depend very much on timetables at
11 different parties' ends.
12 I simply raise it to say that is a problem from our perspective and I think it does need
13 some sort of solution.
14 MR TIDSWELL: That's helpful. I think if you were going to do it in the way you've
15 suggested with the hot tub you would still need some engagement beforehand to work
16 out what it is you want to talk about, because that's the bit I think we are missing at
17 the moment. I am just not clear -- and maybe it will become clear when I spend some
18 time with the expert reports -- but I am just not clear what the extent of those disputes
19 are and the significance of them and therefore how one might best resolve them.
20 MR JONES: They are extensive and (inaudible).
21 MR TIDSWELL: That's what I feared. Yes.
22 MR JONES: It is right to say that if it was dealt with in a hot tub process, I think the
23 first step would be the parties would need to agree on agenda items for the hot tub,
24 and if there is time and if it is possible, the experts would liaise beforehand so that
25 their positions are a bit more flushed out, but even if that were not possible, just having
26 the agenda and having a framework for discussing the points in a hot tub would be

1 helpful, but clearly this has implications for the whole structure of the trial, because if
2 you were going to hot tub these points, you would need at least several days of hot
3 tub, which may be possible in the timetable. Most of the time allocated at the moment,
4 the parties have agreed, is for hot tub/cross-examination of the experts. So that would
5 be a possible way of structuring it.

6 MR TIDSWELL: Thank you. That's very helpful.

7 Mr Lask.

8 MR LASK: If I may, we echo those concerns. That's why we raised the issue of hot
9 tubbing in our skeleton argument for today. We had rather assumed that there was
10 not sufficient time for a further round of expert reports or a formal agree/disagree
11 process, which is why we went straight to hot tubbing. We are very happy to consider
12 any suggestions that the Tribunal has. We would need to consult with our expert team
13 in order to explore their capacity, their availability to engage in that kind of process.

14 If it helps, just to add a bit of colour, just to give you an example of where this sort of
15 issue that Mr Jones refers to arises in our case, in their first reports both Mr Murgatroyd
16 and Mr Holt carried out regression analyses on Allianz's claims costs. In their second
17 report they each criticised the other expert's modelling. What we don't know is what
18 each want to say in response to the criticisms that have been made against them.

19 That's exactly the issue you have identified, sir. Hot tubbing is certainly one way of
20 dealing with it. It may be, given where we have got to and given the time that is left,
21 the best way of dealing with it.

22 MR TIDSWELL: I have to say I have an immediate resistance to another round of
23 experts' reports, which may not be rational, but just the feeling is we have an awful lot
24 of paper in this. If it is the right way to do it, I have no problem with it. I must confess
25 I had not really thought about it as being a feasible option because of the tightness of
26 the timetable, but anyway thank you. It is a helpful observation.

1 Mr Jowell, please.

2 MR JOWELL: We agree these are important issues. These are not necessarily minor
3 issues. They are important issues. We think it should be relatively uncontroversial to
4 create a list of those issues, which I think is what, sir, you are driving at.

5 MR TIDSWELL: Yes.

6 MR JOWELL: There is no reason really why the experts shouldn't be able to create
7 a list, uncontroversial, at a high level, of what the issues are. That should clearly be
8 done in advance of trial, well in advance of trial. I think it is more controversial whether
9 there is room now, whether there is time and space enough for there to be a further
10 round of reports, and certainly we would like to -- I would like to take instructions on
11 the feasibility of that. Of course, I am entirely in your hands ultimately.

12 MR TIDSWELL: That's my understanding too, Mr Jowell. I don't think I would like to
13 make an order to that effect today. I think a list of those issues would be extremely
14 helpful and I think it would be best if it was generated by the experts, and actually in
15 a way -- I don't know if there is an easy way of doing this without making it a more
16 complicated process, but having some sense of the hierarchy of importance if one
17 were able to do that. I don't know enough about it to know whether that's feasible or
18 might just give rise to settle our discussion.

19 MR JOWELL: In order to avoid unnecessary controversy, it may be if there is an issue,
20 if the framing of the issue itself is difficult, one could say "Either this or in their view
21 this", but I think they need to avoid trying to get into sort of debates over the semantics
22 as long as the issue is there.

23 MR TIDSWELL: Good. Thank you.

24 Yes, Mr Woolfe.

25 MR WOOLFE: (Inaudible) measure of agreement between us and Visa, which is that
26 (inaudible) having a list of the issues, but I think what we would be concerned about

1 is a joint expert process at this stage where we are trying to actually agree on stuff.
2 They can be extremely exhaustive and exhausting when there is not a lot of time left.
3 Full reply reports I think would be very difficult, but getting a list of these topics, I think
4 I can certainly see the value in that.
5 For what it is worth, overall picture, as between Dr Trento and the other experts, I think
6 these econometric modelling issues are quite small in comparison to the big picture
7 item, which is choice of proxy and so forth. So I'm not sure they are -- exactly how big
8 they are, but certainly trying to track down what they are would be useful, but I would
9 think very little -- as little as possible should be expended at this stage in producing
10 that kind of ...
11 MR TIDSWELL: When we talk about a list, I think Mr Jowell is suggesting it should be
12 a list that's generated by the experts (inaudible) between them. Is that your view as
13 well?
14 MR WOOLFE: I think if there is going to be a list, it has to come from them (inaudible).
15 Trying to get them to sit in a room together and then reach some point of agreement
16 on the framing of those and/or where they stand on them (overtalking) --
17 MR TIDSWELL: I understand. Preparation of a joint expert --
18 MR WOOLFE: (Overtalking). I think maybe on the importance of these issues we do
19 part company somewhat with the other Claimants on the desirability of having a large
20 chunk of the trial allocated to hot tub, but I anticipate we're going to leave that point
21 for --
22 MR TIDSWELL: We will leave that for the PTR I think. Yes, that's right. Thank you.
23 Anybody else? Mr Cook?
24 MR COOK: We have to be realistic about the short time available. Ideally, of course,
25 there would be some kind of process in the time available. Certainly, what I think
26 would be helpful is it's not uncommon for an expert to put forward an analysis, another

1 expert to respond to it and say, "I have five criticisms", but actually to say, "yes, I agree
2 2 and 3 are right and actually when you play those through, my numbers have shifted".
3 I think it would be very sensible for the Tribunal to give guidance that if there are
4 agreements or admissions by experts that might otherwise, with the way this timetable
5 works, only come out in the middle of the trial, then, you know, it would be very nice
6 to hear any of those over the next week or so. So experts should be encouraged to
7 narrow any issues that they can, because they are no doubt considering each other's
8 criticisms, and it is not uncommon with many of these experts that they will accept
9 points, given the amount of detail. Certainly, that would avoid us prepping for
10 cross-examination when, you know, it turns out that the first question is, "You got this
11 wrong, didn't you?" "Yes, absolutely and that makes this difference." Certainly, we
12 would endorse that kind of proposal. I think anything that ends up being a kind of
13 detailed analysis of all the differences in the modelling is just going to be too late to be
14 useful for us.

15 MR TIDSWELL: Thank you. That is helpful.

16 Mr Simpson.

17 MR SIMPSON: We have no time for a further round of a formal expert process and
18 matters can be dealt with in a hot tub perhaps with a list of issues agreed with the
19 scope of that hot tub to be determined at the PTR would be the position of Mr Merricks.

20 MR TIDSWELL: Thank you. That's helpful. Let's do that. I am not going to specify
21 any dates by which this has to happen, other than we obviously need the list for the
22 PTR. I suspect that takes us back to Friday, 1st November. So having some process
23 between now and then on which the experts engage in relation to I describe them
24 perhaps as the methodology points. They are not restricted to that, but clearly I think
25 we are all clear in our minds about the difference between the big picture points which
26 emerge very clearly from the positive and responsive cases and some of the more

1 detailed differences that go to methodology. They should try and produce, to the
2 extent possible, prioritising by significance the issues that emerge from those,
3 including in that discussion any concessions or agreements they are able to make, as
4 Mr Cook suggests.

5 Can we leave it on that basis? I don't think it is helpful to be any more directive than
6 that, but I think it would be extremely helpful if the experts could have done that and
7 you could produce a list for us by 1st November with the skeletons. That would be
8 really helpful. Good. Thank you.

9 I didn't have anything else in relation to timetable to trial. Anybody ...? No. We have
10 leaked a little bit into -- I will get this done. I think we're then done, Mr Simpson.

11 Just in terms of the trial timetable itself I think I have seen -- only from SSH and
12 Merricks were the two places where there was a rough timetable available, unless
13 I have missed something. What is plain and helpful is that everybody seems to agree
14 there is sufficient time to get the matter tried in the window, which is helpful. Obviously
15 there is some difference of opinion about the balance, but, as I think somebody
16 suggested already, we will deal with that at the PTR.

17 I am probably stating the obvious, but I think if particularly Visa and Mastercard were
18 able to spend some time thinking about, as I know you will be, who you want to
19 cross-examine for how long and what that might involve, that would be really helpful.

20 Obviously that applies to everybody in relation to expert evidence as well, and
21 particularly in relation to the experts and the Claimants particularly if you could give
22 some thought to how you can avoid overlaps, and I know that Visa and Mastercard
23 have some experience of trying to manage that, but I think we are keen not to hear
24 the same things again and again. I am sure you don't want to do that as well.

25 On the hot tub, yes, we will deal with that at the PTR and hopefully the document we
26 just talked about will be helpful. The only indication I will give on that is whatever we

1 do with the hot tub, I think we are likely to want a hot tub of some sort, and I think it is
2 likely to be more than half a day. So I don't think we can get anything sensible done
3 in half a day. It may be a day. It may be longer. I am not clear about what the answer
4 to that is, and Professor Waterson will want to have some input into that as well I am
5 sure. Just for your modelling what I hope will be the next and largely agreed version
6 of the trial timetable, which we will obviously want to see at the PTR, that will have at
7 least a day in there for the hot tub and any other suggestions for what can follow from
8 the exercise we just talked about.

9 The expectation is we will sit four days a week, not five, so Friday is a non-sitting day
10 unless, of course, we need to adjust because of overruns and so on, but we hope that
11 won't happen.

12 Just so you know, Mr Justice Green has a potential conflict on the afternoon of 27th
13 November, which may mean we don't sit that day and it -- that afternoon. It may mean
14 we need to take some time from Friday 29th, if that's helpful for your diaries and your
15 timetable. I don't think that's confirmed, but just worth bearing in mind.

16 Is there anything else on trial timetable? So if I can leave it with you at the PTR.
17 Obviously, as I say, agree it as far as possible, but clearly we are open to different
18 options, particularly in relation to the subject we just talked about. Good. Thank you.
19 I think, unless I have missed anything, we are done on everything except for
20 Mr Simpson's application, then the Redferns and bits and pieces. Is that right?

21 MR JOWELL: There's agenda item 9.

22 MR TIDSWELL: You are right about that. I'm sorry. Thank you.

23 MR JOWELL: It falls to me to give that. At a high level it is expected that the data
24 provision process will be completed at the end of the calendar year. The question
25 then becomes what are the appropriate directions after that for the filing of positive
26 cases? What we have proposed is that -- we would propose is a filing deadline of 24th

1 January for positive cases on acquirer pass-on and a filing deadline of 21st February
2 for responsive cases. I know some have proposed slightly different dates, but in light
3 of the fact that we expect the data only to be provided by the end of this calendar year,
4 we think that's about as quickly as it can realistically be done.

5 MR TIDSWELL: Thank you. I am a little bit concerned we have not made as much
6 progress as I would have hoped. I am sure there are lots of good reasons for that. It
7 is now getting again dangerously tight.

8 MR JOWELL: It is, but nonetheless we hope and expect that we will get the data. We
9 are in the hands unfortunately of Worldpay and Global Payments and Barclays and,
10 of course, we are pushing them and have pushed them as much as we reasonably
11 can.

12 MR TIDSWELL: Would it be helpful to put something in the diary just to check on
13 progress with this, just an informal CMC? I know there are mixed views on the utility
14 of those. What I am concerned about is that we find that this has slipped and we could
15 have done something about it to stop it slipping. If we are really at the stage, for
16 example, where -- I know you are about to agree orders. If the orders aren't agreed,
17 then should I be trying to at least arbitrate that and resolve it in some way?
18 I appreciate it is difficult, because we are dealing with third parties, but what I am
19 anxious not to find is that we get to the end of the month and then no orders are agreed
20 and then we start to find that we just can't do this.

21 MR JOWELL: Well, I propose that we take it up again at the PTR and see where we
22 are.

23 MR TIDSWELL: Yes. That does leave it for a couple of weeks. As I understood the
24 skeletons, we have an expectation the orders are actually going to be agreed
25 imminently. Is that right?

26 MR JOWELL: It is hoped in most cases it can be agreed within the next two weeks.

1 MR TIDSWELL: Right.

2 MR JOWELL: So that would be in advance of the PTR. If it is not, then we can give
3 you a progress update at that point. If it is, all the better.

4 MR TIDSWELL: Yes, Mr Williams.

5 MR WILLIAMS: It may be helpful to have a date in the diary for the acquirers to know
6 that there is that date. I am having a bit of a sense of deja vu, because I think in my
7 first mini-CMC I suggested we have a date whereby the acquirers are on notice to turn
8 up. The reason I say that is because although the parties are very close to agreeing
9 the orders, there is a particular issue with Barclays purporting to need eight weeks
10 from the date of the order to supply the data, which one hopes will be capable of
11 agreement between the parties, given how long Barclays has been on notice and how
12 long we have been negotiating that deadline with them, but that may need resolution
13 so we can get the data before the end of this year. Our experts have told us that we
14 really need the data by the end of November by the absolute latest if we are going to
15 make dates for positive cases in January, given the trial commitments. So in my
16 submission it would be helpful now to have a date whereby the acquirers and parties
17 are on notice, so if those orders need any points of dispute resolved by the
18 Tribunal -- hopefully not, but I was saying this months ago, sir, and we are still
19 disputing them -- that date might be helpful to focus minds.

20 MR TIDSWELL: Mr Jowell is suggesting the date should be the PTR on the 5th. Is
21 that what you're saying as well or are you suggesting something different? What
22 I would like to do is to crystallise. If there are issues with the third-party acquirers that
23 have not been resolved by the 5th, then, firstly, that's a problem. Secondly, there is
24 no reason why we shouldn't be resolving them. Whether it is possible now to create
25 a situation where -- I mean, I suspect the answer is not actually to use the PTR itself,
26 because it is inefficient. It would make more sense for me to deal with this sitting alone

1 and deal with any issues on the order. So, if we need to, get the counsel for the
2 acquirers into the room and let's get it sorted out if we can't sort it out otherwise. That
3 would be my suggestion.

4 MR WILLIAMS: My solicitors have made a good suggestion, if I may say so, that
5 perhaps we could have a mini-CMC, subject to the convenience of the Tribunal, listed
6 for Friday, 1st November. Then there is another opportunity at the PTR, if absolutely
7 necessary, to come back on things.

8 MR TIDSWELL: If you're going to do that -- so is that without the acquirers? That's
9 just going to be --

10 MR WILLIAMS: That will be with the acquirers.

11 MR TIDSWELL: They'll be here as well, in which case it is going to be a formal CMC
12 and they will have to be on notice. I don't know whether that's going to work. Is that
13 going to work?

