

OPUS 2

INTERNATIONAL

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

Day 22

March 15, 2016

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1 Tuesday, 15th March 2016
 2 (10.30 am)
 3 Closing submissions by MR HOSKINS
 4 MR HOSKINS: Good morning sir.
 5 MR JUSTICE BARLING: Good morning, Mr Hoskins.
 6 MR HOSKINS: What I would like to do over the next day or so
 7 is really is to build on what I did in the opening,
 8 because first and foremost I want to set down
 9 a framework for the case.
 10 We did that in the opening and it is the same
 11 framework in closing, but hopefully that gives you
 12 a framework as well to decide what questions you want to
 13 ask. We might disagree about what the answers are to
 14 those questions, but that is the second thing,
 15 obviously, I need to do is to fill in the framework with
 16 our submissions, with particular reference to the
 17 evidence.
 18 It was quite noticeable in Sainsbury's closing
 19 submissions how light the reference was to the
 20 cross-examination, particularly of the experts, and
 21 I intend to actually spend quite a lot of time not
 22 taking you through it verbatim but pointing out what the
 23 evidence actually shows in this case.
 24 I will also attempt to deal with the Tribunal's
 25 questions, because clearly there are certain issues that

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1 you are interested in and I will try and pre-empt them.
 2 No doubt you will have further questions for me.
 3 Given that we have given you a weighty tome,
 4 literally, and time is relatively short, I intend to
 5 focus on the question of restriction, that is ancillary
 6 restraint and restriction within 101(1),
 7 exemption/exemptible level and pass-through. I think
 8 probably I won't have time to develop the competitive
 9 dynamics and volume effects orally, but you have the
 10 written stuff on that.
 11 Mr Cook is going to come in at the end and thrill
 12 you with Sainsbury's Bank interest and ex turpi causa.
 13 Before I go into the framework can I just point out
 14 four undisputed facts which are really fundamental in
 15 this case from a competition perspective, and this is
 16 a competition case.
 17 First of all, the MasterCard scheme creates
 18 substantial benefits for merchants and cardholders.
 19 I will develop all of these, but it seems to me these
 20 are themes which really underpin what this case is
 21 about. The scheme is fantastic, it creates benefits for
 22 merchants and cardholders.
 23 Second point, the MIF is the key component of
 24 competition between payment schemes. Not disputed.
 25 Third point, the MIF is therefore the key means by

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1 which payment schemes seek to increase their market
 2 share. That's what competition is.
 3 The fourth point, the larger a payment scheme, the
 4 more benefits it produces for cardholders and merchants,
 5 the more people who are touched by the scheme, the more
 6 people enjoy the benefits on both sides.
 7 Just as an introductory remark, we say if you take
 8 those four points, which really are uncontroversial, in
 9 light of what we have heard over the last 7 weeks, far
 10 from being a restriction of competition, the MIF is
 11 actually a pro-competitive driver of competition. You
 12 have no doubt read probably you feel enough paper but it
 13 is quite instructive in our closing, page 7,
 14 paragraph 4, we have referenced a judgment approving the
 15 class settlement in the United States and it is quite
 16 interesting, if you read that document, and you read
 17 just the extracts that we have given and you read the
 18 extracts in the court-appointed expert report, you will
 19 see a very different dynamic to the one you see in front
 20 of the Commission.
 21 I'm not saying you have to follow American law or
 22 whatever, but I think it is useful for the debate to see
 23 a very different view of what the MIF is.
 24 Let me move then, if you have our closings, I'm
 25 going to really make my submissions by reference to it.

3

1 I am going to go to restriction of competition -- sorry,
 2 actually I need to keep going.
 3 If you go to page 14 of the closings, just to make
 4 some comments on the status of the EU proceedings: do
 5 they bind the Tribunal; do they not; what weight do they
 6 have?
 7 If I can pick that up at page 16, which is our
 8 response to the Tribunal's second question about the
 9 relevance of Crehan, and you have seen that Crehan
 10 chimes with what we were saying in opening but it is
 11 a good, pithy way of encapsulating, and two particular
 12 aspects, Lord Bingham at paragraph 11:
 13 "Community law does not go to the length of
 14 requiring national courts to accept the factual basis of
 15 a decision reached by a Community institution when
 16 considering an issue arising between different parties
 17 in respect of a different subject matter."
 18 Then Lord Hoffmann at paragraph 69:
 19 "The decision of the Commission is simply evidence
 20 properly admissible before the English court which,
 21 given the expertise of the Commission, may well be
 22 regarded by that court as highly persuasive. As
 23 a matter of law, however, it is only part of the
 24 evidence which the court will take into account. If,
 25 upon an assessment of all the evidence, the judge comes

