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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

Monday, 26 February 2024

(10.30 am)

THE PRESIDENT: Mr Kennelly, good morning.

MR KENNELLY: Good morning, may I call
Ms Dooney, please.

MS GILLEAN DOONEY (sworn)

THE PRESIDENT: Do sit down, make yourself
comfortable. You have some water there and two
screens on which documents will come up.
I hope you heard what I have said to other
witnesses but I will repeat it for you.

If you want to see other parts of the
document that come up, just ask and it will be
shown. You do not have control or agency over
the screens, but you must see things in
context, so do say. I will hand you over to
Mr Kennelly who has some questions along with
the other barristers, but good morning.

A. Thank you.

Examination-in-chief by MR KENNELLY

MR KENNELLY: Thank you, Ms Dooney. You
should have in front of you a red folder.
Could you please turn up tab 1 and can you
confirm it is the first page behind tab 1, can
you confirm that is the first page of your

1 witness statement? {RC-F4/9/1}

2 A. It is.

3 Q. Could you go, please, to page 5 in the
4 bottom right-hand corner {RC-F4/9/5}, could you
5 confirm that is your signature?

6 A. It is.

7 Q. The contents of the statement are true to
8 the best of your knowledge and belief?

9 A. They are.

10 MR KENNELLY: Thank you. My friend will
11 have some questions for you.

12 Cross-examination by MR BEAL

13 MR BEAL: Ms Dooney, your employer is
14 Barclays Bank; correct?

15 A. It is.

16 Q. They published their annual report, did
17 they not, last week?

18 A. They did.

19 Q. Barclays have done rather well, have they
20 not?

21 A. I think the report you are referring to is
22 the Barclays Global report?

23 Q. Yes.

24 A. Yes.

25 Q. What we see there, it is at bundle

1 {RC-R/4/1}. If we could then look, please, at
2 {RC-R/4/2}, for the group as a whole, it had total
3 income, you will see at the bottom of that page
4 there, of 25 billion; is that right?

5 A. I believe so, I did not prepare these,
6 but ...

7 Q. Then if we scroll to the bottom of that
8 page, please, we see a pre-tax profit figure of
9 6.6 billion.

10 A. Yep. Yes.

11 Q. It is not showing on mine. So that is
12 a return on tangible equity of over 10%; is that
13 right?

14 A. That is correct.

15 Q. Barclays is an issuing bank, correct?

16 A. No, Barclays is a -- part of it is
17 an issuing bank but the statement that you are
18 looking at covers the entire Barclays. So it is the
19 corporate bank, the merchant bank, the acquiring
20 bank, the -- you have got markets in here, so it is
21 quite broad.

22 Q. It has an acquiring arm which trades under
23 the Barclaycard brand?

24 A. It does.

25 Q. Barclaycard is one of the two largest

1 acquirers in the United Kingdom, is it not?

2 A. I believe so.

3 Q. Now, at paragraph 9 of your witness
4 statement, which is page 3 {RC-R/4/3}, you say you
5 are aware of the costs involved in running both the
6 debit and credit card issuing businesses? But it is
7 correct, is it not, that because Barclays is a bank
8 it needs to be able to offer a bank card to its bank
9 customers, does it not?

10 A. So we offer a card to our customers as one
11 way to access their funds.

12 Q. You do not routinely issue chequebooks any
13 more; is that right?

14 A. Customers can get chequebooks if they
15 choose, absolutely.

16 Q. But you do not automatically give them
17 one; they have to ask for one?

18 A. We do not, no.

19 Q. You do automatically give them a bank
20 card?

21 A. They can request not to have a debit card
22 as part of their current account if they wish to.

23 Q. How many do that?

24 A. Very few.

25 Q. So the vast majority -- probably almost

1 all, it is fair to say -- of your customers have
2 a debit card with Barclays?

3 A. Those that have a current account, yes.

4 Q. In terms of credit card applications, they
5 are discretionary, are they not?

6 A. Yes.

7 Q. But again, what proportion of your
8 Barclays Bank UK customers would be expected to
9 apply for a Barclaycard?

10 A. I -- sorry, I am happy to give this
11 information, I am just wondering if it starts to get
12 into commercially sensitive areas.

13 Q. You have to tell us that, I am afraid. If
14 you could give a broad range percentage, if it is
15 truly commercially sensitively then obviously do not
16 tell us in open court, but we may have to think
17 about going into closed session.

18 A. Absolutely, I am happy to answer that.

19 THE PRESIDENT: I think if you could
20 explain when you are uncomfortable, the broad
21 nature of your sensitivity, and we will take it
22 from there. I am, for obvious reasons, very
23 reluctant to move into private session, but we
24 will do so --

25 A. Sure.

1 THE PRESIDENT: -- if needed. So when you
2 come to a point where the answer you would like
3 to give you think is something that Barclays
4 would not like you to give in open court,
5 perhaps we could have a discussion and we will
6 see how we proceed with it.

7 A. Yes, of course.

8 THE PRESIDENT: But it may be there is an
9 acceptable level of vagueness in your answers
10 that will satisfy counsel and the tribunal
11 which means we can carry on dealing with things
12 in open court.

13 A. Sure. So Barclays has about 15% of the
14 credit card market share, depending.

15 MR BEAL: Sorry, that was not actually the
16 question I was asking. I was asking from --
17 you described how customers have a current
18 account with you and they will be what I call
19 bank customers, they may have a deposit account
20 with you and again they would be bank
21 customers. I was just trying to get a sense of
22 the proportion of your typical customer who is
23 likely to have both a debit card and a credit
24 card, which I am assuming typically would be
25 a Barclaycard because that is the card you

1 issue, is it not, predominantly?

2 A. It is the one that they would hold if they
3 got it from Barclays. Obviously, customers do also
4 hold credit cards from other areas. It would be
5 approximately 20%.

6 Q. 20% of your customers in the UK would
7 typically hold both a debit card and a Barclays
8 issued credit card?

9 A. 20% of my customers who have a current
10 account who have a debit card would hold a Barclays
11 card.

12 Q. You make money as a bank, do you not, from
13 credit card charges that cardholders pay?

14 A. Credit card charges, what do you mean by
15 that?

16 Q. Well, you charge interest on credit cards?

17 A. Sure. Yes.

18 Q. That is a charge that the cardholder pays?

19 A. That is one of the revenue lines that we
20 make from a credit card, yes.

21 Q. They will also pay if, for example, they
22 meet any of the conditions -- we will look at some
23 in a moment, but if they meet the other conditions
24 for incurring a charge under the rules that are set
25 for holding that credit card?

1 A. That is correct.

2 Q. What is your typical APR on a standard
3 Barclaycard credit card?

4 A. It depends on the card.

5 Q. Could we please bring up {RC-J5/117/1}.
6 This is a summary box from a Barclays Barclaycard
7 Platinum credit card. You will see that in the
8 description of the document, left-hand corner. It
9 says the APR is 24.9%. Do premium cards like a
10 platinum card have a higher or lower APR than the
11 standard?

12 A. It depends on the customer's rate that
13 they came in on and -- but that is -- sorry, I do
14 not know the answer.

15 Q. Can we then please look at tab 115 in this
16 bundle, page 1 {RC-J5/115/1}. So we see that
17 withdrawing cash and cash transactions also leads to
18 credit card providers charging a cash transaction
19 fee. You would accept that is something also that
20 produces an income stream for Barclays?

21 A. That is correct and we sometimes charge
22 fees for, for example, a premier card, like an Avios
23 card, we charge fees.

24 Q. You would also collect substantial fees,
25 would you not, for foreign transactions?

1 A. We collect fees.

2 Q. Could you please have a look at
3 {RC-J5/54.4.2/3}.

4 This is describing foreign
5 transaction fees and how they are calculated. It is
6 not specific to Barclaycard but at page 3 we see
7 that it is a US article, you will see that typically
8 there are costs incurred in using a credit card
9 outside your home jurisdiction; correct?

10 A. Correct.

11 Q. Could we then, please, look at
12 {RC-J5/61/2}. Again this is an article dealing with
13 international service fees and it describes that
14 international service fees have to do with the
15 relationship between the acquiring bank and the
16 issuing bank:

17 "If a transaction occurs in the US
18 and the customer uses a card issued by a bank
19 registered [in] a different country – even if the
20 bank has a branch ... then the merchant will be
21 charged an international service fee."

22 So that generates a significant
23 income, does it not, for issuing banks like
24 Barclays?

25 A. It generates so we earn income from

1 customers who do use our cards overseas.

2 Q. If we look, please, at tab 62 in this
3 bundle, page 1 {RC-J5/62/1}, fees are also incurred
4 where you use an ATM overseas, you will see
5 two-thirds of the way down that page it is referred
6 to as a cash fee. So if you put your credit card
7 into an ATM in France you will incur a -- typically
8 incur a transaction fee?

9 A. Typically.

10 Q. So in a sense, it is actually in the
11 issuer's interests to encourage foreign travel, is
12 it not, because it generates these extra charges
13 that can then be levied against the cardholder?

14 A. It is in our interest to encourage our
15 customers that when they are overseas to think about
16 the ways that they can use the bank's products as
17 they try and make payments. Obviously cards also
18 come with protections as well as the fees.

19 Q. You would need to have the ability to use
20 that card overseas on an interregional basis in
21 order to be able to allow your customers to use it
22 in the way that you have suggested they would want
23 to use it?

24 A. I would need to -- the customer would need
25 to be able to use it overseas and that is a need

1 that a customer expresses to us as well, that they
2 like to be able to use their form of payment of
3 choice overseas.

4 Q. Could we look, please, in {RC-J5/55/1}.
5 Barclaycard in fact gives guidance to its customers
6 about how they can use the Barclaycard overseas and
7 they compare the cost of going abroad. If we scroll
8 down, please, to {RC-J5/55/5}, we see that:

9 "Some overseas retailers [at the
10 bottom of that page] might let you pay in sterling -
11 this is called Dynamic Currency Conversion. And
12 although you'll avoid the transaction fee this way,
13 it could cost you more than expected. That's because
14 the exchange rate set by the retailers may not be as
15 [going over to the next page {RC-J5/55/6}]
16 competitive as the ones set by Visa or Mastercard.
17 Alternatively, you can pay in the foreign currency
18 and pay the fee."

19 It is giving advice, is it not, about
20 using the local currency produces a charge for
21 Barclaycard, rather than using direct currency
22 conversion where the charges may go elsewhere?

23 A. It is making the customer aware -- it is
24 not giving advice, but making the customer aware
25 that they can choose to pay -- to choose the

1 currency and typically that tends to be -- tends to
2 be less expensive than if they to use the Dynamic
3 Currency Conversion.

4 Q. Barclays also makes money from banking
5 services that it provides its customers, does it
6 not?

7 A. Yes, we do.

8 Q. So, for example, quite a lot of the money
9 deposits that you hold from your customers are not
10 interest bearing, correct?

11 A. In the current accounts, it is an
12 operational account.

13 Q. But you then have that cash available so
14 you can use it for banking purposes like investment?

15 A. We -- we hold the customer's funds in our
16 account and we can use it obviously as part of the
17 broader banking relationship.

18 Q. That available cash is not ring-fenced in
19 any way; it forms part of the typical banking
20 structure of the United Kingdom and indeed most
21 banks in Europe?

22 A. Is that a technical question you are
23 asking me or is it my understanding of what happens?

24 Q. Your understanding?

25 A. Yes, it is.

1 Q. Barclays has a profitable and successful
2 investment arm, does it not?

3 A. I believe so.

4 Q. You also make money from business
5 accounts, is that correct?

6 A. We have business accounts, yes.

7 Q. Could we look, please, in bundle
8 {RC-J5/41.01/2}. These are some business account
9 charges admittedly not from Barclays, other banks
10 are available; this is NatWest. We see for example
11 halfway down the page there is a cash management
12 account charge of £120 per account. I assume
13 Barclays has equivalent charges for its business
14 customers as well; is that right?

15 A. We have some, some customers are charged
16 as part of the business. I do not look after
17 business accounts, so that is only my knowledge of
18 the business area.

19 Q. Could we turn, please, to {RC-J5/41.02/1}.
20 Again it is a NatWest printout but we see the
21 account maintenance charge is £10 per account per
22 month on their business rates. Can you see that?

23 A. I can see it.

24 Q. It is also right, is it not, that Barclays
25 and Barclaycard in particular are able to generate

1 high APRs from business and corporate cards?

2 A. I work on the retail arm of the bank, so
3 I do not have a view on the corporate commercial
4 relationship of Barclaycard. It is a different
5 entity.

6 Q. Could we look in {RC-J5/93/1}. This is
7 giving some business credit card rates and
8 admittedly it is a US-based business credit card
9 that is being explored but we see a Visa card there
10 at page 2, please, {RC-J5/93/2} There is an annual
11 card fee there of \$175 and a purchase interest rate,
12 which I take to be equivalent to an APR of 18.5.
13 Can you see that?

14 A. Sorry, what did you want me to answer?

15 Q. I think I said US, I think this may
16 actually be New Zealand?

17 A. I think NAB is probably Australian.

18 Q. Australian, sorry.

19 My question for you is I was putting
20 to you that you can generate high interest charges
21 from business and corporate cards as well?

22 A. You can generate interest from corporate
23 cards as well, yes.

24 Q. When we looked at the Barclays group
25 revenue, do you know what proportion of that revenue

1 is specifically from the European-based banking
2 entity?

3 A. I do not.

4 Q. Do you know what proportion of that global
5 revenue is obtained by revenue from MIFs,
6 Multilateral Interchange Fees?

7 A. Across the bank?

8 Q. Yes.

9 A. I do not.

10 Q. When someone opens a bank account with
11 Barclays, you have to conduct Know Your Client
12 checks and anti-money laundering checks; is that
13 right?

14 A. That is right.

15 Q. So you have to take a series of steps to
16 ensure the customer is genuine and not a fraudster?

17 A. That is correct.

18 Q. Those are part of the costs of Barclays as
19 doing business as a bank; correct?

20 A. That is correct.

21 Q. You would not expect Worldpay to have to
22 pay for those costs, would you?

23 A. In what realms?

24 Q. Well, Worldpay is a rival acquirer, it is
25 one of the two big acquirers in the United Kingdom,

1 it is competing with Barclaycard?

2 A. Correct.

3 Q. Why should Worldpay have to pay anything
4 towards your costs of getting customers on board and
5 making sure they are not fraudsters?

6 A. Are you asking me about the acquiring
7 business?

8 Q. I am asking you why Worldpay as
9 an acquiring business should be contributing towards
10 Barclays' costs as a bank, an issuing bank?

11 A. As an issuing bank?

12 Q. As an issuing bank, yes.

13 A. Okay. I am very sorry, I -- I actually do
14 not understand the question.

15 Q. Well --

16 A. Just to put in relevance, so as it says in
17 my statement, I am actually from the retail side of
18 the bank, so Barclays has in the UK three different
19 entities, the BUK which is the Barclays UK retail
20 business, that has your personal credit debit and
21 business banking in there. Then you have the
22 corporate bank -- or BI -- and that has the
23 investment bank, the corporate bank, Barclays
24 acquiring and the commercial card in there.

25 Q. So there are two things you talk about in

1 your statement?

2 A. Mm-hm.

3 Q. One is essentially the UIFM and what you
4 would do in this hypothetical world in which it
5 might conceivably be introduced?

6 A. Mm-hm.

7 Q. The second thing is how the UIFM is
8 important because it would enable a stream of
9 revenue still to be received by Barclays from
10 interchange income and that income is very important
11 for Barclays?

12 A. That was opined in relevance to my
13 position in the organisation.

14 Q. In paragraph 9, which is where I started,
15 you say:

16 "... I am aware of the costs involved
17 in running both the debit and credit card issuing
18 businesses ..."

19 So you are looking at costs and you
20 are looking at income and you are saying in order to
21 cover some of the costs that we talked about, we
22 need the income from interchange?

23 A. That is correct.

24 Q. So what I have been trying to establish
25 with you is how much income you get from interchange

1 to which your answer was you cannot help us,
2 correct?

3 A. I can help you. As it relates to my
4 business, absolutely.

5 Q. Well, how can you speak for the entirety
6 of the business generating MIFs, that is why I took
7 you to the annual accounts to see what proportion of
8 that revenue was generated from MIF income?

9 A. I was quite clear in my statement that
10 I am not representing the entire of Barclays.

11 Q. Which markets can you speak to?

12 A. The UK.

13 Q. Just the UK?

14 A. Just the UK.

15 Q. Not Ireland?

16 A. Not Ireland.

17 Q. Okay, what proportion of revenue -- first
18 off, how much revenue is generated by Barclays as
19 an issuing bank in the United Kingdom?

20 A. Honestly, I do not know, sorry.

21 Q. Right. I am not sure we are going to get
22 very far with the follow-up question, then, are we,
23 which is: what proportion of that revenue comes from
24 MIFs?

25 A. I can -- I am happy to share what -- how

1 much our MIFs are. I think that is probably when it
2 starts to get into a closed courtroom where we start
3 having quite detailed commercial conversations
4 around both incomes and equally any costs related to
5 that.

6 THE PRESIDENT: Well, I think at the
7 moment what you are being asked is in
8 broadbrush terms, how much whatever division of
9 the bank that you can speak to receives by way
10 of interchange fees.

11 A. Yes.

12 THE PRESIDENT: Now, first of all, is that
13 a question that you feel comfortable in
14 answering, and let me be clear that "do not
15 know" is a perfectly acceptable answer here,
16 you must speak only to the limits of your
17 knowledge. So we are going to get a "do not
18 know" or we are going to get something a little
19 more concrete, in which case, how sensitive is
20 that information, given that we are not
21 expecting a pounds and pence answer? I mean,
22 we are expecting a sort of sense of a feel for
23 how much money we are talking about.

24 A. I actually think it is easier to give
25 a pounds and pence answer, if I am honest.

1 THE PRESIDENT: You think it is easier?

2 A. Yes, but I think that is where it starts
3 to encroach on the commercially sensitive area.

4 MR BEAL: Perhaps I could just try and
5 tackle this another way and see whether I run
6 into the same roadblock. When you are speaking
7 about your division, does your division receive
8 all the other sources of income that we have
9 been through such as credit card --

10 A. Not all of them, no.

11 Q. -- interest? Right.

12 A. So as a rule, our income levers we receive
13 card fees and that's in the way of annual fee on
14 some, very few of our products. APRs we absolutely
15 do receive that. Then we also receive some fees
16 around if a customer does use their card overseas,
17 there is a margin attached to that.

18 Q. So I am assuming there are other UK-based
19 divisions that receive the other sorts of incomes as
20 we have discussed?

21 A. I think the majority of what you were
22 asking me relates to the commercial card business.

23 Q. Investment and obtaining money from
24 business accounts and so on, that is all in
25 a different division, not your division?

1 A. Correct.

2 Q. I think in the circumstances I am not
3 going to get a terribly meaningful comparison if we
4 just find out what your absolute figure for MIF
5 income is because it is not actually reflective of
6 the UK business as a whole; is that fair?

7 A. It is -- it will be the majority of the UK
8 business.

9 Q. You are saying that the MIF income is the
10 majority of the income stream for the UK business as
11 a whole?

12 A. No, not at all. Sorry, the MIF income
13 that we receive would be the majority of the MIF
14 income we received as a UK business.

15 THE PRESIDENT: Well, I think simply
16 because it is helpful to get a sense of just
17 the feel for the market, I wonder if you could
18 give us a ballpark figure for the interchange
19 fee income for the division. If you are
20 comfortable with a ballpark figure that may be
21 enough, but it simply so that we get a feel for
22 the money we are talking about. Mr Kennelly,
23 you are on your feet.

24 MR KENNELLY: Just to assist the witness,
25 she needs to understand what ballpark figure is

1 I think because previously when she was asked
2 to give a range, she gave a specific figure and
3 she may inadvertently give confidential
4 material unless she is very clear about what is
5 meant by ballpark.

6 THE PRESIDENT: To be clear, by, ballpark,
7 Ms Dooney, I am meaning a range or a figure
8 that is one that you feel able to give in open
9 court because we are not -- I say this with
10 greatest of respect -- really that interested
11 in the precision; what I am trying to get
12 a feel for is how this market works generally?

13 A. Sure.

14 THE PRESIDENT: You are here as a very
15 helpful representative of an in part acquiring
16 bank and it is just useful background.

17 A. Okay. So in terms of a range is probably
18 the easiest place to go, so it is between -- sorry,
19 I am just trying to think if there is an easier way
20 to give it.

21 THE PRESIDENT: Why do you not give
22 a figure north of a particular figure. I mean,
23 north of 10,000, north of a million, north of
24 10 million, something like that, and we can get
25 a sense there. It is really orders of

1 magnitude that, at least in the first instance,
2 we are seeing.

3 A. To give you a sense, we have circa
4 22 million cards between debit and credit cards in
5 the market and our interchange would be north of
6 300 million.

7 THE PRESIDENT: Thank you.

8 MR BEAL: Now, acquirers are also
9 responsible for their own fraud detection
10 measures, are they not?

11 A. I believe so, I am not part of the
12 acquiring business.

13 Q. Are you familiar with charge-backs and the
14 charge-back regime?

15 A. I am familiar from an issuer perspective.

16 Q. The scheme rules that Visa operates do not
17 tell Barclays what to do with the MIF income that
18 your division receives, do they?

19 A. No, it does not.

20 Q. Your division income is treated as revenue
21 for the group as a whole, correct?

22 A. It is treated as revenue that comes into
23 our area of the business which helps us fund
24 additional -- fund the actual business to make it
25 economically sustainable.

1 Q. It is not put into any dedicated or
2 ring-fenced accounts within the business?

3 A. No, it is not.

4 Q. If an issuer bank chooses to offer
5 a rewards programme or other incentives, then that
6 is a general cost of the issuing business, is it
7 not?

8 A. It is part of -- when we look at a card
9 proposition and developing a card proposition then
10 we do look at who are the customers that we are
11 trying to attract and what are the customer needs
12 that we need to address there. It is well known,
13 particularly in the UK market, that there is
14 a segment of this market that are really rewards --
15 they really like rewards and so as we develop it, if
16 we want to participate in that particular segment
17 then we do need to offer a rewards programme.

18 Q. You choose as a commercial matter to offer
19 a rewards programme so that people want to take your
20 cards and have a bank account with you?

21 A. The rewards programmes typically are only
22 on credit cards.

23 Q. So you do not offer it for the very
24 substantial number of debit cards you issue?

25 A. We do not.

1 Q. Could I ask you to look at paragraph 13.1
2 of your statement and you refer there to the
3 benefits that cardholders have from having cards?

4 A. Yes.

5 Q. If cardholders derive a benefit from
6 having a card, you could charge them for that, could
7 you not?

8 A. There are certain benefits that customers
9 expect to be included as part of it and then there
10 is certain benefits that we need to offer as well.
11 So for example section 75 is not chargeable nor is
12 the ability for a customer to be able to dispute
13 a transaction, ask for --

14 Q. Section 75 only applies to consumer credit
15 cards, does it not?

16 A. This particular reference, it is to
17 consumer credit cards, yes.

18 Q. So if a cardholder attributed value to
19 having a particular card, that cardholder would in
20 principle pay money to have that card, would he or
21 she not?

22 A. I think the UK market today, and has been
23 for quite some time, there is a level of expectation
24 around what is going to be available to you as
25 a customer holding either a debit or a credit card,

1 both in terms of consumer protections, of which the
2 broader ecosystem has really built up over the years
3 and is not really available in any other payment
4 form, as well as things like money management, fraud
5 protection, those type of things there is a -- is
6 an expectation that that would be part of your card
7 product.

8 Q. American Express charges for some of the
9 cards it issues, does it not?

10 A. Yes, it does.

11 Q. Could we look, please, in bundle
12 {RC-J5/35.01/28} and we see here at the bottom of
13 the page under 2.5 "Card pricing and product
14 features", that:

15 "UK financial institutions offer
16 debit cards free of charge as part of current
17 savings or deposit current accounts. Banks offer
18 various basic current accounts which do not bear an
19 annual fee", etc.

20 "Some banks then offer premium
21 consumer debit accounts which carry a monthly fee."

22 So it is capable, is it not, of
23 generating separate revenue depending on the type of
24 card in question?

25 A. Sorry, what part of -- where does this --

1 I have not seen this before, so where does this come
2 from?

3 Q. This is an RBR report on payments systems
4 in Europe in 2020 and it is dealing with some of the
5 payment features in the United Kingdom at that time.

6 A. Right.

7 Q. It is referring, for example, to a Lloyds
8 Visa Platinum account which has a fee of £288
9 per year. Were you familiar in the market that
10 these charges were payable on premium accounts, for
11 example?

12 A. I am familiar that some of the
13 institutions including Barclays we have an Avios
14 Plus card that we charge an annual fee for. But the
15 Visa Platinum card here at 288 seems quite valued --
16 I am sure it has got quite a lot of benefits
17 attached to it; I am not sure what they are.

18 Q. If we look at page 30 we see there is
19 a breakdown of the different main issuing banks in
20 the United Kingdom, Barclays is indeed mentioned, it
21 has a Visa Business debit card with an annual fee of
22 £72 per year {RC-J5/35.01/28}, can you see that?

23 A. I can.

24 Q. So the question I was putting to you is:
25 people are prepared to pay for cards if they

1 attribute value to it?

2 A. Some people. I think if you look at the
3 percentage of customers that actually hold
4 fee-paying products, it is quite low in the UK.

5 Q. If we then, please, look at page 31
6 {RC-J5/35.01/31}, there is a schedule of the APRs
7 that are charged by Barclays, second row down, for
8 various different products; can you see that?

9 A. I can.

10 Q. Now, it is right, is it not, that Barclays
11 used to be the sole acquirer of Visa cards, do you
12 know that?

13 A. I do not know that.

14 Q. Could we look, please, at page 36 just
15 while we have this document to hand
16 {RC-J5/35.01/36}.

17 We see the penultimate paragraph,
18 towards the bottom of the page begins:

19 "Most of the largest UK banks have
20 issued both Visa and Mastercard since 1989 [which is
21 referred to as duality]. Prior to this time,
22 Barclays was the sole acquirer of Visa ..."

23 Are you prepared to accept that as an
24 accurate statement of the position?

25 A. I assume since it is in here it is

1 accurate but I do not have any knowledge of that.

2 Q. So the fraud costs that you have mentioned
3 that Barclays incurs as an issuer, presumably most
4 of those are geared towards being responsible for
5 checking its own customers; is that right?

6 A. No, it is not.

7 Q. What are the fraud costs that you say are
8 incurred?

9 A. So we have a range of fraud costs that is
10 incurred. Obviously you have fraud prevention which
11 is after -- let us set aside the KYC and upfront
12 fraud checks that you need to do on a customer, we
13 have, as all issuers likely have, invested pretty
14 heavily in making sure that we have in the moment
15 realtime transaction fraud screening to make sure
16 that we understand whether a customer is out of
17 pattern, or whether they actually have -- they are
18 making purchases or keying things slightly
19 differently than what they would normally do to try
20 and prevent fraud.

21 Q. Just pausing there. That is partly to
22 make sure that you are going to get paid the right
23 amount by your own customer, is it not, for those
24 transactions if something funny is going on?

25 A. No, it is to prevent fraud and I am sure

1 if you have spent time with customers who have been
2 through any kind of fraud it is actually quite
3 distressing for a customer. So we spend --
4 obviously we would, from a pure commercial
5 perspective, want to reduce fraud but equally you
6 have to balance that with the ability to allow
7 customers to make transactions as well.

8 Q. If the customer is at all fault for the
9 loss of the card, for example, you would expect the
10 customer to pay would you not?

11 A. It depends on the circumstances.

12 Q. Could we look please in {RC-J4/89.2/99}.
13 This is part of the Visa Core Rules and halfway
14 down -- sorry, three paragraphs up from the bottom
15 it says:

16 "The Issuer may increase the amount
17 of the Cardholder's liability for unauthorised
18 transactions if the issuer reasonably determines,
19 based on substantial evidence, that the Cardholder
20 was fraudulent or negligent in the handling of the
21 account or the Card."

22 That gives you the power, does it
23 not, under the Visa rules to pass the cost of any
24 fraud on to your own customer where they are at
25 fault?

