

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1241/5/7/15(T)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16 December 2016

Before:

THE HON. MR. JUSTICE BARLING
MARCUS SMITH QC
PROFESSOR JOHN 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 SA

Defendants

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HEARING
(Matters reserved for further argument)

APPEARANCES

Mr. Derek Spitz (instructed by MdR) appeared for the Claimant.

Mr. Matthew Cook (instructed by Jones Day) for the Defendants.

1 THE CHAIRMAN: Good morning, nice to see you. Who is going to kick off?

2 MR. SPITZ: Good morning, Sir, and Members of the Tribunal. We have three ancillary matters
3 to deal with today. It is possible that they can be dealt with relatively quickly. The three of
4 them are, first, whether, in calculating the interest payable on the overcharge the Tribunal
5 should adopt a pre-tax approach or a post-tax approach or indeed a hybrid pre-tax and post-
6 tax approach that recognises the delay before payment of tax is due to HMRC.

7 The second issue concerns the rate of interest that should be applied, and in particular
8 whether these rates should be the figures provided in Mr. Harman's second report at tables
9 5.1 for interest on cash, table 5.2 for the cost of debt, or whether the correct figures to use
10 are those provided in Mr. Harman's fourth report at tables 4.1 for cash, and table 4.2 read
11 with appendix 4.1 for debt.

12 There is a subsidiary issue, and I will elaborate on these issues once I have set them up, in
13 relation to the choice between the Harman 2 figures versus the Harman 4 figures, and that is
14 if the Tribunal decides that the correct figures are in Mr. Harman's report, then there is a
15 question as to whether one uses that he provided for 2015/16, or whether one uses for
16 2014/15 for the following year as well. That is the second issue.

17 The third issue is about the confidentiality redactions to the judgment, and whether those
18 proposed by Sainsbury's should be maintained.

19 Turning then to the first issue, if the Tribunal would have a look at para.546.3 of the
20 judgment, and the judgment is in bundle K at tab 1. This is the confidential version of the
21 judgment in bundle K, and I am looking at para. 546 on paginated p. 303. At 546 (3) the
22 Tribunal sets out the relevant interest rates to be applied, and in (ii) the Tribunal says:

23 "On the 30% amount, the figures set out in Harman 2 s.5.16 using the pre-tax
24 figures."

25 The Tribunal goes on to say:

26 "Where Mr. Harman has not provided a figure – as for 2015/2016 – the figure for
27 the preceding year should be used."

28 Paragraph 547 then invites the parties to calculate the interest recoverable by Sainsbury's on
29 the basis set out in 546.

30 The Tribunal will be aware from the submissions on behalf of Sainsbury's that Sainsbury's
31 has calculated interest on the basis of these pre-tax rates. Just to have a quick look at it, the
32 calculations are in B2 at 14 at pp. 911 and 912. The Tribunal will also see that there is
33 some yellow highlighting for the interest rates themselves on the basis that those figures
34 come from Mr. Harman's expert report, and those figures themselves are confidential. The

1 point is that Sainsbury's has then calculated pre-tax interest in line with the provisions of the
2 judgment that I referred to.

3 THE CHAIRMAN: Of course, we said somewhere else in the judgment that we had done it all
4 deliberately on a pre-tax basis because everything to do with taxation is going to be subject
5 to----

6 MR. SPITZ: Indeed, and we are not suggesting----

7 THE CHAIRMAN: You cannot read anything into the fact that we said “pre-tax”.

8 MR. SPITZ: We do not suggest that the Tribunal has its hands tied. It is quite open to the
9 Tribunal to determine what the appropriate rate should be. I simply make the point that we
10 have calculated it on the pre-tax basis.

11 MasterCard contends that the interest should be calculated on a post-tax basis so as to take
12 into account the effect of tax in the calculation of interest in the same way as the parties
13 have taken it into account in the calculation of damages. It criticises Sainsbury's, I do not
14 think we need to go to MasterCard's submissions themselves, but the essence of the
15 criticism levelled in the supplemental submissions and in the original submissions is to say
16 that by adopting a pre-tax approach Sainsbury's implicitly assumes that it would have been
17 able to earn a return on interest income that it would have had to pay to the Government. It
18 puts the point strongly in its submissions of 15th September where it says that Sainsbury's is
19 implicitly assuming the ability to earn a return on the amounts that it would have paid in
20 corporation tax when, says MasterCard, this is clearly not the case.

21 If the Tribunal is minded to adopt a post-tax approach, then we suggest that a particular and
22 fairly limited adjustment needs to be made to the post-tax approach, and it is to cater for
23 what we say is a fallacy in MasterCard's reasoning. The fallacy is to assume that the tax is
24 due and payable immediately. In fact, there is a delay of several months between the time
25 the taxable income is received, and the date when payment is due. During that interval it is
26 indeed the case that interest can be earned on amounts, even though they will be payable as
27 corporation tax at the date on which payment is due. So, Sainsbury's submits that the proper
28 and correct approach to apply is actually a hybrid of a pre-tax and a post-tax approach to
29 interest.

30 THE CHAIRMAN: I see, you say because you do not pay the tax immediately you do earn some
31 interest on the money you do ultimately pay in tax?

32 THE CHAIRMAN: Then you have to pay tax on that as well presumably?

33 MR. SPITZ: Yes, you do, but the way that it works out is for a window of about five months
34 Sainsbury's has access to the funds that it will have to pay and it can earn interest on those

1 funds. So that is the adjustment that we suggest needs to be made to the otherwise
2 understood approach in terms of post-tax calculation.

3 THE CHAIRMAN: You accept the point that they make?

4 MR. SPITZ: What we say is, if the Tribunal does the reassessment and takes the view that post-
5 tax is appropriate, in that we say an adjustment----

6 THE CHAIRMAN: It is not really a reassessment because it is something we left open.

7 MR. SPITZ: Quite so.

8 THE CHAIRMAN: It sounds, from what you are saying, that you are not really pushing very
9 strongly on that.

10 MR. SPITZ: I am not pressing very strongly on the pre-tax point----

11 THE CHAIRMAN: The logic is quite powerful, is it not?

12 MR. SPITZ: -- for several reasons. The first is that this approach is consistent with what
13 Sainsbury's expert has said, and it is consistent with the approach that has been adopted
14 towards the calculation of damages. For those reasons, we do not press it beyond simply
15 pointing out that we have done a pre-tax calculation.

