Neutral citation: [2006] CAT 15

Case No: 1054/1/1/05
1055/1/1/05
1056/1/1/05

IN THE COMPETITION APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

28 July 2006

Before:

Sir Christopher Bellamy (President)

Dr. Arthur Pryor CB

Mr. David Summers

Sitting as a Tribunal in England and Wales

BETWEEN:

MASTERCARD UK MEMBERS FORUM LIMITED

-and-

MASTERCARD INTERNATIONAL INCORPORATED AND MASTERCARD EUROPE SPRL

-and-

ROYAL BANK OF SCOTLAND GROUP

Appellants

-supported by-

VISA EUROPE LIMITED AND VISA UK LIMITED

Interveners

-and-

OFFICE OF FAIR TRADING

Respondent

-supported by-

THE BRITISH RETAIL CONSORTIUM

Intervener

JUDGMENT ON COSTS

Mr. Nicholas Green QC (instructed by Lovells) appeared for the First Appellant, MasterCard UK Members Forum.

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Jones Day) appeared for the Second Appellant, MasterCard International Incorporated and MasterCard Europe Sprl.

Mr. Christopher Carr QC (instructed by Ashurst) appeared for the Third Appellant, Royal Bank of Scotland Group.

Sir Jeremy Lever QC, Mr. Jon Turner, Mr. Meredith Pickford and Mr. Josh Holmes (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Mr. Stephen Morris QC, Ms. Kelyn Bacon and Ms. Anneli Howard (instructed by Freshfields Bruckhaus Deringer) appeared for the First Intervener, Visa (Europe) Limited and Visa (UK) Limited.

Mr. Aidan Robertson (instructed by Dechert LLP) appeared for the Second Intervener, British Retail Consortium.

Background

1. This judgment deals with applications for costs arising from the decision of the respondent, the OFT, to seek to withdraw its decision of 6 September 2005 *Investigation of the multilateral interchange fees provided for in the UK Domestic Rules of MasterCard UK Members Forum Ltd* ("the Decision"), the subject of these proceedings. We set aside the Decision on 19 June 2006, and gave our reasons by judgment dated 10 July 2006: see [2006] CAT 14.

2. The background to this matter up to 9 May 2006 is summarised in the Tribunal's Order of that date: [2006] CAT 10. The period between 9 May 2006 and 19 June 2006 is summarised in our judgment of 10 July 2006 referred to above.

3. Briefly, in the Decision the OFT found that between 1 March 2000 and 18 November 2004 the fallback domestic "interchange fee" agreed between the banks in the United Kingdom participating in the MasterCard credit card scheme infringed Article 81(1) of the EC Treaty and the Chapter I prohibition imposed by section 2 of the Competition Act 1998 ("the Act"), and did not qualify for exemption from those provisions under Article 81(3) of the Treaty or section 9 of that Act. Under the MasterCard and Visa credit card schemes the interchange fee is paid by the acquiring bank (i.e. the bank which deals with the retailer) to the issuing bank (i.e. the bank which issued the card to the cardholder). The retailer pays the acquiring bank a merchant service charge ("MSC"). The Decision found that the interchange fee at issue operated as "a significant and common price floor" for the MSCs (see e.g. paragraph 203).

4. As summarised in paragraphs 10 and 11 of the Decision, the OFT's analysis was that the facts gave rise to two separate restrictions or distortions of competition, namely (i) "the collective price restriction" (which was said to arise from the fact that the interchange fee, known as "the MIF", was agreed multilaterally between the banks) and (ii) "the extraneous costs restriction" (which was said to arise from the fact that, according to the OFT, the MIF exceeded payment transmission costs and contributed to other costs, such as the costs of the interest-free period, which, it was said, should not be borne by retailers). In the Decision the OFT accepted that the arrangements for the

MIF were capable of improving production or distribution or promoting technical or economic progress (the first condition of Article 81(3)/section 9(1)), and that the arrangements did not eliminate competition in respect of a substantial part of the products concerned (the fourth condition of Article 81(3)/section 9(1)). However, the OFT considered that the arrangements were not indispensable, and did not give consumers a fair share of the resulting benefit, within the meaning of the second and third conditions of exemption under Article 81(3)/section 9(1), since the MIF was used to recover from retailers what the OFT considered to be 'extraneous costs' (such as the costs of interest-free period) over and above payment transmission costs.

5. The reason the period of infringement found in the Decision is limited to 18 November 2004 is that, with effect from that date, a change was made to the MasterCard scheme, the details of which are not entirely clear but the effect of which was, apparently, to transfer responsibility for setting the default interchange fee from the members of MasterCard UK Members Forum Ltd. ("MMF") (who comprise most of the banks in the United Kingdom) to the officers of MasterCard International Inc ("MCI"). MCI, a Delaware corporation, is the principal operating subsidiary of the MasterCard organisation, owns the MasterCard trademarks and licenses them worldwide to financial institutions participating in the MasterCard scheme. It is contended by MCI that that change, of which the OFT was apparently informed in a letter from MCI of 28 October 2004, has the effect of removing the "collectively agreed" element from the United Kingdom domestic interchange fee.

