



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1288/5/7/18

BETWEEN:

SAINSBURY'S SUPERMARKETS LTD

Claimant

- v -

(1) VISA EUROPE SERVICES LLC
(2) VISA EUROPE LTD
(3) VISA UK LTD

Defendants

ORDER

UPON (i) the Claimant's application for an order that the Defendants not be entitled to pursue §27 of their Defence (the "**Asymmetric Application**"), (ii) the Tribunal's decision of 16 March 2021 that the Asymmetric Application be determined on the papers, and (iii) the full Tribunal reading the parties' written submissions on the Asymmetric Application filed on 23 March 2021 and ruling on the Claimant's application

AND UPON reading the Redfern Schedule filed by the parties on 23 March 2021 (the "**Redfern Schedule**"), the First Witness Statement of Thomas Kennedy Cassels dated 23 March 2021, the First Expert Report of Derek Holt dated 23 March 2021, the Witness Statement of Frances Mary Murphy dated 26 March 2021 and the skeleton arguments for the Claimant and the Defendants

AND UPON hearing Leading Counsel for the Claimant and Leading Counsel for the Defendants at a case management conference heard remotely on 29 March 2021

BY CONSENT IT IS ORDERED THAT:

1. To the extent that it has not already done so, the Claimant shall give disclosure of the documents in its possession or control identified in Annex A and Annex D and in the “BY CONSENT” parts of Annex B and Annex C to this Order by the dates set out in the Annexes.
2. By 9 April 2021, the Claimant is to provide the Defendants with all documents referred to in the First Witness Statement of Hannah Kate Bernard relating to Sainsbury’s Bank, filed in *Sainsbury’s Supermarkets Ltd v Mastercard Incorporated* (Case Number: 1241/5/7/15 (T)) (“***Sainsbury’s v Mastercard Proceedings***”).
3. By 23 April 2021, the Claimant is to provide the Defendants with all documents identified in the Claimant’s Supplemental Disclosure Statement provided on 16 August 2016 which may be relevant to quantum.

IT IS ORDERED THAT:

Expert evidence

4. The Defendants shall have permission to rely on the expert evidence of Derek Holt in the field of economics/econometrics and Daniel Ryan in the field of forensic accountancy.
5. The Claimant shall have permission to rely on the expert evidence of Nils von Hinten Reed in the field of economics/econometrics and tax.
6. By 28 May 2021, the parties are to exchange and file a statement from their permitted experts as to what specific issues their expert evidence proposes to cover and what methodology those experts propose to use for each such issue.

The Asymmetric Application

7. Paragraph 27 of the Defendants’ Defence is struck out insofar as it relates to an asymmetric counter-factual with Mastercard, but not insofar as it relates to the allegation that there would be switching to American Express. After the

Tribunal has provided written reasons for the full Tribunal's ruling, the Defendants will, within 14 days, file an Amended Defence reflecting that ruling.

Disclosure and the provision of further information

8. The Claimant shall give disclosure of the documents in its possession or control set out in the "BY ORDER" parts of Annex B and Annex C to this Order by the dates set out in the Annexes.
9. By 23 April 2021, based on materials within its possession and control, the Claimant is to provide the Defendants with:
 - (a) a corporate chart or other convenient representation of the structure of Sainsbury's Bank and any changes made to that structure during the period 18 December 2007 to 30 November 2015 (the "**Claim Period**"); and
 - (b) a schedule showing those directors common between Sainsbury's Bank and the Claimant and/or J Sainsbury plc, detailing the period of appointment and the directorships held, during the Claim Period.
10. Within two weeks from the receipt of Mastercard's express consent to this disclosure, the Claimant is to provide the Defendants with all documents referred to, and relevant to quantum issues, in the *Sainsbury's v Mastercard* Proceedings, not previously disclosed to the Defendants, including:
 - (a) all factual witness statements (including exhibits);
 - (b) all expert reports (including exhibits); and
 - (c) all written closing submissions (including exhibits or annexes).
11. By 7 May 2021, the Claimant is to file and serve a statement or statements from a relevant executives or executives, which covers, for the period 1 July 2015 to 31 December 2017:

