Neutral Citation Number: [2015] EWHC 1145 (Ch)

Case No: HC14C00795
and HC14D02587

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2015

Before :

THE HON MRS JUSTICE ASPLIN DBE

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Between :

(1) TESCO STORES LTD **(2) DOBBIES GARDEN CENTRES LTD** **(3) ONE STOP STORES LTD**	**Claimants/ Respondents**
- and -	
(1) MASTERCARD INCORPORATED **(2) MASTERCARD INTERNATIONAL INCORPORATED** **(3) MASTERCARD EUROPE S.P.R.L.** ~~**(4) MASTERCARD UK MEMBERS FORUM LTD (IN MEMBERS' VOLUNTARY LIQUIDATION)**~~ **(5) MASTERCARD/EUROPAY UK LTD**	**Defendant/ Applicants**

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David Railton QC, Tim Ward QC and Rob Williams (instructed by **Humphries Kerstetter**) for the **Claimants/Respondents**
Mark Hoskins QC and Matthew Cook (instructed by **Jones Day**) for the **Defendants/Applicants**

Hearing dates: 25-27 March 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MRS JUSTICE ASPLIN DBE

Mrs Justice Asplin :

1. This is an application for summary judgment/strike out pursuant to CPR 24/3.4(2) which is made by the First, Second, Third and Fifth Defendants, together referred to as "the MasterCard Defendants" on the basis that the claims brought by Tesco Stores Ltd and others have no real prospect of success/ there are no reasonable grounds for bringing the claim as a result of the principle in English law of *ex turpi causa*. The additional ground in the application notice that the claims were barred in whole or part as a result of the Limitation Act 1980 has since been dealt with by agreement. The claims in relation to the Fourth Defendant have been settled.

The Claim and the Application

(i) Outline

2. The Claimants seek damages for breaches of European and domestic competition law in relation to the MasterCard Defendants' imposition of multilateral interchange fees ("MIFs") in the course of operating the MasterCard credit card system. The Claimants (which are all wholly owned subsidiaries within the Tesco group but which are not otherwise related to each other by way of mutual shareholding) claim that MIFs were the result of an anti-competitive agreement or decision of an association of undertakings, resulting in them being set at too high a level. They contend that the MIFs were ultimately passed on to them and seek damages in respect of what they contend is the "overcharge" and a declaration as to the validity of the MIFs.

3. However, it is said on behalf of the MasterCard Defendants that Tesco Bank (which is another wholly owned subsidiary within the Tesco group but which is not a claimant) has carried out and continues to carry out all of its MasterCard business on the basis of the MIFs which the Claimants are contending are anti-competitive and excessive. Further, it is said that both the Claimants and Tesco Bank have promoted the use of Tesco Bank MasterCards in Tesco group stores and approximately half of the sums claimed by the Claimants relate to MIFs which were in fact paid to Tesco Bank. The MasterCard Defendants go on to contend that the Claimants and Tesco Bank are part of a single economic entity which through Tesco Bank is a participant in the alleged illegal conduct upon which the claims are based. In such circumstances, the MasterCard Defendants say that the claims are barred by the maxim *ex turpi causa* and as a result, they are entitled to summary judgment or alternatively, that the claim should be struck out.

(ii) The regime and the Claims in more detail

4. The MasterCard Defendants are companies within the MasterCard group of companies. The MasterCard scheme provides debit and credit card payment products. MasterCard licenses banks and financial institutions to provide the credit cards. Licensees specialise in transacting either with merchants (referred to as acquiring) or with consumers (referred to as issuing) or do both. It is not in dispute that in an ordinary transaction under the MasterCard scheme: a customer presents his MasterCard payment card to a merchant by way of payment; the merchant then seeks payment from his "acquiring bank"; the acquiring bank seeks payment from the customer's "issuing bank"; and the issuing bank seeks payment from the customer. As part of this scheme: acquiring banks pay MIFs to the issuing banks. MasterCard sets

or makes provision for setting interchange fees which apply in the absence of a bilateral agreement between the parties. In addition, merchants pay merchant service charges ("MSCs") to their acquiring banks in return for the services provided to them. MIFs payable in relation to transactions where a credit card is issued in one EEA state and used at a merchant in a different state are referred to as Intra-EEA MIFs. UK MIFs arise where the credit card is issued and the merchant is based in the United Kingdom.

5. By a decision dated 19 December 2007 the European Commission found that the Intra EEA MIFs set by MasterCard between 1992 and December 2007 constituted a breach of Article 81 of the EC Treaty (now Article 101 TFEU) (the "Decision"). The Decision was upheld on appeal by the General Court (Case T-111/08 *MasterCard & Ors v Commission* EU:T:2012:260) and the Court of Justice of the European Union (the "CJEU") in Case C-382/12 P *MasterCard Inc & Ors v Commission*, judgment of 11 September 2014. Following the Decision in June 2008, MasterCard reduced the Intra EEA MIF to zero on a temporary basis while discussions continued with the Commission. Further to those discussions, in July 2009 MasterCard then increased the Intra EEA MIF to a positive but lower level than those considered in the Decision.

6. There are two related claims before the court, one of which is brought by Tesco Stores Limited ("Tesco Stores") and One Stop Stores Limited (the "Tesco Stores Claim"). The other is brought by Dobbies Garden Centres Ltd (the "Dobbies Claim"). As I have already mentioned each of the Claimants is a wholly owned subsidiary of Tesco plc and have been termed "sister" and "cousin" companies. The Tesco Stores Claim was issued on 21 February 2014 and the Dobbies Claim on 30 June 2014. The Tesco Stores Claim both related originally to a period from 22 May 1992 but have since been restricted to the period of six years prior to the start of the respective Claims. That period postdates the period of the infringement found by the Commission in the Decision. However, it is contended in both Claims that the reasoning set out in the Decision applies equally to the subsequent Intra EEA and UK MIFs set by MasterCard so as to render such MIFs unlawful.

7. In fact, the Claimants contend that the level of Intra EEA MIFs for the periods from 21 February 2008 to 12 June 2008 and from 1 July 2009 onwards, was a decision of an association of undertakings which infringed Article 101(1) TFEU; and the UK MIF was set by an agreement or concerted practice between undertakings and/or a decision of an association of undertakings which infringed Article 101 TFEU and the Chapter I prohibition under the Competition Act 1998. The Claimants contend that the MIFs actually set were higher than they should have been and insofar as the MIFs paid by their acquirers were higher than they should have been, the MSCs which the Claimants paid in turn to their acquiring banks were also higher than they should have been. The Claimants claim both ordinary damages, exemplary damages and a declaration to the effect that EEA and UK MIFs imposed in MasterCard transaction are void and unenforceable are sought.

8. Mr Hoskins is not seeking summary judgment in respect of the declaration but submits that that part of the case will wither away if he is successful in his application in relation to the damages which are claimed.

The Court's approach to applications under CPR Parts 3.4 and 24

9. The relevant principles on applications under CPR Rule 3.4(2) to strike out statements of case and under Rule 24(2)(a)(i) for summary judgment are well known and are not controversial. On an application to strike out it is necessary to decide whether the whole or a material part of the Statement of Case discloses no reasonable grounds for bringing the claim. One of the most recent summaries of the relevant principles applicable on an application for summary judgment is contained in the judgment of Simon J in *Arcadia Group Brands Ltd & Ors v Visa Inc* [2014] EWHC 3561 (Comm) at [19]. He referred to the much quoted summary of the relevant principles found in the judgment of Lewison J (as he then was) in *Easy Air Limited v Opal Telecom Limited [2009] EWHC 339 (Ch)* and in addition went on:

> " . . . For present purposes it is sufficient to identify 8 points which are of potential relevance to the present applications.
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> (1) The Court must consider whether the Claimants have a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v. Hillman* [2001] 1 All ER 91, 92.
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> (2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472 at [8].
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> (3) The court must avoid conducting a 'mini-trial', without the benefit of disclosure and oral evidence: *Swain v. Hillman* (above) at 95.
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> (4) The Court should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17].
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> (5) In reaching its conclusion, the Court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v. Hammond (No. 5)* [2001] EWCA Civ 550 at [19].
>
> (6) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination

> and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].
>
> (7) The overall burden of proof remains on the Defendants,
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> > ... to establish, if it can, the negative proposition that the [Claimants have] no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial,
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> see *Apvodedo NV v. Collins* [2008] EWHC 775 (Ch), Henderson J at [32].
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> (8) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see: *Miles v. Bull* [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were grounds for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v. Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), Henderson J at [55]-[56]."

