OPUS 2 INTERNATIONAL

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

Day 19

March 1, 2016

Opus 2 International - Official Court Reporters

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1	Tuesday, 1st March 2016	1	MR JUSTICE BARLING: Yes.
2	(10.30 am)	2	MR HOSKINS: Mr Carroll, please.
3	(Open session)	3	MR BRIAN CARROLL (sworn)
4	MR HOSKINS: Good morning.	4	Examination-in-chief by MR HOSKINS
5	MR JUSTICE BARLING: Good morning, Mr Hoskins.	5	MR JUSTICE BARLING: Thank you very much, Mr Carroll.
6	MR HOSKINS: Before I call Mr Carroll, can I just check with	6	Settle yourself in there.
7	Mr Smith what he thought about our	7	A. Thank you.
8	MR SMITH: The homework?	8	MR JUSTICE BARLING: I hope there is a clean glass? Yes
9	MR HOSKINS: I won't say homework. Was that what you	9	there is.
10	wanted?	10	A. Yes, thank you.
11	MR SMITH: That was, yes. That's excellent.	11	MR HOSKINS: Can we have bundle D3. If you can go to the
12	MR HOSKINS: I don't know if Mr Brealey had any comments?	12	first tab of that bundle. There should be a document
13	MR BREALEY: There just appear to be a few gaps in the	13	entitled "Expert Report of Brian Dirck Carroll"?
14	dates, 2006, 2007.	14	A. Yes it is.
15	MR HOSKINS: There's certainly gaps because	15	Q. If you flick through to the end, you don't need to read
16	MR BREALEY: We don't have 2008 and 2009.	16	it, just look at the pages on the way through, through
17	MR HOSKINS: there is a whole stream of there's	17	to page 11. Can you confirm that that's your witness
18	hundreds of different individual rates, but they don't	18	statement? Sorry, expert report?
19	all change over time, that was meant to be	19	A. It is, yes.
20	representative.	20	Q. Can you confirm that that's your signature?
21	MR BREALEY: Well I just make the point that there is no	21	A. I can.
22	2008 or 2009, there is no 2011/2012/2013.	22	Q. Can you confirm that the contents reflect your
23	MR HOSKINS: Shall we take this offline because I am sure we	23	independent professional opinion?
24	can show Mr Brealey what there is and he can tell us if	24	A. Absolutely, yes.
25	he thinks there is other stuff?	25	MR HOSKINS: Thank you. Mr Brealey will have some questions
	1		3
1	MR SMITH: We certainly don't mind, perhaps you can provide	1	for you.
2	a single copy, if you give us the lot and we can	2	Cross-examination by MR BREALEY
3	MR HOSKINS: I think it is quite difficult because		
4	·	3	MR BREALEY: Good morning.
	I think there is not a physical file sitting somewhere	4	A. Good morning.
5	I think there is not a physical file sitting somewhere with everything in it and quite a lot of stuff was	4 5	A. Good morning. Q. Just staying in your report at paragraph 9, page 2:
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1	Q. No. And you left, I think from paragraph 3, you left	1	prices in their stores."
2	Waitrose in 2004?	2	I take it that is the Big Four. So just could you
3	A. Yes, that is correct, yes.	3	explain to the Tribunal how Waitrose during this time of
4	Q. Again, I am just picking up what you say in paragraph 3.	4	your employment juggled selling better quality products
5	Waitrose during your employment was more of a regional	5	but at the same time tracking prices?
6	retailer focused on the south of England?	6	A. Yes. The whole point of the whole industry, not just
7	A. Yes, yes, it grew towards the end of my time and	7	Waitrose, is not to allow yourself to be tied down to
8	it's grown substantially since.	8	the products which are most price sensitive in
9	Q. Yes. So in the early 2000s it had a market share of	9	consumer's eyes. The things that they buy very
10	what, 2%?	10	frequently and the things which are very commodity like,
11	A. Something like that, a low market share.	11	like a pint of milk, okay, you can get organic but
12	Q. A low market share. It started to grow, as again	12	basically you know it is a pint of milk. The whole
13	I think you say in paragraph 3, at about the time it	13	basis of the supermarket operation has been to deal with
14	acquired I think it was from memory 50 or so stores	14	the fact that until recently, until the recession, it
15	from Morrisons?	15	was true and it was an axiom that your actuaries would
16	A. I wish it had been, but I only got 21.	16	always force upon you when they were reviewing your
17	Q. 21, did you? Okay. But that was in 2004, was it?	17	pension schemes that earnings would rise faster than
18	A. I think that must be just before I retired, yes.	18	prices and this historically had been the case.
19	Q. And was there kind of a reshuffle during this period or	19	Q. It is what you refer to in your paragraph 17?
20	did you just take early retirement?	20	A. Exactly. That also applied that the fact that your
21	A. No, no, it was retirement at 60.	21	second business cost after cost of sales is your labour
22	Q. Right. So this was in 2004, just as about the time that	22	cost and therefore you were going to have to increase
23	Mr Justin King and Mr Coupe you are obviously aware	23	your principal cost, other than the cost of sales, in
24	of those people rolled out the initiative making	24	line with the growth of wages and yet you were competing
25	Sainsbury's great again, is that after your time?	25	on price. So you want to get away from too much
	_		_
	5		7
1	A. I don't remember that in any sort of detail, no.	1	emphasis on basics, too much emphasis on the small
2	Q. No. Again, this is no criticism but you are here to	2	number of items which are monitored every month by the
3	assist the Tribunal. Your experience of retailing is	3	CPI. And that's why you see the whole development of
4	based solely on your employment with Waitrose; correct?	4	supermarkets into more expensive items, more interesting
5	A. Substantially. I did when I first joined the	5	items, bigger shops, more expensive facilities. You
6	John Lewis Partnership, I did work in department stores	6	have to compete on price and you continue to do that.
7	but my substantive high level appointment only in	7	Waitrose of course was never a price setter, never
8	Waitrose.	8	expected to be the cheapest, but that doesn't mean that
9	Q. And it does not extend to the claim period which, as you	9	it wasn't putting great emphasis on prices because
10	probably know from reading the claim, is 2007 onwards;	10	essentially you need to preserve your relative position,
11	correct?	11	or the relative position that you feel works for you.
12	A. Yes.	12	So, you know, not being the cheapest doesn't mean
13	Q. So going to paragraph 13 of your report, that's at	13	that you are not very much aware of price.
14	page 3 at the bottom.	14	Q. No. And from what you have just said, all the
15	A. Yes.	15	supermarkets I take it from what you have just said,
16	Q. You say:	16	will compete on quality in one form or another?
17	"Waitrose will never grow to the scale of the Big	17	A. They will compete on range and they will compete
18	Four. However, I consider Waitrose business to have	18	within the range, they will have differential qualities.
19	been broadly comparable. Waitrose competed directly	19	I mean, Tesco produced Tesco Finest, for example. In
20	with the Big Four."	20	most areas of retailing there is a great degree of
21	Then you say:	21	segmentation in terms of the customers that shops are
22	"We sold more upmarket products."	22	looking at. But supermarkets still serve the whole
23	A. Mmmm.	23	market, which is fairly unusual in modern retailing.
24	Q. You go on to say:	24	Therefore you have different, you have basic ranges
25	"We set prices for key products by reference to	25	which have a special emphasis on price and after my
	6		8

