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

Day 5 - Redacted

February 2, 2016

Opus 2 International - Official Court Reporters

Phone: +44 (0)20 3008 5900
Email: transcripts@opus2.com
Website: http://www.opus2.com
Tuesday, 2nd February 2016

Housekeeping

MR JUSTICE BARLING: Good afternoon.

MR HOSKINS: Just a bit of housekeeping before we start which is the witness order, because I was going to come back with you with our witness order. To confirm where we are this week, we are about to do Mr Brooks and tomorrow we have Ms Bernard and Mr Rogers. Thursday not sitting. Friday is Mr Coupe and then that completes the Sainsbury’s factual witnesses and then we are going to call Mr Abrahams.

MR JUSTICE BARLING: Also on Friday?

MR HOSKINS: Yes, Mr Brealey?

MR JUSTICE BARLING: Also on Friday?

MR HOSKINS: Just a bit of housekeeping before we start which is the witness order, because I was going to come back with you with our witness order. To confirm where we are this week, we are about to do Mr Brooks and tomorrow we have Ms Bernard and Mr Rogers. Thursday not sitting. Friday is Mr Coupe and then that completes the Sainsbury’s factual witnesses and then we are going to call Mr Abrahams.

MR JUSTICE BARLING: Thank you, Mr Brooks. Make yourself comfortable. If you prefer to sit down, which I am sure you do, then do.

MR BREALEY: Could the witness be given C1, please?

MR HOSKINS: I have already got that as a non-sitting morning.

MR JUSTICE BARLING: I'm so sorry, Mr Hoskins, we have

Q. Could you confirm that the evidence in the statement is true to the best of your knowledge and belief?

A. That is my signature.

MR HOSKINS: Afternoon, Mr Brooks. Staying in that witness order if he needs.

Q. We look at bundle E5.2, tab 37, please. It is probably a re-forecast, for example changes in MSCs paid. 'We provide periodic re-forecasts, latest views over the year and analysis of actual performance against budget. We also do a full half year re-forecast and summarise corporate plan submission. Any underlying budget assumption change could also trigger a re-forecast, for example changes in MSCs paid.'

This is all work you do specifically in relation to the MSCs; is that correct?

A. My team do, yes.

MR HOSKINS: You are responsible for. You say:

"My team provides the information in relation to the budgets for MSCs for the different business areas to group finance as well as to the relevant business unit finance analysts who provide periodic re-forecasts.

MR JUSTICE BARLING: I'm so sorry, Mr Hoskins, we have a slight technical problem. Some people's computers have shut down.

Thank you, Mr Hoskins.

MR HOSKINS: I was just reading out paragraph 36. I have got to the sentence:

"We provide periodic re-forecasts, latest views over the year and analysis of actual performance against budget. We also do a full half year re-forecast and summarise corporate plan submission. Any underlying budget assumption change could also trigger a re-forecast, for example changes in MSCs paid."

This is all work you do specifically in relation to the MSCs; is that correct?

A. That is right.

Q. One of the things you do is produce latest views?

A. That is right.

Q. We look at bundle E5.2, tab 37, please. It is probably worth you keeping your bundle C1 and your witness
February 2, 2016 Sainsbury’s Supermarkets Ltd v (1) MasterCard Inc, (2) MasterCard International Inc, (3) MasterCard Europe S.P.R.L Day 5 - Redacted

Q. If one looks through it, let’s for example go to page 747. We see two boxes again. I’m not going to read out any of the figures:

A. It is a cost line on our operating costs that shows up against budget and we explain variances.

Q. And this is a significant cost line?

A. It is significant enough to go into this sort of detail to look at it.

Q. If I can go back to your witness statement, starting at bundle C1. This time go to paragraphs 38 to 39. If you want to have a quick look at those paragraphs to refresh your memory, I am sure you have read this many times. By all means have another look if that assists.

A. It is possible. The first question I wanted to ask you about was why did you volunteer Sainsbury’s participation in the Commission’s 2011 and 2013 surveys?

