

WEDNESDAY 4TH JULY 2018

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

CL2015000471

BEFORE THE MASTER OF THE ROLLS
THE CHANCELLOR OF THE HIGH COURT
And LORD JUSTICE FLAUX

IN C3/2016/4520

B E T W E E N

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
APPELLANTS ("MASTERCARD")

-AND-

SAINSBURY'S SUPERMARKETS LTD
RESPONDENT ("SAINSBURY'S")

("Sainsbury's v. MasterCard")

AND IN C3/2017/0889-0890 and 0892

B E T W E E N

(1) ASDA STORES LIMITED
(2) ~~ARCADIA GROUP BRANDS LIMITED~~ and others
(3) ARGOS LIMITED AND ORS
(4) WM MORRISON SUPERMARKETS PLC
APPELLANTS ("AAM")

-AND-

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED
RESPONDENTS ("MASTERCARD")

("AAM v. MasterCard")

AND IN C3/2017/3493

B E T W E E N

SAINSBURY'S SUPERMARKETS LTD
APPELLANT ("SAINSBURY'S")

-AND-

(1) VISA EUROPE SERVICES LLC
(2) VISA EUROPE LIMITED
(3) VISA UK LIMITED
RESPONDENTS ("VISA")

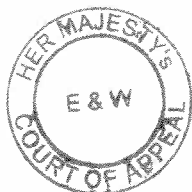
("Sainsbury's v. Visa")

(The MasterCard Appeals and *Sainsbury's v Visa*
being collectively referred to as the "Appeals")



COURT 71
Appeal No.

C3/2016/4520 &
A4/2017/0889 &
A4/2017/0890 &
A4/2017/0892 &
A4/2017/3493



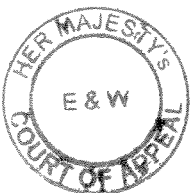
UPON the Court of Appeal handing down judgment on the Appeals (the “Judgment”)

AND UPON reading the documents recorded on the Court file as having been read

IT IS ORDERED THAT:

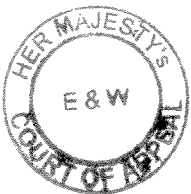
Sainsbury’s v. MasterCard

1. The first ground of MasterCard’s appeal in *Sainsbury’s v MasterCard* is allowed, namely the point that the Tribunal erred because it based its finding that there was a restriction of competition on a counterfactual hypothesis which was not contended for by either party and which was not supported by any evidence. Paragraphs 1, 2 and 5 of the Order of the Competition Appeal Tribunal dated 11 August 2016 and paragraphs 1 and 2 of the Order of the Competition Appeal Tribunal dated 6 February 2017 are, therefore, set aside.
2. MasterCard’s appeal otherwise is dismissed.
3. All sums paid pursuant to the orders set aside shall be held by the respective parties in escrow accounts pending judgment and further Order of the Competition Appeal Tribunal following the remittal pursuant to paragraph 15 of this Order.
4. All issues relating to the costs of these proceedings (including the costs of the Appeal and the original proceedings before the CAT), shall be reserved to the Competition Appeal Tribunal following the remittal pursuant to paragraph 15 of this Order.



AAM v. MasterCard

5. AAM's appeal in *AAM v. MasterCard* is allowed.
6. Paragraphs 1-7 and 10-12 of the Order of Mr Justice Popplewell dated 16 February 2017 (the "Popplewell Order") (which save as set out therein dismiss the claims and make consequential directions) are set aside in their entirety as regards AAM and MasterCard, apart from those parts of paragraph 2 of the Popplewell Order which declare that MasterCard is liable to Asda Stores Limited and WM Morrison Supermarkets PLC for breach of statutory duty in relation to the setting of the EEA MIF for consumer debit cards for the period from 23 May 2007 to 11 June 2008, and those parts of paragraph 3 of the Popplewell Order which declare that MasterCard is liable to Homebase Limited and Argos Limited for breach of statutory duty in relation to the setting of the EEA MIF for consumer debit cards for the period from 5 October 2007 to 11 June 2008.
7. The sums which each of the AAM parties paid to MasterCard by way of interim payment, pursuant to paragraph 7 of the Popplewell Order, shall be held by MasterCard in an escrow account pending judgment and further Order of the Competition Appeal Tribunal following the remittal pursuant to paragraph 15 of this Order.
8. Save as aforesaid, all issues relating to the costs of these proceedings (including the costs of the proceedings before Popplewell J.), shall be reserved to the Competition Appeal Tribunal. The AAM parties have liberty to apply to the Competition Appeal Tribunal for an interim payment in respect of their costs.

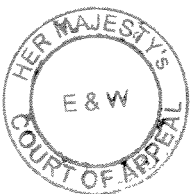


Sainsbury's v. Visa

9. Sainsbury's appeal in *Sainsbury's v. Visa* is allowed.
10. Paragraphs 1 and 3 of the Order of Phillips J. in *Sainsbury's v. Visa* dated 18 January 2018, in which the Judge dismissed Sainsbury's claim and reserved costs, are set aside.
11. The entirety of the Order of Phillips J. in *Sainsbury's v. Visa* dated 28 February 2018, in which the Judge adjourned consequential matters to a later date and reserved costs, is set aside.
12. All issues of costs of the *Sainsbury's v. Visa* proceedings (including the costs of the Appeal and the proceedings before Phillips J) are reserved to the Competition Appeal Tribunal.