10. I was also referred to the recent summary of the principles in the dicta of Floyd LJ in *TFL Management Services Ltd v Lloyds Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006, at [26]-[27]. At [26] Floyd LJ set out the approach set out by Lewison J in *Easy Air Limited v Opal Telecom Limited.* In particular, Lewison J's sixth and seventh principles set out at [26] and the dicta at [27] are relevant here:

> ". . .
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real

> prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.
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> 27. Neither side sought to challenge these principles. I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in Partco v Wragg [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see Partco at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example Hudson and others and HM Treasury and another [2003] EWCA Civ 1612."

11. Mr Hoskins submits that this matter is well suited to strike out/summary judgment because he seeks the application of well known principles of law to what for the most part are uncontested facts. He also says that it is possible to say that upon the assumed facts, the law will never on any view afford the Claimants a remedy and that the court should grasp the nettle at this stage and decide the matter as soon as possible to avoid the unnecessary cost and delay were this matter to go to what would be a lengthy trial.

12. On behalf of the Claimants, Mr Railton points out that in a judgment dated 19 December 2013, Barling J rejected MasterCard's application that the application of the maxim of ex turpi causa be dealt with as a preliminary issue in its litigation with Sainsbury's, partly on the basis that it was likely to give rise to various factual and evidential inquiries.

13. Mr Railton also reminded me that CPR Part 24 is not meant to dispense with the need for a trial where there are matters which should be investigated and it is not appropriate to conduct a mini trial without the benefit of disclosure and evidence. In his written opening he referred to *Bolton Pharmaceuticals v Doncaster Pharmaceuticals* [2006] EWCA Civ 661 at [18] which is to the effect that the court should hesitate about making a final decision without a trial where even though there is no obvious conflict of fact at the time, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case. In this regard, he points out that he is not instructed on behalf of Tesco Bank and that it is likely that there are more facts relevant to the application of the ex turpi causa maxim in this case which have yet to be disclosed.

14. Lastly, in this regard, he pointed out that in an area in which the law is developing it is not normally appropriate to strike out or grant summary judgment on the basis of hypothetical and assumed rather than actual facts and encouraged me to heed the warning of Lord Collins in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration.

The Issues

15. With that, I turn to Mr Hoskin's substantive submissions. He says that it is common ground in this case that there are four issues to be decided. They are:
    (i) Are the Tesco Claimants and Tesco Bank part of a single economic entity?
    (ii) Was Tesco Bank a party to the infringement of EU and UK Competition law?
    (iii) Does the maxim of ex turpi causa apply to the Claims?
    (iv) Does Tesco bear a significant responsibility for the infringement?

    According to Mr Hoskins these are the necessary elements for his ex turpi causa defence to the Claims. Mr Railton submits that the issues are more complex. It is common ground however, that Article 101 applies to decisions by "undertakings" and "associations of undertakings" and "concerted practices". The parties diverge in relation to the test to be applied in determining the precise constitution of the undertaking and the test to be applied in relation to whether an infringement can be attributed to a company within an undertaking, other than the primary wrongdoer. In any event, I will consider the issues as formulated by Mr Hoskins and expand them where necessary.

(i) Are the Tesco Claimants and Tesco Bank part of a single economic entity?

16. First, Mr Hoskins contends that Tesco Bank and the Claimants are a single economic entity or undertaking for the purposes of Article 101 TFEU and Chapter 1 of the Competition Act 1998. This is a necessary first step in making good the ex turpi causa defence to the Claims. It is not in dispute that the fundamental test for the existence of a single economic entity is whether companies form a unitary organisation of personal, tangible and intangible elements which pursue a specific economic aim on a

long term basis: Case T-11/89 *Shell v Commission* [1992] ECR II-00757 at paragraph 311.

17. It is also not in dispute that Case C-97/08 P *Akzo Nobel v Commission* [2009] ECR I-08237 is authority for the proposition that where a parent company has a 100% shareholding in a subsidiary the parent company can exercise a decisive influence over the conduct of the subsidiary and that there is a rebuttable presumption that the parent company does in fact exercise such a decisive influence. It is for the parent company to put before the Court any evidence relating to the organisational, economic and legal links between its subsidiary and itself to rebut the presumption and in seeking to do so, it is not only decisive influence over the conduct of a subsidiary on the market which is relevant. Account must be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent, which may vary from case to case.

18. In particular, Mr Hoskins referred me to a passage from the decision of the Advocate General in *Akzo Nobel*, which was approved by the CJEU at paragraph 74 of the judgment. Paragraph 74 is in the following form:

> "74. It also follows from paragraph 58 of this judgment that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in paragraph 64 of the judgment under appeal, but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list."

The part of the Advocate General's decision to which I was referred is as follows:

> "91. A parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy. Thus, a single commercial policy within a group may also be inferred *indirectly* from the totality of the economic and legal links between the parent company and its subsidiaries. Conversely, the absence of such a single commercial policy as between a parent company and its subsidiary can be established only on the basis of an assessment of the totality of all the economic and legal links existing between them.
>
> 92. For example, the parent company's influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct of the subsidiaries and of the whole group. Moreover, as the Commission correctly points out, even a company's mere membership of a group may influence its market conduct, in relation, for example, to the question of with whom that company should actively compete."

19. The position was considered and summarised by the Competition Appeal Tribunal in *Durkan Holdings & Ors v Office of Fair Trading [2011] CAT 6* at [22] in the following way:

> "From this we see that the EU Courts have expressed in a number of different ways the question we must ask ourselves: did the parent exercise decisive influence over the subsidiary; do the companies concerned determine their own conduct independently on the market or does the subsidiary comply with the instructions that the parent issues; can the parent direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit? However one expresses the test, a number of points emerge:
>
> (a) The fact that the parent owns all the shares in the subsidiary means that it has the ability to exert influence; this does not automatically mean that it actually exerts that influence but it creates a rebuttable presumption that influence was actually exercised.
>
> (b) The exercise of influence can be indirect and may be established even if the parent does not interfere in the day to day business of the subsidiary and even if the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary.
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> (c) It is not necessary to show that any influence was actually exercised as regards the infringement in question: one must look generally at the relationship between the two entities.
>
> (d) The factors to which the court may have regard, when considering the issue of decisive influence, are not limited to commercial conduct but cover a wide range as described by the Advocate General and the General Court."

20. Mr Hoskins submits that there are three points to be discerned from the *Akzo* case. The first is that the decisive influence test is not the only basis for the imputation of liability within a group. One must have regard to all the relevant factors. Secondly, he says that each company within the economic entity is to be regarded as jointly and severally liable for the infringement because the companies within the entity are treated as one and the same and thirdly, that liability for the infringement does not depend on having to establish the personal involvement of each company in the infringement. Emphasis is placed in particular upon paragraphs [57] – [59]:

> "57. The infringement of Community competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person (see, to that effect, *Aalhorg Portland and Others v Commission*, paragraph 60, and judgment of 3 September 2009 in Joined Cases C-322/07 P, C-327/07 P and C-338/07 P

> *August Koehler and Others v Commission*, paragraph 38). It is also necessary that the statement of objections indicate in which capacity a legal person is called on to answer the allegations.
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> 58. It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, to that effect, *Imperial Chemical Industries v Commission*, paragraphs 132 and 133; *Geigy v Commission*, paragraph 44; Case 6/72 *Europemballage and Continental Can V Commission* [1973] ECR 215, paragraph 15; and *Stora*, paragraph 26) having regard in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, *Dansk Rørindustri and Others v Commission*, paragraph 117, and *ETI and Others*, paragraph 49).
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> 59. That is the case because in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking by the purposes of the case-law mentioned in paragraphs 54 and 55 of this judgment. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement."

