

OPUS 2

INTERNATIONAL

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

Day 8 - Redacted

February 8, 2016

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1 Monday, 8th February 2016
 2 (10.30 am)
 3 (Non-confidential session)
 4 Housekeeping
 5 MR JUSTICE BARLING: Good morning, Mr Hoskins.
 6 MR HOSKINS: I was going to do a little bit of housekeeping.
 7 MR JUSTICE BARLING: We have a little bit too. It might be
 8 the same, I don't know.
 9 MR HOSKINS: It might be the same.
 10 MR JUSTICE BARLING: You go first.
 11 MR HOSKINS: Second, Sidenius --
 12 MR JUSTICE BARLING: No, it wasn't that.
 13 MR HOSKINS: Okay. Do you want to go first?
 14 MR JUSTICE BARLING: Mine was very short.
 15 MR HOSKINS: Okay.
 16 MR JUSTICE BARLING: Ms Boyle has basically updated the
 17 schedule to the confidentiality order, and I hope that
 18 by now your team has each got a copy of that updated.
 19 The only changes are to include some of the non-party
 20 representatives' lawyers, and the schedule indicates
 21 whose confidential information those particular parties
 22 are entitled to hear in evidence.
 23 I think it is self explanatory, but we will
 24 obviously want to make the order as soon as we can. All
 25 the undertakings that have been given by the parties are

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1 mentioned in the schedule, in the draft order, and so we
 2 make probably that order as soon as we can, perhaps at
 3 the first break or something of that kind.
 4 MR HOSKINS: You just need a tick from us.
 5 MR JUSTICE BARLING: We want you to have a chance to make
 6 any comments on it. I am sure your team will look
 7 at it.
 8 As far as I'm aware, those are the only bits of
 9 housekeeping I have got. I think Mr Smith has got one.
 10 MR SMITH: Yes, it was simply to ask how the parties were
 11 proceeding on the table of information that we
 12 circulated at the beginning?
 13 MR HOSKINS: A lot of work has been done on it. I'm not
 14 quite sure when it is going to be ready, but there is
 15 a lot of work going on behind the scenes on it. Do you
 16 want an ETA?
 17 MR SMITH: Very grateful. I don't need a further update
 18 than that.
 19 MR HOSKINS: It is being progressed. I know there's a lot
 20 of work being done by those behind us.
 21 MR SMITH: It would be helpful to have it before the
 22 experts. I do not think we need it before any of the
 23 factual witnesses, but before the experts, we would be
 24 very grateful.
 25 MR BREALEY: It will certainly be done before the experts.

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1 We did get something from MasterCard on the Maestro
 2 bit, which is essentially the same as in the skeleton.
 3 And we have given MasterCard some stuff on Australia,
 4 far more detail, and we are waiting for comments on
 5 that. We are co-operating.
 6 MR JUSTICE BARLING: Over to you, Mr Hoskins. You have got
 7 something?
 8 MR HOSKINS: Yes, we sent a second witness statement of
 9 Mr Sidenius' to the Tribunal and to Sainsbury's on
 10 Friday. I have spoken to Mr Brealey and he feels
 11 a little bit bounced if we deal with it now. So
 12 I've said to him that's fine, whenever he's ready to do
 13 it, because obviously I need permission for it. So he's
 14 going to let me know whenever it suits him to deal
 15 with it.
 16 MR JUSTICE BARLING: Yes. That is dealing with a question
 17 that had come from us, isn't it?
 18 MR HOSKINS: Yes, it was prompted by the question you asked
 19 me in opening about what about revenue from interest.
 20 And it became apparent that there was some more
 21 information that could be given on that.
 22 I don't want Mr Brealey to feel bounced; so whenever
 23 he is ready he will tell us, and I can make the
 24 application. I don't want him to be disadvantaged.
 25 The other thing is there has been some

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1 correspondence about further disclosure. Sainsbury's
 2 asked us for certain documents such as pleadings before
 3 the European courts and any submissions we made in the
 4 context of preparation on the regulation. Again, I just
 5 want to flag it up that we have said we don't think it
 6 is appropriate to give the disclosure. But again, I'm
 7 happy -- it is Mr Brealey who will be making that
 8 application whenever it suits him. We're happy to deal
 9 with it whenever he wants to make the application.
 10 I thought it was important to flag those up so you
 11 know they are happening.
 12 MR JUSTICE BARLING: Yes, floating around.
 13 MR HOSKINS: Subject to that, I'm ready to call Mr Douglas.
 14 MR JUSTICE BARLING: Yes, right. The timetable, I think we
 15 have got a new updated timetable and you are going to
 16 let us know whether the offer of the compensation --
 17 I think was it the 11th? I can't remember now -- was
 18 going to be of any assistance, but anyway.
 19 MR HOSKINS: Sorry, what are you waiting for from us, sorry?
 20 MR JUSTICE BARLING: I do not think we are particularly
 21 waiting. I think we indicated that we would be able to
 22 sit on the morning of 11th February as a quid pro quo
 23 for the 18th, but you will let us know in due course.
 24 MR HOSKINS: It is more a matter for Mr Brealey and how he
 25 is getting on.

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1 MR JUSTICE BARLING: Yes, okay.
 2 So you are going to call --
 3 MR HOSKINS: Mr Douglas.
 4 MR KEITH ROBERT DOUGLAS (sworn)
 5 Examination-in-chief by MR HOSKINS
 6 MR JUSTICE BARLING: Good morning, Mr Douglas.
 7 A. Good morning.
 8 MR JUSTICE BARLING: You have brought your own water, have
 9 you?
 10 A. I have, but I'm well supplied.
 11 MR JUSTICE BARLING: Do you have a glass? Right.
 12 MR HOSKINS: Do you have bundle C2 in front of you? Could
 13 I ask you to turn to tab 2, please. There should be
 14 a document, "Witness statement of Keith Robert Douglas"?
 15 A. Yes.
 16 Q. Is that your witness statement?
 17 A. It is.
 18 Q. Thank you. Could you look at the last page, page 42,
 19 please.
 20 A. Yes.
 21 Q. Can you confirm that that's your signature?
 22 A. It is indeed.
 23 Q. Can you confirm that the contents of this witness
 24 statement are true?
 25 A. I can.

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1 MR HOSKINS: Mr Brealey will have some questions for you.
 2 A. Thank you.
 3 Cross-examination by MR BREALEY
 4 MR BREALEY: Good morning, Mr Douglas.
 5 A. Good morning.
 6 Q. Have you been in court throughout the whole of the
 7 proceedings?
 8 A. I haven't, no. I was here on Friday.
 9 Q. You were here on Friday. And have you read the witness
 10 statement of Mr Sidenius, the second one?
 11 A. No, I haven't.
 12 Q. You say at paragraph 4 of your witness statement that
 13 you joined Natwest in 1998; that is correct, yes?
 14 A. That is correct.
 15 Q. And that you managed non-premium payment card business.
 16 What are the key differences between premium and
 17 non-premium? If I can call non-premium "standard".
 18 What are the key differences between premium and
 19 standard payment card businesses?
 20 A. Do you mean when I assumed my role in 1998, or my
 21 opinion today?
 22 Q. Let's have both.
 23 A. In 1998 when I joined Natwest they had split their
 24 current business into two areas: premium cards and what
 25 was called classic cards or non-premium --

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1 Q. Sorry, what were called ...?
 2 A. Classic cards, which were essentially non-premium cards.
 3 Q. Standard.
 4 A. In essence the classic card portfolio products that
 5 Natwest offered were targeted at the mass market, and
 6 consequently those products were very much structured as
 7 pretty basic propositions. And that was the core of
 8 a credit card: the ability to use the card at the point
 9 of sale or to withdraw cash, and indeed to revolve the
 10 balance if the consumer so wished. With an interest
 11 rate that was priced in the second or third decile of
 12 the market. By that, I mean it wasn't particularly
 13 cheap, nor was it particularly expensive, the interest
 14 rate.
 15 So that was what really essentially characterised
 16 classic or non-premium cards --
 17 Q. Just pausing there. On the interest, when you say it is
 18 not particularly cheap, is that the APR?
 19 A. The APR, yes.
 20 Q. You have three bands of APR, do you? You have the lower
 21 APR --
 22 A. I'm trying to think back to then. It ranged from
 23 a certain price point to another price point. It was
 24 based on a variety of things that the issuing bank --
 25 Q. From memory, what was the APR?

