[2006] CAT 14

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

10 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

Heard at Victoria House on 19 June 2006

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.

JUDGMENT ON SETTING ASIDE THE DECISION

Background

1. This judgment deals with two related issues: (1) whether these appeals should proceed further and (2) if not, whether the OFT's 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fees provided for in the UK Domestic Rules of MasterCard UK Members Forum Ltd* ("the Decision") should be (a) withdrawn or (b) set aside. At the conclusion of the hearing of these issues on 19 June 2006 we announced that the appeals would not continue, and that the Decision would be set aside by the Tribunal. We now give our reasons.

2. The background to this matter up to 9 May 2006 is summarised in the Tribunal's Order of that date.

3. Briefly, in the Decision the OFT found that between 1 March 2000 and 18 November 2004 the 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, 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 thrust of the Decision is that the interchange fee payable by the acquiring bank to the issuing bank is, in effect, passed on the retailer via the MSC. This is said to lead, among other things to higher retail prices for the generality of retail customers. In addition, so it is suggested, the MSCs paid by retailers, and substantially passed on by the acquiring banks to the issuing banks through the interchange fee, are unjustifiably subsidising the services offered by the banks to their credit card customers.

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 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 are 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 is 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.

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 the Decision appealed against. On 2 December 2005, the OFT agreed not to proceed with that statement of objections pending the outcome of these appeals.

11. 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 4 days after the hearing of this matter. 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

12. 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".

13. 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 has 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 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.

14. 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.

15. 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.

16. 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.

17. 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.

Submissions of the parties

18. 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.

19. 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.

20. 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 intimated 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.

21. 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 submits 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.

22. In response to those observations by the OFT, MCI submitted that these appeals should nonetheless continue. MCI drew attention to the relief sought in its notice of appeal of 4 November 2005:

> "267. The OFT's case is fundamentally flawed of the reasons set out above. The Tribunal is, therefore, invited to set the entire decision aside.
>
> 268. Furthermore, the evidence available suggests that the MMF MIF is not a restriction and is objectively necessary, so that Article 81(1)/Chapter I do not apply. The Tribunal is, therefore, invited to give a declaration to this effect.
>
> 269. Alternatively, in the light of the OFT's finding that a collectively set interchange fee has pro-competitive benefits that justify exemption, if the Tribunal concludes that any of the OFT's reasons for distinguishing the MMF MIF from this finding are flawed, the Tribunal should conclude that the MMF MIF does qualify for exemption under Article 81(3)/Section 9."

23. Even if the Tribunal were to set aside the Decision, thus granting MCI the relief sought at paragraph 267 of the notice of appeal, MCI submits that it would be deprived of the further relief sought at paragraphs 268 and 269. The position is thus distinguishable from the Tribunal's decision in *Association of Convenience Stores v. OFT* [2005] CAT 36, at paragraph 9. According to MCI, the OFT is not entitled unilaterally to withdraw the Decision once the appeal proceedings are in progress. MCI submits that after more than 6 years of administrative proceedings, they have a legitimate expectation that the Tribunal should reach a decision that its default interchange fee arrangements do not constitute "a restriction of competition" within Article 81(1)/section 2, or alternatively that those arrangements fall within Article 81(3)/section 9.

24. MCI submits that if it were to succeed on those points, the need for further proceedings would not arise. The OFT is doing no more than deferring, without justification and for an indeterminate further period, a decision on these central issues, causing unacceptable legal uncertainty and leaving MCI exposed to civil claims. MCI has spent "millions of pounds" on this case. Reliance is placed by MCI on the judgment of the Court of

Appeal in *Office of Communications v. Floe Telecom (in liquidation)* [2006] EWCA Civ 768, at paragraph 25, to the effect that the Tribunal is not obliged to remit if it feels able to decide the case itself. MCI also considers Visa's application to set aside the Decision and/or strike out the Defence as unfounded, relying principally on *Allsports v. OFT* [2004] CAT 1. In the alternative, MCI submits that the Decision should be set aside, rather than withdrawn, and that the OFT should be required not to reopen the legality of the arrangements prior to 18 November 2004.

