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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

Thursday, 22 February 2024

(10.30 am)

THE PRESIDENT: Mr Kennelly, good morning.

MR KENNELLY: May I begin just by double-checking in view of the large number of people in the room that we have here only the external permitted persons for the purposes of trial 1. So that is not the collective proceedings, trial 1, external permitted persons only.

THE PRESIDENT: Could everyone please check and if they are in any doubt, leave, rather than stay, in terms of their status here. Can I just double-check, I know we have images on the screen, but we are not live streaming, are we? Grateful.

I assume there is a "private" sign on the door.

MR KENNELLY: Yes, there is.

THE PRESIDENT: The gatekeepers are fully aware of what we are doing. So, are you happy, Mr Kennelly, to proceed? We will give a couple of people a chance to exit.

I would be very grateful if each team could take a look behind and make sure that they are happy that everyone is here, should be.

MR KENNELLY: Yes.

THE PRESIDENT: Good.

(Hearing in Private - Separate Transcript)

1 (Open Session)

2 (4.05 pm)

3 MR KENNELLY: We call Mr Petersen.

4 MR CRAIG PETERSEN (affirmed)

5 Examination-in-chief by MR KENNELLY

6 THE PRESIDENT: Mr Petersen, good afternoon, please sit down
7 you have some water there and I am afraid there will be
8 some questions.

9 MR KENNELLY: Good afternoon, Mr Petersen you should have
10 a folder in front of you. Could you turn it open please
11 and go to tab 1 {RC-F4/1/1}. Is that the first page of
12 your witness statement dated 26 January 2021?

13 A. Yes, it is.

14 Q. Could you go, please, to page {RC-F4/1/4}. Could you
15 confirm that that is your signature?

16 A. Yes, it is.

17 Q. That the contents of this statement are true to the best
18 of your knowledge and belief?

19 A. Yes, it is.

20 Q. Now, please turn over to tab 2 {RC-F4/5/1}, is this
21 a further witness statement made by you dated
22 24 October 2023?

23 A. Yes.

24 Q. Could you go, please, to page 3 {RC-F4/5/3}. Is that
25 your signature?

1 A. Yes.

2 Q. Are the contents of this statement true to the best of
3 your knowledge and belief?

4 A. Yes, it is.

5 MR KENNELLY: Thank you. There will be some questions for
6 you.

7 Cross-examination by MR BEAL

8 MR BEAL: Thank you. If you give me a moment, I have
9 technical difficulties. There we are. Thank you. Your
10 statement at RC {RC-F4/1/3}, you refer at page 3,
11 paragraph 10 to the settlement with the Commerce
12 Commission in 2009; Is that right.

13 A. Yes.

14 Q. Presumably following that settlement Visa removed
15 anti-steering rules from its New Zealand scheme rules;
16 is that right?

17 A. Correct, yes.

18 Q. It also removed the prohibition on surcharging?

19 A. Correct, yes that is my understanding yeah.

20 Q. There was also a maximum rate set for interchange fees
21 in consumer debit and consumer credit?

22 A. Correct.

23 Q. So the 2009 rules indicated that first off MIFs could be
24 set bilaterally in principle? The scheme was permitted?

25 A. Correct.

- 1 Q. If there was no bilateral agreement then the issuer
2 would commit to a published rate?
- 3 A. Correct.
- 4 Q. Provided it did not exceed the maximum rate which was
5 set by the Visa scheme?
- 6 A. Yeah, that is correct.
- 7 Q. If no rate were nominated and published by an issuing
8 bank, then there would be the full settlement at par?
- 9 A. That is correct, yes.
- 10 Q. In relation to the maximum rate, the Commerce Commission
11 had a separate arrangement, did it not, with issuing
12 banks?
- 13 A. That was my understanding, yes.
- 14 Q. Did any acquirers and issuers after that ever agree
15 rates bilaterally, say through to 2016, 2017 or so?
- 16 A. They -- not that I was a party to, no.
- 17 Q. In terms of setting an overall MIF rate that deviated
18 from the issuers' rate?
- 19 A. If the issuer was going to take a lower rate they would
20 notify Visa and we would update the table as long as it
21 was below the cap.
- 22 Q. If the fallback position was settlement at par, with no
23 MIF, acquirers are not very likely to agree to pay
24 something to the issuer, are they?
- 25 A. If they did not notify Visa of a rate then it would be

- 1 settlement at par, yes, correct.
- 2 Q. What I am saying is you are not going to suddenly find
3 yourself with an issuer not having set a rate and
4 an acquirer saying, do not worry about it, I will still
5 pay you a substantial chunk of money?
- 6 A. They would pay whatever rate was notified.
- 7 Q. But if the default rule in the absence of that
8 possibility of negotiation is that the issuer sets the
9 price, then it is highly likely, is it not, that the
10 issuer will set the price?
- 11 A. The issuer would notify a rate up to the cap, yes.
- 12 Q. The Visa rules specifically allow the issuers to set
13 a published rate up to the maximum cap?
- 14 A. That is correct.
- 15 Q. They specifically said to issuers you can do what you
16 like up to the maximum level which we set?
- 17 A. They said that the issuers had to notify Visa of what
18 rate they would accept up until the cap.
- 19 Q. Presumably the scheme required that all payments under
20 the scheme would have to be settled as part of a payment
21 system?
- 22 A. Transactions that were processed over VisaNet were
23 settled over VisaNet.
- 24 Q. There would therefore need to be a scheme rule requiring
25 settlement once a valid card is presented to a merchant?

- 1 A. If they were switched over VisaNet, that is correct.
- 2 Q. The specific rule dealing with settlement would require
3 that somebody who presented a card to a merchant, it
4 would go through the acquirer and then to the issuer and
5 be dealt with and then the funds would move from the
6 issuer through the acquirer to the merchant?
- 7 A. That is correct and it would be settled through VisaNet
8 on an Off Us transaction, where the issuer and acquirer
9 were different.
- 10 Q. That settlement process is essentially a clearing
11 settlement process within Visa where you knock off all
12 the cross-charge, if I can put it that way, and you end
13 up with a net figure that is paid?
- 14 A. There is a net settlement file that goes, yes.
- 15 Q. Can you imagine a payment system which did not have
16 a specific rule dealing with settlement?
- 17 A. Can you repeat the question?
- 18 Q. Yes. I appreciate it is an odd one. Can you imagine
19 a payment system which did not have any default rule
20 requiring settlement of transactions?
- 21 A. I am not aware of that.
- 22 Q. You would not have the payment system, would you, it
23 would simply be an acquirer saying to an issuer: for
24 a given transaction I will pay you this much, or vice
25 versa?

