

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1266/7/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

21 July 2017

Before:

THE HON. MR. JUSTICE ROTH
(President)

(Sitting as a Tribunal in England and Wales)

B E T W E E N :

WALTER HUGH MERRICKS CBE

Applicant/Proposed Class Representative

- and -

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

Respondents/Proposed Defendants

*Transcribed by **OPUS 2 INTERNATIONAL LIMITED**
(Incorporating **Beverley F Nunnery & Co**)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2digital*

HANDING DOWN HEARING

APPEARANCES

Ms Marie Demetriou QC and Mr Paul Harris QC (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Applicant/Proposed Class Representative.

The Respondents/Proposed Defendants did not attend and were not represented.

1 THE PRESIDENT: As notified on Tuesday, we were going to hand down our decision in this
2 matter today, but we received an application at 9.25 this morning from the applicant that we
3 should delay announcing our decision, and I understand, Ms Demetriou, you wish to pursue
4 that application?

5 MS DEMETRIOU: Sir, yes, it may be that the application is unnecessary. We were unclear
6 whether you were going to make the order today or simply hand down the judgment. It
7 seems to us that there is a distinction between the two things.

8 THE PRESIDENT: We do not normally make separate orders. We are going to dispose of the
9 application today, and consequential matters, such as costs, as we indicated, will be dealt
10 with later.

11 MS DEMETRIOU: I see. In that case this does need to be addressed now.

12 The difficulty for us, of course, is because the judgment is embargoed we have not been
13 able to take instructions from our clients as to whether or not they want to pursue a further
14 remedy. We see under the Act there is no appeal from a decision such as this. So any
15 remedy would have to take the form of a claim for judicial review. Obviously, that is
16 something we have not yet been able to discuss with our clients. We will once this
17 judgment has been handed down, or once the embargo has been lifted.

18 The practical difficulty is that, as you may recall, when the claim was issued we were only
19 just within the limitation period. I think that we were two days or three days before the
20 expiry of the limitation period. Our concern is that if you make a final order today
21 dismissing the claim----

22 THE PRESIDENT: We will not dismiss the claim.

23 MS DEMETRIOU: No, but dismissing the CPO.

24 THE PRESIDENT: Yes.

25 MS DEMETRIOU: Saying that the CPO should be discontinued. Then we were concerned that
26 that would mean that if our clients were to decide that they wanted to pursue a judicial
27 review and if that were to be successful, then its object would be defeated because there
28 would be no basis upon which the claim could be re-issued because it would be out of time.

29 THE PRESIDENT: It wouldn't have to be re-issued, because, if you were successful, the order of
30 the Tribunal would be quashed.

31 MS DEMETRIOU: Yes. It depends on what the precise order of the Tribunal would be.

32 THE PRESIDENT: We would dismiss the application. That was the application before us.

33 MS DEMETRIOU: But keep live the proceedings?

1 THE PRESIDENT: The proceedings have only been brought on that basis. As I say, whatever
2 order we make, as in any judicial review, if successful, the order of the lower court or body
3 being reviewed is quashed and set aside. Therefore, you are back to where you were.

4 MS DEMETRIOU: What we were concerned about was the effect of the quashing, and we did
5 not---

6 THE PRESIDENT: So what are you asking us to do, to delay making an order until after you
7 have succeeded on a judicial review application?

8 MS DEMETRIOU: In the first instance we wanted to ask you to delay making an order until we
9 have taken instructions from our clients as to whether or not they want to pursue----

10 THE PRESIDENT: Suppose they do, what do you want then?

11 MS DEMETRIOU: Then we would like, in the light of that, a further period of time to come back
12 to you and make submissions on the appropriate form of relief.

13 THE PRESIDENT: From what you are saying - you are saying that we cannot make an order
14 until after you have been through a judicial review to quash an order that has not been
15 made.

16 MS DEMETRIOU: Sir, what we are concerned to ensure is that if the result of the judicial review
17 is to quash the Tribunal's order, then we are concerned that the result of quashing the
18 Tribunal's order would be to leave intact the claim that has been issued so as to avoid----

19 THE PRESIDENT: Clearly, if a court strikes out a claim and then the Court of Appeal allows an
20 appeal and sets aside the strike out, the parties do not have to start all over again, because by
21 then limitation might have expired.

22 MS DEMETRIOU: Sir, that is completely right.

23 THE PRESIDENT: That must be right, otherwise we cannot make an order until after a judicial
24 review, which is the wrong way round, because then there is nothing judicially to review.

25 MS DEMETRIOU: Sir, I think that is completely right. If it were a strike out and there were a
26 right of appeal, that would be the case. I think the complication arises because it is a
27 judicial review. It is not clear, *a priori*, because the judicial review is a discretionary
28 review, what the court might do on a judicial review.

29 THE PRESIDENT: They might not grant it - that is the discretion.

30 MS DEMETRIOU: Of course, they might not grant it, in which case that is the end of it.

31 THE PRESIDENT: But if they do grant it, what you would be asking them to do is to quash the
32 decision of this Tribunal, in which case that is quashing the decision dismissing your
33 application and refusing a CPO. I just do not see the issue, and I do not see what you would
34 ask for if you came back tomorrow or in five days or in five weeks.