21. Although it is not in dispute that the fact that the share capital of two separate companies is held by the same person is insufficient in itself to establish that those companies are a single economic unit, Mr Hoskins says that Case C-196/99P *Aristrain* [2003] ECR I-11005 (a decision of the Court of Justice of the European Communities (Fifth Chamber)) at paragraph 99 is not authority for the proposition that if two subsidiaries are part of a single economic entity that one cannot be liable for the other's infringement of Competition law. Paragraph 99 of the *Aristrain* decision is as follows:

> "The simple fact that the share capital of two separate commercial companies is held by the same person or the same family is insufficient, in itself, to establish that those two companies are an economic unit with the result, that under Community Competition law, the actions of one company can be attributed to the other and that one can be held liable to pay a fine for the other."

22. In this regard, Mr Hoskins relied upon Case C-407/08 P *Knauf Gips*[2010] ECR I-6375 in which it was argued that the General Court had erred in holding that the appellant formed an economic unit with the other companies owned by the Knauf family and by imputing to it liability for the activities of those other companies. It was

held that "the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status ..." and that the "existence of an economic unit may be inferred from a body of constituent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit": see paragraphs [64] and [65].

23. As a result, Mr Hoskins says that the legal test as to a single economic entity and the resultant joint and several liability of the constituent persons within that entity for an infringement of competition law is clear and that all one has to do is to apply the test to the uncontested facts. He accepts that a factual situation of the kind which arises in this case, has not been considered by the Court whether here or in the European Union. Nevertheless, he submits that it is clear on the evidence before the Court that Tesco Plc, Tesco Bank and the Claimants belong to "a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis" and that as a result, liability for an infringement of Competition law by Tesco Bank flows to the Claimants which are also wholly owned subsidiaries of Tesco plc.

24. For the purposes of this application it is accepted that Tesco plc has a decisive influence over each of the Claimants and Tesco Bank, albeit separately in each case and that therefore, there are a number of "vertical" parent/subsidiary relationships. The question is whether Tesco as a whole, for this purpose in the sense of Tesco plc, Tesco Bank and the Claimants are a single economic entity and that as a result there is joint and several liability between the members of that entity for an infringement on a "horizontal" basis between subsidiaries which are "sisters" or "cousins" as well as "vertically" between parent and subsidiary.

25. Mr Hoskins relies upon a number of factors to establish a horizontal as well as vertical single economic entity including the Claimants and Tesco Bank, the first of which is the existence of a common parent in the form of Tesco plc. In fact, between 21 February 2008 which marks the start of the period to which the Claims relate and December 2008, the immediate parent company of Tesco Bank was a joint venture company owned 50/50 by Tesco plc and the Royal Bank of Scotland plc. On 19 December 2008, Tesco plc purchased the entirety of Royal Bank of Scotland plc's shareholding and thereafter, has been the sole parent of Tesco Bank. Mr Hoskins says that in any event, there are enough other factors which establish the existence of a single economic entity for the full period to which the Claims relate and if not, he is happy to cast the period from February to December 2008 aside.

26. The second factor is the existence of overlapping directorships. It is not in dispute that from 2008 until February 2012, Andrew Higginson was a director of Tesco Plc, Tesco Stores and Tesco Bank and at all material times there have been common directors between (i) Tesco Plc and Tesco Stores and (ii) Tesco Plc and Tesco Bank. In fact, throughout the period of the claim, either all of the executive directors or all of the executive directors other than one of Tesco Plc have also been directors of Tesco Stores. Over the relevant period, the number of directors of Tesco Bank who have also been directors of Tesco plc has varied but there has always been at least one and since 2012, generally there have been three. Further, the Executive Committee of Tesco plc, which oversees the implementation of the strategy set by the board of Tersco Bank is chaired by the Chief Executive Officer of Tesco plc (who is also a director

of Tesco Stores) and includes in its composition directors of Tesco Bank (including its Chief Executive Officer) and directors of Tesco Stores. The Head of Tesco Bank is now also in charge of strategy for the Tesco group. In addition, the Company Secretary of Tesco plc also holds that office in relation to Tesco Bank and the board of directors of the plc have power to remove the directors of the Bank.

27. The third factor relied upon is what Mr Hoskins describes as the integrated rationale adopted by Tesco. As Mr Humphries describes at paragraph 24 of his first witness statement, the rationale for Tesco Bank itself was to provide customers with a one-stop service for all their daily needs and was part of a single strategy. Mr Hoskins submits that the Claimants and Tesco Bank are seen by Tesco and represented to the outside world as part of an integrated whole. He took me to Tesco plc's Annual Report and Financial Statements for 2014 in which Tesco Bank is described as one of the four sectors of the Tesco business, the others being the UK, Asia and Europe, there is reference to "putting the customer at the centre of our offer and building a seamless experience around them, whether they want to shop in store, online, in our restaurants, at the Bank or across a combination of them" and amongst other things, it is stated that Tesco's vision is that Tesco Bank is to be the bank for Tesco customers. Under the heading, "Key performance indicators" there is reference to "the whole [being] more than the sum of the parts" and in the section concerned with risk, there is reference to the fact that financial risks taken by Tesco Bank and changes to financial regulation including in relation to MIFs could impact profitability and that the Bank's "Risk Appetite" is approved and regularly reviewed both by the Bank's board of directors and that of Tesco plc. The possible change to MIFs is also noted in the Group Financial Statements.

28. Fourthly, Mr Hoskins relies upon what he calls an overarching group strategy. He referred me to the Tesco plc Annual Reports and Financial Statements for 2009 in which there is reference to responsibility for formulating and implementing Group's strategic plan having been delegated to the Executive Committee. It is not disputed that Mr Higgins the Chief Executive Officer of Tesco Bank was a member of that committee and that from December 2014 has taken responsibility for Group strategy as a whole.

29. Mr Hoskin's next factor was Tesco Bank's commercial strategy. He showed me extracts from the Tesco Bank Governance Manual for 2013 which makes reference to Tesco plc as the Bank's parent company having "sufficient control through the shareholder reserved approvals process and sufficient visibility of TPF's [Tesco Bank's] operations and performance to enable it to comply with the corporate governance requirements as a listed entity, to protect its interests as the shareholder and to ensure that TPF [Tesco Bank] has sufficient independence to comply with its regulatory obligations." It also sets out matters referred to Tesco plc at executive level which include "[A]ny material change in the way Tesco Bank trades which would exceed the financial risk appetite of the Bank beyond that agreed by Tesco [plc]". Further, it is stated under the heading "Policy Approvals" that Tesco Bank takes account of existing Tesco Group policies but only after having confirmed that they are suitable for the regulatory environment in which [TPF] operates".

30. In addition, Mr Hoskins says that account should be taken of the Tesco group's corporate governance which he submits is group wide. Unsurprisingly, there is a

group wide process for establishing risks and responsibility assigned to each level of management and the Chief Executive Officer of each subsidiary business is required to certify by way of an annual governance return that the Group's governance and compliance policies and processes have been adopted. The Chairman of the Tesco Bank audit committee attends the main audit committee twice a year and Tesco Bank's judgments, its capital, liquidity and reserves amongst other things, are reviewed.