25. MMF considered that, if the Decision were withdrawn, there would be nothing left for the appeals to bite on, but MMF supported MCI's position that the OFT was not entitled unilaterally to withdraw the Decision, and that the appeals should proceed. The Royal Bank of Scotland took the same position, while reluctantly conceding that the Tribunal was unlikely to allow the appeals to proceed. The Royal Bank of Scotland submitted that, unlike a body exercising powers of the Crown under the prerogative, there was no statutory basis on which the OFT could withdraw a decision once made. Visa submitted that the OFT did have power to withdraw a decision, and that in any event the Tribunal should not allow the appeals to proceed, and could not do so without ruling on Visa's application that the Decision should be set aside and/or the defence struck out. The BRC did not oppose the matter going back to the OFT, provided that there was no constraint upon the OFT taking a new decision covering the whole period since 2000.

26. The OFT submitted 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 maintained it had power to withdraw the Decision – referring to section 47 of the 1998 Act as originally enacted – but was not "ideologically completely set" on withdrawal rather than setting aside. The OFT submitted that the Tribunal should not make the declarations sought by MCI, and had no power to do so having regard to Article 10 of Regulation (EC) 1/2003. In any event the Tribunal should not decide matters in abstracto. The OFT did not intend 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.

27. In the event that the appeals do not proceed, all three appellants seek costs. Visa seeks costs from the date of the service of the defence, but the BRC does not seek costs.

Analysis

28. It is in our view highly regrettable that, after over 6 years of administrative proceedings, the OFT has reached the view that it should withdraw the Decision, especially in such an important "flagship" case which has commanded widespread attention in Europe and elsewhere. How that situation has come about will be further examined in the Tribunal's ruling on costs, which we do not deal with in this judgment. This judgment is concerned only with the question of whether the appeals should proceed and, if not, by what mechanism the appeals should be brought to an end.

29. If the Decision is set aside, as for the reasons given below the Tribunal considers it should be, that would have the effect of granting the substantive relief sought by MMF at paragraph 10.1(a) of its notice of appeal of 2 November 2005, by the Royal Bank of Scotland at paragraph 6.1(a) of its notice of appeal of 7 November 2005, and by MCI at paragraph 267 of its notice of appeal, cited above. The only specific and particularised additional relief sought by any of the appellants are the two further declarations sought by MCI at paragraphs 268 and 269 of its notice of appeal, also cited above.

30. As to those declarations, the Tribunal would not accept that it would have no jurisdiction to grant the declarations sought, or relief to an equivalent effect, in a proper case. Schedule 8, paragraph 3 (2)(e) of the 1998 Act provides that the Tribunal may "make any decision which the OFT could itself have made". Taking Article 81 first, while it is true that Article 10 of Regulation (EC) 1/2003 reserves to the Commission the power to make a declaration of inapplicability, Article 5 of that regulation provides that the competition authorities of the Member States shall have power to apply Article 81 in individual cases. Acting on their own initiative or on a complaint the national

authorities may take the decisions there specified. The last sentence of Article 5 provides:

> "Where on the basis of the information in their possession the conditions for prohibition are not met they [i.e. the national authorities] may likewise decide that there are no grounds for action on their part."

31. Those words are in our view at first sight wide enough to encompass the relief sought by MCI at paragraphs 268 and 269 of its notice of appeal, or relief of an equivalent effect, as far as Article 81 is concerned. It is not evident to us that there is any limitation on the OFT's power to reach a similar conclusion under the Chapter I prohibition, whether under section 2 or section 9 of the 1998 Act. We note also, in these respects, section 46(3)(a) and (b) of the 1998 Act, Schedule 9, paragraphs 5(1)(d) and (2) of that Act, and paragraph 7(2) of the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 SI 2004/2751.

32. As to whether, in this case, it would be appropriate in the circumstances to continue with the appeals for the sole purpose of considering whether to grant the declaratory relief sought by MCI in paragraphs 268 and 269 of its notice of appeal, the question whether the Tribunal has jurisdiction to grant the declarations sought is quite separate from the question whether the Tribunal should in its discretion exercise that jurisdiction in the particular circumstances of this case. On that latter question, the following considerations are in our view relevant.

33. First, the OFT has stated its intention to withdraw the Decision. Whether the Decision is withdrawn or set aside, MMF and the Royal Bank of Scotland have, in effect, obtained all the relief they seek in these proceedings, and MCI has obtained what in our view is the greater part of the relief it seeks. For the Tribunal in those circumstances to go on to adjudicate on the declarations sought by MCI would involve a substantial investigation of the merits in the light of the arguments now advanced in the defence, and in the light of the replies and any further evidence submitted by the OFT in rejoinder. That would in turn raise the question of how far it would be right, procedurally speaking, for the Tribunal to embark upon such a course in view of the Tribunal's previous case law, cited above by Visa. At the very least, it seems to us that, in procedural terms, such a course is not free from difficulty. While in an appropriate