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1 A. The APR was around 19%/20%, from memory.
 2 Q. That's APR. Is that compounded? That's the annualised
 3 percentage rate? Is that on a compound basis?
 4 A. Essentially that rate translates into a rate that the
 5 consumer would pay on any outstanding balance they had
 6 at the end of the statement month.
 7 Q. So it is compounded?
 8 A. Essentially, yes, from memory.
 9 Q. Sorry, I interrupted you.
 10 So we were talking about what the premium business
 11 was in the old days.
 12 A. Yes, premium business in the late 90s, when I was at
 13 Natwest, essentially propositions that either offered
 14 a form of reward for spending on the card or provided
 15 additional benefits or services to the cardholder, like
 16 insurances, for example, or concierge services, so that
 17 the consumer could, or the cardholder could take
 18 advantage of a service to help them organise holidays or
 19 buy certain goods or services.
 20 Q. Just to kind of keep it as simple as we can, a classic
 21 or a standard card, you don't really get any rewards,
 22 but with a premium card you get rewards. Is that
 23 a simple distinction?
 24 A. I would describe it slightly differently insofar as we
 25 are talking about the 1990s.

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1 The classic card, as you described it, was basically
 2 a card with the core ability to spend and to borrow on
 3 the card. And a premium card offered some form of
 4 additional benefit to the cardholder. That could be
 5 rewards, or it could be other benefits, products and
 6 services, like insurances --
 7 Q. So what is the difference between the classic and
 8 premium today than in, say, the early 2000s or when you
 9 joined in 1998?
 10 A. From my time when I was here in the UK markets, so
 11 through to 2013, a premium card typically offered
 12 rewards, not always, but more often than not did, and
 13 provided additional benefits or services, travel
 14 insurance, holiday booking service, VIP, access
 15 services etc, those sorts of things.
 16 Q. Sorry, so what is the difference between 2000 and 2016
 17 for a premium card? Just more rewards or services,
 18 or --
 19 A. Well, I think there are two differences. One is that
 20 there are a lot more premium cards in the marketplace,
 21 and that's driven by a number of factors. And secondly,
 22 those premium cards offer typically, in addition to
 23 rewards, other benefits, and more often enough those
 24 cards in this market today are fee free.
 25 Q. You said that there are more premium cards now because

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1 of a number of factors. What are they?
 2 A. Well, the whole evolution of the payments market in the
 3 UK through the 90s into the 2000s to today. So let me
 4 give you a few examples.
 5 Back when I joined Natwest, there were really only
 6 five major players in the credit card market. They were
 7 the five big retail banks, many of whom are still here
 8 today. But in the late 90s, a number of new entrants
 9 came to this market. Two were American, Capital One and
 10 MBNA. This was on the back of the economic growth and
 11 prosperity this country was witnessing or experiencing.
 12 Q. I remember it well.
 13 A. Good. And those two particular issues, by way of
 14 example, introduced a number of things to the card
 15 market that hereto at that point hadn't existed.
 16 One is they used analytics to help them understand
 17 the marketplace on which they were operating, and
 18 therefore they were able to advance or offer credit
 19 cards to a wider range of consumers than traditionally
 20 the high street banks had.
 21 Secondly they introduced the concept of balance
 22 transfers; so enabling consumers across all
 23 socio-economic categories to take advantage of borrowing
 24 at lower rates. And that had a number of consequences
 25 for the market: it increased, clearly, the costs to

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1 issuers who had to -- particularly those five high
 2 street issuers I talked about, who had to respond and
 3 compete.
 4 Q. You mentioned this in your statement.
 5 A. In my statement, yes.
 6 Q. Why did that lead to more premium cards? So you have
 7 got the monolines coming in, more competition, as you
 8 say. Why? Is it because people needed to segment their
 9 offering? What was it that led to more premium cards?
 10 You said there were a number of factors?
 11 A. Yes, competition.
 12 Q. It is competition?
 13 A. Absolutely. Competition amongst issuers drove product
 14 differentiation and innovation, which in turn brought to
 15 the market better value propositions for consumers,
 16 cardholders. Also, in my view, brought benefits to
 17 merchants based on the propositions those cardholders
 18 had and the ability that those cardholders had to buy
 19 goods and services as well as take advantage of the
 20 interest-free periods those cards gave consumers.
 21 So that competition and the resultant new entrants
 22 that came into the market, I have given a number of
 23 examples of that, coupled with the fact that then there
 24 was another segment of offering that came into the
 25 market, co-brands, co-brand cards, which were issuers

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1 typically partnering with a merchant or a retailer, and
 2 those cards offered rewards in loyalty. Examples of
 3 those were Sainsbury's cards, Tesco cards, M&S and JLP.
 4 Therefore, rewards became a more common feature of
 5 cards. And consequently issuers had to respond and
 6 networks or schemes in turn had to respond to ensure
 7 that they could remain competitive and compete for
 8 business, and those issuers could compete for consumers.
 9 Q. So if I could just kind of roll that up. It is no
 10 problem, but it is quite a long answer. The effect of
 11 your evidence is, as I understand it, that competition
 12 between issuers has led to greater premium cards?
 13 A. Yes.
 14 Q. And that has in turn led to higher interchange fees to
 15 pay for the premium cards?
 16 A. So competition has led to --
 17 Q. You can go on, but could you just --
 18 A. Sorry, could you repeat that point?
 19 Q. It means that higher interchange fees have essentially
 20 paid for the competition between issuers?
 21 A. You --
 22 Q. Okay. Your evidence is that competition has led to
 23 higher premium cards, a greater number of premium cards.
 24 If we could just go to E3.13, I will try and help,
 25 tab 250. Let's see if we can just do this in stages.

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1 A. Yes.
 2 Q. Have you got there?
 3 A. Yes.
 4 Q. From that answer that you just gave, what I got from it
 5 was that more competition -- and if you could just give
 6 a kind of yes or no; obviously you can qualify it, but
 7 if you can give me a short answer -- more competition
 8 between issuers has led to more premium cards?
 9 A. Yes.
 10 Q. And with more premium cards, that has led to higher
 11 interchange fees?
 12 A. Yes.
 13 Q. Which means logically that if more competition has led
 14 to more premium cards and more premium cards has led to
 15 higher interchange fees, it means that merchants, who
 16 pay the higher interchange fees, have to a certain
 17 extent subsidised the competition between the issuers?
 18 It logically follows, I would suggest to you.
 19 A. My perspective is --
 20 Q. Can you --
 21 MR HOSKINS: Let him answer, please.
 22 A. My perspective would be that merchants or retailers
 23 benefited from the issuance of those premium cards.
 24 MR BREALEY: I will come onto the benefits in a moment.
 25 That's your view. So do you accept or not accept

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1 that merchants have, to a degree, subsidised the
 2 competition between issuers?
 3 A. I don't agree with that statement.
 4 Q. And the reason you don't agree with that is because you
 5 think that merchants benefit from premium cards?
 6 A. The reason I don't agree with that statement is twofold.
 7 Firstly, in an interchange system it is about
 8 balancing the costs and the benefits between the two
 9 parties in that four-party model.
 10 Secondly, I think that merchants did benefit from
 11 the growth of the credit card market, and included
 12 within that is the premium card market, based on higher
 13 ATVs and more transactions in store. Then when you take
 14 into account the growth of e-commerce --
 15 Q. Are we talking about premium cards at the moment?
 16 A. I'm talking about credit cards in general.
 17 Q. I specifically asked you, Mr Douglas -- we will get on
 18 a lot better if you just -- I understand -- you have
 19 given your witness statement and I'm trying to ask you
 20 questions to work out answers that will assist the
 21 Tribunal. So I was asking about the premium cards.
 22 A. Yes.
 23 Q. You didn't accept the proposition that merchants pay for
 24 the competition between issuers on premium cards. You
 25 said two reasons: One is it balances costs and

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1 benefits. Is that regarding premium cards?
 2 A. Yes.
 3 Q. And the second, you said that merchants benefit from
 4 premium cards?
 5 A. Yes.
 6 Q. So the reason I wanted to take you to this document
 7 at E3.13 -- you have got tab 50, yes?
 8 A. Tab 250?
 9 MR JUSTICE BARLING: Mr Brealey, can you give me that
 10 reference again?
 11 MR BREALEY: Yes, E3.13. We have new bundles, 3.12
 12 and 3.13. This is confidential. (Pause)
 13 If you want to read -- I understand this is
 14 confidential -- 5349 and 5350.
 15 Tab250. My Lord, is that sorted?
 16 MR JUSTICE BARLING: Yes, thank you.
 17 MR BREALEY: This is a MasterCard document. It relates to
 18 the UK and it relates to the premium model. I believe
 19 that's confidential.
 20 Then, if you go to 5344, this is an overview of the
 21 feedback we have received to date. You see there
 22 "Merchants"?
 23 A. I do.
 24 Q. Then, if we go to 5349 where there's key themes, 5349,
 25 "Key themes".

