to dismiss or retire prematurely. Further, at para 10134, the code states, 'The Appeal Board will operate without undue formality. Its purpose is to decide whether the decision to retire prematurely or to dismiss is fair'.

The second observation is this: the board in the present case set out the evidence and submissions which it received and heard 'in extenso'. Their conclusion is contained in the final paragraph of three lines. The addition of one or two equally short paragraphs stating in outline the reasons which must have existed for that conclusion would ask little of the board, would give a greater sense of fairness and, if the reasoning is stated shortly and factually, would avoid the creation of a body of precedent, which, I would agree with Mr Forman, is a result devoutly to be wished.

For these reasons I agree with May LJ that this application should be dismissed.

Application dismissed.

Solicitors: *Marsh & Ferriman*, Worthing (for the applicant); *Treasury Solicitor*.

Carolyn Toulmin Barrister.

Re Charge Card Services Ltd

COURT OF APPEAL, CIVIL DIVISION
SIR NICOLAS BROWNE-WILKINSON V-C, NOURSE AND STUART-SMITH LJJ
7, 8, 9 JUNE, 4 JULY 1988

Sale of goods – Payment – Credit card – Nature of credit card transaction – Effect of credit card company's liquidation – Company operating credit card system for purchase of petrol at garages – Company going into liquidation – Debts outstanding from cardholders not paid by company to garages – Whether cardholders' debts due to company or to garages – Whether liquidator bound to pay garages from money collected from cardholders before company had paid garages.

A company operated a charge card scheme under which it issued charge cards to cardholders who could obtain petrol and other products from garages by presenting the card and signing a sales voucher completed by the garage. The cardholder and the garage retained a copy of the voucher and a copy was sent to the company. The company then paid the face value of the voucher, less agreed commission, to the garage and the cardholder paid the full face value to the company. The company financed its business by factoring its debts to a finance company under an agreement whereby all present and future debts owed by cardholders to the company were assigned to the finance company, which paid to the company the amount of the debts less a discounting charge. The company went into liquidation owing almost £2m to unsecured creditors. At the date of liquidation the company owed substantial sums to garages which had supplied fuel on customers' charge cards, while a substantial sum due from cardholders was outstanding for petrol and other products purchased on charge cards prior to the liquidation. On a summons issued by the liquidator of the company, the issue arose whether the receivables due from the cardholders were debts due to the finance company as assignees of the company's receivables or belonged to the garages. The garages contended that they had only accepted payment for petrol by means of the charge card as a conditional discharge of the purchasers' obligation to pay the price of the petrol and since they had not been paid by the company they were entitled to recover payment directly from the cardholders as purchasers of the petrol. The judge rejected the garages' claim and held that the price owed for the purchase of petrol from the garages was unconditionally discharged by the acceptance of the charge card. He accordingly held that the finance company was

absolutely entitled to the moneys collected by the liquidator from cardholders. The garages appealed.

Held – The appeal would be dismissed for the following reasons—

(1) There was no general principle of law that, whenever a method of payment was adopted which involved a risk of non-payment by a third party, there was a presumption that the acceptance of payment through the third party was conditional on the third party making the payment and that, if he failed to pay, the original obligation of the purchaser remained. Instead, each method of payment had to be considered in the light of the consequences and other circumstances attending that type of payment (see p 707 *a d e h* and p 711 *f*, post); *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 All ER 127 considered.

(2) Underlying a credit card or charge card transaction was a contractual scheme consisting of three separate bilaterial contracts between the credit company and the supplier, the credit company and the cardholder, and the cardholder and the supplier respectively, all of which predated the individual contracts of sale by credit card. Before entering into the contract made between the cardholder and the garage both parties had entered into their respective contracts with the company and their underlying assumption must have been that on completion of the sale of the petrol by use of the charge card the parties' future rights and obligations would be regulated by those underlying contracts. Accordingly, the transaction was one in which the garage, by accepting payment by card in substitution for payment by cash as an unconditional discharge of the price, was to be taken to have accepted the company's obligation to pay in place of the customer's liability to pay (see p 706 *b* to *e*, p 708 *f* to *j* and p 711 *f*, post).

