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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

1 Wednesday, 21 February 2024

2 (10.31 am)

3 THE PRESIDENT: Mr Beal, good morning.

4 MR BEAL: Good morning, sir. With the Tribunal's permission
5 please may I call Mr Oliver Steeley of Marks & Spencer
6 to give evidence for the claimants?

7 THE PRESIDENT: Yes please.

8 MR OLIVER STEELEY (affirmed)

9 THE PRESIDENT: Mr Steeley, good morning. Do sit down and
10 make yourself comfortable. You should have some water
11 there.

12 A. Thank you very much.

13 THE PRESIDENT: You may even have your witness statement
14 there but counsel will check that with you. Do not
15 worry, you will be taken to the relevant documents.
16 Some of the documents will be electronic. That means
17 you only see one page at a time and it is the page that
18 the barristers choose. If you want to see anything
19 else, do say so and we will make sure you get taken
20 through the relevant parts of the document before you.
21 This is not a memory test. You need to be aware of
22 context, if you want to be. I will hand you over to
23 Mr Beal.

24 A. Thank you, sir.

25 Examination-in-chief by MR BEAL

1 MR BEAL: I hope you have a small folder in front of you.

2 A. I do.

3 Q. How many folders do you have in front of you?

4 A. Just this one.

5 Q. If you turn to tab 8, so that is {RC-F2/8/1}, I am
6 hoping that that is the first page of a first witness
7 statement from you; is that right?

8 A. It is, yes.

9 Q. Could you turn, please, to page 10 {RC-F2/8/10}. Is
10 that your signature?

11 A. Yes, it is.

12 Q. Have you had a chance to re-read that statement since
13 you made it?

14 A. I have, yes.

15 Q. Are the contents of that statement true to the best of
16 your knowledge and belief?

17 A. Yes.

18 Q. Could I just ask you a couple of very short supplemental
19 questions. Firstly at paragraph 26, page 5 {RC-F2/8/5},
20 you said:

21 "If WorldPay BV offered any cross-border acquiring
22 services at that time, M&S did not take advantage of
23 those services."

24 Just if we could then, please, look at the Merchant
25 Services Agreement that you have with WorldPay BV it is

- 1 a confidential document so I am not proposing to reveal
2 the contents of it. It is at {RC-J2/79/1}, please.
3 That is the first page of a Merchant Services Agreement
4 between your company and WorldPay, and could you look,
5 please, at page 3 {RC-J2/79/3}. Under recital 2, there
6 are some counterparties to that agreement. I hope this
7 is not breaking the confidentiality bank, but it is fair
8 to say that one of those is WorldPay BV; is that right?
- 9 A. That is correct, yes.
- 10 Q. Do you know where WorldPay BV was based?
- 11 A. Netherlands.
- 12 Q. Do you know whether or not you received, or
13 Marks & Spencer received, acquiring services from that
14 entity?
- 15 A. Yes, we did.
- 16 Q. Just for completeness while I have this open, at page 44
17 {RC-J2/79/44} there is a reference to a pricing scheme.
- 18 A. That is correct, for Republic of Ireland.
- 19 Q. It refers to pass-through, for example?
- 20 A. Indeed.
- 21 Q. Did you ever have an individually itemised -- well,
22 pursuant to this agreement did you ever have an
23 individually itemised interchange fee schedule?
- 24 A. No.
- 25 Q. At page 47, {RC-J2/79/44} there are some card schemes

1 covered by this. Are those the card schemes that
2 Marks & Spencer used?

3 A. Yes.

4 Q. In relation to American Express transactions which you
5 do accept, how does that work? Do you have a separate
6 terminal for Amex transactions, or do you use the same
7 terminal and it all goes through to WorldPay?

8 A. We use the same terminal but the transaction is rerouted
9 via our gateway directly to American Express, so
10 WorldPay do not handle our Amex volume.

11 Q. One of the things that we have been asked to think about
12 in the light of the submissions from Mastercard in this
13 case is what would happen if there was not a default
14 interchange fee set by the schemes --

15 MR COOK: Sir, I do have to rise. I am very concerned
16 Mr Beal is basically planning to conduct
17 cross-examination, or what is primary
18 examination-in-chief on what is quite an important
19 central issue in the case. If all of his witnesses were
20 going to address bilaterals, this is something that
21 should have been done in their witness statements so we
22 had notice of all these points. As Mr Beal said, it is
23 an important issue in the case and none of his witnesses
24 covered it and now he appears to appear to want to fill
25 that gap with examination-in-chief and that does seem to

1 us to be inappropriate. There is a difference between
2 clarifying a point from a witness and if a witness has
3 not covered something, starting from scratch on it.

4 MR BEAL: As the Tribunal will be aware, the witness
5 evidence came in in late October -- I think this
6 statement was 26 October -- and Dr Niels in his first
7 expert report gave full flesh and bones to what was said
8 to be the pure negotiation bilateral, which was the
9 first time that had been deployed.

10 THE PRESIDENT: Well, yes, Mr Beal, but then there are such
11 things as supplemental witness statements.

12 MR BEAL: There are, but at the same time
13 examination-in-chief is -- given that it is going to
14 take me about 30 seconds, I hope to ask the question and
15 have the answer given, or thereabouts. I see that it is
16 popular for supplemental witness statements to come in,
17 but we have not gone down that route. If you would
18 prefer us to do that, we can do.

19 THE PRESIDENT: Well, Mr Beal, I will allow it on this
20 occasion and we will see what answer we get because we
21 are keen to have more evidence rather than less, but
22 Mr Cook's point is well made, in that the point of the
23 cards on the table approach in the factual evidence is
24 to enable those points to be dealt with in an orderly
25 way, so let us see where we go. So, Mr Cook, I will

1 allow the questions, but that is not because I regard
2 your intervention as inappropriate. I think it is
3 highly appropriate and we will see where we go with the
4 other witnesses.

5 MR BEAL: Mr Steeley, I was talking about a situation in
6 which one is asked to imagine what would happen if, for
7 example, acquirers simply negotiated with individual
8 banks for an interchange fee or indeed conceivably if
9 shops, or big shops, were able to negotiate directly
10 with cardholders' banks about the terms of the
11 interchange transaction. Have you given any thought to
12 that and, if so, what are your thoughts?

13 A. We have given some thought to that. It is tricky to
14 speculate because we do not have the freedom to do it
15 today, right? Having said that, we did have an approach
16 from an issuer earlier last year and they were
17 specifically looking to develop some commercial
18 partnership with us, so they had done a little bit of
19 a look at their data and they realised that their
20 customers spent rather a lot at M&S, more so than other
21 retailers in terms of their overall profile.

22 They also had an instalment capability that allowed
23 customers to pay in three instalments for a large basket
24 for a transaction that had taken place a couple of days
25 ago, so the customer would log on to their mobile

1 banking app, see they had spent a large basket at M&S
2 and would be offered the opportunity to split that into
3 three interest-free instalments post purchase.

4 The challenge that they have with that is that that
5 transaction is seen by us as a normal card transaction
6 and so the -- there were some challenges of how to grow
7 that and they wanted to grow their share and grow their
8 business.

9 So one of the options might have been for us to
10 agree a bilateral interchange rate, for example, because
11 their customers spent more than other banks at M&S and
12 therefore we could come to some kind of special
13 arrangement. We cannot do that today because of the
14 nature of the agreement -- the agreements that we have.
15 So it is tricky to speculate, but if we were given the
16 freedom to do some additional commercial activity and
17 create some innovative and different new partnerships,
18 well, we would probably explore it.

19 MR BEAL: Thank you. That was the only question I had for
20 you on that particular point. There will be some
21 further questions for you from my learned friend.

22 A. Thank you.

23 Cross-examination by MR KENNELLY

24 MR KENNELLY: Thank you, sir. Good morning, Mr Steeley.

25 A. Good morning.

1 Q. So, Mr Steeley, you are the head of payments at
2 Marks & Spencer?

3 A. Yes.

4 Q. So you are very familiar with the different forms of
5 payment that Marks & Spencer accept?

6 A. Yes.

7 Q. A key part of your role is to manage the cost of
8 accepting payment by different payment methods?

9 A. That is correct.

10 Q. You said in your statement you have an annual budget of
11 approximately £35 million per year?

12 A. Correct.

13 Q. You said your performance is reviewed according to how
14 well you keep to that budget?

15 A. Agreed. Tricky, in lots of ways, because controlling
16 that is not easy --

17 Q. So --

18 A. -- and if I may make one point, it is one of the few
19 budgets in our organisation where, if I overspend, it is
20 not necessarily a bad thing because it means we have
21 sold more stuff, right, so because a lot of our payment
22 costs are related to transactions, what I am really
23 measured on is my ability to create efficiencies within
24 that budget and manage those elements of that budget
25 that are within my control.

1 Q. To that point about efficiencies, Mr Steeley, it is
2 true, is it not, that Marks & Spencer monitor the cost
3 of accepting different payment methods very closely?

4 A. We do.

5 Q. Marks & Spencer thinks very deeply about the relative
6 cost and value of accepting different payment methods?

7 A. We do.

8 Q. Can I ask you to take up your statement, please,
9 paragraph 46 --

10 THE PRESIDENT: Pausing there, it may be that counsel is
11 coming to this, but I wonder if you could give us an
12 insight into how over time the assessments of
13 an organisation like Marks & Spencer as to payment
14 systems has changed. I mean, we go back 20 years and it
15 is cash, not card. We now move to a situation where in
16 many outlets cash is not accepted at all, but for the
17 customers the convenience of paying through their phone,
18 let alone their card, is huge. What do you do to keep
19 up with what customers want in terms of how they pay?

20 A. We look at that -- we look at that very carefully all
21 the time and there are lots of innovations happening in
22 payments and customers are choosing different forms of
23 payment, particularly at the moment, so, you know, we do
24 see some trends happening when we look at the share of
25 different payment mechanisms and we try and respond

1 accordingly, so, for example, before COVID, our cash
2 percentage was probably about 20% of transactions across
3 our store network. During and after COVID that went
4 down to about 9%. It has not really gone back up again,
5 so we have seen a dramatic change.

6 We chose not to go cash free during that time. We
7 felt that our customers were not ready for that at the
8 time. We saw a dramatic change in contactless
9 acceptance during that time as well. Something like --
10 I want to make sure I get my numbers correct. I think
11 it is about 87% of our card transactions in store are
12 now contactless, so that drives how we think about the
13 terminals, the self-service experience and how we train
14 our staff to manage the exceptions.

15 Online we have seen some real changes. We have seen
16 our volumes of PayPal decline actually over the last
17 couple of years as Apple Pay and other similar products
18 have risen and in particular we have seen some quite
19 strong growth in the Buy Now Pay Later mechanisms that
20 we accept, so we accept a solution called Clearpay which
21 is a pay in for interest free instalments solution
22 online for our clothing and home solutions. As part of
23 our PayPal portfolio we accept a product call Pay In 3
24 which is a similar instalment style solution, so we
25 monitor trends in the market and with our customers

1 very, very carefully.

2 We also evaluate each of the payment mechanisms in
3 terms of how they perform across a number of dimensions,
4 so some of these payment mechanisms have a slightly high
5 average order value than others, some deliver us
6 a better return -- a lower returns rate, which for
7 a clothing retailer is really, really important right
8 now. Some of them have different fraud rates associated
9 with them, some of them have higher acceptance rates.

10 So we are constantly looking at the portfolio of
11 payment acceptance that we have. We are watching the
12 trends and we are -- where we feel that the customer
13 behaviour is changing, we try and support that payment
14 mix for our customers. Does that help answer your
15 question? Is that helpful?

16 THE PRESIDENT: Yes, that is very helpful. Can I put it
17 this way: in a sense any business achieves higher sales
18 by differentiating itself from its competitors and
19 normally you would look to the price and the quality of
20 the product being sold, whatever it is. Would it be
21 fair to say that the manner in which customers pay is an
22 important factor in addition to obviously quality and
23 price that undertakings like M&S, but (inaudible) in
24 general, would look to in order to either keep up with
25 or differentiate themselves from their competitors?

1 A. Indeed, so let me illustrate this with our Pay In 3
2 solutions, right? They are relatively new. What we
3 notice is that increasingly some customers are choosing
4 their payment mechanism before they choose their
5 retailer, right, so it used to be the case that you
6 would get to the checkout and then you decide how you
7 want to pay. For a business like Clearpay -- we do not
8 accept Klarna, I will not speak on their behalf but they
9 have a similar business model -- they have a shopping
10 app and so the customer journey often starts inside the
11 shopping app. So I have decided I quite like being able
12 to split my large purchases in three or four, so I am
13 going to go to the Clearpay app, I am going to look at
14 all the merchants that I know accept this sort of
15 payment mechanism and then I am going to -- then I will
16 go from there to that merchant and I will use that
17 payment mechanism.

18 Now, that does a couple of things for us. It sort
19 of disintermediates us from the journey, but it actually
20 also brings us customers who might not otherwise have
21 come to us. It brings us in some cases a different
22 demographic of customer because the customer that is
23 choosing to have their larger purchases across
24 instalments maybe has a slightly different demographic
25 and that is really important for us, to make sure that

1 we are creating offerings that allow a broad spectrum of
2 customers to come and shop with us.

3 It also impacts our marketing because what --
4 you know, what -- we did a -- I will give you
5 an example. We did what we call an AB test where on the
6 products display page on our website we were able to
7 show some customers that you could put this particular
8 product, let us say an expensive jacket, over three
9 instalments using Clearpay and on other -- some other
10 customers as a control group were not shown that message
11 and so you would expect that the customers who had seen
12 that message might have shopped more and those that did
13 not, less. In actual fact, it made no difference
14 because the vast majority of customers who come through
15 that channel had already made up their mind how they
16 were going to pay.

17 So understanding the psychology of the customers and
18 how they think about payment is really, really important
19 for us as a retailer, not just the -- you know, the
20 performance of every individual payment mechanism, some
21 will have higher fraud, some will have lower returns
22 rates, some will have higher average basket values, some
23 will cost us a little bit more. In some cases we
24 perceive that it is worth paying more for that payment
25 mechanism because it is delivering us a different

1 customer segment that maybe we could not get to so
2 easily directly, or it is delivering a different
3 performance, or we know, for example, with some of our
4 BNPL providers that there are times of the year where
5 one payment mechanism performs very, very differently.

6 So on Clearpay, for example, what we know is when we
7 go into sale on school uniform, we get a real big spike
8 in our sales and that particular payment mechanism
9 outperforms others in terms of growth over that period.

10 So I hope that answers your question, but, you know,
11 we are quite sophisticated in how we think about the
12 customer dynamic of how they are thinking about their
13 payment choices as they come and shop with us.

14 THE PRESIDENT: Thank you very much. That was very helpful.

15 Mr Kennelly, I do apologise for the interruption.

16 MR KENNELLY: I was just about to take you to paragraph 46
17 of your witness statement. It is on page 8 in the
18 document you have before you, {RC-F2/8/8}.

19 I am looking, Mr Steeley, at the second line in that
20 paragraph:

21 "... if the card schemes' rules that prevent M&S
22 from steering customers to one form of payment over the
23 other did not exist, then we might have considered
24 steering practices as one of the options available to
25 us."

1 Do you see that?

2 A. I do, prefaced by the sentence "I can only speculate
3 but ..."

4 Q. Of course. Do not worry, Mr Steeley, I shall be
5 returning to those words.

6 A. Thank you.

7 Q. I wanted to understand though, first of all, what rules
8 you are actually talking about here. Which are the card
9 schemes rules that you have in mind that prevent you
10 from steering customers?

11 A. It is a while since I have read them all. I did have
12 a try last night. The Visa rules themselves were
13 946 pages long. To my understanding, there are rules in
14 there that prevent us from steering customers away from
15 Visa products.

16 Q. So --

17 A. I have not got that -- if you would like to see
18 946 pages of Visa rules and find it as part of the
19 evidence, but you probably should have, but my
20 recollection is there is something in there that
21 prevents us from steering customers away from doing
22 that.

23 THE PRESIDENT: Mr Steeley, to be clear, this is neither
24 a memory test nor a legal test. I am and counsel is
25 interested in your understanding of the rules and if

1 Mr Kennelly wants to explore the basis of your
2 understanding further, then of course he will do so, but
3 that is from my point of view a perfectly satisfactory
4 answer.

5 A. Thank you.

6 MR KENNELLY: The President is quite right. I am only
7 concerned with your own personal knowledge.

8 So as to steering rules, are you familiar with the
9 Honour All Products Rule, the rule which the claimants
10 say requires you to accept all Visa cards in one
11 category if you accept one Visa card in that category?

12 A. I am familiar with that rule actually, yes, and there is
13 a variation of that I think called partial acceptance
14 where I believe I can, for example, not accept
15 commercial cards if I chose to, if I am in the EEA.
16 I think it means if I choose not to accept commercial
17 cards I can choose not to accept EEA commercial cards,
18 but I still have to accept commercial cards that are
19 issued outside of the EEA. I think that is my
20 interpretation of the scheme rules.

21 Q. So -- Mr Steeley, but as to commercial cards I think
22 what you are saying is that you accept that M&S was free
23 to decline commercial cards after 2016?

24 A. Within -- commercial cards that were issued within the
25 EEA?

- 1 Q. Yes.
- 2 A. I think I still have to -- if I chose not to, under
3 those scheme rules, then I think I would still have to
4 accept commercial cards issued outside of the EEA. That
5 is my understanding of the rule.
- 6 Q. But to the extent that you had -- well, to the extent
7 that Marks & Spencer had any freedom to steer customers
8 away from commercial cards, Mr Steeley, they did not try
9 to steer customers away from commercial cards, did they?
- 10 A. We chose not to. That is my understanding.
- 11 Q. In terms of credit cards are you aware that M&S was free
12 to decline credit cards after 2001?
- 13 A. I believe that is correct, that we could have chosen not
14 to accept credit cards and just accept debit cards if we
15 had wanted to. We chose not to.
- 16 Q. Surcharging, do you accept that M&S could have
17 surcharged UK issued credit cards before 2018?
- 18 A. That is my understanding of the legislation, yes.
- 19 Q. But M&S chose not to?
- 20 A. Again we chose -- for commercial reasons, we chose not
21 to.
- 22 Q. Even though in those days the Visa and Mastercard MIFs
23 were much higher than they are today, you still chose
24 not to?
- 25 A. I was not there at the time, so I cannot speak for my

1 previous colleagues, but that is my understanding of the
2 decision that was made by M&S at the time.

3 Q. Although you were not there at the time, do you think
4 that the reason why M&S chose not to steer customers in
5 that way was because they were driven by customer
6 preferences?

7 A. Tricky to speculate because I was not -- I was not
8 there. What I would say -- in my responsibilities now
9 there would be a variety of commercial considerations
10 that would impact that decision. Competitiveness, in
11 terms of what our competitors were doing, would be one
12 dimension to that, so if I was the only merchant in the
13 high street surcharging credit cards, that might impact
14 my decision.

15 The share of credit cards that my -- of -- in terms
16 of my payment mix, right, so in 2001 the share of credit
17 cards of my payment mix is slightly different from my
18 share now, so the business impact of doing so would be
19 very different.

20 The number of alternatives available to me, back in
21 2001, I do not believe we accepted Amex, so there were
22 not other alternative solutions available, and we had no
23 website back then as well in terms of trading.

24 So, look, there is a -- as you can imagine, the
25 decision around steering or surcharging is a really

1 because they were not available to me, it was not like
2 I had 20 years' worth of emails I could go back and
3 check through, so the process of discovery was
4 a tripartite exercise between me and my team, the
5 company secretariat and our own internal legal counsel.

6 Q. I am just looking at paragraphs 9, 10 and 11 of your
7 statement. I mean, it sounds -- the way I had read
8 that -- and what you are describing sounds a little bit
9 different -- is that you were the person provided with
10 the list of document categories by your solicitors, you
11 then consulted with your corporate secretariat,
12 paragraph 11, and your legal department. So all I am
13 asking -- I appreciate other people would have done some
14 of the searches, but were you the person that the
15 requests came to and you then circulated them into the
16 organisation?

17 A. The requests came into our internal legal counsel from
18 our external legal counsel who was managing this and
19 I assisted to the extent that I could.

20 Q. Right. I am just trying to understand, because you are
21 speaking to the disclosure done and what I want to
22 understand is: are you in a position to speak to the
23 general disclosure done by Marks & Spencer, or can you
24 only talk about a subset of what was done?

25 A. I am more comfortable speaking about those contracts

1 that were under my purview and my responsibility during
2 my tenure. The existence of a 15-year old contract or
3 document was something that was not available to me in
4 my archive and therefore I needed the support of our
5 company secretariat and our internal legal counsel who
6 would have that archive.

7 Q. Yes, so what I am trying to clarify is whether you are
8 the person who can speak to what was done because what
9 you describe is you were given a list of document
10 categories, that is paragraph 9; in paragraph 10 you say
11 you considered the extent to which those document
12 categories were relevant to Marks & Spencer, so were you
13 the person making those decisions?

14 A. I have certainly reviewed all of the documents that were
15 found during the search, in partnership with our
16 internal legal counsel.

17 Q. Yes. The question was, though, were you the person who
18 decided which document categories were relevant to
19 Marks & Spencer? That is what you describe yourself as
20 having done. Was that you doing it, or was anybody else
21 also doing that exercise?

22 A. It was primarily a partnership exercise between the
23 parties that we discussed. I am a little confused as to
24 what you are looking for.

