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6 **IN THE COMPETITION**  
7 **APPEAL TRIBUNAL**  
8

Case No. : 1288/5/7/18

9  
10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP  
13 (Remote Hearing)  
14

Monday 29 March 2021

15  
16 Before:  
17 THE HONOURABLE MR JUSTICE ROTH  
18 (President)  
19

20 (Sitting as a Tribunal in England and Wales)  
21

22 **BETWEEN:**  
23

24 **SAINSBURY'S SUPERMARKETS LTD**  
25

Claimant

26 -v-  
27

28 **VISA EUROPE SERVICES LLC & OTHERS**  
29

Defendants  
30  
31  
32  
33

34  
35 **A P P E A R A N C E S**  
36

37 Mark Brealey QC and Derek Spitz (instructed by Morgan, Lewis & Bockius UK LLP  
38 appeared on behalf of the Claimant)  
39 Brian Kennelly QC, Daniel Piccinin, Jason Pobjoy and Isabel Buchanan (instructed by  
40 Linklaters LLP and Milbank LLP appeared on behalf of the Defendants)  
41  
42

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1  
2 (10.30 am)

3  
4 **Proceedings**

5 **THE PRESIDENT:** Good morning, everyone. These proceedings are being live  
6 streamed and of course many are joining on the Microsoft Teams platform.

7 I have to start, therefore, with the customary warning. These are proceedings in  
8 open court as much as if they were being heard before the Tribunal physically  
9 in Salisbury Square House. An official recording is being made and an  
10 authorised transcript will be produced, but it is strictly prohibited for anyone  
11 else to make an unauthorised recording, whether audio or visual, of the  
12 proceedings and breach of that provision is punishable as a contempt of  
13 court.

14 We will, as usual, take a short break mid-morning, and, if we have not concluded by  
15 then, mid-afternoon, for everyone's benefit. If either counsel has connection  
16 problems at any time, just send a message and we can pause the  
17 proceedings.

18 Thank you all for your skeleton arguments. I have had, I think, three.  
19 A supplementary one in response from Sainsbury's. I have looked at the  
20 material. I think the first question is expert evidence and I see that  
21 Sainsbury's has applied for permission to call and adduce expert evidence  
22 from an economist, Mr von Hinten-Reed, dealing with the quantum and  
23 compound interest, and Visa from Mr Derek Holt, also an economist. I will  
24 authorise both of those gentlemen to give expert evidence on the basis, then,  
25 that the directions about experts in the order made by the Tribunal on, I think  
26 it was some time in January -- well it was made on 16 December, drawn on

1 13 January. The order of 16 December 2020.

2 Visa, I think, also seeks to adduce evidence on the tax point from Mr Ryan,

3 a forensic accountant.

4 Mr Brealey for Sainsbury's, what is your position on the tax aspect?

5 **MR BREALEY:** Mr von Hinten-Reed will deal with that aspect as well, so we just

6 have one expert.

7 **THE PRESIDENT:** Yes, and presumably explanation of Sainsbury's tax position can

8 be given from in-house Sainsbury's evidence?

9 **MR BREALEY:** Correct.

10 **THE PRESIDENT:** Mr von Hinten-Reed will deal with the tax position as well; is that

11 right?

12 **MR BREALEY:** He will, Sir.

13 **THE PRESIDENT:** Any opposition to Mr Ryan?

14 **MR BREALEY:** No.

15 **THE PRESIDENT:** No.

16 **MR BREALEY:** No.

17 **THE PRESIDENT:** I will give Visa permission for Mr Ryan on accountancy evidence

18 regarding tax.

19 Therefore, there should be a separate expert meeting as between Mr Ryan and

20 Mr von Hinten-Reed to consider the tax issues and again the directions for

21 that will be as in the order of 16 December 2020.

22 Mr Brealey, you wanted to say something?

23 **MR BREALEY:** I apologise. I was just asking through the court, at some point this

24 will have to be sorted out, but on the expert for the quantum, I think it would

25 be beneficial for the Tribunal if the parties could liaise as to the discipline, the

26 nature, of the expert evidence.

1 For example, whether regression analysis is going to be used, whether the experts  
2 are going to use accountancy evidence. I feel that would be beneficial for the  
3 Tribunal if the experts could at least liaise between them as to how they are  
4 going to approach quantum and particular pass on.

5 **THE PRESIDENT:** That seems sensible. It was clear from what I read from Mr Holt  
6 that he is really just at the initial stage of getting his teeth, if I can put it that  
7 way, into the material.

8 **MR BREALEY:** Correct.

9 **THE PRESIDENT:** So he's perhaps not in a position to do that yet, although he will  
10 have some ideas.

11 Mr Kennelly, does that seem sensible to you as well?

12 **MR KENNELLY:** Sir, yes. That seems like a sensible idea in principle. Our  
13 submission is that it doesn't require any formal order today. We have heard  
14 what Mr Brealey says, it seems like a sensible ideal idea, but I will have to  
15 liaise with my experts. There is no point having that meeting until they are  
16 sufficiently into the material to have a useful discussion with  
17 Mr von Hinten-Reed.

18 Just a further point, Sir, on the permission, for which we are grateful, to adduce  
19 evidence from Mr Ryan. It is not just on the question of tax. His forensic  
20 accountancy expertise will be relied upon for quantum more generally, so it is  
21 not limited to the tax --

22 **THE PRESIDENT:** Yes. When you say "quantum more generally," there are  
23 various aspects of quantum. It would be helpful to know quite what actual  
24 issues he's going to be dealing with, and whether you are going to have a full  
25 forensic accountancy exercise, as is sometimes done, in parallel to  
26 a regression analysis. I think I would like to know that, and the Tribunal

1 should know quite what techniques will be used.

2 Maybe rather than putting everyone on the spot now, and it is something you have to  
3 discuss with your experts, it might be appropriate to ask for the experts to  
4 liaise and to in fact direct that they should file a short statement with  
5 the Tribunal by a date we can discuss, setting out, broken down, the issues  
6 they intend to address and the methods they intend to use, so the Tribunal  
7 can consider that.

8 If Visa's proposal is that it wants to have two experts, as it were, covering the same  
9 issue, that's not something I am giving permission for at the moment. It is  
10 something we would need to consider at an appropriate time.

11 **MR KENNELLY:** Sir, I understand that. We hear the point you make. As I said  
12 earlier, the idea that a direction requiring them to liaise for that purpose is  
13 obviously sensible. I will need to take instructions as to what date we would  
14 propose for that.

15 **THE PRESIDENT:** Yes. I think if we put a date in May, that will give them plenty of  
16 time to have considered the matter. Equally, I think their first -- we are going  
17 to seek to agree a list of questions for each expert. That is by December, and  
18 reports in March 2022. So we have a certain amount of leeway here.

19 I want to leave time for there to be a further application if necessary to the Tribunal  
20 before the summer. So I would suggest -- this is not requiring a detailed  
21 analysis of any of the material, it is really a question of what sort of approach  
22 they intend to use, what issues in the case that they are going to cover. The  
23 case now has strict confines, because it is a quantum case only.

24 If I say by 28 May, it seems to me that should be possible.

25 **MR BREALEY:** We are content with that.

26 **THE PRESIDENT:** 28 May, the experts for both sides. Both sides to exchange and

1 file statement from their experts as to what specific issues their evidence will  
2 cover and what methodology they propose to use for each such issue.

3 It would be sensible for them to meet before, but I am not going to direct a meeting.  
4 I shall leave that to the good sense of the parties.

5 I don't think there was in fact a requirement, though it is very helpful that Sainsbury's  
6 has indicated it wants to call two witnesses of fact. Do you know, on the part  
7 of Visa, how many witnesses of fact you intend to call, Mr Kennelly?

8 **MR KENNELLY:** Sir, no, I am not in a position to give that today. That will depend  
9 on a number of other factors including disclosure, but no.

10 **THE PRESIDENT:** Very well.

11 Then it may be that you will want, in due course, another CMC in this case. I am not  
12 going to fix that now, but I can see that might be helpful. We will see where  
13 we get to on disclosure.

14 But I have indicated in the previous order -- you have both helpfully considered the  
15 question -- a PTR. I think the date suggested was 16 May. That can be  
16 provisionally fixed for 16 May, I say "provisionally," because it will depend on  
17 the availability of the full trial Tribunal for that date, and that Tribunal has not  
18 been appointed yet. But, in principle, that should be fine. So we can say  
19 16 May unless otherwise advised.

20 There are no directions at the moment for such matters as skeletons, bundles,  
21 et cetera, or a trial timetable.

22 Is that something that can be left for the PTR or is that too close to trial?

23 There are different aspects of that. As far as skeleton arguments, that may be  
24 sufficient then, bearing in mind that the first week is a reading week, 13 June,  
25 so obviously skeletons have to come sufficient time before that. You can  
26 consider what to propose as far as bundles are concerned and so on. Indeed,

1 what form the trial will take, whether it will be a full physical trial, that may be,  
2 we hope, possibly at that stage. But I suggest that those matters are not  
3 addressed today. Certainly it will be appropriate for you to produce a trial  
4 timetable, but that can be done for the PTR.

5 I think what I would say is that if you can produce for the PTR an agreed list of  
6 issues, that would be appropriate. We are starting to get them in any event  
7 when looking at your disclosure requests, so I think we can add to that the  
8 previous direction that an agreed list of issues be produced for the PTR, but  
9 I shall leave other matters -- namely skeleton, bundles, trial timetable -- for  
10 you to discuss and propose at the PTR.

11 Is there anything else in the way of pre-trial directions before we get to disclosure?

12 **MR BREALEY:** I am not sure, I don't think so.

13 **THE PRESIDENT:** Yes. If anyone, either your other counsel with you or those in  
14 your solicitors team suggest something, you can raise it in the course of the  
15 day.

16 **MR KENNELLY:** Nothing from our perspective, we are content with the suggestion.

17 **THE PRESIDENT:** The other matter is we had written submissions from both sides  
18 on the question of what has been described by the shorthand of the  
19 asymmetric counter-factual. They have been considered by a Tribunal with  
20 myself as chair and Mr Paul Lomas and Mr Tim Frazer.

21 This arises on the Visa defence, and I think it is paragraph 27 of the defence.

22 Effectively, it is an application by Sainsbury's that Visa should not be permitted to  
23 advance the defence in paragraph 27, so in the form of a strike out,  
24 effectively.

25 We have considered those submissions and for the reasons that will be set out in  
26 a written judgment to be produced in due course, we will strike out that

1 paragraph as regards an asymmetric counter-factual with Mastercard, but not  
2 as regards the allegation that there would have been switching to Amex.

3 So Visa can advance the case as regards Amex, but not as regards Mastercard.

4 Reading that paragraph as a whole, it is a little unclear where that leaves the  
5 first part of the paragraph, because there the reference is only to Mastercard,  
6 but then later on it says that substantial volumes would therefore have been  
7 Amex transactions in the counter-factual.

8 I think it would be clearer for everyone, Mr Kennelly, if you could amend that  
9 paragraph to relate only to Amex so that one can be quite clear what is being  
10 said with regard to Amex. If you could produce amended paragraphs, if you  
11 want to wait for the ruling you could do it after that. But everyone should be  
12 clear now what the position is.

13 **MR KENNELLY:** I am grateful for that. We will, if we may, wait for the written  
14 reasons and produce the amendment that the Tribunal has indicated.

15 **THE PRESIDENT:** Yes.

16 On that basis, can we move to disclosure, which I think is the main item or items that  
17 we have to deal with.

18 This is essentially, from what I have seen, Mr Brealey, you are not asking for any  
19 orders on disclosure, is that right, from the Tribunal today?

20 **MR BREALEY:** Correct. We did ask about disclosure from Visa about their issuing  
21 banks. They say they don't have much information, and therefore we are not  
22 pursuing an application for disclosure against Visa.

23 **THE PRESIDENT:** Right. So it is Visa's application?

24 **MR BREALEY:** Yes.

25 **THE PRESIDENT:** Mr Kennelly, it is over to you.

26 **MR KENNELLY:** Thank you, Sir.



1 Just stepping back very briefly, the Tribunal will be aware that this is disclosure for  
2 the quantum trial in which Sainsbury's seeks to recover approximately  
3 £126 million in damages from Visa. You have that figure -- there is no need to  
4 turn it up -- at page B15.

5 Of course, in the Visa case, there has never been a quantum trial --

6 **THE PRESIDENT:** Can you just tell me, does that include compound interest, that  
7 figure?

8 **MR KENNELLY:** I think that is the total figure. I will be corrected, I am working on  
9 the basis that it does, yes, Sir.

10 **THE PRESIDENT:** Yes.

11 **MR KENNELLY:** The important point -- because of the references made to the  
12 Mastercard proceedings and other issues, is that in the Visa case the  
13 quantum issues were of course stayed in our proceedings.

14 **THE PRESIDENT:** Yes.

15 **MR KENNELLY:** This is not a remitted hearing, this is the first time where Visa is  
16 afforded an opportunity to forward its quantum defences.

17 **THE PRESIDENT:** Sorry to interrupt you. Was that stay the order of  
18 Mr Justice Cooke in November 2015? Is that the one? I think I saw that from  
19 something I read.

20 **MR KENNELLY:** It is in Ms Murphy's statement at paragraph 26 as well. We will  
21 check that --

22 **MR BREALEY:** Yes, there was an amendment, but basically what happened -- one  
23 can pick this up, but we will come to it later -- shortly before the phase 1 trial,  
24 Visa applied to have phase 2 stayed. And it was stayed.

25 **THE PRESIDENT:** Yes. It is just the date when it was stayed that would be helpful.

26 **MR BREALEY:** I will double-check this because I was trying to work it out from the

1 papers, I think the hearing was on 21 December. Or the stay was on  
2 21 December.

3 **THE PRESIDENT:** Of?

4 **MR BREALEY:** 2016.

5 **THE PRESIDENT:** 2015?

6 **MR BREALEY:** 2016.

7 **THE PRESIDENT:** The phase 1 trial started on 14 November 2016, the stay was  
8 presumably before the start of that trial?

9 **MR BREALEY:** I think it was 21 December 2016.

10 **THE PRESIDENT:** Well that's in the middle of that trial --

11 **MR BREALEY:** Sorry, I misspoke, during the phase 1 trial. But the skeleton went in  
12 before the start of the trial. So, for example, at bundle A2/141, we see there  
13 Sainsbury's skeleton argument for the phase 2 CMC.

14 **THE PRESIDENT:** Just a second. Bundle A2, at page?

15 **MR BREALEY:** 141. A2/141 is where -- Sir, if you look --

16 **THE PRESIDENT:** That's Sainsbury's skeleton?

17 **MR BREALEY:** Yes. If one looks at 143, we see there that there seems to be Visa  
18 floating the idea of a stay.

19 **THE PRESIDENT:** It is in the order of Mr Justice Cooke, yes, which I was referring  
20 to, in paragraph 3:

21 "There would be a lead trial of the remaining quantum-related issues."

22 That's just that it is going to be separate and after the phase 1 trial, isn't it? Because  
23 you have had a previous order for a phase 1 trial.

24 **MR BREALEY:** Yes. So Mr Justice Cooke set it down to be heard in January 2018.

25 **THE PRESIDENT:** The phase 2?

26 **MR BREALEY:** Phase 2. We will have a look at that a bit later on.

1 **THE PRESIDENT:** Yes. Listed to commence 29 January 2015. I see ... so it is an  
2 order of January 2016, 26 January 2016.  
3 Yes.  
4 **MR BREALEY:** Just so you have the date, if one goes to Mr Cassels' exhibit at  
5 bundle A1, at page A1/144. That is page 74 of his exhibit, A1/144.  
6 **THE PRESIDENT:** Yes.  
7 **MR BREALEY:** This is where I obtained the date from. It is a long time ago, at the  
8 bottom of this page in a letter from Morgan Lewis, and I imagine we will be  
9 looking at this correspondence a bit later on, right at the bottom of that page,  
10 A1/144.  
11 **THE PRESIDENT:** Yes.  
12 **MR BREALEY:** "In the light of the postponement of the phase 2 proceedings  
13 ordered by Mr Justice Phillips on 21 December 2016, following the application  
14 by your clients and Mastercard ..."  
15 **THE PRESIDENT:** Yes. January 2016, Mr Justice Cooke set it down for phase 2  
16 trial.  
17 **MR BREALEY:** Sorry, Sir, the relevant dates are on 17 November 2015 --  
18 **THE PRESIDENT:** Yes.  
19 **MR BREALEY:** -- just so that we have this clear, if one goes to the Murphy exhibit  
20 which is in A2 --  
21 **THE PRESIDENT:** Yes.  
22 **MR BREALEY:** -- at 131. So at 131, on 17 November 2015 --  
23 **THE PRESIDENT:** Yes.  
24 **MR BREALEY:** -- this is the order of Mr Justice Cooke.  
25 **THE PRESIDENT:** It is slightly odd. Although the order is dated 24 November,  
26 that's the order that's referred to in paragraph 3 on page 142.

1 **MR BREALEY:** Yes.

2 **THE PRESIDENT:** Let's stick to that, otherwise we get very confused on dates.

3 Let's call it -- it doesn't matter for present purposes -- 24 November 2015.

4 **MR BREALEY:** 15.

5 **THE PRESIDENT:** Yes.

6 **MR BREALEY:** Then things proceeded -- essentially that was after the order of

7 Mr Justice Flaux, which we will see.

8 **THE PRESIDENT:** Yes.

9 **MR BREALEY:** Disclosure is essentially over by then. Mr Justice Cooke orders that

10 it be set down. We see that on page 133: directions for phase 2 trial. There

11 is to be a lead -- phase 2 trial listed 29 January 2018, and there is a timetable

12 set out in schedule 1 on page 138.

13 You see there, top of 138, under "Disclosure":

14 "Sainsbury's is not being ordered to make any further disclosure."

15 The Arcadia claimants seems to have been a bit behind but nothing from Sainsbury's

16 or from Visa, but there is a timetable for witnesses of fact, evidence of expert,

17 pre-trial review.

18 **THE PRESIDENT:** That's the first order. Then we get the order in January 2016,

19 also from Mr Justice Cooke. So that's a couple of months later. I am just

20 trying to get these references correct. So that one is 24 November. The

21 order, you say, is on page 132.

22 Then the 26 January order, which is at -- I'm trying to find that one -- there are

23 cross-references in the original skeleton, but they are obviously to the position

24 as at that time.

25 The January 2016 order, do you know where that is?

26 **MR BREALEY:** The one we referred to at paragraph 4 of the skeleton, I am not sure

1 it is in the bundle.

2 **THE PRESIDENT:** I am just reading, at the moment, your earlier skeleton.

3 **MR BREALEY:** That's right. The consent order.

4 **THE PRESIDENT:** That's it. There was a consent order and then there was --

5 **MR BREALEY:** Essentially.

6 **THE PRESIDENT:** Then, as you say, there was an order of -- as you have just  
7 shown me -- of Mr Justice Phillips on 21 December 2016 postponing the trial.

8 **MR BREALEY:** Yes.

9 **THE PRESIDENT:** It looks as though it wasn't -- a moment ago you said that  
10 Mr Justice Cooke set it down for January 2018 on 26 January 2016. No,  
11 I think he set it down already in November 2015.

12 **MR BREALEY:** Yes, that's right, yes.

13 **THE PRESIDENT:** Yes. So the January 2016 order was about, in addition to --  
14 would also involve a joint trial of those issues that had remained.

15 Well, it is probably not an important order for present purposes.

16 **MR BREALEY:** I don't think it is, I don't think it is.

17 **THE PRESIDENT:** Yes.

18 **MR BREALEY:** Essentially what was happening at that time, the phase 2 was going  
19 to involve quite a few parties. It was going to --

20 **THE PRESIDENT:** Yes.

21 **MR BREALEY:** -- be a rolling quantum. What was going to happen is that there  
22 would be a joint trial, for example, on the law on pass on --

23 **THE PRESIDENT:** Yes.

24 **MR BREALEY:** -- before one got into the facts relating to each specific claimant.

25 I think that's all that was happening on 26 January 2016. Then we get the Visa  
26 application which, is granted on 21 December, to postpone phase 2.

1 Then there is a -- I don't think it is relevant, but there is then a further order that it  
2 gets listed in 2019. Then, because of the appeals, it gets put off again.

3 **THE PRESIDENT:** Yes.

4 **MR BREALEY:** I think the important point is that it was set down to be heard by the  
5 order of 24 November 2015.

6 **THE PRESIDENT:** Yes. At that point Sainsbury's disclosure was regarded as being  
7 complete.

8 **MR BREALEY:** Effectively.

9 **THE PRESIDENT:** Yes, thank you.

10 Mr Kennelly, that was just getting the background.

11 **MR KENNELLY:** Sir, obviously this is out of interest, I think what Mr Brealey said  
12 was substantially correct. Just to complete the picture that you have there,  
13 from the Sainsbury's skeleton argument you were looking at in bundle A2,  
14 page 144, there is a reference there to Visa apparently seeking to stay the  
15 phase 2 trial.

16 **THE PRESIDENT:** Sorry, this is A2?

17 **MR KENNELLY:** A2/144. I am quoting from the Sainsbury's skeleton. The  
18 suggestion that Visa -- well, it is put that they want to abort the forthcoming  
19 trial.

20 Visa then -- I am instructed, we don't have this document in the bundle -- applied to  
21 postpone the phase 2 trial on 16 December 2016. An order was made to that  
22 effect on 21 December 2016. But we can get the document --

23 **THE PRESIDENT:** No, I have that. That's right.

24 **MR KENNELLY:** Obviously the significance of what Sainsbury's provided by then is  
25 the matter for debate between us today.

26 **THE PRESIDENT:** Yes.

1 **MR KENNELLY:** My solicitors raised concerns in short order with the quality and  
2 completeness of Sainsbury's disclosure at that time.

3 **THE PRESIDENT:** Yes.

4 You were just stressing there never has been a quantum trials, which is clearly  
5 correct.

6 **MR KENNELLY:** I was make point also, Sir -- just to correct a point I made -- you  
7 asked if the £126 million included compound interest or not. It does not  
8 include compound interest, that's the overcharge.

9 **THE PRESIDENT:** Yes.

10 **MR KENNELLY:** The next point to make -- there is no dispute about this -- the  
11 quantum trial is going to involve major complex issues, in particular on  
12 countervailing benefits and pass on and there seems to be no dispute that the  
13 disclosure sought by Visa is clearly linked to the pleaded issues in this case.

14 My point, the reason why I am taking you to this, Sir, is that when you come to  
15 consider proportionality and the justification of putting Sainsbury's to the cost  
16 of the disclosure exercise, three factors are highly relevant.

17 The first is that Visa must be afforded a fair opportunity to advance its defence in the  
18 quantum trial.

19 That is important when Sainsbury's is seeking to recover over £100 million from Visa.

20 Thirdly, even more important, where the issues which Visa is entitled to raise in its  
21 defence are complex, and, as the Supreme Court very recently held in this  
22 very case, depend heavily on the claimant's disclosure.

23 The legal framework is very familiar to the Tribunal. I am not proposing to turn it up  
24 before we get to the meat of our application. You have seen it in our skeleton  
25 argument. We rely in particular on the need for disclosure to be given in light  
26 of both the complexity of the case and the pleaded issues, paragraphs 15 and

1 16 of the skeleton.

2 That explains, we say, what disclosure means in this context. It needs to be  
3 proportionate to the complexity of the case. That does not necessarily equate  
4 to limited disclosure, as Sainsbury's suggests.

5 **THE PRESIDENT:** Yes. You will be aware that we gave a ruling on the principles to  
6 be applied for disclosure in the Trucks cases.

7 **MR KENNELLY:** Indeed, Sir.

8 **THE PRESIDENT:** Which I have to say are of even greater magnitude and greater  
9 complexity than the remaining issues in this case.

10 **MR KENNELLY:** Sir, we positively rely on your ruling in relation to Trucks in our  
11 skeleton argument --

12 **THE PRESIDENT:** Yes.

13 **MR KENNELLY:** -- we have that well in mind.

14 We have, with Sainsbury's, through the use of a Redfern Schedule, sought to narrow  
15 and focus our disclosure requests. We are presenting today a list of requests  
16 that is a lot more limited than that which we initially put to Sainsbury's. We  
17 have been constructive and proportionate ourselves in refining the requests  
18 which we now present to the Tribunal.

19 But there are four areas where Sainsbury's continues to dispute Visa disclosure  
20 requests and where we do maintain them.

21 **THE PRESIDENT:** Yes.

22 **MR KENNELLY:** That is the disclosure relating to ex turpi causa, countervailing  
23 benefits, pass on and taxation.

24 Subject to the Tribunal, I propose to take them in turn and allow Mr Brealey to  
25 respond on each topic, so you hear our submissions on each topic in order.

