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IN THE COMPETITION

Case No:1266/7/7/16

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 19th– Friday 21st February 2025

Before:

The Honorable Mr Justice Roth
Hodge Malek KC
Professor Rachael Mulheron KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Walter Hugh Merricks CBE

Class Representative

- and -

Mastercard Incorporated and Others

Defendants

- and -

(1) Innsworth Capital Limited
(2) The Access to Justice Foundation

Intervening Parties

A P P E A R A N C E S

Mark Brealey KC on behalf of Walter Hugh Merricks CBE (Instructed by Willkie Farr & Gallagher (UK) LLP)

Sonia Tolaney KC, Matthew Cook KC and Owain Draper on behalf of Mastercard (Instructed by Freshfields LLP)

Charles Béar KC and Bibek Mukherjee on behalf of Insworth Capital Limited (Instructed by
Akin Gump LLP)

1 Thursday, 20 February 2025
 2 (10.36 am)
 3 Housekeeping
 4 THE CHAIRMAN: Mr Brealey, you told us yesterday that there
 5 was an agreed timetable between the parties and you
 6 thought that the Tribunal had been informed of it. We
 7 have checked. We have not been informed of it. We have
 8 asked, please, if we could have it. Can it be supplied
 9 to us?
 10 MR BREALEY: Of course. I do apologise. It was supposed to
 11 have been with you for the start of yesterday, because
 12 the Tribunal requested it on Tuesday. Things have
 13 slightly taken over, so can I just update you now.
 14 THE CHAIRMAN: Yes.
 15 MR BREALEY: But I do apologise for that because we had
 16 prepared it and counsel had liaised.
 17 So obviously we have taken up yesterday. I have
 18 spoken to Mr Béar and he says that he will want to make
 19 submissions on reasonableness and he will go on into the
 20 afternoon, so I do not know, say 2.30, 3 o'clock.
 21 MR BÉAR: 3.
 22 MR BREALEY: 3 o'clock. Clearly that is quite a long time,
 23 so I will need time to reply, and so will Ms Tolaney and
 24 so I would imagine that really reasonableness is today
 25 and then we start with distribution tomorrow, if that is

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1 permissible, but I do apologise.
 2 THE CHAIRMAN: Distribution is largely --- essentially it is
 3 Mr Merricks and the Funder, is it not? It is not
 4 Mastercard.
 5 MR BREALEY: It is really, yes, so there is not going to be,
 6 I do not think, as much debate about the distribution.
 7 It is essentially for the Tribunal to ---
 8 THE CHAIRMAN: Well, there might be issues on distribution.
 9 MR BREALEY: Well, there are clearly going to be issues, but
 10 I do not think it is the same issues as reasonableness.
 11 We are not going to go into, for example, so much
 12 confidential information and who said what and ---
 13 THE CHAIRMAN: Yes, yes, so you are fairly confident that
 14 can be done in the day?
 15 MR BREALEY: I think it can be, yes.
 16 THE CHAIRMAN: Very well.
 17 The other thing that we have had correspondence
 18 about is Mr Bronfentrinker's ninth witness statement.
 19 MR BREALEY: Yes.
 20 THE CHAIRMAN: Which you are seeking to admit. The Funder
 21 is objecting but saying if it is admitted they would
 22 like to respond. Our view is, without hearing from
 23 Mr Béar, that it clearly should be admitted. It is
 24 dealing with particular issues of costs that we are
 25 going to have to address and we need to understand the

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1 position on those various issues. They are slightly
 2 sort of discrete issues ---
 3 MR BREALEY: Yes.
 4 THE CHAIRMAN: One part indeed is a response to the schedule
 5 of costs served by the Funder on 17 February dealing
 6 with that summary assessment of those costs. You
 7 clearly need time to respond to that. Normally we would
 8 assess those in writing without ---
 9 MR BREALEY: Yes ---
 10 THE CHAIRMAN: --- putting in a written submission instead,
 11 but you have done it through the witness statement. But
 12 others are dealing with particular aspects of the costs.
 13 But it seems clearly right that the Funder should have
 14 an opportunity to respond, you have had it since I think
 15 Tuesday afternoon, and so if we can have a response by
 16 9.30 tomorrow morning.
 17 MR BÉAR: Yes.
 18 THE CHAIRMAN: That will give your clients and team ample
 19 time to respond to about four separate particular
 20 issues.
 21 MR BÉAR: I will not quibble over the adjective, sir. Can
 22 I just put a flag down that the statement falls into, in
 23 effect, two parts. There are some bits which do need to
 24 be looked at now; there are other bits which are more
 25 contentious and which you may in fact not need to

