

1 This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its
2 judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public
3 hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The
4 Tribunal's judgment in this matter will be the final and definitive record.

5 **IN THE COMPETITION**

Case No. : 1288/5/7/18

6 **APPEAL TRIBUNAL**

7
8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

13 09 July 2021

14
15 Before:
16 THE HONOURABLE MR JUSTICE MICHAEL GREEN
17 (Chairman)

18
19 (Sitting as a Tribunal in England and Wales)

20
21 **BETWEEN:**

22
23 **SAINSBURY'S SUPERMARKETS LTD**

Claimant

24
25 v

26
27 **VISA EUROPE SERVICES LLC & OTHERS**

Defendants

28
29
30
31 **A P P E A R A N C E S**

32
33 Mark Brealey QC and Derek Spitz (instructed by Morgan, Lewis & Bockius UK LLP
34 appeared on behalf of the Claimant)

35
36 Brian Kennelly QC, Jason Pobjoy and Isabel Buchanan (instructed by Linklaters LLP and
37 Milbank LLP appeared on behalf of the Defendants)

38
39
40 Digital Transcription by Epiq Europe Ltd
41 Lower Ground 20 Furnival Street London EC4A 1JS
42 Tel No: 020 7404 1400 Fax No: 020 7404 1424
43 Email: ukclient@epiqglobal.co.uk

1 **Friday, 9th July 2021**

2 **(10.30 am)**

3 **Case Management Conference**

4 **MR JUSTICE MICHAEL GREEN:** Good morning.

5 **MR BREALEY:** Good morning, Sir.

6 **MR KENNELLY:** Good morning.

7 **MR JUSTICE MICHAEL GREEN:** Good morning, everyone. As I am sure you are
8 aware, these proceedings are being live streamed and there are quite a few
9 I can see who are on the Microsoft Teams platform. I must start with the
10 familiar warning that these are proceedings in open court as much as if they
11 are being heard before the Tribunal physically in Salisbury Square House.

12 An official recording is being made and an authorised transcript will be produced, but
13 it is strictly prohibited for anyone else to make an unauthorised recording,
14 whether audio or visual of the proceedings, and breach of that provision is
15 punishable as a contempt of court.

16 Right. Well, I have read the material that you suggested that I read, the skeleton
17 arguments and the various witness statements. I have also to get familiar
18 with the case have read the Supreme Court judgment. We have one sort of
19 substantive issue to decide. I must say at the outset that, having now got into
20 the case and understood what it is about, I can see why Visa were suggesting
21 that perhaps the CMC should have gone off to await the further disclosure,
22 because the issue about the compliance with paragraph 11 of the order
23 seems to me to be all about disclosure really, and whether it should be limited
24 or not, and that was a convenient course that the President took to get things
25 moving on that front and perhaps to limit the amount of disclosure that would
26 have to be given by Sainsbury's.

1 So given that all other issues have effectively been deferred on disclosure, I do
2 wonder whether there is much point in me ruling precisely as to whether the
3 witness statements do actually comply with paragraph 11 or not and where it
4 is actually going to leave the proceedings if I rule one way or the other.

5 So that was my preliminary thought as to whether, you having gone to the effort of
6 arguing it out fully, for which I am grateful, in your submissions, but I do rather
7 wonder where it is actually going to get us.

8 **MR BREALEY:** Sir, on that basis, would it be possible just to adjourn for, say,
9 fifteen minutes so we can take instructions. I can personally see the sense in
10 what you are suggesting.

11 **MR JUSTICE MICHAEL GREEN:** Yes.

12 **MR BREALEY:** As you know, we think we have complied. Visa want to read the
13 disclosure that they have obtained, and before I say "yes" or "no" to that
14 suggestion, I think it would be incumbent on me to at least discuss it with my
15 team.

16 **MR JUSTICE MICHAEL GREEN:** Yes. Well, I think that's sensible. Do you think
17 that's sensible, Mr Kennelly?

18 **MR KENNELLY:** Sir, yes, that is in my respectful submission sensible, and since it
19 was our suggestion to put off the CMC -- but instinctively I agree with your
20 suggestion, Sir, but I will have to take instructions also.

21 **MR JUSTICE MICHAEL GREEN:** I mean, even if you were right that there wasn't
22 substantial compliance -- I assume that's what we are really talking about,
23 whether there is substantial compliance with the order, and I have read the
24 witness statements -- even if you are right, what are you actually asking me to
25 do? Because you are not asking me to direct further witness statements on
26 this occasion, as I understand it. That's for consideration at a later stage,

1 once you have had an opportunity to see the disclosure.

2 So I am really not very sure where it is actually going to get us, one way or the other.

3 **MR BREALEY:** Once item 5 was withdrawn, I see exactly where you are coming

4 from, Sir.

5 **MR KENNELLY:** Sir, if I may, and I apologise if there is any confusion, we are

6 asking Sainsbury's to do those statements again, because they have not

7 complied with paragraphs 11(b) and (c) of the order. We say the Tribunal

8 should direct them to go back and comply with the order, do those statements

9 fully.

10 **MR JUSTICE MICHAEL GREEN:** Okay.

11 **MR KENNELLY:** So that is the relief we seek.

12 There is one further point. I think the public can't hear our proceedings. There is

13 some technical problem I draw to your attention.

14 **MR JUSTICE MICHAEL GREEN:** Okay. If we adjourn for fifteen minutes and

15 hopefully we can sort out that issue in the meantime.

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

17 **MR JUSTICE MICHAEL GREEN:** I think it would make sense if we do that and see

18 where we are.

19 **MR BREALEY:** I am grateful. Thank you.

20 **MR JUSTICE MICHAEL GREEN:** So what I will do is I will just mute and turn off my

21 camera, but I will stay in the meeting and allow you to have your discussions.