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1 Then you see two-thirds of the way down:
 2 "Merchants typically accept ..."
 3 Then "all because they have been"?
 4 A. Yes.
 5 Q. Then at the end:
 6 "There is general ..."
 7 A. Yes.
 8 Q. "Typically feel the same", "cannibalising". Over the
 9 page you get "selected insights". You see what
 10 Sainsbury's says:
 11 "Only part of the supply chain ... can't
 12 negotiate on."
 13 Then if you go, for example, to one store that
 14 I would have thought would have agreed with what you
 15 were saying, you see at "luxury"?
 16 A. Yes.
 17 Q. That is MasterCard's own internal survey. If you can
 18 put that bundle away. We will be going to it in some
 19 detail later on, but if you could take bundle C1, tab 3.
 20 I just have to check whether -- no.
 21 If you go to paragraph 18, this is in the context of
 22 the second point that you were making about benefits to
 23 merchants, 18.
 24 This is David Brooks. He is the head of the finance
 25 operations at Sainsbury's Supermarkets.

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1 He says:
 2 "The theory that the premium cards spend more on
 3 their cards, but we have analysed this and found that
 4 the second half of financial year 2014/15, the average
 5 basket size for a standard MasterCard credit card was
 6 £45.44 compared with £43.37 for a Worldpay card."
 7 Are you prepared to accept that there is a contrary
 8 view that merchants do not see the benefits of premium
 9 cards to compensate them for the high interchange fees,
 10 or higher interchange fees, reflected in premium cards?
 11 A. Based on what Mr Brooks has said in his statement, then,
 12 there is clearly -- he has a point of view that that is
 13 not the case for Sainsbury's.
 14 Q. If you take a small restaurant, I don't know if you are
 15 a football fan, take Tottenham, or you could take
 16 Islington, a small restaurant in Tottenham that does not
 17 want to accept Amex, but under the honour all cards rule
 18 has to accept the premium MasterCard, do you accept that
 19 that small restaurant can conceivably not receive any
 20 benefit from whether the chairman of a public limited
 21 company goes into that small restaurant that is Worldpay
 22 or the people who spend £40 on the terraces go into that
 23 small restaurant, but that small restaurant really
 24 doesn't see any additional benefit whatsoever?
 25 Or if there is, could you tell the Tribunal what

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1 it is?
 2 A. On the bases that we are talking about individual
 3 merchants, then that is a difficult point for me to
 4 answer on the basis one merchant can be quite different
 5 to another and the type of customer that merchant
 6 attracts can be different.
 7 Q. But would you accept that small restaurant -- I mean,
 8 I did ask you a direct question. You said there were
 9 benefits.
 10 Let's just look at that small restaurant in
 11 Tottenham. What benefit does that small restaurant get
 12 by accepting the Worldpay from the chairman of
 13 the public limited company as opposed to a person who
 14 saves up considerably to pay for his or her season
 15 ticket? What additional benefit does that small
 16 restaurant get?
 17 A. Well, that small restaurant may get that individual
 18 buying food in his or her restaurant as opposed to in
 19 another, and the individual may choose to buy food in
 20 that restaurant using the World card based on the
 21 points -- the loyalty points or otherwise that they
 22 attract on that card. They may very well not choose to
 23 do that if loyalty or rewards wasn't a feature of that
 24 particular proposition. They may choose to use cash or
 25 other forms of payment.

18

1 Q. I will ask one more time: what are the benefits that
 2 that small restaurant gets? I ask you: what is the
 3 benefit that that small restaurant gets?
 4 A. They get the trade of that individual using that card.
 5 Q. You think that the individual uses that card in that
 6 small restaurant as opposed to a restaurant next door,
 7 and that's why that small restaurant gets the benefit?
 8 A. The small restaurant gets the benefit of the card
 9 purchase. If your question is specifically on the basis
 10 of it being a World card would they have behaved any
 11 differently, then no, I don't think they would have.
 12 Q. Thank you.
 13 If we go back to your statement at paragraph 4. The
 14 last sentence of paragraph 4:
 15 "I ran a variety of marketing campaigns to encourage
 16 card usage to ensure that consumers were using the right
 17 products and to prompt customers to take advantage of
 18 beneficial interest rates."
 19 Can you just explain to the Tribunal the sort of
 20 campaigns you undertook to persuade consumers to
 21 increase their card usage?
 22 A. Of course. The campaigns that were typically run by me
 23 and my team in this particular role were campaigns to
 24 encourage customers to use credit cards to make
 25 purchases at retailers, rather than using other forms of

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1 payment like cash, because there were benefits in doing
 2 so. There were benefits in the context of potentially
 3 loyalty points or discounts or promotions that we,
 4 MasterCard, had secured with that particular merchant or
 5 category of merchants.
 6 We also promoted campaigns to -- for consumers using
 7 cards to purchase holidays or travel, or be part of
 8 various clubs, whether they are travel clubs, wine
 9 clubs. Again, taking advantage of the card that they
 10 had to take -- to get benefits that they wouldn't
 11 otherwise get or would find hard to get using another
 12 product with another issuer or, indeed, other forms of
 13 payment.
 14 So essentially encouraging cardholders to use a very
 15 valuable card in their wallets to conduct, spend with
 16 merchants or to use it online with online merchants.
 17 Q. I think it is probably common knowledge that banks are
 18 not there for charity or altruistic purposes; they are
 19 there to make money.
 20 So what was the rationale behind Natwest encouraging
 21 the consumer to use the card thereby taking advantage of
 22 beneficial interest rates?
 23 A. Well, there were a couple --
 24 Q. What was the rationale?
 25 A. The rationale, of course, was we would rather -- in this

20

1 particular instance when I worked with Natwest, we would
2 rather they use our card than somebody else's credit
3 card, because, as I alluded elsewhere in the statement,
4 it was a very competitive marketplace and consequently
5 there were many organisations soliciting the business of
6 that particular cardholder or consumer.

7 It was incumbent upon Natwest, including the team,
8 including me that worked for it, to give reasons for the
9 cardholder to choose a Natwest card rather than a Lloyds
10 card, for example, recognising that some consumers don't
11 borrow on cards, so consequently they are looking for
12 value in different ways. And I gave you I think
13 a number of examples of that kind of value relating to
14 spend. But also recognising that some consumers need to
15 borrow or would like to borrow if the rates are
16 competitive or preferential.

17 So one of the great benefits of a card is that the
18 consumer or the cardholder gets an interest-free period
19 at the end of any given month by which they can choose
20 either to repay the balance in full and pay no interest,
21 or alternatively, to repay some of the balance and in
22 doing so incur some interest, giving them flexibility
23 and an ability to manage their cash flow.

24 So that was the second half of my statement in that
25 we offered balance transfer rates, we offered

21

1 competitive rates for purchases for limited periods,
2 again giving customers that choice and the flexibility
3 of getting benefits relating to borrowing, if they so
4 choose, or alternatively benefits to use the card
5 getting better deals, better discounts, better offers.

6 Q. As a matter of revenue, because we know banks are geared
7 to obtaining revenue, to the bank, the interest payment
8 that would be incurred on the card was extremely
9 important?

10 A. Yes. But can I qualify that?

11 Q. Of course you can.

12 A. So I agree with your statement. For banks issuing
13 credit cards then clearly interest income, as we defined
14 it in our business, was an important source of revenue
15 from a card.

16 But, however, there are many different types of
17 cardholders. Some never borrowed on a credit card, or
18 were never going to borrow on a credit card, and
19 consequently we had, as an issuer, a need to ensure that
20 we generated a reasonable profit to cover the cost of
21 issuing that card. Therefore, interchange was
22 an important component of that revenue mix.

