

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

DURBAN

CASE NO 3156/00

DATE 2002/03/04

In the matter between:

DINERS CLUB (SA) (PTY) LIMITED

(PLAINTIFF)

and

ANIL SINGH

(FIRST DEFENDANT)

VANITHRA SINGH

(SECOND DEFENDANT)

BEFORE THE HONOURABLE MR JUSTICE LEVINSOHN

ON BEHALF OF PLAINTIFF:

**MR P M M LANE SC
WITH MR K J TRISK**

ON BEHALF OF DEFENDANTS:

**MR A K KISSOON SINGH SC
WITH MR M W COLLINS**

**PROCEEDINGS
ON 4 MARCH 2002
[Pages 01 - 92]**

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In the matter between

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ANIL SINGH (FIRST DEFENDANT)

VANITHRA SINGH (SECOND DEFENDANT)

MR LANE May it please M'Lord, I appear with my learned friend,
Mr Trisk, for the plaintiff.

LEVINSOHN J Yes, thank you, Mr Lane.

MR KISSOON SINGH May it please Your Lordship. I appear for the
defendants together with my learned friend, Mr Collins.

LEVINSOHN J Thank you, Mr Kisson Singh.

MR LANE M'Lord, may I do some housekeeping to begin with? I
hand in some bundles to Your Lordship.

LEVINSOHN J As long as it's not too messy.

MR LANE M'Lord, we have prepared two bundles for Your Lordship.
M'Lord, we are also handing in a smaller file containing certain
exhibits which will be referred - some of them in my opening address,
M'Lord.

LEVINSOHN J Yes. I take it you will in due course tell me about the
status of these documents.

MR LANE I will, M'Lord. I will definitely do that. M'Lord, we have
prepared a written opening address to facilitate the hearing, and
perhaps I could hand that in to Your Lordship, and on there is a reply

to a rule 35(3) notice which apparently is not in Your Lordship's file. I have the original here, M'Lord, and perhaps during one of the adjournments, if Your Lordship permits, I will see that that is inserted in Your Lordship's file.

LEVINSOHN J Yes. 5

MR LANE M'Lord, if I could then commence with the opening. M'Lord, in giving a brief overview we intend restricting our opening to address those issues on which the plaintiff bears the *onus* in this matter. On the 11th February 1997 the defendants signed an application for personal membership of Diners Club. M'Lord, you'll find that application in the pleadings file as Annexure A at pages 13 to 19. 10

LEVINSOHN J Yes.

MR LANE Now, M'Lord, they admit that the first defendant made an application and that, pursuant to such application, a Diners Club card was issued to the first defendant. An additional Diners Club card was issued to the second defendant. That admission you find in paragraph 3.1 and 3.2 of the plea at pages 41 to 42. But they only admit, M'Lord, that Annexures A1, A2 and A3 are the written application. Now, M'Lord, that is pages 13, 14 and 15. In other words, where there is handwriting, those are admitted. And they state that they have no knowledge as to whether the balance of that application, which is A4, 5, 6 and 7, were a portion or furthermore deny the said annexures were part of that written application. They plead that they have no knowledge as to who, representing the plaintiff, accepted the application and concluded a written agreement 15 20 25

arising out of such application.

Similar allegations were made in the affidavit signed in opposition to the application for summary judgment. Paragraph 7.1, M'Lord, that's at page 91 of the papers - we have paginated it - the first defendant stated,

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"I was the principal applicant for a Diners Club card. I also made application for an additional card to be furnished to my wife, second defendant, for her usage. From the application form it would appear as though both the second defendant and I have incurred joint and several liability for debits or charges by the use of either card."

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No explanation is given, M'Lord, as to the juristic basis of their joint and several liability without there being an agreement having been entered into or indeed on what basis and on what terms and conditions the first defendant utilised the card or had the card issued to him.

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In paragraph 5 of the particulars of claim the plaintiff pleads the material express, alternatively implied, tacit terms of the agreement. That we find at page 5. To this the defendants plead a general denial but aver in the alternative,

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"In the event of the plaintiff proving that Annexures A4, A5, A6 and A7 were part of the written application ..."

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that the "terms" pleaded do not coincide with the terms of the alleged

agreement and consequently deny the allegations,

"... where same do not coincide precisely
with the terms of Annexures A1 to A7."

In paragraph 6 of the particulars of claim plaintiff avers that pursuant to the agreement, Annexures A1 to A7, the cards and PINs were issued to the defendants respectively. To this the defendants plead in paragraph 5 that a Diners Club card and additional Diners Club card and PINs were issued by the plaintiff to first and second defendants, respectively, during about February 1997 and that renewal cards were issued annually thereafter, but aver that the same,

"... was done pursuant to the application for a Diners Club card and additional Diners Club card, made by the first defendant during 1997 to the plaintiff."

The remaining allegations are denied but they plead in the alternative, in the event of the plaintiff proving that Annexures A4 to A7 were part of the agreement between the parties, that the allegations must be admitted.

The defendants furthermore admit that during the period July 1999 to January 2000 they made use of their respective cards and furthermore that the plaintiff, as a result of the use by them of their cards, became liable to and disbursed and/or discharged to such merchants and suppliers, the actual price of the goods and/or services purchased by them.

In paragraph 9 of the particulars of claim the averment is made by plaintiff that first and second defendants are, jointly and severally

as co-principal debtors, liable to the plaintiff "in terms of the agreement in Annexures A1 to A7". The defendants admit that they became liable jointly and severally as co-principal debtors to pay plaintiff the value of all debits and charges incurred by the use by the defendants of their cards respectively in full, upon presentation of any monthly statement presented by the plaintiff, which presentment would be deemed to have taken place on the 10th day after posting of the relevant statement, admit that interest would have become payable to the plaintiff on overdue amounts and admit that they would become liable to pay the plaintiff's costs on the attorney and client scale in the recovery of any outstanding balance for which they were liable. There follows thereafter a general denial.

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Now, M'Lord, it's quite interesting. The joint and several liability appears from Annexure A1 at page 13. Now, that's obviously consistent with a denial of the agreement because that's one of the pages that is admitted as constituting the application form. But, M'Lord, there is no provision, and if one has a look in the block, "Additional card", there is a block beneath the name of Vanithra Singh, second defendant, a number 02/117152.

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LEVINSOHN J This says, "The second card on your account"?

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MR LANE This is the second card on Mr Singh's account. That is the second defendant's card, which is the donor card, as it's referred to, and it says there, M'Lord, in that block,

"Subject to the current general terms and conditions applying to the issue of personal Diners Club cards."

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And the joint additional cardholder on the member's account accept joint and several liability as co-principal debtors for all charges incurred on the cards issued on this account. By their signatures hereto they also accept the terms and conditions of Diners Club membership, as amended from time to time, with which they acknowledge themselves to be acquainted and agree to pay all monies to Diners Club in terms of the said membership. 5

But, M'Lord, what one doesn't find on any of those pages A1 to A3, the admitted pages, the question of interest and attorney and client costs. They admit them but there's no reference on A1 to A3. 10
Where one finds that, M'Lord, is on page A4, which is at page 16.

LEVINSOHN J This is the general terms and ...[intervention]

MR LANE These are general terms, M'Lord, and if you look at paragraph 6.5, in fact paragraph 6 deals with interest and 6.5 with attorney and own client costs. That's at the bottom of the page, 15
page 16, M'Lord, paragraph 6. Now, no explanation is given as to how these terms are now, on the defendants' version, incorporated into the "application". They are nevertheless admitted.

Then, M'Lord, if I could draw one other feature at A3, page 15, and you find under the "H. Personal card fees", below the blocks, the 20
words,

"I hereby apply for a Diners Club card
subject to the terms and conditions printed
hereon which I have read and accepted."

And below that is the admitted signature of Mr Anil Singh, the first 25
defendant.

LEVINSOHN J This seems to just deal with the personal card fees and the frequent flyer programme.

MR LANE That's so, M'Lord.

LEVINSOHN J But don't they also send you these terms and conditions every time you get a new card? 5

MR LANE Yes, M'Lord, absolutely, and I'll show you the pack and the terms and conditions which are included in the pack.

M'Lord, at the pre-trial conference ...[intervention]

LEVINSOHN J Do I have to recuse myself because I get them as well? 10

MR LANE M'Lord, so do I and I think my learned friends get them as well. But we are faced with an unusual position, M'Lord, and perhaps I could demonstrate to Your Lordship the original of this which was taken to the pre-trial conference and shown to the defendants' legal representatives. This, M'Lord, is the original application. If I could ask to hand it to Your Lordship. M'Lord, what you see is one document and what you have, M'Lord, is a position where - I don't know if you can ...[intervention] 15

LEVINSOHN J Yes, I can see it.

MR LANE Turn over the page, M'Lord, at the back of it. You will see the terms and conditions all forming one document. 20

LEVINSOHN J Yes.

MR LANE Now, M'Lord, the defendants have put us to the proof of that.

LEVINSOHN J Even after seeing this? 25

MR LANE Even after seeing it, M'Lord. In fact, it's specifically

addressed, M'Lord, at the pre-trial conference. They were given copies, a reduced copy of a single sheet of the front and a reduced copy of the single sheet of the back were handed to them as part of the request for the pre-trial conference.

LEVINSOHN J Well, if that is so, is there perhaps a higher scale than attorney and own client fees? 5

MR LANE M'Lord, yes, quite. Because in paragraph 12 of our opening address, M'Lord ...[intervention]

LEVINSOHN J Do you want to take this back with you?

MR LANE M'Lord, I will have to prove it so it will be probably the first exhibit before Your Lordship, which I will prove. You will see reference in paragraph 12 of my opening address to the pre-trial conference and the fact that under - and, M'Lord, we have included in the small bundle, and perhaps I could just refer Your Lordship to it -M'Lord, could I refer Your Lordship to the small bundle of papers which was handed up to Your Lordship. I just wish to identify where you will find the document that we are referring to. You will see the third document in that bundle - the first is admission, the second is certificate of balance, and the third is the minutes of the pre-trial conference, which, M'Lord, attached to the minutes of the pre-trial conference are two letters, Annexures PTC2 and PTC3, in which the responses to the questions asked were given, and it is to those that we refer in paragraph 12 of our opening. 10 15 20

LEVINSOHN J Yes.

MR LANE Now, M'Lord, what we refer to, the defendants were furnished under cover of the first 37(4) notice two sheets of paper 25

marked T1 and T2, photocopies of the front of that original application and the back reduced so that it could fit on to one sheet of paper and advised that T1 represents one side of the printed application, to which the first defendant admits having appended his signature, and that T2 represents the reverse of that form. The original was produced at the pre-trial conference. The defendants, in the light of that, were asked to admit that Annexures A4 to A7, inclusive to the plaintiff's particulars of claim, constituted a portion of the application form; that the documents annexed to plaintiff's particulars of claim marked A4, A5 and A7 all appear in a reduced form on Annexure T1 and that the document annexed to the plaintiff's particulars of claim marked A6 appears in a reduced form in Annexure T2. Now, M'Lord, the defendants responded on the 12th February - it's a letter PTC2 to the pre-trial minute, M'Lord. In paragraph 1, which is the answer to it,

"On the face of it defendants cannot deny same. However, the original documents are requested as Annexures T1 and T2 are illegible."

Now, M'Lord, this is after ...[intervention]

LEVINSOHN J Mr Lane, just give me - this is the letters to your attorneys?

MR LANE That is so, M'Lord, 12th February, Annexure PTC, paragraph 1 at paragraph 1.1 to 1.3.

LEVINSOHN J Oh, yes, I've got it.

MR LANE Now, M'Lord, that was the first answer. Now, this is in

the light of having been shown the original already and it says,

"On the face of it defendants cannot deny same. However, the original documents are requested as Annexures T1 and T2 are illegible."

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And then in 2.1 the defendants admit that Annexures A1 to A3 constitute the application form but do not admit Annexures A4 to A7.

Now, what one knows, M'Lord, is that they admit they appended their signatures to the form and they were asked to admit that the acceptance of the application would have resulted in Annexures A1 to A7 becoming a written recordal of an agreement. Now, M'Lord, defendant persistently has said this is simply an application - no agreement came out as a result of it.

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LEVINSOHN J Well, if there's a card issued, that's an acceptance.

MR LANE Well, that is so, M'Lord, but even so they say even though they admit the issue of the card, the receipt of the card - the first card and the renewal card - they still put us to the proof that an agreement resulted from it.

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Now, M'Lord, this pre-trial conference was held on the 7th February. A further 37(4) notice was filed, and I deal with that in paragraph 13 of our opening, M'Lord. In that we recorded, M'Lord, we reiterate that the original application form, bearing the signatures of the defendants were shown to the defendants' legal representatives, and in paragraph 13 of the notice it's said,

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"Defendants will be requested against the visual production of the signed agreement to

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admit same."

And in paragraph 14,

"In so far as defendants refuse to make the admission required in paragraph 13, but admit that an agreement was concluded between plaintiff and themselves, they were required to state the full terms and conditions of such agreement and, in addition, to state when, where, by whom, and in what manner such agreement was concluded."

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LEVINSOHN J That's a request of particulars for purposes of trial?

MR LANE That is so, M'Lord. That was contained in the second 37(4). Now, the defendants undertook to reply by the 12th February 2002 to that question, but as Your Lordship saw from the letter of the 12th February that question was not specifically addressed because if one has a look, M'Lord, it skips - if I could refer to page 2 of PTC2, M'Lord, there is a second heading. That is in relation to the notice dated the 5th February 2002 and those questions are simply not answered.

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LEVINSOHN J So do I understand from what you are saying, Mr Lane, just in a nutshell, that the agreement that you allege is in dispute here?

MR LANE Yes.

LEVINSOHN J Do we know what the contrary agreement is?

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MR LANE No. We've asked, M'Lord, and we haven't been told. In

fact, M'Lord ...[intervention]

LEVINSOHN J But we know there is an agreement. There has to be an agreement.

MR LANE Yes, yes. But what one gets, M'Lord, in PTC3 is the final word from the defendant on this and this ...[inaudible] ...[intervention]

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LEVINSOHN J They must have paid accounts from time to time?

MR LANE Yes. In fact, they say we've overcharged them and they've paid accounts, they've settled this and they queried something else. M'Lord, it's common cause in this matter not only that the cards were issued to both the defendants, renewal cards were issued to the defendants, that they got their PINs but it's also common cause that they used the card. What is in dispute is a series of transactions, which I will come to in a moment, M'Lord, but at the end of the day, M'Lord, yes, but nevertheless they refuse to admit there was an agreement. They refuse to admit that this constituted the agreement and then, M'Lord, one gets this, which is a fascinating response to the final questions asked, M'Lord, it's in PTC3. It's a letter of the 28th February. Now this is in the light of the document being seen, the original being seen by the defendants' legal representatives. The third paragraph, M'Lord.

