

OPUS 2

INTERNATIONAL

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

Day 5 - Redacted

February 2, 2016

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1 Tuesday, 2nd February 2016
 2 (2.00 pm)
 3 Housekeeping
 4 MR JUSTICE BARLING: Good afternoon.
 5 MR HOSKINS: Just a bit of housekeeping before we start
 6 which is the witness order, because I was going to come
 7 back with you with our witness order. To confirm where
 8 we are this week, we are about to do Mr Brooks and
 9 tomorrow we have Ms Bernard and Mr Rogers. Thursday not
 10 sitting. Friday is Mr Coupe and then that completes the
 11 Sainsbury's factual witnesses and then we are going to
 12 call Mr Abrahams.
 13 MR JUSTICE BARLING: Also on Friday?
 14 MR HOSKINS: Also on Friday, yes.
 15 Then going into the next week, that's the week
 16 beginning 8th February, on the Monday, Mr Douglas and
 17 Mr Willeart, on the Tuesday, Mr Perez and Mr Tittarelli
 18 and on the Wednesday, Mr Sidenius and Mr Koboldt.
 19 What we have done is we have got those pairs coming
 20 each day and they will be ready to go when the first one
 21 finishes but we won't have a third one lined up if
 22 that's okay, partly because people are flying in,
 23 et cetera.
 24 MR JUSTICE BARLING: So that takes us up to Wednesday 10th.
 25 MR HOSKINS: That is right. Then Mr Brealey has an overflow

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1 in the afternoon if he needs.
 2 MR JUSTICE BARLING: Yes. Then there is a possibility of
 3 a problem I think in the morning, in the morning of the
 4 11th, isn't there?
 5 MR HOSKINS: I have already got that as a non-sitting
 6 morning.
 7 MR JUSTICE BARLING: Have you? Right. You think that is
 8 more of a definite non-sitting, is it? So it is not
 9 sitting in the morning of the 11th. I will just amend
 10 my diary. But we are sitting in the --
 11 PROFESSOR JOHN BEATH: That's my problem in the morning.
 12 I have another --
 13 MR HOSKINS: We already had it in our plans so no problem at
 14 all.
 15 MR JUSTICE BARLING: We are sitting in the afternoon of the
 16 11th but not sitting on the 12th.
 17 MR HOSKINS: That is right.
 18 MR JUSTICE BARLING: We will take it from there, good.
 19 MR HOSKINS: Mr Brealey is going to call Mr Brooks.
 20 MR JUSTICE BARLING: Yes, Mr Brealey?
 21 Is there anything we need to say about
 22 confidentiality before we start?
 23 MR BREALEY: I understand Mr Hoskins is going to try to
 24 cross-examine Mr Brooks in open court. If he does refer
 25 to any confidential documents he will try and refer to

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1 the non-confidential bits and then maybe leave the
 2 figures out.
 3 MR JUSTICE BARLING: Good.
 4 MR BREALEY: I call Mr Brooks.
 5 MR DAVID BROOKS (affirmed)
 6 Examination-in-chief by MR BREALEY
 7 MR JUSTICE BARLING: Thank you, Mr Brooks. Make yourself
 8 comfortable. If you prefer to sit down, which I am sure
 9 you do, then do.
 10 MR BREALEY: Could the witness be given C1, please?
 11 Mr Brooks, you have a bundle there, C1 and if you go
 12 to tab 3. If you flip through that document and then go
 13 to page 44, right at the end, that's 44 of the bundle.
 14 Do you see there a signature?
 15 A. That is right, yes.
 16 Q. Could you confirm that is your signature?
 17 A. That is my signature.
 18 Q. Could you confirm that the evidence in the statement is
 19 true to the best of your knowledge and belief?
 20 A. I can.
 21 MR BREALEY: If you wait there, I think Mr Hoskins has some
 22 questions.
 23 Cross-examination by MR HOSKINS
 24 MR HOSKINS: Afternoon, Mr Brooks. Staying in that witness
 25 statement that you have just looked at, can you turn to

3

1 paragraph 36, please. This is one of the functions that
 2 we understand you are responsible for. You say:
 3 "My team provides the information in relation to the
 4 budgets for MSCs for the different business areas to
 5 group finance as well as to the relevant business unit
 6 finance analysts who provide periodic re-forecasts.
 7 MR JUSTICE BARLING: I'm so sorry, Mr Hoskins, we have
 8 a slight technical problem. Some people's computers
 9 have shut down.
 10 Thank you, Mr Hoskins.
 11 MR HOSKINS: I was just reading out paragraph 36. I have
 12 got to the sentence:
 13 "We provide periodic re-forecasts, latest views over
 14 the year and analysis of actual performance against
 15 budget. We also do a full half year re-forecast and
 16 summarise corporate plan submission. Any underlying
 17 budget assumption change could also trigger
 18 a re-forecast, for example changes in MSCs paid."
 19 This is all work you do specifically in relation to
 20 the MSCs; is that correct?
 21 A. My team do, yes.
 22 Q. One of the things you do is produce latest views?
 23 A. That is right.
 24 Q. We look at bundle E5.2, tab 37, please. It is probably
 25 worth you keeping your bundle C1 and your witness

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1 statement out. We will come back to that. It is tab 37
 2 of this bundle. It is quite difficult to read because
 3 of the shading and it is also the details are
 4 confidential so I'm not going to go to any of the
 5 figures. But the heading, I hope you can read it as
 6 well, says "MSC 2011/12 Budget Summary". Then one sees
 7 "Latest View 2010/11". Can you read that?
 8 A. Yes.
 9 Q. Then some other entries in the rows and then finally
 10 budget 2011/2012. I just want to clarify, when you talk
 11 in your witness statement at paragraph 36 about
 12 providing latest views, is this an example of one of
 13 those latest views?
 14 A. It looks as though it is, I don't actually submit this
 15 actual form off to Group, my team do, but it looks like
 16 the latest view to me.
 17 Q. It does say "latest view" on it, which is where I got
 18 the clue from. But that's the best you can do?
 19 A. Yes.
 20 Q. If one looks through it, let's for example go to
 21 page 747. We see two boxes again. I'm not going to
 22 read out any of the figures:
 23 "Visa Credit MasterCard."
 24 Then there is various total sales made presumably in
 25 Sainsbury's supermarket that were made using these

