Neutral citation [2016] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House
Bloomsbury Place
London WC1A 2EB

13 May 2016

Before:
THE HONOURABLE MR JUSTICE BARLING
(Chairman)

Sitting as a Tribunal in England and Wales

B E T W E E N:

SAINSBURY'S SUPERMARKETS LTD

Claimant

-v-

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L

Defendants

(1) VISA INCORPORATED
(2) VISA INTERNATIONAL SERVICE ASSOCIATION
(3) VISA EUROPE LIMITED
(4) VISA EUROPE SERVICES INCORPORATED
(5) VISA UK LIMITED

Applicants

JUDGMENT

(NON-PARTY APPLICATIONS FOR ACCESS TO DOCUMENTS)

APPEARANCES

Ms Sarah Love (instructed by MdR) appeared on behalf of the Claimant.

Ms Dinah Rose QC and Mr Jason Pobjoy (instructed by Milbank, Tweed, Hadley & McCloy LLP) appeared on behalf of the First and Second Applicants.

Mr Daniel Jowell QC and Ms Anneli Howard (instructed by Linklaters LLP) appeared on behalf of the Third to Fifth Applicants.

The Defendants did not appear and were not represented.

1. Before the Tribunal there is an application for access to certain categories of documents made by the applicants, who are not party to the proceedings to which the documents relate.

2. The applicants are Visa Incorporated, Visa International Service Association, Visa Europe Limited, Visa Europe Services Incorporated and Visa UK Limited. Those are the applicants but they fall into two categories. Visa Incorporated, and Visa International Service Association are represented by Ms Rose QC and Mr Pobjoy. I will call those applicants "Visa Inc". The other Visa applicants, which I will call "Visa Europe", are represented by Mr Jowell QC with Ms Anneli Howard.

3. The application, which I will explain in a moment, is opposed by Sainsbury's Supermarkets Limited ("Sainsbury's"), represented by Ms Love. Also interested in the application are MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe S.P.R.L. ("MasterCard"), who are the defendants in the claim brought against them by Sainsbury's, out of which the application arises. MasterCard do not appear and are not represented before the Tribunal today, but the Tribunal has received a skeleton argument from Mr Matthew Cook of counsel and a letter indicating what the position of MasterCard is in relation to the application.

4. There were similar applications also by other companies, in particular Ocado Retail Limited and Speciality Stores Limited, on the one hand, and WM Morrison Supermarkets PLC together with various other retailers represented by Stewarts Law LLP and otherwise known as "the Arcadia applicants", on the other hand. However, those applications have been settled in the last few days. In the papers before me are consent orders relating to that resolution, the substance of which has been referred to in the submissions made to me today.

5. The applicants in the remaining application, i.e. the Visa applicants, are not parties to what I will call "the MasterCard proceedings" currently before this Tribunal. Those proceedings, between Sainsbury's and MasterCard, did not start in the Tribunal but were transferred from the Chancery Division of the High Court by an order made by me in December 2015. The position in the

MasterCard proceedings is that a trial has now taken place over some eight weeks or so in the early part of this year, and Judgment is currently awaited. Those proceedings relate to allegations by Sainsbury's that the Multilateral Interchange Fees charged in the claim period pursuant to the MasterCard payment scheme were unlawful as a matter of European and UK competition law, and that Sainsbury's have sustained damages as a result of the alleged breaches.

6. The Visa applicants who, as I have said, are not parties to those proceedings, are, however, defendants in ongoing proceedings in the Commercial Court in which very similar allegations are raised. The timing of those trials is that there are to be split hearings, the first of which, on liability, will begin in October this year, and the second, on quantum, is set to begin sometime in early 2018, and is due to take up a considerable part of the first half of that year.

7. The application before me is for access to three categories of documents which have been referred to and used in open court in the MasterCard proceedings in this Tribunal. In the case of each category only non-confidential versions of the documents are being sought. In this application the applicants do not seek any confidential material.