14 MR WILLIAMS: From our perspective, yes. We can let them know and make this
15 transcript available to them as well.

16 MR TIDSWELL: What I don't want to do is to blow up what is a perfectly sensible
17 discussion. I mean, I need to be guided a bit, Mr Jowell, as to whether you think -- if
18 you think you can get this done without having orders made, I would much rather do
19 that.

20 MR JOWELL: We hope and expect. We are slightly concerned that actually pushing
21 them to a 1st November deadline doesn't give them very much notice and may be less
22 constructive.

23 MR TIDSWELL: That's not very helpful, is it?

24 MR JOWELL: (Inaudible).

25 MR TIDSWELL: I mean, the difficulty I have is at some stage, and I am not sure when
26 it is, there will come a point when I am going to need to make this order, if it is not

1 going to be resolved, and I need your help on that really. In a sense I can't -- I don't
2 think -- you know, what I think we are now seeing -- and I think Mr Williams is fair to
3 make the point -- is that I would have expected these orders would be agreed by the
4 end of the summer and that was certainly where we last left things. There was no
5 reason to think they would not. I am not blaming anybody. I understand there are all
6 sorts of difficulties with these things. We really are at the last point where we can
7 leave this as a consensual process. I need a clear date from you as to what -- I need
8 a (inaudible) I think as to what you are going to do if you can't resolve it. We need to
9 get that in the diary. It doesn't have to be now. I appreciate you are doing this on the
10 hoof. I don't want to press you in those circumstances, but I think we need
11 a proposition which is clear to everybody here as well as to the acquirers, which is if
12 we can't resolve by agreement, then the Tribunal will resolve any differences on the
13 orders, including the timing of delivery of documents, and that is going to be on such
14 and such a date. Don't we need to -- I think we do need to do that.

15 MR JOWELL: That sounds eminently sensible, if I may say so. I will have to take
16 instructions and perhaps come back to the Tribunal with the proposals for, if you like,
17 a drop dead date.

18 MR TIDSWELL: Which needs to work from the other end.

19 MR JOWELL: They will need to be on notice and so on.

20 MR TIDSWELL: Just so you know, I have quite good availability particularly if we can
21 do it remotely. So you can assume you will find -- with a day or two's leeway either
22 way, you can assume you will find some time in my diary to do it. Let's not do it at the
23 PTR, because I think that's not the right way to do it. Otherwise, if you find a date that
24 you think is the right date, obviously with the agreement of the parties, and suggest
25 that to the Tribunal, we will make this work.

26 MR JOWELL: We will write.

1 MR TIDSWELL: Thank you very much, Mr Jowell.

2 Yes, Mr Jones.

3 MR JONES: I am only rising before you get on to the next item actually just to say,
4 meaning no disrespect at all, if we have got to the next item, would our time be better
5 spent on (inaudible)?

6 MR TIDSWELL: I completely agree. Before you do, just one last thing. I have not
7 made an order as to these dates Mr Jowell has suggested and I don't think I want to
8 do that until I know exactly where we are with these documents, but it sounds as if that
9 is going to happen with the timetable unless everybody -- does anybody have any
10 violent objection to those being pencilled in as the likely dates? That is 24th January
11 and 21st February.

12 MR WOOLFE: Sir, I think, as we said in our skeleton, those dates may well be doable,
13 but until our experts see what the data looks like, it is very difficult to commit, because,
14 as you know, it involves different data sets and different people for this kind of work, it
15 can take time. For the moment we have no reason to think a date in January wouldn't
16 be possible. I don't think we can say they definitely are.

17 MR TIDSWELL: Sure. I am not asking you to commit to it absolutely, but just to be
18 clear, if we don't do it, Trial 2B starts on 24th March? No, 24th.

19 MR WOOLFE: (Inaudible). There is not a great deal of time, bearing in mind
20 responsive cases have to be in in February.

21 MR TIDSWELL: That's right, which is really why I am exercised about it, because
22 I think if we are not going to sit on a timetable that does 24th January and
23 21st February, it strikes me that we are back into the situation we're in now, which
24 I don't think any of us enjoy very much.

25 MR WOOLFE: I understand and those behind me understand exactly where you are
26 coming from, sir. It will be a matter of having the experts' statements on the date they

1 | come in in the New Year and we don't know what they are going to look like yet. You
2 | can understand why there is a certain nervousness. (Inaudible).

3 | MR TIDSWELL: That's a fair marker. In a way it is a slightly different point from the
4 | one I am making, but once we see what the timetable for delivery of the data actually
5 | looks like, let's firm that up, but that's not possible at the moment I think.

6 | MR WOOLFE: The SSH Claimants have no problem with that. Hopefully that will be
7 | fine.

8 | MR WILLIAMS: Apparently it's in our submission. We would just say we are being
9 | squeezed for the responsive cases on this timetable, which may well be in Visa's
10 | interests but is not in the interests of all of the Claimants who are against Visa and
11 | Mastercard on that particular issue. So the time between 24th January and 21st
12 | February is very, very tight, and responsive cases are particularly important in the case
13 | of acquirer pass-on, because you will be getting the initial analysis in the responsive
14 | cases and the responsive cases will need to respond to that data analysis. The time
15 | period to actually crunch the numbers is very tight.

16 | So we were planning to suggest later than 21st February. Our initial timetable in the
17 | summer to be entirely consistent with the latest procedural schedule was 26th
18 | February, not 21st, so essentially an extra week, but our experts in the build-up to this
19 | CMC have told us that is incredibly tight if the data is not coming until the end of
20 | December, which we didn't foresee, but I think we can make submissions on those
21 | precise dates once we know the timetable.

22 | MR TIDSWELL: Well, that's a marker put down, another marker. Good. Right.
23 | Mr Simpson. Maybe not.

24 | MR COOK: Sir, there is one other thing on the agenda, which is Mr Economides'
25 | evidence.

26 | MR TIDSWELL: Yes, indeed. I'm sorry. There are all sorts of things that I've missed.

1 MR COOK: We have raised that in our skeleton (inaudible). That might be a matter
2 for the PTR. With where we are on the timetable that would be very sensible.

3 MR TIDSWELL: Let's leave that to the PTR. Let's leave that to the PTR. That's right.
4 Thank you.

5 This time, Mr Simpson.

6 MR LASK: Sorry to interrupt. We are in a similar position to Mr Jones (inaudible).

7 MR TIDSWELL: I think they are trying to wind you up now, Mr Simpson. I am sure
8 that's what they are doing.

9 MR LASK: With the Tribunal's leave, we will take our leave.

10 MR TIDSWELL: Yes. That's absolutely fine. I am sorry. I didn't come back to you,
11 Mr Jones. You are absolutely right to prioritise things and you are very welcome to
12 depart. Thank you.

13 MR SIMPSON: Sir. We submit it is a case of expert shopping and we submit that this
14 is a compelling case where the Tribunal should order wider disclosure than merely
15 reports, prior reports by Dr Niels on pass-on in these proceedings, which we accept
16 don't exist. It must be something I said.

17 The first -- I am going to try to move quickly, sir, but if I move too quickly and you want
18 to go to a document, please stop me.

19 Mastercard's primary position, which is set out at paragraph 23 of its skeleton, remains
20 that there has been no expert shopping here because there's been no change of
21 expert in the Merricks proceedings.

22 If we go to paragraph 23, tab 6, which is on page 35 of the bundle, Frontier Economics
23 have been the expert economists instructed by Mastercard in the Merricks
24 proceedings since 2016, with Ms Webster having taken over as the testifying expert
25 over a year ago after Mr Parker left the firm. Dr Niels was never instructed in these
26 proceedings.

1 Now we say that both those -- there are two key representations there. The first,
2 Ms Webster took over as the testifying expert in the Merricks proceedings and
3 therefore pass-on over a year ago. Secondly, Dr Niels was never instructed in the
4 Merricks proceedings. We say both those are demonstrably incorrect.

5 Dr Niels was instructed by Mastercard in both the Merchant and Merricks proceedings
6 and, in fact, other opt out collective proceedings for the pass-on evidential hearing in
7 both the Merchant and Merricks proceedings in May 2023, and on 12th April 2023
8 Jones Day served a 70 page report in both proceedings. That's at core 43. I am just
9 going to go to a couple of paragraphs of it.

10 Core tab 43, page 1634 is the first one I want to go to. It is core tab 43, page 1634.
11 That should be paragraph 1.14.

12 MR TIDSWELL: Unfortunately, there seems to be quite a bit of discrepancy between
13 the electronic bundle and the main bundle, which I don't think we are going to sort out.

14 MR SIMPSON: It is paragraph 1.14 of that if you have got that.

15 MR TIDSWELL: I have got that. Thank you.

16 MR SIMPSON: Dr Niels says:

17 "In advance of the pass-on evidential hearing on 23-25 May in relation to the Merchant
18 Interchange Fee Umbrella Proceedings concerning a large number of individual
19 merchant claims the Tribunal ordered that the Merchant Claimants and Mr Merricks,
20 the class representative for the consumer collective action, provide draft proposals for
21 assessing pass-on setting out."

22 I can jump to the next page, various points which they were dealing with. Bottom of
23 that page:

24 "Mr Coombs served a report representing Mr Merricks in relation to Trial 2 pass-on",
25 and then at 1.17 Dr Niels says:

26 "In response the Defendants were ordered to provide draft proposals dealing with the

1 same matters as and setting out comments on the Claimants' pass-on
2 proposals" -- that includes Merricks, as we have seen, and Mr Coombs, "and any
3 counter proposals. I have been instructed by Mastercard's solicitors, Jones Day, to
4 set out my views on this topic on behalf of Mastercard."

5 I need not go any further to the rest of the report, because that is what he does in
6 relation to both the Merchant and the Merricks proceedings in the rest of the report. If
7 the page numbers work, you will see, for instance, that section 3, which is at 1662
8 where I have it, headed "Merchant pass-on", deals throughout with Mr Coombs'
9 proposed approach as well as the Merchants' approach.

10 So, taking the proposition that Dr Niels was never instructed in the Merricks
11 proceedings, that proposition is obviously incorrect. Not only has he been instructed
12 in the pass-on part of the Merricks proceedings since at least 2023, picking up the
13 other point in paragraph 23 of Mastercard's skeleton, Frontier were obviously not the
14 expert economists instructed in the pass-on part of the Merricks proceedings in
15 April 2023 or Mr Parker would have dealt with the proceedings and the Merricks part
16 and Dr Niels would have dealt with the Merchants part.

17 Now that links to a significant point, which is that in both its skeleton and its
18 correspondence on this issue Mastercard has consistently blurred two distinctions,
19 first, between Frontier being involved in the Merricks proceedings and Ms Webster
20 having been instructed as testifying expert, a clear distinction there, and, second,
21 between Frontier being instructed in the pass-on part of the Merricks proceedings and
22 being instructed in other parts of the Merricks proceedings.

23 Now Mr Merricks does not dispute that Frontier have had a role in the proceedings for
24 several years. For instance, Mr Parker of Frontier filed reports on cross border and
25 domestic volume of class for the trial in July 2023 and he gave evidence at that trial,
26 as did Mr Coombs for Mr Merricks, but to the best of both Mr Merricks and his expert

1 team's knowledge and belief, Frontier's role has been confined to matters other than
2 pass-on.

3 We turn then to core tab 12, which is a witness statement from Mr Coombs. I don't
4 know if you have had time to glance at it, sir?

5 MR TIDSWELL: I did, yes.

6 MR SIMPSON: If you could just refresh your memory on paragraphs 6 to 11, C188 to
7 189.

8 MR TIDSWELL: Yes. (Pause) Yes.

9 MR SIMPSON: That statement was put in last week with the skeleton and there's
10 been no dispute as to its contents and I need not turn you to it, but you have probably
11 seen there is a schedule of the 11 meetings that subsequently took place.

12 Now the only attendance at any of these by anyone at Frontier was Will Carpenter at
13 the meeting on the 16th May, as the schedule shows. If you would like me to go to it,
14 I can.

15 MR TIDSWELL: I think I have seen it.

16 MR SIMPSON: An issue that Mastercard has conspicuously failed to deal with at any
17 point in any of the dispute about expert shopping is why, if they intended Ms Webster
18 to be the testifying expert in the Merricks claim and she took over as the testifying
19 expert over a year ago after Mr Parker left the firm -- that's in October 2024 (sic), they
20 then did not seek permission for her to be the testifying expert at any point between
21 then and 6th June 2024.

22 Now, sir, it is not as if the issue was a dormant one. It was specifically dealt with in
23 the order which the parties agreed after the January 2024 CMC in which Dr Niels was
24 named as Mastercard's sole economic expert in both the Merricks and the Merchant
25 claims.

26 Now can I take you to the order at core 15? Had the tablet not jammed, I would be

1 able to take you. I can tell you what is there, sir. The recitals deal with the future
2 conduct order, providing a seven week trial to address acquirer and retail pass-on in
3 the Merchants Interchange Fee Umbrella Proceedings and the Merricks Collective
4 Proceedings "shall commence in October or November '24 and upon hearing the
5 above named parties on 10/11th January and upon it being expressly noted that the
6 directions below so far as the Merricks class proceedings are concerned are
7 contingent upon the Merchant Fee Umbrella Proceedings order being extended to
8 those proceedings by further order" -- that's the later UPO that we got, sir, "the
9 directions being made to enable such an order to be made if the Tribunal is so
10 advised."

11 So contingent upon that we have then Dr Niels named on the order as the sole
12 economic expert for Mastercard. This order we believe is sufficient to show that at
13 that point Dr Niels was Mastercard's sole testifying expert in Trial 2. It was that very
14 order that Mastercard applied to amend on 6th June, as you will recall, when it
15 changed its mind.

16 If Mastercard -- if as they say in their skeleton, Mastercard intended Ms Webster to be
17 the testifying expert in the Merricks proceedings from October last year, then they
18 would clearly have sought permission at the CMC for her to be the testifying expert in
19 the Merricks proceedings.

20 MR TIDSWELL: Just give me that date again when Mr Parker left.

21 MR SIMPSON: October last year.

22 MR TIDSWELL: Okay. Yes.

23 MR SIMPSON: Now consistent with the January order, about which there was no
24 dispute, it was settled between the parties. Mastercard put forward Dr Niels. Dr Niels'
25 name goes in. JC/1, the exhibit to Mr Coombs' statement, shows that Dr Niels or one
26 of his team at Oxera attended all 11 expert meetings both before and after the order

1 and Dr Niels contributed, as you will recall, to the joint expert statement and gave
2 evidence at the January hearing.

3 Ms Webster was nowhere to be seen in the inter-expert process until she was added
4 to the experts' e-mail chain on 6th June and that's again JC/1 in the statement,
5 paragraph 8.