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1 different cards, that seems to be what those boxes are,
 2 yes? Then follow that through at page 749.
 3 Then it is MSC and CIT costs. CIT is cash in
 4 transit, again various figures broken down with the main
 5 stores, convenience stores, that is broken down?
 6 A. Yes.
 7 Q. In that way, yes.
 8 Then on page 753 "MSC Budget", you see broken down
 9 by different types of card. Without going into the
 10 detail, it runs on for pages and pages. I think it is
 11 stating the obvious, isn't it? The information in here
 12 is very detailed, isn't it?
 13 A. Mmm.
 14 Q. How is it produced? How do people go about producing
 15 these comprehensive reports on MSC's latest view? What
 16 does your team do to produce it?
 17 A. We take -- we will take the latest sales figures, we
 18 will look at historic breakdown between the different
 19 card types, we will be looking at what the average
 20 transaction values are for those card types and then
 21 applying them to the new forecast sales figures.
 22 Q. It looks as if this is a pretty time-consuming exercise,
 23 is that also fair to say, for someone?
 24 A. It is, yes.
 25 Q. So that is a yes?

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1 A. Yes.
 2 Q. Why is such detailed information produced? What does
 3 the supermarket use it for? What does the company use
 4 it for?
 5 A. It is a cost line on our operating costs that shows up
 6 and we -- significant cost lines we monitor performance
 7 against budget and we explain variances.
 8 Q. And this is a significant cost line?
 9 A. It is significant enough to go into this sort of detail
 10 to look at it.
 11 Q. If I can go back to your witness statement, starting at
 12 bundle C1. This time go to paragraphs 38 to 39. If you
 13 want to have a quick look at those paragraphs to refresh
 14 your memory, I am sure you have read this many times.
 15 By all means have another look if that assists.
 16 The first question I wanted to ask you about this
 17 was why did you volunteer Sainsbury's participation in
 18 the Commission's 2011 and 2013 surveys?
 19 A. Well, as it says in my statement, I was previously head
 20 of procurement at Sainsbury's and I moved across into
 21 this finance operations role in 2010. And I had
 22 experience, whilst I was head of procurement, with the
 23 tender value acquiring business. In 2011, we
 24 re-tendered the business as well. It was becoming
 25 apparent that our costs for taking cards were increasing

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1 and I also say in my statement apart from statutory
 2 items, it was the only area of our cost base that we
 3 couldn't negotiate on, apart from the acquirer margin
 4 that is, or the acquirer processing costs. And we were
 5 having difficulty having any sort of dialogue with the
 6 schemes around why the MIF rates were set as they were
 7 and when the European Commission approached us to get
 8 involved in a survey, I saw it as an opportunity to be
 9 able to demonstrate what the significant cost of taking
 10 cards was against the cost of taking cash.
 11 Q. So I don't want to put words into your mouth, but is it
 12 fair to say that you saw it as an opportunity to
 13 demonstrate that the MSCs were too high?
 14 A. Yes.
 15 Q. What was the process within Sainsbury's for preparing
 16 the information? Let's focus on the 2013 survey,
 17 I don't know if there's any difference. The second one.
 18 That's the Deloitte survey. Can you give us
 19 an indication of the sort of work you prepared in the
 20 response?
 21 A. I had a full-time qualified accountant on it, probably
 22 for one to two months. With all these type of things of
 23 extracting costs, the difficulty is you have to go to
 24 different areas of the business to get that information
 25 and you have to persuade colleagues in the business that

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1 giving you that information is more important perhaps on
 2 that day than doing their day job. So there was a lot
 3 of going round to get these costs because they weren't
 4 in the normal format that we report our costs. One
 5 example would be trying to understand how long it took
 6 a colleague on the till to take a cash transaction
 7 versus a card transaction, and so we would have to go to
 8 the labour methods department for them to give us that
 9 information and prioritise it above other things that
 10 they were doing.
 11 Q. Again, would it be fair to say that that was
 12 a time-consuming exercise as you just described?
 13 A. Yes.
 14 Q. So it must have been an issue that you thought was
 15 important?
 16 A. It was, yes.
 17 Q. Did other people in Sainsbury's also think it was
 18 important?
 19 A. Well, they needed persuading of the importance of it.
 20 Q. Did you persuade them?
 21 A. I hope so.
 22 Q. Who did you persuade?
 23 A. If they were colleagues who were delaying giving me the
 24 information then I would go to their bosses and explain
 25 to them why I needed the information. I would have let

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1 my boss, the group finance director, know as well as the
 2 CFO, John Rogers, know to give them an understanding of
 3 the issue around these costs increasing and having very
 4 little influence on changing them.
 5 Q. Did John Rogers give you the green light to go ahead
 6 with this project?
 7 A. I don't think John did personally. I think I would have
 8 discussed it with the group finance director and we have
 9 agreed it was worthwhile doing.
 10 Q. In paragraph 39 you describe your role in this exercise,
 11 you say:
 12 "My role in responding to the European Commission's
 13 costs of card and cash surveys was to ensure my
 14 colleagues were inputting information correctly and
 15 provide an overview or sense check, for example
 16 reviewing the classification of fixed and variable
 17 costs."
 18 Did you have the final say on whether costs were
 19 classified as fixed or variable?
 20 A. Yes, I would have probably reviewed it before it got
 21 sent off.
 22 Q. You are aware that the more costs that are variable, the
 23 higher the MIF?
 24 A. I was told that fixed costs didn't affect the MIF.
 25 I just wanted to make sure that we got the right