23 Q. We have seen figures, and we may come to it a bit later
24 on, where the revenue from interest payments far exceeds
25 the revenue from interchange fees. Would you accept

22

1 that?

2 A. Yes, the revenue from interest income far exceeds.

3 Q. You say in your witness statement that Natwest was
4 acquired by RBS in the year 2000, and in March 2000 you
5 became head of product development for consumer credit
6 cards.

7 Can you just briefly tell the Tribunal what did that
8 involve? What was your role as head of product
9 development for consumer credit cards?

10 A. So after Natwest was acquired by RBS, then a significant
11 restructuring of the business took place. The role that
12 I assumed as a result of that restructure was looking
13 after the consumer card portfolio. So that was the
14 Natwest branded cards, RBS branded cards, and then there
15 was a third brand called RBS Advanta, which was a direct
16 monoline brand.

17 My job there was to manage the product propositions,
18 ensure they remained relevant in the marketplace, if
19 necessary bring new products to the marketplace so that
20 Natwest or RBS as an issuer can compete in the
21 marketplace for its customers' business, recognising at
22 that time there were a lot of new players, new entrants
23 in the credit card market, and it was highly
24 competitive.

25 So in essence that was my role.

23

1 Q. At paragraph 6 you say that during your time at RBS,
2 Natwest issued MasterCard, Visa and Amex cards. Is it
3 true that your employer, let me put it that way, was
4 issuing, at one time at least, all three cards: Amex,
5 Visa and MasterCard?

6 A. Natwest certainly was at one time issuing all three
7 brands.

8 Q. Was that more common in the old days, or does that still
9 apply now that one bank will issue MasterCard and Visa?

10 A. If your question is just about those two brands, then
11 yes, most issuers in my experience would be issuing
12 MasterCard and Visa. But not exclusively, of course.

13 Q. Is it the case that sometimes the credit card, whether
14 it be Visa or MasterCard, try and enter into exclusive
15 deals with banks?

16 A. As networks, yes, of course.

17 Q. How common is that?

18 A. The networks or the payment schemes are competing for
19 issuers' businesses, and they have a number of bases on
20 which to compete for that. What typically a payment
21 scheme would seek in return for obviously the benefits
22 it is giving the issuer is a form of either exclusivity
23 or a minimum share of the cards that they issue, or
24 a minimum volume that comes with the cards that are
25 issued under that brand.

24

1 So there is a variety of different mechanisms. And
 2 clearly, the issuer has a degree of power in that
 3 negotiation because Visa and then latterly, in the
 4 2000s, Amex competed heavily for issuers' businesses.
 5 So, yes, depending how the negotiation went, then
 6 there was a variety of different ways in which
 7 commitments could be secured.
 8 Q. The issuer would typically obtain more revenue for
 9 itself if it agreed to exclusivity?
 10 A. Potentially, yes.
 11 Q. And that would be funded again by interchange fees?
 12 A. So interchange and other financial incentives absolutely
 13 was part of the value proposition, if you like,
 14 a payment scheme would offer an issuer.
 15 Q. Why did RBS/Natwest drop Amex at that points? Why did
 16 Amex go?
 17 A. I can't -- I didn't have responsibility for that
 18 portfolio when I was at Natwest so I can't give you
 19 specific reasons or specifically recall why, but I'm
 20 anticipating back in whatever it was, 1999, that the
 21 product, for whatever reason, wasn't performing in the
 22 way that both parties anticipated. But that's a guess
 23 from my part.
 24 Q. You say it stopped issuing Amex. I just wondered why --
 25 A. Yes.

25

1 MR JUSTICE BARLING: Sorry, Mr Brealey, can I just clarify
 2 one thing. I wrote down an answer.
 3 You said "Most issuers still issue both MasterCard
 4 and Visa". Then you went on to talk about exclusive
 5 deals in answer to Mr Brealey. But I got the impression
 6 that -- are you saying that you are not normally
 7 successful in getting exclusive deals because most
 8 issuers will still want to go with both?
 9 A. That has become rare. Yes, to your answer.
 10 MR JUSTICE BARLING: Exclusive deals are rare?
 11 A. Are becoming harder to, in my experience, get. In the
 12 UK market, which I think goes to your point, a large
 13 number of issuers issue both Visa debit cards and
 14 obviously Visa credit cards, and a lot of issuers issue
 15 MasterCard credit cards.
 16 MR JUSTICE BARLING: As well as Visa credit and debit cards?
 17 A. Yes.
 18 MR JUSTICE BARLING: Right. So it is less common to have
 19 an exclusive deal?
 20 A. Yes.
 21 MR JUSTICE BARLING: Thank you.
 22 Sorry, Mr Brealey.
 23 MR BREALEY: No, that's fine.
 24 Jumping ahead to paragraph 7 of your witness
 25 statement, you were appointed head of customer

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1 management RBS consumer cards business. Then you say,
 2 essentially, you were appointed to drive revenue growth
 3 to promote card offers and rewards and encourage
 4 consumer spending on payment cards.
 5 Obviously, you have leaflets to publicise credit
 6 cards. How do you actually encourage spending on credit
 7 cards? You are saying that your task was to encourage
 8 consumer spending on payment cards. How do you actually
 9 encourage spending on payment cards?
 10 A. So the most common way of doing that was to formulate
 11 campaigns that would either be communicated through
 12 direct mail or by statement or, obviously, as the
 13 noughties went on, by email to cardholders. And those
 14 campaigns were encouraging, were providing offers. A
 15 little like I discussed earlier on, either
 16 an opportunity to get a discount by buying goods or
 17 services from a particular retailer, or encouraging
 18 consumers to spend on a card by offering them bonus or
 19 more loyalty or reward points, or, you know,
 20 occasionally using third party arrangements with wine
 21 clubs or travel clubs to encourage consumers to use
 22 their card. Bearing in mind that most cardholders would
 23 have at least two credit cards in their wallet at that
 24 point.
 25 So as an employee of RBS, I was bearing in mind that

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1 that consumer had a choice to use whatever card was
 2 right for them to make that purchase. That was my
 3 principal role: to ensure that, if you like, the Natwest
 4 or the RBS card was top of mind when the consumer pulled
 5 that card out of his or her wallet to buy something.
 6 Q. I think it is also correct -- we have seen this from the
 7 document -- that consumers who hold an Amex card will
 8 invariably have either a Visa or a MasterCard as well?
 9 A. Yes.
 10 Q. So that was how you were encouraging payment on cards.
 11 If we go to paragraph 19, we get to the point in
 12 time of the monolines to which you referred to
 13 earlier on.
 14 So 19:
 15 "The credit card market grew substantially during
 16 this period of sustained economic growth, proliferation
 17 of consumer credit and in particular unsecured personal
 18 lending."
 19 Again, you say that this put greater emphasis on the
 20 need for interchange revenues.
 21 This was the mid-2000s. Was this now one of the
 22 ways that the issuers were competing, giving unsecured
 23 credit?
 24 A. Yes, by "unsecured credit" I was referring to the credit
 25 line that is attached to a credit card, which typically

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1 isn't secured. There were some propositions -- few, but
 2 some -- in the marketplace that were secured against an
 3 individual's or a consumer's bank accounts, but the
 4 vast, vast majority of credit cards had a credit limit,
 5 and --
 6 Q. So the credit limit just went up, did it?
 7 A. So credit limits, yes. I mean, part of any bank
 8 strategy is to ensure that the appropriate credit line
 9 is allocated to a cardholder, and consequently those
 10 limits could go up, as they did, or in some cases go
 11 down.
 12 Q. And what safeguards did you undertake at Natwest/RBS
 13 when offering these higher credit limits? What
 14 safeguards? Did you, for example, give information on
 15 the cost of borrowing? Publish the APR, for example?
 16 A. Absolutely, yes. Both on statements, which cardholders
 17 receive clearly on a monthly basis, as well as documents
 18 that they were given at the time they opened the card
 19 account. And if memory serves me correctly, I think
 20 there was an obligation to send that information to them
 21 on an annual basis.
 22 Whenever a new offer was made, particularly one that
 23 related to an interest rate, then there was a full
 24 disclosure of the terms that related to that offer.
 25 Q. Did Natwest undertake a credit assessment? Was there

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1 a credit check?
 2 A. So, clearly, Natwest or at least the departments
 3 I worked in would work hand in hand with the credit
 4 underwriters and the credit underwriting team to ensure
 5 that an appropriate assessment was undertaken of the
 6 cardholder based on the information we knew, and clearly
 7 in some cases information that was available in the
 8 public domain. So, yes, appropriate credit checks or
 9 vetting was undertaken.
 10 Q. You say at paragraph 91, you refer to the monoline
 11 issuers like Capital One, certainly in those days
 12 consisted just of issuing credit cards, correct?
 13 A. Correct.
 14 Q. You say that the monoline issuers like MBNA and Capital
 15 One broadened the availability of credit cards -- this
 16 is 19.1 -- to less affluent cardholders. You say there
 17 that that led to higher cardholder default resulting
 18 from this.
 19 Why was it that the monoline issuers were targeting
 20 the less affluent cardholders?
 21 A. Those two particular companies, MBNA and Capital One,
 22 had developed very profitable and very successful
 23 businesses in the US using analytics as a basis to help
 24 drive value propositions and targeting those value
 25 propositions to consumers.