25 Q. I am simply clarifying whether what you describe --

1 you know, you describe a process that happened and I am
2 just clarifying whether that is the entire process, or
3 that there is somebody else also doing the process?

4 THE PRESIDENT: Well, I think the question is really looking
5 at paragraph 10 of your statement -- do you have that in
6 front of you, Mr Steeley?

7 A. I do.

8 THE PRESIDENT: You have got the use of the word "I" there
9 and I do not think it is being suggested that you did
10 everything yourself. I think what is being asked is the
11 extent of the team within M&S that did this job and your
12 control and relationship to that team, so that counsel
13 and the parties and the court indeed can be satisfied as
14 to the searches that were undertaken, so I do not think
15 anyone is expecting you to say "I did everything myself"
16 but --

17 A. I am certainly prepared to take accountability for
18 making sure that we did that exercise properly, yes.

19 THE PRESIDENT: Okay, thank you. I suspect they may have
20 some questions about how that happened, but I will leave
21 that to Mr Cook to ask, but that I think is the thrust
22 of the questions that you are being asked.

23 MR COOK: Thank you, sir. So paragraph 10 you say you
24 considered the extent to which these document categories
25 were relevant to M&S and conducted searches to locate

1 responsive documents. We have the list of categories
2 and that is at page 9 in this section {RC-F2/8/9}, which
3 is quite a lengthy bit. Can you identify any categories
4 in this annex in respect of which you did not conduct
5 any searches?

6 A. Can I just read it a moment --

7 Q. I am afraid it is a long document but you just told us
8 by the sound of it you excluded some of them. Which
9 ones did you exclude?

10 THE PRESIDENT: Read it first, then the questions will come.

11 A. Thank you. I am not aware we excluded anything but let
12 me just double -- look through this.

13 (Pause)

14 So on category 1 I think that is absolutely correct.
15 On category 2, I believe that is correct. I think there
16 may be a misunderstanding around cross-border acquiring,
17 so let me explain what I mean by that. So I think in
18 the documents that we are seeing here, cross-border
19 acquiring references, WorldPay BV, for example.
20 Sometimes in retailer terminology cross-border acquiring
21 means something slightly different, which is how do you
22 accept payments from your overseas operations and your
23 retail estates and your franchise partners overseas and
24 is that centralised in some way. So I think when we
25 were thinking about cross-border acquiring, naturally

1 the WorldPay BV situation was covered earlier, but we
2 were also thinking about that -- our international
3 business and how we manage that, so I am comfortable on
4 that.

5 MR COOK: To be clear, many of those would essentially be
6 domestic transactions, so if you have got a franchise
7 shop somewhere in France -- I know you did historically,
8 not sure you do any more, but they used to have shops in
9 France and that would be basically -- there would be
10 French cardholders using their cards in a French shop,
11 that would be a French domestic transaction?

12 A. Correct. A lot of our overseas retail stores are
13 franchise businesses and, as such, the franchise
14 operator processes the payments domestically in their
15 own way. We do not see those -- we do not see those
16 payments, so that is what I mean by that, so yes.

17 Most of our overseas activity is managed in
18 a franchise environment.

19 Q. You are going --

20 A. Back to -- so I think we have covered 2. Number 3,
21 I think that is also what we were asked to do and
22 I believe that we did that. I believe on 4 as well we
23 were asked to do that that and I have provided some of
24 that as part of my witness statement, actually. So yes,
25 I think that is clear.

1 Q. If we go back now to paragraph 11 of your witness
2 statement, {RC-F2/8/2}, you say that:

3 "To locate relevant documents, I consulted with both
4 our corporate secretariat, who provided appropriate
5 board minutes and other governance documents related to
6 acquiring ..."

7 So looking at that there, that is board minutes and
8 you say governance documents, so that will be what
9 decision the board agrees to enact a contract or --

10 A. For example, yes.

11 Q. Then your legal -- then carrying on, the legal
12 department:

13 "... who held the archive of contractual documents
14 related to M&S' relationship with its payment
15 acquirers."

16 So those are just simply contractual documents?

17 A. Indeed.

18 Q. Yes. So, I mean, looking at that the two categories
19 that you are describing are essentially just board
20 minutes and decisions essentially in relation to
21 acquiring and actual contractual documents. I mean,
22 that is -- by the sound of things that does not capture
23 things like emails about why decisions are being made.
24 Can you carry out searches for things like that?

25 A. I believe searches were carried out by our corporate

1 secretariat team to identify whether or not there were
2 any emails that related to that. I am not sure they
3 found any, but we asked them to do that search.

4 Q. Why do you not say that at paragraph 11? Paragraph 11
5 you are just talking about board minutes and governance
6 documents.

7 A. I am sorry, what was the question?

8 Q. Well, I am saying if there was some kind of email search
9 conducted, why have you not described that?

10 A. The process was that I consulted with our corporate
11 secretariat, who provided all of the information they
12 were able to find.

13 Q. Okay and that is clearly not what is being described
14 there. You are describing something which was searching
15 for essentially formal documents, either contracts or
16 board minute actual decisions and you suggest you
17 actually went further than that?

18 THE PRESIDENT: Mr Cook, where is this going?

19 MR COOK: Well, there are, I am afraid, a number of points
20 in relation to, if you recall, the adequacy of
21 disclosure in relation to some of these exercises.

22 THE PRESIDENT: Yes, you put it, but if there are gaps that
23 need to be filled then that should have been articulated
24 long ago because there is no way the witness here is
25 going to be able to fill those gaps.

1 MR COOK: Oh, he is not going to be at the moment, sir, but
2 if you recall the history of this that there was a whole
3 series of complaints about the adequacy of the
4 disclosure statements and what that did or did not
5 reveal in terms of what was done, so, you know, of
6 course the gaps are not going to be filled but there may
7 be points made in closing about how far the exercises
8 were essentially not proper exercises in the first
9 place, so -- but that is -- essentially I have put the
10 points for now there.

11 You were asked a couple of questions in relation to
12 the bilateral negotiation you had in relation to an
13 issuer who was potentially looking to provide a Pay In 3
14 product itself and you said you could not agree
15 a bilateral there. Would I be right in thinking that
16 what the issuer was looking for was a higher interchange
17 fee there?

18 A. What we -- so the issuer was --

19 Q. You do not need to mention names. I understand that is
20 confidential so --

21 A. The issuer was looking for an increased commercial
22 contribution from us in return for the partnership work
23 that we would do together, yes. That is correct.

24 Q. So you were looking at higher payments than that and
25 that is the reason why you said you could not do it

- 1 because there is a 0.3% cap, if that was credit card,
2 0.2 if it was debit and so --
- 3 A. We could not do it using interchange as the mechanism,
4 right? There are other commercial mechanisms we could
5 have used but we could not do it using interchange as
6 the mechanism, is my understanding of the situation.
- 7 Q. You were potentially open to looking at a higher fee for
8 exactly the same reason you pay Clearpay much higher
9 fees; is that right?
- 10 A. Indeed a lower fee if we felt that was appropriate based
11 around the commercials.
- 12 Q. But the discussion there was about a higher fee, was it
13 not?
- 14 A. On that occasion it was. Again, it was a number of
15 conversations around potential commercial outcomes
16 and --
- 17 Q. The reason why you were having that discussion, you were
18 open to that idea, is if customers can pay on a deferred
19 basis you expect in general that they will spend more in
20 your shop?
- 21 A. That is generally the case, so most of our instalment
22 based solutions have a higher ATV, average transaction
23 value.
- 24 MR COOK: Okay. No further questions.
- 25 THE PRESIDENT: Thank you, Mr Cook.

1 MR BEAL: No re-examination, sir.

2 THE PRESIDENT: Mr Steeley, thank you very much.

3 Questions by THE Tribunal

4 MR TIDSWELL: Do you mind if I just ask you a question about
5 paragraph 30 of your witness statement and actually I am
6 particularly interested in the note at footnote 4,
7 {RC-F2/8/6}, and just if the transcript there can bring
8 that up, it is {RC-J2/98/3}. If you --

9 A. Oh, yes, I remember this.

10 MR TIDSWELL: I think if you could go on a couple of pages
11 to page 5, please, {RC-J2/98/5}. I am conscious,
12 Mr Steeley, this is I suspect all confidential, or has
13 aspects of confidentiality about it, so I am not going
14 to get into relative positions across here, I am going
15 to ask you some more general questions. But I am just
16 interested in how this works and in particular it seems
17 to suggest that you are -- you are measuring two
18 different things here, one is some direct costs. Can
19 you tell me what the direct costs would be that you are
20 talking about here?

21 A. Can I set some scene -- can everyone see this? Can
22 I set some scene on what --

23 MR TIDSWELL: Everybody cannot see that and I do not want to
24 encourage you to talk about anything that is
25 confidential.

1 A. Okay. I think the -- the background to this graph and
2 this slide is we wanted to understand pound for pound
3 what does each payment mechanism give us, right, and so
4 we know that some payment mechanisms generate value for
5 us in different ways and we know that other payment
6 mechanisms have different costs, so for credit cards and
7 debit cards typically those costs are interchange, are
8 Merchant Service Charges, are acquiring costs and scheme
9 fees, plus some back-office reconciliation and netted
10 out fraud and charge-backs.

11 For example, on something like the M&S gift card,
12 that is a closed loop pre-paid solution. It has a very
13 different set of transaction economics and it delivers
14 some really interesting value enhancements for us, so
15 typically if someone is given an M&S gift card for £20,
16 when that gift card is redeemed inside our store often
17 the basket is £40 or £50, so there is like a halo effect
18 or an uplift because of that particular payment
19 mechanism.

20 So to answer your -- so what I am trying to describe
21 here is that every payment mechanism generates value in
22 its own unique way. It has some direct costs, not all
23 of which are completely comparable but, broadly
24 speaking, they are the costs of accepting and managing
25 that as a payment mechanism for us, and in return

1 relative to debit cards, which is what I think we have
2 tried to explain here, there are what I am calling
3 a halo effect, or an incremental value that each of
4 these different payment mechanisms bring us and that
5 might be that they bring us new customers, that they
6 have a higher loyalty, that they have a lower returns
7 rate, that the transaction succeeds more times than
8 others, that we get paid more quickly, or whatever it
9 might be. So as part of our overall payment strategy we
10 are trying to understand what are the dynamics of these
11 different payment mechanisms, how can we maximise, where
12 appropriate, the benefits and the value of each of those
13 and what this -- and what this is showing is that in
14 particular where we -- where we take a little bit more
15 control, that there is additional incremental value,
16 predominantly associated with the brand that we would
17 associate with it. Does that help you --

18 MR TIDSWELL: That really does cover pretty much what
19 I wanted to ask you. Just so I am clear, this is not
20 an absolute exercise, you are starting with the
21 assumption that the debit card is the baseline; is that
22 right --

23 A. Yes, this particular one is sort of pound for pound
24 relative to debit card what all the other transaction
25 types look like, what are their direct costs and what

1 are those incremental benefits and therefore what does
2 that tell us about our overall payment mix and how we
3 should think about the different forms of payment that
4 we have.

5 MR TIDSWELL: Yes and if you were making decisions and
6 counsel explored a little bit with you the sort of
7 decisions you might make and this is all somewhat
8 speculative, but you talked about some of the different
9 factors you would take into account, would you be making
10 assessments based on this sort of analysis of value, or
11 would it be more likely you would be looking solely at
12 the direct costs? What is -- is this something you
13 would feed into that equation or is it not really that
14 sort of input?

15 A. I think you have to consider a payment mechanism
16 holistically in terms of the value that it creates for
17 your business and so you might -- you might have a --
18 the strategy for that mechanism might change if the
19 direct costs of that change but not necessarily because
20 there might be other factors that would -- that are --
21 outweigh that in the overall mix of your weighted
22 decision on what to do with the different payment
23 acceptance mechanisms and how to market those.

24 MR TIDSWELL: Yes. So to take an example, and I am not
25 going to mention any names, so if you take the box on

1 the right-hand side of the dotted line, the dotted box,
2 and so the green might increase at some stage provided
3 there was sufficient -- I think you are saying provided
4 there was sufficient -- I do not know, it is beige, is
5 it -- at the top then you might tolerate that and that
6 might not change your strategy.

7 A. Precisely. You can see for that particular payment
8 mechanism we are comfortable tolerating a higher cost
9 because of the incremental value that is created and it
10 nets out positive, so that particular payment mechanism
11 has one of our highest average transaction values, it
12 brings with us a -- it brings with it a younger
13 demographic which is really important for our business
14 sustainability in the long term. It has one of the
15 lowest returns rates which is really important for
16 clothing retail, to make sure that you actually
17 genuinely sell what you sell, not half of it comes back
18 again, which is really important in clothing retail,
19 like the returns rates on -- and they are very different
20 by different payment mechanisms, it is quite -- it
21 really drives the economics in the round for us, and we
22 know, as I described earlier, that there are certain
23 times of the year where what we are selling resonates
24 particularly with a particular type of customer group
25 and so we know whether it is back to school, or when we

1 go into beauty box advent calendar at the end of
2 November we know we are going to get those sorts of
3 spikes.

4 Now the way in which we use this graph in my finance
5 team, as you might imagine, look at the bottom line and
6 say "Right, how are you going to reduce those costs,
7 Oliver, whilst not damaging the upside that each of
8 these payment mechanisms bring?" and in some cases we
9 have been able to do that. For that particular
10 organisation we renegotiated the contract last year and
11 we were able to make some specific savings. For others,
12 there is very limited that we can do because of the
13 nature of the card economic model that we are talking
14 about today.

15 MR TIDSWELL: Thank you. I was going to ask you -- I was
16 going to change the subject unless you want to keep
17 going on the subject.

18 PROFESSOR WATERSON: No, I was just going to ask relating to
19 this chart, and I will not mention any names, but if we
20 look at the third element, am I right in thinking that
21 is a potential element rather than an actual?

22 A. Yes. There is a little asterisk there that says
23 "Forecast". That is a new product that, believe it or
24 not, we are switching on in our stores today which is
25 why my phone was going crazy before I came in here, so

1 that is a new payment product and those -- and we are
2 excited about that product because, as you can see, it
3 has relatively low costs for us and yet we think the
4 incremental is going to be very high so we are very
5 motivated to try and ensure that product is a success.

6 PROFESSOR WATERSON: The penultimate one, would you consider
7 dropping those elements in the category?

8 A. Occasionally I come under pressure to switch some off,
9 yes, typically on cost basis, so occasionally we do come
10 under pressure and that is how we might, but, as
11 I mentioned, some of that is -- cost is just one
12 dimension of all of the reasons why a payment mechanism
13 might be in our payment mix.

14 MR TIDSWELL: Can I ask you a completely different question
15 which is about -- perhaps having your statement in front
16 of you and having it to hand, but you talk about the
17 difficulty of distinguishing between cards if the
18 consumer has a phone -- account on a phone or a watch.

19 A. Indeed.

20 MR TIDSWELL: I just wondered if you have any data about the
21 prevalence of that in payments in your stores? Can you
22 tell -- do you have information that tells you how the
23 payment has been paid like that?

24 A. So I can tell you that I think the stat that I referred
25 to in the previous discussion was something like 87% of

1 card transactions in our stores are now carried out in
2 a contactless way. The percentage of those that are
3 done by a non-card device is increasing, I cannot tell
4 you exactly what that number is. I am happy to share it
5 after this as part of the ongoing conversations.

6 Suffice it to say it is quite large now and growing
7 rapidly.

8 MR TIDSWELL: Yes, and I do not want to press you if you are
9 not comfortable, just some sense of the proportion of
10 it, is it around about 20, around about 50 or do you
11 really need to check?

12 A. I would like to check to make sure I was giving you the
13 exact data but it is probably more than one-third and
14 probably closer to half. It is a lot of our
15 transactions -- our contactless transactions are now
16 made by non-card devices.

17 MR TIDSWELL: Yes, well, we might ask you, if you would not
18 mind, to check that and let your solicitors know.

19 THE PRESIDENT: Mr Kennelly, there is no problem in the
20 answer being clarified by the witness after the event?

21 MR KENNELLY: Not at all, sir, no.

22 THE PRESIDENT: Well, in your own time, Mr Steeley, if you
23 would provide that information through your solicitors
24 that would be very helpful.

25 A. We would be very happy to.

1 MR TIDSWELL: Thank you very much.

2 THE PRESIDENT: I think it is appropriate to ask whether,
3 Mr Kennelly and Mr Cook, you have any questions arising
4 out of that and then we will conclude with any questions
5 Mr Beal might have.

6 MR KENNELLY: Indeed, sir. I have no questions arising out
7 of that useful exchange.

8 MR COOK: No.

9 Re-examination by MR BEAL

10 MR BEAL: I do just have one clarification on that very last
11 point, if I may, and by reference to the slide deck that
12 we have seen.

13 So the reference to the slide deck there is an issue
14 that is taken into account, "Speed of settlement", can
15 you just help us with that?

16 A. Yes. I want to get paid quickly because I am
17 a retailer, so some payment mechanisms pay me and settle
18 faster than others, okay, so the timing of that
19 settlement landing into my working capital, into my bank
20 accounts is really important, so there are some payments
21 mechanisms on this list where I get paid the next day,
22 there are some payment mechanisms on this list where
23 I have to wait three or four days, and having that money
24 in my working capital is really, really important for me
25 as a retailer as I manage my cash flows and the monies

1 coming in and out of my business, so there is value
2 associated with the speed at which the money actually
3 lands in my bank account as a retailer after the
4 customer has walked out of the store and unsurprisingly
5 the faster I get paid, the better, please.

6 Q. Thank you.

7 The second point was you referred to non-card
8 payments and their increasing prevalence. Are those
9 non-card payments free-standing payments or do they
10 depend on an underlying financial product so that they
11 are what is termed on the rails of something else?

12 A. Somewhere along -- with the exception of cash, somewhere
13 along the line there are card scheme rails in some way,
14 shape, or form, right? So with some notable exceptions
15 on PayPal where I can settle my PayPal account through
16 ACH, Automated Clearing House direct debit faster
17 payments, typically if I am -- so customers who pay with
18 PayPal at my site, I do not know what underlying
19 mechanism they are using to fund that account. That
20 might be -- if you take PayPal, for example, it might be
21 they have sold something on eBay, they've got a positive
22 balance in their PayPal account. I cannot tell. It
23 might be that they have linked their PayPal account to
24 a credit card or a debit card for other reasons,
25 I cannot tell, or it might be that they have it set up

1 to clear down to their current account via the Automated
2 Clearing Houses. I cannot see any of that. All I see
3 is in my integration with PayPal that that is a PayPal
4 payment.

5 Q. So the follow-up question is the data that you have
6 offered to provide to the Tribunal, will it be
7 desegregated so that you know the underlying source or
8 not?

9 A. So what I was referring to was PayPal online just then.

10 Q. Sorry.

11 A. When we think about the mobile contactless in store then
12 there is a couple of different flavours of mobile
13 contactless. There is the Apple Pay and then there is
14 the Android Pay. Because of the way in which the card
15 number is obscured by cryptography for those sorts of
16 transactions, in my store it is very difficult for me to
17 tell whether it was -- which particular flavour of
18 mobile contactless it was. So what I will be able to
19 share with you is my total mobile contactless. What
20 I will not be able to break down for you is how much of
21 that is Apple Pay, how much of that is Android Pay or
22 something similar. But I think your point still stands,
23 which is the challenges inside my retail environment of
24 not being able to see the card, not being able to know
25 what card type it is because it is an electronic

1 communication taking place, there is nothing --
2 you know, there is just a phone and no one knows what is
3 hidden underneath it and how it is being paid, but that
4 is the information I will be able to share which is what
5 that mobile contactless total is in our store.

6 MR BEAL: Thank you. I am sorry for the rather extensive
7 re-examination, it is just I would rather have from the
8 horse's mouth any qualification on the data that the
9 Tribunal receives and I suspected that there might be,
10 so I apologise for that.

11 THE PRESIDENT: No, it is helpful to have the clarification
12 from the witness to keep the amount of post evidence
13 material to the bare data, so I am very grateful to you.

14 Mr Steeley, thank you very much. We are very
15 grateful to you for your time and evidence. You are
16 released, thank you.

17 A. You are very welcome, thank you.

18 (The witness withdrew).

19 MR BEAL: May I now please call Neil Harrison of IHG to give
20 evidence on behalf of the claimants.

21 MR NEIL HARRISON (called)

22 THE PRESIDENT: Do sit down and make yourself comfortable.
23 Make sure there is some water there and just be ready
24 for some questions. If you want to see any further
25 documents on the electronic stream when they come up,

1 just let us know and we will ensure that that is done.

2 Examination-in-chief by MR BEAL

3 MR BEAL: Mr Harrison, I hope you have before you the folder
4 that Mr Steeley just had and if you would not mind,
5 please, turning in there to tab 5. For the electronic
6 version that is {RC-F2/5/1} and I hope you see there the
7 front sheet of the witness statement.

8 A. Yes.

9 Q. Is your signature at page 13 {RC-F2/5/13}?

10 A. Yes, it is.

11 Q. Are the contents of that witness statement true to the
12 best of your knowledge and belief?

13 A. It is, yes.

14 MR BEAL: Thank you. There will be some further questions

15 Cross-examination by MR KENNELLY

16 MR KENNELLY: Good morning, Mr Harrison.

17 A. Good morning.

18 Q. The Intercontinental Hotel Group accepts a wide range of
19 payments, does it not?

20 A. It does.

21 Q. The reason IHG accepts so many different forms of
22 payment is because customers want to pay with them?

23 A. Yes.

24 Q. You aim -- IHG aims -- to offer a broad selection of
25 payment methods that are popular with customers?

1 A. Yes.

2 Q. In fact you go further in your statement and say that
3 allowing for a variety of payment methods is essential
4 for the business of IHG?