1 MS DEMETRIOU: I think we would ask, perhaps out of an abundance of caution, for the
2 Tribunal to order that the CPO be discontinued, but to make clear that the proceedings, the
3 claim, remains live, so it does not have to be----

4 THE PRESIDENT: If you look at the Act, what you have sought is permission under s.47B, you
5 have commenced collective proceedings, and you have asked for a CPO under s.47B(4) so
6 that they can be continued. If the order is refused they cannot be continued, so they are
7 effectively stayed. I do not see any limitation issue can possibly arise.

8 MS DEMETRIOU: Sir, if we are all clear that that is the correct construction, and that if my
9 clients were to decide to bring a claim for judicial review and were to succeed, then there
10 would be no limitation risk, then we are content to let matters stand.

11 THE PRESIDENT: It has to be. Suppose you succeed on judicial review, suppose then
12 Mastercard appeal and it goes to the Court of Appeal, suppose it goes to the Supreme Court.
13 That could all take years. In most circumstances, the limitation period, if you had to start all
14 over again, would have expired by the time all those appeals were exhausted.

15 MS DEMETRIOU: Sir, we do see that. In a sense, we are in virgin territory because it does seem
16 rather odd that you cannot have an appeal against a decision such as this, and you are
17 limited to judicial review.

18 THE PRESIDENT: That was a policy choice, for reasons----

19 MS DEMETRIOU: That was a policy choice, and we are in slightly virgin territory, but if
20 everyone accepts that that is the position then it may be that there is no problem at all, and
21 the Tribunal can----

22 THE PRESIDENT: I do not know if Mastercard accepts it, but it seems to me that will have to be
23 the position because----

24 MS DEMETRIOU: Sir, might we preserve the position, at least for a couple of days, so that we
25 can ask Mastercard, because what we would not want to happen is, on these provisions
26 which have not yet been interpreted, for Mastercard to turn up and say, "You have won your
27 judicial review, but I'm sorry, it is all done anyway".

28 THE PRESIDENT: I am very reluctant to do that when you have only asked for this an hour and
29 a half before judgment being handed down, when your clients have had a copy of the
30 judgment in draft and have known exactly what is going to happen for some time, and have
31 indeed corresponded with the Tribunal on the judgment before this morning. You wrote to
32 the Tribunal on 18th July. If there was any concern, it should have been raised then.

33 MS DEMETRIOU: Yes, and we apologise for the delay.

34 THE PRESIDENT: That would have enabled Mastercard to respond.

1 MS DEMETRIOU: Yes. Ideally, Sir, that is indeed what would have happened.

2 THE PRESIDENT: It is the obvious thing to do, is it not?

3 MS DEMETRIOU: Sir, the difficulty is that, of course, we have not been able to speak to our
4 clients at all, or the funders, so the position is----

5 THE PRESIDENT: That has not changed since 18th July?

6 MS DEMETRIOU: No.

7 THE PRESIDENT: I just do not think it is appropriate for a party, on grounds that seem to me
8 wholly misconceived, to seek in the morning to delay the handing down of a judgment.

9 MS DEMETRIOU: Sir, we apologise for the delay in bringing this to the Tribunal's attention.

10 THE PRESIDENT: I do not know when your client, or those instructing you, thought about this
11 point.

12 MS DEMETRIOU: I think the position is that as soon as the point was identified we wrote to the
13 Tribunal.

14 THE PRESIDENT: Why did you not ask Mastercard?

15 MS DEMETRIOU: Because this only happened this morning.

16 THE PRESIDENT: So you only thought about it this morning?

17 MS DEMETRIOU: I think yesterday evening, in fact, was----

18 THE PRESIDENT: Why was Mastercard not contacted - why were Freshfields not contacted
19 yesterday? I appreciate you have been hastily instructed to come here and may not have
20 answers to these matters.

21 The answer is, no, I am not going to delay handing down judgment.

22 (See separate ruling ([2017] CAT 18))

23 THE PRESIDENT: It concerns, as I have indicated, an application for a collective proceedings
24 order under s.47B of the Competition Act 1998. There are two conditions which have to be
25 satisfied in order to make a collective proceedings order: first, that the person who is
26 bringing the proceedings is a person who the Tribunal could authorise to act as the class
27 representative in the collective proceedings; secondly, that the claims are eligible for
28 inclusion in such proceedings. For the reasons that are fully set out in the written judgment,
29 the Tribunal has unanimously concluded that the claims are not suitable to be brought in
30 collective proceedings, and therefore the eligibility requirement is not satisfied. If we had
31 found the eligibility condition to be satisfied, then provided that the funding agreement
32 between the proposed class representative, the applicant Mr Merricks, and the third party
33 funder was amended as set out in the judgment, we would have authorised Mr Merricks to
34 act as the class representative. Accordingly, the application for a collective proceedings

1 order is dismissed. If the parties are unable to agree a form of order, they will be invited to
2 make submissions in that regard in writing.

3 I should add that the version now being handed down contains certain excisions in the
4 appendix to the judgment, which have been made at the request of the applicant's solicitors
5 on the ground that the content in question contains confidential material, the disclosure of
6 which would significantly harm its legitimate business interests, and so falls within
7 para.1(2) of Schedule 4 to the Enterprise Act 2002. The Tribunal has not yet reached a
8 view on these matters but has taken the approach that we should not delay the handing
9 down of the judgment. Therefore, it is possible that all or some of the text which is excised
10 in the current version of the appendix may in due course be reinstated. Should that occur,
11 the modified version of the judgment will be substituted on the Tribunal's website in place
12 of the copy that is now being handed down.

13 _____