case an unequivocal waiver by all interested parties would be a highly relevant factor, in this case Visa maintains its procedural objection to these proceedings continuing in the light of the change in the OFT's position, and the OFT has, in effect, conceded that there is force in Visa's arguments. While Visa is strictly speaking an intervener rather than an appellant in these proceedings it is, together with MasterCard, the only other major international credit card organisation, and in our view undoubtedly has standing to take the position it has. In our view it is essential that a case such as the present, with potentially worldwide implications, should proceed on a sound procedural basis. The Tribunal is not satisfied that the procedural foundation for taking these appeals any further is sufficiently secure to justify the Tribunal contemplating that course, particularly given the extensive new material, not contained in the Decision, upon which the OFT would presumably seek to rely.

34. It further appears to the Tribunal that, following the coming into force of Regulation 1/2003, the agreements prohibited are those which are "caught by Article 81(1) of the EC Treaty and which do not satisfy the conditions of Article 81(3)": see Article 1(1) and (2) of that Regulation. It seems to us quite difficult, post 1 May 2004, to examine issues arising under Article 81(1) in isolation from Article 81(3), since an agreement is only prohibited in circumstances where it both falls within Article 81(1) and fails to satisfy Article 81(3), albeit that the burden of proof may shift in accordance with Article 2 of the Regulation. In any event, in the Tribunal's view, it would be inappropriate to attempt to deal in these appeals with discrete issues under, for example, Article 81(1), without examining the whole factual matrix in which the MasterCard scheme operates. In the Tribunal's view it is difficult to justify embarking on such an exercise, simply to adjudicate on MCI's claims for declaratory relief, in circumstances where it is in any event accepted by the OFT that the Decision has to be withdrawn or set aside.

35. In addition it appears that, even if the appeals were to proceed in some way, supplementary administrative procedures would in any event be necessary to deal with MasterCard's arrangements since November 2004, with the position of Visa, and possibly in relation to any additional arguments that may arise under Article 81(3). There are also parallel proceedings at European level which, although concerned with

international rather than domestic interchange fees, may well deal with, or at least bear upon, certain of the points of principle that MCI wishes to argue in these proceedings.

36. In any event, whether or not to hear these appeals for the purpose of determining MCI's claims for declaratory relief is a discretionary matter for the Tribunal to decide under Schedule 8, paragraph 3(2)(c) of the 1998 Act. While we accept that it is undesirable that the administrative procedure should have continued so long, that procedure is now being resumed, so we are told, and will run in parallel with the procedure being undertaken by the European Commission. We are unpersuaded that it is appropriate for the Tribunal to continue to hear a case in which the competition authorities have indicated that there are continuing investigations, notwithstanding the time those investigations have already taken up to now. While we understand MCI's position, we do not think any "legitimate expectation" in the sense in which the phrase is used in administrative law (see e.g. Fordham, *Judicial Review Handbook*, 4th edition, pp. 768 et seq) has arisen in these proceedings, of such a nature as to compel the continuation of these appeals notwithstanding the OFT's decision to withdraw the Decision.

37. As to whether these appeals should terminate by the Decision being withdrawn or set aside, we do not need to rule on the question whether the OFT has unfettered power to withdraw a decision once appeal proceedings have commenced. In our judgment the OFT followed an entirely proper course in this case by intimating its intentions to the Tribunal and the parties, but not in fact withdrawing the Decision until the Tribunal and the parties had had an opportunity to consider the position. We commend that course in future cases of this kind. As to the relative advantages of "withdrawal" or "setting aside", the end result may be much the same. However, it seems to the Tribunal that in cases such as the present there is a need for legal clarity and certainty. The legal effect of a "withdrawal" is not in our view entirely clear, even if the OFT has power to "withdraw", nor would third parties necessarily know the circumstances in which the "withdrawal" had taken place. In our view, an Order of the Tribunal setting aside the Decision under Schedule 8, paragraph 3(2) of the 1998 Act is a clear and definite judicial act which avoids uncertainty and which at the same time gives the appellants the essence of the relief that they seek in these appeals.

38. For these reasons, the Decision is set aside and these appeals, in consequence, will proceed no further. We note the OFT's statement that it does not propose to reopen the

legality of the MasterCard arrangements in the period prior to November 2004, but we think it is inappropriate to make any order in that regard. The Tribunal will deal separately with costs.

Christopher Bellamy Arthur Pryor David Summers

Charles Dhanowa
Registrar 10 July 2006