



[2016] CAT 2

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case: 1241/5/7/15 (T)

Victoria House
Bloomsbury Place
London WC1A 2EB

9 February 2016

Before:
THE HONOURABLE MR JUSTICE BARLING
(Chairman)
PROFESSOR JOHN BEATH OBE
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

B E T W E E N:

SAINSBURY'S SUPERMARKETS LTD

Claimant

-v-

**(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L**

Defendants

RULING
**(CLAIMANT'S APPLICATIONS FOR SPECIFIC DISCLOSURE AND
DEFENDANTS' APPLICATION FOR ADMISSION OF SUPPLEMENTAL
WITNESS STATEMENT)**

1. At the close of play yesterday each of the parties made an application.
2. First, Mr Brealey QC applied on behalf of his clients for specific disclosure in two respects. (There was originally a third element to his application which he did not, in the event, pursue.)
3. The first element related to submissions made by MasterCard to the European Commission in relation to what may conveniently be called the Maestro scenario. This forms the basis of comments by the Commission in their 2013 Impact Assessment, which is one of the documents before us in this case. (For ease of reference it is in bundle E5.4, tab 56, at page 1418). The Commission's comment concerns their view of why 90% of the market share of the Maestro card was lost between 2001 and 2011.
4. The Maestro scenario has been in play in these proceedings, not least in the witness statements exchanged several months ago, in connection with issues relating to the appropriate "counterfactual" to be used at various stages in the consideration of the claimant's case. Also, a good many documents in relation to the Maestro scenario, including internal documents of MasterCard, have been disclosed. Some of them were used in cross-examination yesterday. Equally, the Commission's Impact Assessment has been available to the claimant for some time.
5. Whereas in the months leading up to the trial there have been applications for specific disclosure in respect of other issues, for example, the pass-on issue, no request for disclosure of the submissions made by MasterCard to the Commission on this issue has been made until now, when the trial is under way. There have been ample opportunities for such an application to be made in a much more timely way. Nothing, as far as we can see, has arisen since the hearing began which could be said to justify an application at the stage when we are already in the midst of the evidence of MasterCard's witnesses and when to grant the application would almost certainly cause some disruption to the timetable.
6. This reason on its own is enough to lead us to refuse the application. However, it is not at all clear that having sight of MasterCard's submissions on the European Commission on this point would add anything material to the

evidence, written and oral, which has been (and will be) put before us. It is clear that the Commission's findings of fact in the Impact Assessment, and indeed elsewhere, are not binding on us. We have to make up our own minds on the basis of the evidence placed before us, so far as the factual questions are concerned.

7. Turning to the second element of Mr Brealey's application, much the same applies. That relates to MasterCard's pleadings and submissions on the Maestro scenario put before the European Commission, the General Court and the Court of Justice of the European Union in MasterCard's appeals from the decision taken by the Commission in December 2007, as well as the submissions and pleadings on that issue of the Commission itself in those appeals.
8. First of all, this material could have been applied for months ago. I note that on 14 October 2015 I granted an application by the claimant for disclosure of all evidence and submissions put to the Commission and to the General Court and the Court of Justice, relating to the pass-on issue. Such an application could also have been made for the Maestro counterfactual material, and in our view it is now too late for the matter to be raised.
9. Again, there are also questions of materiality and relevance. We have to decide the facts relating to these matters on the material we have and not on the basis of submissions put to other courts. In so far as we need to determine what those other courts actually decided, we should do this by reference to their judgments and not by reference to material supplied to them.
10. Therefore, we refuse also the second element of the claimant's disclosure application.
11. Mr Hoskins QC has applied to put in a supplemental witness statement of an existing witness, Mr Peter Sidenius. This witness statement was prompted by a question from the Tribunal itself. As far as we understand Mr Brealey's position, and we will be corrected if we are wrong on this, he did not object to the supplemental witness statement, provided that he and his team had sufficient time to consider it before he was required to cross-examine the witness. That proviso appears to be accepted by MasterCard and, therefore, subject to any

further submissions, we agree that the supplemental witness statement of Mr Sidenius can be admitted in evidence.

The Hon. Mr Justice Barling
Chairman

Prof. John Beath OBE

Marcus Smith QC

Charles Dhanowa OBE QC
(Hon)
Registrar

Made: 9 February 2016