Neutral Citation Number: [2018] EWCA 1536 (Civ)

Case Nos: C3/2016/4250, A3/2017/0889, A3/2017/0888, A3/2017/0890 and A3/2017/3493

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL

AND ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE BARLING, PROFESSOR BEATH OBE, AND MR MARCUS SMITH QC
THE HONOURABLE MR JUSTICE POPPLEWELL
THE HONOURABLE MR JUSTICE PHILLIPS
Claim Nos: 1241/5/7/15(T), CL-2012-000299, CL-2012-000767, CL-2012-000959 and CL-2015-000471

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2018

Before:

SIR TERENCE ETHERTON, MASTER OF THE ROLLS
SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE FLAUX

BETWEEN:

SAINSBURY'S SUPERMARKETS LIMITED

Claimant/Respondent

-and-

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA (formerly known as MasterCard Europe SPRL)

Defendants/Respondents

AND BETWEEN:

(1) ASDA STORES LIMITED
(2) ~~ARCADIA GROUP BRANDS LIMITED and others~~
(3) ARGOS LIMITED and others

(4) WM MORRISON SUPERMARKETS PLC

Claimants/Appellants

- and –

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA (formerly known as MASTERCARD EUROPE SPRL)
(4) MASTERCARD/EUROPAY UK LIMITED

Defendants/Respondents

AND BETWEEN:

SAINSBURY'S SUPERMARKETS LIMITED

Claimant/Appellant

- and -

(1) VISA EUROPE SERVICES LLC
(2) VISA EUROPE LTD
(3) VISA UK LTD
(Together "Visa")

Defendants/Respondents

AND:

THE EUROPEAN COMMISSION

Intervener

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Mr Mark Brealey QC, Mr Derek Spitz and Ms Sarah Love (instructed by Morgan, Lewis & Bockius UK LLP and Mishcon de Reya LLP) for the respondent, **Sainsbury's**, in Sainsbury's v MasterCard (CAT), and for the appellant in Sainsbury's v Visa (Phillips J)

Mr Jon Turner QC, Mr Meredith Pickford QC, Mr Christopher Brown and Mr Max Schaeffer (instructed by Stewarts Law LLP) for Asda, Argos and Morrisons (the **AAM parties**) in AAM v MasterCard (Popplewell J)

Mr Mark Hoskins QC, Mr Matthew Cook and Mr Hugo Leith (instructed by Jones Day) for the **MasterCard** appellants in Sainsbury's v MasterCard (CAT), and for the MasterCard respondents in AAM v MasterCard (Popplewell J)

Ms Dinah Rose QC, Mr Daniel Piccinin and Mr Jason Pobjoy (instructed by Milbank, Tweed, Hadley & McCloy LLP and Linklaters LLP) for the **Visa** respondents in Sainsbury's v Visa (Phillips J)

Mr Nicholas Khan QC and Ms Ronit Kreisberger (instructed by the European Commission) for the **European Commission**

Hearing dates: 16-20, and 23- 27 April and 2 July 2018

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PRESS SUMMARY

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This press summary has been prepared to assist the reporting of the judgment. It is not, however, to be regarded as definitive. Only the judgment itself can be relied upon as reflecting the opinion of the court.

