Neutral citation [2024] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1441/7/7/22
1442/7/7/22
1443/7/7/22
1444/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 March 2024

Before:

BEN TIDSWELL
(Chair)
TIM FRAZER
DR WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

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
(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 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

RULING

A. INTRODUCTION

1. The Proposed Defendants ("Visa" and "Mastercard") seek permission to appeal the judgment of the Tribunal handed down on 17 January 2024 ([2024] CAT 3) (the "Judgment"). In that judgment, a Tribunal comprising Mr Ben Tidswell (Chair), Dr Catherine Bell and Dr William Bishop rejected arguments made by Visa and Mastercard about the enforceability of the of the funding arrangements of the Proposed Class Representatives (the "PCRs").

2. Dr Bell has subsequently retired as an ordinary member of the Tribunal. She has been replaced by Mr Tim Frazer, who sits as a replacement for Dr Bell in the Tribunal's consideration of Visa and Mastercard's applications for permission to appeal.

B. THE GROUNDS OF APPEAL

3. The substantive Grounds of Appeal are put forward by Visa and adopted by Mastercard. There are three grounds advanced in Visa's application[1]:

4. **Ground 1 (Cap Point):** The Tribunal should have found that the September Opt-Out LFAs, the November Opt-In LFAs and the ATE insurance policies were DBAs given the cap(s) on the amounts payable to the funder and/or the insurer. The Tribunal referred to this as the "Cap Point".

5. **Ground 2 (Proceeds Point):** The Tribunal should have found that the September Opt-Out LFAs, the November Opt-In LFAs and the ATE insurance policies were DBAs as the amount payable to the funder and/or the insurer is paid out of, or as a share of, the recoveries. The Tribunal referred to this as the "Proceeds Point". Alternatively, the Tribunal should have found that those LFAs and the ATE policies were DBAs by a combination of the Cap Point and the Proceeds Point and the remaining terms of the LFAs and the ATE policies.

[1] Readers should refer to the Judgment for explanations of the acronyms and defined terms.

6. **Ground 3 (the caveat):** The Tribunal erred in finding that the November 2023 Opt-In LFAs and the ATE policies were enforceable due to the caveated (or contingency) wording in the Opt-In Priorities Agreement. The November 2023 Opt-In LFAs and the ATE policies were and remain DBAs which are unenforceable and/or are otherwise contrary to public policy.

7. Visa also notes that the Tribunal has granted the unsuccessful parties in two similar cases permission to appeal. In those cases, the Tribunal decided that there was no real prospect of success for the applicants for permission to appeal, but that there were compelling reasons why the applicants should be permitted to appeal.[2]

8. This was explained in *Neill v Sony* as follows:

> "18. …we recognise that the decision in PACCAR (SC) has resulted in funders and class representatives in a number of collective proceedings amending their funding arrangements so as to avoid the consequences of that decision, which in turn has led to those amended funding arrangements being challenged by defendants in those cases. This is creating uncertainty and consuming the resources of the Tribunal and the parties, and that is unlikely to cease until there has been a conclusive decision on these points by the Court of Appeal. We do therefore consider there to be a compelling reason why we should grant permission to appeal in relation to the funding grounds. It is likely that permission will be granted in other similar cases and it would be expedient for those to be dealt with together in any hearing in the Court of Appeal".

(1) Ground 1

9. Visa argues that the Tribunal erred in its interpretation of the critical provision in section 58AA(3)(ii) of the Courts and Legal Services Act 1990, which provides that:

> *"*the amount of that payment is to be determined by reference to the amount of the financial benefit obtained. ..."

10. Visa submits that the Tribunal focused too much on the primary or substantive mechanism by placing undue weight on the word "*determined*", and consequently failed to give the words "*by reference to*" sufficient weight. This meant that the Tribunal departed from the clear threshold laid down in the

[2] *Neill v Sony* [2024] CAT 1 and *Kent v Apple* [2024] CAT 5.

section and replaced that with a "purpose" test, which does not sufficiently take into account the effect of a funding arrangement.

11. Visa further submits that the Tribunal's interpretation is contrary to the policy objectives behind the legislation, allowing what would otherwise be champertous agreements to be enforceable under certain conditions.