- 1 A. Sounds like a bilateral agreement, what you are
2 explaining.
- 3 Q. Well, A bilateral agreement would be for a given issuer
4 with a given acquirer or merchant, would it?
- 5 A. A bilateral agreement could be between different issuers
6 and different acquirers; correct.
- 7 Q. But you would still, would you not, if you are going to
8 do that bilateral agreement as part of a scheme, you
9 would still have to have an underlying requirement to
10 settle the transaction through Visa?
- 11 A. I do not believe that you would have to, no.
- 12 Q. Well, how would it be a scheme settlement if you are not
13 settling through Visa?
- 14 A. If there was switched through VisaNet, if they had
15 a different bilateral agreement, supposedly they could.
- 16 Q. If it was switched through VisaNet?
- 17 A. So you are saying: could an issuer and an acquirer reach
18 some sort of agreement where they settled amongst
19 themselves?
- 20 Q. Yes. That would not be anything that the scheme got
21 involved in, would it?
- 22 A. Under the scheme rules, I am not exactly sure if that
23 would be allowed.
- 24 Q. Well, your scheme rules have a default settlement rule
25 so even if they bilaterally agree the rate, the

1 settlement still takes place through VisaNet?

2 A. Domestically I am not sure if there is a rule that
3 requires 100% of domestic transactions to go through
4 VisaNet, that is not my expertise.

5 THE PRESIDENT: Can we move the question up a level to the
6 more abstract, steer away from specific rules and just
7 look at schemes in general. Those schemes involve
8 transactions between a merchant and a customer. The
9 merchant communicates that transaction to the acquirer
10 and there are some arrangements by which the merchant
11 gets the purchase price which the customer has promised
12 to pay. The customer knows that they will be paying out
13 of their account with the bank that is issuing the card,
14 so one has got a circle of monies moving round. There
15 must be some rules which are controlling how those
16 monies end up where?

17 A. Correct, yes.

18 THE PRESIDENT: There have to be those rules.

19 A. Correct yes.

20 THE PRESIDENT: Presumably those rules will determine what
21 deductions may and what deductions may not permissibly
22 be made?

23 A. Correct, when it goes through VisaNet that would be
24 correct, yes.

25 THE PRESIDENT: Well, one way or another, when you are

1 talking about monies in the customer's account migrating
2 by way of a chain of transactions through the scheme
3 into ultimately the merchant's account, the payment
4 which is occurring between the merchant and the
5 cardholder customer is concluded, so the payment is
6 made. You need to have some certainty as to how that
7 payment is being made.

8 A. Yeah, correct. So under the Visa rules there would be
9 whole settlement rules in the operating regulations. So
10 that would be correct, yes.

11 THE PRESIDENT: Right, and presumably it would not be
12 consistent with the objective of the scheme to say that
13 any one at any stage of the flow of monies from the
14 cardholder account to the merchant's account, that any
15 person in that chain could withhold what they liked?

16 A. No, you would have to settle the transaction under the
17 scheme rules.

18 THE PRESIDENT: Yes, but what I mean is the scheme rules
19 could not say, please anyone in the chain take away what
20 you fancy, and the person who receives the end result,
21 the net result, gets simply that which is left?

22 A. Yeah, correct, yeah.

23 THE PRESIDENT: Okay, thank you.

24 MR BEAL: So given that we have established with the help of
25 assistance of the learned President that you do need

1 settlement arrangements as part of the scheme, the key
2 question is therefore whether that settlement
3 arrangement needs to have a rule which is different from
4 settlement at par; correct?

5 A. So -- I am not sure I understand the question.

6 Q. Settlement at par --

7 A. Right.

8 Q. -- is a perfectly sensible commercial arrangement that
9 is replicated up and down the land, is it not?

10 A. If the issuer and the acquirer bilaterally agree they
11 want to do settlement at par --

12 Q. It is simply an abstract concept. If I go into a shop
13 and pay in cash, I am settling for the value of the
14 computer, say, I am buying for £500, I am settling that
15 transaction by transferring the entitlement to the £500
16 I have in my possession in return for taking physical
17 delivery of the computer. That is settlement at par;
18 correct?

19 A. In that example, yes.

20 Q. Similarly, for example, with electronic payment systems
21 if the costs lie where they fall and I pay for that
22 computer electronically over the internet with a faster
23 electronic payment, I bear the cost of that, that is
24 settlement at par. I am paying the price of the
25 computer without any deduction for any payment service?

- 1 A. Under that example, yes.
- 2 Q. There is nothing unusual about that. The system is not
3 going to fall apart if you have a system that allows
4 settlement at par?
- 5 A. I think that you need certain incentives in a network
6 payment system in order to maximise throughput of the
7 system so I do not think settlement at par would be the
8 right rate that would maximise throughput.
- 9 Q. Split out the right rate. I am saying can a payment
10 system function with settlement at par?
- 11 A. Can it function?
- 12 Q. Yes.
- 13 A. I would not see why -- I am sure it would function, yes.
14 Would that be the right rate, that would --
- 15 Q. I am not asking you about the right rate, I am asking
16 can it function. You know perfectly well EFTPOS is
17 a payment system in New Zealand?
- 18 A. Correct.
- 19 Q. That does not have anything other than settlement at
20 par, does it?
- 21 A. On debit transactions, correct.
- 22 Q. It is a free service for merchants to receive payment
23 cards which does not impose a MIF?
- 24 A. On debit?
- 25 Q. On debit transactions?

- 1 A. That is correct.
- 2 Q. It has not done very well compared to Visa, but it has
3 been a persistent scheme that is still a chunky size of
4 the payment market in New Zealand for a significant
5 period of time?
- 6 A. It is a payment system that has had zero investment,
7 zero innovation that has worked the same way since its
8 invention, yes, correct. But it does not take
9 contactless payments; it does not take card not present
10 payments; does not work online. So it is something that
11 the banks have absorbed the cost of, so there is a cost,
12 but they have not invested in any sort of innovation
13 with that payment system.
- 14 Q. Visa cards -- Visa has cards, does it not, that use the
15 EFTPOS system?
- 16 A. There are branded Visa cards that can work on the EFTPOS
17 system.
- 18 Q. The way that EFTPOS works in the terminal, as
19 I understand it, in New Zealand, I have not had the
20 pleasure to be there yet, is you can either dip or you
21 can swipe?
- 22 A. Correct.
- 23 Q. "Dip" means you use the chip and PIN, and "swipe" have
24 I got that right -- anyway, there are two different ways
25 of doing it. Take contactless, for example. If I go

- 1 for chip and PIN, the MIF is lower than if I use
2 contactless?
- 3 A. That is correct, yes.
- 4 Q. So what we are seeing, are we not, in New Zealand is
5 an increasing prevalence of merchants over there making
6 a price differential at transaction level where they say
7 if you are going to pay using chip and PIN, I will give
8 it to you for this price; if you are going to pay with
9 contactless, it is going to be this price?
- 10 A. The merchants have the option to surcharge if they
11 choose.
- 12 Q. What I am asking you is in your experience of being in
13 New Zealand and using terminals over there, I am sure
14 you notice what you are doing because you are in the
15 business. You have seen, have you not, merchants
16 offering that differentiation in price?
- 17 A. I have seen some merchants surcharge. I would say the
18 overwhelming majority of my experience is my contactless
19 payments work without a surcharge.
- 20 Q. Legislation in New Zealand now sets a zero maximum rate
21 for debit card present transactions, does it not?
- 22 A. I am not across the latest 2022 settlement, but that is
23 my understanding.
- 24 Q. If we pull that up, please, {RC-7J5/45.1/27}. You will
25 see that is referring to various standards that are

1 imposed. We see that under (3) the standard requires
2 that the MIF for domestic debit retail should not exceed
3 the lowest of, and then (b) (i) is:

4 "In the case of any contacted in person payment
5 method, 0.00 per transaction."