8. The categories are, first, the witness statements of fact of both Sainsbury's and the MasterCard defendants; second, the written closing submissions of those parties; and, third, the expert reports submitted on behalf of those parties, in relation both to liability and quantum. Those aspects were heard in the course of the same hearing, there being no split trial in the MasterCard proceedings.

9. The position of the parties on the application is now surprisingly close, the areas of disagreement having evolved and reduced over the past few weeks since the matter was raised by Visa on, I am told, 4th April 2016 when access to these documents was first sought from Sainsbury's and MasterCard. Although there is not very much between the parties as it now emerges, there has been enough for argument to take up the whole of this morning. It is, I should say, most regrettable that the matter should not have been resolved and that a contested hearing between Sainsbury's and the Visa applicants should have been necessary.

10. MasterCard's approach has been that it is in principle willing to accede to the application. However, noting that Sainsbury's is not willing to accede to it in the form in which it has been made, MasterCard has indicated that it would prefer that the matter should be the subject of an order of the Tribunal. In its latest communication, which arrived this morning, it confirmed that it would like to accede to the application by way of an order that did not include any of the exhibits to the documents in question. I do not think it is necessary for me to deal any further with the position of MasterCard.

11. The application is made, as Ms Rose has indicated, on the basis of the principle of open justice, and in particular on the basis that all the documents in question have been read by the Tribunal panel and been referred to in open court in the course of the trial, and at least some of them have been quoted in open court. Therefore, she submits that these categories of documents fall fairly and squarely within the principle of open justice as set out in the case law to which she has drawn my attention in the course of this morning. I will, at some stage, refer briefly to that case law, but I do not propose to refer to it at any length, because Ms Love, who, as I said, appears for Sainsbury's, does not dispute that the principle of open justice applies to the categories of documents to which I have referred.

12. The burden of Ms Love's submission is that when one is dealing with documents to which that principle applies, the application of the principle is simply a starting point. Its effect is that *prima facie* access should be given to the documents, but the court, in determining that question and the extent and the timing of any access, should have regard to other countervailing factors. She submits that there is a balancing exercise which the Tribunal must undertake. In the present case she submits, not that there should be no access to the documents, but that there should be access subject to certain conditions. It is appropriate at this stage for me to indicate what the final position of Sainsbury's is in relation to those conditions. The position differs slightly depending on the specific category of document.

13. In relation to the whole of the non-confidential version of the written closing submissions (of both MasterCard and Sainsbury's, but obviously Ms Love's submissions related specifically to Sainsbury's documents), Sainsbury's is willing that access should be given to both Visa Inc and Visa Europe. That

version deals with both quantum and liability issues. Therefore there is, if I may say so, a happy meeting of minds in relation to that category of document, save that Ms Love submits that they should not be made available to Visa until 3rd June 2016. The significance of that date is, first, that 3rd June is the date when expert reports on liability issues are going to be exchanged in the proceedings in the Commercial Court. Second, Ms Love submits that in any event there are logistical problems in providing the documents much earlier than that date; this is because there is a trial beginning in June on related issues between other parties, and although Sainsbury's is not itself involved, for the purposes of that trial it is required to carry out a redaction exercise in respect of transcripts of the hearing in the MasterCard proceedings in the Tribunal. Therefore, the earliest Sainsbury's feel able to give access to the written closings sought in the present application is 27th May. Presumably this is on the basis that that date will serve both purposes, in that the experts' reports being exchanged on 3rd June will effectively be finalised by then, and therefore will not realistically be able to take account of any information obtained by the access given on 27th May; secondly, that is the date on which they say they can do it from a logistical point of view.

14. The next category of document is witness statements of fact. Here Sainsbury's are not willing to be quite so generous. They are willing to provide non-confidential versions of the witness statements of fact on liability as soon as may be - "within seven days" I believe was mentioned. So far as witness statements of fact on quantum, the submission is that the timing should be such as is being adopted in the Commercial Court proceedings in relation to witness statements on that issue in those proceedings. That means, effectively, that the matter would be delayed until sometime next year. Further, it is submitted that the witness statements on quantum should then only go to the Visa Europe applicants, who are the defendants to proceedings brought in the Commercial Court by Sainsbury's, which are being case managed together with actions brought against Visa by other retailers, as I have mentioned.