1 A. I think that also you have to establish
2 where they were -- particularly around negligence,
3 I think when you spend the time with customers and
4 understand what they have gone through typically
5 unless a customer has blatantly operated either
6 first or third party fraud, then typically this is
7 not something we would pass on.

8 THE PRESIDENT: Ms Dooney, I think it
9 might assist just again to give a bit of colour
10 to matters and again please do not go into
11 anything confidential.

12 A. Sure.

13 THE PRESIDENT: We are really talking
14 about a very broadbrush picture, but the sense
15 I am getting is that you do not typically
16 regard customers who are the victims of fraud
17 as negligent and I wondered if you could give
18 some instances of where your bank would take
19 a view that there was negligence and enforce
20 a provision?

21 A. Sure.

22 THE PRESIDENT: But also give us some
23 sense of the kind of fraud that the bank is
24 dealing with in terms of card fraud and just
25 the sort of environment in which we are working

1 now because we are not really necessarily
2 talking about just lost cards now. This is
3 a very much more sophisticated arena in which
4 banks, schemes, merchants, everyone is
5 operating and I imagine the nature of a fraud
6 and unauthorised transactions that take place
7 are quite sophisticated and difficult and
8 I think it would be useful just to have a sort
9 of flavour of what is going on.

10 A. Sure.

11 THE PRESIDENT: But at a very general
12 level, if you would not mind.

13 A. No problem, happy to do that. So I think
14 you have got -- first party fraud typically is where
15 you have got customers who are -- who are
16 effectively operating the fraud themselves, so this
17 might be where they make a transaction and then they
18 will say they did not make the transaction or
19 typically we see a withdrawal at ATMs and then, you
20 know, they will deny making that withdrawal.
21 Sometimes it is down to a customer actually forgets,
22 you know, has forgotten, might have been quite
23 a busy day for them etc. So we would need to
24 explore that with the customer, get any evidence
25 that we could, whether it is CCTV that we have in

1 our branches or at ATMs to demonstrate that they did
2 make that transaction. Or sometimes being really
3 thoughtful about understanding the particular
4 customer journey because sometimes they are being
5 coerced into actually making those. So it is not
6 always, particularly now, very black and white as to
7 whether you actually made -- you were committing
8 fraud. It is really understanding that nuance of
9 why the customer -- what happened, why the customer
10 actually undertook that. So that is some first
11 party -- example of first party fraud.

12 I think the third party fraud, which
13 is where another entity or individual that is taking
14 advantage, this can be a huge variety of things
15 where customers have either paid for the goods but
16 not received them. It may be that, and there was no
17 company there at all and we see this with things
18 like investments, sometimes, or it can be with just
19 merchants where a customer has made the
20 transactions. Other times it is where people have
21 taken over that particular customer's account and
22 they have either gained access to their information
23 or access to their credentials to then be able to
24 make transactions that obviously the individual did
25 not. We see this a little bit with accommodation

1 booking, I think it might have been one that was in
2 the media quite recently, Booking.com.

3 So quite a number of variety of
4 merchants where you actually see a lot of fraud.

5 PROFESSOR WATERSON: Just pausing on that
6 one.

7 A. Yes.

8 PROFESSOR WATERSON: Actually I was --
9 I will tell you I was phoned up by Barclays
10 recently because I was making a hotel booking
11 in Spain and they were worried about it.

12 A. Right.

13 PROFESSOR WATERSON: But that aside, if in
14 the case where the person has paid for the
15 goods but not received them, is that the
16 issuing side of the bank that is going to
17 refund the customer or are the acquiring side
18 or is the acquiring side going to pay the
19 issuing side to refund the customer?

20 A. So in the event that there was no such
21 merchant or the merchant was absolutely fraudulent,
22 and then it would be the issuer. So that would be
23 a straight loss to us that we would compensate the
24 customer for.

25 If it was a dispute over goods not

1 received or incorrect, they had ordered something
2 and the merchant had thought it was something
3 different, then typically we encourage the customer
4 to try and negotiate with the merchant and receive
5 the goods that they intended to. If that does not
6 work, then in terms of that instance, then it would
7 typically be the issuer.

8 PROFESSOR WATERSON: So the acquirer's
9 role here, I appreciate you are not on the
10 acquiring side?

11 A. Yes.

12 PROFESSOR WATERSON: But if the acquirer
13 signs up a merchant and that merchant is -- is
14 a fraudulent merchant so supposing for example
15 they claim to be a ticketing agency, they
16 purport to sell someone a ticket, but in fact
17 they never had any tickets, but they have run
18 away long before the event and so they escape,
19 the acquirer has signed up that merchant.

20 A. Yes.

21 PROFESSOR WATERSON: Which is -- but yet
22 you say the issuer has to pay. But does that
23 not create an incentive problem because the
24 acquirer and the issuer?

25 A. That is where the network is or Visa or

1 Mastercard are supposed to make sure because that
2 the acquirer -- for example, if the acquirer signed
3 up a merchant that was selling shoes and it -- so
4 they have to do the due diligence on that,
5 I believe. They also have to periodically do that
6 due diligence to make sure they are still selling
7 shoes and that you are not making transactions of,
8 you know, £10,000 for example because instead of
9 shoes you are investments.

10 So the acquirer is supposed to do
11 that. In that scenario and we have had specific
12 scenarios where that has happened, where actually as
13 an issuer we have had to take the loss and that is
14 because the acquirer has to be able to show that
15 they have done all of their checks and balances both
16 at sign-up and ongoing. But if they have and the
17 merchant just chooses to be fraudulent, then at some
18 point someone has to make the customer whole and so
19 it tends to be the issuer.

20 PROFESSOR WATERSON: Right. Okay. That
21 is interesting. So if it is a different
22 acquirer from Barclays, then they
23 nevertheless -- if they demonstrate to Barclays
24 as the issuer that they have carried out
25 appropriate checks on the merchant --

1 A. Yes.

2 PROFESSOR WATERSON: -- then the issuer
3 will pay the customer?

4 A. In many circumstances, yes. I think that
5 is -- the actual schemes have invested a lot in the
6 disputes network to make sure that that is
7 a relatively smooth running process on the whole.
8 If I compare that to other payment schemes like
9 Faster Payments it is significantly -- obviously
10 there is a lot more volume going through it but is
11 significantly smoother and there is a lot more
12 customer protections in there than what say Faster
13 Payments have.

14 PROFESSOR WATERSON: Right, so what
15 sort -- in terms of the Faster Payments
16 network, what happens there then?

17 A. There is -- we have -- so the Faster
18 Payments is account to account payments.

19 PROFESSOR WATERSON: Yes.

20 A. So in that instance you need to be able to
21 demonstrate that a customer has sent their money on,
22 typically they go through a confirmation of payee
23 check but even if that comes out as positive, they
24 continue to send their money. Then if that turns
25 out to be a scam, or a fraud and a scam, which can

1 often happen, then it comes back to the bank to be
2 able to remunerate the customer, or if the customer
3 has shown gross negligence, so for example we have
4 instances where we have actually said to the
5 customer many times: do not make the payment, we
6 think it is a scam, they will continue to make the
7 payment and at some point they realise it is a scam
8 and then we have to walk them through -- like we try
9 and recover as much of the monies as we can but
10 often there will be a gap.

11 PROFESSOR WATERSON: So this system where
12 if you go to pay someone it checks whether that
13 person that you are trying to pay has that bank
14 account.

15 A. Yes.

16 PROFESSOR WATERSON: Under the ...

17 A. Yes, it checks the name, the sort code and
18 the account number. Yes.

19 PROFESSOR WATERSON: Yes. Thank you.

20 THE PRESIDENT: Thank you very much.

21 MR BEAL: Could we look, please, at
22 {RC-J6/2/20}. This is part of the Payment
23 Systems Regulator report from November 2021 and
24 at paragraph 3.22 and 3.23 -- I think that is
25 the wrong document, sorry. It should be

1 {RC-J6/2/20}.

2 Thank you. Then we see there 3.22 and
3 3.23, the PSR is dealing with the situation
4 that you have described which is where there is
5 effectively fraud by the merchant and says that
6 the risk is borne by the acquirer, because the
7 acquirer has signed the merchant into the
8 system. If, for example -- using your example,
9 if the merchant simply never supplied the goods
10 and never had the intention to supply the
11 goods, the risk lies with the acquirer, does it
12 not? That is how the charge-back system
13 operates, to compel the acquirer to refund the
14 money to the issuer, even if the issuer -- even
15 if the acquirer cannot get the money back from
16 the fraudulent merchant?

17 A. In some instances, I think as an issuer we
18 still have charge-backs that we carry the -- the
19 cost of.

20 Q. You carry the cost of them if the failure
21 in authorisation was something that was at your end,
22 not at the acquirer's end; correct?

23 A. Or, for example, if time lapses. So there
24 is a number of different circumstances.

25 Q. Are you aware that there are four-party

1 payment systems out there that do not charge any
2 interchange fee at all?

3 A. In other markets, I believe. There are.

4 Q. Are you aware for example of the EFTPOS
5 system in New Zealand?

6 A. I am.

7 Q. That is a settlement at par system, is it
8 not?

9 A. I am not familiar with the details but
10 I have used EFTPOS in New Zealand.

11 Q. If interchange fee income is so important,
12 how do those sorts of schemes survive?

13 A. I cannot comment, I am sorry, I do not
14 understand the workings of EFTPOS.

15 Q. At paragraph 10 of your statement you
16 describe what is called the UIFM counterfactual,
17 that is the term you used in paragraph 11.

18 A. Mm-hm.

19 Q. Was that wording given to you in those
20 terms verbatim for inclusion in your witness
21 statement?

22 A. I believe so. It was the scenario I was
23 willing -- asked to consider.

24 Q. No, I am just wondering whether it is your
25 choice of words or their choice of words that are

1 given to you. It is not a criticism; I am just
2 trying to ascertain whose choice of words it is?

3 A. I think it was a question I was asked,
4 so ...

5 Q. There is a reference there to bilateral
6 agreements. Has Barclays ever reached a bilateral
7 agreement with another acquirer in the
8 United Kingdom?

9 A. I am not familiar with that.

10 Q. If Barclays under this system set
11 a unilateral interchange fee, the acquirer would
12 have no choice but to accept it, would they?

13 A. In this model, what I was asked to opine
14 if we had to set the UIFM, where would we set it.
15 So in this I am assuming they could have
16 a conversation, but ...

17 Q. You are an issuing bank, let us put it
18 a different way. You are an issuing bank and you
19 are in charge of Barclays issuing side and imagine
20 that you are also thinking about it from the
21 perspective of Barclaycard, which is an acquirer.
22 If HSBC chose to set at the maximum rate permitted,
23 Barclaycard would have no choice if it was acquiring
24 an HSBC card but to pay that maximum rate, correct?

25 A. I assume so.

1 Q. You say in paragraph 12 that Barclays
2 would have set its MIF at the maximum rate. Have
3 you assumed when coming to that conclusion that all
4 of your cards would still be accepted?

5 A. I -- yes. I did.

6 Q. So you have assumed, have you not, that
7 the Honour All Cards Rule would apply?

8 A. I am not familiar with the Honour All
9 Cards Rule.

10 Q. I am sorry?

11 A. I am not familiar with the Honour All
12 Cards Rule, I believe it is an acquiring rule.

13 Q. If for some reason setting at that rate
14 meant that your cards were no longer accepted, that
15 would not be commercially ideal, would it?

16 A. It would not be ideal.

17 Q. So if that started to happen, I assume
18 that you would think twice about setting at the
19 maximum rate?

20 A. Well, I think the -- I guess the way you
21 have to think about that scenario though is both
22 merchants and acquirers, I guess their business is
23 around making sure that they are able to offer their
24 customers goods and services in the easiest, most
25 convenient and safest way for customers to pay. So

1 my assumption would be that as a merchant or an
2 acquirer, you probably would not want to not accept
3 payment from a part of the market, quite.

4 Q. But you must know from your personal
5 experience not all merchants accept American Express
6 cards?

7 A. That is correct.

8 Q. Because some of them are just too
9 expensive?

10 A. That is correct.

11 Q. So if you set the MIF rate too high there
12 would be a real risk, would there not, that your
13 cards would not be accepted either?

14 A. Yes, although I believe the IFR still
15 applies.

16 Q. If you have also assumed, have you not,
17 that the merchants would not be able to surcharge on
18 the particular transaction in question?

19 A. I do not think I did assume that.

20 Q. Have you assumed that it would not be open
21 to merchants to try and steer transactions away from
22 your cards because of course if that happened that
23 would not be commercially ideal either?

24 A. I think it would not be commercially ideal
25 for the merchant. It is quite -- if a customer

1 comes in to purchase something off you, let us say
2 it is your weekly grocery shop and you are no longer
3 accepting this week Barclays Visa products, then you
4 now have a customer that is disgruntled and not able
5 it pay the way they want to pay.

6 Q. If it is open to the merchant to favour
7 a card that is cheaper than your card, that merchant
8 would try and do so, would they not?

9 A. They could do. Operationally it could be
10 quite complex but yes, they could do.

11 Q. That would not be good for your card
12 either because you would find that other cards were
13 more popular with shops and therefore customers
14 would steer towards those lower cost cards?

15 A. It depends on the incentive.

16 Q. You would then try, would you not, to make
17 Barclays cards more attractive again?

18 A. I think the scenario you are trying to
19 paint though becomes quite unlikely.

20 Q. It is unlikely because what you are
21 essentially saying is that this counterfactual model
22 that you are considering means the Barclays can
23 charge the maximum amount with impunity because it
24 does not risk anything -- any lower card acceptance?

25 A. The model assumes the way that we looked

1 at it was and what I was asked is where would you --
2 not just myself but where would you place the -- or
3 where would you place the MIF if you could in this
4 counterfactual. When we looked at it, we looked at
5 it much like we would any other pricing decision
6 which is how do you start to think about some of
7 your marginal costs associated with actually
8 offering that service or product to a customer base?
9 When with you look at that, you get to a point where
10 the actual caps that are put in place by the RFI
11 means actually you -- your marginal costs is there,
12 thereabouts offering --

13 Q. The reality is that you were able to take
14 that view because you did not factor in that there
15 would be any commercial fall-out from pricing in
16 that way, in this hypothetical world?

17 A. We did think about what happens --
18 obviously we would not know if another issuer priced
19 lower because that would be a competition challenge.
20 But we did think about, you know, what could happen.
21 But like I said I think at the end of the day too
22 both the acquirers trying to acquire as many
23 merchants as possible and so want to offer a broad
24 range service that meets the UK market, as do
25 merchants.

1 Q. Presumably, essentially you are only able
2 to secure the maximum rate that you can because the
3 scheme rules permit you to do exactly that; that you
4 can set as high as you conceivably can with
5 impunity?

6 A. In the counterfactual?

7 Q. Yes.

8 A. So in the counterfactual and I assume that
9 actually -- sorry the UIFM was legal. If it was
10 not, then obviously Barclays would not be able to --
11 we would not undertake it because not only would
12 I not be able to do that or anyone in the business,
13 but equally there would be a number of mechanisms in
14 Barclays that would restrict you from doing
15 something that was not lawful.

16 THE PRESIDENT: Mr Beal, I think we are
17 assuming, are we, the UIFM is legal for these
18 purposes?

19 MR BEAL: That is going to be a matter for
20 submissions.

21 THE PRESIDENT: Of course it is, but the
22 witness is obviously having to ride two horses
23 at the moment so quite clearly Barclays will
24 not be doing anything that is unlawful.

25 MR BEAL: Yes, of course. The assumption

1 is a valid one in that context.

2 THE PRESIDENT: I am not trying to tie you
3 down at -- well, Ms Dooney, I quite understand
4 why you are qualifying your answer and it is
5 entirely appropriate, but can you assume just
6 for your evidence that it is entirely proper to
7 proceed down the UIFM route and there is
8 nothing wrong in competition or any other
9 terms, we are just trying to work out what
10 would happen if it was implemented, I hope that
11 makes things easier for you.

12 A. Yes, it does, it does. I wanted to make
13 sure I had not assumed the wrong thing.

14 THE PRESIDENT: Entirely understand.

15 A. I understand.

16 MR BEAL: Even assuming that the Honour
17 All Cards Rule is in place and that there is no
18 problem with your card acceptance, the reality
19 is that if Barclays is both an issuer and the
20 acquirer for a given merchant, say a large
21 merchant, it would be open to a large merchant
22 would it not, in this hypothetical model to
23 approach Barclays as a unit and say: we do not
24 want to pay the maximum rate that you have set
25 under the scheme?

1 A. I am sure nothing permits a large merchant
2 or a merchant at all doing that. Most large
3 merchants have multi-acquirer relationships, so
4 I assume they would have the opportunity to also
5 look at other costs.

6 Q. Are you familiar with the --

7 MR COOK: Just to clarify, the witness
8 said "nothing permits", I am not sure if that
9 was the word she intended to use. It just does
10 not look right on the transcript?

11 MR BEAL: I think you may have meant
12 "prevents"; is that right?

13 A. Prevents, correct.

14 Q. Are you familiar with the incident
15 involving Amazon Prime and their threat not take
16 Visa credit cards?

17 A. I am.

18 Q. That was an example, was it not, of
19 a large merchant negotiating to get a better deal.

20 A. I believe the negotiation was between Visa
21 and Amazon.

22 Q. In terms of fraud costs that you have
23 mentioned, do you know what fraud costs Barclays
24 incurs as a percentage of the MIF value it receives?

25 A. Going back to what we were talking about

1 before and I do not mean to frustrate you, but
2 relative to my retail business area I do.

3 Q. I see. But that will not give us total
4 figure across the piece?

5 A. It will not include commercial cards at
6 all or business cards, it is just the retail card --

7 Q. Could you speak to debit cards
8 specifically?

9 A. The fraud costs of debit cards?

10 Q. Yes.

11 A. I can speak to the fraud costs for debit
12 and credit card.

13 Q. Right and what percentage of those
14 costs -- what is the ratio between those costs and
15 the overall MIF you receive from debit and credit
16 cards in your division?

17 A. It is about 15%.

18 Q. 15%. Does that break down --

19 MR KENNELLY: I hesitate to interrupt but
20 this is an area where, again, we may be
21 straying into very sensitive Barclays material,
22 not the answer that has just been given, but if
23 it is the granular breakdown of costs, to which
24 the interchange revenue is going towards, that
25 may require a private session so Ms Dooney can

1 answer the questions fully. I may be speaking
2 out of turn but I am conscious she mentioned
3 that already herself.

4 THE PRESIDENT: It is always better to
5 have these things thrashed out in advance
6 rather than in arrears. Ms Dooney, what I said
7 earlier goes for all of your answers. If you
8 are worried, speak to me and we will sort it
9 out. But for my purposes -- it may not be for
10 counsel's purposes, in which case he will tell
11 me -- the way in which we handle the overall
12 interchange fee revenue is above a ballpark
13 figure actually helps because what I am trying
14 to get a feel for is overall flows, I mean,
15 I am frankly not that interested in Barclays;
16 I am interested in the market as a whole.

17 A. Sure.

18 THE PRESIDENT: So your very helpful
19 insight into that market, it may be that that
20 helps you answer the questions. If you can,
21 that is great, but if you have a problem, as
22 I say, do mention it.

23 A. It may be -- that is very useful, thank
24 you. It may be helpful to have a more open
25 conversation about those costs if you are trying to

1 get a ballpark of the market and how it functions.
2 It would mean that we will go into that quite
3 commercially sensitive area. I am happy to talk it
4 through, but ...

5 MR BEAL: The next questions I have at
6 least -- I do not know about the tribunal, of
7 course, that is the tribunal's prerogative --
8 are not figure specific, if that helps.

9 A. Okay.

10 Q. So my learned friend stood up and warned
11 you off giving anything confidential but I was not
12 going to go there. Do you have a breakdown split
13 roughly for domestic, for example, versus EEA cards
14 or is that not just something your division does not
15 do?

16 A. Obviously our customers can use their
17 cards in EEA. We do not issue an EEA.

18 Q. Have you attributed different fraud costs
19 to EEA issued cards versus UK issued cards?

20 A. We do, I do not have them, to my
21 knowledge.

22 Q. They are not going to be significantly
23 different though, are they, because of the single
24 European payment area?

25 A. I cannot -- I cannot comment. I think --

1 Q. Can we look, please, at {RC-J5/51/61}.
2 This is the PSR's most recent December 2023 report
3 and you will see, please, at paragraphs 5.25 and
4 5.26 that issuers were reporting to the PSR the
5 absence of any significant costs impact of Brexit.
6 Can you see that?

7 A. Yes.

8 Q. Of course what that means is even though
9 UK EEA transactions are now covered by interregional
10 MIFs, are you aware of that?

11 A. Yes.

12 Q. That does not reflect any underlying
13 change, significant change in fraud profile, can you
14 see that?

15 A. Yes.

16 Q. To be fair, at the end of 5.26 it says:

17 "A few issuers said that UK-EEA
18 cross-border [Card Not Present] transactions incur
19 higher costs in scheme and processing fees and
20 foreign exchange fees which are charged by, and
21 represent revenue ..."

22 That of course is not dealing with
23 the fraud issue, is it?

24 A. I have to read it. (Pause)

25 Q. Then if you read on perhaps to 5.28 and

1 5.29 you can see acquirers and merchants were saying
2 they have seen no visible change in fraud prevention
3 effectively post Brexit.

4 Then 5.29, none of the additional
5 income from interregional fees was being dedicated
6 towards new anti-fraud measures, etc.

7 A. Mm-hm.

8 Q. You are aware, however, that there was
9 a significant increase in the interchange fees
10 payable on EEA issued cards being used for
11 transactions in the UK following Brexit?

12 A. Yes.

13 MR BEAL: I do not have any further
14 questions, thank you.

15 Questions by THE TRIBUNAL

16 MR TIDSWELL: I just wanted to ask you
17 a few questions about some of the things that
18 Mr Beal has asked you about I want to be really
19 clear with you I am not asking you for any
20 numbers.

21 A. Okay.

22 MR TIDSWELL: I hope I am not going to ask
23 you anything that might be considered
24 confidential, but say so if you feel it is
25 uncomfortable.

1 I am interested in this question of the
2 correlation between the interchange fees and
3 the costs that you incur and I presume you go
4 through a process every year in your bit of the
5 business of setting a budget?

6 A. We do.

7 MR TIDSWELL: Presumably in there, you put
8 in your expectation of what you are getting for
9 various types of interchange fees?

10 A. We do, we do.

11 MR TIDSWELL: Then you presumably also
12 make some estimates no doubt based on what has
13 happened in the past of the sort of costs that
14 you might be going to incur?

15 A. We do, particularly around fraud is
16 absolutely one area that we continue to invest in to
17 make sure that we can continue to prevent our
18 customers being victims of fraud. Also in our risk
19 models, that is another example where we actually
20 have as part of allowing customers to be able to use
21 a credit card, debit card, there is a part where
22 they make a transaction and then they choose not to
23 pay us back, so how do we get better at detecting
24 those and supporting those customers before that
25 actually happens.

1 More broadly, we are expected to
2 continue to upgrade our actual processing and
3 network. So we have what is called upgrades,
4 mandatory changes that occur, sometimes quarterly,
5 sometimes more often than that and that is to keep
6 pace with where the full network is, actually how it
7 is operating and so we can take advantage of things
8 like realtime analysis that Visa might have in terms
9 of their fraud detection. Then of course things
10 like PSDT2 etc, you know, requires investment to
11 make sure we are able to kind of accommodate some of
12 the rules there around customers to step up,
13 contactless limits, etc.

14 So we do invest more broadly there
15 and then equally the other side to that is kind of
16 as I would think about the operational part of the
17 costs factors as you think through.

18 Then you have the customer part of it
19 and that is when I think about what our marginal
20 cost is for that I do not think about servicing of
21 any -- customers calling up about their account and
22 asking questions, that is, I think as the gentleman
23 put it, the counsel put it, that is more broadly
24 about kind of that broader banking relationship.
25 But specifically if it relates to card, obviously,

1 now customers expect to be able access things like
2 apps to be able to understand exactly where they
3 are, realtime payment notifications, money
4 management tools and advice, etc. So there is -- on
5 the customer side in documentation to things like
6 rewards and consumer protections, there is actually
7 now management tools that most customers expect to
8 see as part of their kind of debit or credit card
9 relationship.

10 MR TIDSWELL: Thank you, that is very
11 helpful. I think you mentioned on the revenue
12 side there are some other things like APR.

13 A. Yes.

14 MR TIDSWELL: Presumably when you do this
15 budget you go through an exercise of working
16 out what is coming in on aggregate and what
17 flexibility you might have to change that and
18 then what is -- therefore what you can sensibly
19 spend in order to hit some sort of target
20 margin. Is that the sort of process -- can you
21 say a little bit more about how that would
22 work?

23 A. Sure. So maybe it starts with -- if you
24 think about building or developing a new card
25 proposition and we will say credit card because that

1 has got more levers than, say, a debit card, debit
2 card you only really get income from the customer,
3 the interchange, so the customer spending. Then the
4 customer spending overseas where you get a margin
5 that you attach to the conversion, so that is -- for
6 your debit card, that is your income levers.

7 On a credit card you obviously have
8 the interest that you are able to charge for
9 customers having the ability to be able to borrow
10 that payment, some customers do not do that. So we
11 actually have quite a reasonable part of our book
12 that actually pay us back in full every month. We
13 extend funds to them on a monthly basis for 52 days
14 free of charge as part of that.

15 So as you think about that particular
16 building of a proposition, you think about those
17 income levers. So how much would you charge
18 an annual fee, what kind of APR would you expect to
19 see, and that relates to the type of customer base,
20 their risk profile that you would expect to see,
21 your current loss rates that you are seeing in your
22 portfolio, and then any other income that you would
23 expect from either customer spending overseas, the
24 FX, or any other fees which may be -- and they are
25 small relative, things like a late payment fee as an

1 example.

2 MR TIDSWELL: Thank you. So it sounds
3 a little bit to me as if -- and see if I have
4 got this right -- you are probably looking more
5 at individual card propositions and the
6 marginal costs of issuing different types of
7 cards. When you are thinking about the
8 additional investment, you are making
9 protections and benefits. Is that more where
10 you make those decisions or do you tend to do
11 it at a more aggregated level where you look at
12 the unit, the divisions budget, or a little bit
13 of both? Could you give us a sense of that?

14 A. Yes, a little of both, a little of both.
15 So if you are designing a new card proposition, then
16 obviously you want to make sure that -- you want it
17 to be financially sustainable. Obviously the
18 regulator does not particularly enjoy
19 cross-subsidisation; it drives the wrong kind of
20 behaviours. So, therefore, actually designing
21 a card product that takes all the incomes as well as
22 all the costs that you expect to get into account is
23 right.

24 Equally, when I was asked to look at
25 this particular scenario around the UIFM

1 counterfactual, what -- when we discussed it what
2 I did not do was say, right, what was the cost of
3 running a whole card business, because that would
4 not be proportionately right. Customers paying us
5 APR obviously is an income, but that is customers
6 choosing to lend. It almost happens after the fact
7 of the spend.

8 So if you narrow it down to what is
9 cost of allowing a customer to use a plastic product
10 to be able to make a transaction, that is what
11 I looked at in terms of a marginal cost, and that is
12 where you start to look at your processing, scheme
13 fees, your costs related to fraud and both the
14 infrastructure, not more broadly to service the
15 fraud but the infrastructure you need for realtime
16 payments and the actual losses that you make on
17 those particular accounts.

18 Risk. So there is a cost of
19 customers actually purchasing with us and not paying
20 us back. That is not the full impairment loss that
21 we would see, but just related to the kind of card
22 spend. Then you have rewards. As counsel has
23 outlined, that is obviously a cost that relates to
24 specific cards spend, because we know that customers
25 want to earn those rewards, and so offering in cases

1 that market.

2 Then the plastic itself, you have got
3 the physical -- to actually get it to our customers,
4 in their hands etc. So there is kind of physical
5 costs of all of those things. Happy to share
6 through, but I think that that is --

7 MR TIDSWELL: No, that is helpful.

8 Can I change the subject slightly and just
9 ask you a slightly different question, which is
10 actually looking at it from the other way? So
11 at the moment, the position is that the
12 schemes, these are in this particular case, set
13 the interchange fees. I just wondered if you
14 can say anything about the relativity of those fees
15 to the sort of costs that might relate to them.
16 So, for example, I think I have in mind we know
17 that interregional fees incur a higher
18 interchange fee.