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1 address at all. But rather than take up time now,
 2 I will just put that marker down, that there are large
 3 parts of it which we say are outside your task but they
 4 are unfortunately framed in a somewhat adversarial way,
 5 so ---
 6 THE CHAIRMAN: Yes, well, I think I know what you are
 7 referring to.
 8 MR BÉAR: Yes, exactly, but we will try and respond as
 9 necessary. It may be the sort of response which --- it
 10 may come in a letter rather than a witness statement,
 11 given the time.
 12 THE CHAIRMAN: Yes. Can I just raise one thing on that
 13 witness statement, Mr Brealey, if you have got it. It
 14 is not on --- it may or may not be on Opus, but you
 15 probably have a hard copy, as I do.
 16 MR BREALEY: (Inaudible - no microphone)
 17 (Pause)
 18 THE CHAIRMAN: Yes, just on page 6, paragraph 14, bottom of
 19 the page:
 20 "By way of an example, in respect of the causation
 21 trial, Innsworth challenged and ultimately did not pay
 22 Willkie fees in the total amount of ..."
 23 There is a figure. I did wonder, is that the right
 24 figure? It does seem extremely small.
 25 MR BREALEY: Well, when I read that I did not ---

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1 I confess -- I did not go back and ask, but I will
 2 check.
 3 THE CHAIRMAN: Yes, and perhaps -- and ditto, though less
 4 striking, is the figure for fees in line 4. That may be
 5 a right figure but I did wonder about the first figure.
 6 MR BREALEY: No, when I read it I agreed with you, but
 7 I will double check.
 8 THE CHAIRMAN: Yes, so that can be checked, and I think the
 9 second figure does seem to be right because it is being
 10 explained in paragraph 27.
 11 MR BREALEY: Yes.
 12 THE CHAIRMAN: I hope that any issue about confidentiality
 13 in this has now been resolved, that is something said,
 14 are all the confidential bits properly redacted, but
 15 that is a matter that those instructing you can take up
 16 with the Funder's instructors.
 17 MR BREALEY: I will.
 18 THE CHAIRMAN: Yes, that is all we wanted to raise by way
 19 of -- just one minute.
 20 (Pause)
 21 Yes.
 22 MR BREALEY: Can I just double check, sir. So on the costs,
 23 is it anticipated that we would deal with costs tomorrow
 24 orally, or we would do it all in writing?
 25 THE CHAIRMAN: Well, there are certain principles about

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1 costs --
 2 MR BREALEY: Yes, there are.
 3 THE CHAIRMAN: -- that we will want to deal with orally
 4 tomorrow.
 5 MR BREALEY: That is fine.
 6 THE CHAIRMAN: How far we will go into each particular
 7 aspect, I think we will have to see and look at them one
 8 by one. I have not actually formed a view.
 9 MR BREALEY: Yes, but we will need to -- for the timetable,
 10 we will need to put some time in for --
 11 THE CHAIRMAN: Yes, I think you do, and these things can
 12 sometimes use up disproportionate amounts of time
 13 because they are quite picky.
 14 MR BREALEY: Thank you.
 15 THE CHAIRMAN: Yes, Mr Béar.
 16 Issue 1: Reasonableness (continued)
 17 Submissions by MR BÉAR (continued)
 18 MR BÉAR: Thank you very much. So we can start, just as
 19 a reference point, by looking at the way that Mr Brealey
 20 summarises it at page 17 of his skeleton argument at the
 21 top of the page, paragraph 49. Indeed, one can pick it
 22 up at the bottom of the previous page.
 23 So:
 24 "Adopting a broad brush approach and respecting the
 25 views of the significant expertise of both the

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1 Mastercard legal team and the Merricks legal team,
 2 Mr Merricks cannot properly be criticised for ascribing
 3 little value to the speculative case in any
 4 settlement ..."
 5 That is just a reference to the UK case:
 6 "... or for buying certainty on pass-on."
 7 THE CHAIRMAN: Yes.
 8 MR BÉAR: So that points the way towards what we need to
 9 look at and why we will need to go into closed session
 10 fairly shortly. We will need to see what was in fact
 11 said within the Merricks legal team, but the preliminary
 12 point is one that was mentioned a couple of times
 13 yesterday, which is how much value did the settlement
 14 ascribe to the UK case. The phrase used here is that
 15 Mr Merricks ascribed little value to it. We do not
 16 accept that. We say, for reasons I am about to show
 17 you, that it is completely clear that the settlement
 18 ascribes precisely zero value to the UK case; not little
 19 value, but nothing.
 20 To make that good can I start with the CSAO
 21 application itself and perhaps we could have that on the
 22 screen, it is {NC-AB1/1/20}.
 23 You can see 36(b):
 24 "The damages being limited to EEA MIFs, and no value
 25 being accorded in respect of UK domestic IF