6 But the point does not end there, sir, because Mastercard actually applied for
7 permission for another expert, Mr Harman, as you will recall, at the qualitative
8 evidence hearing. That is at core 30. I will not go to it. That was the day after -- it
9 was on 24th April, sir, and that was the day after Ms Webster had written her first letter
10 to the Tribunal on 23rd April, but neither on 24th April nor at any of the three
11 subsequent CMCs before the UPO hearing or even at the UPO hearing itself, and I will
12 come back to that, did Mastercard make an application for Ms Webster to be added,
13 let alone substituted as the testifying expert in the Merricks pass-on claim. They bided
14 their time, we say, to see how the chips were going to fall on the UPO and then
15 immediately after they fell against them they applied to change expert.

16 Now it is with all that in mind that we go to Jones Day's letter of 19th June.

17 MR TIDSWELL: Just before you do so I have that right, I remember that Ms Webster
18 produced a letter which was all about the difficulty of getting things done with the data,
19 wasn't it? Is that right?

20 MR SIMPSON: It was. I am going to go to that letter. It was dated 23rd April. If I may,
21 can I go to it in course, sir?

22 MR TIDSWELL: Yes, of course. I am just trying to get the chronology right of when
23 she --

24 MR SIMPSON: It is the first time when she appears on the scene. As Mr Coombs
25 says, it is the first he knew of her involvement as expert when he was sent the letter
26 by Willkie on 10th May and our first knowledge of it was that letter.

1 MR TIDSWELL: You will come to it in due course.

2 MR SIMPSON: Yes. We go then to the Jones Day's letter of 19th June.

3 MR TIDSWELL: Where do I find that?

4 MR SIMPSON: It is core 77.

5 MR TIDSWELL: Yes.

6 MR SIMPSON: Jones Day have told us in their letter of 15th October, which is at
7 tab 224 -- we need not go to it -- that this remains Mastercard's answer to the
8 allegation of expert shopping and indeed it is then exhibited to Mr Cotter's statement
9 of yesterday, which I hope you have seen.

10 MR TIDSWELL: Yes.

11 MR SIMPSON: Now, what Mastercard say at paragraph 5 is:
12 "There is no possible prejudice to Mr Merricks of Mastercard substituting Ms Webster
13 as Mastercard would always have sought to rely on evidence from Ms Webster in
14 respect of pass-on issues arising in the Merricks proceedings."
15 If that was the case, why did they not apply to do so at any time before 6th June? Why
16 didn't they at the CMC? Why didn't they when they applied to join Mr Harman or at
17 any time thereafter, and then leave it until just six weeks before positive cases were
18 due, 6th June. You will recall, sir, positive cases were due on 19th July at that point.
19 Why did they do that and why did they at that point get rid of Dr Niels. This is not just
20 about adding Ms Webster. It is about getting rid of Dr Niels.

21 Now paragraph 5.1 then does what I have already referred to, which is it blurs the
22 distinction between Frontier's involvement in the proceedings and their involvement in
23 pass-on issues. It blurs the difference between Ms Webster's involvement and
24 Frontier's involvement. They are interwoven and almost taken as synonymous, but
25 that's just not the case.

26 So 5.1, if I could ask you to read that, sir, it blurs that distinction. (Pause.)

1 MR TIDSWELL: Yes.

2 MR SIMPSON: Then at 5.2:

3 "Frontier Economics were always intended to be Mastercard's competition economists
4 in respect of pass-on issues in the Merricks collective proceedings. This would have
5 been clear to Mr Merricks from the long involvement of Frontier Economics in those
6 proceedings."

7 Now sir, it absolutely was not clear to Mr Merricks that Frontier were always intended
8 to be Mastercard's competition economists in respect of pass-on issues and especially
9 not the sole ones. If that was the case, why was only Dr Niels named in the in order?
10 Why did Frontier have no involvement in the inter-expert process until 13th May and
11 why did Mastercard only apply to amend the order on 6th June?

12 Now, sir, it is worth going to the October e-mail, the exiguous evidence relied upon in
13 support of this proposition at core tab 232, 2892. I have been shown a document
14 I have no knowledge of at all so that's clearly a wrong reference. It is an e-mail, sir.
15 What it says -- I remember it well. If you have it, then --

16 MR TIDSWELL: I have an e-mail of 17th October from someone at Jones Day.

17 MR SIMPSON: This is very good:

18 "Dear Willkie Farr and Gallagher,

19 Thank you for your e-mail.

20 As Mr Merricks' team will already be aware, in addition to the instruction of Oxera as
21 economic experts, Mastercard has instructed Frontier as economic experts."

22 I shouldn't have missed that -- that's crucial -- "in the Merchant claims. Mastercard's
23 instructed Frontier Economics as economic experts in the Merricks claims.

24 However, for the purpose of the upcoming expert meeting Oxera Consulting LLP will
25 attend as Mastercard's representative on behalf of both expert teams.

26 As such, Mastercard's expert representatives for this meeting are Niels and Bell."

1 Now, sir, I have never seen an expert attending a meeting on behalf of another expert
2 before. That is because every expert, every testifying expert in a case has
3 independent duties to the court, and if they are going to fulfil those duties then they
4 have to be fully and properly involved obviously in the inter-expert process. They
5 cannot delegate that to someone else. There wasn't just a meeting on 27th October.
6 It refers to the upcoming meeting. There were a further ten expert meetings between
7 then and May 2024, the first one of which any Frontier representative attended was
8 13th May.

9 MR TIDSWELL: And these are all Umbrella Proceedings meetings.

10 MR SIMPSON: They are. They are. They are in both sets of proceedings. They lead
11 up to January into the JES, the joint expert report.

12 Now, sir, not only that, but we come to that JES now, because if we go to the -- I am
13 coming exactly to the point you are making, sir, because if you go to the JES at core
14 tab 45, page 1723 and you look at the intro paragraphs, it says:

15 "This is the joint expert statement of Justin Coombs materially, Gunnar Niels", and all
16 the other experts then involved, "in respect of the proceedings brought by Umbrella
17 Interchange Fee Claimants and Walter Hugh Merricks CBE against Mastercard and/or
18 Visa. This JES covers issues related to merchant retailer price pass-on and supplier
19 pass-on, although not all experts are instructed on all issues. The expert met on
20 various dates to discuss issues related to merchant retail price pass-on and on 18th
21 December to discuss issues related to supplier pass-on and subsequently discussed
22 matters by e-mail. This JES sets out the matters agreed and not agreed by the experts
23 as regards the issues in relation to merchant retail price pass-on."

24 That is in both sets of proceedings.

25 MR TIDSWELL: This is the document I think we asked for in advance of the January
26 hearing.

1 MR SIMPSON: Yes. Ultimately not much reference was made to it, but I suspect
2 more will be made to it at trial, because it was the product of a long process.

3 MR TIDSWELL: Yes.

4 MR SIMPSON: Now, those meetings were meetings at which Ms Webster, the
5 supposed testifying expert, doesn't attend. Now testifying experts obviously owe
6 duties to the Tribunal. The JES was being served in both sets of proceedings. If
7 Dr Niels were representing Ms Webster in the JES in her capacity as testifying expert
8 in the Merricks proceedings, he would have a duty to say that, and as testifying expert
9 in the Merricks proceedings, Ms Webster would also have to sign the JES confirming
10 that she independently and, as it happens, serendipitously agreed with everything
11 Dr Niels said in it. It would not be enough if, as we are told, her team had participated
12 in this process although there is no evidence they did that until 13th May.

13 If, as Mastercard now contend, Ms Webster was intended to be the testifying expert in
14 Merricks, she would have to participate in the process herself sufficiently to be able to
15 give the confirmation that I have just mentioned.

16 Now in that context that October e-mail I have just taken you to and the inclusion of
17 a Frontier team on the PSR and Trial 2 confidentiality rings in November and February
18 respectively, they look like window dressing to give some sort of basis for a later story
19 that Ms Webster was intended to be the testifying expert in the Merricks claim from
20 October in case Mastercard did exactly what they have now done and changed
21 horses, and having done that that is exactly how they are using it. That is the story
22 they are telling and they are relying on this very e-mail in doing so.

23 So, to sum up on this point, sir, as to whether there's been a change of expert,
24 Mastercard say there has been no change because Dr Niels was never instructed in
25 the Merricks proceedings. Ms Webster was always going to be the testifying expert,
26 but, in fact, Dr Niels was instructed in the Merricks pass-on proceedings in April 2023

1 and produced a report for the pass-on hearing in May 2024. From October 2023 to
2 May 2024 Dr Niels was the only economic expert for Mastercard who was involved in
3 the inter-expert process along with a team from Oxera. He was the only economic
4 expert for Mastercard who contributed to the JES. He was the only economic expert
5 who Mastercard sought to have permission to call in the order of 30th January.
6 The first Frontier document filed in the Merricks proceedings was Ms Webster's letter
7 of 23rd April, to which I will return, but even at that time Mastercard did not apply to
8 add her as an expert or say that they were intending to swap her as a sole expert.
9 The first involvement of any Frontier personnel in the inter-expert process was on
10 13th May 2024, when Oxera asked for three Frontier personnel to be added to the
11 inter-expert e-mail chain, not including Ms Webster, and the first involvement of Ms
12 Webster in the inter-expert process was on 6th June 2024, when she was added to
13 the inter-expert e-mail chain. That was the very day that Mastercard made the
14 application to substitute her for Dr Niels in the January order.
15 So we say Mastercard's argument there has been no change of expert here simply
16 doesn't get off the ground. Now that's a convenient point, sir, if the transcriber would
17 like a break, but if you would prefer me to continue, I can.
18 MR TIDSWELL: That's helpful. Just before we do, I am just wondering about -- I am
19 sure you are going to come on to this. I just want to have this discussion before the
20 break. When we looked at this in the summer, we effectively reversed the position
21 that would normally apply so if you like, we preserved or sought to preserve the
22 confidentiality. We do now what we would have done then. Of course, we are in the
23 position where we have Ms Webster's report and don't have Dr Niels' report and we
24 are wherever we are, close to trial and so on.
25 In terms of the order that might have been made in the summer if, for example, you
26 had run these arguments and you had made your points and persuaded the Tribunal

1 that there was something that warranted further investigation, the order that I think
2 probably would have been made, looking at the authorities, would have been to invite
3 Mastercard to waive privilege as a condition of putting the statement in.

4 MR SIMPSON: Yes. Attendance notes in relation to -- (Overtalking).

5 MR TIDSWELL: No doubt we can talk about where this is going. I am just wondering
6 about where we sit now. If one wheels that forward, do we not sit effectively in the
7 same conditionality and how does that work in the current situation?

8 MR SIMPSON: Let me be clear on this, sir. So we are seeking this order for the
9 disclosure that you have seen which would have been the order that we sought in the
10 summer but for the process.

11 MR TIDSWELL: Yes.

12 MR SIMPSON: But there is also a potentially more serious implication than that,
13 depending upon what the disclosure shows.

14 Now I am not making any allegation of impropriety without seeing any of that
15 disclosure and Mastercard and their expert having an opportunity in advance to give
16 statements, but if it were to show that the Tribunal was misled then the right course
17 would be -- and I am not saying we get that -- the right course we say would be to
18 revoke the order, because it was obtained on a false basis, but I am going to return to
19 that later, sir.

20 MR TIDSWELL: Exactly. It would be helpful -- I am not really trying to --

21 MR SIMPSON: That's the map.

22 MR TIDSWELL: Exactly. In just in terms of the map there is an anterior bit -- I am not
23 challenging this but I want to make sure it is plain, or necessarily agreeing with it but
24 so I understand the sequence, you are saying you would like to see the disclosure.
25 Disclosure will reveal what has really gone on because it is not clear at the moment
26 and there are questions to be asked. You have asked them in the way you have just

1 put your submissions. You would have picked this from my earlier indication -- this
2 means there is probably a second bite to this, which is probably the PTR.

3 MR SIMPSON: We may get the disclosure and that's it.

4 MR TIDSWELL: Or we may end up having a discussion at the PTR about the
5 consequences of disclosure, for example. Before you get to that I suppose putting the
6 question a bit more bluntly, do I have the power to make an order to require
7 Mastercard to disclose documents which they say are privileged?

8 MR SIMPSON: Yes, you do and I can take you to authority on that.

9 MR TIDSWELL: As opposed to the position that would have pertained --

10 MR SIMPSON: (Inaudible) order to make it conditional, so that the way it worked
11 before my friend gets up and corrects me on *Vasiliou*, it is an abbreviated way of doing
12 it. Obviously we are aware of *Derby Mags* and the absoluteness of legal privilege.
13 What's said in *Vasiliou* by Lord Justice Dyson is "We are not ordering an abrogation
14 of privilege. What we are saying is that you can only call this expert if you provide
15 these documents".

16 MR TIDSWELL: So an invitation, if you like, which has consequences if you don't
17 accept.

18 MR SIMPSON: Very serious consequences potentially.

19 MR TIDSWELL: The consequences here might take a number of different forms,
20 might they not? They might, for example, take the form that -- this is not the one to
21 which they have not responded to the invitation -- we turn up for the PTR and you say
22 "We have not got the documents". They say we don't accept your argument. It is all
23 fine and should go ahead. That is one possibility. The second possibility is that as
24 you say we could say they have not responded to the invitation and therefore have not
25 rebutted the presumption that you have articulated in your argument and therefore we
26 could revoke the permission and I think we have power to do that under rule 33 I think.

1 MR SIMPSON: And you have an inherent power, sir.

2 MR TIDSWELL: Which follows from the cases.

3 MR SIMPSON: Exactly.

4 MR TIDSWELL: The third possibility is we might say we think there is something
5 unsatisfactory here, but we think the way of dealing with it would be to ask Dr Niels to
6 come and give evidence. I don't want to say they were the only possibilities, but they
7 seem to be the possibilities that might arise from the sequence that you are
8 articulating. Then the other stream is they turn up and they give you the documents
9 and you look at them and say there is not much to see here and you are unable to
10 persuade us when we get to the PTR --

11 MR SIMPSON: (Overtalking) (Inaudible) and that's it.

12 MR TIDSWELL: The document may actually take us on a similar course, just down
13 a different path.

14 MR SIMPSON: Sir, what I am seeking to show now is I am not making a submission
15 that Mastercard or their expert have deliberately misled the court, I am saying there is
16 enough to mean that the court, in seeking to avoid expert shopping and seeking to
17 avoid its process being abused, which are the twin pillars of the jurisprudence, should
18 make these orders for disclosure and they are orders for disclosure which are indirect
19 orders in the sense that they are orders that if you want -- it can be phrased in this
20 way.

21 MR TIDSWELL: That was really my question. I just want to the make sure we are on
22 the same page --

23 MR SIMPSON: If you call Ms Webster. I think if you look at the authorities, there is a
24 whole thread running through them that if you want to call this expert, the condition of
25 that is you provide these documents. Would you like me to take you to --

26 MR TIDSWELL: No. I think we are on the same page on that. It may be that there

1 are some variants in the way that is put. I mean, in a sense because we -- let me put
2 this a slightly different way. It seems to me that if we were going to revoke the
3 permission, that ought to be a decision of the full panel and I would hate you to think
4 I am ducking this because I am not trying to duck it, because I don't think it changes
5 the dynamic at all.