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"We have taken instruction from our client as to whether they are prepared to admit the application form. I must regretfully advise you that they are not prepared to make such admission. The content of your paragraph 3 is not strictly correct and may perhaps be

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the result of a misunderstanding. In our letter of the 12th February 2002 we pointed out that the defendants could not make the admission until they had sight of the original documents. We did not intend that to be understood as an allegation that our clients' legal representatives had not been shown the document. You will, however, appreciate that the legal representatives seeing the document and being satisfied with the same is not the same as the client being so satisfied."

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An extraordinary proposition, M'Lord.

LEVINSOHN J So your legal representative can give you advice and say, "Look, you signed this document. Here's your signature", and you may say, "Well, I'm not satisfied"?

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MR LANE That's it. You have an attorney, junior counsel, silk. All sitting there, looking at it, but that's not enough, M'Lord. Still we are put to the proof of it. Still, M'Lord, we told them we have to fly down a special witness from Johannesburg to come and give evidence and in the light of that they still persist in it.

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Now, M'Lord, it's obviously now necessary for us to prove and we have brought down Mrs Colleen du Preez, who was the New Business Manager employed by the plaintiff at the time, and she signed this document and she will identify her signature and that it constitutes the document. Her signature appears on A3 at page 15.

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And in paragraph 15.2, M'Lord, we deal with her evidence. She will give evidence that the application form was solicited by Emma Ribeiro who was then employed by the plaintiff's Durban office, and who forwarded it to the plaintiff's Johannesburg office. In her capacity as New Business Manager, Mrs du Preez was required to do a credit check on the applicants and to approve applications, which she did in this case. Having done so, she signed the application, accepting it, and which was also signed by Frik Taljaard, and she knows Mr Taljaard's signature and she will identify it.

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LEVINSOHN J Can I just ask you this, Mr Lane, it just occurred to me now as you were talking. There were the two cards. The one is the satellite card, usually one's wife's card. Does the joint and several liability only arise when that card is used? It doesn't arise when the principal card is used? What is the position?

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MR LANE No, M'Lord, they are joint and several for ...[intervention]

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LEVINSOHN J So it's joint and several for both purposes - any purpose?

MR LANE It's a cross-over, as it were, M'Lord. One for the other and all for one.

LEVINSOHN J Yes, thank you.

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MR LANE 15.2.2, thereafter the cards were embossed and issued to the defendants. And 15.2.3, if I could ask Your Lordship, it's the renewal cards not "received", were "dispatched" in December 1999. She can't give evidence that they were received but they were dispatched in December 1999 at which time the prevailing terms and conditions of the plaintiff which governed the defendants' use of the

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renewal cards were in the 1998 editions. Now, M'Lord, in that regard we've incorporated for ease of reference in the small bundle, if I could refer to such, M'Lord, a document, which is the last document in this bundle - sorry, it's the small bundle, M'Lord.

LEVINSOHN J Yes.

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MR LANE What you will find there, M'Lord, is the terms and conditions with effect 1st March 1998, and what we have done, M'Lord, is to mark in red the changes that were brought about by the 1998 additions which prevailed at the time of the renewal card. Now, M'Lord, the reason for doing this is that a term of the agreement obviously which is disputed is that the prevailing terms and conditions at the time of renewal then governed every subsequent use of the card. It's a standard, M'Lord. You get the pack, you get the terms. The pack tells you, "These are the terms", and in terms of the original application you are bound by those terms. So we just brought this and we've highlighted, M'Lord, those elements where it changes, and there is nothing material except for one aspect, which I should draw to Your Lordship's attention at this point in time, and that is paragraph 7.3 which you will find - unfortunately, M'Lord, the machine appears not to have numbered the pages. 7.3 where it says,

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"By use of the PIN by any person whatsoever the cardholder is deemed to accept liability for all and any transactions so incurred."

Now, for the balance, M'Lord, there is nothing unusual or remarkable.

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At 15.2.4, M'Lord, of our opening address, if Your Lordship

would - it's not "the received cards", it's "the renewal cards" were sent out, and this is now still dealing with the evidence of Du Preez,

"The renewal cards were sent out in a card carrier."

And I'm not going to - it is in the bundle, M'Lord. It will show you the card carrier. It's a standard card carrier. It's in Your Lordship's bundle at page 8. Page 8, M'Lord, this is the card pack. No doubt Your Lordship will have received many of these, as we all have, and at the bottom it says, in B,

"Please sign the back of your card as acceptance and familiarise yourself with the enclosed Diners Club terms and conditions of usage."

Page 9, M'Lord, is the Afrikaans version of that.

LEVINSOHN J It's usually sent by very, very secure registered post?

MR LANE That is so, M'Lord.

LEVINSOHN J And not anybody can go and get it. You have to go yourself.

MR LANE That is so, M'Lord, and in this case we know, it's admitted, the cards were received. This is the pack and all the cards were sent out at that point in time and with this pack came the prevailing conditions which were the 1998 conditions.

LEVINSOHN J Yes.

MR LANE The cards were used after the renewal by the defendants. We know, for instance, M'Lord, that they went to the bank to get their PINs. There were certain transactions with SAA. So we know

that, and that's admitted by them, M'Lord. And then 15.2.6, we make the point that some minor changes were made.

But, M'Lord, the reason for the denial might emerge from the following, and this all that at the end of the day we can ponder. In paragraph 4.1 a cardholder's liability is deemed to have arisen *inter alia* whenever the card and/or the PIN was used for any transaction, and perhaps I should stop there, M'Lord, and paint the picture of what happened in this case. M'Lord, on the 16th February 2000 PINs in relation to both cards were issued to first and second defendant. It's common cause that between the 16th February and the 3rd March ...[intervention]

LEVINSOHN J Sorry to interrupt you, Mr Lane. Now, when you say "PINs issued", the card is issued. You don't get the PIN unless you ask for it?

MR LANE That is so, M'Lord. What happened here was that the defendant - the first defendant - although he doesn't have any memory of it - we asked him whether he admitted it - he has no recollection of this - went to Standard Bank, Chatsworth, and made application. He signed application forms ...[intervention]

LEVINSOHN J Standard Bank, Chatsworth. Standard Bank is an agent of Diners?

MR LANE In fact, Standard Bank holds the franchise for Diners Club. It owns the franchise.

LEVINSOHN J Oh, I see.

MR LANE It acts as the agent - all the PINs generated for Diners Club are generated by Standard Bank of South Africa.

LEVINSOHN J So if you want to use an ATM they will give you the PIN?

MR LANE That is so, M'Lord.

LEVINSOHN J But you've got to sign and identify yourself and so on?

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MR LANE The usual secure procedure, you go to the bank, you take your ID book, you take your card, they identify you and you go through all the formalities. You sign the application forms and ultimately the PIN is given to you.

LEVINSOHN J So you've got - your case is that on the 16th February 2000 PINs were issued ...[intervention]

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MR LANE That's right. That is so, M'Lord.

LEVINSOHN J ... for both cards?

MR LANE For both cards.

LEVINSOHN J On the application of both defendants?

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MR LANE Of both defendants.

LEVINSOHN J Yes, right.

MR LANE Well, I'm going to curtail - I will just give the salient features, because in relation to this evidence we bear no *onus*, and I will show Your Lordship why but in order to understand why we make the submissions in paragraph 16, it is necessary to understand that then it's common cause between the 16th February and the 3rd March, those cards - neither of those cards was utilised. So the PIN wasn't utilised and no point of sale transactions were conducted with the use of those cards. That is common cause. It's also common cause that on the 3rd March the first defendant attempted to use his

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card at an ATM first of all in Stanger ...[intervention]

LEVINSOHN J You can go to any ATM?

MR LANE Any ATM. It's recognised by Saswitch so you can draw money. And the transaction was refused by the ATM. It was a Nedcor ATM and the transaction was refused. He then went to Durban International Airport, and we can tell Your Lordship the times because we have the records to show when these transactions occurred. The first one was at 11.26, I think, and the second one at 12.13 ...[inaudible] Now, again the ATM refused the transaction. The reason was simple. There had been a misallocation of a payment against the accused and there is an automatic block on domestic transactions - by "domestic", I mean in South Africa, of withdrawing money.

LEVINSOHN J So that block would have been put in by the financial administration, the accounts section of Diners?

MR LANE Yes, that was automatic.

LEVINSOHN J If there is something wrong, you are overdue with your payments ...[intervention]

MR LANE 30 days.

LEVINSOHN J ... there's a block.

MR LANE Now, what happens, M'Lord, is that on 30 days the block goes in automatically. The computer does it as soon as the account registers a 30-day non-payment. But that only applies to your South African ATMs. What in ...[indistinct]... Diners Club on this is that members would go along to ATMs and draw money to pay their account so, M'Lord, they stopped that by putting an automatic block

on it, but it doesn't block international transactions and this is the fascinating feature, M'Lord, because ...[intervention]

LEVINSOHN J Do we know the amounts that were attempted to be ...[intervention]

MR LANE Yes, R100 each, M'Lord. Not big amounts but between about half past one on that Friday, because it was a Friday, and 4 o'clock, the first defendant's almost entire efforts were designed at getting his account and card reinstated, correct, and any block on the account lifted, and if we need to, M'Lord, there will be considerable evidence in rebuttal of this because we have recordals - when I say recordals, Text 19, which are computer notes of these telephone calls.

LEVINSOHN J The agents at these telephone exchanges usually write - type that into the computer immediately.

MR LANE That is right. That is so. What it's referred to is a Text 19 recordal. That's just its name, M'Lord, and what they do is - it's very brief. Sometimes they make it, sometimes they don't, and it's little reminders of, "The member phoned. Did this, did that, did something else". And they are then printed out and you have those which are permanent recordals which are kept in the computer forever and those which are temporary which, after a designated period of time, are taken out of the computer. But if needs be, M'Lord, we will deal, and all the witnesses are available to deal with those Text 19 entries.

LEVINSOHN J So did he succeed in getting the whole ...[inaudible]... lifted?

MR LANE Yes, M'Lord. What he succeeded is this, is getting permission to draw money over the counter at Standard Bank,

Chatsworth, and being advised, because he told the one operator that he would be leaving that night for abroad, that he was told that that would be perfectly all right because his cash withdrawals would not be affected from any ATM abroad because that automatic bar only happens at 60 days. So he was assured that he could utilise his card abroad.

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LEVINSOHN J So you've got evidence to that effect?

MR LANE So he effected what he wanted to achieve. Now, M'Lord, on the 4th and 5th March, 190 successful withdrawals from ATMs ...[intervention]

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LEVINSOHN J What date?

MR LANE 190, 4th and 5th March.

LEVINSOHN J 2000?

MR LANE That is so, M'Lord.

LEVINSOHN J 100 and?

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MR LANE 90 - 190 transactions at ATMs in London were transacted. Approximately £54 000, just in round figures, M'Lord, was withdrawn. Now, M'Lord, what we've included in this bundle ...[intervention]

LEVINSOHN J What's the rate of exchange? About 16?

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MR LANE Fortunately, M'Lord, for the defendant it was at far better at that point in time because this was in 2000. So at that point in time he's looking at about 10.5, M'Lord.

LEVINSOHN J So we're looking at R500 000?

MR LANE This is the claim, M'Lord.

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LEVINSOHN J Plus interest.

MR LANE R607 000 plus interest. That is the claim that this case is about.

LEVINSOHN J Is there a dispute that he withdrew this money?

MR LANE Oh, yes, M'Lord. He says he wasn't there. He never gave somebody his card and he didn't give somebody his PIN. So somebody ...[intervention]

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LEVINSOHN J So you're going to lead computer evidence presumably to show that it's impossible? The only way in which you can activate the ATM is by the legitimate PIN?

MR LANE A concurrent of PAN, which is the account number, and it's corresponding PIN, which is the secret number which he was given.

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LEVINSOHN J So that card is put into the ATM, the PIN is activated and the computer does the rest, and that is recorded and you'll have expert evidence that will show that that happened?

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MR LANE Yes, M'Lord. In fact, we have, if we need to, M'Lord, because at the end of the day there's a certificate provision which is admitted here, and I intend leading my evidence, M'Lord, on the agreement and - as I say, Mrs du Preez - and in the front of your file, M'Lord, you'll find an admission ...[intervention]

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LEVINSOHN J May I ask you this, Mr Lane, were both cards used? Were both PINs used?

MR LANE No, M'Lord, only one.

LEVINSOHN J Only one. And have you got any circumstantial evidence showing that he did, in fact, go overseas?

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MR LANE No, M'Lord, not at this stage. We have ...[intervention]

LEVINSOHN J Have you subpoenaed the passport people?

MR LANE M'Lord, we've tried the airlines and we are waiting for information at this present time. Nobody will produce the documents willingly, M'Lord, so we are attempting through subpoenas *duces tecum* to get the information. 5

LEVINSOHN J Have they been subpoenaed?

MR LANE Yes, M'Lord.

LEVINSOHN J Because they have a record of people leaving the country.

MR LANE They have a record, yes. M'Lord, but it could have been anybody if this was, as we think it was, M'Lord, someone utilising the card and the PIN, it could have been anybody utilising that card. 10

LEVINSOHN J But contractually the cardholder is liable.

MR LANE Yes, M'Lord. You see, M'Lord, that is where 7.3 is so important because 7.3 says by use of the PIN by anybody ...[intervention] 15

LEVINSOHN J Yes, but he never reported, "My card's been stolen. My card's lost".

MR LANE No.

LEVINSOHN J "Please put a hold on it immediately." 20

MR LANE On the contrary, M'Lord. What he says is, "I had my card in my possession and I never gave my PIN to anybody that entire week-end and I was in South Africa".

LEVINSOHN J Yes, but your expert evidence overseas is going to gainsay that? 25

MR LANE Yes, M'Lord. What you will see in one of the bundles, the

expert bundles, M'Lord. Would Your Lordship like two bundles of these? I don't want to overcrowd Your Lordship, but there are two bundles. I believe that it's preferable that one you could work with and the other remain intact.

LEVINSOHN J Yes, thank you, Mr Lane, yes. 5

MR LANE That there, M'Lord, is a body of expert evidence. That expert evidence, as I say, will be led in rebuttal as the expert evidence of the South African side. That's the Standard Bank side. So there are experts who will deal with the issue of the PIN, the security regime involved in that, the manner in which PINs are generated, and that will be dealt with in rebuttal this week, if we need to. And then, M'Lord, ones which we dealt with on commission, and those consist of the four banks concerned who owned the ATMs. That's Natwest, Abbey National, HSBC Bank and Lloyds. You'll find their summaries and affidavits in that file. 10 15

LEVINSOHN J But don't they have surveillance cameras?