5 A. Yes, that is correct.

6 Q. In recognition of this IHG has, you said, actively
7 invested in expanding the payment methods that are
8 available?

9 A. Yes, that is correct.

10 Q. They now include, you said, UnionPay, Alipay and WePay?

11 A. Yes.

12 Q. Is that to recognise the fact that you've got guests
13 coming from China, travelling from China and likely to
14 use those payment methods which are familiar in their
15 Chinese market?

16 A. That is correct and just to put some clarification,
17 because it is about timing. Pre-pandemic we started to
18 see a shift in the market to the Chinese market,
19 particularly for London and for Oxford, so we needed
20 to -- they are a different way of paying for things in
21 those countries and we needed to -- take it. They have
22 not been prevalent through post-pandemic until now, we
23 are seeing the Chinese market returning. Likewise with
24 the Japanese market, which is predominantly JCB payment
25 types, we have not seen very much of that post -

1 pandemic and that is still very small compared to what
2 it was pre-pandemic.

3 Q. Can you say, Mr Harrison, even at a high level, what the
4 level of investment was that the group needed to make to
5 accommodate these different payment methods, JCB, China
6 UnionPay and WePay?

7 A. I think the investment is that we have gone out, we were
8 looking at our acquiring technology in particular. We
9 have just recently done an RFP process for our
10 acquirers, looking at who can give us the range of
11 payment applications that we can use to take the
12 payments from those customers. So that is when we say
13 we are putting the investment in and that is -- I can
14 only talk to the hotels that we lease in the UK and that
15 is where I am talking from.

16 As a global organisation there are other -- we have
17 an entire department based out in Atlanta, as
18 I reference in my statement, that deals with wider
19 relationships to that part, but to the points for these
20 hotels we are doing that and we are in the process of
21 taking that and moving that forward.

22 Q. Do you have any idea -- and you may not have any idea
23 what that is costing, just in the UK? If it is
24 confidential obviously we can have that heard
25 confidentially?

1 A. At this moment in time, no, because we have just
2 finalised the RFP for both the online gateway and the
3 payment acceptance at the hotel. That investment was
4 the time and effort to go into looking at that, that has
5 been a time-consuming effort. We are now evaluating
6 that and taking it forward.

7 Q. Is it likely to involve a substantial investment?

8 A. No.

9 Q. No?

10 A. No.

11 Q. In cash terms?

12 A. In cash terms, no.

13 Q. Returning then, Mr Harrison, to decisions regarding
14 payment methods, you said driven by consumer demand, is
15 that why you stopped taking Diners Club because of the
16 lack of take-up from customers?

17 A. Yes, in particular in the UK, yes, that is correct.

18 Q. Mr Harrison, moving on to American Express, if I may.
19 You would accept, would you not, that American Express
20 is very widely used in the travel sector?

21 A. Yes.

22 Q. In fact we can see a breakdown of the split between
23 Visa, Mastercard and Amex in your statement. If you go,
24 please, to paragraph 23 {RC-F2/5/4} at page 4 of the
25 statement, I am looking at the table just below

1 paragraph 23, if you see the far right-hand column it
2 has the payments to IHG split between Visa, Mastercard
3 and Amex and do you see the Amex figure?

4 A. Yes.

5 Q. I am told this is not confidential, 26.7%, and that is
6 really only a little bit less than Visa.

7 A. Yes.

8 Q. Do you see the Visa figure at the top? So on the basis
9 of these figures would you accept that Amex is a serious
10 competitor to Visa in the travel sector?

11 A. Could you just clarify "competitor" so I understand
12 where -- more about the question really.

13 Q. No, of course, Mr Harrison. First of all, I am talking
14 about the travel sector, travel, hotels and associated
15 services that you are familiar with. This is the market
16 for card payments, card payments for travel, tourism,
17 hotels. In that market Amex is a serious competitor to
18 Visa?

19 A. All I can comment on is what we see from our statistics
20 that where we are receiving payments from, rather than
21 to a wider -- whether they are a major competitor I have
22 no -- all I can say is we are seeing that amount of
23 business coming through from Amex.

24 Q. So from your perspective, just your perspective, it
25 looks like Amex is a serious competitor?

- 1 A. Correct.
- 2 Q. One of the reasons why Amex is popular, at least with
3 the customers who come to you, is because of the rewards
4 that it offers, is that not right?
- 5 A. That is partly true. There are also -- Amex also for
6 large American corporations, especially people like
7 Google, Apple for instance use American Express as their
8 corporate card and, for instance, a -- our property in
9 London, they are a major supplier -- bookers of rooms,
10 so that drives part of that.
- 11 Q. Indeed. You accept, do you not, that Amex is
12 significantly more expensive for IHG to take as payment
13 than Visa or Mastercard?
- 14 A. That is correct.
- 15 Q. If you just -- to make that good, Mr Harrison, at
16 paragraph 52 of your statement we see at page 9
17 {RC-F2/5/9}, second line, you see the flat rate -- the
18 flat rate that you pay when accepting Amex cards, do you
19 see that?
- 20 A. Yes.
- 21 Q. 3.25%?
- 22 A. Yes.
- 23 Q. That is obviously a lot more than the cost of accepting
24 a Visa or Mastercard card?
- 25 A. Yes.

1 Q. But notwithstanding this high cost, IHG has never sought
2 to discourage the use of Amex at the point of sale?

3 A. No.

4 Q. You have never sought to recover that additional cost
5 through surcharging Amex cards?

6 A. No.

7 Q. That is because you did not want to discourage customers
8 from making transactions?

9 A. No and I think I say in my statement it is a highly
10 competitive market when you are in the market, it is one
11 of the things that will drive people to make a decision
12 as to whether they are booking with ourselves or other
13 competition.

14 Q. Mr Harrison, turning now to commercial cards, IHG does
15 not treat commercial cards any differently from consumer
16 cards, does it?

17 A. None whatsoever.

18 Q. Again that is a business decision driven by your desire
19 to give customers options?

20 A. Yes.

21 Q. Again, you are aware, are you not, that commercial card
22 MIFs are more expensive than consumer card MIFs?

23 A. Yes.

24 Q. But again you have never sought to resist the use of
25 commercial cards?

1 A. No.

2 Q. You have never sought to surcharge commercial cards?

3 A. No.

4 Q. Again that is a commercial decision?

5 A. That is a commercial decision.

6 Q. Driven again by the desire not to discourage customers?

7 A. Correct.

8 Q. On cross-border acquiring, Mr Harrison, could I ask you
9 to turn up paragraphs 57 to 62 of your statement at
10 page 10 {RC-F2/5/10}.

11 A. Yes.

12 Q. This is a really short question. You mention here in
13 57:

14 "... on one occasion, we very briefly discussed
15 orally the option of using cross-border acquirer
16 services and considered whether cross-border acquiring
17 would reduce payment acquisition costs."

18 Do you see that?

19 A. Yes, I do.

20 Q. You said that discussion took place -- in the next
21 paragraph -- sorry, paragraph 59 -- in Harrogate around
22 May 2018?

23 A. Yes.

24 Q. You mention looking in your old -- this is 62 -- emails
25 and notebooks but you cannot find any notes or any other

1 record of that conversation?

2 A. Yes.

3 Q. You cannot find any document with any reference to it at
4 all?

5 A. No.

6 Q. So is it --

7 A. Can I just give some insights?

8 Q. Of course.

9 A. This was -- I was working -- this was at the time of the
10 acquisition of these hotels from Starwood Capital, that
11 was the main predominant owner of the time, to
12 a partnership with -- between our partners Covivio and
13 IHG, so we were -- I was actually on the other side of
14 the fence. I was with the previous owners. We were in
15 a discussion with IHG on the transitional arrangements
16 and the conversation turned, as you can imagine, to many
17 things because we, from our perspective, did not know of
18 the arrangements that IHG had in place at that time, so
19 a question was asked about acquisition, that type of
20 thing, rather than it being in any great detail, but it
21 was in that context it was discussed.

22 Q. Thank you.

23 Looking now at paragraph 63 of your statement,
24 Mr Harrison {RC-F2/5/10}, you say that your solicitors
25 told you that this trial will consider certain rules

1 implemented by Visa and Mastercard known as
2 anti-steering rules. Is that a phrase that you had
3 heard before, anti-steering rules?

4 A. Yes.

5 Q. Before you were told by the solicitors?

6 A. Yes.

7 Q. Can you explain to the Tribunal what your understanding
8 is of what those rules are?

9 A. That we should not discriminate in any way between
10 different categories of card. If it is issued by Visa
11 or it is issued by Mastercard, or even in a wider
12 context Amex, we should not really be discriminating
13 against where -- how people want to use their cards.

14 Q. At paragraph 64, Mr Harrison, you say you have been
15 asked to consider IHG's position if the Merchant Service
16 Charges associated with accepting different types of
17 cards had been at different levels, do you see that?

18 A. Yes.

19 Q. What you would have done in those circumstances?

20 A. Yes.

21 Q. But it is fair to say, as I think you have just
22 confirmed, that IHG has never engaged in any form of
23 steering before?

24 A. Yes.

25 Q. You have never done it for commercial card transactions?

- 1 A. No.
- 2 Q. For Amex?
- 3 A. No.
- 4 Q. You did not do it for Diners Club --
- 5 A. No.
- 6 Q. -- while you continued to accept them?
- 7 A. Can I say again that is my knowledge since I have come
8 to IHG. Prior to my coming to IHG, I could not comment.
- 9 Q. I understand.
- 10 At paragraph 40, Mr Harrison, back on page 7
11 {RC-F2/5/7}, you refer to the fact that when dealing
12 with inter-regional transactions there is an advantage
13 to merchants where a customer selects Dynamic Currency
14 Conversion. Do you see that?
- 15 A. Yes.
- 16 Q. That is because, as you say, customers may pay
17 approximately 4% more?
- 18 A. Yes.
- 19 Q. But despite that benefit to merchants, IHG has never
20 steered customers towards Dynamic Currency Conversion?
- 21 A. No.
- 22 Q. That is again because you see it as a matter of consumer
23 choice?
- 24 A. Correct.
- 25 Q. All of these examples -- you can see where I am trying

- 1 to go with this?
- 2 A. Not really, I am sure you do.
- 3 Q. Well, I think so far we are on the same page, that all
4 of these decisions that you can speak to, Amex,
5 Diners Club, not steering away from commercial cards,
6 not steering towards Dynamic Currency Conversion, the
7 objective is to ensure that customers are able to pay
8 with the payment method that they want?
- 9 A. Correct.
- 10 Q. So in light of that policy, it is true, is it not, that
11 a Visa or Mastercard debit or credit card would have to
12 have an extraordinarily high MSC before IHG would have
13 to give consideration to trying to prevent customers or
14 discourage customers from using it?
- 15 A. Yes.
- 16 Q. Even then, is it right to say that you would be
17 reluctant to do anything that would make it difficult
18 for customers to compete -- to complete, sorry,
19 transactions?
- 20 A. Yes.
- 21 Q. Finally, Mr Harrison, on surcharging, are you familiar
22 with the relevant legislation governing surcharging?
- 23 A. No.
- 24 Q. Now, at paragraph 69 of your statement, which is on
25 page 11 {RC-F2/5/11}, you say:

1 "If the rule against surcharging was not in
2 place ..."

3 Then in paragraph 70 you say:

4 "Before the rule against surcharging was
5 implemented ..."

6 What rule did you have in mind when you said that?

7 A. I was -- in my mind it was around that anti-steering,
8 competitive, charging, making it a barrier to -- I was
9 not aware of any legislation. I might in the back of my
10 mind be aware that there was competition conversations
11 about it but I am not aware of the law because it was
12 not my remit to understand that bit.

13 Q. So were you aware that until January 2018 merchants in
14 the UK and Ireland were expressly allowed to surcharge
15 on credit cards?

16 A. I was aware. I was not aware of when the date changed,
17 but I was aware from my experience, especially during
18 the financial crisis a number -- most hotel companies
19 did levy a surcharge at that point through 2007/2008.
20 From my experience that dropped away in 2010 and 2011 as
21 the market became even more competitive.

22 Q. So IHG could have surcharged like other hotels but chose
23 not to because of the market --

24 A. I cannot -- all I can comment on is general practice at
25 that time because I did not work for IHG at that point

1 in time.

2 Q. But I think the point you have made is that IHG for its
3 part, to the extent that you know, never surcharged --

4 A. That is correct.

5 Q. -- even if it could have?

6 A. Yes.

7 Q. It is true, is it not, that you have not produced any
8 documents showing that IHG even considered surcharging
9 during that period?

10 A. That is correct. The -- another -- if I may just put
11 a bit of context, when we talk of IHG, IHG is -- and
12 I think I comment in my statement, is a franchise
13 business, so there are things that a franchisee may do
14 that we are not aware of, or were not aware of. We do
15 not stipulate policies around that. That is not within
16 the brand standards per se. We give guidance, we
17 give -- through our contact with our owners
18 association -- on best practice, but we cannot
19 mandate -- you know, franchises in the UK, for instance,
20 of the circa 370 hotels, 360 of them are franchised.

21 Q. I have nothing further for Mr Harrison.

22 Sorry, Mr Cook pointed out to me, Mr Harrison, can
23 you go back to paragraph 7 of your statement just in
24 view of the answer you have just given?

25 A. Sorry, which paragraph?

1 Q. Paragraph 7, please, page 2 {RC-F2/5/2}, just to clarify
2 what you just said about franchisees.

3 A. Yes.

4 Q. Just to read that paragraph 7. You say you are not
5 making:

6 "... this witness statement on behalf of IHG
7 franchised entities [but you] believe IHG maintains
8 standardised payment practices across its corporate
9 group, even if the acquirers engaged by these
10 franchisees may be different."

11 Do you see that?

12 A. Yes.

13 Q. So are you saying -- well, can you tell the Tribunal
14 what you mean by this?

15 A. When I was referring to this in -- the hotel industry
16 works to a set of overall principles called Uniform
17 System of Accounts for the Lodging Industry, which
18 I believe -- as you can imagine from that title is
19 an American-driven process, but all the global
20 account -- global companies work to it and most
21 independent. That allows for standardised practicing
22 for accounting, for transactions where they are
23 accounted for, et cetera. So for instance it talks
24 about Visa, Mastercard and how that is dealt with from
25 a commissions point of view, whether you put that as

1 a cost to rooms costs, or whether it is an admin and
2 general costs within the undistributed expenses lines,
3 so that was the standard practice as I was talking about
4 when I was thinking about this particular statement.

5 Q. It is an accounting practice then?

6 A. Yes.

7 MR KENNELLY: Thank you, Mr Harrison. I have nothing
8 further.

9 Re-examination by MR BEAL

10 MR BEAL: If I may very briefly in re-examination.

11 You were asked about the competitive dynamic between
12 Amex, Visa and Mastercard. Is that a choice that the
13 hotel would make, which card would be used preferably by
14 a given customer?

15 A. No.

16 Q. Why is it not a choice that the hotel makes?

17 A. Because we do not want to steer the customers in any
18 particular way. At the time of booking, there are so
19 many different channels the way the booking may come
20 through, you may be an IHG reward member, so you might
21 be, as we say, burning your points in the hotel, but you
22 might be paying your extras with your own credit card.
23 Now, that could be an American Express, it could be
24 a Mastercard, it could be anything. We do not know
25 until that customer arrives at the hotel and we ask "Do

1 you want to open an extras account, how would you want
2 to settle that?"

3 Q. It was put to you, well, you have not stopped accepting
4 Amex, for example, even though it is expensive. Could
5 you simply stop accepting Visa or Mastercard, for
6 example?

7 A. No.

8 Q. Why not?

9 A. Because the -- the market would not tolerate us doing
10 that. As you can see, and I think it is in one of the
11 parts of my statement, our cards through them to
12 October -- no, September 23 was nearly £74 million-worth
13 of revenue was generated through those cards. We would
14 not turn that away.

15 Q. You were asked about currency conversion and there was
16 a reference to 4% in your statement. Does any of that
17 money come to IHG?

18 A. Yes.

19 Q. On what basis?

20 A. The basis is that it is an agreed percentage. We get --
21 a part of the mark-up comes through. We -- I get
22 an email once a month from our acquirer. We last month
23 from memory gained £1,200 from it from across all the
24 nine hotels out of the potential of nearly 30,000.

25 Q. How do you work out who gets what with your acquirer?

1 A. That is agreed with the acquirer at the time of the
2 acquisition and that was done by our credit card
3 services team. I am not aware of any negotiations,
4 et cetera.

5 Q. You were then asked about brand policies.

6 Do brand policies cover whether a given hotel would
7 accept a type of payment card or not?

8 A. No.

9 MR BEAL: Thank you very much.

10 THE PRESIDENT: Mr Harrison, thank you very much for your
11 time and your evidence. You are released.

12 A. Thank you.

13 (The witness withdrew).

14 MR BEAL: Just looking at the time, sir, I am about to pass
15 the baton to my learned friend Mr Woolfe to call the
16 next witness, consistent with the Lady Chief Justice's
17 direction that all should be involved. Is this
18 a convenient moment perhaps to take the ten-minute
19 break?

20 THE PRESIDENT: I think that is a very convenient moment.

21 It is Ms Copling next, is it?

22 MR BEAL: Ms Copling, yes.

23 THE PRESIDENT: I am very grateful. We will rise for
24 ten minutes. Thank you.

25 (11.54 am)

1 (Short Break)

2 (12.09 pm)

3 THE PRESIDENT: Mr Woolfe.

4 MR WOOLFE: Thank you, sir. I am going to call Mrs Copling
5 to give evidence now.

6 MRS SUSAN COPLING (affirmed)

7 THE PRESIDENT: Do sit down. I hope you have some water
8 there and you will be taken to some documents. First of
9 all, Ms Copling, is that all right, or Mrs?

10 A. Mrs Copling.

11 THE PRESIDENT: When you see some documents, if you want to
12 see other sides or parts of it, just let counsel know
13 and they will take you to it. I will leave you to
14 Mr Woolfe.

15 Examination-in-chief by MR WOOLFE

16 MR WOOLFE: Mrs Copling, you should have near you some
17 witness statements. Could we go to {RC-F2/7/1}.
18 Hopefully you should have there a witness statement
19 marked "First Witness Statement of Sue Copling" with the
20 date of 26 October 2023 at the top right-hand side; is
21 that correct?

22 A. Correct.

23 Q. Do you recognise that statement?

24 A. I do.

25 Q. Could we go to page 12, {RC-F2/7/12}, and you should see

1 there a page with "Confirmation of compliance" and
2 a statement of truth on it and two signatures. Do you
3 have signatures in your copy?

4 A. I do.

5 Q. Are those your signatures?

6 A. They are.

7 Q. Is there anything in that statement you would like to
8 correct or add to?

9 A. Probably just one point of clarification on paragraph 1
10 where it refers to me being the head of financial
11 operations. That was absolutely true at the time of the
12 witness statement, but I have since, since 1 January
13 this year I have been promoted to a new role, so just to
14 clarify that point. It was true at the point of the
15 witness statement but has since been amended.

16 Q. Thank you. What is your new job title?

17 A. I am now the director of financial strategy.

18 Q. Okay. Subject to that, do you adopt this statement as
19 your evidence in these proceedings?

20 A. It is.

21 Q. Then just a couple of points of clarification. On
22 page 4 of that document, paragraph 24 {RC-F2/7/4}, you
23 say:

24 "Card payments are necessary to Ageas'
25 operations ..."

1 You say you only accept Amex and Mastercard, does
2 not accept Amex, PayPal or Apple Pay.

3 You say:

4 " ... due to the costs associated with introducing
5 additional payment methods."

6 What costs are you referring to there?

7 A. I think it would be the combination of the higher
8 processing fees, but also any costs and resources
9 associated with introducing an additional payment type.

10 Q. So that is both one-off costs and ongoing costs?

11 A. Yes.

12 Q. Okay. Then you also in the same paragraph say you are
13 re-platforming and your intention is to be able to
14 introduce new payment methods once the system is live.
15 Do you mean you intend to introduce them, or simply that
16 you intend to have the ability to?

17 A. Both, so, yes, we are re-platforming. We are aiming to
18 go live with our new platform later on this year and our
19 hope and intention would be that we would be able to
20 offer new payment types, for example open payments.

21 Q. Then at paragraph 51, which is on page 8 {RC-F2/7/8},
22 you say you recall that you secured some reductions in
23 WorldPay's own fees following several rounds of
24 negotiation. That is from your own recollection?

25 A. Correct.

1 Q. So which negotiations were those you were referring to?

2 A. So that was our RFP process in 2019, so we went through
3 a full RFP process at that time and we were able to
4 negotiate a reduction in acquiring fees as a result of
5 that.

6 Q. Okay, and you say the WorldPay -- third line of that
7 paragraph:

8 "... made clear that there were certain portions of
9 the Merchant Service Charge which they simply have to
10 pass through, so there is no room to negotiate ..."