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1 allocation between fixed and variable.
 2 Q. And when were you told that fixed costs did not affect
 3 the MIF? Was it prior to doing this survey?
 4 A. I don't think it was. I think it was later on when CEG
 5 started to look at the survey again, CEG is
 6 Mr von Hinten-Reed's company.
 7 Q. We will come to when he was involved, but just to
 8 clarify your evidence, are you saying that you had no
 9 idea that fixed costs, as you put it, had no effect on
 10 the MIF at any stage prior to the results being
 11 submitted to the Commission?
 12 A. I can't recall knowing that.
 13 Q. Do you think it is possible?
 14 A. It is possible. I did meet the accountants from
 15 Moore Stephens and then Deloitte who were doing it but
 16 I can't recall the conversation where they said that,
 17 but it is possible that they might have said that.
 18 Q. Sainsbury's commenced its claim against MasterCard, the
 19 damages claim, the reason why we are all here now, in
 20 December 2012?
 21 A. Yes.
 22 Q. And the Deloitte survey was submitted in 2014. And
 23 Sainsbury's had been preparing its claim since at least
 24 2011; yes?
 25 A. Yes.

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1 Q. Sorry, you need to say "yes" because the nodding doesn't
 2 come up in the transcript?
 3 A. Sorry, yes.
 4 Q. And Sainsbury's had retained Mr von Hinten-Reed at least
 5 as early as 2013 to assist with its damages claim,
 6 hadn't it?
 7 A. Yes.
 8 Q. When did you first meet Mr von Hinten-Reed?
 9 A. Probably at the outset.
 10 MR HOSKINS: Sir, I need to tread carefully here obviously
 11 for privilege reasons, so you will understand why?
 12 MR JUSTICE BARLING: The outset of what, sorry, just so
 13 I know? The outset of the preparation of the claim?
 14 A. When we approached a firm of solicitors and they would
 15 have introduced us to the economist and I would have
 16 been probably there early -- at the early meetings.
 17 MR JUSTICE BARLING: I think you said that was some time in
 18 2011 or that's when you started preparing; is that
 19 right?
 20 A. I can't remember the exact dates.
 21 MR HOSKINS: Can we look at one of Mr von Hinten-Reed's
 22 reports. It is in D2.1, tab 3. If you could turn to
 23 page 521. If you could read to yourself, please,
 24 paragraph 472. Were any persons outside Sainsbury's
 25 involved in preparing the Sainsbury's response to the

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1 2013 survey?
 2 A. I'm not aware of it. I think it was my team who sent
 3 it -- it was quite interesting because when we sent it
 4 off, we believed Deloitte published it before we gave
 5 our final say-so, so I know there was some rowing around
 6 trying to get -- to understand why Deloitte had done
 7 that. We thought it was a final draft that not been
 8 finished that we may have sent. So we were a bit
 9 alarmed to find that Deloitte had gone ahead and
 10 included it in the survey without I guess our formal
 11 sign-off. So that's what makes me think that we were
 12 the only people looking at that.
 13 CEG did subsequently look at that Deloitte
 14 submission and we had further discussions on the
 15 allocation between fixed and variable costs.
 16 Q. Subsequently, so that was after the Deloitte's
 17 submission?
 18 A. I'm fairly certain it is.
 19 Q. I don't want to put words in your mouth so --
 20 A. Well --
 21 Q. Did CEG have any input into the response to the
 22 Deloitte survey?
 23 A. I can't remember them having a response but when you
 24 went across the dates early, before, about when CEG were
 25 brought on board, it is probably they did talk about the

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1 fixed and variable costs at some point before that
 2 Deloitte survey went off but I don't think they
 3 reviewed the survey before it went.
 4 Q. So they didn't review it before it went, but they did
 5 talk about the fixed and variable costs difference
 6 before the survey went in?
 7 A. I can't remember exactly but given the timings you
 8 talked about earlier, about when they came on board and
 9 when we sent the survey off and me meeting with CEG on
 10 several occasions, it is likely that that did come up in
 11 a conversation. So I was really keen that we got the
 12 fixed and variable allocation correct.
 13 Q. Because you knew it made a difference to the level of
 14 the MIF?
 15 A. Yes, probably.
 16 Q. Because you had been told that by Mr von Hinten-Reed?
 17 There's nothing sinister, I'm just trying to establish
 18 what you knew and when.
 19 A. It is possible, I can't remember those conversations but
 20 it is likely that having Mr von Hinten-Reed on board, he
 21 would have mentioned the importance of getting the fixed
 22 and variable cost allocation correct.
 23 Q. And would have told you in the course of meetings that
 24 the more the costs were fixed, the lower the MIF, or the
 25 way you put it that fixed costs didn't affect the level

14

1 of the MIF?
 2 A. We may have done but my view would have been: so be it.
 3 I wanted to get the correct view on what my cost base
 4 was. I was really interested myself to find out what
 5 our cost of cash was because it is counter-intuitive to
 6 think taking cash is cheaper than taking a card. So
 7 I was really intrigued to get this survey right.
 8 Q. What role have you played in bringing this claim against
 9 MasterCard?
 10 A. I have encouraged it.
 11 Q. You say you met Mr von Hinten-Reed at the outset of the
 12 claim, which was in around 2011 at least, that's more
 13 than encouragement?
 14 A. Well, it would have been before that. It would have
 15 been with our legal department and through my work with
 16 the BRC and understanding what was going off in the
 17 European courts, it would have been a discussion with
 18 the legal department to say, and I'm paraphrasing what
 19 I might have thought, but if they have been found to be
 20 acting anti-competitively in Europe, how does that
 21 relate to how they have been behaving in the UK and
 22 what's the read across from Sainsbury's and have we got
 23 any redress? That is the type of conversation that
 24 I would have had with our legal department.
 25 Q. Was it you that raised the prospect of bringing a claim

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1 first within Sainsbury's? Was it your idea?
 2 A. I don't necessarily think it was my idea but that would
 3 have been the conversation and the legal department
 4 would have taken their own decision.
 5 Q. But did you raise it with the legal department?
 6 A. Yes.
 7 Q. Did you take it to them?
 8 A. I took it to them.
 9 Q. You referred to your work with BRC, what work was that?
 10 A. When I moved from procurement to this financial role,
 11 a member of the team sat on the British Retail
 12 Consortium. They had a payments action group because it
 13 was one of the issues for retailers at the time, just
 14 like I guess rates are, business rates are at the moment
 15 and they have different groups looking at that and
 16 deciding the best way forward to try to influence
 17 government or other bodies to see our side, see our
 18 view, take our view. I saw this as quite an important
 19 area and I actually replaced -- one of my team used to
 20 sit on there, and I replaced that member on the team in
 21 BRC round about early 2011.
 22 Working with other members on the BRC there is
 23 a good breadth of retailers on there, Tesco's, Asda,
 24 Morrisons, Marks & Spencer, John Lewis, it was a common
 25 issue for us all. That was my role in that area.

