

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1241/5/7/15

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

14 December 2015

Before:

**THE HONOURABLE MR. JUSTICE BARLING**  
(Chairman)  
**MARCUS SMITH QC**  
**PROFESSOR BEATH OBE**

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**SAINSBURY'S SUPERMARKETS LTD**

Claimant

- and -

**(1) MASTERCARD INCORPORATED**  
**(2) MASTERCARD INTERNATIONAL INCORPORATED**  
**(3) MASTERCARD EUROPE S.P.R.L.**

Defendants

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**CASE MANAGEMENT CONFERENCE**  
**(Pre-Trial Review)**

## **APPEARANCES**

Mr. Mark Brealey QC and Mr. Derek Spitz (instructed by Mdr) appeared for the Claimant.

Mr. Mark Hoskins QC, Mr. Matthew Cook and Mr. Hugo Leith (instructed by Jones Day Solicitors) appeared for the Defendants.

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1 THE CHAIRMAN: Good morning everyone. Here we are at long last.

2 MR. BREALEY: As you, know, Sir, I appear with Mr. Spitz; Mr. Hoskins appears with Mr.  
3 Cook, and Mr. Leith. We shall have Miss Love here later.  
4 I do not know whether it is appropriate to go through the agenda, or whether----

5 THE CHAIRMAN: We thought the timetabling was quite an important matter, just to make sure  
6 we all know where we are on that. We have a few things to float with you and tell you about  
7 on the timetable. Confidentiality, I do not know how long that is going to detain us, I notice  
8 there is some possible issue about the OFT and the Commission and disclosure documents. I  
9 dare say Mr. Hoskins will deal with that in due course, so I am not sure confidentiality is  
10 going to take too long.

11 MR. BREALEY: No.

12 THE CHAIRMAN: And then there are just some little bits and pieces really that I just wanted to  
13 float, some loose ends, with you both. So shall we try and do timetable first?

14 MR. BREALEY: There is a timetable attached to our skeleton.

15 THE CHAIRMAN: We looked at that and it all, if I may say so, seemed perfectly sensible, but  
16 obviously there are one or two problems we have on particular days----

17 MR. BREALEY: Of course.

18 THE CHAIRMAN: --that we ought to just raise with you. I do not think we have any particular  
19 issues at this stage – I note you have a non-sitting day that you are hoping for on the 29<sup>th</sup>, I  
20 do not think there is any issue on that.  
21 The first thing I want to mention is 11<sup>th</sup> February when Professor Beath has a problem in the  
22 morning – have I got that the right way round?

23 PROFESSOR BEATH: That is right, yes.

24 THE CHAIRMAN: There is still a possibility that it will not be a problem, but if it was a  
25 problem it would only be a problem for the morning.

26 MR. BREALEY: That is perfectly do-able because we have that last Friday.

27 THE CHAIRMAN: We have the Friday already posted as a non-sitting day so if there were  
28 catching up.  
29 The other matters I need to flag up with you are the following week. By a happy  
30 coincidence you have suggested a non-sitting day on the 15<sup>th</sup>, subject to witness evidence  
31 running over. Mr. Smith has a problem, which may go away on those first three days on  
32 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup>. So the 15<sup>th</sup> we can leave out of account, but there could be a problem on  
33 the other two days, although as I said it might go away. It probably will be a problem on at

1 least one of those days – I think that is right, is it not – but possibly more. That is possibly  
2 our biggest potential issue.

3 What I can say by way of compensation, as it were, is at the moment the week of the 14<sup>th</sup>  
4 might be available if we needed extra time.

5 MR. BREALEY: I just do not know at the moment but the seven days for me to cross-examine –  
6 actually, no, it would be----

7 THE CHAIRMAN: Starting on the 15<sup>th</sup>, do you mean?

8 MR. BREALEY: It may well be that Mr. Hoskins would go into the week beginning 22<sup>nd</sup>, and I  
9 might go into the week beginning 29<sup>th</sup>. It may well be that we do not need the week of the  
10 14<sup>th</sup> and it all sorts itself out.

11 THE CHAIRMAN: We have, at the moment, a week of non-sitting----

12 MR. BREALEY: Correct, yes.

13 THE CHAIRMAN: --on the 29<sup>th</sup>, so I have a feeling that it ought to be workable.

14 MR. BREALEY: Mr. Hoskins and I tried to do this so there was some flexibility.

15 THE CHAIRMAN: Yes – if I may say so, it is very sensible in timing terms, as far as one can  
16 ever predict at this stage, but if you just bear it in mind at this stage – we will let you know  
17 as soon as possible about the 16<sup>th</sup> and 17<sup>th</sup> February. I am presuming you have your own  
18 reasons for wanting the 15<sup>th</sup> free in any event.

19 MR. BREALEY: To be fair, I have absolutely no idea why it is free! (Laughter)

20 MR. HOSKINS: I thought it came from the Tribunal actually because it was on the first list we  
21 saw.

22 THE CHAIRMAN: Was it? I do not know. It may be, anyway.

23 MR. BREALEY: We can shade the afternoon of the 11<sup>th</sup>.

24 THE CHAIRMAN: If you would.

25 MR. BREALEY: And probably shade 16<sup>th</sup> and 17<sup>th</sup>.

26 THE CHAIRMAN: Shade the morning of the 11<sup>th</sup> – if by "shading" you mean taking it out,  
27 potentially. I think you will have to, probably. That is all we have on timetable. That is  
28 often the most intractable.

29 MR. BREALEY: On item 2, the confidential treatment, as you will probably have seen, Sir, we  
30 have an application in tab 2, MasterCard have an application in tab 3. As I have indicated  
31 there is potentially agreement, so MasterCard are quite receptive to Sainsbury's pricing  
32 information and its investment being kept private, because there will undoubtedly be in the  
33 public gallery quite a few competitors.

1 THE CHAIRMAN: I think you are pushing at an open door as far as the two categories of  
2 documents that you are concerned about.

