

## Court clutch control and private competition actions

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**Competition analysis: Anneli Howard of Monckton Chambers looks at the issues raised following the transfer of the Sainsbury's v MasterCard case from the High Court to the new Competition Appeal Tribunal (CAT) by order of Mr Justice Barling on 1 December 2015.**

### Original news

CAT appeal: Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others—Order of the High Court (pursuant to section 6 Enterprise Act 2002), LNB News 04/12/2015 120

*By an order dated 1 December 2015, the High Court ordered that, in Case 1241/7/15 (T) Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others, the parts of the proceedings relating to a claim to which the section 47A of the Competition Act 1998 applies, and those parts of the proceedings relating to an infringement issue under section 16(6) of the Enterprise Act 2002 (EnA 2002) are transferred to the CAT pursuant to EnA 2002, s 16(4).*

### What are the reasons for the transfer from the High Court to the CAT in this case and how has it been transferred given the transitional provisions?

Apparently, this was a judge-led initiative, as the presiding judge, Mr Justice Barling sits in both the Chancery Division as well as the CAT. The CAT has new powers to hear standalone and collective damages actions, which came into force in October 2015, but there is a time-lag before the new cases come on stream. The transfer provided an opportunity to take advantage of the CAT's capacity and its specialist judicial and economic expertise. The MasterCard proceedings involve technical and complex economic arguments so perhaps the parties agreed to the transfer as they saw an advantage in having the CAT's three-party adjudicating panel which includes an economist, rather than just a single presiding judge.

### Could the possibility of transferring cases from the High Court to the CAT be a way of bypassing the transitional provisions for the CAT's new rules (ie lodge a case at the High Court where it can't be lodged before the CAT and then seek to transfer it)?

Rule 119 of the CAT Rules was inserted at the last minute without consultation to provide a transitional regime for the implementation of the new limitation periods in the CAT, which are intended to bring its procedures in alignment with the six-year limitation period in the High Court (or five years in Scotland). Rule 119 is unhappily drafted and there are huge debates about the extent to which standalone claims can be brought if the facts giving rise to them took place during the transitional period. For follow on actions, permission from the CAT will be necessary for any decisions that remain subject to appeal proceedings so that the decision is not yet 'final'. Follow on claims where the events giving rise to the infringement took place before 1 October 2015 will be subject to the old CAT limitation periods which are much shorter than the High Court. Only cartels implemented after 1 October 2015 come under the new regime but there will be a time lag as secret cartels are notoriously difficult to detect.

Now everyone is asking whether transfer from the High Court (as happened in MasterCard) is a way of getting follow on or standalone cases before the CAT despite the limitations in Rule 119. At the time the CAT Rules were introduced, I would be surprised if anyone had thought transfer in the context of the CAT transitional time limits in Rule 119. Extrajudicially, the CAT is making very broad statements that people should not be reluctant to start cases due to the uncertainties regarding the application of Rule 119, but there is no ruling yet as to how it will apply in practice. So there is considerable uncertainty for practitioners in bringing the first cases as they do not want to be ruled out of time. The transfer mechanism could provide a neat solution to avoid these pitfalls (and crucially minimise any adverse cost risks).

### Is it possible that the transitional rules could be amended, for example when the government looks at the implementation of the EU Damages Directive?

Reform of Rule 119 has not been mentioned in the recent BIS Consultation, which regards the new CAT limitation periods as consistent with the Damages Directive 2014/104/EU (see further, Implementing the EU Damages Directive in the UK). There is also a provision in the Damages Directive precluding its retroactive application. So I don't think there will be any change to the transitional regime.

### **Could there be more transfers on this basis, eg the other cases against MasterCard and Visa that are currently before the High Court?**

We are entering a new era of competition litigation, where cartelists will potentially face third party damages actions from a wide range of claimants, at different levels of the supply chain, and potentially from different Member States. There will also be contribution proceedings between cartelists and related parties as well as potentially collective opt-in or opt-out consumer actions under the new procedures in the Consumer Rights Act 2015. In England, we have three different courts where competition claims can be brought (the Commercial Court, Chancery Division and CAT). Unlike at EU level with the Brussels Regulation, there is no formal mechanism at domestic level for allocating jurisdiction between them and dealing with *lis alibi pendens* issues between related proceedings.

For a defendant, faced with multiple claims in respect of the same infringement, fighting all these claims on various fronts can be a huge drain on resources and legal budget. There can be literally no breathing space between court deadlines to form a holistic case strategy. It will therefore be increasingly important for parties to use transfer and consolidation as a case management tool to concentrate related proceedings before one court.

This is not just for practical reasons but also to avoid the risk of irreconcilable judgments and minimise over recovery by one set of claimants to the prejudice of another class.

That approach will be even more important when the Damages Directive is implemented (forecast for 1 October 2016 in the UK). If you have multi-level claims, a cartel at manufacturer level could attract claims from wholesalers, retailers and consumers. There is no domestic procedure for managing competing claims at all different levels. The Damages Directive has a provision requiring judges to have regard to different claims at different levels to make sure that one set of claimants do not recover more than they have actually suffered (as they may have passed on the overcharge to the next rung down the chain). It would be unfair if defendants were required to pay out twice.

I can see that the courts will want to make use of the transfer provisions, alongside their discretionary case management powers to stay certain cases, consolidate others or case manage certain issues together, in order to ensure consistency and fair recovery between different claims in relation to the same infringement. Parties will also want to make use of those provisions to ensure cost effectiveness and streamlined procedures. You may want to use 'clutch control' to stop one case behind a lead or test case, transfer parts of different cases before one court so that common issues can be heard together before returning to the main trial. Alternatively, judges may 'float' between the CAT and the Chancery Division to hear cases wearing different hats as it were. Or there may be innovative trials, as in the Abramovich litigation, where two judges in related proceedings heard the issues in tandem.

There are also rules to transfer cases from the CAT to the High Court. When largescale collective consumer class actions eventually start, they will have to be case managed alongside claims from intermediaries higher up the supply chain. Liability will have to be resolved first, and then the extent of pass on, so the CAT is going to have to have some sort of mechanism to defer the consumer actions until the extent of any liability or quantum has been determined at the other stages. The CAT may be able to transfer certain quantification issues to the Commercial Court or the Chancery Division and then take them back. I think the fact that the chairmen in the CAT are also Chancery judges will facilitate that as they may be able to sit with two hats on or switch courts.

It's going to be an inventive time, for parties to think of most cost-effective ways to manage complex cases. The English legal system is really adept at being flexible and pragmatic with a duty on all parties to promote effective case management. If you look at civil law, say in Italy, there is just one track where proceedings can last a decade, whereas the English courts are resolving cases in two to three years.

Another important element is that there is vibrant competition between the courts in various Member States, trying to attract competition damages cases to be heard within their jurisdiction. The English system is a 'Rolls Royce' procedure, because of our disclosure rules, adversarial system and oral advocacy, whereas Germany and Holland, for example, tend to adopt more simplified inquisitorial processes. The costs of litigating in the UK, although it produces exceptionally high

and efficient standards of justice, are much higher than elsewhere in the EU. Trials here are going to have to be very cost effective or claimants will vote with their feet to litigate elsewhere in Europe.

*Interviewed by Anne Bruce.*

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