16

1 Q. Within the BRC you obviously discussed this issue of
2 interchange fees?
3 A. Yes.
4 Q. You discussed interchange fees in the UK?
5 A. Yes.
6 Q. You discussed possible means which might be used to put
7 pressure on MasterCard and Visa to lower interchange
8 fees?
9 A. Yes, we did.
10 Q. You formulated a strategy within the BRC to achieve that
11 end, didn't you?
12 A. Yes, we did.
13 Q. And you were part of that strategy?
14 A. I contributed towards it, yes.
15 Q. Within the BRC, what discussions did you have about the
16 response to the Commission's 2013 survey?
17 A. I think we were pleased it supported what we all knew
18 already. We knew cash was cheaper than cards by a long
19 way.
20 Q. Did you have any discussions within the BRC about how to
21 approach the survey?
22 A. No, I think the only discussions we had at the BRC was
23 trying to persuade members to participate in the survey.
24 To this day I don't know what other retailers around BRC
25 table participated in the survey. I was vocal in

17

1 saying: I'm taking part in it, this is the resource I'm
2 having to put against it and I would encourage you to do
3 the same.
4 Q. Within the BRC, did you discuss the extent to which the
5 higher the rate of variable costs, the lower the MIF
6 would be in the end?
7 A. I can't recall ever getting to that sort of detail.
8 Q. Presumably you in taking part of this survey were doing
9 it because I think you already accepted you wanted the
10 MIF to be lower?
11 A. Yes.
12 Q. So you must have known what effect classifying costs as
13 fixed/variable must have had, you weren't doing this
14 blind, were you? You didn't put all this information
15 together purely objectively, send it off to the
16 Commission and hope it was the right result?
17 A. I honestly did.
18 Q. Well we will come to some statements on that. You
19 didn't ask Mr von Hinten-Reed at any stage what the
20 implications would be?
21 A. I honestly can't recall having any detailed
22 conversations about fixed and variable, other than it is
23 important we get this right and maybe that if costs are
24 variable, then that would affect things rather than if
25 they were fixed.

18

1 Q. Sorry, explain that last sentence to me?
2 A. I think what you are saying is that if you classify
3 costs as variable costs rather than fixed costs, then
4 the MIF will be lower.
5 Q. Correct. So you accept that you knew that? Do you want
6 me to read back the transcript?
7 A. No I accept that I knew it but that I didn't try to
8 influence in any way, I wanted an objective study --
9 Q. I will come that, that is important. So you knew that
10 whilst you were compiling a response to the Deloitte's
11 survey, the effect classifying of costs as fixed or
12 variable would have on the MIF?
13 A. I probably did.
14 Q. You did?
15 A. I can't recall that conversation, Mr von Hinten-Reed
16 saying it, but I think because of the timings I probably
17 did.
18 Q. Why didn't you mention in your witness statement the
19 role that you played in bringing this claim against
20 MasterCard?
21 A. I didn't think it was important but I'm happy to say
22 I have talked about what I did.
23 Q. Did you think it would look bad if someone who was in
24 charge of Sainsbury's response to the Commission's
25 survey was also heavily involved in pushing this

19

1 litigation against MasterCard?
2 A. No.
3 Q. It does look bad though, doesn't it?
4 A. I don't think so.
5 Q. Bear with me for one moment, please.
6 Can you turn please to bundle E5.1, tab 29. I'm
7 told the whole of this document is confidential, it
8 seems somewhat surprising when one sees the content, but
9 I will tread carefully.
10 Tab 29, page 539. You see this is an email from you
11 to David Tyler. Can you tell us who David Tyler is,
12 please?
13 A. Yes, David Tyler is the chairman of Sainsbury's Plc.
14 Q. The chairman?
15 A. The chairman.
16 Q. There is a sentence that I want to read out loud but
17 I will check with Mr Brealey it won't be a problem.
18 (Pause)
19 We see in the middle of that email, you say:
20 "Both EFT costs and charge-backs are very much on my
21 radar and I'm presenting back to John in January with
22 more detail covering various issues."
23 Who is John?
24 A. That would be John Rogers, the CFO of Sainsbury's.
25 Q. Sainsbury's supermarkets or --

20

1 A. Sainsbury's Plc.
 2 Q. So in November 20th, 2010, you are raising EFT costs,
 3 which is MIF costs, MSC costs; is that correct?
 4 A. Yes.
 5 Q. And you are raising it with the chairman of the Plc and
 6 the CFO of the Plc?
 7 A. Yes.
 8 Q. This is an important issue?
 9 A. Yes.
 10 Q. Can we go to bundle E5.2 please. Tab 34. This is
 11 a memo from you to John Rogers and Richard Fleming dated
 12 12th May 2011 and the subject is "Interchange Fees".
 13 Can you tell us who Richard Fleming was at that time?
 14 A. Yes, Richard Fleming was the group finance director who
 15 was my boss and he reported to John Rogers, the CFO.
 16 Q. Can you remember why did you write this memo? What was
 17 the purpose of it?
 18 A. I think it was because interchange fees were rising,
 19 they were adding to our cost base and there was very
 20 little we could do about it. It was making John aware
 21 of the issue.
 22 Q. So is it fair to say that Sainsbury's Supermarkets
 23 Limited were concerned about this issue?
 24 A. Yes, we were.
 25 Q. Is it fair to say that Sainsbury's Plc was concerned