Q. Well, as it says in my statement, I was previously head of procurement at Sainsbury’s and I moved across into this finance operations role in 2010. And I had experience, whilst I was head of procurement, with the tender value acquiring business. In 2011, we re-tendered the business as well. It was becoming apparent that our costs for taking cards were increasing and I also say in my statement apart from statutory items, it was the only area of our cost base that we couldn’t negotiate on, apart from the acquirer margin that is, or the acquirer processing costs. And we were having difficulty having any sort of dialogue with the schemes around why the MIF rates were set as they were and when the European Commission approached us to get involved in a survey, I saw it as an opportunity to be able to demonstrate what the significant cost of taking cards was against the cost of taking cash.

Q. So I don’t want to put words into your mouth, but is it fair to say that you saw it as an opportunity to demonstrate that the MSCs were too high?

A. Yes.

Q. What was the process within Sainsbury’s for preparing the information? Let’s focus on the 2013 survey, I don’t know if there’s any difference. The second one. That’s the Deloitte survey. Can you give us an indication of the sort of work you prepared in the response?

A. I had a full-time qualified accountant on it, probably for one to two months. With all these type of things of extracting costs, the difficulty is you have to go to different areas of the business to get that information and you have to persuade colleagues in the business that

Q. How is it produced? How do people go about producing these comprehensive reports on MSC’s latest view? What does your team do to produce it?

A. We take -- we will take the latest sales figures, we will look at historic breakdown between the different card types, we will be looking at what the average transaction values are for those card types and then applying them to the new forecast sales figures.

Q. It looks as if this is a pretty time-consuming exercise, is that also fair to say, for someone?

A. It is, yes.

Q. So that is a yes?
Mr HOSKINS: Can we look at one of Mr von Hinten-Reed's
costs of card and cash surveys was to ensure my
and provide an overview or sense check, for example
A. When we approached a firm of solicitors and they would
A. Probably at the outset.
Q. Sorry, you need to say "yes" because the nodding doesn't
come up in the transcript?
A. Sorry, yes.
Q. And Sainsbury's had retained Mr von Hinten-Reed at least
as early as 2013 to assist with its damages claim, hadn't it?
A. Yes.
Q. When did you first meet Mr von Hinten-Reed?
A. Probably at the outset.
MR HOSKINS: Sir, I need to tread carefully here obviously
for privilege reasons, so you will understand why?
Q. And Sainsbury's had retained Mr von Hinten-Reed at least
as early as 2013 to assist with its damages claim, hadn't it?
A. Yes.
Q. And the Deloittes survey was submitted in 2014. And
Sainsbury's had been preparing its claim since at least
2011; yes?
A. Yes.
Q. Did you persuade them?
A. I hope so.
Q. Who did you persuade?
A. Yes.
A. I don't think John did personally. I think I would have
discussed it with the group finance director and we have
agreed it was worthwhile doing.
Q. In paragraph 39 you describe your role in this exercise,
you say:
"My role in responding to the European Commission's
colleagues were inputting information correctly and
provide an overview or sense check, for example
reviewing the classification of fixed and variable
costs."
Q. Did you have the final say on whether costs were
classified as fixed or variable?
A. Yes, I would have probably reviewed it before it got
sent off.
Q. You are aware that the more costs that are variable, the
higher the MIF?
A. I was told that fixed costs didn't affect the MIF.
I just wanted to make sure that we got the right
allocation between fixed and variable.
Q. And were you told that fixed costs did not affect
the MIF? Was it prior to doing this survey?
A. I don't think it was. I think it was later on when CEG
started to look at the survey again, CEG is
Mr von Hinten-Reed's company.
Q. We will come to when he was involved, but just to
clarify your evidence, are you saying that you had no
idea that fixed costs, as you put it, had no effect on
the MIF at any stage prior to the results being
submitted to the Commission?
A. I can't recall knowing that.
Q. Do you think it is possible?
A. If they were colleagues who were delaying giving me the
information and prioritise it above other things that
they were doing.

A. Yes.
Q. So it must have been an issue that you thought was
important?
A. Yes.
Q. Did people in Sainsbury's also think it was
important?
A. It was, yes.
Q. Did other people in Sainsbury's also think it was
important?
A. Well, they needed persuading of the importance of it.