(3) On the true construction of the agreement between the company and the cardholder the company's authority to debit the cardholder's account was an authority to debit the account in respect of liabilities incurred as well as payment made. Therefore the cardholder was liable to pay the company whether or not the company had paid the garage. Accordingly, payment by credit card was an absolute, not a conditional, discharge of the buyer's liability and the cardholder's obligations to the garages were absolutely, not conditionally, discharged by the garage accepting the voucher signed by the cardholder (see p 710 *e* to *h* and p 711 *d f*, post).

Decision of Millett J [1986] 3 All ER 289 affirmed.

Notes

For payment of the price of goods, see 41 Halsbury's Laws (4th edn) para 800, and for cases on the subject, see 39(2) Digest (Reissue) 413, *3325–3330*.

Cases referred to in judgments

Alan (W J) & Co Ltd v El Nasr Export and Import Co [1972] 2 All ER 127, [1972] 2 QB 189, [1972] 2 WLR 800, CA.
Allen v Royal Bank of Canada (1925) 95 LJPC 17.
Bolt and Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd [1964] 1 All ER 137, [1964] 2 QB 10, [1964] 2 WLR 98, CA.
London Birmingham and South Staffordshire Banking Co Ltd, Re (1865) 34 Beav 332, 55 ER 663.
Man (E D & F) Ltd v Nigerian Sweets and Confectionery Co Ltd [1977] 2 Lloyd's Rep 50.
Maran Road Saw Mill v Austin Taylor & Co Ltd [1975] 1 Lloyd's Rep 156.
Moorcock, The (1889) 14 PD 64, [1886–90] All ER Rep 530, CA.
Romer & Haslam, Re [1893] 2 QB 286, CA.
Sayer v Wagstaff (1844) 14 LJ Ch 116, LC.

Cases also cited

Lewis v Great Western Rly Co (1877) 3 QBD 195, CA.
Liverpool City Council v Irwin [1976] 2 All ER 39, [1977] AC 239, HL.

Metropolitan Police Comr v Charles [1976] 3 All ER 112, [1977] AC 177, HL.
Ornstein v Hickerson (1941) 40 F Supp 305, US DC, ED La.
Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.
Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570, [1976] 1 WLR 989, HL.
Richardson (Inspector of Taxes) v Worrall [1985] STC 693.
Sale Continuation Ltd v Austin Taylor & Co Ltd [1967] 2 All ER 1092, [1968] 2 QB 849.
Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481, [1976] 1 WLR 1187, CA.
Vivacqua Irmaos SA v Hickerson (1939) 193 La 495, La SC.

Appeal

Copes Service Stations Ltd, on their own behalf and as representing all the garages which were or had been franchisees under the Motor Agents Association Fuel Card Scheme, appealed against the decision of Millett J ([1986] 3 All ER 289, [1987] Ch 150) given on 12 June 1986 whereby he held, on a summons issued by the liquidator of Charge Card Services Ltd (the company), that debts due from holders of Motor Agents Association Fuel Cards issued by the company in respect of petroleum and other products obtained by the cardholders with the use of such charge cards from the franchisee garages were due to Commercial Credit Services Ltd as assignees of the company's receivables. The facts are set out in the judgment of Sir Nicolas Browne-Wilkinson V-C.

Robin Potts QC and *Michael Todd* for the garages.
J M Chadwick QC and *Richard Gillis* for Commercial Credit.
Richard Hacker for the liquidator.