31. He also places reliance upon what he says is the interdependence or reliance of Tesco Bank and Tesco Stores upon each other, the reliance of the Bank upon the Tesco brand and the way in which the use of the Tesco Clubcard and the tailoring of offers as a result of shared data provides mutual support and leverage of existing assets and capabilities. This is reflected in the Annual Report for 2012 which states amongst other things, that Tesco Bank is underpinned by the Tesco brand and Clubcard. The materials for a Tesco internal seminar in 2009 emphasise these advantages and in particular, refer to building loyalty and the existence of Bank branches in stores driving footfall. There is also express reference to MIFs and to around 15% of credit card transactions in Tesco Stores being referable to the Tesco Bank Credit Card enabling MIFs to be retained within the Group and the holders of such credit cards spending 30% more in stores.

32. He also points out that although this point does not apply to Dobbies Ltd or One Stop Stores Ltd, it is clear he says from the evidence of Mr Humphries that Tesco Bank makes use of Tesco Stores' assets in the sense that there are only three stand alone bank branches, there is a policy to place ATMs in grocery stores and Tesco Stores is an "appointed representative" of the Bank.

33. Mr Hoskins also relies upon the existence of shared services and marketing. It is accepted for example, that trade mark licensing, data processing and IT are shared and that although Tesco Bank has separate marketing it is based upon "One Voice" which is a single strategy. In fact, although the Bank's marketing is separate, it is merely provided by a different subsidiary within the Tesco group.

34. On the basis of all of this, Mr Hoskins says that it is quite clear that Tesco plc, Tesco Bank and the Claimants form a single economic entity both in a series of vertical and in the horizontal sense and are jointly and severally liable for the alleged infringement of competition law by Tesco Bank.

35. Mr Railton on the other hand whilst not disputing the matters to which Mr Hoskins has pointed, submits that whether companies or other persons form a single economic entity is context specific and therefore is a question of fact which is not suitable to be determined on an application of this kind. The focus he says is on the specific activity, offending conduct or agreement. He says that this is illustrated in the approach of the Court of First Instance (First Chamber) in *Shell v Commission.* At paragraphs [308] – [315] the Court considered the question of whether the applicant, a service company responsible for co-ordination and strategic planning in the sector in question was answerable for the infringement of EU Competition law. It considered the evidence as to the role played by the applicant and concluded at paragraph [315]:

> "For that reason, the Commission was entitled to consider that the applicant was responsible for the coordination of the Shell group's action in the context of the infringement and thus hold it answerable for the infringement."

Mr Railton puts emphasis upon the factual enquiry and the need to consider it in the "context of the infringement". In this regard, he also relies upon the final phrase in paragraph [311] which sets out the definition of a single economic entity to which Mr Hoskins referred (and which is common ground). The entire passage is as follows:

> " . . . Article 85(1) of the EEC Treaty is aimed at economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long term basis and can contribute to the commission of an infringement of the kind referred to in that provision."

In this regard, he also took me to Case C-170/83 *Hydrotherm* at paragraph 11:

> "In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal."

In addition, he referred me to the Opinion of Advocate- General Jacobs in Case C-115-117/97 *Albany v Stichting* in which this decision was described in the following terms at [207]:

> "… the Court has held that "in competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question". Accordingly, the notion of "undertaking" is relative and has to be established in concreto with regard to the specific activity under scrutiny."

36. In addition, he reminded me that in MasterCard's skeleton it is stated that under EU Competition Law it is settled case law amongst other things that "undertaking" "must be understood as designating an economic unit for the purposes of the subject-matter of the agreement in question . . ."

37. He says that this is also made good by the Joined Cases C-172/12 P and C-179/12 P *du Pont and Dow v Commission* in which the Court considered a joint venture between two multinational chemical companies and concluded at [47]:

> "Where two parent companies each have a 50% shareholding in the joint venture which committed an infringement of the rules of competition law, it is only for the purposes of establishing liability for participation in the infringement of that law and only in so far as the Commission has demonstrated, on the basis of factual evidence, that both parent companies did in fact exercise decisive influence over the joint venture, that those

> three entities can be considered to form a single economic unit and therefore form a single undertaking for the purposes of Article [101 TFEU]."

38. In this regard, he also referred me to *Cooper Tire & Rubber Co & Ors v Shell Chemicals UK Ltd & Ors* [2009] 2 CLC 691 [2009] EWHC 2609 (Comm) in which Teare J was concerned with an application in which some of the defendants contended that the English Court lacked jurisdiction. The claims arose out of a decision by the EC Commission that thirteen companies were guilty of an infringement of Article 81 [101] of the EC Treaty in relation to the market for the supply of butadiene rubber and other commodities used in the manufacture of car tyres. At [56] Teare J considered a hypothetical subsidiary manufacturing shoe polish and concluded that such a subsidiary would not be liable for infringement Article 81 [101] because "to be liable a subsidiary must be part of the undertaking which has infringed article 81."

39. Mr Railton submits therefore, that the question of whether there is a single economic entity is not generic and depends upon the context. One needs to focus upon the alleged offending conduct or agreement and the specific activity. In this case, therefore, Mr Railton says that the context could be the setting of MIFs, the charging of MIFs or at its widest it might be the issuing of MasterCard credit cards. However, he points out that none of the members of the Tesco group are involved in the first two activities and that only Tesco Bank is involved in the third. In relation to those activities it is regulated by the FCA and is required to be independent in relation to operational matters. He accepts however, that in relation to the third, as a result of the decisive influence test and the presumption arising from a 100% shareholding, Tesco plc and Tesco Bank are a single economic entity.

40. In this regard, he took me to the 2012 Annual Report and Financial Statements for Tesco plc and in particular to the Notes numbered 2 and 13. Both reveal that there are two separate activities, namely retail and banking and that reporting takes place separately. He also accepts that the synergies to which Mr Hoskins has referred exist but points out that they occur with Tesco Bank's retail business and not with its issuing business. He submits that there is no evidence to show that Tesco Stores is involved in any way with Bank's business in the issue of credit cards. It is accepted that some Tesco stores staff are trained by Bank and assist in some banking matters but Mr Railton says that there is no evidence that this extends to the issuing business itself. However, in Mr Cotter's fourth witness statement produced during the hearing he reiterated that Tesco Bank products including credit cards are promoted in Tesco stores and produced photographs of various leaflets promoting financial products and services on display in a store. This is not disputed.

41. Mr Railton says therefore, that it is not good enough to seek to draw upon the financial statements of a holding company such as Tesco plc, to rely upon the fact that all the subsidiaries are wholly owned by the parent which controls them, to state that they all benefit from the conduct of one and to conclude that they form a single economic entity for the purposes of competition law. He says that the enquiry is fact specific and context specific and that Mr Hoskins' approach which is to take the evidence available at present, in the round, is insufficient. The way in which the competing interests between the Claimants on the retail side of the Tesco business and Tesco Bank on the banking arm are played out, can only be decided at trial when all of the facts are available. In any event, he submits that in this case, the Claimants are

not part of the same entity as Tesco Bank for the purposes of the correctly directed enquiry in relation to MIFs and that MasterCard cannot show that the Claims have no prospect of success.

42. In any event, Mr Railton also submits that even if there are synergies they do not apply to the claims made by Dobbies and One Stop. He also says that there has been no attempt to show that there is a single economic unit here in relation to the relevant subject matter. In fact, the evidence shows that there are two businesses, retail and the banking and when their interests conflict in relation to the level of MIFs, Tesco Stores has no choice but to pay the inflated MSCs. The Bank is ring fenced and has primary responsibility for the operation of controls within the bank. A careful balance has been achieved in order to comply with banking regulation and governance requirements in respect of Tesco plc's listing.