22 **MR BREALEY:** So 10.55.

23 **MR JUSTICE MICHAEL GREEN:** Yes, or shall we say 11 o'clock.

24 **MR BREALEY:** 11 o'clock. Thank you, Sir.

25 **MR JUSTICE MICHAEL GREEN:** All right. See you then.

26 **(Short break)**

1 **MR JUSTICE MICHAEL GREEN:** Good morning again. I think we have sorted out
2 or they have sorted out the live stream issues and we should be back live and
3 people being able to hear us.

4 **MR KENNELLY:** Sir, shall I go first since it is my application?

5 **MR JUSTICE MICHAEL GREEN:** Please do.

6 **MR KENNELLY:** I have taken instructions. We are content to go with the Tribunal's
7 suggestion and adjourn our application until after the provision of disclosure
8 by Sainsbury's, as we suggested, although we maintain our position that there
9 has not been compliance with paragraphs 11(b) and (c) of the order, it is
10 efficient to review their disclosure before coming back to the Tribunal,
11 because if, as Ms Murphy says, we will be given everything that we need, it
12 may be that their failure to comply with the order becomes less serious. So it
13 is plainly appropriate to review their disclosure before returning to you, but we
14 do reserve our rights, obviously, having reviewed their disclosure, to come
15 back and renew our application to seek any specific disclosure that we think
16 we need at that stage.

17 **MR JUSTICE MICHAEL GREEN:** Yes. Understood. I mean, the witness
18 statements were being provided not because we are at the stage of witness
19 statements being provided but in order to facilitate disclosure, and that's why it
20 does seem to me to make sense that disclosure issues or the compliance of
21 those witness statements with the order should be considered alongside
22 outstanding disclosure issues. So I understand that. I think that's sensible.

23 Mr Brealey, did you want to say anything about that?

24 **MR BREALEY:** No. We are on the same page. We do consider that items 4 and 5
25 in the Tribunal's agenda were linked, and once 5 went, it was sensible to
26 adjourn 4. We were only put on notice of the adjournment of item 5 of the

1 agenda on 5th July.

2 **MR JUSTICE MICHAEL GREEN:** Yes.

3 **MR BREALEY:** So that's the first point.

4 The second point is that we need to put down a firm marker, just with respect, and
5 this is the question of delay. We do not want to lose the trial timetable. We
6 consider that one of the reasons that Mr Justice Roth said you should come
7 and sort it out today on 9th July was that he did not want to see any delay on
8 the part of Visa. So we do not want to get to a situation where Visa leisurely
9 look at the disclosure and then in October/November come back and say
10 "There's all these gaps and we can't possibly deal with the trial timetable in
11 June of next year". That I think is why the President was keen to get on with
12 this.

13 So if it is going to be adjourned, I think Visa have got to understand that they cannot
14 be leisurely in looking at the disclosure, the substantial disclosure they have
15 had, and if they are going to come back, they have to come back very quickly.

16 **MR JUSTICE MICHAEL GREEN:** Understood. I mean, I think in fairness, as
17 I understand it, the order that was made was only actually drawn up at the
18 end of May, and this CMC was fixed I think before then, so before the actual
19 timetable for disclosure had been established, and indeed before the next
20 tranche is due. So the timing was perhaps a little unfortunate in that respect.

21 **MR BREALEY:** What we just say, so that you understand where we are coming
22 from, Visa have had substantial disclosure on these issues for several years.
23 Visa may deny it, but it is absolutely true. I don't know if one saw bundle H
24 this morning that we got last night from Linklaters --

25 **MR JUSTICE MICHAEL GREEN:** Yes.

26 **MR BREALEY:** -- enclosing the witness statement from the forensic expert for

1 Mastercard, Mr Harman. Mr Harman sets out Sainsbury's budgets, prices and
2 costs in some detail and it is frankly ridiculous for Visa to continue to say they
3 don't understand what's going on.

4 **MR JUSTICE MICHAEL GREEN:** Yes.

5 **MR BREALEY:** There was a forensic accountant six years ago in the Mastercard
6 trial, which looked at all the disclosure that Visa basically have had. Visa
7 have had access to Harman. They know exactly what's going on. We find it
8 very frustrating that they come back and say "We don't understand what's
9 going on". When we come to the application for two experts on pass on, I will
10 give you a flavour of this, Sir. It is important to bear in mind that this is not
11 new disclosure. They have had substantial disclosure for many, many years.

12 **MR JUSTICE MICHAEL GREEN:** Yes. All right.

13 **MR BREALEY:** So that's why I say they cannot be leisurely in looking at the last
14 tranche of disclosure.

15 **MR JUSTICE MICHAEL GREEN:** Yes. I certainly endorse what you say about
16 having to stick to that trial date, because these proceedings have been very
17 long running now, and it is very important that the trial date is maintained for
18 next year.

19 **MR BREALEY:** Thank you.

20 **MR JUSTICE MICHAEL GREEN:** So I certainly accept that. What are you
21 suggesting, that there ought to be another CMC when?

22 **MR BREALEY:** Well, we don't even know whether there needs to be one,
23 because --

24 **MR JUSTICE MICHAEL GREEN:** Right.

25 **MR BREALEY:** -- they are going to look at the disclosure, and we would say if they
26 look at the disclosure and actually read it, they will know exactly how

1 Sainsbury's prices and costs, but if one wants to pencil in a CMC --

2 **MR JUSTICE MICHAEL GREEN:** Well, I think it would make sense, wouldn't it, if
3 there are going to be applications in relation to disclosure and possibly the
4 adjourned application from today, that there should be a date in the diary
5 when those are going to be heard that ensures that the trial date is not going
6 to be threatened.

7 **MR BREALEY:** Maybe in September or ...