Cur adv vult

4 July. The following judgments were delivered.

SIR NICOLAS BROWNE-WILKINSON V-C. This is an appeal from the judgment of Millett J ([1986] 3 All ER 289, [1987] Ch 150). The litigation arises out of the winding up of Charge Card Services Ltd (the company), which ran a scheme, the Motor Agents Association Fuel Card Scheme, for the purchase of petrol and other products from approved garages with the use of charge cards issued by the company. The company ceased to trade on 21 January 1985 and went into creditors' voluntary liquidation on 4 February 1985 with an anticipated deficiency of some £1·9m. At the date of the liquidation, the company owed substantial sums to garages which had supplied fuel in return for vouchers signed by Fuel Card holders. There were also substantial sums owing to the company from card holders who had purchased fuel with the use of Fuel Cards before the date of the liquidation. Under a factoring agreement the company had assigned all its receivables to the respondent to this appeal, Commercial Credit Services Ltd.

Soon after the winding up, there were disputes as to who was entitled to the moneys owed to the company by the cardholders. Under an order of the court made in the winding up, the liquidator of the company has collected rather over £2m net from the cardholders, which moneys have been paid into a separate account pending the determination in these proceedings of the question to whom they belong.

The dispute is between the garages who supplied fuel but have not been paid by the company on the one hand and Commercial Credit, as assignees of the company's receivables, on the other. Under a representation order made by the court, the appellants, Copes Service Stations Ltd, are representatives of such garages. The garages claim that the garages only accepted payment for fuel by means of the Fuel Card as a conditional discharge of the purchasers' obligation to pay the price for the fuel and that accordingly, since the company had failed to honour its obligation to pay the garages, the garages were entitled to recover the price direct from the purchasers of the fuel, ie the

cardholders. So, say the garages, the sums collected by the liquidator belong to the garages as representing payments of the purchase price due to the garages. Commercial Credit, on the other hand, contend that the moneys collected by the liquidator represent the debts due from the cardholders to the company of which they are the assignees.

The judge rejected the garages' claim that the payment by credit card was conditional and held that the price owed for the purchase of fuel from the garages was unconditionally discharged by the acceptance of the Fuel Card. He accordingly held that Commercial Credit were absolutely entitled to the moneys collected by the liquidator under the order of the court. The garages appeal against that decision. The judge at the same time decided a question as between the liquidator and Commercial Credit as assignees; there is no appeal against that part of his decision.

The detailed facts (which are agreed) are so fully set out in the judgment of the judge that I will not repeat them here.

The case raises fundamental questions as to the legal character of credit card sales. It is therefore convenient, before turning to the specific questions argued, to set out what, in my judgment, are the normal features of credit card or charge card transactions, there being no relevant distinction between charge cards and credit cards for present purposes.

(1) *The general features of credit card transactions*

(A) There is an underlying contractual scheme which predates the individual contracts of sale. Under such scheme, the suppliers have agreed to accept the card in payment of the price of goods purchased; the purchasers are entitled to use the credit card to commit the credit card company to pay the suppliers.

(B) That underlying scheme is established by two separate contracts. The first is made between the credit company and the seller: the seller agrees to accept payment by use of the card from anyone holding the card and the credit company agrees to pay to the supplier the price of goods supplied less a discount. The second contract is between the credit company and the cardholder: the cardholder is provided with a card which enables him to pay the price by its use and in return agrees to pay the credit company the full amount of the price charged by the supplier.

(C) The underlying scheme is designed primarily for use in over-the-counter sales, ie sales where the only connection between a particular seller and a particular buyer is one sale.

(D) The actual sale and purchase of the commodity is the subject of a third bilateral contract made between buyer and seller. In the majority of cases, this sale contract will be an oral, over-the-counter sale. Tendering and acceptance of the credit card in payment is made on the tacit assumption that the legal consequences will be regulated by the separate underlying contractual obligations between the seller and the credit company and the buyer and the credit company.

(E) Because the transactions intended to be covered by the scheme would primarily be over-the-counter sales, the card does not carry the address of the cardholder and the supplier will have no record of his address. Therefore the seller has no obvious means of tracing the purchaser save through the credit company.