43. Mr Railton also submits that even if the Claimants and Tesco Bank are a single economic unit there is no basis upon which the alleged infringement by Tesco Bank can be imputed to the Claimants. It is said that what matters is whether the subsidiary which is to be imputed with liability has decisive influence and control over the subsidiary which committed the infringement and that that test is clearly not satisfied here. He points out that in those cases in which an otherwise innocent parent has been held to be part of the undertaking because of the decisive influence it has been presumed to exercise, no separate enquiry as to whether the liability of the infringing subsidiary should be imputed to it is necessary because the relevant question of decisive influence will by definition already have been answered. Mr Railton submits that this is not true for sister or cousin companies with which this matter is concerned. They may only have been included within the entity or undertaking with the infringer in the first place because of parallel vertical relationships with a common ultimate parent. He points out that there is no case of which he is aware in which such conduct has been attributed horizontally in the absence of decisive influence by the sister or cousin over the offending company.

44. In relation to *Akzo*, at [59] he points out that the conclusions are in the context of a parent/subsidiary relationship in which decisive influence is presumed and that this is made clear at [77] which is as follows:

> "77. It must be observed in that connection that, as it is clear from paragraph 56 of this judgment, Community competition law is based on the principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, which, as stated in paragraph 55 of this judgment, may consist of several legal persons, the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it. It follows that, in that context, the liability of the parent company cannot be regarded as strict liability."

45. He points out that the Advocate General's opinion expressed at [86] and [95] – [99]

also relates to the position between parent and subsidiary, a relationship in which decisive influence is presumed unless rebutted and says nothing about sister and cousin companies. Furthermore, in the Advocate General's opinion, as reflected in paragraph [77] of the judgment of the Court, the parent company responsibility under anti-trust law has nothing to do with strict liability as a result of the decisive influence it exerts over its subsidiaries: see paragraphs [97] – [99].

46. In this regard, Mr Railton also referred me to the decision in Case C-90/09 P *General Quimica v Commission* [2011] ECR I-00001 and to Case C-201/09 *ArcelorMittal Luxembourg SA v Commission* ECR I-02239, a decision of the Grand Chamber. The question of the liability of a sister company as part of an entity was considered in passing in the latter case. At paragraph [104] it was noted that:

> "104. As to ARBED's argument that the attribution of the unlawful conduct to a sister company by virtue of the concept of an economic entity is inconsistent because it leads to stricter rules on liability being imposed on that company than on the parent company, it suffices to note that in the present case the Commission attributed that conduct to the sister company because it had taken over the commercial activities of the parent . . ."

47. However, Mr Railton submits that the Advocate General considered attribution under the headings of two derogations from the norm which were "decisive influence" and "successors," the second of which is not relevant here. Mr Railton accepts that it is possible for decisive influence to apply between sisters or cousins but says that it is instructive that the Advocate General refers to two derogations only. He says that if Mr Hoskins were correct it would be unnecessary to approach the topic by reference to derogations at all.

48. He also pointed out that at paragraph [98] in the *Aristrain* decision in which the question of whether a fine could be imposed on a sister company in respect of its own conduct and that of its sister was considered, it was held that the Court of First Instance was wrong to decide that it was possible to impute to a company all of the acts of a group even though that company has not been identified as the legal person at the head of the group with responsibility for coordinating its activities. This was in circumstances in which it was accepted that they formed an economic unit. Mr Railton also relies upon the *Knauf* decision in this regard. He says that having already decided that the companies in question some of which were sisters, formed an economic entity or an undertaking, when determining the horizontal imputation of liability, the Court nevertheless, went on to consider whether decisive influence was exercised on a horizontal basis.

49. Lastly, in this regard he referred me to Case C-231-233/11 *Siemens Osterreich* [2014] 5 CMLR 17, a case in which a number of companies forming an undertaking were held jointly and severally liable for infringements and joint and several fines were imposed. A question arose in relation to whether the Commission should determine the share of the fines to be paid by each company. The General Court held that it should and the Commission appealed. The issue of sister or cousin companies was not addressed, but Mr Railton submits that there is no hint that liability follows merely from being part of an undertaking. The Advocate General's opinion at [78] – [80]

makes clear that where the undertaking which commits the infringement is made up of a number of legal persons the question arises as to which of them should answer for it in practice. At [80] he states:

> "In that regard, I nevertheless consider that, in the case of an undertaking made up of various legal persons, the persons who have participated in the cartel, as well as the ultimate parent company which exercised a decisive influence over them, may be regarded as legal entities collectively constituting a single undertaking for the purposes of competition law which may be held responsible for the acts of the undertaking."

This, Mr Railton says is entirely contrary to the proposition that all legal persons within an undertaking are jointly and severally liable for the infringement in question.

50. In this regard, Mr Railton also took me to *Provimi Ltd v Roche Products Ltd & Ors* [2003] 2 All ER 683 in which Aikens J considered the position of a subsidiary within the jurisdiction which was part of the same undertaking as other companies outside the jurisdiction where those companies had been parties to an infringing agreement. He concluded that it was arguable that where two corporate entities are part of an undertaking and one enters into an infringing agreement that if another corporate entity implements the agreement it also infringes. Mr Railton points out that if Mastercard were right, it would not have been necessary to consider the matter in that way at all. Mere membership of the undertaking would have been enough. What became known as the "Provimi point", was considered by the Court of Appeal in *Cooper Tire Europe Ltd v Bayer Public Co Ltd* [2010] Bus LR 1697. Longmore LJ stated at [45]:

> "[45] As to the *Provimi* point, we can readily agree that, as Aikens J said, it is "arguable". We would, however, add that it is also arguable the other way. Although one can see that a parent company should be liable for what its subsidiary has done on the basis that a parent company is presumed to be able to exercise (and actually exercise) decisive influence over a subsidiary, it is by no means obvious even in an art 81 context that a subsidiary should be liable for what its parent does, let alone for what another subsidiary does. Nor does the *Provimi* point sit comfortably with the apparent practice of the Commission, when it exercises its power to fine, to single out those who are primarily responsible or their parent companies rather than to impose a fine on all the entities of the relevant undertaking. If, moreover, liability can extend to any subsidiary company which is part of an undertaking, would such liability accrue to a subsidiary which did not deal in rubber at all, but another product entirely? . . ."

51. Last of all he referred me to *KME Yorkshire Ltd & Ors v Toshiba Carrier UK Ltd & Ors* [2012] EWCA Civ 1190. Etherton LJ with whom Ward and Tomlinson LJJ agreed, considered the "Provimi point" obiter at [37] in the following way:

> "37. The *Provimi* point does not arise in the present case because, for the reasons I have given, the respondents have made a stand-alone claim against KME UK clearly alleging that it participated in, and implemented, the cartel arrangements with knowledge of the cartel agreement. Mr Turner accepts that the respondents must prove KME UK's knowledge of the cartel agreement and practices. Since the point was argued, however, I will express my own view that it is clear that, save in a case where the parent company exercises "a decisive influence" (in the language of EU jurisprudence) over its subsidiary or the same is true of a non-parent member of the group over another member, there is no scope for imputation of knowledge, intent or unlawful conduct."

52. In summary therefore, Mr Railton says that the Claimants are not within the same undertaking as Tesco Bank in relation to the infringement in question and even if they were liability for such an infringement could not be imputed to the Claimants without a decisive influence having been exerted between the Claimants and the Bank and that is not even alleged in this case.

(ii) Was/is Tesco Bank a party to the infringement of EU and UK Competition law?

53. In this regard, it is common ground that it was established in the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 that a claim is barred under the maxim of ex turpi causa on the basis of a reliance test, the effect of which was to bar the claim only if the claimant needs to assert, by way of pleading or evidence, facts, which disclosed the illegality. Mr Hoskins took me back to paragraph 49(a) and (c) of the Amended Particulars of Claim and pointed out that it is contended that the relevant Intra EEA MIFs were set by an unlawful decision of an association of undertakings and that the UK MIFs were set by an unlawful agreement or concerted practice between undertakings and/or a decision of an association of undertakings. Mr Hoskins submits therefore, that as Tesco Bank was at all material times a member of the MasterCard Scheme (as an issuing bank), it was therefore a party to the alleged infringements whether framed in terms of arising from an agreement or concerted practice between MasterCard and its licensees or a decision of an association of undertakings and that in their own pleading, the Claimants rely upon an infringement of competition law to which Tesco Bank as an issuing bank is a party.