A. When we approached a firm of solicitors and they would
MR JUSTICE BARLING: The outset of what, sorry, just so
I know? The outset of the preparation of the claim?
A. When we approached a firm of solicitors and they would
have introduced us to the economist and I would have
been probably there early -- at the early meetings.
MR JUSTICE BARLING: I think you said that was some time in
2011 or that's when you started preparing; is that
right?
A. I can't remember the exact dates.
MR HOSKINS: Can we look at one of Mr von Hinten-Reed's
reports. It is in D2.1, tab 3. If you could turn to
page 521. If you could read to yourself, please,
paragraph 472. Were any persons outside Sainsbury's
involved in preparing the Sainsbury's response to the
Q. And would have told you in the course of meetings that it -- it was quite interesting because when we sent it off, we believed Deloittes published it before we gave our final say-so, so I know there was some rowing around trying to get -- to understand why Deloittes had done that. We thought it was a final draft that not been finished that we may have sent. So we were a bit alarmed to find that Deloittes had gone ahead and included it in the survey without I guess our formal sign-off. So that’s what makes me think that we were the only people looking at that.

CEG did subsequently look at that Deloittes submission and we had further discussions on the allocation between fixed and variable costs.

Q. Subsequently, so that was after the Deloittes’ submission? A. I’m fairly certain it is.

Q. I don’t want to put words in your mouth so -- A. Well --

Q. Did CEG have any input into the response to the Deloittes survey? A. I can’t remember them having a response but when you went across the dates early, before, about when CEG were brought on board, it is probably they did talk about the

fixed and variable costs at some point before that Deloittes survey went off but I don’t think they reviewed the survey before it went.

Q. So they didn’t review it before it went, but they did talk about the fixed and variable costs difference before the survey went in?

A. I can’t remember exactly but given the timings you talked about earlier, about when they came on board and when we sent the survey off and me meeting with CEG on several occasions, it is likely that that did come up in a conversation. So I was really keen that we got the fixed and variable allocation correct.

Q. Because you knew it made a difference to the level of the MIF? A. Yes, probably.

Q. Because you had been told that by Mr von Hinten-Reed? There’s nothing sinister, I’m just trying to establish what you knew and when.

A. It is possible, I can’t remember those conversations but it is likely that having Mr von Hinten-Reed on board, he would have mentioned the importance of getting the fixed and variable cost allocation correct.

Q. And would have told you in the course of meetings that the more the costs were fixed, the lower the MIF, or the way you put it that fixed costs didn’t affect the level of the MIF?

A. We may have done but my view would have been: so be it. I wanted to get the correct view on what my cost base was. I was really interested myself to find out what our cost of cash was because it is counter-intuitive to think taking cash is cheaper than taking a card. So I was really intrigued to get this survey right.

Q. What role have you played in bringing this claim against MasterCard? A. I have encouraged it.

Q. You say you met Mr von Hinten-Reed at the outset of the claim, which was in around 2011 at least, that’s more than encouragement? A. Well, it would have been before that. It would have been with our legal department and through my work with the BRC and understanding what was going off in the European courts, it would have been a discussion with the legal department to say, and I’m paraphrasing what I might have thought, but if they have been found to be acting anti-competitively in Europe, how does that relate to how they have been behaving in the UK and what’s the read across from Sainsbury’s and have we got any redress? That is the type of conversation that I would have had with our legal department.

Q. Was it you that raised the prospect of bringing a claim first within Sainsbury’s? Was it your idea? A. I don’t necessarily think it was my idea but that would have been the conversation and the legal department would have taken their own decision.

