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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1517/11//7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14 February – Thursday 28 March 2024

Before:

The Honourable Sir Marcus Smith (President)
Ben Tidswell
Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

**MERCHANT INTERCHANGE FEE UMBRELLA
PROCEEDINGS**

TRIAL 1

A P P E A R A N C E S

Kieron Beal KC, Philip Woolfe, Oliver Jackson & Antonia Fitzpatrick (instructed by Stephenson Harwood LLP and Scott+Scott UK LLP) on behalf of the Stephenson Harwood LLP and Scott+Scott UK LLP Claimants

Brian Kennelly KC, Jason Pobjoy, Isabel Buchanan & Ava Mayer (Instructed by Linklaters LLP and Milbank LLP) on behalf of Visa

Sonia Tolaney KC, Matthew Cook KC, Owain Draper & Veena Srirangam (Instructed by Jones Day) on behalf of Mastercard

Tuesday, 20 February 2024

(10.31 am)

Opening submissions by MR KENNELLY (continued)

THE PRESIDENT: Mr Kennelly, good morning.

MR KENNELLY: Good morning, sir.

So I had finished with the cross-border acquiring rules, I had moved on to the Honour All Cards Rule and as the Tribunal has seen from the joint expert statement, the experts agree that it is helpful to look at the two parts of the Honour All Cards Rule separately: the Honour All Products Rule and the Honour All Issuers Rule.

I will start, if I may, with the Honour All Products Rule. That is the rule requiring merchants who accept a category of Visa branded cards to accept all Visa branded cards in that category and Visa's case is that the Honour All Products Rule applied only to a very limited extent during the claim period and there is no evidence to suggest that the Honour All Products Rule had any appreciable effect on merchant behaviour, merchants' acceptance of Visa branded card products, or the MIFs applied to those products.

I will take three points in turn. First, I will address the extent of the rule itself; I will address the purpose of the rule for the purpose of by object

1 infringement; and the effect of the rule.

2 So starting with the extent of the rule, before
3 9 June 2016 in the United Kingdom, merchants were always
4 free to accept only immediate debit cards and to decline
5 the more expensive credit cards and vice versa.

6 From 9 June 2016, in accordance with Article 10 of
7 the IFR -- the HAPR, if I may call it that -- was
8 disapplied in the United Kingdom and merchants
9 throughout the United Kingdom and Ireland were permitted
10 to decline selectively debit, credit, consumer and
11 commercial cards.

12 Then as to the purpose of the rule, the Tribunal has
13 the 2001 Negative Clearance decision from the European
14 Commission. Ms Tolaney has referred to that already.
15 I am not going to turn it up, just to give you the
16 cross-reference, in paragraph 68 the Commission found
17 that the Honour All Products Rule was positively
18 beneficial because it facilitated the entry of new
19 products. That is paragraph 68 {RC-J5/4/14}.

20 The Commission's position then changed and the 2009
21 statement of objections did express concerns that the
22 Honour All Products Rule reinforced the restrictive
23 effects of MIFs but the debit commitments decision that
24 followed it in 2010 ultimately did not require Visa to
25 take any steps to withdraw that rule.

1 So it is very odd in those circumstances for the
2 Claimants to say that the Honour All Products Rule was
3 so inherently harmful as to amount to an infringement by
4 object and it is odd not least because that case is not
5 supported by their own experts.

6 Mr Dryden has in his report said that the Honour All
7 Issuers Rule, that element, may -- only may -- amount to
8 a by object infringement, but he has not said that the
9 Honour All Products element could be a by object
10 infringement. I will give you the cross-reference:
11 {RC-H2/2/67}, that is paragraphs 13.8 and 13.12 in
12 Mr Dryden's second report.

13 Even Dr Frankel does not contend that the Honour All
14 Products Rule restricts independently competition by
15 object or effect. All his fire is trained on the Honour
16 All Issuers Rule.

17 So I will move on then, if I may, to the effects of
18 the Honour All Products Rule and for effects, a very
19 good natural experiment is of course the period since
20 the IFR in 2016 because, as I said, the IFR disapplied
21 the Honour All Products Rule so merchants could decline,
22 for example, commercial cards and, as the Tribunal
23 knows, those have higher MIFs than consumer cards and
24 those commercial cards' MIFs are capped by the IFR. So
25 we will see how merchants treated commercial cards after

1 the IFR in 2016 and for that, to give you a flavour of
2 the expert evidence to come, I would ask you to turn up
3 Mr Holt's eighth report {RC-H4/3/215}. It is page 698.
4 Page 215, please.

5 THE PRESIDENT: It does not seem to be coming up on the EPE
6 screen.

7 MR KENNELLY: It is {RC-H4/3/215}, paragraph 698.

8 THE PRESIDENT: There we are.

9 MR KENNELLY: It was my garbled instruction that was the
10 problem.

11 So 698 and the second part of that paragraph in
12 particular where Mr Holt says because the IFR has
13 enabled him to look at this question he can assess
14 whether the removal of the HAPR as a result of the IFR
15 resulted in a significant number of merchants ceasing to
16 accept or starting to surcharge commercial cards and
17 whether -- this is also part of the Claimants' case --
18 that led to a reduction in commercial card -- commercial
19 MIF rates. So we see at 699:

20 "... the experience Post-IFR is that some merchants
21 may have begun refusing commercial cards, the prevalence
22 of this change in behaviour is likely very limited (at
23 least amongst larger merchants for which there is
24 evidence)."

25 And the Tribunal sees footnote 683. If you skip

1 down to 683, there is a reference to a European
2 Commission study from 2020 that examined the impact of
3 the IFR and we see the result there that:

4 "Among the merchants that responded to the survey
5 (mostly large merchants), nearly all (99%) declared that
6 they accept payments with commercial cards."

7 So it infers large merchants generally accepted them
8 post IFR but he does not have data on the proportion of
9 small merchants that refused and we will come back to
10 small merchants -- well, in fact, immediately.

11 Next, paragraph 700, that is confidential so I would
12 ask the Tribunal to read that to yourselves and I will
13 come back to that. It is addressed also by the
14 Claimants' experts {RC-H4/3/215}.

15 Please then go down to paragraph 702 where Mr Holt
16 notes that all of this is consistent with the evidence
17 from the Claimants' factual witnesses and we will hear
18 some of that today and during the week. No need to read
19 the rest of the paragraph, the Tribunal will hear for
20 themselves what the Claimants' witnesses have to say.

21 It is an obvious point that declining these cards
22 would result in lost cardholder business and even the
23 relatively high commercial MIF rates were insufficient,
24 an insufficient reason to justify losing that business
25 for merchants.

1 PROFESSOR WATERSON: Can I ask just as a practical point,
2 what do they look like, commercial cards? Do they look
3 any different?

4 MR KENNELLY: No, and that is an interesting point, sir,
5 because it is -- there are some distinctions that can be
6 pointed out in some limited circumstances, but to
7 a large extent it is not possible to distinguish between
8 them. The machines of course can be programmed to tell
9 you what kind of card it is, but the cards themselves --

10 PROFESSOR WATERSON: Right, so when someone proffers the
11 card, the merchant is not able to tell until it goes on
12 the machine what kind of card it is?

13 MR KENNELLY: That is my understanding. I will be told if
14 that is wrong. No one is telling me that I have erred
15 so that --

16 PROFESSOR WATERSON: Right.

17 MR KENNELLY: Yes. In some circumstances you can tell but
18 it requires close scrutiny. Generally it is not obvious
19 from the face of the cards.

20 PROFESSOR WATERSON: So in other words if you wanted to
21 decline it, you would have to wait until it has gone on
22 the machine and say, "Oh, sorry, we do not like those".

23 MR KENNELLY: Some of them might say -- I have seen images
24 of some that say "Commercial" on them but it is not
25 immediately obvious from a distance and I think it is

1 correct, sir, that you have to wait for the machine to
2 tell you at that point and there is obviously consumer
3 inconvenience and friction at that point which has an
4 impact on the willingness of merchants to treat
5 commercial cards differently and we will hear that from
6 the Claimants' witnesses.

7 THE PRESIDENT: The message that we are getting -- this is
8 very interesting because I think the mechanics of how
9 things work is useful for us to understand just as
10 background, but the mechanics are that it will be for
11 the merchant to, as it were, pre-programme their
12 preferences in terms of what the system will let them
13 process --

14 MR KENNELLY: Yes.

15 THE PRESIDENT: -- to the extent they are allowed. It may
16 be that the refusal of certain cards operates at
17 a higher level.

18 MR KENNELLY: Yes.

19 THE PRESIDENT: But either which way, it will be not
20 a scrutiny of the card that will inform the outcome,
21 even if you can tell the --

22 MR KENNELLY: There may be some scrutiny of the card but
23 that is generally difficult.

24 THE PRESIDENT: The fact is if it is hard to tell, people
25 will not do it.

1 MR KENNELLY: Yes.

2 THE PRESIDENT: And what will happen is, as
3 Professor Waterson said, it will be an embarrassing
4 moment when your card is declined for that particular
5 transaction and will the merchant know the reason for
6 the decline? Because, I mean, there could be many
7 reasons why a card is declined.

8 MR KENNELLY: Presumably the machine will tell it. Well,
9 I will get a proper technical answer, but if the --
10 I understood that you could tell from the machine and if
11 the machine tells you "declined commercial" presumably
12 the merchant can then see what happened.

13 PROFESSOR WATERSON: But the situation is very different
14 from if someone proffers an American Express and then
15 the merchant might say "Sorry, we do not accept
16 American Express" and then they get another card out of
17 their wallet or wherever they keep it.

18 MR KENNELLY: Indeed. I have been told to take you to
19 paragraph 11 of Ms Jones' evidence {RC-F4/14/3}.
20 Paragraph 11.

21 MR TIDSWELL: Top of page 4?

22 MR KENNELLY: I'm so sorry, sir?

23 MR TIDSWELL: Page 4 (inaudible).

24 MR KENNELLY: No, I think the appearance -- how you can
25 distinguish them is on page 3 at paragraph 11, sir.

1 Sorry --

2 MR TIDSWELL: This is Ms Jones' CV I think.

3 NEW SPEAKER: Tab 14.

4 MR KENNELLY: I am looking at tab 14.

5 THE PRESIDENT: We were not but we are now {RC-F4/14/3}.

6 MR KENNELLY: So it appears from this that there is an
7 ability to distinguish it by the digits on the bank
8 identification number. I do not see Ms Jones giving any
9 other basis upon which these cards can be distinguished.

10 (Pause)

11 And by the text -- forgive me, and by the text on
12 the card that indicates that the card is a commercial
13 card. Forgive me. So according to our rules the issuer
14 is required to specify on the card that it is
15 a commercial card, post IFR. Mr Pobjoy tells me that
16 Article 10(5) of the IFR actually requires us to make
17 that clear on the face of the card.

18 So to that last point of evidence of commercial MIFs
19 declining, I would ask you to pull up one last piece of
20 evidence from Mr Holt and that is in his second report
21 in these proceedings the ninth report, Holt 9, and that
22 is {RC-H4/4/197}. We saw -- the Claimants' case would
23 be if we saw -- if the Honour All Products Rule was not
24 there, commercial cards could be refused, there would be
25 pressure to push down commercial card MIFs. Since the

1 IFR, merchants can selectively decline commercial cards.
2 Based on what I have just told you it may be slightly
3 easier for merchants to identify commercial cards than
4 Professor Waterson first understood so what do we see in
5 terms of the evolution of commercial card MIFs after the
6 IFR? We see that on the figure A6.1 on page 197. If
7 you read paragraph -- first of all, look at figure A6.1
8 which is confidential and you see the average commercial
9 MIF rate for Visa transactions in the UK, the average
10 credit MIF is dark blue, the average debit MIF is green.
11 The combined average MIF is red and to explain its
12 movement, the Tribunal will need to read paragraph A130.

13 (Pause)

14 To this it is useful to go to Mr Dryden's evidence
15 and Mr Dryden's evidence is in {RC-H2/1/125}. I would
16 ask the Tribunal to go please to the "Honour All
17 Products" heading just above paragraph 12.25. Mr Dryden
18 says -- he sets out first the theory of harm, the
19 mechanisms through which that element, the Honour All
20 Products Rule, may restrict competition and then his
21 assessment of the evidence on actual effects and
22 appreciability.

23 Over the page, {RC-H2/1/126}, 12.26, "Possible
24 effects", he says:

25 "To the extent that a scheme had any 'non-must take'

1 (weak) cards, the Honour All Products element of the
2 HACR could lead to higher MSC payments and thus restrict
3 competition ..."

4 And if you skip down to evidence of actual effects
5 he is identifying how it might work but then what
6 actually happens, paragraph 12.30:

7 "In relation to actual effects, as an overarching
8 point, I note that there is no evidence of whether the
9 Defendants have any weak cards, which is a prerequisite
10 for any anti-competitive effect of the Honour All
11 Products element of the HACR to arise."