21

1 about this issue?
 2 A. I was concerned, I don't know how concerned David Tyler
 3 and John Rogers were per se, there was other things on
 4 their minds, but certainly it was a major concern for
 5 me.
 6 Q. You certainly don't disturb higher officials in the Plc
 7 with trivial matters, do you?
 8 A. No.
 9 Q. So you thought it was a matter they should be concerned
 10 about?
 11 A. I think if -- the email that I sent to David Tyler was
 12 as a result I think of a conversation -- it must have
 13 been a corridor conversation with myself and
 14 Richard Fleming earlier in the day. I think that email
 15 starts off "further to our discussions earlier today"
 16 and I can't recall having a set meeting with him to talk
 17 about interchange but it may have been a follow up. The
 18 chairman may have had one or things on his mind, asked
 19 us a question and then we were obliged to follow up
 20 fairly quickly.
 21 Q. Is it fair to say that this was your project in
 22 Sainsbury's, this was something you took control of?
 23 A. It wasn't a project, it was part of my responsibility.
 24 My role -- I had the responsibility -- the relationship
 25 with the acquiring banks. I have the responsibility for

22

1 putting the budget together. I have the responsibility
 2 for explaining variances to that budget and as part of
 3 that, I will have been questioned on what are we going
 4 to do about this overspend?
 5 Q. You were also proactive about the issue, though, because
 6 you raised it with various people and you persuaded
 7 people to take it seriously?
 8 A. Yes.
 9 Q. You had invested in it?
 10 A. I had.
 11 Q. At page 717 you will see a heading "Our approach to
 12 interchange fees". Can I ask you to read the three
 13 bullet points on page -- bottom of 717 and the top one
 14 on 718 please?
 15 (Pause)
 16 You see in the final bullet point on page 717:
 17 "At our initial meeting with the Commission, they
 18 confirmed that on completion of the study they intended
 19 to discuss the UK retail findings with relevant national
 20 competition authorities. Our view is that they will
 21 uncover that interchange fees are not cost reflective
 22 and too high."
 23 That's the result that Sainsbury's wanted from
 24 the Commission, didn't it, you wanted a finding to that
 25 effect?

23

1 A. Yes.
 2 Q. That's why you agreed to take part in the Commission's
 3 surveys isn't it, it is to help the Commission achieve
 4 that result?
 5 A. Yes, because it would be helping us reduce our MIFs.
 6 Q. The bullet point at the top of 718 says:
 7 "Should the schemes be found in breach of
 8 competition law by the EU or UK at any point, we may be
 9 able to sue for damages to recover the difference we
 10 have paid between a competitively and non-competitively
 11 set interchange fee."
 12 Bear in mind this document is May 2011. That seems
 13 to me to suggest that you were already contemplating the
 14 possibility of damages in May 2011; is that correct?
 15 A. It would have been. It would have been on the advice of
 16 probably our legal team, I had been discussing it with
 17 them around that time.
 18 Q. You go on to say:
 19 "This is very much a last resort but we would want
 20 to use that right, should it arise, at least to get
 21 better financial terms going forward. (The schemes are
 22 likely to argue, perhaps fatally for us, that we have
 23 passed on any alleged legal surcharge to consumers, so
 24 we have not suffered)."
 25 What did you mean by that sentence in brackets: "The

24

1 schemes are likely to argue, perhaps fatally for us",
 2 et cetera?
 3 A. That would have been advice I received from our legal
 4 team.
 5 Q. You don't need to say any more about it, that is
 6 protected.
 7 At the bottom of page 718 you will see a heading
 8 "Evidence" and there's two bullet points:
 9 "Evidence is key to the BRC case, Sainsbury's
 10 already provided evidence."
 11 So again you weren't acting on your own. You were
 12 acting in support of the BRC and the other members of
 13 BRC you mentioned. You were all taking part in the
 14 survey with a view to bringing MIFs down; correct?
 15 A. No, I think that might refer to the BRC's annual survey.
 16 They do what they call -- I refer to it as the cost of
 17 collection survey, it may be called something else, but
 18 each year 60% of UK retailers contribute to the BRC
 19 survey on the costs of their different types of
 20 transactions. I think that's what the BRC would have
 21 been using.
 22 Q. The BRC played a role with the Commission, in fact
 23 I think it made a complaint to the Commission about the
 24 level of MIFs, did it not?
 25 A. I don't -- I really don't know the detail of what the

25

1 BRC -- the BRC have been doing things on this since the
 2 year 2000. I only joined in 2010/11.
 3 Q. But from 2010/11 the BRC were involved in the
 4 proceedings, in the investigation the Commission was
 5 carrying out?
 6 A. Yes.
 7 Q. The language here is evidence is key to the BRC case?
 8 A. Yes.
 9 Q. Is it not fair to assume that the BRC case refers,
 10 amongst other things, to the case they were making to
 11 the EU Commission about the high level of MIFs?
 12 A. Yes, it probably does.
 13 Q. Did you discuss within the BRC, the BRC's role before
 14 the Commission?
 15 A. What I can recall, usually the first agenda item at each
 16 BRC payment action group meeting was interchange fees
 17 and we would have been updated on what the current state
 18 of play is, what they were doing and where they are at
 19 with it.
 20 Q. The first agenda item?
 21 A. The first agenda item.
 22 Q. Because it was the most important generally?
 23 A. Yes, it was -- it was the one where our costs were
 24 rising and we had very little we could do to stop it
 25 rising.

