

Pass on after

Sainsbury's v Mastercard

Daniel Jowell Q.C.

BRICK COURT
CHAMBERS

BARRISTERS

Conclusions of CAT

- Overcharge could lead to (i) lower profits, or (ii) lower costs or (iii) lower expenditure or (iv) higher prices by way of pass on (§§432-437).
- There should be no reduction in damages for lower costs or lower expenditure (§461)
- There can, in principle, be a reduction for pass-on in the form of higher prices charged by a claimant (and pass on to be expected by Sainsbury's: §§467-469)
- But it was “*impossible to say*” what proportion was passed on in the form of higher prices as compared to lower costs/expenditure (§465)

Pass only can only succeed where two conditions met:

- “identifiable increases in prices by a firm to its customers” which must be “causally connected with the overcharge, and demonstrably so”(§484(4)); and
- The Defendant must have identified a purchaser or class of purchasers from the claimant to whom the overcharge has been passed on [and who would be in a position to claim damages] (§§484-485).

Precedential value

- A binding precedent?
- Distinguishable on the facts?
- On appeal

Are the 2 conditions right?

- ▶ *Lowick Rose LLP v Swynson Limited* [2017] UKSC 32, Lord Sumption at §11
- ▶ *Fulton Shipping v Globalia* [2015] EWCA Civ 1299 at § 23
- ▶ *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 and *Hussey v Eels* [1990] 2 QB 227
- ▶ *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086 at §147 and 158

Was it really “impossible to say” how much was passed on?”

- “Prima facie, Sainsbury’s would have sought to pass the cost of its UK MIF on to its customers. Although Sainsbury’s would not have been unconstrained in its ability to pass this cost on, because the UK MIF was a cost common to Sainsbury’s and its supermarket rivals, we consider that a substantial amount of the UK MIF – 50% – would have been passed-on (albeit not in a manner which would have amounted to a “defence” of pass-on, for the reasons given at paragraphs 484 to 485). It follows that had the overcharge not been made, Sainsbury’s would not have received any interest: it would simply have not passed on the overcharge..” §525(1)

Where do we go from here?

- Connection with certification:
MasterCard class action.
- Impact on quantification:
RBB paper for Commission