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1 transactions."
 2 That, at page 44, we can see is in an application
 3 signed personally by both Mr Bronfentrinker and
 4 Mr Sansom {NC-AB1/1/44}.
 5 THE CHAIRMAN: But I do not understand why you say "little
 6 value" to the respective case is just referring to UK
 7 domestic MIFs. It is also referring to pass-on, is it
 8 not?
 9 MR BÉAR: If it is, then obviously --
 10 THE CHAIRMAN: That is not --
 11 MR BREALEY: Although --
 12 THE CHAIRMAN: -- because it says "We cannot conduct a mini
 13 trial on either the UK domestic MIFs or the correct
 14 level of acquirer and merchant pass-on", so I think it
 15 is referring to both.
 16 MR BÉAR: Right, if that is the way that it is read then
 17 that is fine, because I was simply using it as
 18 a launching pad to describe and show you what value the
 19 settlement attributes, which ultimately, without any
 20 disrespect to Mr Brealey, is more important than the
 21 phraseology of his skeleton, no disrespect to his
 22 skeleton.
 23 THE CHAIRMAN: Yes.
 24 MR BÉAR: So it is clear, we say, that that is the approach
 25 taken by both parties in relation to the settlement.

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1 THE CHAIRMAN: Yes.
 2 MR BÉAR: Without taking you through the detail, one can see
 3 the same thing, but again I will show you this very
 4 quickly {NC-AB2/1/28}. This is Mr Merricks' fourth
 5 statement in support of the application, paragraph 60.5.
 6 It starts off "While it gives no value ..."
 7 THE CHAIRMAN: I think that is common ground as far as
 8 I understood it.
 9 MR BÉAR: Yes, it certainly should be.
 10 Now, we are looking at two matters broadly speaking.
 11 We are going to look at the negotiation process and then
 12 we are going to look at the internal process within the
 13 Class Representative camp, so I can start off by showing
 14 you the negotiation process. That is obviously
 15 confidential within the ring but all of us on the row,
 16 so to speak, are within it. There are obviously
 17 persons — not parties in the room who are not in that
 18 ring, so what I am going to try and do is point you to
 19 things without saying things that would give the game
 20 away and if that becomes unduly difficult then we may
 21 have to clear the room of non-participants, as it were.
 22 THE CHAIRMAN: Yes.
 23 MR BÉAR: But I hope I can bring up on the screen at least,
 24 for Mastercard and the Class Representative and us, what
 25 it is that we are looking at. If not, however, we have

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1 prepared —
 2 THE CHAIRMAN: Let us just check that. If documents are
 3 brought up on the screen do they go on the live stream?
 4 No, they do not.
 5 MR BÉAR: However, there will be an opportune moment —
 6 THE CHAIRMAN: It does go up for anyone in the room I think
 7 who is logged on.
 8 MR BÉAR: Maybe the way we can deal with it is if I can just
 9 ask your clerk — what we have done is put together
 10 a hard copy bundle taken from the — a hard copy bundle
 11 just taken from Magnum, so nothing new, but it does have
 12 one advantage which is it also has — it has got the
 13 Magnum numbering at the bottom right, it has got an
 14 index at the front and it has got its own numbering at
 15 the top right in very big font, so —
 16 MR MALEK: It is easy to read. Sometimes when it has blue
 17 it is harder to read.
 18 MR BÉAR: No, sorry, they cannot see this, forgive me, my
 19 mistake.
 20 MS TOLANEY: That is why I asked.
 21 THE CHAIRMAN: This is the — this is all, as it were,
 22 within the blue?
 23 MR BÉAR: Well, this is within the blue, but also for
 24 convenience I have put some of the green in which is why
 25 I got confused just a moment ago.

