

OPUS 2

INTERNATIONAL

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

Day 9 Redacted

February 9, 2016

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Phone: +44 (0)20 3008 5900
Email: transcripts@opus2.com
Website: <http://www.opus2.com>

1 Tuesday, 9th February 2016
 2 (10.30 am)
 3 (Open court session)
 4 MR HOSKINS: Good morning.
 5 MR JUSTICE BARLING: Good morning, Mr Hoskins. We are in
 6 open court at the moment.
 7 The outstanding matter is we should probably give
 8 a short ruling on the matters that were subject to those
 9 applications yesterday evening.
 10 Ruling (sent for approval)
 11 MR JUSTICE BARLING: There we are, that's that. Mr Hoskins,
 12 as I said, I'm not sure which is going to be the first
 13 witness you are going to call.
 14 MR HOSKINS: Today you mean?
 15 MR JUSTICE BARLING: Yes.
 16 MR HOSKINS: I just have a couple of bits of housekeeping if
 17 you want to do that first.
 18 Housekeeping
 19 MR HOSKINS: This is an updated witness timetable. As you
 20 know we have Mr Perez and Mr Tittarelli today.
 21 MR JUSTICE BARLING: Yes.
 22 MR HOSKINS: Then Wednesday will be Mr Willeart --
 23 MR JUSTICE BARLING: Right.
 24 MR HOSKINS: -- and Mr Koboldt.
 25 MR JUSTICE BARLING: So it will be Mr Willeart and

1

1 Mr Koboldt on Wednesday?
 2 MR HOSKINS: That is right.
 3 MR JUSTICE BARLING: Yes.
 4 MR HOSKINS: Then if you are happy to sit Thursday pm, it
 5 would be Mr Sidenius then and that gives Mr Brealey
 6 a bit more time to consider the evidence. So Perez and
 7 Tittarelli today; Willeart and Koboldt tomorrow; and
 8 then Thursday pm, Mr Sidenius.
 9 MR JUSTICE BARLING: Yes. What about Mr Willeart?
 10 MR HOSKINS: That's tomorrow, Willeart and Koboldt.
 11 MR JUSTICE BARLING: Tomorrow, right. Got that. So we
 12 retain Thursday morning as a non-sitting --
 13 MR HOSKINS: That is right.
 14 MR JUSTICE BARLING: Right.
 15 MR HOSKINS: There's one other matter, I have just been told
 16 there is a document that's come to Jones Day's attention
 17 that they believe should have been disclosed and wasn't.
 18 MR JUSTICE BARLING: Right.
 19 MR HOSKINS: It is a document that relates -- it is a Europe
 20 interchange committee decision and it was dated
 21 28th October 2014. It actually relates to the decision
 22 to taper down the MIF with a view to the regulation
 23 coming into effect. Mr Brealey asked questions about it
 24 yesterday.
 25 Again, our view is, having come across this, it has

2

1 to be disclosed. Mr Brealey clearly can't be
 2 disadvantaged. I know Mr Perez's name isn't on the list
 3 of attendees but Mr Tittarelli's is. I have only just
 4 seen this. Mr Brealey's team has only just seen it.
 5 I suggest that they have a chance to absorb it and
 6 I will speak to him in the break.
 7 MR JUSTICE BARLING: Are you calling Mr Perez first?
 8 MR HOSKINS: I'm calling Mr Perez first. Also, if there is
 9 a problem we will need to sort it out, so they have time
 10 to deal --
 11 MR JUSTICE BARLING: Yes, that's fine. Now a lot of
 12 Mr Perez's evidence is shaded, isn't it?
 13 MR HOSKINS: It is, yes.
 14 MR JUSTICE BARLING: We have to do as much as possible in
 15 open court but I think we are really in Mr Brealey's
 16 hands as to whether he is going to delve straight into
 17 confidential matters, in which case there's not much
 18 point starting -- we might as well go into camera if
 19 that's the application, or it may be you feel you can
 20 deal with it as you have done with some other witnesses.
 21 MR BREALEY: I'm conscious that we should be in open court
 22 as much as possible, which is what is my Lord told me.
 23 I will do my best to -- if we go into any of the blue
 24 bits, I will let Mr Perez read.
 25 MR JUSTICE BARLING: So we will see how we get on? Okay.

3

1 MR HOSKINS: I'm very happy, but obviously the Tribunal will
 2 bear in mind as well that Mr Perez has to be free to
 3 talk, I know I keep saying that. I'm grateful to
 4 Mr Brealey, it is not a criticism, but there is that
 5 other aspect to it as well.
 6 MR JUSTICE BARLING: I think what we might do is explain to
 7 Mr Perez, if he doesn't already realise, which he
 8 probably does, but if he feels inhibited and can't give
 9 a full answer without straying into confidential matters
 10 then it wouldn't be in the interests of justice to let
 11 him continue trying and we ought to go into camera.
 12 MR HOSKINS: Thank you. I will call Mr Perez then.
 13 MR JAVIER PEREZ (affirmed)
 14 MR JUSTICE BARLING: Thank you, Mr Perez. Mr Perez just
 15 before Mr Hoskins addresses you, you heard what we were
 16 just talking about. A lot of your witness statement is
 17 actually said to be confidential.
 18 A. Your Honour, if we then go into something confidential,
 19 do I need to stop?
 20 MR JUSTICE BARLING: The point is this, we need to get your
 21 full answers, we don't want you to give half answers,
 22 when you feel there is something else you want to say
 23 but you are afraid to say it because we are in open
 24 court. So I think if you feel you can't give a full
 25 answer to Mr Brealey's questions in particular, without

4

1 straying into material that is confidential, then
 2 I think you should tell us and then we will have to
 3 consider going into camera.
 4 A. Understood. Thank you very much.
 5 Examination-in-chief by MR HOSKINS
 6 MR HOSKINS: Good morning, Mr Perez. You should have
 7 bundle C2 in front of you. If you go to tab 5, there
 8 should be a witness statement of Javier Perez.
 9 A. Yes.
 10 Q. If you just flick through the pages -- no need to read
 11 them -- to the end, just confirm that is your witness
 12 statement.
 13 A. That is indeed.
 14 Q. On the final page, page 91, you will see a signature.
 15 A. Yes.
 16 Q. Is that your signature?
 17 A. It is.
 18 Q. Can you confirm that the contents of this witness
 19 statement are true?
 20 A. Yes, they are.
 21 MR HOSKINS: Thank you very much. Mr Brealey has some
 22 questions.
 23 Cross-examination by MR BREALEY
 24 MR BREALEY: Good morning, Mr Perez. You have got your
 25 statement in front of you, I take it?