3 MR. BREALEY: Likewise, there are four categories in MasterCard, and that is at tab 3, 6.2, and  
4 you can see this at para. 6. The first three: "The Information relating to MasterCard's  
5 internal interchange fee setting process". basically the cost studies that go behind the  
6 interchange, and then over the page MasterCard's assessment of how to operate in a low  
7 interchange environment. We are agreeable to that. It seems sensible as it seems to be  
8 fairly sensitive and private to MasterCard.

9 We have just questioned the category at 6.4, and I have explained this to Mr. Hoskins and it  
10 is essentially this: a lot of the cross-examination of the MasterCard's witnesses will be by  
11 reference to the Commission and OFT documents. Essentially we are on pass-on and they  
12 are on liabilities. They are on objective justification, exemption, restriction of competition,  
13 and a lot of material that I want to use will be in those documents. If we are going to have a  
14 blanket confidentiality sensitive private hearing by reference to those documents, a lot of  
15 this seven weeks will be in private. What I was hoping that MasterCard would do would be  
16 to identify those Commission documents, those OFT documents, which were sensitive for  
17 reasons in addition to the first three, but not just because we gave them to the European  
18 Commission. Sir, I will leave it to Mr. Hoskins to explain, but clearly if we are going to  
19 have just everything that we gave to the Commission is confidential and has to be only  
20 referred to in private, then we will be sitting in private to some considerable extent.

21 THE CHAIRMAN: Just remind me, Mr. Brealey, because I get a bit hazy and confused at all the  
22 different cases, but as far as these documents are concerned, everything went more or less  
23 into the confidentiality ring?

24 MR. BREALEY: It did, yes.

25 THE CHAIRMAN: To save having to argue, basically, about the kind of issue that we might be  
26 talking about now, as to whether they really are confidential.

27 MR. BREALEY: The big argument almost a year ago today was about whether they should be  
28 disclosed to us at all. We succeeded in getting many of those disclosed to us, but they were  
29 put into a confidentiality ring.

30 THE CHAIRMAN: Am I right in thinking that most of the disclosure in this case has gone into  
31 the----

32 MR. BREALEY: I think nearly everything.

33 THE CHAIRMAN: I was going to say, I think virtually everything at this stage is in the  
34 confidentiality ring.

1 MR. BREALEY: Yes. In order to open the door of it for a public hearing----

2 THE CHAIRMAN: Obviously we cannot go into a private hearing if something is just not  
3 needed to be protected.

4 MR. BREALEY: Precisely. So submissions, a reply to a statement of objections that happened  
5 ten years ago, is that really----

6 THE CHAIRMAN: How practical is it now to determine this at this stage, rather than when you  
7 are about to move on to ask questions about particular documents? We could look at heads  
8 of confidentiality.

9 MR. BREALEY: We were hoping that maybe MasterCard would have a look at the documents  
10 that it has disclosed to us on the condition file, the OFT file, and could indicate to us which  
11 documents they would want to keep private.

12 THE CHAIRMAN: We do need some reasons if we are going to do that. I think we are all  
13 perfectly content with items 1 to 3, but obviously some of this might be completely  
14 innocuous, and also old, as it were, in terms of history, that it is going to be of no use to  
15 anyone from the competitive point of view.

16 MR. BREALEY: That is where we were coming from.

17 THE CHAIRMAN: Obviously, one is trying not to make people engage in unnecessary labour.

18 MR. BREALEY: This point, to a certain extent, feeds into the trial bundles that we come on to,  
19 whereas hopefully by tomorrow we will get a list from MasterCard as to what they want to  
20 be put into a trial bundle, because at the moment we do not know.

21 THE CHAIRMAN: It could be a trial bundle but confidential, could it not?

22 MR. BREALEY: That is right, so this is the list, and this is what we regard as confidential.

23 THE CHAIRMAN: Is it worthwhile hearing what Mr. Hoskins has got to say about this  
24 particular category?

25 MR. HOSKINS: I think we are on the same page, because clearly we want to sort confidentiality  
26 in advance of the trial. Cross-examining is hard enough without trying to figure out what is  
27 confidential and what is not.

28 THE CHAIRMAN: Yes.

29 MR. HOSKINS: We are quite happy to re-review the fourth category, and go through it. The  
30 only question is it does leak into the trial bundle issue. Let me explain why, because you  
31 talked about labour. There is a lot of paper in this case. If you have got our skeleton  
32 argument for today, para.7, we have tried to suggest a way through this. First of all, factual  
33 and expert evidence, i.e. the actual witness statements and expert reports, you have seen that  
34 a lot of them are just simply printed on blue or yellow paper, the whole thing, and it seems

1 to us that those should be gone through so that the actual parts of those statements and  
2 reports which are confidential should be marked up in the usual way with square brackets or  
3 sidelining, or whatever, so that we have not got sets of everything which are basically all  
4 confidential. That is the first suggestion we have gone, which would be the normal course.

5 THE CHAIRMAN: Yes.

6 MR. HOSKINS: In relation to the documents, there are an awful lot of documents. What we  
7 would like to see happen is that there is a core bundle agreed. I am not sure it is 50, but we  
8 have had numbers of 50 to 80 lever arch files, It is pointless in terms of time and money for  
9 someone to go through that looking for confidentiality issues and trying to bring stuff out.  
10 What should happen is that the parties should agree a core bundle, and that will hopefully  
11 be somewhere between ten and 20 lever arch files, even as a core bundle. It might be  
12 possible to bring it down again.

13 THE CHAIRMAN: We would hope it would be, the real core bundle would be fewer than that.

14 MR. HOSKINS: I have said the most I can physically cope with is about 20 lever arch files, so  
15 anything more is, I think, hopeless.

16 THE CHAIRMAN: We have been told there were about 80.

17 MR. HOSKINS: Those are the figures I have been given.

18 THE CHAIRMAN: If we put the exhibits in, but we will come on to dealing with whether we  
19 really want copies of that. We will come on to the logistics of that in a moment, because we  
20 do not everyone to have copies of that.

21 MR. HOSKINS: What I am talking about is trying to distil into hard copies. I agree with you, it  
22 may well be less, but I think at the first stage we have got to try and get the 50 or 80,  
23 whatever this electronic figure is, down to ten or 20, and then people can take a view. We  
24 have been pushing to try and get some traction of what would be in the core bundle. We  
25 have done an exercise where we have gone through and tried to identify what we would  
26 want to go in. I am slightly alarmed, because I would have hoped Sainsbury's would have  
27 done the same.