15. Similarly, in relation to the third category, namely, experts' reports: Sainsbury's are willing that the experts' reports on liability should be provided at the same time as the written closings, namely, they consider it may be possible to do it by 27th May 2016, but they would struggle to do it earlier. But, in regard to

experts' reports on quantum, again, they wish to mirror the timing which governs the exchange of what are called the "Phase 2", that is, the quantum aspects of the Commercial Court proceedings; and so access to the expert reports on quantum would not be provided until some time next year, and would not necessarily be provided to all the Visa applicants, but only to those to whom the Commercial Court would give parallel material in those proceedings.

16. That is the position which Sainsbury's submit the Tribunal should adopt in relation to the three categories of document.

17. Ms Love also made clear in the course of her submissions that another condition should be that all the documents that they are willing to provide to the Visa applicants should be provided only into the relevant confidentiality rings that have been set up in the Commercial Court proceedings. She so submits notwithstanding that we are only here concerned with non-confidential versions of the documents, i.e. versions from which all material claimed, accepted and treated in the course of the Tribunal proceedings as confidential, has been redacted.

18. This application has been largely based on a passage in the Tribunal's Guide to Proceedings 2015 (the "Guide"), which is in para. 9.66, and which, under the heading: "Pleadings and other documents referred to during public hearings", states:

> "Where a pleading, skeleton argument, witness statement or expert report is referred to or quoted in open court, the party who produced that document or for whom that document was produced, should be prepared to make a non-confidential version of that document available to a non-party upon request. The non-party should approach the party in question directly to seek access to the relevant document. In the event that access is refused the non-party may make a formal application to the Tribunal."

That is what, in effect, the Visa applicants have done.

19. In addition to the Guide, the parties have all referred specifically to the Rules of the Tribunal, and in particular Rule 102, which provides:

> "Subsequent use of documents provided in proceedings
>
> 102.—(1) Subject to paragraphs (2) to (4), a party to whom a document has been provided in the course of proceedings—
>
> (a) by the Tribunal;

(b) by another party; or

(c) in accordance with an order under rule 63,

may use that document only for the purpose of those proceedings.

(2) Except where a document or a part of a document has been provided within a confidentiality ring, the restriction in paragraph (1) does not apply to a document if—

(a) subject to paragraph (5), the document has been read to or by the Tribunal, or referred to, at a hearing which has been held in public;

(b) the Tribunal gives permission; or

(c) the party who produced or disclosed the document and the person to whom the document belongs agree.

(3) Where a document or part of a document has been provided within a confidentiality ring, the restriction in paragraph (1) applies unless the Tribunal gives permission for further use of that document or the information contained in the document or part of a document.

(4) The restriction in paragraph (1) does not prevent the CMA or any statutory body which is the maker of a disputed decision that is remitted to it by the Tribunal from using such documents for the purposes of determining the remitted issue.

(5) The Tribunal may, either of its own initiative or on the application of a party under paragraph (6), make an order restricting or prohibiting the use of any document provided in the course of proceedings, even where the document has been read to or by the Tribunal, or referred to, at a hearing which has been held in public.

(6) An application for such an order may be made—

(a) by a party;

(b) by any person to whom the document belongs; or

(c) by any person who claims that the document contains confidential information relating to them."

20. It will be noted that sub-paragraph (1) of that Rule appears not to have any bearing on the current issue because it is, in terms, referring to a party to whom a document has been provided in the course of the proceedings. Here, of course, the applications, whether in regard to Sainsbury's or MasterCard, do not relate to parties to whom the relevant documents have been provided. What are sought from Sainsbury's and MasterCard respectively are the documents which have in fact been created, produced and provided by Sainsbury's and MasterCard. Therefore, it is not at all clear that the restriction in sub-paragraph (1) and the related provisions of that Rule have a bearing on the matter today. That may not apply to sub-paragraphs (5) and (6), because those are expressed in more general terms, and indicate that the Tribunal may, either

on its own initiative, or on the application of a party, make an order restricting or prohibiting the use of any document provided in the course of the proceedings even where the document has been read to or by the Tribunal, or referred to at a hearing which has been held in public. It may be, therefore, that the restrictions which Sainsbury's seek to have imposed on the access to these documents fall under sub-paragraph (5), but no detailed submissions have been made in relation to the specific powers of the Tribunal.