5

1 A. Yes, I do.
 2 Q. Just to recap on the background, from 1996 to 2004 you
 3 were general manager of customer division for MasterCard
 4 Europe?
 5 A. Correct.
 6 Q. Could you just assist the Tribunal, what did actually
 7 that entail? What is the general manager of the
 8 customer division?
 9 A. It is -- probably the easiest way to put it is the
 10 commercial role. Fundamentally, anything that has to do
 11 with clients, advertising, promotions, those things that
 12 are mostly business related. That would exclude, for
 13 example, IT, technology, HR, accounting, finance.
 14 Broadly, I think that would be a fair explanation.
 15 Q. When you say "clients", you mean the licensees, the
 16 banks?
 17 A. Yes, some were banks but not all of them.
 18 Q. Some were financial institutions?
 19 A. Correct.
 20 Q. Since 2006 you have been responsible for MasterCard's
 21 European operations, so you are President of MasterCard
 22 Europe SPRL, could you just tell the Tribunal what does
 23 that entail.
 24 A. Basically I oversee the operations of MasterCard in
 25 Europe -- yes, I guess that's a good way to put it.

6

1 Q. So you oversee -- forgive me -- the operations in
 2 Europe?
 3 A. Mmm.
 4 Q. So does that involve the litigation in this case?
 5 A. The one that we are in right now?
 6 Q. Yes.
 7 A. Yes.
 8 Q. Did that involve the proceedings before the OFT?
 9 A. There were many proceedings before the OFT.
 10 Q. What about in 2006 when you came back from the
 11 Caribbean -- if you were in the Caribbean.
 12 A. I wish I was in the Caribbean. Actually, you are
 13 probably technically correct. Yes, so I did come back
 14 and, yes, I did get involved with our legal activities
 15 right away, yes.
 16 Q. When you were the general manager of the customer
 17 division, so dealing with clients, and the original OFT
 18 proceedings started in the early 2000s, were you
 19 involved then?
 20 A. Not directly no.
 21 Q. But you were aware of them?
 22 A. I was aware of them, yes.
 23 Q. You mention in paragraph 16 other countries, other
 24 anti-trust investigations in other countries. Could you
 25 just summarise what other countries, this is

7

1 paragraph 16 of your witness statement.
 2 A. "There has been a longstanding anti-trust ...(Reading to
 3 the words)... and domestic interest in some EEA
 4 countries."
 5 So, for example, there are plenty of countries
 6 actually, if one thinks about that period of time. So
 7 it could be Italy, it could be France, it could be the
 8 UK, it could be Spain, it could be Hungary, it could be
 9 Poland, quite a few countries indeed.
 10 Q. Right, all challenging the level of the interchange fee,
 11 or the majority of them challenging the interchange fee?
 12 A. Yes.
 13 Q. I'm just going to read something that MasterCard said in
 14 opening and I want you to tell me if you agree with it,
 15 and it relates to Maestro and I'm going to ask some
 16 questions about Maestro. So, again, I don't know
 17 whether that's confidential but that's where I'm going.
 18 I will read it out, you don't need to go to it, but what
 19 is said is:
 20 "Of course what we have in the UK is the Maestro
 21 experience. It is a particular characteristic of the UK
 22 market. It has not previously been considered by any
 23 court or regulator."
 24 In your recollection, is that correct or not?
 25 A. Not really, no. I think that the Maestro experience in

8

1 the UK -- of course, the UK is a different market than
 2 other markets, obviously, but I don't think the
 3 fundamentals of what happen in the UK are different than
 4 others, ie I suppose you are referring to why we lost
 5 the Maestro business in the UK, and I don't think that
 6 it is different in other countries, fundamentally
 7 different. There are differences, yes, but not in the
 8 essence of what happened.
 9 Q. But did you -- not you, I will come onto your
 10 involvement a bit later on -- but did MasterCard ever
 11 inform the OFT, what then became the CMA, of the Maestro
 12 experience that you briefly referred to in your witness
 13 statement, paragraphs 45 and 47?
 14 A. I wouldn't know. I don't know, I'm not sure.
 15 Q. I'm going to take you to some documents and see if we
 16 can refresh your memory. The first bundle I want to go
 17 to is bundle E1. It is tab 3, it is page 224 and it is
 18 paragraph 637. There are two pages. This is the OFT
 19 decision, you have probably seen. It is the decision of
 20 the Office of Fair Trading, 6th September 2005. On the
 21 bottom right-hand -- I don't know whether you should
 22 mark it or not -- should the witness mark the document?
 23 MR JUSTICE BARLING: If it helps.
 24 MR BREALEY: Okay. The bottom right-hand, page 224.
 25 A. I think I'm there.

9

1 Q. This is what was being submitted by MasterCard to the
 2 OFT prior to its decision. It is under the heading:
 3 "The MMF MIF must be set by reference to competitive
 4 constraints. Summary of the arguments made ..."
 5 This is MasterCard submitting at 367:
 6 "The OFT fails to recognise the freedom to set the
 7 MFF MIF is indispensable to the scheme, as any outcome
 8 that fettered this freedom would place the scheme at
 9 a competitive disadvantage."
 10 Pausing there, at 537 there is a footnote,
 11 paragraph 566. There has been no disclosure of that, so
 12 we can't actually work out what was actually submitted
 13 but we get the sense at 637:
 14 "The MMF MIF must be set by reference to competition
 15 provided by other payment card schemes, in particular
 16 the Visa scheme. The MasterCard scheme must be able to
 17 set and if necessary vary the amount of the MMF MIF to
 18 be able to respond to competition. Freedom to do this
 19 is indispensable to the MasterCard scheme, as any limit
 20 to its ability to recover overall costs would put the
 21 scheme at a severe disadvantage."
 22 Then, 638, some of it is redacted, argues:
 23 "Without this freedom, competition would be
 24 distorted in favour of the Visa scheme and
 25 issuers/acquirers would move to three-party schemes.