(F) In the circumstances, credit cards have come to be regarded as substitutes for cash; they are frequently referred to as 'plastic money'.

(G) The credit card scheme provides advantages to both seller and purchaser. The seller is able to attract custom by agreeing to accept credit card payment. The purchaser, by using the card, minimises the need to carry cash and obtains at least a period of free credit during the period until payment to the card company is due.

(2) *The particular features of this scheme*

In the present case, the Fuel Card scheme run by the company contained all those features. The scheme and the contracts in which it is contained draws a distinction between the account holder and the cardholders, the former being the company or

person who contracts with the company, the latter being the persons authorised by the account holder to use the card. The distinction is of no significance in the present case and I will refer to both classes as 'the cardholder'. It merely reflects the fact that many account holders were haulage and fleet operators rather than individuals.

The underlying scheme is constituted by two bilateral contracts. (a) The contract between the garage and the company (the franchise agreement). By the franchise agreement the garage undertook to honour the company's Fuel Card. There were two different ways in which the garage could claim payment; nothing turns on the difference between them. The company in effect undertook that on receipt of vouchers signed by the cardholders together with a claim form, payment of the price (less commission) would be made to the garage within five days at the latest. (b) The contract between the cardholder and the company (the subscriber agreement). There is a major issue as to the proper construction of the subscriber agreement to which I will have to revert. In essence, the cardholder authorised the company to pay for fuel supplied to the cardholder and to debit the cardholder. The company was to send to the cardholder a monthly statement of the amount debited and the cardholder was bound to pay to the company within 14 days the full amount shown owing in the statement.

In addition there was a third contract (the forecourt agreement) made between the cardholder and the garage. This contract came into existence when the cardholder bought fuel at the garage. It was necessarily an oral agreement. In the present case, the forecourt agreement has a special feature not to be found in the majority of credit card purchases. At a self-service garage, the petrol is put into the tank by the purchaser/cardholder before there is any contact between him and the staff of the garage. It is common ground that the contract for the sale of the petrol is made at that stage, the garage having made an open offer to sell at pump prices which is accepted by the motorist putting petrol in the tank. Having done so, the motorist then goes to pay for the petrol and produces the Fuel Card. That is the first time at which the garage knows that payment is to be made not in cash but by using the card. There is a dispute between the parties whether, in those circumstances, the purchaser ever becomes liable to the garage to satisfy the price by payment in cash.

(3) The issues

The following principal points were argued. (a) Commercial Credit contended that self-service forecourt sales do not at any stage give rise to a primary obligation on a Fuel Card holder to pay cash for the petrol. It is said that the garage makes an open offer (by exhibiting the Fuel Card sign on the forecourt) that it will accept payment either in cash or by means of the card. Therefore, it is said, there is no primary obligation to pay cash which can revive when the company fails to honour the Fuel Card. The judge rejected this contention (see [1986] 3 All ER 289 at 300, [1987] Ch 150 at 164). I find it unnecessary to decide the point since, on the view I take of the case, it makes no difference. (b) Is there a general principle of law that whenever a method of payment is adopted which involves a risk of non-payment by a third party there is a presumption that the acceptance of payment through a third party is conditional on the third party making the payment, and that if he does not pay the original obligation of the purchaser remains? (c) If there is no such general principle, was the acceptance of the Fuel Card by garages merely conditional payment or was it an absolute payment? (d) Counsel for the garages put forward an alternative argument. He submitted that on the true construction of the subscriber agreement the cardholder was only liable to pay the company if and when the company had paid the garage. On this basis he submitted that since the company had not paid the garages, the sums recovered from the cardholders by the liquidator ought either to be applied in paying the garages or alternatively should be returned to the cardholders since the cardholders were never liable to pay either the garages or the company. On the view which I have formed on the construction of the subscriber agreement (see at 5 below) this point does not arise for decision.