11 Which portions of the Merchant Service Charge are
12 you --

13 A. Specifically that would be the interchange fees.

14 Q. Did they explain why?

15 A. Simply it was non-negotiable and it was a direct
16 pass-through.

17 MR WOOLFE: Thank you. Those are all the questions I have.

18 You will have some questions from my learned friends.

19 A. Thank you.

20 Cross-examination by MR KENNELLY

21 MR KENNELLY: Good afternoon, Mrs Copling.

22 A. Hello.

23 Q. Could I take you first to paragraph 61 of your witness
24 statement, it is on page 9 {RC-F2/7/9} of the statement.

25 Do you have that?

- 1 A. I do.
- 2 Q. You say here that your solicitors at Stephenson Harwood
3 explained to you that the trial would consider rules on
4 the Visa and Mastercard schemes known as anti-steering
5 rules; is that right?
- 6 A. Correct.
- 7 Q. Then you explain at paragraph 62 what you have been told
8 about them, do you see that?
- 9 A. I do.
- 10 Q. Now, I take it from what you have said here that you
11 were not aware of these rules before you prepared this
12 statement; is that right?
- 13 A. Correct.
- 14 Q. At paragraph 68 of your statement, same page, you say --
15 is it, "Ageas" or how do I pronounce that?
- 16 A. Ageas.
- 17 Q. "Ageas engaged in surcharging of credit cards ... as
18 part of various partnership arrangements before the
19 implementation of the anti-[steering] rule."
- 20 A. Anti-surcharging rule.
- 21 Q. Anti-surcharging rule, forgive me. Just to be clear, it
22 was not Ageas itself that was surcharging, it was some
23 of your partnership organisations?
- 24 A. So Ageas would have applied that surcharge but in
25 agreement with particular partners. So for our own

1 direct brands we chose not to surcharge but certain
2 partnerships where effectively it was a white label
3 arrangement, it was agreed with those partners that we
4 would apply surcharging.

5 Q. So the partners -- although as you -- sorry, I think
6 what you said there was while for your own brands you
7 were not surcharging, but the partner brands did
8 surcharge?

9 A. Some partner brands.

10 Q. Some partner brands. Were they surcharging back in
11 December 2011, do you know?

12 A. I would not know, I am afraid.

13 Q. What about when you took over as head of financial
14 operations for Ageas Insurance in 2015?

15 A. So in 2015 I was not part of Ageas Retail, I was part of
16 Ageas Insurance which is our B2C business rather than --
17 our B2B business, I beg your pardon, rather than our B2C
18 business but in 2017 when I became responsible for Ageas
19 retail as well, which is our B2C business, at that point
20 we were surcharging on specific partners.

21 Q. In 2017?

22 A. Yes.

23 Q. But shortly after that, in January 2018, all the
24 surcharging must have stopped?

25 A. Correct.

- 1 Q. Because the prohibition -- the legal prohibition on
2 surcharging on consumer cards came into force?
- 3 A. Absolutely, so any brands where we were surcharging we
4 stopped in January 2018 in accordance with the law --
5 change in the law.
- 6 Q. Thank you. So when you say in your statement that Ageas
7 stopped all surcharging when the anti-surcharging rule
8 was implemented, you mean that legal prohibition --
- 9 A. The legal --
- 10 Q. -- in January 2018.
- 11 You do not suggest anywhere in your statement that
12 any rule imposed by Visa or Mastercard, before 2018,
13 prevented Ageas or its partners from surcharging?
- 14 A. I do not, no.
- 15 Q. Mrs Copling, paragraph 24 of your statement {RC-F2/7/4}
16 you refer to the costs associated with introducing
17 additional payment methods, the point that Mr Woolfe
18 took you to a moment ago. Do you see that on page 4,
19 paragraph 24?
- 20 A. I do.
- 21 Q. When you refer to additional payment methods in the
22 middle of that paragraph, does that include Amex?
- 23 A. That would include Amex, yes.
- 24 Q. Then you say you are currently re-platforming to a new
25 sales and underwriting system and your intention is to

1 and so on. Can you say a little bit more about that?
2 Are you talking -- in particular I am interested in
3 whether you are talking about dealing with a particular
4 cohort of customers and making sure that there are
5 payment options, or whether you are talking more
6 generally about obligations to the regulator?

7 A. Absolutely, so certainly we recognise that insurance is
8 generally not a luxury purchase, it is an essential
9 purchase for most people and most businesses. During
10 the time in question we offered commercial policies as
11 well as personal lines policies. We have since divested
12 our commercial lines business, so therefore being able
13 to offer commercial cards at that point, given that we
14 were selling commercial policies, would have been
15 important to us, so it would not have been a requirement
16 specifically from the regulator to say "You must offer
17 all of these payment types, or these payment cards", but
18 certainly we would have to be cognisant of the customer
19 base that we were serving.

20 MR TIDSWELL: Because there might be some people who were
21 unable to make payments other than through account
22 payment?

23 A. Correct, absolutely. Again in terms of why we do or do
24 not offer Amex it is important that we make our products
25 accessible and give people choice around their type of

1 payment -- whether they pay by credit card, debit card,
2 direct debit, direct bank transfer, for example, and
3 acknowledging that most people, even if it they have got
4 an American Express card, will still have a Mastercard
5 or Visa card generally, being able to offer Mastercard
6 and Visa as options really sort of makes sure that -- we
7 feel that that makes sure that we are making that
8 accessible to our customers.

9 MR TIDSWELL: Thank you.

10 A. Pleasure.

11 PROFESSOR WATERSON: Yes, could I ask, you do not mention --
12 you have just mentioned direct debit, but I did not see
13 it in the statement, unless perhaps I missed it, so
14 would that be sort of a preferred method from your point
15 of view?

16 A. From our point of view as a business?

17 PROFESSOR WATERSON: Yes.

18 A. So we will be equally happy to take a payment up front
19 which could be by -- which generally would be by a card.
20 We do offer the option to pay by instalments recognising
21 that an insurance policy can be an expensive purchase
22 for many people and so we do offer direct debits with
23 an APR attached to that generally.

24 PROFESSOR WATERSON: So do you have much continuing
25 business, business from year --

1 A. Yes, we do have a lot -- a fair proportion of recurring
2 transactions, but equally in the UK insurance market is
3 probably the most competitive insurance market in the
4 world because of price comparison websites, so,
5 you know, there has been a history of customers even
6 when they get offered their renewal, still going and
7 checking on Compare The Market or Money Supermarket
8 et cetera.

9 PROFESSOR WATERSON: Yes, and this is presumably because
10 they are largely driven by price?

11 A. It is a very price-driven market, absolutely.

12 PROFESSOR WATERSON: Thank you.

13 THE PRESIDENT: Anything arising out of that, Mr Kennelly?

14 Further cross-examination by MR KENNELLY

15 MR KENNELLY: I have one very brief question that arises
16 from Professor Waterson's question, if I may.

17 Mrs Copling, you mentioned that you charge an APR.
18 May I ask what that APR is, the figure?

19 A. I am afraid I would not be able to tell you off the top
20 of my head and I think it may vary by brand as well, so
21 I am afraid -- but we do monitor that against the
22 market.

23 Q. I am grateful. Mr Cook may have a question for you
24 immediately after me, but the next question I had for
25 you was why do you charge -- do you know why you charge

1 now released from the witness box. Thank you.

2 A. Thank you, pleasure.

3 (The witness withdrew)

4 MR JACKSON: Please could I call Mr Hirst on behalf of the
5 claimants.

6 MR MARK HIRST (affirmed)

7 THE PRESIDENT: Mr Hirst, good afternoon. Do sit down.
8 Make yourself comfortable. There will be some water
9 there and I am afraid there will be some questions from
10 counsel.

11 Examination-in-chief by MR JACKSON

12 MR JACKSON: Good afternoon. I am going to ask you a few
13 questions and then, as you will have seen, I imagine the
14 card schemes also have a few questions for you.

15 Could you look at the folder of documents in front
16 of you at tab 4. That is {RC-F2/4/1} for the EPE.
17 Page 1 of that should say hopefully, in the middle of
18 the page "First Witness Statement of Mark Hirst"?

19 A. It does, yes.

20 Q. Under that that is your name. Is that still your
21 business address there?

22 A. That is correct.

23 Q. Thank you. If you could turn to page 11 {RC-F2/4/11},
24 there is a statement of truth and two signatures. Are
25 those your signatures?

- 1 A. They are, yes.
- 2 Q. Are the contents of that witness statement true to the
3 best of your knowledge and belief?
- 4 A. They are, yes.
- 5 Q. Thank you. I have a few supplemental questions. If you
6 could turn to page 3 {RC-F2/4/3}, paragraph 11, in the
7 middle of that paragraph 11, you stated that you have
8 been a FTSE corporate treasurer for nearly 20 years.
9 Can you explain what roles you have held in that time?
- 10 A. Yes, sure. So I have worked across different sectors.
11 I am a treasury specialist but I have worked in grocery
12 and retail, gaming and gambling, also travel and my
13 current sector is consumer brand footwear.
- 14 Q. What specific companies have you worked for during that
15 time?
- 16 A. I have worked for Tesco, Thomas Cook, William Hill and
17 my current company is Dr Martens PLC.
- 18 Q. Roughly how many years were you at Tesco?
- 19 A. Ten years at Tesco.
- 20 Q. During those years were you in charge of interchange at
21 any point?
- 22 A. I was indeed, probably for about six or seven of those
23 years.
- 24 Q. From your experience, how do you think you would have
25 reacted in a scenario where Visa and Mastercard had not

1 imposed interchange fees on acquirers and merchants and
2 instead --

3 MR COOK: I am going to have to stand again. This is
4 exactly the kind of examination-in-chief that is wholly
5 inappropriate. It is about a role that has not been
6 mentioned in the witness statement and going into sort
7 of the heart of the case. We need to get forewarning if
8 these kind of issues are going to be raised.

9 MR JACKSON: Mr President, you allowed the question this
10 morning. It is in the interests of the Tribunal we
11 think to hear evidence on this point, given it is
12 relevant. I should also say that, as Mr Beal informed
13 you this morning, this point arose relatively late in
14 the stage of the preparation for this matter and given
15 that we are here, in my submission it would be good to
16 hear the witness' evidence on it.

17 THE PRESIDENT: Mr Jackson, I will allow it, but Mr Beal,
18 I think we ought to have a quick discussion when we rise
19 for the short adjournment about this. Mr Jackson, you
20 can proceed.

21 MR KENNELLY: Just for the record, sir, I also object and
22 I object for the additional reason that had we -- there
23 was ample opportunity to put in a supplemental statement
24 on this issue.

25 THE PRESIDENT: I appreciate that.

1 MR KENNELLY: We would have requested documents. We could
2 have had the opportunity then to make enquiries arising
3 from it and we have been deprived from that opportunity
4 entirely in the way this has been done.

5 THE PRESIDENT: Mr Kennelly, please do not read into the
6 fact that I am going to permit this line of questioning
7 that I am not very conscious of the issues that you are
8 quite rightly raising. That is why I think we need to
9 have five minutes on this without the witness in the
10 box.

11 MR KENNELLY: Forgive me, sir, the second reason why I rose
12 was to say -- because the Tribunal had given the ruling
13 that the question would be asked. We reserve the right
14 if it necessary to recall the witness, having heard his
15 evidence, and made enquiries if we need to about
16 documents and so forth and cross-examine him on the
17 evidence he gives, having had proper time to prepare.

18 THE PRESIDENT: Well, Mr Kennelly, of course (inaudible)
19 application will be received when it is made on the
20 merits, but without wanting to foreshadow it does seem
21 to me that these questions and the answers that are
22 received are likely to be given significantly less
23 weight because of the absence of due process in bringing
24 the answers out and that may be the answer to your
25 approach, but we will not leave the witness hearing us

1 wash our dirty linen in public. We will instead allow
2 him to give his evidence and we will discuss that
3 separately.

4 MR KENNELLY: Thank you.

5 MR JACKSON: I am grateful, Mr President.

6 So the question I was asking you, Mr Hirst, was in
7 your experience how do you think you would have reacted
8 in this purely hypothetical scenario where Visa and
9 Mastercard had not imposed interchange fees and instead
10 acquirers could have tried to negotiate interchange
11 freely with issuers with the payment being settled if
12 those negotiations were successful. Do you have any
13 thoughts on how you would react in that situation?

14 A. I think my thoughts here are probably -- if I synthesise
15 it into I guess a number of factors and I think it would
16 depend on your sector, I think it would depend on your
17 margin structure as a business and I think ultimately if
18 I refer back to Tesco, I think that is a very thin
19 margin business in a very highly competitive sector,
20 especially in the UK. I think our expectation would be
21 that we would want to seek out those acquirers and PSPs
22 who had the scale and the economies of scale and volume
23 with which they could negotiate lower fees with card
24 issuers.

25 There are many card issuers, as you know, in the UK

1 and in other markets in which we operated, but the
2 essence would have been Tesco would have used its power
3 to negotiate those fees down. I think it is probably
4 fair to say that was probably one of the biggest
5 variable costs in the P&L, in the P&L account, the
6 profit and loss account, and it was frustratingly the
7 only cost that was not subject to competitive pressures
8 or market forces and that was a constant source of
9 frustration to the board at Tesco because we are in the
10 business of delivering everyday low-prices for
11 customers.

12 Q. Thank you.

13 You have provided the Tribunal with Dr Martens'
14 current payments roadmap. That is at {RC-J2/105} and
15 I want to look at page 6, please {RC-J2/105/6}. This is
16 your confidential internal document so I am not going to
17 read any of this into the record, but you will see
18 page 6 there -- that is not the correct document, I do
19 not think. {RC-J2/104}? Yes, this is the page I was
20 referring to. It is your confidential document so I am
21 not going to read it out but you see it contains
22 a screenshot of what I assume is your payment site on
23 the right and several bullet points on the left. The
24 third bullet point you referring to commercial
25 negotiations with a payment service provider, could you

1 explain that bullet point to the Tribunal, please. What
2 are you referring to there?

3 A. Sure, so this is -- just for information, this is a page
4 from our website and something you can do as a merchant
5 or a retailer is surface your different payment methods
6 at different stages during the customer journey, so, for
7 example, Buy Now Pay Later methods, which are fairly
8 modern innovations in payments like to be kind of front
9 and centre on the product page, so, for example, if the
10 customer is scrolling through your website and they are
11 looking at a particular product, often what the likes
12 of, say, Klarna or Clearpay or even PayPal would like is
13 for their payment method to appear on the same page as
14 the product, so it sticks with the customer, it becomes
15 front of mind for customers.

16 But generally as a merchant you do not really --
17 when it comes to your overall Merchant Service Charge,
18 of which clearly interchange is the largest component,
19 it is the bulk and it is something you cannot negotiate
20 away, we have not been able to do so. One of the things
21 you can leverage is potentially how your payment methods
22 are presented to customers and clearly at Dr Martens we
23 have a bit of a philosophy that we want to give
24 customers choice, right, when it comes to payments. So
25 payments are typically reflexive behaviours on the part

1 of customers, they will pay it how they have always
2 paid, or at the very least they will express
3 a preference for how they wish to pay. So generally the
4 view has been, certainly in the organisations I have
5 worked for, is that customers are generally
6 over-incentivised to use cards because of things like
7 cashback, miles, Air Miles and other rewards.

8 But one thing we can do, for example, if you are
9 having a sensible conversation in a three-party scheme
10 such as American Express, or Klarna, or even PayPal is
11 you can sit around the negotiating table and have
12 a sensible commercial negotiation but also you can
13 leverage, you know, adoption of that payment in your own
14 estate by doing things such as pushing it up the order
15 of payments on your payment page. That will gain you
16 a bit of leverage with particular schemes.

17 Does that answer that question?

18 Q. Yes, thank you. Also just on this page, second bullet
19 point says at the end "may help optimise". Can you just
20 explain what is being sought to be optimised there?

21 A. Yes, so I think for any merchant, especially one running
22 a website, is that you -- once you get the attention of
23 a customer you want to keep that attention and obviously
24 you want that to result in a sale ultimately and what we
25 try to do is make the checkout process, which is usually

1 the most joyless part of the transaction, as invisible
2 to the customer as possible. So we want to minimise,
3 optimise or eliminate all friction at checkout
4 insofar as we can and typically we know, for example, if
5 we do not offer, for example, a popular payment method
6 and the customer realises that, they will just abandon
7 the transaction, but most likely abandon the whole site
8 as well. That is not great clearly for any merchant.
9 We do not want that to happen.

10 But effectively on optimisation what we are trying
11 to do is understand customer preferences and ultimately,
12 you know, the combination of different factors which are
13 to our benefit rather than to a particular payment
14 scheme or payment method, so the optimisation bit is
15 around, you know, it will differ by market, it can
16 differ by customer segment or cohort or demographic, but
17 it is something we pay close attention to when we set up
18 the website and we try and optimise that inasmuch as we
19 can.

20 Q. In your witness statement at paragraph 21, so this is
21 page 5 of the witness statement {RC-F2/4/5}, you at that
22 paragraph, paragraph 21, you explain who your current
23 acquirer is and then at page 8 {RC-F2/4/8},
24 paragraph 32, you explain how cross-border interchange
25 fees have increased since Brexit and you say in the

1 final sentence there you sent an email to your acquirer.
2 We have that email in the bundle at {RC-J2/91}. So you
3 sent this in November 2021. I am not going to read it
4 out. The Tribunal can read it. Can you explain why you
5 sent this email discussing a formal complaint?

6 A. Yes, very simply we were complaining about the increase
7 in fees. So debit card went from 20 basis points to
8 115, credit card went to 150 basis points from 30 basis
9 points, as a result of the UK losing its EEA designation
10 for interchange purposes. So clearly we felt that was
11 very -- that was unjustified. We could not see a good
12 reason for that change. We have a business which
13 practically takes in European transactions in a UK
14 entity, so the UK is -- sorry, the entity is UK-based
15 and it is the merchant of record, so that would be a big
16 hit to our overall Merchant Service Charge. As a result
17 of this, we wanted to complain. We often -- we know
18 that, you know, that complaint falls on deaf ears but we
19 always think we should go through the process of
20 submitting a complaint and also it is probably fair to
21 say since the PSR came into existence we would always
22 look to copy the PSR into any of those complaints as
23 well.

24 Q. Just to be clear, why would you copy in the PSR? What
25 would you hope to achieve by that?

1 A. We know obviously from a UK perspective they are here to
2 regulate designated payment schemes and methods. As
3 I said, we felt this was really unjust and we wanted to
4 bring this to their attention.

5 MR JACKSON: Thank you. I have no further questions, but my
6 learned friends may.

7 Cross-examination by MR KENNELLY

8 MR KENNELLY: Good afternoon, Mr Hirst.

9 A. Good afternoon.

10 Q. Could I take you, please, to paragraph 13 of your
11 witness statement. It is on page 3 {RC-F2/4/3}. Do you
12 see that, Mr Hirst?

13 A. Yes, I do.

14 Q. You refer here to the different payment methods that are
15 accepted by Dr Martens?

16 A. I do indeed, yes.

17 Q. It is a significant number of payment methods, is it
18 not?

19 A. It is, yes.

20 Q. Now, you make clear in that last sentence of
21 paragraph 13 that Carte Bancaires, iDEAL, SOFORT,
22 MobilePay and Paytrail do not apply to the UK and
23 Ireland and are only available for use in their
24 respective local markets, do you see that?

25 A. Yes.

1 Q. So is it fair to say that the remainder of that list of
2 payment methods do apply in the UK and Ireland?

3 A. Yes, that is a fair assumption.

4 Q. The reason why Dr Martens accepts so many different
5 types of payment method is because you want to
6 facilitate the payment methods the customers want to
7 use?

8 A. That is correct.

9 Q. If we take you to paragraph 15 of your witness statement
10 {RC-F2/4/4}, on page 4, you say you consider three key
11 priorities when you look at which payment methods to
12 accept. Do you see that, the first line of
13 paragraph 15?

14 A. I do, yes.

15 Q. You say:

16 "First, we aim to reduce, minimise or otherwise
17 eliminate friction at the checkout for customers."

18 The same point you made to my learned friend
19 a moment ago:

20 "Second, we aim to offer a broad selection of
21 payment methods that are popular with customers and
22 commercially sensible."

23 Then:

24 "Finally, we consider the fraud and non-fraud risk
25 associated with each payment method ..."

1 Is it fair to say that your primary objective, the
2 most important objective, is to optimise payment
3 acceptance and eliminate friction from the customer
4 checkout?

5 A. I think that is a fair statement. We are here to sell
6 footwear ultimately to our customers.

7 Q. I see there is a reference to fraud in paragraph 15 and
8 you note the different payment methods have different
9 risk profiles. Would you accept that Mastercard and
10 Visa are regarded as low risk payment methods?

11 A. No, I would not, in my experience. I think what
12 typically happens is we see high levels of fraud and
13 non-fraud risk with both Visa card and -- sorry, with
14 Visa and Mastercard and often the burden for dealing
15 with that is pushed on to the merchants, as are the
16 costs of dealing with that too.

17 Q. So on the question of chargebacks then, could I ask you
18 to turn up a slide in the EMA chargebacks document.
19 That is in {RC-J2/106.1/8}. I will begin at page 1 so
20 you see the document I am talking about,
21 {RC-J2/106.1/1}. The first page is -- do you see
22 that -- "EMEA Chargebacks"?