26 **MR BREALEY:** I don't feel that is appropriate, Sir. I want to see how Mr Kennelly



1 opens his application, because I want to take -- if he doesn't, I do want to take  
2 the Tribunal through the history of the disclosure that has taken place, which  
3 relates to pass on and ex turpi causa. I can certainly, after he finishes on ex  
4 turpi causa, go through the history of the disclosure, but it is all wrapped up  
5 into one large book. You can't just take chapters.

6 **THE PRESIDENT:** I understand that point.

7 At the same time, if we are looking at particular items in the Redfern Schedule it is  
8 really much more convenient to deal with them by item, that's the whole  
9 benefit of the schedule, and to rule on each item, of course bearing in mind  
10 the background.

11 I think if Mr Kennelly opens dealing with ex turpi causa, which has been an issue  
12 throughout, so you will be able to take me through and say -- if that is your  
13 argument -- no, we have already had full disclosure on ex turpi causa, and  
14 deal with it then. Then no doubt there will be an overlap with what you then  
15 say on countervailing benefits.

16 I think splitting them into the four stages is helpful, but it is not going to shut you out  
17 from taking me back to the history.

18 **MR BREALEY:** I am perfectly happy with that, Sir.

19 **THE PRESIDENT:** Yes.

20 We start with ex turpi causa; is that right?

21 **MR KENNELLY:** Indeed. I will begin with the pleaded issues, then I'll go to the  
22 requests that we make and Sainsbury's response.

23 The pleaded issues, for this you will need bundle B, tab 15, page 27.

24 **THE PRESIDENT:** Yes. That's your defence.

25 **MR KENNELLY:** Paragraph 22 and following.

26 I am not going to read it to you, Sir. You can see how we put the case on ex turpi

1            causa from 22, 23 and over the page to 26.

2    **THE PRESIDENT:** Yes.

3    **MR KENNELLY:** An important point there is at 26 we say:

4    "Any claim in respect ...(Reading to the words)... reduced to reflect the claimant's  
5            contributory negligence and/or the profits received by the Sainsbury's group  
6            as a result of the bank's involvement in the infringement."

7    **THE PRESIDENT:** Yes.

8    **MR KENNELLY:** Sainsbury's response is in its reply at B16, it begins. The relevant  
9            paragraph is paragraph 9, that's page B19. There is a short denial from  
10          Sainsbury's of the paragraphs I have taken you to in the defence.

11    The issue, obviously, has been joined and if you could turn then, Sir, to the  
12          documents that we seek.

13    **THE PRESIDENT:** Yes.

14    **MR KENNELLY:** For this purpose, Sir, I want to ask you to turn to our draft order.

15    **THE PRESIDENT:** We can do it that way if you want. I was thinking it would be  
16          easier to do it by reference to the schedule.

17    **MR KENNELLY:** The draft order -- obviously the draft order now is the refined  
18          version of our request. The Redfern Schedule contains a huge amount of  
19          material that's now irrelevant.

20    **THE PRESIDENT:** Yes, but it shows me what has been agreed, what has been  
21          removed and so on. So it is quite helpful.

22    The draft order is in bundle --

23    **MR KENNELLY:** A1, behind tab 6.

24    **THE PRESIDENT:** Yes.

25    **MR KENNELLY:** Behind our skeleton.

26    **THE PRESIDENT:** Yes.

1 **MR KENNELLY:** Annex A is the list of items which Visa continues to seek and  
2 Sainsbury's continues to resist. This is lifted directly from the  
3 Redfern Schedule. As we go through it, I can give you the cross-references  
4 to the Redfern Schedule.

5 **THE PRESIDENT:** Yes.

6 **MR KENNELLY:** For ex turpi it's paragraphs 1 to 6 of annex A.

7 **THE PRESIDENT:** Yes.

8 **MR KENNELLY:** Sir, if you want to make a quick note, if you have it in hard copy in  
9 front of you --

10 **THE PRESIDENT:** Yes.

11 **MR KENNELLY:** Paragraph 1 is from the Redfern 2.2.6, 2 is 2.2.7, 3 is 2.2.9, 4 is  
12 2.2.11, 5 is 2.2.12 and 6 is 2.2.14.

13 If you look at the annex A paragraphs 1 to 6, you will see the categories. Again, it is  
14 easier if you read them to yourself, but you will note as you do that they seek  
15 documents from the claim period itself. We are not asking for documents over  
16 which the claimant has no control. Each category refers to the relationship  
17 between Sainsbury's Bank and Sainsbury's entities, including the claimant.  
18 These are the kind of relevant documents we would expect the claimant to  
19 have or to be able to obtain.

20 I will pause there while you read the six paragraphs.

21 **THE PRESIDENT:** Are you asking for annual reports of Sainsbury's Bank?  
22 Presumably annual reports of Sainsbury's parent company are publicly  
23 available anyway, but they can be provided.

24 **MR KENNELLY:** Yes.

25 **THE PRESIDENT:** It is the bank's annual reports, is it?

26 **MR KENNELLY:** It is the bank's annual reports, indeed.

1 **THE PRESIDENT:** Yes.

2 Yes.

3 **MR KENNELLY:** You will have seen, Sir, in our skeleton we mentioned seeking an  
4 order requiring Sainsbury's to at least ask Sainsbury's Bank for documents,  
5 which you will have seen here we didn't include in our draft order. I don't  
6 pursue that today.

7 In an ideal world they would do that, but for the purposes of today, and given all we  
8 have to get through, I am not going to pursue that, it is not in our order.

9 **THE PRESIDENT:** Yes.

10 **MR KENNELLY:** In terms of what Sainsbury's does say about this request, you will  
11 have seen, as I have said, that these are all documents from during the claim  
12 period. So we don't understand what Sainsbury's means when it says in its  
13 supplementary skeleton in paragraph 18 that we are asking for ex turpi causa  
14 documents from after the claim period.

15 **THE PRESIDENT:** Yes.

16 **MR KENNELLY:** To turn to the objections to this request, which are most recently in  
17 Ms Murphy's witness statement at paragraph 30, if you could turn that up,  
18 please.

19 **THE PRESIDENT:** Which is A2, isn't it?

20 **MR KENNELLY:** A2. As it arrived so late on Friday evening, my version doesn't  
21 have pagination within the A2 bundle. I will just have to give you paragraph  
22 numbers.

23 It is page 6 of the internal numbering, paragraph 30.

24 **THE PRESIDENT:** Yes.

25 **MR KENNELLY:** Under the heading "Ex turpi causa", and taking the objection in  
26 turn, Ms Murphy's first point at subparagraph (a) is that Sainsbury's has

1 already provided extensive disclosure specific to ex turpi causa. That's the  
2 second part of the first sentence of paragraph 30(a).

3 **THE PRESIDENT:** Yes.

4 **MR KENNELLY:** That's a point to which Mr Brealey has averted earlier this  
5 morning.

6 Just pausing there, I will take that point first. The truth is that Sainsbury's has given  
7 ex turpi causa disclosure in two batches -- please keep Ms Murphy's  
8 statement open, I will need to go back to it.

9 **THE PRESIDENT:** Yes.

10 **MR KENNELLY:** You will see what they have given already in Mr Cassels' witness  
11 statement. If you could turn that up, that is bundle A1. It begins at A1/51.  
12 I would ask you to turn to paragraphs 26 and 27 on page A1/57.

13 The ex turpi causa disclosure is given in two batches. At 26 and 27 the first batch is  
14 given on 30 December 2015 covering documents collected prior to May 2014  
15 and it was topped up on 2 November 2015 to bring it up to date to June 2015.  
16 So in those two batches they gave their ex turpi causa disclosure for almost  
17 the whole of the claim period from 2007 up to June 2015.

18 But despite applying, as Mr Brealey said in the submissions, the keyword searches  
19 for ex turpi causa for quantum, to their disclosure, these tranches of  
20 disclosure which they gave contained only 113 email exchanges between the  
21 Sainsbury's custodians and Sainsbury's Bank, over an eight-year period only  
22 113 email exchanges.

23 You see that at paragraph 49 of Mr Cassels' witness statement, that is on page  
24 A1/62.

25 He's referring to a letter that Linklaters wrote on 20 April 2017 identifying the serious  
26 deficiencies with this disclosure. This goes to the point Mr Brealey made,

1 well, all disclosure was done, it was all fine. In April 2017 Linklaters wrote  
2 a long letter saying:

3 "We have real concerns about the quality of your ex turpi causa disclosure, for an  
4 eight-year period we only have 113 email exchanges ..."

5 **THE PRESIDENT:** Yes, this is dealing with not just the first item but the whole of  
6 items 1 to 6, isn't it?

7 **MR KENNELLY:** Yes.

8 **THE PRESIDENT:** Yes.

9 **MR KENNELLY:** I am dealing with them collectively at the moment, Sir.

10 **THE PRESIDENT:** Yes, collectively.

11 **MR KENNELLY:** Because Sainsbury's is dealing with them collectively at this  
12 paragraph of Ms Murphy's statement.

13 The first point is you have everything, you have loads already, that should be enough  
14 for you. We are saying from what you gave us for this eight-year period, it  
15 was manifestly inadequate and we said in April 2017 -- as Mr Cassels says  
16 here in his paragraph 49 -- you will need to apply categories. You have to  
17 review your disclosure by reference to categories to make sure that we get  
18 proper ex turpi causa disclosure.

19 The categories of disclosure we now seek are the same ones or included in the list  
20 of categories we sent to Sainsbury's in April 2017.

21 **THE PRESIDENT:** Can I pause to ask the same defence, of course, was run by  
22 Mastercard, wasn't it?

23 **MR KENNELLY:** It was, Sir, yes.

24 **THE PRESIDENT:** Obviously there was disclosure on that?

25 **MR KENNELLY:** Yes.

26 **THE PRESIDENT:** There was some discussion in the materials I have seen as to

1           whether you have had the full disclosure on this issue, relevant disclosure,  
2           and it would be -- it is all about Sainsbury's Bank -- that Mastercard received.

3 **MR KENNELLY:** Yes.

4 **THE PRESIDENT:** Have you had -- which enabled this Tribunal to rule on this  
5           matter and of course it doesn't bind you, the ruling, you can argue it  
6           separately and no doubt will, but have you had that disclosure?

7 **MR KENNELLY:** The answer is no. We have not had the same disclosure that  
8           Mastercard received.

9 May I come back to that in a moment?

10 **THE PRESIDENT:** Yes.

11 **MR KENNELLY:** That's my next point. I will just finish this, because otherwise I will  
12           lose it. I am dealing here with the first point Ms Murphy makes that we have  
13           lots already and that should be enough.

14 **THE PRESIDENT:** Yes.

15 **MR KENNELLY:** The keyword searches they applied for that eight-year period are  
16           obviously inadequate -- the disclosure produced as a result was obviously  
17           insufficient which is why we said you have to do it by reference to categories  
18           also.

19 That's the same reason why what Ms Murphy offers at paragraph 30(e) is not  
20           sufficient, because it will be said against me that we have made an offer to  
21           deal with your concern. If you go to Ms Murphy's statement, paragraph 30(e)  
22           she says:

23 "For the last tranche of disclosure which Sainsbury's has given Visa ..."

24 That is the disclosure provided on 16 August 2016, and this was the third tranche  
25           that brought the disclosure up to date to May 2016, Ms Murphy is saying:

26 "We will apply the keyword search terms relevant to phase 2."

1 That has not yet been done, but she says she will do it. So that's that last tranche of  
2 disclosure.

3 **THE PRESIDENT:** Yes.

4 **MR KENNELLY:** But based on, as I say, the strikingly low returns from that  
5 eight-year period, 2007 to June 2015, we maintain our point that it is  
6 necessary to give disclosure by category, not only by these keywords. In fact  
7 Ms Murphy has agreed to do that for the end of the claim period.

8 If we look at her paragraph 31(c), she acknowledges that for the last four months of  
9 the claim period -- she acknowledges the possibility that we have not received  
10 disclosure for the remaining four months, we say we haven't, July to  
11 November 2015, and she says Sainsbury's is content to provide it in relation  
12 to the specific categories sought in the Redfern Schedule.

13 **THE PRESIDENT:** This is?

14 **MR KENNELLY:** 31(c) on page 7.

15 **THE PRESIDENT:** Yes.

16 **MR KENNELLY:** That is our order. That is paragraphs 1 to 6 of annex A, which  
17 Sainsbury's has conceded for that period, the end of the claim period, July to  
18 November 2015. That, we say, needs to be done for the preceding eight  
19 years.

20 **THE PRESIDENT:** Have you yet looked at the documents you have received on this  
21 point to see what they reveal about the relationship between the bank and  
22 the --

23 **MR KENNELLY:** For the ex turpi disclosure we have received, yes, that was my first  
24 point, Sir. It was having reviewed it that we wrote to Sainsbury's in 2017  
25 saying, "This is manifestly inadequate. How can there only be 113 email  
26 exchanges between you and the bank over an eight-year period."



1 We reviewed it and complained about it in 2017. This last tranche -- Sainsbury's has  
2 not yet done its phase 2, its quantum keyword searches on this last tranche,  
3 which is what they are offering to do now.

4 We say based on our experience up to April 2017 we have no confidence this  
5 exercise will produce the disclosure that we need, which is why it should be  
6 done by category as Sainsbury's has agreed for the last four months of the  
7 claim period.

8 **THE PRESIDENT:** Yes, the categories being, what, the six categories that you have  
9 set out. Is that it?

10 **MR KENNELLY:** Yes, indeed.

11 **THE PRESIDENT:** Yes, well, it is a question of to what extent each category is  
12 proportionate and appropriate. That's something we have to look at.

13 **MR KENNELLY:** Sainsbury's has been rather quiet on why the particular categories  
14 are disproportionate. We say they are not disproportionate at all. That one  
15 can see how they could be provided, we say, easily by Sainsbury's.  
16 Sainsbury's has not said that any particular category is disproportionate for  
17 any particular reason. That's why I am taking you to Ms Murphy's objections.

18 Her first point is you have lots of documents already, and I have dealt with that.

19 The second point is the one you raised with me, Sir, which is you have all the  
20 documents that Mastercard had.

21 **THE PRESIDENT:** Which is what she says in B.

22 **MR KENNELLY:** Absolutely, she says Visa has had access to at least the same  
23 documents, the very same documents that were disclosed by Sainsbury's for  
24 the purposes of the proceedings in Mastercard.

25 **THE PRESIDENT:** You say that is not correct?

26 **MR KENNELLY:** On the face of her own statement, if you go back, Sir, to

1 paragraph 22 on page 4, she refers to a letter sent by Linklaters on 16 March  
2 2016, which asks whether all documents disclosed by our client relating to  
3 phase 2 against Mastercard have also been disclosed by your client in the  
4 Sainsbury's proceedings.

5 **THE PRESIDENT:** That's everything across the board, isn't it? That's not  
6 specifically ex turpi causa, is it?

7 **MR KENNELLY:** No, that is all phase 2 issues.

8 **THE PRESIDENT:** Yes, all phase 2 issues.

9 **MR KENNELLY:** Indeed, she relies on that for this purpose. Mr Brealey may have  
10 a distinction --

11 **THE PRESIDENT:** Yes, and one sees the answer.

12 **MR KENNELLY:** Indeed, and what they say is -- I'll read both, the sentence above  
13 the highlighted passage reads:

14 "If your question is whether all phase 2 documents that were disclosed by our client  
15 to Mastercard have been disclosed to Visa, the answer is no."

16 Pausing there --

17 **THE PRESIDENT:** That seems clear.

18 **MR KENNELLY:** Ms Murphy says then:

19 "If however your question is whether all phase 2 documents relevant to these  
20 proceedings have been disclosed to Visa, some of which may also have been  
21 disclosed to Mastercard where relevant those proceedings, the answer is  
22 yes."

23 **THE PRESIDENT:** What is not entirely clear is whether all documents from  
24 Sainsbury's relating to ex turpi causa where, as you have confirmed, it is  
25 exactly the same issue that arose on Mastercard, and therefore all  
26 Sainsbury's documents on that disclosed to Mastercard would be relevant.

1 One can see that there will be other documents in the phase 2 disclosure with  
2 Mastercard that may not be relevant. But on ex turpi causa, I would have  
3 thought everything is relevant because it is all about Sainsbury's and it is the  
4 same defence.

5 Perhaps I can just ask Mr Brealey -- it is a simple question of fact -- whether, as  
6 regards ex turpi causa, not anything else, has Visa received the same, all the  
7 documents that were disclosed on ex turpi causa to Mastercard?

8 **MR BREALEY:** I am obviously on my own and I would have to, before I give  
9 a definitive answer, look at my screen.

10 **THE PRESIDENT:** Yes.

11 **MR BREALEY:** As far as I am aware, all ex turpi causa Mastercard documents  
12 have been disclosed to Visa. And that was the sense of that response --

13 **THE PRESIDENT:** Yes. Never mind the interpretation of the response. Let's just  
14 get -- well, I think it is important you should confirm that, and if they have not  
15 been, it seems to me they should be.

16 **MR BREALEY:** One sees the sense from the witness statement can --

17 **THE PRESIDENT:** Yes, that's the way I understood it.

18 **MR BREALEY:** Yes. If there is any gap in the Mastercard, then of course it will be  
19 filled. That has been, one sees from paragraph 10 --

20 **THE PRESIDENT:** I don't want you to make submissions, I just wanted you to clear  
21 up that point, and the answer is you believe so, you will have that confirmed,  
22 and if not, it will be provided.

23 **MR BREALEY:** Absolutely.

24 **THE PRESIDENT:** The question then is whether key -- I am surprised that there  
25 was nothing relating to the corporate structure of the bank that was disclosed  
26 to Mastercard, but if you say you have not received it, I think it is a question of

1 looking at what you are asking for and seeing whether it is relevant and  
2 proportionate on this point.

3 **MR KENNELLY:** I am grateful for Mr Brealey's indication that he will check. That's  
4 very important. Because we have real concerns about whether, as you have  
5 seen, we do have what was given to Mastercard, not least because, Sir, when  
6 we reviewed one of the witness statements in the Mastercard case -- that of  
7 Hannah Bernard, that was a Sainsbury's witness statement on the issue of ex  
8 turpi causa -- there was a long list of documents exhibited to that witness  
9 statement which we had never received.

10 So this is not a --

11 **THE PRESIDENT:** Yes.

12 **MR KENNELLY:** -- concern. We listed those again back in April 2017. Having  
13 specifically identified them, Mr Brealey's clients now agree to provide them.  
14 But unfortunately that was happenstance, we have no way of knowing whether what  
15 has been given to Mastercard has been given to us. That's why it is very  
16 important they confirm that properly.

17 **MR BREALEY:** Can I just interrupt --

18 **THE PRESIDENT:** No, **don't interrupt. Just let me listen to Mr Kennelly on this.**

19 I just wanted to have a look at the -- you get some indication, I would have thought,  
20 from the -- yes.

21 Just looking at the judgment of this Tribunal, you should have certain, for example,  
22 strategy documents, because they are referred to in the Tribunal judgment.  
23 So they must have been produced. So you can get some indication of that,  
24 and then it seems that the relevant witness who particularly dealt with that  
25 was Ms Bernard, is that right?

26 You will see the documents that she refers to in her witness statement, and you

1 should get all of those.

2 **MR KENNELLY:** Yes. There is a further point about this, Sir. You will have seen  
3 from Ms Murphy's statement that she appears to accept in principle -- not  
4 least because she relies on it -- that we should have all of the documents that  
5 were disclosed to Mastercard on this issue. She says we have to pay to have  
6 them. We have to pay £50,000.

7 **THE PRESIDENT:** No, she says you have them. She says you already have them.  
8 That's what she says. The £50,000 is if they have to go back to the archive  
9 material and search them in a different way, as I understand it.

10 The first question is whether on ex turpi causa -- there may be other aspects of it --  
11 you have everything that Mastercard had, and if you don't, I have made it  
12 clear that I will order that you should.

13 **MR KENNELLY:** I am grateful.

14 **THE PRESIDENT:** That's the first point.

15 You should get a pretty clear idea of what Mastercard had from reading  
16 Ms Bernard's statement, which refers, for example, to the marketing and  
17 ancillary services agreement ...

18 I am looking at the judgment of the Tribunal at 376, although this section starts at  
19 paragraph 370.

20 **MR KENNELLY:** Yes, Sir.

21 **THE PRESIDENT:** There was obviously a lot of material before the Tribunal and this  
22 is only what's referred to in the judgment, not the disclosure.

23 As we all know, the documents that are reflected in the judgment is just a very small  
24 part of what would have been disclosed. So there must be some substantial  
25 disclosure there.

26 **MR KENNELLY:** Yes.

1 **THE PRESIDENT:** And that you will receive, if you have not already. Then the  
2 question is whether there is anything in categories 1 to 6, because from what  
3 I can see the answers on the Redfern Schedule are effectively really  
4 comprehensive.

5 There is no individualised response to these, I think. Except for -- no. I think that's  
6 right.

7 If we look at the first one, documents relating to the corporate structure of  
8 Sainsbury's Bank including shareholder agreement, I am surprised that  
9 annual reports were not available.

10 As regards documents regarding the appointment of -- you don't need all the  
11 appointment documents, do you? You just want to know when they had  
12 common directors or former directors. That's what you want to know, isn't it?

13 **MR KENNELLY:** Yes, we would be happy with that.

14 **THE PRESIDENT:** That can be dealt with by Sainsbury's simply setting that out in  
15 a list or schedule, rather than by the cumbersome means of disclosure.

16 I am just making a note -- I will come back to Mr Brealey in due course -- but a short,  
17 just by way of further information --

18 **MR KENNELLY:** I don't want to interrupt your flow, Sir, but may I make a short  
19 point, please?

20 **THE PRESIDENT:** Yes.

21 **MR KENNELLY:** We have addressed whether we have what Mastercard had, but  
22 there was that second point made again by Ms Murphy, which is that that was  
23 good enough for the Tribunal in the Mastercard case.

24 Of course, Visa is entitled to approach this question in its own way. The disclosure  
25 in that case was informed by the approach that Mastercard took and the  
26 particular focus that it took and the questions it asked, and Visa is entitled to

1 take the view that it can ask different questions and apply a different focus.  
2 The ultimate legal issue is the same, but we shouldn't be bound by what  
3 Mastercard shows to press or emphasise. It can't be taken that that is  
4 sufficient for our purposes.

5 **THE PRESIDENT:** No, I fully accept that. But at the same time, Mastercard is, I am  
6 sure, no pushover. I am sure they were well represented -- indeed, one can  
7 see who represented them -- that they were very keen to run this defence and  
8 one would expect them to have been diligent in seeking to get appropriate  
9 disclosure.

10 I think it is of some guide -- although of course it doesn't bind you, and you can say,  
11 well, it may not have been of great interest to Mastercard, but it is of great  
12 interest to us. You can say that, but one does bear in mind that a somewhat  
13 similar kind of entity running the same defence did feel that it had received  
14 appropriate disclosure.

15 I think the critical question is looking at what you are asking for.

16 What concerns me is you are asking for the corporate strategy of Sainsbury's Bank.

17 It is clear that there are strategy documents, just from looking at the judgment  
18 in the Mastercard disclosure. Whether every strategy document is there or  
19 not, I don't know. What slightly concerns me is that there is no attempt to say,  
20 "Well, we have the following three strategy documents, they are extremely  
21 interesting, see this document at paragraph 17, and therefore it is clearly  
22 relevant to have any others.

23 But you have not yet engaged with them from what I can see.

24 **MR KENNELLY:** It is of course also open to Sainsbury's to say, in relation to these  
25 categories -- I mean they said in broad terms, "This is all covered by the  
26 disclosure that you have got", but they have not identified that it is the material

1 they gave Mastercard.

2 **THE PRESIDENT:** Yes, but you are the party making application?

3 **MR KENNELLY:** Absolutely. We are making submissions that we don't have these.

4 Sainsbury's have a better idea than we do of what was given to Mastercard  
5 and the extent to which these documents have already been provided, and  
6 they have not said that with any particularity.

7 Going to categories, Sir, again we have been careful to adopt a proportionate  
8 approach. That is reflected in the way this is drafted. Sainsbury's have not  
9 come back and said that it is too broad or any particular aspect of it will put  
10 them to undue work or cost. There is a broad costs figure given at the end of  
11 Ms Murphy's statement but that covers everything.

12 In relation to these six categories no particular concern has been raised about the  
13 onerous nature of them or the cost that they would involve.

14 **THE PRESIDENT:** They have not engaged with that specifically.

15 **MR KENNELLY:** You can see -- they go directly to the pleaded issues, there is  
16 nothing speculative. It is not a fishing exercise. They are the key documents  
17 one would hope to receive in order to make out the case that we pleaded.

18 **THE PRESIDENT:** I don't know about all of that.

19 Is there any more at this point you want to say about any of these specific  
20 categories, 1 to 6?

21 **MR KENNELLY:** Not about the specific categories, Sir.