I will deal with points (b) and (c) in turn.

(4) Is there a general presumption of conditional payment?

Counsel's argument for the garages is founded on the law applicable to cheques, bills of exchange and letters of credit. It is common ground that where a debt is 'paid' by cheque or bill of exchange, there is a presumption that such payment is conditional on the cheque or bill being honoured. If it is not honoured, the condition is not satisfied and the liability of the purchaser to pay the price remains. Such presumption can be rebutted by showing an express or implied intention that the cheque or bill is taken in total satisfaction of the liability: see *Chitty on Contracts* (25th edn, 1983) para 1436 ff, *Sayer v Wagstaff* (1844) 14 LJ Ch 116, *Re London Birmingham and South Staffordshire Banking Co Ltd* (1865) 34 Beav 332, 55 ER 663, *Re Romer & Haslam* [1893] 2 QB 286, *Allen v Royal Bank of Canada* (1925) 95 LJPC 17 and *Bolt and Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 1 All ER 137, [1964] 2 QB 10.

There is a similar presumption applicable to payments made by means of letters of credit. If the seller does not receive payment under the letter of credit, it is presumed that the buyer is still liable to pay the price although this presumption can be rebutted by express or implied agreement to the contrary: see *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 All ER 127 at 139, 147, [1972] 2 QB 189 at 212, 221 per Lord Denning MR and Stephenson LJ, *Maran Road Saw Mill v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep 156 and *E D & F Man Ltd v Nigerian Sweets and Confectionery Co Ltd* [1977] 2 Lloyd's Rep 50.

Like the judge, I cannot detect from the authorities any such general principle as counsel for the garages suggests which is applicable to all cases where payment is to be effected through a third party (see [1986] 3 All ER 289 at 301, [1987] Ch 150 at 166). The cases on cheques and bills of exchange do not contain any reference to such a principle. They are all cases where there was an obligation to pay a sum of money which predated the tendering of the cheque. The principle applied is that the obligation to discharge the pre-existing debt has not been satisfied unless the creditor has expressly or impliedly agreed to accept the cheque or bill in final satisfaction.

When a similar rule was applied to letters of credit in *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 All ER 127, [1972] 2 QB 189, Lord Denning MR (with whom Stephenson LJ agreed) did not treat the matter as decided by any existing general principle of law. He described the question as one of construction to be determined in the light of the consequences (see [1972] 2 All ER 127 at 136, [1972] 2 QB 189 at 209). He then considered the consequences of treating a letter of credit as being an absolute or conditional payment in the light of the circumstances affecting the type of commercial transaction in which letters of credit are used. He reached the conclusion that in those circumstances payment by letters of credit should be treated as conditional. Although he referred to the position as being analogous to that applicable to cheques and bills of exchange, he did not treat those cases as establishing any such general principle as counsel for the garages relies on.

In my judgment, there is no such general principle. Each method of payment has to be considered in the light of the consequences and other circumstances attending that type of payment. When, as with credit cards, a new form of payment is introduced applicable to new sets of circumstances, it is necessary to consider whether such payment should be treated as absolute or conditional in the light of the consequences and circumstances of such new type of payment, not according to any general principle.

(5) Was the acceptance of the Fuel Card by the garages conditional or absolute payment?

The answer to this question must depend on the terms of the forecourt agreement since this is the only contract made between the garage and the cardholder. The terms on which the garage accepted payment from the cardholder must be determined by the only contract to which they are parties. To determine the terms of the forecourt agreement is not an easy task. Such agreement is at best oral and, in the majority of cases, not even that. The sale contract is made by putting the fuel in the tank before the parties have met; tender of the card and the making out of the signature of the voucher for the

sale is often conducted in complete silence. Moreover, although both garage and cardholder are in general aware that some underlying contract exists between the garage and the company and between the cardholder and the company, neither the garage nor the cardholder is aware of the exact terms of the contract to which they are not a party. Therefore the terms of the forecourt agreement have to be inferred from the surrounding circumstances known to the parties.