8 **MR JUSTICE MICHAEL GREEN:** Yes, or early October, or is that a problem?

9 **MR BREALEY:** Very early October, because there is the Sainsbury's v
10 Mastercard --

11 **MR JUSTICE MICHAEL GREEN:** The trial is taking place. What is the date of that
12 starting?

13 **MR BREALEY:** I think there is a reading week. I think we will get into gear on 18th
14 October. So if it was the first week of October --

15 **MR JUSTICE MICHAEL GREEN:** That engages the same team, does it, on the
16 Sainsbury's side?

17 **MR BREALEY:** It does. It is the same counsel, different solicitors.

18 **MR JUSTICE MICHAEL GREEN:** Right. Okay.

19 **MR BREALEY:** Mishcon de Reya are on the record for Sainsbury's in Mastercard
20 and Morgan Lewis are on the record in the --

21 **MR JUSTICE MICHAEL GREEN:** Okay. So Mr Kennelly, you would not oppose
22 having a date put in the diary for this adjourned application and any other
23 applications that you might want to make in relation to disclosure?

24 **MR KENNELLY:** Not at all, Sir. We think that's a good idea. Just to be clear, and
25 to respond, if I may, to the suggestion that we may act in a leisurely fashion,
26 obviously we refute that suggestion. I will deal with those suggestions when

1 we come back before you on the next CMC.

2 In relation to the timing of that, just to be clear, as you have seen from the evidence
3 and my skeleton, the purpose of this further disclosure is to inform the expert
4 analysis, and the expert evidence is due on 4th March 2022. So the expert
5 evidence is not due until March 2022. So this aspect of disclosure is not as
6 urgent as Mr Brealey might make out. For that reason, it is not necessary to
7 have the CMC in September or even October. It could be November. The
8 reason why I put it back that far, Sir, is because I don't want to be in the
9 position that we are in again, where things move so quickly that the parties
10 don't have time to reach a constructive position in advance of the hearing.

11 The disclosure we are promised is extremely substantial. Ms Murphy's statement
12 said that it would provide all the disclosure we need. It will answer all of our
13 concerns. It will need to be interrogated very carefully. August is obviously
14 a difficult month. We will need September as well. Then we will need to
15 engage in correspondence with Sainsbury's as to the gaps, and because of
16 the substantial nature of disclosure, that correspondence will be detailed, of
17 necessity, and the parties should properly seek to narrow the issues between
18 them in advance of coming before you.

19 So in view of the fact that disclosure is needed for expert evidence in March, 2022,
20 we think it would be more than sufficient to have the CMC in, say, early
21 November 2021.

22 **MR JUSTICE MICHAEL GREEN:** I think that's probably going to be right bang in
23 the middle of the trial, isn't it, the Mastercard trial?

24 **MR KENNELLY:** On that, first of all, plainly Visa is not involved in that. Secondly,
25 from the perspective of Sainsbury's, Sainsbury's is a very large and
26 experienced team. In the same way that Visa has had to accommodate

1 overlaps in unavailable counsel, Sainsbury's must do so also. No hearing so
2 far has been fixed for counsel's convenience. That's why we have big teams.
3 It is to accommodate these situations.

4 **MR JUSTICE MICHAEL GREEN:** When are witness statements due to be
5 exchanged?

6 **MR KENNELLY:** 17th September.

7 **MR JUSTICE MICHAEL GREEN:** Okay.

8 **MR KENNELLY:** This disclosure does not go to any of the factual evidence. Sorry.
9 A further point made to me by Mr Pobjoy of course is that another reason why
10 the CMC should not really be in September is because we will be extremely
11 busy dealing with factual witness statements in September.

12 I am just taking instructions.

13 The Mastercard hearing, I am told, that Mr Brealey is referring to is only a two week
14 hearing, beginning 18th October.

15 **MR BREALEY:** It is a four week hearing but with two weeks' reading, but it is a two
16 week hearing. I do not mind a November CMC, as long as Visa realise that
17 the trial date is set.

18 **MR KENNELLY:** There is no dispute about that. We are as anxious as Sainsbury's
19 is to get it to court.

20 **MR BREALEY:** If I put on record that Mr Kennelly says "no dispute about the trial
21 date", subject to your Lordship's direction, November is fine.

22 **MR JUSTICE MICHAEL GREEN:** Right. Good. Well, a remarkable measure of
23 agreement I think we have on that, and everyone is clear that the trial date is
24 going to stay as it is, next June or July, whenever it is, 2022. So we will look
25 for a suitable date in November then for a further CMC and to deal with all
26 and any outstanding disclosure issues so that that can all be sorted out in

1 good time for the exchange of expert reports next March.

2 All right. So that deals with the main issue I think before me. There are also some
3 comments about the scope of the expert evidence.

4 **MR BREALEY:** Yes. We have concerns about Visa adducing two experts on the
5 same issue of pass on.

6 **MR JUSTICE MICHAEL GREEN:** What was the order that was made by the
7 President in this respect? I am just trying to find where the order is.

8 **MR BREALEY:** C1.175.

9 **MR JUSTICE MICHAEL GREEN:** Yes, I have it. They were given permission to
10 rely on both experts, Mr Holt and Mr Ryan. So that has already been decided
11 by the President?

12 **MR BREALEY:** Yes and no. Shall I take you through our concerns first and then
13 Mr Kennelly can respond or ...

14 **MR JUSTICE MICHAEL GREEN:** Yes, I think so, because it is you that is objecting
15 to I think the scope of -- well, there may be some overlap between the two
16 experts.

17 **MR BREALEY:** Correct. So you have seen the order and Visa's skeleton at
18 paragraph 24.

19 **MR JUSTICE MICHAEL GREEN:** Yes.