23 A. Yes, I do.

24 Q. That's -- you should see it is in -- it is buried in the
25 middle "Group Treasury 14 November 2023".

1 A. Yes, I can see it.

2 Q. Are you familiar with this document?

3 A. I am, yes.

4 Q. I would ask you to turn then to page 8 which is "Current
5 Backlog". This is a confidential document I think so --
6 unless I am told otherwise, so I would ask you to read
7 to yourself the passages that I am going to take you to,
8 and at the top of the page below the heading there is
9 a grey box. Do you see that third bullet point
10 referring to current outstanding disputes as at the end
11 of October P7, do you see that?

12 A. Yes.

13 Q. Then you have the backlog of disputes for Klarna, Visa,
14 Mastercard and PayPal and the value of those disputes.
15 Do you see that?

16 A. I do, yes.

17 Q. The combined backlog for Visa and Mastercard you see on
18 the right-hand column, under "GBP", do you see that?

19 A. Yes.

20 Q. Do you see how much less it is when you compare it to
21 the figure for Klarna immediately above it?

22 A. Well, this does not tell the whole picture. You are
23 talking about a backlog. This is literally a backlog of
24 chargebacks we have not been able to get to, so the team
25 will triage a charge-back or a request for information

1 from a payment scheme and will deal with it quickly and
2 effectively usually, but sometimes we build a backlog
3 because of internal resources.

4 Now, every scheme has their own charge-back process
5 and rules and procedures. Visa and Mastercard I think
6 to their credit I think over the years they have
7 probably simplified but not necessarily gone far enough,
8 but because of the volume of transactions we would
9 prioritise Visa and Mastercard chargebacks. So this
10 does not really tell the whole picture, this is just
11 a backlog.

12 Q. Indeed, but is fraud or alleged fraud one of the
13 triggers for these kind of disputes?

14 A. It can be, yes. It is one of the triggers.

15 Q. Mr Hirst, would you accept that the payment landscape
16 has changed or started to change in recent years?

17 A. I would, yes. I think there has been a lot of
18 innovation in payments in the last 15 years and I think
19 that is because of the excess profit and returns on
20 offer.

21 Q. In fact, if you have that document still open in front
22 of you --

23 A. Yes.

24 Q. -- by reference to further innovation, also on the
25 backlog figure, just to complete that piece before

1 I move away from this document, you see the PayPal
2 figure on the bottom right-hand corner? You see that
3 figure for backlog?

4 A. Yes, I do.

5 Q. Again, I would ask you to compare that to the Visa
6 Mastercard figure, just to complete the picture. I only
7 took you to Klarna previously.

8 A. I think the thing you are missing with PayPal, I think
9 as was raised by a previous witness, is actually what
10 sits behind PayPal are often cards, so Mastercards and
11 Visa cards, and it is -- you know, we do not know
12 because the underlying funding mechanism for a PayPal
13 transaction is not known to the merchant but I know from
14 personal experience and discussions with PayPal it is
15 very representative of the UK card mix and the share of
16 market that Mastercard and Visa would have in the UK,
17 for example, as a particular market example.

18 Cash balance is also a consideration, so
19 particularly when PayPal had the eBay account, so people
20 were buying and selling, you were building up a bit of
21 a balance and that was also a consideration. But
22 typically when we think about PayPal as a business we
23 mostly think about, you know, those transactions being
24 funded by Visa and Mastercard, debit, pre-paid or credit
25 cards. It is only a digital wallet. It is a wrapper.

1 I do not really consider it technically to be a payment
2 method in its own right. It is a wrapper.

3 Q. Mr Hirst, I am asking you to compare Visa Mastercard as
4 low risk payment methods to you when compared to Klarna,
5 for example, and you mentioned a moment ago that that
6 charge-back disputes document I showed you really was
7 about backlogs.

8 Could I ask you to turn to page 3 in the same
9 presentation {RC-J2/106.1/3}. You see the heading? Do
10 you see that?

11 A. I do, yes, yes.

12 Q. Do you see the second bullet point?

13 A. Yes.

14 Q. In fact, the first and second bullets.

15 A. Yes, I do.

16 Q. The figures below that, do you see that?

17 A. I do, yes.

18 Q. Comparing Klarna to the other three.

19 A. Yes.

20 Q. Klarna combined, you have that figure at the bottom?

21 A. I see it, yes.

22 Q. Now, just to be clear, the difference in figures that
23 you mentioned a moment ago, it is not just a backlog
24 issue, there is a further problem with this payment
25 method when compared to Visa/Mastercard, is that fair?

- 1 A. It depends from what perspective.
- 2 Q. From your perspective, Mr Hirst?
- 3 A. Are you talking about fraud or non-fraud?
- 4 Q. Both.
- 5 A. Well, Klarna does not take -- Klarna takes all the fraud
6 risk so the charges that we get through Klarna are
7 basically disputes, they are service disputes with
8 customers.
- 9 Q. In terms of the risk, the risk involved -- not just
10 fraud risk -- is there -- it is fair to say, is it not,
11 that Klarna generates more disputes, more opportunities
12 for claimants/customers to raise a dispute -- forgive
13 me -- you see the point I am making, Mr Hirst. This is
14 non-fraud. Is there a distinction that can fairly be
15 drawn between Klarna and Visa Mastercard here?
- 16 A. I would characterise it as Klarna is a fairly new
17 innovation in payment methods. It is a Buy Now Pay
18 Later method as I think you know and I think it is in
19 very early stages in terms of working out its own
20 process and its rules and its procedures. It is
21 actually very akin to Mastercard and Visa in the early
22 days in the sense that the weighting that it gives to
23 customer disputes and whether it falls down on the side
24 of the merchant or the customer, so with Klarna we
25 know -- and it is the same for Clearpay as well -- we

1 know there is no fraud risk because they bear the fraud
2 risk and that is generally also true of PayPal, but
3 there is obviously a risk of service disputes and that
4 effectively is mitigated by reminding customers or
5 educating customers that they should just follow our
6 usual customer, you know, refund or returns policy and
7 it will be dealt with in-house without the intervention
8 of a payment method.

9 Q. But, Mr Hirst, to be clear, certainly at this stage you
10 regard this question of disputes as a problem and
11 potentially a growing problem, do you see that?

12 A. I agree it has been a growing problem with Klarna,
13 absolutely.

14 Q. But notwithstanding that you continue to take them.
15 Could I show you the increased use of Buy Now Pay Later
16 payment options and this is document {RC-J2/104.2/1}.
17 Do you recognise this document?

18 A. I do, yes.

19 Q. If you go to slide 21, please, {RC-J2/104.2/21} and
20 I draw your attention to the bottom box beginning:

21 "Whilst the cost of living ..."

22 Do you see that? Could you just read that to
23 yourself, please. This is all confidential so I will
24 not read it out.

25 A. Yes, I can see it.

1 Q. Just that first sentence.

2 A. Yes.

3 Q. I draw your attention in particular to the last part of
4 that sentence beginning "The fees", do you see that?

5 A. I do, yes.

6 MR JACKSON: Excuse me, I should just say that this is not
7 referred to in Mr Hirst's statement so while it is
8 something that is disclosed, it is not something that he
9 specifically will have looked at in advance of this and
10 so his answers on that should be taken with that in
11 mind.

12 THE PRESIDENT: Well, thank you, Mr Jackson. We all know
13 that cross-examination may range as widely as
14 appropriate and I am quite sure that if Mr Hirst feels
15 unable to answer these questions, he will say so.

16 MR KENNELLY: Yes. I mean, to be fair to Mr Hirst he
17 confirmed that he was familiar with this document.

18 THE PRESIDENT: Yes, I --

19 MR KENNELLY: He is the Group Treasurer and this is a group
20 treasury document presented this year.

21 THE PRESIDENT: Mr Kennelly, you should go on.

22 MR KENNELLY: Thank you.

23 Now, just to be clear, Buy Now Pay Later means you
24 get the goods now but you pay for them later, as the
25 name describes.

- 1 A. Correct.
- 2 Q. So often that involves a period of interest-free credit?
- 3 A. Correct, usually, yes.
- 4 Q. Two of the Buy Now -- BNPL products accepted by
5 Dr Martens in the UK are Klarna pay over time and
6 Clearpay?
- 7 A. That is correct.
- 8 Q. Now, if we go to a document in the bundle RC-J2 -- it is
9 the same one actually, slide -- same slide, slide 21, we
10 see the volume of transactions for both of these, do you
11 see that? It is the -- I am looking at "EMEA
12 e-commerce - payments - volumes and fees", the
13 right-hand diagram?
- 14 A. Yes.
- 15 Q. On the far right we see the columns indicating Clearpay
16 and Klarna POT and would you accept, Mr Hirst, these are
17 significant numbers?
- 18 A. Sorry, could you clarify, counsel? Do you mean for the
19 Buy Now Pay Later --
- 20 Q. Yes, for Clearpay and Klarna POT would you accept these
21 are significant volumes? To be clearer, if you combine
22 them and compare them to Visa, you see their
23 significance even more clearly. Visa obviously is in
24 the middle of that diagram.
- 25 A. Well, do not forget about PayPal because, as you can see

1 there, PayPal is the most popular payment method by
2 share and that will contain, unknown to us, its own
3 share of Visa and Mastercard transactions.

4 Q. Thank you, Mr Hirst. Would you confirm -- I absolutely
5 see the PayPal figure, but for Clearpay and Klarna, just
6 to complete the story, would you accept that they are
7 also significant -- not as significant as PayPal, but
8 significant even when compared to Visa?

9 A. I would say relatively speaking I think if you -- I mean
10 I think you should -- I mean look, it is difficult to
11 give you data on PayPal because we do not have it,
12 right, it is as simple as that, we just do not know what
13 the -- but my supposition is basically if you broke that
14 PayPal bar in half and added it to Visa and Mastercard,
15 that would be representative, I think, of the share, so
16 I think relative to that I think yes, significant, but
17 actually, you know, probably no more so than the other
18 wallets that we have there, Apple Pay, Google Pay.
19 You know, we use local payment methods as well, as we
20 said for certain markets where customers prefer a local
21 payment method.

22 So certainly rising in popularity for sure.

23 Q. But these Buy Now Pay Later payment methods are
24 expensive for Dr Martens, are they not, Mr Hirst?

25 A. It depends what you negotiate.

1 Q. Well, let us see. Let us see the commentary in the box,
2 your document, middle of the bottom box, where you say
3 you offer what you offer. Last sentence in that -- in
4 the middle of the box. Do you see that?

5 A. I do, yes.

6 Q. So do you see "Klarna equates"? Do you see that,
7 Mr Hirst?

8 A. Could -- yes, I do, yes.

9 Q. Yes. Please read that sentence carefully.

10 (Pause)

11 A. Yes, I have read it.

12 Q. So that is obviously pretty clear, is it not, that
13 Klarna is an expensive payment method for Dr Martens?

14 A. In absolute terms -- I mean, look, relative to the
15 capped interchange on consumer cards, yes, but,
16 you know, we have negotiated, I know this from
17 anecdote -- we have negotiated better rates than say
18 other merchants which are retailers, but I guess the
19 point there for us is that at least we have been able to
20 do that. We have been able to sit round a table and
21 negotiate those rates.

22 Q. Mr Hirst, perhaps even more clearly for you is the --
23 since this is your document. You have helpfully
24 provided us with a grey line that runs through the
25 table. Do you see it? It is -- according to the key --

- 1 A. Yes.
- 2 Q. -- it is the payment method fee. This is the cost to
3 you, do you see that?
- 4 A. Yes, I see.
- 5 Q. That compares the cost to you of these various payment
6 methods and you see what it tells us about the cost of
7 PayPal and Clearpay and Klarna in particular. Do you
8 see that?
- 9 A. Indeed.
- 10 Q. So relatively speaking they are much more expensive, are
11 they not?
- 12 A. Sorry, was that a question?
- 13 Q. Sorry, yes, it is a question.
- 14 A. What is the question again?
- 15 Q. The question was according to your own document the cost
16 is much greater, relatively speaking, for Clearpay and
17 Klarna in particular and even PayPal.
- 18 A. Yes.
- 19 Q. The cost to you. These are the fees that you say you
20 negotiated, Mr Hirst. You said this is what you could
21 negotiate bilaterally with Klarna, Clearpay and PayPal.
- 22 A. Correct and I would add as well that certainly with
23 Klarna we have recently renegotiated these fees down
24 again in the last six months.
- 25 Q. To what figure, can you tell us? If it is

1 confidential --

2 A. It is confidential.

3 Q. -- we will have --

4 A. It is lower. It is lower than what you see there.

5 Q. It would be interesting to know what the figure is.

6 Sir, in these circumstances I am in the Tribunal's
7 hands. The figure is important for the purpose of my
8 question. The figure is obviously confidential. It
9 should not be read out in open court.

10 THE PRESIDENT: I am slightly reluctant to go into private
11 session for one answer, but I see what you say.

12 Practically speaking how are we going to handle this?

13 MR KENNELLY: A solution might be for me to ask this
14 question: Mr Hirst, obviously you know the number -- do
15 not say it please, but the number you have negotiated
16 Klarna down to you know, is that correct?

17 A. It -- I do, yes, yes.

18 Q. Well, perhaps --

19 THE PRESIDENT: What I think we will do is -- I see the
20 time. Mr Hirst, I give this warning to all witnesses,
21 which is do not talk about your evidence outside the
22 witness box but I am going to discuss with counsel an
23 exception to this. I wonder if you could communicate
24 the answer to your legal team, just that, do not discuss
25 anything else, and then that can be disseminated amongst

1 THE PRESIDENT: It did?

2 MR KENNELLY: It did and I received information very rapidly
3 for which I am grateful.

4 THE PRESIDENT: Can I thank everyone concerned.

5 MR KENNELLY: When we have a confidential session I will
6 read it into the record so that you have it on the
7 confidential transcript.

8 THE PRESIDENT: That would be extremely helpful, thank you.

9 MR KENNELLY: That is likely to be tomorrow and at the end
10 of today, sir, if it is possible, we can raise with you
11 how we handle issues of confidentiality that will arise
12 tomorrow, but that is for after the witnesses.

13 THE PRESIDENT: Perhaps we will do that when we have
14 concluded the evidence for today.

15 MR KENNELLY: I am obliged.

16 Mr Hirst, I am asking you now to go to another
17 presentation from your department, group treasury,
18 presented in 2023, I think. Could I ask you to go to --
19 or be taken to {RC-J2/101.1}. There we go. Now, this
20 says "Period 8 FY23". What does FY23 mean, Mr Hirst?

21 A. Financial year 2023.

22 Q. Period 8 is what?

23 A. The eighth period of that year, so that is roughly
24 August time.

25 Q. Thank you. Would you go please to -- or be taken to

1 page 20 {RC-J2/101.1/20}, slide 20 it is, and there is
2 a reference to a shift. I would ask you, Mr Hirst, to
3 look at -- in that large grey box on the left-hand side
4 of the page, just below the halfway point, you see "This
5 shift in payments..." Do you see that?

6 A. Yes, I do.

7 Q. Could you please read those two sentences?

8 A. Yes.

9 Q. Notwithstanding the significant difference in costs to
10 you, Dr Martens accepts Buy Now Pay Later payment
11 methods and that is because customers want to use them.

12 A. Yes, that is correct.

13 Q. Mr Hirst, another change in the payment landscape is
14 the -- you mentioned this earlier to us -- the increased
15 use of digital wallets such as PayPal and one can see
16 this from the slide on page 21 which is in a different
17 document, that is {RC-J2/99.1/21} -- the document we saw
18 before -- no, sorry, it is a different document. PayPal
19 is the pale blue in the column on the left-hand side,
20 top left corner -- because we are concerned with EMEA --
21 PayPal is the pale blue. I would ask you to see the
22 share of wallet between PayPal, Visa and Mastercard. Do
23 you see that?

24 A. I do, yes.

25 Q. You see the significance of PayPal even when compared to

1 Mastercard. Do you see that?

2 A. I see the chart you are referring to, yes.

3 Q. Accepting PayPal is also very expensive for Dr Martens,
4 is it not?

5 A. Again, it is something we have negotiated, so the rate
6 on that has been negotiated, so it is more expensive
7 than a stand-alone Visa Mastercard for sure.

8 Q. Let us see the significance of the difference. We will
9 go back to that slide we looked at earlier
10 {RC-J2/104.2}?

11 THE PRESIDENT: Just -- sorry to interrupt, but just looking
12 at the answer just given, counsel asks "Very expensive"
13 and you respond "Something we have negotiated". I do
14 not think there is any suggestion in Mr Kennelly's
15 question that you are getting a bad deal, indeed I am
16 sure you have got a very good deal, but that does not
17 actually answer the question of whether a good deal can
18 also be an expensive one, so I wonder if with that
19 qualification whether your answer would be any
20 different, so the question was "Accepting PayPal is also
21 very expensive for Dr Martens, is it not?", would you
22 agree that it is or is not?

23 A. So the way I would differentiate my previous answer is
24 that with PayPal and with the other Buy Now Pay Later
25 methods there is a bit more incrementality involved, so

1 it drives business into Dr Martens in a way that, say,
2 Visa and Mastercard does not, so I think you heard from
3 a previous factual witness about M&S, about having some
4 traffic driven into the business through other means, so
5 in some ways it is a different distribution or sales
6 channel for the business, and in other ways, you know,
7 it is kind of akin to an affiliate marketing agreement
8 where you drive traffic from other sites into your own
9 site.

10 I think the point I was trying to make was
11 effectively Buy Now Pay Later and PayPal are more
12 expensive than the regulated merchant service -- well,
13 the interchange certainly on Visa and Mastercard, but
14 for us there is a good reason for that.

15 MR KENNELLY: But, Mr Hirst, just to be really clear, they
16 are significantly more expensive than Visa and
17 Mastercard's MIF. If you have not already left that
18 page could I ask you to go back to the columns, it was
19 RC-J2/101.1/21 -- no, sorry, {RC-J2/99.1/21}. Yes.
20 Just look at what you said -- this is coming from your
21 department -- the text at the top of the page beginning
22 in the second sentence:

23 "Visa and Mastercard are ..."

24 You go on to describe their fees and you contrast
25 them with those from PayPal and the Buy Now Pay Later

1 methods and you see yourself the difference in cost to
2 you. Those are significant differences, are they not?

3 A. Well, I guess to be clear, I mean, this is not
4 confidential, but we can pay upwards of -- you know, as
5 it says there in the text, upwards of 2% for Visa
6 Mastercard.

7 Q. Yes, but --

8 A. On an overall Merchant Service Charge basis I think what
9 you are referring to is the final sentence which says,
10 you know, the other methods are potentially 100 basis
11 points to 200 basis points more expensive.

12 Q. Yes, which is a significant difference, is it not?

13 A. I would not say significant, it is a difference.

14 Q. Well, twice as much?

15 A. It depends what your weighted average -- what you are
16 looking at in terms of -- the things I would like to
17 factor in are things like chargebacks so your effective
18 Merchant Service Charge for Visa and Mastercard is much
19 higher than your headline rate because you have to
20 factor in chargebacks, especially from fraud, which we
21 have talked about previously. We do get fraud
22 protection from PayPal and the Buy Now Pay Later
23 methods, so that is -- I would not want to lose sight of
24 that.

25 Q. But the chargebacks, the non-fraud chargebacks we saw

1 already are far worse for Klarna and Clearpay and PayPal
2 than they are for Visa Mastercard?

3 A. All you saw was the backlog --

4 Q. No, no.

5 A. We have not seen the effects.

6 Q. I showed you a separate slide, Mr Hirst, that showed you
7 the average numbers as well.

8 A. Would you mind going back to it then, counsel?

9 Q. RC-J2/106.1 -- sorry, {RC-J2/106.1/3}. This is the
10 document we saw before. Do you see this document,
11 Mr Hirst?

12 A. I can see it, yes.

13 Q. This is non-fraud chargebacks?

14 A. Yes, I can see it.

15 Q. I am comparing the Klarna figure, the combined Klarna
16 figure, and I am comparing that then to the combined
17 figure on the right-hand side of PayPal, Mastercard and
18 Visa, the two yellow boxes at the bottom of the page.
19 You see those figures?

20 A. I do, yes.

21 Q. So you must recognise for Klarna there is a much bigger
22 problem for non-fraud chargebacks than for Mastercard
23 and Visa?

24 A. But by definition it does not include fraud chargebacks
25 which would only be relevant to the right-hand side of

1 that slide, i.e. PayPal, Mastercard and Visa.

2 Q. I am discussing non-fraud chargebacks?

3 A. I was also -- I think you are also -- sorry, let me not
4 give an opinion, but I think the way to an effective
5 Merchant Service Charge, you have to factor it all in,
6 so it is non-risk -- so it is non-fraud chargebacks and
7 it is fraud chargebacks. We do not get fraud
8 chargebacks from the likes of PayPal or the Buy Now Pay
9 Later methods.

10 Q. Let us go back to that slide that I showed you earlier
11 where you discuss the difference in cost between Visa
12 Mastercard, PayPal, Klarna and Clearpay. This is
13 I think it is -- I was going back to slide -- it is
14 RC-J2 -- actually, we will go to a different slide and
15 it is {RC-J2/104.2}, just to bottom this out, Mr Hirst.
16 Before we move on to the slide itself, just double-check
17 again what period we are discussing here. This is
18 another pack prepared by you. May I ask, when you
19 prepare these packs, are these prepared for your board?

20 A. Primarily -- as you can see in the bottom right-hand
21 corner there is a distribution list but it is primarily
22 for the CFO, the Group CFO, Chief Financial Officer, the
23 Chair of the Audit and Risk Committee and also the
24 finance leadership team plus the regional finance
25 directors, that is the audience for the pack.