10

1 This would have significant detrimental effects on
 2 issuers and acquirers."
 3 It is a very similar point that you are making in
 4 paragraphs 45 to 47 of your statement. So I would like
 5 to take you to the OFT's response and ask you how
 6 MasterCard reacted to this, if you can assist the
 7 Tribunal. At 639 it says:
 8 "In essence, this argument suggests that the costs
 9 of additional features [I take that to be the free
 10 funding for example] can legitimately be recovered with
 11 the MMF MIF irrespective of how peripheral these
 12 features may be to the completion of a transaction,
 13 simply because competing payment card schemes also
 14 consider that the recovery of these costs is necessary.
 15 On this basis, otherwise unlawful conduct would become
 16 lawful if others also engaged in it. The OFT cannot
 17 accept this as a justification for the recovery of
 18 extraneous costs through the MMF MIF."
 19 You have just heard from the Tribunal that the
 20 Tribunal will make up its own mind and will not be bound
 21 by what the OFT or the European Commission has said,
 22 because I have accepted that. But can I ask you whether
 23 you were aware of this principle or of this reaction by
 24 the regulatory body?
 25 A. If your question is did I know that that was going to be

11

1 the answer of the OFT? No, I didn't.
 2 Q. No. Were you aware of this answer?
 3 A. After the fact?
 4 Q. After the fact.
 5 A. Yes.
 6 Q. So you were aware, at least from 2005, that -- and we
 7 will go back again -- it would not be a justification to
 8 say, well, Visa also operates a similar scheme and
 9 I will lose business to Visa.
 10 A. Of course, the fact that I'm aware doesn't mean that
 11 I agree with it, right? So I think the statement is
 12 quite clear. I think what we were saying, and we keep
 13 on saying and we keep on repeating, is that unless we
 14 are able to compete on the economics, if we are
 15 disadvantaged versus another scheme because we are
 16 artificially constrained from providing all the benefits
 17 that our clients need and request, it is very difficult
 18 to compete, if not impossible.
 19 Q. Can you go back in this document, this decision, to
 20 paragraph 55, the procedure, which is page 66 of the
 21 bundle. I don't suppose you have --
 22 A. Got it.
 23 Q. Have you read this? I don't suppose you have. You may
 24 have read it.
 25 A. I don't recollect. You haven't given me a chance to

12

1 read it so I don't even know whether I have read it or
 2 not.
 3 Q. No. So it is page 66 of the bundle. I want to just
 4 highlight the procedure here in front of the OFT. If
 5 I can just highlight certain passages. You will see
 6 paragraph 57. There was a complaint made in
 7 September 2000 against both MasterCard, Visa and Switch
 8 card services.
 9 You were aware that the retailers were complaining
 10 about all the schemes in the UK?
 11 A. Yes, I was.
 12 Q. Then, at 59, again this is a MasterCard proceeding, you
 13 will see the last sentence of 59, the OFT provided
 14 non-confidential versions of the rule 14 to Visa
 15 International. Then, over the page at 61 you will see
 16 there written representations received by various banks
 17 and submissions were also received with Visa
 18 International. Were you aware that the banks and Visa
 19 were actively participating in the OFT proceedings
 20 against MasterCard?
 21 A. Yes.
 22 Q. You will see there at 64 the OFT also provided the
 23 non-confidential version of the SR14 to Visa
 24 International and the same goes on.
 25 If one goes on to page 70 of this decision, you will

13

1 see here -- this is under the legal and economic
 2 assessment, and then "Background", and the OFT refers to
 3 the Commission's Visa International proceedings. I take
 4 it that you were aware of the Visa exemption in 2002?
 5 A. I must have been, yes.
 6 Q. If you go to paragraph 81, which is the last paragraph
 7 on page 71:
 8 "On many key points there is considerable similarity
 9 between the reasoning relied on and conclusions reached
 10 by the OFT in this decision."
 11 Were you aware that the reasoning and conclusions in
 12 the Visa decision would apply equally to MasterCard?
 13 A. No, because I think they were separate proceedings.
 14 There was no reason why -- it would have been expected
 15 but I can't say that they wouldn't have been the same
 16 place with us as with Visa, unfortunately meaning, as
 17 you will see we have repeatedly insisted, that an equal
 18 level playing field where we can compete is important.
 19 Q. As far as Visa is concerned, I think you have achieved
 20 that, haven't you?
 21 A. You mean with the legislation that the Commission has
 22 put through, the late legislation?
 23 Q. Let's take the legislation: you have achieved that, the
 24 level playing field?
 25 A. In the legislation that is going into place, I would

14

1 say, in the legislation, yes.
 2 Q. Visa offered commitments, you gave undertakings to
 3 reduce your EEA MIF to 0.3% on credit cards?
 4 A. At some point in time in the past, yes, we did.
 5 Q. A few years' gap but at the end you achieved a level
 6 playing field?
 7 A. It depends what you call -- if you talk about the
 8 legislation we have in place today, the answer is yes.
 9 Over time what I would say is that -- over time what has
 10 happened is that I think the Commission has tried to
 11 really achieve that level playing field, over time, and
 12 at some times they have, at some times they haven't.
 13 Sometimes we have been disadvantaged, sometimes we have
 14 been advantaged. So ...
 15 Q. Have you achieved a level playing field?
 16 A. With the legislation, yes.
 17 Q. If you go over the page in the context of what
 18 MasterCard was arguing here at 82 and 83, if you just
 19 read that. 82 and 83.
 20 A. Sorry, you want me to --
 21 Q. Not read it out. We always make that mistake. If you
 22 can just read it to yourself, paragraphs 82 and 83.
 23 A. Paragraph 82, sorry. I thought you meant page.
 24 Q. Over the page. So it is a paragraph.
 25 A. 82 and 83, yes. (Pause)