- (a) an update of the matters addressed in the witness statements of Michael Coupe and Terence Rogers filed in the *Sainsbury's v Mastercard* Proceedings, in respect of general management structure that specifies responsibilities and empowerment with respect to price setting and agreeing prices from suppliers, and details on how the Claimant's performance management processes work, particularly in relation to target margins;
 - (b) how the Claimant's prices are set and how it responds to changes in competitor's pricing; the effect of the reduction in the Merchant Service Charge ("MSC") as a result of the Interchange Fee Regulation (the "IFR") on its pricing and how it responded to that; the Claimant's approach to recovery of costs; and dealing in particular with the reduction in the MSCs in January 2016, exhibiting any documents relied on; and
 - (c) how negotiations with suppliers are affected by changes in costs (including MIFs/MSCs), exhibiting any documents relied on.
12. By 16 July 2021, the Claimant is to make reasonable efforts to provide to the Defendants, for the period 1 January 2008 to 31 December 2016, a schedule (or other convenient form) setting out with respect to credit cards the number of transactions, or alternatively a per-transaction cost to the Claimant, for contactless payments, chip & pin payments, third-party payment methods, and traditional payment methods (including cash and cheques).
13. By 16 July 2021, the Claimant is to make reasonable efforts to provide to the Defendants, for the period 1 July 2015 to 31 December 2016, a schedule (or other convenient form) setting out the relevant costs of processing each of the payment methods referred to in paragraph 12 above.
14. If upon reviewing the disclosure and information provided by the Claimant pursuant to paragraphs 9 to 13 of this Order, it appears to the Defendants that there are outstanding gaps in the disclosure, the Defendants may request the full set of disclosure from the *Sainsbury's v Mastercard* Proceedings. The Claimant is to provide that further disclosure within 14 days if technically feasible,

otherwise within a reasonable period of time. The cost of that exercise is to be borne by the Claimant in the first instance but reserved for determination by the Tribunal to consider whether it was justified.

15. If upon reviewing the disclosure and information provided by the Claimant pursuant to paragraphs 9 to 14 of this Order, it appears to the Defendants that there are still outstanding gaps in the disclosure, the Defendants may make further targeted requests for disclosure, to be determined at the Case Management Conference referred to at paragraph 16 below, if not agreed.

Other directions

16. A further case management conference is to be listed for a date in July 2021.
17. A pre-trial review (“**PTR**”) shall be held five weeks before trial on quantum, provisionally fixed for 16 May 2022. The parties are to agree a list of issues prior to that PTR. At the PTR, directions shall be made for the filing of bundles and Skeleton Arguments and a trial timetable shall be set down.
18. There be liberty to apply.
19. Save as provided by paragraph 14 above, costs in the case.

The Hon Mr Justice Roth
President of the Competition Appeal Tribunal

Made: 21 May 2021
Drawn: 21 May 2021

ANNEX A: EX TURPI CAUSA

BY CONSENT

For the period 1 July 2015 to 30 November 2015

Disclosure to be provided within 28 days after the date on which the parties reach agreement on the scope of the Claimant's search and associated methodology

1. Documents relating to the corporate structure of Sainsbury's Bank, including any shareholder agreements, annual reports or documents regarding the appointment of any joint or former directors as between Sainsbury's Bank and other relevant Sainsbury's entities.
2. Documents relating to the corporate strategy of Sainsbury's Bank, including documents relating to (i) the role of other Sainsbury's entities in developing such strategy, and/or (ii) the interaction between the corporate strategy of Sainsbury's Bank and other Sainsbury's entities.
3. Documents evidencing any financial investment in or assistance by other Sainsbury's entities to Sainsbury's Bank.
4. Documents evidencing any sharing of resources, whether in the form of personnel, infrastructure, marketing or otherwise as between Sainsbury's Bank and other Sainsbury's entities, and in particular, any discussions regarding the decision to locate Sainsbury's Bank branches within the premises of other Sainsbury's entities.
5. Documents relating to any joint or equivalent membership by other Sainsbury's entities and Sainsbury's Bank of any industry bodies or action groups.
6. Documents evidencing or discussing the desire to build brand loyalties as between Sainsbury's Bank and other Sainsbury's entities, including (but not limited to) documents discussing the benefits of any interchange received by Sainsbury's Bank being retained within the wider group, and the Claimant in particular.