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1 to the conclusion that the view of the Commission was
2 wrong, I do not see how, consistently with his judicial
3 oath, he can say that as a matter of deference he
4 proposes nevertheless to follow the Commission."

5 You will have your own views. You have heard
6 a welter of evidence, evidence that the Commission
7 didn't have the benefit of, evidence which
8 the Commission didn't have the benefit of
9 cross-examination on, so you are in a much better
10 position, to be frank, than anyone who has looked at
11 this before, because of the nature of the process we
12 have just finished.

13 What we say is the Tribunal is not bound by
14 the Commission decision but it is entitled to have
15 regard to it. The Tribunal is bound by the legal
16 principles established by the Court of Justice and by
17 the General Court insofar as it wasn't overturned by the
18 Court of Justice. Because Mr Brealey repeatedly took
19 you to the Commission and the General Court, but quite
20 often didn't follow through the story with the Court of
21 Justice. As I will show you when we go to that, the
22 Court of Justice actually didn't follow the Commission
23 in the General Court in some really important legal
24 matters which are fundamental in this case.

25 That is on the law. Really you have to look

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1 absolutely the whole process. What did the Court of
2 Justice say? Because that's where you find what the law
3 is. But on the facts as well, when you are potentially
4 looking at the Commission decision, what one has to has
5 to remember is that the general courts and the Court of
6 Justice were reviewing the legality of a particular
7 competition decision and effectively it was a judicial
8 review. That's the nature of what the courts were
9 doing. Therefore, they had to judge the legality of
10 the Commission decision on the basis of the facts that
11 were available, because that's the nature of a judicial
12 review. It wasn't a trial like this was, it was
13 a judicial review, and that's important for a number of
14 reasons, but the most important reason, of course, is
15 that the Commission was dealing with an intra-EEA MIF
16 and I think it is pretty much common ground that
17 a threat to the life of a payment scheme is going to be
18 much greater, whatever the right answer is, but the
19 threat is much greater when you are looking at the
20 necessity of a domestic MIF as compared to an intra-EEA
21 MIF, just because of the proportions in which they make
22 up the scheme.

23 Again, when you are looking at the Commission,
24 that's something very important to bear in mind. And
25 you will understand the submission, this Tribunal has

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1 heard and seen a great deal of evidence that is specific
2 to the UK, which the Commission didn't have. I know
3 Mr Brealey kept saying it mentions the UK but that's not
4 the same as the process that we have had in the last 7
5 weeks, and we submit that you can and should make up
6 your own mind on the factual basis of what you have
7 heard, rather than some sort of an inferential approach
8 as to what the Commission might or might not have heard
9 or known about the UK. That's clearly not a very
10 satisfactory basis.

11 Page 18 of the closings deals with the broad axe and
12 I do not think there is much dispute about that. I will
13 come obviously to the issue of exemption against
14 exemptible level, which you debated with Mr Brealey at
15 a appropriate time, and how the broad axe fits into
16 that, but in terms of the principles I understand it is
17 not pushed back on.

18 Before I begin on restriction of competition, if you
19 go back to page 8 of the closings, because that
20 summarises what our main points are on restriction. So
21 I will just identify what they are and then I will
22 develop them orally.

23 The first point, paragraph 7; as you know, we say
24 the realistic counterfactual is that if MasterCard's
25 domestic MIF were assumed to be zero or very low, ie

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1 0.15, we say Visa and Amex would have maintained their
2 actual rates or would have maintained their rates at
3 such a high level that large amounts of switching would
4 have occurred.

5 On objective necessity, as we will see, we say both
6 the economic experts accepted that in that
7 counterfactual MasterCard would have been forced out of
8 the UK market over time. That's why we say domestic MIF
9 was objectively necessary.