19 A. Yes.

20 MR TIDSWELL: I wonder whether you thought
21 that that higher interchange fee bore any
22 necessary relationship to the costs that you
23 incur, either taking into account the other
24 sources of revenue floor for that or not. Does
25 that make sense as a question?

1 A. Yes, it does. When we saw that change,
2 obviously what we did see is all of the large
3 merchants quite swiftly move all of their processing
4 away. So that actually, in terms of our income
5 received on that higher interchange fee, it is -- it
6 is very small, relative.

7 Most of our business is UK based in
8 terms of transactions. So when I talk about fraud
9 and the relevance of, or higher prevalence of fraud
10 that we see from EEA transactions or even broader,
11 majority, 95% of our transactions are actually
12 happening within the UK.

13 So it is a small part of our
14 portfolio. It is an important part of our
15 portfolio, because we want our customers to be able
16 to use us wherever they go. But it is not the base
17 of the business, of my issuer's business.

18 MR TIDSWELL: So it is not really a big
19 enough number for you to actually make any
20 observation about how it fits in with your cost
21 assessments for the actual activity?

22 A. No.

23 MR TIDSWELL: That is helpful.

24 Can I ask you one other question? This is
25 really more curiosity than anything else. It

1 is about virtual cards, because somebody
2 explained to us about virtual cards. I do not
3 know if you can talk about this?

4 A. I do.

5 MR TIDSWELL: They appear to be quite
6 expensive from an interchange fee point of
7 view, but I was not completely sure what, from
8 your point of view, you would need to do in
9 order to process a virtual card.

10 Can you say anything about that, and
11 therefore why they were more expensive, or
12 might be more expensive?

13 A. Can I just explore what you mean by
14 virtual card?

15 MR TIDSWELL: Yes, of course. So the way
16 it was explained to us was -- and I may not
17 have this right, so someone will tell me if
18 I get this wrong -- but what was explained was
19 that in the context, for example, of the travel
20 industry, and I think this might have come
21 particularly out of Covid, but the idea would
22 be that a card would be created for a single
23 instance use, for example for a travel agent to
24 use with an airline or whatever it happened to
25 be, and that would validate a number of

1 different transactions. But there would only
2 be one card usage for one card, effectively a
3 disposable card, that would then never be used
4 again.

5 So that is what I understood. That may
6 not be (inaudible) but that is what
7 I understood.

8 A. No, you are absolutely right. There is --
9 I think virtual card has quite a broad remit.

10 So in that instance, that surrounds
11 specific kind of use case for that particular
12 transaction, so a customer can feel confident that
13 that card credentials cannot be picked up and used
14 elsewhere. But obviously when you do that, you are
15 producing new credentials for a customer for
16 specific spend patterns for a period of time. So
17 the costs would be more -- we have not looked at
18 that specifically because obviously our base is more
19 retail base, and so for virtual card in our instance
20 it would typically be either not producing the
21 plastic, so customers actually using mobile wallets
22 typically as the kind of mechanism to be able to
23 access their card products, and/or today would be,
24 I guess, many of our customers actually leave their
25 plastic at home and just take their -- their mobile

1 wallet out, their mobile phone, and they use it for
2 payments there, and obviously that has an added
3 increase of cost for an issuer as part of that.

4 MR TIDSWELL: So would that incur
5 a different interchange fee, then, for
6 a consumer card?

7 A. Same interchange fee, but we have --

8 MR TIDSWELL: (inaudible) cost for you.

9 A. We have a cost where we share.

10 MR TIDSWELL: That is really helpful,
11 thank you very much.

12 PROFESSOR WATERSON: Thank you.

13 So I was going to ask about you said that
14 most of your customers have a debit card. For
15 those that do not have a debit card, are there
16 other products that they have? I mean, I am
17 thinking about how they actually get money.

18 A. Yes. So we have, most of our customers
19 have a debit card on the whole. We had the little
20 booklets that all banks had. We have subsequently
21 tried to retire those just because they do pose
22 quite a fraudulent risk, so that actually your debit
23 card typically also becomes your kind of mechanism
24 for getting any monies out, whether that is going to
25 a branch and accessing funds that way. Obviously

1 you can have a cheque, and we do offer chequebooks.
2 Faster Payments is our next biggest way of customers
3 making payments.

4 So on our retail base, we see around
5 70% of all payments are actually through cards, and
6 so Faster Payments, account to account payments, are
7 the next biggest way, and then there is a couple of
8 other ways you can do it. But typically they are
9 the main routes.

10 PROFESSOR WATERSON: Have there been
11 movements in that proportion over time?

12 A. Absolutely. I think through Covid
13 obviously the propensity to withdraw cash really
14 declined and really has not picked up, and that is
15 kind of one of two reasons. One is obviously
16 customers did not want to handle monies, but equally
17 a number of merchants were not accepting cash any
18 longer and so cards became the way to pay for those
19 customers.

20 PROFESSOR WATERSON: No, I mean between
21 cards and Faster Payments, have there been
22 movements in the proportion of payments which
23 are by Faster Payments rather than cards?

24 A. Yes. So Faster Payments continues to grow
25 and we expect it to continue to grow. Obviously the

1 advent of open banking is -- you know, where you
2 kind of see some growth in terms of those open
3 banking payments which uses the faster payment
4 rails. I think the -- the network is not as -- or
5 the ecosystem for Faster Payment is not as mature as
6 cards so there is not the same mechanism protections
7 for consumers on it, or acceptance, frankly.

8 So today you cannot walk into, you
9 know, a supermarket or a store and purchase anything
10 using Faster Payments. Equally, it is not -- even
11 though it is faster, it is not instant, and so there
12 is that kind of -- particularly if it is in person,
13 being able to make a payment, if you are in a point
14 of sale you would obviously want that to be instant,
15 or as instant as it can be, like cards products.

16 Whereas --

17 PROFESSOR WATERSON: You are talking about
18 purchasing a physical product rather than, say,
19 a service or --

20 A. Correct.

21 PROFESSOR WATERSON: -- paying
22 a tradesperson or whatever?

23 A. Yes. Paying tradesmen, that is where we
24 see it grow, or people sharing, splitting bills,
25 that type of thing. That is where it tends to be.

1 Peer-to-peer payments or to businesses.

2 PROFESSOR WATERSON: So is that a process,
3 a movement that you encourage or you are
4 nervous about, if you like?

5 A. Definitely encourage, but needs to be
6 encouraged to the right level of maturity around the
7 process. So ensuring that, you know, there are
8 consumer protections that are easily -- for
9 consumers to understand and that the actual process
10 between the ecosystem is really easy to see the flow
11 of what happens when someone does dispute
12 a peer-to-peer payment and what happens there. At
13 the moment it is quite complex.

14 PROFESSOR WATERSON: Right. So on
15 a different topic --

16 A. Sure.

17 PROFESSOR WATERSON: -- one of the levers
18 you have, I guess, is assessing how much the
19 customers should be allowed in terms of spend
20 on their credit card and/or debit card, how
21 much they can withdraw, for example, on their
22 debit card.

23 So these assessments are presumably based
24 on your understanding of the consumer's income,
25 for example, and, as they become a longer term

1 customer, your knowledge of their behaviour, if
2 you like?

3 A. Mm-hm.

4 PROFESSOR WATERSON: So do you know if
5 customers have credit cards with other issuers
6 or do you just have to make a guess about that,
7 if you like?

8 A. Yes. So we do know that customers have
9 credit cards of other issuers. We know that because
10 we can see them obviously paying away to their
11 particular issuer when they are paying that back.
12 But equally, we are obviously well versed with UK
13 finances stats that they put out in terms of the
14 numbers of cards that a customer holds continues to
15 grow. As both customers hold multiple current
16 accounts -- more customers now hold multiple current
17 accounts than what they did kind of five years ago,
18 and it is the same on the credit side as well.

19 PROFESSOR WATERSON: So presumably you do
20 not necessarily see what people do on their
21 other current accounts?

22 A. No, no, I cannot see what they are doing.
23 The only thing I can see is, obviously, if they miss
24 a payment or do not -- you know, they default on
25 their other credit cards, then we can see that in

1 their credit file.

2 But I cannot see what they are paying
3 at all. Much like cash, really; as soon as, you
4 know, they withdraw cash, I do not know what they
5 are going to do with it and it is like that with
6 other credit cards and debit cards.

7 PROFESSOR WATERSON: Thank you.

8 THE PRESIDENT: Last round, I promise you.

9 A. That is fine.

10 THE PRESIDENT: I wonder if you could
11 bring up today's transcript, page 23 [draft].
12 That should come up on screen.

13 So you will see at line 14 you are being
14 asked about if a cardholder attributed value to
15 having a particular card they might be expected
16 to pay for it, and you come back -- do you have
17 that?

18 A. Yes, I do.

19 THE PRESIDENT: You come back saying,
20 well, the market in the United Kingdom operates
21 in a rather different way, and that expectation
22 does not necessarily pertain. I have got that
23 right, have I?

24 A. I think -- so to explain that a bit more
25 fully, I think we are -- this is where I think there

1 is a difference between credit cards and debit
2 cards.

3 So, debit cards obviously you would
4 not expect to have to pay for access to a debit card
5 in the market. You would -- on the whole. There
6 are definitely some providers out there that do do
7 that. You typically are paying for a plastic, for
8 example. So there are some of the neo banks that
9 will charge you just for the delivery of the plastic
10 etc.

11 Whereas on credit cards, depending on
12 the richness of the programme, there could be a fee
13 attributed to it. Customers typically would not
14 expect to pay for a credit card that was not
15 offering any kind of rewards but still had access to
16 things like all the consumer protections, the app,
17 app servicing, kind of alerts, money management
18 tools etc. Those things typically are now kind of
19 hygiene factors that are offered in market.

20 THE PRESIDENT: Thank you.

21 I just want to go back, and it is related
22 to this obviously, to the question of
23 Mr Tidswell asks you about budgeting and costs
24 versus revenue, and that sort of thing.

25 Just so that you are happy, we will talk

1 about, as it were, costs and revenue in your
2 everyday money management division where
3 I assume you would be looking at an overall
4 budgets of your costs versus your revenue and
5 trying to make sure that one was better than
6 the other.

7 A. Correct.

8 THE PRESIDENT: But you do not, as a part
9 of an organisation, precisely link costs with
10 revenues. I mean, you will work out a budget
11 and see where your money is coming from and
12 where your costs are going, but there is no
13 absolute correlation.

14 A. There is no one-to-one relationship, so we
15 do not say for interchange -- we absolutely will use
16 it for these three lines of cost.

17 THE PRESIDENT: That is very helpful.

18 I mean, that was my next question: there is no
19 ring-fencing of the receipt of interchange to
20 any particular cost, it just goes into
21 a general pool of revenue and you apply that
22 revenue to discharge certain costs?

23 A. That is correct.

24 THE PRESIDENT: I do not know whether you
25 have heard of the waterbed as an economic term?

1 speaking purely hypothetically here --

2 A. Sure.

3 THE PRESIDENT: -- but if one were to say
4 for whatever reason the interchange fee was
5 abolished and you just lost that revenue, which
6 we understand to be significant, you would then
7 have to revisit the model that we started off
8 on -- and I hope the transcript is still up
9 there. You would have to think, well, we are
10 going to have to charge in a different way for
11 these cards, and you would look at, for
12 instance, possibly charging for debit cards,
13 maybe charging more for credit cards, but you
14 would look to recover that lost revenue stream
15 in some other way?

16 A. We would. That, that is what I shared in
17 my statement. So, yes, that is kind of as we
18 discussed.

19 THE PRESIDENT: I am very grateful. Thank
20 you very much.

21 Mr Beal, were there any questions arising
22 out of that?

23 Further cross-examination by MR BEAL

24 MR BEAL: There was just a very short
25 follow-up on digital wallets so that I fully

1 understand the answer that the witness gave, if
2 I may.

3 A digital wallet, like Apple Pay for
4 example, can have a credit card behind it, can
5 it not?

6 A. It can be, or a debit card.

7 Q. Or a debit card behind it. So you said
8 that somehow digital wallets imposed an additional
9 cost on you, but Apple will charge for Apple Pay
10 being used, but it will be the acquirer and the
11 merchant that ultimately pay for that; correct?

12 A. (Pause) I pause because obviously I am
13 prevented about talking about our contract with
14 either of our wallet providers in detail.

15 Q. Right. Well, do you have a separate
16 digital wallet for your own customers using the
17 Barclays app?

18 A. We do not.

19 Q. You do not. So you would always link
20 either a Barclays debit or a Barclays credit card
21 with your own app?

22 A. So, yes, that is how they see what is
23 happening with their card, how much they have paid
24 for it, any rewards attached to it, anything like
25 that.

1 Q. I am just trying to ascertain why
2 a digital wallet causes you more cost, which is the
3 answer I think you gave?

4 A. The digital wallet causes us more costs
5 because we have to fund for that right for our
6 customers to be able to access that.

7 THE PRESIDENT: So there is a payment that
8 goes to the provider of an additional wallet,
9 or whatever?

10 A. There is.

11 THE PRESIDENT: Yes, I see.

12 MR BEAL: Thank you.

13 MR COOK: I had a question following on
14 from the tribunal's questioning, if it is okay,
15 sir?

16 THE PRESIDENT: Yes, of course.

17 Cross-examination by MR COOK

18 MR COOK: So you were asked about what
19 would happen if there were no interchange fees,
20 the waterbed effect, and the fact you have said
21 you would look to recover the lost revenue
22 stream in some other way. How easy would that
23 be in circumstances, in the hypothetical,
24 considering American Express could still charge
25 merchant fees, competitors like Klarna and

1 Clearpay could still charge merchant fees,
2 would that be easy or what would you expect to
3 happen?

4 A. Great question. It would be quite hard,
5 right, because you would need to consider not
6 just -- first of all, my primary focus would be for
7 my customers to make sure that we were charging
8 something that was going to be competitive and they
9 continued to choose Barclays as their method of
10 payment. That is a relationship we want to retain.

11 So as we thought about it, it would
12 not be just as easy as, you know, in 24 hours
13 increase the -- add a fee to the bank account or add
14 a fee to the debit card. It would be something that
15 would have to go through the same rigour that we
16 would do for any other increased price or change of
17 price, which is understand where we are relative to
18 the market, what would happen to our customers, take
19 into account any kind of considerations from
20 a consumer duty perspective, and then also ensure
21 that we had appropriate rationale as to why we were
22 looking to increase that.

23 So it would not be an overnight
24 change. It would be one that we would have to
25 seriously consider.

1 So to ask that question and get that
2 answer I would ask the tribunal to sit in
3 private for the purpose only of that question
4 and answer.

5 THE PRESIDENT: Ms Dooney, that will
6 require a private session.

7 A. It absolutely would, yes.

8 THE PRESIDENT: Well, we will be taking
9 a break after you have finished your evidence,
10 Ms Dooney. Can I ask those who are not within
11 the relevant rings to leave the courtroom. It
12 will not be for very long and we will resume in
13 open session after the break when I think
14 Ms Stone is giving evidence. Have I got that
15 right?

16 MR KENNELLY: I think the transcriber
17 needs five minutes.

18 THE PRESIDENT: Can we first of all now
19 pull the livestream.

20 (Hearing in Private)

21 (Hearing resumes in Public)

22 THE PRESIDENT: Ms Dooney, thank you very
23 much for your evidence and for your time. We
24 greatly appreciate it. You are released from
25 the witness box with our thanks. We thank you

1 very much.

2 What we will do, then, is rise for
3 10 minutes when we will resume with the
4 livestream and with the private notice removed
5 from the door in public session. So
6 10 minutes. Thank you.

7 (12.09 pm)

8 (A short break)

9 (12.24 pm)

10 MR KENNELLY: I call Ms Stone.

11 MS GERALDINE STONE (sworn)

12 Examination-in-chief by MR KENNELLY

13 THE PRESIDENT: Do sit down, make yourself
14 comfortable. There will be some water there
15 and you will be asked some questions about your
16 witness statement and probably other documents.

17 As regards the other documents, they will
18 come up on the screen electronically. You do
19 not have any control over what you see; it is
20 done remotely. But if you want to see other
21 parts of the document, do let counsel know and
22 we will make sure that happens, because you
23 will want to see context and you should not be
24 stopped.

25 So I will land you over to counsel. Thank

1 you very much.

2 A. Thank you.

3 MR KENNELLY: Thank you.

4 Ms Stone, could you please open the red
5 folder and turn to tab 1.

6 A. Excuse me. I was told to say that my job
7 title had changed.

8 Q. Yes, I will invite you to make some
9 corrections --

10 A. I am so sorry.

11 Q. -- in a moment. But just begin with the
12 first statement behind tab 1, Ms Stone. Do you see,
13 is that the first page of your first statement?

14 A. Yes.

15 Q. Could you go, please, to page {RC-F4/2/5}.
16 Is that your signature?

17 A. Yes, that is.

18 Q. Subject to the corrections that we will
19 come to, are the contents of this statement true to
20 the best of your knowledge and belief?

21 A. Yes, it is.

22 Q. Could you turn to the second statement,
23 please, behind tab 2 {RC-F4/7/1}. Is that the first
24 page of your statement?

25 A. Yes, it is.

1 Q. Could you turn, please, to page 5, okay
2 {RC-F4/7/5}. Is that your signature?

3 A. Yes, it is.

4 Q. Ms Stone, there were corrections you
5 wanted to make, and for the first, could you turn to
6 paragraph 15 on page 4 {RC-F4/7/4} of the second
7 statement.

8 A. Yes.

9 Q. To help your memory, could I ask you to go
10 to a letter on {RC-N/353/1}. It is on the screen in
11 front of you.

12 A. Yes, yes.

13 Q. Do you wish to --

14 A. That is correct.

15 Q. Please explain to the tribunal the
16 correction that you want to make.

17 A. So sorry. Yes. I was recently told that
18 there had been a bilateral rate made. It was
19 regarding a charity rate, so we corrected the error
20 by the letter to Milbank, but it is also in one of
21 my colleague's statements, Craig Peterson.

22 THE PRESIDENT: I am grateful, thank you.

23 A. Thank you.

24 MR KENNELLY: Ms Stone, paragraph 1 of
25 this same statement, I think it is the job

1 title that you mentioned a moment ago.

2 A. Yes.

3 Q. Could you please explain the correction
4 you want to make to the tribunal?

5 A. Yes. Since late December I am no longer
6 in charge of the AP CEMEA region. I just look after
7 AP.

8 MR KENNELLY: With those corrections, are
9 the contents of this statement true to the best
10 of your knowledge and belief?

11 A. Yes, they are.

12 Cross-examination by MR BEAL

13 MR BEAL: Ms Stone, please could you turn
14 to paragraphs 12 and 13 of your first
15 statement, which is {RC-F4/2/4}, and you there
16 explain at paragraphs 12 and 13 how the
17 Commerce Commission raised allegations against
18 the interchange fee component of MSCs in Visa
19 New Zealand; is that right?

20 A. That is correct.

21 Q. They also challenged the surcharging and
22 non-discretion rules, did they not?

23 A. That is correct.

24 Q. They described the MIF as a form of price
25 fixing?

1 A. Yes, they did.

2 Q. The settlement was reached in 2009; is
3 that right?

4 A. That is correct.

5 Q. Could we look please in bundle
6 {RC-J5/13/1}. This was a settlement between
7 Mastercard and the Commerce Commission. Have you
8 seen this document?

9 A. I have seen this document but obviously
10 not to the same effect as the Visa settlement.

11 Q. I think you have accepted, have you not,
12 that the Mastercard settlement was substantially the
13 same as the Visa settlement?

14 A. It is substantially the same, yes.

15 Q. So if we could look at page 2, please,
16 {RC-J5/13/2} you will see that various commitments
17 were given in relation to interchange under
18 clause 3.1 and the following. Various commitments
19 given. Do you see those?

20 A. Yes.

21 Q. Then over the page at page 4, {RC-J5/13/4}
22 Mastercard also made various warranties as to what
23 it was going to do, not enforce any rules
24 prohibiting or preventing surcharging, etc?

25 A. Yes.

1 Q. You have summarised in paragraph 14 of
2 your statement, page 4, your first statement, the
3 broad effect of the settlements; is that right?

4 A. That is correct.

5 Q. It is right, is it not, that if for any
6 reason an issuer did not notify or set a rate of its
7 own and there was no bilaterally agreed rate, then
8 no interchange fee would be applied?

9 A. That is correct.

10 Q. So in that situation, there would be
11 effectively default settlement at par?

12 A. That is correct.

13 Q. Presumably, in that eventuality, it was
14 not considered that somehow the scheme itself would
15 fall apart because it was something that was
16 contemplated?

17 A. Correct.

18 Q. EFTPOS transactions in New Zealand have
19 always borne no interchange fee; is that correct?

20 A. That is my understanding.

21 Q. In terms of how EFTPOS works in
22 New Zealand, are you familiar with the tap or dip
23 optionality?

24 A. Broadly, yes.

25 Q. So the customer is given a choice or can

1 be given a choice by the merchant?

2 A. Yes, to use the EFTPOS or to use a Visa
3 card.

4 Q. Now, the scheme that operated in
5 New Zealand was set against also a maximum rate
6 being set by Visa for transactions?

7 A. Correct.

8 Q. It was also set against the settlement
9 that you described at paragraph 17 of your first
10 statement. It is page 5 {RC-F4/2/5}.

11 A. Yes.

12 Q. You say there:

13 "I understand that these settlements
14 required the banks to reduce the overall level of
15 interchange fees ..."

16 A. That is my understanding.

17 Q. That was part of the deal for the
18 settlement with the Commerce Commission?

19 A. I was never involved in any -- or was ever
20 communicated any of the substance of the issuer
21 settlement. I have no knowledge of that. I only
22 know from the Visa side. That is what I was told
23 because I was not actually engaged and I picked it
24 up afterwards.

25 Q. Look please in bundle {RC-J5/14.1.1/2},

1 and we see here a settlement with the ANZ
2 National Bank, a settlement of claims is dealt with
3 at the bottom of page 2. You will see that clause 3
4 refers to ANZ bank's commitments in relation to
5 interchange. Details of those have been redacted
6 because they are confidential.

7 Then on page 3, if we go down to
8 that, please, {RC-J5/14.1.1/3} you will see that,
9 clause 4, there was an obligation that the issuing
10 banks -- well, this issuing bank agreed to give the
11 option of unblended as between Visa and Mastercard
12 transactions to make that optionality available.

13 Can you see that?

14 A. Yes.

15 Q. Then under clause 5, other issuing bank
16 commitments related to not -- prohibiting or
17 preventing(?) surcharging. So the idea was you
18 could not stop a merchant surcharging the
19 transactions if they wanted to.

20 A. Correct.

21 Q. The Commerce Commission, I think, thought
22 that this had brought about a new competitive
23 landscape. Is that fair?

24 A. I think from the -- I only know from their
25 evaluation document, but I think they broadly

1 thought it had been successful.

2 Q. But after the settlement expired in 2013,
3 the situation from the perspective of the regulators
4 deteriorated, did it not? They were not so happy
5 with the payment system in New Zealand after the
6 settlement --

7 A. I do not -- I do not agree.

8 Q. Could we look, please, in bundle
9 {RC-J3/85/1}. I think that might be J5 actually.
10 Let us bring up J3 for the moment. No, that is the
11 right one.

12 Can we start, please, at page -- let
13 us just have a look at that page for a moment to
14 locate it. This is the Ministry of Business,
15 Innovation & Employment in New Zealand. It is an
16 issues paper from October 2016. Can you see that?

17 A. Yes.

18 Q. If we then go, please, to page 6,
19 {RC-J3/85/6} and you will see under paragraph 6,
20 "Background", there is a significant contribution
21 being recognised for EFTPOS transactions within
22 New Zealand in terms of overall card payments. Do
23 you see that?

24 A. Yes.

25 Q. If we move on to paragraph 11, page 7,

1 {RC-J3/85/7} the Ministry thought that there was
2 economic inefficiency in the credit card market:

3 "... credit cards provide a number of
4 benefits to both consumers and merchants ... current
5 market incentives drive at least 45 million
6 [New Zealand dollars] per year of additional cost to
7 the economy through the use of more expensive credit
8 card networks ..."

9 So that was the Ministry recognising
10 that the system post-settlement was not working with
11 the efficiency that they wanted to see.

12 A. We had engaged regularly with the
13 New Zealand Commerce Commission and we also had
14 a number of meetings with the Ministry of Business
15 with regard to interchange.

16 We did make some changes in how we
17 set out our -- in terms of our sort of -- in terms
18 of transparency of our rates, just in terms of in
19 response to them. But we did not -- I never
20 understood internally that there were significant
21 concerns with the Commerce Commission or the
22 Ministry of Business that they would, you know,
23 subsequently be further taking any, any action.

24 So we regularly engaged all the way
25 throughout the whole period from settlement until

1 the recent Act.

2 Q. If we look at page 8, please,
3 paragraph 14, {RC-J3/85/8} the Ministry was
4 expressing concern:

5 "... that the inefficiencies
6 generated were increasing ... competition on the
7 issue of ... was driving up interchange fees and the
8 value of rewards [and] ... banks [were] 'flipping'
9 credit card users to higher cost premium cards that
10 offer higher levels of rewards. All but the largest
11 merchants hold little bargaining power," and cannot
12 do much about it.

13 Can you see that?

14 A. Yes.

15 Q. Then paragraph 17, the ministry was
16 expressing concern that the market dynamics were not
17 great either in the debit market ... rapid growth of
18 market share of scheme debit products in place of
19 ... [the] EFTPOS system."

20 Contactless and online scheme debit
21 now make up a significant chunk of the market, and
22 it is unlikely that the EFTPOS no-charge system was
23 going to remain sustainable when competing with
24 scheme products regardless of the underlying
25 efficiencies.

1 So the Ministry is also concerned
2 about the impact of the schemes' increasing use of
3 debit card transactions in New Zealand.

4 A. Okay, yes.

5 Q. Could we then please look at page 36
6 {RC-J3/85/36}. Under paragraph 131, it says.

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

11 Your letter correcting your evidence
12 has drawn attention to the first, which is that
13 charities might wish to have a lower, or rather
14 issuers and acquirers might wish to offer a lower
15 rate of interchange.

16 Then there is a second category,
17 which is:

18 "When large merchants negotiate
19 directly with the issuing side of the merchant's
20 acquirer to have them charge a lower rate of
21 interchange on transactions made by the issuer's
22 customers with the merchant."

23 That was distinct from merchant
24 scheme or merchant acquirer negotiations that may
25 also take place.

1 So it was recognising that for large
2 merchants able to exercise some countervailing
3 power, they could negotiate directly with an issuing
4 bank to get a better deal. Does that reflect your
5 understanding of the market?

6 A. I would not be able to comment. I do
7 not -- I am a lawyer, I would not look after any of
8 the issuers in terms of their finances. So I
9 am afraid I cannot comment on that.

10 Q. Page 43, please {RC-J3/85/43}.
11 Paragraph 162, reassuringly perhaps, New Zealand
12 have a HACR in place. Do you see that? Honour All
13 Cards Rule?

14 So the way that the particular
15 unilateral, so-called unilateral system was working
16 necessarily required the Honour All Cards Rule to be
17 in place; correct?

18 A. I am afraid I cannot answer that. I am
19 not aware of merchant behaviour or the relationships
20 with their issuers. Sorry, with the acquirers,
21 rather.

22 My understanding was, and it was
23 something which we took very seriously, that
24 steering was permitted. So if we had examples
25 where, you know, there was a party complaining about

1 it, we would take action to reinforce the position.

2 Q. Your second statement then deals mostly
3 with the New Zealand Retail Payment System Act 2022;
4 is that right?

5 A. Yes.

6 Q. Could we bring that up, please. It is
7 {RC-J5/45.1/1}, starting at page 1. Could we then
8 please move to page 3 {RC-J5/45.1/3}. It deals with
9 the purpose, under section 3 of this Act, bottom of
10 the page there. It says:

11 "The purpose of this Act is to
12 promote competition and efficiency in the retail
13 payment system ..."

