

OPUS 2

INTERNATIONAL

Sainsbury's Supermarkets Ltd v (1) MasterCard Inc, (2) MasterCard International Inc, (3) MasterCard Europe S.P.R.L.

Day 19

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1 Tuesday, 1st March 2016
 2 (10.30 am)
 3 (Open session)
 4 MR HOSKINS: Good morning.
 5 MR JUSTICE BARLING: Good morning, Mr Hoskins.
 6 MR HOSKINS: Before I call Mr Carroll, can I just check with
 7 Mr Smith what he thought about our --
 8 MR SMITH: The homework?
 9 MR HOSKINS: I won't say homework. Was that what you
 10 wanted?
 11 MR SMITH: That was, yes. That's excellent.
 12 MR HOSKINS: I don't know if Mr Brealey had any comments?
 13 MR BREALEY: There just appear to be a few gaps in the
 14 dates, 2006, 2007.
 15 MR HOSKINS: There's certainly gaps because --
 16 MR BREALEY: We don't have 2008 and 2009.
 17 MR HOSKINS: -- there is a whole stream of -- there's
 18 hundreds of different individual rates, but they don't
 19 all change over time, that was meant to be
 20 representative.
 21 MR BREALEY: Well I just make the point that there is no
 22 2008 or 2009, there is no 2011/2012/2013.
 23 MR HOSKINS: Shall we take this offline because I am sure we
 24 can show Mr Brealey what there is and he can tell us if
 25 he thinks there is other stuff?

1

1 MR SMITH: We certainly don't mind, perhaps you can provide
 2 a single copy, if you give us the lot and we can --
 3 MR HOSKINS: I think it is quite difficult -- because
 4 I think there is not a physical file sitting somewhere
 5 with everything in it and quite a lot of stuff was
 6 posted on the internet.
 7 MR JUSTICE BARLING: I understand.
 8 MR HOSKINS: So this was an attempt to come up with a
 9 representative sample of the period.
 10 MR SMITH: I did notice there were some which were numbered
 11 bulletin number 28, I don't know if there was a bulletin
 12 in a given year or if there was a bulletin over time,
 13 but if there is a sort of run of official notifications
 14 of a single general then it might be helpful to have the
 15 complete set of those. I do take your point that we
 16 don't want several lever arch files full of different
 17 rates.
 18 MR HOSKINS: That's the homework someone has done but I can
 19 understand if Mr Brealey is nervous that that's not --
 20 then we can take it offline and discuss it with him.
 21 MR SMITH: Why don't you do that in the first instance and
 22 then we can discuss it again perhaps at the end of the
 23 day?
 24 MR HOSKINS: Certainly. Are you happy for me to call
 25 Mr Carroll?

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1 MR JUSTICE BARLING: Yes.
 2 MR HOSKINS: Mr Carroll, please.
 3 MR BRIAN CARROLL (sworn)
 4 Examination-in-chief by MR HOSKINS
 5 MR JUSTICE BARLING: Thank you very much, Mr Carroll.
 6 Settle yourself in there.
 7 A. Thank you.
 8 MR JUSTICE BARLING: I hope there is a clean glass? Yes
 9 there is.
 10 A. Yes, thank you.
 11 MR HOSKINS: Can we have bundle D3. If you can go to the
 12 first tab of that bundle. There should be a document
 13 entitled "Expert Report of Brian Dirck Carroll"?
 14 A. Yes it is.
 15 Q. If you flick through to the end, you don't need to read
 16 it, just look at the pages on the way through, through
 17 to page 11. Can you confirm that that's your witness
 18 statement? Sorry, expert report?
 19 A. It is, yes.
 20 Q. Can you confirm that that's your signature?
 21 A. I can.
 22 Q. Can you confirm that the contents reflect your
 23 independent professional opinion?
 24 A. Absolutely, yes.
 25 MR HOSKINS: Thank you. Mr Brealey will have some questions