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1 THE CHAIRMAN: Well, let us see how we get on.
 2 MR BÉAR: Let us see how we go, and it may be that
 3 Ms Tolaney and her team — because I am still not quite
 4 sure about showing things on the screen, it may be that
 5 is a bit risky, but presumably you have got hard copies
 6 that you can look at of the bundle?
 7 THE CHAIRMAN: No, I do not — I suspect you do not, do you?
 8 MR BÉAR: Maybe you do not.
 9 MS TOLANEY: I have hard copies of some material, but
 10 obviously not of your confidential material, so that
 11 is — and you would not want me to see it.
 12 THE CHAIRMAN: I think it is the negotiation between
 13 Mastercard and Mr Merricks which is green, so —
 14 MS TOLANEY: That is right.
 15 THE CHAIRMAN: — Mastercard's team are entitled to see it,
 16 but there are people in the room who are not entitled to
 17 see it and that is the problem about bringing up things
 18 on Opus, I think.
 19 MR BÉAR: What we will do is we will take out the blue and
 20 then you can have a subset of this which just has the
 21 green.
 22 THE CHAIRMAN: I think that is — yes.
 23 MR BÉAR: I am sorry, I should have thought of that earlier.
 24 MS TOLANEY: Thank you very much.
 25 THE CHAIRMAN: It is quite difficult to navigate through

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1 these different rings, as it were.
 2 MR BÉAR: I am sure there is a more complicated way to
 3 manage a hearing, but I have not yet thought of what it
 4 might be. We are very grateful, I think all of us, to
 5 the Tribunal for its patience in managing the
 6 complexity.
 7 So there is — you will see where it starts, there
 8 is a letter which is not to come up on the screen, so
 9 just the reference is IBA, tab 3, page 54. That is
 10 a green letter. It is dated 1 February 2024 and it is
 11 page 3 of the new bundle of the whatever we call it.
 12 Let us call it the new bundle.
 13 THE CHAIRMAN: That is the letter from Willkie Farr for
 14 Mr Merricks to Freshfields or Mastercard.
 15 MR BÉAR: Yes, exactly, but I was not going to say anything
 16 openly about it, but just to show you — so page 3 is
 17 where it starts and then page 5, under the first
 18 sub-heading, about a quarter of the way down the page,
 19 you will see what is said there.
 20 So that was the first point and then we go forward
 21 to page 7 of the new bundle, which is — which I am
 22 sure — well ... This is dated 12 August and it is
 23 referred to in the evidence. You will be able to pick
 24 it up from the witness statements which record it.
 25 There is an account of it given on both sides in their

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1 witness statements for the application material, so it
 2 is 12 August 2024 and that is also from Willkie Farr.
 3 MS TOLANEY: Sorry, sir, we cannot follow this on screen
 4 because the references are different, so I think
 5 I really do have to wait for ---
 6 THE CHAIRMAN: Well, I think it might be sensible, it will
 7 not take long ---
 8 MS TOLANEY: --- the hard copies.
 9 THE CHAIRMAN: --- if we rose for five minutes, or say until
 10 11, and you prepared what we can call the green bundle.
 11 MS TOLANEY: Thank you very much.
 12 THE CHAIRMAN: I do not think --- if necessary, although we
 13 do not normally do this, we can arrange for
 14 photocopying, as it were, back of house in the Tribunal
 15 if you do not have enough copies.
 16 MR BÉAR: In fairness to those behind me, the problem is
 17 that it has been copied double-sided so that a green
 18 page may have a blue page on the back.
 19 THE CHAIRMAN: Yes, well, if you want to supply Mr Collier
 20 with the documents that are green, we can run off ---
 21 Mr Brealey can have the whole bundle and his team, so
 22 what would it be, five copies?
 23 MS TOLANEY: That would be wonderful. Thank you very much.
 24 THE CHAIRMAN: Yes, well, perhaps we had better say 5 past.
 25 MR BÉAR: Thank you very much. I am grateful.

1 (10.56 am)
 2 (Short Break)
 3 (11.15 am)
 4 MR BÉAR: Thank you very much for your patience.
 5 THE CHAIRMAN: We will not now take another break before 1.
 6 We will rise at 1.
 7 MR BÉAR: Thank you, sir. So just for the record, so
 8 Mastercard have got a bundle with green material, which
 9 is in fact a blue covered file, just to make matters
 10 more confusing. You and I and Mr Brealey have the full
 11 set of this extract of material, both green and blue, so
 12 at page 7, and the numbering at the top is the same, of
 13 the new bundle, which is Tab 3, page 63, but do not
 14 bring it up, of the IBA bundle, is a letter which is
 15 referred to in open statements so I can say what it is.
 16 It is Willkie Farr's offer, without prejudice save as to
 17 costs, of 12 August 2024 on behalf of the Class
 18 Representative, so that started the --- as Mr Merricks
 19 says, started the active phase of the negotiations.
 20 The offer itself you can see from the middle of the
 21 first full paragraph on page 7.
 22 THE CHAIRMAN: Yes.
 23 MR BÉAR: Then I also draw to your attention what is said in
 24 the last paragraph of that sentence --- sorry, the last
 25 paragraph on the page, forgive me, beginning "Unless