10 If you reject that -- sorry, before we do that. To
11 further develop it, what's happened actually during the
12 hearing is the Tribunal has suggested two further
13 counterfactuals. One is that acquirers would take steps
14 to keep MasterCard afloat for the general good of the
15 market and for acquirers, and I will deal with that, our
16 submission is not borne out by the evidence but we will
17 come to the detail of that; and the second
18 counterfactual that's been floated is that merchants, if
19 they sold MasterCard at zero or low, would turn towards
20 Visa and put pressure on Visa to bring its rates down,
21 and it must be a logic of the suggestion by the Tribunal
22 that it would come down to such a level that switching
23 would not occur, therefore not objectively necessary,
24 and again I will deal with that in detail when we come
25 to it.

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1 transaction or average merchant, to base it on a sample
2 of one is absolutely hopeless.
3 The second point is what do you do about the fact
4 that the 2015 Commission survey only included large
5 merchants, categories 6 to 8? Mr Brealey took you --
6 this is 307 of our closings -- to the eight classes. We
7 have got data for 6 to 8 but nothing more.
8 What we know from the Commission's survey, we set it
9 out at 308, the Commission's survey recognises, this is
10 the last couple of lines of paragraph 4:
11 "... it is a trade off between precision of data and
12 sample size and representativeness."
13 Paragraph 23:
14 "The Commission therefore considers [this is at the
15 bottom of 23] that without further data from small
16 merchants it is not possible to draw reliable
17 conclusions from the study concerning the level of
18 indifference of all merchants."
19 That is the Commission saying that. 26:
20 "Collecting data from small merchants proved to be
21 a difficult task, while using data from large merchants
22 to approximate the cost of small merchants is
23 a questionable exercise."
24 That is the Commission's view. Again,
25 Mr von Hinten-Reed accepted that in cross-examination.

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1 We have set it out at 309. Again, does it matter if we
2 just take 6 to 8? Does it really matter? It does
3 matter. Because it is quite clear from the evidence
4 that if you base your analysis on the data for classes 6
5 to 8, you will get a result, a MIT-MIF, which is too
6 low. I say that for the following reasons.
7 First of all, 311, the relative costs of payment
8 methods will vary depending on the size of the merchant.
9 The Commission itself again recognised merchant
10 heterogeneity. At 311(b) the wrong quote is set out, so
11 if you can strike that through. I will show you what he
12 actually said. It is at transcript Day 13, page 126.
13 The actual reference should be to T13, page 126.
14 PROFESSOR JOHN BEATH: At lines 4 to 10?
15 MR HOSKINS: 4 to 24:
16 "Question: Do you agree that one of the factors
17 that may have an impact on costs is the size of the
18 merchant?
19 "Answer: Yes.
20 Then dropping down to 21:
21 "Question: Do you agree that large retail firms
22 will tend to have lower costs in accepting cash due to
23 economies of scale?
24 "Answer: Yes."
25 MR JUSTICE BARLING: That is what should have been in

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1 paragraph (b)?
2 MR HOSKINS: That is correct. T13, page 126. If one goes
3 to paragraph 312 of the closing, larger merchants are
4 likely to have lower costs in accepting cash due to
5 economies of scale. We have just seen
6 Mr von Hinten-Reed accept that. It is also in Rysman
7 and Wright, and then we give the proper reference to
8 lines 21 to 24.
9 If you pick it up at 313 of the closing, we say
10 relying solely on data in relation to large merchants is
11 therefore likely to lead to a MIT-MIF which is too low.
12 One gets that from Rochet and Tirole. Merchants are
13 heterogeneous, and IF that properly guides cardholders'
14 decisions must reflect the average, not the marginal
15 merchant benefit. This implies that the merchants who
16 benefit least from the card, say the large retailers,
17 are likely to fail the tourist test at the social
18 optimum, ie you get a MIT-MIF that is just too low if
19 you base it solely upon large retailers. Again,
20 Mr von Hinten-Reed agreed with that statement from
21 Rochet and Tirole in cross-examination.
22 MR JUSTICE BARLING: I hadn't spotted that. Why do they
23 benefit of use from the card? It probably doesn't
24 matter.
25 MR HOSKINS: It does matter. I'm going fast because it's