12 He makes a point in support of his "must have"
13 argument then at the end of paragraph 12.30.

14 12.31:

15 "In assessing the effects of the Honour All Products
16 element ... I distinguish between two types of evidence:
17 (i) direct evidence of an effect ... on the level of
18 MIFs; and (ii) indirect evidence on the effect of the
19 rule on merchants' acceptance (the idea being that - if
20 the rule forced merchants' acceptance of certain
21 cards - in the absence of the rule merchants may have
22 credibly threatened the schemes not to accept those
23 cards and constrained MIFs as a result)."

24 Then he looks at the evidence, first the direct
25 evidence:

1 "... the factual witness evidence suggests that the
2 Honour All Products element ... may have had a direct
3 effect on the level of MIFs ..."

4 That evidence will be tested before you, but even on
5 Mr Dryden's analysis "may" is a fairly weak position to
6 take.

7 Then on indirect evidence, 12.36 {RC-H2/1/127}, this
8 is over the page, 127:

9 "... if there is evidence that the Honour All
10 Products element of the HACR induced merchants to accept
11 cards which they would otherwise have rejected, one can
12 reasonably assume that -- in the absence of the rule --
13 schemes may have been forced to reduce the MIF on those
14 cards (in order to avoid rejection)."

15 The factual evidence, he says on the existence and
16 extent of those effects and merchants' acceptance, is
17 mixed. He thinks that Mastercard's factual evidence
18 actually supports his point but he acknowledges that
19 Visa's and the Claimants' factual witness evidence
20 suggests otherwise. He acknowledges that the Claimants'
21 witness evidence does not show an appreciable effect and
22 in my submission the claimant evidence, the merchants'
23 own evidence of the likelihood of rejecting commercial
24 cards is key and a vast majority of merchants have
25 continued to accept commercial cards in the post IFR

1 period because declining those cards would result in
2 lost cardholder business and the relatively high
3 commercial MIFs are insufficient reason to justify such
4 a loss.

5 Still in Mr Dryden's first report, paragraph 12.38
6 over the page, page 129 {RC-H2/1/129} he reviewed the
7 Claimants' survey, with the survey of course including
8 large and small merchants:

9 "Only one question directly relates to the
10 honour-all-products element ... and asks whether the
11 merchant ever decided not to accept certain types of
12 Visa and/or Mastercard cards during the claim period."

13 And you see the confidential evidence which he
14 proceeds to give upon which we rely for our submission.

15 Now, Mr Dryden makes the point that that figure
16 might be skewed by post IFR data. Merchants were less
17 likely to decline post IFR because MIFs were lower, but
18 the Tribunal will recall that the European Commission
19 made a survey about the extent of declining cards in
20 2009 when credit MIFs were much higher and we see that
21 in Visa's response to the Commission's 2009 supplemental
22 statement of objections. I will just pull that up
23 briefly if I may, {RC-J4/23/116}. It is paragraph 343
24 and I would ask the Tribunal to read -- I understand
25 that this is in part confidential. I would ask the

1 Tribunal to read paragraph 343.

2 (Pause)

3 One sees the low percentage of merchants that
4 decline and all of this, if I may say so, is consistent
5 with how merchants treat Amex. Professor Waterson made
6 the point to me, "Well, Amex is easy to spot so it is
7 easier for merchants to decline Amex", but even in the
8 context of Amex, Amex has high penetration in the
9 commercial card segment. If there was ever a card you
10 would reject, it is Amex because of the high MIFs, easy
11 to spot, but in the commercial card segment, with which
12 we are now concerned, Amex has very high penetration and
13 they do not decline Amex to a greater extent for the
14 same reason I have been canvassing throughout, which is
15 that they want the merchant business and avoid friction
16 with cardholders.

17 That is all I have to say about the Honour All
18 Products Rule. On the Honour All Issuers Rule this has
19 never been found to be restrictive of competition. It
20 is positively endorsed in the IFR. That is recital 37
21 of the IFR. As to the effect of the Honour All Issuers
22 Rule, I repeat and rely on what I said in relation to
23 issue 3. The Honour All Issuers Rule makes no
24 difference to the acquirers' ability to negotiate
25 interchange fees bilaterally below 0.2 and 0.3 in the

1 United Kingdom and below 0.1 for debit in Ireland. It
2 will not make a difference to the acquirer's bargaining
3 power, but nothing near enough to get them to set
4 bilateral interchange fees below those very low capped
5 figures.

6 So there is no evidence that the Honour All Issuers
7 Rule has undermined merchants' ability to exert pressure
8 on Visa to reduce MIFs. There is no evidence that
9 merchants would have exerted any such pressure and in
10 fact our evidence hopefully will show you that the
11 merchants have no incentive to exert that kind of
12 pressure, to push MIFs below those caps.

13 The Tribunal will recall the Interchange Fee
14 Regulation set the caps at the level which
15 the Commission believed was the level at which merchants
16 benefited from receiving card payments, rather than
17 other payment methods such as cash and that recalls,
18 indirectly at least, a question which Mr Tidswell put to
19 me yesterday about really -- when I was talking about
20 the zero MIF and the difference between the zero MIF and
21 the advantage to the acquirer of the zero MIF and the
22 advantage to the issuer of the positive MIF and
23 Mr Tidswell said, "Well, in the real world surely what
24 is really happening in a zero MIF situation is the
25 acquirer is receiving the money that is just due from

1 the transaction that the merchant and cardholder have
2 undertaken", but that, in our respectful submission,
3 ignores numerous things, including fraud. In a fraud
4 scenario where there has been cardholder fraud, the
5 merchant still gets paid, the issuer still honours that
6 transaction, but the issuer is not getting the money.
7 The issuer bears that cost of the fraud. The merchant
8 gets the money, benefit to the merchant, the merchant
9 gets the money despite being duped by the fraudster and
10 the MIF serves to make a payment from the acquirer to
11 the issuer to cover the cost of that fraud and that is
12 one example.

13 Another example might be the expensive payment
14 methods like Klarna where people can buy now, pay later.
15 The obvious benefit to the merchants, the merchants get
16 the business straight away, but that is a credit risk
17 and the MIF covers that, paid again by the issuer --
18 sorry, by the acquirer to the issuer, but the merchant
19 definitely gets a benefit. So it is a real question as
20 to whether even in Mr Dryden's scenario, the merchants,
21 still less the acquirers, would have an incentive to
22 induce their acquirers to try and negotiate interchange
23 fees below the very low levels capped in the Interchange
24 Fee Regulation.

25 Moving on, if I may, then to the next topic which is

1 surcharging. Our case is that during the claim period
2 the law applicable in both the United Kingdom and
3 Ireland either expressly permitted merchants to
4 surcharge, for all material purposes, so that the
5 prohibition on surcharging did not apply, or the law
6 expressly prohibited surcharging so that the prohibition
7 in the Visa rules had no effect.

8 Now, for this we need to recall the claim period in
9 issue. The Visa claim period began in 2011. Looking at
10 the live claims now before you, the earliest seems to us
11 to have been issued in January 2017 and so the claim
12 period which concerns Visa begins in January 2011. Let
13 us look at the Claimants' submissions on how narrowly
14 they now put their surcharging case against Visa and we
15 will -- if we can pull up their submissions, please
16 {RC-A/1.1/121}. I am looking at paragraph 244
17 {RC-A/1.1/123}. There is reference to Mastercard in (1)
18 and (2).

19 But the claim against Visa, the claim against both
20 schemes, is limited to the period after 2009 -- well,
21 for us it begins in 2011 -- and prior to 13 January 2018
22 in respect of inter-regional transactions only.

23 Now, if we go back in this document we see how the
24 Claimants examine the rules that apply to inter-regional
25 transactions. If you go back to page -- in the hard

1 copy it is page 112, paragraph 237, please go back --
2 sorry, I have not got -- probably page 121
3 {RC-A/1.1/118}. 118, please. We see at table A what
4 the Claimants say were the applicable rules for
5 inter-regional transactions in the United Kingdom and
6 that is the fourth column, D, "Inter-regionals". So for
7 the period up to October 2009 for credit cards it says
8 "Prohibition on surcharging, save to the extent of
9 costs". What that means is surcharging was allowed up
10 to the extent of the costs of the card transaction to
11 the merchant.

12 But then for the period between 2009 and 2018, the
13 box immediately below that, it says:

14 "No additional restriction - but the one at D1 above
15 applies."

16 So they acknowledge that the permission to allow
17 surcharging up to the level of costs continued until
18 2018 under, as the Claimants say, the 1990 order and we
19 see what the 1990 order was in paragraph 237.1:

20 "The Credit Cards (Price Discrimination) Order
21 1990 ... which entered into effect ..."

22 In 1991 and continued, as the Claimants say, until
23 2018. So the Claimants' case here -- for the
24 United Kingdom, the no surcharging rule, their claim in
25 respect to the no surcharging rule is restricted to

1 inter-regional transactions on debit cards in the UK
2 between 2011 and 2018. So it is already narrow but it
3 has an even more narrow effect if one looks at the 1990
4 order. The 1990 order has wider impact than the
5 Claimants' submission would suggest. I would ask you to
6 take that up, please. It is in {RC-J5/1.2/1}. This is
7 the 1990 Credit Cards (Price Discrimination) Order.

8 It is common ground that it expressly permitted
9 credit card surcharges until 2018. The key thing for my
10 purposes is to see how credit card transactions are
11 defined. If you look on page 2, {RC-J5/1.2/2} you see
12 "credit card transaction", what does that mean? It
13 means:

14 "... a transaction under which goods, services,
15 accommodation or facilities are supplied on the
16 production in the United Kingdom of:

17 "(a) a credit card, or

18 "(b) any other type of payment card which:

19 "(i) bears a trade mark or service mark which is
20 also borne by a credit card;

21 "(ii) does not bear a trade mark or service mark
22 registered in a Member State of the European Economic
23 Community and borne by ... a type of payment card which
24 is not a credit card, and

25 "(iii) is not readily distinguishable from a credit

1 card ..."

2 If you skip down, please, to subparagraph 2(b):

3 "Without prejudice to it otherwise being readily
4 distinguishable, a payment card shall be deemed to be
5 readily distinguishable from a credit card when:

6 "(i) either it bears a trademark, service mark or
7 other distinguishing feature which is borne only by the
8 payment card or it does not bear such a feature which is
9 borne only by the credit card."

10 These are cumulative requirements:

11 "... the supplier in question has received in
12 writing a clear description of the distinguishing
13 feature and notice that such a payment card is not
14 a credit card, and

15 "(iii) with the facilities and equipment which he
16 possesses the supplier is able quickly and easily to
17 ascertain by reference to the distinguishing feature or
18 its absence (if shown to the supplier ...) whether or
19 not the payment card is a credit card."

20 Now, we will hear from the factual witnesses, but
21 one can see right away how difficult it would be to
22 distinguish in many cases between a credit card and
23 debit cards, applying that approach.

24 That is the scope of the legal permissions and the
25 prohibition is not in dispute after the second payment

1 services directive, but in any event there is no
2 evidence of actual effect. The evidence from the
3 Claimants themselves is crystal clear. There was great
4 reluctance to surcharge and that was nothing to do with
5 any Visa or Mastercard rule and there is expert
6 agreement on this question.

7 If you go to the joint expert statement
8 {RC-H5/1/17}, we will see what the experts say. If we
9 look at the areas of agreement and the last two bullet
10 points -- the question is whether the Visa and
11 Mastercard surcharging rules infringed Article 101(1) in
12 conjunction with other rules and the experts agree, even
13 Dr Frankel that:

14 "There is no or limited evidence to conclude that
15 surcharging rules had an appreciable effect in the UK
16 during the relevant period.

17 "Three experts (Mr Dryden, Mr Holt and Dr Niels)
18 agree that there is no or limited evidence that
19 surcharging rules had an effect in Ireland during the
20 relevant period."

21 It is surprising in my respectful submission that
22 the Claimants have continued to pursue this claim in
23 view of their own evidence, their own factual and expert
24 evidence, even to the point of my learned friend Mr Beal
25 opening on it in this trial, not least because of the

1 evidence that only a small proportion of the sampled
2 Claimants said they surcharged Visa or Mastercard at any
3 time during the claim period and you have that from --
4 I will just give you the reference -- {RC-H3/2/248},
5 footnote 386. As you will hear from evidence from
6 Dr Niels, he estimates the figure is much lower. He
7 will be questioned about that, but his evidence will be
8 that the figure of Claimants who surcharged was even
9 lower than the very low figure the Claimants themselves
10 put forward and that is consistent with the survey
11 conducted by the Commission in 2008 which showed that
12 92% of merchants did not surcharge and why did they not
13 surcharge? Not because of Visa or Mastercard rule, it
14 was the obvious reason: for fear of losing customers and
15 the evidence from the Claimants themselves, as you will
16 hear, corroborates that. They would never have
17 surcharged even when they were permitted to do so.