54. As I have already mentioned, Mr Hoskins submits that Case C-97/08 P *Akzo Nobel v Commission* [2009] ECR I-08237 para 61 is authority for the proposition that all of the members of a single economic unit are regarded as jointly and severally liable for infringements of competition law. He says therefore, that Tesco plc and the Claimants are jointly and severally liable for the alleged infringements and that this requirement is met.

55. Mr Railton submits that it is important not to forget that in order to succeed on this application, MasterCard must show in this regard, that there is no real prospect of Tesco Bank escaping liability for the infringement. He points out that the Decision was against MasterCard only or at least, a number of MasterCard companies and that there was no finding against Tesco Bank of any kind and that it was not a party to the proceedings, nor is it a party to the proceedings in which these applications are made.

Furthermore, he points out that Tesco Bank has not been the subject of any regulatory action.

56. He also points out that although some information has been shared between Tesco Bank and the Claimants this is subject to a number of exceptions one of which relates to confidential material which MasterCard has refused to allow Tesco Bank to share with the rest of the group. In the circumstances, he says that the Court should be careful about reaching any conclusions about Tesco Bank and its conduct and that this sort of matter should be decided only at trial after full disclosure and in conjunction with findings in relation to MasterCard's conduct. In that regard, of course, he points out that no Defence has been served by MasterCard in this action but that it is of note that in similar proceedings brought by Sainsbury's, they contend that certain structural changes were made in the relationship between them and the banks in 2007, 2009, 2010 and 2014. The Claimants have no information as to these and no doubt, other matters. Only when that information is available will the Claimants be able to assess and articulate arguments which might be put by them on behalf of Tesco Bank. Mr Railton says that I am not in a position to reach a conclusion on this issue at this stage and it is classically a matter for trial.

(iii) Does the maxim of ex turpi causa apply to the Claims?

57. In this regard, Mr Hoskins took me to *Les Laboratoires Servier and Anr v Apotex Inc & ors* [2014] 3 WLR 1257 in which the maxim of ex turpi causa was considered by the Supreme Court. Lord Sumption with whom Lords Neuberger and Clarke agreed stated at [25]:

> "The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they engage the public interest in the same way. Leaving aside the rather special case of contracts prohibited by law, which can give rise to no enforceable rights, this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption, which have always been regarded as engaging the public interest even in the context of purely civil disputes; some anomalous categories of misconduct, such as prostitution, which without itself being criminal are contrary to public policy and involve criminal liability on the part of secondary parties; and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character, such as the competition law considered by Flaux J in *Safeway Stores Ltd v Twigger* [2010] 3 All ER 577."

58. Mr Hoskins says that the infringement of competition law whether under Article 101 or Chapter 1 falls squarely within the parameters described by Lord Sumption and in this regard he drew attention to Case C-52/09 *TeliaSonera* [2011] ECR I-527 at [22] where it was stated that the function of the competition rules was described as

"precisely to prevent competition from being distorted to the detriment of the public interest." There is no need he says, to show negligence or recklessness and that in making such references, Tesco seeks to confuse and conflate an infringement with the imposition of penalties which he says is an entirely separate matter which is dealt with separately under by the TFEU and the Competition Act. Mr Hoskins submits that it would be irrational were the application of the maxim of ex turpi causa to depend upon whether a party was fined given that all may not be investigated and that for example, it is possible to admit an infringement and in certain circumstances to seek leniency and as a result, avoid a fine.

59. In any event, he says that even if he is wrong about this, Tesco was clearly negligent and therefore, the requirement is satisfied because in accepting that section 32(1)(b) Limitation Act 1980 cannot be relied upon for the period prior to 2008, the Claimants have impliedly accepted that they knew or could with reasonable diligence have discovered the relevant facts underlying the infringement in this case. In the alternative to his argument that all parts of the single economic entity are as one in any event, Mr Hoskins submits that if the Claimants accept that they fall within section 32(1)(b) then Bank is in a worse position because it is part of the MasterCard Scheme and knows how it operates. He says therefore, that if the Claimants accept that they know the essential aspects of the case then Bank must do so as well. In addition, he says that it was in the public domain that the competition authorities were investigating MIFs. Nevertheless, in full knowledge of the relevant matters Tesco Bank continued to adhere to the MasterCard Scheme and to apply the relevant MIFs. Mr Hoskins submits therefore, that this satisfies all requirements, even if it is necessary for the liability to be personal rather than vicarious.

60. On behalf of the Claimants, Mr Railton emphasises the need for conduct of a criminal or quasi criminal nature and says therefore that infringement alone is insufficient. He points to the reference to "civil sanction of a penal character" referred to by Lord Sumption at [25] in the *Apotex* case. He says therefore, that without proof of intentional or negligent conduct there is insufficient mens rea to elevate an infringement into conduct of a quasi criminal nature and it would amount merely to a civil action for damages or akin to an action for breach of statutory duty. Mr Railton says that where a fine has been imposed it is likely that the acts are of a quasi criminal nature but he says that he is not seeking to confuse infringement and penalty or to suggest that a fine is necessary for the conduct to be of the requisite nature. He submits that in fact, it is a fact based assessment which must be carried out and is concerned with whether the conduct is intentional or negligent, not upon whether a fine is actually imposed. An infringer might have escaped a fine on a technicality but might still have been negligent and satisfy the requirements for quasi criminal conduct. On the other hand, not all infringements are based on quasi criminal conduct.

61. In relation to Mr Hoskins' submission that there is negligence in any event, Mr Railton also says that Mr Hoskins asks the wrong question when he says that in any event, the Claimants have been negligent either because it can be inferred from the withdrawal of the section 32(1)(b) defence that they had requisite knowledge of the wrongdoing or that Tesco Bank is in no better position because it was a party to the arrangements and must have known what was going on. In this regard, Mr Railton submits that the relevant question is whether the conduct of Tesco Bank was negligent or intentional and whether that conduct can be imputed to the Claimants. He points

out that that is an entirely separate question from whether the Claimants could mount a case in deliberate concealment against MasterCard. Further, he says that whatever the Claimants did in relation to their claim pre 2008 is irrelevant for a number of reasons. First, the fact that they are not pursuing historic claims says nothing about whether there is a right to do so. Secondly, whether the Claimants had constructive knowledge of sufficient facts to plead a prima facie case at a certain time in relation to a historic period of infringement is separate from their knowledge in 2009, 2010 or 2014 in relation to which MasterCard are asserting a different fact pattern. Lastly, even if it were relevant, the particular pre 2008 facts said to be relevant to the post 2008 infringement would have to be isolated and considered. In short, the focus should be upon Tesco Bank's conduct and a mere assertion that it was part of the MasterCard Scheme is insufficient. In its defence in the similar action by Sainsburys against MasterCard it has pleaded a series of matters as to its state of mind and reasonable beliefs. Mr Railton submits that these raise triable issues and that it is unlikely that Tesco Bank's position would be any worse than that of MasterCard itself.

62. Lastly, Mr Railton says that if he is wrong about this and first, the infringement here is quasi criminal and if and to the extent that negligence or intentional conduct is necessary, that there is such mens rea, it would also be necessary to consider two additional and related questions. They are first whether the strict liability exception applies and secondly whether there is personal liability. Lord Sumption stated at [29] of his judgment in *Apotex* that there may be exceptional cases where even criminal or quasi criminal conduct "will not constitute turpitude for the purposes of the illegality defence." He goes on to refer to the fact that there is a recognized exception to the category of turpitudinous acts in cases of strict liability where the claimant was not privy to the facts making his act unlawful.