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1 Q. Can we take bundle E5.3, please. Tab 50. This is all
 2 on yellow paper. So neither of us is allowed to go into
 3 the detail of it. You will see the title of this
 4 document. It is a brief that's written for "John's
 5 Meeting". You will see on page 1245 it was you who
 6 wrote this brief on 4th February 2012?
 7 A. Yes.
 8 Q. Who is John?
 9 A. Again that is John Rogers, the CFO.
 10 Q. On page 1243 you see a heading at the bottom of the
 11 page:
 12 "MasterCard Litigation"?
 13 A. Yes.
 14 Q. You don't need to get into the details but if you have
 15 a quick glance through that section. You see there is
 16 a detailed description of the litigation against
 17 MasterCard there?
 18 A. Yes.
 19 Q. Did you write that section?
 20 A. I would have written it but it is certainly not
 21 something I would have written on my own. I would have
 22 been working with our legal department to get the facts
 23 right in that.
 24 Q. But is it fair to say that you were working with your
 25 legal department on the claim, it was something you were

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1 actively involved in, the claim against MasterCard?
 2 A. Yes.
 3 Q. Again bear with me for a moment, please.
 4 Can you go to bundle E3.6, please? It is tab 138A.
 5 Hopefully you get an email from
 6 paulcrisp@sainsburys.co.uk to you and Martyn Lee?
 7 A. Yes.
 8 Q. If one looks over the page, pages 2 and 3 of this email,
 9 they come first in time, you see that what's happening
 10 here is these are the results that are being worked up
 11 for Sainsbury's response to the 2011 survey; is that
 12 correct?
 13 A. Yes.
 14 Q. Then you send an email to Paul Crisp on 30th March 2011:
 15 "I would like to nominate both David and Angela for
 16 Shining Stars for the support work we are doing for the
 17 BRC and for the EU to help demonstrate the fees we pay
 18 to the banks for debit and credit cards are excessive."
 19 So the 2011 survey was work that you did to help
 20 demonstrate that the fees that you paid to banks for
 21 debit and credit cards are excessive?
 22 A. Yes.
 23 Q. Now, we know that Sainsbury's issued its claim against
 24 MasterCard on 19th December 2012.
 25 A. Yes.

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1 Q. You can take my word for that. Can we go, still in this
 2 bundle, to tab 140A? It should be a chain of emails.
 3 The one at the top of the page should be from
 4 Bruce Lessels, 5th July?
 5 A. Sorry, what was the tab again?
 6 Q. It is 140A.
 7 A. At 140 I have got at the bottom "Consultancy Group".
 8 Q. Behind that what's the next tab you have, is it A or
 9 141?
 10 A. I have got a 141 then.
 11 MR HOSKINS: Let me see if I can have a clean copy handed
 12 up.
 13 Sorry, sir, if you will bear with me.
 14 MR JUSTICE BARLING: Do you have one?
 15 MR HOSKINS: We are trying to find one.
 16 MR JUSTICE BARLING: These bundles have been updated, your
 17 bundle has obviously missed out on the updating process.
 18 (Handed)
 19 MR HOSKINS: If you could just slot that in behind
 20 page 2787. Thank you.
 21 If we can begin at the bottom because again it is
 22 a chain of emails that begins at the bottom. There is
 23 an email from you dated 27th June 2013 to
 24 Edward Anderson.
 25 We see from the email above, at the foot of that, he

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1 was head of dispute resolution competition and retail
 2 law at Sainsbury's Supermarkets Limited; is that
 3 correct?
 4 A. That is correct.
 5 Q. What was Edward Anderson's role in the damages claim
 6 against MasterCard?
 7 A. Edward would have been -- is the person I had been
 8 working with on the claim, he is the person from the
 9 legal department who has been leading the claim
 10 litigation.
 11 Q. When you said you have been working with him on the
 12 claim, I'm interested to know what you have been doing.
 13 What's your role been?
 14 A. Well, nothing like instructing solicitors or anything
 15 like that. It would have been -- he would have been
 16 asking me for information to support the claim and
 17 I would have been working with him on that.
 18 Q. Are you the main contact in the business for the claim?
 19 A. Yes. Outside of legal, yes.
 20 Q. I understand. Is it Bruce Lessels --
 21 A. Bruce Lessels was an accountant who was working in that
 22 area for -- on a six month temporary contract. That was
 23 the -- the previous person had moved elsewhere in the
 24 business and I had not been able to recruit so I brought
 25 somebody in temporarily.

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1 Q. Then the email on 27th June you said to Edward Anderson:
 2 "I have reviewed the EU survey and I'm happy with
 3 the content. However, before we send it off to the EU,
 4 I thought that you and Mishcon may also want to review
 5 in view of the claim versus MasterCard."
 6 Mishcons are the solicitors who are representing
 7 Sainsbury's in this claim against MasterCard?
 8 A. That is right.
 9 Q. The reason why you wanted them to review it is you
 10 wanted to make sure that your response to the 2013
 11 survey helped the case against MasterCard?
 12 A. I think it was just due diligence. We have got one part
 13 of the business in litigation against MasterCard. I'm
 14 submitting information to the EU about MasterCard.
 15 I just --
 16 Q. You were taking part in the survey, you have told the
 17 Tribunal, because you wanted the Commission to find that
 18 MIFs were excessive?
 19 A. Yes.
 20 Q. You have already told us that. You have been one of the
 21 prime movers in the business of Sainsbury's bringing
 22 a claim against MasterCard based on allegations the MIF
 23 is too high?
 24 A. Yes.
 25 Q. The reason you wanted Mishcon to review the survey was

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1 to make sure that it helped your case against
 2 MasterCard.
 3 A. Yes, but I would just see that as due diligence that I'm
 4 sending something off, I want our legal people to cast
 5 their eyes over it to make sure there is no glaring
 6 errors or omissions in there.
 7 Q. They were not checking the maths or the arithmetic, they
 8 were making sure they were helping your case, weren't
 9 they? What else would the solicitors instructed to
 10 bring this claim against MasterCard be capable of doing
 11 other than giving you comfort that what you were doing
 12 would help you in your claim against MasterCard?
 13 MR BREALEY: Is Mr Hoskins suggesting that Sainsbury's
 14 in-house legal has somehow massaged the figures --
 15 MR HOSKINS: I'm sorry, Mr Brealey should not be standing up
 16 and making that sort of comment to me in
 17 cross-examination. I will make submissions at the end
 18 on the basis of the evidence that is given.
 19 MR BREALEY: Well, precisely --
 20 MR HOSKINS: That is not an appropriate intervention, I'm
 21 sorry.
 22 When I asked you earlier this afternoon about
 23 whether anyone else had played a role in the survey, you
 24 didn't mention Mishcons, did you?
 25 A. I can't recall you asking me everybody who was involved