6 A. That is correct.

7 Q. So that is setting a zero rate, ie par settlement, for
8 that particular category of debit card transactions in
9 New Zealand?

10 A. That is correct, yes.

11 Q. The issuers have not run to the hills screaming saying
12 they are not going to issue cards with that any more,
13 have they?

14 A. I would say the issuers have not invested in the EFTPOS
15 system, so that is why there has not been any sort of
16 innovation in terms of contactless payment, online
17 payment, tokenisation payments.

18 Q. Visa has not taken a decision to pull the cards that can
19 be used with the EFTPOS system?

20 A. No.

21 Q. Could we then, please, deal with the suggestion that all
22 of the interchange fees will be set at maximum or have
23 been set at maximum under the New Zealand regime.

24 I think you have recognised, have you not, that there is
25 a different rate applied for charities?

1 A. That is correct, yeah.

2 Q. If we could look in a New Zealand Government department
3 report, an MBIE report, from 2016, it is {RC-J3/85/36}.
4 At paragraph 131, if you would be kind enough to cast
5 an eye over that. It says:

6 "Issuers are free to charge interchange below the
7 cap. We understand that generally, issuers charge the
8 maximum allowable interchange with two exceptions."

9 One is the charities one you mention but the other
10 is:

11 "When large merchants negotiate directly with the
12 issuing side of the merchants' acquirer to have them
13 charge a lower rate of interchange on transactions made
14 by the issuer's customers with the merchant."

15 In other words, if you are dealing with a single
16 entity that is both issuer and acquirer, large merchants
17 may have more clout to be able to get a better deal?

18 A. Yeah, so if it is an On Us transaction where the issuer
19 and acquirer are negotiating amongst themselves, or the
20 issuer and the merchant, I should say, they negotiate
21 their own bilateral deal to which Visa not a party of.

22 Q. That therefore does not have to be published as a rate
23 under the Visa system?

24 A. On a On Us transaction where the issuer and acquirer are
25 the same, and the merchant is processing through the

1 same financial institutions, yeah, that does not have to
2 be processed through VisaNet and Visa does not have any
3 visibility into that financial arrangement.

4 Q. If you look, please, then, at paragraph 149
5 {RC-J3/85/40}. We see that some large merchants had
6 also been able to secure substantial payment rebates
7 from issuers. Is that an On Us transaction or is that
8 separate?

9 A. My understanding of that statement is part of the
10 settlement with the Commerce Commission the issuers had
11 to provide certain rebates back for a period of time.
12 So I think there was a period of time about three years
13 where issuers were providing back specific merchants'
14 rebates.

15 Q. If a merchant has sufficient clout it could, in theory,
16 require a different interchange fee even if it was not
17 an On Us transaction, ie they would pressurise the
18 issuer to give them a better deal, that is possible, is
19 it?

20 A. They could negotiate bilateral deals with issuers to get
21 a different rate, but that would be up to them and they
22 would negotiate bilaterally with an issuer.

23 Q. But that would still take place through the Visa scheme,
24 would it?

25 A. No, that would be an On Us transaction and Visa would

- 1 not have any visibility into that kind of deal.
- 2 Q. "On Us" was when both the issuer and the acquirer were
3 the same entity?
- 4 A. Correct, so if a merchant went to an issuer and wanted
5 to negotiate a lower deal, and they went through that
6 issuers acquirer, is what I am saying, then they --
- 7 Q. Why can they not use their own acquirer?
- 8 A. Or if they use their own acquirer and in that specific
9 instance it would not go over VisaNet.
- 10 Q. Why not?
- 11 A. So if -- your question is a merchant goes to an issuer
12 and wants to negotiate a lower deal.
- 13 Q. Yes. Or a merchant approaches its acquirer and says:
14 I am really not happy about this, you go to the issuer
15 and get me a better deal, or I am off. The issuer takes
16 that seriously.
- 17 A. They are free to try and do that. There is nothing that
18 stops them from trying to negotiate.
- 19 Q. If you are the likes of Amazon, then you can do that
20 successfully. If we look at {RC-J5/51/39} we see that
21 the PSR is alert to the fact companies such as Amazon
22 are able to negotiate better deals?
- 23 A. If they were getting some sort of rebate on the back
24 end, Visa would not be a party to that. Visa would not
25 have any visibility into what kind of back end rebate

1 they were getting from the issuer.

2 Q. It should have been page 36 {RC-J4/51/36}. Sorry, I did
3 say page 39. I beg your pardon. Page 40, {RC-J4/51/40}
4 I am sorry, I have given myself the wrong reference.
5 Page 40 and then paragraph 4.39(b) there is a reference
6 to Amazon threatening to take Visa credit cards off
7 Amazon Prime and it was subsequently reported in the
8 Financial Times that Amazon had reached a global truce.

9 A. I am reading here it says for some UK merchants.

10 THE PRESIDENT: Why do you not read it first and then the
11 questions will follow? {RC-J5/51/40}.

12 A. Okay.

13 MR BEAL: So my question to you is: depending on the
14 countervailing bargaining power of the merchant, it is
15 possible to drive down a better deal?

16 A. Yes, correct.

17 Q. We have seen that in New Zealand to some extent, have we
18 not? So if we turn please to {RC-J3/85/41},
19 paragraph 150, the MBIE in this report says:

20 "Any competition that occurs between acquirers for
21 merchants is seemingly restricted to the acquiring
22 margin, with the interchange rate charged by the issuer
23 acting as a relatively hard floor ..."

24 But then:

25 "A consistent theme of our discussions with

1 stakeholders was the gap between the [Merchant Service
2 Charges, as we call them] faced by large and small
3 merchants. This appears to be largely a function of the
4 differing interchange caps set by schemes, with much
5 lower caps set for strategic merchants than for smaller
6 merchants."

7 That seems to imply, does it not, that you do get
8 not just a bespoke deal but in fact a different overall
9 rate or cap for strategic merchants?

10 A. That is correct. So we had strategic merchant rates for
11 a variety of reasons. Early on one was just simply by
12 volume or size of merchants, so I think Air New Zealand
13 being one of the largest merchants in Australia at the
14 time, early on they had a deal based on volume. Then we
15 had strategic merchant rates that we gave special deals
16 to that were things we were trying to accomplish in
17 terms of the payment system. So, for instance, petrol
18 stations or supermarkets, if they agreed to certain
19 innovations in the payment system such as deploying
20 contactless terminals or some online types of payments
21 in terms of tokenisations, innovations of that sort, we
22 gave certain strategic merchant rates in order to
23 innovate in the market. That is correct, yes.