1 otherwise agreed ..."
 2 (Pause)
 3 So that sentence, and then you can also see what is
 4 said at the top of page 8 as well. Obviously that is
 5 not a feature of where we are today. Then the next ---
 6 a month later, on 12 September, came something which
 7 again is referred to generically, as it were, in the
 8 open material so I can say what it is and that it
 9 exists, which is Freshfields' counteroffer of
 10 12 September, and you can see that what they say in
 11 paragraph 2 --- and you can see what they say in reality
 12 is very likely to be the outcome, their assertion, in
 13 paragraph 2, and then effectively we start what one
 14 might call the waterfall going down from the original
 15 headline number of the claim. So paragraph 3 talks
 16 about reductions that made an initial --- took a big
 17 chunk out of the initial figure, and then reference
 18 paragraph 4 to the two Tribunal judgments in 2024,
 19 obviously causation and limitation, and then at the top
 20 of the next page how they say the stated claim will fall
 21 down, what that number gets to. I am afraid I cannot
 22 remember quite which bits of the waterfall are open yet
 23 so I am just going to keep it like this.
 24 Then you can see the assertion again at the start of
 25 5, the first sentence, which concerns the EEA claim.

1 Then paragraph 5 sets out the remaining stages of the
 2 waterfall, as I call it, within the EEA claim, so (a) is
 3 not itself contentious, as they say, it is accepted; (b)
 4 is then interest and you will see the adjective that
 5 they apply towards the end of the second line of (b),
 6 even to the rate that they propose there. That is their
 7 argument.
 8 Then you can see (c), so the first phrase which
 9 refers to two assumptions goes back to what we see at
 10 the top of the preamble just before the colon, which is
 11 what they call major errors, so they are saying those
 12 assumptions are major errors.
 13 MR BREALEY: Plus footnote 6.
 14 MR BÉAR: Plus footnote 6, thank you, which Mr Brealey asks
 15 us to look at. So one can see the conclusion at
 16 footnote 6, what they say is their contention for the ---
 17 indeed what they assert is the case for that particular
 18 factor.
 19 Then coming back to the text just after footnote 6,
 20 the next ten words or so, or indeed the next two lines
 21 or so, go to the point or part of the point that the
 22 Chair was debating with, or raising, rather, with
 23 Ms Tolane yesterday afternoon.
 24 Then you will see that they argue that there is
 25 a percentage reduction and you will see between the

1 dashes in the penultimate line of (c) the epithet that
2 they apply to that and then there is a point on run-off.
3 So they end up in bold type, three lines from the top of
4 page 11, that is their argument and the conclusion,
5 which they say is very likely, is put forward in 6.

6 Now, then it is -- can I just ask you to note for
7 your note, which I will come to when we go into the
8 closed session, that I am obviously going to show you
9 what was going on internally at the time that this offer
10 and counteroffer was made, so, as it were, further to
11 come which you may want to put in at that point.

12 Then one can see a revised offer from Mr Merricks
13 which starts at -- so there is a bit of internal
14 material which we will come to, but 16 of the new bundle
15 should be a Willkie Farr letter of 4 October, and again
16 its existence and what it is, is open. So that is
17 a counteroffer back from the Class Representative on
18 4 October.

19 As you would expect, a robust response is put
20 forward. One can see if one looks at page 16, the first
21 full paragraph beginning "Mr Merricks considers ...",
22 what he says in the first sentence of that paragraph,
23 and again please make a note that we will be looking
24 carefully at the internal correspondence to see to what
25 extent it corresponds, so to speak, and then the next

17

1 two sentences, in particular the sentence beginning "It
2 is premised on the basis that ..." In my submission
3 that sentence is perfectly accurate that that is in fact
4 the Mastercard approach.

5 (Pause)

6 So the conclusion that they reach, about two-thirds
7 of the way through that paragraph, "the suggestion
8 that ..." ending with the word "misconceived", we say,
9 although put in a sort of advocacy way, is actually
10 a perfectly fair comment.

11 Then I am just going to ask you to read to
12 yourselves the first two paragraphs on page 17.

13 (Pause)

14 MR MALEK: Mr Béar, these letters, would they be shared in
15 draft with your client before they go out, or are these
16 going out without your client seeing the draft?