15

1 Q. In particular 83, where the OFT says:
 2 "It is certainly not the case" --
 3 A. I'm sorry, I'm a little bit slow, I apologise.
 4 Q. No, go on, you finish. (Pause)
 5 A. Go ahead.
 6 Q. So at 83:
 7 "It is certainly not the case, has been argued ..."
 8 You will see the Visa submission:
 9 "... that the OFT has rejected the Commission's
 10 analysis in the Visa MIF decision out of hand."
 11 Do you see that? So, were you aware that Visa was
 12 arguing that its Visa decision should be applied to
 13 MasterCard?
 14 A. When was this? At which year is this?
 15 Q. This is after -- this is -- you see the Visa submission
 16 is 2005, 25th February.
 17 A. Because --
 18 Q. It was three years after its exemption decision.
 19 A. Because at some point, yes, of course, I know that Visa
 20 was suggesting that MasterCard -- MasterCard should be
 21 brought down to the same level as MasterCard.(sic)
 22 Q. But MasterCard was arguing that the Visa exemption
 23 should apply to it, correct?
 24 A. On which case? I'm sorry, it is just that -- that is
 25 a very general statement.

16

1 Q. In this case, are you aware that MasterCard was arguing
2 that the Visa exemption should apply to its methodology?
3 A. Yes.
4 Q. Why should the Visa methodology apply to MasterCard?
5 A. Because to the best of my knowledge, if I recall this
6 correctly, the Visa methodology and the MasterCard
7 methodology were based on cost and therefore similar.
8 Q. Because, essentially, they are identical four-party
9 payment schemes, correct?
10 A. I don't think they are identical, no.
11 Q. Very similar?
12 A. Similar, yes.
13 Q. Right. So they are very similar?
14 A. I wouldn't say very similar, no.
15 Q. Why wouldn't you say they are very similar?
16 A. Why do you say --
17 Q. I'm not here to answer the questions Mr Perez, you are
18 here to give evidence.
19 A. Yes, so what's your question?
20 Q. Are their schemes very similar?
21 A. No.
22 Q. Why not?
23 A. Because I think what we offer and what Visa offers is
24 similar but not very similar to our clients, in terms of
25 products, in terms of branding, in terms of positioning,

17

1 in terms of interaction with our clients, in terms of
2 client management and things like that.
3 Q. What about just the mechanics of it? Four-party
4 schemes; do you at least accept that they operate in
5 a similar way --
6 A. Yes.
7 Q. -- the two four-party schemes?
8 A. That I would agree with.
9 Q. Thank you. I think you can put that -- actually, if you
10 could just go to tab 5 of this bundle, we finished with
11 the OFT decision. Tab 5, this is a press release from
12 the Office of Fair Trading. It hasn't been copied that
13 well, but you see there:
14 "The OFT is to refocus credit card interchange fees,
15 work."
16 OFT sets aside its decision but it is starting
17 an investigation afresh into both Visa and MasterCard.
18 Were you aware that in 2006 the OFT launched
19 an investigation into both Visa and MasterCard?
20 A. Yes.
21 Q. You can put that bundle away. If you can go to
22 bundle E3.12 please. The tab that I want to go to is
23 tab 210A. This hasn't been blued so I take it ...
24 (Pause)
25 It is blue?

18

1 MR SMITH: It is blue.
2 MR BREALEY: Oh. (Pause)
3 Then I'm going to have to ask questions on this, I'm
4 afraid.
5 MR JUSTICE BARLING: Right. This is MasterCard's material,
6 isn't it?
7 MR BREALEY: It is and I want to ask questions about the
8 Maestro --
9 MR JUSTICE BARLING: Yes, all right. I'm afraid we are
10 going to have to ask those people who are not in the
11 confidentiality ring and who are not -- if they are in
12 the confidentiality ring if there's anyone in this
13 category who is not able to hear MasterCard's
14 confidential information then I'm going to have to ask
15 those people to be kind enough to leave the court.
16 MR HOSKINS: Sir, I don't want to add to the degree of
17 difficulty but we had yesterday some people from
18 MasterCard and there are some of the witnesses from
19 MasterCard today. They have not all signed the
20 undertaking. I'm not being facetious but Mr Perez
21 hasn't signed the undertaking. Do you want them to
22 leave, do you want them to sign the undertaking?
23 MR JUSTICE BARLING: I think everyone who is listening to
24 this information should sign the undertaking.
25 MR HOSKINS: We will get the witnesses to sign undertakings.

19

1 It is done. They've all signed.
2 MR JUSTICE BARLING: You have a highly efficient team behind
3 you.
4 Sorry about this, those of you who have to go.
5 (11.13 am)
6 (End of open session)
7 (The court adjourned until 10.30 am on
8 Wednesday, 10th February 2016)
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13
14
15
16
17
18
19
20
21
22
23
24
25

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1 INDEX
2 (Open court session)1
3 Ruling (sent for approval)1
4 Housekeeping1
5 MR JAVIER PEREZ (affirmed)4
6 Examination-in-chief by MR HOSKINS5
7 Cross-examination by MR BREALEY5
8 (End of open session)20
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