16 THE CHAIRMAN: And you have done a calculation also of your five month period?

17 MR. SPITZ: We have, and that is at bundle H, tab I, p.73.

18 THE CHAIRMAN: It is in the letter, is it not? Is there anything other than in your very recent
19 letter?

20 MR. SPITZ: The table is in the letter.

21 THE CHAIRMAN: I have got the letter.

22 MR. SPITZ: The tables are at p.81, and what you will see there is that two calculations have been
23 carried out. It is bundle H, tab I, p.81.

24 THE CHAIRMAN: I was just glancing through, it is in the letter. There are two tables, table 1?

25 MR. SPITZ: Table 1 applies MasterCard's tax adjusted approach, but it also accounts for the five
26 months' tax delay. It sets out the calculations on the basis of the figures in Mr. Harman's
27 second report.

28 THE CHAIRMAN: Using the second report?

29 MR. SPITZ: Yes, we provide two examples, one using the second report, and that is table 1; and
30 table 2 uses the fourth report. You will see, reading the headings from left to right across
31 the top, that the first four columns follow the MasterCard post-tax approach and ignore the
32 issue of tax delay. Then the last two columns deal with the interest due to the tax delay.

33 THE CHAIRMAN: The last two columns?

1 MR. SPITZ: The last two columns. I am not going to read the figures out but you will see that in
2 table 1, using Mr. Harman's second report figures, we say that there would need to be an
3 adjustments of the amount set out on the----

4 THE CHAIRMAN: On this thing you get an extra - this is the £62,000 figure, is it not, and then it
5 is grossed up?

6 MR. SPITZ: Then it is grossed up. I think, Sir, you are looking at table 2 for the moment?

7 THE CHAIRMAN: I am, yes, at the moment.

8 MR. SPITZ: So that is using Mr. Harman's fourth report. I should add for clarity that when we
9 have used his fourth report, we have also used his 2015/16 figure.

10 THE CHAIRMAN: All right.

11 MR. SPITZ: You will see that that is set out in the heading and in the source at the bottom. Then
12 the previous table, table 1, yields a somewhat higher adjustment which is then grossed up to
13 yield that figure.

14 THE CHAIRMAN: Yes, that is clear enough.

15 MR. SPITZ: It is also worth having a very quick look at the HMRC guidance on paying
16 corporation tax, which ought to be in bundle B at tab 20, and it begins at p.972. At the top
17 of p.973 under the heading, "Who has to pay corporation tax in instalments", the Tribunal
18 will see that it is generally large companies with an annual rate of more than £1.5 million.
19 Those are the companies that pay corporation tax in instalments, and you will see at p.974,
20 just below the middle of the page under the heading "When instalment payments have to be
21 paid", that this sets out when these instalments are due. For an accounting period of 12
22 months the guidance provides, "If your company has a 12 month accounting period, you
23 will have to pay in equal instalments", and it then sets out when those instalments are due,
24 the first instalment being six months and 13 days after the first day of the accounting period.
25 It then sets out that the subsequent instalments are due three months after each prior
26 instalment.

27 So what we have done is to say that there is approximately a five month period between the
28 mid-point of the first quarter, which is one and a half months into the year, and the date on
29 which the first quarterly payments is due, which is six months and 13 days into the year.
30 In relation to the second quarter, there will also be around a five month period before the
31 second quarterly payment is due, and that we get from the mid-point of the second quarter,
32 which is four and a half months into the year, and the second quarterly payment being due
33 around nine and a half months into the year, and that is three months after the first payment
34 is due. This approach is consistent for the other two instalments.

1 So what it boils down to is simply this: that there is a five month gap during which time
2 interest can be earned on funds that will be paid to HMRC. As we have seen, we have
3 illustrated that in the two tables.

4 The submission on this point, and this is all that I think that I need to say about the first
5 issue, pre-tax versus post-tax or a hybrid approach, the conclusion is to recognise that the
6 delay before tax is payable, and so damages should be estimated using a hybrid approach,
7 with a pre-tax approach for an initial period of five months before tax is deducted, and the
8 resulting post-tax amount then being compounded forward, using post-tax interest rates, and
9 the resulting total damages are then grossed up, as we have seen in the table.

10 That is all I want to say about the first issue.

11 The second issue concerns which rates of interest to use. Are they the figures from Harman
12 2, which deal with average cost of debt, or are they the figures from Harman 4, which deal
13 with the cost of new debt? Looking again at the judgment at para.545, p.302-3, the Tribunal
14 begins this paragraph by noting its preference for the approach of Mr. Harman. It
15 continues in the next sentence to exclude the relevance of sale and leaseback agreements,
16 and then it goes on to say:

17 “We also consider that it is better to calculate interest on the cost of new debt as
18 suggested by Mr. Harman. This reflects the reality of the situation that must
19 consider when assessing damages: absent the overcharge, Sainsbury's would have
20 found itself with additional funds, which it could have used to increase its cash
21 balances or ...”

22 and we place emphasis on these words -

23 “... or to pay down its existing debt obligations.”

24 Then the judgment continues at 546(2):

25 “in relation to that 50% ...”

26 that is the 50 per cent of Sainsbury's assessed damages -

27 “... we will award interest on 20% of the overcharge at the rate that Sainsbury's
28 would have earned on its cash balances. We will award interest on 30% of the
29 overcharge at the rate that Sainsbury's would have saved by taking out less new
30 debt.”

31 And in 546(3) the judgment then deals with the relevant interest rates to be applied, and if
32 one looks at (ii):

1 “On the 30% amount, the figures set out in Harman 2 s.5.16 using the pre-tax
2 figures. Where Mr. Harman has not provided a figure – as for 2015/2016 – the
3 figure for the preceding year should be used.”

4 The figures in Harman 2 are at D3.1, tab 4, p.488, and Mr. Harman has set out both the pre-
5 tax cost of debt figures and the post-tax cost of debt figures. The Tribunal will also see that
6 he has not provided a figure in table 5.2 on p.488 for the 2015/16 year.