21. It is also right to record that none of the parties has suggested that, where a person remains unwilling to provide the documents sought in the circumstances envisaged by paragraph 9.66 of the Guide, the Tribunal does not have power to make an order requiring such provision where it is appropriate to do so. In that regard I have already referred to Rule 102 of the Tribunal Rules and, in particular, sub-paragraph (5) of that Rule, providing an express power to restrict the use of documents. Such a power may be thought to be wholly or substantially otiose if there were not an underlying power to require the provision of documents. Furthermore, by virtue of, for example, Rule 53 of the Rules, the Tribunal has extremely wide case-management powers; these include powers in relation to the disclosure and production of documents or classes of documents.

22. Therefore, even leaving aside the case law which indicates that all courts and tribunals have a duty to comply with principles of open justice, there appears to be jurisdiction in the Tribunal in a case such as the present to make an order for access, if it is thought it appropriate.

23. So far as those principles of open justice are concerned, on which this application is very firmly put by Ms Rose and Mr Jowell, Ms Rose identified four propositions as follows. First, rights of open justice requiring publicity for material should be such that the public should be able to scrutinise both written and oral evidence and argument upon which the court has been invited to arrive at its decision.

24. Second, the achievement of that purpose requires that a member of the public who is an observer should be afforded access to the same written submissions and witness statements, given to the judge and referred to in open court.

25. Third, the reasons or motives for a non-party seeking access to such material, including where it is sought in order to inform the non-party for the purposes of other litigation which is in being, or is contemplated (which is not an illegitimate purpose) are not a reason for refusing access, if it is appropriate.

26. Fourth, if a court is minded to impose a restriction on a witness statement in terms of access or use, where that witness statement has been referred to in open court, then some specific prejudice should be established sufficient to outweigh the principle of open justice.

27. To make good those submissions Ms Rose took me to a number of decided cases.

28. The first was a decision of the Court of Appeal in *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd and Others* [1999] 1 WLR 984, where what was in issue was the entitlement to have access to witness statements and also to documents referred to in the witness statements. The question of the witness statements themselves had been resolved before the matter came to the Court of Appeal, but there remained outstanding the question of specific documents exhibited to witness statements. The main judgment was given by Lord Justice Potter, and included extensive guidance in relation to the open justice principle generally, and in particular with respect to documents which formed part of the evidence contained in court bundles. A distinction was drawn between such documents on the one hand, and witness statements and written submissions or skeleton arguments, on the other.

29. That distinction runs through that case and indeed through many of the other cases to which I have been referred. In particular, witness statements that have been referred to or read in open court, or which have been treated as evidence-in-chief without being read aloud, as is now the usual practice, and also written submissions which also, in current usage, very often take the place of what would otherwise have been oral submissions made at length, are in a distinct category from documents annexed or exhibited to witness statements or affidavits. Access to the latter has not been treated as liberally as in the case of the former categories.

30. In the present case, thankfully, we are not concerned with exhibits. Until Ms Rose opened her case this morning it did appear (particularly from Mr Jowell's skeleton argument) that the application was also for access to the documents exhibited to the expert reports and witness statements of fact. I will say no more about that, because it is now clear that the application does not extend to any of those documents. Both sides, however, have put down markers in relation to possible future applications, as indeed did I on behalf of the Tribunal. My marker was to indicate that any application in relation to those documents, which have not in general been marked up for confidentiality, unlike the witness statements, written submissions and expert reports, and which extend to about sixty large ring binders, should in my view - a provisional view only, as I have not heard argument on it - be made to the Commercial Court by way of an application for specific disclosure, rather than to this Tribunal.