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1 So they brought that knowledge and experience that
 2 they deployed in the US market for many years to the UK
 3 and applied it in an appropriate but no doubt similar
 4 way where they could to this market. So they were able
 5 and had more sophistication in terms of the ability to
 6 do credit assessments and to target more successfully
 7 consumers, giving them a credit card that perhaps they
 8 wouldn't have otherwise got from one of the big high
 9 street retailer banks in the UK.
 10 Some of those clearly turned out to be bad choices,
 11 but on the whole those businesses were able to
 12 allocate -- to target and allocate an appropriate credit
 13 card proposition for those two segments of the UK
 14 population which probably were more underserved than
 15 most.
 16 Q. You say that some of them were bad choices, I think was
 17 your words. Was it the result of those bad choices that
 18 led to what you describe in 19.1, "higher cardholder
 19 default"?
 20 A. No. The way I would -- no, the answer to that is no.
 21 I think they were very good at what they did and
 22 consequently, as in any business, you don't get all of
 23 your decisions correct. And clearly with any credit
 24 underwriting policy, you factor in what your bad rate or
 25 your default rate is going to be. So I'm pretty sure

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1 that -- although I can't -- I don't have evidence in
 2 front of me or knowledge at this point as to how they
 3 performed against the default rates they expected, but
 4 I think they did a very good job in the marketplace
 5 given the experience and expertise they had.
 6 Q. I'm just trying to see what your evidence is. You do
 7 seem to be posing a link between targeting the less
 8 affluent cardholders and the higher cardholder default.
 9 There is a link?
 10 A. No, there is. Sorry, if I didn't make myself clear
 11 there, that was not my intention. What I was saying, or
 12 what I meant to say was the default rates under which
 13 those businesses were operating were typically higher
 14 than what the high street banks would have operated on.
 15 So, in that sense, that was known, but they clearly
 16 were operating a business model based on their
 17 experience to enable them to operate in that domain.
 18 Yes, default rates went up. I agree with what you have
 19 said and that's what's in my statement. But the point
 20 I was trying to make was that default rate, albeit
 21 higher than what was typically seen in the market, was
 22 probably, and I say probably, around what they were
 23 operating or planning to.
 24 Q. To be fair, you make the same point, if you want to just
 25 double check, at 56.2 of your witness statement.

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1 A. Yes.
 2 Q. Where you say:
 3 "MBNA and Capital One also brought a highly
 4 analytical approach to the credit decision process,
 5 which enabled them to build out their business in the
 6 less affluent sector. Another example of this was RBS
 7 Advanta joint venture."
 8 I just pause there.
 9 You were in charge of that at one point,
 10 weren't you?
 11 A. In terms of product development I was.
 12 Q. You were in charge of the monoline?
 13 A. Yes.
 14 Q. Reading again:
 15 "Another example of this was the RBS Advanta joint
 16 venture...(Reading to the words)... The inevitable
 17 result of this widening of credit card access to the
 18 less affluent sector has been an increase in cardholder
 19 default rates which has resulted in increased costs for
 20 issuers."
 21 Just pausing there. Could you just expand a little
 22 on why you say it was the inevitable result?
 23 A. Well, essentially, I think my comment there touching
 24 upon what I said in your previous question, is clearly
 25 when you look to target consumers in different segments,

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1 and in this case a lower socio-economic group, then you
 2 will get some of your decisions correct and some of your
 3 decisions will be wrong. So you will end up, as I have
 4 stated here, with higher default rates.
 5 The basis on which the issuer finds that acceptable
 6 is based on their business model, what they
 7 anticipated etc. It was inevitable that there was going
 8 to be an increase in cardholder default rates on the
 9 basis of offering different credit to different segments
 10 of the population.
 11 Q. In 56.2 you refer to this credit decision process. To
 12 this credit decision process.
 13 As I understand it from what you are saying,
 14 the risk of default would put a check on any lender's
 15 decision to lend. If I can put it another way, the risk
 16 of default puts a check on the lender's decision to
 17 lend. Do you accept that?
 18 I would imagine that's --
 19 A. Absolutely. And to qualify that I would say they were
 20 using statistical models and algorithms and other bases,
 21 the credit underwriters, to understand, as you look at
 22 a population of cardholders as a whole, what the likely
 23 default rate could be and, consequently, what the costs
 24 to the issuer would be.
 25 Q. It is in the lender's interest to a certain extent that

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1 the cardholder doesn't default?
 2 A. Absolutely, yes.
 3 Q. So on that basis, you would also accept, I would
 4 imagine, that if the risk of default is passed to
 5 a third party, not the lender but to a third party,
 6 there is a greater risk that the lender will lend more
 7 money than it would otherwise have done if it was
 8 assuming the risk?
 9 A. Can I ask you what you mean by a third party?
 10 Q. Okay. So you have a situation where the lender is
 11 lending money and is making what you call the credit
 12 decision process.
 13 A. Yes.
 14 Q. In that credit decision process it is working out
 15 whether the cardholder is going to default, correct?
 16 And on that basis it will decide whether to lend money
 17 or not.
 18 If, hypothetically, the lender now knows that
 19 someone else will pay in respect of the cardholder's
 20 default, it inevitably follows that the lender will lend
 21 more money than it would otherwise have done because it
 22 doesn't bear the risk of default.
 23 A. I'm not sure I agree with what you are saying, if
 24 I understand what you are saying correctly --
 25 Q. No, no, I understand.

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1 A. In my experience, as an issuer, and working with
 2 colleagues who are credit underwriters, then we never
 3 intentionally lent money or issued a card to a consumer
 4 whom we felt wasn't going to be able to repay their
 5 debts --
 6 Q. Pause there, sorry. You mentioned the word
 7 "intentionally". Let's assume it is a bad choice. It
 8 is a bad choice because the lender has just got it
 9 wrong. It has got the default risk wrong.
 10 A. Okay.
 11 Q. If a third party is picking up the tab for that poor
 12 choice, I would suggest to you that the lender is liable
 13 to make more bad choices.
 14 A. Okay. I'm not aware of any third party who would take
 15 on the debt, the bad debt of a business, without clearly
 16 having some incentive or premium to do so. And if that
 17 were the case -- and again, I'm drawing out your point
 18 here -- then that would mean that the issuer or the
 19 primary lender would suffer some form of loss in that
 20 process which would not be good for them.
 21 Q. When you say you are not aware of any third party,
 22 really what I'm putting to you is that in the scenario
 23 that you have in the first several pages of your witness
 24 statement, clearly the merchant is a third party and the
 25 merchant is, to a certain extent under the Visa and

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1 MasterCard schemes, bearing the cost of the cardholder's
 2 default, correct?
 3 A. I think one of the factors in determining what the
 4 interchange rate is, is losses, yes. But that is the
 5 limit of my knowledge.
 6 Q. And the merchant has no visibility about Capital One's
 7 decision process, whether or not to lend money on
 8 a credit card to a cardholder who may not be able to
 9 afford to pay it off, correct? The merchant simply
 10 doesn't have any visibility of that decision-making
 11 process, correct?
 12 A. Correct. But if I was to qualify that, I would say that
 13 the merchant does know that they receive a payment
 14 guarantee. So on that basis, if the card is used at
 15 that merchant, that transaction is authorised and that
 16 merchant will receive the value of the purchase from the
 17 issuer, even if the issuer is unable to get the
 18 cardholder for whatever reason to repay the balance on
 19 his or her credit card.
 20 Q. What I'm suggesting to you, Mr Douglas, is that the
 21 effect of all this is that by imposing a cost on the
 22 merchant of the default risk, there is a risk of issuers
 23 making bad choices about lending money on credit cards.
 24 Do you accept that?
 25 A. There is -- well -- what I would say in response --