6 MR SIMPSON: We would need the disclosure or the (inaudible).

7 MR TIDSWELL: Precisely, and it seems to me that in order to do that in order to be
8 fair to Mastercard in that situation, whatever the situation was, it would be helpful to
9 have not only the benefit of Mr Justice Green but also the benefit of
10 Professor Waterson. I think just to give you fair notice of where I am on this I don't
11 think you were expecting me to be making that sort of order today, but on the other
12 hand this whole question of how we deal with whether you have gone far enough to
13 persuade me that there is a presumption that needs to be answered by the documents
14 is really what we are talking about.

15 MR SIMPSON: That's what (Overtalking). Not revoking the order. Do you think there
16 is enough smoke and fire here that you are going to order disclosure of the documents
17 for the reasons I will come to in a moment.

18 MR TIDSWELL: Or disclosure is shorthand for effectively creating the jeopardy for --

19 MR SIMPSON: Because they could always make (inaudible).

20 MR TIDSWELL: Precisely.

21 MR SIMPSON: It is the shorthand I am using, I don't suggest you have the power
22 directly to do it.

23 MR TIDSWELL: No, I just want to be clear about it. That's very helpful. Shall we take
24 the break then and we will come back at -- we will take ten minutes and come back at
25 3.25. Thank you.

26 (Short break)

1 MR SIMPSON: I will try to move as quickly as I can, but this is important stuff and
2 I want to deal with it properly.

3 The next point that Mastercard makes is a subsidiary point, but it links to several others
4 and it links to what happened at the UPO hearing, which is fundamental to the issue
5 of whether the court was or was not misled. So Mastercard says Mr Merricks should
6 have objected. This is para 27 of their skeleton -- at the time he made the UPO
7 application to Mr Merricks -- to Mastercard relying on a single testifying expert.

8 Now this is just a bad point. Mr Merricks has never had any objection to Mastercard
9 relying on a single testifying expert economist for Trial 2A. His objection has been to
10 the tactical swap from Dr Niels to Ms Webster where Mastercard lost the UPO. The
11 important thing is Mastercard did not flag this possibility either before the UPO hearing
12 or in its skeleton for the UPO hearing. In fact, its skeleton was squarely premised on
13 instructing both Dr Niels and Ms Webster.

14 Just to recap briefly, Mr Merricks issued the renewed UPO application on 7th March.
15 That's core tab 61. We need not go to it. At that date the only economic expert
16 Mastercard had permission to call was Dr Niels. The first indication that Mastercard
17 intended to rely on the second expert for Merricks was on 23rd April, when Ms Webster
18 wrote her letter. That letter -- we are going to go to it now -- is at core 49.

19 Just to summarise, there is no hint in this letter that Mastercard might be considering
20 swapping to her as expert for both the Merchant and Merricks proceedings and the
21 opposite was true. Throughout that letter she referred to Dr Niels as Mastercard's
22 expert for the Merchant proceedings and herself as expert for the Merricks
23 proceedings. For the sake of speed, I will just go to one passage where that happens.
24 It is section 2.4.1. It is page 9 internally of the document. If I could just ask you to
25 read paragraphs 24 to 25. Those paragraphs couldn't be clearer and are consistent
26 with the rest of the report that:

- 1 1. Dr Niels is going to deal with the Merchant claims.
- 2 2. He is going to produce pass-on estimates for 17 of the 31 sectors into which he
- 3 divided the economy.
- 4 3. Ms Webster is going to deal with the Merricks claims.
- 5 4. She is going to generate pass-on estimates for the remaining 14 sectors of the
- 6 economy that Dr Niels will not be dealing with.
- 7 5. She is also going to produce a UK wide pass-on estimate, which, of course, Dr Niels
- 8 doesn't have to do, because he is dealing with the Merchant claims.

9 MR TIDSWELL: So it is plain at this stage that Ms Webster is going to be -- on the
10 assumption that the UPO is made, she is going to be joining the experts.

11 MR SIMPSON: The additional expert to deal with Merricks. I will come back to our
12 objection to that at the UPO hearing in a moment. I will also return in a moment to
13 how much of that work Ms Webster has actually done now she is the single expert in
14 both claims and the answer is none of it. Despite the fact -- she's done none of it. She
15 has not produced -- I use Dr Niels 31 sectors and I will come back to how she does
16 use her groupings and the Mastercard sectors in a moment. But Mastercard's
17 skeleton argument for the UPO hearing, that's core 52, served on 20th May then
18 reinforced this. Could I ask you to go to paragraph 32.1.

19 Now the fundamental premise of this skeleton is that Dr Niels is going to be dealing
20 with 17 of the 31 Merchant sectors and Ms Webster would be dealing with the other
21 14. They say at 32.1:

22 "For the purpose of estimating pass-on rates, Mastercard's experts splits the economy
23 into 31 sectors ..."

24 Now that is Dr Niels. That is based on the Webster paragraph I have just taken you
25 to:

26 "... only 17 of which are covered by the Merchant Claimants. There are accordingly

1 on Mastercard's analysis 14 additional sectors that would have to be addressed in
2 Trial 2 in order to be able to respond to Mr Coombs' analysis."
3 One of the concerns here is that it's not been done.
4 Now there is not even the slightest suggestion in this skeleton that Mastercard was
5 even contemplating swapping to Ms Webster as the single expert for both the
6 Merchant and Merricks claims. Again the opposite is true, the entire argument is
7 premised on Dr Niels dealing with the Merchants sectors and Ms Webster -- of his 31
8 and Ms Webster dealing with the Merricks sectors, the other 14.
9 Now consistent with that, and this is important, skeletons were exchanged on the same
10 day, 20th May, two days before the hearing. You need not go to it because I will quote
11 it. In our skeleton, core 53, we said at paragraph 44E:
12 "The real issue here appears to be the fact that Mastercard is seeking to rely on two
13 experts with identical expertise to deal with identical issues."
14 This is the way we understood it at that point. The obvious reason for that is
15 Mastercard finds it forensically convenient to have one expert arguing for no pass-on
16 and a different expert arguing for full pass-on. Having separated out its experts for
17 that tactical reason, it is now submitting to the Tribunal that it should facilitate
18 Mastercard's tactical decision by having two trials. The paragraph concluded:
19 "Mastercard's preference for an entirely duplicative expert" as we understood it at that
20 point Ms Webster "cannot sensibly be used as a ground for rejecting the Merricks'
21 application."
22 Now, what's interesting is that there was silence after that. It was served two days
23 before the UPO hearing and at no point before that UPO hearing did Freshfields or
24 Jones Day then write to us saying we have got it all wrong and Mastercard's skeleton
25 has it all wrong and Ms Webster has it all wrong, because Mastercard only wanted
26 a single expert for both the Merchants and Merricks claims who would be Ms Webster.

1 Now what an obvious point to make if we have completely misunderstood it at that
2 point and she is intended to be the testifying expert.

3 Now in my opening submissions at the UPO hearing the first point I took -- this is core
4 32. I am just giving references now, sir, for speed although I can go to anything. The
5 first point I took was that Mastercard only had permission for one expert, Dr Niels.
6 Core 32, page 891. I pointed out that only Dr Niels and not Ms Webster had been
7 attending the expert meetings to date, that only Dr Niels had contributed to the JES
8 and the first we had heard of Ms Webster's involvement was 23rd April. None of that
9 was disputed by Mr Cook in his response.

10 I then said that if Mastercard wanted to rely on a further economic expert in Trial 2,
11 they needed to make an application to do so or at the very least explain exactly why
12 they needed a second expert of exactly the same discipline to cover substantially the
13 same field in the context in which they were saying there is not enough time in Trial 2
14 for Mr Merricks to be bolted on.

15 Finally, I said that as a starting point of his submissions Mr Cook needed to explain
16 exactly why Mastercard needed a second expert with exactly the same expertise as
17 the first.

18 Now, it is worth then going to what Mr Cook said at the beginning of his submissions
19 in reply. Now this is at 32, page 923, line 25. I need not trouble Mr Williams, who is
20 trying to follow my role with swift references, because I remember what it says. The
21 first point to note if you read from line 25 is that Mr Cook rightly corrects himself to
22 refer to Frontier rather than Ms Webster's involvement in Merricks, but we have
23 already seen that even Frontier involvement in the inter-expert process on pass-on
24 had begun only nine days previously when Oxera asked for three Frontier personnel,
25 not including Ms Webster, to be added to the e-mail circulation list.

26 The second point is the more important one. I have to confess, sir, I missed this at the

1 time because it was only three words and it was completely inconsistent with
2 Mastercard's entire approach previously. Mr Cook then said:
3 "It may be appropriate to move to one expert, namely Ms Webster, but in any event
4 I am not saying anything in relation to that because we have two experts historically."
5 Now, I missed that and had I heard it I would have leapt like a scalded cat, which is
6 exactly what we did when we got the letter of 6th June.
7 So that was the first hint that Mastercard was contemplating swapping expert to Ms
8 Webster as its single expert for both claims. Now, if that was correct, it was
9 fundamentally important to the UPO application and therefore was a point which
10 Mastercard should have brought fully and properly to the attention of the Tribunal and
11 us in its skeleton argument.
12 Now, if they had flagged it in their skeleton argument, or even in their submissions in
13 reply, properly that it was contemplating swapping to Ms Webster, then we would have
14 done exactly what we did immediately when they notified us of the change of expert,
15 but Mr Cook said nothing further about the possibility of a swap to Ms Webster in the
16 rest of his submissions at the UPO hearing, nor did he seek to explain the obvious
17 inconsistency between this possibility and what was said in Ms Webster's letter of
18 23rd April and Mastercard's skeleton argument, which was based on that letter. He
19 did not even mention Ms Webster again in his submissions until Professor Waterson
20 asked about her at page C32, 942.
21 Now, the exchange is very revealing. On page 941 Mr Cook had been talking about
22 the additional burden of dealing with the Merricks claim period if it came into Trial 2.
23 The President then asked him specifically on 941 about the additional burden of
24 dealing with retailer pass-on for the Merricks claim period.
25 At lines 11 to 12 of 942 Mr Cook refers to the kind of changes which have occurred
26 over the past 30 years. These are familiar points, sir, for instance, in relation to internet

1 shopping.

2 Professor Waterson then says:

3 "This is material that has all been considered by Ms Webster?"

4 On the basis of what Mastercard are now saying, you would expect the answer to be
5 a straightforward "yes", but look at Mr Cook's actual answer, and Mr Cook is not
6 normally a man lost for words.

7 "Q. This is material that has all been considered by Ms Webster?"

8 Mr Cook: These are the kinds of points that were -- had it been considered by her in
9 what sense? These are the kind of --

10 The President: What has Ms Webster been doing? Is she moving from a standing
11 start?

12 Mr Cook: No. Frontier have been involved for some time, so they are not moving from
13 a standing start, sir, but that's very different from -- the focus has very much been on
14 existing Trial 2 preparation, not --

15 The President: Yes, that has been Dr Niels.

16 Mr Cook: Yes, sir. No, we are not moving from a standing start, sir, but moving from
17 actually trying to do Positive Cases in eight weeks' time. That's a big change."

18 It really is a big change, sir, when the first thing you do when that is ordered is you
19 sack your existing expert.

20 Now the most revealing thing about Mr Cook's throw away three words earlier in the
21 submissions about Mastercard potentially moving to Ms Webster as a single expert is
22 that they show that at the date of the UPO hearing on 22nd May Mastercard and its
23 legal team had already discussed the possibility of swapping to Ms Webster as their
24 single economic expert for both the Merchants and the Merricks proceedings.

25 Now we are seeking an order for the disclosure of the attendance notes of those
26 discussions and any other discussions in relation to the swap to Ms Webster. They

1 must have involved Freshfields, Jones Day, Dr Niels and Ms Webster. Those
2 attendance notes should show definitively whether the explanation that Mastercard
3 has given for the change is true. It is very difficult to see why Mastercard would object
4 to a privilege in them if it is.

5 Let's look at the explanation which Jones Day gave back to their letter of 19th June,
6 tab 77 of the core bundle at paragraph 12, which is reiterated as Mastercard's
7 explanation in the skeleton argument.

8 Mastercard had the audacity --

9 MR COOK: It is coming up to 3.45. I would like an opportunity to respond at some
10 point to my learned friend.

11 MR TIDSWELL: How long do you think you are going to be, Mr Simpson?

12 MR SIMPSON: I don't know, sir. I have significant material to get through. I don't
13 want to abbreviate this. It is so important. If it goes to issues of potentially the court
14 being misled, which again I have to be clear I am not alleging at this point.

15 MR TIDSWELL: Maybe there is a way to short cut this a little bit and also perhaps to
16 save you duplication. I rather suspect you are going to have to do a lot of this again
17 at the PTR for the reasons we discussed before the break and obviously it is not
18 wasted and not least because it is all going to be there on the transcript and available
19 to the other panel members, but, I mean, at the moment I think, as I understand the
20 position -- tell me if I am wrong -- what you are trying to do is to convince me that there
21 is enough here to get over a threshold of requiring something further and for me to
22 give some indication of that to Mr Cook.

23 MR SIMPSON: Yes.

24 MR TIDSWELL: Because I think that's all I can do. I don't think I can tell him what the
25 consequence is going to be if he doesn't turn up with these documents because it
26 rather depends on what the panel decides to do at the PTR.

1 MR SIMPSON: Sir, I was looking for something more than that. I am not suggesting
2 that you revoke the permission. That would be for the PTR. I am suggesting that you
3 make a contingent order, as I will now call it, of the type that is envisaged in all the
4 cases, which is that you cannot -- it is not enough we say -- if there were an inevitability
5 that the inference will be drawn that there has been expert shopping and that the order
6 would be revoked if no documents were produced with an observation from you, well,
7 I would accept that, sir, but the stick in this, or the carrot, if one actually puts it the right
8 way, is you can have your expert. She can be called but only if you disclose.
9 Now, sir, given -- the reason I am reluctant to curtail too much -- I can outline where
10 I am going, but without that order we could be at the PTR and Mastercard saying "It is
11 all very difficult. We haven't got any documents". Then we are in the position where
12 the question is does the Tribunal draw adverse inferences from that and Mastercard
13 will say "Well, you can't possibly".

14 MR TIDSWELL: It is no different, is it? It amounts to the same thing, doesn't it? I am
15 not entirely sure whether there is any difference or any benefit in me making the
16 decision now to effectively revoke if the documents are not provided, which is what
17 you are inviting me to do, or for the Tribunal at the PTR to decide to revoke the
18 documents, I mean, it amounts to the same thing. As I have indicated, I think there is
19 more than one possible outcome to the non-provision of documents. It may be
20 that -- I am not saying this is the right answer, but it may be it is seen to be
21 a proportionate response to the problem to require Dr Niels to attend to be
22 cross-examined. So I am just not sure why I should make that order today. It doesn't
23 seem to me to achieve anything at all.

24 MR SIMPSON: The position is if you don't provide them, then we will consider
25 revoking because you will not revoke even -- you will not contemplate a contingent
26 revocation at this point. I understand that. Then fair enough. That puts pressure on

1 Mastercard to produce the documents.

2 MR TIDSWELL: There is obviously jeopardy for Mastercard assuming you have made
3 your case. Let's say for present purposes you have got so far. You have certainly
4 made your points and I understand them. I mean, in a way it would be quite helpful -- I
5 don't want to hurry you through things which are important for that point.