18 As to the claim that the no surcharging rule is
19 a restriction by object, that is not supported by any of
20 the Commission's findings to date.

21 THE PRESIDENT: Again, Mr Kennelly, how is this surcharging
22 signalled? I mean, in times gone by there would be
23 a little sign on the counter saying "We will charge you
24 extra if you pay by credit card". Is that -- well, was
25 that the only way in which one signalled the surcharge,

1 or would there be other ways of doing it?

2 MR KENNELLY: There were other ways. It may be better to
3 wait -- you will hear this from the Claimants'
4 witnesses.

5 THE PRESIDENT: You are quite right.

6 MR KENNELLY: The question will be answered very clearly but
7 by the Claimants' witnesses themselves. They give very
8 useful evidence on how surcharging took place when it
9 did take place and you will hear some of that this
10 afternoon.

11 But in terms of whether it is restriction by object,
12 that is all that is left, there is no question of any
13 effect, so is there a restriction by object? The
14 Negative Clearance decision said in terms that at no --
15 that this surcharging rule had no appreciable effect on
16 competition and in the 2009 SO and the 2012 SSO
17 the Commission said it reinforced potentially
18 anti-competitive effects but was not restrictive in its
19 own right and of course those are just allegations that
20 the Commission was raising at that stage but it was not
21 suggested even then that the no surcharging rule was in
22 its own right a restriction of competition by object, so
23 really that part of the Claimants' case is completely
24 hopeless and it should be dropped as soon as possible.

25 The last issue is co-badging. Co-badging, it is

1 a short point and I will take it quickly, but Mr Beal,
2 my learned friend, did address it. He said that Visa
3 had prohibited applying its badge, its trademark, to
4 other domestic and international payment card schemes
5 and that was a restriction of competition as well.

6 Now, as regards domestic payment card schemes, the
7 experts agree that Visa has permitted co-badging. You
8 have seen the evidence that Visa did co-badge with
9 Carte Bancaires in France, with GiroLink in Germany,
10 with Laser in Ireland, so there is no question of not
11 co-badging with domestic schemes.

12 The focus of the Claimants' evidence experts is on
13 co-badging with international schemes. They are saying
14 it is a restriction of competition for Visa not to put
15 its own badge alongside Mastercard's on issuers' payment
16 cards and Visa's reluctance to do that is a restriction
17 of competition.

18 Now, our response to this is first on the correct
19 counterfactual, assuming that we had no restriction in
20 our own rules on co-badging with international schemes
21 like Mastercard, our prohibition makes no difference
22 because over the claim period there has been no demand
23 for international co-badging of the type the Claimants
24 describe. Even if issuers had been free to co-badge
25 with Mastercard and Visa, it is very unlikely that they

1 would have wanted to do so.

2 Secondly, as you will see in the evidence, even if
3 the issuers had wished to co-badge, there were serious
4 technical problems with international schemes
5 co-badging, distinct from the co-badging with domestic
6 schemes and you will hear that in the evidence.

7 Finally, even if it had been feasible and issuers
8 had wanted to do it, the prohibition was not
9 a restriction of competition. Visa's reluctance to have
10 its badge alongside Mastercard's was a legitimate way of
11 preserving Visa's brand investment and intersystem
12 competition, the competition between Visa and
13 Mastercard.

14 I will begin with the lack of demand, the
15 counterfactual. The counterfactual is not, as
16 Dr Frankel suggests, a rule which requires Visa to
17 co-badge with Mastercard. The counterfactual is to
18 assume away our internal rule restricting co-badging
19 with international schemes and I have not seen any
20 mention in any of the Claimants' witness statements
21 relating to co-badging and again we have in the IFR
22 a good natural experiment. The IFR has required Visa to
23 permit co-badging since 2016. That is eight years ago
24 and in that time, as you will hear, Visa has never
25 received even a request from an issuer to approve

1 a co-badging arrangement with an international payment
2 scheme and why would they? It is common ground that the
3 issuers play the schemes off each other to obtain higher
4 interchange fees. That is the product of intersystem
5 competition. It is not in the issuers' interests to
6 allow merchants to pick and choose schemes on a card in
7 order to pay less interchange and you will hear
8 Mr Holt's evidence on that.

9 The Claimants' experts have no answer to these
10 points, nothing at all, and as to the allegation that
11 the co-badging rule has the object of restricting
12 competition, that is hopeless. As the experts explain,
13 the object of the co-badging rule was to avoid the
14 technical problems that would arise if both
15 international schemes run the same card, to enhance
16 transparency and critically, to protect Visa's brand and
17 allow it to compete with Mastercard.

18 Again, surprising that this allegation on
19 restriction of competition has been pursued all the way
20 to trial and we invite the Claimants to drop it now.

21 Now, those are my submissions. I think Ms Tolaney
22 has some follow-up on those points and then we will
23 begin the witnesses.

24 THE PRESIDENT: Very grateful, Mr Kennelly. Thank you for
25 that. Ms Tolaney.

1 Opening submissions by MS TOLANEY (continued)

2 MS TOLANEY: Good morning, members of the Tribunal. I adopt
3 Mr Kennelly's submissions insofar as the same points
4 arise in relation to Mastercard's scheme rules. I am not
5 proposing to go through each of the scheme rules in
6 detail. May I give you the references in our written
7 openings where each rule is addressed and then I have
8 two short points. So scheme rules are generally
9 addressed in our openings at section H, which is
10 {RC-A/2/77}.

11 The Honour All Cards Rule, issue 9, is dealt with in
12 section H2. Surcharging issue 11 is dealt with in
13 section H3 and the co-badging rule and
14 non-discrimination rule are addressed together in
15 section H4.

16 Mastercard's rules operated differently to Visa's
17 rules but the same types of points arise in relation to
18 both, which is why I am not proposing to traverse the
19 same ground.

20 There are two Mastercard specific points. The first
21 point relates to the period that the Tribunal is looking
22 at in relation to the scheme rule and there is an issue
23 between Mastercard and the Claimants about that; and the
24 second point is in relation to Mastercard's
25 non-discrimination rule, the NDR. Visa does not have an

1 equivalent rule so I will briefly address you on that.

2 So in relation to the relevant period, my learned
3 friend made a point in his written opening at
4 paragraph 241 -- and the reference to that is
5 {RC-A/1.1/121}. Now, my learned friend suggests that
6 M&S' claim in relation to Mastercard's scheme rules
7 starts to run from 6 December 2007. That is wrong. My
8 solicitors wrote to the Claimants about this on
9 15 February following this submission being also made in
10 opening on {Day2/83:1}, and the letter, if we can bring
11 that up, is at {RC-N/359}. Please could the Tribunal
12 read that letter.

13 (Pause)

14 THE PRESIDENT: Yes, I see.

15 MS TOLANEY: Thank you. So you will see from the letter
16 that M&S commenced proceedings against Mastercard on
17 5 December 2013 but its claim was limited to MIFs and on
18 22 December 2022 a draft particulars was sent to
19 Mastercard proposing to add claims in relation to
20 Mastercard's scheme rules, but Mastercard has never
21 consented to those amendments and no application has
22 ever been made for permission to amend the particulars.

23 We would oppose any application if it were now to be
24 made and it is far too late for any such application to
25 be made mid-trial and therefore the period we are

1 actually concerned with for the claims in relation to
2 the challenged rules only goes back to 17 July 2014.

3 Now, the Claimants' solicitors responded yesterday
4 and I think their response is not in the bundle but do
5 we have copies, please? What broadly they said was
6 that -- if I may read this:

7 "We accept that as issued, M&S' claim related to
8 Mastercard's consumer UK and Irish and intra-EEA MIFs.
9 However, we note that the draft particulars of claim
10 that were provided to you on 22 December 2022, included
11 claims in respect of all types of MIFs and the full
12 change of scheme rules. The period for which those
13 claims may be advanced depends inter alia on the outcome
14 of the presently stayed Volvo appeal by the SH
15 Claimants. Moreover, those amendments are subject to
16 the directions order dated 23 December 2022 and the
17 parties have subsequently agreed to suspend the pleading
18 out of the M&S claim and other claims pending the
19 outcome of the Volvo appeal. In any event, the rules
20 that were in fact operated by the schemes from
21 6 December 2007 are relevant in so far as they form part
22 of the context for M&S' claim in respect of MIFs."

23 Now, it is suggested, therefore, that the period for
24 which these claims may be advanced depends on the
25 outcome of the Volvo appeal and it is also argued that

1 the pleadings are relevant as context. We want to put
2 a marker down quite clearly that none of those points
3 actually change the objection that we have made and they
4 do not grapple with it, which is that Mastercard would
5 oppose any application to amend which sought to
6 introduce claims going back more than six years from the
7 date on which permission to amend was granted and,
8 therefore, the pleadings on the scheme rules only go
9 back to July 2014.

10 THE PRESIDENT: Clearly now is not the time for resolving
11 this sort of dispute, but equally we need to ensure that
12 we find a space in the trial window so that this -- and
13 it may be that there are other -- I do not want to
14 diminish the importance of the point -- other loose ends
15 in terms of constitutional claims, can be dealt with.
16 Can we leave it, Mr Beal, for you to consider the
17 position and --

18 MR BEAL: Of course, sir. That sounds very sensible, with
19 respect.

20 THE PRESIDENT: We will find the time for it, but I am very
21 conscious that you have all got quite a lot of other
22 things on your plate and we would not want this sort of
23 thing, important as clearly it is, to be a distraction
24 to the general points, so I think, Ms Tolaney, you have
25 put down a very clear marker.

1 MS TOLANEY: Thank you, sir.

2 THE PRESIDENT: And I am quite sure that we will find a way
3 of dealing with it and, as I say, any other points.
4 I am very conscious of one of the problems of having
5 a collection of claims not under a collective action
6 wrapper is that there may well be issues like this in
7 other matters which may need to be addressed, I have no
8 idea, but it would be surprising if that were not the
9 case and we will try and deal with them in one go but we
10 will need to identify them or deal with this one if it
11 is the only one.

12 MS TOLANEY: Thank you very much.

13 The second topic I want to briefly cover is the
14 non-discrimination rule which arises only in relation to
15 Mastercard. We have covered it in our written
16 submissions. I simply flag that the Claimants do not
17 independently address the NDR in their written openings,
18 but my learned friend made some submissions on it orally
19 at {Day 2/82:10-15}, and we suggest there may be some
20 misunderstanding on the Claimants' part as to how the
21 rule in fact works.

22 The Claimants appear to be suggesting that the NDR
23 prevents merchants from taking steps to discourage the
24 use of Mastercard cards in general. In fact, that is
25 plainly not right. The NDR only applies where cards are

1 co-badged with Mastercard, such that a transaction could
2 be processed through the Mastercard scheme or other card
3 payment scheme, so where a card has two badges or
4 brands, Mastercard's as well as another scheme's. You
5 can see the rule pre-2015 at {RC-J7.4/2/2}. It is rule
6 5.11.1. What you will see are the words:

7 "... in favour of any other acceptance brand."

8 At the end of that rule, which makes it clear that
9 the rule is only relevant where a card is co-badged and
10 given, as Mr Kennelly has already explained, the very
11 limited relevance of co-badging to these claims, the NDR
12 is therefore also of very limited relevance.

13 In those circumstances, prior to the IFR, merchants
14 choosing to accept Mastercard payment cards were not
15 permitted to prevent the use of or discriminate against
16 Mastercard as a brand for domestic or intra-EEA
17 transactions where it was co-badged with another scheme.

18 From June 2015 as a result of the general
19 prohibition on card schemes preventing steering in
20 Article 11 of the IFR, Mastercard prohibited merchants
21 who chose to accept Mastercard from preventing the use
22 of the Mastercard scheme for domestic or intra-EU
23 transactions but merchants are free to discriminate
24 against Mastercard payment cards in co-badge situations
25 in order to discourage their use.

1 You can see the rule after the change, for example,
2 at {RC-J7.4/3/2}.

3 The final point is that the NDR did not restrict
4 competition by object or effect and we address that in
5 paragraphs 236 to 238 and broadly in circumstances where
6 there was no domestic scheme in the UK which could have
7 been co-badged with Mastercard, the NDR has no practical
8 relevance. As for Ireland, the only domestic scheme
9 available was Laser and Mastercard co-badged with Laser
10 until its collapse.

11 In those co-badged situations, the transactions were
12 automatically processed through Laser anyway, so again
13 the NDR has no relevance and none of the Claimants even
14 refer to the NDR or the co-badging rule for that matter,
15 which highlights the fact that they really had no real
16 world impact in either the UK or the Irish markets.

17 So those are all my submissions on the scheme rules.
18 I think just on loose ends, before we sit down in
19 opening, I think that we needed to make a formal
20 application to adduce Niels 3 and Mr Cook was going to
21 deal with that, with your permission, right now.

22 THE PRESIDENT: Yes, of course.

23 MR COOK: I am conscious of what you have just said as to
24 whether this is the kind of loose end you want to have
25 dealt with now or whether you want to have it dealt with

1 at a different time. The expert evidence starts I think
2 on 9 March, so we do have some time but equally I am
3 ready to deal with it now.