Introduction

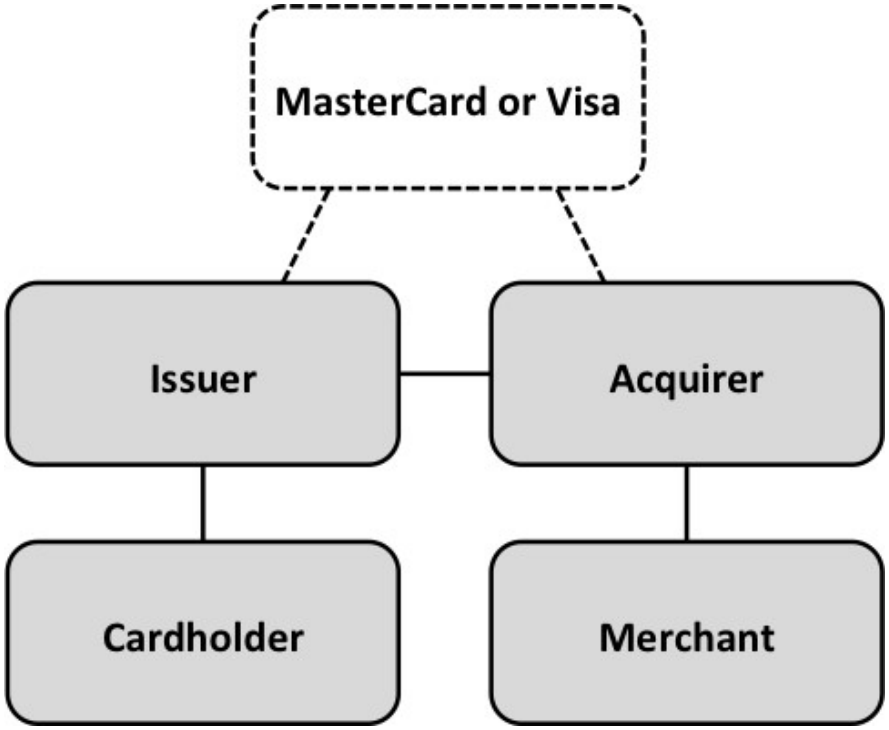
1. The Court of Appeal (Sir Terence Etherton, Master of the Rolls, Sir Geoffrey Vos, Chancellor of the High Court, and Lord Justice Flaux) has handed down its judgment in these 3 appeals today. The central question in each appeal is was whether the setting of default multilateral interchange fees ("MIFs") within the MasterCard and Visa payment card systems was an unlawful restriction of competition infringing article 101 of the Treaty on the Functioning of the European Union 2012/C326/01 ("article 101").

2. Article 101(1) provides that agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited as incompatible with the internal market of the European Union. Section 2 of the Competition Act 1998 makes the same provision in relation to agreements which may affect trade within the United Kingdom, and which prevent, restrict or distort competition within the United Kingdom.

3. Two of the appeals were brought from the Commercial Court, and one from the Competition Appeal Tribunal (the "CAT"). The CAT decided in *Sainsbury's v MasterCard* that the MIFs charged within the MasterCard payment system were prohibited anti-competitive agreements, whilst the two Commercial Court judges decided, for different reasons, in each of *AAM v MasterCard* and *Sainsbury's v Visa* that the MIFs charged were not prohibited anti-competitive agreements.

4. The Court of Appeal had to resolve the considerable differences of approach between the three decisions under appeal.

5. Both the MasterCard and the Visa payment card schemes are known as four-party schemes, though there is in each case a fifth party, namely the scheme operator itself. The schemes can be represented by the following diagram:



6. The essentials of the four-party payment card scheme are that:

   i) The cardholders contract with issuers (which are mostly banks) as to the terms on which they may use the card issued to them to buy goods from merchants.

   ii) The issuers contract with acquirers (which are also mostly banks) to settle the transactions by which cardholders "buy" goods or services from merchants using a payment card.

   iii) The scheme rules provide that the issuer will pay the acquirer the value of the cardholder's transaction, (normally) minus the interchange fee due under the terms of the scheme.

   iv) The acquirers contract with the merchant on the basis that they will pay the merchant the value of the cardholder's transaction minus a merchants' service charge that normally includes (i) the interchange fee, (ii) the scheme fee payable by the acquirer to the scheme, and (iii) an acquirer's margin.

7. These appeals are not concerned with three-party payment card schemes such as that operated in the UK by American Express and Diners Club.