ANNEX B: COUNTERVAILING BENEFITS

PART A: BY CONSENT

For the remainder of the Claim Period 1 July 2015 to 30 November 2015

Disclosure to be provided within 28 days after the date on which the parties reach agreement on the scope of the Claimant's search and associated methodology

1. Documents relating to whether, and if so why, Sainsbury's sought to conduct business with schemes offering MIFs above the levels of the Concession or higher MSCs or costs of acceptance.
2. Documents evidencing or discussing the importance of credit cards' credit functionality to merchants and the benefits of consumer credit in general.
3. Documents evidencing or discussing the extent of any harm that Sainsbury's would have suffered if MIFs had been reduced or removed, including (but not limited to) in the form of higher average transaction costs, lower transaction volumes and/or lost profits from deterred sales.
4. Documents evidencing or discussing the relationship between MIFs and innovations such as contactless, chip & pin and Verified by Visa, or the roll-out of unmanned checkouts or the development of cashless stores including (but not limited to) any cost-benefit analysis assessing the commercial justification for these technologies from the point of view of merchants and issuers. In addition, any information on the costs and benefits associated with such innovations to these stakeholders.

PART B: BY ORDER

Disclosure to be provided by 16 July 2021

5. For the period 1 December 2015 to 31 December 2016, documents relating to whether, and if so why, Sainsbury's sought to conduct business with schemes offering MIFs above the levels of the Concession or higher MSCs or costs of acceptance.

6. For the period 1 December 2015 to 31 December 2017, documents evidencing or discussing the importance of credit cards' credit functionality to merchants and the benefits of consumer credit in general.
7. For the period 1 December 2015 to 31 December 2017, documents evidencing or discussing the extent of any harm that Sainsbury's would have suffered if MIFs had been reduced or removed, including (but not limited to) in the form of higher average transaction costs, lower transaction volumes and/or lost profits from deterred sales.
8. For the period 1 December 2015 to 31 December 2016, documents containing any information or discussion of the costs and benefits to Sainsbury's associated with innovations such as contactless, chip & pin and Verified by Visa, or the roll-out of unmanned checkouts or the development of cashless stores including (but not limited to) any cost-benefit analysis assessing the commercial justification for these technologies from the point of view of merchants and issuers.
9. For the period 1 July 2015 to 31 December 2016, documents recording how Sainsbury's Bank intended to and did respond to the introduction of the IFR, including (but not limited to) any consideration by Sainsbury's Bank of introducing or amending card and account fees, changes to rewards (including "Nectar" rewards), and changes in card issuance to its customers.

ANNEX C: PASS-ON

PART A: BY CONSENT

Disclosure to be provided by 23 April 2021

1. The documents listed in Annex 1 to the Redfern Schedule (i.e. Financial Review Presentations).
2. The documents listed at Annex 2 to the Redfern Schedule (i.e. certain corporate plan packs and Star Chambers documents).
3. Further explanations, to the extent they are available, for the different charge descriptions in “Barclays April 2007 – Mar 14, 01042016 (Scheme fees and acquirer fees).xlsx”.

For the remainder of the Claim Period 1 July 2015 to 30 November 2015

Disclosure to be provided within 28 days after the date on which the parties reach agreement on the scope of the Claimant’s search and associated methodology

4. The Claimant’s financial statements and management accounts.
5. Any memoranda, presentations or other documents relating to financial performance reviews undertaken by the Claimant, including business plans, investor briefings and/or presentations to rating agencies.
6. A complete list of margin targets communicated each year; and any documents explaining how such targets affect the remuneration of buyers and category managers.
7. To the extent not already disclosed, documents relating to the Claimant’s approach to, review of, and ongoing monitoring of, budgeting, including but not limited to:
 - (a) minutes of Board, Executive and senior management meetings where pricing, margins and/or target margins are discussed, and the relevant meeting papers;