4 THE PRESIDENT: Well, Mr Cook has very helpfully (inaudible)
5 something which was of course flagged by Mr Beal early
6 on.

7 MR BEAL: Yes, the difficulty I have, sir, is this. We have
8 one of our witnesses who needs to be away at lunchtime
9 and we are already at 11.30.

10 THE PRESIDENT: Yes.

11 MR BEAL: I have had no notice of the grounds that are going
12 to be relied on.

13 THE PRESIDENT: In that case say no more.

14 MR COOK: We are very happy to deal with it after the
15 witnesses but Mr Beal does, because we wrote a letter
16 saying "This is why we are going to produce it" so he
17 knows the material has not changed, but we are happy to
18 do it whenever, sir.

19 THE PRESIDENT: Mr Cook, there is no criticism in these
20 things. It just needs to be sorted out. Let us get
21 a list of applications that need to be dealt with, to
22 the extent they cannot be agreed, as clearly this one
23 cannot be, and we will deal with it ideally without
24 taking up any court time. It may be that we will sit at
25 10 o'clock for a couple of mornings to get these points

1 knocked on the head without encroaching on time that is
2 needed but I think Mr Beal's point about witnesses
3 needing to get away is well made and we will park it for
4 the moment.

5 MR COOK: The only point to make in response to that, sir,
6 is certainly if there are witnesses that need to get
7 away we should certainly get on with that, but at the
8 moment the plan is likely that we will not sit this
9 afternoon, so we to some extent have an afternoon which
10 is available. There will no doubt be windows perhaps
11 later, but I just simply mention that -- that is an
12 available time or alternatively it would be sitting
13 earlier or matters like that.

14 THE PRESIDENT: That is helpful. Mr Beal perhaps you can
15 have a think about whether this afternoon can be used
16 for --

17 MR BEAL: I've got an accompanying letter that was very
18 brief. I have not actually got grounds in support of
19 the application at all or indeed --

20 THE PRESIDENT: Mr Beal, if it cannot be done then just say
21 so.

22 MR BEAL: I regret to say I would need I think to see the
23 basis on which the application is being made in advance
24 otherwise I am responding on the hoof which is not fair
25 to my clients.

1 THE PRESIDENT: That is fair enough.

2 MR COOK: Sir, I am afraid there is one other matter on
3 which there were some questions which were asked by the
4 Tribunal over the last couple of days, we prepared
5 a short note which sets out Mastercard's position in
6 response to those, so we were simply going to hand that
7 up.

8 THE PRESIDENT: Is that -- it is a pure Mastercard position?

9 MR COOK: Pure Mastercard position.

10 MR KENNELLY: Yes, it is a pure Mastercard position.

11 THE PRESIDENT: Very good, thank you.

12 MR COOK: What it particularly addressed, sir, is the
13 questions you asked Mr Kennelly yesterday, on Day 3, in
14 relation to negotiating incentives and also a second
15 point in relation to -- the second point which is at
16 paragraph 9 onwards, Mr Tidswell asked a question about
17 settlement at par and matters like that. That was also
18 partly dealt with by Mr Kennelly this morning, so simply
19 so you have those in writing. That is, we say, quite an
20 important framework which obviously, sir, you alluded to
21 that you needed to understand what we said the network
22 of incentives was in relation to those issues.

23 THE PRESIDENT: Mr Cook, that is very helpful. Just to give
24 you some understanding as to where we are coming from,
25 there is going to be a wealth of questions, I suspect,

1 that we will have as we unpack exactly how the system
2 operates. To the extent that they are, as it were,
3 background questions we will rely on the parties simply
4 to inform us and educate us by this sort of note. Of
5 course the moment something moves from the "We are
6 simply educating the Tribunal into how systems work"
7 into something more contentious than that process
8 obviously will not work and we will rely on the parties
9 to ensure that when we transit from educating the
10 Tribunal in what they probably should know already to
11 dealing with matters that are generally contentious, we
12 will obviously have to trim our approach accordingly.

13 MR COOK: Certainly, sir. We think the first half of this
14 note is dealing with matters that, at least the experts
15 would say, are uncontentious. Mr Beal may have
16 different views and no doubt, as with everything, there
17 are points of detail. With the second matter that is
18 moving into matters more of submission, but it is simply
19 so you can see -- I understand where Mastercard's
20 position is in relation to these issues and to the
21 extent they are contentious clearly these are points you
22 will take up with the experts, we will take up with the
23 experts, but this is basically the essential framework,
24 we say, of a number of fundamental points that lead into
25 why historically bilaterals were not viable, now they

1 are viable and where the outcome -- the outcome of the
2 bilaterals counterfactual comes to.

3 THE PRESIDENT: That is very clear and to the extent that
4 there is a problem with this both parties will let us
5 know and we will deal with it as it goes, but we are
6 very grateful to you, Mr Cook, for that.

7 MR BEAL: Sir, it is 11.30. I am very happy to call my
8 first witness. Could I just check with my learned
9 friends that they are going to be able to get through
10 two witnesses by 1 o'clock. If not I will need to
11 change the order of the witnesses.

12 MR KENNELLY: Yes, I think from my part yes, I think I will
13 be finished by 1. If we have a short break -- perhaps
14 a slightly shorter break now.

15 THE PRESIDENT: We can go into the short adjournment if
16 there is an overrun.

17 MR BEAL: I am very grateful.

18 THE PRESIDENT: So to that extent there is some latitude.
19 What is the absolute hard deadline for your second
20 witness?

21 MR BEAL: I think he wanted to be away by lunchtime because
22 he has another commitment.

23 THE PRESIDENT: That is vague.

24 MR BEAL: I do not have a specific time. He had been told
25 he did not need to be here for 2 o'clock.

1 THE PRESIDENT: That is entirely fair. Look, Mr Kennelly,
2 it sounds as if it makes sense to invert the order if
3 you are not going to be --

4 MR KENNELLY: Not at all. Is it the idea that we start with
5 Mr Buxton?

6 THE PRESIDENT: I think if there is a problem with timing
7 then you will update us.

8 MR KENNELLY: I am sure I will finish Mr Buxton before
9 lunchtime, so we can have our break.

10 THE PRESIDENT: On that basis I think we will deal with
11 Mr Buxton first. Thank you very much for accommodating
12 us, Mr Kennelly.

13 MR BEAL: Please may I call Mr Buxton on behalf of the
14 Claimants.

15 MR MARK BUXTON (affirmed)

16 THE PRESIDENT: Mr Buxton, good morning. Do sit down, make
17 yourself comfortable. I hope there is some water there
18 and pour yourself a glass. You have a file in front of
19 you. I am sure counsel will tell you what is in it
20 because I do not know but you will get some questions
21 from your counsel and then you will be cross-examined by
22 counsel for the schemes, but just answer the questions
23 and you will be fine. Thank you very much. Mr Beal.

24 Examination-in-chief by MR BEAL

25 MR BEAL: Mr Buxton, please could you look in the bundle at

1 {RC-F2/3/1}. That gives your name and address for
2 a witness statement, is that right? Your business
3 address I should say?
4 A. That is correct, yes.
5 Q. Does that remain your business address?
6 A. Yes, it does.
7 Q. Could you look at page 12, please. {RC-F2/3/12} Is that
8 your signature?
9 A. Yes, that is my signature.
10 Q. And you give a statement of truth there. Have you had
11 a chance to look back through that witness statement?
12 A. I have, yes.
13 Q. Are the contents true to the best of your knowledge and
14 belief?
15 A. They are, yes.
16 Q. May I just ask one or two supplemental questions
17 in-chief. Please could you be shown on the screen
18 RC-J2/61/1. This is a confidential document so I am not
19 going to read it out, but if we look at page 1 there
20 is -- that is the wrong one.
21 THE PRESIDENT: Mr Buxton, while counsel is finding the
22 correct reference, electronic documents are by their
23 nature not manipulatable by the witness. You cannot
24 move pages. If you want to see any other parts of the
25 document then just say so and we will bring it up and do

1 not be shy about that. You need to be comfortable at
2 locating yourself in a document, so just say.

3 A. Okay, thank you.

4 (Pause)

5 Q. I am going to scrap that question because it does not
6 need to be asked in the light of having the wrong
7 document.

8 Now, one of the things that has been suggested in
9 the course of submissions is that if the interchange
10 fees were not set by the schemes, what would happen is
11 that the schemes would change their rules and one of the
12 ways in which the schemes might change their rules would
13 be by introducing bilateral negotiation between either
14 merchants and cardholders' banks or between acquirers
15 and cardholders' banks. Do you have any view on what
16 impact that would have if, for example, you were
17 required to negotiate individually as a business with
18 cardholders' banks?

19 A. I guess in terms of the number of issuers there are,
20 there are a huge number of different card issuers.
21 I mean we are fortunate, due to the size and scale of
22 Jet2, that we have relationships with some of the major
23 banks, the five major banks in the UK, but, for example,
24 we do not have any relationship with Nationwide who are
25 a major card issuer and then beneath that there are

1 many, many issuers out there. It would be impossible to
2 go out and negotiate individually with each issuer, even
3 for a business of the size and scale of ours. For much
4 smaller merchants it would just be completely
5 impractical.

6 Q. What about if the situation changed so that the merchant
7 acquirers were able to negotiate directly with
8 cardholders' banks? Would that have any impact on your
9 relationship with your merchant acquirers?

10 A. Again, I think it would be very challenging for the
11 acquirers. What we could also end up with in that
12 situation -- we use five different merchant acquirers
13 because of the nature of our business and if each
14 individual acquirer was then negotiating with issuers,
15 we would get different rates with different issuers, so
16 I would just -- it would just be incredibly complicated.
17 I cannot see practically how it would work.

18 MR BEAL: Thank you. I do not have any further questions
19 for you but my learned friend, Mr Kennelly, will.

20 Cross-examination by MR KENNELLY

21 MR KENNELLY: Mr Buxton, good morning.

22 A. Good morning.

23 Q. You are you say the director of group finance and
24 treasury for Jet2.com Limited and Jet2 Holidays Limited?

25 A. That is correct, yes.

1 Q. And you have held that role since April 2023?

2 A. Yes, I have, yes.

3 Q. And prior to that you were group financial controller
4 and head of treasury?

5 A. That is correct.

6 Q. A role that you held since January 2021?

7 A. Correct.

8 Q. So that means you have held full responsibility for
9 payments since January 2021?

10 A. That is correct.

11 Q. And payments to Jet2 -- and I use Jet2 collectively, as
12 you do -- using Visa and Mastercard are of great
13 importance to your business, are they not?

14 A. That is correct.

15 Q. So as part of your role it is important to be aware of
16 the scheme rules that are issued by Visa and Mastercard?

17 A. I have -- yes, I have an understanding of the rules.

18 Q. Yes, because you need to know what the business can and
19 cannot do --

20 A. Mm-hm.

21 Q. -- in receiving payments from Visa and Mastercard.

22 Mr Buxton, I want to ask you about payment options
23 because in addition to Mastercard and Visa, Jet2 also
24 accepts payments from American Express and PayPal, does
25 it not?

- 1 A. That is correct.
- 2 Q. And the reason that you accept American Express and
3 PayPal is because customers want to pay with them?
- 4 A. Yes, I think that is fair to say, yes.
- 5 Q. Because the business has taken the decision that it
6 should accept the cards that customers want to use, or
7 the methods that customers want to use?
- 8 A. We offer more than just payments by Visa and Mastercard,
9 yes.
- 10 Q. Because you want to --
- 11 A. Because we need to give an element of choice to our
12 customers in terms of payment methods.
- 13 Q. And focusing on American Express, an important reason
14 why customers want to book with American Express is
15 because American Express cards generally offer better
16 rewards than Mastercard and Visa?
- 17 A. My understanding is that can be the case.
- 18 Q. So customers like to use, for that reason, to get the
19 good rewards, customers like to use Amex cards for
20 higher value purchases like flights and holidays?
- 21 A. Some customers do, but in terms of our mix of card
22 usage, 85% of our cards that we accept payment on are
23 Mastercard and Visa. The remaining 15% is PayPal and
24 Amex, so it is a relatively small amount.
- 25 Q. But when they use them, when customers do use Amex, they

1 like to use them for higher value purchases like flights
2 and holidays to get rewards?

3 A. I could not -- I could not sit in the shoes of
4 a customer to say that that is the reason why, but they
5 may be doing that to gain the rewards available.

6 Q. Can I just ask you to check something in your statement,
7 Mr Buxton. Paragraph 23, it is on {RC-F2/3/5}. You see
8 there you say -- you have discussed the split of Amex
9 cards and then you say:

10 "Amex cards generally offer better rewards and
11 consumers therefore like to use them for higher value
12 purchases such as flights and holidays."