6. The findings and reasons set out in the Decision were strongly contested by the appellants in this case, that is to say MMF (i.e. the United Kingdom banks which are members of the MasterCard organisation), The Royal Bank of Scotland (which is the largest issuer of MasterCard credit cards in the United Kingdom and has lodged its own appeal while also supporting MMF's appeal) MCI (the international MasterCard organisation) and MasterCard Europe SPRL ("MCE"), which is a subsidiary of MCI and responsible for MasterCard's European operations. MCI and MCE, which we refer to together as "MCI", are jointly represented, while MMF and the Royal Bank of Scotland are separately represented.

7. The Decision was also strongly contested by Visa Europe Limited and Visa UK Limited ("Visa") who have been given leave to intervene in these proceedings. Visa also relies on a decision by the European Commission, *Visa International Multilateral Interchange fee* OJ 2002 L318/17 which, following certain modifications to the Visa scheme, grants an exemption under Article 81(3) in respect of the international (but not domestic) interchange fee arrangements applicable to the Visa system. The OFT is supported in these proceedings by the British Retail Consortium ("BRC"), which has also been given leave to intervene in this case.

8. The appeals were lodged variously between 2 November and 7 November 2005, and the first case management conference was held on 9 December 2005. On that occasion the Tribunal extended the OFT's time for defence by over two months, to 28 February 2006.

9. On 2 February 2006 the OFT issued a press release to the effect that it had opened an investigation into the new MasterCard arrangements, referred to above, which had come into effect on 18 November 2004. However, the OFT did not expect that investigation to progress beyond the preliminary stage before the determination of these appeals since the latter were "likely to have a substantial, and potentially decisive, impact on the new investigation which has now been launched".

10. We understand that on 19 October 2005, i.e. just before the Decision was taken, the OFT had also issued a statement of objections against Visa, along substantially the same lines as the Decision appealed against. On 2 December 2005, the OFT agreed with Visa not to proceed with that statement of objections pending the outcome of these appeals.

11. At a hearing on 31 January 2006 to consider an application by the British Retail Consortium for disclosure, the Tribunal made the following remark (transcript, p 12):

> "we would like to take this opportunity to raise a more general concern we have about the management of this case and in particular the cost, which is a matter that has already been drawn to our attention in the course of argument this morning. Despite the fact that these Appeals are consolidated, we seem, in effect, to still have three Appeals on foot. The experience of handling this particular application suggests that the relevant

> work is still being tripled with enormous expenditure of cost and time on behalf of the parties and indeed on behalf of the Tribunal. Simply to organise a hearing today with so many parties, all with slightly different, but not fundamentally different, points of view does take an enormous amount of time and effort and cost. We, therefore, propose at the next case management conference to give further consideration to how this case can be managed and organised from the point of view of costs, and indeed, perhaps in a provisional way, as to what our attitude should be to costs in a case such as the present."

12. To complete the procedural background, we understand that in 2003 the European Commission issued a statement of objections against MCI in respect of MasterCard's international (rather than domestic) interchange fee arrangements in the European Community. The issue by the Commission of a supplementary statement of objections in those proceedings was said during the hearing of this matter to be "imminent". We understand from press reports that such a second statement of objections was in fact issued on or about 23 June 2006, only four days after the hearing of this matter on the question of whether the Decision should be set aside. On 9 February 2006 the European Commission had informed the Tribunal that it did not wish to submit observations in this case under Article 15 of Regulation (EC) 1/2003. Apart from the OFT, certain other national competition authorities also appear to be interested in the MasterCard and Visa domestic interchange arrangements.

The OFT's defence and subsequent events

13. These appeals proceeded normally until the lodging of the OFT's defence on 28 February 2006. It was apparent from the defence, and conceded by the OFT at the subsequent case management conference of 31 March 2006, that in important respects the route by which the OFT reached the conclusion in the defence that the domestic interchange arrangements in the MasterCard scheme infringed Article 81(1)/section 2, and did not qualify for exemption under Article 81(3)/section 9, was different from the route by which the OFT had reached that conclusion in the Decision. A number of the changes are summarised at paragraph 12 of the Tribunal's Order of 9 May 2006, but for present purposes it is sufficient to mention four of the main changes: (a) the abandonment of the 'counterfactual' that the MasterCard scheme could operate on the basis of bilateral agreements between banks with arbitration as a fallback; (b) the

suggestion of a new 'counterfactual' to the effect that the MasterCard banks could deal with each other 'at par' (in effect a zero interchange fee) as suggested in new expert evidence prepared by Professor Carlton and Dr. Frankel of Lexecon in Chicago; (c) the withdrawal of the OFT's position in the Decision to the effect that the MasterCard arrangements met the first condition for exemption under Article 81(3)/section 9 (improving distribution etc.); and (d) the contention that payment transmission costs should be measured by reference to those of the Maestro debit card scheme. The OFT also stated, in the defence, that the Decision was "indicative rather than dispositive" and that its findings in the Decision on Article 81(3)/section 9 had been "obiter".