6 MR SIMPSON: What we may then see is what Mastercard produces by the time of
7 the PTR on that basis if I have got over that hurdle. What I am worried about doing is
8 sitting down and you saying "I am not sure about this". What would be -- if I were to
9 abbreviate significantly now and leave it to the PTR and you were to make any sort of
10 order today or an observation, what would that be?

11 MR TIDSWELL: Well, it depends on what Mr Cook says.

12 MR SIMPSON: That's the problem.

13 MR TIDSWELL: But you are going to get a reply.

14 MR SIMPSON: I will.

15 MR TIDSWELL: You are right, I am not going to cut you short if you want to make the
16 point. All I am doing is perhaps conditioning your expectations as to the order -- not
17 the order -- the indication I am going to give. So in one sense it is binary, because
18 either you have got over the line once I have heard from Mr Cook, in which case I am
19 going to be saying to Mr Cook "I think you have a problem here and if you don't do
20 something about it, you will face the consequences". I can't think what they are or you
21 haven't got over the line in which case I am going to saying "There is no jeopardy, Mr
22 Cook. It is all fine".

23 MR SIMPSON: I will abbreviate this case, sir. I will cut off -- if I cut off at 4 o'clock,
24 just zip through some points on the basis that I will have to make them again at the
25 PTR.

26 MR TIDSWELL: Obviously we have some other things to do as well and they are

1 important as well. We are going to spend more time talking about it than you telling
2 me about it.

3 MR SIMPSON: I will do it on the basis I can make the other submissions at the PTR
4 in due course.

5 MR TIDSWELL: Depending what the answer is, yes.

6 MR SIMPSON: In short, we are told in the Jones Day letter. I am going to do this
7 more or less off the top of my head. We are told in the Jones Day letter it is cost
8 savings and efficiencies. Four reasons Mr Merricks is sceptical about that, if they were
9 looking for cost savings and efficiencies they wouldn't have instructed two firms in the
10 first place.

11 Second, if they had instructed two teams, as they steadfastly maintain they have done
12 on the Merricks pass-on and they wanted cost savings and efficiencies the only
13 rational approach would be to continue to use the expert team they were already using
14 on pass-on and that they used in the previous year, and that is Dr Niels, not
15 Ms Webster.

16 Third, if the cost savings and efficiencies for Mastercard by switching to Ms Webster
17 were obvious, as they say in the Jones Day letter of 19th June, then that would
18 instantly have neutralised the point that Mastercard was relying on very heavily at the
19 UPO hearing, which is there is duplication and the preference for a duplicative expert
20 cannot be used as a ground for rejecting the UPO.

21 Finally, Mr Cook said at the UPO hearing that the crux of Mastercard's opposition to
22 UPO was the incredibly unfair burden it would place on Mastercard to expect the
23 necessary extra work in the next eight weeks. In that case it makes no sense at all to
24 swap from an expert who has not been involved at all -- from an expert who has been
25 involved completely to an expert who has not been involved at all.

26 To be clear, sir, we would have taken this point at the UPO hearing if it had been

1 flagged properly beforehand.

2 I will move on then very briefly, to the issue of whether the Webster approach is aligned
3 with the Niels approach, which was the issue you said in the summer "Let's have a look
4 at this". We pointed out at paragraphs 50 to 52 of our skeleton for this hearing what
5 was said and there were substantial differences in principle and approach between
6 Dr Niels and Ms Webster.

7 First on sectors. Now Mastercard's basic point is there is no substantial difference of
8 principle and approach. The key sentence of their skeleton is 45.1. They say Ms
9 Webster does, in fact, use Dr Niels' sectors to identify likely range of pass-on for the
10 sectors relevant for the Merricks claim period and that's just smoke and mirrors. That's
11 complete nonsense. She does not use Dr Niels' 31 sectors. That's the first point.

12 Secondly, she only uses Mastercard's 27 sectors as a source of card expenditure data
13 so she can map her three broad groups on to those sectors to potentially produce
14 a UK wide pass-on rate, which she then fails to do, but Dr Niels wasn't using those 27
15 sectors because Mastercard had card expenditure data for them. He didn't need card
16 expenditure data.

17 What he does is, sir, he takes the 27 sectors and in the JES you will see this, section 3,
18 he takes the 27 sectors. He takes the 12 in which you have the Merchant Claimants
19 and he says "Do I need further subdivision?" and he divide them into 17 and then there
20 is 14 left. He does that by three criteria. They are principal criteria which means you
21 have similar merchants in similar sectors.

22 Ms Webster doesn't do this, doesn't even mention the three criteria. Doesn't adopt his
23 12 sectors, his 17 sectors or the 31 sectors. Her subsequent use of the Mastercard
24 27 sectors is nothing to do with generating estimates as pass-on which it was for
25 Dr Niels. Dr Niels was going to look at the sectors, generate a pass-on figure for each
26 once he had used his principal criteria to sub divide them. Ms Webster generates her

1 pass-on estimates so far as she can only for her three broad groups.

2 At that point, having got her three broad groups, she then maps those on to

3 Mastercard's sectors so she can produce, if she could, a UK wide figure. So there is

4 a fundamental difference of approach in relation to sectors.

5 Secondly, I can deal with this shortly. *Sainsbury's* and *AAM*. At paragraphs 51 to 52

6 of our positive case wrapper, we summarise Dr Niels' approach to pass-on in

7 *Sainsbury's*. At paragraph 66 of our responsive case wrapper, we noted in the

8 *Sainsbury's* litigation Dr Niels quoted 23 statements by authorities and statements

9 from retailers dating from 1997 to 2015 and we stated at paragraph 67:

10 "In contrast to Ms Webster, Dr Niels accepted pass-on across the whole economy

11 would be expected to be very high and relied on numerous reports and third party

12 statements to that effect."

13 Now at paragraph 36 of their skeleton for this hearing Mastercard pick this up and say

14 Ms Webster would not agree with that and then they say more importantly nor would

15 Dr Niels.

16 One of the points I am going to make in saying that Dr Niels should be here, maybe

17 that is for the PTR, is, it is not for Mastercard to say what he would have said or what

18 he did say. Let's have him. Let's have him there to be cross-examined.

19 Now Mastercard base this statement on what Dr Niels says in the JES but nowhere in

20 the JES does Dr Niels disavow his approach in *Sainsbury's* or say he has changed his

21 mind on the broad principle, that there will be higher pass-on across the whole

22 economy. It would be very difficult to, because since the responsive cases were

23 served we have now learned that Mastercard took an even more bullish approach in

24 the claims brought against it by Asda, Argos and Morrisons based on reports from Dr

25 Niels and Mr Harman served in August of 2022.

26 MR TIDSWELL: Have you got those?

1 MR SIMPSON: We have not got those reports. We asked for redacted copies and in
2 principle I think Mastercard are happy to provide them. We have asked AAM's
3 solicitors whether they will provide unredacted and they said no, so we have to go
4 back to Mastercard and say "Please can we have the redacted".

5 Sir, what's important about this -- I have to step back -- is in the pleading, in the AAM
6 pleadings, each of them, Mastercard make much in their responsive wrapper of the
7 fact they only plead there was a material degree of pass-on in these pleadings. In the
8 AAM pleadings they originally pleaded that, but when they got Dr Niels's report and
9 Mr Harman's report, they deleted it and they pleaded pass-on of all, or substantially
10 all, MSCs in higher prices. I don't have time to take you to the pleading, but I am sure
11 Mr Cook will. He pleaded it, so he will contradict me if I am wrong.

12 What happens is they are even more bullish in the AAM pleadings and, sir, you might
13 think that that merited some mention in Ms Webster's report, her own client has said
14 that there's full pass-on, alternatively substantial pass-on in the context of three
15 retailers who actually fall into three different sectors of Mr Coombs. She doesn't
16 mention it at all. We don't know whether she was told, but clearly we need some
17 disclosure here.

18 Now, the next point -- the final point I am going to deal with on differences is this point
19 that's really fundamental, which is in the long run all costs are variable. As you know,
20 it is a core point made by Mr Coombs, not dealt with by Ms Webster in her report, dealt
21 with, we say by Dr Niels in the JES and also in *Sainsbury's*.

22 Now, I don't have time to go to it, sir, but perhaps the most revealing thing in relation
23 to the differences between Ms Webster's report and Dr Niels is the degree to which
24 Mastercard have felt it necessary to distort what Dr Niels says in the JES as against
25 what he actually says.

26 What they say in their skeleton at paragraph 44, they refer to page 20 of the JES.

1 I don't have time to go to it. They say:

2 "The question of how the cost -- Dr Niels says:

3 "The question of how a cost is taken into account in pricing is the ultimate question."

4 That's what they quote him as saying. Now, sir, that's not what he says. That's not

5 close to what he says. In fact, it is contradicted by what he says. He says it is

6 a relevant factor. If you look forward in the JES to page 27, his ultimate conclusion is:

7 "What Merchants base prices on is not definitive."

8 Now, I don't want to be accused of misquoting off the top of my head here, sir, but

9 please do look at those passages because they simply don't support it.

10 The desperation with which Mastercard are approaching this is they are completely

11 misrepresenting what Dr Niels says. What Merchants decide about pricing -- let me

12 get this right -- is the ultimate question. He hasn't said that at all, but they need it

13 because that's what Ms Webster says. There's a fundamental divergence between

14 them.

15 Now, the final point I want to make is that in our responsive case wrapper we point out

16 that the reasons Ms Webster gives for not adopting -- Ms Webster gives no reason for

17 a change in methodology. Mastercard try to explain it and try to explain it on the basis

18 that all depends on the data, etc, but we say "You knew in April you were only going

19 to get 10 Merchants giving you qualitative data. There were another 21 sectors where

20 you knew that you wouldn't be getting that. How could you say in April and then in

21 June how could you say I am going to be adopting a methodology which is aligned

22 with Dr Niels". There is no response to that. Mr Cotter served a statement yesterday.

23 We have not seen anything since we served our responsive case. We have not seen

24 anything from Ms Webster, we haven't seen anything from Dr Niels and the only thing

25 we have seen from Jones Day picked up one point in relation to the order.

26 So there is no answer to this at the moment and Mr Cook cannot answer it in his

1 | submissions. He cannot give evidence. I need not mention the law.

2 | Then we turn to the order. Core 11, 185. That's the order sought or the categories of

3 | documents sought. It is at 185. We are seeking both categories of documents. Now

4 | Mr --

5 | MR TIDSWELL: I am sorry.

6 | MR SIMPSON: C185.

7 | MR TIDSWELL: Oh, it is the page number. I thought it was the tab.

8 | MR SIMPSON: Speed has its drawbacks. C185.

9 | MR TIDSWELL: Just give me a moment. You don't know which tab is it, do you?

10 | MR SIMPSON: It is tab 11.

11 | MR TIDSWELL: Tab 11. Thank you.

12 | MR SIMPSON: Second page of tab 11.

13 | MR TIDSWELL: Yes.

14 | MR SIMPSON: You will have seen Mr Cotter's statement. He says that there are no

15 | communications between Mastercard, Freshfields, Ms Webster and Dr Niels dealing

16 | with Dr Niels' views as to pass-on rates in each of his 17 sectors or the UK economy

17 | as a whole. What he conspicuously doesn't deal with is the next bit. If you put

18 | a line before "and/or" he doesn't say that they don't exist in this category that we are

19 | seeking. This is crucial. Dr Niels' views on pass-on as expressed in *Sainsbury's*

20 | and/or *AAM* and or any other claims by Merchants. Of course, those views are

21 | extremely inconvenient to Mastercard. We would like the notes of those discussions

22 | about those views.

23 | Second, documents related back to that.

24 | Third, communications between Ms Webster and Dr Niels and Mastercard in relation

25 | to the change of expert. Why are they changing? What did they tell Dr Niels? What

26 | did they say to Ms Webster? When did she come on the scene? Why is she told she

1 is being brought in? All of this.

2 Finally, sir, communications between Ms Webster and Mastercard in relation to her
3 letter to the Tribunal of 23rd April.

4 Now that's an extremely abbreviated version, sir.

5 MR TIDSWELL: Let's say -- I want to stress this is entirely hypothetical -- let's say that
6 Mastercard had realised that Professor Waterson didn't like Dr Niels and as a result
7 decided it was not a very clever thing to put him forward not because of the views he
8 held but just because of the way he gave evidence or something like that. Now if
9 that's, for example, set out in all sorts of document are you saying you are
10 entitled -- not entitled -- are you saying they should be giving you that information? In
11 other words, are you asking for not only documents that are responsive to Dr Niels'
12 views on the substantive issue but also alternatively if there's another reason, you
13 want to see the other reason.

14 MR SIMPSON: Why they changed.

15 MR TIDSWELL: And just to pursue that a bit, what if there are other reasons,
16 something that gave you some tactical advantage?

17 MR SIMPSON: Sir, you cannot represent to a Tribunal that the only reason for
18 changing is cost savings and efficiencies. Have a Tribunal make an order based on
19 that representation and then say "But I am not going to give disclosure because it is
20 tactically to my disadvantage". You should have thought of that in the first place. So
21 in these circumstances yes, we are absolutely entitled to know what the true reason
22 is. If it were Professor Waterson taking a dislike to Dr Niels, so be it. The truth would
23 be before the Tribunal. If that is the truth, then the truth has not been told, because
24 what should have been said is there are reasons that we can't explain, the actual truth
25 but, you know, whatever way they wanted to gloss it, but the single thing they couldn't
26 say is the only reason for changing is cost savings and efficiencies.

1 We are beyond the stage where you could say "Well, we will take a liberal view
2 because you have outlined some reasons and we will not ask you to give them in full".
3 The reason has been given. If it is not the true reason, then in order to prevent its
4 process being abused, the Tribunal needs to know what the true reason is.
5 Now, sir, if there were some super confidential reason, then it is possible that either
6 another Tribunal could have a look at it or that the Tribunal itself could have a look at
7 it, but I am not saying that's right, but what cannot happen is an unqualified
8 representation is made. It is relied on time and time again. It is relied on again in the
9 skeleton argument, and then we say "Well, it wasn't actually true, but something else
10 was true".
11 We need the disclosure that gives the actual truth as to why this expert swapping took
12 place. We say there are numerous obvious reasons, *Sainsbury's*, *AAM*, the difference
13 of view on long-term costs and all of those implications. So we say the true reasons
14 that they need to rebut if we are going to go by disclosure as a condition of calling Ms
15 Webster, they need to be before the Tribunal and before us.

16 MR TIDSWELL: Thank you.

17 Mr Cook.

18 MR COOK: Sir. My learned friend left me relatively little time.

19 MR TIDSWELL: Don't worry about that. We will find you extra time if you need it.
20 Why don't you get going and we will see how we go.

21 MR COOK: My learned friend's submissions range far and wide with what I suggest
22 is little regard for the case law on expert shopping or the order previously made by the
23 Tribunal. The jurisprudence on expert shopping is designed to avoid a party
24 instructing an expert who gives them an adverse opinion and then changing to
25 a second expert in the hope of avoiding that adverse opinion ever seeing the light of
26 day, and instead getting a better opinion, and reflecting that, the jurisprudence

1 explains, and that is set out in Mr Merricks' skeleton at paragraph 41, that it will be the
2 usual order for a party to be required to disclose previous reports from its old expert,
3 and that is sort of a standard condition but also in general almost the exclusive
4 condition, and the question then becomes reports, drafts, material like that.