12. In the event the Tribunal's approach is the correct one, Visa alternatively submits that the Tribunal applied its own test incorrectly, by failing to conclude that the express cap in the funding arrangements meant that the arrangements had the substance of a DBA.

13. The distinction now drawn by Visa between the purpose of a funding arrangement and its effect is not one which was made in the Judgment. Instead, the Judgment provides that the test set out in section 58AA(3)(ii) requires a common sense approach, which involves looking at the relevant provisions in the round.[3] The critical question is whether the funder's fee is in substance determined by reference to sharing in a percentage or other proportion of the claimant's spoils of litigation. That requires consideration of both the apparent purpose and the likely effect[4].

14. It is of course correct that the word "*determined*" and the words "*by reference to*" need to be given their proper effect. They serve different purposes:

    (1) "*by reference to*" requires the identification of a connection between the payment mechanism and the spoils of litigation.

    (2) "*determined*" requires an analysis of the causative quality of that connection, recognising that not every connection should be considered determinative of the outcome[5].

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[3] See Judgment at [63].
[4] See Judgment at [67].
[5] See Judgment at [57] and [58].

15. The focus on the word "*determined*" therefore reflects the Tribunal's view that it is necessary to look at the real substance of the arrangements in question.

16. As for the public policy point, we understand it to be accepted by the Proposed Defendants that a funder's fee which is determined by reference to a multiple of outlay alone would not be objectionable if there were no contractual provisions linking it to any aspect of the spoils of litigation[6]. There is therefore no principled objection to funding arrangements which do not contain such a linkage. The relevant question (which the Judgment addresses) is whether such a linkage can reasonably be said to exist so as to engage section 58AA(3)(ii). In other words, the Visa public policy argument is circular – it all depends on whether the arrangement is caught by that section.

17. In reaching its conclusion, the Tribunal considered that the real and substantive factor by which the funder's fee is determined is the application of a multiple of costs outlaid by the funder. The cap is a subsidiary factor which may or may not have an effect in any given situation, but cannot reasonably be said to be a material factor by reference to which the funder's fee is determined.

18. For these reasons, we consider that the Proposed Defendants have no real prospect of succeeding on appeal in relation to Ground 1.

(2) Ground 2

19. Under this Ground, Visa challenges the Tribunal's interpretation of observations made by Lewison LJ in Lexlaw Ltd v Zuberi [2021] EWCA Civ 16. We consider there to be no sensible basis to suggest that Lewison LJ meant anything other than recorded in the Judgment7, and we consider that the Proposed Defendants have no real prospect of succeeding on appeal in relation to Ground 2.

[6] See Judgment at 55 for a discussion of such a scenario.
[7] See Judgment at [48] and [49].

(3) Ground 3

20. This Ground relates to the Tribunal's rejection of the Proposed Defendants' arguments that a clause which preserves the possibility of a change in the law (and which only becomes operative in those circumstances) is contrary to public policy. Visa has provided no authority for this point. That is presumably because the point lacks any coherent logic – if a contractual provision is expressly subject to a precondition that it does not apply unless the law changes, it quite obviously has no effect in the absence of that event. We consider that the Proposed Defendants have no real prospect of succeeding on appeal in relation to Ground 3.

(4) Any other compelling reason

21. As noted in *Neill v Sony* and *Kent v Apple*, the continuing uncertainty about these issues of funding enforceability arising in a series of cases before the Tribunal is unlikely to be resolved without determination of the issues by the Court of Appeal. It seems possible that these proceedings will be able to be progressed sufficiently quickly to catch up with those cases in which permission to appeal has already been granted, in which case it may be of assistance to the Court of Appeal to have a slightly different fact pattern to consider when resolving the points on appeal.

22. On that basis only, we grant Visa and Mastercard permission to appeal.

C. DISPOSITION

23. We refuse the Proposed Defendants permission to appeal on the Visa Grounds 1, 2 and 3, but grant them permission to appeal on the basis that there is another compelling reason to do so.

24. This decision is unanimous.

Ben Tidswell
Chair | Tim Frazer | Dr William Bishop

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar | Date: 1 March 2024