7 Here, too, Sainsbury's submission is a short one, and it is that the application of the figures
8 in Harman 2 is consistent with the reasoning in para. 545 of the judgment and, in particular,
9 with the words that I stressed earlier, that Sainsbury's would have found itself with
10 additional funds which it could have used to increase its cash balances or to pay down its
11 existing debt obligations. This is because if Sainsbury's had used the additional funds,
12 absent the overcharge, to pay down its existing debt obligations it would have saved its
13 average cost of debt, and that is why we say that the figures in Harman 2, which deal with
14 average cost of debt can be used, consistent with the reasoning in the judgment.

15 The figures for new debt are not in Harman 2, but are in Harman 4, which is at D3.1 at
16 p.664. There, the court will see under para. 4.17 in table 4.2 Sainsbury's annual weighted
17 average cost of new debt and, again, Mr. Harman has set out the pre-tax and the post-tax
18 rates. The source listed underneath table 4.2 is appendix 4.1.

19 Sir, you will see, looking down that list of figures, that in table 4.2 Mr. Harman has
20 provided figures for 2014/15 but the figure for 2015/16 appears in appendix 4.1, which is
21 the source of this table.

22 I need to make sure that the Tribunal has appendix 4.1 because you will see on p.673 at the
23 back that a copy was provided electronically, but it may well not be in your bundles. We
24 have sought to insert it, but if the Tribunal does not have it, I have copies, and I would like
25 to hand those up to the Tribunal.

26 THE CHAIRMAN: I am pretty sure we have it, but we will just take it now as well. (Same
27 handed) Thank you.

28 MR. SPITZ: It is really only the first page of this spreadsheet which is relevant for our purposes,
29 and this is appendix 4.1 and the Tribunal will see that here Mr. Harman has provided a
30 figure for 2015/16 at 3.77. That figure is a pre-tax figure and so if the Tribunal adopted the
31 post-tax approach one would need to apply the post-tax figure not the pre-tax figure of 3.77.

32 THE CHAIRMAN: Do you have it?

33 MR. SPITZ: Yes, we have.

34 PROFESSOR BEATH: (After a pause) It is about [REDACTED] per cent.

1 MR. COOK: Exactly so.

2 THE CHAIRMAN: Okay, is it something you do not want to say?

3 MR. SPITZ: Yes, we should probably not say----

4 MR. COOK: The one he has just said!

5 MR. SPITZ: These are specific to Sainsbury's.

6 THE CHAIRMAN: So you do not mind announcing the gross amount.

7 MR. SPITZ: Professor Beath mentioned it.

8 PROFESSOR BEATH: It is [REDACTED], yes.

9 THE CHAIRMAN: There we are! (Laughter)

10 MR. SPITZ: Our primary submission is the figures in Harman 2 are consistent with the reasoning
11 in the judgment. If one looks at the figures in Harman 4 and applies those figures then one
12 needs to apply all of them not just the figures up to 2014/15 because in this situation when
13 the Tribunal says if there are no figures then apply the same figure for 2014/15 to 2015/16
14 here there is a figure, so that figure must be applied.
15 Those are my submissions in relation to----

16 THE CHAIRMAN: The trouble with Harman 2 is that Mr. Harman himself says that there might
17 be something better coming along and, if it does, I will say, and, of course, he did in
18 Harman 4. You hang it on the peg of the----

19 MR. SPITZ: We do, on the basis of the average cost of debt in Harman 2.
20 The third issue concerns the redactions, and I would like to turn to those.

21 THE CHAIRMAN: Is there anything else?

22 MR. SPITZ: Actually, Mr. Cook makes a suggestion and I think it is a sensible one.

23 THE CHAIRMAN: Deal with it separately?

24 MR. SPITZ: That is primarily a matter between Sainsbury's and----

25 THE CHAIRMAN: Exactly, so shall we hear Mr. Cook on those points?

26 MR. SPITZ: Yes.

27 MR. COOK: Sir, I was not indicating that we would not stave off the confidentiality, we will
28 make some submissions on it, so the Tribunal's minds are firmly fixed on interest and
29 taxation before we move to matters of confidentiality.
30 I think, from my learned friend's submissions, it turns out that the issues are considerably
31 narrowed between us. I am extremely concerned by the fact that Sainsbury's has kept £2
32 million of MasterCard money for five months.

33 THE CHAIRMAN: You will get interest.

1 MR. COOK: We will, but I am more putting a marker down at this point that they dropped the
2 argument without any notice on the day of the hearing. It has been an issue that has been
3 live for five months and it has resulted in MasterCard being kept out of £2 million of its
4 money.

5 THE CHAIRMAN: It is the 'pre-imposed' point?

6 MR. COOK: The pre-imposed point, which has now been dropped. Yes, we will get interest on
7 it, and these are matters I am more raising for the purposes of putting a marker down for
8 both interest and costs because, again, there have been rounds of submissions on exactly
9 this point and the point has now been dropped. Nonetheless, that is the marker put down for
10 now.

11 What we are left with in terms of the pre and post-tax point is a point that has only arisen
12 this week, and we say that is farcically too late to try and raise an entirely new calculation
13 of this order for a number of reasons. This is something that has never been canvassed
14 before in any of the submissions, and none of the experts took the point that the calculation
15 should never have been done. So it is something that has simply come out of the blue at us
16 this week.

17 There are a number of problems with it, that if this was going to be the route we were going
18 to go down, we would have needed expert evidence on these issues and it cannot simply be
19 done by Mr. Spitz showing you some kind of corporation tax schedule. There are a number
20 of reasons, we say, on that, and these are issues that we have not gone into before because
21 the parties were not focused on these kind of very small points.

22 The first point is that Sainsbury's does not, in fact, pay the merchant service charge on the
23 day of the transaction. It was being billed for merchant service charge at the end of the
24 month by the bank. If we are going to get into points where effectively we are splitting
25 hairs about number of days of interest, then we would need to look at exactly when
26 payments were being made, because they are billed at the end of the month, it is coming
27 through like that, and that knocks a month out of these numbers. We are getting to a stage
28 where, in all honesty, it becomes rather silly and not cost effective. Again, we would be
29 getting into those kind of issues.