MR LANE M'Lord, unfortunately, the surveillance cameras and, in fact, these machines were out of range of any cameras. The Lloyds, in some of their machines, have what they refer to as pinhole cameras and the pinhole cameras are - unfortunately, by the time the request had got through to Lloyds, the films from those pinhole cameras had been destroyed so we don't have any pictures but perhaps I could just give Your Lordship a picture of what happened, M'Lord. If I could refer you first of all to PTC1 to the pre-trial minute. This was given pursuant to a request by the defendant for details of the ATMs, the times and dates of each of the transactions. What we've attempted 20 25

to do, M'Lord, is to set it in a time sequence and to give it some form of colour coding so that Your Lordship can immediately identify the banks in question and the movement between the various machines. Then, M'Lord, if one turns that page to the next document, again for Your Lordship's - and it will be explained in the rebuttal evidence - we have done a diagrammatic representation of how these machines work and then the next document, M'Lord, you will find a map of where the machines were in London and ...[intervention]

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LEVINSOHN J So what it was it's a pattern, it's a systematic pattern over a given period of time of withdrawals, using that card and using that PIN?

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MR LANE That is so, M'Lord.

LEVINSOHN J Defendant says, "It's not me. Somebody else did it. I was in South Africa. I've got an alibi."

MR LANE That's what it is, M'Lord.

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LEVINSOHN J So, irrespective of where the *onus* lies, there is this very, very heavy evidentiary burden of him to get into the witness box and explain all this.

MR LANE He's got to explain it, M'Lord, and he's got to ...[intervention]

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LEVINSOHN J I don't know about the *onus*. You say the *onus* might be on him.

MR LANE Yes, M'Lord. I'll take you through those ...[indistinct]... now, M'Lord, but what is particularly significant, and I drew Your Lordship's attention to 7.3 of the 1998 of edition.

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LEVINSOHN J Isn't it a fraud ...[inaudible]

MR LANE Yes, M'Lord.

LEVINSOHN J Isn't this a gross fraud, and if I come to the conclusion at the end of this that he has been untruthful, this is a fraud because it is designed to withdraw the money without any prospect of repaying it?

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MR LANE That is so, M'Lord. That is so, M'Lord, and this is a systematic, as Your Lordship so neatly put it, a systematic attack on the card. And, of course, Your Lordship will appreciate the ramifications on this type of offence because it is the simplest possible defence. "It wasn't me. It wasn't my card. I didn't give my PIN." How simple. And that, M'Lord, is what we are testing today.

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LEVINSOHN J Yes, one goes on an absolutely feeding frenzy overseas, drawing out in foreign currency and then saying, "Well, it's not me. I don't know. I've got an alibi. I wasn't there".

MR LANE That is so, M'Lord. Now, what does Diners Club have to do? Fortunately, they've got an agreement which does come to their assistance. But at the end of the day if we are put to the rebuttal there are four or five witnesses from Diners Club, United Kingdom, who are employed by International to prove the working of the system, the integrity of the system, the integrity of the transfer of the information. There are banks who own the ATMs who can talk about the integrity of their system, the balancing of their machines, the integrity of the transfer of information. There are witnesses from Standard Bank of South Africa to establish the integrity of their computers, the integrity of their PINs, the fact that they've never been attacked and that this has never ever happened ever before and,

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incredibly, one transaction, one person. If someone could have attacked the system and obtained the PINs, can you imagine, M'Lord, what attack could occur on all credit cards? But this happens just to Mr Singh. But, fortunately, M'Lord, we do have the agreement, and the agreement says that whoever uses the PIN, whoever that might be, if the PIN is utilised you are liable. He's got a ...[indistinct]... up, M'Lord, and this where I ...[intervention]

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LEVINSOHN J Can I just ask you this from a computer point of view, your card has got the strip, that's a computer programme, and the computer then would recognise, when it's activated and put into the machine, would recognise your card, subject to you putting in your code, your PIN. Now, there are two elements to it. There is the PIN and there is the card and you can't have somebody else's card with your PIN?

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MR LANE No, M'Lord.

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LEVINSOHN J Am I right or wrong about that?

MR LANE No, you're absolutely right, M'Lord. It's a random PIN associated with that PAN number. Now, that magnetic strip that Your Lordship mentions contains two bits of information, what they call CBV1 and CBV2 information. What that information gives is your account number, the expiry date of the card, etcetera. It gives you those details. Now, it doesn't contain your PIN at all. Your PIN is held entirely separate from that magnetic strip. There is no reference to what they refer to as a PVB ...[intervention]

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LEVINSOHN J Only once the PIN is in then it will recognise it.

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MR LANE So you've got to have that card or a card, M'Lord,

because we know about clone cards, a card but the key to this, M'Lord, is the PIN because you've got to put that card in and you've got to feed your PIN.

LEVINSOHN J So what are the prospects of somebody having another card with your PIN? 5

MR LANE No, M'Lord, absolutely ...[intervention]

LEVINSOHN J What are the probabilities of that?

MR LANE We would suggest, M'Lord, there are just none at all. Just nil.

LEVINSOHN J Yes. 10

MR LANE M'Lord, if I could go back to paragraph 16.1 of the opening address. We say in paragraph 4.1 of the agreement a cardholder's liability is deemed to have arisen *inter alia* when the card and/or PIN was used for any transaction. Now that's important, M'Lord. A PIN is defined as a personal identity number, entitling the cardholder to draw money by means of a card at automatic teller machines, ATMs, nominated by Diners Club, or where appropriate to obtain goods or services by utilising the card with the PIN. In terms of 7.3 - now, this is the clause I referred Your Lordship to earlier, 15

"By use of the PIN by any person
whatsoever the cardholder is deemed to
accept liability for all and any transactions
so incurred." 20

Furthermore, in terms of clause 8.3,

"A certificate under the signature of any
manager of Diners Club shall, upon its mere 25

production by Diners Club or its legal representative, and without any evidence being required therefor, constitute *prima facie* proof of such indebtedness and the amount due and payable at date of signature of the certificate." 5

We make reference to provisions in clauses 8.1 and 8.2 because, M'Lord, if we come to rebuttal, 8.2 has a deeming provision in relation to accepting evidence of statements, computer printouts and so on without the formalities of evidence. 10

LEVINSOHN J Something that worries me now, Mr Lane, and I am deviating a bit from what you are saying, you mentioned to me in chambers in the presence of Mr Kissoon Singh this morning that evidence on commission is going to be led in this case.

MR LANE Yes, M'Lord. 15

LEVINSOHN J And that presumably is the London connection. It's the experts, the banks and so on.

MR LANE That is so, M'Lord.

LEVINSOHN J And it's going to be before a commission that's designated already. I'm a little bit concerned about that because it seems, if that is all in dispute, shouldn't the Court actually see and hear the witnesses to assess their credibility and their expertise and so on? There is going to be a bit of a problem here. Because it's not mere formal evidence. This is controversial evidence, it seems to me. 20

MR LANE Well, M'Lord, I think as to what extent the controversial evidence will emerge, we've been given notice that a Mr Gibson is 25

being called by the defendant to give evidence. Now, Mr Gibson is the only expert witness which the defendant intends adducing evidence from. That will be heard this week, M'Lord.

LEVINSOHN J But how can it?

MR LANE Well, Mr Gibson - on the defendant. Because the English evidence is rebuttal, M'Lord. M'Lord, all the plaintiff must prove is the agreement ...[intervention] 5

LEVINSOHN J That the card ...[intervention]

MR LANE No, I have don't have prove that the card was used or the PIN was used, M'Lord, because the certificate provision proves the indebtedness. So what I intend, M'Lord, is I will prove the agreement. I will hand - and I was going to refer you to the admission and to the certificate. I will hand in the certificate to Your Lordship by consent, and that will be the end of the plaintiff's case. 10

LEVINSOHN J But how can you cross-examine Mr Gibson unless you've got your own people present? 15

MR LANE I have an expert here in South Africa who is also available here to give evidence. I have consulted with all the witnesses in England and will have to deal with Mr Gibson on the basis of my consultations with those witnesses and with the advice given by one of the experts who is present. I also have all the Standard Bank experts who are present and there are a number of them as well, M'Lord. So I will be in a position to cross-examine Mr Gibson, I believe. 20

So, M'Lord, the plaintiff's intention is to adduce the evidence on the agreement, hand in the certificate and close its case. 25

Thereafter the defendant must adduce whatever evidence it wishes. If then at the end of the defendants' case, the plaintiff believes that there is, in addition to that, M'Lord, evidence which it wishes to deal with in rebuttal, or needs to deal with in rebuttal, then that evidence consists of a packet of South African witnesses. Those consist of factual witnesses. In other words, the people who received and made the telephone calls on the 3rd and the 6th March, because there was quite a flurry on the 6th March when the 190 transactions were identified. The Standard Bank witnesses, who deal from an expert point of view ...[intervention]

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LEVINSOHN J Did any of your investigators confront him?

MR LANE He was confronted on the telephone and you will hear evidence, M'Lord, of those telephone conversations on the 6th March as to what he said on that day and the fact that the card was ultimately returned at about 4.30 that afternoon. So, yes, M'Lord, he was confronted and there will be evidence dealing with that issue. Thereafter, M'Lord, there will be evidence, as I said, from Standard Bank and there will be evidence from an expert, a South African expert, who was extensively involved when he was employed by ABSA Bank with the establishment of the Saswitch, which is the main switching - South African Switching Organization and is very involved in the encryption and the security of encryption of this form of information transfer system. That will then bring to an end the South African portion of the evidence and thereafter the matter will shift to London. Now, M'Lord, that evidence in London is really, we believe, because of its nature - there really isn't a credibility issue involved in

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that. The nature of the evidence is very simple ...[intervention]

LEVINSOHN J Not so much credibility but reliability. When one has an expert witness ...[indistinct]... one's got to be satisfied as to his reliability as an expert.

MR LANE Yes. M'Lord, I appreciate that and I will bear that in mind and obviously take instructions as the week goes on, with Your Lordship's concern in that regard. The witnesses there will consist of the four representatives of the individual banks who will testify to the accuracy of the ATM - the fact that those ATMs balanced. Well, that's an important consideration - all those ATMs balanced. So what that means is that there were 16 machines utilised, four banks. All of them balanced. So there was no discrepancy in the money. Then, M'Lord, it's a paper chase because all it goes, from there it goes to the host bank. The host bank then sends it through to a switch organization who switches it again. Once it recognises where it is, it switches that information to another switch, GNS, and that switches, eventually switches it to Diners Club, UK. That's sorted out there and then there's an accounting between London and here. So really after that you're on a paper chase. So it's really an accounting because what Your Lordship will see is that - there's obviously a description but Your Lordship can read that description. There's a description of how it happens, how that information is encrypted en route and de-encrypted and how that rolls down the line. So at the end of the day you have an audit which says, "I have a transaction starting here and that same transaction I can trace it through all the elements down to there, and it's the same transaction". That's all that evidence is

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establishes, is the integrity of the transfer of an electronic piece of information, is what that evidence - and it seems like a lot of paper but that's really what it amounts to.

LEVINSOHN J Are you confident that you are correct about the *onus* and the amount of evidence you have to lead for purposes of your case? Because I understood you to say that you're relying on the certificate which is signed, which indicates that there is an indebtedness and it arose on such and such a date, and that's *prima facie* - it's agreed to be *prima facie* evidence. It can be conclusive.

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MR LANE No, it can't be conclusive.

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LEVINSOHN J It's agreed to be *prima facie* evidence.

MR LANE Yes, M'Lord.

LEVINSOHN J Do you not need to go a little bit further and prove that that was as a result of a PIN being used?

MR LANE M'Lord, perhaps we could go to that very provision, because it is an important element in this case, M'Lord.

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LEVINSOHN J Because I just gather from what you've been saying, *prima facie*, of course, is that the defendants' defence here is tactical and strategic. They're putting you to the proof of things. I'm just wondering whether you might face an absolution application if you close your case. I don't know.

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MR LANE Well, M'Lord, let me - because what one is bringing in this, M'Lord, is on the principles of *The Bank of Lisbon v Venter* 1999 (4) SA 463, a judgment of the Supreme Court of Appeal. It is the leading, we believe, case in that regard, M'Lord. Now, M'Lord, that was a case Your Lordship will recollect, which dealt with whether a

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certificate ...[intervention]

LEVINSOHN J I don't know much law, Mr Lane.

MR LANE Dealt with this question of the *prima facie* case, as distinct from the conclusive case, and has been then followed since on the question that you can discharge the *onus* from a *prima facie* point of view by the delivery of a certificate. 5

Now, M'Lord, could I ask Your Lordship then to look at page 17 of the pleadings bundle? And perhaps, M'Lord, it would be convenient, Your Lordship is entitled in terms of rule 39(11) to consider the question of the evidential *onus* under 39(11). 10

LEVINSOHN J Yes, whose duty to begin and so on.

MR LANE A duty to begin, M'Lord, and perhaps that should be dealt with now and we should ask Your Lordship for a ruling in terms of rule 39(11).

LEVINSOHN J Quite obviously, if you ask me for a ruling I'd rule that you'd have to begin because of what you've said about the contract. 15

MR LANE Correct. Yes.

LEVINSOHN J So you've got to begin. What the ambit of what you have to prove as far as the *onus* is concerned, I am not sure about that. 20

MR LANE Well, M'Lord, let's go to paragraph 8, page 17.

LEVINSOHN J Of the pleadings?

MR LANE That's the pleadings, M'Lord. It's headed, "Documentary evidence of indebtedness". So one assumes, M'Lord, that I'm able to prove there was an agreement and I'm able to prove that this was the term of the agreement. Now, M'Lord, 8.3, 25

"A certificate under the signature of any manager."

LEVINSOHN J Yes, it says, "of the indebtedness".

MR LANE Yes.

LEVINSOHN J That is the amount that is reflected in the accounts as being due, but does it actually reflect the amount ...[intervention]

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MR LANE Well, once he's indebted, M'Lord, I don't think Your Lordship has to enquire how that indebtedness arose.

LEVINSOHN J How that arose, yes.

MR LANE I think that's the issue, M'Lord.

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LEVINSOHN J Yes, yes, I see that.

MR LANE So really, M'Lord, what it's saying is, I simply prove an indebtedness. So, in fact ...[intervention]

LEVINSOHN J Indebtedness which arises through the operation of the card in terms of this agreement.

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MR LANE In terms of this agreement. Once I prove that, M'Lord, then what I have ventured into and the background of all those facts and those circumstances is unnecessary from the plaintiff's point of view, because once I establish the agreement and an indebtedness, regardless of how that - and that indebtedness arose in terms of this agreement then, M'Lord, *cadit quaestio*.

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LEVINSOHN J Yes, I see that.

MR LANE Yes. Now, M'Lord, I see it's time for the short adjournment.