14 So that was the purpose behind this
15 legislation, was it not?

16 A. Correct.

17 Q. The New Zealand legislative clearly took
18 the view that further regulatory control of
19 interchange fees was needed?

20 A. This was part of a broader labour
21 manifesto. So yes, correct.

22 Q. If we look, please, at page 13,
23 section 29, {RC-J5/45.1/13} this was to:

24 "... ensure that payment surcharges
25 for payment services are no more than the cost to

1 the merchant ..."

2 So it was introducing a restrict
3 surcharging to the cost of the retail payment system
4 for that particular merchant; is that right?

5 A. That is correct, but that had been there
6 in the settlement agreement as well. That had been
7 in place since settlement in 2009.

8 Q. Section 32 then, at page 14 at the bottom
9 the page and then overleaf, top of page 15, deals
10 with the standards that can be imposed by the
11 Commission which could limit the surcharge level.
12 Can you see that?

13 A. Yes.

14 Q. Surcharging remains relatively common in
15 New Zealand, does it not?

16 A. No. It is not common. I mean, I look
17 after Australia as well and that is ubiquitous
18 there. In New Zealand it is considerably less,
19 surcharging is much less.

20 Q. Is it fair to say that it is on the rise
21 in New Zealand? We have seen some press articles
22 which are in theory confidential, which I take --

23 A. I am not aware. I was in New Zealand
24 fairly recently and I have never really noticed
25 surcharging anywhere near the same level as I do in

1 Australia. It is -- it has always been something
2 which I am alert for when I go to that part of the
3 world.

4 So, no, I do not think it is any
5 problem in comparison with Australia, for example.

6 Q. Page 26, please {RC-J5/45.1/26}. It is
7 right, is it not, that each of Mastercard and Visa
8 were designated as applicable systems for the
9 Commission to be able to set standards?

10 A. That is correct.

11 Q. At page 27 {RC-J5/45.1/27}, we see that
12 a maximum interchange fee has been imposed under
13 subsection (3) for a variety of different payment
14 methods. So a contactless payment method has
15 a zero rate per transaction. Can you see that?

16 A. Yes.

17 Q. Then there are slightly higher rates for
18 contactless in person payment methods, and then any
19 online or other payment method?

20 A. That is correct.

21 Q. Now, there is some guidance issued by the
22 Commerce Commission to deal with this Act, and that
23 can be seen in bundle {RC-J5/48.001/1}, starting at
24 page 1.

25 It is just to locate the guidance so

1 you can see what I am dealing with. Then, please,
2 page 6, paragraph 2.2.

3 The concern was there expressed that
4 The Act had been introduced to deal with the lack of
5 efficient competition in aspects of the system
6 leading to poor outcomes for merchants and
7 customers. Can you see that?

8 A. Yes.

9 Q. Page 8, paragraph 2.16 confirms that
10 interchange fees are only payable on certain
11 transactions, not others. That is the switch to
12 acquirer model. Is that talking about the EFTPOS
13 system?

14 A. Would you say that again, please?

15 Q. It is talking about a switch to acquirer
16 model. Sorry, you are quite right, it is the next
17 paragraph, 2.17, switch to issuer transactions,
18 which are the EFTPOS system. Is that right? In
19 contrast to the switch to acquirer?

20 A. It includes EFTPOS, but yes.

21 Q. Then page 9, please, {RC-J5/45.1/9}
22 paragraph 2.20, it says:

23 "Certain larger merchants are
24 classified as strategic merchants by the schemes.
25 Transactions processed for strategic merchants

1 attract lower interchange fees, and therefore
2 a lower [merchant service fee], than transactions
3 processed for small businesses."

4 Did that reflect the competitive
5 landscape in New Zealand in 2022?

6 A. There were certainly strategic merchant
7 rates, usually for particular sectors.

8 Q. Then, please, if we move on to page 10,
9 {RC-J5/45.1/10} paragraph 3.1, reiterating that the
10 purpose of this Act was to promote competition
11 efficiency. So that is 3.2 says:

12 "The purpose of the Act is to promote
13 competition and efficiency in the retail payment
14 system ..."

15 That tracks the statutory language;
16 correct?

17 A. Sorry, would you say that again?

18 Q. That tracks the statutory language? We
19 saw section 3.

20 A. Yes.

21 Q. Then page 13, paragraph 4.1
22 {RC-J5/45.1/3}, the purpose of these caps was to
23 ensure that the merchant service charge payable by
24 merchants decreased because the MIF was the largest
25 component of it?

1 A. Yes, that is what it says.

2 Q. Page 20, please, paragraph 5.11
3 {RC-J5/45.1/20}. This confirms that the Commerce
4 Commission understands that issuers customarily
5 adopt the maximum rate set by the schemes?

6 A. Correct.

7 Q. That was because why would an issuer
8 charge less than the maximum they were entitled to
9 get under the scheme as it applied in principle;
10 correct?

11 A. Broadly, I would understand, yes.

12 Q. In terms of 5.12, it then deals with how
13 an interchange fee is charged and processed, and
14 perhaps I can summarise this rather than necessarily
15 getting you to read quite a long paragraph.

16 In essence, settlement does not
17 involve the transfer of funds into a designated
18 scheme bank account and then out again at this
19 stage, does it?

20 A. No.

21 Q. So you have authorisation codes that
22 authorise the direct transfer from issuer to
23 acquirer of the actual sum of money; is that
24 correct?

25 A. Usually you would have a settlement agent

1 sitting at the back, which then allows for -- Visa
2 would pass the information and there would be
3 settlement, netting off at the end of the day. That
4 is how it broadly works.

5 Q. The interchange fee is simply deducted by
6 the issuer before that transfer of funds takes
7 place?

8 A. It would be my understanding -- my
9 understanding would be that the acquirer, when they
10 get the funds, would then deduct at the merchant
11 before the funds were passed through. I think that
12 is correct.

13 No, I am sorry, it is wrong. It is
14 the issuer. You are right. Yes, the issuer would
15 deduct and pass it through.

16 Q. The acquirer has no option but to
17 therefore receive the amount of money that the
18 issuer chooses to transfer pursuant to the scheme
19 rules?

20 A. I do not understand. Please say that
21 again?

22 Q. Well, the acquirer is not going to get
23 a sum of money and then remit a portion of that sum
24 of money back to the issuer. It is simply stuck
25 with whatever the issuer transfers to it pursuant to

1 the scheme?

2 A. I -- I do not understand settlement
3 enough, I am afraid.

4 THE PRESIDENT: That may mean you cannot
5 answer this question. But in a sense it is one
6 thing where the monies are routed, and
7 I understand your answer that it is a direct
8 payment not via the scheme, but what we have
9 got is settlement at a fairly high level of
10 abstraction and that you net off within an
11 institution and (inaudible) against them, and
12 you need to perform a whole series of quite
13 complex aggregations of no doubt many millions
14 of transactions.

15 A. Yes.

16 THE PRESIDENT: Just in very general
17 terms, that has got to be done by sort of one
18 agency to make sure that everyone has brought
19 into it. You cannot have everyone doing their
20 own sums separately. How does it work in
21 general terms? Is there a sort of settlement
22 office, or is there an office that rationalises
23 everyone's figures to make sure they align?

24 A. Usually my understanding is it is possible
25 that there are other parties, you know, inserted in

1 different markets in different countries. But
2 broadly, you have I go and buy a dress, the
3 transaction gets righted back to my issuer to say
4 that, yes, I have the funds. It would go back
5 through the acquirer, the acquirer would send
6 a message to the merchant to say, yes, we have
7 received an authorisation, I would walk out of the
8 store with a dress, and then the acquirer would send
9 back to the issuer, usually via the settlement via
10 Visa or a settlement agent, who would then deduct
11 the funds from my account and then send back to the
12 acquirer, who would then send on to the merchant
13 with, you know, subject to whatever merchant
14 settlement arrangements they have.

15 THE PRESIDENT: So --

16 A. That would be my -- that would be my
17 general understanding. If there was any very
18 specific arrangements in New Zealand and, for
19 example, the language, the switch to acquirer,
20 switch to issuer, is not the language I would use in
21 Visa.

22 So that is how broadly I would
23 understand the settlement to occur.

24 THE PRESIDENT: Do correct me if I am

25 wrong, but what I am getting the sense of is

1 that actually settlement occurs almost in
2 realtime and on a, as it were, per transaction
3 basis, there is no --

4 A. Usually.

5 THE PRESIDENT: -- aggregation?

6 A. It would -- usually you would have a daily
7 settlement. Some markets you might have, you know,
8 weekly, three days, whatever. But sophisticated
9 markets you would usually expect settlement within
10 a couple of days.

11 Whether the parties choose to then
12 pass on the funds, whether my bank would want to
13 deduct the money immediately, depends on their own
14 systems; likewise whether the acquirer would credit
15 the -- deduct the merchant depends on the
16 arrangements they would have. But that is sort of
17 broadly how they would do it.

18 THE PRESIDENT: Presumably, as the years
19 go by and technology improves, it is getting
20 faster and faster, not slower and slower?

21 A. In theory but you would be surprised
22 sometimes. Settlement, in Japan, settlement can
23 take up to 30 days for example.

24 THE PRESIDENT: Thank you very much.

25 MR BEAL: If we look, please, at page 21,

1 paragraph 5.15, this records the Commerce
2 Commission noting that Visa and Mastercard have
3 a key role to play in both setting the maximum
4 rates and in the net settlement process through
5 which interchange fees are charged and settled.
6 That is an accurate description, is it not?

7 A. Yes.

8 Q. In paragraph 5.18, page 22, we see that
9 each of issuers, acquirers and switches have key
10 compliance obligations, so it is not simply issuers
11 who are tasked with being responsible to ensure that
12 the maximum MIFs are respected under the Act, is
13 that right?

14 A. I would say every party has -- they have
15 their issuers and acquirers need to make sure their
16 inputs are properly done. We have to make sure that
17 they are also properly inputted and the system
18 works.

19 Q. We can see a scenario, for example at the
20 bottom of page 22. Paragraph 5.23 sets out
21 a scenario where the scheme sets a maximum rate for
22 contactless debit at 0.3, but the applicable cap is
23 0.2:

24 "The issuer adopts the maximum rate
25 of 0.3 and charges the acquirer at this rate."

1 Under 5.24, under that scenario the
2 total interchange fee for contactless debit exceeds
3 the cap and the Commerce Commission would consider
4 that each of the scheme and the issuer had the
5 ability to ensure compliance but had failed to do
6 so. So it would be both the issuer and the scheme
7 which were tolerating a breach of the cap and both
8 of them would be held responsible?

9 A. I mean, that is a theoretical. I mean in
10 practice, you have got to -- this is an Act of
11 Parliament. I mean, Visa and the issuers, you
12 know -- you do not take these -- you take these
13 things very seriously. We have a number of checks
14 and balances for our finance teams, our interchange
15 teams, likewise on the issuer sides, to make sure we
16 do not breach.

17 Q. We see that in this hypothetical -- and
18 I appreciate it is a hypothetical and we want it to
19 remain a hypothetical -- but we see at 5.24.2 that
20 the scheme by setting its maximum rate had allowed
21 the issuer to exceed the interchange fee rate and
22 was involved in entering that interchange fee into
23 its interchange system and assigning that fee in the
24 net settlement process. So that is how the scheme
25 becomes responsible for the breach of the cap?

1 A. Yes, if it breached the cap.

2 Q. Page 27, please. Paragraph 6.8 deals with
3 the concept of net compensation. This essentially
4 is an anti-avoidance mechanism, is it not?

5 A. Yes.

6 Q. It is a way of ensuring that the
7 equivalent of interchange revenue is not achieved by
8 another route?

9 A. That is right.

10 Q. Now, given that we have been operating in
11 this world of zero MIFs for contacted in-person
12 debit charges in New Zealand, have you, with overall
13 responsibility for New Zealand, seen a sudden
14 stampede of custom to American Express or another
15 scheme rather than Visa?

16 A. No.

17 MR BEAL: Thank you. I do not have any
18 further questions.

19 THE PRESIDENT: No questions from us.

20 MR KENNELLY: No re-examination.

21 THE PRESIDENT: Ms Stone, thank you very
22 much for your evidence, we are very grateful
23 for your time and answers. You are released
24 from the witness box. Thank you.

25 MR KENNELLY: Sir, our next witness is

1 Mr Knupp, and I have one question to ask him in
2 chief before my friends begin their
3 cross-examination and, again, for that one
4 question and answer we need to go into private
5 and I can explain to the tribunal why that is.
6 Again it is an exceptional circumstance, but
7 I can give the tribunal.

8 THE PRESIDENT: Just pausing there. We
9 have got Ms Stokes at 2 o'clock, have we not?

10 MR KENNELLY: Yes, sir. Sorry, not before
11 2.

12 THE PRESIDENT: Not before 2. I suppose
13 the question is how long are we going to be
14 with Mr Knupp. I would not want Mr Stokes to
15 be discombobulated given the efforts we have
16 gone to to line him up for 2 o'clock.

17 MR BEAL: Well, as the tribunal will be
18 well aware from its sitting practice and from
19 the days in practice before sitting, the timing
20 of cross-examination depends on the timing of
21 the answer. I would hope to be done within
22 an hour or so with Mr Knupp, but that does
23 rather assume relatively short answers rather
24 than an answer and then a speech. I do not
25 mean that in a derogatory way but you are aware

1 that witnesses give answers in different ways.

2 THE PRESIDENT: Of course. So all things
3 being equal to coin an economist's term --

4 MR BEAL: Yes.

5 THE PRESIDENT: -- do you think an hour
6 and a half would be a safe -- I am not holding
7 you to anything but --

8 MR BEAL: No, I hope if we are sitting
9 again as the tribunal indicated at 1.30 pm in
10 my head I am hoping that we would be on to
11 Mr Stokes by 3.00 pm. That may be ambitious
12 but let us see. Then in terms of Mr Stokes
13 I do have more questions for him at the moment
14 but one thing that I have mooted with my
15 learned friend Mr Stokes and Mr Korn both give
16 evidence on things like the co-badging rule and
17 given Mr Stokes' medical issues, one thing
18 I have mooted at least, but I have not yet had
19 an answer back from my learned friend, would be
20 if I simply put to Mr Stokes that this is also
21 covered by Mr Korn, to the extent that there
22 are contentious aspects of his evidence I will
23 cover them with Mr Korn, is he happy with that
24 and he may say yes or no at that point. But
25 that would strip out some of the questions

1 I might otherwise need to ask Mr Stokes.

2 THE PRESIDENT: That is helpful to know.
3 I am just wondering, seeing the time, whether
4 we ought not to deal with Mr Stokes first. Now
5 that means we would have to think about
6 starting him --

7 MR KENNELLY: I am sorry, sir, the
8 tribunal is missing a key piece of information
9 which is that Mr Knupp needs to fly out back to
10 the United States, I think it is this evening,
11 and so -- sorry, first thing tomorrow morning
12 I am told. That is fine.

13 THE PRESIDENT: Look, we will proceed then
14 at 1.30, if that is all right, and I am sorry
15 that is an abbreviated break, but I would
16 rather we got through both of those witnesses
17 today and we will proceed at 1.30 with Mr Knupp
18 and hopefully at 3 o'clock, or before, with
19 Mr Stokes, but we will certainly keep an eye on
20 guiding the witnesses as to what helps us.

21 I mean speeches are rarely appropriate but
22 sometimes they are and if they are then --

23 MR BEAL: As I said, I did not mean that
24 in a derogatory way, but it is beyond my
25 control how they answer a question for the most

1 part.

2 THE PRESIDENT: Not at all. It is quite
3 understandable, Mr Beal, that you should
4 appropriately qualify your estimates. We would
5 qualify them in any event because we know
6 counsel estimates are writ in water, but we are
7 very grateful for the guidance. We will resume
8 then at 1.30.

9 MR KENNELLY: May we resume in private?

10 THE PRESIDENT: We may resume in private.

11 MR KENNELLY: I am obliged.

12 THE PRESIDENT: I do not think I am going
13 to require you to justify that because,
14 frankly, we expect you to have good reason for
15 it and we will see in due course. We will
16 resume in private, but not for very long, and
17 then we will shift into public session for the
18 rest of the afternoon, hopefully. Thank you
19 very much. Until 1.30 pm.

20 (12.59 pm)

21 (The short adjournment)

22 (1.30 pm)

23 (Hearing in Private)

24 (1.30 pm).

25 Questions by THE TRIBUNAL.

1 (Hearing resumes in Public)

2 MR TIDSWELL: In that case, Mr Knupp,

3 I just want to ask you a question about the way
4 in which the interchange fees are set because
5 I understand you have quite a lot of expertise
6 in that. The thing that I want to understand
7 better is what your objectives are and,
8 therefore, how you balance the various
9 considerations when you go about that and so,
10 for example, one of your objectives might be,
11 I think it is, as I understand it, to maximise
12 the issuance of cards and therefore the size of
13 the scheme as a whole. But I am keen to
14 understand whether there are other objectives,
15 for example setting the balance between issuers
16 and acquirers which fall, if you like, outside
17 that objective; in other words are you trying
18 to strike some form of pricing to reflect
19 supply and demand between issues and acquirers
20 just for the purpose of getting the price
21 right, or are you more focused on the outcome
22 to issuance. I do not know if that makes sense
23 as a question; is there anything in there you
24 do not understand?

25 A. I understand the question.

1 MR TIDSWELL: Yes, thank you.

2 A. So if we just take a bit of a step back,
3 all right. So interchange is not Visa's revenue,
4 right. So we make money the more throughput there
5 is through the system, so the more transactions, the
6 more volumes, we make money. So to do that, we need
7 to maximise participation on both sides, so
8 ultimately we want as many merchants to participate
9 in the system and as many cardholders to participate
10 in the system, right. The more we have of that,
11 right, then the more interactions there are and the
12 more transactions we have.

13 So when you think about interchange,
14 right, from the end point perspective it is quite
15 black and white, right, so issuers will always
16 prefer more interchange, right, because then they
17 can put better cardholder benefits, obviously it
18 helps with their profitability and remember
19 an issuer is serving the consumer in the capacity of
20 "I am providing them a payment service", right.

21 Merchants want the lowest possible
22 interchange at all times, right, so they want the
23 lowest cost and they are by the way serving the
24 exact same consumer, they just want to do it as the
25 consumer's capacity as a shopper, right, so I want

1 to offer the lowest cost or the best service to the
2 consumer as the shopper. The issuer is doing it as
3 the same consumer as their payment option. So, you
4 know, merchant side wants it to be low, issuer side
5 wants it to be high.

6 So the objective is to try and get
7 the balance right and, you know, it is not perfect.
8 Interchange is a little bit of a blunt instrument
9 because we only have so many rates and there are,
10 you know, tens of millions of merchants out there
11 and, you know, thousands and thousands of issuers
12 out there who create these benefits.

13 So we are trying to balance that to
14 bring it, you know, into equilibrium.

15 So the market, you know, doing that
16 also realising we have competitors that are managing
17 the same value propositions.

18 So, you know, historically, you know,
19 American Express is one of our big competitors.
20 They have chosen a higher merchant rate and better
21 benefits to cardholders but that means that
22 historically they have had less merchants accept
23 them, right, that is their trade-off with the
24 equilibrium. Visa and I guess Mastercard have chosen
25 a slightly lower rate and we then have broader

1 acceptance as a result.

2 So different networks can try and
3 choose equilibriums and then the market will
4 typically tell you when you have the balance wrong,
5 right. So if another network has a higher
6 interchange rate and they are doing very well on
7 merchant acceptance, then, you know, competitively
8 this will be disadvantaged. We have to consider
9 that.

10 On the other hand, you know, we have
11 a lot of merchants that today do not accept our
12 rates and so, you know, clearly our pricing
13 structure is not working for them and so then in
14 those cases we often have to introduce lower rates
15 to bring them into the system.

16 So it is not -- A lot of times this
17 is made out to be like an issuer versus an acquirer
18 or issuer versus merchant issue. It is not. You
19 just have stakeholders in the merchant and the
20 issuer who are trying to serve the consumer in the
21 way that they have the relationship with that
22 consumer.

23 So trying to balance that out,
24 because at the end of the day, right, you said it
25 might be a secondary consideration. Merchant costs

1 and acceptance is a primary consideration, right,
2 because the true value of the network is how many --
3 is the utility that we can provide to the
4 cardholders and that utility is in the way that we
5 can -- that the acceptance that is out there, right.

6 So there are really two primary
7 things, which is how do we get the most merchants on
8 the system and then how do we provide a great value
9 proposition for the issuers to get the most
10 cardholders? When it is out of whack, we will lose
11 cardholders on the issuer side to a competing
12 network or we will not have the merchant acceptance
13 that we need to provide the utility back.

14 MR TIDSWELL: Can you say anything about
15 the sort of material available when you are
16 making that evaluation particularly in relation
17 to the merchant side, because obviously there
18 is a question there about the degree to which
19 increases in price might affect merchants and
20 their decisions. Obviously -- and you clearly
21 have an existing position which you can
22 benchmark against and presumably quite a lot of
23 history, but do you gather information about
24 the sensitivity of the merchants to price, is
25 that done in any formal way or modelling way?

1 What sort of materials do you rely on when you
2 look at that side of the market?

3 A. So, you know, one way is you can just look
4 and say, well, where we look at our transactions,
5 where do we have acceptance, where are merchants,
6 you know, accepting us, where are merchants
7 accepting us, but they are really not happy so they
8 are actively steering or trying to do something away
9 from us. But really the best thing is you talk to
10 them, right, so Visa has merchant sales teams all
11 over the world and some of them work with large
12 merchants, but some of them are just tasked with
13 going out there and saying how do we build more
14 acceptance.

15 So they will go talk to those
16 merchants and, you know: Why are you not
17 accepting -- what would be a rate or a structure?
18 Obviously like you are aware we set an interchange
19 and we have our fees but the acquirer ultimately
20 sets the end price to the merchant and we cannot
21 control that. But as far as the part we can
22 control, there is a pretty substantive feedback loop
23 to hear back from merchants, right.

24 So that should just be like, you
25 know, everybody wants a lower price, right, on

1 anything, right. If you talk to any merchant they
2 will always say: I -- you know, the honest merchants
3 say I love -- I love the product, I just wish it was
4 cheaper.

5 But what we are really out to find is
6 okay, well, what is the price where you are finding
7 value in the product and you are willing to accept
8 because it is finding that point where it is more
9 valuable than the cost to take it, is sort of what
10 we are trying to get at. You know, we say jokingly,
11 like, we get it right when you know both sides are
12 upset at Visa, so issuers complain it is not high
13 enough and merchants complain it is too high, you
14 know; somewhere in there is a balance that is
15 working.

16 MR TIDSWELL: Can I ask, is there a system
17 by which all that information that comes out of
18 just engagement in the field, comes back to you
19 as a pricing team? Is that a structured
20 system, or is it more anecdotal?

21 A. It is more like we do not have a system
22 that just brings everything that we need to.
23 I mean, we have systems where the salespeople take
24 all their notes and do all the things but most of it
25 is done through iterations, so we are focused on

1 this segment of merchants in this country, you know,
2 let us have a discussion about the specific merchant
3 type, the specific rates that are in play, and, you
4 know, sometimes it is, well, you have an interchange
5 rate but it has got a per item component, so I am
6 just making this up, but let us say the rate is, you
7 know, 0.5% plus 10 cents, but then they say, well,
8 for these merchants have a low transaction size,
9 that 10 cents is causing the problem, it is not the
10 other part.

11 So we try to think about the
12 specifics of the merchant.

13 It is a bit of a trade-off, right.
14 You do not want to have so many different rates that
15 it is just unwieldy for everyone to work with, but,
16 you know, the fewer rates you have then the more
17 mismatches you have, that just does not work for
18 certain segments or certain types of merchants.

19 MR TIDSWELL: Thank you.

20 PROFESSOR WATERSON: A follow-up on
21 a couple of points related to all that. Would
22 you say that the situation in the
23 United States, where the interchange fees are
24 higher, is occasioned by the fact that American
25 Express is much more important in the US than

1 it is in, for example, in Britain?

2 A. I would say it is a contributing factor.

3 There are plenty of other markets around the world
4 that have interchange much higher than the UK, where
5 Amex is not such a predominant player. A lot of it
6 has to do with how the systems have evolved and
7 whether they have evolved towards stronger
8 cardholder propositions in terms of, you know,
9 cardholders paying low fees or no fees, reward
10 structures, versus other markets that have developed
11 where interchange is lower but, you know, the
12 cardholder is getting a lot less benefit when they
13 use the product.

14 So it is hard to generalise.
15 Competitive factors are important. The fact that
16 American Express was there and American Express was,
17 you know, actually there before Visa, if we go way
18 back in history, that actually does matter from
19 a competitive standpoint. But it is certainly not
20 the only factor and there are other markets where
21 American Express is not as big a player in the
22 United States that have interchange that is sort of
23 equivalent to the US on them.

24 PROFESSOR WATERSON: Thanks. I got the
25 impression you were talking mainly about credit

1 cards in your discussion with my colleague.

2 What about debit cards, where in a sense there
3 were fewer levers to pull, how do you see
4 things there because there are not generally
5 benefits in the same way with debit cards?

6 A. It depends. So sort of it is a bit
7 relative. So in the United States before
8 interchange was regulated, there were actually quite
9 a lot of debit rewards programmes. When interchange
10 came down, at least for the banks where it came
11 down, most of that went away. Debit cards are
12 a little bit different because when you have
13 a credit card the only real revenue in the credit
14 card is for an issuer is the fees that you might
15 charge the cardholder, the interchange and then they
16 have sort of their interest that they earn on any
17 lending behaviour, right. But debit cards are
18 usually attached to a demand deposit account so
19 there are other levers that issuers pull depending
20 on what -- what the level of interchange is.

21 So when interchange tends to be in
22 markets where it has been relatively higher, you see
23 a lot of the -- there is not a lot of fees or other
24 things on those demand deposit accounts, right, so
25 you see much lower instances of overdraft fees and

1 other things like that because the issuer who has
2 a demand deposit is making money on the debit card
3 usage. When you see interchange very low, then you
4 see consumers paying quite a bit more for their core
5 banking accounts.

6 Again, you know, I do not want to
7 make like it is black and white, there are all
8 different flavors of that depending on how high the
9 debit interchange rate is in terms of supporting the
10 rest of the demand deposit account P&L.

11 PROFESSOR WATERSON: Thank you. What
12 about other mechanisms that may bypass Visa
13 completely? I am thinking of the Faster
14 Payment system for example, how do you see
15 those?

16 A. So I would suggest that those are -- they
17 are forms of money movement, right. It is not --
18 moving money is not hard, right, that is it is not
19 hard and it is not expensive, right. Our costs to
20 settle transactions to actually put the money where
21 it is supposed to go is not hard. It is everything
22 that goes around it, you know, how are you
23 authenticating the partners, the two parties
24 involved in the transaction? How are you handling
25 disputes that could arise? How is liability put

1 between the end points or to the user of the payment
2 mechanism and again so payments is -- I mean, the
3 best analogy I can come up with it is a little bit
4 like a manufacturing business that when things
5 are -- do not cost a lot of money to operate when
6 everything goes right, but, like if you have defects
7 in a manufacturing business those are very, very
8 expensive to manage.

9 In our transactions that go poorly,
10 whether it is fraud whether there is a dispute,
11 those types of transactions then become expensive
12 for the ecosystem to handle, right. So a lot of
13 what Visa does and a lot of the support is around
14 risk and fraud and managing disputes and how to try
15 to minimise those but also try to, you know, manage
16 those as seamlessly as possible when they happen.

17 So when you are talking about RTP or
18 HCH or others, those basic rails to move money are
19 there, most of them were created to move -- transact
20 large dollar amounts between financial institutions,
21 right, that is what it was made for; not a lot of
22 transactions but two known parties, right.

23 Payment systems are about moving lots
24 of little transactions between parties that do not
25 know each other. Right? So the solutions that you

1 talked about, I mean, we consider them to be very
2 real competitors but they also have drawbacks,
3 right. They do not do a lot of the things very well
4 that I just talked about and typically when you see
5 those types of solutions come into the market they
6 come into, like, the safest, lowest fraud least
7 dispute type of environment, right.

8 So, you know, you paying your utility
9 bill, right, it is a similar amount, person knows
10 who you are, like that is an easier transaction, you
11 know, you going to purchase at a luxury retailer is
12 a very, very different type of transaction.