20 **MR BREALEY:** At the March CMC Mr Justice Roth granted Visa permission to rely
21 on the expert evidence of Mr Holt in the field of economics and Daniel Ryan in
22 the field of forensic accountancy. That is the order that we see. It is a little bit
23 more nuanced than that. I think one has to go to the transcript and what the
24 President actually said to Visa. That's at C2,33.

25 **MR JUSTICE MICHAEL GREEN:** I find it quite difficult to follow the numbering in
26 this bundle. It does not follow chronologically in some places. C2?

1 **MR BREALEY:** Are you looking at the electronic or the hard copy?

2 **MR JUSTICE MICHAEL GREEN:** Electronic.

3 **MR BREALEY:** Oh. The only reference I have is the one C2,33, so Bundle C2.

4 **MR JUSTICE MICHAEL GREEN:** Is it C2? What is the bundle reference on the
5 left-hand side? Is it 8 point something? There's pages 112 to 122 of the
6 transcript. Is that the relevant one?

7 **MR BREALEY:** 209 of the transcript.

8 **MR JUSTICE MICHAEL GREEN:** So you want 209. Oh, here we go. Transcript.
9 209. That's the first page of the transcript, is it?

10 **MR BREALEY:** Yes.

11 **MR JUSTICE MICHAEL GREEN:** Okay. Yes.

12 **MR BREALEY:** The order has to be read in the light of what actually Visa was given
13 at the time.

14 **MR JUSTICE MICHAEL GREEN:** Okay.

15 **MR BREALEY:** If I can just take you through. It is only a few pages. We are at
16 C2,33 on the bottom at 209. Mr Justice Roth thanks us all for the skeletons
17 on line 18.

18 **MR JUSTICE MICHAEL GREEN:** Yes.

19 **MR BREALEY:** "I have had, I think, three. A supplemental one in response from
20 Sainsbury's. I think the first question is expert evidence and I see that
21 Sainsbury's has applied for permission to call and adduce expert evidence
22 from an economist, Mr Von Hinten-Reed, dealing with quantum and
23 compound interest, and Visa for Mr Derek Holt, also an economist. I will
24 authorise both of these gentlemen to give expert evidence on the basis, then,
25 that the directions about experts in the order made by the Tribunal on, I think
26 it was some time in January – well it was made on 16 December, drawn on 13

1 January. The order of 16 December 2020.

2 Visa, I think, also seeks" at C2, 34, "to adduce evidence on the tax point from

3 Mr Ryan, a forensic accountant."

4 So we have got Mr Holt, the economist, and we have Mr Ryan, the forensic

5 accountant. So Mr Ryan is like the Mr Harman in Mastercard.

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

7 "Von Hinten-Reed will deal with that as well."

8 So essentially we have got one expert dealing with everything.

9 **MR JUSTICE MICHAEL GREEN:** Who is an economics expert rather than

10 a forensic accountant?

11 **MR BREALEY:** Yes, but he deals a lot with company's accounts. He is an expert.

12 **MR JUSTICE MICHAEL GREEN:** And the impact of tax.

13 **MR BREALEY:** Correct.

14 So "Mr Von Hinten-Reed will deal with the tax position as well ... Any opposition to

15 Mr Ryan? "

16 "No."

17 I say "no", because Mr Ryan is the accountant on the tax point.

18 "The President: I will give Visa permission for Mr Ryan on accountancy evidence

19 regarding tax."

20 So that is actually at the time we will see the limit of the permission that Visa got.

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

22 Mr Von Hinten-Reed to consider the tax issues."

23 **MR JUSTICE MICHAEL GREEN:** Does it actually make sense for an expert to just

24 deal with tax? I mean it has to be contextualised really, hasn't it?

25 **MR BREALEY:** It can be contextualised, yes, but ... yes.

26 **MR JUSTICE MICHAEL GREEN:** That was obviously thought to be feasible

1 anyway by the President.

2 **MR BREALEY:** I apologise. I say at line 23: we need to know what are the
3 disciplines and the nature of the expert evidence because we were
4 concerned at this point about the type of evidence that's going to be used for
5 pass on. That's coming.

6 "Whether regression analysis is going to be used", and that's essentially the
7 modelling, "or whether the experts are going to use accountancy evidence.
8 I feel that would be beneficial to the Tribunal if the experts could at least liaise
9 between them as to how they are going to approach quantum and in particular
10 pass on."

11 The President says:

12 "That seems sensible. It was clear from what I read from Mr Holt that he is really just
13 at the initial stage of getting his teeth, if I can put it that way, into the material."

14 So being quite leisurely, in my submission:

15 "Correct.

16 "Mr Kennelly, does that seem sensible to you?

17 "Yes, a sensible idea."

18 Then Mr Kennelly goes on at 18:

19 "Just a further point, Sir, on permission, for which we are grateful, to adduce
20 evidence from Mr Ryan. It is not just on the question of tax. This forensic
21 accounting expert will be relied upon for quantum more generally."

22 I emphasise the words "quantum more generally".

23 "So it is not limited to the tax"

24 "The President: Yes. When you say 'quantum more generally', there are various
25 aspects of quantum. It would be helpful to know quite what actual issues he
26 is going to be dealing with and whether you are going to have a full forensic

1 accountant exercise, as is sometimes done, in parallel to regression analysis.
2 I think I would like to know that, and the Tribunal should know quite what
3 techniques will be used."

4 So he doesn't put anybody on the spot, but he orders the issues they intend to
5 address -- this is line 6 -- and the methods they intend to use so the Tribunal
6 consider that. Then at line 8.

7 **MR JUSTICE MICHAEL GREEN:** Right.

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

12 So Visa did not get permission to adduce expert evidence on the same issue of
13 pass on. That was something that would have to be considered at another
14 time. So although the order says permission for Holt and Ryan, one has to
15 look to see what actually the President was allowing Visa to do. That is why
16 we then get the short expert statements from Holt, Ryan and Von
17 Hinten-Reed as to the issues that they are going to cover.