22 Simply to address the final point that Ms Murphy makes against us. At  
23 paragraph 30(c) she makes point that Sainsbury's Bank only received  
24 £6.7 million of interchange income. This is at page 6 of her statement. She  
25 says the cost of producing this disclosure wouldn't be proportionate in view of  
26 such a small amount of interchange income --



1 **THE PRESIDENT:** Yes.

2 **MR KENNELLY:** -- but it is very possible that the proportion of the interchange  
3 income that actually did go to benefit Sainsbury's that is in play on this point  
4 was very large.

5 Could you turn up, please, the judgment of the Tribunal --

6 **THE PRESIDENT:** The proportion of the Sainsbury's Bank net income?

7 **MR KENNELLY:** Absolutely. That was used for the benefit of the claimant. If you  
8 go to the judgment of the Tribunal at --

9 **THE PRESIDENT:** You are saying a large proportion potentially of this figure?

10 **MR KENNELLY:** Yes, of the 6.7 million, exactly. The suggestion is if the  
11 interchange income is only 6.7 million, how much of that would be relevant for  
12 this plea? How much of it is really going to assist the claimant or the broader  
13 Sainsbury's group?

14 **THE PRESIDENT:** I think she's saying that even if 80 per cent of it went, it wouldn't  
15 amount to very much?

16 **MR KENNELLY:** My point is directly to refute that: 80 per cent of £6.7 million is still  
17 a significant figure.

18 **THE PRESIDENT:** In the context of Sainsbury's business?

19 **MR KENNELLY:** In the context of the proportionality the cost of doing the exercise,  
20 to apply categories 1 to 6 --

21 **THE PRESIDENT:** This is for an ex turpi causa defence, that's the issue.

22 **MR KENNELLY:** Yes, indeed.

23 **THE PRESIDENT:** So it has to be material on the issue, I think that's what is being  
24 said.

25 **MR KENNELLY:** Yes.

26 **THE PRESIDENT:** Anyway, you say that a large proportion of it may have gone?

1 **MR KENNELLY:** Indeed. There is no need to turn it up then, Sir. You have the  
2 80 per cent figure. That is in Bundle C1, paragraph 501, page C1/284.

3 **THE PRESIDENT:** Yes.

4 **MR KENNELLY:** The final point Ms Murphy makes against me is paragraph 31(d),  
5 that's the point you touched upon, that the Tribunal rejected Mastercard's ex  
6 turpi causa defence and she maintained, this was Sainsbury's position, that  
7 this means of itself that further disclosure on the issue in the Visa case is  
8 unnecessary. You already have the point and you have repeated it already,  
9 Sir, that the decision on ex turpi causa in the Mastercard case is not binding  
10 obviously ... there is no strike-out application.

11 **THE PRESIDENT:** No, I think everyone accepts it is not binding.

12 **MR KENNELLY:** One document I have not taken you to -- it may assist you, if your  
13 concern, Sir, is that isn't it likely to be covered by the Mastercard disclosure,  
14 and that is a short cut through the six categories. I have not actually shown  
15 you the list of documents that were missing from Ms Bernard's statement.  
16 That's why we are concerned.

17 **THE PRESIDENT:** Yes, that would be helpful.

18 **MR KENNELLY:** You see these. You actually go to the April letter, which in the A1  
19 bundle. That's page A1/147. This is the letter that Linklaters sent on  
20 20 April 2017.

21 **THE PRESIDENT:** A1/147. Yes.

22 **MR KENNELLY:** If you go to A1/149, you see the Bernard documents. We  
23 reviewed the statement -- the one you referred to, Sir -- and noted a number  
24 of documents don't appear to be included in disclosure.

25 If you could read the rest to itself, and over the page:

26 "Therefore you requested that disclosure ..."

1 | If you go to annex 2, you see --

2 | **THE PRESIDENT:** Yes.

3 | **MR KENNELLY:** -- the list of documents.

4 | **THE PRESIDENT:** Yes. Have you had those now?

5 | **MR KENNELLY:** No, but they have agreed to provide them now --

6 | **THE PRESIDENT:** Yes.

7 | **MR KENNELLY:** -- respond to this letter. But as I said, if you look the documents

8 |       that are exhibited, the Bernard's Documents, as you say, Sir, these are the

9 |       kind of documents you would have certainly expected them to have given.

10 |       Documents like these are referred to by the Tribunal in the Mastercard

11 |       judgment, so they were provided and that gives you a flavour for the theme

12 |       and nature of the disclosure we have so far --

13 | **THE PRESIDENT:** Some of them clearly come into the categories you have now set

14 |       out.

15 | **MR KENNELLY:** Yes, indeed. The categories we now set out include -- sorry,

16 |       annex 1 to the letter are the categories that we now set out.

17 | Annex 2 are the list of the Bernard documents that we did not receive and now they

18 |       have agreed to provide.

19 | **THE PRESIDENT:** Yes.

20 | **MR KENNELLY:** The problem is if documents this basic are missing, it strongly

21 |       suggests they have not done the job properly. That's why --

22 | **THE PRESIDENT:** This is a letter that you have shown me of what? April 2017, that

23 |       we are looking at, this annex?

24 | **MR KENNELLY:** Yes.

25 | **THE PRESIDENT:** Which is a long time ago. When did you receive the annex 2

26 |       documents?

1 **MR KENNELLY:** We never received them, they never gave them to us.

2 **THE PRESIDENT:** You don't have them yet?

3 **MR KENNELLY:** No. They have only agreed to give them to us now, and they are  
4 now at annex B of the draft order before you. So Sainsbury's now are  
5 agreeing to provide them, but not before this moment.

6 **THE PRESIDENT:** Yes.  
7 I think I should hear from Mr Brealey.

8 Mr Brealey, just picking up where we left off before you make any more general  
9 submissions, this annex 2 that we have just looked at -- what are called the  
10 Bernard documents -- clearly were part of the Mastercard disclosure.

11 **MR BREALEY:** Yes. We are surprised that they have not had them, so I am not  
12 certainly conceding that they have not been given these documents. What  
13 I am --

14 **THE PRESIDENT:** Can you tell me, this was a letter of April 2017. Here we are  
15 almost four years later. Why on earth has this not been sorted out by now?

16 **MR BREALEY:** To answer that point, I think one needs to go to the Cassels' exhibit.

17 **THE PRESIDENT:** It may be everything was put on hold --

18 **MR BREALEY:** Correct.

19 **THE PRESIDENT:** -- pending the appeals.

20 **MR BREALEY:** Correct.

21 **THE PRESIDENT:** I can see that. But at least I can understand it was not dealt with  
22 in 2017/2018, and then went to the Supreme Court.  
23 But once this case got going, prior to this hearing today, I would have thought this  
24 should have been dealt with. It is a waste of everyone's time. It is clear they  
25 are entitled to them. It is clear from what you said you agree they should  
26 have them. And here we are in a situation where they have not had them yet.

1 **MR BREALEY:** But we have spent 10 minutes with Mr Kennelly saying he would  
2 like them, and they have known for quite a few -- well, they have known for  
3 a long time that they can have them. So I really don't understand what the  
4 issue is about the Bernard documents.

5 **THE PRESIDENT:** I suppose the only issue is that if they have not had them, it  
6 suggests there is part of the Mastercard disclosure that has not been  
7 provided.

8 **MR BREALEY:** One has seen the disclosure in the Tribunal's judgment, all  
9 concerning the Sainsbury's Bank corporate structure --

10 **THE PRESIDENT:** Yes.

11 **MR BREALEY:** -- and the documents relating to the corporate strategy that are in  
12 Sainsbury's retail supermarket's possession and control. All I would say on  
13 the Bernard documents, they will have them. They should have had them,  
14 and they were attached to a witness statement. It is not as if it was in the  
15 disclosure; it was in the witness statement.

16 They have had the witness statement.

17 **THE PRESIDENT:** Yes.

18 **MR BREALEY:** They had the witness statement a long time ago in the Court of  
19 Appeal. It is a straw person, really, this Barnard documents --

20 **THE PRESIDENT:** Except if they had them that might help to resolve some of these  
21 categories.

22 Let's look at the categories.

23 Category 1, documents relating to the corporate structure of Sainsbury's during the  
24 claim period.

25 Dealing with that first and the appointment and common directors. Is there any  
26 objection to you being required to produce a chart or other depiction of the

1 corporate structure of Sainsbury's Bank showing any changes through the  
2 claim period and schedule of joint or former directors as between Sainsbury's  
3 Bank and other relevant Sainsbury's entries?

4 I don't think you need to do documentary disclosure of all documents relating to it,  
5 but simply set it out by way of further information.

6 **MR BREALEY:** If so be it.

7 Much of it is in paragraph 366 onwards of the Tribunal's judgment.

8 **THE PRESIDENT:** Yes. But I think --

9 **MR BREALEY:** I am not sure that it necessarily goes into the granular detail of who  
10 were the directors.

11 **THE PRESIDENT:** No, I don't think it does. That seems to me it is not an  
12 unreasonable request. It may be that it is in the disclosure, it may be that it is  
13 not. It will be actually rather more convenient for everyone if rather than it  
14 being buried in documents it can be done by way of a chart and a schedule.

15 **MR BREALEY:** If that is the order, Sir --

16 **THE PRESIDENT:** Yes.

17 Then I will not make any order at the moment regarding shareholder agreements  
18 until Visa has had a look based on the chart to the shareholder agreements it  
19 is now getting, which it is clear it is now getting.

20 Have you agreed a date by which these Bernard documents are going to be  
21 provided?

22 **MR BREALEY:** The order was 23 April this year.

23 **THE PRESIDENT:** Yes.

24 **MR BREALEY:** But I am sure that these documents can be produced within seven  
25 days.

26 **THE PRESIDENT:** Yes.

1 We won't say seven days precisely because it is Easter, but if we say that those  
2 documents should be provided by 9 April, the Bernard documents as they are  
3 called, and 23 April corporate chart or other convenient representation of the  
4 structure of Sainsbury's Bank and any changes through the claim period.

5 Secondly, a schedule showing common directors between Sainsbury's Bank and  
6 other relevant -- I don't know what are relevant Sainsbury's entities, nor do  
7 I know how many Sainsbury's entities there are. I think I will say Sainsbury's  
8 Bank and the claimant and the parent company is Sainsbury's Plc, is it?

9 **MR BREALEY:** Yes.

10 **THE PRESIDENT:** Is that right?

11 **MR BREALEY:** Yes, J Sainsbury's Plc.

12 **THE PRESIDENT:** Yes. So between the Sainsbury's Bank and the claimant and/or  
13 J Sainsbury's Plc, showing the period of appointment: so date of appointment,  
14 date of resignation.

15 And indicating -- when I say common directors, this is directors of Sainsbury's Bank,  
16 and it will say, "Joe Bloggs also director of J Sainsbury's Plc," or, "Also  
17 director of Sainsbury's Supermarkets" or whatever. So that one can  
18 understand it. I don't think I need to specify with that degree of granular  
19 detail, and I think that will be helpful to the Tribunal, helpful for the defendant.

20 It is always open to them, when they have had the Bernard documents, when they  
21 have had these charts, if they think there are other shareholder agreements  
22 they want, they can write to you. But I am not going to order anything else on  
23 1.

24 Then, this is corporate strategy documents --

25 **MR BREALEY:** Of Sainsbury's Bank.

26 **THE PRESIDENT:** Of the bank. As I said, there must be such documents. Do you

1 have instructions of what documents are in the Mastercard disclosure? It is  
2 clear there are some bank strategy documents.

3 **MR BREALEY:** My instructions are that it is unlikely that Sainsbury's retailer would  
4 be in possession or control of corporate strategy documents of Sainsbury's  
5 Bank, which was half owned at the time by HSBC, and to the extent that there  
6 were any disclosed, they have been disclosed.

7 You know, one has not been taken through, for example, the order of  
8 Mr Justice Flaux, the disclosure list which shows all the keywords that were  
9 agreed between --

10 **THE PRESIDENT:** Yes.

11 **MR BREALEY:** -- Sainsbury's and Visa. Extensive keywords that were -- many of  
12 these questions, Sir, are questions of Sainsbury's Bank. Visa has said it will  
13 not give disclosure of any sensitive documents relating to its issuing banks.

14 **THE PRESIDENT:** Yes.

15 **MR BREALEY:** It can hardly complain if we say, "If you want these documents you  
16 should make that application to Sainsbury's Bank". What documents  
17 Sainsbury's retailer, the claimant, has in its possession or control has been  
18 disclosed.

19 **THE PRESIDENT:** Yes.

20 **MR BREALEY:** I don't accept, at the moment, that even the Bernard documents  
21 were not disclosed.

22 **THE PRESIDENT:** Yes, but they will be redisclosed if they have not been before.

23 **MR BREALEY:** Absolutely agreed.

24 **THE PRESIDENT:** Just a moment. You say what strategy documents you have in  
25 your possession or control were disclosed, as far as you are aware, as part of  
26 the Mastercard disclosure.



1 Looking at 3 "Financial investment", I don't know to what extent the claimant here will  
2 have those documents, will they.

3 **MR KENNELLY:** Sir, if they don't have them, again they can say so. But because  
4 of our plea on single economic entity --

5 **THE PRESIDENT:** Yes.

6 **MR KENNELLY:** -- if the documents exist, they are obviously very important.

7 **THE PRESIDENT:** Yes.

8 **MR KENNELLY:** We believe that there may well be documents which the claimant  
9 possesses or controls which goes to this question of the extent to which they  
10 are providing assistance to the bank under the leadership of their joint parent  
11 company.

12 **THE PRESIDENT:** Yes.

13 **MR KENNELLY:** That's an important distinction between the point that Mr Brealey  
14 seeks to make against Visa. I mean Sainsbury's Bank is wholly owned by J  
15 Sainsbury's Plc.

16 **THE PRESIDENT:** Sainsbury's Bank is wholly owned by J Sainsbury's Plc?  
17 I thought it was 50 per cent owned in the claim period and by Bank of  
18 Scotland, isn't that right?

19 **MR BREALEY:** That's right. It changed.

20 **THE PRESIDENT:** Now it is wholly owned?

21 **MR KENNELLY:** Yes. Whereas Visa, obviously when Visa approaches the issue  
22 as it approaches them as third parties. There is no control over the  
23 documents they have.

24 **THE PRESIDENT:** Yes.

25 **MR BREALEY:** Sir, when we go down this list, there are two points to make on the  
26 ex turpi causa disclosure.

1 The first is that we say they have had what is relevant in the Mastercard  
2 proceedings, but I think it is also very important to remember -- this has been  
3 skirted over -- that there has been a discrete ... this is not just the Mastercard  
4 disclosure being handed over. If I could ask you to go to bundle A2, page 43,  
5 this is the order of Mr Justice Flaux that you have not seen.

6 **THE PRESIDENT:** Yes.

7 **MR BREALEY:** I am being faced with these six categories and kind of very wide  
8 allegations that it is all deficient and --

9 **THE PRESIDENT:** Yes.

10 **MR BREALEY:** When one looks at the Flaux J order of 14 July 2015, this is in  
11 addition to the Mastercard disclosure. This is separate to the Visa  
12 proceedings. So it is a consent order upon the application for the claimant's  
13 solicitors:

14 "... it is ordered that Sainsbury's provide disclosure by list to Visa Europe in relation  
15 to issue 12 of the consolidated list of issues."

16 If one turns the page to page 46. This is 30 September 2015, so six years ago:

17 "A reasonable and proportionate search."

18 If one looks at the bottom of page 46:

19 "The disclosure to which -- ..."

20 **THE PRESIDENT:** This post-dates Mr Justice Flaux's order?

21 **MR BREALEY:** No, this is as a result of --

22 **THE PRESIDENT:** Of Mr Justice Flaux's order, yes, I see. Yes, pursuant to the  
23 order.

24 **MR BREALEY:** Yes:

25 "The disclosure to which this statement relates supplements the disclosure by list of  
26 10 July 2015 and arises from the following searches of the claimant's

1 documents. Ex turpi causa, pursuant to the order dated 14 ... 2015, the  
2 claimant is required to disclose documents relevant to the issue of ex turpi  
3 causa by 30 September, in this regard keyword searches were agreed with  
4 Visa."

5 When I get these allegations of it is all deficient -- so the keyword searches were  
6 agreed with the defendants following service of the amended defence on  
7 21 May 2015 and the addition of ex turpi causa as a relevant issue in the  
8 proceedings.

9 **THE PRESIDENT:** Yes.

10 **MR BREALEY:** So the ex turpi came a bit late:

11 "These keywords listed in section 3 under ex turpi causa keywords were applied to  
12 the claimant's electronic documents."

13 One sees, on page 50, the search terms that we used at the bottom.

14 **THE PRESIDENT:** Yes.

15 **MR BREALEY:** So that is additional searches that were made.

16 **THE PRESIDENT:** Yes.

17 **MR BREALEY:** This is 30 September 2015. A month later Mr Justice Cooke  
18 basically set this case down for trial.

19 **THE PRESIDENT:** Yes.

20 **MR BREALEY:** That is why potentially we are being told to revisit what was done  
21 six years ago.

22 I should add that the April 2017 letter basically referred to the 18 January 2017 letter.

23 That was immediately after Visa had successfully had the phase 2 trial stayed  
24 and essentially we were waiting for the judgment.

25 **THE PRESIDENT:** Yes.

26 **MR BREALEY:** My main point is -- this is the thrust of Ms Murphy's witness

1 statement -- that not only have they had the Mastercard disclosure, and if  
2 there are gaps we have said we will give it, but there was, as one can see,  
3 very extensive discrete search made, by reference to keywords "agreed with  
4 Visa" six years ago.

5 **THE PRESIDENT:** Yes.

6 **MR KENNELLY:** Mr Brealey says that we are asking him to revisit something that  
7 was done six years ago and complete. He's not engaging with the fact that  
8 when we reviewed the product of this work, in April 2017, we raised the fact  
9 with Sainsbury's that it was obviously inadequate.

10 Mr Brealey says "relevant documents are provided", but he means documents  
11 responsive these search terms. As we explained in April 2017, they were  
12 obviously not producing the right disclosure. That's why the Bernard  
13 documents were not there and that's why they only had 113 emails for a  
14 period of 8 years --

15 **THE PRESIDENT:** Yes. They have agreed to provide the documents in these  
16 categories for the last five months, is it, of the claim period.

17 **MR KENNELLY:** Four months, Sir.

18 **THE PRESIDENT:** Four months of the claim period.

19 They are going to provide you with what I have ordered with respect to paragraph 1  
20 of annex A. It seems to me that you should now look at those documents and  
21 look at the documents that are in the Mastercard disclosure. Which, for  
22 example, seem to include a trademark licence. So you have had something  
23 on brand loyalties.

24 I am just picking things up from the judgment.

25 Then, if you say there are clear gaps and things that are not clear, and are also not  
26 clear when looking at Ms Bernard's witness statement which appears to

1 address all this, which I have not read, then come back with an application for  
2 targeted specific disclosure. But to cover this significant period and require  
3 Sainsbury's now to go back and search for, for example, documents relating  
4 to membership of industry bodies or action groups. I mean, first of all I find it  
5 hard to see that is of any particular relevance and/or added value in this case,  
6 but it may be that you have some of that already in the Mastercard disclosure.

7 In none of these categories, or in your evidence, does it says:

8 "We have received, in fact, the following three shareholder agreements. But it is  
9 clear from looking at them that there is a shareholder agreement that is  
10 missing."

11 You have just asked for shareholder agreements and you clearly have some.

12 Similarly, it says documents relating to brand loyalties. You clearly have some.

13 I think you need to just explain quite where you see there are specific gaps, and why  
14 you say filling that gap is relevant. You can restore your application in a more  
15 targeted way in June or July after you have reviewed the Mastercard  
16 documents. But I am not going to order any more under ex turpi causa at this  
17 stage.

18 **MR KENNELLY:** Thank you, Sir.

19 It is your ruling, but it seems a sensible approach in any event.

20 **THE PRESIDENT:** Yes. I think often with disclosure on these big cases a staged  
21 approach can be helpful. The other thing you will see is getting these  
22 categories, albeit only for four months, you may then comparing what you get  
23 with what you have had for the previous period of years, say:

24 "Well, look, it just shows this category is important because by applying this category  
25 we have this document. There will almost certainly have been equivalents in  
26 the previous period, which we have not got, and that's why we need a further

1 search."

2 **MR KENNELLY:** Indeed, Sir.

3 **THE PRESIDENT:** Right. Before we go to countervailing benefits, let us take the  
4 countervailing benefit of a ten-minute break. We will come back at 12.25.

5 **MR BREALEY:** Very good, Sir.

6 **THE PRESIDENT:** You may want to turn your microphone off if you are not leaving  
7 the meeting, so that any conversation you have is not recorded.

8 **(12.18 pm)**

9 **(A short break)**

10 **(12.25 pm)**

11 **THE PRESIDENT:** Yes, Mr Kennelly, countervailing benefits.

12 **MR KENNELLY:** Sir, yes. To see where the issue is joined we will go first to the  
13 pleadings.

14 **THE PRESIDENT:** Just pause a second. **(Pause)**

15 I am sorry, there was an issue with the livestream.

16 We go first to the pleadings, yes.

17 **MR KENNELLY:** Bundle B to the Visa defence. That's tab 15. It begins at  
18 paragraph 27, which I am going to skip --

19 **THE PRESIDENT:** Yes.

20 **MR KENNELLY:** -- for the reasons you gave in your ruling this morning. But you  
21 have the point in our skeleton that your ruling on the asymmetric  
22 counter-factual doesn't affect the request for disclosure, they arise also on the  
23 symmetric counter-factual. We see that from paragraph 28. The adverse  
24 consequences should be quantified on the basis that both Visa and  
25 Mastercard reduced their MIFs to the levels of the concession and they  
26 should give credit, 29:

1 "For the extent to which its profits would have reduced ...(Reading to the words)...  
2 levels of the concession."

3 So the actual levels and credit must also be given, we see at 30:

4 "To the extent the claimant would have derived fewer benefits from the use of  
5 payment cards."

6 If you could read, Sir, from 30 to 33 over the page, you see how we plead  
7 countervailing benefits.

8 **THE PRESIDENT:** Yes, thank you.

9 Yes, can you just explain paragraph 30(b):

10 "If credit MIFs had been set at the level of the concession, there would have been  
11 passing on by issuers of all or some of the reduction of interchange revenue  
12 to card debt, and the issuers would have had less because the MIF they  
13 received would have been lower."

14 **MR KENNELLY:** Yes.

15 **THE PRESIDENT:** What do they mean by "passing on a reduction to card holders"?

16 **MR KENNELLY:** It must mean fewer benefits, fewer rewards.

17 **THE PRESIDENT:** But that is (c).

18 **MR KENNELLY:** Whilst to the extent not covered by (c), the effect of the reduction  
19 in interchange revenue is going to be passed on, in the economic sense, to  
20 card holders.

21 **THE PRESIDENT:** I just don't quite understand it. I can understand (c). Anyway,  
22 I suppose --

23 **MR KENNELLY:** I am thinking of what there could be under (b) that is not covered  
24 by (c) and (d), and in truth (b) is really explaining why (c) and (d) happened.

25 **THE PRESIDENT:** Yes.

26 **MR KENNELLY:** I suppose to the extent something is not caught by (c) and (d), it

1 will be covered by (b), but (c) and (d) will cover all the obvious ways in which  
2 a reduction in interchange revenue is passed on to card holders.

3 **THE PRESIDENT:** Yes.

4 **MR BREALEY:** Just to interrupt, we had already always interpreted 30(b) as if you  
5 pass on the reduction to the card holder, that means the issuing bank will  
6 charge the card holder.

7 **THE PRESIDENT:** Yes, I see. Impose a charge, yes.

8 **MR BREALEY:** That's the way we had read it.

9 **THE PRESIDENT:** So a credit card that was free could then be subject to a fee?

10 **MR BREALEY:** That is certainly what Visa said in the exemption hearing.

11 **THE PRESIDENT:** Yes. I see.

12 **MR KENNELLY:** Okay.

13 **THE PRESIDENT:** Yes.

14 **MR KENNELLY:** Then Sainsbury's answer is at B20, behind tab 14 in the same  
15 bundle, from paragraphs 12 to 13.

16 **THE PRESIDENT:** Yes. But they have not sought to strike out this plea and you  
17 say that what has been decided is there were not benefits that could meet the  
18 condition for exemption, but it doesn't mean that there are no benefits or  
19 consequences at all.

20 **MR KENNELLY:** Indeed.

21 **THE PRESIDENT:** Yes. So the legal issue is for trial and the interchange fee  
22 regulator -- the IFR -- issue is something indeed you seek to address in some  
23 of the disclosure.

24 But the fact that the total income -- because these were, as it were, legacy cards as  
25 I understand it, is that it is not insignificant but not of huge significance.

26 **MR KENNELLY:** Yes.



1 **THE PRESIDENT:** I think that is a fair way to put it, isn't it, in relation to the figures?