The issues

8. The court resolved the following main issues:

   i) **The article 101(1) issue:** Do the schemes' rules setting default MIFs restrict competition under article 101(1) in the acquiring market?

   ii) **The ancillary restraint death spiral issue:** Should the schemes' argument that the setting of a default MIF is objectively necessary for their survival be considered on the basis of an assumption that a rival scheme would be able to continue to impose (unlawful) MIFs? This is called the "death spiral" because if a rival scheme can continue to set high MIFs, the challenged scheme would

"die" because business would be lost to the rival scheme in which issuers receive high MIFs and cardholders received benefits as a result.

iii) **The article 101(3) exemption issue:** If the setting of default MIFs infringes article 101(1), should it have been held that the four conditions required for the application of the exemption in article 101(3) were applicable in these cases, and if so at what level(s) were the MIFs exemptible?

iv) **The quantum issue:** Should any damages to which the merchants are entitled be reduced or eliminated because they passed all or part of the MIFs on to their customers either in the form of higher prices than the merchants would otherwise have charged or in some other way?

v) **The disposition issue:** How should the court dispose of each of the cases in the light of its decisions on the other issues?

The Court of Appeal's conclusions

9. The Court of Appeal decided that the CAT in *Sainsbury's v MasterCard* and Popplewell J in *AAM v MasterCard* had been right to say that the rules of the MasterCard scheme providing for a default MIF in the absence of bilaterally agreed interchange fees infringed article 101(1). Phillips J had been wrong in *Sainsbury's v Visa* to reach the contrary conclusion in relation to the Visa scheme.

10. Popplewell J had, however, been wrong in *AAM v MasterCard* to conclude that the possibility of a "death spiral" should be considered in relation to article 101(1) and in relation to whether the default MIFs were objectively necessary for the survival of a 4-party card scheme. Phillips J had been right in *Sainsbury's v Visa* on this point.

11. The CAT had been wrong in *Sainsbury's v. Mastercard* to decide that the validity of the default MIF restriction was to be considered on the basis that, in its absence, issuers and acquirers would agree bilateral interchange fees on a case by case basis. The Court of Appeal held that the correct approach was to compare the default MIFs with a situation in which there would be no MIFs and a rule that transactions would be settled at par.

12. The Court of Appeal decided that it was, on the main article 101(1) issue, bound to follow the decision of the Court of Justice of the European Union of 24 May 2012 in the Commission's case against *MasterCard*.

13. Popplewell J's approach to the article 101(3) exemption issue had been wrong in *AAM v MasterCard*. He ought to have concluded that MasterCard had failed to satisfy the first "benefits" condition of article 101(3), namely that the restrictive agreement must contribute to improving the production of goods or to promoting technical or economic progress.

14. Phillips J had also been wrong in his second judgment in *Sainsbury's v Visa* on the article 101(3) exemption issue, because he overlooked or ignored important factual and empirical evidence which was before him.

15. On the quantum issue, the Court of Appeal held, in agreement with Phillips J and disagreement with Popplewell J, that the merchants do not bear the burden of proving the lawful level of MIF. The correct analysis is to apply articles 101(1) and (3) in

order to determine whether or not the default MIF, as charged, is in whole or in part unlawful, and then to assess damages on the unlawful amount. The CAT was right not to have reduced Sainsbury's damages for 'pass-on'.

The disposal of the appeals

16. The Court of Appeal, therefore, decided to allow the merchants' appeals on the article 101(1) issue. The court will make appropriate declarations in each of the three cases to the effect that the agreements are restrictive of competition infringing article 101(1).

17. The Court of Appeal decided to remit all three cases for reconsideration of the article 101(3) exemption issue and for the assessment of the quantum of the claims. It decided that all three claims should be sent back to the CAT, rather than to the Commercial Court, since the CAT is a specialist tribunal expert in competition matters. The cases will all be remitted to the same CAT with a High Court Judge as chair to be reconsidered on the article 101(3) and quantum issues, not for retrials. The CAT will not hear new evidence (save in respect of quantum in *Sainsbury's v Visa* and *AAM v MasterCard*) but, in order to ensure consistency and avoid arbitrary results, the parties in each case will be able to rely on generic evidence from the other two cases that was equally applicable to both the schemes and to all merchants.