28 THE CHAIRMAN: Probably they have.

29 MR. HOSKINS: It has to move, it has to get done. So we are happy to say, "Here's a list of what  
30 we want in", but Sainsbury's are going to have to do some work on this as well. Then, once  
31 we have exchanged the lists, we will get a sense of where we are in terms of the amount of  
32 paper. At that stage, if there is a reasonable amount, it may be that that is the stage to go  
33 through and do the redaction process.

34 THE CHAIRMAN: Time is getting a bit short for this?

1 MR. HOSKINS: It is, I agree.

2 THE CHAIRMAN: I was hoping that quite a lot of this would already have been looked at. Yes,  
3 of course, what you say is perfectly sensible. If we, for some reason, delved into  
4 something, or a witness referred to something that had not already been dealt with in the  
5 core, as to whether it was redacted or not, we would all have to check. I do not know  
6 whether the Livenote system that you are planning will be able to do that.

7 MR. HOSKINS: We could put a timetable on this.

8 THE CHAIRMAN: We will talk about that in a moment.

9 MR. HOSKINS: Absolutely.

10 MR. SMITH: Mr. Hoskins, did I understand it right, that you are providing a list of what you  
11 want to go into the trial bundles by way of documents, not the slimmed down ones, but the  
12 complete ones, tomorrow?

13 MR. HOSKINS: We have been pushing to try and move this forward, and what one of our  
14 solicitors said in a conversation on Friday was that we had done an exercise to try and distil  
15 things down into what we wanted. I was hoping and expecting something more formal  
16 from Sainsbury's than simply "Send us your list", because I would quite like to know that  
17 they are doing the same. If that moves things forward, we will distil the list.

18 THE CHAIRMAN: The answer is that you both need to exchange lists and see what is common  
19 and then work from there.

20 MR. SMITH: In terms of your list, Mr. Hoskins, would you be able to indicate not simply what  
21 you want on there, but those documents which you would regard as confidential?

22 MR. HOSKINS: As confidential?

23 MR. SMITH: Yes, so you could highlight----

24 MR. HOSKINS: That has not been done.

25 MR. SMITH: That has not been done – how quickly could you do that?

26 MR. HOSKINS: I would need to take instructions on that. (After a pause) Within a week we  
27 could do a document based analysis. I would rather say we would try and do it in a granular  
28 way, because the whole point of this is to narrow the number of documents, since now the  
29 confidentiality is on the face of the documents. I am happy to hold our feet to the fire but  
30 please do not necessarily burn us if we do our best----

31 THE CHAIRMAN: Under the rules, normally the claimants – you should send them a list, should  
32 you not, of what is going in the trial bundle? I cannot remember now, I thought it was the  
33 claimants who normally did that.



1 MR. HOSKINS: There is so much paper here, I think it make sense for us to do it together. I am  
2 not trying to point score, I just need to get----

3 THE CHAIRMAN: Have you got what you wanted? Have you got a draft list of your own, as it  
4 were for these things?

5 MR. BREALEY: My draft list was all the documents that are referred to by the witnesses.

6 THE CHAIRMAN: Is there a list of all that so that you can just say: "There it is".

7 MR. BREALEY: There is a list.

8 THE CHAIRMAN: You have a list as well, Mr. Hoskins, you have your list.

9 MR. HOSKINS: If Mr. Brealey's list is everything referred to in the witness statements and  
10 expert reports, I think you are into scores of bundles. He will correct me if I am wrong. I  
11 am a bit concerned because our list is not that, we have gone through the documents and  
12 picked out lists of individual documents, and with respect I think that is what we need.

13 THE CHAIRMAN: It sounds as if what they have done is a trial bundle list so we know what  
14 could be necessary for a trial bundle, and your list sounds as though it might be a core  
15 bundle.

16 MR. BREALEY: Yes.

17 THE CHAIRMAN: So you may have helped each other there, but we had better say we need  
18 both, do we not? You need to agree a core bundle, but equally you need to have some outer  
19 perimeters of a trial bundle.

20 MR. BREALEY: That is exactly the point. I am cross-examining various people in February,  
21 and hopefully I will be working on the case in January and February and I may be coming  
22 up to a document actually I want them to refer to. I do not want to say "I do not want to  
23 refer to it" now. So, really, everything that they have relied on is potentially relevant.

24 THE CHAIRMAN: Is potentially for the trial bundle.

25 MR. BREALEY: Yes.

26 THE CHAIRMAN: That makes perfect sense.

27 MR. HOSKINS: But not the core bundle.

28 THE CHAIRMAN: Not the core bundle, no. If it is a big document that is only going to be  
29 referred to once for some oblique answer of an expert, you obviously do not want it in the  
30 core bundle.

31 MR. BREALEY: We were supposed to lodge the trial bundles on 23<sup>rd</sup> December I think.

32 THE CHAIRMAN: Yes.

33 MR. BREALEY: If that could be put back to 30<sup>th</sup> or 31<sup>st</sup>, whenever the Thursday is, we could  
34 spend this week exchanging lists on the core bundle.

1 THE CHAIRMAN: We will put you on some timetable for that. What about extending the time  
2 for the trial bundle? I would rather it were done properly. Quite frankly, the reading I do  
3 before, between now and 31<sup>st</sup> is not going to matter whether I have got the things that were  
4 kindly supplied to me in advance to look at, so that is not a problem as far as I am  
5 concerned, not getting it before 31<sup>st</sup>.

6 MR. HOSKINS: I am sure the trial bundle matters, Sir, because there are 50 to 80 lever arch files  
7 I am not sure that any of us are going to be dipping into that before Christmas and New  
8 Year, it is the core bundle that is absolutely essential and as quickly as possible. Now, if that  
9 means you take a bit more time to get that done faster, I want to be able to sit down ASAP  
10 with the core bundle to prepare the case properly, and I am sure you feel exactly the same.