18 **MR JUSTICE MICHAEL GREEN:** Yes.

19 **MR BREALEY:** It is important. Mr Justice Roth was not put on notice that they were
20 going to have two experts on pass on there, although I think he was aware
21 that that might be something, but we do now know that Visa wished to adduce
22 two experts on the pass on issue. I will show you the short statements in
23 a moment.

24 We also know it is going to be substantial duplication, Holt and Ryan trawling
25 through Sainsbury's accounts and financial planning. I need to show you how
26 Holt --

1 **MR JUSTICE MICHAEL GREEN:** If they are looking at it from a different
2 perspective, as I think they would be, wouldn't they?

3 **MR BREALEY:** Yes.

4 **MR JUSTICE MICHAEL GREEN:** One looking at more general economic theory
5 and the other looking actually at the nuts and bolts as to how Sainsbury's
6 actually did it, as it were. Is that fair?

7 **MR BREALEY:** It is fair. So the short answer to that is that is what Holt says. If
8 I can just --

9 **MR JUSTICE MICHAEL GREEN:** Yes. Okay.

10 **MR BREALEY:** So Holt 2 is at E23. That is how we understood it. It still doesn't
11 mean they will get permission for the two disciplines.

12 **MR JUSTICE MICHAEL GREEN:** No.

13 **MR BREALEY:** On the macro level, they say "I want to have two experts dealing
14 with the same issue". Let's see on the micro level, the analysis they are going
15 to go through, because it is too easy to say one is economic theory and the
16 other is forensic accountancy, as I will try and show you.

17 So Holt 2, this is the statement that Holt made in answer to the direction from the
18 President: "I want to know what you are doing and how you are going to do
19 it". Because basically, as Visa candidly say in their skeleton, Mr Justice Roth
20 wanted to avoid duplicative evidence. That's what they say at paragraph 24.

21 So if we see E24, which is paragraph 3. As suggested by paragraph 3:

22 "With a view to refining our respective reports for the benefits of the Tribunal during
23 the virtual discussion of the issues."

24 So he goes on:

25 "Mr Ryan's evidence is intended to address issues of taxation, interest and pass on.
26 Our respective evidence on the issue of pass on will be complementary, not

1 duplicative, drawing upon our different expertise. My evidence will address
2 matters of economic theory, while Mr Ryan will focus on evidence of
3 Sainsbury's financial performance, how it sets prices, deals with suppliers ..."

4 If I could ask you, Sir, to note that. This is what Ryan is dealing with:

5 "... how it sets prices, deals with suppliers. I expect to be able to take account of
6 Mr Ryan's findings and seek to complement his analysis with quantitative
7 techniques, with a view to estimating the extent of pass on, as appropriate."

8 Then, if one goes to section 4, again this is all with a view to showing the Tribunal
9 that there is no duplication. Essentially, that's why they consistently say there
10 is no duplication.

11 **MR JUSTICE MICHAEL GREEN:** Yes.

12 **MR BREALEY:** If one goes to E28, mitigation --

13 **MR JUSTICE MICHAEL GREEN:** What is that?

14 **MR BREALEY:** Section 4, paragraph 24. E28.

15 **MR JUSTICE MICHAEL GREEN:** What is E28?

16 **MR BREALEY:** That I understand is the electronic bundling.

17 **MR JUSTICE MICHAEL GREEN:** 762, I understand.

18 **MR BREALEY:** I clearly have not --

19 **MR JUSTICE MICHAEL GREEN:** E28, okay.

20 **MR BREALEY:** Section 4, mitigation of loss, that is basically pass on. That's how
21 the Supreme Court in the Sainsbury's case -- it is essentially pass on.
22 Paragraph 24 is quite important:

23 "My analysis in relation to the issue of pass on will be complementary to the analysis
24 undertaken by Mr Ryan. I understand from Mr Ryan's report that he proposes
25 to analyse Sainsbury's internal price setting and performance management
26 process."

1 So this is what Mr Ryan is doing, the forensic accountant.

2 Mr Ryan will deal with "Sainsbury's responses to various cost shocks and
3 Sainsbury's historic financial performance. Such analyses requires his
4 forensic accounting skills and fall outside of my expertise."

5 I have to question and we would have been making this submission on the
6 compliance with paragraph 11 --

7 **MR JUSTICE MICHAEL GREEN:** Yes.

8 **MR BREALY:** -- that Visa do not rely on any statement from Mr Ryan saying there
9 is deficiencies. They rely on Mr Holt to say there's deficiencies,
10 notwithstanding that all these matters, on his own admission, fall outside of
11 his expertise.

12 **MR JUSTICE MICHAEL GREEN:** Yes.

13 **MR BREALEY:** "My analysis, as set out below, will focus on the economic principles
14 of pass on, where appropriate draw upon Mr Ryan's analysis in my
15 quantitative modelling."

16 Then, over the page, one sees what Holt is doing. It is a long -- big page, but
17 paragraph 25, the last sentence of 25 (a):

18 "Where relevant, I will refer to findings that Mr Ryan may reach in the light of his
19 investigation of Sainsbury's practices regarding the setting and monitoring of
20 budgets, prices and supplier costs."

21 "(b) ... I will then seek to understand at a high level", so at a high level, "how
22 Sainsbury's sets its prices and how it negotiates contracts with suppliers.
23 I expect to rely primarily on Mr Ryan's description of these processes, as well
24 as industry expert knowledge." Then he can articulate the assumptions.

25 So that is how it was being sold to us and to the Tribunal, that Holt was not looking at
26 the internal practices of Sainsbury's. That was outside his expertise. He

1 would try to seek to understand it at a high level.