14. At the case management conference of 31 March 2006 the Tribunal raised, among other things, the procedural consequences for the appeals of those changes in the defence; the position of Visa, in respect of whose arrangements there had so far been no administrative procedure; and whether, in any event, further administrative proceedings were in contemplation following the Tribunal's ruling. The position of the parties was that MCI, MMF, and the Royal Bank of Scotland wished the appeals to continue and to serve replies and further evidence. The appellants all agreed that they would not take "procedural points" in relation to the new arguments in the defence. The OFT accepted that the matters referred to above were "in substitution" for the relevant parts of the Decision, and that the Tribunal's case law on the circumstances in which the OFT can change its position from that of the Decision "presents problems so far as this case is concerned". However, the OFT considered that the appeals should continue at least to the stage of replies, at which stage one could take stock. The BRC, in support of the OFT, wished the appeals to continue. Visa, however, submitted that the changes made in the OFT's defence were fundamental, and that the Tribunal's only proper course, in accordance with such cases as *Argos and Littlewoods v. Director General of Fair Trading* [2003] CAT 16, was to remit. Visa emphasised that, if the Tribunal were to continue with the appeals, the legality of the Visa system would be determined, de facto, without any administrative procedure at all.

15. The Tribunal decided on 31 March 2006 that in all the circumstances the appeals should proceed at least to the stages of replies, a further case management conference being fixed for 19 June 2006. At the case management conference on 31 March 2006, the Tribunal again raised its general concern as to the level of costs in these

proceedings, stating that "we continue to exhort the parties to minimise costs where possible, bearing in mind there is a very strong public interest in these proceedings that is likely to affect any orders of costs (if any) that we might make at the end of the day" (transcript, p 55).

16. The Tribunal understood that following the case management conference of 31 March 2006 the OFT would, as requested by MCI and Visa, serve a schedule indicating the divergences between the defence and the Decision. Following correspondence between the parties, that schedule was not forthcoming and on 27 April 2006 Visa applied to the Tribunal for an appropriate order. That was resisted by the OFT, but on 9 May 2006 the Tribunal nonetheless made a reasoned Order requiring the preparation of such a Schedule: [2006] CAT 10.

17. The OFT, having submitted that the preparation of the necessary schedule would be "enormously time-consuming and costly", was in fact able to serve its schedule by 15 May 2006. That schedule indicates that around 250 paragraphs of the Decision, out of some 750 paragraphs in all, are affected by the changes made in the OFT's defence.

18. The replies of MMF, the Royal Bank of Scotland, MCI and Visa were served on 26 May 2006 in accordance with the Tribunal's timetable. All three appellants and Visa served further evidence with their replies.

19. Visa's reply was accompanied by an application to the Tribunal to the effect that, having regard to the changes made in the OFT's defence and the nature of the new case now advanced, the Tribunal should set aside the Decision and/or strike out the OFT's defence. Visa relied on the statutory framework and the Tribunal's previous decisions in *Napp (preliminary issue)* [2001] CAT 3, *Napp (substance)* [2002] CAT 1, *Aberdeen Journals (No. 1)* [2002] CAT 4, *Argos and Littlewoods*, cited above, and *Allsports v. OFT* [2004] CAT 1. Visa also filed further expert evidence, but intimated, by way of a witness statement, that it was encountering difficulties in obtaining further evidence from its member banks to counter the OFT's new case within the time available.

20. In response to Visa's application, MCI, MMF, the Royal Bank of Scotland and the BRC, in submissions lodged between 12 and 14 June 2006, submitted that these appeals should continue, contrary to Visa's position.

21. In its submissions dated 14 June 2006 in response to Visa's application, the OFT stated that it had concluded that, subject to any observations of the Tribunal, it should withdraw the Decision, with a view to investigating further MasterCard's and Visa's current arrangements. The OFT stated that it had had regard to the Tribunal's observations at the case management conference on 31 March 2006 and in the Order of 9 May 2006; that according to the OFT, MMF had not renounced all procedural points; that the appellants and Visa had filed further evidence, to which the OFT would need to reply, thus creating "further procedural problems for the Tribunal"; that the OFT recognised the public interest in the OFT's reasons being transparent on the face of the Decision; that the changes to MasterCard's arrangements meant that the Tribunal's judgment might not, after all, give definitive guidance on the law applicable; that the Tribunal had indicated in *Napp (substance)* [2002] CAT 1, at paragraph 133, that if the OFT relies on new reasons, its proper course is to withdraw the Decision; and that the public interest was best served by terminating these already lengthy proceedings and concentrating on MasterCard's and Visa's current arrangements.