1 time, Waitrose introduced a range called 1 investment of profit into the business for the Waitrose Essentials. It did amuse me that asparagus was 2 2 development of the business. 3 included in that. 3 So if you are in a price competitive environment, 4 Q. My children eat it. 4 you can't simply control prices in the way that, say, You have mentioned, perhaps you can just expand on 5 5 Apple are able to. 6 it, how do they compete on the ambience of the service? 6 So therefore to the extent that you can't control 7 A. That is essentially the Partnership culture. The 7 the prices, you have to control the costs. 8 8 Q. How did Waitrose in your time achieve that? How did it Partnership is different of course from the other 9 9 businesses that we are talking about. It is a Plc control -- cut the costs? 10 because it borrows on the euro market, for example, but 10 A. Obviously, there are some things you can do in very 11 11 it doesn't have equity, it is set up by a trust, it is short term places. You can have a review of 12 12 immune to takeover. a particular cost area and make some changes but 13 It is guaranteed a life by Parliamentary 13 basically you have to control costs on the basis that 14 legislation. So it is in a unique position and it can 14 you set a budget, that you expect that budget to be 15 think long-term. It has a long-term culture of the 15 adhered to and if things are going wrong, then action 16 importance of the staff and there are special channels, 16 must be taken to deal with that if possible, there are 17 there is a Parliament, as I said, I addressed the 17 some costs of course that -- if the exchange rate 18 Waitrose Parliament. 18 changes in a way which is unhelpful, then that's 19 So Waitrose would say that it would be regarding the 19 a problem for buyers who are getting goods from 20 quality of its staff and their ability to relate to 20 overseas. 2.1 customers as being extremely important. And the sort of 2.1 But they will have to try to persuade the sellers 22 22 simple classic everyday expression of that is that if to -- the producers to take a lower price. So there are 23 you ask someone in Waitrose where a product is, you 23 all sorts of ways in which you can -- you have to 2.4 should expect that they will take you there. 24 constantly control costs and I give you examples. 25 Q. Right. So service is still quite an important --25 A fairly trivial example I give of, if there are