13 PROFESSOR WATERSON: Yes, but one of the
14 things you said about allocating risk and so
15 on, presumably, that is also a decision tool
16 within the issuer/acquirer framework who pays
17 for problems?

18 A. So, yes, so there are, you know
19 effectively there are potentially three parties that
20 could pay, you know, the issuer, the acquirer or
21 potentially the cardholder. So Visa cards come with
22 zero liability so you as a cardholder are not liable
23 and, you know, the issuer and the acquirer through
24 the Visa rules and our dispute processes will assign
25 liability and effectively figure that out, right.

1 But if, you know, it is not quite the
2 same, but if you want to pay cash somewhere and
3 there was a problem it is on you, you got to go
4 figure it out with the merchant if there was some
5 problem or how to deal with it, right. So our
6 systems offer that benefit and some of these RTP
7 they have not quite figured out all those dynamics
8 about, you know, who is liable, when, how, you know,
9 how any fraud or charge-backs will be handled. So
10 all those processes are (inaudible), but as
11 a network we have very specific rules about, you
12 know, in what situations, you know, which party has
13 to hold the liability for the transaction.

14 PROFESSOR WATERSON: Thank you very much.

15 A. Okay.

16 THE PRESIDENT: A few questions from me.
17 I do not know if you read the transcript of
18 Mr Livingston's evidence to the tribunal?

19 A. I have not.

20 THE PRESIDENT: Well, no matter. If you
21 imagine the ecosystem of schemes and I am
22 asking neutrally about Visa and Mastercard and
23 if you could make your answers general or
24 indicate when they are Visa specific, that
25 would be very helpful, but they are general

1 questions.

2 We have got the scheme at the apex of two
3 limbs, one is down the issuing bank side where
4 they pay the scheme for participating in the
5 payment side, moving across to the merchant
6 side, which is the other limb, where one has
7 the acquirer providing services to merchants,
8 providing services to customers. But as you
9 said earlier, at the end of each limb the
10 customer is actually the same person, you have
11 got the customer's consumer buying things with
12 the money that they have in their own account
13 or on credit with their -- in their role as the
14 holder of the bank.

15 So you have got these two sides of the
16 market all to do with payment. Presumably
17 there are negotiations as to price between the
18 issuing banks and the scheme and the acquirers
19 and the scheme, which go on in the normal way.

20 A. So with the issuing side, yes. So are we
21 talking about we are not take about interchange.

22 THE PRESIDENT: Not talking about
23 interchange no.

24 A. Okay. So we negotiate participation with
25 issuers for sure and as you might imagine, it

1 follows the way economic theory would suggest, the
2 larger the issuer, right, the more value they bring
3 and so they would get, you know, a better price,
4 a very small issuer would get less of a discount or
5 an incentive.

6 So that negotiation happens and then
7 in return, those issuers then make a commitment to
8 the scheme, right, it could be Mastercard, Visa, if
9 they participate in Amex, whoever, and they can make
10 a commitment at the bank level, we are going to
11 issue all of our cards, Visa, all of our cards,
12 Mastercard, or it could be at the portfolio level we
13 are going to issue this specific portfolio with Visa
14 and Mastercard, different clients do it different
15 ways.

16 On the acquirer's side, there is very
17 little negotiation specifically with acquirers and
18 the reason for that is acquirers -- if you gave --
19 let us say you gave the largest acquirer in the
20 market a better deal than the smallest acquirer, the
21 largest acquirer would have a competitive advantage
22 to go out and bid for merchants, right. So you want
23 to keep acquirers on a level playing field so they
24 can all compete for the same merchants and we are
25 not sort of favouring one versus the other.

1 When we do negotiations directly with
2 the merchant, right, that is a little different,
3 right, because then we know -- so, for example, if
4 we gave an acquirer one acquirer a reduction -- let
5 us say we said: we are going to give you a 5 cent
6 incentive on every transaction. Well, they could
7 pass that on to merchants and the other acquirers
8 would not be able to compete very well with that.
9 But if we go down to the merchant level and have
10 a -- we may have an incentive deal or something with
11 them, then that is okay, that is fine because you
12 are not disrupting the competitive equilibrium of
13 the acquirer market.

14 THE PRESIDENT: It must be a fairly large
15 merchant to have specific negotiations between
16 scheme and merchant?

17 A. Generally that is -- that is the case and
18 just like, you know, on the issuer side you give the
19 biggest benefits to the biggest issuers, on the
20 merchant side it is generally the largest merchants
21 that would have some sort of customer arrangement.

22 (Hearing in Private)

23 (Hearing resumes in Public)

24 THE PRESIDENT: I am grateful. Just to go
25 back to what you called the non-negotiation

1 with acquirers, in effect what you are saying
2 is that there is a constraint on the scheme in
3 terms of the ability to differentiate in terms
4 between acquirers because you want to maintain
5 the level playing field between the merchants
6 to whom the acquirers sell their business?

7 A. Correct, there is two factors there; that
8 is the first one which is you want a level playing
9 field on the acquirer's side.

10 The second one is, I mean, I guess we
11 are getting into two-sided economic theory, but on
12 the issuer side the issuer is making a single
13 decision: they are going to issue Visa, they are
14 going to issue Mastercard, American Express, CUP,
15 whoever they are going to do.

16 On the acquirer side, acquirers and
17 merchants engage in multi-homing. They are going to
18 accept multiple brands, right. So -- and the few
19 merchants out there that only accept one brand, you
20 know, the interchange and fee prices just fall off
21 a cliff, right, because they are providing unique
22 benefit to the network saying well, you know, if you
23 want to shop at my merchant then you know, I only
24 take one of the network's cards but all of the other
25 merchants they accept all brands, right, for the

1 most part, right, or all brands that are going to be
2 relevant for them. So when -- if you provide
3 a discount to them, you are not really getting any
4 benefit in the network, because they are just going
5 to accept the other brands as well. The largest
6 merchants like I said, Amazon, have the ability to
7 negotiate that. But in general, like, you know, as
8 a business, you put incentives where it is going to
9 drive sort of unique value or value to your business
10 and so that dynamic also comes in.

11 THE PRESIDENT: That is very helpful. If
12 I could put it fairly brutally. The
13 competition that exists between Visa and
14 Mastercard is either attenuated or non-existent
15 as between acquirers because the merchants to
16 whom they sell their business have got, for the
17 reasons you have just given, to offer
18 acceptance of both Visa and Mastercard because
19 the customers who buy from the merchants do not
20 really differentiate between the two.

21 A. That is correct, right, and so if you --
22 and if you think about how a merchant would react
23 when they get reductions, let us just say for
24 example Visa offered a lower price to a particular
25 merchant, right. I have never seen a situation

1 where that merchant would say, okay, great, I am now
2 putting signs up in stores saying you get a discount
3 when you purchase, but only when it is a Visa card.

4 Let us assume that it is perfect
5 markets and they 100% pass-through and they lower
6 price, they are just going to lower price on every
7 product no matter how you pay for it, right. So
8 that puts networks in a difficult dynamic where, you
9 know, a cardholder going in with a competitor's
10 card, that would be a higher interchange rate than
11 the one that Visa would be getting enabling, you
12 know, that issuer to perhaps offer a better value
13 proposition. So that is why the -- you have that
14 dynamic that exists there.

15 You know, again, that is where you
16 have acceptance. When you are going to build
17 acceptance that does not exist today, you know,
18 oftentimes networks will discount pricing to try and
19 find a value proposition that works for merchants
20 that are not currently accepting.

21 THE PRESIDENT: So just to recap, before
22 I come to my final couple of questions.

23 I think what you are saying is when one looks
24 at the two sides of this two-sided market, the
25 prospect of proper competitive negotiations on

1 the issuing side are much more real than they
2 are on the acquiring side because acquirers
3 have all these difficulties of consumers, that
4 is to say the purchasers from the merchants who
5 buy from the acquirers being indifferent really
6 as to card, they just want the same price
7 whatever is happening; merchants know this and
8 that affects the abilities to negotiate on the
9 acquirer's part with the scheme at the apex for
10 the reasons you have given over the last few
11 questions?

12 A. That is true with the way that -- so if
13 an issuer decides that they do not want to make
14 a commitment I am going to stay free to issue
15 whatever cards I want and they do not get a discount
16 or a negotiation. You know, there are not a lot of
17 merchants that have chosen to say I only want to
18 accept one or I am only going to accept, you know,
19 four of the five or whatever.

20 In those cases, those dynamics change
21 very rapidly but when you we are talking about this
22 environment where acquirers and merchants multi-home
23 issuers, single-home, that is what drives this
24 dynamic. It is not really about size exasperates
25 it, so the size of the issuer, the size of the

1 merchant, that can exasperate it, but it is really
2 about the fact that issuers choose to single-home,
3 make one decision, merchants choose to multi-home,
4 right. They do not have to, neither side has to do
5 that, but that is the way that it is mostly
6 developed.

7 THE PRESIDENT: Indeed and choose, if

8 I may say so, is implying a freedom of choice
9 which is really belied by the commercial
10 realities on each side, because you say
11 an issuing bank can genuinely say: I will go
12 with Visa, I will go with Mastercard, I will
13 not go with both. But the merchant, the
14 intermediate, the direct counterparty to the
15 acquirer really has no such choice because as
16 we have discussed they need to multi-home, not
17 as matter of choice but because they will lose
18 an awful lot of custom if they do not?

19 A. I think that is directionally true. But
20 they do not necessarily need a single home. Right,
21 if I was a (inaudible) merchant, let us use that as
22 an example, had a lot of cross-border volume, Visa,
23 Mastercard, Amex, Discover, I could issue a network
24 RFP and say, you know, I am only accepting three of
25 the four, I am only accepting two of the three.

1 Right, and so they -- so you either have to assume
2 like every brand they accept is a "must accept", or
3 you have to assume not all brands are "must accept",
4 in which case, so if every brand is "must accept"
5 and you say: okay, well every network is in the same
6 boat and they are all kind of competing in the same
7 way or if you say some networks are not "must
8 accept", then the merchant would be free to say:
9 well, I am going to pressure the networks for lower
10 rates but running an RFP that says: hey, maybe I am
11 only going accept a few of you at the end of this.

12 THE PRESIDENT: Fair enough and we heard
13 from a number of witnesses that American
14 Express is by the example very different from
15 Visa and Mastercard. But it would be quite
16 a strange proposition for a merchant to accept
17 Mastercard and not Visa or vice versa, or am
18 I missing something?

19 A. No, no. It -- it is how we have all been
20 conditioned, right, but it does not necessarily have
21 to be that, right, that is just the way it has
22 developed. At the end of the day, at least
23 I believe that is the case because merchants are
24 still the costs they are paying, they may wish were
25 lower but their costs are still well below the value

1 they are getting for accepting all those products.

2 THE PRESIDENT: No, that is helpful. So
3 what this has been leading up to is; we have
4 got these forms of negotiation but different on
5 both sides of the market. Why do you need the
6 interchange fee to operate, as it were, as
7 a cut-across between the two limbs? Why do you
8 not leave it to the negotiations between on the
9 one hand the scheme and the issuer and, on the
10 other hand, the scheme and the acquirer? Why
11 do you have this extra form of charge or
12 pricing that moves across and on one level does
13 not involve the scheme but on another level
14 clearly does because it is the scheme that sets
15 the rate?

16 A. So if you are asking me: could a Visa and
17 Mastercard evolve so that we said we are not doing
18 interchange which is this pass-through mechanism, we
19 are simply going to increase, we are going to do it
20 all in the fee structure, so we are going to charge
21 a higher fee on the acquirer side and then we will
22 pass a bigger incentive through to the issuer side,
23 which is effectively how Amex operates today.
24 I mean, they had the same economic flow we do, they
25 just structure it as fee and incentive as opposed to

1 an interchange rate.

2 It could be done. There is a couple
3 of reasons why that I would say that that is
4 probably sub optimal. The beauty of an interchange
5 fee falling due is it keeps everything on a nice
6 level playing field. So issuers can all say: hey,
7 I know what the interchange rate I am getting and
8 a small issuer can say: I know I am getting the same
9 rate as the largest issuer in the market. You know,
10 a merchant, you know, can say, you know, are we
11 still in the way the posted rates were, you know,
12 a small merchant and a large merchant are getting
13 the same interchange rate, you know. Obviously some
14 large merchants may be able to negotiate that.

15 But generally, like, everybody is --
16 it is a very transparent way that people can sort of
17 trust the system. If you are out there negotiating
18 separately what is now in the open, right, the rates
19 separately with every issuer, every acquirer, it
20 leads to, you know, people always assuming that:
21 wait, I must not be getting the best rate. Someone
22 else might be doing something better.

23 So when you operate a system globally
24 at the scale that we do, having that transparency
25 and trust that everyone understands what the numbers

1 are, in most cases our fees are also like public as
2 well, and again, you know, different end points
3 understand there is some negotiation on the fee and
4 the incentive side. But the fact that the most of
5 the revenue flowing through this model is
6 interchange and it is very transparent, that
7 transparency drives a lot of trust in what we do.

8 The other thing is -- sorry, just --

9 THE PRESIDENT: No, please do.

10 A. Sometimes we have to change it, right, so
11 if we are trying to go out and say: hey, we are
12 doing very poorly in, I do not know, small ticket or
13 we are not doing very well in, you know, this
14 segment, Visa can change that rate and then it is
15 applicable to all issuers going in. So we can, you
16 know, just go ahead and drive that value to the
17 merchant and know that all the interchange flows
18 back to the issuers are the same. They have
19 different negotiated agreements with everyone. It
20 is a little bit more challenging to adjust the
21 system as you need to move it forward.

22 THE PRESIDENT: That is very interesting.

23 So the last question, really ending up
24 where Mr Tidswell began, he asked you, if you
25 remember, what informed your setting of the

1 price of the interchange fee and I wonder if --
2 and do please push back if I have got this
3 wrong because that is really important, are you
4 trying at the aggregate level in setting the
5 interchange fee to proxy what would be the
6 outcomes of the various negotiations that would
7 otherwise occur on price as between acquirers
8 and scheme and scheme and issuers? In other
9 words, is that what you are trying to achieve,
10 albeit at the aggregate level so that you set
11 one rate for all issuers and all acquirers?

12 A. I will say yes and no, and I will explain
13 that.

14 Yes, in that some ways the balance we
15 are trying to achieve maybe would be similar I think
16 to that outcome. But any time you would be
17 negotiating across that many entities, it is a lot
18 of extra work for all parties involved, but,
19 secondly, you are always going to get outliers that
20 probably do not make sense and risk disrupting. So,
21 you know, if we were going to negotiate with 8,000
22 issuers and, I do not know, let us just say it was
23 3,000 acquirers, chances are you are going to find
24 some situations where, you know, for whatever reason
25 someone is going to want to justify why they are

1 special or they are different and then, you know,
2 you can end up with some non-competitive, non-level
3 playing field things like that. So I just, I do not
4 think you can truly replace the interchange
5 structure which is transparent and visible to all
6 with private -- even if you could conduct that many
7 private negotiations, I think you are going to end
8 up with some disequilibrium in that type of
9 structure.

10 I also just think it is -- it is
11 probably not -- sorry ...

12 When we set rates, the interchange
13 rates, and they apply to everyone, and if we change
14 them they equally apply to everyone, people know
15 that and so when they do custom deals with us, they
16 do it with that certainty. If we were going to be
17 constantly negotiating different rates with
18 different entities and so the effective interchange
19 rates could be constantly moving entities would not
20 want to engage into very long deals, right, they
21 would like: maybe I will do this for two years but
22 then Visa: you might negotiate something different
23 with my competitive issuing bank or a merchant might
24 say: we might negotiate something with my
25 competitive merchant bank, so you would end up just

1 in this I think a dual loop of spending all this
2 time in negotiation. Whereas when you set the rates
3 there, you know, when you do have negotiations, you
4 have fewer of them and they are for a longer
5 duration of time because there is a cost and time
6 and energy to all parties involved.

7 Last thing to say it is also -- it is
8 probably not feasible to do negotiations with
9 everyone. It is just, you know, there is a lot of
10 participants in the system, people are going in and
11 out of the system, you know, people acquire each
12 other, which deal applies? It can get quite
13 complicated.

14 (Hearing in Private)

15 (Hearing resumes in Public)

16 THE PRESIDENT: I am grateful to you,
17 Mr Beal, can we then go into public session.
18 Do we need to rise?

19 We will do that and maybe we will take
20 a break after half an hour or so.

21 MR BEAL: Would you like me to wait until
22 the sign is off the door?

23 THE PRESIDENT: We may as well do that.

24 Cross-examination by MR BEAL

25 MR BEAL: Right. Mr Knupp, could we look,

1 please, in your second witness statement which
2 is at {RC-F4/15/1}. I am sorry, that is the
3 wrong one; it is the first witness statement,
4 {F4/8/1} and can we pick it up, please, at
5 paragraph 12. {RC-F4/8/3}, bottom of page 3 you
6 refer to the Durbin amendment and top of page 4
7 {RC-F4/8/4} you say:

8 "... I co-led a cross-functional team ...
9 that ... developed Visa's approach to
10 maintaining placement with issuers ... enabled
11 incremental authentication functionality ...
12 reworked ... pricing; and ... competed for
13 debit routing through commercial deals ... with
14 merchants."

15 It then says:

16 "I also continued to work on large issuing
17 client deal renewals."

18 So Visa, when it is appropriate to do so,
19 will cut significant deals with issuing banks
20 to get the Visa proposition accepted by issuing
21 banks?

22 A. Yes. Visa when we talked about this
23 before but, yes, we will cut commercial deals, so we
24 provide incentives and other benefits to issuers, in
25 return for them selecting Visa as their primary card

1 network.

2 Q. Now, quite a lot of your witness statement
3 is taken up with corporate structure. My suggestion
4 to you is that the changes in the corporate
5 structure have not affected the fact that the Visa
6 setting of interchange fees involves a collaborative
7 effort between the members of Visa and the Visa
8 companies, would you accept that?

9 A. By "members", are you --do you mean
10 issuers?

11 Q. Members as I understand it can be
12 acquirers as well of course but yes, predominantly
13 issuers?

14 A. So issuers and acquirers obviously have
15 opinions about what we should do with interchange.
16 But they have no vote. It is Visa that sets the
17 interchange rate and obviously we seek feedback from
18 our clients, but whether both on the issuing and
19 acquirers merchants but they have no say in how it
20 is set; that is a Visa decision.

21 Q. Could we look, please, at {RC-J5/32/10}
22 turning to page 10. We see this is part of
23 a commitments decision that Visa received in
24 relation to interregional MIFs and it was Visa Inc
25 that received this decision. Are you familiar with

1 this?

2 A. I may be, but let us go ahead and proceed.

3 Q. Your witness statement also deals with
4 interregional fees.

5 A. Of course.

6 Q. So I am assuming you are familiar with
7 those and you must be familiar with the settlement
8 that Visa --

9 A. Yes.

10 Q. -- effectively reached with the European
11 Commission on interregional fees?

12 A. I am.

13 Q. If we could pick it up, please, at
14 recitals (32) and (33) on this page, and if you look
15 there:

16 "... the Commission [formed] the
17 preliminary view that Visa's rules on inter-regional
18 MIFs constitute a decision by an association of
19 undertakings that has as its object and effect an
20 appreciable restriction of competition in the market
21 for acquiring card payments within the EEA."

22 Recital (33) then says:

23 "In the 2017 SSO [which was
24 a statement of supplementary objections that the
25 Commission had sent Visa] the Commission came to the

1 preliminary conclusion that Visa is an association
2 of undertakings, as it fulfils the two conditions
3 established by the Court ... namely the retention by
4 the Visa scheme's members of certain important
5 decision-making powers in respect of essential
6 aspects of the operation of the ... scheme, and the
7 existence of a commonality of interests ..."

8 So the European Commission was
9 treating Visa as a common association of its
10 constituent elements when it was setting the rules
11 and setting the individual MIFs, was it not?

12 A. The Commission -- that is what the
13 Commission report says.

14 Q. Yes.

15 A. I do not necessarily agree with that but
16 that is what it says.

17 Q. Well --

18 A. That is what they it says that is what
19 they believe.

20 Q. Well, Visa chose, did it not, to offer
21 commitments to the European Commission to end this
22 investigation?

23 A. Well, we were forced with a decision of
24 ongoing regulatory or legal proceedings or trying to
25 come to closure on an outcome --

1 Q. Mr --

2 A. It does not mean that we agree with their
3 findings or any of the things, but we had to make
4 a choice about what we wanted to do.

5 Q. If you thought this was all mad and
6 importantly you could challenge it, then you would
7 have fought it, would you not?

8 A. We did fight it for a time, but it was our
9 belief that we do not really have the ability to
10 challenge it very well. So, you know, you have
11 to -- in these kind of proceedings, right, it is --
12 given where the situation and how this was working
13 we had to make a choice to, you know, accept the --
14 make a commitment that we did not think it was fair
15 or continue to fight.

16 Q. Paragraph 34 on the next page, page 11,
17 {RC-J5/32/11} the Commission had come to the view,
18 preliminary conclusion, it says about six lines down
19 that:

20 "... the objective of Visa's rules on
21 interregional MIFs was to fix a part of the price
22 charged to merchants and to restrict competition to
23 the benefit of Visa and its members/licensees,
24 primarily the issuers".

25 That was the view that the Commission

1 had formed, correct?

2 A. That was the Commission's viewpoint, yes.

3 Q. It is also right, is it not, that the
4 object of having MIFs is to secure the transfer of
5 funds from acquirers, from merchants via acquirers
6 to the issuing banks?

7 A. I am sorry, I am not clear on the question
8 you are asking me.

9 Q. So the object of having the interregional
10 MIFs charged, indeed any MIF charged, through the
11 Visa system is to procure a transfer of funds from
12 the merchant via the acquirer to the issuing bank?

13 A. Yes, an interchange or MIF by definition
14 is a transfer price that goes from the acquirer to
15 the issuer. That is true.

16 Q. So the whole point of this rule is to
17 provide a sum of money, a sum of funds, to issuing
18 banks for their participation in the scheme?

19 A. That -- yes, but that is not the part we
20 object to. The part is the level that was set we
21 believe is well below fair value and well below what
22 a competitive market would set.

23 Q. So you were not objecting as such to the
24 characterisation of the way that the MIF is set and
25 the concerns that the Commission had about it; you

1 just thought that they were insisting that you pick
2 a figure for interregional MIFs that was too low?

3 A. Well, we had multiple issues with what
4 they do, the first being that, you know, a single
5 price or in this case four prices does not
6 adequately address the variability on the merchant
7 side. So, you know, yes, we had objections to the
8 structure as well. But I do not have an objection
9 to, you know, what we characterise as interchange
10 which is the transfer price between acquirer and
11 issuer.

12 Q. Then if we look at recital (35) a bit
13 further down that page, it is describing how the MIF
14 ends up determining a significant component of the
15 price that is charged to merchants for acquiring
16 services through the MSC.

17 Again, you cannot object to that in
18 principle, can you; that the effect of the MIF is to
19 set a significant component of the Merchant Service
20 Charge?

21 A. It is -- it is a component but it is up to
22 the acquirer, it is a price we charge to the
23 acquirer, transfer fee we charge to the acquirer as
24 the issuer. The acquirer is up to set whatever
25 price they want. Whether the MIF or the interchange

1 rate is a substantial portion or a small, you know,
2 portion is up to the acquirer to decide.

3 Q. But with interchange plus plus pricing, it
4 is inevitable, is it not, that the MIF that you set
5 via the scheme will be passed on to the acquirer via
6 the acquirer to the merchant?

7 A. For acquirers in the subset of merchants
8 they choose to do interchange plus plus pricing.
9 Acquirers have lots of pricing models that are not
10 that.

11 Q. If we were to find, for the sake of
12 argument, somewhere in the Visa rules a requirement
13 to use interchange plus pricing, would that surprise
14 you?

15 A. Yes. That would surprise me. I do not
16 think we have any -- we are very careful not to
17 dictate to acquirers how they price to merchants.

18 Q. In recital (36), we see that the
19 Commission is suggesting in its preliminary findings
20 and its preliminary view that the impact of the MIFs
21 is to drive prices upwards in the issuing market
22 because both you and another scheme like Mastercard
23 will be competing to increase MIFs so that you can
24 attract issuers and that produces an upwards
25 pressure. Again you must accept that is simply

1 a mechanic of the four-party system, is it not?

2 A. I accept that we operate in a competitive
3 environment that also includes American Express,
4 Discovery, China UnionPay, lots of other three and
5 four-party schemes and we have to offer
6 a competitive price point to the issuers to be
7 attractive to them. So, yes, we have to respond to
8 competition whichever way it may flow so that we
9 continue to offer a value proposition that allows us
10 to be on Visa cards.

11 Q. At the top of page 12, {RC-J5/32/12}
12 recital (39), we saw that the Commission took the
13 view that Visa's rules on interregional MIFs were
14 not objectively necessary. In a nutshell, it is
15 right, is it not, that you do not need a MIF to run
16 a four-party system?

17 A. So I strongly disagree with that. You
18 know, I have stated here today I think the benefits
19 that we derive by running a MIF based system, the
20 Commission might disagree but I -- I disagree with
21 not my statement but I strongly believe that we need
22 MIFs to run a system like this particularly on
23 interregional transactions.

24 Q. So if the evidence is that plenty of
25 four-party schemes in fact do exist which do not set

1 an interchange rate, you would presumably find that
2 very surprising, would you?

3 A. I would find it very surprising if there
4 are four-party systems that do not have an
5 interchange rate structure.

6 Q. Now, paragraph 23 of your statement, you
7 refer to the four-party model and the network rules
8 and the economics of interchange fees. The
9 economics that you are there talking about is
10 essentially an income stream being provided from the
11 acquiring side to the issuing side; is that right?

12 A. It is a transfer price from the acquirer
13 side to the issuer side that the issuer, you know,
14 presumably recognises as revenue.

15 Q. You have never had an experience, have
16 you, of the transfer price going in the opposite
17 direction from the issuing banks to the acquirers?

18 A. That is not true at all. ATM
19 transactions, for example, interchange flows the
20 other way. It flows from the issuer to the acquirer
21 of the ATM.

22 Q. So in the payment card system involving
23 debit and credit card payments, have you ever
24 experienced an interchange fee flowing the other
25 way?

1 A. I just gave you an example in a debit card
2 or a credit card transaction of a transaction on an
3 ATM which flows from issuer to acquirer.

4 Q. It is right, is it not, that it is the
5 Visa scheme that determines what the value of that
6 price transfer should be?

7 A. Yes, that is correct, Visa decides what
8 the value is.

9 Q. You do not tell the issuing banks what to
10 do with it?

11 A. We do not tell the issuing banks what to
12 do with it.

13 Q. The specific fee cannot be calibrated by
14 reference to any specific cost, can it, because you
15 have no direct knowledge of what the particular
16 issues bank's costs would be?

17 A. So that is not true. We do issuer cost
18 studies from time to time in multiple markets where
19 we try to understand what issuers' costs are, what
20 their acquisition costs are -- let us just stick
21 with credit cards right now -- what their
22 acquisition costs are, what their rewards costs are,
23 what the risk in fraud costs are, what their
24 customer service cost is, so it is a pretty
25 extensive study to give us a sense of what those

1 costs were. It differs by market, right, and it
2 differs by issuer size, so we do that. But I will
3 just say for the record so we do have a lot of good
4 information on that but it is not meant to be purely
5 a cost-based model. We do want to know what costs
6 are but that is not what we use to drive interchange
7 as the sole -- as the sole sort of -- it is not like
8 the only factor that drives what we do for
9 interchange.

10 Q. Can I just be clear; you do not have any
11 direct negotiation with acquirers as to what this
12 price should be, this transfer price should be?

13 A. Yes, we typically do not negotiate
14 interchange prices with acquirers.

15 Q. You do not let the acquirers negotiate it
16 directly with the issuers?

17 A. We do let -- acquirers or merchants can
18 negotiate custom rates any time they choose so and
19 we have functionality enabled on our system that
20 would allow them to do that.

21 Q. It happens exceptionally rarely, does it
22 not?

23 A. Yes, it is rare.

24 Q. You accept, do you not, that Visa payment
25 cards are "must take" cards for merchants in the UK

1 and Ireland?