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1 late in the day but I'm probably going too fast, as it
2 is late in the day. If you back to 312, larger
3 merchants are likely to have lower costs in accepting
4 cash due to economies of scale.
5 MR JUSTICE BARLING: I see. They benefit least from the
6 card because of the comparison --
7 MR HOSKINS: Exactly.
8 MR JUSTICE BARLING: But then someone else says they're both
9 likely to --
10 MR HOSKINS: No, what the Commission says is it is not clear
11 that will be the case, because they --
12 MR JUSTICE BARLING: They are both likely --
13 MR HOSKINS: I'm about to take you to the evidence that will
14 demonstrate that in fact it is clear that there is
15 a major difference, on the basis of the evidence,
16 between the levels of MIFs or MSCs you get to if you
17 rely on the large merchant information and what you
18 would get to if you looked at the average merchant.
19 If I'm going too fast, obviously you will slow me
20 down.
21 I'm at page 105, paragraph 314. This is where we
22 get to the facts. 314, the fact that the MIT-MIF will
23 differ depending on the size of the merchant and will be
24 lower for larger merchants is confirmed by the
25 calculation set out in the Commission's survey.

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1 We need to go to E3.10, tab 202, 4358. You see
2 there is a number of -- you see what it's doing at
3 paragraph 212:

4 "The tables below show the median in different
5 thresholds for the merchants service charge in both the
6 card-based and retail-based approach."

7 What's important is they calculate different MIT
8 MSCs on different bases for categories 6 to 7 and
9 category 8. You will see the sort of differential that
10 one comes up with, in particular it is 12(b) for us,
11 credit cards.

12 It doesn't really matter the detail of how they got
13 there. The point is they do an exercise which is
14 separate, MSC for categories 6 to 7 and get 0.4.2, and
15 they do the calculation for size A, the largest gets
16 0.14. That is a dramatic indication of how, if you are
17 relying on just larger merchants, you will get a MIT MSC
18 that is dramatically different and lower. We say
19 clearly too low for the average merchant.

20 So what do you do? The problem matters. So what do
21 you do to try and palliate the problem?

22 As you know, what Dr Niels has done is to say: well,
23 we have got categories 6, 7 and 8, the problem is we
24 don't have 1 to 5. Again, it is not perfect but I'm
25 more likely to get something approximating the right

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1 answer by taking categories 6 and 7 and excluding 8.

2 It is a simple point. He says: if you have not got
3 the bottom half, I chop a bit off the top and I'm more
4 likely to get something that arrives at the average.

5 Mr von Hinten-Reed says: no, I'm going to take 6, 7
6 and 8. Which, as I hope I have demonstrated already,
7 will take you to a MIF that is going to be too low.

8 What Mr von Hinten-Reed did to try and justify his
9 approach, remember he said: I did this, I took 6, 7 and
10 8, but then I did the sensitivity analysis to show that
11 it is all right -- sorry, just using Sainsbury's data,
12 and then performed a sensitivity analysis. But
13 Sainsbury's is category 8, so it is even worse than
14 I described.

15 A number of problems with that. This is at 317 of
16 the closing. First of all, of course, again, you have
17 got Mr von Hinten-Reed relying on a sample of one, very
18 large, whilst Dr Niels has got a sample of 126
19 merchants.

20 You had Mr Brealey poking sticks into Dr Niels
21 saying, "This takes out a number of merchants in the
22 UK". Again, we are not saying it is perfect, but the
23 exercise here is not: how imperfect is Dr Niels? The
24 exercise for you is: which is the preferable approach,
25 Dr Niels or Mr von Hinten-Reed, in the world of

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1 imperfection? So Dr Niels sample of 26 merchants in
2 categories 6 and 7. Mr von Hinten-Reed, sample of one
3 in category 8.

4 He then tries to justify it with his sensitivity
5 analysis. You remember that, in his report, he had
6 an assumption that smaller merchants would have
7 a MIT-MIF which was twice or three times higher than
8 large merchants, and in cross-examination he admitted he
9 had no evidential basis for taking two and three.

10 Q. What the data in the Commission survey shows is that
11 that sort of assumed differential, times two or times
12 three, was clearly unrealistic. I took him to the
13 survey. If we pick it up again, E3.10, tab 202, this
14 time at page 4351. You remember I took him to this in
15 cross-examination. This was a distribution of the
16 estimated MIF MSCs by the number of merchants.