11 PROFESSOR BEATH: The thing I would want to see as early as possible is what are going to be  
12 the crucial documents that I have to get on top of.

13 MR. BREALEY: Sometimes a core bundle, or a trial bundle is chronological, it just goes from  
14 2002. I think that is the right way to do this, for example, there are eight or nine lever arch  
15 files which contain all the regulatory documents, all the Commission documents, and that  
16 you can see just flows logically. So if you split those up and put them in different bundles,  
17 it does not----

18 THE CHAIRMAN: To take an example, what will be in the core bundle? Probably just the  
19 Decision, is it not? That may be an authority, I do not know, but how much do you want of  
20 those documents? If you do it schematically, as long as you agree it, as long as the scheme  
21 works for both of you and works for us.

22 MR. BREALEY: Yes.

23 THE CHAIRMAN: The trial bundle we all agree is something that can wait, at least certainly to  
24 be prepared, and you have probably got a list of it already----

25 MR. BREALEY: We have, yes.

26 THE CHAIRMAN: --which will be probably more or less what their list would be, because  
27 everything is referred to. Let us not worry about that, let us get the core. The first step  
28 would be that you should agree a core bundle. It should be done now, really, within the  
29 next few days. Really, the teams want to go home at Christmas knowing what they have.

30 MR. SMITH: Mr. Hoskins, you can provide your list of what you think should go in almost  
31 immediately?

32 MR. HOSKINS: We can do it tomorrow.

33 MR. SMITH: Why do you not do it tomorrow, and then give Mr. Brealey a certain amount of  
34 time to suggest augmentations to it, and you can use that time to identify the bits in your list

1 that you regard as confidential, and then you will simply have to go through the additions  
2 that Mr. Brealey's team have and see whether the confidentiality issue arises in relation to  
3 those. With a bit of luck before Christmas we would have both an agreed list and, at least  
4 on a document basis, an identification of those areas where Mr. Brealey will have to tread  
5 carefully.

6 MR. HOSKINS: I am happy with that.

7 THE CHAIRMAN: So shall we put some times on this then, and I think it would be helpful to  
8 everyone if it is an order. I think that is a very good idea. So you supply your list by, what,  
9 close of play today?

10 MR. HOSKINS: Tomorrow. The way we have done it, thematically, if you like, is we have a list  
11 which goes to infringement, which includes exemption. We have a list that goes to pass-  
12 through and we have a list that goes to exemplary damages, and we have a list that goes to  
13 compound interest. If you like, rather than giving a great mass----

14 THE CHAIRMAN: I think that would be very sensible.

15 MR. HOSKINS: --we could put them under those headings and that might start----

16 THE CHAIRMAN: That might be what Mr. Brealey had in mind when he said he did not  
17 necessarily want it chronologically. You will do that by what – 4 o'clock tomorrow?

18 MR. HOSKINS: Yes.

19 THE CHAIRMAN: So you will supply a list of proposed documents for a core bundle?

20 MR. HOSKINS: Under subject headings. We do not have a list for exemplary damages, but we  
21 will do it under the headings we have.

22 THE CHAIRMAN: Such as you have it now, you will supply it by 4 pm tomorrow. Then how  
23 long will you need to add to it, or criticise it? It is more likely to be adding than criticising.

24 MR. BREALEY: Probably 4 pm on Wednesday.

25 THE CHAIRMAN: Can you do it by then?

26 MR. BREALEY: I will just look round! (Laughter)

27 THE CHAIRMAN: Double check because that is just a day.

28 MR. BREALEY: (After a pause) Yes.

29 THE CHAIRMAN: Right, by 4 pm you will supply an amended list. Let us not get into  
30 arguments at this stage, if they want a document in it at the moment let us just add to it and  
31 not argue about it. That is core. Then shall we give you time to consider – you can create  
32 that then, can you not? Is there any reason why that core bundle cannot be created at least  
33 as an initial one? We are now up to Wednesday. How will you create it? Will you create it  
34 electronically initially, or will you put together a hard copy as a prototype?

1 MR. BREALEY: They take it off Relativity, which is a bit of cumbersome software – I am sorry  
2 – and then they will put hard copies.

3 THE CHAIRMAN: So they need to be put together – by the end of the week? Is that okay? Can  
4 it be done? I think this is for you, is it not, your side will do that?

5 MR. BREALEY: Yes.

6 THE CHAIRMAN: The claimants, so it will be put together and created, whether it is  
7 electronically or hard copy or both, and supplied to the other side by – close of play on  
8 Friday?

9 MR. BREALEY: 4 pm Friday, but if they need the weekend because of how many copies----

10 THE CHAIRMAN: Let us say 4 pm on Friday because it may be that it can be done by then – the  
11 sooner the better really----

12 MR. BREALEY: Yes.

13 THE CHAIRMAN: --because it is the end of term and people's availability will lessen once we  
14 get beyond Friday, will it not? Then thereafter the trial bundle, we need to do a list for that,  
15 do we not, the outer perimeters of the trial bundle – so shall we have the same process then?  
16 You have your list already of that, have you not? Is there any reason why that cannot be  
17 supplied this week just to the other side?

18 MR. BREALEY: Yes, absolutely.

19 THE CHAIRMAN: Then you could comment on that – that is going to be a much longer list  
20 presumably?

21 MR. BREALEY: It is all the documents that they refer to so they can just go through their----

22 THE CHAIRMAN: And make sure you have not missed any basically, or that they want in  
23 addition. When can you do that by, Mr. Hoskins, if they supply that to you by 4 pm,  
24 tomorrow when you get theirs?

25 MR. HOSKINS: I think as long as it comes with an explanation of what is on the list, because  
26 this is not going through reviewing individual documents, it is just putting all exhibits,  
27 whatever in. So if they give us a clear description of what they have done I doubt we are  
28 going to go through and check they have every one right, it is just to see that the categories  
29 are right.

30 THE CHAIRMAN: I think it is as well to have a physical list.

31 MR. HOSKINS: That should not take long. All I am saying is as long as they tell us how they  
32 have done the list.

1 MR. BREALEY: The list is just referring to the exhibits they have referred to in the witness  
2 statements and the experts, but, Sir, you may have picked up a lot of the witnesses and  
3 experts refer to documents in footnotes, which are not exhibited.