Q. But did you raise it with the legal department? A. Yes.

Q. Did you take it to them? A. I took it to them.

Q. You referred to your work with BRC, what work was that? A. When I moved from procurement to this financial role, working with other members on the BRC there is a good breadth of retailers on there, Tesco’s, Asda, Morrisons, Marks & Spencer, John Lewis, it was a common issue for us all. That was my role in that area.
Q. Within the BRC you obviously discussed this issue of interchange fees?
A. Yes.
Q. You discussed interchange fees in the UK?
A. Yes.
Q. You discussed possible means which might be used to put pressure on MasterCard and Visa to lower interchange fees?
A. Yes, we did.
Q. You formulated a strategy within the BRC to achieve that end, didn’t you?
A. Yes, we did.
Q. Did you have any discussions within the BRC about how to approach the survey?
A. No, I think the only discussions we had at the BRC were trying to persuade members to participate in the survey.
Q. You formulated a strategy within the BRC to achieve that end, didn’t you?
A. Yes, we did.
Q. And you were part of that strategy?
A. I contributed towards it, yes.
Q. Within the BRC, what discussions did you have about the response to the Commission’s 2013 survey?
A. I think we were pleased it supported what we all knew already. We knew cash was cheaper than cards by a long way.
Q. You discussed possible means which might be used to put pressure on MasterCard and Visa to lower interchange fees?
A. Yes.
Q. Within the BRC, did you have any discussions about the extent to which the role that you played in bringing this claim against MasterCard?
A. Yes.
Q. Did you discuss the extent to which the role that you played in bringing this claim against MasterCard?
A. I think what you are saying is that if you classify costs as variable costs rather than fixed costs, then the MIF will be lower.
Q. That means you acknowledged that you had an incentive to put variable costs up?
A. I don’t think so.
Q. Within the BRC, did you discuss what the implications would be?
A. I honestly can’t recall ever getting to that sort of detail.
Q. Within the BRC, what discussions did you have about the response to the Commission’s 2013 survey?
A. I think we were pleased it supported what we all knew already. We knew cash was cheaper than cards by a long way.
Q. Did you have any discussions within the BRC about how to approach the survey?
A. No, I think the only discussions we had at the BRC were trying to persuade members to participate in the survey.
Q. To this day I don’t know what other retailers around BRC table participated in the survey. I was vocal in trying to persuade members to participate in the survey.
A. I can’t recall ever getting to that sort of detail.
Q. There is a sentence that I want to read out loud but I will tread carefully.
A. I think you already accepted you wanted the MIF to be lower.
Q. Why didn’t you mention in your witness statement the role that you played in bringing this claim against MasterCard?
A. I didn’t think it was important but I’m happy to say I have talked about what I did.
Q. Correct. So you accept that you knew that? Do you want to read back the transcript?
A. Yes.
Q. I will come that, that is important. So you knew that whilst you were compiling a response to the Deloittes survey, the effect classifying of costs as fixed or variable would have on the MIF?
A. I honestly don’t.
Q. You must have known what effect classifying costs as fixed or variable would have on the MIF?
A. Yes.
Q. You formulated a strategy within the BRC to achieve that end, didn’t you?
A. Yes, we did.
Q. And you were part of that strategy?
A. I contributed towards it, yes.
Q. Within the BRC, what discussions did you have about the response to the Commission’s 2013 survey?
A. I think we were pleased it supported what we all knew already. We knew cash was cheaper than cards by a long way.
Q. Did you have any discussions within the BRC about how to approach the survey?
A. No, I think the only discussions we had at the BRC were trying to persuade members to participate in the survey.
Q. To this day I don’t know what other retailers around BRC table participated in the survey. I was vocal in trying to persuade members to participate in the survey.
A. I can’t recall ever getting to that sort of detail.
Q. There is a sentence that I want to read out loud but I will tread carefully.
A. I think you already accepted you wanted the MIF to be lower.
Q. Why didn’t you mention in your witness statement the role that you played in bringing this claim against MasterCard?
A. I don’t think it was important but I’m happy to say I have talked about what I did.
Q. Correct. So you accept that you knew that? Do you want to read back the transcript?
A. Yes.
Q. I will come that, that is important. So you knew that whilst you were compiling a response to the Deloittes survey, the effect classifying of costs as fixed or variable would have on the MIF?
A. I honestly don’t.
Q. You must have known what effect classifying costs as fixed or variable would have on the MIF?
A. Yes.
Q. You formulated a strategy within the BRC to achieve that end, didn’t you?
A. Yes, we did.
Q. And you were part of that strategy?
A. I contributed towards it, yes.
Q. Within the BRC, what discussions did you have about the response to the Commission’s 2013 survey?
A. I think we were pleased it supported what we all knew already. We knew cash was cheaper than cards by a long way.
Q. Did you have any discussions within the BRC about how to approach the survey?
