Neutral citation [2023] CAT 58

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1441/7/7/22

1442/7/7/22

1443/7/7/22

1444/7/7/22

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /
Proposed Class Representative

\- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED
(5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
(6) MASTERCARD EUROPE SERVICES LIMITED

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant /
Proposed Class Representative

\- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
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(6) MASTERCARD EUROPE SERVICES LIMITED

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /
Proposed Class Representative

- v -

(1) VISA INC.
(2) VISA INTERNATIONAL SERVICE ASSOCIATION
(3) VISA EUROPE SERVICES LLC
(4) VISA EUROPE LIMITED
(5) VISA UK LTD

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant /
Proposed Class Representative

- v -

(1) VISA INC.
(2) VISA INTERNATIONAL SERVICE ASSOCIATION
(3) VISA EUROPE SERVICES LLC
(4) VISA EUROPE LIMITED
(5) VISA UK LTD

Respondents /
Proposed Defendants

REASONED ORDER (PERMISSION TO APPEAL)

UPON the Tribunal having handed down its Judgment *([2023] CAT 28)* on 8 June 2023 ('the Judgment')

AND UPON the Proposed Class Representatives' confirmation to the Tribunal on 3 August 2023 of their intention to present a revised application for a Collective Proceedings Order in the Proposed Collective Proceedings

AND UPON the application dated 25 August 2023 from the solicitors for the Mastercard Proposed Defendants' ('Mastercard') requesting permission to appeal the Judgment ('the Application') and considering the correspondence from the solicitors for the Visa Proposed Defendants ('Visa') regarding the juncture for applications for permission of appeal in view of the Proposed Class Representatives' intention to present a revised application for a Collective Proceedings Order

AND HAVING REGARD TO the power of the Tribunal under Rule 107 of the Competition Appeal Tribunal Rules 2015 ('Tribunal Rules 2015')

IT IS ORDERED THAT:

1. Visa's Application for an extension of time for applications for permission to appeal the Judgment is refused.

2. The Proposed Defendants' Application for permission to appeal is refused.

REASONS

1. The Application for permission to appeal by Mastercard raised two grounds of appeal to the effect that the Tribunal erred in law in its consideration of the eligibility of the claims for inclusion in collective proceedings under section 47B(5)(b) Competition Act 1998 and Rule 79 of the Tribunal Rules 2015, in holding that the individual proceedings were not more suitable than the proposed opt-in or opt-out collective proceedings ('relative suitability') as per paragraphs [229-240] and [258] of the Judgment.

(1) Preliminary Matters

2. Visa invited the Tribunal to grant an extension of the time limit for applications for permission to appeal the Judgment so as to align with the time limit for applications for permission to appeal the determination by the Tribunal of a revised application for a Collective Proceedings Order. The Tribunal, by this Order, did not grant that extension. The hearing of the revised application for a Collective Proceedings Order will take place on 17 to 19 April 2024. It is desirable, if at all possible, that the status of the matters which are the subject of Mastercard's Application for permission to appeal are resolved before that revised application is heard. The Tribunal has decided to refuse Mastercard's Application for permission to appeal, but if it is renewed before the Court of Appeal and granted, then it would be of considerable assistance if the appeal could be disposed of before the April hearing.

3. In the alternative, Visa adopted Mastercard's Application for permission to appeal on the same grounds.

4. Mastercard submitted that the Court of Appeal has jurisdiction to hear an appeal of the matters raised in its Application, on the basis that it would be an appeal of a decision to grant a collective proceedings order, which is now well established[1] as a decision "as to the award of damages" pursuant to section 49(1A) of the Competition Act 1998. We agree that the points raised in Mastercard's Application are decisions "as to an award of damages". We comment further below on whether they are properly characterised as points of law.

(2) The Grounds of Appeal

5. Mastercard's first ground of appeal concerned the proposed opt-in proceedings. It was said that the Tribunal:

   (1) Failed to take into account and or draw proper inferences from the size and sophistication of the proposed class members and the value of the individual claims.

[1] See *UK Trucks Claim Ltd v Stellantis NV & Ors [2023] EWCA Civ 875* at paragraphs [48]-[54]*; Evans v Barclays Plc & Ors [2023] EWCA Civ 876* at paragraphs [47]-[55].

(2) Failed to take into account and or draw proper inferences from the extent of prior litigation and settlement within the proposed class.

(3) Had no proper basis to conclude that there was a respectable case to be made for the costs and benefits favouring opt-in proceedings over individual proceedings.

6. Mastercard's second ground of appeal concerned the opt-out proceedings and was that there was no proper basis for the Tribunal to conclude that the costs and benefits pointed in favour of the proposed collective proceedings.

(3) Analysis

(i) Ground 1

7. We will deal with each of Mastercard's sub grounds separately.

8. **Size, sophistication of class and value of claims:** It is correct that putative class members of the opt-in class are likely to be large and sophisticated entities, if only because the class definition requires a turnover in excess of £100 million. It also follows that they are likely to have claims of a material size, which of course is relevant to the economics of conducting litigation. However, even taking those factors into account, our view is that those entities are likely to obtain advantages from participating in a collective action – for the reasons we identify in paragraphs [231] and [232] of the Judgment. There is no requirement that the class members in collective proceedings be individuals or small to medium enterprises (SMEs): that is clear from paragraph [122] of the judgment in *Evans CA*[2]:

> *"There is reference in the documents leading to the adoption of the legislation that the new regime was to protect consumers and SMEs but there is nothing suggesting that it was limited in that way, and the admissible background documents refer to both SMEs and also to businesses more generally. Further, the legislation is drafted in broad and unlimited terms."*

[2] *Ibid.,* at footnote [1].