31. Before I leave *GIO*, I should say that Lord Justice Potter made it clear there that a motive for seeking skeleton arguments, witness statements, and so on, which relates to the fact that the applicant contemplates or is involved in parallel litigation, was not regarded as in any way illegitimate.

32. The *Law Debenture Trust Corporation (Channel Islands) Ltd v Lexington Insurance Company and Others* [2003] EWHC 2297 (Comm) case, a decision of Mr Justice Colman, also confirmed the previous point, namely that reliance on the principle of open justice on the basis that the non-party applicant wished to have access to the documents in question for the purposes of other proceedings, contemplated or actual, was not regarded as inappropriate or illegitimate. That case further confirmed that the High Court had an inherent jurisdiction to grant a non-party access to written submissions or skeleton arguments.

33. The next case to which I ought to refer is *Dian AO v Davis Frankel & Mead* [2005] 1 WLR 2951, a decision of Mr Justice Moore-Bick (as he then was) sitting in the Commercial Court. This was relied upon by Ms Love in her skeleton argument as apparently indicating that a desire to have access to documents in order to use them as guidance for subsequent potential proceedings did not engage the principle of open justice. The passage relied upon is at paragraph 31 as follows:

> "[The applicant] has no interest in the performance of the judicial function in that case, which as far as one can tell was in any event very limited. It simply seeks permission to use the court file as a source of potentially useful information to assist it in other litigation. That does not in my view engage the principle of open justice."

34. However, Ms Rose submitted, and I agree, that this passage must be read in the context of what was actually being sought by the non-party applicant there; this was, in fact, the right to inspect the whole of the court file in proceedings which had settled, and to take copies of any documents that might be of assistance in the subsequent litigation. Read in the context of the judgment as a whole, and in particular paragraphs 29 and 56, it is quite clear that the learned judge's reference to "that does not, in my view, engage the principle of open justice" refers to the non-party's desire to have access to the whole of the court file in order to trawl through it and see whether there is any useful information for the purposes of the other proceedings. In the other paragraphs to which I have referred, the judge makes it quite clear that it is that kind of open-ended, untargeted exercise, rather than an application which simply seeks access to the skeleton arguments and witness statements read by the judge, which he regarded as not being a legitimate subject for the open justice principle. Indeed, read in that context, this case confirms that documents in the categories with which we are concerned are fully within that principle, notwithstanding that they are being sought with a view to provide guidance or assistance in other proceedings.

35. I probably need make only very limited reference to the other cases. *British Arab Commercial Bank v Algosaibi Trading Services Limited and Others* [2011] EWHC 1817 (Comm), a decision of Mr Justice Flaux, once more drew a distinction between witness statements on the one hand, and the exhibits to those witness statements on the other. The learned judge indicated that the exhibits fell into a different category for the purpose of access by third parties, and in fact refused access to them.

36. In relation to such documents an important case is *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court and Another* [2012] 3 WLR 1343, a Court of Appeal decision. In the main judgment, Lord Justice Toulson very helpfully reviewed the law on open justice, and stated at paras [69] and [70] as follows:

> "69 The open justice principle is a constitutional principle to be found not in a written text but in the common law. It is for the courts to determine its

> requirements, subject to any statutory provision. It follows that the courts have an inherent jurisdiction to determine how the principle should be applied.
>
> 70 Broadly speaking, the requirements of open justice apply to all tribunals exercising the judicial power of the state. The fact that magistrates' courts were created by an Act of Parliament is neither here nor there. So for that matter was the Supreme Court, but the Supreme Court does not require statutory authority to determine how the principle of open justice should apply to its procedures."

37. In that case the documents in issue were, in fact, specific documents which had been disclosed, rather than witness statements or written submissions. Lord Justice Toulson stated that in holding that the principle of open justice extended to such material, the decision of the Court of Appeal was to some extent breaking new ground. He also indicated that when a court or tribunal was contemplating whether such documents are in the public domain and whether access to them should be given in the interests of open justice, it was appropriate to consider any countervailing factors: in effect a proportionality exercise should be carried out. The extent of any burden placed on the court itself in having to produce material would be a relevant factor (see paragraphs [85] to [87]).