13 A. That is correct.

14 Q. Is it fair to say that payments -- coming back to the
15 point you just made, Mr Buxton, that payments made using
16 Amex and PayPal in fact do represent quite a significant
17 part of your business?

18 A. As I said, 85% of payments are on Mastercard and Visa
19 and then the remaining 15% are on PayPal and Amex, so --

20 THE PRESIDENT: Mr Buxton, that is 85% by volume?

21 A. By --

22 THE PRESIDENT: Or by value?

23 A. I think the two are broadly the same, so I would say 85%
24 by volume.

25 THE PRESIDENT: I see, but you think that was --

1 A. There will not be a fundamental difference in the
2 average transaction value on different cards.

3 THE PRESIDENT: I see. I am grateful.

4 MR KENNELLY: Mr Buxton, let us just unpack that a little.

5 If we go to paragraph 15 of your witness statement, that
6 is page 3 {RC-F2/3/3}, and this is the split you have
7 just been discussing with the president.

8 A. Yes.

9 Q. You set out the percentage of transactions by Mastercard
10 and Visa in the year to May 2023 and so just looking at
11 Jet2.com in the second line you say Mastercard
12 payments -- sorry, just pausing here for a second. Is
13 this confidential? I want to make sure I do not read
14 anything out that is confidential. No one is telling me
15 that it is, so I will proceed.

16 "Mastercard payments account for 45% of our overall
17 card sales ... with 37% for Visa."

18 And it says, as you say:

19 "The remainder of card payments are Amex and
20 PayPal."

21 That leaves about 18% of sales on Amex and PayPal?

22 A. Yes, that is correct.

23 Q. And you would accept that is a significant figure?

24 A. I guess it depends on your view of what significance is.

25 Q. Are you able --

- 1 A. It is not insignificant.
- 2 Q. Are you able to give the Tribunal an estimate --
- 3 A. It is subjective, is it not, of what is and is not
- 4 significant. But it is not insignificant.
- 5 Q. Can you give the Tribunal an estimate, we do not have
- 6 the figures in the bundle, of what 18% might look like
- 7 in terms of value?
- 8 A. Of our overall card sales it is probably -- let us say
- 9 our overall card sales for the group will be in the
- 10 region of 4 billion, so it will be about 700 million.
- 11 Q. Very good. We have some statistics from 2019,
- 12 Mr Buxton. For this we are going to pull up a document
- 13 just to -- sorry, one second please. Sorry, Mr Buxton,
- 14 I think I do not need to go to these documents in view
- 15 of the helpful answers you have been giving.
- 16 I am going to skip ahead to commercial cards.
- 17 A. Yes.
- 18 Q. Mr Buxton, you accept that commercial cards are
- 19 a distinct category of Visa card?
- 20 A. As being separate from consumer cards?
- 21 Q. Yes.
- 22 A. Yes, I do.
- 23 Q. And Jet2 does not treat commercial cards any differently
- 24 from consumer cards, does it?
- 25 A. No, we accept all cards, all Visa cards.

1 Q. And that decision is driven, is it not, by Jet2's desire
2 to give customers the freedom, as you said earlier, to
3 pay by their payment method of choice?

4 A. That is correct.

5 Q. Now, you are aware, are you not, Mr Buxton, that the
6 MIFs that are paid by acquirers on commercial card
7 transactions are significantly higher than the MIFs paid
8 on consumer card transactions?

9 A. Yes, that is correct.

10 Q. And despite that, at no point during the claim period
11 did Jet2 decide to stop accepting commercial cards?

12 A. I think given the size and scale of our business and the
13 volume of customers that we have, we have to be in the
14 position where we will accept commercial and consumer
15 cards.

16 Q. At no point, Mr Buxton, did Jet2 try to steer customers
17 away from using commercial cards?

18 A. No, we have not, no.

19 Q. And at no point during the claim period did Jet2 seek to
20 recover that additional MIF cost through surcharging on
21 commercial cards?

22 A. No, we have not surcharged since -- it is in here
23 somewhere, bear with me. Credit cards we stopped
24 surcharging in December 2015 and we have never
25 surcharged on debit cards.

1 Q. I will come back to that point in a moment. The reason,
2 again -- sorry for repeating myself, Mr Buxton, but the
3 reason why you do not do any of those things for
4 commercial cards is because some customers want to pay
5 using commercial cards and you want to facilitate the
6 customers.

7 A. Yes. We have to accept the cards that our customers
8 want to pay with, so we have -- we accept all Visa and
9 Mastercard.

10 Q. And in particular commercial card customers benefit from
11 using a commercial card because they get a percentage
12 rebate of the transaction value from the issuer.

13 A. Certainly for -- I think we see two different types of
14 commercial cards. There are the physical commercial
15 cards that were talked about earlier, but there are also
16 virtual credit cards, so a virtual credit card is
17 a single use credit card that is generated and used
18 quite frequently in the travel industry to pay for
19 flights and hotels and the virtual credit cards I am
20 aware have I think interchange fees around 2% and
21 an element of that is then passed back to the company
22 that is paying by the virtual card as a rebate by the
23 issuer.

24 MR TIDSWELL: Can you help us a bit with who is the
25 cardholder in that situation? Would it be a travel

1 agent, for example?

2 A. Yes, so we see this with a lot of the online travel
3 agents and the -- I think the reason that it is done is
4 that we end up with a separate credit card per
5 transaction and this particularly when we were in COVID
6 was very helpful because we were having to refund
7 millions of transactions because all flying was
8 cancelled, so having them going back to individual cards
9 actually made the process work better than having
10 everything going back to a single card, so the use of
11 virtual cards has increased significantly probably over
12 the last five years within the travel industry and the
13 hospitality industry.

14 MR TIDSWELL: Thank you.

15 MR KENNELLY: And for the rebates -- for the customers that
16 get these rebates, they can be very significant, can
17 they not?

18 A. For the online travel agents?

19 Q. Yes.

20 A. They are a sizeable revenue stream, yes.

21 Q. Moving on, Mr Buxton, to the Honour All Cards Rule, you
22 say at paragraph 34 of your statement -- just to go to
23 that please, it is on page 8 {RC-F2/3/8}, top of the
24 page. You say there:

25 "I am aware of certain rules that prohibit merchants

1 who accept both Visa and Mastercard cards from
2 encouraging customers to use alternative payment
3 methods."

4 Do you see that?

5 A. Yes.

6 Q. Could you explain to the Tribunal what those rules are?

7 A. I cannot specifically. My understanding is that we are
8 not allowed to offer discount incentives to use certain
9 payment types, so we could not say to someone "You will
10 save 5% if you pay by route X". That is my
11 understanding.

12 Q. And are you distinguishing there between Visa and
13 Mastercard in any way?

14 A. No, I am not distinguishing in between them.

15 Q. I am just going to focus for a moment on the Honour All
16 Cards Rule, Mr Buxton.

17 A. Yes.

18 Q. You are aware, are you not, that Jet2 is not required
19 under Visa's rules, or under Mastercard's rules, to
20 accept all forms of Visa or Mastercard?

21 A. My understanding is that if we accept commercial cards
22 we have to accept all commercial cards.

23 Q. But it was always open to you to only accept debit
24 cards, for example, not to accept credit cards? That
25 was always the case, were you aware of that?

- 1 A. In our claim period?
- 2 Q. Yes.
- 3 A. I think practically we would never be in a situation
4 where, as I said earlier, we could only accept debit
5 cards or accept credit cards. When, you know, you are
6 taking 8, 9, 10 million bookings a year we have to be
7 able to take payments by both debit and credit cards
8 because that is what our consumers have.
- 9 Q. And it was always open to you to decline commercial
10 cards. You had that option, did you not?
- 11 A. But that would be all commercial cards and, you know, as
12 I said earlier, we need to be able to accept all cards
13 given the size and scale of our business.
- 14 Q. And it is the size and scale of the business that
15 prompts you to do it. It is not a Visa or Mastercard
16 rule that forces you to accept commercial cards?
- 17 A. Accept all commercial cards.
- 18 Q. It is not a Visa rule that makes you accept them?
- 19 A. No.
- 20 Q. And to the extent that you are accepting all Visa
21 branded cards, not just commercial cards, again you
22 would accept that is not a Visa rule that forces you to
23 accept them all, it is a commercial imperative?
- 24 A. To accept all commercial cards?
- 25 Q. No, no, just all Visa branded cards.

1 A. Sorry?

2 Q. You said you accepted all Visa branded cards.

3 A. Yes.

4 Q. You do that because customers want to use them.

5 A. Yes. I mean, the -- in the UK consumers have either

6 a Visa or a Mastercard, or both, so we have to accept

7 them in order to take payments because we take all our

8 payments online.

9 Q. It was a commercial decision, was it not, Mr Buxton?

10 A. It is a commercial decision that -- yes, a business of

11 our size and scale has to take -- we do not have any

12 alternative option.

13 Q. So it was not a Visa rule that made you accept them all?

14 A. It is a commercial decision that we have had to make.

15 THE PRESIDENT: Mr Kennelly, just so that we are clear, you

16 have been using the designation "Visa" sometimes and

17 "Visa or Mastercard" sometimes. I think the witness is

18 answering in relation to both schemes but can I just

19 ensure that we are clear that you have been impliedly

20 putting the same point for Mastercard when you have

21 mentioned Visa, or is there a distinction and we will

22 have to go over the same questions again?

23 MR KENNELLY: That is very fair, Mr President.

24 Sorry, Mr Buxton, to be clear I have been putting to

25 you Visa and Mastercard so far, except in one instance

1 where I thought Mr Buxton might be referring to
2 a Mastercard non-discrimination rule and I am sure
3 Mastercard can take that up. I am not as familiar with
4 that rule as Mastercard is. But when I ask you
5 questions about Visa, I mean Visa and Mastercard.

6 A. I understood.

7 THE PRESIDENT: That is very helpful. So, Mr Kennelly, use
8 "Visa" we will read "Mastercard" in and, Mr Buxton, that
9 is how you can answer. If you want to draw
10 a distinction, please do, but unless you do when you say
11 "Visa" I am clocking "Visa Mastercard" and we will
12 proceed like that. Thank you.

13 A. Thank you.

14 MR KENNELLY: So then surcharging, Mr Buxton. Are you
15 familiar with the relevant law dealing with surcharging?

16 A. I am not familiar with the full detail of all of the
17 laws around surcharging.

18 Q. Were you aware that until 12 January 2018 merchants in
19 the UK were expressly permitted to surcharge on credit
20 cards issued by UK banks?

21 A. So as I said, we ceased charging on credit cards in
22 December 2015. My recollection was that that preceded
23 the change to the rules that meant that you could not
24 surcharge for consumer cards.

25 Q. Sorry, you say the rule -- the law that meant you could

- 1 no longer surcharge?
- 2 A. Yes.
- 3 Q. You are aware then that that came into force on
4 13 January 2018?
- 5 A. I am not aware of the specific date.
- 6 Q. But from that time, without saying precisely when the
7 date was, you knew that merchants then were prohibited
8 by law from surcharging?
- 9 A. Yes, and that was the reason why we stopped surcharging
10 for credit cards in 2015.
- 11 Q. I am sorry, you said that was the reason --
- 12 A. Yes, so we stopped charging surcharges for credit cards
13 on 24 December 2015 and that was in advance of the
14 change to the law.
- 15 Q. Indeed, in advance of it.
- 16 Now, you did surcharge on all credit card and
17 American Express transactions before 2016?
- 18 A. That is correct.
- 19 Q. And, as you say, Mr Buxton, you decided to stop
20 surcharging on 24 December 2015. That is when you
21 stopped surcharging?
- 22 A. Yes.
- 23 Q. How was that decision taken?
- 24 A. I am not aware of the details of that decision. I was
25 not responsible for payments at that time and I was not

- 1 party to the making of that decision.
- 2 Q. But, Mr Buxton, that was in December 2015. Were you not
3 group financial controller at the time?
- 4 A. I was, but we had a separate group treasurer in 2015 who
5 held responsibility for payments, so I was not party to
6 any discussions that were made on that aspect.
- 7 Q. And do you recall, Mr Buxton, even if you were not
8 involved in the making of the decision, how it was
9 communicated, this decision to stop surcharging at the
10 end of 2015?
- 11 A. I know it was communicated to customers. There will
12 have been an announcement on our website to say that we
13 were no longer charging for cards, if that is what you
14 are referring to.
- 15 Q. So the customer announcement is the first you heard that
16 surcharging was no longer going to take place?
- 17 A. I cannot recall the exact timeline of events around
18 December 2015. I may have been told a few days before,
19 but I cannot recall the exact timelines.
- 20 Q. Are you aware, Mr Buxton, of any searches that were
21 undertaken to locate documents concerning this decision
22 to stop surcharging?
- 23 A. Yes, we did -- we did have a look to see whether we
24 could find any specification. The individual who was
25 our commercial director at the time no longer works for