63. Longmore LJ had also considered the matter in *Safeway Stores Ltd & Ors v Twigger & Ors* [2011] 2 All ER 841 in a case in which the Claimants had infringed the Competition Act 1998 and had been penalised by the Office of Fair Trading. They had been precluded by the maxim ex turpi causa from recovering the amount of the penalty from their directors and/or employees. The liability imposed upon the undertaking was found to be personal to it and not vicarious. Mr Railton says that given that the Claimants here had no involvement at all in Banks' business, it is extremely difficult to see how they could be privy to any illegality or bear any moral culpability for any infringement by the Bank but in any event, this is a matter for trial. He also says that any attempt to impose liability on an innocent sister or cousin company is much more akin to vicarious than personal liability and therefore falls outside the ex turpi causa rule.

64. Lastly, Mr Railton made clear that there could be no public policy against the making of a declaration in the form in which it is sought. In any event he understands the point to have been conceded. He points out that the position as to the future is very important to his clients and that therefore, it will be necessary to have a trial in any event.

(iv) ***Does Tesco bear a significant responsibility for the infringement?***

65. This final issue arises from Case C-453/99 *Courage v Crehan* [2001] ECR I-06297 paras 17-36. It was a case in which the brewery sued a publican in respect of

deliveries of beer under a beer supply agreement which applied to all tied tenants and was faced with the defence that the exclusive purchase obligation was contrary to EU competition law and unenforceable and by a counterclaim for damages as a result of the high prices charged for the beer. In a reference to the Court of Justice of the European Communities, the Court of Appeal stated that since English law did not permit a party to an illegal agreement to recover damages from the other party, the defendant's claim to damages would as a matter of English law be barred in any event, even if his article 81 [Article 101] defence was successful. The ECJ considered the matter at [17] to [36] and held at [31]-[34] as follows:

> "31. Similarly, provided that the principles of equivalence and effectiveness are respected (see *Palmisani*, paragraph 27), Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. Under a principle which is recognised in most of the legal systems of the Member States and which the Court has applied in the past (see *Commission of the European Communities v Italian Republic* (Case 39/72 *Commission v Italy* [1973] ECR 101, paragraph 10), a litigant should not profit from his own unlawful conduct, where this is proven.
>
> 32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.
>
> 33. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.
>
> 34. Referring to the judgment in Case 23/67 *Brasserie de Haecht v Wilkin* [1967] ECR 407 and Case C-234/89 *Delimitis* [1991] ECR I-935, 984-987, paragraphs 14 to 26, the Commission and the United Kingdom Government also rightly point out that a contract might prove to be contrary to Article 85(1) of the Treaty for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of Article 85, particularly where in practice the terms of the contract were imposed on him by the party controlling the network."

66. Mr Hoskins submits that on the basis of the undisputed core facts to which he has referred, there can be no question but that the Claimants bear significant responsibility for the infringements. He says that there is no inequality of arms here, Tesco Bank is a major member of the MasterCard Scheme, MIFs are in fact paid to issuing banks such as Tesco Bank and Tesco Bank was not obliged to remain in the Scheme. It did so because it was commercially advantageous to do so and in fact, chose to issue credit cards which bear higher rate default MIFs. It is said therefore, that Tesco Bank and therefore, the Tesco Group has been a substantial net recipient of MIFs amounting to $639m over the period from 2008 – 2013. It is said that roughly half of the MIFs which the Claimants contend they paid and in respect of which they are seeking damages, were received by Tesco Bank.

67. In this regard, Mr Railton points out that the matters referred to at paragraphs [32] – [34] of the ECJ judgment in *Courage v Crehan* are a non-exhaustive list of what must be taken into account. He also submits that it is the personal conduct of the Claimants which is relevant. The ex turpi causi principle applies only to claimants in actions. Mr Railton submits that there is nothing in *Courage v Crehan* to suggest that "significant responsibility" should be judged on an undertaking wide basis. On the contrary, he points to the references to "the party to the contract" in paragraphs [31] – [33] and the focus on the bargaining power of the contracting party. He says that it is clear from *Crehan* that the focus is on the personal conduct of the Claimants and is not to be confused with the prior issue as to whether the Claimants have legal responsibility by reason of being part of the wider Tesco undertaking. He submits that this is an end to the use of the ex turpi causi defence because it is impossible to say that the Claimants have had any personal involvement in or have contributed to the distortion of competition brought about by the charging of MIFs. On the contrary, he says, they are the parties who have suffered loss as a result.

68. If that submission is wrong, he points out that it is necessary to look at the relative position of Tesco Bank and Mastercard. He says that this is an enquiry which requires further information which is not available on this application but would be at trial once disclosure or possibly third party disclosure has taken place. It includes the effects upon Tesco Bank's position of the changes of position which it seems that Mastercard has pleaded in the Sainsburys action. In any event, Mr Railton submits that such an enquiry is not suited to an application of this nature. If that enquiry were embarked upon he reminded me that the MIFs are imposed under the Scheme Rules which are a contract of adhesion which applies to every licensee and is non-negotiable. Mr Railton says that this is a strong indication that significant responsibility does not lie with Tesco Bank. In relation to relative commercial strength, he says that the relevant comparison between MasterCard and Tesco is with Tesco Bank's position as an issuing bank and not with Tesco Stores as a grocery business. There is nothing to suggest that in this capacity, Tesco Bank had power to change the applicable rules. The second point taken is that Tesco Bank could have negotiated bilateral agreements and avoided the imposition of the MIFS. There is a conflict of evidence as to the prevalence of bilateral agreements and as to their commercial effect. Mr Railton says that in such circumstances, I am not in a position to form a view on this issue. Third, it is said that Tesco Bank had the choice not to enter into the scheme at all. Mr Railton says that is wholly unreal. Lastly, it is said that Tesco has failed to avail itself of its legal remedies. In this regard, Mr Railton says that it is not Tesco Bank which suffered the loss. The Claimants he says have pursued

their remedies in good time. He also says that: in not seeking damages for the period prior to 2008 does not mean that the Claimants knew or should have known prior to that date; the Claimants have no means of disentangling the position between Bank and Mastercard; and in any event, that is only one factor relevant to the respective bargaining position of the parties which is of limited use in the context of the market wide standard form contract imposed by Mastercard.

Conclusions:

69. It seems to me that this matter is unsuited to be dealt with by way of strike out/summary judgment for a number of reasons. First, rather than a matter in which principles of law can be applied to agreed facts, in my judgment, this is a case which falls within the warning given by Lord Collins in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [84]. It seems to me that in this case, it is not appropriate to decide difficult questions of law at an interlocutory stage where the facts may determine how those legal issues present themselves for determination and furthermore, the legal issues are in an area that requires not only detailed argument but mature consideration. It would be incorrect to suggest that I have not had the benefit of detailed argument. Its effect however, has been to convince me that the complex legal issues in this matter may be affected by the full facts which will only be available at trial. In my judgment, it is quite possible and even probable that there is more evidence which will put the present documents in a different light and therefore, it would be wrong to give summary judgment/strike out because the Claimants have a real as opposed to a fanciful prospect of success in relation to the ex turpi causa defence which it is intended should be raised. This is not merely a case of Micawberism on the part of the Claimants. In my judgment, for example, there is likely to be further relevant evidence available as to Tesco Bank's relationship with MasterCard and its responsibility if any for the alleged infringement by it, which will be available to a trial judge after disclosure and possibly third party disclosure has taken place.

70. To put the matter another way, I do not consider that this is a case in which I should "grasp the nettle". This is not a short point of law in relation to which all the facts are before the court.