A. No, I think the only discussions we had at the BRC were trying to persuade members to participate in the survey.
Q. To this day I don’t know what other retailers around BRC table participated in the survey. I was vocal in trying to persuade members to participate in the survey.
A. I can’t recall ever getting to that sort of detail.
Q. There is a sentence that I want to read out loud but I will tread carefully.
A. I think you already accepted you wanted the MIF to be lower.
Q. Why didn’t you mention in your witness statement the role that you played in bringing this claim against MasterCard?
A. I didn’t think it was important but I’m happy to say I have talked about what I did.
Q. Correct. So you accept that you knew that? Do you want to read back the transcript?
A. Yes.
Q. I will come that, that is important. So you knew that whilst you were compiling a response to the Deloittes survey, the effect classifying of costs as fixed or variable would have on the MIF?
A. I honestly don’t.
Q. You must have known what effect classifying costs as fixed or variable would have on the MIF?
A. Yes.
Q. You formulated a strategy within the BRC to achieve that end, didn’t you?
A. Yes, we did.
Q. And you were part of that strategy?
A. I contributed towards it, yes.
Q. Within the BRC, what discussions did you have about the response to the Commission’s 2013 survey?
A. I think we were pleased it supported what we all knew already. We knew cash was cheaper than cards by a long way.
Q. Did you have any discussions within the BRC about how to approach the survey?
A. No, I think the only discussions we had at the BRC were trying to persuade members to participate in the survey.
Q. To this day I don’t know what other retailers around BRC table participated in the survey. I was vocal in trying to persuade members to participate in the survey.
A. I can’t recall ever getting to that sort of detail.
Q. There is a sentence that I want to read out loud but I will tread carefully.
A. I think you already accepted you wanted the MIF to be lower.
Q. Why didn’t you mention in your witness statement the role that you played in bringing this claim against MasterCard?
A. I don’t think it was important but I’m happy to say I have talked about what I did.
Q. Correct. So you accept that you knew that? Do you want to read back the transcript?
A. Yes.
Q. I will come that, that is important. So you knew that whilst you were compiling a response to the Deloittes survey, the effect classifying of costs as fixed or variable would have on the MIF?
A. I honestly don’t.
Q. You must have known what effect classifying costs as fixed or variable would have on the MIF?
A. Yes.
Q. You formulated a strategy within the BRC to achieve that end, didn’t you?
A. Yes, we did.
Q. And you were part of that strategy?
A. I contributed towards it, yes.
Q. Within the BRC, what discussions did you have about the response to the Commission’s 2013 survey?
A. I think we were pleased it supported what we all knew already. We knew cash was cheaper than cards by a long way.
Q. Did you have any discussions within the BRC about how to approach the survey?
A. No, I think the only discussions we had at the BRC were trying to persuade members to participate in the survey.
Q. To this day I don’t know what other retailers around BRC table participated in the survey. I was vocal in trying to persuade members to participate in the survey.
A. I can’t recall ever getting to that sort of detail.
Q. There is a sentence that I want to read out loud but I will tread carefully.
A. I think you already accepted you wanted the MIF to be lower.
Q. Why didn’t you mention in your witness statement the role that you played in bringing this claim against MasterCard?
A. I think you already accepted you wanted the MIF to be lower.
Q. Why didn’t you mention in your witness statement the role that you played in bringing this claim against MasterCard?
A. I don’t think it was important but I’m happy to say I have talked about what I did.
Q. Correct. So you accept that you knew that? Do you want to read back the transcript?
A. Yes.
Q. I will come that, that is important. So you knew that whilst you were compiling a response to the Deloittes survey, the effect classifying of costs as fixed or variable would have on the MIF?
A. I honestly don’t.
Q. You must have known what effect classifying costs as fixed or variable would have on the MIF?
A. Yes.
Q. You formulated a strategy within the BRC to achieve that end, didn’t you?
A. Yes, we did.
Q. And you were part of that strategy?
A. I contributed towards it, yes.
Q. Within the BRC, what discussions did you have about the response to the Commission’s 2013 survey?
A. I think we were pleased it supported what we all knew already. We knew cash was cheaper than cards by a long way.
Q. Did you have any discussions within the BRC about how to approach the survey?
A. No, I think the only discussions we had at the BRC were trying to persuade members to participate in the survey.
Q. To this day I don’t know what other retailers around BRC table participated in the survey. I was vocal in trying to persuade members to participate in the survey.
A. I can’t recall ever getting to that sort of detail.
Q. There is a sentence that I want to read out loud but I will tread carefully.
A. I think you already accepted you wanted the MIF to be lower.
Q. Why didn’t you mention in your witness statement the role that you played in bringing this claim against MasterCard?
A. I don’t think it was important but I’m happy to say I have talked about what I did.
Q. Correct. So you accept that you knew that? Do you want to read back the transcript?
A. Yes.