22. In response to MCI's contention that the appeals could and should continue in any event, in particular to determine whether the setting under the MasterCard scheme of a "default" interchange fee is a "restriction of competition" at all, the OFT submitted that it would be wrong to pick out one of a number of issues for determination, or to proceed with the appeals without a full factual matrix, particularly since a further appeal to the Court of Appeal and a possible reference to the European Court of Justice under Article 234 of the EC Treaty would delay even further the OFT's investigation of MasterCard's and Visa's current arrangements. The OFT resisted any order for costs.

23. In response to those observations by the OFT, MCI submitted that these appeals should nonetheless continue. Those submissions are summarised in [2006] CAT 14 at paragraphs 22 to 24. MMF and the Royal Bank of Scotland supported MCI, albeit recognising the reality of the situation that had arisen.

24. In response to MCI's submissions, the OFT submitted, among other things, that the principal problem influencing the OFT's decision to withdraw was the need for the OFT to file yet further evidence in response to the appellants' replies. The OFT considered it should be guided by *Napp (substance)*, cited above, at paragraph 133.

The OFT also stated that it did not intend further to pursue the MasterCard arrangements prior to 2004, but now intended to proceed against the current Visa and MasterCard arrangements in parallel, with a view to issuing statements of objections within the first quarter of next year. It would, however, be necessary to have regard to the position of the European Commission in its proceedings against MasterCard, and also to the European Commission's interim report in its sector inquiry on payment cards dated 12 April 2006.

25. The Tribunal set aside the Decision on 19 June 2006.

Costs

26. All three appellants seek costs. Visa seeks its costs from the date of the service of the defence. The BRC does not seek costs. At the hearing on 19 June 2006 the Tribunal heard brief submissions on the question of costs. The Tribunal ordered (1) the appellants and Visa to lodge short schedules detailing the main heads of costs within seven days and (2) the OFT to lodge any further written submissions it wished to make in reply within fourteen days thereafter. The schedules filed by the appellants and Visa claim costs of just under £5 million in total. The OFT's submissions on costs were filed on 10 July 2006 and the appellants replied in writing on 20 July 2006.

- *The appellants' submissions at the hearing on 19 June 2006*

27. MCI submits that there are three principal considerations which the Tribunal should have in mind when deciding whether to exercise its discretion in favour of a costs award. First, the OFT took a decision which it now accepts was fundamentally flawed, forcing MCI to bring an appeal. Secondly, having recognised the deficiencies in the Decision, the OFT adopted new arguments in the defence and pursued that position for some months, forcing MCI to incur very significant costs. Thirdly, the OFT was aware in October 2004 of MCI's new arrangements when Mr Selander, President and CEO of MCI, informed the OFT by letter of the changes being made to MasterCard's arrangements for setting the interchange fee. In March 2005 MCI filed a submission with the OFT which explained why the analysis of the historical arrangements could not apply to the current arrangements. Yet the OFT made a deliberate decision to

concentrate its attention upon MasterCard's historic arrangements, forcing MCI – in the light of the decision to withdraw the Decision, needlessly – to incur considerable costs.

28. MMF submits that there is no scope for a protective rule under which decision makers should be protected from the consequences of their own failings. This is not a case where there has been a fair and vigorous tussle between the authority and the appellants where the appellants prevail narrowly and important principles of law are established, which might perhaps justify some mitigation of the ordinary costs rule. Here, says MMF, the OFT has thrown in the towel despite conducting an inordinately long investigation and issuing a loudly heralded decision castigating the banks for imposing a "tax" on merchants. The OFT has in MMF's submission accepted that it would have lost the appeal, and there is no reason why the ordinary rule applicable in the Administrative Court should not apply here. In any event, the OFT has conducted itself thoroughly unreasonably in the proceedings.

29. RBSG supports the submissions made by MMF and MCI.

30. Visa seeks its costs incurred from the date of receipt of the defence, i.e. 28 February 2006. Visa submits that (1) the defence should never have been advanced by the OFT in these proceedings, (2) the OFT accepts that the withdrawal of the Decision and termination of proceedings arises because it "relies on new reasons" in the defence and (3) all of Visa's costs since then have been incurred as a result of the OFT's seeking to proceed in that way.

- *The OFT's observations of 10 July 2006*

31. In its written observations of 10 July 2006 the OFT submits that the appellants' costs should lie where they fall. As for Visa's costs, these should be borne by the OFT insofar as they were reasonably incurred in connection with Visa's application for the summary determination of the proceedings.