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1 I know you're asking me a direct question and I will
 2 answer it, but an organisation like RBS or Natwest has
 3 a responsibility to its shareholders, and that is to
 4 make prudent decisions based on the information known at
 5 the time that they make that decision.
 6 So my difficulty with your statement is that you are
 7 implying that an organisation like RBS is doing
 8 something that is not prudent relative to its
 9 obligations to its shareholders. And I don't believe,
 10 certainly from my time working there, that that was the
 11 case. RBS essentially had to compete in the marketplace
 12 and did so to the best of its ability based on the
 13 options and the practices that were present at that
 14 point in time.
 15 Q. That's RBS. What about the monoline? If the monolines
 16 are advancing unsecured credit to people with a higher
 17 risk of default knowing that merchants are going to
 18 contribute to that default if the cardholder fails, do
 19 you not accept that with the monolines targeting this
 20 less affluent market, it would put a break on the
 21 monolines' credit decision process?
 22 A. Well, the monoline, you know, the interchange mechanism
 23 is there to ensure there's an appropriate balance to
 24 cost and revenues. So in that scenario with the
 25 monolines, as I understand it, the monoline would be

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1 taking a far bigger financial loss based on default of
 2 the cardholder than the merchant based on the fact that
 3 the merchant would have received a payment guarantee in
 4 order to, you know, accept that card as a form of
 5 payment for the goods or services.
 6 Yes, they are paying interchange, but that
 7 interchange is probably a much smaller proportion of the
 8 overall loss to the monoline. So in that sense, the
 9 interchange there is, I think, allocating the risk
 10 appropriately.
 11 Q. You talk about re-allocating the risk, why don't the
 12 schemes reallocate the benefits? We know that, as you
 13 have accepted, interest payments far outweigh
 14 interchange fees. Why is it that in this two-sided
 15 platform or two-sided market, whatever you want to call
 16 it, that the schemes, both Visa and MasterCard, do not
 17 factor in the substantial amounts of revenue that
 18 issuers earn on the credit cards?
 19 A. I don't know the answer to that question, in part
 20 because -- or in large part because I was not involved
 21 in calculating or setting interchange rates. That was
 22 done by a separate team in MasterCard, so I can't answer
 23 that question specifically for you.
 24 MR BREALEY: My Lord, I'm moving on to another topic.
 25 I don't know whether it is a convenient time?

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1 MR JUSTICE BARLING: Yes, I am sure the transcript writers
 2 would appreciate a short break.
 3 (11.36 am)
 4 (A short break)
 5 (11.43 am)
 6 MR BREALEY: Mr Douglas, in September 2010 you became
 7 MasterCard's UK group general manager. Have I got that
 8 right?
 9 A. Yes. That was the timeframe.
 10 Q. As the MasterCard UK group general manager, were you
 11 aware of the litigation commenced in the UK by various
 12 retailers against MasterCard?
 13 A. In 2010?
 14 Q. Well, it started in 2012. As MasterCard's UK group
 15 general manager, did you become -- maybe I should say
 16 aware of the litigation?
 17 A. I did in 2012.
 18 Q. And also against Visa?
 19 A. Yes.
 20 Q. On 5th May 2013, I understand you gave an interview with
 21 the Daily Telegraph, do you remember that interview,
 22 saying that retailers did not pass on any of the
 23 interchange fees and higher prices?
 24 A. I don't remember that specific interview, but I know
 25 I did a number of interviews at that time.

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1 Q. If you can go to E5.4, at tab 55A, which is at the
2 bottom right-hand side, 1392A.1.
3 A. Yes.
4 Q. At the bottom of 1392A.1, you see an email from -- is
5 that Shawn Miles? No, no, from James Harborne.
6 A. From James to Shawn, yes.
7 Q. "Shawn, I thought you might want to see what has just
8 gone out under embargo to the 17 national journalists we
9 have briefed on interchange regulation.
10 "This document is the executive summary of the
11 Europe Economics report."
12 Do you remember that?
13 A. I do.
14 Q. And:
15 "At least three journalists have said they will
16 write about the modelled impact."
17 It goes on: BBCRadio 4, Sky News, even
18 Jeff Randall's slot.
19 So at this point I think you personally, as you have
20 just accepted, publicising the fact that there was zero
21 pass-on of the interchange fees?
22 You nodded, but --
23 A. Sorry, yes, absolutely. I did a number of interviews,
24 and as an employee of MasterCard part of my job was to
25 conduct media interviews and to do lobbying on behalf of

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1 MasterCard. And at that time a number of the statements
2 made by MasterCard included that point that you
3 referenced.
4 Q. Because this was an official MasterCard statement.
5 I mean, whether it is your own personal view --
6 A. Yes, it was an official MasterCard statement.
7 Q. -- it was an official MasterCard statement you have
8 accepted?
9 A. Yes.
10 Q. At tab 54, if you go back, that is the report of Europe
11 Economics.
12 A. Yes.
13 Q. You are aware of any other firm of economists that
14 MasterCard instructed at this time to deal with the
15 question of pass-on? NERA, for example? There are
16 references in the bundles to NERA?
17 A. I can't recall. I certainly remember this report,
18 Europe Economics.
19 Q. If you go to 1341, the executive summary, the headline
20 "Findings and impacts for the UK if interchange fee
21 regulation is introduced".
22 It says:
23 "In Spain and Australia, the regulation of
24 interchange fees (IFs) resulted in a transfer of costs
25 from retailers to consumers. Retailers' costs fell as

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1 they paid lower ...(Reading to the words)... was not
2 passed on to consumers in the form of lower retail
3 prices. Consumers ended up paying higher cardholder
4 fees and interest charges as issuers sought to make up
5 for the reduced revenues from IFs."
6 Is that the message that you were giving publicly
7 in 2013?
8 A. Yes, the primary message I was driving was the impact on
9 consumers as a result of regulation on interchange, and
10 that ultimately meant that they would pay higher costs
11 for that outcome, whether that was --
12 MR JUSTICE BARLING: Higher costs?
13 A. Yes, whether that meant they were paying a card fee or
14 a bigger card fee, or they were earning less reward
15 points than they previously had, or they had a shorter
16 interest-free period than they previously had. That was
17 the key message that I was driving.
18 MR BREALEY: And the key message you were driving was that
19 was going to occur because there was no pass-on --
20 A. Yes, I had no evidence one way or the other to suggest
21 whether those costs were being -- those interchange
22 costs were being transferred to consumers in the form of
23 higher prices or not. But yes --
24 Q. You say you have no evidence. The evidence you were
25 relying on, with respect, was Spain and Australia.

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1 A. Yes, but I had not seen any specific numbers to suggest
2 that. Albeit the executive summary says, in this
3 particular report, says that.
4 Q. I mean, the report is here. Can you remember reading
5 this report or did you just read the executive summary?
6 A. I don't remember reading the report, but I certainly
7 read the key outputs from it.
8 Q. Right.
9 A. Which are contained in the executive summary.
10 Q. It is a question that I have to ask you, you may not
11 know the answer: but 2013, this was the public message
12 by MasterCard, "No pass-on".
13 Are you able to assist the Tribunal as to how it
14 came about that MasterCard swore a statement of truth in
15 its defence in 2013 saying there was full pass-on?
16 A. No, I'm not able to help on this.
17 Q. You can put that bundle E5.4 away. If you go, please,
18 to paragraph 61 and 62 of your witness statement.
19 A. Yes.
20 Q. This is in the context of a low or zero level of
21 interchange fee, and I'm interested in what you say at
22 paragraph 62.1, where you say that in a low interchange
23 fee environment, I think you say -- I will read it.
24 I do not think this is confidential:
25 "It is inevitable that UK issuers of MasterCard