LEVINSOHN J Yes, we'll probably ...[inaudible] Unless Mr Singh very briefly wants to add anything. Do you want to say anything,

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Mr Singh, at this stage? I know you don't have the floor but you may want to make some comments briefly.

MR KISSOON SINGH Yes, M'Lord.

LEVINSOHN J Do, please.

MR KISSOON SINGH Certainly, M'Lord, we've taken careful note of certain questions which Your Lordship has been putting to my learned friend as he addressed you and we are confident that in due course we will be able to satisfy Your Lordship that it is not as simple a matter as my learned friend seeks to make it out to be. M'Lord, we will also be adducing evidence to show that these types of transactions are capable of fraudulent ...[intervention]

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LEVINSOHN J But is it your case, just in a nutshell, Mr Singh, let's get to the nitty-gritty, that your card was stolen, that somebody else used it and that you didn't use it?

MR KISSOON SINGH No, M'Lord. It is our case that the card was in our possession, that we did not use the card, M'Lord.

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LEVINSOHN J So whatever was activated in London is not your doing. Is that what you're saying?

MR KISSOON SINGH That is correct, M'Lord.

LEVINSOHN J So you had the card the whole time?

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MR KISSOON SINGH That is so, M'Lord.

LEVINSOHN J And all these amounts that were being spewed out by the computer and the money taken, you had nothing to do with?

MR KISSOON SINGH That is so, M'Lord. And, M'Lord, we submit that the question of the *onus* is very ...[intervention]

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LEVINSOHN J Why have we got all these tactics about denying the

agreement and all that, Mr Singh? Because that is, in reality, what the defence is.

MR KISSOON SINGH No, M'Lord, it's not necessarily tactics and once my clients have a look at the application they might be prepared to admit ...[intervention]

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LEVINSOHN J But why haven't they looked at it already, Mr Singh?

MR KISSOON SINGH We didn't have it.

LEVINSOHN J Isn't it available?

MR KISSOON SINGH We didn't have it in our possession, M'Lord. We asked for it.

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LEVINSOHN J They made it available to you.

MR KISSOON SINGH M'Lord, the clients were not present at the rule 37 conference. We asked for ...[intervention]

LEVINSOHN J The client has really got nothing to do with it. The client just must take advice because that's what you're there for. Senior counsel, Mr Singh.

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MR KISSOON SINGH Yes, they will, M'Lord, but ...[intervention]

LEVINSOHN J When I resume at 11.30 I want to be told that that issue has now been dealt with.

MR KISSOON SINGH M'Lord, it might very well be dealt with that the application was made in that form. That does not mean to say that that is the contract, M'Lord. M'Lord, but there is also the question of the *onus*. We disagree with my learned friend as to the question of what his duties are and simply to hand up the certificate and thereafter the *onus* shifts to us, M'Lord.

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LEVINSOHN J I anticipated something like that.

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MR KISSOON SINGH M'Lord, we will address Your Lordship. We have prepared brief heads of argument as well, M'Lord, on the question of the *onus* and dealing with the certificate, M'Lord.

LEVINSOHN J So are you going to ask me for a ruling?

MR KISSOON SINGH M'Lord, we believe it's essential if my learned friend is going to adopt the attitude that he's just going to hand up the certificate, lead evidence on the contract and then say that the *onus* shifts to us. 5

LEVINSOHN J So you want me *in limine* to make a ruling on the duty to begin, coupled with the *onus*? 10

MR KISSOON SINGH M'Lord, not on the duty to begin.

LEVINSOHN J But, you see, I don't know how to make a ruling on the *onus* if I don't know what is in issue as far as the contract is concerned.

MR KISSOON SINGH Yes, M'Lord. 15

LEVINSOHN J That's my difficulty.

MR KISSOON SINGH Yes, M'Lord. We appreciate that, M'Lord. That is why we say ...[intervention]

LEVINSOHN J That is why I think you should look at those documents, the original documents, because it seems to be manifest that, Mr Singh, your client and his wife signed that document. 20

MR KISSOON SINGH M'Lord, there's no doubt about it. We've admitted that we signed the document.

LEVINSOHN J Yes, but that's the contract.

MR KISSOON SINGH No, M'Lord, that isn't the contract, with respect. 25

LEVINSOHN J Well, what is the contract then?

MR KISSOON SINGH M'Lord, the contract has changed from time to time. Each time there was an issue of a new card, M'Lord, the terms and conditions under which it operated.

LEVINSOHN J The PIN ones changed. 5

MR KISSOON SINGH Yes, M'Lord, if I understood, and I may not have understood what my learned friend ...[intervention]

LEVINSOHN J But if the contract does change then you are bound by it because that's like an insurance policy. Every year it gets renewed, it's a new contract. 10

MR KISSOON SINGH Yes, M'Lord, we accept that but it may not be the contract relied upon by my learned friend in his heads of argument. I'm not sure whether I misunderstood what he said - I might have - where he had certain things highlighted in red, and he referred to that as the 1998 ...[intervention] 15

LEVINSOHN J There were some minor alterations. I saw those.

MR KISSOON SINGH Yes, M'Lord, but then there was the 2000 contract as well, which reverted, M'Lord, and took out the words which he hadn't read.

LEVINSOHN J Well, Mr Singh, I just hope that by the time I resume at half past eleven there is some more light shed on this. I want the real issues to be canvassed here, not just have tactics. 20

MR KISSOON SINGH M'Lord, it's not simply a question of tactics.

LEVINSOHN J I think it is, Mr Singh, with great respect to you. If you say your client hasn't seen the documents, he's made no effort to see it, it's been available, then I think there are some tactics 25

involved and I - you know, I don't approve of that, Mr Singh. I believe that these cases should be ventilated and the true issues should be decided.

MR KISSOON SINGH We will try and get to the true issues as soon as possible, M'Lord. 5

LEVINSOHN J Yes. I will adjourn.

COURT ADJOURNED

ON RESUMPTION

LEVINSOHN J Yes, Mr Singh. 10

MR KISSOON SINGH M'Lord, may I place on record my indebtedness to Your Lordship for allowing the matter to stand down to enable certain amendments to be prepared in typewritten form? M'Lord, may I ask leave to hand up these proposed amendments and I can perhaps take Your Lordship through them on the pleadings to show Your Lordship exactly where I intend them to be done? 15

LEVINSOHN J May I just enquire if they are going to be opposed?

MR LANE No, M'Lord, ...[inaudible]

MR KISSOON SINGH M'Lord, I will endeavour overnight to have the appropriate amended pages typed to be filed into the court file. 20

LEVINSOHN J Yes.

MR KISSOON SINGH M'Lord, if I can first take Your Lordship to page 42 of the paginated papers of the pleading bundle.

LEVINSOHN J Yes.

MR KISSOON SINGH M'Lord, that commenced with paragraph 3.2. 25

LEVINSOHN J 42 - I think mine is paginated somewhat differently.

I've got the defendants' plea at 43.

MR KISSOON SINGH I beg M'Lord's pardon. My defendants' plea starts at page 40.

LEVINSOHN J Well, anyway, let's just try and find it. In subparagraph 3.3?

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MR KISSOON SINGH Yes, M'Lord, paragraphs 3.3 and 3.4 are to be deleted in their entirety as they appear in the pleadings, M'Lord, and to be substituted by the 3.3 and 3.4 which appears in the notice.

LEVINSOHN J Yes, so I'll just write here, "See amendment para 1". Right.

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MR KISSOON SINGH M'Lord, the second amendment is that 3.5 has been again deleted entirely and substituted. That's simply to make provision for the purposes of this action, admitting the parties on behalf of the plaintiff who contracted.

LEVINSOHN J Right.

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MR KISSOON SINGH M'Lord, the next amendment is to delete paragraph 3.6 in its entirety.

LEVINSOHN J Yes.

MR KISSOON SINGH M'Lord, then on the same page as where M'Lord just deleted 3.6, M'Lord will notice 4.2 starting saying, "aver, in the alternative ...". M'Lord, that preamble until the end of that page is deleted and substituted with the one line,

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"In amplification of the foregoing denial
aver ..."

LEVINSOHN J Yes.

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MR KISSOON SINGH And then, M'Lord, 4.2.1 and 4.2.2 remain per

the pleading over the page.

LEVINSOHN J Right.

MR KISSOON SINGH The next one, M'Lord, is to delete 5.1, 5.2 and 5.3 entirely and substitute the new 5.1, 5.2 and 5.3 and a new 5.4.

LEVINSOHN J Yes.

MR KISSOON SINGH M'Lord, those are the amendments which the defendants move for, M'Lord.

LEVINSOHN J Yes. Yes, Mr Lane.

MR KISSOON SINGH I'm sorry, M'Lord, by those admissions, obviously the earlier issue as to whether the application form A1 to A7 was a part of the contract now falls away because it's now admitted that that was the application, M'Lord.

LEVINSOHN J Yes, thank you, Mr Singh. So without further ado I must just grant the amendment, which I hereby do.

MR KISSOON SINGH As Your Lordship pleases.

LEVINSOHN J Yes, Mr Lane.

MR LANE As Your Lordship pleases. M'Lord, that, of course, takes out of the dispute arena the question of the fact that an agreement or contract existed between the plaintiff and the first defendant. There remains the issue, M'Lord, in relation to that contract and that is this question of the renewal cards, and if I could ask Your Lordship to look at page 16 of the pleadings bundle in this regard.

LEVINSOHN J I think you'd better just quote the paragraph numbers to me because I think there is a bit of a mix-up with the pagination here. Page 16?

MR LANE Page 16, paragraph 3.4.

LEVINSOHN J Of your particulars of claim?

MR LANE Particulars of claim, M'Lord. It should be a document headed "General terms and conditions applying to the ...".

LEVINSOHN J Is it one of the annexures?

MR LANE It's an annexure, M'Lord. It's page 16. It's Annexure A4. 5

LEVINSOHN J Yes, I've got A4.

MR LANE Well, could I ask Your Lordship what page number reference that is so that can get Your Lordship's ...[intervention]

LEVINSOHN J My A4, "General terms and conditions", starts at 15.

MR LANE M'Lord, may we uplift your file during one of the adjournments and see what's gone wrong with the pagination? 10

LEVINSOHN J Yes, thank you. That will be helpful, yes.

MR LANE M'Lord, paragraph 3, "The Card". Now, 3.1 deals with what the cardholder must do upon receipt and then in paragraph 3.4, M'Lord, it says, 15

"Shall at the discretion of Diners Club be renewed annually by despatch of a renewal card/s prior to expiry of the existing card/s to the cardholder at the last notified address on record. Such renewal, or where applicable, replacement card/s is/are issued subject to the prevailing terms and conditions accompanying the card, of which the cardholder shall be deemed to be aware of and to have accepted upon use of the card." 20 25

So it creates a mechanism to allow at the time of the renewal a variation to the terms. So what one has, M'Lord, is the contract. The contract remains extant but a mechanism if there are any changes to the conditions of use of the card which will be introduced later. Now, it's not disputed, M'Lord, that the card - in fact, it's now common cause in relation to both the first defendant and the second defendant - was, in fact, renewed in December 1999.

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LEVINSOHN J That is when the new card was sent?

MR LANE That's when the new card is sent, M'Lord, and ...[intervention]

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LEVINSOHN J With a new ...[intervention]

MR LANE The pack, I think I referred you to ...[intervention]

LEVINSOHN J The cardboard ...[intervention]

MR LANE That is so, M'Lord. It's called a card pack, M'Lord. An example of that card pack one finds at page 8 of the bundle.

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LEVINSOHN J So your case is that this 3.4 then presupposes that the card is renewed. The contracts, in so far as they are extant, will stay the same. In so far as they have been changed, will be changed.

MR LANE So it's just an amending agreement, as it were, M'Lord, to an existing contract which prevails through those conditions. And the card pack has at the bottom of it,

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"Please sign the back of your card as acceptance and familiarise yourself with the enclosed Diners Club terms and conditions of usage."

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And accompanying the 1999 pack - in other words, the cards that

were issued to the defendants in 1999 - were the terms and conditions prevailing as at the 1st March 1998, and they prevailed in terms of this document through until May 2000, covering that spectrum.

LEVINSOHN J It's during the relevant period?

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MR LANE Yes, that is so, M'Lord, and the document I referred Your Lordship to in the small bundle constitutes - we've highlighted for Your Lordship where the minor variations were brought about to those conditions of use. But the provision of 3.4 doesn't change, M'Lord. As I pointed out to Your Lordship, the only one that might impact at all on this matter is the change brought about to 7.3.

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Now, M'Lord, whilst the defendants admit that the cards were issued to them in December, they do not admit the 1998 amendments to their contract and so in that regard, M'Lord, I will have to adduce evidence. Again, Mrs Colleen du Preez will give that evidence.

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LEVINSOHN J Very well.

MR LANE Now, M'Lord, there remains the issue which we have debated, and that is this question of the duty to adduce evidence. The rule 39(11) allows Your Lordship to give a directive as to the duty to begin or the duty to adduce evidence as it is otherwise referred to. It's obviously - M'Lord, for the parties embarking upon a matter of this nature, there is a great advantage for both parties and I think we are *ad idem* on that.

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LEVINSOHN J Does this just deal with the *onus* properly so called?

MR LANE No, M'Lord. It's ...[inaudible] ...[intervention]

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LEVINSOHN J [Inaudible]... it's actually the - it says the *onus* of

adducing evidence.

MR LANE That is so, M'Lord, and this is really about the *onus* of adducing evidence, not about the true *onus*.

LEVINSOHN J The duty to begin. The true *onus* is determined by the pleadings and it's a matter of law.

MR LANE The true *onus* is a matter of law in this matter and in this matter the plaintiff will at the end of the day bear the *onus* of establishing its case.

LEVINSOHN J The true, the legal *onus*.

MR LANE The legal *onus*, M'Lord. This is about the evidential *onus*. In other words, who has to adduce evidence when. This is what this is about, M'Lord.

LEVINSOHN J And then it goes on - doesn't it talk of when you lead the evidence on the issues where the *onus* is on you, you can close your case?

MR LANE And as long as you haven't then canvassed - trespassed, shall I say, on the issues which you want to lead in rebuttal, then you have that opportunity to adduce evidence in rebuttal. So the door is not closed to you, M'Lord.

LEVINSOHN J I think it's pretty self-evident that you have the duty to begin?

MR LANE Yes, I must prove that 1998 variation of the agreement. It's the one last element that rests on me. The certificate is admitted, M'Lord. So we have admitted - in the small bundle, M'Lord, you can find ...[intervention]

LEVINSOHN J This is the rule 37 bundle?

MR LANE Yes, M'Lord, ...[inaudible] ...[intervention]

LEVINSOHN J That's the certificate of Vitor Prospero.

MR LANE Prospero, M'Lord, Manuel Seixas Prospero.