30 My learned friend's comments were also "approximately five per month". Again, if we
31 were going to get into that we would be saying that this would need to be done properly.
32 The next point is we have not been able to replicate the figures that my learned friend has
33 put in front of you. As far as we can see, they are not right, but we do not know why. So

1 again, we would be needing to go into expert issues to try and work out what is a correct
2 number.

3 There is then another matter, which is a matter of principle, which again the Tribunal has
4 never been asked to look at before, and we would need to go into it. It is evidential matter,
5 and it becomes this: the Tribunal has taken an approach in the interest section of its
6 judgment in looking at what Sainsbury's will do with the money it would have had at the
7 time. You reached the findings you did in relation to that. What you were not focused on is
8 the idea that Sainsbury's will have a small pot of money - probably a large pot of money
9 given its corporation tax bill - which it knows that it has to pay to the Government in three,
10 four, five months time. That is an entirely different consideration in terms of what you
11 might do with money where it is not simply part of your general business funds, it is
12 something that you know you have a tax bill to meet very shortly, and that money is
13 effectively earmarked to meet that tax bill. There will be an entirely different question
14 about what you might have done with it. We will be saying at that stage that, while the
15 Tribunal's comments on what you do with your general business monies makes sense, in
16 the sense of making an apportionment between some of it would sit in the bank, some of it
17 would be used to pay off debt, we would say, particularly given transactional costs, no one
18 would go out, pay off debt, wait four months and then take new debt out in order to deal
19 with your corporation tax bill. It might theoretically be a good idea if the world was cost-
20 free, but it is not. So in the real world, in all likelihood, if you have got a tax bill meet - and
21 as a barrister I know a little bit about that on a personal level - to some extent you have the
22 money earmarked in your bank account. So we would be saying that if you are into that
23 kind of territory realistically that would simply be interest on your cash balances, it would
24 not be something where there would be an element of new debt.

25 The reality is, we say, all of these points are ones that are raised far too late in the day.
26 They would have needed to be matters of evidence, because again Mr. Spitz is talking about
27 what Sainsbury's would have done with the corporation tax bill money, and we would have
28 asked questions of their witnesses and said, "If you have got some money waiting for
29 corporation tax, presumably you mentally keep that aside, and you do not want to pay off
30 debt with it?" So these are factual and expert questions that would need to have been
31 raised. Frankly, at this stage, given the sums in dispute, it simply is not sensible or cost
32 effective to do so, We say that raising it at this point when there have been two rounds of
33 submissions, when the trial is five months over, is simply impermissible and the Tribunal
34 should rule it out entirely.

1 If not, at the moment we cannot simply replicate the numbers. They would need to give us
2 their calculations, we would need to have a process of trying to agree them, and we say that
3 is not acceptable at this stage and not cost effective, and it would mean that this hearing
4 could not be final in any event. I think we would all like this to be the last hearing on these
5 issues.

6 So that is what we say in relation to the first issue.

7 Sir, I would ask you to take up the judgment, turning to the second issue, which is the
8 question of----

9 THE CHAIRMAN: Harman 2 versus 4.

10 MR. COOK: Yes, effectively Harman 2 versus 4, Sir, and that is a very nice of way of dealing
11 with it. We say this is effectively a completely impermissible attempt again by Sainsbury's
12 to appeal against your judgment. We say that is the case, because if you would you turn to
13 the judgment, bundle K, p.302 and 303, where we see your judgment on these issues,
14 because we have had this fight before. We have had the fight about whether this should be
15 average cost of debt generally, trailing average cost of debt or new debt. We had the fight,
16 we heard the evidence and the Tribunal has reached its reasoned judgment on this, and
17 Sainsbury's has not appealed, nor did we appeal on it.

18 If we start at para.543, working through, the Tribunal repeatedly concludes new debt is the
19 relevant rate. At 543(2) it says:

20 “... we consider that interest should be awarded:

21 (2) At the rate of Sainsbury's new debt on 30% of the overcharge.

22 This reflects the factual position that we have found to exist.”

23 Then para.544, and this is dealing with the argument about trailing average cost of debt, and
24 this is not, of course, common to, this is a sort of hybrid that was Mr. Reynolds' approach,
25 but it was midway between Harman 2 and Harman 4, it was a trailing average cost of new
26 debt. You have gone through setting out Mr. Reynolds travelling average, and about five
27 lines up from the end of the paragraph:

28 “By contrast, Mr. Harman implicitly assumed that the debt, which would have
29 been paid down by Sainsbury's had the overcharge not occurred, would have been
30 new debt taken either at a variable or on terms permitting regular refinancing.”

31 Again, I have emphasised the words “new debt”.

32 “Thus, the cost of debt fell much more swiftly on Mr. Harman's approach
33 compared to Mr. Reynolds' approach.

34 We prefer the approach of Mr. Harman.”

1 Paragraph 545. So, once again, the Tribunal has explicitly said this should be a cost of new
2 debt. You go on to give the reasons for that:

3 “We consider that the sale and leaseback agreements had nothing to do with the
4 overcharge ... We also consider that it is better to calculate interest based on the
5 cost of new debt as suggested by Mr. Harman.”

6 So there is a third repetition of the point. The judgment then goes on to explain:

7 “This reflects the reality of the situation that we must consider when assessing
8 damages: absent the overcharge, Sainsbury's would have found itself with
9 additional funds, which it could have used to increase its cash balances or to pay
10 down its existing debt obligations.”

11 My learned friend tries to use that to rewrite everything that the Tribunal has explicitly said.
12 You have said explicitly three times, new debt, new debt, new debt. We say that is the end
13 of the point. If my learned friend disagree with that, he had the opportunity to appeal, but
14 he did not. We say that is absolutely clear, it must be the cost of new debt. It makes perfect
15 sense that you would not take out new debt if you had had more money available to do so,
16 and that is the reason why the Tribunal found that was the right answer.

17 Then we come effectively to what is, with respect, an error, but, frankly, a not very
18 surprising error, given the multitude of reports that were running around with different
19 figures in place. The error is in 546(3)(ii), where it says, “the figures set out in Harman 2”.
20 Of course, as you rightly said, Sir, Mr. Harman explicitly said in his second report those
21 were the best he could do, he would change if anything better came along. Something
22 better did come along. Those are the cost of new debt figures that we see in Harman 4, and
23 those clearly must be, in the light of the Tribunal’s very clear repeated finding that new debt
24 is the correct approach, the numbers that should be utilised. We say, again, that is a point
25 where the correct approach is Harman 4, and quite clearly Harman 4.