At the time of the sale, it is almost inconceivable that either party addressed its mind to the question: what will be the position if the company does not pay the garage? At one stage in the argument, both parties were contending that *The Moorcock* test (see (1889) 14 PD 64, [1886–90] All ER Rep 530) should be applied to determine what term should be implied in the agreement. If such test were to be applied, one would be looking for a term that any reasonable garage proprietor and cardholder would have agreed should be the result. On such a test, it is most unlikely that any term could properly be implied. But, in my judgment, this is not the right test since in a case such as the present there has to be *some* term regulating the legal effect of the acceptance of the card. The law has to give an answer to the problem. In my judgment, the correct approach in such a case is that the court should seek to infer from the parties' conduct and the surrounding circumstances what is the fair term to imply; this approach became common ground between the parties.

A sale using the Fuel Card for payment did not, in my judgment, differ in any material respect from an ordinary credit card sale. The one peculiarity of the transaction (viz that the contract for sale of the petrol took place when the tank was filled and not, as in a supermarket, at the till) does not make any relevant difference. The question remains: on what terms did the supplier accept the card in payment?

Although neither party to the forecourt agreement knew the exact terms of the other party's contract with the company, both parties were aware of the underlying contractual structure. The customer/cardholder knew that, if he signed the voucher, the supplier/garage would be entitled to receive a payment for the petrol which would fully discharge the customer's liability for the price; depending on his sophistication, the customer/cardholder might or might not have known that the company would deduct commission in paying the garage. On the other side, the garage knew that on signing the voucher the cardholder rendered himself liable to the company to pay to the company the price of the petrol. Before entering into the forecourt agreement, both parties had entered into their respective contracts with the company and their underlying assumption must have been that on completion of the sale of the petrol by use of the Fuel Card, the parties' future rights and obligations would be regulated by those underlying contracts. In the majority of cases, the garage had no record of the address of the customer and no ready means of tracing him.

To my mind, all these factors point clearly to the conclusion that, quite apart from any special features of the Fuel Card Scheme, the transaction was one in which the garage was accepting payment by card in substitution for payment in cash, ie as an unconditional discharge of the price. The garage was accepting the company's obligation to pay instead of cash from a purchaser of whose address he was totally unaware. One way of looking at the matter is to say that there was a quasi-novation of the purchaser's liability. By the underlying scheme, the company had bound the garage to accept the card and had authorised the cardholder to pledge the company's credit. By the signature of the voucher all parties became bound: the garage was bound to accept the card in payment; the company was bound to pay the garage; and the cardholder was bound to pay the company. The garage, knowing that the cardholder was bound to pay the company and knowing that it was entitled to payment from the company which the garage itself had elected to do business with, must in my judgment be taken to have accepted the company's obligation to pay in place of any liability on the customer to pay the garage direct.

In the present case, there are two additional features which point the same way. First,

under the franchise agreement, the company undertook to provide a guarantee of its obligations to the garage. This undertaking unhappily was not honoured. But the inclusion of the term in the franchise agreement provides some support for the view that, in the event of the company being unable to pay, the garage was looking for payment, not to the customer, but to the guarantor lying behind the company.

Second, there is a feature of great importance which may or may not be common to all credit card sales. Counsel for the garages in effect accepted that neither party could have envisaged that the cardholder/customer would have to pay twice: once to the company and again to the garage. To avoid this result, he submitted that the acceptance of the card by the garage was conditional on *either* the company paying the garage *or* the cardholder paying the company. A condition to that effect is wholly different to that applicable in the case of cheques or letters of credit. I find it an impossible condition to imply. I fully see the force of implying a condition that payment is conditional on the actual discharge of the price by a third party; such condition is based on the fundamental premise that a seller expects to be paid for the goods sold. But I can see no reason for implying a condition that the seller is not to be so paid if the buyer had discharged another obligation to a different party. In truth, the suggestion of this additional condition is merely a forensic device designed to avoid what everyone looking at the transaction feels, viz that in no circumstances can the result be that the cardholder has to pay both the garage and the company.