3

1 for you.
 2 Cross-examination by MR BREALEY
 3 MR BREALEY: Good morning.
 4 A. Good morning.
 5 Q. Just staying in your report at paragraph 9, page 2:
 6 "I have not been asked to review a substantial
 7 amount of documentation, I have only been provided with
 8 the claim and the defence".
 9 I take it from that that you haven't seen the
 10 witness statements of either Sainsbury's or MasterCard?
 11 A. That's correct.
 12 Q. And you haven't seen the expert reports of
 13 Mr von Hinten-Reed?
 14 A. That's also correct, yes.
 15 Q. And not seen any of the disclosure? All these documents
 16 I take it?
 17 A. No.
 18 Q. And you say in paragraph 1 that you are giving expert
 19 evidence based on your experience of supermarket
 20 retailing. And the experience, as I take it from the
 21 report, is based on your employment with Waitrose?
 22 A. Yes.
 23 Q. So you have never been employed by Asda or Tesco or
 24 Sainsbury's?
 25 A. No.

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1 Q. No. And you left, I think from paragraph 3, you left
 2 Waitrose in 2004?
 3 A. Yes, that is correct, yes.
 4 Q. Again, I am just picking up what you say in paragraph 3.
 5 Waitrose during your employment was more of a regional
 6 retailer focused on the south of England?
 7 A. Yes, yes, yes, it grew towards the end of my time and
 8 it's grown substantially since.
 9 Q. Yes. So in the early 2000s it had a market share of
 10 what, 2%?
 11 A. Something like that, a low market share.
 12 Q. A low market share. It started to grow, as again
 13 I think you say in paragraph 3, at about the time it
 14 acquired -- I think it was from memory 50 or so stores
 15 from Morrisons?
 16 A. I wish it had been, but I only got 21.
 17 Q. 21, did you? Okay. But that was in 2004, was it?
 18 A. I think that must be -- just before I retired, yes.
 19 Q. And was there kind of a reshuffle during this period or
 20 did you just take early retirement?
 21 A. No, no, it was retirement at 60.
 22 Q. Right. So this was in 2004, just as about the time that
 23 Mr Justin King and Mr Coupe -- you are obviously aware
 24 of those people -- rolled out the initiative making
 25 Sainsbury's great again, is that after your time?

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1 A. I don't remember that in any sort of detail, no.
 2 Q. No. Again, this is no criticism but you are here to
 3 assist the Tribunal. Your experience of retailing is
 4 based solely on your employment with Waitrose; correct?
 5 A. Substantially. I did -- when I first joined the
 6 John Lewis Partnership, I did work in department stores
 7 but my substantive high level appointment only in
 8 Waitrose.
 9 Q. And it does not extend to the claim period which, as you
 10 probably know from reading the claim, is 2007 onwards;
 11 correct?
 12 A. Yes.
 13 Q. So going to paragraph 13 of your report, that's at
 14 page 3 at the bottom.
 15 A. Yes.
 16 Q. You say:
 17 "Waitrose will never grow to the scale of the Big
 18 Four. However, I consider Waitrose business to have
 19 been broadly comparable. Waitrose competed directly
 20 with the Big Four."
 21 Then you say:
 22 "We sold more upmarket products."
 23 A. Mmmm.
 24 Q. You go on to say:
 25 "We set prices for key products by reference to

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1 prices in their stores."
 2 I take it that is the Big Four. So just could you
 3 explain to the Tribunal how Waitrose during this time of
 4 your employment juggled selling better quality products
 5 but at the same time tracking prices?
 6 A. Yes. The whole point of the whole industry, not just
 7 Waitrose, is not to allow yourself to be tied down to
 8 the products which are most price sensitive in
 9 consumer's eyes. The things that they buy very
 10 frequently and the things which are very commodity like,
 11 like a pint of milk, okay, you can get organic but
 12 basically you know it is a pint of milk. The whole
 13 basis of the supermarket operation has been to deal with
 14 the fact that until recently, until the recession, it
 15 was true and it was an axiom that your actuaries would
 16 always force upon you when they were reviewing your
 17 pension schemes that earnings would rise faster than
 18 prices and this historically had been the case.
 19 Q. It is what you refer to in your paragraph 17?
 20 A. Exactly. That also applied that the fact that your
 21 second business cost after cost of sales is your labour
 22 cost and therefore you were going to have to increase
 23 your principal cost, other than the cost of sales, in
 24 line with the growth of wages and yet you were competing
 25 on price. So you want to get away from too much