2 Ryan, which is on the next tab, essentially says the same thing. This is what he is
3 going to do. He is going to analyse what actually happened and he will
4 analyse Sainsbury's internal price setting and performance. That's essentially
5 what Mr Harman did, the forensic accountant.

6 The reason I am setting this out is -- you will appreciate by now, Sir, when you read
7 Holt 3, if we can quickly go to Holt 3 at C4.

8 **MR JUSTICE MICHAEL GREEN:** Yes. You are essentially saying how could he
9 have commented on the disclosure about what Sainsbury's is doing and the
10 witness statements as to compliance with paragraph 11, when he said he is
11 not an expert in that sort of thing.

12 **MR BREALEY:** Yes, and not only that. When one reads Holt 3, he says he is going
13 to go through all this material. C4, 146.

14 **MR JUSTICE MICHAEL GREEN:** One minute.

15 **MR BREALEY:** It is probably the last document I will refer to. I thought this was the
16 electronic version.

17 **MR JUSTICE MICHAEL GREEN:** 690.

18 **MR BREALEY:** So one looks at Holt 3. This is what he is now saying he wants and
19 wants to do. Holt 3 is completely, notwithstanding what Visa submits in its
20 skeleton, completely inconsistent with what he says in Holt 2.

21 So one just has to read the whole of Holt 3. He wants to understand this in almost
22 insane detail. Paragraph 2 (a):

23 "My understanding as to what the issues para 11 of the order ... why this material is
24 necessary both for my economic analysis of pass on and for the
25 complementary forensic accounting ..."

26 So he is saying that all the detail that he says he wants in this statement is

1 necessary both for his analysis and for Mr Ryan's analysis.

2 **MR JUSTICE MICHAEL GREEN:** What he said in his second report is that he
3 would rely on what Mr Ryan was saying to build on for the purposes of his
4 report.

5 **MR BREALEY:** Yes.

6 **MR JUSTICE MICHAEL GREEN:** So he is going to take that into account.

7 **MR BREALEY:** Yes. But when one reads paragraph 6:

8 "I need all this information to allow me to understand ..."

9 If one just reads -- I mean, this statement is littered with instances where he says he
10 wants a lot of detail, (6), so he can:

11 "... understand Sainsbury's internal processes in respect of setting prices and
12 supplier negotiations ... how a substantial change in MSCs would have
13 affected internal decision-making ..."

14 That is the forensic accounting exercise which he says is not within his expertise.

15 Paragraph 9:

16 "Gross margins not set in a vacuum."

17 **MR JUSTICE MICHAEL GREEN:** How does this actually cause you a problem?

18 Are you saying that if they have got two experts that you would also want
19 someone to sort of respond to Mr Ryan or what? You have been satisfied
20 that your expert can deal with essentially both aspects, whereas they are
21 saying: "We need two experts to deal with these two complementary sides to
22 the question of pass on."

23 **MR BREALEY:** It is duplication, as they say on the macro. So they are having two
24 experts on pass on, two different ways. But the way that we are undoubtedly
25 going to get two expert witness statements, and Holt in particular, by the looks
26 of it, is going to be analysing in extreme detail Sainsbury's internal

1 management.

2 **MR JUSTICE MICHAEL GREEN:** Well, I dare say you will be able to point out to
3 him in cross-examination that he said in his second report that he is not
4 actually an expert in that and therefore shouldn't be opining on it.

5 **MR BREALEY:** Yes.

6 **MR JUSTICE MICHAEL GREEN:** I am sure they will bear that in mind for the
7 purposes of preparing the actual reports for the trial. I would hope that they
8 would confine their reports to what they are actually experts in and what they
9 have said they are experts in, but apart from it taking a little bit more time in
10 terms of having to cross-examine two experts on the question of pass on, it
11 doesn't seem to me that there is much prejudice to your side in they being
12 allowed to deal with the question of pass on in this way.

13 **MR BREALEY:** It is one of those instances where you need the reaction. If you, Sir,
14 are saying two disciplines on the same issue, you know, I take that, but
15 I would also submit to you that Visa and Mr Holt certainly until you just made
16 that statement, you would hope they would understand -- certainly when one
17 reads the third expert of Mr Holt --

18 **MR JUSTICE MICHAEL GREEN:** Yes.

19 **MR BREALEY:** -- neither he nor Visa have properly understood, because he is
20 saying this is what he wants.

21 **MR JUSTICE MICHAEL GREEN:** Yes, I see that.

22 **MR BREALEY:** You can't have it both ways.

23 **MR JUSTICE MICHAEL GREEN:** That, if I may say, is a very good forensic point.
24 There is, I agree, on the face of it, some inconsistency in what Mr Holt is
25 saying, and I think the problem has probably arisen as a result of Visa
26 deciding to use Mr Holt for the purposes of their application in relation to

1 paragraph 11, whereas, based on what they said before, it probably should
2 have come from Mr Ryan.

3 **MR BREALEY:** Yes, but it didn't. It has come from -- and that's one of the points
4 we were going to make on the alleged non-compliance. The whole basis for
5 the application was made on the back of someone who says he does not
6 have the expertise.

7 **MR JUSTICE MICHAEL GREEN:** There is quite a lot of overlap between these two
8 forms of expertise, isn't there? I mean, they are both essentially economists.

9 **MR BREALEY:** One is an accountant and one is an economist. One is expert in
10 economic theory. That is what he said he was going to do. Economic theory,
11 which means "I am looking at the state of the market".

12 **MR JUSTICE MICHAEL GREEN:** What is your chap an expert in, if he is covering
13 all the necessary fields?

14 **MR BREALEY:** Mr Von Hinten-Reed -- this is why I raised the point with
15 Mr Justice Roth right at the beginning, because it can be prejudicial and
16 unnecessary duplication if you just have various experts dealing with one
17 issue in different ways. In other words, should you be allowed to have
18 an expert with a regression model on pass on and a forensic accountant on
19 pass on?