24 Q. Presumably if you rolled out the same model here, UK
25 merchants would have the opportunity to try and

1 negotiate, if they have the clout for it, so that they
2 get the sort of merchant incentive rates as well?

3 A. They can certainly have the discussion with the schemes
4 and the acquirer and issuers, yes.

5 Q. So in the counterfactual that we are dealing with where
6 you are positing this might conceivably happen, we are
7 in a position whereby you must recognise that MIFs will
8 not entirely be set, certainly for large merchants at
9 the default issuer rate?

10 A. My understanding was that the MIFs were all at the
11 default rate for a variety of reasons. So issuers are
12 competing amongst themselves for new cardholder
13 business. So if an issuer is earning less revenue than
14 another issuer then they can invest in the cardholder
15 value proposition, you know, the cost of funds, low
16 annual fees, cardholder usage programmes, they get
17 cardholders to use their card at merchant shop. So if
18 one issuer is taking a lower interchange rate than
19 another issuer, then that issuer becomes uncompetitive
20 and it is harder for them to compete and attract
21 cardholders.

22 Q. How come the issuers in New Zealand did not become
23 uncompetitive when they gave Air New Zealand a better
24 deal?

25 A. All issuers received the same rate so Air New Zealand --

1 the interchange on Air New Zealand was the same rate for
2 every issuer in the market.

3 Q. For that particular --

4 A. For basically all volume with the exception of charity.
5 So all the issuers chose to take interchange at the cap.

6 Q. But I thought you said that -- well, this report
7 suggests that the cap did not operate as a functioning
8 interchange cost for certain merchants because they were
9 able to negotiate discounts. It is what it says in the
10 terms?

11 A. I think that has to do in regards to the rebates for the
12 period of time of the settlement.

13 Q. It says they have negotiated a seemingly modest
14 reduction in Merchant Service Charges for its members
15 with Westpac. Sorry, that is moving on to 152. So
16 having dealt with large merchants at 151, saying they
17 have been able to secure lower caps for strategic
18 merchants, you then move -- I see what you are saying;
19 you are saying an individual cap was set for a sector --

20 A. Correct.

21 Q. -- within the New Zealand economy?

22 A. Yes. Correct.

23 Q. Then 152, what we see however seems to be slightly
24 different which is collective bargaining on behalf of
25 smaller retailers by Retail New Zealand led to

- 1 a reduction with a particular bank, Westpac?
- 2 A. Of their merchant service fee, that is what it looks
3 like it is saying.
- 4 Q. Well, we know that the merchant service fee is a product
5 of the MIF. Why would not that also reflect
6 an underlying MIF change?
- 7 A. The MIF would have been at the cap so it would be the
8 same for all issuers. So if they collectively it is the
9 Retail New Zealand -- so they collectively on behalf of
10 their members with Westpac negotiated a lower merchant
11 service fee, is what I am reading. It is not a lower
12 interchange rate. The interchange rate would be public
13 and it would be at the cap. If they negotiate at
14 a lower interchange rate it would have been posted and
15 I am not aware of any -- anyone having a lower
16 interchange rate. All the interchange rates were at the
17 cap, except for charity transactions.
- 18 Q. The separate transactions that were then treated as
19 a thing apart?
- 20 A. Can you repeat that?
- 21 Q. Well, Visa -- was Visa suddenly setting a cap for the
22 aviation sector in New Zealand for example, or was it
23 the issuing bank setting that cap?
- 24 A. No, visa was setting the cap.
- 25 Q. So Visa was asked by the issuing banks to give a special

1 deal to the aviation sector to benefit Air New Zealand?

2 A. No, they were not asked to. The history of the
3 Air New Zealand rate pre-dates Visa Inc actually; it was
4 under the association days. So Visa -- that rate was
5 already established.

6 Q. But you had a separate subcategory that was
7 sector-specific for all cards for the aviation sector?

8 A. For Air New Zealand, yes. There was a cap for
9 Air New Zealand, yes, in that it was a capped
10 interchange rate. It was the same rate available to all
11 issuers, so all issuers received the same rate. They
12 could have opted to take a lower rate but no issuer did.

13 Q. We then see in paragraph 153 the point I was making
14 about EFTPOS keeping going. But being perhaps less well
15 used because of the increase in contactless debit
16 payments which are not EFTPOS based; is that right?

17 A. Yeah, contactless, the technology does not work on the
18 EFTPOS system.

19 Q. Then 154 and 155 we see that American Express has had
20 higher rates for Merchant Service Charges but that has
21 nonetheless impacted on its acceptance levels; is that
22 fair?

23 A. On American Express acceptance?

24 Q. Yes, it says as a result of having the higher MSCs, as
25 we call them, merchant acceptance of American Express

1 and other closed credit cards is significantly lower
2 than for open credit cards?

3 A. Yeah, I am not exactly sure of their market share in
4 New Zealand.

5 Q. If we then please move on to paragraph 157, at page 42
6 {RC-J3/85/42}. You will see that there are two options
7 for merchants being able to do something about
8 influencing the payment option a customer uses. You
9 have surcharging and then steering. 159 there are
10 a series of different reasons given as to why
11 surcharging is subject to four main barriers. Can you
12 see that?

13 A. Yes.

14 Q. The first of those was the existence of the no surcharge
15 rules which were then prohibited by the settlement?

16 A. Correct.

17 Q. At paragraph 159, over the page {RC-J3/85/43}, top of
18 page -- whatever that is -- we see that there is
19 a recognition that merchants are reluctant to surcharge
20 for the simple reason that customer reaction is usually
21 adverse. Is that fair?

22 A. Yeah, I am sure customers do not like to be surcharged,
23 yes.

24 Q. Paragraph 162, the MBIE report is dealing with the
25 Honour All Cards Rule, and it says:

1 "... merchants who accept a scheme's credit cards
2 are not allowed to steer customers away from high-cost
3 cards, towards low-cost credit cards."

4 Does that remain the case in New Zealand?

5 A. My understanding is no, it allowed for steering. The
6 settlement allowed for steering.

7 Q. Well, it is referring to the Honour All Cards Rule and
8 saying if you accept one high value card of a particular
9 type, say a credit card, you also have to accept the low
10 cost -- sorry, other way around.

11 A. Of Visa cards. Okay, yes.

12 Q. So it is not open, is it, to an acquirer simply to
13 demand that only the low cost credit cards are taken
14 under the UIFM scheme as it was operating at the time?

15 A. The Honour All Cards Rule was in place, yes.

16 Q. Do you accept that in practice acquirers who wish to
17 offer the Visa card acquiring services are not able to
18 negotiate down the MIF set by issuers under the Visa
19 rules?