71. In fact, it seems to me that I should heed Floyd LJ's warning in the *TFL Management Services Ltd v Lloyds Bank plc* case in two respects. At paragraph [27] of his judgment he pointed out that difficult points of law especially in developing areas are better decided against actual as opposed to assumed facts which I consider to be the case here. In addition, he advised against dealing with single issues where there will be a full trial in any event. Although Mr Hoskins says that the claim for a declaration would wither away without the claims for damages, I do not consider that I am in a position to come to a conclusion on that issue upon the evidence before me. Furthermore, it seems to me that for the most part, the points which have been made in relation to ex turpi causa have related to Tesco Stores and that the position of One Stop Stores Ltd and Dobbies Ltd is or may well be different.

(i) Are Tesco Bank and the Claimants part of a single economic entity?

72. Having set out my broad conclusion, in addition I will address the individual issues which have arisen in this application. The first essential component in the MasterCard

Defendant's argument that the Claims have no prospect of success or that there is no reasonable ground for bringing the claim in the light of the application of the ex turpi causa maxim is that the Tesco Claimants and Tesco Bank form a single economic entity. It seems that the majority of the cases in that regard are concerned with the relationship between the parent company and a wholly owned subsidiary rather than between sister/cousin subsidiaries themselves. Quite clearly, complex questions of law arise in relation to the application of the single economic entity principle to vertical and horizontal relationships at the same time.

73. In any event, in my judgment, it is clear from the *Akzo Nobel* case upon which Mr Hoskins relied that when seeking to rebut the presumption of decisive influence by the parent upon the conduct of the subsidiary, account must be taken of all relevant factors relating to economic, organizational and legal links which tie the parent and the subsidiary on a case by case basis. In fact, the Competition Appeals Tribunal makes clear in *Durkan Holdings & Ors v OFT* that the factors cover a wide range. It seems to me that if one assumes that the position is the same or at least not more restrictive in the case of an alleged subsidiary/subsidiary, sibling style relationship and/or a sibling/sibling/parent relationship, it must be necessary to consider a wide range of factors. Therefore, in my judgment, the *Akzo Nobel* case and the way in which the law was summarised by the Competition Appeals Tribunal in *Durkan* works against Mr Hoskins in this regard. Although Mr Hoskins has referred to numerous factors which he submits are determinative of this central issue, it seems to me that this is a matter which turns on a wide range of factors which should be decided at trial with the benefit of full disclosure, including possibly third party disclosure and oral evidence. I must resist the temptation to conduct a mini-trial in this regard. In my judgment, reasonable grounds exist for believing that a fuller investigation of the facts may add to or alter the evidence relevant to this issue. It cannot be said therefore that the Claimants have no real prospect of success in showing that they are not part of the same single economic entity with Tesco Bank.

74. In addition, I also consider that in the light of the authorities to which he referred me, it cannot be said that there is no reasonable prospect of success in Mr Railton's argument that, in fact, the existence of a single economic entity is context specific and therefore, must be determined by reference to the activity complained of and may be drawn narrowly in one of the ways in which he suggests. If such an argument were to succeed, the group wide perspective and the wider canvass of facts to which Mr Hoskins took me would not necessarily be relevant or may be presented and have relevance in a different way. I fully accept that in the authorities to which I was referred there appears to be some elision between the delineation of the single economic entity said to have committed an infringement of competition law and the liability of the legal persons forming the single economic entity for that infringement. However, this only confirms that there are difficult issues of law which should be considered against the backdrop of all the relevant facts at trial.

75. To put the matter another way, I do not consider it fanciful to suggest that the precise way in which the single economic entity should be drawn depends in turn upon the way in which the infringement itself is defined, that it should be drawn narrowly in one of the ways in which Mr Railton suggests and that it is not necessarily synonymous with the Tesco group. Furthermore, it seems to me that once the context for the single economic entity is determined the question of which activities and

therefore, which legal persons fall within it, is fact and context specific. It is not possible to determine that question at this stage first because the definition of the single economic entity itself has yet to be determined and as a result, it is not clear which facts are relevant and secondly, because it is not clear that all of the relevant facts are available. In my judgment it is not fanciful to suggest that some of the synergies and other factors which pertain to the Tesco group as a whole to which Mr Hoskins has referred including the promotion of credit cards and financial products by Tesco Stores, may be irrelevant if the single economic entity is defined in any of the ways which Mr Railton suggests, the widest of which was the issue of MasterCard credit cards. In addition, if that were the case, it is not fanciful to suggest that Dobbies Ltd and One Stop Stores Ltd might fall outside the net. Furthermore, as I have already mentioned I do not consider it to be Micawberism to suggest that there are further relevant facts and matters in relation, for example, to the position of Tesco Bank and the way in which the competing interests of Bank and Tesco Stores in relation to MIFs are played out which are not before the Court and may well be available at trial.

76. I also agree with Mr Railton that even if the Claimants and Tesco Bank are a single economic entity for the purposes of Competition law, it cannot be said that the Claimants do not have a realistic as opposed to fanciful prospect of success in showing that nevertheless, the alleged infringement by Tesco Bank should not be imputed to them. I come to this conclusion based upon paragraph [77] of the judgment in the *Azko* case and paragraphs [97]-[99] of the Advocate General's opinion, together with the approach adopted in the *ArcelorMittal* decision of the Grand Chamber and the *Knauf* decision to which Mr Railton referred me. In my judgment they render it more than merely arguable that responsibility for an infringement within a single economic entity, is not based upon strict liability (or to put the matter another way, mere membership of the entity) but requires something more which may be decisive influence. My conclusion is consistent with the approach of the Advocate General in the *Siemens Osterreich* case to which I was referred and the way in which Etherton LJ dealt with the matter, albeit obiter in the *KME Yorkshire Ltd* case.

77. Further, and in any event, in this regard, there is no evidence before me in relation to Tesco Stores Ltd, One Stop Stores Ltd and Dobbies Ltd, as opposed to the position of the Tesco group in the round and through Tesco plc. Even if there were, it seems to me once again, that this is a matter which should be dealt with at trial.

78. My conclusions are sufficient to dispose of this application both under the heading of CPR 24 and CPR 3.4. However, as submissions were made in detail and with great care, I will address the further issues in brief.

(ii) Was/is Tesco Bank a party to the infringement?

79. It will be readily apparent from the conclusions I have reached already, that I consider that the MasterCard Defendants cannot establish that there is no realistic as opposed to a fanciful prospect of the Claimants succeeding in showing that Tesco Bank was not a party to the infringement in question. Although the pleadings refer to a decision of an association of undertakings, given the changes of position upon which MasterCard itself relies in its defence in the Sainsbury's proceedings and the fact that matters passing between Tesco Bank and the MasterCard Defendants have yet to be disclosed, in my judgment it is not fanciful to suggest that the Claimants may succeed in showing that Tesco Bank is not party to the infringement for the purposes of the

Claims which relate to the period from 2008.

(iii) Does the maxim apply to the Claims?

80. Once again in this regard, in my judgment, the MasterCard Defendants cannot show that the relatively low threshold necessary in order to avoid summary judgment/strike out has not been met. I consider it more than merely arguable that in order to fall within the category of quasi criminal acts/civil sanctions of a penal character to which Lord Sumption was referring in the *Apotex* case, it is necessary to establish intentional or negligent conduct. Lord Sumption himself referred to *Safeway Stores Ltd v Twigger* as an example of such conduct, a case in which the company had been held personally liable for a fine. I consider it more than merely arguable that it is necessary to establish whether the Claimants and each of them have the requisite state of knowledge. This is another reason not to deal with this matter at the summary stage but at trial against the background of all of the relevant facts.

(iv) Does Tesco bear a significant responsibility for the infringement?

81. Lastly, if it were necessary, I would also decide that the question of significant responsibility is fact specific and ought also to be determined at trial. I consider the argument that the issue of whether significant responsibility must be determined with reference to the contracting party in question and not on an undertaking wide basis has a real prospect of success. I also consider that there are reasonable grounds to believe that further information which will be available at trial is relevant to the issue.

82. For all of the reasons set out I dismiss the MasterCard Defendants' application.