- 1 Q. That is an important audience, is it not?
- 2 A. Indeed, yes.
- 3 Q. So the accuracy of what you are presenting is important,
4 is it not?
- 5 A. Absolutely agree, yes, yes.
- 6 Q. Let us go to slide 21 which we looked at previously and
7 the difference in cost to Dr Martens of payments from
8 Mastercard and Visa and payments through PayPal,
9 Clearpay and Klarna. The right-hand side "EMEA
10 e-commerce - payments - volumes and fees", do you see
11 that?
- 12 A. I do, yes.
- 13 Q. So I ask you the question again: just in terms of the
14 cost, would you accept there is a significant difference
15 in the costs of accepting Mastercard and Visa payments
16 and the costs of accepting PayPal, Clearpay and Klarna?
- 17 A. Yes, there is a difference and, as I said, mitigated by
18 incremental benefits from those payment methods.
- 19 Q. Subject to that mitigation point, would you accept these
20 are significant differences? We take the mitigation
21 point, Mr Hirst. I am just asking you: is it
22 a significant difference?
- 23 A. Yes.
- 24 Q. Now, if we move on please to commercial cards, you
25 accept, do you not, that commercial cards are a distinct

- 1 type of Visa card?
- 2 A. I do, but not really a factor for our business at all.
- 3 Q. That is material to what you go on to say about "Must
4 accept cards" and "Should accept cards". Can I ask you
5 to turn to your witness statement and paragraph 16
6 {RC-F2/4/4}. Do you see paragraph 16 is on page 4?
- 7 A. I do, yes, I do.
- 8 Q. Now, you describe Visa and Mastercard as "Must accept"
9 cards, do you see that?
- 10 A. Yes, I do.
- 11 Q. Now, this is not language we have seen in any of the
12 Dr Martens documents that have been disclosed to us.
13 May I ask where that expression came from, "Must
14 accept"?
- 15 A. It is language I have used throughout my career, my
16 professional career, starting with Tesco.
- 17 Q. Does the business, does your business, Dr Martens, have
18 a list of "Must accept" cards described in that way?
- 19 A. Our view internally is it is Visa and Mastercard in
20 terms of payment methods globally.
- 21 Q. Just to understand the difference between what you
22 describe as "Must accept" and "Should accept", at
23 paragraph 18 you say -- do you see that at the bottom of
24 page 4?
- 25 A. I do, yes.

1 Q. "Where we consider a card 'must accept' we believe that
2 not accepting it would increase friction at the checkout
3 which could result in the customer abandoning the
4 transaction [entirely]."

5 Do you see that?

6 A. I do, yes.

7 Q. At paragraph 16, the last sentence of that you say it
8 would be commercial suicide if you did not accept them,
9 by you which I think you mean it would be commercial
10 suicide if you did not accept a "Must accept" card?

11 A. Agreed, which are Visa and Mastercard.

12 Q. Now, for "Should accept" cards, again back down to
13 paragraph 18, Mr Hirst, very last line on page 4, you
14 say:

15 "Where we consider a card 'should accept' (such as
16 Visa and Mastercard pre-paid) then we consider it is in
17 our best interests to offer it as a payment method given
18 refusal to accept it is likely to lead to confusion or
19 negatively impact cardholders' perception of us as
20 a business."

21 A. Yes.

22 Q. So do I take it that on this approach rejection of
23 a "Should accept" payment card would not lead to the
24 transaction being abandoned?

25 A. I think it is a 50/50 chance, to be perfectly honest.

1 I think again it comes back to friction at the checkout.
2 We would wish to minimise that, or eliminate it
3 completely.

4 Q. I think the point you are emphasising here again is it
5 is in the company's best interests to continue to offer
6 "Should accept" cards, not just the "Must accept", but
7 "Should accept" as well?

8 A. Yes, I think so, in the sense that we want to facilitate
9 transactions.

10 Q. Now, you have not dealt separately here with commercial
11 cards. Would you accept that commercial cards are
12 "Should accept" not "Must accept"?

13 A. I generally think for our business -- it could go either
14 way but it is not a big factor for our business. We do
15 not get much volume or value on commercial cards. It is
16 just not that kind of scenario really. That does not --
17 it is neither here nor there for us.

18 Q. So they are more "Should accept" rather than "Must
19 accept"?

20 A. I guess so but again equally if we switched them off
21 tonight, would we notice a difference? Probably not.

22 Q. Does that not make them more "Should accept" rather than
23 "Must accept"?

24 A. Yes, but I guess -- well, I am talking about "should
25 accept" rather than "Do not accept". They are not "Must

1 accept", right, in our business.

2 I -- it is not really a factor, we do not think too
3 much about it internally. To be honest we know
4 obviously they drive higher Merchant Service Charge
5 naturally because they are not capped -- the interchange
6 on them is not capped but it is not a big factor for us.

7 Q. You say higher, they are four times higher, are they
8 not?

9 A. Much higher, yes.

10 Q. You have never tried to steer your customers away from
11 using commercial cards, have you?

12 A. Well, the first thing is practicality, right. So again
13 a lot of acquirers, PSPs do not always have the
14 technology to distinguish between the two, consumer or
15 commercial, in my experience.

16 Q. You have never sought to surcharge commercial cards,
17 have you?

18 A. The volume is low, very low.

19 Q. But is it not more because of a business decision you
20 have taken to treat all cards equally?

21 A. I think we do not look at it like that. I think we look
22 at it as -- you know, from the customer experience point
23 of view, the customer journey. So again we do not want
24 to throw barriers in the way of customers to execute on
25 that transaction, we just want them to get through the

1 process as painlessly and as friction free as possible.

2 Q. Just in terms of what you said about treating cards
3 equally, Mr Hirst, to remind you, could you go back to
4 your witness statement at paragraph 25 {RC-F2/4/6}. Do
5 you see that?

6 A. We do, yes.

7 Q. Do you see the first sentence? That is where I was
8 coming from. You said there you treat in general all
9 payments -- all card payments equally.

10 A. That is right.

11 Q. That remains your evidence, does it not?

12 A. Sorry, say that again?

13 Q. Is that still your evidence?

14 A. Yes, yes.

15 Q. Now, American Express, Mr Hirst. You accept that Amex
16 is significantly more expensive than Visa and
17 Mastercard, do you not?

18 A. Yes.

19 Q. Now, at 19, paragraph 19 of your witness statement --
20 could you turn to that, please, it is on page 5
21 {RC-F2/4/5}. Middle of the paragraph you say:

22 "Customers do not tend to care whether a card is
23 Visa or Mastercard but do appreciate that there is
24 a difference between Visa and Mastercard on the one hand
25 and American Express on the other. There is a general

1 perception that it is very expensive for merchants to
2 accept American Express and therefore customers tend to
3 accept a business' decision not to accept it."

4 Do you see that?

5 A. I do, yes.

6 Q. Mr Hirst, is that based on your own personal experience
7 as a consumer, or your professional experience?

8 A. Both.

9 Q. But despite that, despite the fact that customers
10 understand if you will not accept American Express,
11 Dr Martens still continues to accept American Express,
12 does it not?

13 A. It does, yes.

14 Q. That is because, as I said before, or I asked you,
15 Dr Martens wants to be able to provide customers with as
16 many payment options as possible?

17 A. That is right. It is about choice.

18 Q. It is about, as you said, optimising payment acceptance
19 and eliminating friction from the customer choice?

20 A. That is correct.

21 Q. Has Dr Martens ever sought to discourage the use of Amex
22 at the point of sale?

23 A. Not that I am aware of, no.

24 Q. You have never sought to surcharge the use of Amex
25 cards?

- 1 A. No.
- 2 Q. At paragraph 29 of your statement, Mr Hirst, you deal
3 with Amex again. Can I ask you to turn that up, please,
4 page 7 {RC-F2/4/7}. You refer to -- I am looking just
5 below the halfway point on paragraph 29, you say Amex
6 claim they attract a more affluent customer, you say:
7 "In many years of working in customer payments,
8 I have yet to see any real evidence supporting this
9 claim."
10 Do you see that?
- 11 A. I do, yes.
- 12 Q. So you are acknowledging here that that is central to
13 Amex's business proposition, that it attracts more
14 affluent customers and that customers using Amex cards
15 are likely to buy more expensive items?
- 16 A. I think if you are a merchant that is one of the reasons
17 why you might go with Amex.
- 18 Q. But that is what Amex itself says, does it not?
- 19 A. It is one of the things it says, yes.
- 20 Q. Would you accept that Amex is not likely to make such
21 a claim unless it has some basis in fact?
- 22 A. Well, as I said in my statement I have heard that claim
23 over many years but I have yet to see evidence in my own
24 numbers.
- 25 Q. Have you ever undertaken any quantitative analysis to

- 1 investigate that point?
- 2 A. We have, yes, in various companies. Probably -- not to
3 my recollection at Dr Martens, but in other companies I
4 have worked for, we have done that analysis. We can
5 look at things like ATVs, average order values, Average
6 transaction values, we can look at repeat and non-repeat
7 customers but again I just find it is quite scant,
8 you know, the support for that claim.
- 9 Q. You have not referred to any of those other quantitative
10 analyses in your statement, have you?
- 11 A. I am talking about it from a Dr Martens perspective
12 because that is the claim period we are talking about.
- 13 Q. So the analyses you are talking about are pre-claim
14 period, are they?
- 15 A. Yes, that is correct.
- 16 Q. Now, you go on to say that Amex is not a serious
17 competitor to Visa or Mastercard. Do you see that in
18 the last sentence in 29?
- 19 A. I do, yes.
- 20 Q. Is that based on your years working in customer
21 payments?
- 22 A. Indeed, yes.
- 23 Q. You have not done any market or data analysis to support
24 that claim, have you?
- 25 A. We have -- I mean, look, now you can. Clearly the PSR

1 collects this data. It needs that data to make its own
2 decisions and form its own opinions, but absolutely,
3 I mean, we -- I know from running tenders or RFPs when
4 we speak to acquirers or PSPs I have always had a direct
5 relationship typically with American Express, so again
6 I receive information, or I obtain information that way
7 around market share, so in the UK and Europe certainly,
8 as I said, I just do not think it is a serious
9 competitor at all to Visa or Mastercard and that I think
10 shows in the volumes.

11 Q. To be clear, you mean here UK and Europe -- do you mean
12 UK and Ireland?

13 A. I do, yes. Obviously we have been talking about EMEA
14 but specifically for this UK and Ireland as it relates
15 to Dr Martens.

16 Q. Would you accept that Amex is at least a competitor?

17 A. I do, yes.

18 Q. Would you accept that Amex is a serious competitor in
19 the United States market?

20 A. I think yes, because it is more of a day-to-day card in
21 the US.

22 Q. Would you accept that Amex is more widely used in
23 certain sectors or segments --

24 A. I do.

25 Q. -- like inter-regional transactions, for example?

- 1 A. Yes and travel, as we mentioned today.
- 2 Q. Mr Hirst, turning then to paragraph 38 of your witness
3 statement {RC-F2/4/9}, last sentence -- the second half
4 of the last sentence, you say:
5 "... if there were a significant gap ..."
6 Perhaps I will begin the sentence:
7 "We might be prepared to overlook a small difference
8 in the MSCs, but if there were a significant gap then we
9 would definitely question it and seek to negotiate the
10 difference away, or steer customers towards a cheaper
11 payment method."
12 Do you see that?
- 13 A. I do, yes.
- 14 Q. But it is true, is it not, as you have said, that
15 Dr Martens has never engaged in steering before?
- 16 A. Not to my knowledge, no.
- 17 Q. As you said, you have not done it for commercial card
18 transactions?
- 19 A. No.
- 20 Q. You have not done it for Buy Now Pay Later transactions?
- 21 A. No.
- 22 Q. You did accept eventually that Buy Now Pay Later
23 transactions are significantly more expensive?
- 24 A. Yes, with benefits, yes.
- 25 Q. You have not done it for PayPal transactions, have you

- 1 either, sought to steer customers --
- 2 A. Steering or surcharging?
- 3 Q. Both.
- 4 A. No, we have not, although I guess there is -- just to
- 5 clarify, there is some soft steering that goes on
- 6 currently on our website whereby PayPal sits at the top
- 7 of the stack for payments, but that is less by design,
- 8 I would say. It is a bit more of a softer kind of that
- 9 is how we have landed up, so that is something we would
- 10 look at as potential ability to steer something or steer
- 11 a particular payment type.
- 12 Q. But apart from that, Mr Hirst, you have not sought to
- 13 steer customers away from --
- 14 A. Not consciously, not deliberately.
- 15 Q. You have not sought to steer customers away from Amex,
- 16 despite Amex being more expensive?
- 17 A. No, again it is just we take the opposite view of things
- 18 that we let customers pay how they wish to pay.
- 19 Q. But Amex are significantly more expensive, are they not?
- 20 A. Not for us, no, not necessarily. They are cheaper than
- 21 Buy Now Pay Later for us.
- 22 Q. But significantly more expensive than Mastercard and
- 23 Visa?
- 24 A. Yes, yes, more expensive, yes.
- 25 Q. In light of those examples and the company's approach

1 that you have described, Mr Hirst, a Visa or Mastercard
2 debit or credit card would have to carry
3 an extraordinarily high MSC before Dr Martens would
4 consider trying to discourage customers from using it,
5 is that fair?

6 A. It is fair, but since the consumer interchange was
7 capped in 2015 we have been less concerned about that
8 because we think, you know, the rates feel more
9 reasonable compared to where they were.

10 Q. But even when the rates were higher you never tried to
11 steer customers away from Visa and Mastercard?

12 A. I was not around so I cannot really speak to it.

13 Q. To your knowledge you said --

14 A. Not to my knowledge.

15 Q. -- Dr Martens did not try to steer people away from --

16 A. Not to my knowledge.

17 Q. Even when the MIFs were higher?

18 A. That is correct.

19 Q. At paragraph 39 of your statement {RC-F2/4/9} you say
20 that:

21 "Ideally you would avoid getting into a debate about
22 payment methods ... in store, but there are subtle ways
23 of steering customers towards particular methods of
24 payment ... we do not currently do that, but would
25 potentially consider it providing it were within the

1 rules."

2 Now, what rules are you referring to here, Mr Hirst?

3 A. I think as has been previously referenced, anti-steering
4 rules, our understanding of those. The schemes are not
5 always open and transparent with merchants about various
6 rules.

7 Q. But you yourself accepted earlier on that you knew it
8 was open to Dr Martens to discourage customers from
9 using commercial cards?

10 A. Yes, and it depends on timing. It depends on, you know,
11 the time you are talking about. These rules have
12 changed over time.

13 Q. But at the time when it was possible, Dr Martens did not
14 try to discourage people from using commercial cards.

15 A. Again, it was not a factor for us, so no.

16 Q. There were never any rules precluding you from
17 discouraging customers from using Amex.

18 A. Well, if you accept Amex, I mean they kind of have their
19 own rule, right, so, you know, you negotiate a contract
20 with Amex, then you accept Amex then in your stores or
21 on your website.

22 Q. But you said Amex was a "Should have" card and it was
23 open to you, open to the company, to discourage Amex or
24 to decline Amex if it did not want to.

25 A. Yes, but the thing is if you have negotiated a contract

1 with Amex you are not going to go and turn round
2 six months later and discourage use of that card. That
3 would not be sensible.

4 Q. But would it have been commercial suicide not to take
5 Amex cards?

6 A. Not for us, no. Again, as I said, it is the opposite
7 end for us; it is about choice.

8 Q. There were no rules precluding you from discouraging
9 customers from using Buy Now Pay Later or PayPal?

10 A. No.

11 Q. The final sentence of 39, paragraph 39, you say:

12 "After all, why would you not want to steer
13 customers towards a cheaper payment method if it makes
14 no difference to the customer?"

15 Presumably you would accept, Mr Hirst, that there
16 would be reasons not to steer customers towards
17 a cheaper method if it did make a difference to the
18 customer?

19 A. I do. I do, yes.

20 Q. You refer here to steering towards a cheaper payment
21 method. Can I take you to another presentation prepared
22 by you and your team last year. This is {RC-J2/104/11}.
23 Let me get it for myself. Actually we will go to page 1
24 first just to make absolutely sure what we are looking
25 at, page 1, "Payments SteerCo" group treasury,

1 25 May 2023. Are you familiar with this document,
2 Mr Hirst?

3 A. I am, yes.

4 Q. So we will go back to slide 11, please, {RC-J2/104/11}
5 and recalling the evidence you have given the Tribunal
6 about steering towards cheaper payment methods, to use
7 your language, you see that here the cost of payments in
8 EMEA are set out. Could you point the Tribunal to the
9 cheaper online payment method you would steer to,
10 "cheaper" being the language of your statement?

11 A. Well, it is purely theoretical because I said why would
12 you not if it made no difference to the customer. The
13 fact is it does make a difference to the customer
14 because they are over-incentivised, as I said
15 previously, to use cards. So they will collect cashback
16 and Air Miles. So that is why we do not actively steer.
17 So it is purely theoretical. I mean, from an online
18 perspective debit cards would be the cheapest.

19 Q. At paragraph 40 of your statement {RC-F2/4/9} you say,
20 first line:

21 "If we were not bound to do so, we would consider
22 whether to continue accepting all forms of
23 Visa/Mastercard or not."

24 So, Mr Hirst, I think as you said earlier on you
25 have a huge amount of experience dealing with Visa and

1 Mastercard, do you not?

2 A. I do, yes.

3 Q. So you are well aware, are you not, that you were not

4 bound to accept all forms of Visa and Mastercard?

5 A. During what time, sorry?

6 Q. Well, it was open to you at all times to only accept

7 debit cards, for example, you were not obliged to accept

8 credit cards. You could have only taken debit.

9 A. Yes.

10 Q. But you still took credit cards, did you not?

11 A. Yes. We also accepted future innovations which

12 surprisingly obviously seem to come with high fees.

13 Q. It was open to you not to accept commercial cards after

14 the IFR, after 2016?

15 A. Yes.

16 Q. But you still accepted them?

17 A. Oh, we did, but again, as I said, not a big concern for

18 us, commercial cards.

19 Q. On surcharging, Mr Hirst, you say at paragraph 41 that

20 you are aware of the rules against surcharging, first

21 sentence in paragraph 41. May I ask what rules you are

22 aware of?

23 A. So shortly after IFR I was aware of the rules on,

24 you know, cards -- consumer cards that were capped by

25 the EU IFR and then later the UK IFR. You could not

1 surcharge. I do not remember the exact date of that
2 piece of legislation.

3 Q. Were you aware that up until January 2018,
4 12 January 2018, merchants in the UK were expressly
5 allowed to surcharge on credit cards issued by UK banks?

6 A. I was aware but not to my understanding on consumer
7 cards that were capped.

8 Q. No, so were you aware -- regardless of caps, were you
9 aware that it was open -- merchants were permitted to
10 surcharge on credit cards issued by UK banks?

11 A. Up until what point, sorry? What timeline?

12 Q. Up until 12 January 2018.

13 A. I am not -- that is not my recollection at the time.

14 Q. What did you think the rule was, Mr Hirst?

15 A. So I thought once the EU IFR had passed, or the
16 legislation had been enacted, so generally that was
17 a prohibition on merchants surcharging for consumer
18 capped cards. That is my -- that was my understanding.

19 Q. I am talking about the period before that, Mr Hirst, the
20 period before that.

21 A. Well, the EU IFR was December 2015.

22 Q. No, the -- exactly. The claim period stretches before
23 that. Were you aware of the freedom of merchants to
24 surcharge before the rules changed, before the
25 prohibition was in place?

- 1 A. Before EU IFR? Yes.
- 2 Q. Were you aware that in Ireland merchants were allowed to
3 surcharge on credit cards issued in the EEA from 2009 to
4 2018?
- 5 A. Again, I am not sure I agree with the timelines, but
6 again, look, we have had rules that have changed over
7 time. My general I guess understanding, as I recollect
8 it now, is once EU IFR had come into force, that
9 generally negated merchants being able to surcharge on
10 consumer cards, in all of the territories or
11 jurisdictions of the EEA.
- 12 Q. Mr Hirst, are you familiar with the Payment Services
13 Directive and the Payment Services Directive
14 implementation?
- 15 A. I am, yes.
- 16 Q. Were you aware of its role in relation to surcharging?
- 17 A. Yes.
- 18 Q. What did you think was the implications of that
19 legislative change for surcharging?
- 20 A. Are you talking about PSD1 or PSD2?
- 21 Q. Both.
- 22 A. Well, generally I guess the thrust of the legislation or
23 the regulation was really to prevent merchants
24 surcharging more than the cost of the actual underlying
25 payment instruments or methods.

- 1 Q. So in circumstances where merchants could surcharge,
2 Dr Martens never surcharged when it was able to?
- 3 A. Not to my knowledge. Again, this pre-dates me, but not
4 to my knowledge.
- 5 Q. You have not produced any documents showing that
6 Dr Martens even considered surcharging when it was able
7 to?
- 8 A. Well, again the context is you have got to look at what
9 your competitors are doing. We are a consumer brand so
10 again this would add to friction.
- 11 Q. Is that why Dr Martens chose not to surcharge when it
12 could?
- 13 A. I do not know. Before my time. I am not sure, I could
14 not say.
- 15 Q. Similarly, in relation to commercial cards, you have not
16 produced any documents showing that Dr Martens even
17 considered surcharging on commercial cards, have you?
- 18 A. Again, why, because it was not a concern. It was not
19 a big factor for us.
- 20 Q. Because it was such a small part of the business?
- 21 A. A small volume, yes.
- 22 Q. But it had nothing to do with any rule from Visa or
23 Mastercard, did it?
- 24 A. Well, again, I would say the schemes are not always open
25 and transparent about what their rules are with

1 merchants and often you rely on your acquirer or your
2 PSP to try and understand snippets of what is actually
3 going on in their rule set.