20 A. Can you repeat the question?

21 Q. Yes. It is not open to acquirers to negotiate down in
22 practice the MIF that is set by issuers under the Visa
23 scheme rules?

24 A. The acquirers can get with the issuers and try and
25 negotiate something, yes.

- 1 Q. But in practice they are not able to secure that, are
2 they, for the majority of merchants?
- 3 A. In practice issuers, for competitive reasons, have
4 chosen to take the interchange at the cap.
- 5 Q. In a sense why would any issuer, except where it really
6 had to, settle for less than the cap?
- 7 A. Correct, if they are going to compete. If they take
8 something other than the cap, then: one, an issuer is
9 going to be uncompetitive, they are not going to be able
10 to invest in their cardholder programmes. So, yeah,
11 I would say each issuer, for competitive reasons, would
12 need to be at the cap.
- 13 Q. We know, do we not, that the effective prevailing MIF
14 rate in the market is essentially set by the cap that is
15 put in place?
- 16 A. Visa independently set the cap.
- 17 Q. At paragraph 13 of your statement {RC-F4/1/4} you report
18 the Commerce Commission as noting that MIFs have started
19 to increase following the expiry. That must be because
20 the cap had increased, is that right, following the
21 expiry of the settlement?
- 22 A. Following the expiry of the settlement, due to certain
23 moves made between -- competitive moves on various
24 products between Visa and Mastercard.
- 25 Q. It is simply a direction of travel as to what happened

- 1 to the cap: did it go up or down?
- 2 A. Both. Some went up, some went down.
- 3 Q. So why is the Commerce Commission noting that MIFs had
4 started to increase? Presumably it had done
5 an aggregate exercise?
- 6 A. I would say headline product rates on certain types of
7 premium products increased over time.
- 8 Q. In paragraph 14 of your statement {RC-F4/1/4}, you refer
9 to the Honour All Cards Rule as being a reason why
10 effectively rates have continued to be set at the
11 maximum level. In truth, it is right, is it not, that
12 a decision to set at the maximum level is insulated from
13 any material commercial consequences as a result of the
14 scheme?
- 15 A. Can you repeat the question?
- 16 Q. Yes. The impact of the Honour All Cards Rule, once you
17 have got a maximum fee set --
- 18 A. Correct.
- 19 Q. -- is essentially to insulate an issuer from any
20 commercial consequences if it chooses to follow that
21 maximum rate and set its MIF at that rate?
- 22 A. I would say issuers choose to accept at the cap, just to
23 remain competitive, regardless of Honour All Cards.
- 24 Q. You have referred, at paragraph 13, to the Commerce
25 Commission report of 19 December 2013. That starts at

1 {RC-J3/65/1}. You focused on one passage there,
2 paragraph 22 I think it was.

3 Could we look, please, at the page 6, paragraphs 14
4 and 15 {RC-J3/65/6}. The nature of the complaint that
5 was made by the commission was essentially to not just
6 the setting of the MIF, which it found to be
7 anti-competitive, but also the no surcharge rule and the
8 no discrimination rule; is that right?

9 A. Correct, yeah.

10 Q. If we look at paragraph 16, over the page {RC-J3/65/7}:

11 "The combined effect of [those] rules was that the
12 credit card schemes and banks could collectively set
13 high interchange rates without fear that consumers would
14 switch to other payment options."

15 Can you see that?

16 A. Correct, yeah.

17 Q. At paragraph 18, we see as a result of the Commission's
18 investigation, settlement agreements were reached. We
19 know roughly what those settlement agreements are; we
20 went through them earlier with Mr Livingston.

21 Then at paragraph 19, at the top of page 8
22 {RC-J3/65/8} there is a reference to the commission
23 considering anticipated savings to merchants were
24 between 70 million and 80 million New Zealand dollars
25 over that three-year period.

1 None of that was mentioned in your witness
2 statement. Was there a reason for that?

3 A. So, Visa did not have any visibility into what
4 individual issuers were required to rebate back to
5 merchants, so we never had a number. All we were doing
6 was implementing interchange at the cap. So, we did not
7 have visibility into the amount of reduction to each
8 individual issuer.

9 Q. I am just wondering why the entirety of this report, if
10 one reads it cover to cover, you happen to highlight one
11 particular paragraph and not deal with any of the rest
12 of it?

13 A. It was an open question. I do not know.

14 Q. Please could we then look at page 13 of this document
15 {RC-J3/65/13} which I hope is paragraphs 43 and 44
16 {RC-J3/65/14}. We see that in relation to a small --
17 whilst a small proportion of merchants are surcharging,
18 nonetheless "... merchants may be able to negotiate
19 lower fees from banks in order for banks to avoid their
20 card transactions being surcharged."

21 So essentially the ability to surcharge does at
22 least give some negotiating graft to the merchant, does
23 it not?

24 A. The ability to surcharge was part of the discussion and
25 negotiations with merchants in terms of strategic

- 1 merchant rates, yeah, that is correct.
- 2 Q. We know that the Ministry for Business Innovation and
3 Employment was concerned about the competitive landscape
4 for retail payment systems in New Zealand; is that
5 right?
- 6 A. Which section are you referring to?
- 7 Q. I have not got time unfortunately to take you through
8 them all so we are just going to deal with the
9 principle --
- 10 A. I am not sure what you are referring to then.
- 11 Q. The New Zealand Government then legislated to introduce
12 the caps precisely because it was worried about the
13 competitive structure of the market, no?
- 14 A. Yeah, that was after my time so I was not involved in
15 the latest regulation.
- 16 Q. Paragraph 10.1 of your statement, page 3 {RC-F4/1/3} you
17 highlight factors which you say Visa took into account
18 when setting the maximum rate. Was that maximum rate
19 set in consultation with issuing banks?
- 20 A. It was in discussions with a broad range of industry
21 players, including issuers, acquirers and merchants,
22 regulators, the Commerce Commission. We took a range of
23 feedback and set rates in which we thought were
24 appropriate for the market and Visa independently set
25 those rates.

1 Q. You were presumably predicting what revenue would accrue
2 to issuing banks as a result of the maximum that you
3 set, were you not?

4 A. We were looking at costs for banks to remain competitive
5 to not only amongst themselves but competing against
6 Mastercard, competing against American Express. So we
7 did factor in various costs, yes.

8 Q. So you must have budgeted for the banks setting at the
9 maximum rate that they could in order to work out what
10 revenue they would get?

11 A. That was a consideration, yes.

12 Q. It is the only consideration, is it not. If you have
13 got to work out what costs have to be made, you have to
14 predict what they will charge?

15 A. No, it is not the only consideration. So when we set
16 interchange rates, what we are looking at is we are
17 trying to maximise throughput through the system. So,
18 we are trying to get issuers to issue as many cards as
19 possible, acquirers to sign up as many merchants as
20 possible, and get cardholders to use those cards at
21 a merchant shop.