17 This, by definition, is just within categories 6, 7
18 and 8, because that's all the Commission had. What
19 I did was I looked at the median of the most common MIT
20 MSC, which was 0 to 0.5, and I compared it with the
21 median of the other results in this category. I did it
22 in cross-examination but we set out the results in the
23 closing at page 107, because it gives you a sense of
24 what the differentials of MIT MSC are, even within the
25 category of large retailers.

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1 You will see (ii):

2 "Around 15% of large merchants had a MIT MSC around
3 three times higher than the majority of large
4 merchants."

5 (iii):

6 "Around 6 to 7% of large merchants had a MIT MSC
7 around six times higher than the majority of large
8 merchants.

9 (iv):

10 "Around 5% of large merchants had a MIT MSC around
11 14 times higher than the majority of large merchants".

12 Then (v):

13 "Around 2% of large merchants had a MIT MSC at least
14 20 times higher."

15 That is the sort of spread one is getting just
16 within categories 6 to 8. You remember I took
17 Mr von Hinten-Reed through that, and he confirmed that
18 he would expect the disparity to be greater if one were
19 comparing the large retailers with the retailers in
20 categories 1 to 5. So he would expect a larger spread.
21 That is the top of page 108 at (c).

22 In our submission, it is quite possible, indeed
23 probable, that you are talking about differentials that
24 might be in the order of 20-odd, not certainly of 2
25 and 3.

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1 So what Mr von Hinten-Reed was then -- go and do
 2 another exercise and show us what would happen if you
 3 take higher differentials. Oxera did the same exercise
 4 and they have put their conclusions in appendix C
 5 because again I think, from memory, Mr von Hinten-Reed's
 6 goes no higher than times 7 in the one that he redid,
 7 which is still nowhere near the ballpark spread we are
 8 seeing from the Commission's own data. Oxera have done
 9 it with higher factors including a factor of 10 and 20.

10 It is in appendix C to our closings but we
 11 summarised the results at 321 and what it shows, I will
 12 pick it up in the third line, this shows that with the
 13 differential of times 20, which as I have shown is
 14 perfectly possible and indeed probable, the MIT-MIF
 15 would be 0.75 using the Commission's scenario 2, at
 16 least 1.67 based on the Commission's scenario 3 and 0.86
 17 even on Mr von Hinten-Reed's Sainsbury's based
 18 calculation. The factor of 10, you get the equivalent
 19 figure, 0.42, 0.94 and 0.49.

20 With respect to Mr von Hinten-Reed, his sensitivity
 21 analysis just isn't worth the paper it is written on
 22 because it is based on unrealistic assumptions and
 23 that's also the case indeed for his updated one, which
 24 only goes to times seven.

25 This is paragraph 322. Mr von Hinten-Reed sought to

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1 defend his reliance on Sainsbury's, on using Sainsbury's
 2 data only, ie a sample of one, by saying: well, typical
 3 payment takes place at a large retailer, therefore it is
 4 reasonable to assume that the MIT-MIF obtained by such a
 5 large retailer would represent the large majority of UK
 6 sales.

7 As we set out at 323 it is quite clear from the
 8 Rochet and Tirole 2008 article, which Mr von Hinten-Reed
 9 himself relies on, is what you are looking for is the
 10 average merchant. So even within his own world that's
 11 not really justification for a sample of one.

12 Therefore we say Mr von Hinten-Reed's suggested
 13 approach is clearly unreliable, relying on Sainsbury's
 14 sensitivity analysis, clearly unrealistic, and it will
 15 lead to a MIT-MIF which is too low.

16 In Sainsbury's closing, at paragraph 319, they make
 17 the point it would be unfair to impose a MIF that is too
 18 high on the very large merchants. But that's dealt with
 19 by the Shaw case that I showed you. You are not looking
 20 at the effect on each individual merchant, you are
 21 looking at the effect on the average merchant. For your
 22 note the point made in Sainsbury's closing,
 23 paragraph 319, is dealt with in our closing at
 24 paragraph 240.