2 A. I do not accept that openly, no.

3 Q. Would you accept that consumer debit and
4 credit cards are "must take" cards for merchants
5 in the UK and Ireland?

6 A. I do not and I would hazard a guess --
7 I do not know the UK market as well, but not all
8 merchants probably take Visa or Mastercard in the --
9 in the UK. I assume some merchants do not.

10 Q. Do you accept that issuing banks can
11 generate revenue in many other ways beyond receiving
12 the full transfer price courtesy of Visa?

13 A. We talked a little bit earlier about this,
14 that on a credit card issuers have the option of in
15 addition to interchange can charge cardholder fees
16 and then depending on whether the card revolves
17 a balance they may charge interest and we talked
18 about in a debit account they could charge fees,
19 different kinds of fees also for the use of the
20 checking account. So there are some other fee
21 elements that issuers have but those are the primary
22 ones.

23 Q. You could promote the Visa brand with
24 issuers, could you not, other than by requiring this
25 default transfer price to be handed over?

1 A. We -- we could not. We would without this
2 transfer price or recreation of, you know, this
3 transfer price through fees and incentives, we could
4 not. We would not be competitive with, you know,
5 American Express or pretty much anyone else out
6 there who would have this economic flow between the
7 acquirer's side and the issuer side, we would not be
8 competitive.

9 Q. American Express is not a four-party
10 system, is it, so it does not have a flow between
11 acquirers and issuers?

12 A. American Express absolutely has a flow
13 between acquirers and issuers. They have many
14 issuer partners around the world so they have in
15 their own proprietary business, which we refer to as
16 a three-party model, they have a flow from their
17 acquirer side to the issuer side and in the
18 agreements that they have with other banks, where
19 they are operating more like a four-party model,
20 they absolutely have a flow from acquirers through
21 issuers, they just do it through fees and incentive
22 as opposed to a direct transfer price like
23 interchange.

24 Q. Amex stopped its co-branding in 2017 in
25 the United Kingdom, are you aware of that?

1 A. I was not but they maintain it in many,
2 many other parts of the world, so when you have
3 UK -- at UK merchants you have American Express
4 cards issued by banks who in a four-party model
5 coming in on international and interregional
6 transactions.

7 Q. In the United Kingdom American Express
8 acquires its own transactions directly or using
9 intermediaries, but it is the acquirer?

10 A. Well, you just -- you said the key part of
11 it, "or intermediaries", right. So basically
12 American Express also operates a four-party model on
13 the acquirer side because even though they designate
14 themselves the acquirers, they are effectively using
15 other entities to go out and sell acceptance. So
16 they effectively operate a four-party model both on
17 the issuing side with all of their issuing partners
18 around the world and as a four-party model on the
19 acquirer side when they are using intermediaries to
20 go out and sell acceptance.

21 Q. Another way of promoting the brand surely
22 would be to have promotional measures or incentive
23 schemes with issuing banks that Visa pay for?

24 A. I do not see how the revenue that Visa
25 makes, which is a fraction of interchange, could

1 possibly balance out the economic flows versus
2 competitors that are charging interchange or
3 creating an interchange like flow between acquirer
4 and issuer with their fee structure.

5 Q. Customers could also be asked, could they
6 not, to pay for the bank cards they receive and use
7 if they are of value to cardholders?

8 A. They could be asked. I do not see very
9 many scenarios where they would pay for a Visa card
10 or a Mastercard card when they could get an American
11 Express or a Discover fee without paying those fees.

12 Q. American Express card frequently charge
13 their cardholders a fee, do they not?

14 A. American Express has all levels of fee and
15 no fee cards, just like Visa and Mastercard have,
16 you know, issuers that have fee-based and non-fee
17 based cards.

18 Q. What the Visa system does surely is
19 essentially subsidises banks for issuing Visa cards
20 to cardholders at the expense of merchants, does it
21 not?

22 A. No. What I -- we have a transfer price,
23 right, but we believe the value that merchants
24 receive for accepting is far less than either the
25 fees or the interchange rates that they pay.

1 Q. If you abolished Merchant Interchange
2 Fees, that would lead to lower Merchant Service
3 Charges from merchants to their customers, correct?
4 Sorry, from acquirers to merchants?

5 A. So again we cannot control what acquirers
6 pass on to merchants, probably worth spending
7 a moment on this.

8 So earlier there was reference to
9 this interchange plus plus model, right, and
10 interchange. That means it is interchange -- the
11 acquirer is pricing to the merchant such that they
12 take the interchange rate and the network fee rate
13 and then the acquirer adds whatever mark-up they do
14 and that comprises the price to the merchant, right?
15 When you see that model, let us say that model is
16 primarily applicable to large merchant, okay, so
17 large merchants.

18 So whatever product type, whatever
19 brand, Amex/Visa/Mastercard, the exact cost of
20 interchange plus the network fee plus the
21 merchant -- I am sorry, plus the acquirer mark-up
22 would be priced to the merchant.

23 The vast majority of merchants by
24 count are smaller and medium-sized merchants and
25 frequently their pricing model is they pay one price

1 for any transaction they come to. So that just
2 means it does not matter if it is
3 credit/debit/Visa/Mastercard, it is a single price
4 that they pay for any type of transaction that comes
5 in; it is a very simplified pricing structure.

6 So, you know, in those cases, if
7 interchange went away when the acquirer changed
8 their pricing structure, I do not know, in an
9 interchange plus plus model then the rate the
10 merchant paid would go down because it is
11 an interchange plus plus model.

12 Q. Could we please bring up {RC-J4/22/100}.
13 If you look at recital 290, paragraph 290 in this
14 document, which is a Commission statement of
15 objections sent to Visa, it says.

16 "As Visa Europe acknowledges, the
17 setting ... of interchange fee rates is not akin to
18 a contentious process such as a price negotiation
19 where opposing interests of buyers and sellers meet.
20 Rather, Visa Europe's member financial institutions
21 eventually share a common interest that merchants
22 pay a higher price than they would in the absence of
23 MIFs."

24 That is an accurate statement of the
25 mechanism of setting MIFs, is it not?

1 A. Sorry, I am reading the paragraph.

2 (Pause) I -- is the -- I am not familiar with this
3 document, so Visa Europe acknowledges the setting of
4 interchange fee rates is not akin to a contentious
5 process.

6 Q. That must be right because you have
7 already described to us?

8 A. Right, but the second point here comments
9 that merchants pay a higher price than they would in
10 the absence of MIFs, is that a -- is that something
11 Visa Europe is saying or is that something that --

12 Q. I think they have moved on to then that is
13 the Commission's view?

14 A. Yes, so that is the Commission's view,
15 that is what I was saying. So I do not think that
16 merchants pay a higher price than they would in the
17 absence of MIFs I can think of.

18 Q. I think I may have been unfair to myself
19 then, not unfair to you. If we look at footnote 300
20 it quotes from a Visa Europe response and it says:

21 "The interchange fee in the Visa
22 system is designed to promote the fullest use of the
23 Visa payment services. If there were no interchange
24 fees, each issuer would have to recover all its
25 costs, as issuer, from the revenue received from

1 cardholders'."

2 So that does imply that it is the
3 issuers driving the demand for an interchange fee in
4 order to defray their costs that would otherwise
5 have to be obtained allocated elsewhere?

6 A. I do not think so. I think that is
7 a narrow point of view that says if they -- if in
8 the absence of interchange they would have no choice
9 but to do it as it says here by charging cardholders
10 and we would not be very competitive if we did that.

11 Q. In essence, when you say Visa is somehow
12 determining a balance, it is acting as a benign
13 dictator, is it not, benign or malign, depending on
14 your viewpoint. But it is acting -- it is directing
15 what would otherwise be a market-driven process.

16 A. Well, you are -- I do not think the system
17 I am not sure what you mean by a "market driven
18 process". Everybody, I mean, we -- every issuer --
19 I am not sure what you mean by that, I guess,
20 I cannot answer the question. Market -- what is the
21 counterfactual or what is the state of the market if
22 we did not have an interchange fee in place that you
23 are asking me to --

24 Q. Well, you would have a default settlement
25 at par system which would be perfectly operational?

1 A. Yes, but we -- we would not -- I mean, the
2 network never would have gotten off the ground had
3 we done that and I do not understand how we would be
4 at all competitive if we did that.

5 Q. I am not going to repeat the position
6 I have put to you that plenty of other four-party
7 systems have no interchange fee rate at all; I am
8 going to deal with that separately. I have put the
9 question to you and we have received your evidence
10 and it would be surprising if that were in fact the
11 evidence.

12 Can we deal with the second point you
13 make, for example, in paragraph 34, page 10 of your
14 witness statement where you say we need the
15 international interregional MIFs otherwise we would
16 not be able to continue operating as a network.

17 You rely on what you say as the
18 competitive threat posed by American Express, can
19 you see that? You say:

20 "That is especially so if other
21 unregulated payment schemes such as Amex continue to
22 be able to set similar charges."

23 A. Yes, I see that.

24 Q. That is the point you have just made, as I
25 understand it. Competitive threat from Amex equals

1 we must have the MIF otherwise we become
2 uncompetitive?

3 A. Correct. This is -- I think I have cited
4 some other examples such as, you know, approval
5 rates and things like that. But yes, one of the key
6 factors is American Express would be a competitive
7 threat that, you know, we would not really be able
8 to be competitive with.

9 Q. Presumably therefore on your analysis if
10 your interchange fees were capped, that would
11 restrict your access to funding from the MIF and
12 that would make you uncompetitive and people would
13 flood to join the ranks of American Express as
14 issuing banks?

15 A. So again it is a question of degrees. If
16 there is, you know, one country that caps rates at
17 a sufficiently high level, you know, it creates
18 challenges for us but it is, you know, something
19 that could be managed. If, you know, it is multiple
20 countries and the interchange is taken down to zero,
21 yes, that makes -- that creates a real competitive
22 challenge for us.

23 Q. Could we look please in {RC-J5/44.03/20},
24 page 20, this is part of Amex's SEC Form 10K annual
25 return. If we could look under the section that

1 says "Payments Regulation" about halfway down the
2 page, second paragraph after that describes how the
3 EU, Australia, Canada and other jurisdictions have
4 focused on interchange fees as well as the rules.

5 Then it says regulation in other
6 governmental actions relating to prices could affect
7 all networks.

8 "In some cases, [it says about three
9 or four lines down] regulations also extend to
10 certain aspects of our business, such as network and
11 co-brand arrangements or the terms of card
12 acceptance for merchants, and we have exited our
13 network businesses in the EU and Australia as a
14 result of regulation in those jurisdictions, for
15 example. There is uncertainty as to when or how
16 interchange fee caps and other provisions of the EU
17 and UK payments legislation might apply ..."

18 What we saw is when Interchange Fee
19 Regulation was introduced Amex in fact exited
20 certain key markets, were you aware of that?

21 A. I am sorry, do you have a question?

22 Q. I was wondering if you were aware of that.
23 You were saying Amex is a big threat but their
24 response to interchange fee regulations being to
25 exit key markets that you are still in?

1 A. So let us be clear, they exited those
2 markets domestically, not for international
3 transactions, so I am pretty sure Amex is very
4 active on the acceptance side in EU and UK and --
5 I am sorry, in Australia and the UK and the EU.

6 So, yes, I am very aware of
7 Australia, how they were outside of the initial
8 regulation, they picked up substantial market share
9 in the 10 years in which Visa and Mastercard were
10 regulated but American Express was not. As you
11 might imagine, they had high fees, we had regulated
12 fees, issuers basically co-badged, so they sent
13 out -- for all their cardholders, they gave an
14 American Express card and a Visa card and
15 a Mastercard, they said use the American Express
16 card everywhere you can because we pay you better
17 rewards on it. You know, the regulator figured out
18 10 years later that this was a non-level playing
19 field and you cannot have a situation where one
20 network is earning substantially higher, you know,
21 interchange or a flow from the acquirer side and so
22 then they made American Express cards subject to the
23 same caps and at that point the banks stopped
24 issuing American Express. It notes here Amex exit
25 the market, what really happened first was all the

1 banks stopped issuing American Express because they
2 did not have this much higher effective interchange
3 rate flowing and at that point American Express,
4 once it was back to a level playing field, their
5 business dwindled and they exited the market.

6 Q. Could we look, please, at {RC-J4/80/70}.
7 This is paragraphs of a document that was marked
8 "Restricted Confidential" but which over the weekend
9 has been cleared for public consumption. Can we
10 look, please, at the table dealing with total
11 value -- "Visa consumer card transactions in EEA by
12 card and transaction type 2014". There is a table
13 and it says there is a total, and you will see that
14 the number of transactions and the value of
15 transactions on interregional transactions is far
16 lower, is it not, than the counterpart for domestic
17 and entry European transactions?

18 A. Yes, correct. There are far fewer
19 interregional transactions than there are domestic
20 or intra-Europe transactions.

21 Q. We see under recital (245) that
22 interregional transactions make up a fraction of all
23 transactions with Visa consumer cards, 4.9% by
24 number or 6% by value, do you see that?

25 A. Yes, I see that.

1 Q. So the reality is that interregional MIF
2 fees are a small part of the picture, are they not,
3 for issuing banks based in the UK and Ireland?

4 A. So you are talking about -- so these are
5 UK issued cards?

6 Q. Or Irish issued cards?

7 A. Irish cards issues that are travelling to
8 other parts of the world.

9 Q. It is dealing with interregional
10 transactions. So if -- what I am saying is if they
11 were not deriving an interchange fee on
12 interregional transactions, it would not move the
13 dial, would it, in terms of acceptance levels for
14 the issuers of these cards?

15 A. I mean, I do not know these numbers
16 because these look like they are EU issued cards.
17 I know the numbers the other way, though if you look
18 at US cards I mean, yes, they are overall
19 international or interregional transactions are
20 lower, but for premium cards, like co-branded cards,
21 cards where people used to travel a lot,
22 interregional transactions can be up to 25% of the
23 transactions they make.

24 So as you expect, you know, people
25 who are wealthy, you know, business type cards that

1 travel a lot and they make up a disproportionate
2 amount of interregional transactions, and so it is
3 quite material from those because it is
4 a substantial number of the -- of the transactions
5 for those types of cards.

6 Q. Since Brexit, the interregional rates have
7 been applied, have they not, to EEA issued cards
8 that are used in the UK?

9 A. Yes. We apply the same rate as we
10 negotiated with the EU Commission for transactions
11 into the EEA, we applied those same rates too for
12 transactions from the EEA to the UK.

13 Q. So when in paragraph 39, page 11, you say
14 there is a completely unique and distinct
15 competitive landscape for interregional
16 transactions, am I to infer from that that you think
17 that unique and distinct interregional
18 transaction -- unique and distinct feature, the
19 landscape changed overnight when the UK left the EU?

20 A. I -- well, what we are doing is we are
21 treating the UK -- we are treating the EEA the same
22 as we are treating all interregional transactions
23 into the UK and so, you know, they are all
24 interregional transactions, obviously different
25 corridors are going to behave differently, right, so

1 a transaction from France into Europe into the UK
2 might be different than a transaction from, you
3 know, Brazil into the UK. But we are still treating
4 them all the same, we are treating them consistently
5 as interregional transactions.

6 Q. In paragraph 41, where you say that
7 interregional transactions are generally more
8 expensive for issuers than interregional
9 transactions, are you suggesting that those costs
10 changed overnight with Brexit?

11 A. Well, the costs -- so you are talking
12 about specifically -- you are not talking about the
13 greater number of interregional transactions --

14 Q. Please may I be clear: an interregional
15 transaction was an EEA/UK transaction on
16 31 December 2020. That became an interregional
17 transaction on 1 January 2021. So is it your
18 evidence that the expense associated with those two
19 transactions that bookend the end of one year and
20 the beginning of the new year has changed radically
21 overnight?

22 A. No, I do not think the expense has
23 changed. I think the fact that they were subject to
24 0.2 and 0.3 was artificially low for a transaction
25 between different countries.

1 Q. Surely issuing banks need their cards to
2 have international capability, do they not, if they
3 are to be popular?

4 A. Yes. International -- I mean, acceptance
5 broadly is going to value more to some cardholders
6 than others but it is an important part of the value
7 proposition.

8 Q. Anyone who wants to use their card on
9 holiday is going to want it to be capable of being
10 used abroad?

11 A. Correct.

12 Q. It is right, is it not, that transaction
13 fees exist for foreign transactions that issuers can
14 benefit from?

15 A. Can you rephrase?

16 Q. Yes, issuing banks are able to charge
17 a transaction fee where their issued cards are used
18 in a jurisdiction outside their home jurisdiction?

19 A. Yes, they are able to, Visa does not have
20 any rules for or against: Some charge, some do not.

21 Q. Are you aware that our regulator, the
22 Payment Systems Regulator, has reached a provisional
23 view that there is no justification for the increase
24 in fees post Brexit that Visa brought about?

25 A. I am not aware of that.

1 Q. Paragraph 42, you deal with a higher
2 instance of fraud that is said to exist for
3 cross-border transactions. Where is your data
4 underlying that statement?

5 A. We pulled this data right off of the Visa
6 system so we looked at every transaction for the
7 12 months ending March 2023 in the Visa system that
8 was interregional and acquired in the UK and then we
9 pulled and we looked obviously at the domestic
10 transactions in the UK at the same time, same time
11 period. So we looked at every transaction and then
12 we compared the fraud rates.

13 Q. Are you aware, for example, that that
14 assertion would apply in principle to transactions
15 taking place between Ireland and Northern Ireland?

16 A. I am sorry, are you asking Ireland and
17 Northern Ireland --

18 Q. That is treated an interregional
19 transaction post-Brexit, so your statement would
20 have to be equally good to that situation, would it
21 not?

22 A. We would have -- we captured everything
23 that was in our system shows up at interregional.
24 Yes.

25 Q. Are you aware that the payment systems

1 regulator in this country in its December report
2 found that the changes that you made to your
3 interregional fees could not be attributed to higher
4 fraud costs?

5 A. No, I am not aware of that. That would be
6 surprising; this data here suggests otherwise.
7 I mean, it is clearly stated that fraud is ten times
8 higher on interregional transactions, so ...

9 Q. At paragraph 46 you describe how your MIF
10 setting for the interregional MIFs takes into
11 account everyone's interests. How does it take into
12 account the interests of merchants?

13 A. Well, if we did not consider merchants the
14 rates would be higher than they are. As I stated
15 earlier, issuers want, you know, the highest
16 interchange possible so that they can serve
17 consumers in their capacity as cardholders.
18 Merchants want lower fees. So if we only listened
19 to the issuer side, we would make interchange
20 higher. The fact that we separate where they are
21 represents a balance of what the issuers need to run
22 their cardholder value propositions and to approve
23 the transactions, and then we think about the
24 merchants side, like, what is a palatable rate for
25 merchant acceptance.

1 Q. In reality you simply try and get as much
2 for the issuing banks as you can unless it impacts
3 on card acceptance by merchants; correct?

4 A. No, that is not true. We are -- we do not
5 move the interregional rates a lot because it
6 affects -- the same interregional rates affect
7 countries across the globe. Same rates apply
8 everywhere. But we are constantly evolving domestic
9 rates up and down in multiple markets to try and,
10 you know, fine-tune to get that balance right.

11 Q. At paragraph 48 at the bottom of page 14
12 you say the Commission's decision on interregional
13 fees setting a cap, you seek to correlate that with
14 the level of card declines that allegedly
15 significantly increased. Are you saying that there
16 was a causal relationship between the cap being
17 introduced and the level of declines increasing?

18 A. Yes.

19 Q. Were you looking at non-EEA issuers or EEA
20 issuers in this period?

21 A. We were looking at non-EEA issuers; so
22 interregional transactions between the rest of the
23 world and the UK, excluding Europe.

24 Q. How did you get the data on the reasons
25 for the declines?

1 A. Are you saying how we got -- the data came
2 off of Visa's system.

3 Q. The data simply tells you about a given
4 outcome, does it not? Namely, there has been
5 an increase in the rate of declines. It does not
6 tell you the reason for that.

7 A. Right. So the reason -- so when this
8 happened, and this was a few years ago, obviously
9 this did not go unnoticed. This is a massive change
10 in decline rates; almost 50% of transactions were
11 being declined. So, you know, I cannot talk to
12 every issuer in the world. But the issuers we did,
13 talked about -- said that they had to recalibrate
14 their authorisation parameters.

15 So any time an issuer makes
16 a decision, right --

17 Q. I think you have answered my question for
18 me.

19 The reason for the decline was that
20 issuing banks changed their terms of acceptance for
21 their own cardholders in, say, the United States?

22 A. No, no, no. I am not saying that at all.
23 I am saying that when you -- when the interchange
24 rate is higher, you can afford to have more
25 fraudulent transactions because you have more

1 revenue to offset losses that you have from those.

2 When you have less revenue from
3 interchange, you cannot afford to authorise as many
4 transactions. So they had to rework their
5 authorisation systems and the risk and fraud
6 decisions so that they could tighten them up to try
7 and weed out more fraud, and any time you do that
8 you end up weeding out some, you know, transactions
9 that would be fine.

10 So any fraud system is doing its best
11 to say, you know, we are trying to maximise the
12 number of good transactions, minimise the number of
13 bad transactions, against what cost it will be if
14 the issuer has to eat those bad transactions.

15 So they had to recalibrate that to
16 a lower authorisation level, higher decline level to
17 bring that back into balance.

18 Q. So if I have got this right, issuing
19 banks, they cannot do anything about their cards one
20 way or the other, can they; they have issued them,
21 so the cards are still going to be used?

22 A. Yes.

23 Q. So what you are saying is they change the
24 algorithm setting for decline/accept for foreign
25 transactions taking place in the UK in order to, you

1 say, reflect different costs returns from the MIF.

2 Is that your evidence?

3 A. Yes.

4 Q. It also coincided, did it not, with Covid
5 and lockdown, so the incidents of people using
6 a card overseas was going to be massively
7 diminished, was it not?

8 A. Well --

9 Q. February/March 2020, quite a lot of the
10 country went into lockdown with nobody travelling,
11 and that would suggest, would it not, that if there
12 is a foreign transaction something funny is going
13 on?

14 A. Yes, but the data here was the 12 months,
15 April 29, that is -- and then if we look at the
16 12 months (inaudible) there, we would have --

17 Q. It is 12 months following April 2019, so
18 it is including the back end of the middle of 2020
19 when everyone is lockdown.

20 A. To April 2020, but, like, Covid did not
21 really impact anything until March, February, maybe
22 there was a month of data in there that is not as
23 good. But that would have just been reflected in
24 lower volumes. That would not have -- what we are
25 measuring here is the --

1 Q. If your theory were good, why did the
2 figures normalise the following year?

3 A. Well, so a year later, I said the issuers
4 had to recalibrate their systems and they
5 recalibrated them at higher decline rates. So they
6 shot up post the change, and then they sort of came
7 down and they settled in at a higher level than they
8 had been previously.

9 Q. It was 21%?

10 A. Right, and 17% before.

11 Q. It is not much of a difference, is it,
12 17.7 versus 21%?

13 A. 20% times these number of transactions, it
14 is a lot of transactions getting declined. I mean,
15 when you think about it how it works today. 20%,
16 one in five transactions, today are being declined.
17 One in five. Because the issuers are not earning
18 enough to authenticate or authorise more
19 transactions. One out of five. If your card only
20 worked one out of five places, like, in a system for
21 us that is an enormous amount.

22 Q. In paragraph 53 at page 16, you refer to
23 the relationship between Visa Europe Limited and
24 Visa Inc in the period from 2007 to 2016, and that
25 was governed by a framework agreement, was it not?

1 A. Yes.

2 Q. Could we bring that up, please. It is at
3 {RC-J4/9.2/5}. Could we then look at page 6, clause
4 3.2. I should just clarify. Each entity at 2.1 and
5 2.2, we see there at the bottom of page 5, provision
6 of services, essentially each of them are providing
7 clearing settlement under the Visa scheme; correct?

8 A. I am sorry --

9 Q. It is hopefully not controversial. They
10 each have to clear their respective transactions,
11 have they not, clearance --

12 A. What it is saying is Visa Inc will provide
13 the clearing settlement processing services to Visa
14 Europe, because Visa Europe did not have their own
15 systems, and it is meant to be until such time as
16 Visa Europe could build their own authentication --

17 Q. 2.2 then says:

18 "... Visa Europe shall provide to
19 Visa Inc ... clearance, settlement and payment
20 processing ..."

21 So I simply assumed it was mutual
22 clearing and settlement once there was a transaction
23 moving between the two of them?

24 A. So, yes, but effectively Visa Inc is
25 running the systems for both, at least when it was

1 set up. So we are providing the systems, but you
2 are right, we are providing a back and forth to each
3 other.

4 Q. At clause 3.2 at page 6, {RC-J4/9.2/6}
5 Visa Europe was agreeing to pay charges to Visa Inc
6 and -- sorry, Visa Inc was agreeing to pay amounts
7 comprising the charges to Visa Europe in accordance
8 with schedule 1.

9 A. Yes.

10 Q. Clause 5, page 7, this was an agreement of
11 perpetual duration. Can you see that?

12 A. I am sorry, I missed that.

13 Q. It says this agreement is perpetual.

14 A. Yes, correct.

15 Q. Only determined by consent.

16 Then at clause 8, page 8, there was
17 a effectively a settlement guarantee. It is called
18 a settlement guarantee; I am assuming it was
19 a settlement guarantee?

20 A. Yes. I mean, we are just basically
21 requiring each entity to maintain capital levels so
22 that they can meet their settlement obligations.

23 Q. Clause 12.1, page 8 {RC-J4/9.2/8} says
24 that:

25 "The parties shall perform their

1 respective obligations hereunder in manner that
2 complies with all applicable laws."

3 Can you see that?

4 A. Yes.

5 Q. That was always going to be a requirement,
6 was it not? You would not want any part of your
7 system to be operating unlawfully?

8 A. Yes, we wanted at all times our business
9 to operate under applicable law.

10 Q. If we look, please, at page 35. This is
11 part of schedule 1. Paragraph 12.1, please. At
12 12.1.2 you see that:

13 "Each party shall comply with all
14 applicable law at all times when performing its
15 obligations ..."

16 Correct?

17 A. Yes, I see that. It is correct.

18 Q. Page 37. There was a system, was not
19 there, if there was a change to the applicable law
20 you could put in a change request and that would be
21 actioned between the two parties?

22 A. Yes, That is correct.

23 Q. If we look please at page 66,
24 paragraph 33.1:

25 "Subject to applicable law, Visa

1 shall manage the settlement function, daily
2 settlement windows, required for the interface
3 between VisaNet and the VE Clearing and Settlement
4 System and ... Europe shall comply with, the master
5 settlement position for international transactions."

6 So when dealing with international
7 transactions, this framework agreement expressly
8 recognised that that would be subject to any local
9 applicable law?

10 A. Yes.

11 Q. At paragraph 33.3, Visa would set the
12 interchange rates for the international
13 transactions. So it is doing that but under the
14 rubric of subject to applicable law. Can you see
15 that?

16 A. Yes, we have -- I mean, that is true in
17 every country.

18 Q. Of course.

19 So if the applicable law in this
20 jurisdiction said you could not impose interregional
21 MIFs in the sum demanded, Visa Inc could not insist,
22 could it, on those interregional MIFs being paid?

23 A. So, in the hypothetical where applicable
24 law said we could not set MIFs for interregional
25 transactions, then yes, Visa would not be able to

1 set MIFs for interregional transactions into the UK,
2 or whatever the jurisdiction was where that local
3 law applied.

4 Q. Visa Europe's rules could not insist that
5 they be paid notwithstanding?

6 A. I mean, presumably Visa Europe would also
7 be subject to the applicable law.

8 Q. Of course. I am saying there is no way in
9 which an environment would operate where, if there
10 has been a binding ruling, say, from this tribunal
11 that interregional MIFs are unlawful, that those
12 interregional MIFs would be charged?

13 A. That is correct. We would comply with
14 local law.

15 MR BEAL: Thank you. I do not have any
16 further questions.

17 THE PRESIDENT: We will take a break. We
18 have a few questions, but I think for the
19 shorthand writer we will break for 10 minutes.