32. The OFT submits first that it has conducted itself responsibly, both in coming to the Decision and in defending itself before the Tribunal. The MMF MIF was a legitimate object of investigation by the OFT, given the amount of revenue generated in the UK by MasterCard and Visa interchange fees (some £1 billion per annum). During these

proceedings the OFT continued to believe that it had reached the correct conclusion in relation to Article 81 EC. The OFT considered that it would not be in the public interest simply to withdraw the Decision before setting out in the defence why it adhered to its conclusions despite certain aspects of the reasoning in the Decision. The defence was, in the OFT's view, simple and persuasive, and would enable the Tribunal to give a judgment helpful to all concerned. The beliefs of the OFT in this regard, it says, were reasonable (irrespective of whether they were correct). The OFT contends that the reasonableness of its approach is reinforced by the fact that the matter was not brought to a halt by the Tribunal at the second case management conference on 31 March 2006 despite strongly argued submissions by Visa to the contrary. Following consideration of the replies and evidence, the OFT acted reasonably in deciding to seek to withdraw the Decision. It took into account the Tribunal's observations in its Order of 9 May 2006, and recognised that by filing evidence in rejoinder (as it would have wished to do) it would have created the very situation the Tribunal sought to avoid in its case law on the extent to which the OFT may advance a "new case" before the Tribunal. It also took into account what it says was a "qualification" in correspondence with MMF's solicitors as to the extent to which MMF renounced procedural points.

33. The OFT further argues that an award of costs in favour of the appellants would have a very significant and deleterious impact on the OFT's capacity to perform its public interest duties. It would be liable to act as a serious deterrent for the OFT against taking on large, well resourced corporations in all bar the most straightforward cartel cases. A comparison of the appellants' costs with their resources suggests that the costs incurred in the appeal will likely be trivial. In contrast, for the OFT such costs are substantial relative to its total budget, particularly so in relation to that part of its budget allocated to competition enforcement. The total amount claimed by the appellants and Visa represent over 40% of the OFT's total budget for such work. The OFT submits that the Tribunal should have regard to the dicta of Lord Bingham CJ in *Bradford Metropolitan District Council v Booth* 164 JP 485 (10 May 2000) as to "the need to encourage public authorities to make and stand by honest, reasonable and apparently sound…decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged". The OFT submits that far from "throwing in the towel", as MMF has put it, it had to make a difficult decision as to whether the public interest in a final determination of the lawfulness of the

interchange fees was best and most expeditiously pursued by further administrative proceedings or by continuing with these appeals (with all the procedural risks and potential objections that would entail). It would be unfortunate, the OFT says, if it felt under great pressure to continue with litigation despite considering that the public interest was better served by discontinuing.

34. If the Tribunal were minded to make a costs order, the OFT submits that the Tribunal should order the payment of fixed sums. Moreover, the OFT submits that the amounts claimed by the appellants are plainly disproportionate and reflect the needless duplication – both in their notices of appeal and at each stage in the proceedings – which has characterised the appellants' conduct of their case. Moreover the OFT says that there has been a *volte face* by MMF on the question of payment transmission costs: whereas in the administrative proceedings, MMF argued that the intercharge fees were necessary to cover costs on the cardholder side such as the interest free credit period, in its notice of appeal MMF contended that, in any event, the intercharge fees did not exceed payment transmission costs properly allocated. No costs should be recoverable in relation to payment transmission costs, according to the OFT.

35. Finally, the OFT submits that the costs incurred by the appellants have not been wasted, given that (1) the OFT has indicated that it intends to proceed with its investigations of the current MasterCard and Visa arrangements and (2) the issues debated in these appeals are, as the appellants have themselves contended, likely to be of crucial importance in the subsequent administrative proceedings.

36. As to Visa, the OFT submits that whilst normally the costs of an intervention will very often in justice be allowed to lie where they fall, the OFT accepts that Visa should recover the costs that it reasonably incurred in connection with its application for the summary determination of the proceedings. Subject to that exception, says the OFT, the normal rule should apply in relation to Visa. As to Visa's abortive survey of member banks for the purpose of preparing its reply, in relation to which Visa claims to have incurred substantial expense, the OFT draws attention to the fact that Visa has refused to disclose to the OFT the survey or any material on which the OFT is able to consider Visa's claim in this regard.

37. As to the appellants' and Visa's costs schedules, the OFT submits that (i) the appellants' schedules are manifestly disproportionate, (ii) a comparison of the schedules reveals startling discrepancies as to the levels of costs incurred, (iii) the rates charged by the various firms of solicitors, particularly the partner rates, are in excess of the guideline rates for summary assessment produced by HM Court Service in January 2005, and (iv) there is a major disparity between the rates paid by the OFT to its advisers and the rates charged by the appellants' lawyers. The OFT also draws attention to the lack of clarity surrounding the economic expert fees incurred by MMF and RBSG.

- *The responses of 20 July 2006*

38. In their written submissions dated 20 July 2006 the appellants and Visa respond as follows.

39. MMF submits that costs should follow the event since (a) that should be the ordinary rule when the OFT withdraws; and (b) the OFT has behaved unreasonably in this case. MMF emphasises that (i) the OFT's decision to seek to withdraw the Decision deprived MMF, which spent a great deal of money in preparing itself for a hearing, of much needed guidance from the Tribunal as to the principles governing the setting of interchange fees; (ii) the OFT is prepared to pay some of the costs incurred by Visa, an intervener; (iii) there are no special features warranting the Tribunal not to award costs; (iv) the OFT's own press release of 2 February 2006 about its investigation into the new MasterCard arrangements indicated that the Tribunal's judgment was likely to be decisive for the assessment of those arrangements; (v) the OFT plainly threw in the towel – if it genuinely believed its assertion that the defence was "simple and persuasive" its subsequent conduct is inexplicable; (vi) the internal financial arrangements of the OFT are not a decisive factor, being a matter for the Treasury rather than the Tribunal; (vi) whilst the Tribunal enjoys a discretion in relation to costs, the facts of this case are extreme on any view. If the Tribunal does not award costs in this case it is difficult to see any circumstances in which costs could be awarded; and (vii) the withdrawal of the Decision has deprived the banks of an opportunity to address various allegedly pejorative remarks made by the OFT. MMF further emphasises that the OFT should have withdrawn the Decision much earlier than it did, apparently