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1 emphasis on basics, too much emphasis on the small
 2 number of items which are monitored every month by the
 3 CPI. And that's why you see the whole development of
 4 supermarkets into more expensive items, more interesting
 5 items, bigger shops, more expensive facilities. You
 6 have to compete on price and you continue to do that.
 7 Waitrose of course was never a price setter, never
 8 expected to be the cheapest, but that doesn't mean that
 9 it wasn't putting great emphasis on prices because
 10 essentially you need to preserve your relative position,
 11 or the relative position that you feel works for you.
 12 So, you know, not being the cheapest doesn't mean
 13 that you are not very much aware of price.
 14 Q. No. And from what you have just said, all the
 15 supermarkets I take it from what you have just said,
 16 will compete on quality in one form or another?
 17 A. They will compete on range and they will compete --
 18 within the range, they will have differential qualities.
 19 I mean, Tesco produced Tesco Finest, for example. In
 20 most areas of retailing there is a great degree of
 21 segmentation in terms of the customers that shops are
 22 looking at. But supermarkets still serve the whole
 23 market, which is fairly unusual in modern retailing.
 24 Therefore you have different, you have basic ranges
 25 which have a special emphasis on price and after my

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1 time, Waitrose introduced a range called
 2 Waitrose Essentials. It did amuse me that asparagus was
 3 included in that.
 4 Q. My children eat it.
 5 You have mentioned, perhaps you can just expand on
 6 it, how do they compete on the ambience of the service?
 7 A. That is essentially the Partnership culture. The
 8 Partnership is different of course from the other
 9 businesses that we are talking about. It is a Plc
 10 because it borrows on the euro market, for example, but
 11 it doesn't have equity, it is set up by a trust, it is
 12 immune to takeover.
 13 It is guaranteed a life by Parliamentary
 14 legislation. So it is in a unique position and it can
 15 think long-term. It has a long-term culture of the
 16 importance of the staff and there are special channels,
 17 there is a Parliament, as I said, I addressed the
 18 Waitrose Parliament.
 19 So Waitrose would say that it would be regarding the
 20 quality of its staff and their ability to relate to
 21 customers as being extremely important. And the sort of
 22 simple classic everyday expression of that is that if
 23 you ask someone in Waitrose where a product is, you
 24 should expect that they will take you there.
 25 Q. Right. So service is still quite an important --

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1 A. Service is very important with Waitrose because if you
 2 have decided you can't compete on price you have to
 3 compete on other things, and service in the Waitrose
 4 culture -- and you know there have been imitations of
 5 that. I think it is fair to say that imitation is the
 6 sincerest form of flattery and, you know, the Asda
 7 introduction of the phrase "colleagues", it is a tribute
 8 to the Waitrose/John Lewis concept of partners.
 9 Q. You refer in paragraphs 13 and 14 that Sainsbury's was
 10 kind of closer to Waitrose; is that correct?
 11 A. Yes, I believe that to be the case.
 12 Q. And that meant that they would also compete with
 13 Waitrose on service and quality?
 14 A. They would -- I would say that they would be less able
 15 to do either of those things, but they would regard them
 16 as significant.
 17 Q. You mention in various places in your report on cutting
 18 cost, controlling cost, paragraph 17, cutting cost,
 19 paragraph 20. Could you just explain to the Tribunal
 20 why that was important to the supermarkets during your
 21 time; cutting the cost and balancing the budget?
 22 A. Because what you have to do to be a successful business
 23 is, as I say in the report, to create the return on
 24 capital which is what you need for your funding. In our
 25 case that would be some borrowing, but also the