Q. I will come that, that is important. So you knew that whilst you were compiling a response to the Deloittes survey, the effect classifying of costs as fixed or variable would have on the MIF?
A. I honestly don’t.
Q. You must have known what effect classifying costs as fixed or variable would have on the MIF?
A. Yes.
1. A. Sainsbury’s Plc.
2. Q. So in November 20th, 2010, you are raising EFT costs, which is MIF costs, MSC costs; is that correct?
3. A. Yes.
4. Q. And you are raising it with the chairman of the Plc and the CFO of the Plc?
5. A. Yes.
6. Q. This is an important issue?
7. A. Yes.
8. Q. Can we go to bundle E5.2 please. Tab 34. This is a memo from you to John Rogers and Richard Fleming dated 12th May 2011 and the subject is "Interchange Fees".
9. A. Yes, Richard Fleming was the group finance director who was my boss and he reported to John Rogers, the CFO.
10. Q. Can you tell us who Richard Fleming was at that time?
11. A. Yes.
12. Q. Can you remember why did you write this memo? What was the purpose of it?
13. A. I think it was because interchange fees were rising, they were adding to our cost base and there was very little we could do about it. It was making John aware of the issue.
14. Q. So is it fair to say that Sainsbury’s Supermarkets Limited were concerned about this issue?
15. A. Yes, we were.
16. Q. Is it fair to say that Sainsbury’s Plc was concerned about this issue?
17. A. Yes.
18. Q. You go on to say:
19. A. It would have been. It would have been on the advice of the legal team.
20. Q. The bullet point at the top of 718 says:
21. A. Yes.
22. Q. That’s why you agreed to take part in the Commission’s surveys isn’t it, to help the Commission achieve that result?
23. A. Yes, because it would be helping us reduce our MIFs.
24. Q. The bullet point at the top of 718 says: "At our initial meeting with the Commission, they confirmed that on completion of the study they intended to discuss the UK retail findings with relevant national competition authorities. Our view is that they will uncover that interchange fees are not cost reflective and too high.”
25. That’s the result that Sainsbury’s wanted from the Commission, didn’t it, you wanted a finding to that effect?
26. Q. You certainly don’t disturb higher officials in the Plc with trivial matters, do you?
27. A. No.
28. Q. So you thought it was a matter they should be concerned about?
29. A. I think if -- the email that I sent to David Tyler was as a result of me thinking of a conversation -- it must have been a corridor conversation with myself and Richard Fleming earlier in the day. I think that email starts off “further to our discussions earlier today” and I can’t recall having a set meeting with him to talk about interchange but it may have been a follow up. The chairman may have had one or things on his mind, asked us a question and then we were obliged to follow up fairly quickly.
30. Q. Is it fair to say that this was your project in Sainsbury’s, this was something you took control of?
31. A. It wasn’t a project, it was part of my responsibility.
32. Q. My role -- I had the responsibility -- the relationship with the acquiring banks. I have the responsibility for putting the budget together. I have the responsibility for explaining variances to that budget and as part of that, I will have been questioned on what are we going to do about this overspend?
33. Q. You were also proactive about the issue, though, because you raised it with various people and you persuaded people to take it seriously?
34. A. Yes.
35. Q. You had invested in it?
36. A. I had.
37. Q. At page 717 you will see a heading “Our approach to interchange fees”. Can I ask you to read the three bullet points on page -- bottom of 717 and the top one on 718 please?
38. A. Yes.
39. Q. You had invested in it?
40. A. I had.
41. Q. That’s the result that Sainsbury’s wanted from the Commission, didn’t it, you wanted a finding to that effect?
42. Q. So you thought it was a matter they should be concerned about?
43. A. I think if -- the email that I sent to David Tyler was as a result of me thinking of a conversation -- it must have been a corridor conversation with myself and Richard Fleming earlier in the day. I think that email starts off “further to our discussions earlier today” and I can’t recall having a set meeting with him to talk about interchange but it may have been a follow up. The chairman may have had one or things on his mind, asked us a question and then we were obliged to follow up fairly quickly.
44. Q. Is it fair to say that this was your project in Sainsbury’s, this was something you took control of?
45. A. It wasn’t a project, it was part of my responsibility.
46. Q. My role -- I had the responsibility -- the relationship with the acquiring banks. I have the responsibility for putting the budget together. I have the responsibility for explaining variances to that budget and as part of that, I will have been questioned on what are we going to do about this overspend?
47. Q. You were also proactive about the issue, though, because you raised it with various people and you persuaded people to take it seriously?
48. A. Yes.
49. Q. You had invested in it?
50. A. I had.
51. Q. At page 717 you will see a heading “Our approach to interchange fees”. Can I ask you to read the three bullet points on page -- bottom of 717 and the top one on 718 please?
52. A. Yes.
53. Q. You had invested in it?
54. A. I had.
55. Q. That’s the result that Sainsbury’s wanted from the Commission, didn’t it, you wanted a finding to that effect?
schemes are likely to argue, perhaps fatally for us”,