17 MR BÉAR: Can I get back to you on that?

18 MR MALEK: Yes, thank you.

19 MR BÉAR: The broad answer is that this -- well, I had
20 better be careful what I say.

21 MR MALEK: Get the right answer.

22 MR BÉAR: I think also because it is better addressed in
23 closed session to look at it, but Mr Garrard's witness
24 statement gives you a picture so that is the best place
25 to look.

18

1 (Pause)

2 THE CHAIRMAN: Yes. How far do you want us to read?

3 MR BÉAR: Well, I was just going to show you those two
4 paragraphs, and then you can see in particular pages 18
5 and 19 of the new bundle, for example what they say
6 about interest, which I will deal with briefly when we
7 come to look at the detail. You can see what they say
8 about pass-on and the factor that they draw attention to
9 there, which I think the Tribunal will be well familiar
10 with, and in -- so pass-on, if you drop down six lines
11 there is a sentence beginning "The reality is that ..." and then there are some percentages given.

12 THE CHAIRMAN: Yes, well, we have seen that.

13 MR BÉAR: Thank you. Then the conclusion in the last
14 sentence of that paragraph.

15 THE CHAIRMAN: Yes.

16 MR BÉAR: Et cetera, so -- and then the punchline, so to
17 speak, is at the top of page 20.

18 THE CHAIRMAN: Yes. These are the kinds of points people
19 take in negotiating letters, are they not?

20 MR BÉAR: Absolutely, and as I say, what will be of
21 particular interest is when we come to see how that
22 corresponds or not to internal assessment.

23 THE CHAIRMAN: Yes.

24 MR BÉAR: Then there is a further letter from Freshfields at

25 page 21, which I do not take you to in detail but just

1 to show you that it exists, because that does not make
2 a further offer.
3 THE CHAIRMAN: It debates the various points and says --

4 MR BÉAR: Exactly.

5 THE CHAIRMAN: Then basically in paragraph (inaudible)
6 sticks with its previous offer.

7 MR BÉAR: Yes, and then we know from the evidence that there
8 were some telephone discussions in the first week or two
9 of November between solicitors for Mr Merricks and
10 solicitors for Mastercard, between the two partners, and
11 those are referred to, page 29, which is from
12 Freshfields, so you can see --

13 THE CHAIRMAN: Yes, there were discussions on 8 and
14 12 November.

15 MR BÉAR: Precisely, thank you. Then you can see
16 paragraph 3, so this is sent on the 14th, which is
17 a Thursday, and they refer to a date in paragraph 3.

18 Then the offer is over the page, and you can see the --

19 THE CHAIRMAN: I think it is not confidential to say that
20 this was an offer to expire on the day that the pass-on
21 trial was due to start.

22 MR BÉAR: Yes, indeed, the date and time I suppose, 10.30.

23 THE CHAIRMAN: Yes.

24 MR BÉAR: Then you can see how they explain the calculation

25

20

1 of this revised offer in paragraph 5, the arithmetical
 2 explanation for how the figure has been arrived at.
 3 Then you can also see in paragraph 6 something which
 4 then does also flow forward in a more specific way and
 5 we will be looking at that later. So this paragraph 6,
 6 which is amplified — again you may wish to make a note,
 7 there is some internal correspondence on the same day
 8 that will amplify this and it is the genesis of that
 9 particular feature which is obviously a contentious
 10 feature for you to consider.

11 (Pause)

12 THE CHAIRMAN: So this is exclusive of ... I am just trying
 13 to understand footnote 1, about costs.

14 MR BÉAR: It is paragraph 4, third line.

15 THE CHAIRMAN: Yes.

16 MR BÉAR: Inclusive of everything that is then mentioned.

17 THE CHAIRMAN: Inclusive of a fixed (inaudible) in footnote

18 1, "Exclusion of costs that have already been ordered".

19 MR BÉAR: There being, as I understand it, at this stage
 20 they were being held over, but they have now been
 21 wrapped in so —

22 THE CHAIRMAN: Yes, so this is not actually the
 23 settlement —

24 MR BÉAR: No, but it is sort of very close to it.

25 THE CHAIRMAN: It is close to it but there is a difference

21

1 about costs.

2 MR BÉAR: That is not the only difference, of course,
 3 because you have got the 10 million that comes in.

4 THE CHAIRMAN: Yes.

5 MR BÉAR: But — and then that footnote, I believe I am
 6 right in saying, has effectively been thrown into the
 7 mix, so it is no longer being held open.