LEVINSOHN J That's been admitted?

MR LANE That's been admitted, M'Lord, his signature and the fact
that he's a manager has been admitted. The issue between the
...[intervention]

LEVINSOHN J Well, the defendant says that that doesn't take you
anywhere because it admits *prima facie* that certain transactions went
through the Diners Club card records and that doesn't shown that the
defendant engaged in the transactions ...[intervention]

MR LANE Indeed, M'Lord.

LEVINSOHN J ... that are in issue in this case.

MR LANE That is as we understand the submission, M'Lord.
M'Lord, if that were to be correct then the whole purpose of having
a certificate in any contract would be completely nugatory, and one
merely has reflect on any one of the decisions in which a certificate
has been upheld as being constituting *prima facie* proof to know that
to be the case, M'Lord.

LEVINSOHN J Well, my *prima facie* view on that is, it seems to me
that when the certificate is issued it relates to transactions which
have gone through *prima facie* by the use of the card. They have
come through the system and they are deemed to reflect the amounts
involved in those transactions unless the contrary is proved.

MR LANE That is so, M'Lord, and, in fact, the certificate is said to
arise from the agreement. It says ...[intervention]

LEVINSOHN J You referred me to it earlier, the word "indebtedness".

Prima of such indebtedness.

MR LANE That is so, M'Lord. Such indebtedness, and once you've established, M'Lord, that there is an agreement, the terms of the agreement are, the terms of the agreement say, the proof of your use of the card or your indebtedness arising out of this agreement will be proved by a certificate, then a certificate of that indebtedness is sufficient and, M'Lord, what is the sufficient?

LEVINSOHN J From a common sense point of view I'd have a lot of difficulty in requiring Diners to go and prove a transaction that I engaged in in Macy's in New York. It would just make nonsense of ...[intervention]

MR LANE Absolutely, M'Lord. If you imagine that in every case Diners Club had to prove that, it would be an impossibility. In fact, I think probably it would put most card companies out of business if that were the case. They couldn't do it, M'Lord. They just wouldn't run trials and they wouldn't recover these debts if that were the case. And what one looks at, M'Lord, bearing that in mind, is the oft-quoted passage from *Salmons v Jacoby* which is the 1939 Appellate Division decision 588, which deals with, "What is *prima facie* evidence?" And this probably, M'Lord, puts it in a nutshell.

"At the end of the case when all the evidence, which includes the certificate, is in, the Court must decide whether the party on whom the *onus* rests has discharged on a proper balance of probabilities."

That's the distinction between evidential *onus* on the one hand and the true *onus*, the legal *onus*, on the other or the ...[indistinct]... - now I am getting myself tied up. They speak of it in that sense. As was pointed out by STRATFORD J in *Ex Parte Minister of Justice in re R v Jacobson and Levy* 1931 (18) 466 at 478,

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"*Prima facie* evidence in its more usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence."

LEVINSOHN J You need just enough to get you past absolution.

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MR LANE That's so, M'Lord, and then it says,

"If the *prima facie* evidence or proof remains unrebutted at the close of the case it becomes sufficient proof of the fact or facts in issue with which it is concerned necessary to be established by the party bearing the *onus* of proof."

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I think, M'Lord, that encapsulates the purpose of a certificate and how it serves to facilitate the plaintiff's proof in this matter and reserve its evidence to rebuttal if that is needed in the fullness of time.

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LEVINSOHN J Yes, but you couldn't contract with a party to say, "Well, that certificate will be conclusive proof".

MR LANE No.

LEVINSOHN J That would be against public policy.

MR LANE That's been decided against public policy in a number of cases, M'Lord, the first decided in 1989 that that was against public

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policy. There were a number of decisions. His Lordship FLEMING J gave one of them in the Transvaal, which upheld this conclusive evidence certificate and restricted the defences to fraud. That's now been rejected in its entirety. It can only be *prima facie* evidence which goes to the evidentiary burden, as distinct from true *onus*. So, M'Lord, we submit that it is a proper case for us to adduce evidence only restricted to the agreement, that last condition, and thereafter we close the case based upon the certificates which Your Lordship has in front of you.

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LEVINSOHN J Yes, and you've made your bed, you lie on it. You say, "These are the issues on which I bear the *onus* and I'm leading my evidence and then I'm going to close my case", and if there is an application for absolution you'll face it.

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MR LANE I'll have to face the application for absolution at that stage, M'Lord.

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LEVINSOHN J So, in fact, the only ruling that I need make here at this stage is to rule that you must begin?

MR LANE That is so, M'Lord.

LEVINSOHN J Which I do.

MR LANE As Your Lordship pleases.

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LEVINSOHN J Yes.

MR KISSOON SINGH M'Lord, may I ask Your Lordship for an indulgence just to mention one other aspect, M'Lord?

LEVINSOHN J Yes, certainly, Mr Singh.

MR KISSOON SINGH The purpose for this being raised at this point is not to ask Your Lordship to make a ruling that my learned friend has

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to begin. I think my learned friend has accepted all along that he would have to begin. The purpose here, M'Lord, as I understand his opening address and what he indicated at the rule 37, he intends at a later stage to bring an application to lead evidence in rebuttal and, M'Lord, that application will obviously be opposed and rather than having a difficulty at that stage - I understand M'Lord can't make any ruling at this point.

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LEVINSOHN J I think, Mr Kisson Singh, the situation is this, that he leads his evidence of what he conceives to be the issues where he has the *onus*, and he closes his case. You will then get up and make an application for absolution, saying, "You haven't proved your case".

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MR KISSOON SINGH No, M'Lord, the ...[intervention]

LEVINSOHN J Because the *onus* is on you and you should have proved that. He can't then lead any further evidence. It'll be the issue of whether he's a reasonable man - there is sufficient evidence on the issues where he has the *onus* for a reasonable man to find in his favour. That's absolution. Now, I don't think it goes any further than that.

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MR KISSOON SINGH No, M'Lord, it's a question of as long as my learned friend is fully well aware that in due course I will ask for rule 39(13) and rule 39(14) if he should bring an application to lead any evidence in rebuttal, urging at that stage, M'Lord, any submissions that he knew all along that the issues in the case were on him but he elected to lead only partial evidence and therefore he cannot lead any other evidence.

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LEVINSOHN J You mean if it turns out that he was wrong about his

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assessment of the *onus*?

MR KISSOON SINGH Yes, M'Lord.

LEVINSOHN J Yes, well, I think he accepts that.

MR KISSOON SINGH As long as it's clear, M'Lord, because at that stage there may be an argument ...[intervention]

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LEVINSOHN J But there will be evidence in rebuttal in so far as the *onus* is on you. He would be entitled to reopen his case on those issues.

MR KISSOON SINGH Yes, and only on those issues.

LEVINSOHN J Only on those issues.

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MR KISSOON SINGH Yes, M'Lord, that I accept. I have no difficulty, of course, M'Lord saying that there's no *onus* on me at all because there is no issue on which I bear the *onus*.

LEVINSOHN J Yes, but his case is that you do have the *onus* on certain issues.

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MR KISSOON SINGH M'Lord, that is a matter which obviously will be decided in due course. I just didn't wish the matter to proceed before Your Lordship and Your Lordship under the impression that I had accepted that there was a certain *onus* on me, and so on and so forth.

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LEVINSOHN J No, I realise, Mr Kisson Singh, there is very little you accept here about what he says.

MR KISSOON SINGH Well, M'Lord, on analysis of the pleadings.

LEVINSOHN J Yes, Mr Lane.

MR LANE As Your Lordship pleases. I call my first witness, Mrs du Preez.

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LEVINSOHN J Of course there is also the aspect which Mr Lane did mention, Mr Kissoon Singh, is if he widens the issues then that's also another matter. He might then traverse issues where you have the *onus*. Well, that's a different matter too.

MR KISSOON SINGH Well, yes, M'Lord, but certainly some of the evidence which we envisage being ...[indistinct]... we submit is part of the *onus* which he bears, M'Lord, and he should not be able to call it in rebuttal. If he wants to, then he must do it before closing his case.

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LEVINSOHN J Yes, I understand that. Thank you.

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MR LANE CALLS

COLLEEN ROSEMARY DU PREEZ (sworn in)

EXAMINED BY MR LANE As Your Lordship pleases. Mrs du Preez, in 1997 what position did you hold with the plaintiff company, Diners Club? --- I was Manager, New Applications.

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And as Manager of new applications what did that involve? --- It required me to research the applications which I received and to pass them for the initial approval.

Would your function - would you have knowledge of the renewal of cards as well? --- I do have knowledge of the renewal. They would be renewed every two years. 60 days before the card was to be renewed, if the account was in order, the card would be renewed.

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LEVINSOHN J Just let me write this down. So 60 days before you researched the account. If the account was in order then you would

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process it for renewal? --- No. I didn't process the renewal.

But you would approve the renewal? --- I did not approve the renewal. It's automatic if the account is in order.

MR LANE Mrs du Preez, what I want to do is, I just want to show you, just for identification, so we can hand it to His Lordship. It is now common cause that this document is the contract that was entered into.

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LEVINSOHN J Well, let's give it an exhibit letter. Have we given your bundle any ...[intervention]

MR LANE I haven't given any exhibits, M'Lord.

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LEVINSOHN J How many have we got? We've got the two big bundles which contain documents so should they be A and B, respectively?

MR LANE M'Lord, there are two copies of the bundle. Could we make the bundle of discovered documents bundle A, M'Lord.

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LEVINSOHN J Exhibit A, right.

EXHIBIT A - BUNDLE OF DISCOVERED DOCUMENTS

MR LANE Then the little bundle, M'Lord, perhaps we could just make that bundle B.

LEVINSOHN J This one here, the rule 37?

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MR LANE Yes, and we could collectively make that Exhibit B.

LEVINSOHN J Yes.

EXHIBIT B - RULE 37 BUNDLE OF DOCUMENTS

MR LANE And then, M'Lord, the expert summaries we could refer to bundle C, if Your Lordship pleases.

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EXHIBIT C - BUNDLE OF EXPERT SUMMARIES

LEVINSOHN J Yes, so this document will be Exhibit D.

EXHIBIT D - CONTRACT

MR LANE That will be Exhibit D. M'Lord, might I ...[intervention]

LEVINSOHN J Yes, certainly.

MR LANE Yes, well, I want to show you Exhibit D, Mrs du Preez. 5

LEVINSOHN J Just show it to the witness, please.

MR LANE It is now common cause that this is the contract which was entered into between the plaintiff and the defendants in this matter. Do you recognise that document? --- I do.

Does your signature appear on that document? --- Yes, it's on 10
the left-hand side - it's my initial.

I beg leave to hand it up, M'Lord, as Exhibit D.

LEVINSOHN J Yes, thank you.

MR LANE M'Lord, what I'm going to hand up now, if I may mark it ...[intervention] 15

LEVINSOHN J And your signature appears where it says, "Office use", is that where it appears? --- Down on the bottom there's two initials.

Oh, yes. Yes.

MR LANE Now, M'Lord, what I intend handing up now are in the 20
bundle but these constitute the original of the documents in the bundle. If I could refer to the first one as Exhibit E, M'Lord, which is the card pack.

LEVINSOHN J Yes.

EXHIBIT E - CARD PACK

LEVINSOHN J That's a sample of a card pack? 25

MR LANE That is so, M'Lord, and you will find at page 8 of the bundle a copy of that document. Now, Mrs du Preez, would you look at this document? It's Exhibit E. And tell His Lordship what that is. --- This is the card carrier. The card is inserted in here when it goes out.

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Now, that's an example of a card carrier. Did the format of that card carrier change over the years? --- No.

Was it still the same? Would you just look at the bottom signed by Don Bale, the Managing Director. When did he become the Managing Director? --- In August 1997.

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And would this document have been changed at that point in time to reflect his signature? --- Only to reflect his signature.

Otherwise the contents remained the same. May I beg leave to hand it in, M'Lord. It's Exhibit E.

Now, the defendants' credit cards in this matter were issued to them in February 1997 and they were due to expire then in February 2000. When would the cards have been issued? Well, we know it's common cause the cards were issued in December 2000. Was that in keeping with the practice of Diners Club? --- Yes, 60 days before. It would have been the December. The renewal, if the cards are in order, automatically run for renewal.

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Now, the note that appears on Exhibit E - sorry, let me rephrase that question. What accompanies the card pack when the cards are sent to the individual members? --- The new card?

The new card, the renewal card, what accompanies ...[intervention] --- The renewal card?

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Yes. --- The renewal card has the - it's in the card carrier and it has the terms and conditions.

Now I want to show you - M'Lord, with Your Lordship's permission I will mark this Exhibit F.

EXHIBIT F - TERMS AND CONDITIONS

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MR LANE M'Lord, this document is copied at page 11 of the bundle and also appears in Exhibit B in retyped form. Can you show that to the witness, please.

LEVINSOHN J This is Exhibit F?

MR LANE F, M'Lord. As I say, M'Lord, it's the same as page 11 in the bundle. Mrs du Preez, what is that document? --- This is a copy of the terms and conditions.

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As prevailing when? --- Effective 1st March 1998.

And would you look - I'm not certain which page in the original it is but if you would look at the page which is signed by D Bale and J.J Breytenbach. Just beneath that there are the words, "MKTG05/00". What does that mean? --- The terms and conditions were reprinted then.

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So during what period were these terms and conditions in operation? --- From March 1998.

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And in May 2000 were they still in operation? --- They would have been.

No further questions, thank you, M'Lord.

NO FURTHER QUESTIONS BY MR LANE

LEVINSOHN J Any questions, Mr Kisson Singh?

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MR KISSOON SINGH Just a few questions, M'Lord.

CROSS-EXAMINED BY MR KISSOON SINGH Mrs du Preez, do I understand correctly that you initialled the original application form which has been shown to you this morning - M'Lord, perhaps if the witness could be shown the application form.

LEVINSOHN J Just show it to the witness, please. 5

MR KISSOON SINGH It's Exhibit D in the case. --- The initial on the left-hand side is mine.

And who else initialled it? --- On the right-hand side is that of our credit director, Mr Frik Taljaard.

In the same block where your initial appears? Is that where you refer to? --- The two are side by side. 10

The Credit Manager was who, ma'am? --- Mr Frik Taljaard.

Now, the application was accepted by the two of you or was it accepted by a committee? --- It was just accepted by the two of us. We were the committee. 15

And do I take it then that you and Mr Taljaard were responsible for the ...[intervention]

MR LANE M'Lord, I don't like to interrupt my learned friend but I have an amendment which has been given to me no longer than 20 minutes ago which admits these facts. 20

LEVINSOHN J Let Mr Singh proceed. We'll give him a little bit of latitude. We will find - it might be relevant. He might really want to know these things for some other purpose. I don't know.

