



Neutral citation: [2016] CAT 23

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

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

Victoria House  
Bloomsbury Place  
London WC1A 2EB

22 November 2016

Before:

THE HON. MR JUSTICE BARLING  
(Chairman)  
PROFESSOR JOHN BEATH OBE  
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

B E T W E E N:

**SAINSBURY'S SUPERMARKETS LTD**

Claimant

-and-

**(1) MASTERCARD INCORPORATED**  
**(2) MASTERCARD INTERNATIONAL INCORPORATED**  
**(3) MASTERCARD EUROPE SA**

Defendants

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**RULING (PERMISSION TO APPEAL)**

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1. The Tribunal handed down judgment in these proceedings on 14 July 2016 (the “Judgment”), save in relation to certain matters expressly reserved for further argument (the “Taxation and Interest Matters”), which will be the subject of a further short oral hearing. Save where the contrary is stated, or the context otherwise requires, this Ruling adopts the terms defined in the Judgment.
2. On 4 August 2016, MasterCard applied for permission to appeal the Judgment to the Court of Appeal (the “Application”). MasterCard has confirmed to the Tribunal that it wishes the Application to be determined on the papers in advance of any further ruling on the Taxation and Interest Matters.
3. We have read the grounds of the Application, together with the brief submission in response from Sainsbury’s dated 15 September 2016. MasterCard has advanced two grounds on which it seeks permission to appeal the Tribunal’s finding on liability, and three grounds on which it seeks permission to appeal the amount of damages awarded by the Tribunal.
4. As a preliminary point, MasterCard has submitted that its appeal on liability is not limited to an appeal on a point of law, which is the usual standard applicable to an appeal from a decision of the Tribunal. MasterCard contends that because these proceedings originated in the High Court, its appeal on liability is subject to the general standard applicable to appeals from the High Court pursuant to Rule 52.11 of the Civil Procedure Rules. It relies in this regard on the transfer ruling of Barling J dated 30 November 2015 ([2015] EWHC 3472 (Ch)) (the “Transfer Ruling”) and the terms of his Order dated 1 December 2015 transferring the proceedings from the High Court (the “Transfer Order”).
5. We consider that MasterCard’s appeal on liability from the Tribunal is limited to an appeal on a point of law. The Tribunal is a statutory tribunal and it follows that its jurisdiction is as defined by statute. It is not open to us to give permission to appeal on a wider basis than is set out in the relevant statutory provision, namely section 49 of the Competition Act 1998 (as amended).
6. Whilst it is correct that the Transfer Ruling and the Transfer Order made clear that the transfer of the proceedings to the Tribunal was not intended to alter, limit or exclude any element of Sainsbury’s claim as constituted in the High Court prior to

the transfer taking effect, neither the Transfer Ruling nor the Transfer Order can or should be construed as referring to the position which would apply in the event of an appeal. Nor did the parties raise this as an issue prior to the making of the Transfer Order.

7. In any event, for the reasons set out below, we do not consider that either of the two grounds on which MasterCard seeks permission to appeal the Tribunal's finding on liability has a real prospect of success, whether as a matter of fact or a matter of law.
8. In the first ground of the Application, MasterCard has contended that the Tribunal erred insofar as it based its finding that there was a restriction of competition by effect on a counterfactual hypothesis which was not contended for by either party and which was not supported by any evidence. We consider this ground to be entirely without merit:
  - a. The Tribunal, like any other court, is obliged to determine the case on the issues pleaded by the parties, and not on other issues.<sup>1</sup> In this case, the case pleaded by Sainsbury's was that the UK MIF constituted a restriction of competition. No specific, counterfactual, hypothesis was pleaded in relation to liability.
  - b. In determining whether there was a restriction of competition, the Tribunal was obliged to consider what the position would have been absent the allegedly infringing agreement or provision (the "counterfactual hypothesis"). The Tribunal was obliged to reach a conclusion on this point based on the evidence and was not committed to the rival evidential cases advanced by the parties.<sup>2</sup> Accordingly, to the extent that MasterCard has submitted that the counterfactual hypothesis preferred by the Tribunal must have been contended for by one of the parties, we consider that submission to be misconceived. In this regard we note the approach to the counterfactual taken by this Tribunal in

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<sup>1</sup> See *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041; *Zahoor v Masood* [2009] EWCA Civ 650.