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1 A. Service is very important with Waitrose because if you 2 have decided you can't compete on price you have to 3 compete on other things, and service in the Waitrose 4 culture -- and you know there have been imitations of that. I think it is fair to say that imitation is the 5 6 sincerest form of flattery and, you know, the Asda 7 introduction of the phrase "colleagues", it is a tribute 8 to the Waitrose/John Lewis concept of partners. 9 Q. You refer in paragraphs 13 and 14 that Sainsbury's was 10 kind of closer to Waitrose; is that correct? 11 A. Yes, I believe that to be the case. Q. And that meant that they would also compete with 12 13 Waitrose on service and quality? 14 A. They would -- I would say that they would be less able 15 to do either of those things, but they would regard them 16 as significant. 17 Q. You mention in various places in your report on cutting 18 cost, controlling cost, paragraph 17, cutting cost, 19 paragraph 20. Could you just explain to the Tribunal 20 why that was important to the supermarkets during your 21 time; cutting the cost and balancing the budget? 22 A. Because what you have to do to be a successful business 23 is, as I say in the report, to create the return on 2.4 capital which is what you need for your funding. In our case that would be some borrowing, but also the 25

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roadworks outside the store, then you know the details would be collated and we would make a claim for loss of earnings. The importance of that is not so much that that individual cost is going to make a huge difference to the bottom line, but it emphasises to the store manager you know, that centrally, miles away in the offices, people are actually concerned with those details. It is part of the message that you send to make sure at the individual level because in the end, the profit of the business, apart from the e-commerce area, the profit of the business comes down to the sum of the profits and the efficiency of individual shops.

Just building up on that, there is evidence, you may not have seen because you haven't seen the reports, there is

- Q. Just building up on that, there is evidence, you may not have seen because you haven't seen the reports, there is evidence that says that Tesco's aggressively cut labour costs in its store and that was a detriment to its business?
- A. That is right. What is interesting about the supermarket competition in the period we are talking about is that there was a great deal of competition and a great deal of concern with costs, with prices, all those factors, but I would say it was in a sort of arena. So nobody was making drastic changes and what you have seen now of course is a sort of avalanche effect, where -- a combination of the fact that wages