- (b) copies of all of the regular Board reports that relate to profitability and pricing;
 - (c) copies of internal monthly management accounts along with reporting packs;
 - (d) copies of monthly budget reports;
 - (e) documents concerning outperformance of budget; and
 - (f) documents showing whether any targets were met or incentives awarded.
8. Documents relevant to/showing the quantum of MSCs and/or MIFs paid by the Claimant (e.g. merchant service agreements, invoices from acquirers and evidence of payment of those invoices), including the quantum of MIFs and/or MSCs paid by the Claimant in “on us” transactions.
 9. Documents relevant to how the Claimant determines the prices of its products, including but not limited to any targets of a particular margin to be obtained, the extent to which the Claimant’s pricing responds to changes in its competitors’ pricing, and its approach to recovering its costs, and the role of MIFs/MSCs in doing so.
 10. Documents relevant to how the Claimant’s prices, and how negotiations with suppliers, are affected by changes in costs (including MIFs/MSCs).
 11. Documents showing how the Claimant’s responds to changes in other (i.e. non-MSc) costs (e.g. changes in VAT, sugar or other taxes, increases in utility costs, increased prices charged by suppliers, and an increase in costs arising out of the devaluation of the British pound following the referendum to exit the EU).
 12. Data underlying the Claimant’s weekly pricing information by SKU, including (i) volumes sold each week; (ii) the category of product to which each SKU belongs; (iii) an indication of whether the price was promotional and, if so, what kind of promotion (i.e. reduced price or multi-buy); (iv) an indication of what

promotion, if any, a given price was in response to at Tesco's; and (v) the weekly (or at least monthly) wholesale price of each product in these data.

13. All internal notes, presentations or other documents (i) addressing the rationale behind the initiatives outlined in document PROD01_00000624; and (ii) concerning any other cost savings initiatives in response to a cost pressure (such as labour costs or the increased cost of plastic bags).

PART B: BY ORDER

Disclosure to be provided by 23 April 2021

14. The Claimant will make reasonable efforts to provide any responses submitted by the Claimant to the Competition and Markets Authority in respect of profitability margins, competition and pass-on during the proposed Sainsbury's/Asda merger with appropriate redactions for confidential or irrelevant material.

Disclosure to be provided within 28 days after the date on which the parties reach agreement on the scope of the Claimant's search and associated methodology

15. For the period 31 December 2015 to 31 December 2018, documents showing how the Claimant responded to reduced MSCs as a result of the IFR (assuming that its MSCs did, in fact, reduce).
16. For the period 31 December 2015 to 31 December 2018, documents relating to the European Commission's review of the IFR (including any submissions made by Sainsbury's Bank) and/or the acquirer market review conducted by the Payment Services Regulator.

Disclosure to be provided by 16 July 2021

17. The Claimant's management account data in an Excel file, or equivalent file format, if available in such format, for the period 18 December 2007 to 31 December 2017.

18. For the period 18 December 2007 to 31 December 2017, the underlying spreadsheets for the Financial Review Presentations previously disclosed to the Defendants.
19. For the period 1 December 2015 to 31 December 2017, to the extent not already disclosed, documents relating to the Claimant's approach to, review of, and ongoing monitoring of, budgeting, including but not limited to:
 - (a) minutes of Board meetings where pricing, margins and/or target margins are discussed, and the relevant Board meeting papers;
 - (b) copies of all of the regular Board reports that relate to profitability and pricing;
 - (c) copies of internal monthly management accounts along with reporting packs;
 - (d) copies of monthly budget reports;
 - (e) documents concerning outperformance of budget; and
 - (f) documents showing whether any targets were met or incentives awarded.
20. For the period 1 December 2015 to 31 May 2016, documents relevant to/showing the quantum of MSCs and/or MIFs paid by the Claimant (e.g. merchant service agreements, invoices from acquirers and evidence of payment of those invoices), including the quantum of MIFs and/or MSCs paid by the Claimant in "on us" transactions.

ANNEX D: TAXATION AND INTEREST

BY CONSENT

Disclosure to be provided by 23 April 2021

1. Evidence, by way of externally audited accounts publicly available through Companies House, of the corporation tax paid by Sainsbury's in every calendar year between 2006 and 2016 (inclusive), together with the details of how the corporation tax paid was calculated.

Disclosure by 7 May 2021

2. Documents relating to Sainsbury's financing, including debt and equity, in every calendar year since 2007 to be identified by way of searches for (a) Sainsbury's monthly Treasury reports for the claim period that the Defendants indicate they do not have; (b) any UBS WACC estimates for the years 2014-2016; (c) Sainsbury's own final WACC calculations for 2012, 2014, 2015 and 2016, including the assumptions and inputs used, along with explanatory memoranda and emails associated with these.