<sup>2</sup> *Slocum Trading Ltd v Tatik Inc* [2013] EWHC 1201 (Ch) at [71] and [2014] EWCA Civ 831 at [70].

*2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited.*<sup>3</sup>

- c. MasterCard's submission that the counterfactual hypothesis preferred by the Tribunal was not supported by any evidence is also clearly wrong. This argument was raised at the hearing and was expressly considered and rejected by the Tribunal for the reasons set out at paragraphs 179 *et seq* of the Judgment.
9. In the second ground of the Application, MasterCard has contended that the Tribunal erred insofar as it found that, under its counterfactual, the MasterCard scheme would not have collapsed. This argument was made by MasterCard at the hearing and was considered and rejected by the Tribunal for the reasons set out at paragraphs 260 *et seq* of the Judgment. The Tribunal was entitled to take the view it did in the light of the material before it.
  10. Further, to the extent that MasterCard argues that the economic consultants who gave evidence to the Tribunal fall to be treated as expert witnesses in respect of the identification of the appropriate counterfactual and its effect on the MasterCard scheme, the Tribunal considers that the submission is misconceived for two reasons.
    - a. In making such predictions, the consultants do not appear to have any special expertise. The Tribunal specifically considered the weight to be attached to the expert economists' evidence in paragraphs 36 *et seq* of the Judgment.
    - b. Moreover, the opinions of the economists fell to be considered in the context of the totality of the evidence before the Tribunal, and this is precisely how the Tribunal approached the question: see paragraphs 179 *et seq*. To the extent that MasterCard contends that the Tribunal was obliged to follow expert opinion, that contention is wrong.<sup>4</sup>
  11. Grounds three to five of the Application relate to the Tribunal's finding on damages. In the third ground of the Application, MasterCard has contended that

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<sup>3</sup> [2012] CAT 19 at [397].

<sup>4</sup> *Fuller v Strum* unreported (HC 1999 03350) at 34-35 and [2002] EWCA Civ 1097 at [22] to [23]; *Kingley v Brudenell* [2016] EWCA Civ 980 at [26] *et seq*.

the Tribunal erred insofar as it awarded Sainsbury's damages even though Sainsbury's suffered no loss of profits as a result of the infringement found. This argument was expressly considered and rejected by the Tribunal at paragraphs 486 *et seq* of the Judgment. The Tribunal does not consider that there is a real prospect of disturbing that conclusion on appeal.

12. In the fourth ground of the Application, MasterCard has contended that the Tribunal erred insofar as it found that Sainsbury's damages should not be reduced to take account of the extent to which Sainsbury's had passed on any overcharge. The question of pass-on was considered by the Tribunal at paragraphs 479 to 485 of the Judgment. MasterCard has not identified why it considers the Tribunal's findings in this regard to be erroneous. We do not consider that an appeal on this ground, as currently formulated, would have a real prospect of success.
13. In the fifth ground of the Application, MasterCard has contended that the Tribunal erred insofar as it failed to take account of the extent to which there would be switching by issuer banks from MasterCard to Visa and Amex under the Tribunal's counterfactual in its assessment of Sainsbury's loss. As we made clear at paragraphs 260 *et seq* of the Judgment, we were not persuaded that such switching would occur in the counterfactual hypothesis. In those circumstances, this ground too is misconceived and provides no prospect of a successful appeal.
14. In light of the above, we do not consider that any of the five grounds set out in the Application has a real prospect of success, nor that there is another compelling reason why the appeal should be heard.
15. Accordingly, permission to appeal is refused.

The Hon. Mr Justice Barling  
Chairman

Prof. John Beath OBE

Marcus Smith QC

Charles Dhanowa OBE, QC (Hon)  
Registrar

Date: 22 November 2016