MR LANE Yes, M'Lord.

MR KISSOON SINGH Sorry, ma'am, did you and Mr Taljaard settle the terms and conditions which had to accompany the issuance of a 25

card to the defendants in this particular case? --- I would not be able to answer on the terms and conditions. I didn't set them.

You didn't set them. Did you settle the terms of the amendments which went out in 1998? --- No. I was the New Applications Manager. I processed the applications.

LEVINSOHN J Did you know about the changes to the terms and conditions or is it something that you don't concern yourself with? --- No, I wasn't party to them. I would have known a new application ...[intervention]

So there's really no point in asking you about the terms and conditions and what those documents contain? --- No.

MR KISSOON SINGH And I take it that you were not responsible for dispatching renewal cards and carriers of the cards and things like that? --- Our embossing room would have done those. After we'd signed it would have gone out from our embossing.

No, I'm talking about the renewal cards, not the ...[intervention] --- Also.

Also the renewal cards. So are you in charge of the embossing room? --- No. New business.

When you processed the application of the defendants did you fix a limit to the original application? --- No.

Now, I am instructed by the first defendant that he had been advised by Diners Club that he had a limit on his card of R45 000 and that immediately prior to his card having been taken away or when he returned it, his limit had been increased to R60 000.

LEVINSOHN J R45 000, you said?

MR KISSOON SINGH M'Lord, R45 000.

LEVINSOHN J And then it went up to R60 000?

MR KISSOON SINGH To R60 000. Do you know about that? ---

No, I can't answer on that.

LEVINSOHN J Do you know from experience whether any limits are placed on Diners Card members? --- I wouldn't be in a position to answer.

You don't know that.

MR KISSOON SINGH Well, I ask you in your capacity as one of the persons who approves the application and who processes the application. One of the terms and conditions of this application was that the card limit is something which Diners Card had the right to increase or reduce and I refer to 3.3 of the application form, Exhibit D. It says that,

"The card shall at all times remain the property of Diners Club and that Diners Club in its sole and absolute discretion may revoke the card, terminate the agreement imposed, increase or reduce the card limit or decline to make any advance for the card without being required to give reasons."

--- That would be a credit control function.

So do I understand from that that there's a possibility that limits could be imposed by another department? --- I can't answer that.

LEVINSOHN J Doesn't it look as if you would approve it without a limit but if something went wrong Diners Club would then look at it

again and say, "We are going to take the card away" or, "We are going to impose a limit", or something like that? --- [Inaudible]

You are not concerned with that? --- No, no.

MR KISSOON SINGH And you said to His Lordship earlier on that if there was no difficulty with the account then the card renewal would be automatic. Is that correct? --- That's correct. 5

In this particular case was there any problem or was the renewal automatic? --- I would not have known that. I was on the new business side. I would not have known that.

Oh, I see. So you don't know anything at all about how the renewal card came to be sent out? --- I know how the renewals - I have knowledge of how the renewals but I'm not involved in that. 10

And you don't know about the particular renewal of the defendants? --- No.

Just to ask you as well, ma'am, do you know anything about conditions of usage of the card at an automatic teller machine? --- Well, yes, I do know that the terms and conditions control the PIN. The PIN controls the terms and conditions. 15

Do you know if there's a limit that is placed on the usage of a card at an automatic teller machine? --- There's a limit of R1 000 a day locally, up to R3 000 a month in this country. 20

And internationally? --- Internationally that's per charge.

I'm sorry, I didn't understand that. --- Internationally it's as they make the charges, as they make the withdrawals.

Do you know that or is that something which you assume? --- 25

I can't answer on that no.

You're just assuming that? --- No, I'm not assuming. I do know that there is a - you can withdraw up to a certain amount.

Up to a certain amount? --- I'm not sure of the amount.

You're not sure what the amount is? --- No.

So you know that there is an amount up to which you withdraw but you don't know what that amount is? --- No.

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Thank you, M'Lord, no further questions.

NO FURTHER QUESTIONS BY MR KISSOON SINGH

LEVINSOHN J Re-examination?

MR LANE M'Lord, just a few questions.

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RE-EXAMINED BY MR LANE On this question of the limits on ATMs, Mrs du Preez, I think perhaps we need to clarify some confusion. What you said was that there was a R1 000 per transaction with a maximum of R3 000 locally in South Africa. Is that correct? Sorry, you'll have to say "Yes", and not nod your head. --- Yes, M'Lord.

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Now, in relation to international transactions and let's deal specifically with those in the United Kingdom. Are there limits set for those transactions for the withdrawal of money from ATMs? --- By PIN number you would have an amount that you could draw per charge.

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What do you mean by "Per charge"? --- It wouldn't be - you wouldn't be able to draw like R3 000 and it would stop. You would be able to draw charge by charge.

Let me understand what you're saying. Charge by charge, that means the transaction itself? --- That's right.

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So in this case if the member wanted to draw money from an

ATM would it be the case that he would go to the machine say once he wants a limit of £350 he could draw as many times as he liked that £350? Is that correct? --- Per charge.

Per charge. Is that what you mean by "per charge"? --- Yes.

And is there a monthly limit on that? --- To the best of my knowledge, no.

Thank you, M'Lord, no further questions.

NO FURTHER QUESTIONS BY MR LANE

LEVINSOHN J Thank you, Mrs du Preez.

MR LANE M'Lord, might I hand in the original of the certificate signed by Prospero. There is a copy in Exhibit ...[inaudible] ...[intervention]

LEVINSOHN J I see that on the pleadings.

MR LANE But that is the original certificate, M'Lord.

LEVINSOHN J Shall we give this an exhibit letter?

MR LANE Sorry, M'Lord, perhaps ...[intervention]

LEVINSOHN J Exhibit G.

EXHIBIT G - ORIGINAL CERTIFICATE

MR LANE M'Lord, the two salient features of that have been admitted, that he signed in his capacity as Manager. He was Manager as at the date of the signature and that it is his signature that is on that document. It is given under his signature. And if I could draw Your Lordship's attention to paragraph 3, where Mr Prospero certifies that he has checked and perused the plaintiff's statements and records with regard to the claim against the first and second

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defendants,

"I hereby certify that first and second defendants are jointly and severally indebted."

And paragraph 3.1 through to 3.6 mirror the relief sought in the particulars of claim.

LEVINSOHN J Yes, very well.

MR LANE M'Lord, that is the case for the plaintiff.

CASE FOR THE PLAINTIFF

LEVINSOHN J Mr Kissoon Singh.

MR KISSOON SINGH I am not going to apply for absolution from the instance in view of the certificate which was handed in, M'Lord. It's my intention to call the defendants to testify, as well as certain additional witnesses.

LEVINSOHN J Yes, certainly, Mr Singh. Do you want to open your case or are you just calling witnesses?

MR KISSOON SINGH No, I would prefer to briefly address M'Lord on a short opening address, M'Lord, and then at the end, depending on how long that is to ask M'Lord, whether we could perhaps start taking the evidence tomorrow morning.

LEVINSOHN J Yes, with pleasure, Mr Singh. I don't want to put you under pressure. Would you prefer to start at 10 o'clock tomorrow.

MR KISSOON SINGH M'Lord, I can actually address, not to waste time, for a few minutes this afternoon, M'Lord, and then just start calling the evidence tomorrow morning.

LEVINSOHN J Yes, very well.

MR KISSOON SINGH Thank you. M'Lord, it will be the case for the defendants that whilst the first defendant accepts, and, M'Lord, I refer to the first defendant because I think it is common cause that it was only his card which was used - or not his card, M'Lord, but his account which was responsible for the withdrawals in the United Kingdom.

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LEVINSOHN J Well, I assume the second defendant has been joined because of the joint and several aspect.

MR KISSOON SINGH Yes, M'Lord. That's the only reason I believe that she has been joined. I can't think of any other reason, unless, M'Lord, there may be evidence in rebuttal that she went overseas to use the card. I can't talk for that but I assume on the face of it that she's joined because of the joint and several liability.

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LEVINSOHN J Yes.

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MR KISSOON SINGH Therefore, M'Lord, in addressing Your Lordship I will, for convenience sake, refer to the first defendant rather than the second defendant as well. M'Lord, the first defendant will, in due course, testify to Your Lordship that he had his card in his possession at all stages. M'Lord, he has had an account which operated in good order with the plaintiff for several years prior to March 2000.

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LEVINSOHN J Prior to?

MR KISSOON SINGH Prior to 2000, M'Lord, yes. He applied for his card in 1997, I think, M'Lord, and 1997, 1998, 1999 his account was in good order.

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LEVINSOHN J So he was a member in good standing?

MR KISSOON SINGH In good standing, yes, M'Lord. M'Lord, he had never applied for a PIN number because he did not have need to operate a card with a PIN number but in consequence of a transaction, which he will tell Your Lordship about, where another card company had suggested that he obtain a PIN number for convenience, he though at that stage he might as well apply for the Diners Club PIN number as well, and that's how the application came to be made by him, and I presume by the second defendant, for their PINs in February 1997. Now, M'Lord, there will be an issue arising out of that because it will be the case for the defendants that the PIN number was not issued to the second defendant in respect of her card.

LEVINSOHN J It wouldn't be a common PIN number for ...[intervention]

MR KISSOON SINGH No, M'Lord, it was apparently a separate PIN number for first defendant and a second one for second defendant. What happened, M'Lord, as the evidence will reveal, is that first defendant went to the Standard Bank in Chatsworth where he normally banks, where he was well-known, and he asked whether he could be furnished with the PIN numbers and because he was well-known at the bank he was allowed to apply for the PIN numbers for himself and his wife. The PIN numbers were issued to the first defendant, not to the first defendant and the second defendant. The second defendant will testify that she never went to the bank at all to get a PIN number.

LEVINSOHN J But they got the PIN number but he got it for her?

MR KISSOON SINGH That is correct, M'Lord. And that, M'Lord, is an important aspect because it is one of the areas in which the defendants contend that the security systems of which the plaintiff speaks to - of course, it hasn't spoken to yet because its closed its case, are not inviolate as is suggested in some of those experts notices because there is the first matter where one person got a PIN card ostensibly which is due to somebody else and it doesn't matter, M'Lord, that he's the principal cardholder. It's a separate PIN number on a separate card which is not in his name.

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LEVINSOHN J Did he take her card with him?

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MR KISSOON SINGH He took her card with him, M'Lord, but he did not have her accompany him. At a later stage the form was sent by the bank to her at her shop and she was asked to sign the application form.

LEVINSOHN J So obviously his bank trusted him.

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MR KISSOON SINGH That is correct, M'Lord.

LEVINSOHN J Does he bank with Standard Bank?

MR KISSOON SINGH He banks with Standard Bank, M'Lord. Secondly, M'Lord, having obtained the PIN number, it didn't matter to him to use the PIN number because he'd never used the PIN number in the past. He'd had the card from 1997. He did not wish to withdraw monies from automatic telling machines with his card but, having been in Stanger on business, and this is nothing, as I seem to gather the suggestion that there was something surreptitious in his conduct in going to Stanger and 40 minutes later at the Durban International Airport. He will tell Your Lordship that he has a shop in

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Stanger and he had closed up at the shop and he was on his way - he needed R100, and that's why he tried the machine and he couldn't get the cash. It's the first time in his life he used the PIN to try and draw R100 cash. He then had to go to the Durban International Airport, M'Lord, to collect somebody from there who is working there and whilst he was waiting for the person he took the opportunity of trying in case there had been a problem with the automatic telling machine. I'm now taking Your Lordship to the afternoon of the 3rd March 2000.

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LEVINSOHN J Yes. So he tries the ATM in Stanger.

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MR KISSOON SINGH For R100. It doesn't give it.

LEVINSOHN J On the 3rd March. What time was that?

MR KISSOON SINGH I think, M'Lord, it was somewhere round about midday. The times we can give Your Lordship in due course.

LEVINSOHN J Well, that doesn't really matter.

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MR KISSOON SINGH I think it's common cause, M'Lord.

LEVINSOHN J Then that is not successful. Yes, and then?

MR KISSOON SINGH He goes to the Durban International Airport because he's going to meet somebody there to pick them up. Not a passenger, M'Lord. I think somebody who works at the airport, and whilst there he tries it again because he thinks maybe there's a malfunction in the machine. Card is rejected, M'Lord, and he will tell Your Lordship in evidence that he then sees a message on the screen that he should contact his nearest branch or the plaintiff or somebody.

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He can't remember exactly what he saw, M'Lord, but in consequence of that he went to the Standard Bank in Chatsworth.

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LEVINSOHN J That same day?

MR KISSOON SINGH The same day, M'Lord. When he goes to the Standard Bank, he is dealt with by at least one person but there's another employee of Standard Bank who I think overheard the conversation, where he complained about why he wasn't able to draw cash with his Diners Club card. Enquiries were then made. The employee of Standard Bank telephoned through to the card department which I think administered the plaintiff's office locally or he's not sure, M'Lord, about how the plaintiff's operations work. He didn't make the call himself initially. The call was made by an employee of Standard Bank. The employee from Standard Bank, M'Lord, telephoned the card division controlling this and ascertained that the reason why the card why was not dispensing money through the ATM was because it had been blocked. It had been blocked because it had not been paid. M'Lord, the first defendant will then testify that he had intended to make a trip overseas during the course of the next week. This was now 3rd March, a Friday afternoon. On the week of the 6th March 2000 he had intended to make a trip overseas.

LEVINSOHN J Incidentally, what business is he in?

MR KISSOON SINGH M'Lord, he runs a string of retail outlets. I think he has seven or eight shops functioning throughout the KwaZulu-Natal coast or Durban and coastal areas, and he is a large importer and exporter of clothing, M'Lord, particularly from India and he had intended to go to India in order to, I think, get involved in business, either to transact - purchase stock to bring into South Africa

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or something like that, and that's why he had intended to go to India the following week. Now, quite naturally, M'Lord, he was alarmed when his card, he was told has been blocked, that his account hasn't been paid and intending to use his card overseas when he was gone to India, M'Lord, he naturally wanted the card to be unblocked. He will tell Your Lordship that the sum total of the conversation is he was told by the representative of Diners Club whom he spoke to that the card could not be unblocked on that afternoon and, contrary to what my learned friend said in his opening address, that the card could only be unblocked on the Monday because of the system when the money had to be credited to the correct account, having been incorrectly debited. So therefore, M'Lord, the corrections to the account would have to take place on the Monday and the card would remain.

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LEVINSOHN J Was that blocked for all purposes, including going to restaurants or whatever?

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MR KISSOON SINGH Yes, M'Lord, it was blocked. As far as he was aware, it was blocked.

LEVINSOHN J Then how come the Chatsworth, the bank then gave him a PIN number when there was a problem with his card?