26 MR. SMITH: It is clear that, first of all, that Harman 4 is explicitly referenced in the judgment
27 earlier on, we actually refer to it in para.34 as being material before us. Paragraph 4 of
28 Harman 4 makes very clear that Harman 4 is updating Harman 2 in the light of additional
29 evidence.

30 MR. COOK: Absolutely, sir. It is quite clear that this is Mr. Harman saying that he did the best
31 he could with limited material, he got some more and better material, and he set out new
32 debt rates. Then we have the fight between Mr. Reynolds’ trailing average and
33 Mr. Harman’s new debt, and the Tribunal has come down on our side on that point. It is a
34 small error, one which can be----

1 THE CHAIRMAN: Homer nodded, you say.

2 MR. COOK: Sorry?

3 THE CHAIRMAN: You say that Homer nodded.

4 MR. COOK: I am not sure I would say it was even at that level, Sir. In the multitude of reports
5 you had, not to remember the specific reference is, frankly, wholly unsurprising.

6 We say quite clearly it should be Harman 4.

7 Turning then to the small point in relation to the 2015/16 rates, if we can turn up bundle D,
8 3.1, where we find Harman 4.

9 THE CHAIRMAN: Page 664, is it?

10 MR. COOK: Page 664 is table 4.2, which is the----

11 THE CHAIRMAN: Then you want the appendix?

12 MR. COOK: I will come to the appendix, Sir, because we say that my learned friend's reliance
13 on the appendix is misguided. Table 4.2 sets out SSL's annual weighted average cost of
14 new debt, and it has the figures included with it, including of course a 2014/15 figure. It
15 does not have a 2015/16 figure, and there is a reason for that. The reason for that is that
16 Mr. Harman did not have the data to calculate an annual weighted cost of new debt for
17 2015/16, and my learned friend, with respect, has led you slightly astray by taking you to
18 the front page of appendix 4.1. If we can go to that, and it is apparent why he has not
19 included it.

20 Sir, if you go to appendix 4.1, you start with a front page which I accept is headed "Annual
21 cost of debt", but it is an automatic figure generated from within the report. If you go two
22 pages into the detailed spreadsheet, and I am afraid the text is very small, what you have if
23 you look at the financial year 2016 column on the right hand side is only two quarters. It
24 does not actually have the full year data, and that is the reason why, in his main report, he
25 has not given a weighted average for 2015/16 because he did not have the data to do it. So
26 that is an incomplete number, and he has not taken it into his main report.

27 There are also some other issues which we flagged in our submissions about the reason, in
28 part, why that would not have been an appropriate number anyway, the figures which were
29 taken from Mr. Reynolds included a hybrid debt equity instrument which, certainly we
30 would say, would not be treated as being a debt figure rather than equity figure in any event.

31 Ultimately, it was not gone into because there was not enough data to do a full year figure.

32 THE CHAIRMAN: Where does the figure that we see on p.1 come from again?

33 MR. COOK: Weighted average, but it is not a full year figure, and a full year figure would take
34 you down to a debt which are actually the two big ones - there are two numbers, 250 and

1 those other numbers that I can say because they come from the accounts, which are £250
2 million----

3 PROFESSOR BEATH: For the financial year 16, since we are only two quarters in, might they
4 be subsequently revised?

5 MR. COOK: That is what we would say. Effectively, Mr. Harman did not do a calculation
6 because he did not have the data to do a full year one, and anything like that was always
7 going to be incomplete at the partial year point. So he did not have the full year accounts
8 and that is the reason why he has not put a full year figure within it. Had it been necessary
9 to get into it, again we have issues that what is included in Mr. Reynolds' numbers, the two
10 £250 millions, are hybrid equity debt instruments, and arguably we would say, on analysis
11 would not be included with a debt figure rather than an equity figure, but that was not
12 something that Mr. Harman got into because he just simply did not have the data for that
13 year. Again, it could be said that perhaps the front page of appendix 4.1 is slightly
14 misleading, but when you look into it there is a reason why he has not taken into the main
15 report a 15/16 figure, and the Tribunal, with respect, is better using the 14/15 year, which is
16 a full year figure showing what Sainsbury's could actually borrow money at than something
17 that is an incomplete, partial figure, which inevitably then is not going to reflect the actual
18 cost of borrowing during that full year. Ultimately, we are, in fact, looking at a full year
19 because the way in which Sainsbury's financial years run. We say it should be the best data
20 for the Tribunal. Obviously, the ideal date would be a full year, 15/16, we do not have that;
21 the best data is the most up to date full year figure you have, which is the 14/15 figure, and
22 that is what Mr. Harman has put before you in table 4.2 of his fourth report because that is
23 what he considered to be the best of data available and we say the Tribunal should follow
24 that.

25 Those are the points we make in relation to the taxation and interest points. Unless there is
26 anything I can help you with in relation to that?

27 It is common ground now that Sainsbury's owes us a couple of million pounds back, there is
28 then going to be the issue of what interest rate should be applied to that. I think the effect of
29 the judgment we would say is formally that we are entitled to judgment debt interest on the
30 basis the judgment says they are required to pay the money to us. The Tribunal might think
31 that is a little bit generous, I would say it is entirely fair in circumstances where they have
32 kept us out of the money for no reason at all but, if not, the Tribunal would need to
33 determine a rate which took account of exactly that fact, that we have been kept out of the
34 money with no explanation.

1 THE CHAIRMAN: You can reply generally but, when you reply, perhaps deal with the point of
2 the repayment rate of interest, because we need to know what both of you say on this.

3 MR. SPITZ: Just as a rough idea, the amounts that are in issue – on the first issue, whether it is a
4 pre-tax or a post-tax approach, that is not a substantial sum. The substantial sum is on
5 whether one uses the figures in Harman 2 or Harman 4.