Q. Can we take bundle E5.3, please. Tab 50. This is all
e on yellow paper. So neither of us is allowed to go into
the detail of it. You will see the title of this
document. It is a brief’s that’s written for “John’s
Meeting”. You will see on page 1245 it was you who
wrote this brief on 4th February 2012?

A. Yes.

Q. Who is John?

A. Again that is John Rogers, the CFO.

Q. On page 1243 you see a heading at the bottom of the
page:

“MasterCard Litigation”?

A. Yes.

Q. You don’t need to get into the details but if you have
a quick glance through that section. You see there is
a detailed description of the litigation against
MasterCard there?

A. Yes.

Q. Did you write that section?

A. I would have written it but it is certainly not
something I would have written on my own. I would have
been working with our legal department to get the facts
right in that.

Q. But is it fair to say that you were working with your
legal department on the claim, it was something you were
actively involved in, the claim against MasterCard?

A. Yes.

Q. Again bear with me for a moment, please.

A. Yes.

Q. If one looks over the page, pages 2 and 3 of this email,
they come first in time, you see that what’s happening
here is these are the results that are being worked up
for Sainsbury’s response to the 2011 survey; is that
correct?

A. Yes.

Q. Then you send an email to Paul Crisp on 30th March 2011:

“I would like to nominate both David and Angela for
Shining Stars for the support work we are doing for the
BRC and for the EU to help demonstrate the fees we pay
to the banks for debit and credit cards are excessive."

So the 2011 survey was work that you did to help
demonstrate that the fees that you paid to banks for
debit and credit cards are excessive?

A. Yes.

Q. Now, we know that Sainsbury’s issued its claim against
MasterCard on 19th December 2012.

A. Yes.
MR HOSKINS: If you could just slot that in behind. We are trying to find one.

MR JUSTICE BARLING: Do you have one?

MR HOSKINS: Let me see if I can have a clean copy handed up. Sorry, sir, if you will bear with me.

Q. Behind that what’s the next tab you have, is it A or 141?

A. I have got a 141 then.

Q. It is 140.

A. At 140 I have got at the bottom “Consultancy Group”. Behind that what’s the next tab you have, is it A or 141?

A. I have got a 141 then.

MR JUSTICE BARLING: Do you have one?

MR HOSKINS: We are trying to find one.

MR JUSTICE BARLING: These bundles have been updated, your bundle has obviously missed out on the updating process. (Handed)

MR HOSKINS: If you could just slot that in behind page 2787. Thank you.

Q. If we can begin at the bottom because again it is a chain of emails that begins at the bottom. There is an email from you dated 27th June 2013 to Edward Anderson.

A. It is too high?

Q. What was Edward Anderson’s role in the damages claim against MasterCard?

A. Edward would have been -- is the person I had been working with on the claim, he is the person from the legal department who has been leading the claim.

Q. When you said you have been working with him on the claim, I’m interested to know what you have been doing.

A. Edward would have been leading the claim, he is the person from the legal department who has been leading the claim litigation. Q. Was he the prime mover in that? A. He was leading, yes.

Q. Are you the main contact in the business for the claim?

A. Yes. Outside of legal, yes. Q. I understand. Is it Bruce Lessels --

A. Bruce Lessels was an accountant who was working in that area for -- on a six month temporary contract. That was the -- the previous person had moved elsewhere in the business and I had not been able to recruit so I brought somebody in temporarily.
Q. Sorry, can you say that more loudly?
A. Yes.

Q. The due diligence you talk about, the reason why you didn’t want to harm Sainsbury’s, was that it was obvious from the outset that the proposed response to the Commission was unhelpful, did you?
A. Yes.