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1 credit and debit cards would have done one of the
 2 following if we had moved to low or zero interchange
 3 fees without doing anything to replace issuer revenues."
 4 Then at 62.1:
 5 "Moved their entire premium credit card portfolios
 6 to Amex."
 7 So that is your evidence.
 8 Are you sure that you don't want to qualify that
 9 statement when you say they would move their entire
 10 premium credit card portfolios to Amex?
 11 A. So my basis for making that statement was what happened
 12 to MasterCard in the debit market in the UK in and
 13 around the same period, where Visa had a higher debit
 14 interchange rate than the equivalent MasterCard product
 15 at the time, which is called UK domestic Maestro.
 16 Q. I hate to stop you, but we will undoubtedly come to the
 17 Maestro story. Could we just concentrate on the Amex.
 18 Obviously I don't want to cut you on your evidence, but
 19 we will come to Maestro.
 20 A. No, I understand. My simple basis for referencing that
 21 is what happened to MasterCard when it was in a lower
 22 interchange environment.
 23 Q. So the basis for saying that issuers would move their
 24 entire premium credit card portfolio to Amex is simply,
 25 essentially, premised on the Maestro story; is that

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1 correct?
 2 A. That, and obviously what Amex were doing in a number of
 3 discussions with a number of my customers -- RBS,
 4 Lloyds, MBNA -- with their GNS proposition. So they
 5 were two key reasons for me making that point.
 6 Q. We are going to be looking at E3.12 and E3.13 in some
 7 detail. Could we go to E3.13 first, please, and go to
 8 tab 252, which is at the back, towards the back,
 9 page 5381.
 10 We have seen documents reflecting what I'm about to
 11 say, but this is as good a place as any. Now, this is
 12 in the context of what you fear Amex will do in
 13 an environment of low interchange fees. Could you just
 14 clarify to the Tribunal what actually you mean by "low"?
 15 Is it 0.2, 0.3? What would low be?
 16 A. Well, low would be zero or a rate that was --
 17 Q. You make a distinction in your statement between zero
 18 and low. So zero --
 19 A. So low for me -- yes, at the end of the day, given what
 20 we witnessed with the Lloyds Duo product, then 60/70
 21 basis points differential, you know, could have been
 22 that trigger to move the business to Amex.
 23 Q. I refer you to -- this is the website from the CMA. So
 24 on that basis can you explain to me, and if you go over
 25 the page, at 5382 you see there, ahead of the

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1 interchange fee regulation, ahead of that, the CMA is
 2 pleased to note that MasterCard has decided to reduce
 3 the interchange fees applicable to its premium cards
 4 down to the level of its standard credit card fees on or
 5 before 1st April 2015.
 6 Have you got the page?
 7 A. 5382, yes.
 8 Q. So it is the --
 9 A. I have it now, thank you.
 10 Q. "Ahead of that, the CMA is pleased to note that
 11 MasterCard has decided to reduce the interchange fees
 12 applicable to its premium cards down to the level of its
 13 standard credit card fees on or before 1st April 2015
 14 regardless of whether the interchange fees regulation is
 15 adopted."
 16 In other words, you are bringing down the premium
 17 card rates to the level of the standard rates.
 18 And I explored with Mr Scott Abrahams how, in 2014,
 19 you were going to bring the premium rates down even
 20 further. If you were so worried about this difference
 21 between Amex, why on earth did you bring the premium
 22 cards rates down before you were even obliged to?
 23 A. I have no line of sight as to why that decision was made
 24 as at that point I was not working in the UK and Ireland
 25 business, I was working in the US business.

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1 Q. So you can't assist the Tribunal as to whether
 2 MasterCard, having reduced the rates, Amex has been
 3 extremely nervous and is bringing down its own rates?
 4 A. I can't, on the basis that I wasn't involved in that,
 5 nor am I living and operating in this market now.
 6 Q. No. Okay.
 7 Can you go to bundle E2.3, because I want to put
 8 what you say in 62.1 in context. This is
 9 the Commission's decision. The decision is in various
 10 places. Forgive me, I forget where they are all. If
 11 you go to page 1178.
 12 MR JUSTICE BARLING: I don't think so.
 13 MR BREALEY: Whoever has the Commission's decision, it is
 14 paragraph 636.
 15 It is in 2.2, is it? Sorry. (Pause)
 16 I will have to sort my bundles out. So E2.2,
 17 page 1178. So this is the Commission's decision of
 18 2007. Have you ever seen the Commission's decision?
 19 A. I haven't, no.
 20 Q. So you have never read paragraph 636, obviously?
 21 A. I haven't.
 22 Q. You have not seen the decision. But the reason I take
 23 you to this is because it does refer to the Australian
 24 experience, and having seen the report by Europe
 25 Economics, I took it that you might be aware of the

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1 Australian experience, MasterCard and Amex. Were you
2 aware of the Australian experience?
3 A. I was aware in broad terms.
4 Q. Okay. Well, in broad terms let's just have a look
5 at 636. This is in the context of a similar argument
6 that you are making really in 62.1, and it is frequently
7 called the death spiral argument.
8 If we just look at 636:
9 "The decrease of interchange fees for MasterCard and
10 Visa credit cards in Australia was followed by a sharp
11 decrease of the merchant fees in both schemes.
12 "The fees of the both schemes of American Express
13 and of Diners Club were not regulated by RBA, but their
14 merchant fees also increased, even though in a less
15 pronounced manner. As American Express...(Reading to
16 the words)... merchants fees, this drop of American
17 Express and Diners Club also constrained their
18 possibility to attract cardholders at the expense of
19 MasterCard and Visa.
20 "The combined market share of American Express and
21 Diners Club in Australia therefore increased only
22 slightly from 15% to 17% and then remained stable. The
23 development of MasterCard's market share and the
24 continuing growth of its sales values disproves
25 MasterCard's argument that a reduction of interchange

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1 fees could lead to a death spiral as MasterCard's
2 members' banks would be motivated to evolve towards
3 three-party schemes."
4 Now, that is the Australian experience.
5 When you made this statement, were you aware of how
6 Amex had responded by lowering its fees, MasterCard had
7 reduced its fees, Amex had reduced its fees? Were you
8 aware of that?
9 A. As I say, I was aware in very broad terms of what
10 happened in Australia. As I -- obviously, I was very
11 well aware of the threat of Amex, as you have heard me
12 previously state. Albeit MasterCard did take action to
13 protect its -- to remain competitive by introducing the
14 World card into the UK market in 2007/2008, if my memory
15 serves me correctly, which I think helped MasterCard
16 compete and consequently, you know, offered
17 an alternative to issuers.
18 Q. Let's look at another document and then we will probably
19 finish this. If you can go to E3.13, I don't know if
20 you have still got it with you? You can put that
21 Commission decision away.
22 Now, you may have seen this document because you
23 were a member of MasterCard's UK and Ireland executive
24 management team from 2009 to 2014, and this is dated
25 2nd November 2012.

50

1 A. Sorry, could you just tell me which tab?
2 Q. Tab 249, I do apologise. E3.13. Is this confidential?
3 (Pause)
4 But I can identify the document. It relates to UK
5 premium.
6 A. Okay. Can you give me the page reference just to make
7 sure I'm 100%?
8 Q. Yes. If we can go to 5318.
9 A. Okay.
10 Q. If you read the first two lines.
11 A. Yes.
12 Q. Are you aware that Lloyds Duo basically has a very small
13 market share, Lloyds Duo? If you look at the figures.
14 A. I have seen the MasterCard side of those figures, yes.
15 Q. So you agree that it is a fairly small market share?
16 A. It is a small market share, yes.
17 Q. Then, you see -- I mean, it is difficult in open court
18 for me to read this out and put it to you, so I'm going
19 to ask you to look at the words and then see whether you
20 agree, or you accept what is said by MasterCard.
21 You see:
22 "In the UK Amex's ..."
23 You see the third?
24 A. Yes.
25 Q. Does that somehow chime with or reflect your experience?