22 So we look at a range of considerations. So,
23 you know, merchants' willingness to pay. You know, for
24 example, say you had an industry with very low margins,
25 we would consider that when setting interchange rates.

1 So, there is a whole range of things that go into that.
2 Also competing against the very rich value propositions
3 of American Express; so American Express provided
4 cardholders with you know very rich cardholder value
5 propositions.

6 So, we are considering a whole range of issues
7 across the market.

8 Q. When you found out, as you did, that almost all issuers
9 were setting their so-called unilateral rates at the
10 maximum rate, did you reconsider things and think: well
11 that cannot be right, it needs to be changed?

12 A. I thought that issuers, in order to be competitive, need
13 to be earning revenue. That they should not be
14 discriminated against in terms of earning less revenue,
15 otherwise they could not invest in cardholder value
16 propositions that drive the cardholder to use their
17 product.

18 Q. In other words you did not reconsider the maximum rate,
19 save periodically to raise it?

20 A. We evaluated maximum rates usually twice a year and
21 considered a whole range of issues, and we talked to
22 merchants and we talked to retail associations, so we
23 considered a whole range of considerations. We usually
24 did that twice a year.

25 MR BEAL: Thank you very much.

1 MR COOK: I would like to ask a couple of questions arising
2 out of the Tribunal's questions.

3 THE PRESIDENT: Mr Tidswell will go next.

4 Questions by THE Tribunal

5 MR TIDSWELL: Just one question about the last topic you
6 were covering, the question of how prices are set.

7 I do not know if you were listening to the previous
8 witness where he talked about some sort of pricing team
9 that was involved. I just want to get a sense from you
10 about the breadth of that exercise, whether you consider
11 it to be qualitative or quantitative, what sort of input
12 comes in and what sort of resources are applied to
13 a decision like the one you have just talked about now.

14 A. Good question. It is quantitative and qualitative.

15 There is a piece of it that goes into what are costs of
16 funds. Are we in a rising cost of funds environment?
17 Is it low at the time in question? Cost of funds have
18 been near zero, and now they are increasing.

19 MR TIDSWELL: Sorry to interrupt you. Can I just be clear.

20 When you talk about cost of funds is that because of the
21 interest-free period that comes with the credit card?

22 A. Exactly. Exactly. So that is one consideration. We
23 would look at broad costs, that is another
24 consideration. We would look at, you know, product
25 requirements and how issuers need to invest in

1 cardholder usage programmes.

2 Certain types of products have cardholder usage
3 programme requirements, like premium products, stipulate
4 issuers need to invest in certain cardholder usage
5 programmes.

6 So we look at all those sorts of things. But then
7 we also look at, you know, on the merchant side they are
8 willing to pay, how much margins do they have. Clearly
9 if you are like Louis Vuitton or something, they have
10 enormous margins: why are we having very, very low
11 interchange for that type of merchant? But then when
12 you look at a petrol section, where you know merchants
13 selling petrol, that is very, very slim margins, and so
14 you have to adjust for that. So there is a bit of art
15 for that in adjusting for that.

16 There are some merchant segments like petrol where
17 issuers are losing money on every transaction but it is
18 part of growing the network and they are making it up in
19 other areas.

20 So we consider a broad range of considerations on
21 that.

22 MR BEAL: Nothing further from that sir, thank you.

23 Cross-examination by MR COOK

24 MR COOK: Mr Petersen you were asked some questions by The

25 President in particular about certainty and particularly

1 in relation to matter of settlement; do you remember
2 those questions?

3 A. Yes.

4 Q. What I want to ask you about is you were being asked
5 about the need for certainty and settlement. If you
6 have got legislation, so government rule that define
7 settlement, define the maximum deductions, presumably
8 there will be no need for scheme rules dealing with
9 those matters; do you agree?

10 A. Local laws and regulations override scheme rules.

11 Q. So you would not need the scheme rules if they were
12 overridden?

13 A. The scheme might have those rules in place but local law
14 and regulations would override all scheme rules.

15 Q. You would not need the rules therefore?

16 A. It depends on the market.

17 Q. Yes. In relation to how it might alternatively be done,
18 in terms of bilateral negotiation, are you aware
19 particularly of the Amex G&S model?

20 A. I am aware of the model.

21 Q. Am I right in thinking under that model Amex agrees
22 bilaterally with issuing banks how much it will pay in
23 settlement or interchange fee equivalent it will
24 provide?

25 A. You know, to be honest, I cannot comment on the Amex

1 model that much. I am not involved in their
2 negotiations; I've never worked for Amex.

3 Q. But in terms of that structure agreeing bilaterally, you
4 do not see any reason why that would not work in that
5 model?

6 A. Like I said, I am not familiar with that.

7 MR KENNELLY: No re-examination, sir.

8 THE PRESIDENT: Mr Petersen, thank you very much for your
9 time and your evidence. We are very grateful. You are
10 released from the witness box with our thanks; thank you
11 very much.

12 (Witness released)

13 Housekeeping

14 MR BEAL: If I may, by way of housekeeping, the document my
15 learned friend was concerned about being legally
16 privilege was part of a batch of documents that were
17 disclosed to us in circumstances where we understood
18 that they had been disclosed in previous litigation. We
19 had made a request for disclosure of key documents from
20 previous litigation. My understanding is they came in
21 that batch. There was a specific metadata entry as to
22 whether or not it should be treated as privileged or not
23 privileged, and it was not privileged.

24 This is the subject of correspondence in
25 {RC-J9/296/1}, there is a letter from Milbank dated

1 14 December 2023 where this is all dealt with.

2 That is a precursor to saying I am not yet in
3 a position to know what the answer is. My learned
4 friend Mr Kennelly says there has been inadvertent
5 disclosure of privilege.

6 THE PRESIDENT: I think Mr Kennelly wanted to be assured
7 there had not been an inadvertent disclosure. It may be
8 that that position has hardened.

9 MR KENNELLY: Well, indeed, because I was not aware of the
10 document. Now that we have reviewed the document, the
11 document is most certainly privileged and it has been
12 disclosed inadvertently to the Claimants. The claimant
13 are now in possession of a privileged document. If they
14 wish to rely on it, they need to apply to the Tribunal
15 for permission. What I hope to resolve with Mr Beal is
16 to demonstrate to him the nature of the privilege, how
17 it was disclosed inadvertently to him -- we will do this
18 by correspondence and hopefully the Claimants will do
19 the decent thing, otherwise we will have a contested
20 application before you.

21 THE PRESIDENT: I think the position is one that needs to be
22 established on the facts clearly, I think you both agree
23 with that, and the question will be: first of all, has
24 the privilege been retained in terms of what happened
25 before it was put into the bundles? Has the privilege

1 been lost because it is been waived by virtue of its
2 inclusion in a manner which is understandable.

3 MR BEAL: With respect, that is exactly the enquiry I need
4 to undertake as to the circumstance in which it was
5 disclosed.