4 THE CHAIRMAN: Are they in your list?

5 MR. BREALEY: They will be in the list.

6 MR. HOSKINS: If that is the description, and there is a covering letter saying: "Here's our list,  
7 this is what we've done" it is not going to take us long to look at the categories, because we  
8 are not going to go through and see----

9 THE CHAIRMAN: Yes, but I think you had better do this sensibly, so when will you respond  
10 with an amended version of it?

11 MR. HOSKINS: Let us do the same timetable.

12 THE CHAIRMAN: Yes, Wednesday?

13 MR. HOSKINS: Otherwise we will spill into the next week.

14 THE CHAIRMAN: Can we do that? Yes, okay, close of play Wednesday for that. It is a bigger  
15 list though, do you want a bit longer?

16 MR. HOSKINS: Maybe we are at cross purposes, because what I am trying to say is I do not  
17 think it is going to be worth my solicitors going through line by line on the list, ticking off  
18 that they have correctly got all the exhibits. That is all I am saying. If they say to us: "We  
19 have listed all the exhibits, and we have listed all the documents that are referred to in  
20 witness statements or expert reports, which are not formally exhibited, that is all we need to  
21 check, is it not, with the list?

22 THE CHAIRMAN: With your additions.

23 MR. HOSKINS: Which is why I am saying 24 hours should be fine, as long as you are not  
24 expecting us to go through the list line by line.

25 THE CHAIRMAN: It is up to you what you do.

26 MR. HOSKINS: I am trying to make everyone's life easier, so let us do the 24 hours agree the  
27 categories.

28 THE CHAIRMAN: All right. We will end up then with, by Wednesday, two lists, a big one and  
29 a smaller one.

30 MR. SMITH: Just to raise the question of how the paper files will interact with any trial  
31 management system the parties intended to use, I had understood, but you will correct me if  
32 I am wrong, that you are planning to use some form of electronic system for the  
33 presentation of documents?

1 MR. BREALEY: Certainly that is not agreed at the moment. I know it was in MasterCard's  
2 skeleton, but we were not aware that we had agreed to that. One of the reasons we had not  
3 agreed to it is because of the cost. There are quite a lot of documents in hard copy and the  
4 Magnum is a very, very costly exercise. We wanted to see how many bundles there were,  
5 whether Magnum was going to be cost effective. We would suggest that MasterCard, if  
6 Magnum was going to be used, would pay 50 per cent of it. That is to benefit of both  
7 parties.

8 THE CHAIRMAN: Fifty per cent, as it were, up-front and then adjustments for winners and  
9 losers at the end of the day?

10 MR. BREALEY: Absolutely, yes. That means that Sainsbury's does not bear the cost of all the  
11 hard copies and----

12 THE CHAIRMAN: You would not have to put everything in. I suppose you could just put in the  
13 core documents, could you not? Is that something that could be done?

14 MR. BREALEY: I had not really appreciated that you cannot put all the disclosure on Magnum  
15 because that runs into many, many millions of pounds. You could put electronically what is  
16 in the core bundle. Again, it is a costly exercise. Someone has to be, as the Tribunal  
17 knows, there to take the witness through, if necessary. Hopefully, the witness might have  
18 hard copies. There has to be someone in court each day from Magnum.

19 MR. HOSKINS: Can I make a suggestion? Forget the trial bundle, let us have a core bundle, and  
20 let us have it on paper. If anyone has got an extra document that is not in the core bundle  
21 they want to refer to, bring a hard copy and we will stick it in the core bundle. I do not see  
22 any point in photocopying ten times someone's background, or spending a lot of money  
23 having every bit of paper that is available electronically coded and available. Let us just  
24 have a paper core bundle.

25 THE CHAIRMAN: Sorry, I am not understanding you. Are you now suggesting that you do not  
26 want one of these Livenote systems?

27 MR. HOSKINS: I think the suggestion was, because in the universe there are 50 to 80 lever arch  
28 files of documents - my main concern, as I think has become fairly obvious, is that I would  
29 like a manageable core bundle in hard copy.

30 THE CHAIRMAN: You are all agreed on that.

31 MR. HOSKINS: Exactly, so the question is, do we need something else for all the other  
32 documents?

33 THE CHAIRMAN: I did not think that was the question.

34 MR. HOSKINS: We are cross-purposes, you will need to----

1 THE CHAIRMAN: I thought we were talking about transcript systems at the moment, rather than  
2 bundles.

3 MR. HOSKINS: Mr. Brealey was talking about putting all the documents on to an electronic  
4 system.

5 MR. BREALEY: It is my fault. I think everybody is agreed that there should be Livenote.  
6 Magnum is where everything is on your computer and you can take it home. Everyone is  
7 agreed that we should have Livenote.

8 THE CHAIRMAN: We are cross-purposes. We will come back to your question.

9 MR. SMITH: Let us start with the way the paper is going to work. As I understand it, you will  
10 have, importantly, an agreed list of trial bundles simply because Mr. Brealey needs his room  
11 for manoeuvre. If he sees, when he is preparing his cross-examination, there is a document  
12 he wants to refer to, there is agreed reference, everyone knows where it is. It is not  
13 necessarily in our room, but you know where it is. You can say, "I want to be putting this  
14 document to the witness", or you produce it and then it can be slotted into the core files if it  
15 is used. We do not need to be particularly troubled with the trial bundles, which is perfect.  
16 That suits us very well, I think.

17 Going on though, in terms of core files, which are going to be voluminous if it starts at 20  
18 files which is not an insubstantial amount, plus pleadings, witness statements, and so on, it  
19 would assist logistically for us to know whether we are going to be working on paper based  
20 versions or whether there will be an electronic system. If it is paper based, that is absolutely  
21 fine, but we will need rather more copies than would otherwise be the case. If it is going to  
22 be on a trial management system then we may be able to get away with one, or perhaps a  
23 few copies, whereas, given the number of members of the Tribunal and the fact that we  
24 work in different places, if it is entirely paper then you will have to scale your provision  
25 accordingly. At the end of the day, it is the parties' call as to how they choose to do it.