20 **MR JUSTICE MICHAEL GREEN:** It is not unusual. I mean, I did a case at the bar
21 concerning transfer pricing, quite a big case on tax, where the experts were --
22 we had a forensic accountant and an economist, and both were dealing with
23 essentially the same issues, but from very different perspectives.

24 **MR BREALEY:** Yes. All I am trying to impress, when one reads Holt 3, it seems to
25 be that they are not coming at it from that much of a different perspective.

26 **MR JUSTICE MICHAEL GREEN:** Yes.

1 **MR BREALEY:** That was our concern. But if Visa are going to take on board that
2 what is in Holt 3 he has already basically said is not within his expertise, then
3 maybe we can leave it there and Visa can reflect on the nature of Holt's
4 evidence.

5 **MR JUSTICE MICHAEL GREEN:** I think the main point is that they need to only
6 give evidence that is within their expertise.

7 **MR BREALEY:** Right. Correct.

8 **MR JUSTICE MICHAEL GREEN:** I am sure they have heard what you have to say
9 about that and will ensure that their reports do stick to their own expertise.
10 But on the broader point about whether there is actually duplication, it does
11 seem to me that if their areas of expertise are confined in the way they
12 suggest, that there is some sense in approaching this issue of pass on from
13 those two different perspectives.

14 **MR BREALEY:** That I understand. It is just when we read Holt 2 and then we read
15 Holt 3, there seemed to be a serious disconnect.

16 **MR JUSTICE MICHAEL GREEN:** No, I can absolutely see that. I don't know
17 whether Mr Kennelly has an explanation for that, but I saw that point in
18 considering the main issue that was before us, and wondering why it was
19 Mr Holt that was providing the evidence as to what evidence he requires to
20 complete his expert report when, on the face of it, it would look like he
21 wouldn't need that sort of evidence for his expert report --

22 **MR BREALEY:** Correct.

23 **MR JUSTICE MICHAEL GREEN:** -- but Mr Ryan might.

24 **MR BREALEY:** Yes. Sir, you have my submissions on that.

25 **MR JUSTICE MICHAEL GREEN:** Yes. Thank you very much.

26 Mr Kennelly, what do you say?

1 **MR KENNELLY:** Ultimately, although it had to be dragged out of Mr Brealey, I think,
2 with all the various warnings and markings, he is not objecting to us having
3 Mr Holt and Mr Ryan on this issue.

4 Just to be very clear, Sir, the reason why Mr Holt spoke to these issues in Holt 3 was
5 because we didn't have permission to put in evidence from Mr Ryan on this
6 question of what was needed for pass on. That's the very point Mr Brealey
7 made to you in opening on this point. When Mr Holt spoke in Holt 3, he was
8 speaking to what he needed but also to what Mr Ryan needed.

9 Just to be very clear, when Mr Holt was speaking about what he required for his
10 econometric analysis, econometric analysis is not simply a question of pure
11 economic theory, as Mr Brealey might suggest. Econometric analysis, which
12 is within Mr Holt's area of expertise, requires the application of statistical
13 techniques to data, and Mr Holt needs data, that's hard data, in order to run
14 his modelling exercises.

15 What Mr Ryan is doing is complementary, but different. Mr Ryan is analysing, Sir, as
16 you said, as a forensic accountant how Sainsbury's actually handle these
17 costs in its business, something which Mr Ryan can understand and quite
18 frankly Mr Holt is not qualified to assess, but both Mr Ryan and Mr Holt need
19 the data, the data that's going to be produced in the disclosure, and Mr Holt --

20 **MR JUSTICE MICHAEL GREEN:** Yes. Why do you say that there was no
21 permission for Mr Ryan to have given the evidence that Mr Holt gave in his
22 third report?

23 **MR KENNELLY:** Because we understood that the evidence that needed to be given
24 in Holt 3 went to the question of pass on, and, as Mr Brealey said to you at
25 the beginning of this issue, it wasn't clear from the order that Mr Justice Roth
26 gave that Mr Ryan had permission to speak to pass on issues.

1 **MR JUSTICE MICHAEL GREEN:** I see.

2 **MR KENNELLY:** The President was quite careful as to circumscribe Mr Ryan's
3 permission at that stage. So we were concerned that if we put in something
4 from Mr Ryan, we might be accused of lacking permission to do so, which is
5 why --

6 **MR JUSTICE MICHAEL GREEN:** So you are accepting that was still an open
7 question as to the extent of what Mr Ryan could give expert evidence on in
8 these proceedings?

9 **MR KENNELLY:** Indeed.

10 **MR JUSTICE MICHAEL GREEN:** So that is probably a matter before me actually
11 today, left open by the President.

12 **MR KENNELLY:** Indeed, and he left it open because he was concerned about the
13 risk of duplication, but as the President said himself, and just to repeat what
14 Mr Brealey quoted to you, he wanted to know:

15 "... whether Visa was going to have a full forensic accountancy exercise, as is
16 sometimes done in parallel to a regression analysis."

17 So the President was acknowledging, just as you have, Sir, in relation to your
18 transfer pricing case, that sometimes there is a forensic accounting exercise
19 in parallel to the regression analysis.

20 That's precisely what we are proposing to do here, bearing in mind all the while that
21 there should be no duplication between them. That is the basis on which
22 permission is sought, and it would be foolish for us to put forward Mr Holt on
23 questions of forensic accountancy since he says himself in terms he is not
24 a forensic accountant. He is not qualified to speak to these issues and so --

25 **MR JUSTICE MICHAEL GREEN:** So when Mr Holt says in his third report that he
26 needs this evidence for the purposes of his report, what he is really saying is

1 that "Mr Ryan needs this evidence for the purposes of his report and I will
2 then rely upon what Mr Ryan says in his analysis of the raw data for the
3 purposes of my economic analysis".