20 (3.23 pm)

21 (A short break)

22 (3.33 pm)

23 MR BEAL: Sir, I am sorry to still be on
24 my feet.

25 Could I just put down a marker, because

1 I did not make it clear to the witness and
2 I probably should have done. I did not ask him
3 quite a lot of questions about balancing funds,
4 who allocates what costs etc, because you know
5 my submission is that is all for Trial 3, not
6 for here.

7 What I did not want was it to be suggested
8 that I should have put those questions to this
9 witness in this trial, and failure to do so
10 means I have somehow accepted for Trial 3
11 whatever he may have to say about that.

12 We simply say it is not the appropriate
13 venue and we are parking that issue for
14 Trial 3.

15 THE PRESIDENT: Mr Beal, I think you
16 probably know this tribunal well enough that we
17 do not really go for the technical "that point
18 has not been put" point unless there is a very
19 good reason for it, and it is useful to have
20 your explanation on the record but we are not
21 ...

22 MR BEAL: Sometimes it is easier to
23 predict behaviour that will never happen in
24 order to avoid it than to deal with it after
25 the event.

1 THE PRESIDENT: Thank you for that
2 clarification.

3 Questions by THE TRIBUNAL

4 PROFESSOR WATERSON: Can I come back on
5 one point that you said earlier, which
6 I thought was very interesting. This was at
7 page 148 of the draft transcript today, line 19
8 [draft].

9 There we are. So the question that came
10 to you was:

11 "Well, you would have a default settlement
12 at par system which would be perfectly
13 operational?"

14 Then you answered:

15 "Yes, but we -- we would not -- I mean,
16 the network never would have gotten off the
17 ground had we done that ..."

18 So I think most people would accept that,
19 that that is why the system got off the ground.

20 It is a somewhat different question,
21 though, about whether the system would survive
22 changes at the present state of development, if
23 you like. I mean, clearly when the system is
24 getting off the ground, you have to engage very
25 closely with issuers and to some extent with

1 acquirers and certainly with merchants in order
2 to get the system off the ground. But once the
3 system is off the ground, the engagement, need
4 it be as intensive?

5 A. You might be interested to know the first
6 rates were 7%, so things have come down dramatically
7 since then.

8 A lot depends on the state of the
9 market. So, you know, when a merchant -- so
10 obviously you need a value proposition for issuers
11 or consumers who are interested and you need a value
12 proposition for merchants. Obviously one of the big
13 value propositions for a merchant is cardholders
14 coming in and saying they want to use the card. If
15 no one is showing up, then they have no reason to
16 accept it.

17 So -- and in developed markets where
18 payments are -- electronic payments are ubiquitous.
19 So, like, you know, the UK or the United States.
20 Once sort of all that behaviour is reinforced,
21 governments or other bodies could enforce a lower
22 transfer pricing, if you will, just understanding
23 how that balances out the different sides, right?
24 So you have a lower price to merchants and a lower
25 exchange rate to issuers.

1 You know, that is not
2 consequence-free. I mean, there are things that
3 happen with approval rates. You know, most markets
4 where interchange has been regulated lower, the
5 consumer value proposition obviously goes down. We
6 can debate how much of that has been passed through
7 to merchants, but that can exist when it is a level
8 playing field for all participants.

9 So historically what we have seen is
10 on domestic regulation it applies to all parties,
11 because the government is effectively controlling
12 the issuing and the acquirer side, and so you can
13 effectively choose a different equilibrium, if you
14 will. What we saw in Australia was they did that,
15 but they only applied for Visa Mastercard not Amex,
16 you had an imbalance and then one company that was
17 not regulated obviously got a bunch of share until
18 they were regulated.

19 So once that is established, I can
20 work.

21 We have -- moving to other countries,
22 we have plenty of less developed countries where
23 that dynamic would be very challenging. You just
24 would not create the issuer/cardholders part of the
25 dynamic, and we have a lot of countries where we

1 have really struggled.

2 Interregional is more difficult
3 because -- so we are talking for this, this
4 particular case about transactions that are acquired
5 in the UK. But, you know, the issuer value
6 propositions are largely set based on what their
7 domestic environments are like, right?

8 So clearly, in the US where
9 interchange on credit is like 2%, issuers have
10 a certain value proposition required to compete
11 there. You know, in Europe where it is, you know,
12 20.2 and 20.3, there is a different level of -- you
13 know, the cardholder expectation how that has been
14 set up is very different.

15 But when you talk cross-border, you
16 have all these different domestic situations that
17 have evolved then feeding into a single country. So
18 in that sense the dynamic is a little bit difficult,
19 because you would be saying, you know, an
20 interchange is at a lower rate or it is zero, or
21 whatever, but you are not affecting both the issuer
22 and the acquirer side like you would domestically;
23 you are affecting just the issuer side. So that
24 is -- I am sorry, just the acquirer side.

25 So that creates -- and then

1 particularly if it was not equal, you are saying,
2 Amex, you can have this economic transfer because
3 you do it in a different way, you get unbalanced.

4 So it is harder in an international
5 context because you are -- any kind of regulation is
6 not basically hitting the issuing acquirer side,
7 like, in the same way.

8 PROFESSOR WATERSON: No, I understand that
9 must be a very broadbrush sort of decision.

10 A. Yes.

11 PROFESSOR WATERSON: Just a related point,
12 or maybe related, maybe unrelated point.

13 When debit card transactions became more
14 important in Britain, a lot of retailers would
15 not accept them or would not accept them below
16 a certain money value; below £5, for example.
17 Was that because there was a fixed amount as
18 well as a variable amount?

19 A. Yes, and so -- so absent regulation, we
20 frequently have an interchange structure that has
21 a -- a per item. So, let us say, it is, you know,
22 5 cents or something, and then a variable component
23 usually expressed in a percentage, right?

24 To be fair, that transaction, you
25 know, simple interchange like that works very well

1 that a level playing field? You talked several
2 times about a level playing field.

3 A. Yes.

4 PROFESSOR WATERSON: Clearly, when
5 I bought something for, I think, £1.26 and paid
6 with my card, that is going to give a very
7 small amount to the issuer. So the trouble
8 with the phrase "level playing field" is that
9 it means a lot of different things to different
10 people.

11 A. Yes. So what I mean level playing field,
12 the way rates -- so cross-border we do not have
13 a whole lot of rates. The rates are pretty
14 simplistic. Domestically, for example, in the
15 United States there is probably 200 different rates,
16 and so level playing field means to me for merchants
17 that are of the same type. So a fuel merchant would
18 have a certain rate, an airline merchant would have
19 the same rate. So merchants competing against each
20 other would have the same rate even though we have
21 different rates for different types of merchant
22 segments.

23 Then just to your small ticket
24 question, so even merchants that have the majority
25 of their transactions at a higher amount will

1 sometimes have a transaction at a very low amount,
2 right?

3 We are not trying to optimise for
4 that, but we are trying to optimise for merchants
5 who might have two thirds of their transactions at
6 a very low amount. In that case the model does not
7 really work for them. If it is a merchant that has
8 multiple ticket sizes, generally the model is going
9 to work for the majority of transactions that they
10 have.

11 PROFESSOR WATERSON: Right. Yes, I see.

12 Okay, thank you.

13 Mr Kennelly, any re-examination?

14 MR KENNELLY: Yes.

15 Re-examination by MR KENNELLY

16 MR KENNELLY: One point, on the
17 transcript, Mr Knupp, could I ask you to go to
18 page 145, please. Page 145, top of the page.
19 Do you see, line 3, an answer you gave from
20 line 3 to line 6? [draft]

21 A. I am sorry, I cannot see the actual
22 question maybe. Okay. Thank you.

23 Q. Do you see the answer you gave?

24 A. It started on line 3 that says:

25 "No. What I -- we have a transfer

1 price ..."?

2 That -- yes, I see that.

3 Q. Yes. Are you happy with that answer?
4 I am giving you an opportunity to correct it if you
5 think it was -- if you misspoke, because you say:

6 "We believe the value that merchants
7 receive for accepting is far less than ..."

8 A. Sorry. I am sorry. Yes, I meant -- I was
9 talking too fast, I think. The value the merchant
10 receives for accepting is far greater than either
11 the fees or the interchange rates that they pay.

12 MR KENNELLY: Thank you, Mr Knupp.

13 I have no further re-examination for
14 Mr Knupp, but before he goes, I need to put
15 down my own marker in view of what Mr Beal
16 said, just to be absolutely clear, and I am not
17 taking any technical points, and I will not do,
18 but just to be clear about his point, could
19 I ask the tribunal to look at page 167 [draft]
20 at the top, which is what my learned friend
21 said when we came back from the break.

22 He said:

23 "... I am sorry I am still on my feet ...
24 because I did not make it clear to the witness
25 and I probably should not have done I do not

1 ask him quite a lot of questions about
2 balancing funds and who allocates what costs
3 etc ..."

4 So he mentioned balancing and funds
5 because he said they are for Trial 3.

6 Just to put down our own marker, as I said
7 in opening, our case is that this question of
8 balancing both sides of the market is for
9 Trial 1, it is part of our object case, apart
10 from everything else, following Budapest Bank.

11 Secondly, on the allocation of costs,
12 I thought my learned friend had put questions
13 about how costs are allocated to other
14 witnesses, and those are obviously points he
15 thinks are relevant to Trial 1 also. So
16 I would not want him to be under any
17 misapprehension. If he wishes to put questions
18 about balancing or allocation he has
19 an opportunity to do so now with Mr Knupp. But
20 I understood he had already done so, in fact,
21 in the course of his own cross-examination.

22 THE PRESIDENT: Thank you, Mr Kennelly.

23 I do not think --

24 MR BEAL: The point I was making was about
25 being shut out of putting things in Trial 3

1 from here. To what extent --

2 THE PRESIDENT: Indeed.

3 MR BEAL: -- I have made my bed, I need to
4 lie on it for Trial 1, fine. But for Trial 3
5 I just do not want to be shut out.

6 THE PRESIDENT: Thank you, both. Thank
7 you very much for your evidence, and your time.
8 We are very grateful. You are released from
9 the witness box.

10 A. Okay, thank you very much.

11 (The witness is released)

12 MR KENNELLY: Now we call Mr Stokes who we
13 are hearing remotely.

14 THE PRESIDENT: We had better make sure he
15 is on the right screens for us to see as well
16 as everyone else.

17 MR HUGH STOKES (appearing via video)

18 MR KENNELLY: I am waiting for him.

19 THE PRESIDENT: I think we all are. I am
20 assuming he is going to come through the EPE
21 screen for us.

22 MR KENNELLY: I hope so.

23 THE PRESIDENT: We need to sort out the
24 technical details. I think that is probably
25 best done if we rise. So we will do that for

1 five minutes or less, thank you.

2 (3.50 pm)

3 (Technical pause)

4 (3.53 pm)

5 THE PRESIDENT: Mr Stokes. Good

6 afternoon. Can you hear and see us?

7 A. I can hear but I cannot see.

8 THE PRESIDENT: Give it a moment to

9 adjust. What can you see, just so that I am
10 clear?

11 A. I can see myself and I can see three icons
12 of Trevor Gilbert from the CAT and somebody else.

13 THE PRESIDENT: Okay. Are you seeing CAT
14 courtroom 1?

15 A. No, I cannot see --

16 THE PRESIDENT: Mr Stokes, are you happy
17 with us to proceed with us seeing you but you
18 just hearing us? It is not a problem for you,
19 is it?

20 A. I guess we will go ahead on that basis.

21 What I can see now is my statement that has come up
22 on the screen, but I cannot see the courtroom.

23 THE PRESIDENT: Okay, we will feel our
24 way, Mr Stokes.

25 First of all, you have been given,

1 I think, an affirmation. I wonder if you would
2 first of all state --

3 A. Yes, I have.

4 THE PRESIDENT: -- your full name to the
5 court.

6 A. My name is Hugh Richard Stokes.

7 THE PRESIDENT: If you would not mind,
8 could you read the affirmation out to the
9 court?

10 A. I, Hugh Richard Stokes, do solemnly,
11 sincerely and truly declare and affirm that the
12 evidence I shall give shall be truth, the whole
13 truth and nothing but the truth.

14 THE PRESIDENT: Thank you very much,
15 Mr Stokes.

16 Before I hand you over to counsel, just
17 a couple of other points. You are sitting on
18 your own in the study that we see?

19 A. That is correct. Yes, there is nobody
20 else here.

21 THE PRESIDENT: You have, as you mentioned
22 earlier, access to the documents. Are they
23 being brought up by the same people who are
24 bringing up documents for us, do you know?

25 A. Opus2. I assume so.

1 THE PRESIDENT: You assume so.

2 A. Yes. So at the moment I can see the first
3 page of my witness statement.

4 THE PRESIDENT: That is very helpful.
5 Which is what I am seeing also.

6 In case something goes wrong, because it
7 almost certainly will, is there technical help
8 on site, or if things go wrong are you on your
9 own?

10 A. One moment. Somebody from Linklaters has
11 kindly been helping me today who is still available,
12 I believe.

13 THE PRESIDENT: Very good.

14 A. But apart from that I am on my own.

15 THE PRESIDENT: Okay. Well, let us hope
16 nothing goes wrong, but I am sure we can call
17 that person if there is a problem at your end.

18 With that, Mr Stokes, I am going to hand
19 you over to Mr Kennelly who will have a few
20 questions, and then you will be cross-examined
21 by Mr Beal, who is counsel for the Claimants.
22 But Mr Kennelly is going over next, and I would
23 ask anyone who is addressing Mr Stokes to make
24 clear who they are, because he does not have
25 visual.

1 Examination-in-chief by MR KENNELLY

2 MR KENNELLY: Good afternoon, Mr Stokes.

3 This is Brian Kennelly. I am counsel, as you
4 know, for Visa.

5 A. Good afternoon.

6 Q. Yes. So you have mentioned that you have
7 in front of you the first page of a witness
8 statement. Could you go, please, or could you be
9 taken, please, to page 34, and that is
10 {RC-F4/10/34}, and can you confirm that is your
11 signature?

12 A. That is correct.

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

15 A. Yes, that is correct, subject to one point
16 that is dealt with in my second witness statement.

17 Q. Could I have that second statement, please
18 {RC-F4/19/1}.

19 . Do you see that?

20 A. Yes, I do.

21 Q. Could you go, please to page 4
22 {RC-F4/19/4}. Can you confirm that is your
23 signature?

24 A. Yes.

25 Q. That the contents of this statement are

1 true to the best of your knowledge and belief?

2 A. Yes, I can.

3 MR KENNELLY: I have nothing further.

4 Mr Beal has some questions for you now,

5 Mr Stokes.

6 A. Thank you.

7 Cross-examination by MR BEAL

8 MR BEAL: Mr Stokes, can you see and hear
9 me satisfactorily?

10 A. No. I can -- I can hear you, Mr Beal, but
11 unfortunately I cannot see you.

12 Q. Well, that is not to your disadvantage,
13 I suspect. As long as you can hear my questions and
14 you can answer them, then that is fine by me.

15 First off, you are a qualified
16 competition lawyer; is that right?

17 A. I was. I mean, I am almost retired now,
18 but I was, yes.

19 Q. You are aware, are you not, that a witness
20 statement is not the place for legal submissions?

21 A. Indeed.

22 Q. So to the extent that you seem to have
23 slipped a few into your witness evidence, I simply
24 shall not be asking you any questions about those,
25 okay?

1 A. Okay.

2 Q. Now, paragraph 17, page 5 of your witness
3 statement {RC-F4/10/5}, you say that the Visa rules:

4 "... do not prescribe the type of
5 Visa services offered by Issuers and Acquirers or
6 the terms on which such services should be
7 provided."

8 You would accept, however, would you
9 not, that Visa sets the terms of the default MIFs?

10 A. Yes, that is correct.

11 Q. Those default MIFs as we know --

12 A. Yes.

13 Q. -- provide the significant substantial
14 component part of Merchant Service Charges?

15 A. Yes.

16 Q. At paragraph 20, page 6, you say that
17 Visa Inc and Visa Europe limited from 2007 had an
18 arm's-length relationship, but of course Visa Europe
19 still had to charge the interregional fees that were
20 set by Visa Inc; correct?

21 A. That is correct.

22 Q. Visa Europe then set the terms and the
23 levels of the MIFs for intra EEA and domestic
24 transactions where it was the fall back?

25 A. Yes, that is correct.

1 Q. It was always a feature of the Visa Inc
2 rules, the global rules, the core principles, that
3 the interchange would be paid by the acquirer to the
4 issuer regardless of the MIF?

5 A. I think that is correct, yes.

6 Q. At paragraph 29 on page 8, you say Ireland
7 set its own domestic immediate debit MIF, and
8 then --

9 A. Yes.

10 Q. -- at paragraph 45, page 45 -- sorry, not
11 page 45. In paragraph 45, page 12, you say
12 {RC-F4/10/12}:

13 "... there was no impact on the UK
14 and Ireland (which I understand ...), given that
15 they had registered domestic rates."

16 That is two slightly different
17 things, is it not? One is registering a domestic
18 rate with Visa and the other is setting the domestic
19 rate.

20 Going back, if we can, please, to
21 paragraph 29, page 8, just so that I am clear, there
22 was not a domestic rate set by an association of
23 Irish banks, was there?

24 A. No. My recollection is that the rate was
25 set directly by the Visa Europe board, from memory.

1 Q. We can help your memory, I hope, by
2 looking at {RC-J4/24/18}. This is part of Visa's
3 response to a Commission request for information.

4 Can you see halfway down the page, it
5 says:

6 "On 27 February 2009, Visa Europe set
7 country-specific credit rates for Ireland ...
8 effective on 7 November 2009 ...

9 "Since 10 March --

10 A. Sorry. Yes, yes, I have got it, yes.

11 Q. "Since 10 March 2009, the formerly
12 applicable default MIF rates apply in whole or in
13 part to domestic consumer transactions in the
14 following countries ..."

15 One of which was Ireland.

16 A. Yes.

17 Q. Essentially -- and then footnote 24:

18 "Since 25 August 2007, only Irish
19 domestic consumer credit and deferred debit
20 transactions have defaulted to the interregional
21 MIFs. Visa Europe has set country specific MIFs for
22 credit and deferred debit transactions in Ireland
23 which will be effective from 7 November ..."

24 So it was either set at the default
25 rate by reference to the EEA or at some point Visa

1 Europe itself set a country-specific rate for
2 Ireland?

3 A. That would be correct, yes.

4 Q. If we look at -- I do not think in the
5 light of your answer we need to look at that. Could
6 we then please turn to paragraph 43, page 11
7 {RC-F4/10/11}.

8 You say that you found the logic of
9 the Commission's position and its statement of
10 objections hard to follow, and that was a statement
11 of objections concerning the cross-border acquiring
12 rules. That is right, is it not?

13 A. Yes. Is this referring to the 2009
14 statement of objections?

15 Q. Yes, it is.

16 A. Yes. Agreed.

17 Q. Then at paragraph 50, page 13, five or six
18 lines down on paragraph 50 {RC-F4/10/13}, you say:

19 "The Commission's provisional view
20 [on the CBA rules and the SSO] was, again, difficult
21 to follow."

22 You have not mentioned here the
23 Mastercard 2 Central Acquiring Rule decision. Were
24 you aware of that decision?

25 A. The Mastercard 2 Central Acquiring

1 decision, was that the decision where Mastercard was
2 fined?

3 Q. Yes, it is.

4 A. Yes. That post-dated both of these Visa
5 SOs. I think it is probably why I did not mention
6 them.

7 Q. It covers a similar period. Let us have
8 a look at it in {RC-J5/30/1}, just to give you the
9 front cover so you can see what I am talking about.
10 You will see the case reference is there.

11 A. Yes.

12 Q. Over the page, page 2, it says
13 22 January 2019, relating to a proceeding etc?

14 A. Yes.

15 Q. If we then please turn to page 9,
16 paragraph 25, recital 25, {RC-J5/30/9} we have
17 a description of the cross-border acquiring rule as
18 applied by Mastercard.

19 Do you want to take a quick look at
20 that paragraph if you have not read this recently?

21 A. Yes, thank you.

22 Q. So that you can compare and contrast that
23 rule with the old Visa cross-border acquiring rule.

24 A. Okay. Yes, I have read paragraph 25.

25 Q. If you turn, please, to page 13,

1 paragraphs 45 to 46, the Commission in this decision
2 was exploring the impact of that rule on the
3 respective domestic markets.

4 You can see there that under
5 recital 46, for example, it says:

6 "The restriction of cross-border
7 acquiring locked in merchants and forced them to
8 accept the domestic MIFs applicable in their 'home'
9 Member State."

10 A. Yes.

11 Q. That was what the Commission was objecting
12 to; correct?

13 A. Yes, but I think we need to be clear that
14 the nature of the Commission's objections differed
15 as between the Visa 2009 SO and the 2012 SSO. The
16 analysis that you are taking me to here is very
17 similar to that in the 2012 Visa SO. SSO, sorry.

18 It is different from that in the 2009
19 one.

20 Q. I think you would accept, would you not,
21 that there was an evolution in the Commission's
22 thinking that they recognised themselves in various
23 communications with Visa over the years?

24 A. Yes. I mean, that is one way of putting
25 it. But I think you -- I would also say it was

1 quite a stark evolution, in that one of the
2 commitments that Visa gave in relation to the 2009
3 SO was -- required a mandatory registration of
4 domestic rules/interchange rates, and shortly
5 afterwards in 2012 the Commission was characterising
6 that as an infringement.

7 So evolution is one way of describing
8 it, but it was quite an abrupt break with how they
9 had come to look at it previously.

10 Q. Well, they were concerned initially, were
11 they not, with the non-registration of domestic
12 rates, which meant that there was no way --

13 A. Correct.

14 Q. -- that a cross-border acquirer would know
15 what rate was the going rate in the domestic market?

16 A. If there was a particular concern that
17 a cross-border acquirer might be undercut in the
18 domestic market.

19 Q. Yes. So if they were keeping a lower
20 domestic rate hidden and all the cross-border
21 acquirer could offer was a higher intra EEA rate,
22 that put the acquirer at a disadvantage because he
23 could not offer a designated domestic rate because
24 he did not know what it was?

25 A. Correct. That was the analysis in the SO.

1 Q. Then the concentration moved after that.
2 Because of the registration process, you had
3 visibility about domestic versus intra EEA, and the
4 Commission's concern then became, well, we want
5 acquirers to be able to offer whichever is the
6 lower.

7 A. Yes, that is correct.

8 Q. If you look, please, at page 17,
9 paragraph 62-63, here we see the Commission finding,
10 do we not, that the CAR was a restriction of
11 competition by object for article 101(1) purposes?

12 A. Yes. Yes, I am looking at paragraphs 62
13 through 64. Yes, they -- they consider it to be
14 restriction by object.

15 Q. The two-sided nature of Mastercard's card
16 scheme did not change that conclusion?

17 A. That is what it says, yes.

18 Q. Paragraph 66, the concern, was it not, was
19 that this was being used to shield domestic
20 acquiring from cross-border competition?

21 A. Yes, that is what it says.

22 Q. Then at 67-68 on the next page
23 {RC-J5/30/18}:

24 "The fact that the cross-border
25 acquiring rules may have pursued other possibly

1 legitimate objectives does not preclude them being
2 regarded as a restriction 'by object'."

3 A. Yes.

4 Q. But in any event, see recital 68:

5 "... there were no objective
6 justifications for the cross-border acquiring rules
7 during the relevant period. In particular, the
8 Commission considers that the interests pursued by
9 the cross-border acquiring rules were not those of
10 the public, but the private, commercial interest of
11 Mastercard and its members."

12 So that was the conclusion that was
13 reached in relation to a remarkably similar rule to
14 the old CBAR that Visa was operating.

15 MR COOK: (Inaudible) important words
16 during the relevant period as Mastercard
17 accepted for that 18-month period.

18 MR BEAL: The disembodied voice you have
19 just heard is counsel for Mastercard.

20 A. Thank you.

21 MR BEAL: Paragraph 76, page 19,
22 {RC-J5/30/19} the Commission found that the
23 test for objective necessity was not met. Can
24 you see that? Cross-border --

25 A. Yes, paragraph 76, yes.

1 Q. Could we look, please, in bundle
2 {RC-J4/89.2/100}. This is part of Visa's core
3 rules from a public version. So it is October 2023,
4 and you will see that clause 1.5.1.1 says:

5 "An acquirer must accept and submit
6 transactions into interchange ... [only] within that
7 acquirer's jurisdiction.

8 "An acquirer must accept transactions
9 only from a merchant outlet within the acquirer's
10 country of domicile ..."

11 So the current rules have a
12 restriction on cross-border acquiring, but that is
13 then relaxed, see fourth bullet point for the Europe
14 region, by:

15 "An acquirer has passported its
16 licence in line with EU passporting regulations".

17 So the Mastercard rules currently
18 permit principal members to have a sponsored entity
19 in another member state that can act as
20 a cross-border acquirer. Is that right? From 2015.
21 This is the new rule that was put in place.

22 A. Yes. I am assuming this is post the IFR
23 as well, but yes, if this is from 2015 that looks
24 correct.

25 Q. No, this is from 2023 but the rule changed

1 that was effective --

2 A. 2023, okay.

3 Q. -- from 2015 allowed principal members to
4 have a sponsored entity in another member state that
5 could act as a cross-border acquirer. Is that
6 correct to the best of your knowledge and
7 recollection?

8 A. It sounds correct, yes.

9 Q. Could we have a quick look at the modern
10 version of the rule. This is a confidential
11 document, so I am going to invite you to read it and
12 I am not going to, I hope, describe the specific
13 content of this rule. So it is {RC-J7.2/6/2}.

14 Could you please read the definition
15 of "cross-border acquired transaction",
16 "cross-border acquirer" and "cross-border
17 acquiring".

18 A. Yes, I have read that.

19 Q. Can you see that the focus is on entities
20 in the EEA?

21 Now, I hope it is not a controversial
22 point, but a UK entity is no longer in a European
23 Economic Area country, is it?

24 A. No, it is not. Although that post-dated
25 my time at Visa, but yes.

1 Q. Then the body of the rule that applies to
2 the entities that we have seen just described is at
3 page 3, and the options available to a cross-border
4 acquirer are set out at the top of page 3.

5 Does that accord roughly with your
6 recollection of how the new CBAR works?

7 A. Yes. This looks to me like the new rule
8 that was implemented to give effect to the
9 commitment that was offered to resolve the points
10 set out in the 2012 SSO, yes.

11 Q. So the position that we have reached, is
12 it not, is that a cross-border acquirer can either
13 charge the intra EEA MIF or the MIF applicable in
14 the member state of the merchant?

15 A. Yes, I think that is --

16 Q. In light of the IFR.

17 A. Yes. Sorry, that was the caveat that that
18 was going through my mind. Yes, I think that is
19 correct.

20 Q. It is setting -- I had better not go
21 into ...

22 What it does not permit, does it, is
23 an acquirer, a cross-border acquirer, to offer a MIF
24 based on the prevailing domestic rate in the
25 acquirer's own market, the home market of the

1 acquirer?

2 A. No, I think That is correct.

3 Q. So if we were to take the position in
4 Ireland as it is at the moment, for example, there
5 is a domestic debit cap in Ireland of 0.1%. Are you
6 familiar with that?

7 A. I would say that I was aware that the
8 Irish authorities had their own rate. The 0.1
9 figure sounds vaguely familiar, but I would not
10 claim that I knew it in any detail.

11 Q. Just bear with me and assume it is right
12 for the moment. That would then produce --

13 A. Okay.

14 Q. -- a different MIF rate, would it not,
15 than a rate that would be available in
16 Northern Ireland which would be 0.2% asset by the
17 Visa scheme?

18 A. Yes. That is correct.

19 Q. So if a Northern Irish merchant went to an
20 Irish acquirer, an acquirer based in Ireland, before
21 Brexit, that Northern Irish merchant would be
22 offered 0.2% as an intra EEA MIF; is that right?

23 A. Yes. I think that is right.

24 Q. Following Brexit, depending on the card
25 transaction in issue, substantially higher rates

1 would be offered because it would be classified an
2 interregional transaction; is that correct?

3 A. I believe so. Again, bear with me.
4 Following Brexit is after my time working at Visa,
5 but I think -- I believe it is correct.