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1 in, I think you just asked me whether Mr von Hinten-Reed
 2 was involved in it and I said he was --
 3 Q. I asked you whether anyone from outside Sainsbury's was
 4 involved in the 2013 survey. So Mishcons were?
 5 A. Well, in terms of reviewing that document, yes, clearly.
 6 Q. Then if we go up from Edward Anderson to David Brooks:
 7 "Thanks David."
 8 My copy has a hole in it but I think it says:
 9 "You would like Nils to make sure he understands it,
 10 can it be forwarded on?"
 11 Is that Nils von Hinten-Reed?
 12 A. Yes.
 13 Q. Then the next two emails up, Bruce Lessels, 2014, 10.56,
 14 you were copied in on it:
 15 "Hi Edward, please find attached the latest draft of
 16 the Sainsbury's 11/12 EU survey submission. Please can
 17 you forward on to Nils ..."
 18 Again Mr von Hinten-Reed?
 19 A. Yes.
 20 Q. "... for his review? I will follow up with Deloitte
 21 about the submission date but we would like to ensure
 22 that Nils is in agreement before sending to Deloitte's,
 23 please."
 24 So you wanted Mishcons to say that this helped your
 25 case and you also wanted to make sure that

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1 Nils von Hinten-Reed was happy that it helps your case
 2 with the Commission; is that correct?
 3 A. I honestly think I was just being diligent in checking
 4 in with our legal team and checking in with the
 5 economist that was doing similar work on it.
 6 Q. Being diligent because you didn't want to harm
 7 Sainsbury's claim against MasterCard. It was not some
 8 simple neutral accountancy exercise?
 9 A. No, honestly, first of all, there was such a disparity
 10 between card costs and cash costs. If they wanted to
 11 make some tweaks I don't think it would have made
 12 a great deal of difference. I was just merely wanting
 13 other parties who were involved to make sure that there
 14 was no glaring omissions or errors in it. I generally
 15 objectively wanted to really understand what the cost of
 16 our cash was in a different way than we had done it with
 17 the BRC.
 18 Q. The due diligence you talk about, the reason why you
 19 involved Mishcons and Mr von Hinten-Reed in the response
 20 to the 2013 survey was because that response, the
 21 response to the survey was part of Sainsbury's overall
 22 strategy to have the level of the MIF lowered, wasn't
 23 it?
 24 A. Yes.
 25 Q. Sorry, can you say that more loudly?

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1 A. Yes, sorry.
 2 Q. You didn't want to put in their response the survey
 3 which was unhelpful, did you?
 4 A. As I have explained earlier, the difference between cash
 5 and cards was so great that I knew filling in the survey
 6 would be helpful, there was no small -- it wasn't
 7 marginal.
 8 Q. It was obvious?
 9 A. Yes.
 10 Q. Can we go to bundle D3, tab 3, please. It is page 330.
 11 I should explain to you, if you look at the front page
 12 first, it is 207, behind tab 3. This is the first
 13 report of Dr Gunnar Niels. Do you follow me?
 14 A. No, I'm sorry.
 15 Q. The title page, it says it is the expert report of
 16 Dr Gunnar Niels?
 17 A. Yes.
 18 Q. Do you know who he is?
 19 A. Yes.
 20 Q. Who is he?
 21 A. He is the expert witness who has been looking at whether
 22 MIT-MIF is appropriate.
 23 Q. Can you turn to page 330 of his report. Paragraph 6.79:
 24 "As illustrated in the table 6.2, Sainsbury's has
 25 over time switched a significant proportion of its costs

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1 of cash from variable to fixed.
 2 "I consider that those changes reflect a certain
 3 degree of subjectivity in terms of the allocation of
 4 costs."
 5 Then table 6.2:
 6 "Sainsbury's allocation of its costs of cash in
 7 different drafts ...(Reading to the words)... cost items
 8 for which the allocation is changed."
 9 Then I can give you the dates, you will see the type
 10 of costs, there is fixed variable, by value variable by
 11 number and then there is various -- these are document
 12 references in the litigation. So 58567 was on
 13 5th July 2013, we think. Then 62718, 24th July 2013.
 14 Then 62728 oddly also appears to be on the
 15 24th July 2013.
 16 Now, what Dr Niels has done is he has looked at the
 17 spreadsheets that you produced, these documents on the
 18 different dates, and he has looked to see the way they
 19 have changed. You will see that the level of fixed
 20 costs in the first draft that he refers to goes from 11%
 21 at the outset to 55% in the final submissions to
 22 Deloitte and the variable costs move from a total of
 23 58% to 14%.
 24 So, with respect, Mr Brooks, it wasn't at all
 25 obvious from the outset that the proposed response to

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1 the survey was going to be helpful to Sainsbury's?
 2 A. I'm not familiar with the drafts but I think you said
 3 they were drafts and with draft documents you are
 4 waiting for figures and so my thought process is that we
 5 were waiting for parts of the business to come back with
 6 costs. One of the most difficult areas I do remember
 7 was trying to get details off our fixed cost register
 8 and it may be that that is why the fixed costs have
 9 built up as we have been getting to the bottom --
 10 Q. It is not accretion because what he is comparing is in
 11 the first draft we have said a certain category of costs
 12 is fixed and he is going through iterations of the
 13 draft. He follows it through and he gets to the end and
 14 one finds that it has gone from 11% to 55. You
 15 understand the significance of that?
 16 A. I do, yes.
 17 Q. That's not a matter of detail, is it?
 18 A. It may be a matter of -- if it is not building up those
 19 costs as a draft as I first explained, it would be
 20 a matter of review and I think there is a matter of
 21 subjectivity between fixed and variable and it may be
 22 that it was that subjectivity that was being firmed up.
 23 Q. You made the final call, you told us, on what was to be
 24 a fixed and variable cost?
 25 A. I would have on the final meeting reviewed that.