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1 investment of profit into the business for the
 2 development of the business.
 3 So if you are in a price competitive environment,
 4 you can't simply control prices in the way that, say,
 5 Apple are able to.
 6 So therefore to the extent that you can't control
 7 the prices, you have to control the costs.
 8 Q. How did Waitrose in your time achieve that? How did it
 9 control -- cut the costs?
 10 A. Obviously, there are some things you can do in very
 11 short term places. You can have a review of
 12 a particular cost area and make some changes but
 13 basically you have to control costs on the basis that
 14 you set a budget, that you expect that budget to be
 15 adhered to and if things are going wrong, then action
 16 must be taken to deal with that if possible, there are
 17 some costs of course that -- if the exchange rate
 18 changes in a way which is unhelpful, then that's
 19 a problem for buyers who are getting goods from
 20 overseas.
 21 But they will have to try to persuade the sellers
 22 to -- the producers to take a lower price. So there are
 23 all sorts of ways in which you can -- you have to
 24 constantly control costs and I give you examples.
 25 A fairly trivial example I give of, if there are

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1 roadworks outside the store, then you know the details
 2 would be collated and we would make a claim for loss of
 3 earnings. The importance of that is not so much that
 4 that individual cost is going to make a huge difference
 5 to the bottom line, but it emphasises to the store
 6 manager you know, that centrally, miles away in the
 7 offices, people are actually concerned with those
 8 details. It is part of the message that you send to
 9 make sure at the individual level because in the end,
 10 the profit of the business, apart from the e-commerce
 11 area, the profit of the business comes down to the sum
 12 of the profits and the efficiency of individual shops.
 13 Q. Just building up on that, there is evidence, you may not
 14 have seen because you haven't seen the reports, there is
 15 evidence that says that Tesco's aggressively cut labour
 16 costs in its store and that was a detriment to its
 17 business?
 18 A. That is right. What is interesting about the
 19 supermarket competition in the period we are talking
 20 about is that there was a great deal of competition and
 21 a great deal of concern with costs, with prices, all
 22 those factors, but I would say it was in a sort of
 23 arena. So nobody was making drastic changes and what
 24 you have seen now of course is a sort of avalanche
 25 effect, where -- a combination of the fact that wages

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1 have no longer been rising with prices since the
 2 recession which made people more price conscious and
 3 then Aldi and Lidl combined with a comparatively small
 4 section of the market growing okay but with the planning
 5 constraints nevertheless it was a bit like an avalanche,
 6 a small effect but it had a huge effect.
 7 So now you are in a different situation where people
 8 are not having to compete tactically but they are having
 9 to compete strategically, and we have to see how that
 10 pans out.
 11 Q. What you are saying is it is a complex business with
 12 lots of variables going on?
 13 A. Yes, but to a certain extent partly because the
 14 supermarket business is very transparent in the sense
 15 that everybody knows the key prices in CPI, they are
 16 available, what's happening is available on a monthly
 17 basis, you don't have to be an insider.
 18 What's going on in the shops is totally visible.
 19 Every time you open a new shop you expect to greet
 20 leading members of other firms and you shake hands and
 21 smile at each other.
 22 Q. Okay, all right.
 23 A. It is very, very visible. So within that framework
 24 there is intense competition but only occasionally does
 25 the framework get busted, like now, for example.

13

1 Q. If we move on, if we could, to paragraph -- 27, 28,
 2 where you give your view on the likely impact of
 3 a hypothetical reduction in merchant fees.
 4 A. Yes.
 5 Q. You say:
 6 "I have been asked to consider a substantial
 7 reduction by, say, 50% of merchant fees and how it was
 8 being dealt with by supermarkets in the mid-2000s";
 9 correct?
 10 A. Yes.
 11 Q. In paragraph 28 you -- the answer is dependent on, to
 12 a certain extent whether it was publicly known?
 13 A. Yes.
 14 Q. Then, going over the page to 28B, you say that:
 15 "Assuming alternatively that reduction in merchant
 16 fees were publicly known, in those circumstances I am
 17 firmly of the view that all the major supermarkets would
 18 have publicly taken the step to reduce prices quickly by
 19 the full amount of this cost reduction. Just as with
 20 a VAT reduction, it would not be feasible for
 21 a supermarket to hold onto a publicly known reduction in
 22 their costs. I do not believe that supermarkets would
 23 have run the risk of the adverse publicity of not
 24 passing this on."
 25 Then you go on at paragraph 29 to say in your view