- 1 Jet2, so we could not find anything relevant to it.
- 2 Q. You did not explain in your statement why Jet2 stopped
3 surcharging in 2015. Do you have any personal knowledge
4 as to why Jet2 took that decision?
- 5 A. My understanding, as I said earlier, was that it was in
6 advance of expected changes to the laws. That was my
7 understanding. That is all I know.
- 8 Q. And what is that understanding based on, Mr Buxton? Is
9 that based on a document, or anything you can remember
10 reading?
- 11 A. That is my recollection based on conversations at the
12 time.
- 13 Q. Conversations with whom, Mr Buxton? Do you recall any
14 names?
- 15 A. No, I do not, sorry.
- 16 Q. Is it possible, Mr Buxton, that decision to stop
17 surcharging was a commercial decision, there were
18 commercial reasons also for deciding to stop
19 surcharging?
- 20 A. I cannot comment on it, I am sorry. I do not know.
21 I do not know.
- 22 Q. You do not know either way?
- 23 A. As I said, I was not part of the decision-making process
24 on why we stopped charging. As I said, my understanding
25 was that it related to a few changes to the rules, the

- 1 law around the ability to surcharge.
- 2 Q. And do you recall -- sorry, one last question on this,
3 Mr Buxton. That understanding is based on
4 a conversation. Do you remember roughly when that
5 conversation took place?
- 6 A. I do not remember when that conversation took place.
- 7 Q. At paragraph 37 of your witness statement, Mr Buxton,
8 can I show you -- it is at page 8 {RC-F2/3/8}. You see
9 paragraph 37 you say, about halfway down -- you refer to
10 the decision to stop surcharging and then you say:
11 "If we were permitted to do so again, then the
12 application of surcharges would be a commercial decision
13 and I could not speculate on the outcome."
14 Do you see that?
- 15 A. Mm-hm.
- 16 Q. When you say "Permitted to do so again", do you mean if
17 the law was changed that would allow you to surcharge?
- 18 A. That is what I meant by that, yes.
- 19 Q. So it has got nothing to do with Visa's and Mastercard's
20 rules as to whether you can surcharge or not, it is the
21 law that you are discussing here?
- 22 A. I am not certain I understand the technicality of that
23 point.
- 24 Q. Well, you said a moment ago that you stopped surcharging
25 because you anticipated a legal change. You say here if

1 the law -- you just said that "If we were permitted to
2 do so again" means "if the law allows us to surcharge
3 again". It is as simple as that, Mr Buxton. You are
4 simply saying if the law changed this is what you would
5 consider.

6 THE PRESIDENT: Well, Mr Kennelly, are you hypothesising
7 a prohibition on scheme rules to surcharging, or are you
8 postulating that the only barrier to surcharging is the
9 law apart from scheme rules?

10 MR KENNELLY: Only a change of the law.

11 THE PRESIDENT: So you are otherwise free to do it.

12 MR KENNELLY: Sorry?

13 THE PRESIDENT: You are otherwise free to do it.

14 MR KENNELLY: Otherwise -- sorry, no. I am postulating the
15 removal of the bar on surcharging. I am not asking
16 about the scheme rules at all. I am saying if the bar
17 to surcharging was removed from the law, what would Jet2
18 do.

19 THE PRESIDENT: Well, indeed, but you've got an implied
20 question that is begging, which is do the scheme rules
21 prevent or not prevent that outcome, which would
22 obviously affect Jet2's position because they would want
23 to be, one would infer, compliant rather than
24 non-compliant with the scheme rules so --

25 MR KENNELLY: Well, I will test that with Mr Buxton because

1 if you look at the rest of your paragraph, Mr Buxton,
2 you say:

3 "If we were permitted to do so again ..."

4 And I will ask the question again so you have
5 a chance to think about it. When you say "If we were
6 permitted to", do you mean there permitted by the law?

7 A. I think it needs to be a combination of the law and the
8 scheme rules. If the combination of the two allows it
9 to happen then, as I said, the application would be
10 a commercial decision and I could not speculate on the
11 outcome.

12 Q. Well, then, let us assume it is a combination, as you
13 say, of the law and the scheme rules. You say the
14 application of surcharges would be a commercial
15 decision. You say you cannot speculate but then you go
16 on to describe the factors that you take into account in
17 taking such a commercial decision and you see there,
18 Mr Buxton, you say brand perception, that would have to
19 be managed very carefully and the impact that surcharges
20 would have. Do you mean the perceptions of your
21 customers if you were to surcharge?

22 A. Yes, I do.

23 Q. And then you go on:

24 "We would also be very mindful of the approach that
25 our competitors take."

1 Again the focus is on there on how you would look
2 compared to your competitors in the eyes of your
3 customers?

4 A. I think the point that I was trying to make there is
5 that if we apply surcharges and our primary competitors
6 do not apply surcharges, then the perception of Jet2 may
7 be impacted adversely compared to the competition. We
8 pride ourselves with business on our customer service,
9 our openness and how we deal with the people we are
10 taking on holiday and that is very important to us in
11 any decision that we make.

12 Q. On this question of surcharging, you are aware that
13 commercial cards were not covered by this legislation.
14 That is correct, is it not?

15 A. I am aware.

16 Q. But you still -- so you were still allowed to surcharge
17 for commercial cards?

18 A. We were.

19 Q. But you have not done so?

20 A. We have not.

21 Q. And as you said a moment ago you have not surcharged for
22 Amex cards either?

23 A. We have not.

24 Q. And why have you not?

25 A. I think it comes down partly to that final point there,

1 so our -- we see our major competitors as TUI and
2 Easyjet in the leisure travel business, so big holiday
3 companies. Neither TUI nor Easyjet surcharge their
4 customers and we have chosen to take the same approach
5 as them.

6 THE PRESIDENT: Mr Cook, I think in that case we will take
7 a short transcriber break. We will rise, Mr Buxton, for
8 ten minutes. Please do not talk to anyone about your
9 evidence. I am sure you would not want to, but do not
10 and we will see you back in the witness box in ten
11 minutes' time. Thank you.

12 (12.08 pm)

13 (Short Break)

14 (12.18 pm)

15 THE PRESIDENT: Mr Buxton, welcome back. Mr Cook, over to
16 you.

17 Cross-examination by MR COOK

18 MR COOK: So, Mr Buxton, you were asked some questions at
19 the start of your evidence about bilateral negotiations.
20 You did not address bilateral negotiations in your
21 original statement, did you?

22 A. Sorry, I am not sure --

23 Q. Right at the start of your evidence you were asked some
24 questions by Mr Beal about bilateral negotiations, so
25 shall we call -- negotiations between Jet2 and issuers,

1 acquiring banks and issuers?

2 A. I understand.

3 Q. That is what I am talking about, so that is what we call

4 bilateral negotiations. So you did not address any of

5 that in your original statement. Can you explain why

6 not?

7 A. I was not -- it was not discussed at the time. I guess

8 it is, from my perspective, a hypothetical situation.

9 It is not something that is actually -- we are able to

10 do today.

11 Q. And just in terms of your experience, you have no

12 personal knowledge or experience of negotiations between

13 banks, do you?

14 A. Sorry, between?

15 Q. Between banks.

16 A. Between two banks?

17 Q. Yes.

18 A. No, I have never worked for a bank.

19 Q. Now, the first question you were asked by Mr Beal was

20 what would happen if Jet2 was required to negotiate

21 individually with cardholder banks?

22 A. Yes.

23 Q. I am afraid that question was put on a false premise.

24 Mastercard is not suggesting that merchants would

25 negotiate directly with issuers. So just to clear that

1 away, that answer is -- that question is a situation
2 that nobody is suggesting would arise.

3 So what I want to ask you about is a second question
4 that was put to you about if your acquirers were being
5 asked to negotiate with issuers, so that is what
6 I wanted to ask you about.

7 Now, to be clear we are not suggesting that there
8 will be a separate deal for Jet2 and other merchants,
9 this will just be a general negotiation of the terms of
10 dealing between a merchant acquirer and issuer, do you
11 understand that?

12 A. Mm-hm.

13 Q. Now, in terms of your experience I think you trained as
14 an accountant; is that right?

15 A. That is right.

16 Q. And then you have entirely worked in the finance
17 department of businesses, primarily Jet2?

18 A. Yes, so I trained with Deloitte between 1992 and 1995.

19 I have then had a variety of roles in industry, working
20 in finance departments between 1995 and 2013 and
21 I joined Jet2 in 2013.

22 Q. So it is accountancy followed by finance departments
23 of --

24 A. It is all accountancy.

25 Q. And your role essentially in finance departments is

1 accountancy still; is that right?

2 A. Yes, I think that is fair to say.

3 Q. Yes, I mean sometimes -- the future accountancy,
4 budgeting and matters like that --

5 A. It is all finance.

6 Q. It is all finance, yes. And you said in your evidence
7 that in 2015 and we are talking about the change to the
8 surcharging policy of Jet2, you say Jet2 had a separate
9 group treasurer at that time who had responsibility for
10 payments?

11 A. Yes.

12 Q. When did you take over responsibility for payments?

13 A. So I took over payments in January 2021.

14 Q. January 2021?

15 A. Yes.

16 Q. Okay. So it is really fairly a recent matter. Had you
17 dealt with payments or had responsibility for payments
18 before that?

19 A. I did not have responsibility before that. I had some
20 awareness of what we were doing in the payments side
21 because in our finance function, effectively there are
22 three heads of finance reporting into the group CFO, one
23 of which was the group treasurer and one of which was
24 myself. In 2021 we changed the structure so Treasury
25 was rolled into my responsibilities at that point.

1 Q. So -- I mean essentially when I said you had no
2 experience of bank negotiations, you really have not had
3 much experience of payment cards until relatively
4 recently; is that right?

5 A. Three years of experience now.

6 Q. So looking at that you are not really in a position, are
7 you, to comment on the complexity of negotiations
8 between acquirers and issuers, are you?

9 A. We have five acquirers and we have negotiated with our
10 acquirers over recent years. The issuers are part of
11 banks. I have negotiated financing arrangements with
12 banks over the last three years that I was involved in
13 credit facility term loans, so I have had experience of
14 negotiating with banks of which issuers may be part and
15 I have had experience of negotiating with acquirers.

16 Q. But no experience of banks negotiating with each other?

17 A. No, because I have never worked for a bank.

18 Q. Now, in terms of your relationship with your merchant
19 acquirers, if an actual or potential acquirer told you
20 that you would not be able to accept cards from all
21 issuing banks, that presumably would be a very
22 unattractive outcome, very undesirable outcome for Jet2,
23 would it not?

24 A. I think it would be very confusing for a customer if
25 they went and made payments on our website and it said

- 1 "No, that issuer bank card is not accepted".
- 2 Q. So if an acquirer said "If you come with us you will not
3 be able to get all issuers available" that would be not
4 an attractive acquirer, would you?
- 5 A. I think from a consumer perspective it is completely
6 impractical.
- 7 Q. And from your perspective as a business that is
8 impractical?
- 9 A. Well, yes, because the customer would go to pay on our
10 website and they would put their card details in and it
11 would say "Sorry, your card is not accepted".
- 12 THE PRESIDENT: Presumably, Mr Buxton, what you are saying
13 is you would be sensitive to a consumer's desire to pay
14 in a manner that they would want, within reason, so they
15 would want -- if they wanted to pay by way of
16 a particular card, you would want to facilitate that?
- 17 A. I think my understanding of the question I am being
18 asked is if certain issuers of Visa cards were not
19 effectively approved by our acquirer because there was
20 no arrangement between them, our website, our payment
21 page is Visa branded, and I think by implication of it
22 being Visa branded, if you present a Visa card, you
23 would expect to be able to pay with that Visa card.
- 24 MR COOK: But from your commercial perspective if you are
25 upsetting customers that is a bad thing, presumably?

1 A. Well, as I have said, if we are putting a Visa
2 branded -- a Visa branding on our payment page where the
3 implication is that a customer is coming with us to book
4 a holiday and they get to that, and it is Visa branded
5 but not your Visa card, i.e. your Visa card gets
6 rejected, yes, it is not going to be good for our
7 customers and our customers will not be happy because
8 they want to go on holiday with us.

9 Q. And that is not good for your business?

10 A. It is not good for our business, no.

11 Q. Nothing further.

12 PROFESSOR WATERSON: Could I ask a couple of questions?

13 A. Yes, of course.

14 Questions by THE Tribunal

15 PROFESSOR WATERSON: So first of all you said that the rules
16 on surcharging changed in advance of the law as you
17 understood it?

18 A. I am not entirely clear on that point around the
19 differentiation between the rules and the law but we
20 were expecting a change, or my understanding was there
21 was a change coming so we chose at that point to stop
22 surcharging.

23 PROFESSOR WATERSON: Yes, and when people I guess pay quite
24 some months in advance for their holidays -- I mean,
25 what would be the maximum time between making a payment

1 and actually taking the holiday, would you say?

2 A. So we are on sale now for at least summer 2025, so you
3 could book a flight or a holiday through until probably
4 the end of October 2025.