8 THE CHAIRMAN: Yes.

9 MR BÉAR: Now we can see page 31. This was not the only
 10 letter sent by Freshfields on 14 November, so this is an
 11 open letter, and this letter follows on from letters
 12 that Willkie Farr had sent to the Tribunal on 8 and
 13 11 November concerning amendments to Mr Merricks' LFA,
 14 and that amendment in particular contained the clause
 15 whereby a settlement, in the event that the Funder and
 16 Class Representative disagreed, would have to be
 17 determined by an independent KC, so that was what was
 18 notified on 8 November, and if you recall from
 19 yesterday, that was not due to come into effect for
 20 a further six weeks, on 20 December, the theory
 21 apparently being that there needed — and I am not
 22 suggesting this is a correct theory, but that the
 23 Tribunal needed to have a chance to, in some magical
 24 way, assess it, but whether that theory is in any way
 25 valid does not matter. The point is that on 8 November

22

1 Willkie Farr, on behalf of Mr Merricks, told the
 2 Tribunal and also Freshfields that there was a new LFA
 3 with this new settlement clause which was due to come in
 4 just before Christmas.

5 In response to that letter —

6 THE CHAIRMAN: I think strictly it was an amendment, was it
 7 not, to the LFA?

8 MR BÉAR: Yes, I am so sorry —

9 THE CHAIRMAN: It was not a new one.

10 MR BÉAR: — you are absolutely right, I accept the
 11 correction entirely, and indeed that terminology is used
 12 in paragraph 3. The amendments to the LFA suggest that
 13 a dispute may have arisen, so Freshfields say, between
 14 Mr Merricks and the Funder, which may have important
 15 implications, and then they go on to talk about the
 16 costs, and in paragraph 5 they say that the
 17 authorisation of the Class Representative was contingent
 18 on there being funding to cover both his and
 19 Mastercard's costs.

20 Paragraph 6, they say that:

21 "If the total ... amount is insufficient ... or
 22 Mr Merricks does not presently have funding in place to
 23 cover his or Mastercard's costs for the next steps, or
 24 a dispute between Mr Merricks and the Funder is
 25 preventing a necessary next tranche of funding from

23

1 being released ... that is highly germane [they argue]
 2 to the continued authorisation of the Class
 3 Representative and therefore the continuation of the
 4 proceedings."

5 So to use the phrase that I think was used yesterday
 6 afternoon, they smelt blood, in their polite way, and so
 7 they ask in paragraph 7 for confirmation "Does he have
 8 funding in place to cover his and Mastercard's
 9 recoverable costs for the next steps in the
 10 proceedings?" and then "Has any current tranche of
 11 funding been exhausted ..." et cetera.

12 So there is then a considerable amount of internal
 13 material that we will need to look at in the period in
 14 particular from the 14th to 21 November.

15 THE CHAIRMAN: Yes.

16 MR BÉAR: But just to pick up the open or inter partes
 17 aspect, you can see at page 76 of the new bundle —

18 MR MALEK: What was that last page? I did not hear it.

19 MR BÉAR: 76, sir, a Willkie Farr letter of the 25th, so we
 20 were looking at Thursday 14 November. On Monday the
 21 18th, Trial 2A starts on merchant pass-on and carries on
 22 through to more or less the end of term, and then on the
 23 25th, so the Monday after that, Willkie Farr write —
 24 and you can see, sir, this is an open letter, and you
 25 can see from the first paragraph that they refer to

24

1 their letter of 8 November which notified the amendments
2 and they also refer, at point 3, to Freshfields' letters
3 to this firm dated the 14th, which is the one we just
4 looked at and a letter which we have not put in the
5 bundle but which is a letter to the Tribunal of the
6 21st, which essentially follows up with the same request
7 for information but now made through the medium of the
8 Tribunal saying "We want confirmation of the funding
9 please".

10 Then passing over they make a complaint about timing
11 and, understandably perhaps, quite a lot to deal with
12 when you are opening a major trial.

13 Then at the top of the next page, page 77:

14 "Having regard to matters that Mr Merricks
15 considered Mastercard is legitimately entitled to know,
16 whilst ensuring it does not gain an unfair tactical
17 advantage that would not usually be available to an
18 opponent in litigation ... now provide certain
19 confirmations as to what appears to be the principal
20 concern of the Trial 2 costs he has got sufficient funds
21 within his approved budget ..."

22 So as the Tribunal may or may not recall, you have
23 got the total commitment, but within that there is an
24 approved budget which is a subset, potentially the whole
25 of it, that is approved by the Funder from time to time

25

1 and that is the maximum for Mr Merricks' own costs.