25 Again Dr Niels isn't saying that his approach is

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1 perfect. But we say it is better, clearly better than
 2 Mr von Hinten-Reed's and should be preferred. Then, the
 3 final point of difference, which is: is it correct to
 4 always use cash as the relevant comparator for this
 5 calculation? First of all, online transactions. As
 6 I already said, it is common ground that cash is
 7 generally not a substitute for online transactions. So
 8 if you are not using a four-party payment scheme credit
 9 card, what are you using? What's available? It is Amex
 10 and it is PayPal.

11 Again, it is not that we say it is perfect but the
 12 problem you have got is that Mr von Hinten-Reed doesn't
 13 take any account of online transactions, but yet it is
 14 clear that the MIT-MIF is intended to apply to online
 15 transactions and for all its advantages and
 16 disadvantages. At least Dr Niels has taken account of
 17 the fact that the MIT-MIF has to apply to online
 18 transactions and that in online transactions cash is not
 19 an appropriate comparator.

20 Again, you get this very sort of stark approach from
 21 Mr von Hinten-Reed: I'm not doing anything, I'm not
 22 taking any account of this fact. It is interesting that
 23 what Mr von Hinten-Reed sort of criticises: well, why
 24 does Dr Niels go to Amex and PayPal? The reason is
 25 because those are the realistic alternatives for online

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1 transactions. He doesn't suggest any other alternative
 2 himself, he just ignores online transactions.

3 Again, we say neither is perfect, but Dr Niels is
 4 clearly preferable. Then the final point between them
 5 relates to this idea of increased sales resulting from
 6 the availability of credit.

7 What we have seen is that there are certain face to
 8 face credit card purchases that wouldn't take place
 9 absent credit. So, for example, the worker who is
 10 getting paid at the end of the week but wants to go for
 11 a nice meal couldn't afford it unless he used credit.
 12 Transactions where something is bought on credit and
 13 then there is subsequently a default.

14 So there are, we submit, quite clearly categories
 15 where transactions take place that wouldn't otherwise
 16 take place if credit weren't available. Dr Niels takes
 17 some account of them; Mr von Hinten-Reed takes no
 18 account of them. We say Dr Niels is therefore clearly
 19 preferable.

20 I think it is important to note, this is
 21 paragraph 338, he applies a weighted approach to this.
 22 So it is a nuanced approach. It may not be perfect but
 23 there is some attempt at nuance. Whereas
 24 Mr von Hinten-Reed is simply: no account.

25 For that basis we say, if you are going to -- and

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1 you should -- I think it is worth looking at a MIF 1
2 approach -- but it should be with the proper approach, 2
3 the best approach is the one put forward by Dr Niels 3
4 rather than Mr von Hinten-Reed. 4
5 You will see the range that Dr Niels gets to, 5
6 paragraph 347. Subject to the sorts of debates we have 6
7 been having about whether you go to the lower or the 7
8 higher end of the range, for most of that range there is 8
9 then no overcharge because the comparison is between the 9
10 figures in 346A for credit cards and the range in 347. 10
11 MR JUSTICE BARLING: You won't have time to do the adjusted 11
12 cost benefit, if you are -- 12
13 MR HOSKINS: I won't have time to finish it today. 13
14 MR JUSTICE BARLING: No. You have probably got another 14
15 5 minutes if you want? 15
16 MR HOSKINS: To be safe, I imagine we want to finish 16
17 tomorrow, and that includes Mr Brealey's reply. So what 17
18 I'm trying to do is get to a situation where I sit down 18
19 at lunchtime. I have got to finish this and I have got 19
20 to do pass-through and then we have got Mr Cook, who 20
21 will have slightly over ... I think we agreed 21
22 Mr Brealey would have an hour in reply -- 22
23 MR JUSTICE BARLING: Would it be sensible if we sit earlier? 23
24 MR HOSKINS: I think if we could start at 10.00 we would be 24
25 safe. 9.30 is an awfully long day. 25

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1 MR JUSTICE BARLING: I agree. We will sit at 10.00.
2 MR HOSKINS: Then I will stop now and take this when we're
3 fresh in the morning. Thank you.
4 MR JUSTICE BARLING: Thank you.
5 (4.25 pm)
6 (The court adjourned until 10.00 am on
7 Wednesday, 16th March 2016)

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