5 That is indeed the category of materials the Tribunal's order of 5th July giving
6 Mastercard permission to call Ms Webster identified, the issue of whether there were
7 prior conclusions from Dr Niels.

8 If I can ask you to turn that up, sir, it is in bundle C -- it is in C212 in my version. I will
9 see if I can -- page 212.

10 MR TIDSWELL: 212.

11 MR COOK: 212.

12 MR TIDSWELL: Yes, I have that.

13 MR COOK: If you turn to that. It starts obviously at 209. 212 is then what I would
14 suggest is the crux of this, paragraph 6:

15 "The Tribunal has discretion to depart from the usual approach as set out in the
16 authorities, and in my judgment is the appropriate course in the circumstances.
17 Mastercard should have permission to adduce expert evidence from Ms Webster.
18 Once that is filed the extent to which her opinions do depart from those expressed by
19 Dr Niels will be capable of scrutiny. It is open to Mr Merricks or indeed any other party
20 to apply to investigate any differences, including by seeking information about views
21 previously expressed by Dr Niels, and or seeking to compel his attendance at trial to
22 be cross-examined."

23 That reflects what is the proper scope of the jurisprudence on expert shopping which
24 is testing whether there were previous contrary different views expressed by a prior
25 expert. That's what the Tribunal is talking about in that ruling, exactly that issue.

26 That is the limited and proper basis for the jurisprudence on expert shopping. What

1 my learned friend is doing here is seeking material which massively goes beyond that
2 and beyond anything that there is any support for in any of the case law in terms of
3 digging into privileged analysis of why a party prefers one expert over another for
4 reasons that are nothing to do with the previous views expressed by that expert. There
5 is nothing in any of the cases my learned friend cites in his skeleton, nothing said here
6 which justifies any entry into those privileged matters. So what we have is case law
7 that is very narrowly focused on prior views.

8 Now the problem my learned friend has, what he tries to gloss over is there is no
9 material of that kind here, available here. That is set out very clearly -- my learned
10 friend made another caveat about whether we have tried to use cute language. We
11 keep on trying to be as comprehensive as we can be. My learned friend tries to find
12 another reason to say we haven't been comprehensive enough.

13 We addressed this in Mr Cotter's statement, which is at tab 13.1. It is at page 196.1
14 in the bundle, which -- it started I am afraid from what is my learned friend's multiple
15 suggestions that we have been cute in our language. What is said in his skeleton
16 argument at paragraph 76 which starts with a misleadingly incomplete quotation from
17 the relevant letter from Jones Day, and the full quotation is set out at page 196.2 and
18 that's page 2 of Mr Cotter's statement. The critical bit there is the top of the third
19 page there:

20 "We confirm that Dr Niels has not produced a draft report nor any document containing
21 the substance of his opinion, to use the phrase from the particular case, *Vasiliou*".
22 That, of course, is the critical part that was missed out of paragraph 76 of Mr Merricks'
23 skeleton argument.

24 What we have done is taken the language in the cases, the case Mr Merricks had cited
25 to us, and said this is the relevant legal test. So we have taken the legal test and said
26 that is what's being said. There is nothing of that kind here.

1 MR TIDSWELL: Let me just test that a little bit. I can understand the point you make,
2 and I think it has been made elsewhere, that it is quite understandable that Dr Niels
3 has not given a view on the answer to the exam question when he hasn't received the
4 exam question in the form of data or the studies or whatever it is. So I understand that
5 point, but I think that Mr Simpson is aiming -- he says (inaudible) -- but he is certainly
6 aiming I think legitimately more (inaudible) to say it is more than just that, and
7 Mr Cotter's statement does not cover more than just that, because you have things
8 like what is the -- for example, what is the approach that Dr Niels has taken to short
9 run and long run just as an example. There are points of economic principle, aren't
10 there, which sit above the particular data and investigation of it and obviously if
11 Dr Niels has expressed some views on those which are now inconvenient, as
12 Mr Simpson is putting it, then disclosure of that information would be relevant to the
13 point in issue. I mean, do we agree on that?

14 MR COOK: I mean, the practical matter in this case, of course, is what we have is the
15 JES statement. That is set out. That is a document that produces a summary of the
16 views of Dr Niels. There is, you know -- my learned friend says I can't give evidence,
17 but, we don't have more draft reports of any kind (overtalking).

18 MR TIDSWELL: Just before you get to that, we do have obviously quite a lot of
19 evidence that Dr Niels has given before in relation to *Sainsbury's* and so to the extent
20 that that makes that material exist as to his views in *Sainsbury's*, that's clearly available
21 already and we have the *AAM* material which I am assuming is going to be
22 forthcoming.

23 MR COOK: From the perspective of Mastercard we have no objection in principle to
24 handing over prior reports of Dr Niels. The practical problem that is faced there is that
25 Mastercard does not presently hold, does not now hold the copy of that report redacted
26 to remove *AAM* confidential information and the problem with that is we are

1 therefore -- should not hand over a copy of the report. That would be in breach of the
2 confidentiality order in those proceedings. What we have is the fully confidential one,
3 which we can't give them in breach of that order, and we don't hold the one that was
4 redacted to show the bits that we shouldn't show them. Mr Merricks has been asking
5 AAM to provide that and they have not done so. In principle we have no objection to
6 that. It is just the difficulty of we cannot now know or recall what two years ago AAM
7 decided were the confidential bits.

8 MR TIDSWELL: I mean --

9 MR COOK: The route round that I think we have suggested is to take an incredibly
10 broad approach to deal with sections that are obviously not confidential because they
11 deal with general matters and principles, which, you know, will probably come as no
12 great shock to my learned friend, reflect very heavily what was said in *Sainsbury's* for
13 obvious reasons, but where it is anything that deals with the detail of those businesses,
14 and just to clarify, of course, what my learned friend essentially has is us addressing
15 three supermarkets and Argos, which is a rather different business, but three
16 supermarkets which is essentially one sector, and then Argos, which is sort of
17 a somewhat unusual business, so we have no objection to them getting over that
18 hurdle of providing that material, no objection to providing that.

19 That is just a practical question of how we can do it in a way which doesn't put us in
20 breach of prior obligations to the Tribunal and another court.

21 MR TIDSWELL: No, I understand all that. I think the point was -- I think the point I am
22 trying to drive at is if you stand back for a minute, Mr Simpson has stood up and said
23 there is a whole bunch of things here which are very odd and inconsistent with the way
24 you are presenting it. The Tribunal has been through all that and you may feel you
25 want to go through some of it as well. Then he is saying that gives rise to a question
26 as to whether or not Dr Niels has -- your decision was based on your expectation that

1 Dr Niels may say something that was previously convenient but is no longer
2 convenient, which I think is a species if you like of the description you gave of the case
3 law. I think it would fit neatly within the description, albeit a little bit different from the
4 usual run of cases. So the argument goes you switched because it is no longer
5 convenient for you to have the argument articulated in the way it was and you want
6 something different.

7 Then you get to the question if Mr Simpson has got over the line, and we can argue
8 about that and hear what you have to say about that, but if he's got over the line, have
9 you got anything that is going to be responsive to a reasonable request, and that is
10 really what we are talking about now, isn't it? If you put aside the extent of the request
11 he has made, and I don't want you to give evidence on this but one way to deal with
12 this to shortcut all of this is if in effect the position is there is nothing, and I am not just
13 talking about draft reports, I am talking about the dialogue he has been having with
14 your instructing solicitors over a period of time that makes it plain that he hasn't
15 reached any particular -- is not expressing particular views, then let's have that, rather
16 than let's have a witness statement that says there is nothing, or indeed if there are
17 some things, you may choose to give them to us, because on the basis that one
18 assumes that they rather say what -- if they say anything, they are probably unlikely
19 to depart from the views he has previously expressed in relation to Sainsbury's, which,
20 of course, we have.

21 If you stand back from this, and I am not trying to stop you from running the argument
22 about the threshold and so on, but there is a sort of pragmatic answer to all this, which
23 is that if Dr Niels has said anything in any of his engagements or material
24 engagements that's recorded that is different from anything he said before, then
25 presumably you have found that. You have been looking for it and found it and
26 actually, you know, you probably ought to be handing it over if you want to switch

1 experts, and if he has not said anything different, then somebody can say that in
2 a witness statement in a way that's more, without any disrespect to Mr Cotter who
3 I understand was answering the question that was put to him, but it could be said more
4 comprehensively than paragraph 8 does. I don't know if that's helpful, Mr Cook.

5 MR COOK: What we have to be careful about in draft statements is what is said in
6 paragraph 1 of my learned friend's request is any discussion about the views he
7 expressed in *Sainsbury's*. Obviously, there is a great deal of material dating from
8 2014, 2015, 2016 about his views on *Sainsbury's* all to do with his views on
9 *Sainsbury's* because the entire expert process will have generated innumerable
10 e-mails going back to that process. So we couldn't say we don't have any
11 communication going back to that because, of course, there was an entire multiple
12 expert report process that led up to those reports --

13 MR TIDSWELL: Sorry to interrupt you, but just to be clear and Mr Simpson will correct
14 me if I have this wrong, but I think he is not talking about that. I think he is saying in
15 the context of these proceedings, in other words the discussions that the solicitors
16 have had with Dr Niels in these proceedings about the issues in these proceedings
17 and that might incorporate some discussion about what he did in *Sainsbury's* or *AAM*,
18 but if he has been sitting around the table saying in the context of pre-UPO Merricks
19 arrival, and I am not suggesting he has, but actually I think economic theory suggests
20 in the long run this is all going to be passed on, then actually that ought to be emerging
21 in this process if you are being transparent with the Tribunal about it and if it goes to
22 the decision you have made to change. In a way either you have that material or you
23 haven't.

24 As I say, I may be wrong, but I rather suspect that because of the way this has played
25 out someone has had a good look for it and you know whether you have or not. I am
26 not questioning you on that now, but I am just trying to shortcut what seems to

1 | be -- because at the end of the day -- let me put it a different way.

2 | It seems to me that Mr Simpson has at least created enough smoke to suggest that

3 | there might be some fire somewhere. You can try as hard as you like to push back on

4 | that, but I don't think this is going to go away, and you are going to be left with this

5 | awkward situation which is that you don't quite know what is going to happen with the

6 | PTR because you are going to be forced into this jeopardy situation. I suppose I am

7 | inviting you to think about whether there is a way to cut through that. If you think you

8 | have some material that's relevant, pop it up and we can deal with it or if you think you

9 | have not, then be very, very unequivocal about it. Take it or leave it, but that is what

10 | I am putting on the table.

11 | MR COOK: I mean, certainly having heard the complaint, one understands how this

12 | could be drafted more comprehensively.

13 | MR TIDSWELL: It is not a criticism. I am not criticising anybody. If you have things

14 | to say about what Mr Simpson said, then I am entirely open to that. I just don't think

15 | with the passion that Mr Simpson exhibited, it is not going away. So, you know, we

16 | are in a situation unless I were to say today I don't think there is anything to see here,

17 | then it is going to come back at the PTR and you are stuck with this problem of how

18 | you are going to position yourself with that. At the moment, I think I can say that

19 | Mr Simpson has done enough, unless you persuade me otherwise, that I don't think

20 | I can say there is nothing to see. I am not suggesting there is a problem or anybody

21 | has done anything wrong. I am just saying the way it has played out has been a bit

22 | unfortunate and therefore suggest, certainly as Mr Simpson has indicated, there might

23 | be a reason for further discussion about it. Now you are welcome to persuade me

24 | otherwise.

25 | MR COOK: The problem is there was an hour and a quarter or so of submissions and

26 | it will take me a similar amount of time in trying to rebut each of those points. I accept

1 there has been a lot of smoke and mirrors, not that that demonstrates the existence of
2 any fire.

3 MR TIDSWELL: Absolutely, and to be clear I am not making an assumption
4 whatsoever on what the right answer is. In a way it is becoming increasingly clear
5 I think that we are not going to achieve anything here today other than me giving you
6 some indication. Even then in a way you know better than I do whether what
7 Mr Simpson says has any validity. If some of those points have hit home, then you
8 know you have some problems to deal with at the PTR. I can tell you that I think what
9 Mr Simpson has said on the face it has raised some interesting questions. You can
10 persuade me that they are not that interesting, but it is going to take some doing
11 I think -- let me put it this way. If you are so confident that you can answer all those
12 points then maybe it is better to keep your powder dry and do it at the PTR, but if you
13 think there is anything that has come out of what Mr Simpson said that gives rise to
14 concern, then I think you do need to think about how you are going to deal with that in
15 terms of assurance about what has or has not been discussed.

16 MR COOK: May I have a moment?

17 MR TIDSWELL: Of course, yes.

18 MR COOK: Sir, given where we are at 4.20 and, as you say, what we can particularly
19 and profitably achieve today, we will go away, take on what has been said by
20 Mr Simpson and, of course, by you, about whether a witness statement can be drafted
21 in broader terms, we can draft something in broader terms because there is not
22 something we are trying to hide, and put that forward and then go ahead at the PTR
23 on the basis of the broader confirmation that we feel we are in a position to give and
24 take it from there, sir.

25 Now if you are in any way persuaded about any of the matters that go beyond that,
26 that is something on which I would wish to make submissions and to be quite clear,

1 | there is a whole lot of material Mr Simpson -- I am happy to keep my powder dry on
2 | all the things Mr Simpson has said but to be quite clear we think a lot of that is
3 | extremely misleading and it would take time for me to go through and correct it, but it
4 | is a question of if you were going to express any indicative or preliminary views about
5 | the appropriateness of going much wider than what I respectfully submit is the proper
6 | scope of the expert shopping jurisdiction, which is the prior views of Dr Niels however
7 | broadly written or however broadly defined in relation to these proceedings to avoid
8 | the -- there being 700 e-mails from 2014 about pass-on rates in the Sainsbury's
9 | proceedings.

10 | MR TIDSWELL: If we look just very briefly at page 185, Wilkie Farr letter, and so there
11 | is a bit of a division, isn't there, in the bits of this that deal with the views of Dr Niels,
12 | however they might have been expressed, whether they were in a draft report or
13 | whether they were in a Freshfields file note or whatever, and I am not sure it makes
14 | much difference if it has been done in any formal way.

15 | MR COOK: Certainly from our side we were not trying to draw any distinction about
16 | the formality in which it has been recorded. It will be privileged in any event in the
17 | issue of waiving privilege there. We are not taking any point about the exact way in
18 | which the authorities refer to the way in which the advice is recorded.

19 | MR TIDSWELL: Then you get into a slightly different area which is when you get into
20 | 3, which is these communications about the reasons for the change of expert. You
21 | know, you will have picked up from my exchange with Mr Simpson that I do have some
22 | concern about -- I do think there is a division between on the one hand saying you had
23 | better tell us whether this was the reason, i.e. the discomfort with a view, and on the
24 | other hand saying to you we want to know what the reason is.