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the number of the interchange fee requilation? then Add and Lidd combined with a comparatively small a section of the market growing play but with the planning a section of the market growing play but with the planning a section of the market growing play but with the planning of constraints never theless it was abilities an availanche, a small effect but it had a huge effect. 5 So now you are in a different situation where people are not composed and an another planning to compete institution where people are not having to compete textically but they are having a name of the planning to compete textically but they are having a name of the planning to compete textically but they are having a to compose strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that to compete strategleally, and we have to see how that the competence of the text to compete strategleally, and the services in CPI, they are self-all to easily and the services in CPI, they are a validable, what is happering is available on a monthly to decide the section of th	1	have no longer been rising with prices since the	1	it would have been publicly known. You are obviously
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So now you are in a different situation where people are not having to compete statically but they are having to compete strategically but they are having to compete strategically and we have to see how that pans out. 10	5		5	-
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13 15 1 O. If we move on, if we could, to paragraph 27, 28, 1 wrong. 2 where you give your view on the likely impact of 2 MR BREALEY; Yes. I have no further questions. Thank you a hypothetical reduction in merchant fees. 3 very much indeed. 4 A Yes. 4 MR JUSTICE BARLING: Any re-examination? 5 O. You say: 5 MR HOSKINS: Sorry, please bear with me a second. 6 "I have been asked to consider a substantial 6 MR JUSTICE BARLING: Yes. There might just be another reduction by, say, 50% of merchant fees and how it was 8 being dealt with by supermarkets in the mid-2000s"; 8 MR HOSKINS: We have no further questions, sir. 9 correct? 9 MR JUSTICE BARLING: Mr Carroll, thank you very much indeed. 10 A Yes. 10 In paragraph 28 you the answer is dependent on, to 1 a certain extent whether it was publicly known? 12 MR BREALEY: I think that is all the evidence. 13 MR BREALEY: We are doing very well. 14 MR JUSTICE BARLING: We are doing very well today but 4 have got to exchange closing submissions essentially 17 firmly of the view that all the major supermarkets would 18 have publicly taken the step to reduce prices quickly by 18 MR JUSTICE BARLING: That's my understanding, yes. 19 the full amount of this cost reduction. Just as with 19 MR JUSTICE BARLING: That's my understanding, yes. 19 the full amount of this cost reduction. Just as with 19 MR JUSTICE BARLING: That's my understanding, yes. 19 the full amount of this cost reduction. Just as with 19 MR JUSTICE BARLING: That's my understanding, yes. 19 the full amount of this cost reduction. Just as with 19 MR JUSTICE BARLING: That's my understanding, yes. 19 the full amount of this cost reduction. 21 the oral closings on Friday 11th, which I think is the 22 current plan, isn't it? 19 when I'm due to start and then I think 19 passing this on." 24 I'm due then to work over the weekend and continue on 19 the Monday.	24		24	·
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14 16	25	Then you go on at paragraph 29 to say in your view	25	the Monday.
		14		16

1	MR JUSTICE BARLING: Yes.	1	INDEX
2	MR HOSKINS: I will be working over the weekend as well and	2	PAGE
3	starting on Tuesday.	3	(Open session)1
4	MR JUSTICE BARLING: You will do a bit as well, will you?	4	MR BRIAN CARROLL (sworn)3
5	Right.	5	Examination-in-chief by MR HOSKINS3
6	MR HOSKINS: Just to keep him company.	6	Cross-examination by MR BREALEY3
7	MR BREALEY: But that's where we are.	7	(End of open session)18
8	MR JUSTICE BARLING: Okay.	8	
9	MR BREALEY: If you want the submissions in any particular	9	
10	format?	10	
11	MR SMITH: We found the electronic files that you provided	11	
12	us with at the outset actually incredibly useful for	12	
13	those of us who work out of London. If it is not	13	
14	a great deal of trouble, would it be possible to update	14	
15	those memory sticks with the additional material that	15	
16	has been finding its way into the paper bundles?	16	
17	MR JUSTICE BARLING: Ms Houghton is nodding.	17	
18	MR BREALEY: So on our side, yes.	18	
19	MR HOSKINS: I am sure that will be fine. Are you going to	19	
20	give us back the memory stick	20	
21	MR JUSTICE BARLING: You can have them back if you want	21	
22	them.	22	
23	MR HOSKINS: I'm not technically minded enough to	23	
24	MR SMITH: Mine happens to be residing in Cambridge at the	24	
25	moment.	25	
	17		19

1 MR HOSKINS: So you will want a new one?

2 MR SMITH: If possible.

3 MR JUSTICE BARLING: The new ones might be easier, you can

4 have them all back at the end.

If we have any steer to give you on any particular issue that we would like help on, we might just send you something through. Other than that, we hope to see you

on the 11th and hear from you a little bit before that.

9 MR BREALEY: Thank you very much indeed.

10 MR HOSKINS: Thank you.

11 (11.03 am)

12 (End of open session)

13 (The court adjourned until 10.30 am

on Friday 11th March 2016)

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