having known from an early stage that the Decision was untenable. Neither MMF's case on payment transmission costs, nor its position on procedural issues, in any way justify the OFT's stance.

40. MCI in essence makes similar submissions to those of MMF. MCI emphasises in particular the facts that (i) it had suggested to the OFT in October 2004 that it might be more sensible to concentrate on the revised arrangements which were then about to come into effect: it is only now, after the parties have incurred huge costs, that the OFT has adopted that approach; (ii) as to the level of costs incurred, MCI has effectively had to appeal twice – once against the Decision and then against the defence; (iii) the Decision was fundamentally flawed, the OFT accepting that the changes made in the defence affected approximately a third of the Decision; (iv) it must have been clear that the OFT's approach in the defence was to drive a "coach and horses" through the procedural safeguards in the Act; (v) had the OFT recognised the fundamental flaws earlier, the Tribunal could have considered at a much earlier stage whether the matter could proceed; and (vi) in any event the OFT should have decided at or shortly after the CMC on 31 March 2006 whether to defend the appeals rather than waiting for MCI and the other appellants to incur the costs of responding to the defence.

41. MCI also contends that the OFT's conduct was unreasonable. Among other points, MCI emphasises that the administrative procedure was inordinately long; the OFT should have foreseen the difficulties of advancing a new case after the Decision was taken; in abandoning its counterfactual in the Decision the OFT effectively accepted arguments already made during the administrative procedure; the real reason for the OFT's withdrawal must have been its realisation that its case was hopeless; the withdrawal could and should have occurred much earlier; very little evidence had been filed in the replies (none by MCI); and MCI took no procedural point.

42. MCI also seeks costs from the BRC in relation to the latter's application for disclosure which the Tribunal heard on 13 January 2006. That is resisted by BRC in its solicitor's letter of 21 July 2006.

43. RBSG supports the submissions made by MMF and MCI. It also contends: (i) RBSG was at the relevant time the largest issuer of MasterCard credit cards in the UK and,

given the possibility of damages actions and the precedent value of the proceedings, had a very significant interest in the outcome; (ii) in order for RBSG to protect its interests it was necessary for it to prepare its own appeal and instruct its own representatives. Beyond that, RBSG recognised the need to avoid, and did avoid, duplication where a common interest arose; and (iii) since the position as to future administrative proceedings is unclear, the suggestion that RBSG will benefit from costs incurred in these proceedings should be ignored.

44. Visa submits that nothing, in fact, changed, after the service of the defence: the procedural problems faced by the OFT were plain for all to see at the date the defence was served. Visa's suggestion that the procedural problems should be faced before the replies were served was not accepted. In those circumstances Visa had no option but to incur costs in seeking to prepare a substantive response to the defence, and should be entitled to those costs, as well as its costs on its procedural application to set aside, which have been conceded by the OFT.

The Tribunal's analysis

45. The Tribunal's jurisdiction on costs is contained in Rule 55 of The Competition Appeal Tribunal Rules 2003, which provides, so far as material:

> "55. (1) For the purposes of these rules 'costs' means costs and expenses recoverable before the Supreme Court of England and Wales ….
>
> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or all or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order under paragraph (1), (2) or (3) or may direct that it be assessed by the President, a chairman or the Registrar, or dealt with by the detailed assessment of a costs officer of the Supreme Court …."

46. The Tribunal has made clear on a number of occasions that it has full discretion in deciding whether to make an order as to costs: see e.g. *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2002] CAT 2 ("*GISC: Costs*") at paragraph 39. There are no rigid rules to be applied; the Tribunal proceeds on a case-by-case basis, remaining flexible enough to meet circumstances as they arise consistently with the overriding objective of dealing with cases justly: see e.g. *GISC: Costs* at paragraph 48. The fact that an appellant has succeeded is a starting point for the exercise of the Tribunal's discretion as to costs, but other factors may lead to the conclusion that those costs should lie where they fall: see e.g. *Racecourse Association and others v Office of Fair Trading* [2006] CAT 1 at paragraph 8; *Hutchison 3G v. Office of Communications* [2006] CAT 8 at paragraphs 41 to 48.