38. As we are not here asked to order that access be given to documents in this category I need say no more about this authority.

39. I should refer to the judgment of Mr Justice Birss in *Nestec SA and Others v Dualit Limited and Others* [2013] EWHC 2737 (Pat) where he, too, drew the now familiar distinction between documents such as written submissions, expert reports and witness statements referred to in open court and/or read by the judge, and exhibits to those documents. He confirmed that the former category were documents where the default position was that they would be treated as available to third parties under the principle of open justice, although he did not regard himself as having a discretion to provide access to documents in the latter category. The *Guardian* case does not seem to have been cited to him. In *NAB v Serco Limited and Another* [2014] EWHC 1225 (QB), Bean J (as he then was) took a different view in the light of the *Guardian* case.

40. I approach this case on the basis that the Tribunal has the power to make an order in respect of the documents now sought from Sainsbury's and indeed from MasterCard. I also approach it on the basis that the principle of open justice is fully engaged in the case of the documents sought - it is not seriously disputed,

if at all, by Sainsbury's, that these documents are squarely within the scope of that principle, given that they have been read by the Tribunal and referred to in the course of proceedings in open court. Ms Love's point was not that the principle was not engaged, but that there were countervailing factors to be considered.

41. I also accept for present purposes (without deciding whether and to what extent the approach would differ in relation to an application dealing with exhibited or disclosed documents) that the court has a discretion in relation to the order it makes and to any conditions which it may apply. It seems to me that that is implicit in the nature of the principle of open justice, and is also reflected in Rule 102 of the Tribunal Rules and in paragraph 9.66 of the Guide. Therefore, it being the case, as I find, that, *prima facie,* the applicants are entitled to have access to all the documents in question, it is permissible and appropriate to take account of any countervailing factors which might affect the Tribunal's order.

42. The only real countervailing factors that have been urged in what Ms Love described as the 'balancing exercise' relate to the prejudice which she submits would be suffered by Sainsbury's unless the conditions which I have already described, and which particularly concern the timing of the release of the documents on quantum, are imposed by the Tribunal in its order. In the course of oral submissions I sought to explore precisely what the prejudice would be if the Visa applicants - and here I treat them collectively, although only one group of them is, in fact, involved in the proceedings brought by Sainsbury's - if they had access to material on quantum (which is the material that is particularly objected to by Sainsbury's) several months or indeed a year earlier than might otherwise be the case. I am not really sure that Ms Love, in the course of her helpful and attractive submissions, was really able to identify what the prejudice would be, save that there might be a corresponding disadvantage to Sainsbury's in the litigation if the Visa applicants obtained an advantage by reason of getting the material earlier. An advantage to one litigant could be said to be something of a disadvantage to another. Such advantage/disadvantage might or might not exist. However, it seems to me that even if there were to be a tangible advantage, it would not be one which could possibly justify delaying access for a year, or indeed for any substantial period, where such access should, in principle, be available straight away on the basis of open justice.

43. In his submissions, Mr Jowell (whose clients are defendants in Sainsbury's claim in the Commercial Court) also pointed to the fact that in those proceedings the date for standard disclosure in both Phase 1 (liability) and Phase 2 (quantum), has already passed; he submitted that the documents which are the subject of this application are clearly relevant to that claim and should have been disclosed by now in any event. Therefore, he submitted, that if Sainsbury's had complied with their obligations under disclosure, those documents would have been in his clients' possession, if not in Ms Rose's clients' possession, already. Therefore, in his submission, there was no possible prejudice to Sainsbury's.

44. I do not have to decide in this application, and Mr Jowell did not ask me to, whether the documents are disclosable or not. I should record that Ms Love did not accept that her client's disclosure had been defective in any way, but it was agreed that that was not a matter for me but a matter for the Commercial Court.

45. In any event, as I have already said, it seems to me that the alleged prejudice to Sainsbury's, if any, is negligible, and certainly nothing like substantial enough to outweigh the need for the documents to be supplied in accordance with open justice.