6 Q. That higher rate would be the only one
7 available to the Northern Irish merchant even though
8 the Irish acquirer would be able to offer Irish
9 merchants debit MIFs of 0.1%, so there would be
10 a differential?

11 A. Yes, that is the way -- that is the way
12 the commitment worked, yes.

13 Q. So the Northern Irish merchant is
14 substantially worse off than its Irish counterpart
15 that is immediately across the border; you would
16 accept that, would you not?

17 A. On the -- on the basis of comparing those
18 two rates, yes, you could put it like that.

19 Q. Now, when the CBR commitments were given
20 in 2014, do you recall that Worldpay was not happy?

21 A. Yes, I do.

22 Q. They lodged a complaint with the
23 Competition Markets Authority in the United Kingdom;
24 is that right?

25 A. Yes.

1 Q. Their essential complaint was that Visa
2 was refusing to lower the domestic interchange rate
3 in the United Kingdom; is that right?

4 A. As I recall. I am familiar with the
5 outline, I was not involved in the case itself but
6 I am familiar with the main details, so I believe
7 that is correct, yes.

8 Q. But they went to the CMA and said this is
9 jolly unfair because this new commitment is coming
10 in, its cross-border acquirers will be able to offer
11 debit transactions at 0.2%, but we have a higher
12 domestic debit card rate in the UK, which all our
13 customers would prefer to pay less money.

14 A. I think that was the -- that was the
15 substance of the complaint, yes.

16 Q. Worldpay ultimately established
17 a sponsored member, Worldpay BV in the Netherlands,
18 in order to offer the lower intra EEA MIF?

19 A. Yes.

20 Q. Now, paragraph 60 of your witness
21 statement, page 17, you express concern that this
22 sort of arbitration, sorry, arbitrage might take
23 place. Why were you worried about arbitrage between
24 different rates leading to lower MIFs?

25 A. I think the concern at the time was that

1 de facto it could lead to a situation in which you
2 would get much lower MIFs than the headline 0.2 and
3 0.3 which the Commission had previously agreed to
4 because if there was a very low rate in one market,
5 merchants could gravitate to a cross-border acquirer
6 who is located there leading to, you know, a very
7 substantial reduction in interchange which went
8 below the rate the Commission had previously agreed
9 on for that matter was agreeing in the credit
10 commitments package itself.

11 Q. But that lower interchange would feed into
12 lower Merchant Service Charges for merchant,
13 correct?

14 A. It might. But this was looking at it from
15 Visa's perspective that it was -- it was thought
16 that having such an abrupt very dramatic reduction
17 in interchange in this way might be damaging to
18 the -- to the Visa system and again cut across other
19 rates that were being -- that were being agreed with
20 the Commission which themselves were lower than the
21 rates that had previously been enforced.

22 Q. Could you look, please, at paragraph 56.3
23 at page 16 of your first witness statement,
24 {RC-F4/10/16}. You say Visa is keen -- it
25 encourages promotion of competition and a level

1 playing field, since this competition drives
2 Merchant Service Charges as low as possible and
3 thereby encourages merchant acceptance.

4 So if that is right surely you would
5 be keen to have cross-border acquirers able to offer
6 a lower Merchant Service Charge to merchants in the
7 United Kingdom?

8 A. Yes. I mean, that depends on what element
9 of competition you are talking about. Obviously
10 interchange is a significant component of the
11 Merchant Services Commission but it is not the only
12 one and as I just reiterate, Visa was concerned with
13 structuring a remedy, if you like, or commitment in
14 this way would have negative consequences for the
15 system.

16 Q. Now, most of your witness statement is
17 taken up with looking at a series of regulatory
18 decisions and statements of objection, statements of
19 supplemental objection. I am going to have to go
20 through those as quickly as I can with you and just
21 pick out, if I may, the headlines. You will be
22 aware that many of those documents are highly
23 detailed and I simply do not have time to go through
24 them in detail with you. The first one you have
25 relied upon is the Visa I decision, at paragraph 31

1 of your witness statement.

2 A. Yes.

3 Q. Could you look, please, at bundle
4 {RC-J4/31/186}. Here I hope we have recital 598 of
5 the European Commission's supplementary statement of
6 objections to Visa and we see in 598 that there is
7 an express reference back to the Visa I decision and
8 the negative clearance. It is said the fact that
9 that decision was taken:

10 "... does not mean that the
11 Commission is bound by the exemption decision until
12 it is formally revoked. Formal revocation of the
13 Visa I decision is not required for the Commission
14 to engage in the reassessment of such rules."

15 It deals then with the status or
16 otherwise under EU law of the negative clearance
17 decision.

18 So it is clear, is it not, that the
19 European Commission was taking the view that it was
20 not bound by this negative clearance decision and it
21 was reassessing the matter?

22 A. Yes. Yes, that is the way they presented
23 it, yes.

24 THE PRESIDENT: Mr Beal, Mr Kennelly,
25 I wonder if I could ask your assistance before

1 Mr Beal goes through a large number of
2 documents with the witness. I quite understand
3 why these points are being put but in a sense,
4 it is quite possible to predict both what
5 points Mr Beal is going to be taking with the
6 witness and what the witness is going to be
7 saying. Provided we take it that these points
8 have been put and that we can anticipate what
9 answers Mr Stokes is going to be given, are we
10 not going to be predicting -- really are we not
11 going to be dealing with points of submission
12 as to the bindingness of these documents where,
13 with great respect to Mr Stokes, what actually
14 he says or does not say is not really going to
15 make very much difference?

16 MR BEAL: No, I am very happy to pursue
17 that course.

18 MR KENNELLY: I entirely agree for my
19 part, sir.

20 MR BEAL: Could I add also this perhaps
21 for Mr Stokes' benefit: Mr Stokes, have you
22 read the evidence from Mr Korn?

23 A. I have seen one small extract point but
24 not otherwise, no.

25 THE PRESIDENT: Mr Stokes, just to explain

1 the exchange there. You were about to be taken
2 through, quite properly by Mr Beal, a whole
3 series of regulatory decisions and you would
4 have been asked to agree or disagree with
5 certain passages in those decisions. What
6 I think we have achieved is a measure of
7 agreement that we will leave it to later
8 submission to identify those passages which the
9 Claimants rely upon and we will leave it to
10 Mr Kennelly to articulate Visa's objection to
11 those statements. If, as may well be
12 contended, those statements are binding, then
13 it will be a matter for the tribunal to
14 determine whether they are or whether they are
15 not, but I do not see why you need to be
16 troubled with those points if Visa are not
17 insisting, as they are not, that they be put.

18 So I think, Mr Beal, that gives you
19 an opportunity to focus on areas where --

20 MR BEAL: It does, thank you very much.

21 THE PRESIDENT: Thank you. I am very
22 grateful to you with that.

23 MR BEAL: Could I, with that in mind, put
24 some headline points to you, Mr Stokes.
25 Firstly, you suggest at various places that the

1 Commission was not very interested in some of
2 the scheme rules, the Honour All Cards Rule,
3 the surcharging rule and so on. Can I put to
4 you that in fact they had routinely expressed
5 concern about those rules, the extent to which
6 they have made any findings one way or the
7 other will be a matter for legal submission?

8 A. Yes, I think that characterisation is
9 fair. Obviously leaving aside the Visa I decision,
10 surcharging and Honour All Cards crop up in the 2009
11 and 2012 SO and SSO. So respectively they are
12 expressed as not being an issue in their own right
13 but of reinforcing the way in which the Commission
14 saw the restrictive effects of interchange to that
15 effect. So expressing concern, yes, I would not
16 disagree with that characterisation.

17 Q. The Commission also had not viewed either
18 the IPO of Visa Inc in 2006, 2007 as changing its
19 analysis, nor indeed the one Visa transaction in
20 2016; is that right?

21 A. I think that is correct, yes.

22 Q. The Commission at various stages in its
23 decision-making process made clear that it was
24 parking certain issues such as commercial cards; is
25 that fair?

1 A. Yes.

2 Q. It routinely expressed its right to come
3 back and look at things in a different context, for
4 example the Honour All Cards Rule?

5 A. Yes, I think that is right. Are we
6 talking about any particular instances or --

7 Q. Just deal with the general principle that
8 when one looks at these decisions there are certain
9 things the Commission was doing: One, it was
10 reserving its right to look at different aspects of
11 the rules in different contexts, that is the first
12 point I have made to you?

13 A. Yes, no, I think that is fair.

14 Q. It was also reserving the right to come
15 back on specific MIFs such as, for example,
16 interregional MIFs or commercial card MIFs?

17 A. Yes, that is correct. I mean, I think
18 that happened with commercial cards on more than one
19 occasion but yes, the statement is correct.

20 Q. Now, paragraph 52, page 14, you say that
21 the European Commission by its decision which was
22 the first Commitments decision essentially required
23 you to maintain the cross-border acquiring rule.
24 With respect, that is not quite right, is it? What
25 they were doing was saying that they were requiring

1 you to register domestic merchants for the reasons
2 we discussed earlier, which was that otherwise there
3 was not visibility for the cross-border acquirer of
4 what the potentially applicable domestic rate was?

5 A. That is correct, but that was in the
6 framework of the then existing cross-border
7 acquiring rules.

8 Q. Could I invite you, please, to look at
9 bundle {RC-J4/28/2}. This is a confidential
10 document so I am not proposing to read it out, but
11 there is a paragraph three up from the bottom that
12 begins "As a result ...". Could you read that
13 please?

14 A. Yes. (Pause) this document is from 2009
15 or --

16 Q. Yes, you will see what the contingency --
17 sorry, constituency of the people at the meeting at
18 page 1. So it is a series of people both from the
19 European Commission and from Visa --

20 A. Got it.

21 Q. -- and Freshfields?

22 A. 2010 yes.

23 Q. Then that paragraph, it is a specific
24 technical matter which does not come out of the
25 decision which is why I have taken you to it.

1 There is a reference there to
2 a number of rule changes that might be needed if
3 certain things happen. Was that level of change
4 required each time a rate -- a new rate was set for
5 a MIF? Do you know?

6 A. I am probably not the best person to ask
7 about this.

8 Q. Fine.

9 A. I think that would be better put to one of
10 my colleagues such as Tim Steel who I think is
11 giving evidence.

12 Q. Thank you.

13 A. But I do recall that each time
14 a commitment or intention was implemented there was
15 a very substantial amount of work that required to
16 be done from a technical perspective, but I would
17 not like to proffer any more explanation of that
18 because it is not my area of expertise.

19 Q. So presumably if you had a series of
20 individually set MIFs per issuing bank, that would
21 multiply the level of work required quite
22 considerably?

23 A. Again, I am not really -- that seems
24 plausible but again not my area of expertise.

25 Q. Now, when on two occasions at least, in

1 fact three occasions, Visa has or Visa Inc, Visa
2 Europe, have accepted proffered commitments to deal
3 with an investigation, it is right, is it not, that
4 that represents Visa's acceptance that those
5 commitments must be given to meet the
6 European Commission's competition concerns?

7 A. Yes. I mean that -- that is how
8 commitments -- that is how commitments work, that is
9 the idea of putting a package together that would
10 cause the Commission to bring its proceedings to an
11 end.

12 Q. Please could we look in {RC-J4/49/14},
13 just under the redacted section can you see there is
14 the statement saying "the Board ..." and it says:

15 "The Board congratulated management
16 on achieving the commitments, welcomed the new
17 regulatory strategy and discussed specific elements
18 of the proposed regulation including commercial
19 cards and cross-border acquiring ..."

20 Et cetera. So certainly this is from
21 2014?

22 A. Yes.

23 Q. Just confirm that date. It is at the
24 7 March 2014, page 1 of that document. The board
25 was essentially happy that they had been able to

1 secure the commitments they gave to the Commission
2 in 2014, were they not?

3 A. In 2013, I think, yes, I mean, I think the
4 board is happy that the legal proceeding had been
5 resolved, yes.

6 Q. At paragraph 77 I am afraid this is
7 a specific point that I do need to raise with you,
8 it is not a sort of general "this is what the
9 Commission found" point.

10 But at paragraph 77 you make
11 a specific complaint about the Commission and you
12 say that they failed to take into account Visa's
13 arguments that the majority of merchants do not
14 surcharge even when permitted to do so.

15 In fact, if we look in that
16 particular decision at {RC-J4/22/104}, I have called
17 it a decision, it is a preliminary view, contained
18 in a statement of objections, just to be clear. But
19 if you read, please, (303), recital (303), through
20 to (307), you will see, will you not, that the
21 European Commission was addressing the extent to
22 which surcharging did in fact take place or did not
23 take place and if so, for what reasons.

24 THE PRESIDENT: You need to read those
25 paragraphs, Mr Stokes?

1 A. Yes, may I read them quickly?

2 THE PRESIDENT: Yes, of course.

3 A. Okay, yes, I read (303) and (304).

4 MR BEAL: So the Commission had in fact
5 dealt with the arguments you had raised, had
6 they not, on this point?

7 A. I mean, I think there are separate points
8 here. The merchants -- I mean, the Commission is
9 giving a raft of reasons why it considers that
10 surcharging would take place if it were -- if the
11 various constraints that they had identified
12 including -- were not in place.

13 Q. Now, you have dealt extensively --

14 A. But I am not.

15 Q. Sorry, I did not mean to cut across.

16 A. No, it is all right, keep going. Do not
17 worry.

18 Q. Are you sure, I do not mean to interrupt
19 you?

20 A. No, it is fine, keep going.

21 Q. Now, you have dealt also with, for
22 example, the Honour All Cards Rule, co-badging rule,
23 non-surcharging rule and so on. Those are points
24 also that your colleague Mr Korn covers and what
25 I am proposing to do, which your counsel has not

1 objected to, is I am only going to put one set of
2 questions on those issues to one witness, and so
3 given the time, I was not proposing to cover those
4 with you, I just wanted to make that clear.

5 So I am going to move on to deal with
6 the final bits that you deal with in your statement,
7 which concern commercial cards and commercial rates
8 and specifically the factual assertions you make
9 from for example paragraph 107, you refer to
10 a suggestion that the market share for Amex at one
11 point was 60% of the commercial cards business in
12 the European Union based on turnover.

13 Which specific market, if any, are
14 you talking about there?

15 A. I cannot recall. This is an old number.
16 It was some time in the early 2000s if I recall and
17 I do not recall exactly how that figure was compiled
18 but I also meant that there were difficulties with
19 it because Amex was not very -- was not very
20 forthcoming with putting anything in the public
21 domain.

22 Q. Could we look at a confidential document?

23 A. I --

24 Q. Sorry -- I keep on doing that --

25 A. Honestly I cannot answer that, that

1 question in terms.

2 Q. Could we look please at -- it is
3 a confidential document so I am not going to read if
4 out, it is {RC-J4/8/131}, this is a very old
5 supplemental statement of objections that was not
6 actually addressed to Visa, it was addressed to
7 somebody else. But if you look at 131 there is
8 a paragraph 537. Can you read that paragraph,
9 please?

10 A. Yes. (Pause)

11 Yes, I have read it.

12 Q. So given the hierarchy of who is
13 successful in that market and who is not, it is not
14 possible to achieve, is it, a figure of 60% that you
15 quote in paragraph 107?

16 A. I mean, this is different. I think it is
17 probably a few years later, as I said I think that
18 number is quite old. But this was the best estimate
19 at the time.

20 Q. Are you aware --

21 A. I also wonder -- just a thought here,
22 there are different categories of commercial card
23 and I wonder if the definitions are identical. It
24 is just a thought, but I do not know if they are.

25 Q. Are you aware of the more recent

1 indications of Amex's share in the UK commercial
2 card market from, say, 2018 and 2019?

3 A. I do not think I have seen any data.

4 Q. If I was to say it is more in the region
5 of 10 to 11%, would you be able to disagree with it?

6 A. I am not in a position to. I do not know
7 enough about it, but ...

8 Q. Now, paragraph 112 of your witness
9 statement, page 30, you deal with a response to
10 a request for further information and you start
11 examining what you think an issuing bank might need
12 for a particular part of its business. Have you
13 ever worked for an issuing bank?

14 A. No.

15 Q. Did you rely on issuing bank's accounts
16 and figures to derive these assertions?

17 A. I -- I think in putting together
18 submissions, I related the first instance with
19 Visa's commercial card team who all had very close
20 relationships with commercial card issuer banks and
21 we also spoke to at least one commercial card issuer
22 at the time in some detail.

23 Q. Could I ask you, please, to look at --
24 sorry?

25 A. In advance of this, this particular RFI.

1 Q. I am sorry, again I cut across you. It is
2 difficult with remote cross-examination to know when
3 you have finished and when you have not, so it is my
4 fault.

5 A. I am sorry.

6 Q. No, there is a slight time lag. Bundle,
7 please, {RC-J4/5/11}. Yes, if we could start,
8 please, at -- to orientate myself -- the bottom of
9 page 10. This is a Visa observation to the
10 European Commission. I am not going to go into any
11 detail but you will see under section 6.1 it refers
12 to some points that the Commission has made on
13 commercial fees. Can you see that?

14 Then please could you read --

15 A. 6.1?

16 Q. -- 6.2 to 6.4. (Pause)

17 A. Okay. 6.2 and 6.4, okay. Yes.

18 Q. Just setting the scene. Essentially the
19 comments that then follow are all geared towards
20 relying upon an exemption being granted under what
21 was then Article 81.3 and you will see that at the
22 top of page 11. So these are submissions that are
23 being deployed, are they not, for the benefit of
24 seeking to get a justification for the MIFs charged
25 for commercial cards rather than saying that there

1 is absolutely nothing wrong with commercial cards,
2 MIFs?

3 A. Yes. I think it was positioned in
4 a slightly different way saying that Visa thought it
5 would be helpful to explain to the Commission what
6 Visa's view on possible Article 81.3 arguments would
7 be. That might -- that might be more productive
8 even if at that point Visa still disagreed with the
9 Commission about the application of 81.1 to
10 interchange agreements.

11 But, yes, I think -- I think it is
12 also fair to say that Visa would -- would have
13 considered an agreement with the European Commission
14 at some point if it could be done on what was seen
15 to be commercially acceptable terms.

16 MR BEAL: Thank you. I do not have any
17 further questions.

18 THE PRESIDENT: We have no further
19 questions, Mr Kennelly.

20 MR KENNELLY: One short point in
21 re-examination.

22 THE PRESIDENT: Of course.

23 Re-examination by MR KENNELLY

24 MR KENNELLY: Mr Stokes, could I ask you
25 to be shown in the [draft] transcript page 204,

1 top of the page, lines 1-7, where you were
2 cross-examined on the 60% figure.

3 A. Yes.

4 Q. Do you see that?

5 A. Yes.

6 Q. Could I ask you to go to {RC-J4/3/17} --
7 sorry, 19, forgive me, {RC-J4/3/19}.

8 Yes. First of all, this is Visa's
9 response, if you see the heading, Visa's response to
10 an RFI from the European Commission in that same
11 investigation in December 2002, do you recognise
12 this document?

13 A. I believe so, yes.

14 Q. Yes. You see the table below it, do you
15 want to say anything about that table to the
16 tribunal?

17 A. Yes. I mean, that is -- that is where the
18 number came from that I used in my witness statement
19 and which at the time was thought to be correct. As
20 I said, I cannot remember exactly how the data was
21 put together but that is consistent with what
22 I said.

23 MR KENNELLY: Thank you, Mr Stokes, I have
24 no further re-examination.

25 THE PRESIDENT: Thank you very much,

1 Mr Kennelly.

2 MR COOK: It was not for re-examination,
3 but it was just a series of questions were
4 asked about the Irish and Northern Irish
5 example interregional rates. Just for
6 clarification, that does not reflect how
7 Mastercard system works, nor how Visa system
8 works, that level of detail. I do not want it
9 to be said, because I am not saying anything
10 about it, it is a Visa witness being asked
11 about Visa, but that does not reflect how
12 Mastercard operates.

13 THE PRESIDENT: I think that is a point
14 for submission.

15 Thank you for making that clear.

16 Mr Stokes, that concludes your remote
17 examination, can I express our thanks for your
18 time and your giving evidence in these
19 circumstances, we are very grateful to you,
20 I would normally say you are released from the
21 witness box but I will say now I think you can
22 switch yourself off. But thank you very much,
23 we are very grateful to you.

24 A. Thank you very much.

25 (The witness withdrew)

1 THE PRESIDENT: Thank you.

2 MR KENNELLY: One piece of housekeeping
3 before we depart.

4 THE PRESIDENT: Mr Kennelly, yes.

5 Housekeeping

6 MR KENNELLY: On the hot-tub which we are
7 seeking to accommodate in the timetable we have
8 written to the Claimants and they may have
9 written to us in the course of the day, I have
10 not seen it, we have suggested Wednesday
11 6 March. If you go to the timetable, it is in
12 {RC-P/1/2}, Mr Dryden's evidence is -- I raise
13 this now just because we are about to go into
14 a non-sitting period and I wanted to raise it
15 now.

16 THE PRESIDENT: That is very helpful.

17 MR KENNELLY: Mr Dryden's evidence is due
18 to begin on 6 March in the morning and what we
19 had proposed was that the hot-tub take place in
20 the morning and then we have the afternoon to
21 -- either for the hot-tub to overrun or to
22 absorb which is very important for my purposes
23 -- to absorb the outcome of that hot-tub
24 because I go straight into cross-examining Mr
25 Dryden after that. Mr Dryden's

1 cross-examination will begin in the morning of
2 Thursday, so it would help me first to
3 understand the answers he gave, but also to
4 reduce my own cross-examination, I imagine
5 the tribunal will cover a lot of the ground
6 that I plan on covering.

7 THE PRESIDENT: That is very helpful, can
8 I express my gratitude -- our gratitude -- to
9 the parties. For our part we will try to
10 indicate -- there is no promises -- but we will
11 try to indicate the areas that we would want to
12 traverse with the witnesses, but you can expect
13 it to be at a fairly general level in terms of
14 how the scheme operates or how the ecosystem --
15 a word which everyone seems to be using in
16 evidence -- operates, so that we can understand
17 where all the experts are coming from with
18 a view to narrowing what they say but we quite
19 understand that you will need some time to
20 adjust as the first cross-examiner of the
21 experts.

22 MR BEAL: Sir, could I just say this: what
23 I want to avoid at all costs if I can --
24 obviously it is ultimately for the tribunal --
25 is Mr Dryden being in purdah over that weekend

1 and indeed on the non-sitting day on Friday 8th
2 and I have discussed with my learned friend two
3 ways of accommodating that. One is that the
4 hot-tub is confined to the morning session and
5 that would require Mr Dryden to be
6 cross-examined on frankly bits that I do not
7 anticipate are going to change about his expert
8 opinion, notwithstanding the hot-tubbing
9 process and then my learned friend can sort of
10 realign overnight. If that is not acceptable,
11 then the other option -- my understanding is
12 this tribunal is booked in for the morning of
13 Friday 8th for the trial 2 CMC and I do not
14 know whether the tribunal in order to
15 accommodate this trial would be willing to have
16 any additional final elements of
17 cross-examination of Mr Dryden dealt with that
18 morning rather than -- because the alternative
19 is I then do not have the benefit of that
20 expert for three days over the weekend when
21 I am cross-examining their experts the
22 following week which, with respect, is unfair.

23 THE PRESIDENT: I understand. First of
24 all, we will certainly be amenable to being
25 more flexible in terms of dates. I think we

1 will take it away but it may well be that we
2 should use Friday as a proper hearing day to
3 the extent that that assists the parties. So
4 perhaps you could just pencil that in and we
5 will deal offline with the trial 2 case
6 management hearing that would ordinarily take
7 place on that date. So we are certainly going
8 to be flexible in that regard.

9 Can I make a more general point regarding
10 experts and purdah. We appreciate that in
11 cases like this, as in most cases, experts
12 perform a dual function, they are not of course
13 giving evidence themselves but they are also
14 assisting parties in cross-examining the other
15 experts. Given that they are experts rather
16 than witnesses of fact, and have, as they will
17 all be aware, higher obligation to the
18 tribunal, for our part we are rather more
19 relaxed about the purdah rule than in other
20 cases. We regard it as frankly unconceivable
21 that conversations with their own legal team
22 would cause the experts issues and really the
23 purdah rule is there more to protect them than
24 to ensure that their evidence is in some way
25 corrupted. So I think you can take it that we

1 are likely to be much more flexible and we will
2 be clear about this when we come to it about
3 the application of the purdah rule because we
4 would not want you, Mr Beal, or anybody else in
5 a similar position to be disadvantaged going
6 forward. So we will give the usual purdah
7 directions, but we will ensure we nuance them
8 in that sort of case.

9 So obviously, Mr Kennelly, we will hear
10 from you if it comes to that, but it does seem
11 to me that Mr Beal's point is a fair one and
12 one that we would be minded to attempt to
13 accommodate.

14 MR KENNELLY: Indeed and I entirely
15 understand the concern and I have no difficulty
16 in carrying on on Friday with my
17 cross-examination if the tribunal is willing to
18 sit on Friday, subject to other commitments.

19 THE PRESIDENT: I am very grateful to you
20 both so we will make it work, Mr Beal, but
21 thank you for raising it because these things
22 do need to be sorted out in advance. We will
23 think further about Friday but I think you can
24 take it that unless something surprising
25 happens, it is a date that will be available to

1 you but we will make sure that I have not
2 misspoken because my diary, and indeed those of
3 my colleagues, is not as predictable as it
4 might be.

5 MR KENNELLY: Sorry, sir, I have been told
6 there is an adjournment application for trial
7 2. Currently anticipated -- I am so sorry --
8 it is the outer limit of the time period for an
9 application for an adjournment, if one is made
10 for trial 2.

11 THE PRESIDENT: It is one of the things
12 that is a floating contingency; let us leave it
13 as nebulous as that.

14 MR KENNELLY: Very well.

15 MR BEAL: Final point, if I may, sir.

16 Monday 4 March Mr Jensen is being
17 interposed and I think he is from New Zealand
18 and I think that is an early start if the
19 tribunal is happy.

20 THE PRESIDENT: We need to work out what
21 the starting time is, that is very helpful. Do
22 you have a starting bid?

23 MR BEAL: 9 o'clock I think was the
24 request.

25 MR KENNELLY: If the tribunal is happy

1 with 9 o'clock, that works for us.

2 THE PRESIDENT: If that works for you we
3 will make that work because I imagine that
4 involves either a very early start or a very
5 late start for him.

6 MR BEAL: It is a very late start for him.
7 It is a 10pm start for him.

8 The other thing to mention is of course we
9 have Mr Butler to squeeze into Monday 4th as
10 well but hopefully if we are starting early, we
11 can get through what would otherwise then be
12 a further five witnesses after Mr Jensen.

13 THE PRESIDENT: Yes. Well, I have said it
14 before but I will say it again now. Everyone
15 is moving at an appropriately fast pace. I am
16 very keen they do not move too quickly because
17 that way you just do not get the right answers
18 out of the witnesses, it is not fair to them,
19 it is not fair to you or indeed us, so we will
20 proceed in the way we have done feeling our
21 way. So far it has worked, if I may say so,
22 extremely well and that is credit to the legal
23 teams, not to us. We will obviously be
24 flexible in order to ensure that you all get
25 the appropriate amount of time with the

1 witnesses that are being called.

2 MR BEAL: Thank you very much.

3 THE PRESIDENT: But I think beyond saying
4 it is a 9 o'clock start on that Monday, it will
5 be dangerous to go further than that.

6 MR KENNELLY: I can give my learned friend
7 some comfort, I do not plan on cross-examining
8 Mr Jensen for a lengthy period of time so that
9 should give him some reassurance.

10 THE PRESIDENT: Well, that is good; in
11 other words, we will have a long day on Monday
12 and ...

13 PROFESSOR WATERSON: Also on Tuesday
14 I think.

15 THE PRESIDENT: Also on Tuesday. But we
16 will take Tuesday when it comes, we have at
17 least a clear idea of Monday.

18 So unless there is anything more, we will
19 adjourn until 9 o'clock on Monday, 4 March, but
20 if there are any issues that you need to raise
21 with the tribunal any time of course we will be
22 delighted to seek to deal with them.

23 With that, we are adjourned until then.

24 Thank you very much.

25 (4.58 pm)

1 (The hearing was adjourned until
2 Monday, 4 March 2024 at 9.00 am)
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