5 PROFESSOR WATERSON: Right, so in other words you would have
6 to be -- or your company, not you yourself, but your
7 company would have to be very aware of upcoming changes
8 in the law in order that -- you know, if someone is
9 buying a holiday for summer 2025, that the rule does not
10 suddenly change in between?

11 A. I think the rules probably relate more to the timing of
12 the payment.

13 PROFESSOR WATERSON: I see.

14 A. But you have got that added complexity in that --
15 particularly for a package holiday -- you will pay
16 a deposit and then you will pay a final balance ten
17 weeks prior to the date of travel. So I guess, yes,
18 there is a risk of the impact of the rules changing
19 between the two, but if rules or laws change, that is
20 something we would just have to communicate out to our
21 customers.

22 PROFESSOR WATERSON: Yes, yes, but they might well be very
23 annoyed if --

24 A. Yes, yes.

25 PROFESSOR WATERSON: So this is just a slightly personal

1 thing, but I actually recently travelled with Jet2 about
2 three weeks ago.

3 A. I hope you had a good time!

4 PROFESSOR WATERSON: Yes, we did, the flights were online --
5 on time and so on, yes, and it was a very pleasant
6 experience, better than --

7 A. Good, I am glad to know.

8 PROFESSOR WATERSON: -- the experience on some other
9 airlines.

10 But anyway, the point I was going to make about this
11 was so the way that I got to buying the flights was
12 through Skyscanner and then, you know, flights from your
13 company and flights from other companies came up and we
14 chose your company. So then presumably Skyscanner does
15 not provide this service for free, so what happens
16 there? Does my payment actually go through Skyscanner,
17 or --

18 A. Did you pay on the Skyscanner website or did it route
19 you through to the Jet2 website?

20 PROFESSOR WATERSON: I think it probably brought me through,
21 yes.

22 A. If it routes you through to the Jet2 website -- I am not
23 certain of the specifics for Skyscanner, but if it
24 routes you directly through to the Jet2 website then it
25 is Jet2 that is taking the payment through our acquirers

1 and then there will be, I would imagine, a commission
2 arrangement in the background to pay commission to
3 Skyscanner for your booking.

4 PROFESSOR WATERSON: Right, yes. Okay. That is what
5 I want -- but if I had done it direct on the Skyscanner
6 site then they might have taken the payment and --

7 A. Yes. There are varying different ways that it works as
8 to how the payments are taken through third parties and
9 some are taken directly onto our website and some are
10 taken separately.

11 PROFESSOR WATERSON: Yes. So the final point, you mentioned
12 the COVID experience which I am sure was very difficult
13 for the company?

14 A. Yes.

15 PROFESSOR WATERSON: In that -- you know, if you are forced
16 to make a refund to a customer because you cannot fly
17 then how would that be processed? I mean, you have
18 already taken money from them and you have already paid,
19 therefore the acquirer has already provided you with the
20 money.

21 A. Yes.

22 PROFESSOR WATERSON: What are the mechanics of you making
23 a refund to a customer, then?

24 A. So essentially we modified our -- or amended our
25 reservation systems to -- and I am not technical, I do

1 not work in IT, but effectively it reversed the
2 transactions and it refunds the transactions through the
3 gateways, acquirers, back to the issuer, so the refund
4 will go onto the card that you originally paid with,
5 provided that that card is still live and active and
6 then anything where we were unable to make an automated
7 payment, we then had to contact the customers directly
8 to arrange the repayment back to them.

9 PROFESSOR WATERSON: Yes, okay. So would there be any cost
10 to you in that arrangement of having to take money and
11 subsequently refund? Would there be a net cost that --

12 A. From a payment card perspective?

13 PROFESSOR WATERSON: Yes.

14 A. So my recollection was that elements of the cost, the
15 interchange fees were refunded back to us. I think some
16 of the other fees we had to continue to bear.

17 PROFESSOR WATERSON: Right, thank you. That is very useful,
18 yes.

19 MR TIDSWELL: Just a couple of questions from me as well.

20 Just on that last point, would you pay an interchange
21 fee on the refund transaction as well, do you know?

22 A. No, no. We -- the interchange fees were refunded by
23 most of the acquirers. We had an issue with one of our
24 acquirers -- I think it is detailed somewhere in the
25 evidence that we got a -- one of our acquirers was

1 resisting refunding interchange fees. We worked with
2 a payment consultancy, CMSPI, who helped us through that
3 process and we ended up negotiating a repayment of those
4 fees.

5 MR TIDSWELL: And that is on the original transaction but
6 what about the repayment transaction?

7 A. So there is no interchange -- basically the interchange
8 fees are reversed, refunded back to us as part of that
9 repayment.

10 MR TIDSWELL: Yes, thank you. Can I ask you about the table
11 in paragraph 25 of your witness statement and I just
12 was -- I just wanted to explore with you the difference
13 between the volume percentage -- percentages for volume
14 and percentages for value. I think I understand why and
15 I am particularly interested in Jet2.com. Can you just
16 see the difference in the table {RC-F2/3/6} at 25 which
17 is 78.24% domestic MIF and then when you get to by value
18 it is 92.27, which struck me as being quite
19 a significant difference and obviously a difference then
20 in the intra-EEA MIF and the inter-regional. I just
21 wondered if you were able to tell us why there would be
22 that difference by value compared to volume?

23 A. So the MIFs on intra-EEA and intra-regional are
24 significantly higher than domestic MIFs. I think that
25 the virtual credit cards that I referred to earlier

1 quite often come through as inter-regional MIFs,
2 typically at a 2% interchange fee, so they sit in the
3 inter-regional.

4 One of the reasons -- you can see in the table --
5 why we broke it all out by year was so that you could
6 see the impact of Brexit when everything that was
7 previously intra-EEA in 2022 then became an
8 inter-regional MIF.

9 MR TIDSWELL: I see, so there was quite a bit happening
10 through that period --

11 A. Yes.

12 MR TIDSWELL: -- in relation to the mix. Because actually
13 your point about inter-regional would suggest the number
14 would be -- the value would be higher rather than lower
15 but it is the other way round. That is actually what
16 made we wonder about that. Because the value of
17 inter-regionals is only 4.3% whereas the volume, unless
18 I am misunderstanding the table, the volume is 14.3.

19 A. So the bottom of the table is the transaction value
20 itself but because the MIFs are so much higher that is
21 why the value of the MIFs is a lot higher than the value
22 of the actual transaction -- or the proportion of the
23 MIFs is a lot higher than the value of the transactions
24 themselves.

25 MR TIDSWELL: I see. Yes, that is really helpful. That

1 does make sense.

2 THE PRESIDENT: Any questions arising out of that?

3 MR KENNELLY: No thank you.

4 MR BEAL: No re-examination.

5 THE PRESIDENT: Mr Buxton, we are very grateful for your

6 help. Thank you very much, you are released.

7 A. Thank you.

8 (The witness withdrew)

9 MR BEAL: May I now please call Neil Bailey of Pendragon to

10 give evidence for the Claimants.

11 MR NEIL BAILEY (sworn)

12 THE PRESIDENT: Do sit down, make yourself comfortable.

13 There is some water there should you need it and

14 I suspect you have your witness statement in front of

15 you but counsel will take you to that.

16 A. Okay, thank you.

17 Examination-in-chief by MR BEAL

18 MR BEAL: Mr Bailey, please could you turn to {RC-F1/1/1}.

19 Is that your witness statement? If it helps --

20 A. I am trying to find.

21 Q. -- the signature is at page 22 {RC-F1/1/22}.

22 A. Sorry, RC, tab 1?

23 Q. RC-F1. I am hoping it is the first one in that file.

24 A. I have RC-F2 bundle. Is that the wrong bundle?

25 Q. That is the wrong bundle.

1 THE PRESIDENT: Do not worry, it will be sorted out,
2 Mr Bailey.

3 MR BEAL: Do you now have the right witness statement?
4 A. I now have the right one, yes.

5 Q. I hope at page 22 we have a signature. Is that your
6 signature?
7 A. It is.

8 Q. Are the contents of that witness statement true to the
9 best of your knowledge and belief?
10 A. Yes, they are.

11 Q. At paragraph 23 {RC-F1/1/8}, which is page 8, you talk
12 about the difference between consumer cards and
13 corporate cards and you talk about the ability or not to
14 be able to distinguish between them?
15 A. Yes.

16 Q. What about cards that are issued in a foreign country
17 like the United States and cards that are issued in the
18 United Kingdom? Can you distinguish between those?
19 A. I think only by physically looking at them.

20 Q. Yes.
21 A. Only by physically looking at them.

22 Q. Oh, I see. And what about, for example, European --
23 A. Or, sorry, I think if you put it into a machine it might
24 say it requires a signature rather than chip and PIN and
25 that would alert the retailer to say it is actually

- 1 an overseas card.
- 2 Q. And what about cards that are issued, for example, in
3 the EU? Are there any differences with cards issued in
4 the EU?
- 5 A. I do not know, sorry.
- 6 Q. Could I ask you, please -- it is a confidential document
7 but if you could look, please, in bundle {RC-J1/38/1}.
8 We will start at page 1 so I can tell you what the
9 document is. Can you see what that says?
- 10 A. Yes.
- 11 Q. And SOP stands for?
- 12 A. Standard Operating Procedure.
- 13 Q. Could you then please turn to page 6 {RC-J1/38/6}.
14 There is a third bullet point there.
- 15 A. Yes.
- 16 Q. That is the point you have just made, is it?
- 17 A. Yes.
- 18 Q. And then at page 8 {RC-J1/38/8}, top of the page, there
19 is a reference to something called ePDQ. Can you help
20 us with what that is?
- 21 A. EPDQ is the online Barclaycard system that we use, so as
22 opposed to physical chip and PIN machines in car
23 dealerships, so that is where we take a payment via
24 an email link or directly through a website.
- 25 Q. Then at page 9 {RC-J1/38/9} there is a reference to:

1 "If you suspect a fraud attempt may be taking
2 place."

3 How does fraud arise in your business with card
4 payments?

5 A. It is usually when a stolen card is used, so somebody
6 comes into a dealership and puts a card in the machine
7 and the machine then might be able to say -- they will
8 give a code basically which might say "Phone Barclaycard
9 to take further action".

10 Q. And do you ever have any dealings with businesses?

11 A. We do, yes. But not as much as with consumers.

12 MR BEAL: Thank you. There will be some questions for you.

13 Cross-examination by MR KENNELLY

14 MR KENNELLY: Good morning, Mr Bailey.

15 A. Morning.

16 Q. I would like to ask you some questions about surcharging
17 and to take up your statement, your witness statement,
18 {RC-F11/1/9} paragraph 26. Do you have that?

19 A. Yes.

20 Q. In the middle of the paragraph you say:

21 "... we recommend surcharging on card payments above
22 certain limits when surcharging was allowed ... and
23 absolute limits on the amount that we should accept via
24 credit or debit card after surcharging was outlawed."

25 Do you see that?

1 A. Yes.

2 Q. And at paragraph 44 {RC-F1/1/15} which is on page 15 at
3 the top you say:

4 "Pendragon has at times, when it has been legal to
5 do so tried to impose surcharging on high value
6 transactions made on debit or credit cards."

7 Do you see that?

8 A. Yes.

9 Q. And on paragraph 45 over the page {RC-F1/1/16}, the
10 first sentence of that you say:

11 "We ended any attempts to surcharge after it became
12 unlawful to surcharge for card use."

13 Do you see that?

14 A. Yes.

15 Q. Am I right to assume that this reference to surcharging
16 becoming unlawful is a reference to the ban on
17 surcharging, the use of payment instruments regulated by
18 the Interchange Fee Regulation that came into force in
19 January 2018?

20 A. That is correct.

21 Q. And that change was communicated to dealers via
22 a red top communication. Can we just pull that up,
23 please. It is in {RC-J1/18/1}. You should have that on
24 your screen.

25 A. Yes.

1 Q. Just below the boxes at the top of the page, "What's
2 changing;" do you see that, Mr Bailey?

3 A. Yes.

4 Q. "From 13 January 2018, we shall no longer be able to
5 charge customers for using their debit or credit cards."

6 Because prior to January 2018 Pendragon's policy was
7 to surcharge on debit and credit cards,
8 American Express, Visa and Mastercard.

9 A. Yes.

10 Q. And the policy was in place for credit cards from 2005?

11 A. Yes.

12 Q. You say that -- just to show you the document, I will
13 take you first to your witness statement at paragraph 44
14 {RC-F1/1/15}, page 15, 44(a) you refer to your credit
15 card acceptance policy and then you refer to an
16 underlying document. Just to show you that so we are
17 clear about what we are describing, that is {RC-J1/1/1}.
18 It should be on the screen for you. Just below the
19 halfway point, "Credit and debit card charges". Do you
20 see the last sentence of that paragraph:

21 "[reading redacted]"

22 Do you see that?

23 MR BEAL: I am sorry to interrupt, this is a confidential
24 document.

25 MR KENNELLY: I am so sorry, I am so sorry. I apologise and

1 I am sure --

2 MR BEAL: If it helps, I am sure the witness is willing to
3 say from 2005 if he wants to what the position was, but
4 it is up to the witness.