46. Another factor relied upon by Visa, is that in the other applications of this kind, which, as I have indicated already, have been settled in the last few days and in which there are consent orders, Sainsbury's have agreed to supply all the closing submissions and the expert reports on liability to those other applicants by 20th May. Ms Rose submits that it is extremely unfair, unreasonable and inappropriate that the Visa applicants should have to wait any longer in respect of those particular documents.

47. Ms Love's response to that was that although the Arcadia applicants would get both sides' expert reports on liability on 20th May, Sainsbury's current offer to the Visa applicants was not significantly different.

48. That really is the ambit of the dispute.

49. I find that there is no or negligible prejudice to Sainsbury's in giving access to the Visa applicants now rather than later, and certainly nothing that can outweigh the need to provide all the documents in question, including the expert

reports on quantum, as soon as is reasonably possible. I will come onto timing in a moment.

50. I also should say that the suggestion that these documents, when they are supplied, should be supplied into the same confidentiality ring or rings as exist in the Commercial Court is not, in my view, appropriate. I am not going to make an order to that effect because, as I have already said several times, the documents being sought are all non-confidential versions, and therefore there is no conceivable reason why, in the light of the reasons for the principle of open justice, they should be subject to a limitation or a restriction of that kind.

51. For those reasons, despite the skilful submissions that have been made on behalf of Sainsbury's, I do not propose to impose any restrictions on the provision of these documents, whether they are concerned with quantum or liability issues. I do propose to make an order that non-confidential versions of them - that means non-confidential both as regards Sainsbury's confidential information and MasterCard's confidential information - should be supplied to both sets of applicants, if they wish, or one if they are prepared to tolerate one set between them - I do not know what the arrangements are between the Visa applicants.

52. The only remaining question, therefore, relates to the time by which that should be done. As I have already explained, Sainsbury's have said that they are under some logistical pressures in relation to the redaction of transcripts, but have offered 27th May rather than 3rd June as originally put forward in their skeleton argument. All the documents in question have been already marked up for the confidential material of both MasterCard and Sainsbury's, and I take into account the fact that this request was raised by the Visa applicants a month and a half ago. Therefore they should be provided at the earliest opportunity.

53. In the circumstances I am going to order that all the documents in redacted form be supplied by 4pm on 20th May, that is a week today.

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MS ROSE: I am grateful. We seek our costs of this application. As you will have seen from the bundle, we engaged in accordance with para. 9.66. We first approached Sainsbury's and MasterCard to seek the documents direct from them as the practice Guide suggests. MasterCard promptly indicated that they would

not object. Sainsbury's has put up the objections that you have seen and has consistently made those objections in spite of our protests and our correspondence up until today. I should make it clear that at no stage did we ever seek exhibits. The only reference that has ever been made to exhibits was in Mr Jowell's skeleton argument of yesterday. At no stage did my clients ever suggest that they were seeking exhibits. Our application was always limited to the witness statements, closing submissions and expert reports. We were seeking exactly the order that you have made. We submit it was unreasonably and unjustifiably resisted and that we ought to get our costs of this application.

MR JOWELL: My Lord, we submit the same. In essence, this has been a filibuster by Sainsbury's, and really the court, in my respectful submission, should put a marker down that this sort of filibustering will not be tolerated otherwise these contested applications will proliferate.

THE CHAIRMAN: Just before you sit down, it did strike me as odd there were two of you, frankly. Why did you both need to be here? I appreciate you have some distinction but----

MR JOWELL: We are, at the present time, completely different entities, and we are, of course, sued in the Sainsbury's proceedings, they are not, and we have materially different----

THE CHAIRMAN: There has been no conflict between you in your submission.

MR JOWELL: No, but at the same time I have also tailored them so there has been no reproduction, of course, we made a joint application.

THE CHAIRMAN: Ms Love?