2 **MR KENNELLY:** Yes. In relation to that narrow point on revenue itself, that is  
3 correct. But of course our case, as you have seen in the pleadings, is that the  
4 benefits are far wider than just the strict revenue received by the bank,  
5 Sainsbury's Bank itself.

6 **THE PRESIDENT:** Yes, sure.

7 **MR KENNELLY:** Putting to one side the legal point about the exemption, which  
8 Sainsbury's maintain even in the material they sent us on Friday night -- I will  
9 come back to that.

10 **THE PRESIDENT:** Yes.

11 **MR KENNELLY:** The key question for the Tribunal is the disclosure that will identify  
12 what benefits if any Sainsbury's would have lost in the counter-factual. So  
13 what if any are the benefits that Sainsbury's received from MIFs above the  
14 concession level compared to what the benefits would have been at the time if  
15 MIFs had been as low as the concession levels.

16 The Tribunal knows that Visa's case is that higher MIFs encouraged issuers to  
17 promote card usage and fund innovations to make cards more attractive, as  
18 the rewards contactless technology, which you have seen, and seen  
19 reference to merchants benefiting from saving the higher cost of processing  
20 cash and saving labour costs through, for example, unmanned checkouts  
21 and, we say, it is pleaded merchants benefited from how customers spend  
22 when they use cards instead of cash.

23 **THE PRESIDENT:** Yes.

24 **MR KENNELLY:** That case informs then the request -- again I will ask you to turn to  
25 the draft order -- which contains what is left from the Redfern Schedule that is  
26 dealing in dispute. That is again annex A, paragraphs 7 to 15.

1 **THE PRESIDENT:** Yes. If you can again kindly give me the cross-references?

2 **MR KENNELLY:** Paragraph 7, Sir, is 2.3.2.

3 8 is 2.3.3.

4 9 is 2.3.4.

5 10 is 2.3.6.

6 11 is 2.3.9.

7 12 is 2.3.10.

8 13 is 2.3.11.

9 14 is 2.3.14.

10 15 is 2.3.16.

11 **THE PRESIDENT:** Yes.

12 **MR KENNELLY:** If you could, Sir, read -- I shall not read them to you, but if you  
13 could read from paragraph 7 to 11 to yourself, I then will have a brief remark  
14 to make about paragraph 12.

15 I will explain when we finish going through the list what we hope to get from them  
16 and why we seek them.

17 **THE PRESIDENT:** Yes.

18 **MR KENNELLY:** At 12, Sir, we ask for documents from July 2015 to the end of  
19 2018 evidencing or discussing the relationships between MIFs and  
20 innovations. In our skeleton we incorrectly said we needed these documents  
21 to date. In paragraph 6.6 of our skeleton, that is an error. We only seek them  
22 up to the end of 2018.

23 **THE PRESIDENT:** Yes.

24 **MR KENNELLY:** Paragraph 13, again up to 2018 evidencing the discussing the  
25 cost of processing contactless payments and so forth.

26 At 14, we do seek documents from the end of the claimant period to date evidencing

1 analysis or consideration given to the impact of what was called strong  
2 customer authentication requirements of Sainsbury's online sales. The  
3 reason why that is sought up to date is because what is called the SCA was  
4 only introduced in 2019. As Mr Holt will explain -- I will take you to it -- it is  
5 a very narrow at category of disclosure, probative but narrow. So even  
6 though it is sought to date, it shouldn't be unduly onerous for Sainsbury's.

7 At paragraph 15 we seek documents to the end of 2018 recording how Sainsbury's  
8 Bank dealt with the IFR.

9 **THE PRESIDENT:** Yes.

10 **MR KENNELLY:** And then changes. Then halfway down 15, we seek changes --  
11 documents relating to changes in card issuance to its customers and  
12 documents from 2015 to date relating to the European Commission's review  
13 of the IFR and the "acquire market review" conducted by the payment  
14 services regulator in the UK.

15 The reason why those documents are sought to date is because the Commission's  
16 review of the IFR began in 2018 and ended last year, and the PSR's review,  
17 I think, also began in 2018 and is still open. That's why the more recent  
18 documents are sought, the events themselves are much more recent.

19 **THE PRESIDENT:** Yes.

20 **MR KENNELLY:** These requests -- I will deal with them at a high level initially, but  
21 I will go into the detail as we go through them -- perform three distinct  
22 functions. It is important that I take you to this, because Sainsbury's answer  
23 is, well, we have already agreed to give disclosure of the extent to which we  
24 reacted to reduced MSCs following the IFR. The point is this is not about  
25 reduced MSCs.

26 The first function which the countervailing benefit disclosure seeks is Sainsbury's

1 own view of the link between MIFs and merchant benefits. These are  
2 important, of course, because Sainsbury's is a sophisticated merchant. It has  
3 an issuing bank in its group, and so documents from the period that's in  
4 issue -- that is the post-claim period -- which come after the introduction of the  
5 IFR are likely to shed, we say, meaningful light on that causal link.

6 Pausing there, Sir, you will appreciate in the skeletons that what is in issue between  
7 us is the post-claim period, we are looking at the period from the end of 2015  
8 through to 2018.

9 The second of the three functions that this disclosure serves is they will identify the  
10 card holder behaviour at Sainsbury's, and measure the changes in card  
11 holder behaviour at Sainsbury's. There is no need for any discussion of MIFs  
12 in those documents. If we have documents relating to card holder behaviour  
13 and changes in card holder behaviour, that will help us to identify the effects  
14 that we are looking for.

15 **THE PRESIDENT:** This is card holder changes as a result of the reduction in the  
16 MIF from the IFR, is that what you mean?

17 **MR KENNELLY:** We need to know what the card holder behaviour in Sainsbury's is  
18 and how it changed over the period.

19 **THE PRESIDENT:** When you say "card holder behaviour", behaviour in what  
20 respect?

21 **MR KENNELLY:** If you go to paragraph 8, Sir, customer's propensity to use cards.  
22 So the extent to which Sainsbury's looked at its own customer's propensity to  
23 use cards, how did they use cards and how did that change over that period.

24 Similarly, at 14 -- I will come back to that, because that goes to the extent to which  
25 when, after the IFR, tougher securities measures were imposed which might  
26 have undermined frictionless card payments, how did that impact Sainsbury's

1 customers that used cards?

2 If we establish a causal link between MIFs and card usage, using other evidence --  
3 because you will appreciate we will need to deploy other evidence in order to  
4 make that point good -- and we use that other evidence to show what would  
5 have happened to card holder behaviour at Sainsbury's. We need to know  
6 what the card holder behaviour at Sainsbury's was, so that if, as we hope, we  
7 establish a link between MIFs and card holder behaviour, we can prove how it  
8 would have affected Sainsbury's at the time.

9 **THE PRESIDENT:** Yes. Well the IFR is obviously a very helpful natural experiment,  
10 isn't it?

11 **MR KENNELLY:** Indeed.

12 **THE PRESIDENT:** And it comes near the end of the claim period.

13 **MR KENNELLY:** Absolutely.

14 The third important function that this disclosure serves is to quantify the benefits that  
15 Sainsbury's derives from changes in card holder or issuer behaviour. You  
16 have that already, Sir, from looking at paragraph 10 that talks about the  
17 importance of credit cards, credit functionality to merchants and the benefits  
18 of consumer credit.

19 Paragraph 11, the extent of any harm that Sainsbury's would have suffered if MIFs  
20 had been reduced, so higher costs/lower volumes.

21 12, obviously the very important innovations that we say MIFs funded or brought  
22 forward, such as contactless.

23 Similarly 13 and 14.

24 The documents that go to these issues may well say nothing about reduced MSCs,  
25 but if they go to show the important benefits that Sainsbury's gets from these  
26 innovations and if we can establish a causal link between the MIFs and these

1 innovations, such as contactless, then we can quantify the value of the impact  
2 on Sainsbury's itself. Because we will have identified the value that  
3 Sainsbury's placed on these innovations.

4 **THE PRESIDENT:** Yes, I mean you will have the burden of establishing the causal  
5 link.

6 **MR KENNELLY:** Absolutely. That's why this disclosure is so important.

7 Those are the three broad functions that these requests serve.

8 May I take you then to the particular objections that Sainsbury's has raised?

9 **THE PRESIDENT:** Yes. Can I just ask you -- of course the claim period ends at the  
10 end of November 2015 --

11 **MR KENNELLY:** Yes.

12 **THE PRESIDENT:** -- so there is a distinction about getting disclosure to the end of  
13 the claim period and post-claim period. I don't know, because you are  
14 seeking it from July 2015, is that because you have had it up to July 2015?

15 **MR KENNELLY:** Yes. As I said, in the tranche of disclosure that I referred to  
16 beginning we have had Sainsbury's quantum disclosure up to July 2015.

17 **THE PRESIDENT:** There is no complaint at the moment about that?

18 **MR KENNELLY:** We have to pick our battles, Sir.

19 **THE PRESIDENT:** Yes.

20 Anyway, if you had it to the end of July and it's common ground you've not had it  
21 beyond, is there any objection to you getting it to the end of November 2015?

22 **MR KENNELLY:** I don't know if there is an objection, but it would not serve its  
23 main --

24 **THE PRESIDENT:** You say that would not help? Yes.

25 **MR BREALEY:** Can I just help you, Sir, on this? Again because you have not been  
26 taken through the whole picture. Can I just pick it up --

1 **THE PRESIDENT:** No. Mr Brealey, I don't want to be chopping and changing the  
2 whole time.

3 Let Mr Kennelly finish and then you will have your turn.

4 **MR BREALEY:** Okay.

5 **THE PRESIDENT:** Yes, right, Mr Kennelly, okay. Objections?

6 **MR KENNELLY:** Yes. Those are in Ms Murphy's statement we received on Friday  
7 evening. That's in bundle A2, paragraphs 40 to 44.

8 You will note, Sir, that again they say really very little. This reflects their approach in  
9 the Redfern Schedule about why we should not have this disclosure, bearing  
10 in mind the guidance that you gave --

11 **THE PRESIDENT:** Doesn't that answer the question I just raised? To the extent for  
12 the four months to the end of the claim period, that's agreed.

13 **MR KENNELLY:** Yes.

14 **THE PRESIDENT:** Yes. So that's the first point. So you get it for whatever it is, July  
15 or August, to the end of November 2015 is agreed.

16 **MR KENNELLY:** Yes. Pausing there, Sir, that's the point I made earlier.  
17 Sainsbury's is agreeing to give us the disclosure by category for that four  
18 month period.

19 **THE PRESIDENT:** Yes.

20 **MR KENNELLY:** Of course, the ex turpi causa, pass on and countervailing benefits.  
21 But as I said, that doesn't help us at all in getting documents from the key  
22 post-claim period, where we can see the effects of the natural experiment that  
23 occurred.

24 Her first point is the one you just made. The second is she repeats the fact that we  
25 have had all of the disclosure in the Mastercard case, but you have our  
26 submissions about that.

1 The nub of her submissions, really, is at paragraph 41 and 42. She argues at 41 that  
2 it will be disproportionate for us to have disclosure for the three year period  
3 following the claim period.

4 Her second point, at 42, is that Visa's concession on the exemptible level of the MIF  
5 precludes any disclosure showing a link between the MIFs actually set by  
6 Visa and the benefits to Sainsbury's. She says at the end of 42:

7 "The Visa concession therefore means that Visa accepts ..."

8 **THE PRESIDENT:** Sorry to interrupt you, Mr Kennelly, but I will hear from  
9 Mr Brealey on that. As I said to you a moment ago, my present view is that  
10 does not follow.

11 **MR KENNELLY:** I won't press the point. We think that is completely wrong --

12 **THE PRESIDENT:** Yes.

13 Then that's basically it, isn't it?

14 **MR KENNELLY:** That is basically it. So I won't press you on --

15 **THE PRESIDENT:** But she does make the point about disproportion of the three  
16 years to the end of the claim period.

17 **MR KENNELLY:** Yes, she does.

18 **THE PRESIDENT:** And she says -- it is a little bit vague -- but she says it could  
19 exceed 2.5 million.

20 **MR KENNELLY:** We would say extremely vague. Of course that cost of disclosure  
21 is not limited to countervailing benefits disclosure; that paragraph 45 of her  
22 statement appears refer to the cost of doing all of the disclosure which Visa  
23 seeks in this application.

24 **THE PRESIDENT:** Yes.

25 **MR KENNELLY:** And it is quite (inaudible) we see 2.5 million overall.

26 I will come back to that at the end because that is covering the cost of the pass on



1 disclosure also.

2 That's it in terms of proportionality --

3 **THE PRESIDENT:** Can you explain why you need to go as far as the end of 2018?

4 **MR KENNELLY:** Could you go to Mr Holt's report, Sir, please? It is in A2,  
5 paragraph 2.11, "Period covered."

6 At paragraph 30, we are for these purposes relying on Mr Holt's evidence. We  
7 submit that it is self-evident. He says he believes:

8 " ... that documents produced after the claim period and up to the end of 2018 are  
9 likely to be highly relevant as the period covers a potentially important natural  
10 experiment and might allow the experts to study the effects of the reduction in  
11 MIFs on issuers, card holders and merchants. Implementation of IFR ..."

12 And he says:

13 "I would expect that it took several years for the effects of the IFR, which forced four  
14 party schemes such as Visa and Mastercard to lower their MIFs, by  
15 December 2015 to be fully filtered through to merchants."

16 That is his insight. It is obvious, we say, that such a significant change as the IFR  
17 which came into force on 9 December 2015, will take time to produce the  
18 effects, so we need to see to make this natural experiment useful.

19 He says at 31 that if he has to draw a line, he draws it at the end of 2018. At the end  
20 of 31, he says:

21 "While some of the implications of the IFR may not have been visible at the end of  
22 2018, he expects that data beyond that point will not provide sufficient  
23 additional value to justify the costs, bearing in mind his duties and those of  
24 Visa re proportionality."

25 In our submission, the period up to 2018 is a reasonable and proportionate one in  
26 view of the time it will take for the effects of the IFR to bed in and filter through

1 to issuers, card holders and merchants.

2 Of course, what we are looking for is not simply the immediate effect on issuers.

3 Issuers have to respond to the IFR. They will take steps --

4 **THE PRESIDENT:** That's IFR. But I am looking at something like your category 10,  
5 which is Sainsbury's documents discussing "the importance of credit cards,  
6 functionality for merchants and the benefits of consumer credit in general."

7 I mean, you have that discussion for the entire claim period, or will have. Of course,  
8 you could go to 2021. There might be more discussion -- there will always be  
9 more discussion. That's about credit card functionality generally; it is not  
10 about IFR, is it?

11 **MR KENNELLY:** Absolutely. It is about the importance --

12 **THE PRESIDENT:** That's not covered by what we have just looked at in Mr Holt's  
13 statement.

14 **MR KENNELLY:** Sorry, Sir, it is. Because this establishes a key benefit and we see  
15 how Sainsbury's value this benefit in the post-claim period.

16 **THE PRESIDENT:** The IFR establishes a key benefit?

17 **MR KENNELLY:** No. What paragraph 10 is seeking to identify are benefits that  
18 Sainsbury's derives from credit card functionality and consumer credit. The  
19 consumer credit that the credit card provides.

20 **THE PRESIDENT:** Yes.

21 **MR KENNELLY:** If we can establish that there is a link between higher MIFs and  
22 increased consumer credit and increased credit functionality, and we combine  
23 that with what we know from disclosure Sainsbury's got by way of benefits  
24 from that functionality, we can then identify what credit Sainsbury's should  
25 give from the reduction in consumer credit and credit functionality that it would  
26 have endured during the claim period if the MIFs had been at the concession

1 of the bank.

2 **THE PRESIDENT:** I understand that. But the benefits you are looking at are  
3 benefits while the MIFs were high.

4 **MR KENNELLY:** No --

5 **THE PRESIDENT:** And which benefits you say may no longer be there once MIFs  
6 come down.

7 **MR KENNELLY:** If we have the benefits in the post IFR period, if we see how  
8 Sainsbury's regarded credit functionality and consumer credit in the post IFR  
9 period when MIFs were lower, then we can see the effect of lower MIFs on  
10 consumer credit benefits and credit functionality in that post claim period.  
11 That actually helps us identify the link between lower MIFs and the extent to  
12 which consumer credit benefits rose at that time.

13 Because Sainsbury's view, as they saw changes in card holder behaviour  
14 happening, they may have taken a view as to whether, you know, perhaps it is  
15 worth encouraging Amex because higher MIFs lead to greater consumer  
16 credit and greater credit functionality. Therefore, we might get insights into  
17 how Sainsbury's regarded higher MIF cards in terms of greater consumer  
18 credit and the effect that had on its business as it fed through its customers.

19 **THE PRESIDENT:** Yes.

20 The idea that you would find Sainsbury's discussing that the shoppers at its  
21 supermarkets should use Amex seems to me somewhat fanciful, if you think  
22 of the extent of Amex card-holding compared to Visa and Mastercard.

23 **MR KENNELLY:** That may be that smaller --

24 **THE PRESIDENT:** We all know that there has been over this period -- and it has  
25 accelerated -- just a greater use of credit cards in general, because of the way  
26 behaviourally people carry cash and like to make payments.

1 We are only concerned, am I right, I think I saw somewhere, that on debit cards you  
2 actually had the MIF at the level of the concession and therefore there is no  
3 claim in respect of debit cards. Is that right?

4 **MR KENNELLY:** You are right, Sir, about the level of the MIF. It was effectively at  
5 the concession level. But Sainsbury's disputes whether it has a claim in  
6 relation to that. Mr Brealey, perhaps, can address you on that.

7 **THE PRESIDENT:** Yes. But it is basically about credit cards --

8 **MR KENNELLY:** Yes.

9 **THE PRESIDENT:** -- you say; no claims for debit, yes.

10 **MR KENNELLY:** Yes.

11 **THE PRESIDENT:** So it is about credit cards, yes.

12 **MR KENNELLY:** The countervailing benefits points are all about credit cards.

13 **THE PRESIDENT:** Yes.

14 **MR KENNELLY:** I take, Sir, your point about 10, but that must not obscure the other  
15 parts of this disclosure request.

16 **THE PRESIDENT:** Yes.

17 **MR KENNELLY:** The ones at 12 and 13, and contactless payments. Because the  
18 later period, 2015 to 2018, it is not just the IFR but also we see a great  
19 development in technology and innovation at the end of the claim period going  
20 into the post-claim period. That's a really important benefit to Sainsbury's that  
21 we say is funded by the higher MIFs. That post claim period disclosure is  
22 really important in order to make that point good.

23 The need for this is addressed item by item by Mr Holt in his report.

24 **THE PRESIDENT:** Yes.

25 **MR KENNELLY:** I have shown you the passage where he deals with the post-claim  
26 period up to 2018.

1 You will have this already, Sir. Giving disclosure from a period after the claim period  
2 is absolutely standard in competition damages cases --

3 **THE PRESIDENT:** Yes.

4 **MR KENNELLY:** -- where it assists the expert examination of what the  
5 counter-factual would have been like during the claim period.

6 What Sainsbury's is offering will not capture what is needed. If you keep Mr Holt's  
7 report open and just go to what is being offered in annex B to our draft order,  
8 which lists the agreed disclosure, then you will see --

9 **THE PRESIDENT:** Sorry, go to annex B?

10 **MR KENNELLY:** Annex B, draft order, paragraph 4. We are getting documents  
11 relating to the IFR, and you see at paragraph 4 of annex B:

12 "Sainsbury's is agreeing to provide documents between the end of the claim period  
13 and the end of 2018 showing how Sainsbury's responded to reduced MSCs  
14 as a result of the IFR, assuming that the MSCs did in fact reduce."

15 But the point I have been making is that the countervailing benefits disclosure is not  
16 about reduced MSCs. None of the documents I have been describing are  
17 likely to refer -- they may do, but they don't have to refer to reduced MSCs to  
18 fall within those categories. That's not the focus of those documents.

19 **THE PRESIDENT:** Yes.

20 **MR KENNELLY:** That paragraph already goes to pass on, as indeed it is labelled in  
21 annex B, and not countervailing benefits.

22 **THE PRESIDENT:** Yes.

23 **MR KENNELLY:** So why the countervailing benefits material is so important is  
24 addressed by Mr Holt. If you go back to him, you will see at paragraph --

25 **THE PRESIDENT:** 41 and 42, isn't it?

26 **MR KENNELLY:** Well, actually, 38 is the first point. This deals with the strong

1 customer authentication disclosure. Paragraph 38 on page A2/12.

2 I see the time, Sir.

3 **THE PRESIDENT:** I assume you are coming to the end of your application. I am  
4 therefore expecting you will be able to wrap up in the next few minutes, then  
5 we will take our break and then Mr Brealey can respond.

6 You have set it out, taken me through the categories, and Mr Holt, at 37 to 47, goes  
7 through each one and I can read that over lunch.

8 **MR KENNELLY:** Yes.

9 **THE PRESIDENT:** He doesn't, I think, address 2.3.16, does he?

10 Yes, he does. So he addresses all the categories that you are dealing with.

11 **MR KENNELLY:** Okay. Just to wrap up my application then, I would ask you, over  
12 the break, to read Mr Holt from paragraph 38 to paragraph 47.

13 That leaves the last point that Sainsbury's make against me, which was the  
14 Mastercard disclosure was given and was sufficient for the Tribunal in the  
15 Mastercard case: it was good enough for them; it should be good enough for  
16 you.

17 The short point I make here, of course, is that as we have seen Mastercard got  
18 disclosure up to November 2015. The disclosure that Mastercard had was up  
19 to November 2015 and the Mastercard trial began in January 2016, so they  
20 had disclosure almost up to the date of the hearing. They had the most up to  
21 date disclosure they could get.

22 Now we are not asking for disclosure up to the date of our hearing. We are asking  
23 for a lot less. We are asking for up to 2018 --

24 **THE PRESIDENT:** Yes.

25 **MR KENNELLY:** -- where the natural experiment or event happened after that.

26 Those are my submissions on countervailing benefit, Sir.

1 **THE PRESIDENT:** Yes. We will resume at 2.05 pm.

2 **(1.06 pm)**

3 **(The short adjournment)**

4 **(2.04 pm)**

5 **THE PRESIDENT:** I should say, Mr Kennelly, I read that passage in Mr Holt's report  
6 that you asked me to. I also took the opportunity to look at  
7 Mr Justice Phillips's second judgment, the exemption judgment, and the Court  
8 of Appeal's passage in the Court of Appeal judgment dealing with that  
9 judgment and Mr Justice Phillips.

10 It does seem to me that effectively exactly the same argument was run at trial before  
11 Mr Justice Phillips, albeit for the purpose of exemption. But it was the same  
12 point. He dismissed it essentially on the facts, not simply saying it didn't meet  
13 the criteria for exemption, it wasn't sufficient to say it hadn't been established  
14 that these benefits were there -- you will be familiar with the passages in his  
15 judgment where he considers the various benefits. And, as I understand it,  
16 the Court of Appeal overturned that on the basis that he had not properly  
17 considered all the evidence.

18 That was in the context of exemptions. There is no binding finding in this case,  
19 because his conclusions have been overturned. That's, as I see it, the  
20 situation of what has happened.

21 **MR KENNELLY:** That's right, Sir. It is not binding. As I said earlier, there are  
22 obviously important differences of principle between showing enough benefits  
23 to get an exemption, which in view of the test establishing that is extremely  
24 difficult --

25 **THE PRESIDENT:** Yes.

26 **MR KENNELLY:** -- and giving credit for the benefits short of exemption --

1 **THE PRESIDENT:** Yes --

2 **MR KENNELLY:** -- but still should be (overspeaking) in any damages award.

3 **THE PRESIDENT:** -- but Mr Justice Phillips found that you just had not made out  
4 the benefits full stop.

5 **MR KENNELLY:** Indeed, but ... as you say, Sir, on the facts.

6 **THE PRESIDENT:** So there was a lot of evidence about these benefits. I suppose  
7 one question is, well, is that -- clearly that evidence has to be reconsidered,  
8 because of what the Court of Appeal said. To what extent can we have a lot  
9 more evidence going to the same points in part to make good -- even if his  
10 conclusion was not binding -- his criticisms, if you like, of the trial judge and  
11 the evidence that Visa adduced last time.

12 **MR KENNELLY:** Indeed. But you have my point, Sir, about the different evidence  
13 that we seek to adduce now and the different material --

14 **THE PRESIDENT:** Yes.

15 **MR KENNELLY:** -- and we have the benefit of what we hope to be extremely  
16 significant developments post-claim period --

17 **THE PRESIDENT:** I understand that --

18 **MR KENNELLY:** (Overspeaking)

19 **THE PRESIDENT:** -- yes, I see that. It is an unusual situation.  
20 Yes, Mr Brealey?