General / disposal

13. It is declared that:
 - (a) the UK Multilateral Interchange Fees ("MIFs") set by MasterCard which are subject to the claim brought by Sainsbury's were restrictive of competition within the meaning of, as the case may be, Article 101(1) of the Treaty of the Functioning of the European Union ("TFEU") and section 2 of the Competition Act 1998, and they are therefore unlawful subject to the possibility of MasterCard showing that the conditions of exemption in, as the case may be, Article 101(3) TFEU and/or section 9 of the Competition Act 1998 are satisfied.



(b) the intra-EEA, UK and Irish MIFs set by MasterCard which are subject to the claims herein brought by AAM were restrictive of competition within the meaning of, as the case may be, Article 101(1) TFEU, section 2 of the Competition Act 1998, Article 53(1) of the Agreement on the European Economic Area (“EEA”), and (in relation to the MIFs subject to the claims herein set by MasterCard in Ireland) section 4(1) of the Irish Competition Act 2002, and they are therefore unlawful subject to the possibility of MasterCard showing that the conditions of exemption in, as the case may be, Article 101(3) TFEU, section 9 of the Competition Act 1998, Article 53(3) EEA and/or section 4(5) of the Irish Competition Act 2002, are satisfied.

(c) the UK MIFs set by Visa to which the claim herein brought by Sainsbury’s relates were restrictive of competition within the meaning of Article 101(1) TFEU and section 2 of the Competition Act 1998, and they are therefore unlawful subject to the possibility of Visa showing that the conditions of exemption in Article 101(3) TFEU and/or section 9 of the Competition Act 1998 are satisfied.

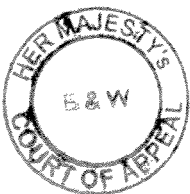
14. There be no order for costs in respect of the intervention in the Appeals by the European Commission, pursuant to Article 15 of Regulation (EC) 1/2003.

15. Each of the Appeals shall be remitted to the Competition Appeal Tribunal for re-consideration, not retrial, in accordance with the



Judgment, of MasterCard's and Visa's cases advanced in the Courts/Tribunal below that the MIFs subject to these claims satisfy the conditions for exemption pursuant to Article 101(3) TFEU, section 9 of the Competition Act 1998, Article 53(3) EEA, and/or section 4(5) of the Irish Competition Act 2002. The Appeal in *Sainsbury's v. MasterCard* shall also be remitted to the Competition Appeal Tribunal for assessment of the quantum claim, based on the principles set out in the Judgment. The three proceedings will be heard together, by a Tribunal chaired by a High Court Judge. It will not be open to any party to advance a new case or to adduce any fresh evidence on the remittals for reconsideration and assessment of quantum in *Sainsbury's v. MasterCard*. However, the parties to each of the proceedings may rely on evidence from the other two proceedings if and only to the extent that it is relevant to the case on exemption advanced in the proceedings in question.

16. The Competition Appeal Tribunal will also determine all issues relating to quantum and any other issues reserved to the Phase 2 trial in *Sainsbury's v. Visa* and *AAM v. MasterCard*.
17. So far as concerns the *Sainsbury's v Visa* case, the Competition Appeal Tribunal shall give effect to the acceptance by Sainsbury's at the trial in *Sainsbury's v Visa* that MIF levels of up to 0.2% for debit cards and up to 0.19% for credit cards would be lawful, these being Sainsbury's estimates of the UK MIT-MIF at the *Sainsbury's v Visa* trial.



Permission to appeal

18. Sainsbury's application for permission to appeal in relation to paragraph 17 of this Order be refused.
19. Visa's application for permission to appeal on the grounds set out in Visa's draft Grounds of Appeal dated 18 June 2018 be refused.
20. MasterCard's application for permission to appeal on the grounds set out in MasterCard's submission dated 18 June 2018 be refused.
21. AAM's application for permission to appeal in relation to the decision to remit their claims for reconsideration be refused.

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



By the Court

**WEDNESDAY 4TH JULY 2018
IN THE COURT OF APPEAL**

ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

ORDER

Copies to:

Queen's Bench Division - Admiralty & Commercial Court
DX 160040
Strand 4

Queen's Bench Division - Administrative Court
Room C317
Royal Courts of Justice
The Strand
London WC2A 2LL

Jones Day Solicitors
Dx 67
Chancery Lane
Ref: RMC/BJN/TOM/348490

Linklaters Llp
One Silk Street
London
EC2Y 8HQ
Ref: 70902.00000/JS/CA

Morgan, Lewis & Bockius Uk Llp
Condor House
5-10 St Paul'S Churchyard
London
EC4M 8AL
Ref: FRANCES MURPHY

Stewarts Law Llp
Dx 369
London/Chancery Lane
Ref: JMS.KLP/5968.1

Mishcon De Reya Llp
Dx 37954
Kingsway
Ref: RM/NP/40708.3

* This order was drawn by M Uddin (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to M Uddin, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is 020 7947 7856