The question therefore is whether, under the subscriber agreement, the cardholder could be required to pay the company even though the company had not paid the garage. The relevant clauses of the subscriber agreement are:

> '1. Use of the Card will authorise Charge Card Services Limited (CCS) to pay for petrol . . . supplied to the Account Holder or the Authorised Signatory . . .
>
> 2 . . . The Account Holder or the Authorised Signatory must sign a sales bill (bearing an imprintation of the Card) every time the Card is used but neither the failure to do so, nor the breach of any of these Terms and Conditions shall relieve the Account Holder from liability to CCS for the reimbursement of any payment made by it in respect of fuel or oil supplied to the Account Holder or Authorised Signatory by any garage . . .
>
> 3. A statement showing all amounts debited, less any credits or refunds, will be sent to the Account Holder by CCS each month. The Account Holder will pay to CCS, within 14 days from the date to which such statement is made up, the whole of the amount shown to be owing by that statement . . .
>
> 6. If any Card is lost or stolen, the Account Holder shall immediately notify CCS . . . The Account Holder will remain liable to CCS for any payments made by it to suppliers arising from the use of the Card by any person before such confirmation is received.'

It is to be noted that the company does not undertake any obligation to the cardholder to pay the garage; cl 1 merely confers authority on the company to do so. Under cl 3, the cardholder's liability is to pay the amounts debited on the monthly statement. The agreement does not expressly provide when or what the company is entitled to debit. The dispute between the parties is whether the company is entitled to debit the cardholder before the company has paid the garage. If so, under cl 3 the cardholder becomes bound to pay the company whether or not the garage is paid by the company. On this issue, the subscriber agreement is ambiguous.

If one were simply to construe the words of the agreement divorced from the factual matrix in which it was entered into, there is considerable force in counsel's argument for the garages that the company is only entitled to debit the cardholder with sums actually paid to the garage. Clause 1 only expressly confers on the company an authority to pay and it is therefore reasonable to construe the reference to debits in cl 3 as references to debits of sums actually paid to the garage. This view is strengthened by the reference in

cl 2 to 'relieving' the cardholder from liability to the company for 'reimbursement' of any payment made by it; those words are wholly consistent with an obligation only to make good payments already made by the company to the garages. To the same effect are the references in cl 6 to the cardholder remaining liable to the company for any payments made by it.

However the subscriber agreement must be construed in the context of the facts known to the parties. In fact, the scheme operated as follows. The garage sent a number of vouchers (signed by cardholders) together with a claim form to the company. The company credited the garage and debited the cardholder in its books with the price of the petrol, such credit and debit being made as at the date of the supply transaction, ie the date entered on the voucher signed by the cardholder. The company thereafter paid the garage within five days of the receipt of the claim. The company sent a weekly invoice to the cardholder showing all purchases made by use of the card during such week, each voucher being separately recorded and showing a total of the sum due for VAT for that week. The monthly statement sent to the cardholders set out the individual invoices and the total for that month, less cash received.

What was actually done under the agreement would not, of course, have been known to the cardholder at the time he entered into the subscriber agreement. But the evidence is that there were included in the publicity material sent to prospective cardholders examples of the weekly value added tax invoice and monthly statements. From such material, it could be seen by the cardholder that he was to be debited according to the date of the transaction of purchase and that the monthly statement showed debits made on that basis, there being no reference of any kind to amounts being paid to the garages.