6 THE CHAIRMAN: Just remind me, what scale is the pre/post – leave aside the----

7 MR. SPITZ: Pre/post is either 110 or about 205 depending on whether one uses Harman 2 or
8 Harman 4.

9 THE CHAIRMAN: 1000.

10 MR. COOK: Just to explain, Sir, the pre or post tax point, as it was originally formulated was
11 worth about £2 million, but they dropped the argument on that. So, effectively we are
12 always entitled to £2 million.

13 MR. SPITZ: I think, with respect, that is not correct. We can do the numbers but I think that on
14 either basis, whether it is a pre-tax or a post-tax, the sums at stake are in the region that I
15 indicated, but of course we can check that.

16 PROFESOR BEATH: (No microphone) It cannot be much less (Inaudible).

17 THE CHAIRMAN: Right.

18 MR. SPITZ: As far as the point that was raised in relation to this being an evidentiary matter, and
19 requiring to ask questions about what Sainsbury's would, in fact, have done with the money,
20 the Tribunal will recall the broad axe that was applied in formulating the breakdown of 20
21 per cent in relation to cash balances, 30 per cent in relation to borrowing and, on the basis of
22 the view, that 50 per cent of the damages were passed on although in a non-legal and purely
23 economic sense. On that sort of basis a broad axe approach would be applicable and
24 appropriate here, too, to make the adjustment; it is a fairly straight forward point.

25 THE CHAIRMAN: Maybe we have to do something similar, as he says.

26 MR. SPITZ: Perhaps.

27 THE CHAIRMAN: That might be a lot more though, once we start getting into that, because that
28 covers----

29 MR. SPITZ: Sir, this is on the adjustment point.

30 THE CHAIRMAN: No, I appreciate, and you are talking about the five months.

31 MR. SPITZ: Yes.

32 THE CHAIRMAN: Mr. Cook makes the point if you start getting into that kind of issue, which
33 has not been looked at before, then leaving aside evidential questions they have points about
34 when the actual merchant service charge was paid by Sainsbury's and there might be

1 something to be adjusted there. I do not know how big that would be, but it might be quite
2 a lot.

3 MR. SPITZ: The Tribunal has my submissions on this issue.

4 THE CHAIRMAN: You are not going to say any more about that then?

5 MR. SPITZ: No. As far as the second issue is concerned, it is not an effort by Sainsbury's to
6 bring an appeal against the judgment before the Tribunal. The point, really, is this: one way
7 or another and, as Mr. Cook has indicated, there is a small but relevant error in the judgment
8 and the error is either that there are references to new debt when average cost of debt was
9 met, or the error is there is a reference to the figures in Harman 2 rather than Harman 4.
10 What Sainsbury's proposed in the correspondence to deal with this was that it could be dealt
11 with on paper and it was not actually necessary to have a hearing in order to do so.

12 THE CHAIRMAN: We were rather hoping that you would both have got your heads together and
13 actually sorted this out without troubling the Tribunal again at all.

14 MR. SPITZ: Indeed, absolutely, Sir, and if it was necessary to trouble the Tribunal we suggested
15 that it could be dealt with briefly and on paper.

16 Sir, that error needed to be addressed one way or another; it is not a question of trying to
17 appeal against a finding on an issue that has already been analysed, and that is all I want to
18 say in relation to the second issue.

19 One brief point on the question of interest, our submission is that the if any amount is to be
20 reimbursed to MasterCard, the interest on that amount should be at the rate at which these
21 funds have been invested and attracted interest so far, and on that we can obtain the details
22 and write to the Tribunal and advise what that figure is. That would ensure that everything
23 that Sainsbury's has obtained in terms of interest would be payable to MasterCard. There is
24 no basis, in our submission, for interest at the judgment debt rate.

25 MR. SMITH: So that would be on the assumption that Sainsbury's would, quite rightly, invest
26 money to earn the highest rate of interest available in the circumstances, and MasterCard
27 might not be able to do any better had it held on to the money?

28 MR. SPITZ: It might be, I cannot confirm that but that may well be the case.

29 MR. SMITH: You cannot give us an indication of what sort of return was achieved?

30 MR. SPITZ: I can take an instruction and see whether we are able to. (After a pause) Mr. Smith,
31 I am told that it is confidential, but we can give an indication in writing to the Tribunal.

32 THE CHAIRMAN: It would obviously be very nice if you could agree something, split the
33 difference, or do something that is between you, but obviously that would need to be done
34 fairly quickly and, in the meantime, by all means send us that.

1 MR. SPITZ: Indeed.

2 THE CHAIRMAN: Mr. Cook, I suppose, technically, you can say more about that point if you
3 want to.

4 MR. COOK: Thank you for the invitation, Sir. It is simply the rate which Sainsbury's generated,
5 in the real world, Sir, that is not going to be a rate that anyone can easily establish. Money
6 is fungible, it is going to have been paid into Sainsbury's business as a whole. I cannot
7 imagine that they have put this into a suspensory account and received a separate rate on it,
8 so we would be into territory of, in some senses, the rate Sainsbury's earned on it is not the
9 measure; it is a measure of MasterCard's loss in not having the money. We have not got to
10 the stage of putting in evidence on that issue, but we say it is a matter where the Tribunal
11 does, as it does in 95 per cent of cases, it simply awards interest at a standard rate rather
12 than getting into the cost and difficulty of assessing the specific rate. It certainly should not
13 be looking at the rates of Sainsbury's where you have made a variety of discounts, only 50
14 per cent for passing on, none of those issues arise in relation to MasterCard.

15 THE CHAIRMAN: If you won lottery with it, I suppose you might be hesitant.

16 MR. COOK: MasterCard does not play! (Laughter)

17 THE CHAIRMAN: Right, we are on to confidentiality then, are we? Are we going to be able to
18 deal with this conveniently? Shall we try without----

19 MR. SPITZ: Yes, I think let us try and do that. Obviously, I will point to the particular
20 redactions without----

21 THE CHAIRMAN: I do not envisage us giving a judgment on this, we will just hear what you
22 both say and probably give you some notice of what we propose to do by letter.

