



IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1517/11/7/22 (UM)

1266/7/7/16

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS

(the “Merchant Interchange Fee Umbrella Proceedings”)

AND BETWEEN

WALTER HUGH MERRICKS CBE

Class Representative

(the “Merricks Class Representative”)

- v -

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

(3) MASTERCARD EUROPE S.P.R.L.

Mastercard Defendants

(the “Merricks Collective Proceedings”)

REASONED ORDER
(TRIAL 1)(CONFIDENTIALITY RING ORDER)

UPON the Order of the President made on 23 December 2022 and drawn on 13 January 2023 setting out directions as to the future conduct of proceedings (“Future Conduct Order”) in the Merchant Umbrella Interchange Fee Proceedings (“Umbrella Proceedings”)

AND UPON the Order of the President made on 5 July 2023, providing for a confidentiality ring to deal with confidentiality issues for the purposes of Trial 1 (“Trial 1 Confidentiality Ring”) in the Umbrella Proceedings

AND UPON the Order of the President made on 16 November 2023, providing for a confidentiality ring to deal with confidentiality issues reacting to documents which contain information confidential to the Payment Systems Regulator for the purposes of the Umbrella proceedings

AND UPON the Order of the President made on 28 February 2024, providing for a confidentiality ring to deal with confidentiality issues for the purposes of Trial 2 in the Umbrella Proceedings

AND UPON the Order of the President made on 1 July 2024 extending the Umbrella Proceedings Order to include the Merricks Collective Proceedings in relation to questions of acquirer and retailer pass-on

AND UPON the letter from the Tribunal dated 13 June 2024 inviting the parties to provide Additional Annexes with the names of any individuals they are seeking to add as Permitted Persons within the Trial 1 Confidentiality Ring and the responses from Willkie Farr Gallagher dated 14 June 2024, Pinsent Masons dated 17 June 2024 and Hausfeld dated 17 June 2024 enclosing Additional Annexes of individuals to be added to the Trial 1 Confidentiality Ring

AND UPON the letter from the Tribunal dated 21 June 2024 allowing the parties to object to the provision of specific categories of documents containing Trial 1 Confidential Information to individuals listed in the Additional Annexes

AND UPON considering the written responses objecting to the provision of specific categories of documents containing Trial 1 Confidential Information of the Visa Defendants and the Stephenson Harwood and Scott + Scott Claimants dated 25 June 2024

AND UPON considering the written reply to those objections from the Merricks Class Representative dated 26 June 2024

IT IS ORDERED THAT:

1. The individuals named in the Additional Annexes filed with the Tribunal Registry are to be added as Permitted Persons to the Trial 1 Confidentiality Ring.

2. Trial 1 Restricted Confidential Information provided by the Visa Defendants in relation to Issue 3 of the Umbrella Proceedings is excepted from access by individuals included as additional Permitted Persons within the Trial 1 Confidentiality Ring.
3. Redacted non-confidential versions of the excepted Trial 1 Restricted Confidential Information in paragraph 2 above, as including in the Trial 1 bundle, will be provided by the Visa Defendants to the additional Permitted Persons within the Trial 1 Confidentiality Ring.

REASONS

(a) The SSH Claimant objections

1. The SSH Claimants object to the additional Permitted Persons to the Trial 1 Confidentiality Ring Order (“CRO”) having access to the disclosure of certain claimants who have settled their cases against Visa and Mastercard Defendants on the basis that these claimants no longer have an interest in the litigation and some of them are in administration or have been dissolved. The SSH Claimants also seek to be excused from additional work or expense in responding to questions about Trial 1 disclosure. Further, they provide their agreement to all other documents being made available to the additional Permitted Persons on the understanding that the Trial 1 documents will only be used for the purposes of the Umbrella Proceedings, in accordance with rule 102 of the Competition Appeal Tribunal Rules 2015.
2. Mr Merricks challenges the basis on which the disclosure of the settled claimants is sought to be withheld, saying that the reasons given do not justify that outcome. Mr Merricks also says that he has not had previous involvement with the Trial 1 disclosure process and it would be unreasonable to restrict his ability to ask the SSH Claimants questions in relation to that process. Mr Merricks confirms that, once the order adding the Merricks Collective Proceedings to the Umbrella Proceedings is made, Trial 1 disclosure will only be used for the purposes of the determination of pass-on issues in the Merricks Collective Proceedings and the Umbrella Proceedings.

3. I agree with Mr Merricks that there is no obvious reason why the disclosure of claimants who have already settled should be excluded from the Trial 1 disclosure which is made available to the additional Permitted Persons. The SSH Claimants have advanced no argument to suggest that the material involved has a degree of sensitivity which justifies that course of action. The points made by the SSH Claimants about costs and the potential difficulties of obtaining instructions from some of the settled claimants are noted, but provide no justification for the objection. The material in question should therefore be treated in the same way as the other material in the Trial 1 disclosure and should be available to the additional Permitted Persons.
4. I also consider that it would not be reasonable to restrict the ability of Mr Merricks to ask proportionate questions about the Trial 1 disclosure, and I decline therefore to excuse the SSH Claimants from responding to such queries.
5. In relation to the use of the documents comprised in the Trial 1 disclosure, the Merricks Collective Proceedings are now added to the Umbrella Proceedings in relation to the question of pass-on including both “acquirer pass-on” and “merchant pass-on”, as per the Future Conduct Order made 23 December 2022. The documents may therefore be used for the purposes of both the Umbrella Proceedings and the Merricks Collective Proceedings insofar as that use concerns the question of pass-on.

(b) The Visa Objections

6. Visa objects to the additional Permitted Persons having access to certain disclosure and witness (factual and expert) evidence designated as Restricted Confidential Information in Trial 1 relating to Issue 3 in the Trial 1 List of Issues. That is because the material is highly sensitive (which is reflected in the fact that the Tribunal sat in a closed session to hear evidence on that subject). Visa says that the material is of no relevance to Trial 2 and that it can be easily and clearly isolated from the remaining Trial 1 material. Visa proposes to provide redacted versions of expert evidence.
7. On the basis of the knowledge Mr Merricks currently has (noting that his legal advisers have been admitted to the Trial 1 Confidentiality Ring in order to consider this issue),

Mr Merricks does not challenge Visa's objection. He does however seek redacted versions of all material which is withheld.

8. I am satisfied that the material which Visa objects to is of a sufficient sensitivity to justify its exclusion from the Trial 1 disclosure which is made available to the additional Permitted Persons. I am also satisfied that the material is not of any obvious relevance to Trial 2 and that it can be easily and clearly isolated from the other Trial 1 material. I therefore order that the material (which is identified in Linklaters's letter of 25 June 2024 and an accompanying spreadsheet) should be excluded from the Trial 1 Disclosure made available to the additional Permitted Persons.
9. I also direct that Visa should supply the additional Permitted Persons with redacted versions of any of this material which was included in the Trial 1 trial bundle, which I understand will be readily available in non-confidential versions of the trial bundle. If Mr Merricks wishes to see redacted versions of other documents (that is, material disclosed which has not found its way into the Trial 1 trial bundle) then he should specify what is wished to be seen. In the event of a dispute about the supply of those documents in redacted form, the parties may apply to the Tribunal to determine same.

Mr Ben Tidswell
Chair of the Competition Appeal Tribunal

Made: 5 July 2024
Drawn: 5 July 2024