26 MR. BREALEY: The answer to that is that we have given some considerable thought to this. At  
27 the moment we are on the paper, not electronic, because paper plus electronic is extremely  
28 expensive. As I say, if we could find a way where MasterCard paid 50 per cent of the cost -  
29 Magnum is the system that we are talking about - then it starts to become more cost  
30 effective, and it can all be sorted out at the end of the trial.

31 THE CHAIRMAN: So you are agreed that you are going to use Magnum?

32 MR. BREALEY: No, we are agreed that we are going to use paper.

33 THE CHAIRMAN: I thought you were agreed about Livenote.

1 MR. BREALEY: There are two. There is a distinction between Livenote and Magnum. Livenote  
2 is essentially when you are speaking----

3 THE CHAIRMAN: And you get a transcript.

4 MR. BREALEY: You get a transcript.

5 THE CHAIRMAN: That is one thing I would like to be sure of, we are going to get a transcript in  
6 hard copy as well?

7 MR. BREALEY: In hard copy by 5 pm, or whatever, with whatever people have said.

8 THE CHAIRMAN: That is agreed and a given?

9 MR. BREALEY: Yes.

10 THE CHAIRMAN: The only question then is whether you want an upgrade of the electronic  
11 system, with all the cross-referencing and everything that Magnum does?

12 MR. BREALEY: Precisely, and that is extremely expensive. I think under the rules it is at the  
13 parties' option. The normal rule is that it would be paper. We are flexible, but we do not to  
14 be so flexible that we are going to end up paying for everything.

15 THE CHAIRMAN: You do not want to do that - is that the position? You do not want to share  
16 the costs of this?

17 MR. HOSKINS: I just want paper. I want the minimum number of core bundles on paper.

18 THE CHAIRMAN: We are happy with paper. We do not need the full Magnum Opus, or  
19 whatever the expression is! I think it probably means that each of us will need a core  
20 bundle.

21 MR. BREALEY: Of course.

22 THE CHAIRMAN: We certainly are not going to need - I will probably get into trouble with the  
23 Registrar, but speaking for myself, I think we would be happy to have one copy of a trial  
24 bundle that we could keep for the Tribunal, and then, if there was a reference to a document,  
25 we could access a copy of it. Is that going to cause problems? (After a pause) I think we  
26 could live with one copy of the trial bundle, which hopefully will not break the bank or the  
27 many thousands of banks.

28 MR. BREALEY: Sainsbury's Bank.

29 THE CHAIRMAN: In terms of the number of core bundles, it will not just be the three of us.  
30 There will obviously need to be one for Référéndaire, and so on, so probably five copies.

31 MR. HOSKINS: Can I throw a potential spanner in the works? What if the core bundle is too  
32 big? What if we do this exercise and we get to Friday and there are 30 lever arch files?

33 THE CHAIRMAN: I think you should agree then a core of the core bundle. Let us take an  
34 example----



1 MR. HOSKINS: I completely agree, that is why I raised it. Do you want to hold our feet to the  
2 fire on that?

3 THE CHAIRMAN: If one of you thinks that the core bundle is too big - I am trying to avoid  
4 having to come back to us to try and resolve it, so can we put in the order that if someone  
5 objects to the size of the trial bundle they shall, within such a period, suggest a shorter  
6 version, and then exchange lists in this way, in trying to come up with a shorter version.  
7 The very core is presumably the pleadings, the witness statements, and other----

8 MR. HOSKINS: It is going to be the other documents that are going to be the problem. The  
9 point is that it becomes easier to narrow it down the closer we get to the start of the trial  
10 because cross-examination is getting narrower. Giving nothing away, neither Mr. Brealey  
11 nor I have finished preparing our cross-examination at this stage.

12 THE CHAIRMAN: When are we going to ask you to deliver the core bundles? Have we got that  
13 in the order at the moment? We have extended it to the 31<sup>st</sup>, have we not? That means all  
14 the bundles, does it not, effectively? It means our core bundles plus the single version. We  
15 are not too fussed about the single version probably.

16 MR. BREALEY: That is right.

17 THE CHAIRMAN: If we could have the single version by the time that the time for reading  
18 starts, probably the Friday before, the 8<sup>th</sup> or whatever it is. If we could have delivered to the  
19 Tribunal the single copy of the full trial bundle and the core bundles.

20 PROFESSOR BEATH: For the two reading weeks, I shall be reading in a rural location in  
21 Scotland, so I would want to be sure that the critical documents were in a box in my office  
22 at home. I do not want to be having to come to London.

23 MR. HOSKINS: That is why I am trying to narrow it down.

24 PROFESSOR BEATH: I want what you think I absolutely essentially ought to be on top of  
25 before we meet on 25<sup>th</sup> January.

26 THE CHAIRMAN: Realistically, you are probably going to have to have couriered the core  
27 bundle. If you can try and make the core as small as possible, and if you can both----

28 MR. HOSKINS: I think we might need to revisit this. We will produce whatever the core is  
29 looking like by the 18<sup>th</sup>, which is this Friday, and all I am encouraging everyone to do is to  
30 say if we can whittle it down thereafter we should do, but we need to try and do it by the 8<sup>th</sup>,  
31 ideally, but at the very least so that you have a reading list saying this is the essential  
32 reading, and perhaps even hard copies of that for you to take with you.

33 PROFESSOR BEATH: That would be particularly helpful.

1 MR. HOSKINS: So either a manageable core bundle or a reading list, including documents, and a  
2 hard copy of that. I do not want to produce too many bundles, but you need something  
3 manageable to take with you.

4 MR. SMITH: Without in any way revisiting the Magnum issue, it is possible, I believe, to export  
5 on to a hard disk the images of the documents that form the paper bundles, and I wonder if  
6 it would be possible, as long as the cost implications are negligible, for that to be provided?  
7 I, at least, would find that quite helpful, working, as I do, from rather multiple locations. I  
8 do not particularly like the idea of schlepping 20 or 30 files back to Cambridge for me to  
9 work overnight on.