6 THE PRESIDENT: That is absolutely right. So you are both
7 right, but what we need to ensure is that either the
8 matter is resolved by agreement before Mr Beal needs to
9 put the document, if he wants to, to another Visa
10 witness, or we rule on that in good time to enable that
11 to occur.

12 So I am, for my part, perfectly content to leave it
13 like that. Absolutely understand that an application
14 may need to be made if you cannot agree the situation
15 but that application will need to be made in good time
16 to enable any questions that the Claimants might have to
17 be put.

18 MR BEAL: It should be, with goodwill, capable of being
19 resolved without troubling the Tribunal.

20 THE PRESIDENT: That is music to our ears but we are very
21 willing to deal with that at an out-of-court point --

22 MR BEAL: Of course.

23 THE PRESIDENT: -- if an application is made, and I do not
24 want there to be an argument about whose application it
25 should be.

1 MR BEAL: I think strictly speaking if it is established
2 there has been inadvertent disclosure, and if it is
3 established it is still protected by confidentiality in
4 some way, then it would be for us to apply for
5 permission to rely upon it. Rule 65 I think. But that
6 is for another day if we need to.

7 THE PRESIDENT: That is for another day. What I am saying
8 is, I do not really care whose application it is as long
9 as we have the substantive issue before us, and I do not
10 want there to be a kind of jockeying of position as to
11 who has to make the application because that is somehow
12 conceding something. We are not interested in that
13 (inaudible) substance.

14 MR KENNELLY: Indeed. In defence to Mr Beal, he did say
15 earlier he was not planning on putting this document, or
16 he thought he did not need to put this document to any
17 witness.

18 MR BEAL: Any other witness.

19 MR KENNELLY: Any other witness.

20 THE PRESIDENT: That may make matters more relaxed but
21 I cannot say whether that is something which Mr Beal may
22 want to revisit or not.

23 MR BEAL: It is currently designated as a restricted
24 confidential document anyway. I was not proposing to
25 challenge that classification, and indeed we heard the

1 document cited in closed session. So it is, with
2 respect, unless the Tribunal takes a different view it
3 is not going to see the light of day in an open judgment
4 anyway. I do not know to what extent it makes
5 a difference.

6 THE PRESIDENT: If it is the case that you presently do not
7 see any need to put it to any --

8 MR BEAL: I am not going to be putting it to another
9 witness.

10 THE PRESIDENT: Then I think it is time to resolve it, as
11 long as it is resolved before closing submissions.

12 MR KENNELLY: Indeed, but it does need to be resolved. It
13 is a question of utmost importance.

14 THE PRESIDENT: (inaudible).

15 MR KENNELLY: Mr Beal also helpfully said if there were any
16 other documents like that -- which he sees the documents
17 that he intends to rely on -- that appear to be in the
18 same category, he will let us know and we can resolve
19 that in a spirit of co-operation also.

20 THE PRESIDENT: Indeed. That is very helpful both of you.
21 I am grateful.

22 MR BEAL: Thank you.

23 MR KENNELLY: There are some further housekeeping matters.

24 Mr Stokes is due to give evidence on Monday. I need
25 to give the Tribunal two letters to update you on

1 Mr Stokes. He will still give evidence but he may need
2 to do it remotely and I want to alert the Tribunal to
3 the possibility and the reasons why.

4 I am sorry these letters are not on Opus. Obviously
5 they were sent to the Claimants. Claimants have them.
6 If the Tribunal could read the letter of 20 February and
7 then the letter of the 21st I will address you on them
8 very briefly.

9 (Pause).

10 THE PRESIDENT: Yes.

11 MR KENNELLY: Sir, the default is that Mr Stokes is coming
12 in-person to the Tribunal, but in view of what you have
13 read, we need to put something in place to make sure
14 that if he cannot, and it needs to be done remotely,
15 that it can be done in a way that causes minimal
16 disruption to the hearing and does not delay us, and
17 that is what we propose to do.

18 THE PRESIDENT: Let me make a very tentative comment on
19 that. It does seem to me that riding two horses in this
20 case is not particularly desirable. It puts a burden on
21 the parties, and the risk of something going wrong in
22 addition to the burdens that are put on Mr Stokes, my
23 feeling -- and I raise it now because, Mr Beal, I will
24 want you to push back on them -- my feeling is given the
25 medical question, we ought to default to remote now and

1 make it work.

2 I have done a very large number of hearings
3 remotely. Without solicitor supervision it makes for
4 a little bit longer to bed the witness in, I have
5 a large number of questions that I ask about who is in
6 the room, who is not, and so on, but these things do
7 work, and I just do not like the idea of someone who is
8 obviously in an unpredictable but pretty serious medical
9 state to be monitoring his condition hour-by-hour to
10 work out whether they can or cannot come to court.

11 So I anticipate, Mr Kennelly, you will not have
12 a problem with that but Mr Beal?

13 MR BEAL: Let me just explain why my preference is for the
14 witness to attend in person, if possible, and it is very
15 much "if possible". That is I have an awful lot of
16 material to get through with him. It is quite
17 paper-heavy and doing it over a screen is sub-optimal on
18 any view.

19 What I would propose is we find out at some point
20 Saturday evening, Sunday, what his present state of play
21 is. Because I had understood his preference is to be
22 here in person as well, if he can be. I appreciate
23 however the point that you have made, sir, that leaving
24 it until Saturday or Sunday may not be terribly
25 satisfactory, if practical arrangements have to be made.

1 I do not know if practical arrangements can be made and
2 then they can be dispensed with if he feels well enough
3 on Monday to attend, for example.

4 THE PRESIDENT: It is the infrastructure in his home as
5 I understand it that you will need to be up, so it will
6 be a question of screens, all that sort of thing. Now,
7 we have got a working day to do it, tomorrow, and then
8 we have Monday to receive his evidence.

9 MR KENNELLY: Yes.

10 THE PRESIDENT: I anticipate, given the question of
11 tiredness, we may have to do that evidence in chunks,
12 interposing other witnesses in between if that is the
13 problem. These are a great many issues which actually
14 will be easier if we do it remotely because Mr Beal
15 absolutely needs to be given the space in which to
16 unpack his case. So I think the real question,
17 Mr Kennelly, is that I want enough monitors to be
18 provided and enough tests to be done of the connections
19 so that we can be assured close of business tomorrow
20 that we do not have a car crash on Monday.

21 MR KENNELLY: That is well understood, sir.

22 THE PRESIDENT: That I think is better achieved if you know
23 that the remote option is the option that we are going
24 down and people do not think: oh well, he is well enough
25 on Sunday evening, he can always toddle down to London

1 and sort it out. I want everyone to be clear now that
2 that is obviously the preference when one has a willing
3 and fit and healthy witness. But I just do not think it
4 is worth riding two horses now. I say that because
5 I want Mr Beal to be able to have the best
6 cross-examination experience, if I can call it that, and
7 I think the best way to achieve that is to bite the
8 bullet now and proceed down the remote route, as in
9 these circumstances the best way to receive Mr Stokes'
10 evidence.