<p>A</p> <p>ability (1) 10:20 able (4) 10:16,18 12:14 19:13 absorb (1) 3:5 accept (2) 11:17 18:4 accepted (1) 11:22 accounting (1) 6:13 achieve (1) 15:11 achieved (4) 14:19,23 15:5,15 acquirers (1) 11:2 actively (1) 13:19 activities (1) 7:14 add (1) 19:16 additional (1) 11:9 addresses (1) 4:15 adjourned (1) 20:7 advantaged (1) 15:14 advertising (1) 6:11 affirmed (2) 4:13 21:5 afraid (3) 4:23 19:4,9 afresh (1) 18:17 agree (3) 8:14 12:11 18:8 ahead (1) 16:5 amount (1) 10:17 analysis (1) 16:10 answer (6) 4:9,25 12:1,2 15:8 17:17 answers (2) 4:21,21 anti-trust (2) 7:24 8:2 apologise (1) 16:3 application (1) 3:19 applications (1) 1:9 applied (1) 16:12 apply (4) 14:12 16:23 17:2,4 approval (2) 1:10 21:3 argued (1) 16:7 argues (1) 10:22 arguing (4) 15:18 16:12,22 17:1 argument (1) 11:8 arguments (1) 10:4 artificially (1) 12:16 aside (1) 18:16 asked (1) 2:23 aspect (1) 4:5 assessment (1) 14:2 assist (2) 6:6 11:6 attendees (1) 3:3 attention (1) 2:16 aware (13) 7:21,22 11:23 12:2,6,10 13:9,18 14:4,11 16:11 17:1 18:18</p> <hr/> <p>B</p> <p>back (4) 7:10,13 12:7 12:19 background (2) 6:2 14:2 banks (4) 6:16,17 13:16,18 BARLING (23) 1:5,11 1:15,21,23,25 2:3,9 2:11,14,18 3:7,11 3:14,25 4:6,14,20 9:23 19:5,9,23 20:2 based (1) 17:7 Basically (1) 6:24 basis (1) 11:15 bear (1) 4:2 believe (1) 2:17 benefits (1) 12:16 best (2) 3:23 17:5 bit (3) 2:6 9:10 16:3 bits (2) 1:16 3:24</p>	<p>blue (3) 3:23 18:25 19:1 blued (1) 18:23 body (1) 11:24 bottom (2) 9:21,24 bound (1) 11:20 branding (1) 17:25 break (1) 3:6 Brealey (12) 2:5,23 3:1,21 4:4 5:21,23 5:24 9:24 19:2,7 21:7 Brealey's (3) 3:4,15 4:25 briefly (1) 9:12 Broadly (1) 6:14 brought (1) 16:21 bundle (8) 5:7 9:16,17 12:21 13:3 18:10 18:21,22 business (3) 6:12 9:5 12:9</p> <hr/> <p>C</p> <p>C2 (1) 5:7 call (3) 1:13 4:12 15:7 calling (2) 3:7,8 camera (3) 3:18 4:11 5:3 card (4) 10:15 11:13 13:8 18:14 cards (1) 15:3 Caribbean (3) 7:11,11 7:12 case (6) 3:17 7:4 16:2 16:7,24 17:1 category (1) 19:13 certain (1) 13:5 certainly (2) 16:2,7 challenging (2) 8:10 8:11 chance (2) 3:5 12:25 characteristic (1) 8:21 clear (1) 12:12 clearly (1) 3:1 client (1) 18:2 clients (6) 6:11,15 7:17 12:17 17:24 18:1 CMA (1) 9:11 come (4) 2:16,25 7:13 9:9 coming (1) 2:23 commercial (1) 6:10 Commission (3) 11:21 14:21 15:10 Commission's (2) 14:3 16:9 commitments (1) 15:2 committee (1) 2:20 compete (3) 12:14,18 14:18 competing (1) 11:13 competition (3) 10:14 10:18,23 competitive (2) 10:3,9 complaining (1) 13:9 complaint (1) 13:6 completion (1) 11:12 concerned (1) 14:19 conclusions (2) 14:9 14:11 conduct (1) 11:15 confidential (7) 3:17 4:9,17,18 5:1 8:17 19:14 confidentiality (2) 19:11,12 confirm (2) 5:11,18</p>	<p>conscious (1) 3:21 consider (3) 2:6 5:3 11:14 considerable (1) 14:8 considered (1) 8:22 constrained (1) 12:16 constraints (1) 10:4 contents (1) 5:18 context (1) 15:17 continue (1) 4:11 copied (1) 18:12 correct (6) 6:5,19 7:13 8:24 16:23 17:9 correctly (1) 17:6 cost (1) 17:7 costs (4) 10:20 11:8 11:14,18 countries (7) 7:23,24 7:25 8:4,5,9 9:6 couple (1) 1:16 course (4) 8:20 9:1 12:10 16:19 court (9) 1:3,6 3:15,21 4:24 8:23 19:15 20:7 21:2 credit (2) 15:3 18:14 criticism (1) 4:4 Cross-examination (2) 5:23 21:7 customer (3) 6:3,8 7:16</p> <hr/> <p>D</p> <p>dated (1) 2:20 Day's (1) 2:16 deal (2) 3:10,20 dealing (1) 7:17 decision (14) 2:20,21 9:19,19 10:2 12:19 13:25 14:10,12 16:10,12,18 18:11 18:16 degree (1) 19:16 delve (1) 3:16 depends (1) 15:7 detrimental (1) 11:1 differences (1) 9:7 different (4) 9:1,3,6,7 difficult (1) 12:17 difficulty (1) 19:17 directly (1) 7:20 disadvantage (2) 10:9 10:21 disadvantaged (3) 3:2 12:15 15:13 disclosed (2) 2:17 3:1 disclosure (1) 10:11 distorted (1) 10:24 division (3) 6:3,8 7:17 document (4) 2:16,19 9:22 12:19 documents (1) 9:15 domestic (1) 8:3</p> <hr/> <p>E</p> <p>E1 (1) 9:17 E3.12 (1) 18:22 early (1) 7:18 easiest (1) 6:9 economic (1) 14:1 economics (1) 12:14 EEA (2) 8:3 15:3 effect (1) 2:23 effects (1) 11:1 efficient (1) 20:2 engaged (1) 11:16 entail (2) 6:7,23 equal (1) 14:17 equally (1) 14:12</p>	<p>essence (2) 9:8 11:8 essentially (1) 17:8 Europe (5) 2:19 6:4,22 6:25 7:2 European (2) 6:21 11:21 evening (1) 1:9 evidences (3) 2:6 3:12 17:18 Examination-in-chief... 