1 Q. In preparing Sainsbury's response to the 2013 survey,
 2 you adopt an approach to classifying costs as fixed and
 3 variable that was helpful rather than unhelpful to your
 4 case, did you not?
 5 A. No, as I explained earlier, I was trying to get it
 6 factually correct.
 7 MR HOSKINS: Sir, I have no further questions but Mr Cook
 8 has some questions.
 9 MR JUSTICE BARLING: All right, okay.
 10 MR HOSKINS: I don't know if it is a good time for you to
 11 take a break.
 12 MR JUSTICE BARLING: Is it a good time?
 13 MR COOK: Sir, it certainly would be a good time. Before
 14 I start, my cross-examination is going to be dealing
 15 with matters to do with Sainsbury's Bank, it is an area
 16 where there are unfortunately a lot more documents that
 17 are categorised as confidential. It is doubtful to my
 18 mind how many of them are, but certainly I will be going
 19 to 20 documents or so, of which about 10 of them are
 20 completely yellow and I need to look at some of the
 21 comments that are specifically within them.
 22 Unfortunately, sir, I don't see any easy route round
 23 it other than to say that the whole of the
 24 cross-examination should be held in camera. Otherwise
 25 people will be going in and out as I move from document

1 to document.
 2 MR JUSTICE BARLING: I think Professor Beath has one
 3 question on the subject that Mr Hoskins has been dealing
 4 with.
 5 PROFESSOR JOHN BEATH: Yes, it should be, I hope, fairly
 6 factual and that is we have been talking about
 7 classifying items that appear in the balance sheet or in
 8 the set of accounts into fixed and variable. Is there
 9 anywhere available at all, a list of the things that
 10 would comprise cost items so that we could see to what
 11 extent I, for example, might be able to think about what
 12 I would consider fixed and what I would consider
 13 variable?
 14 MR HOSKINS: Sir, there are, because the extract from
 15 Dr Niels' report I just looked at had the document
 16 references.
 17 PROFESSOR JOHN BEATH: Yes.
 18 MR HOSKINS: For example, those drafts are available and
 19 they are Excel spreadsheets with entries.
 20 PROFESSOR JOHN BEATH: Where are they in the bundle?
 21 A. Schedule E to Deloitte's survey, I don't know if we have
 22 that in the bundle but I think that is the breakdown
 23 between fixed and variable.
 24 MR HOSKINS: We will obviously check and make sure you have
 25 those.

1 MR JUSTICE BARLING: Thank you very much.
 2 PROFESSOR JOHN BEATH: Yes, that would be helpful.
 3 MR JUSTICE BARLING: I don't know who is in court at the
 4 moment but there may be members of the public in court.
 5 One of the ways in which we can actually hear these
 6 cases efficiently which often involve evidence about
 7 business secrets is by having a confidentiality ring so
 8 that only certain people who need to see documents are
 9 able to see them and that's one of the ways in which the
 10 litigation can be conducted in the interests of justice
 11 to all sides.
 12 So I'm afraid that does mean that from time to time
 13 when matters have to be ventilated, only those who are
 14 within the confidentiality ring or the relevant
 15 confidentiality ring can remain in court.
 16 Mr Brealey, Mr Hoskins, I think we have an order in
 17 place now, haven't we, with everyone who needs to have
 18 given undertakings having given undertakings? Is that
 19 your understanding?
 20 MR HOSKINS: I believe that is correct, yes.
 21 MR JUSTICE BARLING: Yes. And you would presumably be able
 22 to identify members of your team or someone in your team
 23 will be able to identify those who are within the
 24 confidentiality ring, who can remain. I know there are
 25 people in the slightly different categories too and then

| | | |
|----|---|----|
| 1 | there is the relay to Jones Day that we talked about | 1 |
| 2 | last week. | 2 |
| 3 | When I believe I was told that steps would be taken | 3 |
| 4 | to ensure that only those within the confidentiality | 4 |
| 5 | ring would be able to see the live feed that's being | 5 |
| 6 | transmitted. | 6 |
| 7 | MR HOSKINS: I will double-check that has been done. | 7 |
| 8 | MR JUSTICE BARLING: We will rise now for a short time and | 8 |
| 9 | if you could confirm when we come back that those people | 9 |
| 10 | in court are within the ring and if there's anyone in | 10 |
| 11 | the court who knows that they are not, who has not given | 11 |
| 12 | the relevant undertakings, who is not within the | 12 |
| 13 | confidentiality ring, I'm afraid it means that until | 13 |
| 14 | further notice -- and we will make it as short as | 14 |
| 15 | possible -- you will have to leave the court. | 15 |
| 16 | MR HOSKINS: Sir, before you rise, I don't want to waste | 16 |
| 17 | people's time or not in the ring, but tomorrow it is | 17 |
| 18 | going to be the same position for Hannah Bernard and | 18 |
| 19 | Mr Rogers. | 19 |
| 20 | MR JUSTICE BARLING: What, for all their cross-examination? | 20 |
| 21 | MR HOSKINS: Yes. | 21 |
| 22 | MR JUSTICE BARLING: We will have a word -- I think the same | 22 |
| 23 | will apply therefore. | 23 |
| 24 | MR HOSKINS: I just raise it now, so I don't want someone to | 24 |
| 25 | turn up tomorrow. | 25 |

| | |
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2 who were planning to come tomorrow who are not in the
3 confidentiality ring then it might be that if they do
4 come, they will be disappointed. Anyway, there we are.
5 (3.08 pm)
6 (A short break)
7 (3.20 pm)
8 (In camera session)
9 (Confidentiality Ring Only)
10 (4.45 pm)
11 (The court adjourned until 10.30 am
12 on Wednesday, 3rd February 2016)
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