



[2006] CAT 2

IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1054/1/1/05
1055/1/1/05
1056/1/1/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

31 January 2006

Before:
SIR CHRISTOPHER BELLAMY
(President)
DR. ARTHUR PRYOR
DAVID SUMMERS
(Sitting as a Tribunal in England and Wales)

BETWEEN:

MASTERCARD UK MEMBERS FORUM LIMITED

and

**MASTERCARD INTERNATIONAL INCORPORATED AND
MASTERCARD EUROPE SPRL**

and

ROYAL BANK OF SCOTLAND GROUP

Appellants

Supported by

VISA (EUROPE) LIMITED AND VISA (UK) LIMITED

Intervener

-and-

OFFICE OF FAIR TRADING

Respondent

Supported by

BRITISH RETAIL CONSORTIUM

Intervener

Transcribed from the Shorthand notes of
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RULING: DISCLOSURE

APPEARANCES

Mr. Nicholas Green QC (instructed by Lovells) appeared for the First Appellant, MasterCard UK Members Forum.

Mr. Thomas Sharpe QC and Mr. Matthew Cook (instructed by Jones Day) appeared for the Second Appellant, MasterCard International Incorporated and MasterCard Europe Sprl.

Mr. Christopher Carr QC and Mr. Mark Hoskins (instructed by Ashurst) appeared for the Third Appellant, Royal Bank of Scotland Group.

Mr. Jon Turner and Mr. Josh Holmes (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Ms. Kelyn Bacon (instructed by Freshfields Bruckhaus Deringer) appeared for the First Intervener, Visa (Europe) Limited and Visa (UK) Limited.

Mr. Aidan Robertson (instructed by Dechert LLP) appeared for the Second Intervener, British Retail Consortium.

1 THE PRESIDENT:

2 1 The British Retail Consortium, Intervener in this case, seeks disclosure of some 39 documents
3 from the various Appellants on the basis that it is to file its Statement of Intervention by
4 7 March 2006, and that it is in difficulty preparing that Intervention and instructing its experts
5 unless it sees unredacted versions of the documents in question.
6

7 2 The BRC submits that it is, in general, better placed than the OFT to make certain submissions
8 on behalf of retailers and it has put forward an extremely focused request for disclosure.
9 Certain documents, it has accepted, should be confined to a confidentiality ring consisting of
10 legal advisers and certain named economists, while other documents, it is said, could go also to
11 a working group formed of various representatives of certain members of the BRC. As to the
12 last point, we would have very great difficulty in extending the idea of a confidentiality ring to
13 a working group of that nature, but it is unnecessary for us to say any more about that at this
14 stage.
15

16 3 The OFT broadly supports the position taken by the BRC on the basis that the OFT's case is
17 that the merchants are the victims of what is alleged to be an agreement infringing the
18 Chapter I prohibition and Article 81 of the EC Treaty, and that they should be in a full position
19 to make their comments to the Tribunal.
20

21 4 The Appellants oppose the application on a number of grounds. They rely on a lack of
22 particularity, they rely on the highly confidential nature of at least certain information, some of
23 which is described as the "Crown Jewels", or, in the case of one Appellant, the Royal Bank
24 of Scotland, highly confidential information about possible future strategy or developments.
25

26 5 The Appellants submit that there could be no added value that the BRC can bring, as it were, to
27 the party, that to allow the intervention to develop in an extended way would lead to a
28 disproportionate proliferation of submissions, documents and effort, and would go beyond the
29 proper scope of an intervention of an Intervener in the position of the BRC.
30

31 6 They also point out that a strange position would arise as regards Visa, who are also an
32 Intervener in this case but have not made an application to see these confidential documents.
33 The position might be that the BRC had certain documents that Visa did not have, which
34 would complicate the case procedurally, so it is submitted.

1
2 7 Those being the main outlines, we are at the case management stage in this case and it seems to
3 us that we should deal with the matter on the basis that we consider to be most efficient from
4 the case management point of view. The most important thing, in our view, at this stage is to
5 get this case, as it were, on the road so that we can begin to see the issues in further detail.
6

7 8 In any case, where confidentiality is claimed, there are essentially three questions: first of all,
8 is confidentiality properly claimed having regard to the test which is set out in Schedule 4 of
9 the Enterprise Act? Secondly, if, at first sight, the material is properly confidential, is it
10 nonetheless something that is very likely to be necessary for explaining the reasons for the
11 Tribunal's decision, in which case it is extremely difficult, for obvious reasons, to keep the
12 matter confidential? Thirdly, and in any event, what is the balance of interest between the
13 various parties which requires disclosure? In a case such as the present, that does raise an
14 issue which, as far as the Tribunal is aware, has not really been dealt with in previous
15 judgments to date, which is, "What is the role of the Intervener in a case such as the present?"
16 or, to put it more precisely, "What is it that falls for the OFT to do and what is it for the
17 Intervener to do?"
18

19 9 In our view, we cannot really decide any of those questions without considering the individual
20 documents, and that is likely to be, if we had to do it, a time consuming and extensive exercise.
21 It is certainly an exercise that the Tribunal would be prepared to embark on if necessary in an
22 appropriate way, but in order to embark upon such an exercise we do need a very clear idea of
23 the relevance of the documents in dispute, how far they are likely to be material to the issues in
24 the case and to what extent the various claims and cross-claims for confidentiality and
25 necessity are to be balanced.
26

27 10 Our view is that it is difficult to embark on such an exercise at this stage before we have the
28 OFT's Defence and before we have the Statement of Intervention of the BRC. The OFT's
29 Defence is due on 28 February 2006. We would not wish to see any slippage in this case as a
30 result of having to delay either that Defence or the Statement of Intervention which is due on
31 7 March 2006. It is true that the BRC would have, on that timetable, to prepare its Statement
32 of Intervention without having seen all the detail in the documents that have been disclosed,
33 but, on the other hand, as far as we are aware, a great deal of information has already been

1 disclosed. It does not seem to us impossible for a Statement of Intervention to be prepared and
2 filed on the basis of existing information.

3
4 11 Once we have got the OFT's Defence and we have BRC's Statement of Intervention, albeit
5 prepared on, from their point of view, a less complete basis than they would have wished, it
6 seems to the Tribunal that the issues in the case will be much more crystallised and focused
7 than they are at the moment. In particular, at that stage, we can see, on the basis of more
8 detailed argument, why certain information is, or might be, really wanted, and what steps we
9 should take in that regard. We will also be able to see exactly what the OFT's position is on
10 various points and take a view as to how far it is necessary for the proper management of this
11 case for the Intervener to supplement what the OFT is saying or whether it is sufficient for the
12 OFT to take the lead on various issues, bearing in mind that this case is essentially a case
13 between the Appellants and the OFT in which the latter is the Defendant and has to justify its
14 Decision. The OFT has seen all the material and should, one would have supposed, be in a
15 position to deal with it. Nonetheless, at that later stage there may still be some scope for
16 further disclosure to BRC.

17
18 12 We are not closing the door on that issue. We, however, take the view that it is an issue that is
19 more easily and properly addressed when we are a little further down the line and we can see
20 exactly to what extent and where the battle lines are joined and what pieces of information are
21 relevant to what. We can see in one or two of the documents that we have only really had a
22 chance to consider very provisionally that there may be one or two passages or certain kinds of
23 information for which it is, in fact, going to be extremely difficult to maintain confidentiality
24 as the case goes on, but we are not today proposing to cross any of those particular bridges, but
25 to adjourn this application to a date to be fixed once the Defence and the Statement of
26 Intervention have been filed.