25 | Now, you know, again I am not expressing any concluded view on that. I am not
26 | inviting you to argue about it, but I do think that 1 and 2 is more consistent with, as you

1 say, the authorities, isn't it?

2 MR COOK: Absolutely. In my submission my learned friend at most has a basis to
3 say he wants 1 read narrowly and 2 read narrowly in the sense of the recent 18 month
4 period, not the historic material. Then 3 and 4 are completely different and outside the
5 scope of what is the proper basis of this application regardless of what he says in
6 support of his complaints.

7 Then in terms of Dr Niels being made available for cross-examination, that's really
8 a point for the PTR.

9 MR TIDSWELL: I think it is really a point for the PTR.

10 MR COOK: By the very nature of the fact that Dr Niels has not expressed an opinion
11 to us and part of that was he was not in a position to express opinions to us on all
12 these matters because he had not had the material, it is very difficult to see what he
13 can say in relation to those matters, because he just has not done any of the work that
14 would be required to analyse whether he would agree with Ms Webster on a particular
15 sector, a particular rate or anything else.

16 MR TIDSWELL: I think we would be back, wouldn't we, to what might be more
17 questions of economic theory and views expressed by him earlier and whether or not
18 they were inconsistent with Ms Webster's view on, for example, short run and long
19 run, that sort of thing. You are right. I think we should -- we will leave the question of
20 Dr Niels' attendance at the trial over to the PTR.

21 One thing I would ask you to do is just make sure he is available because it would be
22 unhelpful to find that he had gone off to Antarctica on holiday or something, which I am
23 sure he is not going to do. I am not suggesting from that that there is any indication
24 as to whether it is likely or not, just as a practical matter.

25 So I think, Mr Cook -- as I say, I don't want to hurry you or stop you from making
26 submissions on anything you want to, but it just seems to me I think -- the more I think

1 about the benefit of me giving an indication, which is the most I have indicated to
2 Mr Simpson would appear to do and I am sure I disappointed him on that, the less
3 valuable I think it is when actually you and your clients know what is there and what
4 isn't and you know how vulnerable you are to the points that Mr Simpson has made or
5 not and you know it is coming back again. So in a way, you know, I think I am rather
6 inclined to leave you with the problem, which is to say you have got a choice. You can
7 turn up and have done nothing by the PTR, i.e. maintain your position to date, in which
8 case you take the risk that Mr Simpson makes some serious progress and the
9 inferences for not having provided more add up. You can turn up and produce a fuller
10 witness statement than Mr Cotter has now dealing with all the potential variants that
11 might be sensibly put against you, or you could turn up with some documents if there
12 are indeed some documents that might be responsive to some of the points that you
13 feel you might be exposed to that Mr Simpson is going to make. I can't order you to
14 do any of that, but I do think you need to appreciate that you are at risk and you are
15 the best judge of how far you are at risk because of what Mr Simpson has said and is
16 likely to say.

17 MR COOK: Sir, if that's the limit of what you are planning to do today, then it is not a
18 problem for me to spend 45 minutes going through various bits of Mr Simpson's
19 submissions many and varied as they are. I say those can be dealt with at the hearing
20 with the benefit of what we all take away, which is we need to try to ensure the
21 statement is as comprehensive as it possibly can be.

22 MR TIDSWELL: Yes. I mean, there are two aspects to this, aren't there? One is to
23 the extent, and it may be that some of this goes into the witness statement or maybe
24 you leave it for your submissions, but there are clearly some points Mr Simpson has
25 made that require answering. I am not suggesting for a moment that I accept all of
26 them at face value, but there was enough there, were they not answered they get

1 comfortably over the threshold because of the points Mr Simpson has raised.

2 MR COOK: With respect, in these circumstances having heard only half the story, you
3 are only persuaded by half the story presumably until you have heard my side of the
4 story.

5 MR TIDSWELL: Precisely. There is nothing more than that. The second bit of it is
6 you can put all of this into the rear vision mirror. If you are very clear and very
7 forthcoming in relation to whatever it is you can say about the points, and the more
8 you do that, the easier it is going to be for everybody I would have thought, but if you
9 choose not to do that and I understand it may be not entirely straightforward and there
10 may be all sorts of practical difficulties as well, so you have to make a judgment as to
11 the risk you face from Mr Simpson when you are doing all this at the PTR, which is
12 what he is clearly going to do.

13 MR COOK: Sir, we are quite happy with that as the indication you have given us. We
14 will take that away.

15 MR TIDSWELL: Thank you. Mr Simpson. That's where I am. If there is anything
16 else you want to say, of course.

17 MR SIMPSON: Just briefly. Sir, on the law so that we are not taken as accepting
18 anything Mr Cook said, from the very beginning of the authorities, it has been
19 absolutely clear that there are two purposes for this jurisdiction on disclosure. The
20 first is to discourage expert shopping. The second is to prevent the court's process
21 being abused. In my submission there is a strong case, though Mr Cook has not yet
22 had his say on it, that the court's process has been abused here. That will be our
23 submission at PTR subject to any disclosure we may see before then.

24 We sent on Sunday to Mr Cook, Mr Draper the latest case we found on expert
25 shopping. Just briefly I want to go to three paragraphs of it so that Mr Cook knows
26 where we are coming from. We have already told him that these are the

1 paragraphs we wish to run, but it is important that you also are taken to this. I need
2 not take you to the case itself, but in essence this was a case called *Rogerson*. It is
3 at 17.1 of the bundle. In that case the Tribunal did go beyond prior reports, and if you
4 look -- and ordered the disclosure of an attendance note of a meeting at which the
5 expert had given his views on causation.

6 MR TIDSWELL: Yes.

7 MR SIMPSON: Have you looked at it?

8 MR TIDSWELL: I don't know the case but it doesn't surprise me. I think Mr Cook is
9 accepting in principle that is (inaudible).

10 MR SIMPSON: So we say it is not in principle limited to prior drafts, etc.

11 MR TIDSWELL: I think that's accepted, as I understand it.

12 MR SIMPSON: One of the points made in this case is the lack of candour by the party
13 and failure to put in any statements. Now if statements now go in, sir, if a statement
14 now goes in from Jones Day saying "This is the position in relation to discussions with
15 Dr Niels", then Dr Niels has to verify that. There has to be a statement from Dr Niels
16 saying "That is correct" or we will ask the Tribunal to draw adverse inferences against
17 that.

18 Likewise Ms Webster can put in a statement as to the precise circumstances in which
19 she came to express her opinions in April. One of the most important silences in
20 Mastercard's skeleton argument for this is on the point that she knew everything in
21 April that she knew in August about qualitative evidence and yet proceeded on the
22 basis she was going to use Dr Niels' sectors. That's just not been replied on. That's
23 just been ignored.

24 Now if Mastercard is going to put in evidence in particular taking account of the
25 candour issue here, it needs to be full and frank and have exhibits to it and not just be
26 assertion. It needs to have documents. I only put that marker down.

1 MR TIDSWELL: I think in a way, the way that I would like to leave it is with Mastercard
2 to make the decision about what they want to do. Obviously there will be
3 consequences from that. As I say, they are faced with the jeopardy here. We
4 rehearsed earlier what the things are that might happen and they could be quite
5 unpleasant things. They have plenty to think about and you have made your position
6 very plain on the shortcomings so far. I don't think it is appropriate for me to make any
7 direction or give an indication.

8 MR SIMPSON: No indications, sir.

9 MR TIDSWELL: No. I understand you are sending your message, but just to be clear
10 about it, you know, there is a point here, isn't there, about -- there is you a difference
11 between a statement which is less than fulsome or might be seen as evasive and
12 a verification of a statement that's not. I am not in the business of, a partner from
13 Jones Day gives me a witness statement that says "This happened on such and such
14 a date and such and such a time" I am not in the business of seeking verification on
15 that because I am sure they are going to be accurate and take very seriously the
16 statement of truth and their professional obligation. I don't think you are suggesting I
17 am requesting that. I think the marker you are putting down, which I completely
18 understand and I think is similar to what I have been saying to Mr Cook, is if things are
19 not dealt with in a fulsome and obviously transparent way, then it only raises further
20 questions.

21 MR SIMPSON: One administrative point finally. If evidence is going to be served, we
22 have the PTR skeletons due on 31st October.

23 MR TIDSWELL: 1st November I think I said in the end.

24 MR SIMPSON: They should be served by 4:00 pm three clear working days before.

25 MR TIDSWELL: I cannot remember the dates. If you are going to do something, you
26 will have to do it in time for the PTR, so I am afraid the heat's on a bit.

1 MR COOK: That is understood.

2 MR TIDSWELL: Exactly. Basically I think the skeletons are due on Friday at 10.00
3 am. I think Mr Simpson is suggesting if you are going to produce anything, can he
4 have it on Monday, 28th. I think that's what it boils down to. If it is not then, it is going
5 to have to be very soon afterwards because otherwise it is not going to work. That's
6 not an order. It is entirely up to you whether you put it in. If you put it in after 28th,
7 I think everyone is going to be pretty cross with you, so please don't do that.

8 I think we have dealt with that.

9 Now we have, of course, some things left to do. I don't know whether the transcriber
10 is willing to do a little bit longer and whether people can do another 20 minutes or so.
11 I think with a bit of ruthless efficiency we might be able to get through the items.
12 Mr Jowell, let me just see whether there is any objection to that. Why don't you get
13 going?

14 MR JOWELL: (Inaudible). Three points of clarification on your order, sir. I don't know
15 which way you want me to do it.

16 MR TIDSWELL: Whichever way you want to do it.

17 MR JOWELL: I suggest the clarifications might be first. It shouldn't take long.

18 The first is that within your order you have on a number of occasions ordered
19 confirmation be given that there have been reasonable and proportionate searches
20 conducted and two issues on that. First, on one occasion in relation to Travix you did
21 not include -- it is in the bundle C, 139.

22 MR TIDSWELL: I have them separately. Have you page of the schedule it is on ... It
23 is the one I am using.

24 MR JOWELL: It is page 53. In relation to Travix you ordered such a statement, but
25 you did not state uniquely in the case of Travix that a statement of truth should be
26 provided. We assume that was an oversight.

1 MR TIDSWELL: I think it probably was. It applies to number 3 as well, doesn't it?

2 MR JOWELL: Yes.

3 MR TIDSWELL: There were some occasions where I ordered that searches should
4 take place not with a statement of truth. I think Sony was an example of that. It was
5 actually a different case where they hadn't said and done it as far as I could see. I think
6 you are probably right and I don't know whether Mr Woolfe has anything to say about
7 it. If he has no objection, I think I should include that. (overtalking).

8 MR WOOLFE: No.

9 MR TIDSWELL: That is helpful.

10 MR JOWELL: The second point is this. There is certain ambiguity as to what is meant
11 by confirming that there have been reasonable and proportionate searches. There
12 seems to us to be two possible interpretations of that. One is you were expecting that
13 they would describe in outline the searches that they have actually carried out, and
14 then state that they consider them to be reasonable and proportionate. Alternatively,
15 that it was simply a bare assertion that you were expecting from them.

16 We don't think it would be onerous for them to provide the explanation of the searches
17 that have been carried out, because they have done so in correspondence in their
18 letter of 2nd October. We wanted to be clear --

19 MR TIDSWELL: I was going to say I was working on the basis that the explanation
20 had been provided. The point of what I am trying to achieve here is to give you the
21 assurance that somebody has actually taken accountability for this and signed up for
22 it.

23 I think it makes sense that that statement of truth should be linked to the explanation,
24 but I don't think they needed to produce a witness statement which rehearses what's
25 in the statement. Cross referring would make sense, but it seems to me that is
26 precisely the point of the exercise, which is I want someone for your benefit,

1 recognising that you are not getting any extra, to take accountability on a statement of
2 truth basis for the statement that there is nothing there.

3 MR JOWELL: We are grateful for that.

4 The third point is this. It relates to one of the Sony requests that was refused.

5 MR TIDSWELL: Yes.

6 MR JOWELL: It is at C -- that doesn't help you. Forgive me. It is page 36.

7 MR TIDSWELL: Page 36, I am sorry. It is unhelpful.

8 MR JOWELL: You will see in the penultimate column on the right we asked for
9 an explanation of the meaning of the term "margin calc" in a particular document that
10 had been provided in response and in your response to that you fairly state that this is
11 a request for evidence, not disclosure of documents and then add "or reasonable
12 clarification".

13 We would just ask for clarification as to -- because Sony are not going to be giving
14 a witness statement or not going to have any witnesses at trial, and our experts are
15 keen to understand what is indeed the meaning of this term "margin calc" in the
16 document, whether we were precluded from that by effectively serving an RFI on the
17 other side asking them in an alternative -- in that alternative format what is meant by
18 "margin calc" on that document.

19 MR TIDSWELL: What I suggest, just to put a marker down, I am not prepared to
20 reopen these and I know you are not doing that. I think there is a limit as to how far
21 we can go with these. What I suggest you do is you ask your expert to contact
22 Dr Trento's team and ask them for an explanation of it. Do it expert to expert and if
23 there is any problem with that, obviously you might have some cause for complaint.

24 MR JOWELL: I am grateful.

25 MR TIDSWELL: I hope we can do these quite quickly. It may be easier for me to
26 explain why I didn't deal with them on the papers.

1 MR JOWELL: Yes.

2 MR TIDSWELL: In relation to the first one, which is on page 18, and so it is Three,
3 isn't it, I think or is it -- actually maybe it is -- it is Hilton. This is actually a Mastercard
4 point I think. So really perhaps one --

5 MR JOWELL: It might be necessary to go into private.

6 MR TIDSWELL: Let me just -- I think I can probably -- the point here is the reason
7 why I wanted to discuss this was -- and I think it is probably for Mr Woolfe to answer
8 this question -- it seemed to me that part of the point here is that a sample document
9 has been given and there is a concern that it is not necessarily representative. That
10 is as I understand the request or the complaint about the response to the request and
11 I wanted to explore whether there was actually a proportionate way of providing
12 a wider sample, because I understand the point that is being made, Mr Woolfe,
13 about -- you have been asked for some stuff. You have turned up. You have given
14 a template document and some other documents and I think that the questions, as
15 I understood them, or the complaint that has been made is Mastercard would like to
16 see a broader selection. Have I got that right? Not necessarily.

17 MR COOK: No, sir. The issue is non-hotel room revenue.

18 MR TIDSWELL: I understand.

19 MR COOK: So we started off with nothing on this category. We have been trying to
20 find -- get some sort of material on how prices for other categories of goods are set.

21 MR TIDSWELL: And you want to see how that all works.

22 MR COOK: costs that go into gyms, conference facilities, other kinds of additional
23 supply.

24 MR TIDSWELL: You would like to see some more.

25 MR COOK: We would also like to see some material on what are substantial revenue
26 streams. When you go to a hotel, it is fundamentally about the supply of the room, but

1 they also provide other services. That is the principal revenue in general is the sale
2 of food and drink.