23 MR. SPITZ: Thank you, that is helpful. There are two paragraphs where it is Sainsbury's
24 understanding that the Tribunal has accepted----

25 THE CHAIRMAN: The numbering?

26 MR. SPITZ: The numbers, yes – para. 452 and para.533.

27 THE CHAIRMAN: We will just check to make sure.

28 MR. SPITZ: Page 260. It is p.251 of the judgment, and it is para. 453.

29 THE CHAIRMAN: Yes, that is one that I recognise. You need not trouble us about that.

30 MR. SPITZ: The next one is para. 533, which is at p.298.

31 THE CHAIRMAN: Yes, we need not trouble you about that either.

32 MR. SPITZ: There are then five paragraphs where some phrases and some sentences have been
33 redacted, and Sainsbury's would seek to preserve those redactions. The first to look at is

1 para. 450 at p.258. I am taking these slightly out of order. You will see there the phrases
2 that Sainsbury's seeks to keep confidential.

3 THE CHAIRMAN: Speaking entirely for myself, I think, it is all very general, and what you
4 would predict any sensible would be doing, it is just generalised material, but it is also quite
5 an important part, which is why it is quoted. I cannot see how any of your competitors
6 would be remotely surprised to read that.

7 MR. SPITZ: What we say about it is that it deals with the circumstances in which Sainsbury's
8 will consider price increases and also with how it manages negotiations with counterparties
9 or suppliers, and this could impact on the way in which negotiations between those
10 counterparties and Sainsbury's take place, if they are aware of the points mentioned in this
11 paragraph.

12 PROFESSOR BEATH: These to me just seem like a set of all the possible things you might do
13 rather than committing yourself to any particular action. It does not seem to commit
14 Sainsbury's to anything in particular. This is what you would tell a young business
15 administration student to think about.

16 THE CHAIRMAN: This is quite important for us to understand what possibly led the Tribunal
17 to----

18 MR. SPITZ: On that issue, Sir, because of course when one looks at this, one is also doing it with
19 a view to what is necessary to go into the judgment to explain the reasons for the decision.
20 My submission in relation to that point is that these issues go to the question of pass-on.
21 There are a number of paragraphs in the judgment, and I can give the Tribunal the
22 references if need be, where it is quite clear how the Tribunal dealt with the question of
23 pass-on, and how it came to the conclusion that MasterCard had not demonstrated that there
24 had been pass-on. These paragraphs are necessary to appreciate the Tribunal's reasoning in
25 relation to that. Just for your list, Sir, the paragraphs that I would highlight would be
26 para.464 and 465, 469, 470, 484(4)(i) and (ii) and 485. If one has a look at those
27 paragraphs it is clear that interested third parties will readily be able to appreciate why the
28 Tribunal concluded that MasterCard's pass-on argument was not accepted, and why
29 MasterCard had not established that Sainsbury's had passed on the overcharge into price.
30 Sir, the next paragraph is para.441 at p.255, The point we make here is that these phrases
31 identify line items on which Sainsbury's would focus in the event that its budgeting numbers
32 do not stack up. It is not widely below the CFO level, and it deals with how Sainsbury's
33 treats budgeting gaps and where it aims to push costs down in what order. The order in

1 which it would deal with pushing down costs will impact on competition with other
2 supermarkets and negotiations with counterparties.

3 The third one is para.444. All I want to say about this is that the redacted phrases set out
4 specific factors that govern the retail prices charged by Sainsbury's.

5 The last two are paras.432, p.250, and 523, p.294. On those I would simply propose to
6 point the Tribunal to what we said in the letter from Mishcon de Reya of 13th July 2006, and
7 that is in bundle H, tab I, pp.37-8. Paragraph 523 is dealt with in this letter at p.41.

8 Sir, those are the five paragraphs. I would just mention briefly the context around the issue.
9 The Tribunal will recall that at the pre-trial review both parties brought applications for
10 material to be confidential and for parts of the hearing to be heard in private. The transcript
11 records that the Tribunal was sympathetic to the confidentiality concerns of Sainsbury's and
12 indeed MasterCard. There are two references for the Tribunal's note. The transcript is at
13 bundle B2, and I do not propose to turn those sections up but simply to flag them. They are
14 at B2, tab 19, pp.952-53, and at p.952 makes the point, "I think you are pushing at an open
15 door as far as the two categories of documents that you are concerned about", and those
16 categories related to pricing information and investment decisions.

17 Also in the transcript at B2, 19, pp.969-70, the Tribunal made the point:

18 "How the claimant prices its product is clearly a matter as to which there is
19 commercial importance in maintaining confidentiality, it is commercially very
20 sensitive. The same applies to information as to Sainsbury's investments and
21 financial planning. Both these categories of information are represented in the
22 documents disclosed and are relevant to an issue in the trial relating to pass-on.
23 Therefore, both will have to be canvassed in evidence and submissions, and for
24 reasons set out by the claimant in the application ought to be the subject of such
25 protection as is appropriate."

26 That then led to the evidence of Mr. Coupe and Mr. Rogers being given in private.

27 It is well understood that when it comes to the question of what is published in the
28 judgment, one does not simply follow the fact that confidentiality protection has been
29 afforded to this material in the past, because the Tribunal must form its opinion that the
30 disclosure of the commercial information might significantly harm the business interests of
31 Sainsbury's. Having said that, when the Tribunal looks at these passages and takes its
32 decision, there are six points I would briefly highlight that we submit should be taken into
33 account.

1 The first one is that Sainsbury's approach to its pricing is not public knowledge, and even
2 within Sainsbury's itself it is not widely known or shared.

3 The second is that the management of costs and retail prices are both key parameters in
4 competition in the grocery market.

5 The third is that we are not with old information that has long since ceased to be
6 confidential. The redactions that are sought relate to the way Sainsbury's does business
7 today, and it is information that remain contemporary.

8 The fourth is that the disclosure of the information has an impact not just on competitors but
9 on potential negotiating counterparties.

10 The fifth is that Sainsbury's has sought to narrow down as far as possible the statements
11 over which it seeks to retain confidentiality. Five paragraphs in a judgment of some 550
12 paragraphs over almost 300 pages is not disproportionate.

13 The sixth and final point to bear in mind is that the evidence of Mr. Coupe and Mr. Rogers
14 dealt with the pricing strategy and it was afforded protection during the proceedings
15 themselves.