47. In the present case, it is highly regrettable that, after some 6 years of proceedings, these appeals have had to be terminated without result. The administrative procedure before the OFT lasted for some 5½ years and involved issuing three statements of objections. After such a lengthy period of investigation, it should be the case that the OFT would be in a position to marshal the facts and arguments and arrive at a decision to which it could then adhere when challenged before the Tribunal.

48. In fact, the OFT filed a defence on 28 February 2006 which in material part resiled from the case made in the Decision – which is unfortunate. The change made in the defence affected some 250 paragraphs of a 750 paragraph decision, which is a considerable proportion by any reckoning. Given in particular the Tribunal's case law, cited above, as to the circumstances in which the OFT can change its position once it has adopted a decision, the OFT's strategy of pressing on notwithstanding the change of case set out in the defence was in our view risky, and foreseeably so. For reasons that the Tribunal has found hard to understand, the OFT then declined to particularise the changes to the Decision and had to be ordered to do so: [2006] CAT 10.

49. Against that background we deal first with the costs incurred after 31 March 2006, and then with the costs incurred before that date.

- Costs incurred after 31 March 2006

50. In our view, if the OFT finds that for whatever reasons it is unable or unwilling to support a decision before the Tribunal, its proper course is to notify the Tribunal and the parties of its position at the earliest possible moment. In our view, the costs incurred after 31 March 2006 were needlessly incurred as a result of the OFT's failure to notify its intention to withdraw the Decision until shortly before the hearing on 19 June 2006.

51. In its submissions of 14 June 2006, the OFT set out a number of factors influencing its decision to withdraw, summarised at paragraph 21 above. We do not think that any of those factors justify the delay in the OFT's decision to withdraw, nor give any grounds for not awarding costs against the OFT for the period after 31 March 2006.

52. In particular, the suggestion that it was the questions raised by the Tribunal at the case management conference of 31 March 2006 and the subsequent Order of 9 May 2006 that contributed to the OFT's predicament is not one that the Tribunal would accept. The procedural difficulty arising from the approach taken by the OFT in the defence had already been raised by Visa before 31 March 2006 (observations of 27 March 2006) and was recognised by the OFT during that hearing (transcript, p. 34). The Tribunal's remarks and subsequent Order did no more than draw attention to the existing case law, which was not challenged by the OFT and was expressly accepted in its submissions of 14 June 2006 (paragraph 2(4) and (5)).

53. As to the OFT's allegation that it was in difficulties because MMF had not renounced procedural points, our understanding was, and is, that both MMF and RBSG were prepared to waive any procedural right they may have had to challenge the OFT's change of position as such, and to press on with the case regardless. That seems to us to have been a responsible attitude taken by those appellants. MCI took a similar position, in even clearer terms. The only specific matter left open in the correspondence between MMF and the OFT was that MMF reserved the right if necessary to challenge the introduction of factual evidence by way of an expert's report. MMF's stance in this regard was in our view neither unreasonable nor inconsistent with the assurances it gave through counsel on 31 March 2006.

54. As to the fact that the appellants filed further evidence in response to the defence, although some reply evidence was filed by the appellants and Visa, in our view the OFT could scarcely have been surprised by that, given the wholly new evidence adduced by the OFT itself in the defence. It was in our view foreseeable by the OFT that the appellants and Visa would file evidence in reply to the defence, and equally foreseeable that the OFT would wish to file yet further evidence in rejoinder. The procedural difficulties to which that would give rise, emphasised by leading counsel for the OFT during the hearing of 19 June 2006 (transcript, pp. 28 *et seq*) were in our view plainly foreseeable from 31 March 2006 onwards at the latest.

55. As to the alleged risk that the proceedings, if continued, would not give "definitive guidance", notably because of alleged changes in the MasterCard arrangements subsequent to October 2004, we observe (i) that was not the impression given by the OFT's press release of 2 February 2006, which stated that a judgment of the Tribunal on these appeals would be important and possibly decisive in relation to the new arrangements; and (ii) the OFT had already been informed by MCI of the new arrangements in October 2004 but had nonetheless proceeded to adopt the Decision in November 2005. Similarly, the OFT's view that resources are now better devoted to investigation of the (new) MasterCard arrangements and those of Visa (whose arrangements, incidentally, have not changed as far as we know) was a view that could have been taken prior to the adoption of the present Decision, or at the latest by 31 March 2006.

56. The nub of the matter, in our view, is that, for whatever reason, the OFT decided – presumably prior to filing the defence – that the position taken in the Decision was in certain important respects not one that it was able or willing to defend before the Tribunal. The OFT accordingly decided to run a new case in that regard, supported by new evidence, notwithstanding the procedural difficulties to which such a course would – foreseeably – give rise. The OFT recognised the force of those procedural difficulties only belatedly on 19 June 2006, accepting in effect the essence of Visa's submissions. However, as far as we can see, the situation in which the OFT found itself on 19 June 2006 had not changed significantly (or unforeseeably) between 31 March 2006 and 19 June 2006. Moreover, in our view, the procedural difficulties encountered by the OFT in this case are difficulties entirely of its own making.