10 MR. BREALEY: It can be put on a hard disk.

11 MR. SMITH: If I could have it on a hard disk on my computer that would be helpful. I am very  
12 easy as to whether it is a memory stick or a DVD. However it is done, I can then put it on  
13 my machine and treat it as electronic paper bundles. I am very grateful.

14 THE CHAIRMAN: Obviously we would all appreciate having one of those. If there is going to  
15 be one you can probably do one for all of us. Shall we say we have all that by the 8<sup>th</sup>? We  
16 do not need it before the 8<sup>th</sup>. So the single one and the core bundle by the 8<sup>th</sup>. I think  
17 everything by the 8<sup>th</sup>, if it helps. I cannot remember when the skeletons are due?

18 MR. BREALEY: The 7<sup>th</sup>.

19 THE CHAIRMAN: That probably makes good sense, does it not? (After a pause) Sorry, we have  
20 slightly side-tracked ourselves when we were dealing with your other category, the fourth  
21 category, did we not? Did we make it part of the order that you were going to have an  
22 exercise?

23 MR. BREALEY: Yes.

24 THE CHAIRMAN: It clearly should be.

25 MR. HOSKINS: I think both sides have to do an exercise, because the witness statements----

26 THE CHAIRMAN: At the moment we are dealing with your fourth category, are we not?

27 MR. HOSKINS: But my point is this confidentiality exercise of marking up is to be done by  
28 both sides.

29 THE CHAIRMAN: Yes.

30 MR. HOSKINS: So we have an extra "bit" in a sense that we have to review to what extent  
31 category 4 has a free-standing life, because clearly documents falling in categories 1, 2 and  
32 3 it is agreed they should be protected, and that is easy. So it is just where there is any  
33 residual documents in category 4 they would claim any confidentiality for. But what has to  
34 be done is the witness statements, expert reports have to be marked up with the confidential

1 passages, and the documents in the core bundle need to be marked up for confidentiality.  
2 Our exercise that you talk about, yes, we have this extra bit, but in the grand scheme of  
3 things it is probably quite small compared to the exercise of making sure everything else is  
4 in order.

5 THE CHAIRMAN: I do not know, it may be, but that is the bit we are on at the moment, though,  
6 the categories, and the marking-up is something I think everyone accepts has to be done, so  
7 we do not have any issue on that, do we? Do you want to put a time on for that? It is  
8 something that you each will be doing in relation to all the documents, is it not, because the  
9 witness statements, for example, you are going to want to mark-up theirs as well as your  
10 own, and vice-versa. None of that has been done, yet, has it?

11 MR. HOSKINS: Not in a refined way, that is why you have simply got yellow pages and blue  
12 pages, and everything is yellow and blue. There will be then a difficult question which is to  
13 what extent can we run the hearing in public and private, but until we have done this  
14 redaction exercise it is very difficult to know in advance----

15 THE CHAIRMAN: (After a pause) I think it is more an issue for you. I have already, because  
16 you were kind enough to supply copies of the witness statements and so on, my colleagues  
17 have not. I do not know whether they want them – they may not until----

18 PROFESSOR BEATH: It is rather crucial that we have plenty of time to assess the experts so  
19 that I can carry out my own analysis of it.

20 THE CHAIRMAN: You have very kindly provided me with a box of material----

21 MR. BREALEY: I am sure we can do the same.

22 THE CHAIRMAN: It is only a fairly small compass, it is basically the witness evidence, the  
23 expert. Would you like to have them?

24 PROFESSOR BEATH: Certainly for the economic and financial evidence.

25 THE CHAIRMAN: It is possible without breaking people's backs to produce those – I think it  
26 would be nice if we could have those for Mr. Smith and Professor Beath – just what I have  
27 got, not with any fancy redaction, just the bare----

28 MR. BREALEY: Just straight.

29 THE CHAIRMAN: As far as marking the material up, I really think that is a matter for you to do.  
30 We are not going to put you on time for that, it needs to be done, obviously, so that we all  
31 know when a witness is about to be called. You will know by the time you open the cases  
32 what you are not going to want to refer to and what you do not want us to bleat out, and so  
33 by the time the hearing starts there ought to be those marked up documents.

34 MR. HOSKINS: You will have marked up then----

1 THE CHAIRMAN: I know, but that is always the problem, so the sooner the better is the answer.  
2 I am conscious that time is short and there is a lot of preparation to be done.

3 MR. HOSKINS: I am grateful for that because it potentially inconveniences you.

4 THE CHAIRMAN: Well, it is a risk for you as well.

5 MR. HOSKINS: (Laughter) A risk, absolutely.

6 THE CHAIRMAN: If you want a date, if you think it would be helpful for everyone to say that  
7 the marking up exercise shall be done by a certain time then we can do it, if you think that  
8 would be good for discipline generally.

9 MR. BREALEY: I think people might want some time. I would have thought we will try and do  
10 it before the bundles are lodged, because certainly when we get the list we can identify what  
11 documents fall in the first three categories.

12 THE CHAIRMAN: I think it has to be done by the 8<sup>th</sup>, does it not? That is a fall back time, is it  
13 not?

14 MR. BREALEY: Yes.

15 THE CHAIRMAN: We will not say anything else about that then, except to say in open court  
16 that the bundles that are lodged with us, the core bundle that is lodged with us on the 8<sup>th</sup>  
17 needs to be properly marked up. I think we can park your fourth category, can we not, Mr.  
18 Hoskins, at the moment?

19 MR. HOSKINS: Yes. We will review and if there is a dispute we will transfer it out.

20 THE CHAIRMAN: You cannot rush into private just because of something that has been  
21 supplied to the OFT or the Commission earlier.