21 **MR BREALEY:** Sir, thank you.  
22 Probably just picking up the last point you made, Sir, can I just as a starting point  
23 reiterate what disclosure Visa will have had and what Sainsbury's has said it  
24 will give.  
25 Just a few documents to show this, if one goes to paragraph 53 of Mr Cassels'  
26 witness statement -- and that is A1/63.



1 **THE PRESIDENT:** Yes.

2 **MR BREALEY:** I suppose we can pick it up at 51, the countervailing benefits:

3 "The category of documents relates to the benefits Sainsbury's took from Visa's  
4 domestic at their actual levels and the adverse consequences that  
5 Sainsbury's will have suffered."

6 **THE PRESIDENT:** Yes.

7 **MR BREALEY:** These are benefits during the claim period, had the MIF been lower  
8 you would have suffered some adverse consequences.

9 So it is not quite clear as to what benefits in 2020 you get is relevant to that, but  
10 I pass that over for the moment.

11 At 53 -- this is the first point I want to make about Cassels -- is that Visa recognise  
12 the significant overlap between the categories of disclosure requested for  
13 quantum purposes with regard to the countervailing benefits argument in the  
14 Redfern Schedule and the disclosure effected by Sainsbury's from the phase  
15 1 trial. That, I think, just confirms a point that you were making, which is that  
16 Mr Justice Phillips had a lot of disclosure relating to what Visa said were  
17 benefits.

18 **THE PRESIDENT:** Yes.

19 **MR BREALEY:** I will come back to the limited quantum disclosure after July 2015,  
20 because that's a red herring. But we see, at the last sentence, Visa is not  
21 seeking any disclosure for these categories in respect of the period before  
22 July 2015.

23 They do have substantial disclosure as to these categories for the claim period.

24 I say "the claim period", because it is something I have been trying to say  
25 a few times but this is relevant to the 16 August 2016 disclosure list. So if we  
26 could --

1 **THE PRESIDENT:** Yes. But isn't the short point this, you have agreed to give it to  
2 the end of the claim period but now that it comes back, there may be material  
3 post-claim period. Obviously not disclosed before, because of the time when  
4 disclosure was being considered -- you know, the disclosure orders previously  
5 were in, effectively, 2015, weren't they?

6 **MR BREALEY:** This is the point I have been trying to make and would just like to  
7 make.

8 **THE PRESIDENT:** Okay, you go ahead.

9 **MR BREALEY:** If one goes to A2/73, this is the 16 August 2016 disclosure list.

10 **THE PRESIDENT:** Just one moment. My document is currently paginated in  
11 a slightly different way.

12 **MR BREALEY:** Sorry. A2/73?

13 **THE PRESIDENT:** Yes. That's 16 August 2016.

14 **MR BREALEY:** Yes. I will show you the document. What I want to impress upon  
15 you, Sir, is that not only have they had the disclosure in the categories to July,  
16 but it has been the case since 2016 but the disclosure will be up until May  
17 2016. That is to say six months after the claim period.

18 If one looks at 73:

19 "Following discussion in advance between the parties, claimant has now conducted  
20 supplemental searches for documents ..."

21 This is at the bottom of 73.

22 **THE PRESIDENT:** Yes.

23 **MR BREALEY:** "... it supplements the disclosure of 10 July 30 September,  
24 2 November, February and August."

25 One goes over the page, to page 74. It is a continuing obligation, Morgan Lewis say.  
26 That over half a million documents have been collected from the custodians,

1 and what happened was that they apply the keyword searches on the phase 1  
2 issues and then the last sentence is important, because this keeps on being  
3 missed out:

4 "The keywords which are relevant to phase 2 issues were not applied to the  
5 additional documents but will be applied for the purpose of considering  
6 ongoing disclosure in respect of phase 2 issues at an appropriate juncture in  
7 future."

8 Because of course by this time Visa had succeeded in its application to have a split  
9 trial in Sainsbury's case.

10 Just to recap, it is not correct to say that the disclosure that Visa will have in the June  
11 trial of next year will be for the whole of the claim period up to November, and  
12 for a six-month period afterwards, as Mr Kennelly concedes in his skeleton,  
13 May 2016. So that is six months. That not only dovetails with the end of the  
14 claim period, but gives you six months of what happened as a result of the  
15 interchange fee regulation.

16 **THE PRESIDENT:** Yes.

17 **MR BREALEY:** Not only that --

18 **THE PRESIDENT:** Does that cover, then, these categories? Was it done by the  
19 keywords or were the keywords designed to capture these categories?

20 **MR BREALEY:** The keywords, as I understand it, are designed to catch these  
21 categories, because the same keywords would have been applied for the  
22 period prior to July 2015. So there would be an obvious continuum.

23 **THE PRESIDENT:** Yes.

24 **MR BREALEY:** That is six months that they have.

25 **THE PRESIDENT:** Yes.

26 **MR BREALEY:** As Visa knows, the evidence at the trial was that issuing banks

1 were preparing themselves way in advance of the December interchange fees  
2 fee regulation, a directive had been out. It is not as if it automatically  
3 happened at the beginning of December 2015, Visa had been preparing itself  
4 for some time.

5 It is May 2016 which we have always agreed to give. But in addition -- and I make  
6 this --

7 **THE PRESIDENT:** Can I just clarify, this search that is referred to here, has that  
8 been done yet?

9 **MR BREALEY:** I think it started, and then it hasn't been completed, but it would be,  
10 as I understand it -- it can be done to meet the 23 April deadline.

11 **THE PRESIDENT:** Yes.

12 **MR BREALEY:** So there is no issue about it not being done by the April deadline.

13 **THE PRESIDENT:** Yes.

14 **MR BREALEY:** In addition to that -- I just pick this up from my skeleton, this is my  
15 starting point what Visa are going to have. Paragraph 14 of the skeleton.

16 **THE PRESIDENT:** Just a minute. This is your initial skeleton or your supplementary  
17 skeleton?

18 **MR BREALEY:** No, sorry, the disclosure skeleton.

19 **THE PRESIDENT:** The skeleton for this CMC?

20 **MR BREALEY:** Yes. The one that arrived on Friday, after we received the expert  
21 report and the completed (inaudible).

22 **THE PRESIDENT:** Yes.

23 **MR BREALEY:** I appreciate this is --

24 **THE PRESIDENT:** Paragraph?

25 **MR BREALEY:** 14.

26 One can't just dismiss this on the basis this relates to pass on. In Redfern Schedule

1 2.4.13 and 14, Sainsbury's has agreed to search for documents from the end  
2 of the claim period to 2018, so far as it relates to the IFR.

3 We say this is not selling the pass for the vast categories of documents that they  
4 now seek for the extended period of time, some to date, but it is in recognition  
5 that this is an interchange fee case and the IFR is relevant --

6 **THE PRESIDENT:** Yes.

7 **MR BREALEY:** -- so we have said we will look for documents from the end of the  
8 claim period, because the IFR documents were disclosed for the claim period,  
9 to the end of 2018.

10 **THE PRESIDENT:** Yes.

11 **MR BREALEY:** The IFR obviously related to exemption and quantum. In my  
12 submission, they will have had, because disclosure was given on phase 1,  
13 they are likely to have had IFR anyway to the claim period, if not thereafter.

14 **THE PRESIDENT:** Yes. But one can understand your point that in terms of  
15 planning for the IFR that started well before December 2015 --

16 **MR BREALEY:** Yes.

17 **THE PRESIDENT:** -- but that as regards assessing the impact of the IFR, that would  
18 have played out after, it might have started in January 2016, but it would have  
19 continued its implications and assessment of them well beyond May 2016.  
20 Indeed, you recognised that by saying the end of 2018.

21 **MR BREALEY:** That then leads me -- one has to remember, also, that the Supreme  
22 Court judgment came out last year. Visa have had time to put us on notice of  
23 these points. We had the CMC in December. The order was made on  
24 16 December, and parties were supposed to complete disclosure by 23 April.

25 **THE PRESIDENT:** Yes.

26 **MR BREALEY:** Because one recognises that the quantum trial has been put off at

1 least twice, if not three times, and at some point one has to put a halt to if  
2 there is an appeal and there is delay how much more disclosure you are  
3 going to have to give, because one party has appealed to the Supreme Court.

4 Can I make three points on why we are resistant to the categories of document in  
5 annex A, which is countervailing benefits 7 to 15?

6 My first point, notwithstanding what you just said to me, is that Mr Holt has not  
7 looked at this extensive disclosure that has already been made. He says that  
8 in terms.

9 **THE PRESIDENT:** Yes, I saw that.

10 **MR BREALEY:** In my submission, it is quite unacceptable for an expert to come to  
11 court, to the Tribunal, saying that he wants another three to six years worth of  
12 disclosure when he hasn't even reviewed the substantial disclosure that Visa  
13 have had for several years. Particularly when the Tribunal in Mastercard felt  
14 able to consider whether Sainsbury's did actually obtain benefits from the  
15 MIFs.

16 That's my first point. It is unattractive for Visa to come to the Tribunal saying, "Well,  
17 it's clearly necessary" when they haven't even bothered to allow the expert to  
18 review the existing disclosure.

19 The second point I would like to make is that there is -- I think I have just made this  
20 point, but I want to make it again -- a cost issue and a time issue which goes  
21 to proportionality. Murphy, at paragraph 45, refers to the cost. I know you  
22 have that point already.

23 **THE PRESIDENT:** That's quite generalised.

24 **MR BREALEY:** It is, but so is the Redfern Schedule. If you are going to be looking  
25 for three to six years for pass on and for countervailing benefits, it is not  
26 surprising that actually you give a global figure.

1 But one sees that the costs associated with phase 1 and phase 2 exceeded  
2 5.5 million. That excludes the cost of disclosure in Sainsbury's v Mastercard,  
3 because there has been dialogue between Visa and Sainsbury's in addition to  
4 the Mastercard disclosure, and those costs would quite possibly exceed  
5 2.5 million until 2018, and for some categories of documents up to date.

6 **THE PRESIDENT:** It is hard to divine any exact figure.

7 **MR BREALEY:** It isn't --

8 **THE PRESIDENT:** It looks as though it is about something like 0.75 million a year  
9 for a year. You can't relate it exactly because she says it is 0.5 million for the  
10 extra, is it, four months, but 2.5 million to go to the end of 2018 and some  
11 categories up to date. I think that includes the 0.5 million, the 2.5 million as  
12 I read it. Yes.

13 **MR BREALEY:** To search for another three years, if not six years -- because there  
14 are instances where --

15 **THE PRESIDENT:** Yes.

16 **MR BREALEY:** -- they are seeking six years, it will be a substantial task in terms of  
17 cost in addition to the substantial cost that has already been incurred.

18 I think, on timing, when one looks at these at categories of documents in annex A,  
19 she says at paragraph 39 of the statement that that could take a substantial  
20 amount of time. I think one can take just common sense notice of this, that for  
21 three to six years of supplemental disclosure to be done by 23 April --

22 **THE PRESIDENT:** No, well it clearly can't be done -- that is clear, it is a question of  
23 what is reasonable and when it could be done by.

24 **MR BREALEY:** Precisely.

25 Not only has there been the timetable has been -- the trial has been listed, we have  
26 expert reports, we have witnesses of fact that have been ordered, the

1 deadlines for all these, and to roll up several weeks before the time for  
2 completion of disclosure --

3 **THE PRESIDENT:** When did you get these requests which are in annex A?

4 **MR BREALEY:** On the countervailing benefits -- I will be corrected -- at the  
5 beginning of the year.

6 **THE PRESIDENT:** January?

7 **MR BREALEY:** Yes.

8 **THE PRESIDENT:** Yes.

9 Yes. So that is your second point.

10 The third point -- you said three points?

11 **MR BREALEY:** Yes. One has to look at the categories.

12 **THE PRESIDENT:** Yes.

13 **MR BREALEY:** They are, on any view, wide. I ask the Tribunal to look at the wide  
14 categories of disclosure sought -- I mean I will go from Mr Kennelly's order,  
15 12:

16 "Documents evidencing or discussing the relationship between MIFs and innovations  
17 such as ... chip and pin, verified rollout of unmanned checkouts and the  
18 development of cashless stores, including but not limited to any cost benefit  
19 analysis assessing the commercial justification for these technologies."

20 Then:

21 "Documents [in 13] evidencing or discussing Sainsbury's cost of processing  
22 contactless payments."

23 14:

24 "Documents to date [to date] evidencing any analysis or considerations given to the  
25 impacts ..."

26 **THE PRESIDENT:** Yes.



1 **MR BREALEY:** So if one just takes category 14 -- I won't go on -- and then looks at  
2 the pleaded case, which is in bundle B --

3 **THE PRESIDENT:** You need not address me on category 14 specifically.

4 **MR BREALEY:** It is the general point. Clearly category 15 of the order relates  
5 essentially to Sainsbury's Bank.

6 **THE PRESIDENT:** Is that something in your control?

7 **MR BREALEY:** No.

8 **THE PRESIDENT:** Then you are only being asked to give documents in your  
9 control.

10 **MR BREALEY:** Could I just make -- this is an important point, in the context of the  
11 proportionality of the exercise and whether it is going to derail the timetable,  
12 et cetera.

13 The point I want to make is this: by reference to paragraph 30 of bundle B -- so  
14 paragraph 30 of the defence, at B29 --

15 **THE PRESIDENT:** Yes.

16 **MR BREALEY:** Just see how it is pleaded. Paragraph 30:

17 "The claimant must also give credit for the extent to which the claimant would have  
18 derived less benefit from the use of payment cards if MIFs had been set at the  
19 levels of the concession. In particular, if credit MIFs had been set at the level  
20 of the concession there would have been fewer issuers, passing on by  
21 issuers, a reduction in benefits and reward to card holder."

22 le a reduction in benefits by issuers to card holders, and a reduction in the promotion  
23 of cards by issuers to card holders.

24 Those four consequences are simply not within Sainsbury's retailer's gift. It is  
25 a defence by Visa as to what its members would have done.

26 It then says because its issuers would have done this, certain consequences would

1 have occurred essentially during the claim period.

2 My third point is this: what Visa is trying to do, because it hasn't proved the causal  
3 link before, and I appreciate it might be different to a certain extent but it has  
4 not proved it before, it is trying to place the evidential burden of its own  
5 defence on Sainsbury's. It could come to court, to the Tribunal, with these  
6 consequences, evidence from its member banks, but what its doing is it is  
7 essentially assuming -- I wrote down quite a few times Mr Kennelly's  
8 submission, "Well, there is clearly a link between the MIF and innovation".  
9 Well, they didn't prove it last time, but okay they want to seek to prove it this  
10 time. But this category of document from 7 to 15 is placing an unjustifiable  
11 evidential burden on Sainsbury's, in circumstances where it has not been able  
12 to discharge its burden before. It was the same issue. And it comes late and  
13 it risks derailing the timetable yet again. That's why we object to it.

14 **THE PRESIDENT:** Yes.

15 The disclosure that you have agreed to give, that is to say the impact of the IFR until  
16 the end of 2018 and the rest until November 2015, that you can do by  
17 23 April. Is that right?

18 **MR BREALEY:** As I understand it, that's the deadline we have been working to,  
19 yes.

20 **THE PRESIDENT:** Yes, thank you.

21 **MR KENNELLY:** Sir, may I respond very briefly?

22 **THE PRESIDENT:** Of course.

23 **MR KENNELLY:** If I just begin with the point that Mr Brealey made initially where  
24 he, again, made the point that significant disclosure has been given, and in  
25 fact goes up to May 2016. He referred you to the document at A.73, the  
26 disclosure statement. This is disclosure given in August 2016. That was the

1 first point Mr Brealey made.

2 There is no point to turn it up, Sir. I think you saw the document and you took the  
3 point.

4 **THE PRESIDENT:** Yes.

5 **MR KENNELLY:** Mr Brealey's clients are offering to apply their keywords to that  
6 disclosure for the purposes of our quantum disclosure. They are not doing so  
7 by reference to categories, and although Mr Brealey asserted this, the  
8 keywords that are being used are not designed to capture the particular  
9 categories that we have listed in the Redfern Schedule and in our draft order.  
10 It is not the same thing.

11 It is the point I made to you earlier when I raised concerned -- as indeed Linklaters  
12 did in 2017 -- about the way these keywords are producing incomplete and  
13 inadequate disclosure, and that was all set out in relation to countervailing  
14 benefits also --

15 **THE PRESIDENT:** You are not seeking a different approach pre-July 2015?

16 **MR KENNELLY:** No, and that is -- as I said initially, Sir -- because we have to pick  
17 our battles. We could have raised a complaint about that, we have our  
18 concerns, but we are can choosing -- in order to be focused and  
19 constructive -- to seek this disclosure by category for the period after  
20 July 2015. There are perfectly valid complaints we could have made about  
21 that earlier period, but we have to focus in the hope that a more focused  
22 approach will commend itself to the Tribunal.

23 We are focused on the period after July 2015 up to 2018, and the disclosure that will  
24 be given up to May 2015 by keywords is inadequate. We say that by  
25 reference to what we have already seen and the fact, again, that when  
26 Linklaters came to review the disclosure that was given to us in April 2017

1 they raised this point specifically.

2 If you could turn to that letter again, because it answers a point that Mr Brealey  
3 made. It is in A1.149. It addresses the paucity of documents going to the  
4 introduction of the IFR.

5 At A1.149, paragraph 6, they say:

6 "Documents recording your client's response to the IFR ...(Reading to the words)...  
7 from December 2015 will be irrelevant to the phase 2 issues."

8 Then:

9 "It is regrettable that the disclosure contains only a very small number of such  
10 documents."

11 **THE PRESIDENT:** Yes.

12 **MR KENNELLY:** "... significantly more documents in your client's possession or  
13 control than those that have been disclosed and therefore we request  
14 disclosure of documents relating to your client's response to the IFR."

15 And we give certain categories at that stage in 2017.

16 **THE PRESIDENT:** Yes.

17 **MR KENNELLY:** We raised the inadequacy of the disclosure that had been given  
18 up to July 2015 at that time. In any event -- in any event, Sir -- even if the  
19 disclosure up to May 2016 were adequate, that is still manifestly insufficient to  
20 address the problem that we face in examining the natural experiment of the  
21 IFR in particular.

22 **THE PRESIDENT:** To some extent you have just taken me to that letter which talks  
23 about documents relating to the IFR.

24 As I understood it from what Mr Brealey just said, in categories 2.4.13 and 2.4.14,  
25 Sainsbury's agreed to give you documents relating to the IFR to the end of  
26 2018. Is that not -- for whatever reason -- precisely the point raised in that

1 letter, which has now been accepted?

2 **MR KENNELLY:** The point that has been made in that letter, Sir, is a broader point.

3 In any event, the point I am trying to make there is that we did not accept the  
4 adequacy of that disclosure at that time.

5 **THE PRESIDENT:** No.

6 **MR KENNELLY:** But that was 2017. The disclosure which Mr Brealey referenced to  
7 you just now is on the face of Mr Holt's evidence, the submissions I made to  
8 you, obviously inadequate because the countervailing benefits disclosure is  
9 not linked or it does not reference reduction in MSCs or reduction in MIFs. It  
10 goes, as I said earlier, among other things, to the benefit that Sainsbury's gets  
11 from the features that we say are promoted or accelerated by MIFs. That's  
12 why the six-month period after the claim period is obviously inadequate.

13 **THE PRESIDENT:** Yes.

14 **MR KENNELLY:** It is obvious, Sir, if you look at it, because the IFR, as you said,  
15 came into force in December. It needed to produce effects -- this is a very  
16 crude summary of the chronology -- it would need to produce effects on issuer  
17 behaviour, so they have to adjust the rewards and benefits that they provide  
18 to their card holders reflecting the reduced interchange revenue.

19 **THE PRESIDENT:** Yes.

20 **MR KENNELLY:** Then the card holders have to be affected. Their behaviour will  
21 change as the reduced benefits and rewards filter through to them.

22 Then we look at the impact of that changed card holder behaviour on Sainsbury's.

23 That's why Mr Holt says that the impact of the IFR to be understood at all  
24 needs to be viewed over that three-year period, probably longer, but he  
25 accepts he has to draw a line somewhere.

26 **THE PRESIDENT:** That's the point, isn't it? For all these exercises it could be better

1 if you go on longer. It will be less perfect if it is shorter, and we have to draw  
2 a line.

3 Mr Holt would like to draw the line at three years. I have to decide what is  
4 proportionate on any view.

5 I understand your point that May 2016 is not enough. You are now going to get  
6 certain documents to the end of 2018.

7 I can say, to try and shorten this a bit, I am prepared to give you some additional  
8 disclosure but not of the extent you seek and with a delay -- you will get it later  
9 than 23 April. Because I can see that there is now -- albeit there wasn't to the  
10 same extent before, for the trial before Mr Justice Phillips -- more information  
11 one can get from the natural experiment. That's something to some extent  
12 you can produce evidence for from issuers, but equally you want to see the  
13 effect on Sainsbury's as a merchant.

14 It is a case of looking at the categories to see what Mr Holt says is justification and  
15 what seems proportionate.

16 That's what I would like to do now, is to look at them one by one.

17 The first one that is numbered is 2.3.2.

18 He says that the -- bear in mind the IFR, as regards certainly the issuer perspective,  
19 it didn't come as a bolt from the blue. There had been a lot of consultation  
20 on it. It was a regulation of, I think, April 2015, and they prepared their  
21 response. So they would have responded pretty promptly once it came into  
22 effect.

23 The first category is 2.3.2, willingness to conduct business with higher cost schemes  
24 offering MIFs above the level. Well, the IFR put down the level of the  
25 schemes to both Visa and Mastercard, so I slightly struggle to understand  
26 what he's referring to in other payment instruments, and exactly what he

1 means as regards that point.

2 I am prepared to give you that disclosure to the end of 2016, because that  
3 consideration would have been in Sainsbury's as they saw and expected the  
4 reduction in the MIFs that took place from early December 2015.

5 That will take you to the end of 2016. From what I can see -- from what Mr Holt  
6 says -- that is proportionate.

7 The next one is 8: customer's propensity to use cards. Mr Holt takes that together  
8 with 9: relationship and card rewards. The causal link between the MIF and  
9 issuer, as well card holder behaviour.

10 Well, MIF and issuer, that's not Sainsbury's, the link between MIF and issuer. That's  
11 just documents Mr Holt should get from your members, the effect on card  
12 holder behaviour, and he wants documents from Sainsbury's that would have  
13 impacted the rewards of associated cards.

14 I don't see that that is information -- it may be relevant, but that's particularly  
15 something for which it is necessary to have disclosure from Sainsbury's.

16 Perhaps you can explain that to me? Certainly Mr Holt doesn't.

17 **MR KENNELLY:** If you look at not what Mr Holt said but the actual request in  
18 paragraph 8. The focus here is on Sainsbury's customers' propensity to use  
19 cards, the extent to which they are using cards over the period.

20 Then we look at how that propensity to use cards changed as interchange fees  
21 changed after the introduction of --

22 **THE PRESIDENT:** Yes. But you will know that because the clients are your client's  
23 cards. What Sainsbury's might have said about it is not relevant. The  
24 question is: did it affect customer's propensity to use them or not?

25 **MR KENNELLY:** But Sainsbury's discussions about their customer's propensities to  
26 use the cards goes directly to the commercial decisions Sainsbury's is

1 making, for example, to encourage the customers to use them more. How  
2 could they encourage customers to use cards if that propensity is falling in  
3 view of reduced rewards. In order to show within Sainsbury's the benefit that  
4 it was getting from increased card usage.

5 It is a jigsaw puzzle, Sir. Each of these -- as I said before -- categories links into  
6 another part of the case which Visa are seeking to prove. A number of these  
7 categories go to the benefits that Sainsbury's gets from increased card usage.  
8 Sainsbury's and its customers will not be looking at MIF levels, but if we can  
9 show the benefits they get from card usage, and then with other evidence to  
10 show that MIFs are leading to those positive features ...

11 **THE PRESIDENT:** Customers' benefits of using cards comes, it seems to me, under  
12 10, as explained by Mr Holt in paragraph 44.

13 The evidence from Sainsbury's to look at the benefits received by Sainsbury's and  
14 discussed by Sainsbury's, the effect of change on Sainsbury's internal  
15 documents. It doesn't seem to me that you need 8 to establish whether the  
16 changes in MIFs affected the propensity to use cards.

17 **MR KENNELLY:** 10 is about credit card functionality and the benefits of consumer  
18 credit. So the customer's propensity to use cards within Sainsbury's may  
19 have a range of direct commercial benefits to Sainsbury's, which is why  
20 Sainsbury's makes commercial decisions about how it steers customers using  
21 cards or how it recognises those benefits.

22 10 is focused on a particular narrow aspect of it, which is --

23 **THE PRESIDENT:** If it is a general point about benefits to Sainsbury's of customers  
24 using cards, why does that have to go to the end of 2018? For just a general  
25 point.