5:5 21:6 example (3) 6:13 8:5 11:10 exclude (1) 6:12 exemption (4) 14:4 16:18,22 17:2 expected (1) 14:14 experience (3) 8:21 8:25 9:12 explain (1) 4:6 explanation (1) 6:14 extraneous (1) 11:18</p> <hr/> <p>F</p> <p>facetious (1) 19:20 fact (3) 12:3,4,10 fails (1) 10:6 fair (3) 6:14 9:20 18:12 far (1) 14:19 favour (1) 10:24 features (2) 11:9,12 February (3) 1:1 16:16 20:8 fee (2) 8:10,11 feel (3) 3:19 4:22,24 feels (1) 4:8 fees (1) 18:14 fettered (1) 10:8 field (5) 14:18,24 15:6 15:11,15 final (1) 5:14 finance (1) 6:13 financial (1) 6:18 fine (1) 3:11 finish (1) 16:4 finished (1) 18:10 first (5) 1:12,17 3:7,8 9:16 flick (1) 5:10 footnote (1) 10:10 forgive (1) 7:1 four-party (3) 17:8 18:3,7 France (1) 8:7 free (2) 4:2 11:9 freedom (4) 10:6,8,18 10:23 front (3) 5:7,25 13:4 full (3) 4:9,21,24 fundamentally (2) 6:10 9:6 fundamentals (1) 9:3 funding (1) 11:10</p> <hr/> <p>G</p> <p>gap (1) 15:5 general (4) 6:3,7 7:16 16:25 give (5) 1:7 4:8,21,24 17:18 given (1) 12:25 gives (1) 2:5 go (17) 3:18,23 4:11 4:18 5:7 8:18 9:16 12:7,19 14:6 15:17 16:4,5 18:10,21,22 20:4 goes (2) 13:24,25</p>	<p>going (13) 1:12,13 3:16 5:3 8:13,15,17 9:15 11:25 14:25 19:3,10,14 good (5) 1:4,5 5:6,24 6:25 grateful (1) 4:3 guess (1) 6:25</p> <hr/> <p>H</p> <p>half (1) 4:21 hand (1) 16:10 hands (1) 3:16 happen (1) 9:3 happened (2) 9:8 15:10 happy (2) 2:4 4:1 heading (1) 10:2 hear (1) 19:13 heard (2) 4:15 11:19 helps (1) 9:23 highlight (2) 13:4,5 highly (1) 20:2 Honour (1) 4:18 Hoskins (25) 1:4,5,11 1:14,16,19,22,24 2:2,4,10,13,15,19 3:8,13 4:1,12,15 5:5,6,21 19:16,25 21:6 housekeeping (3) 1:16,18 21:4 HR (1) 6:13 Hungary (1) 8:8</p> <hr/> <p>I</p> <p>identical (2) 17:8,10 important (1) 14:18 impossible (1) 12:18 INDEX (1) 21:1 indispensable (2) 10:7 10:19 inform (1) 9:11 information (2) 19:14 19:24 inhibited (1) 4:8 insisted (1) 14:17 institutions (1) 6:18 interaction (1) 18:1 interchange (4) 2:20 8:10,11 18:14 interest (1) 8:3 interests (1) 4:10 International (4) 13:15,18,24 14:3 investigation (2) 18:17,19 investigations (1) 7:24 involve (2) 7:4,8 involved (2) 7:14,19 involvement (1) 9:10 irrespective (1) 11:11 issuers (1) 11:2 issuers/acquirers (1) 10:25 Italy (1) 8:7</p> <hr/> <p>J</p> <p>Javier (3) 4:13 5:8 21:5 Jones (1) 2:16 justice (24) 1:5,11,15 1:21,23,25 2:3,9,11 2:14,18 3:7,11,14 3:25 4:6,10,14,20 9:23 19:5,9,23 20:2 justification (2) 11:17 12:7</p>	<p>K</p> <p>keep (3) 4:3 12:12,13 key (1) 14:8 kind (1) 19:15 know (10) 1:20 3:2 4:3 8:16 9:14,14,21 11:25 13:1 16:19 knowledge (1) 17:5 Koboldt (4) 1:24 2:1,7 2:10</p> <hr/> <p>L</p> <p>late (1) 14:22 launched (1) 18:18 lawful (1) 11:16 leave (2) 19:15,22 legal (2) 7:14 14:1 legislation (7) 14:21 14:22,23,25 15:1,8 15:16 legitimately (1) 11:10 Let's (1) 14:23 level (7) 8:10 14:18,24 15:5,11,15 16:21 licensees (1) 6:15 limit (1) 10:19 list (1) 3:2 listening (1) 19:23 litigation (1) 7:4 little (1) 16:3 longstanding (1) 8:2 Lord (1) 3:22 lose (1) 12:9 lost (1) 9:4 lot (2) 3:11 4:16</p> <hr/> <p>M</p> <p>Maestro (7) 8:15,16 8:20,25 9:5,11 19:8 majority (1) 8:11 making (1) 11:3 management (1) 18:2 manager (3) 6:3,7 7:16 mark (2) 9:22,22 market (2) 8:22 9:1 markets (1) 9:2 MasterCard (27) 6:3 6:21,24 8:13 9:10 10:1,5,16,19 11:6 13:7,12,20 14:12 15:18 16:13,20,20 16:21,22 17:1,4,6 18:17,19 19:18,19 MasterCard's (3) 6:20 19:5,13 material (2) 5:1 19:5 matter (2) 1:7 2:15 matters (3) 1:8 3:17 4:9 mean (4) 1:14 6:15 12:10 14:21 meaning (1) 14:16 meant (1) 15:23 mechanics (1) 18:3 memory (1) 9:16 mention (1) 7:23 methodology (4) 17:2 17:4,6,7 MFF (1) 10:7 MIF (9) 2:22 10:3,7,14 10:17 11:11,18 15:3 16:10 mind (2) 4:2 11:20 mistake (1) 15:21 MMF (5) 10:3,14,17 11:11,18 Mmm (1) 7:3</p>	<p>moment (1) 1:6 morning (5) 1:4,5 2:12 5:6,24 move (1) 10:25</p> <hr/> <p>N</p> <p>name (1) 3:2 necessary (2) 10:17 11:14 need (6) 3:9 4:19,20 5:10 8:18 12:17 non-confidential (2) 13:14,23 non-sitting (1) 2:12</p> <hr/> <p>O</p> <p>obviously (2) 4:1 9:2 October (1) 2:21 offer (1) 17:23 offered (1) 15:2 offers (1) 17:23 Office (2) 9:20 18:12 OFT (22) 7:8,9,17 9:11 9:18 10:2,6 11:16 11:21 12:1 13:4,13 13:19,22 14:2,10 16:1,9 18:11,14,16 18:18 OFT's (1) 11:5 Oh (1) 19:2 Okay (2) 3:25 9:24 open (8) 1:3,6 3:15,21 4:23 20:6 21:2,8 opening (1) 8:14 operate (1) 18:4 operates (1) 12:8 operations (3) 6:21,24 7:1 original (1) 7:17 ought (1) 4:11 outcome (1) 10:7 outstanding (1) 1:7 overall (1) 10:20 oversee (2) 6:24 7:1</p> <hr/> <p>P</p> <p>page (12) 5:14,14 9:17,24 12:20 13:3 13:15,25 14:7 15:17,23,24 pages (2) 5:10 9:18 paragraph (10) 7:23 8:1 9:18 10:11 12:20 13:6 14:6,6 15:23,24 paragraphs (3) 9:13 11:4 15:22 participating (1) 13:19 particular (4) 4:25 8:21 10:15 16:1 passages (1) 13:5 Pause (4) 15:25 16:4 18:24 19:2 Pausing (1) 10:10 payment (3) 10:15 11:13 17:9 Perez (17) 1:20 2:6 3:7,8,24 4:2,7,12 4:13,14,14 5:6,8,24 17:17 19:20 21:5 Perez's (2) 3:2,12 period (1) 8:6 peripheral (1) 11:11 place (4) 10:8 14:16 14:25 15:8 playing (5) 14:18,24 15:6,11,15</p>
--	--	---	---	---	---	--