5 THE PRESIDENT: Mr Bailey --

6 A. I can, yes. I suppose in a nutshell where we could
7 charge for credit cards we recommended charging --
8 surcharging credit cards. I say -- I think I say
9 somewhere else in my witness statement with a low degree
10 of success. Debit cards are cheap so you would not
11 charge 10 or 12p on. When debit cards became more
12 expensive, when interchange rules changed in 2015, we
13 charged -- we recommended charging both debit and credit
14 cards because we are a high value retailer and if you
15 sell an expensive car, you know, 1.2% or 0.2%, 0.3% of
16 a high value is a large charge, whereas historically
17 something like 10p per transaction regardless of value
18 is fine.

19 MR KENNELLY: Mr Bailey, that is very helpful. Thank you.

20 If you look at paragraph 44, I am not going to --
21 just for the Tribunal's benefit, I apologise for the
22 breach of the labeling and I am sure we can fix the
23 transcript. I am not going to take the point about how
24 that policy from so long ago could be restricted as
25 confidential.

1 THE PRESIDENT: Well, I was about to ...

2 MR KENNELLY: I would rather move on.

3 Mr Bailey, rather than go to the documents that
4 support the points you make in your witness statement,
5 just to show the Tribunal what you were speaking to just
6 now in relation to surcharging, if you look at
7 paragraph 44, we have covered the credit card acceptance
8 policy. At (b) you describe your policy of surcharging
9 Amex payments, do you see that?

10 A. Yes.

11 Q. And you have already told the Tribunal about surcharging
12 on debit cards. That was from September 2016. So what
13 these documents all show, Mr Bailey, is that Pendragon
14 policy was to surcharge on Mastercard and Visa credit
15 cards during the period 2005 until January 2018?

16 A. Yes.

17 Q. And as far as you are aware, Visa and Mastercard's rules
18 did not prevent you surcharging during this period, did
19 they?

20 A. As far as I was aware, yes.

21 Q. Now, notwithstanding the policy on surcharging, in
22 practice, as you have hinted a moment ago, surcharges
23 were imposed on fewer than 20% of transactions to which
24 the policy actually applied, is that not right?

25 A. That is correct.

1 Q. And that is because dealers were very reluctant to
2 impose this surcharge on customers?

3 A. That is correct.

4 Q. Because it could jeopardise the sale?

5 A. Correct.

6 MR KENNELLY: Thank you, Mr Bailey. I have no further
7 questions for him -- I will just quickly check. No,
8 that is it for me.

9 Questions by THE Tribunal

10 PROFESSOR WATERSON: Yes, so just to understand the process,
11 if I were to buy a car from you --

12 A. I hope you do.

13 PROFESSOR WATERSON: Then I am -- I've never bought a car
14 through one of these three-year things, schemes, I have
15 always bought it outright, but if I were to buy it
16 outright -- I do not think it would be a Jaguar, but if
17 I were to buy it outright then I would only be allowed
18 to pay by card for a part of that purchase, is that the
19 position, or ...

20 A. Well, we would impose a monetary limit depending on the
21 franchise but we would say to you, you can pay a deposit
22 up to a certain value with a debit or credit card, but
23 the balance over that, i.e. the vast part of the
24 purchase price, we would insist on a bank transfer.

25 PROFESSOR WATERSON: Right, and that is because of the fees

1 or because of some other reason?

2 A. It is the fees. It is purely commercial.

3 PROFESSOR WATERSON: Right, yes. Okay, thanks.

4 A. If you sell a £100,000 car, you know, a bank transfer
5 costs you pennies and a card transaction costs you a few
6 hundred pounds.

7 PROFESSOR WATERSON: Yes. I am not thinking of buying
8 a £100,000 car.

9 A. Yes, but in our world that is the --

10 PROFESSOR WATERSON: Yes, I understand. It depends on the
11 dealership but, yes, and presumably also -- does it
12 provide any assurance, the fact that the first payment
13 goes through, that you are going to get the rest, as it
14 were, or --

15 A. Well, obviously -- if it is by the same method, yes. We
16 would encourage these days you to do one transaction by
17 use of open banking which is an automated form of bank
18 transfer. So if you pay a deposit by open banking and
19 it went through we would have assurance -- well, it is
20 very secure anyway, but you as the customer would say
21 "Oh, I have -- I made my deposit and that worked quite
22 well, I will then pay the balance".

23 But we wouldn't give you the chance to say "I'm so
24 sorry we can't" -- I say we can't, the policy would
25 recommend that you do not pay by card but if you have an

1 have been referred to in open Tribunal, but if that
2 causes difficulty for any reason then perhaps I could
3 take further instructions on that. But that is the
4 opening request, if I can put it that way.

5 THE PRESIDENT: Yes, I see. In a sense it depends. I am
6 very happy to have during the course of the proceedings
7 elliptical reference to these matters and since he is
8 not coming to give evidence that will be pretty easy.
9 If, however, we consider when writing the judgment that
10 it is desirable, not necessary but desirable to refer to
11 his evidence then we will do so and we would not be very
12 keen to have redactions suggested after that, so --

13 MR BEAL: Completely understood.

14 THE PRESIDENT: -- on that basis I think we are happy to
15 proceed.

16 MR BEAL: It is just a slightly odd situation in that he is
17 not formally being called to give evidence and obviously
18 the claim that his company has brought has been settled
19 so --

20 THE PRESIDENT: It is indeed, Mr Beal, but it is for that
21 reason that I (inaudible) actually yesterday when this
22 was raised that the evidence simply ought to come in.
23 Now, we are very happy to have his evidence in and
24 neither of the schemes has made any objection to that so
25 we will take it on that basis, subject to, as we say,

1 questions of weight. We will have regard to what you
2 have said about confidentiality, but subject to the
3 further rider that if we need to refer to it, we will.

4 MR BEAL: If I may say so, that saves me having to make any
5 further point on it.

6 Just by way, if I may, on housekeeping. You have
7 left us I think with an encouragement to try and agree
8 amongst ourselves what needs to be resolved and how and
9 when and we will endeavour to do so without disturbing
10 the Tribunal, save with maybe short written submissions
11 perhaps on certain things and then followed up, if
12 necessary, with a half hour here or there where we can
13 squeeze it in.

14 There is an issue that has arisen that I have
15 noticed. I have -- as you have seen, I have been
16 working predominantly from paper because I am a dinosaur
17 and on J5 I had goodness knows how many files going up
18 to tab 64. On Opus, I think we are now up to tab 194
19 and what has been happening is documents are being added
20 to the Opus bundle with no clear audit trail that I have
21 been able to discern as to what is going in.

22 Now, when that comes to dealing with witnesses it
23 becomes a little problematic because I then need to know
24 why a document is being relied upon, by whom, for what
25 purpose. I have visibility over the documents I am

1 asking my team to make available on Opus and I am
2 prepared to provide a reason as to why I have asked for
3 that document to go in and who I will be predominantly
4 taking -- which witness I will taking that particular
5 document to, so there is merit in my view -- in my
6 submission in having some sort of audit trail of what
7 has gone in, from whom, for what purpose and when.

8 Now, to the extent that J5 has a lot of material
9 from the reply experts' reports, I do not think that
10 will take very long because we will be able to work out
11 which expert's reply report has referred to which
12 document and correlate them, but if J5 is being used as
13 a repository for all sorts of documents that will be put
14 in cross-examination to a particular witness, then it
15 would be very useful for me to know. And, as I said,
16 I am willing -- for example, there is a CMA interim
17 relief decision from 2014 dealing with WorldPay where,
18 rather curiously, there is an extract of that in J4,
19 I think, which is restricted confidential, even though
20 at the September CMC, as you remember, I produced the
21 CMA's own website version of a summary of that decision,
22 so there are wrinkles. I am just very keen to find an
23 effective way of managing the process.

24 Perhaps I can sit down now and let my learned
25 friends comment.

1 THE PRESIDENT: No, that is helpful (inaudible).

2 MR COOK: I think from our perspective we are not aware of
3 any great sort of tranche of new material having gone
4 into that. I think this may be a case of the vast
5 majority of that being documents that are referred to in
6 the expert reports and there is going to be no objection
7 to those documents being in there. Certainly if it is
8 the case that there are any documents that are being
9 slipped in, then that would need to be audited and there
10 will be a trail in some kind of way but I am certainly
11 not aware that we have been trying to do that.

12 THE PRESIDENT: I do not think there is any suggestion of
13 a problem beyond knowing what is going in and I know
14 from my experience that electronic bundles have an
15 unhappy knack of expanding surreptitiously in a way that
16 paper bundles do not. Mr Kennelly, you are on your
17 feet?

18 MR KENNELLY: Yes, indeed. There may be something to what
19 Mr Beal says but it is not known to me because as far as
20 Visa is concerned we have been adding -- we added
21 a handful of documents for the purpose of
22 cross-examination but we told the Claimants that we were
23 adding them and we would understand that that is the
24 normal approach and we would expect the Claimants to do
25 the same when they add documents to the bundle also. It

1 is -- I do not know if that is a written protocol but it
2 has certainly been the practice of the solicitors to
3 notify their counterparts when they are adding documents
4 to the bundle.

5 I suspect that vast increase in J5 that my learned
6 friend has noticed is, as has been pointed out,
7 documents referred to in the expert reports. The expert
8 reports and the expert reply reports refer to documents
9 which were only very recently added to the electronic
10 bundle and that has caused a large increase in the size
11 of J5 in particular. Those are all documents referred
12 to in the expert reports. Apart from that, I am afraid
13 I have not seen the problem that Mr Beal describes.

14 THE PRESIDENT: Well, that is helpful, but I think we can
15 have a further articulation of the practice. I see that
16 we go up to RC-Q at the moment. Perhaps we should have
17 a RC-R bundle which is simply documents which are added
18 to the record during the course of the trial and that
19 way one can watch the expansion of the record, so,
20 for instance, Mr Cook's very helpful note of this
21 morning could then go into that file and I think,
22 speaking for us, we would find that quite helpful
23 because when one has new documents put in, one always
24 thinks "Where have they gone?" and it may be that one
25 can do it by reference to additional documents and if

1 one can have in the Opus system a short explanation as
2 to what they go to, so much the better, but I am sure
3 your protocols in that regard are otherwise sufficient,
4 but that might be a way of dealing with it. We would
5 certainly find that helpful and that is not a criticism
6 of anyone, it is simply an evolution of the practice
7 that I am sure is already going on.

8 MR KENNELLY: From our side we are perfectly content with
9 that, sir, as a solution to the problem.

10 MR BEAL: Yes, that would solve the problem ideally, if
11 I may say so.

12 In terms of Mr Cook's document, having skim-read it
13 in the time available to me, in our respectful
14 submission, this is a legal submission. It does not
15 purport to be evidence, but it gives evidence, so we
16 would like it, please, to be treated as a legal
17 document. I have no objection to it going in, or indeed
18 going in as RC-R document 1, but we would like it to be
19 marked as a legal submission.

20 THE PRESIDENT: Well, that is fine. We will give it the
21 honour of being the first RC-R/1 and it goes in on that
22 basis, but to be clear, we regard these notes as of
23 assistance but we encourage anyone, as Mr Beal has just
24 done, to make clear the extent to which they are pushing
25 back on the documents, the point that Mr Beal made is

1 perfectly fair, Mr Cook you are accepting it, but we do
2 like more information rather than less because we ask
3 the questions and the parties quite rightly and quite
4 helpfully are responding to those questions and for that
5 we are grateful.

6 MR BEAL: Thank you very much, sir. That is the only
7 housekeeping.

8 THE PRESIDENT: We are two witnesses down tomorrow, are we
9 not, if I am counting right?

10 MR BEAL: We are.

11 THE PRESIDENT: How are we doing -- we are obviously doing
12 better in terms of timing than otherwise but do the --

13 MR BEAL: I think we have asked the witnesses who are
14 attending in the afternoon if they can attend in the
15 morning. We will see how quickly we can get through
16 them. We have Mr Steeley, Mr Harrison, Ms Copling, who
17 my learned friend Mr Woolfe is going to take, and
18 Mr Hurst, who my learned friend Mr Jackson is going to
19 take, so you will hear somebody other than me conducting
20 the examination-in-chief tomorrow.

21 THE PRESIDENT: Right, well, I think to the extent it can be
22 done, if we can move up witnesses so that we sit not an
23 over-full day but a full day, that would be helpful, but
24 we recognise that there are obviously practical
25 difficulties in rearranging things at short notice and

1 we know the parties will do their best.

2 In that case thank you all very much. We will
3 adjourn until 10.30 tomorrow morning. Thank you.

4 (1.02 pm)

5 (The hearing adjourned until 10.30 am
6 on Wednesday, 21 February 2024)

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