Q. Can we go to bundle D3, tab 3, please. It is page 330. Can it be forwarded on?
A. Yes.

Q. The title page, it says it is the expert report of Dr Gunnar Niels. Do you follow me?
A. Yes.

Q. The due diligence you talk about, the reason why you didn’t want to harm Sainsbury’s, was that it was obvious from the outset that the proposed response to the Commission was unhelpful, did you?
A. Yes.

Q. Who is the expert witness who has been looking at whether MIT-MIF is appropriate.
A. He is the expert witness who has been looking at whether MIT-MIF is appropriate.

Q. Do you know who he is?
A. Yes.

Q. You didn’t want to put in their response the survey which was unhelpful, did you?
A. As I have explained earlier, the difference between cash and cards was so great that I knew filling in the survey would be helpful, there was no small -- it wasn’t marginal.

Q. It was obvious?
A. Yes.

Q. I should explain to you, if you look at the front page first, it is 207, behind tab 3. This is the first report of Dr Gunnar Niels. Do you follow me?
A. No, I’m sorry.

Q. Can we go to bundle D3, tab 3, please. It is page 330. Can it be forwarded on?
A. Yes.

Q. Who is he?
A. He is the expert witness who has been looking at whether MIT-MIF is appropriate.

Q. The title page, it says it is the expert report of Dr Gunnar Niels. Do you follow me?
A. Yes.

Q. Can you turn to page 330 of his report. Paragraph 6.79:
A. Yes.

Q. Do you know who he is?
A. Yes.

Q. Who is he?
A. He is the expert witness who has been looking at whether MIT-MIF is appropriate.

Q. Who is he?
A. He is the expert witness who has been looking at whether MIT-MIF is appropriate.

Q. Do you know who he is?
A. Yes.

Q. Who is he?
A. He is the expert witness who has been looking at whether MIT-MIF is appropriate.

Q. Do you know who he is?
A. Yes.

Q. Who is he?
A. He is the expert witness who has been looking at whether MIT-MIF is appropriate.
the survey was going to be helpful to Sainsbury’s?

A. I’m not familiar with the drafts but I think you said they were drafts and with draft documents you are waiting for figures and so my thought process is that we were waiting for parts of the business to come back with costs. One of the most difficult areas I do remember was trying to get details off our fixed cost register and it may be that is why the fixed costs have built up as we have been getting to the bottom --

Q. It is not accretion because what he is comparing is in the first draft we have said a certain category of costs is fixed and he is going through iterations of the draft. He follows it through and he gets to the end and one finds that it has gone from 11% to 55. You understand the significance of that?

A. I do, yes.

Q. That’s not a matter of detail, is it?

A. It may be a matter of -- if it is not building up those costs as a draft as I first explained, it would be a matter of review and I think there is a matter of subjectivity between fixed and variable and it may be that it was that subjectivity that was being firmed up.

Q. You made the final call, you told us, on what was to be a fixed and variable cost?

A. I would have on the final meeting reviewed that.
there is the relay to Jones Day that we talked about last week.

When I believe I was told that steps would be taken to ensure that only those within the confidentiality ring would be able to see the live feed that’s being transmitted.

MR HOSKINS: I will double-check that has been done.

MR JUSTICE BARLING: We will rise now for a short time and if you could confirm when we come back that those people in court are within the ring and if there’s anyone in the court who knows that they are not, who has not given the relevant undertakings, who is not within the confidentiality ring, I’m afraid it means that until further notice -- and we will make it as short as possible -- you will have to leave the court.

MR HOSKINS: Sir, before you rise, I don’t want to waste people’s time or not in the ring, but tomorrow it is going to be the same position for Hannah Bernard and Mr Rogers.

MR JUSTICE BARLING: What, for all their cross-examination?

MR HOSKINS: Yes.

MR JUSTICE BARLING: We will have a word -- I think the same will apply therefore.

MR HOSKINS: I just raise it now, so I don’t want someone to turn up tomorrow.

(3.08 pm)

(A short break)

(3.20 pm)

(In camera session)

(Confidentiality Ring Only)

(4.45 pm)

(The court adjourned until 10.30 am on Wednesday, 3rd February 2016)

INDEX

Housekeeping ........................................ 1
MR DAVID BROOKS (affirmed) ......................... 3
Examination-in-chief by MR BREALEY ............. 3
Cross-examination by MR HOSKINS ............. 3

41

43