4 **MR KENNELLY:** In part, Sir. He will also need the raw data for his econometric
5 modelling. So some of the raw data that will come out of the disclosure that
6 we are seeking will be fed into his econometric model.

7 Again, the point I was trying to complete before, Sir, is Mr Ryan looks at how
8 Sainsbury's did things. To simplify it a bit, Mr Ryan will look at how
9 Sainsbury's did things in detail in the past. Mr Holt is building a counterfactual
10 model. What would have happened had the costs been reduced? Had the
11 MIFs been reduced in the counterfactual, what would have happened? He
12 does that not by reference necessarily to what happened to the actual MIFs at
13 the time, but by reference to how other costs were treated, the intensity of
14 competition in the market and other factors which he will build into his model.

15 **MR JUSTICE MICHAEL GREEN:** So Mr Ryan will not be opining on the
16 counterfactual?

17 **MR KENNELLY:** No, Mr Ryan will not be speaking to what Sainsbury's would have
18 done had the MIFs been reduced. Yes, that is correct.

19 **MR JUSTICE MICHAEL GREEN:** I follow.

20 **MR KENNELLY:** They complement each other and should assist the Tribunal.

21 **MR JUSTICE MICHAEL GREEN:** I understand that. I think the confusion --
22 I understand Mr Brealey's confusion by the third expert report of Mr Holt,
23 because it did rather look as though he was straying outside what he said was
24 his area of expertise from what he said in his second report, but I think that
25 explains it, and I think, as you said, Mr Brealey now accepts that it's
26 appropriate, so long as they are confined to their expertise, that they should

1 both be able to deal in their experts' reports with the question of pass on, and
2 from the way that you have described it, Mr Kennelly, it looks like Mr Ryan will
3 be looking at how Sainsbury's, if it did, passed on the cost to its customers in
4 the past whereas Mr Holt will be looking at what would have happened had
5 the MIFs been reduced and how Sainsbury's would have reacted to that.

6 **MR KENNELLY:** In broad terms, Sir, yes.

7 **MR JUSTICE MICHAEL GREEN:** Very broad terms.

8 **MR KENNELLY:** Sir, just to reassure Mr Brealey and perhaps the Tribunal, and
9 there is no need to read these now, Sir, if you have made your mind up, but
10 Mr Holt addressed this issue at paragraphs 14 and 16 of his third report. The
11 points that I made to you orally I have actually taken from paragraphs 14 and
12 16 of his third report, which hopefully explains the extent to which he in his
13 own right will need access to the data that will come from the disclosure in
14 addition to Mr Ryan's need for it for his forensic accountancy exercise. I don't
15 want to waste the Tribunal's time. There is no need to read it.

16 **MR JUSTICE MICHAEL GREEN:** I did actually read his third report anyway
17 beforehand. I think it was on the reading list. So that makes sense.

18 All right. So I think as a result -- did you want to say anything else, Mr Brealey?

19 **MR BREALEY:** No, Sir.

20 **MR JUSTICE MICHAEL GREEN:** So, yes, it should be made clear then that
21 Mr Ryan is, therefore, able to deal with pass on as well in his report, and that
22 both experts should obviously confine their experts' reports to their own
23 expertise, and hopefully in the end that will -- their reports will prove to be
24 complementary and feed off each other as necessary.

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

26 **MR JUSTICE MICHAEL GREEN:** So that's the position on expert evidence. What

1 about factual evidence? Do we need to say anything -- do I need to do
2 anything about the factual evidence which is raised I think in the agenda?

3 **MR KENNELLY:** No, Sir.

4 **MR JUSTICE MICHAEL GREEN:** Right. I think there was a concern from
5 Mr Brealey that they couldn't really understand why you needed eight to ten
6 factual witnesses, but I think you will just have to wait and see what does
7 actually emerge.

8 **MR KENNELLY:** Indeed. You know, we are aware of the deadline as much as
9 Sainsbury's and we will let the Tribunal and Sainsbury's know as soon as we
10 have our final list of witnesses.

11 **MR JUSTICE MICHAEL GREEN:** Yes.

12 **MR KENNELLY:** We need to review their disclosure first. That will certainly help us
13 decide who we are going to put forward.

14 **MR JUSTICE MICHAEL GREEN:** Okay. All right then. So I think that's all
15 outstanding issues, unless anybody wants to raise anything else.

16 **MR KENNELLY:** Nothing from our side, Sir.

17 **MR BREALEY:** No, Sir, no.

18 **MR JUSTICE MICHAEL GREEN:** Thank you very much. So I think what comes out
19 of this is that we need to arrange a CMC at a convenient time in November to
20 resolve all outstanding issues, in particular disclosure, that need to be
21 resolved.

22 **MR BREALEY:** Maybe we should reserve the question of costs until that CMC,
23 because we do feel that, when Visa abandoned item 5 for the purposes of
24 today, item 4 fell away as well.

25 **MR KENNELLY:** Sir, I am happy with that but for my own reasons, because we
26 have concerns also about whether this hearing should have taken place at all.

1 We suggested it should not take place. It was premature. Sainsbury's
2 insisted that it take place. We will have submissions about that in due course.

3 So I have no objection to costs reserved.

4 **MR JUSTICE MICHAEL GREEN:** I will reserve the costs then.

5 All right. Well, thank you very much.

6 **MR BREALEY:** Thank you. Have a good week-end.

7 **MR JUSTICE MICHAEL GREEN:** Yes, and you too, and I will probably see you in
8 November, if not before. All right. Thank you very much. Thank you.

9 **(11.53 am)**

10 **(Hearing adjourned)**

11

12

13