4 Q. Mr Hirst, please, you are not suggesting that you --
5 that Dr Martens chose not to surcharge commercial cards
6 because of a confusion about Visa or Mastercard's rules?
7 That is not your evidence, is it?

8 A. No, what I am saying is that we did not surcharge. In
9 the time that I have been here, we have not considered
10 surcharging and prior to that I do not know because
11 I was not here, but in essence what I am saying is
12 actually, you know, merchants have to navigate a bit of
13 a minefield when it comes to the rules of the schemes
14 and the procedures and we rely heavily on acquirers and
15 PSPs to help us navigate that minefield.

16 MR KENNELLY: I have no further questions for Mr Hirst.

17 THE PRESIDENT: Thank you, Mr Kennelly.

18 Mr Cook.

19 Cross-examination by MR COOK

20 MR COOK: Sir, yes, I do have some questions for Mr Hirst.

21 Before I ask them there is a procedural issue I sort of
22 need to raise against myself because it is going to be
23 raised when I try and do it. As you will recall there
24 was a question asked of Mr Hirst in-chief in relation to
25 his role at Tesco, or rather hypothetically what he

1 would have done at Tesco. I have a couple of questions
2 to ask in relation to that. As part of that I want to
3 put to Mr Hirst about what he has previously said about
4 interchange fees in a previous witness statement and
5 that was a witness statement that he gave while he was
6 at -- I think just after actually he had left Tesco but
7 on behalf of Tesco for the purposes of the *Tesco v Visa*
8 trial which would have been the third of the
9 trials that took place, as one will remember, in 2016.

10 Now, that document has been disclosed, I believe it
11 is referred to in Visa's expert evidence. It is not
12 presently in the bundle. I do understand that Visa are
13 now sort of -- there is a concern about whether it
14 should have been disclosed or not potentially because
15 Tesco settled the day before that trial started, so the
16 judge, Phillips J, was asked to read it and the reading
17 period had finished so I think we take it as read he
18 would have read all the things he was asked to read, so
19 it would have been read by Phillips J it was not then
20 referred to in open court. The copy that we have is
21 a redacted one, so all confidential information has been
22 excluded from it but we do have a copy of it, so -- and
23 it has been disclosed, so I am intending to put that to
24 the witness.

25 MR BEAL: Disclosed by whom?

1 MR COOK: Visa, yes, it was disclosed by Visa in the course
2 of these proceedings. So I am more raising it now so
3 that rather than objection being made when I ask a
4 question on it, there is an opportunity for my learned
5 friend to say now and us have that --

6 MR BEAL: Could I just throw into the mix, please, a further
7 factual matter which my learned friend has not mentioned
8 which is that the disclosure or use of this document is
9 in fact governed by a confidential agreement.

10 Now, I am not privy to the confidential agreement
11 but I suspect Visa is so that is something I think for
12 Mr Kennelly to address. We did not disclose this
13 document.

14 MR KENNELLY: Sir, I can say right away that as far as I am
15 aware, the agreement, the confidential agreement, made
16 with Tesco when we settled does not address the
17 situation. What -- but I am instructed to say that it
18 is not clear that we should have disclosed that
19 document, not because of the agreement but because of
20 the rules governing its use in these proceedings having
21 been -- having been adduced in the previous proceedings
22 which were settled. Now, I do not know what the answer
23 to that is. This has happened in the last few minutes
24 so I will need to clarify that but that is what I have
25 been told to say. We would need to check exactly the

1 circumstances in which this was disclosed. We told the
2 claimants we did not intend to rely on it.

3 MR BEAL: Could I just add to this. What happened was I saw
4 this witness statement in the Opus bundle and I spoke to
5 my instructing solicitors and said "Why has this
6 suddenly arrived in the bundle?" As you can imagine
7 that has been a concern of mine for the last couple of
8 weeks.

9 THE PRESIDENT: Well, you addressed it yesterday, yes.

10 MR BEAL: I was told we had not disclosed it and I said
11 "Well, has anyone given consent from the parties to that
12 litigation for this to be used in these proceedings?" to
13 which the answer came back "Those proceedings were
14 settled". At which point we put in train enquiries to
15 understand what had happened and my instructions were
16 that the use of material in that trial was governed by
17 the terms of the confidentiality agreement which
18 needless to say I have not seen.

19 MR KENNELLY: The concern we had was CPR 32.12 that the
20 witness statement may only be used for the purposes of
21 the proceedings for which it was served and that
22 suggested to us that it could not be used in these
23 proceedings.

24 THE PRESIDENT: Except that does not cover the situation
25 where it has been deployed.

1 MR KENNELLY: Yes.

2 THE PRESIDENT: Then you get into the question of has it
3 been deployed.

4 MR KENNELLY: Indeed.

5 THE PRESIDENT: By the judge.

6 MR KENNELLY: Indeed and that is the point that my learned
7 friend makes because it was in the reading list which
8 was given to Phillips J to read.

9 THE PRESIDENT: Indeed.

10 MR COOK: I suppose just to add to that that of course that
11 rule is subject to three exceptions: 1, where the
12 witness himself consents to it being used, which might
13 avoid this problem, though Mr Hirst may or may not feel
14 happy to do so; 2, if the Court orders and it is
15 probably a technical question about which court that
16 should be --

17 THE PRESIDENT: Which court, it is not us.

18 MR COOK: Yes and those are probably the two relevant for
19 these purposes. Ultimately of course had a witness
20 statement gone in four or five months ago, two months
21 ago, addressing any of these matters this would all have
22 been ironed out months ago.

23 THE PRESIDENT: Thank you. I am going to propose, but
24 I will receive comments from those sitting next to me
25 when I have proposed a tentative course as to whether it

1 is appropriate, but I will raise it now to see what the
2 parties think. It does seem to me that this point
3 having been explicitly raised without particular
4 foreshadowing in-chief that the defendants are entitled
5 to a considerable degree of latitude in how they address
6 matters and therefore it seems to me this is something
7 that we ought to address if we possibly can.

8 I am not going to put Mr Hirst in the position of
9 assenting or not to the use of this. I do not think
10 that would be appropriate given that he was giving
11 evidence in someone else's proceedings, but it does seem
12 to me that the points ought to be put if they can be.

13 What I am going to direct because it seems to me not
14 right to oblige Mr Hirst on return when these matters
15 have all been sorted out, is that I am going to invite
16 Mr Cook to put these questions de bene esse to Mr Hirst
17 and Mr Hirst, you answer them just as you wish, and we
18 will leave it to the legal teams to sort out whether
19 these questions should or should not have been put.

20 If they should not have been put then I will simply
21 strike them from the record. I do not think there is
22 any need to go into private session from that. It is
23 simply a question of whether this non-confidential
24 material which may be protected by other routes should
25 never have been put because the material was not

1 properly available to Mr Cook, given that this point was
2 raised fairly late in the day and I do not want, as
3 I said, to cramp the style of the defendants to question
4 points that were elicited as evidence-in-chief.

5 I am just going to check that that is an appropriate
6 course.

7 (Pause)

8 Mr Cook, we are going to hear from all three of you
9 before we go forward. The point that we have just been
10 discussing is that we would not want the Tribunal to be
11 implicated in what might be a breach of the collateral
12 use rule in another court, so the point that I made
13 earlier stands in the sense that we do not think that we
14 can sanction the use of this material. That is a matter
15 for the High Court. It crossed my mind that I am of
16 course a High Court judge, but I am not going to make an
17 order with that hat without it being properly flagged in
18 the appropriate jurisdiction, so that route we are not
19 going to go down.

20 That being said, the horse does seem to have bolted,
21 in that you actually do have the material and it has
22 been deployed in these proceedings, so on the basis that
23 we will manage any impermissible use of this document in
24 the manner that has been articulated and with the
25 parties having an obligation to seek to either

1 regularise the situation, or tell us that it does not
2 need to be regularised, we are minded to allow you,
3 Mr Cook, to embark upon your cross-examination but,
4 first of all, I know what you are going to say about
5 that, Mr Cook, I will allow you the last word, does Visa
6 have any particular problems with that?

7 MR KENNELLY: No, sir, we do not.

8 THE PRESIDENT: Mr Beal?

9 MR BEAL: The witness has not actually read that witness
10 statement, as I understand it, as a practical matter
11 because it was withdrawn by Visa, so it was not actually
12 in the bundle for the witness to consider.

13 THE PRESIDENT: You mean before these proceedings?

14 MR BEAL: He must have read the witness statement when he
15 wrote it in 2016 because he signed it, but this witness
16 has not refreshed his memory by reference to a witness
17 statement that is now over eight years old.

18 THE PRESIDENT: That is a fair point, Mr Beal. That is
19 a practical objection rather than --

20 MR BEAL: Yes, of course.

21 THE PRESIDENT: It is a very good --

22 MR BEAL: I thought it was important to draw it to the
23 Tribunal's attention.

24 THE PRESIDENT: How long is the statement, Mr Cook?

25 MR COOK: It is a long statement, it is 32, 33 pages.

1 THE PRESIDENT: How much of it are you going to be taking
2 the witness to?

3 MR COOK: Four or five paragraphs.

4 THE PRESIDENT: All right, what we are going to do is we are
5 going to rise for ten minutes. Mr Hirst, you are going
6 to be given a witness statement. You will be asked to
7 read certain paragraphs and you will probably be asked
8 questions about that.

9 MR BEAL: I am reminded by my learned juniors that the
10 obligation under CPR 32.12 applies to anyone who seeks
11 to rely upon this material so Mr Cook, so that he knows,
12 is potentially putting his client in a position of
13 breach of the CPR. I just want that to be absolutely
14 crystal clear.

15 THE PRESIDENT: Well, I think the problem we have got
16 because this has come out late and we may need -- I just
17 do not want to have it now -- a debate about what the
18 significance of a document appearing on the judge's
19 reading list is. Now, the law on this is not
20 straightforward. My understanding is that Mr Cook is
21 right and that if the document has been read by the
22 judge then it has been deployed, but I am not coming
23 close to ruling on that, that is why -- I mean, we can
24 park all this and have Mr Hirst back next week.

25 MR BEAL: I think with the greatest respect that would be

1 the safer course.

2 THE PRESIDENT: You would rather do that?

3 MR BEAL: I would rather do that because this is an open
4 Tribunal feed. It is open to the world. It is a public
5 hearing and if a document is to be referred to that
6 should not be referred to, then that is a matter of
7 import to the judge who heard the original proceedings,
8 for example, and it is also a matter of import to
9 a non-party to these proceedings who is not here to be
10 represented.

11 THE PRESIDENT: Yes.

12 MR BEAL: The reality is, sir, whilst you say that this is
13 an issue that has come late, the issue of the
14 admissibility of this document has not come late because
15 it was a point that was flagged before opening
16 submissions last week, is my understanding of the
17 timing. I will be corrected if I am wrong about that.

18 THE PRESIDENT: Well, I think the point is -- and the reason
19 I am interested in hearing Mr Hirst's answers is because
20 of the examination-in-chief. That is why we are
21 really -- if it had been in a supplemental witness
22 statement and Mr Cook was making this application now
23 then the answer would be a no because you should have
24 sorted it out earlier, but the fact is you have not had
25 that opportunity, you have no doubt been thinking about

1 what you can put to address a point that has been
2 unleashed upon everyone late and that is what you are
3 doing and that is, it seems to me, an entirely fair and
4 appropriate course, but Mr Beal makes a very fair point,
5 is that going to be a problem for you if we take
6 Mr Beal's course?

7 MR COOK: Sir, what I suggest we can do, and I understand
8 the concern, is I have a number of questions I can ask
9 now in any event and depending on the answers it may be
10 it is actually not necessary for me to -- so if the
11 witness confirms something that I ask him I do not need
12 to say "And by the way you said it ten years ago". So
13 I could do that now and it may be this point goes away.

14 THE PRESIDENT: No, I do not think that is fair to you or
15 fair to Mr Hirst.

16 MR COOK: Do not worry about being fair to me, sir, I am
17 very comfortable with the proceedings --

18 THE PRESIDENT: I will put it differently: fair to your
19 client or fair to Mr Hirst.

20 MR COOK: Then we could then come back if it does prove
21 necessary. I am just saying that way we could avoid --
22 potentially it would not be necessary to come back.

23 THE PRESIDENT: The trouble is we then get a situation
24 where, in media res, you say well, we had better now
25 kick it off. I think if there is no problem in

1 returning next week then we ought, as regards the
2 entirety of this issue, to deal with it because then you
3 will know where you stand in regard to this statement,
4 so that I think is a helpful suggestion from Mr Beal and
5 if it can be accommodated then I think that is the best
6 way to deal with it.

7 MR COOK: Can I take instructions for just one moment?

8 THE PRESIDENT: Of course.

9 MR BEAL: While my learned friend is doing that, my learned
10 junior -- soon to be Silk -- Mr Woolfe has drawn to my
11 attention the CPR, which ironically is one of the set of
12 rules I do not have with me. It says paragraph 1, which
13 is the prohibition on using it for a purpose beyond the
14 proceedings in which it is served:

15 "... does not apply if and to the extent that the
16 witness gives consent in writing to some other use of
17 it, the court give permission for some other use or the
18 witness statement has been put in evidence at a hearing
19 held in public."

20 I mean, that is obviously --

21 THE PRESIDENT: Yes, it is the "put in evidence" that is the
22 problem.

23 MR BEAL: At the hearing held in public. The problem is if
24 it settled before the hearing was held in public then on
25 my literal reading of that rule then there is a breach,

1 but that is a matter for submission perhaps next week
2 if --

3 THE PRESIDENT: Well, I think it is a matter for submission.
4 As you say, it is principally a matter for Mr Cook and
5 obviously this Tribunal is not going to sanction an
6 approach that is in breach of the rules of another
7 court.

8 MR BEAL: No.

9 THE PRESIDENT: That is clear. My concern was that I did
10 not want to have Mr Hirst back again.

11 MR BEAL: Nor, with respect, do I but sometimes there is the
12 lesser of two evils.

13 THE PRESIDENT: It is certainly right. Mr Cook, you have
14 taken instructions?

15 MR COOK: Sir, having taken instructions and having thought
16 about it a bit more now I think I can ask these
17 questions without the need to go to this document. So
18 I suggest we do answer them and potentially does not
19 arise. If it turns out that I do, then basically I will
20 be saying we should come back at a later point. But we
21 could actually just put this all to bed, it is going to
22 be no more than ten minutes in total, sir, of questions.

23 THE PRESIDENT: Mr Cook, the problem with that is you are
24 effectively conducting a cross-examination on the basis
25 that you have some document that if Mr Hirst does not

1 agree with what you are putting to him, you can then say
2 "Oh, well, let us draw stumps now and you can come back
3 next week and I will show you something which will force
4 you to agree" so I am not going to do that. You can
5 cross-examine on this today without using the document
6 but you are not coming back, or we can park this whole
7 topic and come back next week. I do not mind which way
8 we do it, but I am not having Mr Hirst being told that
9 his attendance next week is in some way contingent on
10 the satisfactory nature of his answers to you today.

11 MR COOK: If that is the choice, sir, then I will take the
12 next week choice.

13 THE PRESIDENT: Next week. Very good.

14 Mr Hirst, I do apologise for a second washing of
15 dirty linen in public. Do not worry about any of that.
16 It was very technical. You are not going to be asked
17 questions about this statement, but there is no
18 difficulty I think in providing Mr Hirst with the
19 statement after close of play so you have something to
20 read. We will make sure you only are told which
21 particular paragraphs you have to read and it may be,
22 Mr Hirst, you will have the inconvenience of coming back
23 next week to deal with this topic and I apologise for
24 that, but I think it is the lesser of two evils.

25 A. Okay. Understood, thank you.

1 THE PRESIDENT: Do you have any questions for me?

2 A. No.

3 Discussion re procedural matters

4 MR BEAL: Sir, I do not know Mr Hirst's personal
5 arrangements but if we could intercede him at 10.30 on
6 Monday morning that would be the most convenient point
7 unless Mr Hirst cannot make it, because the rest of next
8 week is not sitting.

9 THE PRESIDENT: That is true. Mr Hirst -- I am going to
10 leave the diary arrangements to off stage, but obviously
11 what counsel said is right and we will sort that out,
12 but that is for later on.

13 A. Okay.

14 MR COOK: The only question on timing is perhaps a practical
15 one that the easiest solution to all of this may simply
16 be a very brief application -- admittedly we have to
17 notify Tesco of it, in the High Court in which the
18 High Court judge is asked to give permission for it and
19 which will avoid any form of issues at all and will
20 probably take 15 minutes. The question is getting that
21 on before Monday morning might be relatively difficult
22 and obviously that that is if we had the evidence, and
23 you have heard me on that already, but if we had the
24 evidence three, four, five months ago as we should have
25 done, that could be done very easily. Trying to get it

1 done this week might be practically impossible so it may
2 be better to think about Mr Hirst coming back the
3 following Monday and of course we are not sitting for
4 four days next week, to have the time just to regularise
5 it and that avoids -- what we do not want is to spend an
6 hour in front of you making submissions about has it
7 been sufficiently referred to if there is a much easier
8 route out which is just -- I do not want to use the word
9 "rubber stamp", but if there is a confirmation from the
10 High Court it is acceptable.

11 THE PRESIDENT: We are not going to try to resolve this
12 problem on the hoof. We will park the logistical
13 questions, including when Mr Hirst comes back, for the
14 parties to consider.

15 MR BEAL: Sir, can I suggest if we can find a practical way
16 through this, we will, because one of the options
17 appears to be that Mr Hirst can consent in writing which
18 will not take very long.

19 THE PRESIDENT: That will not take very long but I would not
20 want him to be in any way discombobulated by what is
21 a somewhat recondite point, bearing in mind he will have
22 been giving this evidence on behalf of somebody else.

23 MR BEAL: That is my concern. He may need to square it away
24 with his former employer.

25 THE PRESIDENT: He will be quite rightly put to considerable

1 effort in satisfying himself that he can actually give
2 consent that is needed, which is why I suspect an
3 application, if that needs to be done, is the more
4 straightforward course because it avoids all of that
5 difficulty.

6 MR BEAL: Potential awkwardness, yes.

7 THE PRESIDENT: But equally I would not discourage the
8 parties from seeing whether the existing law solves the
9 problem. It may very well not because I do not think
10 this is a --

11 MR BEAL: Leave it with us and we will see what we can do.

12 THE PRESIDENT: Thank you, Mr Beal, I am much obliged to
13 you. Mr Cook, you have --

14 PROFESSOR WATERSON: Can I ask one question?

15 THE PRESIDENT: We have not finished yet. I am sorry to say
16 we have not finished yet. Mr Cook, over to you, unless
17 you had anything else?

18 MR COOK: Well, no, the only questions I am going to ask are
19 on this topic, so they all cover that.

20 THE PRESIDENT: In that case, Professor Waterson, over to
21 you.

22 Questions by the Tribunal

23 PROFESSOR WATERSON: This is uncontroversial, but just
24 a question, you refer to pre-paid cards here, which is
25 the -- you say, for example, Mastercard pre-paid is

1 a "Should accept" card and similarly you write the same
2 sort of thing about Visa. Can I ask about the nature of
3 these cards, so these are cards where someone has
4 already got some money on the card that they can use, is
5 that the idea?

6 A. Yes, that is correct, so the card has been pre-funded
7 with money and it is basically then ready just to spend
8 at any merchant.

9 PROFESSOR WATERSON: Right. At any merchant?

10 A. Generally if you accept pre-paid cards, which again it
11 is very difficult to differentiate -- when you are in
12 store you do not want your cashier trying to figure out
13 whether it is a credit card, a debit card or a pre-paid
14 card. It is just impractical and impossible, actually.

15 PROFESSOR WATERSON: Yes, and so with this pre-paid card
16 what -- is the fee structure similar to a debit card, or
17 is it a credit card, or what?

18 A. It can be. They tend to be categorised -- again it is
19 not necessarily consistent between the schemes, but
20 generally they are kind of debit instruments, so they
21 attract a similar if not the same interchange fee as
22 a debit card.

23 PROFESSOR WATERSON: Right, thank you. That is all I wanted
24 to ask.

25 THE PRESIDENT: Any re-examination?

1 Re-examination by MR JACKSON

2 MR JACKSON: One very short question. Much more prosaic,
3 I am afraid, than the weighty matters we have just been
4 discussing.

5 Mr Hirst, you said in answer to some of
6 Mr Kennelly's questions that in your career you have
7 conducted various quantitative analyses of Amex's claim
8 that it attracts more affluent customers who spend more
9 and you said that those analyses had found scant proof
10 for it. Roughly in what years, when did you conduct
11 those analyses?

12 A. It is going back some time, I have to say. It is
13 probably at least eight, nine, ten years ago. That is
14 my best guess from recollection.