Against that factual background known to both parties I contrue the ambiguous word 'debit' in the subscriber agreement as meaning sums which the company had become liable to pay in respect of supplies of fuel to the cardholder irrespective of the date of payment by the company to the garage. Such construction accords with the commercial common sense of the transaction, and there is nothing in the subscriber agreement which contradicts this construction. References to the cardholder's liability to repay or reimburse the company, although pointing the other way, are not inconsistent with the construction I favour. Both those clauses are dealing with cases of irregular debits where it might be said that the cardholder was not liable to pay the company. The clauses merely provide that if in those cases the company has paid the garage, the cardholder must reimburse.

In my judgment, therefore, the cardholder is liable to pay the company whether or not the company has paid the garage. It follows that, on the garages' argument, the cardholder might be liable to pay twice, once to the company and again to the garage. That is a result which no one could have intended in the context of a credit card transaction. Accordingly, apart from any guidance to be obtained by analogy with the authorities on cheques and letters of credit, I would reach the conclusion that payment by credit card is normally to be taken as an absolute, not a conditional, discharge of the buyer's liability and that the particular features of the present case support this conclusion.

I do not find the analogy with cheques at all close or helpful. Payments by cheque involve the unilateral act of the buyer and his agent, the bank on which the cheque is drawn. The buyer's basic obligation to pay the price is sought to be discharged through a third party, the bank, which is in no contractual relationship with the seller. Moreover, the seller has had no say in the selection of the bank. It is very far from the position in a credit card sale where the seller has agreed to rely on the credit of the credit card company and there is a pre-existing contractual obligation on the credit card company to pay the supplier quite separate from any obligation of the buyer.

The analogy with letters of credit is much closer. In both, there are three parties to the arrangement and, once the letter of credit is issued, the bank is contractually bound to pay on the presentation of the documents. But the whole commercial context of the two types of transaction is totally different. The letter of credit is primarily an instrument of international trade issued pursuant to an individually negotiated contract of considerable substance made in writing; the credit card is used for small, over-the-counter transactions between strangers, there being, at best, an oral agreement and more often an agreement by conduct. In the case of credit card sales, the seller does not even know the address of the purchaser, which makes it hard to infer an intention that he will have a right of recourse against the purchaser. It is normally the buyer, not the seller, who selects the bank issuing the letter of credit; if, unusually, the seller does select the bank, this factor may rebut the presumption of conditional payment by letter of credit: see *W J Alan & Co Ltd v El Nasr Export and Import Co* ([1972] 2 All ER 127 at 137, [1972] 2 QB 189 at 210). In contrast, in a credit card transaction the seller has decided long before the specific supply contract is made whether or not to accept the cards of the credit card company and has entered into an overall contract with it, under which the seller is obliged to accept the card and the credit card company is bound to pay him. With letters of credit, the issuing bank is the agent of the buyer and not the seller and it is the buyer who pays for the facility; in credit card transactions the credit card company is in a contractual relationship with both but it is the seller who pays for the facility by allowing the deduction of the commission. These differences are, in my judgment, so fundamental that the law affecting letters of credit is not of great assistance in deciding what law should apply to credit card transactions.

Accordingly, I agree with the judge, and broadly for the same reasons, that the cardholder's obligations to the garages were absolutely, not conditionally, discharged by the garage accepting the voucher signed by the cardholder and that accordingly the appeal should be dismissed. I reach this conclusion with satisfaction since I think it reflects the popular perception of the role of credit cards in modern retail trade as 'plastic money'.

The judge expressed certain views as to the effect of payment by use of a cheque supported by the production of a bank card (see [1986] 3 All ER 289 at 301, [1987] Ch 150 at 166). As the point is not directly material in the present case and there may well be features of such transactions of which I am ignorant, I prefer to express no view on that point.

NOURSE LJ. I agree.

STUART-SMITH LJ. I agree.

Appeal dismissed.

Solicitors: *Sebastian Coleman & Co*, agents for *Wragge & Co*, Birmingham (for the garages); *Cameron Markby* (for Commercial Credit); *Alsop Wilkinson* (for the liquidator).

Celia Fox Barrister.