16 The final point is the one that I adverted to earlier, and that is that none of these redactions
17 are necessary to appreciate the reasoning that the Tribunal went through its conclusions on
18 pass-on. That is as far as I need to take the confidentiality redactions.

19 THE CHAIRMAN: Thank you. Do you want to say anything?

20 MR. COOK: I do, Sir, yes, just to put some considerations before the Tribunal. Obviously, when
21 we are talking about individual numbers, then that is not something where we raise any
22 issue at all. Those are numbers that are specific to Sainsbury's and they are not ones that are
23 going to be of any particular relevance in other proceedings.

24 What I want to draw to the Tribunal's attention is the practical difficulties that will arise
25 from these paragraphs remaining redacted, because the issue of passing on in particular, as
26 the Tribunal knows, is going to be a central one in so far as other judgments arise against
27 MasterCard. They are all going to give rise to the same issue of passing on, and we will be
28 fighting about it. We have just had an eight week trial by 12 claims, Morrison's, among
29 others, Arcadia, and we are waiting for judgment on that.

30 There is a £14 billion consumer class action launched at the Tribunal in relation to 1992 to
31 2008 where, in order for consumers to have a claim, they need to show passing through
32 from retailers to consumers where fundamentally, therefore, passing through and pass-on is
33 going to be, one might say, one of the central, if not the central, issues in that case.

34 Therefore, all of these cases are going to involve parties fighting about passing on.

1 The first thing that all those parties are going to do, as of course has happened in the past
2 here, is try and get access to these judgments. In the Morrison's case, for example, the part
3 2 quantum trial that is scheduled to take place will have Sainsbury's participating in it
4 because it's a joint Visa and MasterCard trial. So Sainsbury's will be there suing Visa. All
5 the other retailers will be there suing both----

6 THE CHAIRMAN: That is on quantum, is it?

7 MR. COOK: That is on the quantum side of it, yes. They are suing Visa and they are going to be
8 part of a trial with MasterCard with other claimants who are suing both MasterCard and
9 Visa, a slightly odd situation. Nonetheless, parties are going to be seeking access to these
10 judgments and the court will want access to these judgments in order to see them. In the
11 consumer action they are going to want access to these parts of the judgment. There are
12 going to be, as of course the Tribunal has received in the past with some of the
13 confidentiality parts of the hearing, applications by other parties to come along to them. As
14 soon as these materials are redacted they are ones that parties are going to want to see and
15 they are going to be either asking to be brought within confidentiality rings to be able to see
16 them, or we are going to be dealing with judgments that are incomplete.

17 THE CHAIRMAN: There is going to be a huge amount of that kind of material in the trial that
18 you are talking about that?

19 MR. COOK: There will be, but in most circumstances you are in the convenient situation where
20 you want everyone to be within the ring for as much information as possible, at least in
21 terms of the lawyers in the room. Either the Tribunal is going to be facing applications for
22 some people to be able to see this information, and then we will have points in the hearing
23 where some people can see it and others cannot, and it is going to be a practical problem.
24 We say the Tribunal should take the approach here of aiming to ensure that as much is in
25 the public domain as possible unless there is a very legitimate reason.
26 With the specific numbers we accept there is a legitimate reason there. Those are ones that
27 are Sainsbury's specific, there is no real reason for anyone to see it, and they can be
28 removed from the judgment without it making any difference at all.
29 The problem one has when you are removing individual paragraphs or lines in a paragraph,
30 it is all very well to say that it does not rally make a difference to the meaning of the
31 judgment, but actually a third party reader is going to say, "There is something there, the
32 Tribunal obviously thought it was important enough to quote, how important is it?" They
33 simply do not know what the position is.

1 With respect, all of the redactions that are being sought here are statements of the blinding
2 obvious, and, Professor, you are quite right to say that these are first year business
3 administration student stuff. What would you do? You would think about taking account
4 of the following considerations. If you are going to try and reduce your costs would you
5 look at the big items or the small items to try and do so? I just pose the question, but I think
6 all of us will know what the answer to that question would be.

7 THE CHAIRMAN: I suppose that point is a double-edged sword because it is so blindly obvious
8 it is not going to do any harm to give the benefit of the doubt.

9 MR. COOK: That is the problem. You can say that because we might know, for example what
10 was in a paragraph of the judgment. Somebody reading it does not know that that is what is
11 necessarily being referred to. There are parties who are going to want to know what they
12 are because they simply do not know what the redactions mean. With respect, there is
13 nothing here that says anything other than is quite obvious.

14 You have to recognise the realities of this market: first, you have a lot of movement back
15 and forth of staff into different businesses, secondly, this is a market in which they change
16 their prices and all the other supermarkets know about it, frankly, within minutes
17 particularly when it is on line. You have heard all the evidence, that is what they do; they
18 are looking on line to see what is going on, and one can think about some of the recent Press
19 articles, dealing with the impact of recent currency fluctuations. What are those Press
20 articles saying? Prices are going up in supermarkets, what are they trying to do in order to
21 mitigate the effect on prices? They are listing exactly the kinds of things that are being
22 redacted from these submissions and it is just, with respect, obvious material but the
23 problem is to a third party reader who does not know what is in there, they do not know if
24 what is being listed is the obvious material, or there is some other specific factor or not, and
25 it is going to cause practical problems and, with respect, there is no good reason to have this
26 material redacted.

27 MR. SPITZ: Just one short point. In Mr. Cook's submissions to the Tribunal, there has been no
28 demonstration that any of this material is required to understand the reasoning in the
29 judgment. I think there was the assertion that it would be important, but there has been no
30 illustration of how that is the case. It is simply not necessary. When one gets to that length
31 of the inquiry, it is simply not necessary to see this material in order to understand the
32 reasoning in the judgment.

1 THE CHAIRMAN: All right. Unless there is anything else, thank you very much. We will write
2 to you in due course on the redactions, and we will let you have a judgment as soon as
3 possible – I do not know when that will be – on those outstanding matters.

4 MR. SPITZ: Thank you very much.

5 THE CHAIRMAN: I doubt we will be doing any calculations on the other matters, we will be
6 resolving those points of principle.

7 MR. SPITZ: Indeed.

8 MR. COOK: Yes, thank you.

9 THE CHAIRMAN: Thank you very much.

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