3 MR TIDSWELL: They have given you something, a tool kit, isn't it?

4 MR COOK: They have given us a tool kit to design menus, how to make them pretty
5 and how to describe the food --

6 MR TIDSWELL: Yes.

7 MR COOK: -- which is very interesting.

8 MR TIDSWELL: That's helpful.

9 MR COOK: Literally nothing. When I go to a hotel room and they tell me it's £3 for a
10 can of Coke.

11 MR TIDSWELL: I've got that. We are going to move on to -- moving on quickly,
12 Mr Woolfe, can you do something with that?

13 MR WOOLFE: The answer is if you look at page 19 of the Redfern --

14 MR TIDSWELL: I am on 19.

15 MR WOOLFE: -- it is the third column from the left-hand side. It is the one headed
16 "Further response from disclosing party". The last paragraph there saying what we
17 are providing, but then:
18 "As previously explained, pricing to do with revenue streams is very much locally
19 managed by each hotel team based on a variety of factors. There is very limited
20 documentation held at hotel level."
21 This is actually consistent with what Mr Percival says in his second statement. It is in
22 the bundle if you want it. Essentially the evidence broadly shows I would say there is
23 not a lot of -- there are not a lot of documents about the pricing process. What there
24 is more of is what is dealt with in Mastercard's second request in respect of Hilton,
25 which you have ruled on, which is about the review of profitability. So ex post facto
26 there is a review of how hotels are performing and some actions and so on can come

1 out of that, but really overall hotel financial performance. What there doesn't seem to
2 be is a great pool of documents about actually -- how pricing of food items works.

3 MR TIDSWELL: The question really is whether there is any sensible basis on which
4 you can conduct a search for some of those documents related to food and drink. It
5 is as simple as that. I was not sure whether you were saying you had looked and had
6 not found anything, or you were just saying you don't think there is anything (inaudible).

7 MR WOOLFE: My understanding from our answers in the Redfern schedule is that
8 we have looked and can't find stuff.

9 MR TIDSWELL: So are you saying you've conducted a reasonable search for food
10 and drink pricing, because if that's the case, then let's have a statement to that effect
11 supported by a statement of truth. If not, can you go away and have a good look for
12 some and do the reasonable and proportionate test. That's the question. It wasn't
13 clear to me from the statement -- I am asking you to answer it on the hoof, but I would
14 like to know. It has to be one or the other, hasn't it, I think?

15 MR WOOLFE: (Inaudible).

16 MR TIDSWELL: Yes. I think therefore we probably fall back to the formulation that
17 says you have to confirm you have conducted the reasonable and proportional search,
18 but if you haven't, you are to do it and provide the documents by 4th November.

19 MR WOOLFE: I don't the issues -- I don't think we can say, "We can do X", which is
20 a more limited but reasonable search. I don't think I am in a position where I can say
21 to you --

22 MR TIDSWELL: I was not clear whether you had actually looked properly for this
23 category I think is the point. So the answer is you are going to do it. Either if you
24 haven't done it, you are going to do it, and if you have done it, you are going to give
25 us a statement of truth saying you have done it.

26 MR WOOLFE: We will do whatever is required for a statement of truth to be given.

1 MR TIDSWELL: Yes, exactly. There is a formulation that I've used in here that we
2 can adopt for that.

3 MR WOOLFE: Thank you for that indication.

4 MR TIDSWELL: Okay. Thank you. That's helpful. The next one I think is page 39.
5 It is actually very similar. This is one of yours, Mr Jowell. The point here is it is the
6 same sort of thing with the Pay As You Go, isn't it? You say you haven't got very much
7 on this at all and I am just not clear whether there has been a proper search for it.

8 MR WOOLFE: Perhaps I can short circuit on these two.

9 MR TIDSWELL: Yes. The same point applies on both.

10 MR WOOLFE: (Inaudible). If it is helpful, I can explain why we took the route of
11 focusing on the contract element as that is the largest share of customers and revenue.

12 MR TIDSWELL: Yes, I understand that.

13 MR WOOLFE: But we are content to conduct further searches in relation to Pay As
14 You Go.

15 MR TIDSWELL: I think the same thing applies really. If you haven't done a proper
16 search in there for cost and pricing information, you should do so. I understand the
17 point about the size of the market, but I think the point that's being made is regardless
18 of the size of the market, it is an important indication of how things are done.

19 MR JOWELL: Our expert's calculations are that 50% of the MSCs are (inaudible). It
20 may be from the overall market it is only 10%, but what we are concerned about for
21 this case it is 50%.

22 MR WOOLFE: It's a very good point. The document -- from 2018 things have changed
23 somewhat since then.

24 MR TIDSWELL: You can see what they want.

25 MR WOOLFE: It's important. Exactly.

26 MR TIDSWELL: So that's going to be -- you are going to go away. It sounds like you

1 have not done so. You will conduct the search and provide us with the --

2 MR WOOLFE: We'll do some searches for Pay As You Go documents. What was
3 not clear to me, though, sir, is whether or not -- Visa's request I think is still somewhat
4 broader under request (inaudible). Request 1 is asking for evidence of the actions of
5 (inaudible).

6 MR TIDSWELL: The Pay As You Go bit is the bit that I was concerned about. So
7 that's the extent to which the request is permitted.

8 MR WOOLFE: Thank you.

9 MR TIDSWELL: That is it I think, isn't it? Is there anything else?

10 UNKNOWN SPEAKER: (Inaudible) Wagamama request.

11 MR TIDSWELL: Yes, of course. Thank you. Yes, you are right. The point here
12 is -- and again I think probably it is you, Mr Woolfe -- I think the point here is this point
13 about interaction, because what Mastercard are saying is, "It is all very well to tell us
14 about budgeting, all very well to tell us about targets and price, but you are not actually
15 dealing directly with the point about interaction". I was not sure what your answer was
16 on that point. In other words, have you looked properly for a discussion of the relevant
17 costs and prices? That's basically the point.

18 MR WOOLFE: If I get it up on my screen so I can remind myself. Sir, the point that
19 remained live was how the budgeting processes interact with (inaudible) performance.

20 MR TIDSWELL: Exactly.

21 MR WOOLFE: We have given a great deal of disclosure in relation to the price setting
22 process.

23 MR TIDSWELL: I think that's right, but again the point that's being made is that is all
24 well and good, but if that doesn't cover the interaction between the price setting
25 process and the cost budgeting process, then --

26 MR WOOLFE: My understanding on the basis of -- obviously there is the budgeting

1 documents that this deals with and there is no dispute about disclosure being provided
2 with that. There is the price setting documents. What seems to be in this request is
3 somehow for some other category of documents to connect those two categories of
4 documents.

5 MR TIDSWELL: Precisely. It may be the price setting documents are, if you like, the
6 category that contains that, but that was not clear from your answer. In other words,
7 if you are saying, "We don't think there is anything else" then we are back to, "We have
8 conducted a reasonable and proportionate search" and a statement of truth. If you
9 are saying "Actually there might be something between those two that we have not
10 explored", then you need to go and explore it.

11 MR WOOLFE: Sir, can I have a moment?

12 MR TIDSWELL: Yes, of course.

13 MR WOOLFE: My understanding is we understand there are not documents of this
14 type, but we will go away and confirm that with a statement of truth in relation to that.
15 If that enquiry process does throw up, "There is actually now I think about it X", we will
16 provide further documents.

17 MR TIDSWELL: Precisely. The enquiry is to go to somebody who would know the
18 answer to that and say, "Do you think there's likely to be any other category of
19 documents that have not been disclosed?"

20 MR WOOLFE: I think the expectation at this stage is that there won't be.

21 MR TIDSWELL: Fine. So this is again the same formulation effectively that you either
22 give us a statement of truth saying you've done a reasonable and proportionate search
23 or you are going to say, "We have actually done some more work and here are some
24 documents", one or the other.

25 MR WOOLFE: Thank you, sir.

26 MR TIDSWELL: Good. Okay. Thank you. Just in terms of tidying that up, I don't

1 know whether it is easiest -- maybe it is easiest for me to do that and actually send it
2 back to you on the basis of what we have just discussed, but you all know what the
3 answers are to those. So hopefully no-one is going to be held up on that. I am keen
4 that this should be covered by an order expressly. So someone will need to prepare
5 that and append this as being the orders that were made on the process. Good. Okay.
6 Thank you.

7 We just have a few minutes before 5 o'clock. Hopefully that's time to deal with
8 confidentiality, (inaudible) point. Who wants to start on that? Maybe, Mr Woolfe, we
9 can keep you back on this again. We are now on Mr Williams' schedule and this is
10 the 75% point. Really to see if you have anything else to say on it.

11 MR WOOLFE: In a sense I laid out my position before. To summarise it, if somebody
12 internally in these companies had carried out a calculation of the rate at which they
13 pass on their -- a large chunk of their costs, their overheads or costs as it may be, into
14 their prices on the basis of their internal private data, we wouldn't have trouble saying
15 that is confidential information. The fact that it happens to be worked out by
16 an external economist doesn't change the position. That's why we thought it was
17 confidential.

18 (Inaudible) on one further point and then see what he says in response? As regards
19 your concern about the judgment, obviously your judgment is going to have to reach
20 your conclusions on what you say the pass-on rate of MSCs are that should apply in
21 the Umbrella Proceedings. Those conclusions cannot be anything other than public.
22 We see that. Clearly it is going to have to recite in the course of the judgment
23 Dr Trento's evidence as to what his rates for particular Claimants are, and sometimes
24 there are ranges. Therefore, ultimately even if you are completely persuaded by
25 Dr Trento and ignore anything else, you have to pick a number anyway. You can't
26 have a range.

1 Now in a sense we could cross the bridge of what the judgment looks like when we
2 come to the judgment, because if it is simply recited in the evidence, one can quite
3 easily just redact a small figure in a judgment if it is appropriate to do so. That's not
4 the same thing as redacting the final conclusion, but you wouldn't necessarily have to
5 do so anyway, because when you get to a judgment, there will be a whole mass of
6 evidence. Dr Trento is just one part. At this stage the prospect of your conclusion
7 being simply what Dr Trento says pass on is seems somewhat unlikely. In a sense
8 I would not want the concern about what the judgment looks like to drive how
9 confidentiality is dealt with at this stage.

10 MR TIDSWELL: No, I don't think it does. I think -- and I am sure this is a point that
11 Mr Williams will make if I don't -- I think we are back to the sharp point of this. Are you
12 able to persuade me that this is sufficiently commercially sensitive that there would be
13 a significant risk of harm to your client as a result of the disclosure of it? So in
14 a way -- I think you are right about the point about the expert and internal point. That
15 is not really the question here. The real question is, given it is a range, given that it is,
16 if you like, one bit of data in a piece where someone else is going to be saying "It is
17 not 75%; it is 45% or 20%", or whatever it is, we know these numbers are going to be
18 all over the place. Is it really giving any serious commercial harm to your clients that
19 there might be a (inaudible) bit of information? I am not entirely sure I see that at the
20 moment, given that they are ranges and given that there are going to be numbers all
21 over the place.

22 MR WOOLFE: Simply on the numbers all over the place, that is (inaudible), which
23 although experts seem dramatically different on MSC pass-on, that margin is based
24 on doing different kinds of regression, although there does seem to be some
25 disagreement over some technical details. Those disagreements are not necessarily
26 quite so stark, but, sir, in a sense I have laid out my point. This is a calculation of the

1 relationship between costs and prices based on confidential information. These are
2 quite substantial categories of costs which are large enough to have a material
3 influence on pricing. That is the reason why we suggest it should be confidential. In
4 a sense I can't do any more.

5 MR TIDSWELL: Mr Williams, do you want to say anything?

6 MR WILLIAMS: These are about sectors, not merchants. There is a range. If we
7 want to round them up or down, I'm sure we can do that, sir. There is a number of
8 ways. It's as simple as that.

9 MR TIDSWELL: So this is a question as to whether percentage rates of pass-on that
10 have been calculated by experts and particularly the Claimant's experts should be
11 treated as confidential. Mr Woolfe has argued that they should be, because they are
12 disclosed potentially for an individual Claimant, because it is individual Claimant data
13 that at what rate particularly categories of costs are being passed on and prices.
14 Mr Williams for Mr Merricks argues that they are ranges. It is also possible Mr Williams
15 says for those ranges to be made less precise in order to make it clear that they are
16 not precise numbers.

17 I am not satisfied that if they are ranges and in the context of a number of other
18 numbers that are going to be put forward for potential pass-on rates that they do reach
19 the hurdle of creating a risk of significant harm to the merchant Claimants, and
20 I therefore direct that they should not be treated as confidential in the way presented
21 in items 1 and 2 of the schedule provided by Mr Merricks on Friday, whatever date
22 that was.

23 It is open to the Claimants if they remain concerned about that and in the process of
24 making adjustments to their positive and responsive cases' confidentiality
25 designations to adjust those ranges if they wish to make them less precise. I have to
26 say, looking at the ranges, I am not sure that is going to add anything and may create

1 quite a lot of confusion, so I wouldn't encourage that, but if there were particular ranges
2 which were perhaps so narrow that they cause particular concern, then that is
3 something that would be open to the Claimants.

4 So, Mr Woolfe, I think if there is anything you are particularly bothered about, you can
5 actually make that adjustment if you wish, but simply my view is --

6 MR WOOLFE: It would be possible to produce a non-confidential version of
7 something confidential, by placing a range around it, but in terms of -- what we can't
8 do is fiddle with the expert's conclusions.

9 MR TIDSWELL: That's probably right. I mean, I think he would be entitled to express
10 a broader range if he felt uncomfortable about the precision on it. I am not sure
11 whether he does. I don't know.

12 MR WOOLFE: In the course of our confidentiality review, we will consider the point.

13 MR TIDSWELL: Yes. That is absolutely open to you. Maybe that is a better course
14 of action. If you find there is something that is sufficiently precise that you are really
15 bothered about, maybe there is a justification for keeping it designated. Anyway that's
16 dealt with that.

17 Is there anything else we need to deal with today?

18 MR WOOLFE: Sir, no. A few clarifications. Item 3, that was about how certain costs
19 are categorised in management accounts. We are content with the categorisation.

20 MR TIDSWELL: I am not planning to do anything more (inaudible). I think that was
21 as far as we were planning to go today. If you want more guidance, then I am happy
22 to do it. I am just conscious of the time.

23 MR WOOLFE: (Inaudible).

24 MR TIDSWELL: If -- I mean, I am rather hoping and expecting that the process of
25 considering Mr Williams' schedule is going to work its way through without further
26 assistance from the Tribunal. If you get stuck, of course, you can come back to me,

1 but I am really not encouraging you to do that, because, as I said right at the beginning
2 of all this, it strikes me as something you should all be able to work out yourselves.
3 I appreciate -- I am not trying to criticise anybody, because I understand the difficulties
4 of it, but we just -- you know, we need practical solutions really rather than rulings on
5 most of this I would have thought.

6 MR WOOLFE: Let me just see if there is anything else. I don't think there is anything
7 else.

8 MR TIDSWELL: I am assuming, as was indicated in the skeletons, that there was no
9 item 6 and no other case management points arising out of those kinds of cases.

10 In that case I think we are done. Thank you very much and I will see you all at the
11 PTR, which I am sure will come very, very quickly. Thank you.

12 (5.01 pm)

13 **(Hearing concluded)**

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