26 **MR KENNELLY:** No, Sir, because if you can track changes in the propensity of



1 customers to use cards over the period after the IFR, one can infer -- among  
2 other things -- that changing propensity is influenced by the reduction in MIFs.

3 **THE PRESIDENT:** That doesn't depend on evidence from Sainsbury's. You have  
4 the evidence on the propensity to use cards, either you can make that  
5 inference -- which seems to me quite a leap, but maybe you can -- but that's  
6 nothing to do with Sainsbury's.

7 **MR KENNELLY:** Sorry, Sir, the second stage, if you will let me finish --

8 **THE PRESIDENT:** Yes.

9 **MR KENNELLY:** -- is it is Sainsbury's reaction to that changing effect. As the  
10 customer's propensity changes, we see how Sainsbury's adjusts its  
11 behaviour. The extent to which Sainsbury's recognises that it gets benefits  
12 from customers' card usage --

13 **THE PRESIDENT:** That's the point I am trying to make, Mr Kennelly. Sainsbury's  
14 getting benefits from different propensity to use cards is something you will  
15 see from 2007 to 2015, because we all know that credit card usage went up.  
16 And I think it is reflected in the judgments.

17 So what Sainsbury's derived from that you will see. You don't need the natural  
18 experiment to see that. The propensity to use cards went up. So the answer  
19 is no, I am not going to order paragraph 8. I don't think it is particularly  
20 relevant and insofar as it has some relevance, I don't think it is proportionate.

21 Number 9 ... cash rewards and bank, that 2.3.4: how a reduction would have  
22 affected the expert's need to assess the causal link between the MIF and  
23 issuer as well as card holder behaviour.

24 That I see. But I just don't understand how Mr Holt's explanation in paragraph 43 -- it  
25 is for his benefit that this disclosure is being sought, as I understand it. That  
26 is how it is being put -- how that depends on evidence from Sainsbury's.

1 **MR KENNELLY:** Sir, I am sorry, it is the same point we discussed a moment ago.

2 True it is, Sir, as you say, that in the claim period one sees higher MIFs and  
3 maybe one will be able to infer benefits from higher MIFs which steer  
4 customer card usage.

5 But the great advantage -- it's the same point I rely on here -- of the post-IFR period  
6 is you see what happens when you have a precipitous fall in MIFs, down to  
7 levels very like the concession level, which is the level we are looking at for  
8 the counter-factual. So it is a much better natural experiment than the claim  
9 period and therefore highly probative.

10 Plainly the issuers -- Visa has some other evidence to show the link between MIFs  
11 and rewards and other benefits, but then how that feeds through to card  
12 holders and Sainsbury's customers and how Sainsbury's itself recognised the  
13 benefits that it receives will be documented by these documents at  
14 concession levels. That's why it is so important.

15 **THE PRESIDENT:** The relationship between interchange fees and cash rewards  
16 and bank fees, how changes in the interchange rates are anticipated to  
17 impact the awards associated with cards and the level of bank fees in the UK.  
18 That seems to me it is a matter for issuers. It has nothing to do with evidence  
19 from Sainsbury's. They might have commented on it. But this is a matter you  
20 wish to prove. I understand that it is relevant, I understand what Mr Holt says,  
21 but I don't think it depends on disclosure from Sainsbury's. So it goes  
22 together with 8 and I will not order that.

23 10, documents -- the importance of credit card functionality. That is 2.3.6, Mr Holt  
24 paragraph 44. This is about Sainsbury's, the increasing availability of credit,  
25 including of course credit cards. The benefits received by Sainsbury's  
26 particularly as an effect on the availability was discussed. That I can

1 understand and I do see that going to only the end of the claim period is less  
2 than optimal.

3 I can also see that the IFR would be likely to have triggered some discussion within  
4 Sainsbury's and, as you rightly pointed out, the effect on card holder  
5 behaviour of any changes made in rewards takes time to filter through.

6 So I'm sympathetic to number 10. But I think that, because of where we are in this  
7 case and the need to keep the trial date, I don't think it is necessary to go to  
8 the end of 2018. There may be some benefit. I am sure there would be  
9 indeed, but it is always a question of trying to strike a balance between the  
10 burden and cost and the benefit. I will order that to the end of 2017.

11 11, this is 2.3.9: quantify the benefits and Mr Holt says:

12 "Post ... is particularly relevant as the actual impact of changes in card usage ..."

13 Again, I can see that. It is exactly the same point. I will order that to the end of  
14 2017.

15 I am reserving the question of the date by which you will receive this, which I will  
16 raise with Mr Brealey.

17 12, 2.3.10, which is Mr Holt's paragraph 46, the relationship between MIFs and  
18 innovations from the point of view of any cost -- in addition. This doesn't  
19 seem, as I understand it, to relate to the IFR. What Mr Holt says is:

20 "Documents up to the end of 2018 are relevant because the full scale of the benefits  
21 from the innovations may not have been realised by the end of the claim  
22 period."

23 On your case, of course, the IFR meant there were less innovations, because less  
24 MIF revenue, therefore less incentive to innovate. So I don't quite understand  
25 why Mr Holt says for this element it should go to the end of 2018. Can you  
26 explain that? This is not a IFR point.

1 **MR KENNELLY:** The reason, as he says in paragraph 46, is that for a number of  
2 these innovations they accelerated just at the end of the claim period and  
3 after the claim period up to 2018. What we will see here is in the first instance  
4 the extent to which Sainsbury's is assessing the cost of benefits associated  
5 with innovation. This goes to working out the extent of the benefit they get  
6 from these innovations and then --

7 **THE PRESIDENT:** Yes, but these are innovations during the claim period?

8 **MR KENNELLY:** Innovations during the claim period, but how Visa assesses them  
9 as those innovations develop will cast light on the value of the innovations to  
10 Sainsbury's during the claim period. Particularly where if the innovations slow  
11 after the IFR, again, that's very useful to show the causal link between those  
12 innovations and --

13 **THE PRESIDENT:** If the innovations are slow after the IFR, that's something that  
14 comes from you, from your evidence.

15 **MR KENNELLY:** It is the extent to which Sainsbury's is deploying innovations.  
16 Because if it is doing a cost-benefit analysis it is having to obviously incur  
17 costs but also it gets benefits from the cost savings and higher revenues that  
18 it gets from deploying these technologies.

19 **THE PRESIDENT:** The contactless payments -- sorry to interrupt you -- they were  
20 considered in the trial before Mr Justice Phillips, weren't they?

21 **MR KENNELLY:** They were, but many of these technologies were in their infancy at  
22 this stage. Now we have a much richer data set and a data set which  
23 demonstrates how these innovations are weighed in the balance by  
24 Sainsbury's after MIFs go down to the concession level. It is highly probative  
25 of that last point.

26 **THE PRESIDENT:** Only if --

1 **MR KENNELLY:** Cost benefits associated with such innovations to the  
2 stakeholders, including Sainsbury's.

3 **THE PRESIDENT:** I think it is really the point in the last sentence, isn't it:  
4 "Information on the costs and benefits associated with such innovations to  
5 Sainsbury's.

6 **MR KENNELLY:** Yes.

7 **THE PRESIDENT:** I don't know who the stakeholders are in your --

8 **MR KENNELLY:** It is merchants and issuers. Plainly to the extent that Sainsbury's  
9 have documents that were produced by Sainsbury's Bank under their  
10 possession and control, great. But obviously they have their own documents  
11 where they examine the costs and benefits of these innovations --

12 **THE PRESIDENT:** Yes, but it is really to the claimant, isn't it?

13 **MR KENNELLY:** Yes.

14 **THE PRESIDENT:** I think one can cut this down. I think again I will do it to the end  
15 of 2016. I simply order information on the costs and benefits associated with  
16 "innovations" is a rather vague word, but you can take it in from above:  
17 "Innovations such as contactless, chip and pin, Verified by Visa or the rollout of  
18 unmanned checkouts or development of cashless stores to Sainsbury's."  
19 But not the relationship between MIFs and innovations, I don't think. That's a matter  
20 for Sainsbury's. Is that clear? So:  
21 "Any information or discussion of the costs and benefit associated with innovation  
22 such as contactless, chip and pin, Verified by Visa or the rollout of unmanned  
23 checkouts or the development of cashless stores ..."

24 Just pause for a moment:  
25 "... to Sainsbury's."  
26 Yes. That will be from July 2015 until the end of 2016.

1 Then 2.3.11.

2 **MR KENNELLY:** May I help with this paragraph, Sir?

3 **THE PRESIDENT:** I can see the relevance of that.

4 **MR KENNELLY:** If you will forgive me --

5 **THE PRESIDENT:** Yes.

6 **MR KENNELLY:** -- obviously during that post-claim period we see a reduction in the  
7 MIFs down to the concession levels. The question is what impact does that  
8 have on other payment methods that may in fact be more expensive for  
9 Sainsbury's? To what extent does Amex gain market share, or other mobile  
10 payment methods, Google Pay, Apple Pay, to what extent do people use cash  
11 because they are not encouraged to use cards as much, and how does  
12 Sainsbury's cope with that? Do its costs of processing those other payments  
13 increase?

14 An important natural experiment would have happened during the claim period if the  
15 MIFs had reduced to the concession level. For that we do need the  
16 transactions by method or, as we say alternatively, a per transaction cost to  
17 Sainsbury's for the whole of the period.

18 **THE PRESIDENT:** I think I want to split this into two.

19 There is the costs discussion -- costs of processing the different methods. If we look  
20 at the first part, costs of processing the different methods and traditional  
21 methods, you want to see what's the benefit, it says "Sainsbury's  
22 counter-factual payment processing costs".

23 I think I will come back to that one. I can see that is a very relevant category, but  
24 I will return to that.

25 2.3.14, the strong customer authorisation came in in 2019, is that right?

26 **MR KENNELLY:** That's correct.

1 **THE PRESIDENT:** Yes. This is restricted to online sales.

2 **MR KENNELLY:** Yes.

3 **THE PRESIDENT:** Is there any evidence of what proportion of Sainsbury's sales in  
4 the claim period were online?

5 **MR KENNELLY:** Not that I have at my fingertips. If somebody has it, it will be  
6 communicated to you --

7 **THE PRESIDENT:** I will be very surprised if for much of the claim period it was that  
8 significant.

9 **MR BREALEY:** It was quite small, I understand.

10 **THE PRESIDENT:** I would expect so. Obviously it is very high now. Clearly the  
11 situation in particularly the past -- what has happened in the past year -- is  
12 quite different from what was going on in the period from 2007 to 2015.

13 **MR KENNELLY:** Forgive me interrupting again --

14 **THE PRESIDENT:** Yes.

15 **MR KENNELLY:** -- but the point for a strong customer authentication is not just  
16 online payments, that's an example where in the case of online payments  
17 there was a tipping point where we would say the revenue from MIFs reduced  
18 and therefore there was a greater intensive to beef up the online security  
19 measures and limit the exposure to fraud. And, because the revenue from  
20 interchange was reduced, they were prepared to forgo the extra money from  
21 frictionless online payments.

22 It is a model of what happens when MIFs reduce.

23 **THE PRESIDENT:** Yes, but in a slightly different form of market.

24 **MR KENNELLY:** Indeed.

25 **THE PRESIDENT:** ... online, and it is way beyond the claim period. We are now  
26 looking at something that is 2019/2020.

1 No, I don't think that is proportionate in this case, so I am not going to order that.

2 15, the point made on this by Mr Brealey is this is all about Sainsbury's Bank. It is an  
3 example of an issuer, along with all the other issuers, and this is -- I don't see  
4 why it is any better than the evidence you have from Barclaycard and other  
5 members of the Visa scheme.

6 **MR KENNELLY:** The fact, Sir, that we may be able to get it from them -- and there  
7 is no guarantee that we will --

8 **THE PRESIDENT:** Aren't they your members?

9 **MR KENNELLY:** They are our members, Sir, and obviously in the previous trial we  
10 did our best to get evidence from issues, but we don't control them, we don't  
11 control their documents.

12 The fact that that is an avenue open to us doesn't mean that Sainsbury's gets off the  
13 hook. We are not asking Sainsbury's Bank for anything. They may have no  
14 documents that fall into this category, if so fine, but if they have documents  
15 from Sainsbury's Bank dealing with the introduction of the IFR, which they  
16 might well have because of the relationship between them, common parent, it  
17 is highly probative. So here in terms of proportionality the cost to them is  
18 minimal, but the benefit of resolving the issue fairly is enormous.

19 **THE PRESIDENT:** I will order it to the end of 2016, which will be quite enough as to  
20 how they decided to respond.

21 Obviously it will be any documents in custody or control of the claimant.

22 That is the first part.

23 Then there is the question of the European Commission's review of the IFR. Again,  
24 the acquirer market review. It is all about the causal link between MIFs and  
25 merchant benefits. It is simply supplementing what you might be able to get  
26 and should be able to get from your own issuers.



1 **MR KENNELLY:** Sir, yes. But again it is a very narrow category of documents and  
2 one can easily imagine how in a single group Sainsbury's Bank in responding  
3 to the European Commission would consult with other members of  
4 Sainsbury's and say: is this IFR a good thing or a bad thing? It has been  
5 potentially a real problem for Sainsbury's in reducing card usage. They could  
6 easily consult them. If they have that document, highly probative and minimal  
7 cost and inconvenience to them to provide it.

8 **THE PRESIDENT:** Yes.

9 I think that should be, really, a separate category. It is quite different from the first  
10 part of 15 so you can number that separately.

11 Yes, I will order that, the last part: documents from December 2015 to date on those  
12 two matters.

13 That means one goes back to number 13, 2.3.11.

14 Mr Brealey, on this particular item, number of transactions, the last sentence first:

15 "Number of transactions by each of these methods."

16 In other words, by contactless, chip and pin, cash, cheque and so on. It may be that  
17 you can't break it down as much as that, but I would have thought it will be  
18 useful to see what has happened in the way customers shop and pay over the  
19 period of the claim. I would have thought that would be information that  
20 Sainsbury's would gather.

21 Can you help me on that? Is that something that's -- it is not so much a documentary  
22 disclosure request, it is more an information request. What I want to know is  
23 would you be able to produce that schedule -- sort of year by year -- showing  
24 with columns the proportions, numbers or whatever it is by the different  
25 methods?

26 **MR BREALEY:** Two points.

1 The first is I think that there are documents before Mr Justice Phillips which had  
2 whether it was a contactless payment or whether it was a chip and pin  
3 payment.

4 **THE PRESIDENT:** Yes.

5 **MR BREALEY:** It obviously takes time and man hours and cost. So a request for  
6 further information, I see that. It is a question of for what period of time.

7 My second point is -- I have stayed silent to a certain extent -- what actually is this  
8 going to? You said to Mr Kennelly you see this is relevant, but if contactless  
9 payments go up, which we all know it has, where is that taking Visa in  
10 a counter-factual of a MIF being lower?

11 **THE PRESIDENT:** I think the answer is this: Visa has to prove that the MIF being  
12 lower would have led to less card usage. That is the burden on Visa. If they  
13 fail then this is of course irrelevant. That is their case, they have alleged that.  
14 If they succeed on that, then one has to say, well, okay, what benefit does  
15 that bring to Sainsbury's? The benefit it is said to bring is that your costs of  
16 processing cash is higher than your costs of processing a credit card  
17 payment.

18 **MR BREALEY:** Yes.

19 **THE PRESIDENT:** But how much, of course, that Visa doesn't know. But that's  
20 something that they need information from Sainsbury's. So that's what it goes  
21 to. It goes to quantify the benefit they said alleged to flow.

22 You are quite right, they have to prove the benefit, the link, and obviously you will  
23 say they won't succeed. But if they do, and that's their case, then one wants  
24 to see what does that mean in terms of financial benefit to Sainsbury's.

25 **MR BREALEY:** I would just obviously need to take instructions. But the extent to  
26 which this is now post-claim period, and one is going through an exercise of

1 looking at whether Sainsbury's has benefitted from contactless payments, it  
2 may well be that there is a further damages claim against Visa by Sainsbury's,  
3 which may need to be pleaded.

4 The reason for me saying that is this: the evidence before Mr Justice Phillips on our  
5 case is that the high MIFs actually restricted the introduction of the  
6 contactless payments.

7 **THE PRESIDENT:** Yes.

8 **MR BREALEY:** We say that that evidence was all one way and was actually quite  
9 compelling, and that Visa never got off the ground in showing any link  
10 between a MIF and the innovation. It had already been done before.

11 **THE PRESIDENT:** Yes.

12 **MR BREALEY:** If it is the case that we have to go through this exercise of  
13 essentially quantifying whether accepting contactless is enhanced over, say,  
14 a chip and pin, it may well be that we would have to address a further  
15 damages claim because contactless would have been rolled out earlier.

16 The answer to the question, I think it can be done by way of an information request  
17 on a number of transactions.

18 **THE PRESIDENT:** That's just the number. Then the first part is what actually is the  
19 benefit to Sainsbury's or the cost of one compared to the other.

20 **MR BREALEY:** That is --

21 **THE PRESIDENT:** Which I imagine -- sorry to interrupt you -- to some extent must  
22 have been in the previous trial.

23 **MR BREALEY:** Certainly the cost of accepting payment cards was at the trial, but  
24 I am almost certain that it didn't distinguish between chip and pin and  
25 contactless, for example.

26 **THE PRESIDENT:** The other point is we are concerned essentially, are we not, with

1 credit cards?

2 **MR BREALEY:** Yes.

3 **THE PRESIDENT:** A lot of chip and pin payments are debit cards.

4 **MR BREALEY:** That's right.

5 **THE PRESIDENT:** I am not sure, as framed -- what we really want to know, isn't it,  
6 is credit cards as opposed to --

7 **MR BREALEY:** This is why I say the categories are very vague. This is why I took  
8 you, Sir, to the pleading.

9 What we are doing is we are looking at the pleading and then we are looking at  
10 several paragraphs from Mr Holt's expert report which has come to us --  
11 I mean Linklaters wrote in February about all this, and then we get an expert  
12 report on Wednesday or Thursday.

13 It is quite uncertain whether this is credit cards, debit cards, what actually is the  
14 counter-factual. In a world of lower MIFs has this led to more or less  
15 innovation? So I say: what actually is this going to on countervailing  
16 benefits?

17 **THE PRESIDENT:** I thought I tried to explain to you --

18 **MR BREALEY:** On credit cards, but not --

19 **THE PRESIDENT:** Yes. But you can only look at that by comparison to other  
20 payment systems. I would have thought that it ought to be processing -- it  
21 ought to include as a category credit cards, but it is up to Mr Kennelly to  
22 clear -- do you know when Google Pay and Apple Pay came into wide usage?

23 **MR KENNELLY:** Sir, I can help you straightaway by saying we are talking about  
24 credit cards, as I explained.

25 **THE PRESIDENT:** But they are not specified in paragraph 13.

26 **MR KENNELLY:** I am happy for that to be added. Also, the contactless and chip

1 and pin was also used for credit cards.

2 **THE PRESIDENT:** Yes.

3 **MR KENNELLY:** I can get the date for the introduction of Google Pay and Apple  
4 Pay. But you actually have an interesting point that Mr Brealey made, the  
5 evidence before Mr Justice Phillips was not complete because many of those  
6 innovations occurred near the end of the claim period. The material he had  
7 was not as comprehensive as it could have been. It is the nature of the thing  
8 that the disclosure did not catch much of the development, that it occurred  
9 near the end of the period.

10 Whereas now not only do we have the longer period showing the development of the  
11 technology, but we have -- this is critical -- the impact of MIFs collapsing to  
12 the concession level.

13 **MR BREALEY:** No, that is simply not correct.

14 **THE PRESIDENT:** If these were only introduced at the end of the claim period with  
15 a high MIF, all you can say is if the MIF had been low they would not have  
16 been introduced towards the end of the claim period.

17 **MR BREALEY:** That's correct, yes.

18 **THE PRESIDENT:** The introduction would not have taken place. That's your point.  
19 In which case it has very little impact, because it is only from the point of  
20 introduction that it could bring a benefit to Sainsbury's.

21 **MR KENNELLY:** Sir, I don't want to speak too soon and say it came in at the end of  
22 the claim period.

23 **THE PRESIDENT:** You said "towards the end", I think.

24 **MR KENNELLY:** I will be corrected, someone will send me the actual dates. It is  
25 definitely not an afterthought in the claim period. We spent a lot of time in the  
26 trial arguing about the benefits contactless payments. It not just the date it

1 happened, of course it is the pace at which they come.

2 The critical point is the one you made, Sir, to Mr Brealey. We are completely in the  
3 dark, how can we formulate a case that says:

4 "Had the MIFs been at the concession level there would have been fewer credit card  
5 payments and people would have used other payment methods that may in  
6 fact have been more expensive to Sainsbury's and to make the comparison  
7 between them."

8 **THE PRESIDENT:** I would have thought there would be some evidence of the  
9 different costs at the trial. But I think you can apply later to vary it, if you think  
10 appropriate.

11 I will delete "Mobile payment methods including Google Pay and Apple Pay",  
12 because I am going to limit this to the end of 2016.

13 On the first part you will have July 2015 to December 2016 on cost differences,  
14 because they are going to change in more recent years.

15 It will include costs of processing credit card payments, contact payments, chip and  
16 pin payments and traditional payment methods including cash and cheques.

17 Then, separately, that Sainsbury's will provide in schedule -- or other convenient  
18 form -- the number of transactions or alternatively a per transaction cost from  
19 ...

20 I think, Mr Brealey, that ought to start at the start of the claim period, should it not?

21 One wants to see what the movement is from cash to credit cards over  
22 period? You will, I am sure, be very surprised if Sainsbury's doesn't monitor  
23 that and the methods of payment. I would say from the start of the claim  
24 period -- so that is from the ... the claim period is at the end of 2007, isn't it, so  
25 let's say from 2008, because the claim period is 18 December isn't it, to the  
26 end of 2016.

1 **MR BREALEY:** I am not saying you don't order it, Sir, it is the question of whether  
2 obviously Sainsbury's can give it.

3 **THE PRESIDENT:** Yes. It will be to make reasonable efforts to provide. It may not  
4 be broken down by all those categories.

5 **MR BREALEY:** Correct. Because clearly there was a lot of evidence and that's how  
6 the MIF is calculated. It is the cost of the payment transaction. You give the  
7 card and it is the front of till, it is the till expenses, it is taking -- clearly --

8 **THE PRESIDENT:** It may be you do it as a per transaction cost, which is the MIF  
9 approach.

10 **MR KENNELLY:** Yes. We will see what we have, yes.

11 **THE PRESIDENT:** Yes.  
12 I do think that's very relevant and it is the question of what's the proportionate and  
13 sensible way of providing it.  
14 I mean, there will be in this order liberty to apply in the usual way. If it turns out that  
15 actually doing it like that is not appropriate, or hugely burdensome, but there  
16 is another way in which you can give almost as full and helpful information  
17 you can propose that to Visa. If Visa are not satisfied you can come back and  
18 seek a variation of the order.

19 **MR BREALEY:** Just to recap, that's why I took you to the Cassels statement. I can  
20 take you to the skeleton, the Visa skeleton says that up to July 2015 the  
21 disclosure covers these categories.

22 **THE PRESIDENT:** Right. Does that include the last, the number of transactions?

23 **MR BREALEY:** It doesn't include, as I will just -- it is paragraph 28 of Visa's  
24 skeleton.

25 **THE PRESIDENT:** Not Mr Cassels'? Visa's skeleton?

26 **MR BREALEY:** I am going to the skeleton now. Paragraph 28, page 12.

1 **THE PRESIDENT:** Yes.

2 **MR BREALEY:** "As can be seen from the wording of the categories above [that's  
3 the categories we have been looking at] these requests all relate to the period  
4 after July 2015. Visa accepts that Sainsbury's had already given disclosure to  
5 these issues for the period up to July 2015, including through its provisional  
6 liability disclosure. The question is whether we should supplement that  
7 disclosure with documents after that time."

8 **MR KENNELLY:** Sir, if I may, I apologise to Mr Brealey, I probably should have  
9 inserted something in brackets at that sentence. Because as the order that  
10 accompanied the skeleton made clear, there was an exception to that in this  
11 paragraph 13, where we clearly wanted the number of transactions ie to the  
12 payments or a per transaction cost from 2007 to 2018.

13 **THE PRESIDENT:** Yes.

14 **MR KENNELLY:** In general --

15 **THE PRESIDENT:** I don't think, Mr Brealey, you should hold Mr Kennelly to that  
16 form of words given what is annexed, this is the one exception. If it has been  
17 provided that is fine. But I think again to have in tabular form either the  
18 number of transactions or the per transaction costs from 2008 to the end of  
19 2016, will be very helpful. But it does seem to me relevant.

20 The next question on this is time and when you might be able to do that. I said in the  
21 course of the submissions that I accept that this is additional material that you  
22 can't be expected to provide by 23 April. But when is it reasonably that you  
23 could do that?