MS LOVE: Sir, I cannot resist the costs principle, but I do take issue with the proposition that we are footing the bill for the four opposite me, two of whom are in Silk, when it was suggested to those instructing me by a letter of 9th May, that it was "a self-contained application which could be dealt with by many barristers - there is no need to use the same Counsel that appeared in MasterCard". The suggestion was that we were holding out because we wanted to use our leading counsel and, in fact, we are the only ones who have chosen

not to take that course of action. That letter, Sir, you can see from p. 40 of the bundle. We do object to bearing two sets of costs for two teams that are too strong, both of which are headed by Silks. There is no disrespect to Mr Jowell when I say that, helpful though his submissions may have been, one wonders if the outcome would have been in any way materially different had there been one set between them.

The argument that they are separate entities, with respect, Sir, the very fact that the application was joint gives the lie to that. They may remain separate entities, but they can make the same application.

I do say that the position in relation to exhibits has been somewhat murky, certainly for my part until 10.27am I was under the impression I was going to be addressing you, Sir, on the exhibits issue and I was informed that Ms Houghton, late last night, received an email clarifying the position.

MS HOUGHTON: (No microphone) We asked a couple of days ago (inaudible) exhibits and had no response, I do not believe it was clarified in their skeleton, which was the response.

MS LOVE: It was clarified shortly before you, Sir, came in. It was very clearly requested in Mr Jowell's skeleton, and the very notion of exhibits was first floated in a letter that his instructing solicitors, Linklaters, wrote to Morgan Lewis, who act for my client in the Commercial Court proceedings, I believe on 9th May. If I could just invite you to turn to that, it is at p.47 of the bundle.

If you look at the bottom of that first page this is where the disclosure argument first surfaces: "All factual witness statements (including exhibits), All expert reports (including exhibits)".

For our part, it was a different letter to Morgan Lewis than it was about the Commercial Court disclosure, but this is the first time the "E" word has featured, it is certainly not part of the application and at that point we did ask for clarification, and we did have the matter made murkier by Mr Jowell's skeleton argument, and it is only on the very doorstep of this hearing that it has been clarified. So, sir, I do respectfully say one set of costs, costs for a Junior, and some deduction to take into account the exhibits issue which was raised and never actually eventuated.

THE CHAIRMAN: You do not have a schedule or anything, have you? I am not going to summarily assess them without.

MS ROSE: We are not asking for summary assessment, Sir. Obviously, the question of the extent to which the costs are reasonable and proportionate is a matter that can be dealt with on assessment. I submit this is clearly a case that was suitable for leading counsel, given the enormous significance of the issues that are involved for my clients.

THE CHAIRMAN: Thank you. The Visa applicants clearly should have their costs. I do feel, despite the helpful submissions of Ms Love, that this is an application that should not have been resisted, save perhaps in regard to exhibits. However, that element was abandoned by Mr Jowell's clients in the openings this morning and I accept that those documents were never included in the application made by the Visa Inc applicants.

I have considered whether that late abandonment and/or the appearance of two teams on behalf of the Visa applicants merit some discount, but I have decided that in all the circumstances no discount should be made. As I have said, the application should not have been resisted in the way that it was in regard to the written closing submissions, witness statements or expert reports. Further, it seems to me that, on balance, the Visa applicants are entitled to come separately represented given that, despite their names, they are totally independent parties and the matter is of some importance. It might be said that it was over-egging the matter to have two Silks here, but on the other hand, as I have said, it is an important matter with knock-on effects potentially in other important litigation.

I therefore do not feel that I would be justified in ordering, for example, that there should be costs for Juniors only, or for one team only. So I will order that each of Visa Inc and Visa Europe should have its costs of the application, such costs to be subject to detailed assessment on the standard basis if not agreed.

MS ROSE: So in terms of drawing up the order----

THE CHAIRMAN: Would you please do that and agree it if you can----

MS ROSE: Yes, yes.

THE CHAIRMAN: --to reflect----

MS ROSE: Yes.

THE CHAIRMAN: --and I do not think there should be any controversy about that, it is quite straightforward. If you send it through we will initial it.

MS ROSE: I am grateful, and I apologise it took rather longer than anticipated, and thank you for your patience.

THE CHAIRMAN: Thank you. Thank you for your help.

The Hon. Mr Justice Barling
Chairman

Charles Dhanowa OBE QC
(Hon)
Registrar

Date: 13 May 2016