2 Then they go on to say:

3 "He also confirms he has sufficient funds in his
4 approved budget to cover other ongoing workstreams in
5 the collective proceedings ..."

6 So this is five or six lines up from the bottom.

7 "... and his litigation Funder has indicated it is
8 willing to make available the entire total commitment
9 and a further sum over and above the total commitment
10 should Mr Merricks consider it necessary to have access
11 to further funds."

12 He trusts this addresses any legitimate concerns
13 that have been raised; and there is no response to that
14 or come back from Freshfields at any stage.

15 Then the last exchange of correspondence we can see
16 starting on page 78, which is Willkie Farr's letter of
17 the 29th, another without prejudice letter, so you can
18 see that they refer to a letter which we have not put in
19 of the 22nd which amended the terms and extended the
20 period for acceptance of the offer until that day, 5 pm
21 on the 29th, so that is the first paragraph on the page.
22 So the original deadline, if you recall, was the 18th
23 and it was put back to the 29th.

24 Then you will see what is said in the next paragraph
25 and you will see in particular that on the fifth line,

26

1 after the phrase "waiver of privilege", and the comma,
2 there is then a further phrase and that is then
3 explained in the next paragraph that runs over the page.

4 (Pause)

5 THE CHAIRMAN: We have not got your solicitors' letter of
6 the -- which is referred to in that paragraph, do we?

7 MR BÉAR: No, we can add that in.

8 THE CHAIRMAN: Yes, if we could, please.

9 MR BÉAR: Of course.

10 THE CHAIRMAN: That is the letter to Mr Merricks.

11 MR BÉAR: Absolutely.

12 MR MALEK: When I asked about whether you saw the
13 correspondence, the drafts and everything, it includes
14 letters like this, so if I could have a schedule at some
15 stage in relation to all these letters from Willkie Farr
16 whether you were provided drafts before they went.
17 Thank you very much.

18 MR BÉAR: Yes. I am pretty sure the answer is no, but
19 rather than do it on the hoof --

20 MR MALEK: No, you do not need to do it on the hoof --

21 MR BÉAR: Yes, I think by tomorrow morning, but --

22 MR MALEK: Yes.

23 MR BÉAR: So just in terms of the propositions, as it were,
24 the critical point in that paragraph, the first
25 paragraph on the page, or half paragraph, is three or

27

1 four lines up from the bottom where the line ends
2 "litigation ..." then it starts with "Mr Merricks",
3 those are the last two words in the line, and then you
4 will see the verb that then follows and that sentence,
5 so that is a proposition, and then the next sentence
6 explains what it is in terms of how -- its impact on the
7 negotiation.

8 Then the next paragraph is explanatory, so to speak,
9 of that and you will see that --

10 THE CHAIRMAN: Yes, we have read it.

11 MR BÉAR: I was just going to say the same verb is used four
12 lines up from the bottom, the line that begins "being
13 presented ...", roughly in the middle of the line the
14 same verb is used and then the request they make in the
15 final sentence.

16 Then page 80, they -- Freshfields that day, in fact
17 the evidence is that it was within an hour, refer to the
18 letter that I have just read and they agree.

19 (Pause)

20 Now, you have also got some evidence on this from
21 Mastercard's and Mr Merricks' sides which I would like
22 to talk about, but for that, although obviously
23 Mastercard need to be here, I am going to ask you to ask
24 members of the public not to attend because that is
25 green material.

28

1 THE CHAIRMAN: Yes. So we would ask everyone who is in
2 court who is not within the confidentiality ring
3 embracing Mastercard, Mr Merricks and Innsworth, please
4 to leave court and the live stream will be turned off.
5 We would not normally stop the real time transcript,
6 because that is available for the parties, and it is
7 marked as being confidential and does not go on the
8 website. So, transcriber, please continue to
9 transcribe, but with the heading "The Tribunal went into
10 closed session".
11 MR BÉAR: Yes.
12 THE CHAIRMAN: If each party — because you will know, and
13 obviously the Tribunal does not, who is in the green
14 confidentiality ring, but as far as your own teams and
15 solicitors are concerned, there is no one here ...
16 It is not a ring, it is just an agreement, I see.
17 There is no one here who is ...
18 MR BÉAR: I am proceeding on the assumption that all of the
19 ladies and gentlemen in the hearing are —
20 THE CHAIRMAN: Yes, well, I think each set of solicitors
21 knows and can check and vouch for whoever is here.
22 (11.55 am)
23
24
25