11 MR KENNELLY: From our part, sir, we are entirely content
12 with the Tribunal's view.

13 THE PRESIDENT: I am grateful. I know that Linklaters will
14 do what they need to to make this work. If it does not
15 then we will handle that --

16 MR BEAL: You are not getting a strong push back from me in
17 the circumstances. Could we pencil him in for 2 pm and
18 try and deal with Ms Dooney, Mr Knupp, possibly
19 Mr Butler in the morning?

20 THE PRESIDENT: That seems very sensible. Let us do that.

21 MR KENNELLY: Ms Stone as well. Mr Beal was to
22 cross-examine Ms Stone.

23 MR BEAL: I mentioned her first, I thought. I may have
24 mispronounced her name. Ms Dooney?

25 MR KENNELLY: No, Ms Dooney is in addition to Ms Stone.

1 Geraldine Stone.

2 MR BEAL: I beg your pardon.

3 THE PRESIDENT: Let us say Mr Stokes for 2 o'clock. Let us
4 fudge it for a longer afternoon because I think we may
5 have not a firm 2 o'clock start, maybe "not before".
6 But what I am reading from this letter is that we may
7 need a number of breaks for Mr Stokes, depending on how
8 long it is, and I do not want anyone to feel that they
9 need to rush him through documents without him having
10 breaks as necessary. So, just probably going to tell
11 him that if he needs a break then we will break, and we
12 will see how we go. So that is the sort of parameters
13 that I am thinking about.

14 MR KENNELLY: Indeed, sir. In view of the Tribunal's
15 indication and I appreciate that it places a further
16 burden on Tribunal staff, may we start earlier on
17 Monday, start at 10? I say that also because --
18 (Pause). I see that proposal is shut down.

19 THE PRESIDENT: Yes. Otherwise, yes, we would say no
20 problem. But I am afraid it has to be 10.30, but we are
21 quite prepared to shave off half an hour from the short
22 adjournment, in other words gain half an hour there and
23 sit late in the afternoon.

24 MR KENNELLY: Just to reassure the Tribunal, part of the
25 reason why we are suggesting a slightly earlier start --

1 it will not be on Monday but perhaps on other days -- is
2 to build in time for the hot tub which the Tribunal has
3 envisaged and we will discuss with the Claimants. We
4 want to make sure we build time in for that before the
5 experts submit to cross-examination.

6 THE PRESIDENT: I am very grateful for that. Perhaps we can
7 leave the precise arrangements regarding Monday
8 witnesses between the two of you because I anticipate on
9 that sort of level there is a high degree of
10 constructive co-operation between the parties.

11 You can take it that the Tribunal will seek to
12 accommodate whatever reasonable requests the parties may
13 have with regard to facilitating the taking of evidence,
14 but unfortunately a 10.00 or 9.30 start on Monday will
15 not work. On other days, of course, we will be
16 receptive to that, as we usually are.

17 MR KENNELLY: I am obliged.

18 One last piece of housekeeping from my side.
19 Obviously I received from my learned friends the
20 confidential Klarna renegotiated figures from Mr Hirst.
21 We need to provide those to the Tribunal but in
22 a suitably confidential manner so the Tribunal adds it
23 to your file as restricted confidential and we will do
24 that by correspondence, if that is acceptable to the
25 claimant?

1 MR BEAL: Yes, that makes sense.

2 THE PRESIDENT: I think that is the way to deal with it.

3 MR BEAL: What we could do is include it in the letter that
4 is coming that deals with the other witness sweep-up
5 points as well. I think there was an APR rate for
6 Ageas.

7 THE PRESIDENT: What I suggest you do is include these
8 materials in a single letter that goes into Opus, which
9 we will read, and then we need not go into any private
10 or restricted session, we will just read the material.
11 But do let us know what to read and it will be in
12 Mr Cook's special extra file of supplemental matters
13 handed up during the course of the hearing. That is
14 what we will do unless the parties suggest --

15 MR BEAL: That sounds very sensible, with respect.

16 Can I correct one thing I got wrong. It goes back
17 to the prejudice letter. I said it would have been
18 classified as restricted confidential. I misspoke. It
19 is actually non-confidential, but it was obviously dealt
20 with in a confidential session. I just wanted to set
21 the record straight.

22 THE PRESIDENT: We will ensure that whatever its status,
23 privilege or not privileged, it is protected. So can we
24 migrate it into the restricted confidential class and
25 any other document like it.

1 MR BEAL: That may have a practical import on -- as long as
2 we are not going to have a procedural wrangling about
3 whose application it is, I do not think that matters.

4 THE PRESIDENT: We have made clear we are not going to go
5 into whose application it is. I am quite prepared to
6 label it as a joint application to resolve matters
7 regarding this document. But what I do want to ensure
8 is that obviously if it is privileged then that is that.

9 MR BEAL: My team will not be doing anything with it until
10 this issue is resolved, if that helps.

11 THE PRESIDENT: That is very helpful.

12 I had one point which arises out of, Mr Cook, your
13 entirely helpful questions to both witnesses that we
14 heard today regarding the operation of the Bilateral
15 Interchange Fee. It does seem to me, and you probably
16 already have this in mind to do, but it does seem to me
17 that you are going to have to produce a form of
18 Mastercard rules as to how they would operate on this
19 basis of the no interchange unless it is bilaterally
20 agreed because we would want to know how the settlement
21 rules in the Mastercard scheme would operate in that
22 circumstance.

23 MR COOK: I can do it very briefly, sir, on the basis that
24 our case is there would be no settlement rules, and that
25 is the essence of the bilaterals category but we can

1 produce --

2 THE PRESIDENT: Okay. What I want is not now, but at some
3 point, a little bit of red meat that we can look at so
4 that there is an ability to understand exactly what is
5 proposed. Because you saw from the witnesses and from
6 your questions that there is a degree of ambiguity about
7 what exactly would happen, and that is something which
8 absolutely needs to be nailed because we need to know
9 precisely what is being said when you are saying no
10 interchange unless it is agreed.

11 MR COOK: No, sir, we are actually saying something much
12 more profound than that, sir. We are saying no terms of
13 settlement unless they are agreed.

14 THE PRESIDENT: Okay. That is fine. I have well in mind
15 that Mr Beal expressed a degree of uncertainty on his
16 part. I am simply reflecting on that - I want to know
17 exactly what it is that we are talking about in
18 contractual terms. It may be extremely easy, great, but
19 even if it is not extremely easy and there is lots of
20 red lining, also great, we just need to know.

21 MR COOK: I am grateful.

22 THE PRESIDENT: In that case we will resume at 10.30 on
23 Monday morning and can I thank you all very much for the
24 very constructive way in which the procedural matters
25 have been handled today. Thank you all. 10.30 on

1 Monday.

2 (5.15 pm)

3 (The hearing adjourned until 10.30 am on Monday,

4 26 February 2024)

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