MR KISSOON SINGH No, M'Lord, the PIN number was two weeks prior. On the 16th February. We are now talking 3rd March.

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LEVINSOHN J I see. But at that stage there was no problem with his account?

MR KISSOON SINGH 16th February there was no problem with the card, M'Lord. Probably what happened was that at the end of February when the account had not been paid it went on to a block.

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LEVINSOHN J Oh, I see.

MR KISSOON SINGH And this was now 3rd March. I presume, M'Lord, had the first defendant tried the card on the 26th or the 27th February there might have been no difficulty. I'm not sure when the Diners Club billing system came to an end but one presumes that between the issue of the PIN and the 3rd March the block had come into operation.

M'Lord, first defendant and second defendant will testify to Your Lordship that neither of them left the country that week-end. Neither of them parted with possession of their Diners Club cards and neither of them gave their PIN numbers to anybody else to utilise overseas or anywhere else. M'Lord, the card was in possession of the first defendant and the second defendant, respectively, their respective cards. They didn't use the card over the week-end because the first defendant had been advised that the card was blocked. It could only be sorted out on Monday morning. On Monday morning he received a telephone call some time after 10 o'clock from a representative of the plaintiff company to ask him where was his card.

LEVINSOHN J Monday, that's the 6th?

MR KISSOON SINGH Monday, the 6th. Received a telephone call from the plaintiff company to say, "Where is your card? I thought you were overseas". "No, I am here." "Where is your card? Please give it to our office in Durban."

LEVINSOHN J What time was that?

MR KISSOON SINGH Some time after 10 o'clock in the morning,

M'Lord. M'Lord, he then takes his card and hands it to a representative of Diners Club at the Durban offices, at lady called Carla, and he says he did so at 11 o'clock on the morning. Not the 5 o'clock or half past four, or whatever time alleged by the plaintiff.

LEVINSOHN J Did they tell him what the problem was?

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MR KISSOON SINGH Not at that stage, M'Lord, no. But when he got to the Diners Club offices in Durban, M'Lord, he was told that the reason why was because a fraud had been perpetrated by his card or use of his card or on his card. He can't remember the exact wording.

LEVINSOHN J These transactions ...[intervention]

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MR KISSOON SINGH All took place on the week-end, the Saturday and the Sunday.

LEVINSOHN J The Saturday and the Sunday.

MR KISSOON SINGH Yes, M'Lord. M'Lord, the first of the transactions took place at plus/minus 1 o'clock to half past one on the Saturday and the last transaction took place at 5.25 on the Sunday afternoon, and the card was handed back by the first defendant on at 11 o'clock on the Monday morning. Now, M'Lord, first defendant will contend that, firstly, there was insufficient time if he was there physically with his card to get it back into the country.

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LEVINSOHN J Or anybody else.

MR KISSOON SINGH Or anybody else, M'Lord, and he says that - and he will tell Your Lordship that if anybody wanted to know whether he left the country - forget about his passport, which he made available a long time back, South African Immigration authorities could have been contacted to find out whether he left or whether his wife

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left.

LEVINSOHN J Or somebody else.

MR KISSOON SINGH Or somebody else. M'Lord, the first defendant will say that if his card was handed back at 11 o'clock the probabilities would favour that that was not the card that was used overseas in London. 5

LEVINSOHN J But the case for the plaintiff is that it's that card. It must be that card. Well, M'Lord, evidence will be tendered in due course by the defendants, M'Lord, to show to Your Lordship that a card can be manufactured bearing the same information that appears on the original card which comes from the plaintiff. 10

LEVINSOHN J And some other PIN number can activate it?

MR KISSOON SINGH Well, M'Lord, can I perhaps just deal with that step by step? M'Lord, what happens is the following, my expert, Mr Gibson, will testify that a card has on the back of it, and perhaps I can just demonstrate by utilising my own card, M'Lord. 15

LEVINSOHN J I hope it's a Diners.

MR KISSOON SINGH It's a Diners card, yes, M'Lord. How long the plaintiff allows me to keep it is another issue but anyway, M'Lord. It's got a strip on the back, a magnetic strip, which has certain information imprinted thereon. 20

LEVINSOHN J That's a computer programme. It's ...[intervention]

MR KISSOON SINGH M'Lord, it's called a magnetic stripe. It has two tracks on it. Some cards have three tracks but this one, I think, has two tracks according to the plaintiff's expert witnesses. This card, M'Lord, when one uses it at an establishment to pay for services 25

is very often taken away out of sight of the cardholder. It's taken away to a cashier's desk, run through and a voucher is brought for the cardholder to sign. What happens, M'Lord, in fraud syndicates operating internationally, M'Lord, is that machines called skimming machines or skimmers for short, M'Lord, are in operation. A skimmer is very similar to a terminal device which is used to swipe the card through and what happens is a dishonest employee, who is under pressure from a syndicate or for whatever reason, takes the card, swipes it through the skimmer, swipes it through the normal voucher terminal. That skimmer now has a record of all the magnetic information on the back of the card. There are card machines available on the Internet widely for sale, M'Lord, which can reproduce the card, however in a blank form but having all the pertinent information because that is what is important to the computer, whether you use it in a card terminal or whether you use it at an ATM. The strip at the back is where the information is read, not what appears on the front. Those skimming machines, M'Lord, can store up to 270 cards' information on them.

LEVINSOHN J 200 and?

MR KISSOON SINGH 270 cards. In other words, 270 individual cards can have the magnetic stripe's information stored on the skimming machines. At a stage appropriate to the criminals involved, M'Lord, they retrieve the skimming machines. They take off there by using other equipment or whatever, M'Lord - they take out the pertinent information and they manufacture a card of the same proportions. It may not say Diners Club. It may not say anything else

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on it but it is a card with pertinent information on it.

LEVINSOHN J And then the PIN?

MR KISSOON SINGH M'Lord, I will just take M'Lord to the PIN just now. Now, once that card is available, M'Lord, and, by the way, I digress to say that there are even machines available which can emboss the card as well. They may not be able to emboss a Diners Club so I don't want to be held guilty of misleading M'Lord, but there are certainly card machines available on the Internet which can even emboss the card, so when you present it at an establishment, if it happens to be similar to the card of that establishment you could even pass it off as though it's a genuine card from that establishment.

M'Lord, if a criminal now has a card which can be used because it has all the first defendant's information on it, M'Lord, all that he needs now to activate the PIN - the ATM terminal overseas is the PIN number. Now, M'Lord, plaintiff, and with respect, at its peril chose not to lead any evidence in so far as the question of how the PIN numbers are allocated, how they are kept and so on and so forth. M'Lord, the PIN numbers, from what we understand from the expert notices delivered by the plaintiff in this matter are in an encrypted form. In other words, not a clear print by the figures 1, 2, 3 and 4. They are in an encrypted form, maybe asterisks or whatever their computer may have on it, which can't be read by the naked eye and if somebody for some reason even looked at an encrypted form, unless you could decrypt it you are not able to tell what that particular PIN number is. But, M'Lord, there are problems with the system of security, notwithstanding the say-so of the plaintiff through its expert

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witnesses and, M'Lord, the simplest and most common problem which we submit is something which Your Lordship will have to take into accord in due course, when the card PIN number is issued - let's take, for example, the first defendant, M'Lord, on the 16th February when he went to the Standard Bank to get his PIN number issued. What happens, M'Lord, is ordinarily one is expected to produce your card and your identity document and one then hands that to the employee of the bank responsible. They then check it through whatever system they have to and they come back to you with an envelope which has got a portion of it blocked off under which an impact printer has impacted the number in a clear form, in other words, the numerals. It's no longer encrypted. It is now decrypted. So all that the person has to do is open and open his envelope and he sees what his PIN number is. Now, that, M'Lord, is conducted and the printer is kept in the premises in this case of Standard Bank and, M'Lord, the first defendant, and it will be submitted in due course through Mr Gibson's evidence as well that it's quite possible at the time when the impact printer is printing out, M'Lord, for a second piece of paper to be inserted and therefore the impact of the PIN number to be on it.

LEVINSOHN J So, Mr Singh, what you say, there are two sets of circumstances here. There is the skimming, which is the reproduction of the account details on a computer printout or a computer programme if you can call it that.

MR KISSOON SINGH Yes.

LEVINSOHN J That strip. That's the first set of circumstances.

Then added to that there has to be some more fraud perpetrated and

that is to somehow or other intercept the impact printed number. Is that what you say?

MR KISSOON SINGH No, M'Lord, that is one other possibility. There are many others. The most simple, M'Lord, is ...[intervention]

LEVINSOHN J You see, what I thought you were going to say, and you haven't, is that once you have this card that's been intercepted that these fraudsters can introduce their own PIN number and that would work. 5

MR KISSOON SINGH M'Lord, it might. We don't know.

LEVINSOHN J Now, what does your expert say about that? Is that possible? It seems highly unlikely. 10

MR KISSOON SINGH M'Lord, I have spoken to an expert who, unfortunately, I'm not in a position to call to testify at this particular point because he's not available and therefore I don't wish to mislead M'Lord as to what discussions I've had with him. They were very hurried over the telephone, M'Lord. He is from Johannesburg and I was not able to deal in great detail but that is a distinct possibility, M'Lord, that the ATM can be duped into believing that there is a proper PIN number. In other words, it gets a verification although there is no proper verification. 15 20

LEVINSOHN J But is there any evidence of that?

MR KISSOON SINGH M'Lord, he'll give evidence that these things happen.

LEVINSOHN J If that is so, Mr Singh, it would mean, I think, that the card companies would go out of business. 25

MR KISSOON SINGH Well, M'Lord, the card companies continually

employ people to upgrade their security systems. It happens that from time to time no matter how good a computer programme or security system is that somebody can break into it. They have these so-called hackers, M'Lord, who operate on an international basis. M'Lord will recall in the United States even the Department of Defence had their computer systems broken into fairly recently, M'Lord, and one can't assume that they would have lax security in any way.

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LEVINSOHN J But the hacker is very unlikely to break into this system because of the encryption of the number.

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MR KISSOON SINGH No, M'Lord, the thing is this. Perhaps I should just taken it one step even earlier, M'Lord. I said to Your Lordship point 2, in other words of how one can get a PIN with a dishonest employee. Point 1 is very simple. When Mr Anil Singh, the first defendant, used his PIN either at Stanger or Durban International Airport somebody could have watched him punching it in. They call that shoulder surfing, M'Lord, in ...[intervention]

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LEVINSOHN J Yes, but that person then presumably, by coincidence, has already got a copy of his card.

MR KISSOON SINGH No, M'Lord, he might be working or employed in a syndicate or they might have been watching, Mr Singh. Because once you have a Diners Club card, M'Lord, it's presumed that you're a person of some worth. There may be these fraud syndicates going on. M'Lord, we have asked and the plaintiff has declined to tell us how many other instances persons are alleged to have used their cards and have the same offence as Mr Singh in this case. I can tell

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Your Lordship as a fact that I act for one client - in fact, he was subpoenaed by the plaintiff and he was outside court this morning.

A similar sort of thing. A card was allegedly used in London and he has filed a plea in this matter which I signed, saying he didn't use it.

LEVINSOHN J Same defence. Identical case.

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MR KISSOON SINGH Almost identical, M'Lord.

LEVINSOHN J Yes, yes, I understand the issues here. It's becoming clearer to me now.

MR KISSOON SINGH And, M'Lord, we've made enquiries and in due course we may have an argument with my learned friend about similar fact evidence because we have got to issue a subpoena on the Registrar to produce other files just in this court alone, M'Lord, where persons have been sued by Diners Club.

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LEVINSOHN J Well, when you talk about similar, it's a question of similar and unconnected or similar and connected facts which are relevant. *Prima facie* it would seem to me to be relevant.

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MR KISSOON SINGH Yes, M'Lord, because it shows whether the system is inviolate and whether somebody can utilise these cards when persons are not in London.

LEVINSOHN J Yes, I *prima facie* agree with that.

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MR KISSOON SINGH Yes, M'Lord, and the plaintiff - we asked at the rule 37 and they just brushed us off and said, "We are not going to give you this information", but we've done the checking, we've found the information, and in due course we may have an argument about whether it's admissible or whether it isn't.

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LEVINSOHN J You see, what worries me at the moment about what

you're saying is this chain of coincidence, and there is a very big coincidence here. The one is the actual interception of the card itself. Then the acquiring of the PIN number. I don't know. It seems to me ...[intervention]

MR KISSOON SINGH No, M'Lord, it's not - you see, M'Lord, we have read in the expert notice of Mr Bonfra[?] which the plaintiff has produced, M'Lord, that one of these machines which can do this information to decrypt the PIN, I think, M'Lord, if I can just find his expert notice, because I don't want to say something which is incorrect, can be purchased for R200 000.

LEVINSOHN J This impact printer, where is it housed?

MR KISSOON SINGH Any Standard Bank, M'Lord, who dispenses with cards. Access to that, M'Lord, in due course ...[intervention]

LEVINSOHN J Do they actually - or does it come from Diners?

MR KISSOON SINGH No, M'Lord, Standard Bank generates the PIN.

LEVINSOHN J Oh, I see.

MR KISSOON SINGH The PIN is not being generated by Diners Club. It's common cause from the expert notice.

LEVINSOHN J So they punch in the account details and various other details and then this is generated.

MR KISSOON SINGH Yes.

LEVINSOHN J It's printed by what you say, impact printer.

MR KISSOON SINGH Impact printer.

LEVINSOHN J Yes.

MR KISSOON SINGH M'Lord, if I can just take you to the bundle of expert witness, Mr Bonfra, M'Lord, in bundle A - it's the big bundle,

M'Lord, at page 48. It's bundle C, M'Lord, at page 48.

LEVINSOHN J Is it bundle C - is this big one here?

MR KISSOON SINGH Yes, M'Lord. It's division No 1, I think. At page 48, M'Lord. M'Lord, it's the tenth opinion. What he says at 119.1 on that page, M'Lord, is,

"It is almost impossible that the information on the magnetic strip on the card and the PIN could have been obtained by a third party without the plaintiff having given the PIN and the card to such third party."

And look at his reasons at 119.2 which is very significant, M'Lord.

"Whilst it is not impossible to install a sniffer on a system and decrypt the information, the process is time-consuming and very costly. The machine necessary to perform the exercise costing not less than R200 000."