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1 it would have been publicly known. You are obviously
 2 aware of the interchange fee regulation?
 3 A. Yes.
 4 Q. Are you aware that MasterCard announced a reduction in
 5 2014 --
 6 A. Yes.
 7 Q. -- from 0.8 to 0.3 ultimately?
 8 A. Yes.
 9 Q. So my question on this is, you have not seen it, but we
 10 have thousands and thousands of documents in this case,
 11 the teams on both sides have trawled the internet, and
 12 no one can find one single advert from any supermarket
 13 which says: lower interchange fees, lower prices. So
 14 would you not accept that the logic, based on your
 15 experience, of that is that the supermarkets are not
 16 telling the customers that they are passing on these
 17 fees?
 18 A. I would accept that my estimate of the public visibility
 19 of this was wrong and that -- but my insider's view that
 20 this would have been important and perhaps -- I mean
 21 perhaps if my marketing director would have said: don't
 22 be ridiculous, we can't make anything of this. So
 23 I think I would have to accept that the facts show that
 24 what I expected there in terms of, you know, the
 25 opportunity of publicising this has been shown to be

15

1 wrong.
 2 MR BREALEY: Yes. I have no further questions. Thank you
 3 very much indeed.
 4 MR JUSTICE BARLING: Any re-examination?
 5 MR HOSKINS: Sorry, please bear with me a second.
 6 MR JUSTICE BARLING: Yes. There might just be another
 7 question. (Pause)
 8 MR HOSKINS: We have no further questions, sir.
 9 MR JUSTICE BARLING: Mr Carroll, thank you very much indeed.
 10 THE WITNESS: Thank you.
 11 MR BREALEY: I think that is all the evidence.
 12 MR JUSTICE BARLING: How are we on the timetable?
 13 MR BREALEY: We are doing very well.
 14 MR JUSTICE BARLING: We are doing very well today but --
 15 MR BREALEY: I haven't got it in front of me, but I think we
 16 have got to exchange closing submissions essentially
 17 a week today.
 18 MR JUSTICE BARLING: That's my understanding, yes.
 19 MR HOSKINS: 4 pm Tuesday.
 20 MR JUSTICE BARLING: Then you are still on target to start
 21 the oral closings on Friday 11th, which I think is the
 22 current plan, isn't it?
 23 MR BREALEY: That's when I'm due to start and then I think
 24 I'm due then to work over the weekend and continue on
 25 the Monday.

16

1 MR JUSTICE BARLING: Yes. 1
2 MR HOSKINS: I will be working over the weekend as well and 2
3 starting on Tuesday. 3
4 MR JUSTICE BARLING: You will do a bit as well, will you? 4
5 Right. 5
6 MR HOSKINS: Just to keep him company. 6
7 MR BREALEY: But that's where we are. 7
8 MR JUSTICE BARLING: Okay. 8
9 MR BREALEY: If you want the submissions in any particular 9
10 format? 10
11 MR SMITH: We found the electronic files that you provided 11
12 us with at the outset actually incredibly useful for 12
13 those of us who work out of London. If it is not 13
14 a great deal of trouble, would it be possible to update 14
15 those memory sticks with the additional material that 15
16 has been finding its way into the paper bundles? 16
17 MR JUSTICE BARLING: Ms Houghton is nodding. 17
18 MR BREALEY: So on our side, yes. 18
19 MR HOSKINS: I am sure that will be fine. Are you going to 19
20 give us back the memory stick -- 20
21 MR JUSTICE BARLING: You can have them back if you want 21
22 them. 22
23 MR HOSKINS: I'm not technically minded enough to -- 23
24 MR SMITH: Mine happens to be residing in Cambridge at the 24
25 moment. 25

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1 MR HOSKINS: So you will want a new one?
2 MR SMITH: If possible.
3 MR JUSTICE BARLING: The new ones might be easier, you can
4 have them all back at the end.
5 If we have any steer to give you on any particular
6 issue that we would like help on, we might just send you
7 something through. Other than that, we hope to see you
8 on the 11th and hear from you a little bit before that.

9 MR BREALEY: Thank you very much indeed.
10 MR HOSKINS: Thank you.
11 (11.03 am)
12 (End of open session)
13 (The court adjourned until 10.30 am
14 on Friday 11th March 2016)

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