please (1) 18:22
 plenty (1) 8:5
 pm (2) 2:4,8
 point (5) 3:18 4:20
 11:3 15:4 16:19
 points (1) 14:8
 Poland (1) 8:9
 positioning (1) 17:25
 possible (2) 3:14,22
 President (1) 6:21
 press (1) 18:11
 previously (1) 8:22
 principle (1) 11:23
 prior (1) 10:2
 probably (5) 1:7 4:8
 6:9 7:13 9:19
 problem (1) 3:9
 procedure (2) 12:20
 13:4
 proceeding (1) 13:12
 proceedings (6) 7:8,9
 7:18 13:19 14:3,13
 products (1) 17:25
 promotions (1) 6:11
 provided (3) 10:15
 13:13,22
 providing (1) 12:16
 put (6) 6:9,25 10:20
 14:22 18:9,21

Q

question (2) 11:25
 17:19
 questions (7) 2:23
 4:25 5:22 8:16
 17:17 19:3,7
 quite (2) 8:9 12:12

R

reached (1) 14:9
 reacted (1) 11:6
 reaction (1) 11:23
 read (11) 3:24 5:10
 8:13,18 12:23,24
 13:1,1 15:19,21,22
 Reading (1) 8:2
 realise (1) 4:7
 really (3) 3:15 8:25
 15:11
 reason (1) 14:14
 reasoning (2) 14:9,11
 recall (1) 17:5
 recap (1) 6:2
 received (2) 13:16,17
 recognise (1) 10:6
 recollect (1) 12:25
 recollection (1) 8:24
 recover (1) 10:20
 recovered (1) 11:10
 recovery (2) 11:14,17
 redacted (1) 10:22
 reduce (1) 15:3
 reference (2) 10:3,14
 referred (1) 9:12
 referring (1) 9:4
 refers (1) 14:2
 refocus (1) 18:14
 refresh (1) 9:16
 regulation (1) 2:22
 regulator (1) 8:23
 regulatory (1) 11:24
 rejected (1) 16:9
 related (1) 6:12
 relates (3) 2:19,21
 8:15
 release (1) 18:11
 relied (1) 14:9
 repeatedly (1) 14:17
 repeating (1) 12:13

representations (1)
 13:16
 request (1) 12:17
 respond (1) 10:18
 response (1) 11:5
 responsible (1) 6:20
 retailers (1) 13:9
 retain (1) 2:12
 right (13) 1:23 2:2,11
 2:13,14,18 7:5,15
 8:10 12:11 17:13
 19:5,9
 right-hand (2) 9:21,24
 ring (2) 19:11,12
 role (1) 6:10
 rule (1) 13:14
 ruling (3) 1:8,10 21:3