22 MR. HOSKINS: That is why we have said we will review.

23 MR. BREALEY: The fourth point on the agenda is "Transcripts" and that---

24 THE CHAIRMAN: --has been dealt with.

25 MR. BREALEY: The fifth point, that is the hearing we had about the Commission documents----

26 THE CHAIRMAN: I think Mr. Hoskins, or one of you in your skeleton argument just referred to  
27 the fact that----

28 MR. HOSKINS: It was our para.10. We were trying to anticipate what the loose end was.

29 THE CHAIRMAN: The loose ends there were, first, I have not responded other than to politely  
30 say "thank you" that I have received it, for the Commission's very helpful and detailed  
31 response. I have not responded other than to say other than I was asking you, the parties, at  
32 their request, as to whether there were any objections, and I included your objections to  
33 them publishing their Opinion. I said I would check with you and I did indeed, I think,  
34 email you, but I think that has slipped through the net. I asked you whether you had any

1 objections to what they were proposing to do by way of publication but I feel I should reply,  
2 and I do not know whether you have any objections. So, do you want to let me know?

3 MR. BREALEY: From our perspective, I think the email is at p.352 of the case management  
4 bundle.

5 THE CHAIRMAN: This hearing bundle?

6 MR. BREALEY: Yes, 352, tab 32, and then at 354.

7 THE CHAIRMAN: That was on the assumption that it was going to be pursued.

8 MR. BREALEY: Then at 354 I think what you are referring to, Sir, is the last sentence: In due  
9 course if you have any objections"? We certainly do not have any objections. Sometimes  
10 they do publish it themselves.

11 THE CHAIRMAN: Yes, but I think the writer indicated, and I think I wrote back saying: "I have  
12 no objections" or words to that effect, but I do not know about the parties, and I will ask  
13 them.

14 MR. BREALEY: Formally we have no objection.

15 MR. HOSKINS: No objection.

16 THE CHAIRMAN: At some point then I will write accordingly. That is fine. We have dealt  
17 with the timetable. Do you want me to say something about going into private now, or can  
18 we just assume that that is your application – you each have applications.

19 MR. BREALEY: We are happy with that.

20 MR. HOSKINS: Yes.

21 THE CHAIRMAN: I will just record then that both parties have made an application for the  
22 Tribunal to sit in private while certain categories of evidence are either being dealt with in  
23 the course of submissions or are the subject of cross-examination.  
24 So far as the claimant is concerned, there are two categories of document in particular for  
25 which they seek protection at the hearing. The first category relates to pricing information  
26 and the second relates to the claimant's investments and financial planning. Each of these  
27 categories, the claimant submits, falls within paragraph 1(2)(a) and/or (d) of Schedule 4 to  
28 the Enterprise Act 2002, as either containing commercial information the disclosure of  
29 which might significantly harm Sainsbury's legitimate business interests, or is information  
30 the disclosure of which would be contrary to the public interest.

31  
32 How the claimant prices its products is clearly a matter as to which there is commercial  
33 importance in maintaining its confidentiality. It is commercially very sensitive. The same  
34 applies to information as to Sainsbury's investments and financial planning.

1 Both these categories of information are represented in the documents disclosed and are  
2 relevant to an issue in the trial relating to passing on. Therefore both will have to be  
3 canvassed in evidence and submissions and, for the reasons set out by the claimant in the  
4 application, ought to be the subject of such protection as is appropriate. As and when the  
5 time comes, insofar as the Tribunal is satisfied that it is not possible properly and fairly to  
6 deal with the evidence/submissions touching on the confidential material without expressly  
7 referring to it, the Tribunal, will be likely to accede to an application to go into private  
8 session while that material is the subject of evidence or submissions. The guiding principle  
9 is that wherever possible, consistently with the trial being conducted in a manner conducive  
10 to the fair and proportionate administration of justice, the hearing should be in public.  
11

12 The defendants, MasterCard, have made a similar application in respect of four categories of  
13 document. The first is information about MasterCard's internal processes for setting  
14 interchange fees. That, it seems to us, is very analogous to the kind of pricing information  
15 that we have already indicated, so far as the claimant is concerned, merits appropriate  
16 protection.

17 The second category is financial information contained in or obtained for the purposes of  
18 EDC cost studies. Such material is contained in documents disclosed and in witness  
19 statements and expert reports filed on behalf of MasterCard. It includes details of the costs  
20 of card issuing for use in MasterCard's fee setting processes, some of it obtained from  
21 licensees of MasterCard and summarised in reports to MasterCard. It is clearly confidential  
22 material, disclosure of which it would be liable significantly to harm MasterCard's or their  
23 licensees' legitimate business interests.

24 The third of the categories is in an internal assessment by MasterCard of how to operate in a  
25 low interchange fee environment, and a discussion of alternative business models. It needs  
26 no explanation really to elaborate why that merits protection as highly commercially  
27 sensitive material. Again, all things being equal it is likely to be appropriate that it should,  
28 in due course, be the subject of hearing in private as and when it is referred to, where no  
29 other reasonable and proportionate form of protection will suffice.

30 The fourth category for which MasterCard seeks protection relates to the documents which  
31 were part of the now completed and closed antitrust investigations by the European  
32 Commission and by the OFT. This is material some of which was agreed to be disclosed,  
33 some of which was the subject of contested disclosure applications, and in so far as  
34 disclosure was granted, those documents were disclosed into the confidentiality ring that

1 was set up in these proceedings. It appears that as things stand there is a blanket application  
2 for protection for these documents, which may fall into various categories. We have reached  
3 a consensus in the course of this morning that in order to justify the protection of any of  
4 these documents there would have to be some more specific information about why they  
5 were thought to be commercially sensitive or otherwise meriting the protection of a hearing  
6 in camera. Therefore, it has been agreed that we will park that fourth category until  
7 MasterCard has had an opportunity to assess to what extent they wish to take that aspect of  
8 the application further.

9 Those are all the matters that need to be mentioned.

10 How shall we go about preparing the order that we have discussed? You have been very  
11 helpful in the past and knocked one out for us. Are you volunteering?

12 MR. BREALEY: I am not, but Mr. Spitz will do that.

13 THE CHAIRMAN: Thank you very much for that. The Tribunal is very grateful. You will send  
14 it through as and when so that we can approve it.

15 I think I will ask at some point for contact details to be exchanged in due course, if it has  
16 not already been done.

17 Thank you for your help, and we look forward very much to seeing you, all being well, on  
18 the 25<sup>th</sup>.

19 MR. BREALEY: And everyone have a nice break.

20 THE CHAIRMAN: Thank you.

21 \_\_\_\_\_