9. The Umbrella Proceedings (representing the likely available option for individual proceedings to be brought as an alternative to collective proceedings) are novel and complicated, giving rise to relatively complex considerations requiring careful assessment. In any event, the potential preference of entities for individual or collective proceedings is just one factor in the assessment of suitability. Other important factors include the efficient use of judicial resource (in relation to which the Umbrella Proceedings must also be carefully considered) (see paragraphs [238] and [239] of the Judgment). The Tribunal has carried out an exercise of weighing up these factors, which is similar to the exercise described by the Court of Appeal in *Le Patourel v BT Group PLC and another* [2022] EWCA Civ 593 at [57]:

> *"57. On the other hand when it comes to the weighing up of the various factors relevant to the choice of opt-out or opt-in this is essentially an exercise of judgment over facts and evidence by an expert, specialist, body, that will over time accrue an Approved Judgment: CA-2022-002002 & CA-2022-002003 Evans v Barclays PLC & Ors / O'Higgins 23 increasing well of experience in how to handle these complex cases. The appellate courts recognise that the case management decisions of the CAT are exercises in pragmatism and that undue formalism and precision are not required: See the summary of the case law in NTN v Stellantis NV and others [2022] EWCA Civ 16 at paragraphs [24] - [29]. These considerations broaden the Tribunal's margin of discretion or judgment. This Court should not interfere simply because it might, for the sake of argument, have drawn a different conclusion from the weighing exercise. We would expect that most opt-out/opt-in decisions will involve a weighing exercise of this nature."*

10. The first sub ground advanced by Mastercard is not therefore in our view a point of law. Even if it were, we would not consider that Mastercard has a real prospect of success in relation to the appeal of the point, or that there is any compelling reason why the appeal should be heard. It is an exercise of discretion based on the particular facts of the case, which are complex. We disagree with Mastercard's suggestion that there remains an open question about the application of the opt-in regime to large businesses. The position is clear for the reasons set out in *Evans* at [122], as referred to in [8] above.

11. **Extent of prior litigation and settlement:** The Judgment records at paragraph [139] the argument advanced by Visa in relation to settlements and it is of course inherent in the existence of, and any discussion about, the Umbrella Proceedings that there is a considerable history of individual proceedings being brought. Settlement of prior litigation demonstrates that individual claims are possible and effective. That, however, is of limited value in deciding whether collective proceedings are more suitable, which requires a more nuanced assessment.

12. As with the above point about size, sophistication and value, the extent of prior litigation and settlements is a point which forms part of a wider assessment of the factors relevant to suitability and is not in our view a point of law. Nor do we consider that Mastercard has a real prospect of success in relation to the appeal of the point, or that there is any compelling reason why the appeal should be heard. It is an exercise of discretion based on the particular facts of the case.

13. **Costs and benefits of the opt-in proceedings:** It is clearly not the case that the Tribunal failed to take into account the differential between the subject matter of the Umbrella Proceedings (all MIFs) and the subject matter of the proposed opt-in proceedings (consumer and inter-regional MIFs). That issue was recorded at paragraph [136] of the Judgment and was also the subject of detailed discussion elsewhere in the judgment. See for example paragraphs [181] and [182] of the Jugdment relating to methodology.

14. It is the case that there remains a degree of uncertainty about how the proposed opt-in proceedings would (if subsequently certified) be managed with the Umbrella Proceedings, but that issue is dealt with at paragraphs [239] and [241(4)] of the Judgment, in the context of assurances from the PCRs of their intention to join the Umbrella Proceedings as and when a Collective Proceedings Order is made. It seems unlikely that the final form of any proceedings which may be certified will materially impact that question, but if it does then the question will be a different one for consideration at the appropriate time.

15. Similarly, the uncertainty concerning issues such as methodology did indeed require the Tribunal to make an assessment of suitability in less than ideal conditions. However,

the argument from Mastercard is tantamount to saying that the Tribunal could not decide the suitability point where there remained uncertainty about the future methodology to be advanced by the PCRs as a result of the adjournment of the application. We do not accept that is the case – we were entitled to reach conclusions about suitability on the basis of the case put before us.

16. Overall, these points form part of an assessment under Rule 79(2) of a variety of factors. Criticism of the weight that may or may not have been given to a particular factor does not in our view amount to a point of law. Nor do we consider that Mastercard has a real prospect of success in relation to the appeal of the points, or that there is any compelling reason why the appeal should be heard. It is an exercise of discretion based on the particular facts of the case.

17. For these reasons, we refuse permission to appeal in relation to Ground 1.

(ii) Ground 2

18. Ground 2 concerns the opt-out proceedings and essential repeats the points made under the third sub-argument in Ground 1, namely that the Tribunal failed to assess the costs and benefits of the proposed opt-out proceedings because of (a) the differential between the subject matter of the Umbrella Proceedings (all MIFs) and the subject matter of the proposed opt-in proceedings (consumer and inter-regional MIFs) and (b) the uncertainties in any future shape of the proposed proceedings and their likely relationship with the conduct of the Umbrella Proceedings .

19. For all the reasons given in paragraphs [13] to [16] above, we refuse permission to appeal on the basis that:

(1) We do not consider them to give rise to an appealable point of law.

(2) We do not consider that Mastercard has a real prospect of success in relation to the appeal of the points, or that there is any compelling reason why the appeal should be heard. It is an exercise of discretion based on the particular facts of the case.

2. DISPOSITION

20. For the reasons set out above, we refuse the Defendants' Application for permission to appeal. This decision is unanimous.

Ben Tidswell Chair	Dr Catherine Bell CB	Dr William Bishop

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 2 October 2023