24 Do you want to take instructions or is that something you have instructions on?

25 **MR BREALEY:** Obviously I need to because there is quite a lot in there. I think one  
26 has to recognise that with the COVID pandemic, Sainsbury's offices are



1 closed.

2 **THE PRESIDENT:** Yes.

3 **MR BREALEY:** It may well be that it is for the experts and it can be done  
4 electronically and the data can be obtained electronically, but I think that that  
5 has to be factored into proportionality if we are going to keep the trial date.

6 **THE PRESIDENT:** Are they completely closed or now reopening with a skeleton  
7 staff?

8 **MR BREALEY:** I don't know the answer to that. I know that some people go in  
9 occasionally, but I get the impression that for all intents and purposes it is  
10 empty.

11 **THE PRESIDENT:** Yes, well it is a question of how much is held electronically.

12 **MR BREALEY:** Yes.

13 **THE PRESIDENT:** This is an appropriate time to take our break anyway. I should  
14 say I do have to finish by 5 o'clock, I can't sit beyond 5 o'clock as I have  
15 another professional engagement.

16 In terms of we have to deal with pass on, taxation, will be short, so I would hope that  
17 we are on target to finish soon after 4.30.

18 **MR BREALEY:** Yes.

19 **THE PRESIDENT:** But I will take ten minutes now. If I say that I come back at 3.45,  
20 and if you can take instructions and propose a date which I would hope can  
21 be some time in late June, then it should be done before the end of June.  
22 Otherwise we get into difficulties and clearly it is in your interests that we must  
23 keep our trial table. I am not going to vacate that trial and put it off.

24 Very well, 3.45.

25 **(3.36 pm)**

26 **(A short break)**

1 (3.45 pm)

2 **THE PRESIDENT:** Mr Brealey first, time.

3 **MR BREALEY:** I have not been able to get definitive instructions. It may well be  
4 that if we said mid-July, I have an email saying July. I also have an email  
5 saying that Sainsbury's are remote working until July, that they haven't had  
6 a corporate plan on lockdown measures easing yet.

7 That's all I have been able to get in the 10-minute break, which is ...

8 **THE PRESIDENT:** The date for experts' meeting is January 2022, right, I think?

9 **MR BREALEY:** Yes, it is quite a long period.

10 **THE PRESIDENT:** Yes, it is quite a long period.

11 Normally that would be a rather extended period, I do appreciate the difficulties  
12 everyone is in, particularly with regards to disclosure.

13 Mr Kennelly, if we were to say here mid-July -- and there are constraints as you just  
14 heard -- is that workable?

15 It is still quite a long time before the experts have to do much of significance, and  
16 I would hope that Sainsbury's, insofar as they can supply material earlier, will  
17 do so.

18 **MR BREALEY:** Yes.

19 **THE PRESIDENT:** It does not all have to be held back to the end of the period.

20 Mr Kennelly, if I were to say 16 July?

21 **MR KENNELLY:** Yes. That is fine from our perspective. In fact I positively rely on  
22 the date for the purpose of my pass on submissions to meet the concern  
23 Mr Brealey has raised about whether it can be done by April.

24 This in fact reflects what we said at the last CMC about how much time would  
25 actually be needed for the claimant's disclosure.

26 **THE PRESIDENT:** Yes. So 16 July. As I say, on the different categories there will

1 be liberty to apply.

2 Right. Pass on.

3 **MR KENNELLY:** Sir, if you go first to the pleadings, the defence is at tab 15, page  
4 B30.

5 **THE PRESIDENT:** Yes.

6 **MR KENNELLY:** The claimant must give credit for the extent to which its retail  
7 prices would have been lower on the counter-factual.

8 **THE PRESIDENT:** Yes.

9 **MR KENNELLY:** You see the point. I draw the Tribunal's attention in particular the  
10 last four lines, and the reference to the "heavy evidential burden on the  
11 claimant", which obviously the Tribunal has from the Supreme Court --

12 **THE PRESIDENT:** The Supreme Court, yes.

13 **MR KENNELLY:** -- in Sainsbury's.

14 That plea is met in the reply to the defence at paragraph 15, which is on page B21.

15 **THE PRESIDENT:** Yes.

16 **MR KENNELLY:** There is a fundamental issue between the parties on this. We get  
17 it from Sainsbury's most recent skeleton argument, the one we received on  
18 Friday night. There is no need to turn it up, Sir. I will just simply quote a very  
19 brief point from it. This is paragraph 20 for your note.

20 Mr Brealey said there that the primary focus, as far as pass on is concerned, is one  
21 of historical fact. He said:

22 "Did Sainsbury's pass on the overcharge?"

23 We say that is incorrect. It is important because it informs much of Sainsbury's  
24 erroneous thinking on this issue, and also in fact on the countervailing  
25 benefits point we just looked at. The question of what prices Sainsbury's  
26 actually charged or paid is a question of historical fact which will be answered,

1 presumably, by documents from the claim period.

2 But pass on is not a question of historical fact. It is a counter-factual question. The  
3 question is: would Sainsbury's have charged lower prices if MIFs had been  
4 lower? Would it have paid more to its suppliers or received fewer  
5 countervailing benefits?

6 That's why the period after the claim form is important, because it allows us to see  
7 what happened when Sainsbury's had lower MIFs, from which we hope to  
8 draw inferences as to what might have happened in the counter-factual.

9 **THE PRESIDENT:** Yes is.

10 **MR KENNELLY:** That's why, Sir, as you know very well, post-claim data is routinely  
11 provided in competition claims.

12 The problem for us is that proving pass on, and the legal burden does lie on Visa, is  
13 far from straightforward. It requires an understanding of the claimant's  
14 business over a period of several years, how the claimant alters its pricing --

15 **THE PRESIDENT:** Yes.

16 **MR KENNELLY:** -- and costs when faced with an increase or decrease of the cost  
17 of a particular input.

18 **THE PRESIDENT:** Yes.

19 **MR KENNELLY:** That can only really be done by reference to the detailed financial  
20 information of the business in question, how the prices and costs were set or  
21 agreed, and how they interacted.

22 **THE PRESIDENT:** Yes.

23 **MR KENNELLY:** That complex task requires extensive disclosure from the  
24 claimant. That's a basic question of fairness.

25 **THE PRESIDENT:** Yes.

26 Again, I ask you, this was also, of course, a very strong issue in the Mastercard

1 case, where I think again there was lot of information about how Sainsbury's  
2 set its prices, its profits and so on and part of that is referred to in the  
3 judgment.

4 Again, pass on is something where disclosure comes entirely from Sainsbury's. You  
5 don't know anything about how Sainsbury's dealt with costs and prices.

6 I will ask Mr Brealey: has all the pass-on disclosure that was given to Mastercard  
7 been given to Visa? It seems to me it should all be relevant to this case as  
8 much as to that case.

9 **MR BREALEY:** As I understand it, the same answer is yes, Sir, and they will get  
10 more, because it will go up to May 2016.

11 I will come onto response, but I think that what Mr Kennelly says about historical fact  
12 and the counter-factual, there is a far more complex question of law there.  
13 I don't think it is as simple as he makes out.

14 **THE PRESIDENT:** Yes. You can deal with that in due course.

15 You have had -- I know these requests are mostly from July. You will get, I think,  
16 much of this to May 2016, is that right, Mr Kennelly, is that what's been  
17 agreed?

18 **MR KENNELLY:** Yes, subject to the following.

19 First of all, as to whether we have the disclosure that was given do Mastercard, you  
20 have my submissions on that.

21 **THE PRESIDENT:** Yes.

22 **MR KENNELLY:** Even if we are getting further disclosure up to May 2016, that is  
23 insufficient.

24 First, because of the inadequacy with the approach that Sainsbury's are taking,  
25 because they are applying the same keywords that they applied previously,  
26 which produced such a paucity of documents, notwithstanding the eight-year

1 period from which they applied them. So we have a real concern about that  
2 approach, which is why, since April 2017, we have been asking for it to be  
3 done by category.

4 The second problem with that, of course, is that the period is far too short.  
5 May 2016 -- for the same reason I gave you for countervailing benefits --  
6 doesn't capture the effect of the IFR, which is the best natural experiment  
7 available to the Tribunal, which was not available in the Mastercard case.

8 **THE PRESIDENT:** Yes.

9 **MR KENNELLY:** Even if it was done properly by category -- which is not what is  
10 being offered up to May 2016 -- it would still be inadequate.

11 **THE PRESIDENT:** Yes, but you are asking for what looks to me like a huge volume  
12 of documents for the claim period in categories 26 and 27.

13 **MR KENNELLY:** And 18.

14 **THE PRESIDENT:** Yes, and 18.

15 I will leave out 17 for the moment.

16 For an organisation the size of Sainsbury's, and given the number of products that it  
17 stocks, that is vast.

18 **MR KENNELLY:** I don't shy away, Sir, from the extent of the disclosure. But this is  
19 the disclosure we need for pass on. It is not possible --

20 **THE PRESIDENT:** Why was it that Mastercard's expert and the trial in that case  
21 didn't require this and could have quite full and detailed evidence on pass on  
22 and on how Sainsbury's priced and costs and recovered margins and all the  
23 rest of it as discussed in the Tribunal's judgment?

24 **MR KENNELLY:** Sir, I mean, we are entitled to take a more rigorous approach than  
25 that taken by Mastercard. We are entitled to run the case as we think --  
26 I mean --

1 **THE PRESIDENT:** Yes, you can take a more rigorous approach, you can ask for  
2 more extensive disclosure --

3 **MR KENNELLY:** Yes.

4 **THE PRESIDENT:** -- than Mastercard received.

5 **MR KENNELLY:** First of all -- I am repeating myself -- the disclosure given to  
6 Mastercard does not include this post-claim material, which is extremely  
7 important.

8 **THE PRESIDENT:** No, no, I understand that. I am looking at the 26 and 27.

9 **MR KENNELLY:** Our expert, as Mr Holt says at paragraph 67, in relation to 2.4.3,  
10 which is paragraph 18 referred to by Mr Brealey, and also to paragraphs 26  
11 and 27, which is 2.4.18, this is what he requires in order to do the job which  
12 I have just outlined in summary as I opened my application on pass on.

13 The task facing Visa to prove pass on to discharge the legal burden on us is a heavy  
14 one. It is very difficult and complex. There is no easier way to do it than that  
15 which has been set out by Mr Holt. And none is suggested by Mr Brealey.  
16 Mr Brealey has not said, "There is some great short cut that will allow you to  
17 run your pass on arguments without requiring this material".

18 If we don't --

19 **THE PRESIDENT:** I didn't get a note. Paragraph 18 of your annex is, did you say,  
20 2.4.3, is that right?

21 **MR KENNELLY:** Yes, yes.

22 **THE PRESIDENT:** Paragraph 26 is?

23 **MR KENNELLY:** 2.4.18.

24 **THE PRESIDENT:** Paragraph 27?

25 **MR KENNELLY:** Is also 2.4.18.

26 The categories in the Redfern Schedule in relation to pass on are in certain places

1 broken down. I am happy to give you the paragraphs now.

2 **THE PRESIDENT:** Mr Holt says, as to item 2.4.18, disclosure is not complete for the  
3 post-claim period.

4 **MR KENNELLY:** Yes. But as far as I understand it, for the entire claim period we  
5 do not have all of these documents which are sought in 26 and 27.

6 **THE PRESIDENT:** Does Mr Holt say that he needs them for the earlier period?

7 **MR KENNELLY:** I will wait for the reference, but he makes a broader point about  
8 pass-on disclosure more generally from paragraph 50. He deals with the  
9 specific categories from paragraph 63. In relation to 2.4.18 specifically, we  
10 see what he says in paragraph 72.

11 **THE PRESIDENT:** Yes.

12 **MR KENNELLY:** I will wait for any further reference that will be given to me. But  
13 even if Mr Holt's evidence is limited in that way, we say in circumstances  
14 where we don't have for the whole claim period documents that we set out in  
15 26 and 27, they are plainly necessary in order for us to do the pass-on  
16 exercise.

17 Again, this is not fishing or speculative. This is exactly what you would need to do to  
18 track through the interaction of the costs of the MIF as a cost input, and its  
19 impact on the other costs and prices set by Sainsbury's at that time.

20 **THE PRESIDENT:** You have to show a direct relation between MIF and prices. It is  
21 not at all clear, I mean, this will necessarily help you do so. This is looking at  
22 week-by-week pricing documents from a large supermarket, where they are  
23 not even necessarily the same in each region, and over a period of very many  
24 years.

25 It is not clear to me from what Mr Holt says that he can't do any kind of during and  
26 after approach, as the approach he wants to do, for the claim period and the



1 post-claim period without those documents. I would have thought he should  
2 be well able to do that. Plus details of internal documents -- I appreciate the  
3 question of the IFR and the value of the IFR looking at what impact that had  
4 on Sainsbury's pricing when the merchant service charge to Sainsbury's came  
5 down at the beginning of 2016. 2016 is going to be a very useful year, from  
6 that point of view.

7 That, I see, and stopping at May 2016 is therefore in my view not adequate. I can  
8 understand that. But for a sophisticated retailer they are going to look at  
9 prices with great frequency and they will be aware of the MIFs coming down  
10 and the merchant service charge coming down in January 2016. So are two  
11 points.

12 (a) whether one really needs to go up to 2018 for a lot of this.

13 (b) why the paragraphs 26, 27 and 18 data at that level of granularity are needed.

14 **MR KENNELLY:** May I address you on that point, Sir?

15 **THE PRESIDENT:** Yes.

16 **MR KENNELLY:** On the level of granularity for the claim period documents, if you  
17 turn, please, to A1, and went back again to the letter of April 2017, which  
18 I have taken you to a few times now.

19 **THE PRESIDENT:** Yes.

20 **MR KENNELLY:** It's addressed in annex 3 to that letter, A1.153.

21 **THE PRESIDENT:** Yes.

22 **MR KENNELLY:** If you look at paragraph 2, and you see the reference first to  
23 documents concerning responses to changes in VAT, and then in the second  
24 part of paragraph 2, the request for disclosure of data underlying the weekly  
25 pricing information by stock keeping unit, the volume sold each week and so  
26 forth.

1 **THE PRESIDENT:** Much of this information appears to be available based on  
2 documents in the disclosure.

3 **MR KENNELLY:** Yes. But that's what we are missing. To show how it is missing --  
4 sorry, Sir --

5 **THE PRESIDENT:** "... but these do not cover sufficiently frequent or consistent time  
6 periods."  
7 Yes.

8 **MR KENNELLY:** Exactly. These are the gaps. A1.150, these are the gaps that we  
9 identified having reviewed the disclosure we had been given. That's why we  
10 say the document we were given was not sufficient because of the lack of  
11 frequent and consistent time periods to allow for a complete analysis. That's  
12 why since December 2017 we have ought --

13 **THE PRESIDENT:** Sorry, this is in which annex?

14 **MR KENNELLY:** This is annex 3 to the April 2017 letter.

15 **THE PRESIDENT:** Yes, I have that.

16 **MR KENNELLY:** Then if you go back to the letter itself, it is the last page, A1.150.  
17 This is just to show you why annex 3 is attached.

18 **THE PRESIDENT:** "The gaps and omissions, annex 3, 4 and 5 ..."  
19 So it is 4 and 5, I see, "Missing financial review".

20 **MR KENNELLY:** Then the "Missing budgeting documents", annex 5.

21 **THE PRESIDENT:** Yes.

22 **MR KENNELLY:** In particular annex 3, because that links in to what we are seeking,  
23 what you are asking about in paragraphs 26 in particular. We don't shy away,  
24 Sir, from the level of detail, but this is the level of detail that we need in order  
25 to prove pass on.

26 I appreciate when one looks at the list of categories here it appears to be a long list.

1 But really in a trial where Sainsbury's is suing Visa for 126 million, not  
2 including interest, and where the issues are, on any view, highly complex, that  
3 the burden on Visa is going to be difficult to discharge in view of the legal test.  
4 And this is the raw material, without this we really are struggling --

5 **THE PRESIDENT:** Well, you are not, because you can have the general approach  
6 to pricing, the approach to recovery of costs. You have evidence from  
7 individuals dealing with that and you look at how Sainsbury's dealt with costs  
8 and how it set prices. But this is, in my view, quite disproportionate to go  
9 through week by week, product by product the Sainsbury's pricing for a period  
10 as long as this. That's a period of eight years. Indeed you want it longer,  
11 I think. This is for eight years.

12 At the end of the day all of this pass on is going to be an estimation. You will never  
13 know exactly what would have happened, because, as you said, it is  
14 a counter-factual question. So you are trying to understand how Sainsbury's  
15 dealt with costs and prices and you have, in this case, unusually, the great  
16 benefit of a natural experiment because you can actually see what happened  
17 when the MIF was reduced.

18 As Mr Holt points out, that is of great value in this case. Many cases you don't have  
19 that. You have it to a greater extent than in a trial that would have taken place  
20 in 2016.

21 I don't see that that level of disclosure, which I think is wholly disproportionate, is  
22 justified.

23 **MR KENNELLY:** Sir, just two points.

24 **THE PRESIDENT:** Yes.

25 **MR KENNELLY:** I can see that persuading you to change your mind in view of  
26 those comments is going to be very difficult indeed. It may be better to move

1 on and what I imagine is going to happen is that you will then make a ruling  
2 on these pass-on issues. You mentioned earlier the need potentially for  
3 a CMC in this matter this year. So one that could deal with the fall-out from  
4 this CMC and any further disclosure matters. It may be if we can produce  
5 something more focused that addresses your concern, we can do it then --

6 **THE PRESIDENT:** Yes. I am not going to produce a reserved judgment on this  
7 CMC. That's not my intention, unless you are asking me to. I mean, these  
8 are case management issues of what is proportionate. I am not saying it is  
9 completely irrelevant. There is almost no limit to the data that could be  
10 relevant to this sort of exercise. It is just a question of where one draws the  
11 line in the interests of time, costs, trial management, et cetera. Particularly  
12 when one is investigating a counter-factual.

13 **MR KENNELLY:** Sir, I am not asking for a reserved judgment.

14 **THE PRESIDENT:** Yes.

15 **MR KENNELLY:** I was simply reserving my own position to revive these --

16 **THE PRESIDENT:** You can.

17 Let's go back to the other material you want.

18 First of all, the material that you have identified in the annex, there is a list. Can you  
19 remind me what page that was on?

20 **MR KENNELLY:** In our draft order?

21 **THE PRESIDENT:** No, it is the annex to the letter.

22 **MR KENNELLY:** That's in --

23 **MR BREALEY:** A1.153.

24 **THE PRESIDENT:** A1.153. Thank you.

25 If we just look at annex 4 --

26 **MR KENNELLY:** That is agreed.

1 **THE PRESIDENT:** Annex 5, are they agreed?

2 **MR KENNELLY:** Annex 4 is certainly agreed. I am just checking the draft order.  
3 Annex B of the draft order.

4 **MR BREALEY:** To the extent that there are some missing documents, to extent that  
5 they exist we have said we will look for them.

6 **THE PRESIDENT:** Yes. They have identified what they say is missing, so you will  
7 look for those documents and provide them if they can be found. Is that right?

8 **MR BREALEY:** Yes.

9 **THE PRESIDENT:** Yes.  
10 Then one goes to the other material on pass on, starting at paragraph 16, does this  
11 correspond to 2.4.1?

12 **MR KENNELLY:** 2.4.1.

13 **THE PRESIDENT:** 17 is 2.4 --

14 **MR KENNELLY:** 2.4.2.  
15 The point here is addressed by -- it may be useful to have Mr Holt open at the same  
16 time.

17 **THE PRESIDENT:** Yes.

18 **MR KENNELLY:** He deals with 2.4.1 and 2.4.2 at paragraph 65, page A2/18. The  
19 simple request here is he's asking, well, to the extent that Sainsbury's is  
20 providing it, Mr Holt needs it in Excel rather than PowerPoint.

21 **THE PRESIDENT:** Yes, that is 2.4.2.

22 **MR KENNELLY:** Yes.

23 **THE PRESIDENT:** Financial reviews.

24 **MR KENNELLY:** And 2.4.1 as well. The management account data in an Excel file.

25 **THE PRESIDENT:** Yes.  
26 If we take 16 and 17, Mr Brealey, is there a problem providing Excel files?

1 **MR BREALEY:** It is just a question of extra costs. Does Mr Holt really need it?

2 **THE PRESIDENT:** You don't have it in Excel?

3 **MR BREALEY:** No.

4 **THE PRESIDENT:** You don't have to create a --

5 **MR BREALEY:** No. To the extent that we had it in Excel I am sure that it can be  
6 provided. But what I would balk at, obviously, is creating it.

7 **THE PRESIDENT:** No, I don't think you can be required to create it. You are  
8 disclosing your existing documents.

9 **MR BREALEY:** Yes.

10 **THE PRESIDENT:** If you have it in Excel, or equivalent. If not, if you have to create  
11 it, Mr Holt can no doubt create it or someone can create it for him.

12 Then it is to the end of -- if you put it is the end of 2018, are you able to do that and  
13 the two online spreadsheets, the spreadsheets for the finance previously  
14 disclosed. I think that is what we were just looking at, isn't it in that schedule?

15 **MR KENNELLY:** Yes. I understand, yes.

16 **THE PRESIDENT:** Yes. So that's agreed:

17 "Any memoranda relating to it undertaken by Sainsbury's business plans, investor  
18 briefings or presentations to rating agencies."

19 What do you say about that?

20 **MR BREALEY:** Can I just -- I mean, Sainsbury's has disclosed thousands and  
21 thousands of documents --

22 **THE PRESIDENT:** Yes.

23 **MR BREALEY:** -- on pass on, relating to its internal workings.

24 **THE PRESIDENT:** Yes.

25 **MR BREALEY:** These are essentially categories that have been sprung on us in  
26 February of this year. It is very late in the day to start re-inventing the wheel.

1 Particularly when we do not want to lose the date for the trial. Visa have had  
2 hundreds of documents relating to budgets, how costs are controlled, how  
3 prices are set, what is called the star chamber -- that is to say the discussions  
4 as to margins -- the Mastercard experts looked at it in extreme detail. There  
5 was a forensic accountant, Mr Harman, there was Mr Gunnar Niels, they all  
6 looked at the thousands of documents that Sainsbury's disclosed.

7 The point I am trying to make is we are going to go through these categories as if we  
8 were starting afresh, and we are not. The disclosure on pass on was  
9 supposedly completed seven years ago, and Mr Holt has not even looked at  
10 these yet.

11 **THE PRESIDENT:** I think the issue is we go a bit further now. Seven years ago you  
12 obviously were not going to the end of 2018.

13 **MR BREALEY:** If so, we were talking about --

14 **THE PRESIDENT:** I am not ordering, as I have made clear, these documents for the  
15 claim period which are going back over what you could have been asked to  
16 produce before. I am looking at documents that are starting in July 2015,  
17 I think you have acknowledged you are going to give them up to the end of  
18 the claim period or indeed beyond --

19 **MR BREALEY:** That's right.

20 **THE PRESIDENT:** You will give them to May 2016. So really what we are looking  
21 at is these documents between May 2016 and the end of 2018?

22 **MR BREALEY:** Yes.

23 My submission is that 2018 is too -- particularly given the fact that we are not starting  
24 a fresh here. We were given this in February just some weeks ago. It is as if  
25 in the current pandemic we can just go away and get these many, many  
26 documents. I am urging upon you, Sir, to cut the wishes of Visa's expert.

1 **MR KENNELLY:** Sir, two points there.

2 First of all, Mr Brealey says repeatedly that this has been sprung on him. In the  
3 skeleton argument before the CMC in December we raised the fact that we  
4 were going to seek this disclosure at that time and we relied on that in order to  
5 propose a trial timetable to this Tribunal.

6 We did that within weeks of the decision to bypass the exemption trials. So this was  
7 the earliest point at which disclosure crystallised -- the need for it had  
8 crystallised -- and we did it then. That skeleton argument is in your bundle.

9 **THE PRESIDENT:** Yes. Let's just go through it, shall we?

10 Number 16, you are giving it to May 2016. You will not have to give it in Excel file if  
11 you don't have it in Excel file. In Excel file if available.

12 I think, again, it is proportionate to get the effect of the reduction in the MSC through  
13 the reduction in the MIF from the IFR to the end of 2017, and I don't think that  
14 should be onerous. Because these are your management accounts.

15 Number 17, underlying spreadsheets previously disclosed, and for the period July --  
16 you are giving it ... the ones previously disclosed are the missing ones which  
17 you have agreed to give. Thereafter you have agreed to go to May 2016.

18 Again, I shall go to the end of 2017.

19 I will not order the additional memoranda presentations including investor briefings,  
20 et cetera. It seems to me it is the internal documents that are the important  
21 ones. So that will deal with 17.