S

saying (3) 4:3 12:12
 12:13
 says (2) 11:7 16:1
 scheme (9) 10:7,8,16
 10:16,19,21,24
 12:8,15
 schemes (8) 10:15,25
 11:13 13:10 17:9
 17:20 18:4,7
 see (13) 3:25 5:14
 9:15 13:5,13,15,22
 14:1,17 16:8,11,15
 18:13
 seen (3) 3:4,4 9:19
 sense (1) 10:13
 sent (2) 1:10 21:3
 sentence (1) 13:13
 separate (1) 14:13
 September (2) 9:20
 13:7
 services (1) 13:8
 session (4) 1:3 20:6
 21:2,8
 set (4) 10:3,6,14,17
 sets (1) 18:16
 severe (1) 10:21
 shaded (1) 3:12
 short (1) 1:8
 sic (1) 16:21
 Sidenius (2) 2:5,8
 sign (3) 19:22,24,25
 signature (2) 5:14,16
 signed (3) 19:19,21
 20:1
 significant (1) 11:1
 similar (12) 11:3 12:8
 17:7,11,12,13,14
 17:15,20,24,24
 18:5
 similarity (1) 14:8
 simply (1) 11:13
 Sir (1) 19:16
 sit (1) 2:4
 slow (1) 16:3
 SMITH (1) 19:1
 sorry (5) 15:20,23
 16:3,24 20:4
 sort (1) 3:9
 Spain (1) 8:8
 speak (1) 3:6
 SPRL (1) 6:22
 SR14 (1) 13:23
 started (1) 7:18
 starting (2) 3:18 18:16
 statement (10) 4:16
 5:8,12,19,25 8:1
 9:13 11:4 12:11
 16:25
 stop (1) 4:19
 straight (1) 3:16

straying (2) 4:9 5:1
 subject (1) 1:8
 submission (2) 16:8
 16:15
 submissions (1) 13:17
 submitted (2) 10:1,12
 submitting (1) 10:5
 suggest (1) 3:5
 suggesting (1) 16:20
 suggests (1) 11:8
 summarise (1) 7:25
 Summary (1) 10:4
 suppose (3) 9:4 12:21
 12:23
 sure (2) 1:12 9:14
 Switch (1) 13:7

T

tab (6) 5:7 9:17 18:10
 18:11,22,23
 take (7) 5:25 9:15
 11:5,9 14:3,23
 18:23
 talk (2) 4:3 15:7
 talking (1) 4:16
 taper (1) 2:22
 team (2) 3:4 20:2
 technically (1) 7:13
 technology (1) 6:13
 tell (3) 5:2 6:22 8:14
 terms (5) 17:24,25,25
 18:1,1
 Thank (5) 4:12,14 5:4
 5:21 18:9
 things (2) 6:11 18:2
 think (18) 3:15 4:6,24
 5:2 6:14 8:25 9:2,5
 9:25 12:11,12
 14:13,19 15:10
 17:10,23 18:9
 19:23
 thinks (1) 8:6
 thought (1) 15:23
 three (1) 16:18
 three-party (1) 10:25
 Thursday (3) 2:4,8,12
 time (7) 2:6 3:9 8:6
 15:4,9,9,11
 times (2) 15:12,12
 timetable (1) 1:19
 Tittarelli (2) 1:20 2:7
 Tittarelli's (1) 3:3
 today (5) 1:14,20 2:7
 15:8 19:19
 told (2) 2:15 3:22
 tomorrow (3) 2:7,10
 2:11
 Trading (2) 9:20 18:12
 transaction (1) 11:12
 Tribunal (6) 4:1 6:6,22
 11:7,19,20
 tried (1) 15:10
 true (1) 5:19
 trying (1) 4:11
 Tuesday (1) 1:1
 two (2) 9:18 18:7

U

UK (8) 8:8,20,21 9:1,1
 9:3,5 13:10
 Understood (1) 5:4
 undertaking (4) 19:20
 19:21,22,24
 undertakings (2) 15:2
 19:25
 unfortunately (1)
 14:16
 unlawful (1) 11:15
 updated (1) 1:19

V

various (1) 13:16
 vary (1) 10:17
 version (1) 13:23
 versions (1) 13:14
 versus (1) 12:15
 view (2) 2:22,25
 Visa (28) 10:16,24
 12:8,9 13:7,14,17
 13:18,23 14:3,4,12
 14:16,19 15:2 16:8
 16:10,11,12,15,19
 16:22 17:2,4,6,23
 18:17,19

W

want (12) 1:17 4:21
 4:22 8:14 9:16 13:3
 15:20 18:22 19:7
 19:16,21,22
 wasn't (1) 2:17
 way (3) 6:9,25 18:5
 Wednesday (3) 1:22
 2:1 20:8
 Willeart (5) 1:22,25
 2:7,9,10
 wish (1) 7:12
 witness (9) 1:13,19
 4:16 5:8,11,18 8:1
 9:12,22
 witnesses (3) 3:20
 19:18,25
 words (1) 8:3
 work (2) 10:12 18:15
 wouldn't (5) 4:10 9:14
 14:15 17:14,15
 written (1) 13:16

X

Y

year (1) 16:14
 years (1) 16:18
 years' (1) 15:5
 yesterday (3) 1:9 2:24
 19:17

Z

O

0.3 (1) 15:3
 1 (3) 21:2,3,4
 10.30 (2) 1:2 20:7
 10th (1) 20:8
 11.13 (1) 20:5
 14 (1) 13:14
 16 (2) 7:23 8:1
 1996 (1) 6:2

2

20 (1) 21:8
 2000 (1) 13:7
 2000s (1) 7:18
 2002 (1) 14:4
 2004 (1) 6:2
 2005 (3) 9:20 12:6
 16:16
 2006 (3) 6:20 7:10
 18:18
 2014 (1) 2:21
 2016 (2) 1:1 20:8
 210A (1) 18:23
 224 (2) 9:17,24
 25th (1) 16:16
 28th (1) 2:21

3

3 (1) 9:17
 367 (1) 10:5

4

4 (1) 21:5
 45 (2) 9:13 11:4
 47 (2) 9:13 11:4

5

5 (5) 5:7 18:10,11
 21:6,7
 537 (1) 10:10
 55 (1) 12:20
 566 (1) 10:11
 57 (1) 13:6
 59 (2) 13:12,13

6

61 (1) 13:15
 637 (2) 9:18 10:13
 638 (1) 10:22
 639 (1) 11:7
 64 (1) 13:22
 66 (2) 12:20 13:3
 6th (1) 9:20

7

70 (1) 13:25
 71 (1) 14:7

8

81 (1) 14:6
 82 (5) 15:18,19,22,23
 15:25
 83 (6) 15:18,19,22,25
 16:1,6

9

91 (1) 5:14
 9th (1) 1:1