15 MR JACKSON: Thank you. No further questions from me.

16 THE PRESIDENT: Thank you very much, Mr Jackson.

17 Mr Hirst, thank you very much for your evidence.
18 I know you are thrilled to be coming back, thank you in
19 advance for doing that. I am not therefore going to
20 release you as a witness. That is simply because we do
21 not have to re-swear you. But I do want to be very
22 clear the purdah that exists I am lifting, you can feel
23 free, if you want to, and you may very well not, to talk
24 about the case to whomever you please. This is
25 a self-contained matter.

1 MR COOK: I apologise, sir, could I heard on that topic
2 because --

3 THE PRESIDENT: Right.

4 MR COOK: There is a bit of evidence-in-chief he has
5 given -- I have indicated I am going to cross-examine on
6 it. To talk about that with instructing solicitors,
7 counsel on the other side, with respect, would be
8 inappropriate because there may -- they will talk about
9 the kind of questions I might ask which is exactly the
10 kind of matter that should not happen when a witness is
11 in the middle of giving evidence, so with respect, sir,
12 I would say the purdah should remain in relation to
13 matters covered by this witness' evidence.

14 MR BEAL: If it helps, sir, I support that actually.

15 I would rather that we could not talk to the witness on
16 substantive matters but we will of course need to speak
17 to him about procedural matters. It is not my intention
18 than to do more than ask him to look at his witness
19 statement and refresh his memory by reference to it and
20 then leave him on the substantive issues to the perils
21 or pitfalls of my learned friend's cross-examination on
22 Monday.

23 THE PRESIDENT: Well, Mr Beal, that is right. The reason
24 I am releasing or am minded to release the witness from
25 purdah is because I do not want him to feel under any

1 constraint when he is talking to you about the things
2 that he is going to have to talk about, but you see I am
3 completely confident that your team will not go down the
4 entirely inappropriate route of effectively coaching the
5 witness because I know you will not, so I do not see any
6 danger in the situation that I am envisaging because if
7 it Mr Hirst asks "What is that Mr Cook going to be
8 asking me next week or the week after?" Well, you will
9 say "I think that is something that I do not think
10 I should be responding to", and that I think is the
11 safeguard that, Mr Cook, you get because we have in this
12 jurisdiction professional advocates that we can
13 absolutely rely upon and I am doing that now, but I do
14 not think that the witness needs to be in any --

15 MR COOK: Sir, with that clarification from the Tribunal
16 I am very comfortable of course.

17 THE PRESIDENT: That is helpful.

18 Mr Kennelly.

19 MR KENNELLY: Yes, I have a separate concern and it relates
20 to how the evidence was elicited in the first place.
21 Ordinarily we would have received a supplemental witness
22 statement addressing the point which was elicited from
23 Mr Hirst in examination-in-chief and it would have
24 contained a statement of truth and a statement of
25 compliance with the very important Practice Direction

1 that this Tribunal has in how witnesses produce their
2 evidence and that Practice Direction is not a mere
3 formula; it serves to confirm, and the solicitors
4 confirm it, that the witness' evidence is his own, his
5 own language, his own words and has been elicited in
6 an appropriate way. The documents which have been shown
7 to him and that he has relied upon are contained in the
8 list at the end of the statement and we have none of
9 that for the purposes of this very important -- well,
10 for the purpose of this issue. So I am not seeking to
11 dissuade the Tribunal from the course it is taking but
12 the claimants will need to comply with the procedural
13 requirements under the Practice Direction in order to
14 confirm to us that the evidence which has been elicited
15 and that will be elicited from Mr Hirst complies with
16 the requirements that apply to all evidence that is
17 adduced in-chief in this Tribunal.

18 For that purpose we do urge the Tribunal to require
19 the witness not to speak to anyone about the case. We
20 also have faith in the legal teams on the claimants'
21 side, but he really ought not to be speaking about this
22 matter with anyone, including anyone at Tesco, for the
23 purposes of the evidence he is about to give, for the
24 reasons the Tribunal will well understand. It is very
25 important we get his unvarnished evidence in the way

1 that we would get if he was producing a statement.

2 THE PRESIDENT: There are two questions there and two issues
3 and I will address one to the lawyers and the second to
4 Mr Hirst.

5 So the first question is what was shown or used
6 before Mr Hirst gave evidence. Now, the Practice
7 Direction is framed by reference to witness statements
8 and we do not have that --

9 MR KENNELLY: I am not asking for one.

10 THE PRESIDENT: -- at all so what -- all we have had is
11 Mr Hirst's response to questions that were put to him
12 and by definition that is his evidence because we saw
13 him give it and that is that.

14 The question of whether there are any documents that
15 Mr Hirst was shown on this point, yes, if there were,
16 then they should be disclosed. I have no idea what the
17 answer to that is.

18 MR BEAL: This essentially raises an underlying point about
19 the nature of the evidence that was given in-chief and
20 the reality is the reason we are here is because there
21 is no evidence on the pure bilaterals negotiation
22 counterfactual from anyone and it was raised not in the
23 current formulation in Niels 1, Dr Niels' first report.
24 It then, in response to our experts' reports, was
25 refined and treated as what is now referred to as the

1 pure bilaterals no settlement rule. None of that had
2 been clear from Dr Niels' first report.

3 The second report suddenly majors on that; still no
4 evidence because it is a speculative counterfactual
5 evaluation of what might theoretically happen. Then in
6 my learned friend Ms Tolaney's opening she said by way
7 of submission -- and of course there is no evidence from
8 any of the claimants on any of this and as you heard
9 from my opening, our position is this is a matter
10 involving a counterfactual, that is a mixed question of
11 fact and law for this Tribunal. It is largely
12 speculative in nature. There is a warning from
13 Lord Neuberger when he was Master of the Rolls about the
14 weight that should be attached to any witness evidence
15 that goes to the counterfactual because of course after
16 the event is 100% hindsight and you know what you are
17 aiming for.

18 So when we are dealing with this it is a response to
19 an opening which tweaked our tail and said "There is no
20 evidence" and we said "Well, we can give evidence by
21 virtue of asking a short supplemental question", to the
22 extent it bears any weight whatsoever it simply provides
23 the Tribunal with another source of opinion/hypothesis
24 which is available from the merchants.

25 Now, it is being said that the merchants have given

1 no evidence on this and they now have. The weight that
2 the Tribunal gives to that is an entirely separate
3 point.

4 I accept of course, and I apologise to the extent we
5 have not done this, that this has not featured in the
6 three days since the opening in a supplemental witness
7 statement but I do have a response to that, which is
8 that the parties have been quite busy --

9 THE PRESIDENT: I understand that.

10 MR BEAL: -- and there are three different ways in which
11 evidence has in fact been given since. The first one of
12 those ways is for Ms Jones in her supplemental witness
13 statement which Visa have sought the permission of the
14 Tribunal to put in and which I have taken the view, as
15 I mentioned with Geraldine Stone, I have taken the view
16 that if these are factual corrections that could simply
17 be made in-chief and they are committed to writing then
18 that is preferable than doing in-chief.

19 Now, Geraldine Stone did not do a supplemental
20 witness statement, it was conveyed by way of a letter
21 and I took no objection to that either, because again
22 she could simply have corrected or modified her
23 evidence-in-chief and therefore it was a shortcut.

24 With this witness it was frankly easier, rather than
25 trying to get a supplemental witness statement in the

1 time available, given the nature of the dispute and,
2 with respect, limited weight that is going to be given
3 to the evidence anyway, to just deal with it largely by
4 way of a short supplemental question in-chief and I took
5 the view -- I am afraid it was my decision. I took the
6 view it was easier to do it that way than to make a big
7 deal about it but I may have been wrong.

8 What I can say, with respect, is that the third way
9 in which evidence is being put before this Tribunal is
10 the four-page submission from my learned friend without
11 his name at the bottom of it which makes all sorts of
12 factual assertions with no substantiated evidence and
13 which is being put forward to this Tribunal as evidence
14 of fact when there is no basis for it whatsoever and no
15 witness statement either.

16 The reality is this has been a very truncated
17 procedural process, done at high speed with the
18 cooperation of the parties, mercifully, and inevitably
19 the formal situation where everything is done perfectly
20 has simply not happened and so with that in mind, with
21 my apology that it has not been formally converted into
22 a supplemental witness statement, there is with respect
23 little benefit in doing so because, as you have pointed
24 out sir, the witness' evidence was given on oath or
25 affirmation, it is the evidence that he gave, in the

1 same way that the evidence he gave in answer to
2 my learned friend's cross-examination is evidence on
3 oath.

4 The final point I have to make is that the people
5 who you might think who would be best suited to give
6 evidence on acquirers' incentives or what an acquirer
7 might do in a counterfactual situation of negotiation
8 with different market parameters being applied to them,
9 different contractual parameters being applied to them,
10 would be the acquirers and that is something I pushed
11 for from a very early stage, pre-September actually last
12 year, where I kept on saying time and again "Look, it
13 would be very useful to get some acquirer evidence" and
14 that is something we left with Mr Kennelly and we said
15 to Mr Kennelly's client it would be very useful to have
16 some acquirer evidence and it ran into the sand. Now,
17 spilt milk, cannot do anything about it but I would like
18 the Tribunal to be cognisant of the best evidence from
19 the best people has not been put before this Tribunal
20 and so we are having to do a workaround, partly with the
21 PSR evidence and partly with a merchant to some extent
22 speculating about what they might be able to persuade
23 their acquirer to do on their behalf if the acquirer
24 does not have its hands tied behind its back.

25 Those are the four points I wanted to make.

1 THE PRESIDENT: That is very helpful.

2 MR KENNELLY: I will be very brief, sir, because I think
3 I can reassure Mr Beal on one score. I am not asking
4 for a witness statement. We are all seeking to reach
5 a solution here, a pragmatic and efficient way in which
6 we can sensible way in which we can have these questions
7 put to Mr Hirst. All I wanted with as a certificate of
8 confirmation from the solicitors pursuant to the
9 Practice Direction which provides us with the
10 reassurance that we would ordinarily get and that can
11 come by way of a letter or certificate from the
12 solicitors which I am sure the claimants' solicitors
13 would be happy to provide, along with any documents
14 shown to the witness.

15 MR COOK: If I may --

16 MR BEAL: I was going to volunteer a letter which might
17 short-circuit my learned friend's submission.

18 MR COOK: There is a lot Mr Beal just said that we obviously
19 disagree with hugely, very significantly our bilaterals
20 counterfactual is pleaded in absolutely clear terms and
21 it was as long ago as September 2020. I just wanted to
22 lay that down. I know that will be in dispute in due
23 course but we absolutely disagree with an idea that
24 there is any surprise other than the fact that Mr Beal
25 is not ready for the case or his clients are not ready

1 evidentially for these matters.

2 THE PRESIDENT: Mr Beal, first of all, I do not think you
3 need offer any apology for this. We entirely understand
4 that in any case of this size the pressures on the
5 parties are enormous and this is a case which if we wind
6 back to last September was when all parties were saying
7 it could not take place, so we are very conscious of the
8 extraordinary burdens that have been placed on the
9 parties and now is as good a time as any for us to put
10 on the record how grateful we are to all of the teams --

11 MR BEAL: Thank you.

12 THE PRESIDENT: -- for achieving that, so I am not going to
13 accept your apology, not because I do not regard it as
14 sincere, but because I really do not think it is needed.

15 MR BEAL: Thank you for that, sir.

16 THE PRESIDENT: So we are really dealing here with the
17 practical question of ensuring that the Tribunal has the
18 best evidence on which to decide the very complex
19 matters that lie before it and it will have come as no
20 surprise to those who have seen this Tribunal in
21 operation that we will be asking our own questions of
22 the witnesses. You saw that this morning when we asked,
23 for example, Mr Steeley a number of questions which were
24 not directly arising out of his witness statement with
25 regard to differential between retailers and competitors

1 as far as price is concerned.

2 Now, that was material which was extremely helpful
3 in terms of the background and just to give a bit of
4 notice, we are likely to be asking that sort of question
5 of other witnesses so that we can understand the
6 competitive dynamics that operate on both sides of this
7 two-sided market, so on the acquirer side, the chain
8 starting with the customer, moving to the merchant,
9 moving to the acquirer, moving to the scheme; and on the
10 other side, starting down, the scheme, to the bank, to
11 the account holder. This detail matters not because it
12 is determinative on issues but because it provides
13 incredibly helpful background into how competitive
14 markets, or uncompetitive markets operate.

15 So we regarded your questions on the bilateral
16 interchange fee in that light and we welcome rather than
17 oppose the expansion of the record in these matters
18 because it is very hard to anticipate what is and what
19 is not needed to deal with matters, so the question is
20 not should you or should you not have asked the
21 question, it is a question of how do we ensure fairly
22 that the evidence is articulated? Because we are not
23 objecting to your putting the question, we let you put
24 it, we are concerned to make sure that there is an
25 adequate ability to respond in this material.

1 Now, the point you make about weight is relevant and
2 there is going to be a limit to how far we let this
3 process drag on because Mr Hirst is not giving evidence
4 of fact in any conventional sense in these facts, he is
5 dealing with a counterfactual and there is a limit to
6 how far he can actually provide evidence in the real
7 sense of the word on that point because it is
8 a counterfactual and I would like the parties to bear
9 that in mind. It goes to your question of weight. We
10 are not going to say anything more about qualitative
11 evidence beyond it is a counterfactual question and
12 needs to be handled accordingly, so that is the general
13 approach that we are going to take.

14 We are, I think, driven to take the route that is
15 indicated earlier, Mr Hirst will come back and give
16 evidence at a convenient time when the procedural
17 hurdles regarding this statement have been sorted out.
18 If they cannot be sorted out then we will just have
19 a cross-examination without resort to that document and
20 that is fine, so I think that is everything I have to
21 say to the advocates except Mr Kennelly's point about
22 compliance with the protocol. If you send a letter
23 saying the nearest equivalent to compliance with
24 the protocol and it is a very different situation when
25 you have got questions in-chief to a witness statement,

1 if you could provide some comfort -- you have heard
2 Mr Kennelly's concerns.

3 MR BEAL: Yes.

4 THE PRESIDENT: That will be more than enough from our point
5 of view, but that is not intended to be compliant with
6 the protocol, it is simply to ensure that the defendants
7 know the context in which the answers to your questions
8 will be given.

9 MR BEAL: Yes, of course. We will accept a letter
10 identifying which, if any, documents the witness saw on
11 this point, which is a speculation.

12 THE PRESIDENT: That would be very helpful.

13 MR BEAL: Which -- I do not think it will take very long to
14 deal with that.

15 THE PRESIDENT: I suspected that might be the answer but we
16 will take that on the record.

17 MR COOK: Sir, if I can just say one thing. The last set of
18 comments I made, I said something about Mr Beal not
19 being ready. I really meant his client's evidence not
20 being ready. If that was intended -- it sounded, when
21 I read it back on the transcript, like more of a jibe
22 than it was intended to be and I absolutely was not
23 criticising Mr Beal's obvious extensive preparations for
24 this case personally.

25 THE PRESIDENT: That leaves the next point about

1 communication with Tesco or others. I remain of the
2 view, and I will explain this to Mr Hirst in a moment,
3 I remain of the view that an embargo on discussions
4 would be inappropriate. I think it is -- particularly
5 for the potential that it might be a week or more before
6 Mr Hirst is back, it would be wrong to impose any
7 obligations on Mr Hirst in this regard. That being
8 said, and I will, as I say, communicate this to Mr Hirst
9 so that you get it, but you of course, Mr Cook, will be
10 entitled to ask Mr Hirst about any communications he has
11 had between now and when he gives evidence on this topic
12 and I will, to be clear, oblige Mr Hirst to answer
13 those. Since we have already closed out any risk of
14 communication with lawyers, because we know what Mr Beal
15 will and will not do, and we know that that will be
16 appropriate, if Mr Hirst wants -- in order to prepare
17 himself to speak to other people then I think he should
18 be at liberty to do so, but he knows that you will ask
19 him about that.

20 So I think that is a course which I hope meets with
21 your approval -- if it does not, do say now -- I will
22 turn to Mr Hirst and explain the state of play.

23 MR COOK: Sir, I think you may have written my first
24 question that I will be asking him, but nonetheless
25 I have no further objections.

1 MR KENNELLY: None from Visa.

2 THE PRESIDENT: I am grateful. So have we, in procedural
3 terms, dealt with this topic? Good.

4 Mr Hirst, thank you for bearing with us. You are
5 going to be, to your considerable relief, leaving the
6 witness box now but you will be coming back at a time to
7 be agreed and do please have regard to your own diary
8 because I know you are a busy man and I do not want this
9 to be any more onerous than it needs to be.

10 You are at liberty to speak about this case. I am
11 not going to impose the purdah on you. If I may be so
12 bold as to give you any advice, I would avoid talking
13 about it if you can, but there is no restriction, you
14 must do what you think is right, and you may -- you must
15 take the course that you see best, but I flagged with
16 counsel and I flag now with you that you will, just so
17 that your evidence can be located in context, be asked
18 about what you have talked about between now and
19 whenever you come back to give evidence and you will
20 have to answer those questions and that is I think the
21 best control that there can be because you may very well
22 want to talk to someone about this and you will have to
23 explain it to the court as to why you have done it, so
24 that is the course I am minded to take. I will leave
25 matters to your good sense and the good sense of the

1 claimants' legal team.

2 Do you have any questions on the procedural side
3 that are unclear because I would not want you to leave
4 the witness box without knowing exactly where we, the
5 lawyers, are coming from?

6 A. No, I think I understand. Thank you.

7 THE PRESIDENT: Well, in that case I am extraordinarily
8 grateful to you, Mr Hirst, for your time. You are free
9 to go, but I am afraid you will be back.

10 A. Okay, thank you.

11 THE PRESIDENT: Thank you very much.

12 (The witness withdrew).

13 So that concludes the claimants' factual evidence,
14 do I have that right?

15 MR COOK: With one exception, sir, I think there is
16 a New Zealand witness, he is being interposed.

17 MR KENNELLY: Mr Jenkins.

18 THE PRESIDENT: We have the interposition, that is quite
19 right.

20 MR KENNELLY: I got to my feet, sir, in order to address you
21 on tomorrow because the Visa witnesses will begin
22 tomorrow morning and I wanted to raise with the Tribunal
23 the order in which they will give evidence which I have
24 discussed in part with Mr Beal although some adjustments
25 will be made now in my proposal which Mr Beal has not

1 heard and he will address you on them and the question
2 of sitting in private.

3 The easier of the two is the order. We propose that
4 Mr Livingston and Mr Nicol go first, then Ms Dooney and
5 finally Mr Peterson. I have spoken to my learned friend
6 about how long he plans on taking. He thinks that he
7 will need more than a day to cover five witnesses, so on
8 that basis we propose that Ms Stone be moved to Monday
9 to ensure that no one has to be in purdah over the
10 weekend and that allows Mr Beal ample time to
11 cross-examine the four witnesses tomorrow. Unless --

12 THE PRESIDENT: Let us take it issue by issue. Does that
13 work for you, Mr Beal?

14 MR BEAL: Yes. With a fair wind I will get through all five
15 but it depends on how straightforward some of the
16 answers are and it is always slightly imprecise, so
17 I did not want Ms Stone, who I think has a medical
18 condition, to be put in a position where she would have
19 to come twice and so having discussed it with
20 Mr Kennelly we thought it was fairer on her as a witness
21 to give her certainty, so either she goes first tomorrow
22 or she goes first on Monday and having her in reserve on
23 a Thursday afternoon was not fair, I took the view, and
24 I think Mr Kennelly shared that view.

25 THE PRESIDENT: That seems very sensible. Shall we say

1 Monday morning for her in that case?

2 MR KENNELLY: Yes, sir, I am grateful.

3 THE PRESIDENT: I am very grateful to you both, and I am
4 sure the witness will be when she hears of the
5 consideration that has been given, but thank you.

6 MR KENNELLY: So then to the more difficult subject which is
7 the evidence of Mr Livingston and Mr Nicol. In
8 explaining why their evidence is highly sensitive I am
9 constrained by the fact that we are now in public and
10 there is a limit to what I can even say in public about
11 how sensitive their evidence will be. The Tribunal has
12 read the statements, you are familiar with the issues.

13 THE PRESIDENT: We have, but I think given that we do not
14 like, for reasons that are too trite to traverse, to
15 make a ruling about sitting in private I think it is
16 appropriate that you, admittedly briefly, articulate
17 those.

18 Since this is the last item on the agenda I am going
19 to suggest that we go into private session now but let
20 me make sure that it is the last item on the agenda so
21 that we can get the regime sorted out for tomorrow
22 morning without having to go back into open session at
23 the end of it today.

24 So I am not seeing any bids for further court
25 attention or other points in which case we will suspend

1 the live stream now in order for you to make an
2 application that tomorrow morning's proceedings, as far
3 as Mr Livingston and Mr Nicol are concerned, are heard
4 in private and we will resume, since I am confident this
5 application is not being made without a good reason, we
6 will probably resume in private tomorrow morning and
7 move into the open session after we have heard the
8 private parts of Livingston and Nicol in due course but
9 we will go into private session now, if we can do that.

10 MR KENNELLY: Thank you, sir.

11 THE PRESIDENT: I think those in court will need to consider
12 their position in terms of whether they can or cannot
13 remain in court and in order to enable that to be done
14 we can take a ten-minute transcriber break so we resume
15 in private when we resume in ten minutes. Thank you.

16 (3.31 pm)

17 (Short Break)

18 (3.48 pm)

19 (Hearing in Private)

20 (4.08 pm)

21 (The hearing adjourned until 10.30 am on
22 Thursday, 22 February 2024)

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