22 If we then go to 19, "Minutes of board where pricing, general management structure  
23 ..." The minutes of board senior management meetings, I don't know how  
24 broad senior management meetings and what executive meetings there are,  
25 and how Sainsbury's operates. I would have thought that again the working  
26 principle is we go to the end of 2017. This is additional to what has not been



1 disclosed.

2 Let's look at 19(b) first:

3 "General management structure and details of how Sainsbury's performance  
4 management processes work."

5 Was that covered in a witness statement for the Mastercard trial, Mr Brealey?

6 **MR BREALEY:** Sorry, this is --

7 **THE PRESIDENT:** 19(b) and (c).

8 **MR BREALEY:** Absolutely, there were two witnesses of fact. One from Mr Coupe,  
9 who was the head, and one from Mr Rogers, who was the CFO. So we had  
10 the boss and the main financial --

11 **THE PRESIDENT:** Yes, that's the impression I had.

12 I think the question is if they can take those statements and any supplementary done  
13 by way of further information, supplementary addition or correction -- well, not  
14 correction, addition or amendment to what is said in those statements to deal  
15 with the period to the end of 2017, which those statements were presumably  
16 not covering and things may have changed.

17 That is instead of documentary disclosure for (b) and (c). It should be done by  
18 a further statement from an executive within Sainsbury's just bringing what  
19 those two witness statements say up to date to the end of 2017.

20 Then there is a certain -- I haven't read those statements, so I think, at the moment  
21 ... nor is any reference made to those statements which, from what  
22 I understood, you have already provided to Visa, have you not?

23 **THE PRESIDENT:** Yes.

24 **MR BREALEY:** Yes, and they are referred extensively in the Tribunal's judgment.

25 **THE PRESIDENT:** Yes, but Visa has the actual statements?

26 **MR KENNELLY:** Yes.

1 **THE PRESIDENT:** I will just say therefore minutes of the board for 19(a), delete  
2 "executive senior manager", minutes of the board where pricing margins  
3 et cetera, and relevant meeting papers, relevant board meeting papers, and  
4 19(a) really goes together with 19(d). There seems to be a certain overlap,  
5 but (a) and (d) to the end of 2017.

6 Copies of internal monthly management accounts along with reporting packs. Again,  
7 to the end of 2017.

8 Monthly budget -- yes, I think you should give actually all of (e) to (h) under 19 to the  
9 end of 2017.

10 Now 20.

11 **MR KENNELLY:** That's 2.4.6, Sir, in the Redfern Schedule. It's paragraph 68 of  
12 Mr Holt's statement. It is a short point, Sir, about payments being made to  
13 acquirers (inaudible).

14 **THE PRESIDENT:** Yes. So they have given it to the --

15 Mr Brealey, are you offering to give this to May 2016, is that right?

16 **MR BREALEY:** I believe so, yes. Yes. Because it relates to quantum and the  
17 extent to which the quantum of the MSCs, which was clearly in issue during  
18 the claim period, the keyword searches will not pick that up.

19 **THE PRESIDENT:** I think May 2016 is sufficient. I would find it extraordinary if you  
20 could get away with not paying your banks for more than five months. So to  
21 May 2016.

22 21 --

23 **MR KENNELLY:** That is 2.4.7, paragraph 69.

24 **THE PRESIDENT:** Yes. Whether Sainsbury's would have passed on any reduction  
25 in MIFs.

26 Can you explain that, Mr Kennelly? I thought it is accepted that the MIF, the MSC,

1 90 per cent of the MSC is the MIF, and that that has always been common  
2 ground.

3 **MR BREALEY:** That's **correct** --

4 **THE PRESIDENT:** Just a minute, Mr Brealey.

5 Is that right, Mr Kennelly?

6 **MR KENNELLY:** Yes. Unless I am corrected, yes, that has always been my  
7 understanding also.

8 **THE PRESIDENT:** I don't see why this is needed. That has been accepted, and  
9 that's the basis on which the trial took place and we continue. So that's not  
10 necessary.

11 **MR KENNELLY:** I am being told the point is that on average that's what it  
12 constitutes. But we don't know the extent to which where the acquirer and  
13 issuer are the same -- those are what are called "on us" transactions --  
14 whether it changes in those circumstances. That's something we would  
15 discover from these documents.

16 It would be useful to see -- margin in negotiations after the IFR ...

17 **THE PRESIDENT:** That's not what Mr Holt says in paragraph 69.

18 **MR KENNELLY:** It is the same point. He's interested in the extent in which  
19 acquirers are passing on reductions in MIFs.

20 **THE PRESIDENT:** Allow the experts to study the natural experiment of the IFR.

21 **MR KENNELLY:** Indeed, so where the acquirer and the issuer are the same --

22 **THE PRESIDENT:** They don't have a MIF.

23 **MR KENNELLY:** Yes, Sainsbury's is paying a MIF.

24 **THE PRESIDENT:** When the acquirer and issuer are the same, is a MIF charged on  
25 an "on us" transaction?

26 **MR KENNELLY:** Yes. Sainsbury's pays -- Sainsbury's pays, I think, whatever

1 happens. The question is how does it affect the acquirer margin.

2 After the IFR comes in, how does the acquirer margin change in those on us  
3 transactions? That's where the percentage of the MSC may change and  
4 that's what we are trying to find. It is a very narrow point, but again not  
5 difficult for Sainsbury's to produce in terms of proportionality.

6 **THE PRESIDENT:** Well.

7 **MR KENNELLY:** It is their negotiations with their acquirers.

8 **THE PRESIDENT:** "Whether Sainsbury's acquirers would have passed on any  
9 reduction in MIFs."

10 That's what Mr Holt says, "How Sainsbury's acquirers reacted to the reduction in  
11 MIFs". That's what --

12 **MR KENNELLY:** May I do something more focused, Sir. Really what we would  
13 need is one negotiation round post IFR between Sainsbury's and its acquirers.  
14 The documents relating to Sainsbury's negotiations with its acquirers after the  
15 IFR, one negotiation round would be sufficient, I am happy to reformulate the  
16 request in that way. Because that will tell us how the IFR is affecting that  
17 negotiation.

18 **THE PRESIDENT:** This is all about the merchant service charge?

19 **MR KENNELLY:** Yes, indeed. The extent to which post IFR that merchant service  
20 charge and the MIF element of it changes.

21 **THE PRESIDENT:** The MIF element clearly does change.

22 **MR KENNELLY:** Sorry, the extent to which there is negotiation between Sainsbury's  
23 and the acquirers and focusing in particular on where there may be some  
24 movement on on us transactions. That's the point.

25 **THE PRESIDENT:** Yes. That's certainly not what Mr Holt says. If he's looking for  
26 this information.

1 **MR KENNELLY:** Sir, no. That's not what he's saying in that part. He's making  
2 a related but slightly different point.

3 I am trying to suggest a more narrow basis for what we are seeking, even if it is --

4 **THE PRESIDENT:** Documents between Sainsbury's acquirers in -- you want the  
5 first negotiation between Sainsbury's and acquirers post December 2015?

6 **MR KENNELLY:** Yes.

7 **THE PRESIDENT:** I don't know how many documents that concerns.

8 **MR BREALEY:** A Mr Brooks of Sainsbury's gave evidence before Mr Justice  
9 Phillips, disclosing the confidential acquirer contracts.

10 **THE PRESIDENT:** Yes.

11 **MR BREALEY:** It was accepted that the MIF was non-negotiable. This is a new  
12 point, in the sense that Mr Kennelly is arguing on his feet, I suppose, which  
13 is: is there now evidence that acquirers for some reason lowered their own  
14 margin because the MIFs have been lowered?

15 It certainly doesn't come from what Mr Holt is saying at 6 to 9.

16 **MR KENNELLY:** I am sorry, Sir, Mr Holt is saying the documents will determine  
17 whether Sainsbury's acquirers would have passed on any reduction in MIFs.  
18 What happened to the MSC after the IFR comes in and how do we get that  
19 from negotiations between Sainsbury's and its acquirers. That's what Mr Holt  
20 is saying there and that's what I'm saying --

21 **THE PRESIDENT:** The answer is the MSC comes right down, because it is  
22 common ground that 90 per cent of the MSC is the MIF.

23 **MR KENNELLY:** I am sorry, Sir. That last point, it is common ground on average,  
24 but on on us transactions it may not be. So it does vary.

25 **MR BREALEY:** I beg your pardon, it was accepted that the MIF was not negotiable,  
26 by Sainsbury's. It was a must take --

1 **THE PRESIDENT:** I think, Mr Kennelly, you need to reformulate this request and  
2 Mr Holt has to explain what it is he actually wants.

3 At the moment this doesn't seem to me -- how Sainsbury's acquirers, in other words  
4 the bank Sainsbury's used, reacted to the reduction in MIFs, what did they do  
5 to the MSC --

6 **MR KENNELLY:** Sir, if I may interrupt you. I think it is a good idea, respectfully, to  
7 move on from it. I am conscious of the time and the fact ... so let's move on  
8 from this.

9 **THE PRESIDENT:** Yes, at the moment I am struggling with that.

10 22.

11 **MR KENNELLY:** 2.4.9, paragraph 70 of Mr Holt.

12 **THE PRESIDENT:** Which is 2.4.11?

13 **MR KENNELLY:** That is the next one, 23.

14 **THE PRESIDENT:** The question is how that is going to be dealt with. Because  
15 documents relevant to how prices are affected by changes in costs is  
16 potentially a vast and vague category.

17 **MR KENNELLY:** We are only concerned in the post-claim period, Sir, of course.

18 **THE PRESIDENT:** Yes, I understand that.

19 **MR BREALEY:** It is still vast.

20 **THE PRESIDENT:** That doesn't -- I mean, it is a question of how one deals with that  
21 sort of issue.

22 I think what is important, Mr Brealey, is rather than trying to deal with this by way of  
23 disclosure, I have said that the statements on Sainsbury's approach to  
24 budgeting and so on -- particularly with regard to margins, 19(b) and (c)  
25 should be brought up to date.

26 You had a statement about how prices are put.

1 If someone could mute their microphone, please.

2 How prices are set in the previous trial with Mastercard, explaining how matters  
3 work. I think the best way to approach this initially in a proportionate manner  
4 is for Sainsbury's to provide a statement from someone in the company who  
5 deals with pricing as to the effect of the reduction in the merchant service  
6 charge as a result of the IFR on its pricing and how it responded to that.

7 **MR BREALEY:** That can certainly be done.

8 **THE PRESIDENT:** I think it is sensible to do it and to exhibit any documents relied  
9 on. I think it may be the same person, it may be a different person -- I suspect  
10 it will be someone different -- to deal with the question of ... well, I think the  
11 question of how negotiations with suppliers are affected by changes in costs  
12 and dealing with the period from July 2015 to the end of 2017.

13 **MR KENNELLY:** Sir, yes --

14 **THE PRESIDENT:** And exhibiting any documents.

15 Then, once you have had that explanation, Mr Kennelly --

16 I would like that done before July, Mr Brealey.

17 **MR BREALEY:** Okay. So this is not an updated witness statement then, this is a --

18 **THE PRESIDENT:** I don't know who did it last time. It may be that it is -- I don't  
19 know how it was done last time, because I have not read the witness  
20 statements.

21 **MR BREALEY:** No.

22 **THE PRESIDENT:** But I think there should be -- whether it's by way of updating or  
23 whether it's by way of separate witness statement from somebody else just  
24 explaining over that period how you determined the price of your products and  
25 how you respond to changes in competitor's pricing and your approach to  
26 recovery of costs.

1 In other words, to do it by way of witness statement rather than by way of disclosure.

2 **MR BREALEY:** Yes.

3 **THE PRESIDENT:** And ditto for 23, up to the end of 2017, including MIFs/MSCs,  
4 annexing any documents relied on. If that could be done by, I would hope,  
5 either the end of April or some time in May such that having received that and  
6 considered it, then Visa can decide whether on the basis of that it wants to  
7 seek any particular disclosure.

8 **MR BREALEY:** Sorry, I am conscious of the time.

9 Mr Coupe, who was the CEO, and Mr Rogers, who was the CFO, they are no longer  
10 with the company. They will be giving evidence at the trial.

11 In their witness statements, which will be similar to the ones that they signed in the  
12 Mastercard, they go into some detail on all these issues at 22 and 23.

13 So how the star chamber dealt with costs, how it dealt with suppliers, whether the  
14 MSC had any impact, et cetera, et cetera. What I think is slightly strange -- if  
15 I might respectfully say so -- is they have to give a witness statement that  
16 something didn't change or --

17 **THE PRESIDENT:** They are both giving evidence, were they both with the company  
18 to the end of 2017?

19 **MR BREALEY:** Yes, I believe, so, yes.

20 **THE PRESIDENT:** I think it is a case of, then, giving any -- but doing it now rather  
21 than waiting for the witness evidence -- update to the witness statement  
22 before, that's been provided, taking it to the end of 2017 and dealing in  
23 particular with the reduction in the MSCs in presumably January 2016.

24 **MR BREALEY:** If I can just cut through this. Visa have the existing witness  
25 statements. A short witness statement from these two gentlemen to say  
26 whether anything changed in 2016 and 2017 --



1 **THE PRESIDENT:** Whatever period their existing witness statement goes up to.

2 **MR BREALEY:** Yes.

3 **THE PRESIDENT:** I don't know when it ends from the date of the statement, so

4 I don't know.

5 **MR BREALEY:** I think it goes up to --

6 **THE PRESIDENT:** You will have a look and see.

7 **MR BREALEY:** Yes.

8 **THE PRESIDENT:** So from whatever date that is until the end of 2017, including if

9 they have not already addressed it, what was the effect of the reduction in the

10 MSC in January 2016.

11 **MR KENNELLY:** Sir, this is a very important statement that is being directed. It is

12 vital. Since it is a short cut through our disclosure request, and potentially

13 a very useful document, it is vital it does address the matters which you raised

14 with Mr Brealey, the effect of the reduction of the MSC, not only on their own

15 pricing but also on the costs they negotiated with suppliers.

16 **THE PRESIDENT:** Yes.

17 **MR KENNELLY:** That has to be addressed. It is very important also, if we are to

18 preserve the trial timetable, that we get it sufficiently early. The date that the

19 President mentioned would be ideal from that perspective, because that

20 would allow us then to make any further ...

21 **THE PRESIDENT:** That's what I wanted to do.

22 I would hope that could be done by early in May, Mr Brealey.

23 **MR BREALEY:** I don't see a problem, Sir. I really don't.

24 **THE PRESIDENT:** Yes.

25 If we say that that is to be provided by 7 May, I've given extra time bearing in mind

26 the fact that they are neither still employed by Sainsbury's, otherwise it would

1 have been earlier. But it is slightly more difficult when they are no longer your  
2 client's employees.

3 Right, 24. I don't know how useful that will be, but it will be at least readily available.

4 Is there any problem about providing that information, Mr Brealey?

5 **MR BREALEY:** I do not think there is a problem. It is just another instance of: what  
6 relevance does it have to 2007 to 2015? It is just a further piece of  
7 information that ... the relevance is not really articulated. Again, one must  
8 remember this is about pass on and mitigation. Did Sainsbury's mitigate its  
9 loss by passing on the overcharge in the claim period and what its margins  
10 are in 2020 seems to have very little relevance --

11 **THE PRESIDENT:** Yes, I can see that, that it may not be relevant, but it might -- just  
12 a moment, looking at Mr Holt, this is 2.4.17, presumably?

13 **MR KENNELLY:** Yes, it is, Sir. Again it goes to the IFR, because this  
14 Sainsbury's/ASDA merger case was April 2019, so we have obviously the IFR  
15 bedded in and information about competition and pass on, any of that to the  
16 CMA would be extremely useful.

17 **THE PRESIDENT:** Yes.

18 **MR KENNELLY:** Intensity of competition goes directly to the question of pass on  
19 and the relevance of profitability margins again is very important in  
20 understanding how Sainsbury's deals with the increase of a particular cost  
21 input, and Mr Holt deals with that.

22 **THE PRESIDENT:** I will interrupt you. I am sorry to be a bit abrupt and interrupt you  
23 repeatedly, but I am very aware of time.

24 Mr Brealey, I can see your point that the relevance may be relatively low. On the  
25 other hand so is the burden of disclosure, because this ought to be readily  
26 available. I think therefore the proportionality balance tips in favour of

1 ordering it. I shall do so.

2 I would have thought that could be done by 23 April, because that should be with  
3 your solicitors.

4 **MR BREALEY:** That should be --

5 **THE PRESIDENT:** In fact, I think as it happens we have reason to think your  
6 solicitors for that merger were Linklaters. As it paradoxically --

7 **MR BREALEY:** Hopefully they have not read it for the purposes of the  
8 proceedings --

9 **THE PRESIDENT:** Yes, I am sure they have been very careful.

10 Paragraph 25.

11 **MR KENNELLY:** If I may help, 25 and 28 are the same, except 28 has the correct  
12 date. You can ignore 25 and just look at 28.

13 **THE PRESIDENT:** I saw what Mr Holt said about that. I think again it is a question  
14 of how far one goes. That would have been important if we didn't have the  
15 IFR, but because we have that natural experiment, although Mr Holt says,  
16 "Well, we have other sources as well now", namely the sugar tax and the  
17 devaluation of the pound, but I think we should stick to the IFR in this case.  
18 I will not order 28.

19 Right, taxation.

20 What is the problem, Mr Brealey, about this? The details will be summary details.

21 **MR BREALEY:** Yes.

22 **THE PRESIDENT:** The sort of client schedule their accounts department will have  
23 prepared. Then if Visa's expert needs more detail they can ask, but it does  
24 seem to me a case where tax is an issue, to show the tax paid in each year  
25 seems sensible.

26 **MR BREALEY:** Yes. I don't believe there is a problem.

1 **THE PRESIDENT:** Yes.

2 I would have thought that should be provided by 23 April, can't it?

3 **MR BREALEY:** Yes.

4 **THE PRESIDENT:** Yes.

5 Mr Kennelly, you get 29.

6 **MR KENNELLY:** Thank you, Sir.

7 Very quickly, before you go, the CMC suggested later this year, could you put it  
8 down for June? I think in terms of what we have been proposing that would  
9 be sensible from our perspective.

10 **THE PRESIDENT:** Yes. Let's try to fix one for June.

11 It won't be before me, it will be before the Chairman of the trial Tribunal, who will be  
12 Mr Justice Michael Green, so it will have to be fixed by discussion with him.  
13 We will take care of that from the CAT.

14 But I retain involvement really because of overlapping issues with the other two  
15 cases, such as the asymmetric counter-factual, but now that we are in the  
16 detail of preparing this case it is appropriate that it is handled by the judge  
17 who will chair the actual trial.

18 **MR KENNELLY:** Thank you, Sir.

19 The second point: is it our understanding that we are now getting all of the  
20 Mastercard disclosure for quantum. That seems to be Mr Brealey's  
21 undertaking --

22 **THE PRESIDENT:** I think except insofar as it specifically relates to Mastercard,  
23 such that it doesn't relate to Visa, but everything to do with Sainsbury's  
24 pricing, costs recovery, benefits from use of credit cards compared to cash  
25 and so on, my understanding is that that is what you will get, insofar as you  
26 don't have it already, which will be rechecked.

1 That which you have identified as being missing, again, that will be provided unless  
2 Sainsbury's solicitors say, well, look at our letter of such and such, that's when  
3 we gave it to you.

4 **MR KENNELLY:** I am sorry to interrupt Mr Brealey. What matters from our  
5 perspective is that we get it without the keyword searches. It is that we have  
6 that disclosure, the quantum schedule, in unvarnished form. The keyword  
7 searches have been problematic in the past as I have said. That's what our  
8 concern is.

9 **MR BREALEY:** May I respond very quickly on that?

10 As Frances Murphy said at paragraph 22 of her statement, there was, pursuant to  
11 the order of Mr Justice Hamblen, a system for giving the relevant Mastercard  
12 disclosure to Visa. That was the bit in bold at paragraph 22 of her statement,  
13 page 5, which Mr Cassels omitted from his statement at paragraph 44.

14 **THE PRESIDENT:** Yes.

15 **MR BREALEY:** That is how things have stayed for quite a considerable period of  
16 time. We have done what we said we would do. The Mastercard disclosure  
17 will cost £50,000 to retrieve. We have said if Visa pay the £50,000, they will  
18 get all the Mastercard disclosure, clearly subject to any confidentiality  
19 undertaking.

20 So they can have the lot, but we have put it away because we did what we said we  
21 would do. We don't think it is right that we now have to take it out of storage  
22 and pay the cost of it.

23 **THE PRESIDENT:** Did you give the disclosure? Was it based on a keyword search  
24 or was it based on just removing certain documents that were confidential to  
25 Mastercard?

26 **MR BREALEY:** It was keyword searches. This is why we never really went to the

1 background to the disclosure: very quickly, it was in the schedule to the order  
2 of Mr Justice Hamblen, where he ordered -- page 29 of A2 --

3 **THE PRESIDENT:** Yes.

4 **MR BREALEY:** -- there was a debate about what should happen. At page 29,  
5 schedule 3, this is the order of Mr Justice Hamblen. He recognised we had  
6 given standard disclosure in Mastercard. There was a process for giving Visa  
7 the relevant documents. That was done.

8 Now Mr Kennelly, several years later, says it is all very unsatisfactory --

9 **MR KENNELLY:** No, no, I said in 2017, Sir. We have been saying this since 2017.

10 It was inadequate. That's why we have been asking for it since then. This is  
11 not new.

12 **MR BREALEY:** That is incorrect.

13 **THE PRESIDENT:** So the position is the disclosure that you gave to Visa was  
14 pursuant to this regime.

15 **MR BREALEY:** This regime, yes.

16 **THE PRESIDENT:** And the documents have now been archived?

17 **MR BREALEY:** Yes.

18 **THE PRESIDENT:** And you say it would cost £50,000 to retrieve them?

19 **MR BREALEY:** Yes. This is what Ms Murphy says in her witness statement.

20 **THE PRESIDENT:** Why would it cost £50,000?

21 **MR BREALEY:** That I do not know. All I know is --

22 **THE PRESIDENT:** Was it given electronically or are these hard copy documents?

23 **MR BREALEY:** I think all the disclosure was just downloaded electronically.

24 **THE PRESIDENT:** I just find it hard to understand that it cost £50,000.

25 **MR BREALEY:** The bottom line is, though, we have said if Visa are concerned that  
26 they have not had all the disclosure, they can have everything in Mastercard.

1 It has been in storage. We complied with the order of Mr Justice Hamblen.  
2 Keyword searches were agreed. Things have stayed for a considerable  
3 period of time --

4 **THE PRESIDENT:** I can't go into the whole history -- which is clearly hotly disputed  
5 between you on instructions -- but it could be restored for a cost.

6 **MR BREALEY:** Yes.

7 **THE PRESIDENT:** "Currently archived ..." I am reading the paragraph.

8 **MR BREALEY:** Paragraph 31A, yes.

9 **THE PRESIDENT:** You are both large businesses. I don't at the moment  
10 understand why it should cost such an enormous amount. It clearly will be  
11 expensive, nonetheless.

12 It seems to me it is earmarked as a separate cost that will be shown there. I would  
13 have thought that in the first instance, provide Visa with the missing  
14 documents they have referred to. If they then say -- which can be done  
15 promptly as you say -- that actually, that does not seem to be adequate, then  
16 I think you should provide that data whatever it costs, initially at your cost, and  
17 the costs of that exercise can be separately reserved to the Tribunal to  
18 consider if it was justified. I can't decide at the moment whether it is justified  
19 without actually knowing whether it produces material that Visa has not  
20 already got. Mr Kennelly thinks it might; you say no, it wouldn't. We just don't  
21 know.

22 So I think in the first place: provide the missing documents what they say are missing  
23 and you accept they should have. If, on receipt of those documents, you  
24 receive a letter from Visa's solicitors saying "We think there are still large gaps  
25 ..." then I think you must provide this at your cost initially, but the costs of that  
26 exercise shall be reserved to the trial Tribunal.

1 **MR BREALEY:** Very well.

2 **THE PRESIDENT:** I think that's the only sensible way we can deal with that at this  
3 stage.

4 **MR KENNELLY:** We are content with that, Sir.

5 **THE PRESIDENT:** It is a complicated order, I appreciate that. Could you, between  
6 you, draw up that order?

7 I hope that you can cooperate sensibly going forward -- or that your solicitors can  
8 cooperate so that this can be conducted in an efficient way -- because these  
9 trials, even when confined like this, are complicated, and sometimes they are  
10 not even confined like this but involve much broader issues of liability. We  
11 have to keep a lid on the amount of work and costs that can be incurred.

12 **MR BREALEY:** Okay, thank you. It sounds like we say goodbye to you, Sir.

13 **THE PRESIDENT:** In respect of this case, yes.

14 You will receive a judgment on the asymmetric counter-factual.

15 **MR KENNELLY:** Thank you very much, Sir. Thank you for sitting late.

16 **(5.01 pm)**

17 **(The hearing concluded)**

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19