57. We do not think it is relevant that the appellants, as of 31 March 2006, wished to press on with the appeals or that the Tribunal was persuaded by the appellants and the OFT to allow the matter to proceed to the stage of replies. Neither the appellants nor the Tribunal were to know that the OFT would later take the view that its procedural position was untenable.

58. It follows in our view that the appellants are entitled to recover their reasonable and proportionate costs incurred after 31 March 2006.

59. The same applies in our view to Visa's costs incurred in dealing with substantive issues in its reply. The OFT's stance on and after 31 March 2006 made it inevitable, in our view, that Visa would have to incur costs dealing with the new substantive issues raised in the defence. Although as an intervener Visa's costs might ordinarily be held to lie where they fall, in our view Visa's interests as the only other major international credit card organisation are very similar to the interests of the MasterCard appellants and should be treated alike.

60. As to the question of quantum, in our view that matter should go to detailed assessment. Although we recognise that the three appellants had to some extent separate interests, we think it inevitable that there was a degree of duplication in having three appeals rather than one appeal. That is a matter that would require to be investigated by the costs judge as part of the detailed scrutiny of the level of costs incurred in this case. Various other points of detail (such as Visa's survey) would also need to be examined in the context of a detailed assessment.

- Costs up to 31 March 2006

61. As to the costs of the appeal in the period up to 31 March 2006 – which are principally the costs of preparing the notices of appeal and considering the defence – in our judgment somewhat different considerations apply.

62. First, we note that the appellants represent effectively all the major banks in the United Kingdom and, indirectly, all the major banks in the world, almost all of whom belong to the MasterCard and Visa organisations. In that regard, the costs incurred by the

appellants, although seemingly high, represent only a small amount relative to the total turnover of the parties or the turnover generated by the disputed interchange fee (in the United Kingdom some £1 billion a year). In this particular case, we have difficulty in persuading ourselves that the appellants will suffer financial hardship if we order that the costs incurred up to 31 March 2006 should lie where they fall.

63. In addition, the disparity between the resources available to the appellants and the resources available to the OFT is in this case particularly marked. The Tribunal has already referred, in *GISC: Costs* at paragraph 56, to the possible adverse effects that costs orders in appeals in complex regulatory cases may have on the willingness of public authorities to take enforcement decisions. That factor was recognised as relevant by the Tribunal in *Hutchison 3G v. Office of Communications*, cited above, at paragraph 47. See also the remarks of Lord Bingham CJ in *Bradford Metropolitan District Council v. Booth*, cited above. The Decision raised important public interest issues worthy of investigation.

64. Moreover, the Tribunal has not adjudicated on the arguments set out in the notices of appeal, which cover many issues other than the new "counterfactual" advanced by the OFT in the defence. The Tribunal is not in a position to say, one way or another, whether the appellants would have succeeded on many of the issues raised in the notices of appeal.

65. Further, MMF raised for the first time in its notice of appeal the contention that the calculation of costs properly described as "payment transmission" costs would amount to, or could exceed, the level at which the interchange fee was set at the relevant time. This represented, as the OFT submits, a departure from the case made by MMF at the administrative stage, where it contended that the OFT's approach would have the effect of drastically reducing the level of the interchange fee. In *GISC: Costs*, cited above, at paragraph 60 the Tribunal said that whether an appellant had introduced new material after adoption of the contested decision would be a factor to take into account in exercising discretion as to costs.

66. Finally, these proceedings appear to be only one aspect of a series of major and continuing regulatory battles taking place in various jurisdictions round the world

concerning the MasterCard and Visa interchange fees. The European Commission, in particular, has recently opened fresh proceedings and the OFT has stated its intention resume the administrative procedure. In those circumstances we find it difficult to say that the costs incurred in the first stages of this case have, from the appellants' point of view, been entirely wasted: the work done may be, directly or indirectly, of some benefit in further administrative or legal proceedings of one kind of another. In addition, a considerable amount of the work necessary for the preparation of the appeals will already have been done during the administrative stage, for which no costs are recoverable. Although it is true that the appellants have been put to expense in the appeals, the outcome from their point of view does not seem to us to have been commercially disadvantageous, viewed overall.

67. In those circumstances it seems to us that the costs up to and including 31 March 2006 should lie where they fall. We recognise that certain of the above arguments could equally apply after 31 March 2006, but in our view the crucial difference is that the difficulties into which the OFT had got itself were known by 31 March. If the OFT had withdrawn at that stage, the costs of the replies would not have been incurred.

68. As to the costs incurred in relation to BRC's application for disclosure of 16 January 2006, that application was stood over by the Tribunal and not adjudicated upon. In all the circumstances we consider that the costs of that application should lie where they fall.

69. Accordingly we conclude (i) the appellants and Visa should have their costs incurred after 31 March 2006, subject to detailed assessment; (ii) save as aforesaid, there should be no order as to costs.

Christopher Bellamy Arthur Pryor David Summers

Charles Dhanowa
Registrar 28 July 2006