Now, M'Lord, in this case alone R600 000 is what the defendants are being sued for. If one is in the crime-making business where one could afford the R200 000 to get the equipment you'd make it up on this case alone, leave out any others that might be going on internationally. Forget about just with Diners Club. What about American Express, Visa, Mastercard? One doesn't know, M'Lord. So, M'Lord, we will actually lead Mr Gibson to tell Your Lordship that a skimming machine can be purchased for US \$950 on the Internet. And, in fact, M'Lord, it's our intention if we are able to obtain the

expert to give evidence, to manufacture a card with all the magnetic information on it before Your Lordship in the court. So the expert would be able to show to Your Lordship that there is a card now manufactured with all the information. All that one now needs is to get the PIN, and assuming, M'Lord, they had got hold of my card which I held in the court just now, M'Lord, all they have to do is just follow me around to see whether I use my card at an ATM. Perhaps fortuitously they might see me doing it somewhere and then I'm on the hook, M'Lord. They've got my information on the card. They could keep it for up to two years, M'Lord, because these cards, as Mrs du Preez said, are not just for a year as per the contract, they are for two years. They could have the information stored, M'Lord, and wait.

LEVINSOHN J Well, I find that quite scary. Mr Singh, if that is so, it's ...[intervention]

MR KISSOON SINGH M'Lord, it is scary indeed and even more scary is the terms of the new contract because it certainly makes me think about my own vulnerability with the Diners card and PIN.

But, M'Lord, anyway, to get back to the case of the defendants, the defendants' contentions will then be and the evidence will disclose that those are not the only two ways in which one could get the information to get the PIN number out. There are other ways in which the information could be obtained. A telephone line, dedicated or otherwise, M'Lord, is used to carry the transmissions from the ATM point to the central computers and back, and that could also be broken into. Dedicated or otherwise. Plaintiff witnesses in the expert

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notices talk about dedicated line as though this is something which is magic, M'Lord, but according to Mr Gibson it isn't so. M'Lord, you could decrypt the information even if you obtained it in encrypted form, depending on the amount of money and machinery that you have to do it, and if we are talking about a large fraud syndicate overall, operating internationally, M'Lord, then one can understand that this is not something beyond their means to do.

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M'Lord, there are still other ways in which one could obtain the PIN number. As frightening as it might sound, M'Lord, Mr Gibson will give evidence that through his research he is aware, and perhaps, M'Lord, I should just tell you that Mr Gibson is the head of the department at the University of Natal. He is in the computer security industry department there, M'Lord. He has also worked for a large bank, assisting them in the setting up of their computer operations, so he is well-versed in computer security. Mr Gibson will tell Your Lordship that overseas he has come across, through his research, that a well-known establishment - I am not saying the plaintiff, M'Lord - a well-known establishment had its name used on a false ATM machine set up in a busy shopping mall and unsuspecting persons were putting their cards in, punching their PIN numbers in and drawing cash, and the next thing, M'Lord, is the information was recorded on that false machine. I'm not suggesting this happened at Durban International Airport or at Stanger but I'm just suggesting to Your Lordship that these are possibilities. At the end of the day it doesn't mean to say that the only conclusion to be drawn is that my client is guilty of a fraud. We don't know. Many things could have happened. There is

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another device which is available, for sale on the Internet, and which has been used, according to Mr Gibson, and that is they put a false front over the face plate of an ATM disguised to look like the ATM itself. Mr Gibson will tell Your Lordship that you can then insert your card through it. It goes through a false plate and into the correct plate at the back. The false plate picks up all the information as the card goes through and enters the machine at the back. The person punches in the PIN number. That gets recorded on the false plate and then goes into the machine at the back. At the end of the day, M'Lord, or whenever, the information is removed from there and all the information on the cards is available. There are many ways in which these kinds of things are available. If M'Lord has a look at the transactions. If I can perhaps take M'Lord to the pleadings, the annexures being the statements to the pleadings. In particular the ones which become the area in dispute. Those are from B9. It should be somewhere round about page 27, 28 of M'Lord's papers.

LEVINSOHN J I've got it.

MR KISSOON SINGH M'Lord would notice that the series of transactions all - the first one £200, £300, £300, £300, £300, £300, £300. Now, M'Lord, those machines, and we have seen the evidence in the expert notices adduced by the plaintiff, and perhaps they are in the bundle which the plaintiff adduced in court as evidence this morning where he had the various machines highlighted, M'Lord. Yes, it is in the little bundle, the fold-out page in the little bundle. M'Lord, on the opening page of the little bundle - perhaps we can start at the top of that page. Does M'Lord have Lloyds TSE on the top?

LEVINSOHN J Lloyds, yes.

MR KISSOON SINGH Now, if M'Lord would have a look, M'Lord would see that the first transaction at Lloyds was done on the 4th March at 13:20. The next one was done on the 4th March at 13:21, 4th March at 13:22.

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LEVINSOHN J Was it the same ATM?

MR KISSOON SINGH The same ATM, M'Lord, was accessed. In fact, those times are not accurate. If one has a look at the actual times as per the printouts, one would see that these are less than a minute. Some of them are 35 seconds and 40 seconds apart from each other. Then, M'Lord, it comes to a certain point and suddenly the machine is no longer accessed. Instead what happens is that the person withdrawing the money suddenly goes to another machine. As Your Lordship would see from immediately under there, Natwest, the ATM identified is now 56619780 and it runs through now down, M'Lord, and several other transactions are now in close proximity. And so on, M'Lord, for each of these things, and Mr Gibson will tell Your Lordship that the reason for that happening is very simple. As part of computer security systems, M'Lord, what one expects responsible banks to have is a system of checks in place when something out of the normal spending pattern is taking place with the use of a card. It's out of the spending pattern for £300 at a time to be withdrawn from the Lloyds Bank and, M'Lord, that is no more apparent than when has a look at the exact withdrawals for that transaction machine, the ATM from Lloyds. Plaintiff has produced it in terms of part of their expert notices, M'Lord, and we've seen the

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amounts that have been drawn by the various people for the whole time relevant, M'Lord, and these transactions are £300, £300, £300, £300. Now, M'Lord, the question that must be asked is this, if there is indeed no limit placed on the automatic telling machine why doesn't the person just sit there for the whole 24 hours, M'Lord, and keep withdrawing £300 a time? Because after all is said and done, the only evidence before Your Lordship is the per charge evidence of Mrs du Preez so then per charge £300, per charge £300, per charge £300. Why move to another automatic telling machine? Just keep carrying on until that machine empties itself of cash, and that machine did not empty itself of cash, M'Lord, because it dispensed cash to other persons thereafter. None of the other machines emptied themselves of cash, M'Lord, because all of them seem to have dispensed cash to people thereafter. So, M'Lord, what happened over here, according to Mr Gibson is that prior to the computer system somewhere at Lloyds Bank or wherever the security check was, M'Lord, coming and swinging into operation and alerting somebody that there's something fishy going on at that machine, whoever it was withdrawing the cash, withdrew the cash and scooted off so that they wouldn't be traced. Now, M'Lord, not only is the first defendant not in London on the 4th and 5th March but he's never been to London in his life. He must be a criminal of superb intellect in order to identify which automatic telling machines will have this kind of system available, where there are going to be no video cameras and, M'Lord, as my learned friend said, no pinhole cameras in the ATM either. He must take such a risk, M'Lord, that he would go there and stand there and do transaction

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after transaction after transaction without knowing whether there's a pinhole camera in that ATM, taking his photograph, and it's just coincidental for him that Lloyds Bank or whichever bank it was that destroyed the video footage did so before Diners Club could turn round and sue the defendant. And these, M'Lord, are all host ATMs of Diners Club. They are the host banks.

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M'Lord, the only conclusion to be drawn at the end of the day is that there was some limit placed on that card because if there is no limit placed on the card, it is horrendous to think of what could happen. M'Lord, just postulate the situation where a person, an innocent person with a Diners Club card is held up by gunpoint and his card and PIN number is beaten out of him. He is then locked in a room and his card and PIN number are taken. Is he going to be liable to pay R1 million, R2 million, R3 million, R4 million because crooks have now held him at gunpoint, taken his PIN number and continued to access the machines and withdraw money from the machines? M'Lord, the answer must be no. There must be a security in place whereby the card would only be capable of being used up to a certain amount, beyond which there would be a block on the card.

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M'Lord, it was the intention of the defendants to call the employee of the Standard Bank who was overhearing the conversation between the first defendant and Diners Club who told him that his card would only be on on Monday morning. Indeed, M'Lord, more importantly than that, what they actually said to him because, quite clearly, he was upset. He had been refused twice. Because of no fault of his, his account hadn't been paid and therefore his card had

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been blocked. He was now saying, "I have a trip planned for Monday or Tuesday", whatever he said, M'Lord, "And I need my card. I don't want to have a problem in India". They said to him, "Well, you can draw R1 000. We authorise R1 000 over the counter", and that, M'Lord, is on a transcript of the computer printing that went on at Diners Club, M'Lord. We asked for that and eventually we were given that. We've seen it. It's there that R1 000 was authorised over the counter. Now, M'Lord, if the card had been unblocked over that week-end why offer him R1 000? They could simply have said to him over the telephone, "It's unblocked. Go and withdraw the money. You're at the bank. Go and use the machine at the bank."

LEVINSOHN J I take it his evidence will also be that he didn't know that that didn't apply to the overseas situation.

MR KISSOON SINGH Of course, M'Lord. How would he know what the regulations are about overseas, M'Lord. In any event, M'Lord, £35 000 is beyond the ...[intervention]

LEVINSOHN J What he would know is, "My card is blocked till Monday".

MR KISSOON SINGH "My card is blocked till Monday."

LEVINSOHN J That's what he knows.

MR KISSOON SINGH That's what he knows, M'Lord, and that's what he must assume because the evidence is common cause.

LEVINSOHN J It looks as if that's going to be common cause.

MR KISSOON SINGH Common cause, M'Lord, that - at the rule 37 -well, it's not common cause that the card was blocked. My learned friend said in his opening address that the card was unblocked on that

afternoon because my client was going ...[intervention]

MR LANE No, M'Lord, let me correct my learned friend ...[inaudible]... misquote me. It is not correct. What I said, M'Lord, is that a blocking, if Your Lordship will recollect, because there's some amusement to the story. The blocking applies on 30 day accounts in the Republic only. It does not apply to international transactions.

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LEVINSOHN J Yes, well, he said so. But would he have known that? That's the point.

MR LANE Yes, M'Lord, there will be evidence that he, in fact, was told that.

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MR KISSOON SINGH Well, M'Lord, if he was told that then we would like to see where the evidence comes and when it's going to come because it can't come in rebuttal.

LEVINSOHN J I beg your pardon?

MR KISSOON SINGH M'Lord, I said the evidence can't come in rebuttal because plaintiff has elected to close its case.

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LEVINSOHN J Well, I don't know about that. You know, that's subject to argument because it depends on the issues on who has got the *onus*.

MR KISSOON SINGH Yes, M'Lord, that is why, M'Lord, I didn't want to - I wanted the matter to be clarified at one point. In any event, M'Lord, that's neither here nor there. The thing is this, M'Lord, that as far as the first defendant is concerned, he was told that, "Your card is blocked". He didn't know that his card is unblocked for overseas purposes, M'Lord. He would then have to go London or get his card to London. He would have to give his PIN number to

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somebody, knowing that in South Africa his card was blocked and he was told at Standard Bank that his card will only be unblocked on the Monday, and hope that this fraudulent scheme would work on the Saturday and the Sunday. And, more importantly, M'Lord, on the Monday morning he received the call to hand his card back. He handed his card back on the Monday. It's common cause that the card was handed back on the 6th. The time may be in issue. First defendant says 11 o'clock in the morning. I think the plaintiff will say late afternoon, maybe 4.30, 5 o'clock. But, M'Lord, I don't know how this operates, but on the statements B9, B10, B11 and so on and so forth to the pleadings, M'Lord, we see that the transaction dates were recorded as the 4th March and the 5th March, and the date that these transactions were received by the plaintiff was apparently the 8th March. So the card had been handed back prior to that.

LEVINSOHN J You say the 6th March?

MR KISSOON SINGH We say the 6th - we will in due course prove the letter, M'Lord, if we have to, M'Lord, where it was confirmed that the two cards were handed back, signed by Diners Club. The card for A Singh was delivered on the 6th and V Singh - common cause, M'Lord, my learned friends.

MR LANE The time is not common cause ...[inaudible]

MR KISSOON SINGH Time is in issue that first defendant's card was on the 6th and second defendant's on the 7th. So, M'Lord, the first defendant would obviously, to perpetrate a scheme like this, M'Lord, have to be a person of tremendous insight into how these systems operate. He'd have to be a person of tremendous insight and

knowledge to perpetrate this fraud in London, to use these ATMs until certain times, withdraw knowing exactly - know the per charge amount as well on each of these machines, because there were various banks. He would have to assume or he would have to know whether the limits on each bank per charge would have been the same - Lloyds Bank, Natwest Bank - are they all £300, are some £200, are some £250. M'Lord, he would have to have that kind of information because M'Lord will see from that schedule that there were certain transactions, I think which were ...[intervention]

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LEVINSOHN J One was £800, I saw.

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MR KISSOON SINGH One for £800, I think, was refused at some stage, but there were a stage where I think transactions of £250 were attempted. Yes, M'Lord, there were some transaction at certain banks at £250 according the schedules over here. So he would have to know what the limits were, if there were any, at any banks. If there were limits on the actual bank itself which it had placed on its own automatic telling machine, irrespective of the plaintiff to say that if anybody puts a card into this machine for security reasons we will not just dispense any amount of cash. Up to a certain point we will not dispense it. He would have to know whether that applied or didn't apply. He would have to be able to get from one machine to another, knowing where the security is lax, and he would have to come back to South Africa and hand his card back the next morning or get his back here and hand it back the next morning. And, M'Lord, the question, of course, is this, that if he knew all that, M'Lord, why didn't he just keep withdrawing pounds, why stop at £55 000? It

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hadn't been picked up. He could have drawn the whole night. He could have continued drawing at the various machines in London, the same ones as well, M'Lord, where he'd been to before. He could have stopped way beyond the £55 000 limit. Why stop at that limit?

M'Lord, there are many questions which we submit would have to be answered, M'Lord. The overall conclusion at the end of the case on our part would be that there is sufficient evidence for us to submit to Your Lordship that the plaintiff would not have discharged its *onus*. I have indicated we intend to call the witness from Standard Bank, M'Lord, to confirm what she knew of the transaction between when the card was blocked and he went through to Standard Bank. It was also our intention to call the witness, Carla, M'Lord, but unfortunately when those instructing me sent two attorneys there this morning to take a statement she indicated that somebody from the plaintiff had asked her not to speak to those instructing me. Whether that's true or not - my learned friend says "No", but obviously if Carla is willing to give evidence it's our intention to call her to tell Your Lordship when the card was handed back to her. And obviously the defendants will testify. Mr Gibson will testify and if by that stage, M'Lord, we haven't run out of the time for the hearing I may be forced to apply for an adjournment to call the additional evidence of the other experts that I have already told of.

LEVINSOHN J Yes, thank you. So we'll adjourn till 10 o'clock tomorrow.

COURT ADJOURNED TO 5 MARCH 2002