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1 A. Yes, although what I would add is the first bullet point
2 under that heading is important, given that's where Amex
3 was investing a lot of its time to agree its acceptance
4 footprint to make, you know, their brand more valuable
5 to issuers and to consumers alike.
6 Q. So before we get onto the bottom of this page, if you go
7 over the page, I think it is not a confidential fact
8 that MasterCard has a significant acceptant advantage
9 over Amex. I think that's correct, isn't it? That is
10 one of the main selling points?
11 A. It does, but that varies by merchant categories. That
12 was the point I was trying to make previously.
13 Q. Okay. You see there the relative acceptance --
14 A. Yes --
15 Q. -- by category.
16 Then going back to page 5318, in open court, so it
17 is not a -- it was said by one of the witnesses that the
18 Lloyds Duo was complex. Would you accept that the
19 Lloyds Duo has been disappointing to Amex? If I refer
20 you to what is said at the bottom of page 5318.
21 A. I'm not a 100% sure what Amex's goals were, and
22 therefore objectives in terms of the spend they hoped to
23 see on the Amex cards. But if -- I will be purely
24 speculating here -- if that's based on volume share
25 shift, then I am sure they are a little disappointed,

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1 yes.
 2 Q. Just so you know, Ms Hannah Bernard, who had been part
 3 of Sainsbury's Bank, who gave evidence last week said to
 4 the Tribunal that the Lloyds Duo had not been really
 5 a success due to the complexity of it; customers didn't
 6 really understand the dual nature of it.
 7 A. Right.
 8 Q. You agree with that?
 9 A. No, I agree. The product, on the very basis that it was
 10 two cards, was -- on that fact alone -- a more complex
 11 proposition for the consumer, yes.
 12 Q. If you go to 5325, again is there anything -- well, are
 13 you aware of ever seeing this? I start --
 14 A. Yes, I have seen this document.
 15 Q. You have seen this document, thank you.
 16 Having seen this document, I mean this is
 17 an internal MasterCard --
 18 A. Yes.
 19 Q. Is this what the perception was within MasterCard at the
 20 time when you read this?
 21 A. Yes, I think we were surprised that the proposition
 22 hadn't been more successful than it was.
 23 Q. Then, again, the reason that I referred you to
 24 the Commission's decision, if you go to 5363, here again
 25 is MasterCard internally. 5363. Sorry, mine is

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1 handwritten. It is 5363, is it? Sorry, I beg your
 2 pardon, it is 5563.
 3 A. 5563.
 4 MR JUSTICE BARLING: Is it 5536?
 5 MR BREALEY: Yes.
 6 MR JUSTICE BARLING: 5536?
 7 MR BREALEY: To give me my due -- that is a 63? Yes. It is
 8 5336.
 9 Does it say "in Australia"? (Pause)
 10 These were done over the weekend. I do apologise.
 11 5363, tab 250. 5363. 5363.
 12 The reason I want to take you to these documents,
 13 these are internal MasterCard documents. We have seen
 14 what the European Commission has said publicly and
 15 I asked you at the beginning of this line of questioning
 16 whether you wanted to qualify paragraph 62.1, where you
 17 say that:
 18 "In a low interchange fee environment," which is
 19 what I understand all this is about, that you want to
 20 qualify the "move their entire premium credit card
 21 portfolios to Amex". It is not realistic, is it?
 22 A. I stand by my statement. My basis for making it was, in
 23 a highly competitive market like the UK, which had
 24 evolved quite dramatically through the noughties, for
 25 want of a better description, given new entrants, given

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1 product innovation, given product development, issuers
 2 were heavily vested in the propositions they had put
 3 into the marketplace and were competing very
 4 aggressively to do so.
 5 So in an environment where MasterCard would have
 6 been operating at a disadvantage, whether that was zero
 7 or low interchange, and Amex was not, then my view was
 8 that an issuer would look at alternatives to sustain the
 9 value proposition that they were competing with others
 10 on in the marketplace before they would take any action
 11 with regards to reducing the benefits or otherwise that
 12 the cardholders received on their value proposition.
 13 You asked me earlier what is a low rate or
 14 a differential? 60-70 basis points was quite
 15 substantial and, in my view, would give an issuer a very
 16 significant reason to think about the long-term
 17 viability of that proposition and what was the best
 18 thing for his or her business.
 19 In the UK, as you discussed earlier, most issuers
 20 issued both Visa and MasterCard. In other words, they
 21 had familiarity and processes to cope with two networks.
 22 I'm not saying technically standing up Amex is easy, I'm
 23 not saying that for one minute, but they had the
 24 knowledge and wherewithal to do that. And some
 25 intelligence that we got through discussions with RBS

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1 indicated that they were actually building an Amex
 2 platform to support such a proposition.
 3 So just that highly competitive nature of the
 4 marketplace, given how vested issuers were and how they
 5 were competing with each other, I think, and I stood by
 6 that view, in a premium marketplace where Visa, based on
 7 their actions at that point and MasterCard being forced
 8 at a low or zero rate, would have lost a significant if
 9 not all of its premium portfolios over time.
 10 Q. Is that your personal view or MasterCard's view?
 11 A. That is my personal view, living and breathing and
 12 operating in the marketplace as I was at that point in
 13 time talking to the very same issuers who made some of
 14 these decisions.
 15 Q. I appreciate it is your personal view, but you have just
 16 established that MasterCard did, in the autumn of 2014,
 17 announce that it was reducing its premium rates?
 18 A. Yes.
 19 Q. We are almost, whatever it is, a year and a half on from
 20 that. That Doomsday scenario or death spiral, to coin
 21 the phrase, has not materialised, has it?
 22 A. It hasn't, no.
 23 Q. If we could put E3.13 away and go to E3.12. We are
 24 going to, unfortunately, go through a lot of these
 25 documents, and the first one is at tab 206. I will just

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1 give you some of the documents just to give you a few
 2 moments.
 3 A. Okay.
 4 Q. Before I do, can I just check with Mr Hoskins -- I'm not
 5 sure how much of this has been blued.
 6 (Pause)
 7 Tab 206. Everything has been blued, has it?
 8 MR HOSKINS: From 206, yes.
 9 MR JUSTICE BARLING: Looking at the documents you want to
 10 put to the witness, are we dealing with a lot of blue or
 11 is it just this first document?
 12 MR BREALEY: No, nearly all of them. Sir, I'm afraid if
 13 MasterCard are going to insist -- I mean, this relates
 14 to Maestro and I don't feel that I can properly ask
 15 questions about this in the way that I have just tried
 16 to just by asking the witness to read the document and
 17 then --
 18 MR JUSTICE BARLING: Well, it is quite awkward to have to do
 19 that, so --
 20 MR BREALEY: I do apologise.
 21 MR JUSTICE BARLING: Mr Hoskins, you want to maintain the
 22 confidentiality?
 23 MR HOSKINS: We do, yes. I think also it is not fair -- it
 24 is difficult for the witness as well --
 25 MR JUSTICE BARLING: No, I don't think it is very

1 satisfactory, and having looked at the nature of the
 2 documents, one can see why it is regarded as
 3 confidential. So I'm afraid that means that we are
 4 going to have to clear the court of anyone who is not in
 5 the confidentiality ring.
 6 Now, the order which has been now brought up to
 7 date, we need to take account of that. This is
 8 MasterCard's confidential material. Give me a moment to
 9 find the draft.
 10 So that means, and I would ask the parties to check
 11 that this is respected, those from Stewarts Law who have
 12 given undertakings may remain. They are in the
 13 confidentiality ring as far as this information is
 14 concerned. Then there are Sainsbury's representatives
 15 in other proceedings. No? (Pause)
 16 They are not permitted to stay. That is right. I'm
 17 sorry, those who are from Morgan Lewis & Bockius I'm
 18 afraid are not able to remain, and those who represent
 19 the claimants in -- effectively their representatives
 20 from Hausfeld LLP, they are able to remain because they
 21 are now part of the confidentiality ring so far as the
 22 defendant's confidential information is concerned. Is
 23 that clear? I hope so.
 24 Mr Hoskins, can your team just check because it is
 25 your information, that as far as you can tell those who

1 remain are entitled to remain?
 2 MR HOSKINS: I'm fine with this side of the room, but
 3 I don't know all the faces on the other side of the
 4 room, that's the problem.
 5 Everyone sitting on my side of the room is fine.
 6 MR JUSTICE BARLING: Good. So we will put the notice up.
 7 MR HOSKINS: I think it is a bit like a wedding, with bride
 8 and groom.
 9 MR BREALEY: I'm sorry.
 10 (12.26 pm)
 11 (End of non-confidential session)

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5 (End of in camera session)

(The court adjourned until 10.30 am
on Tuesday, 9th February 2016)

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(Non-confidential session)1

Housekeeping1

MR KEITH ROBERT DOUGLAS (sworn)5

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