



Neutral citation [2021] CAT 21

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1287/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 July 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
TIM FRAZER
SIMON HOLMES

Sitting as a Tribunal in England and Wales

BETWEEN:

- (1) ASDA STORES LIMITED
- (2) ARGOS LIMITED AND OTHERS
- (3) WM MORRISON SUPERMARKETS PLC

Claimants

- v -

- (1) MASTERCARD INCORPORATED
- (2) MASTERCARD INTERNATIONAL INCORPORATED
- (3) MASTERCARD EUROPE SA
- ~~(4) MASTERCARD UK MEMBERS FORUM LIMITED~~
- (5) MASTERCARD/EUROPAY UK LIMITED

Defendants

RULING – PERMISSION TO APPEAL

1. This ruling concerns the Defendants’ application for permission to appeal against one part of the Tribunal’s judgment of 28 June 2021: [2021] CAT 16 (“the Judgment”). We use the same abbreviations as in the Judgment.
2. Following the judgment of the Supreme Court in these and other proceedings concerning Mastercard and Visa MIFs, the present cases, which are being heard together, are before the Tribunal for trial on quantum. The Judgment addressed three matters on which AAM sought to strike out parts of Mastercard’s defence or on which Mastercard sought permission to amend its defence.
3. One of those three matters concerned the argument which Mastercard sought to advance to the effect that AAM suffered no loss on the basis that, if the Mastercard MIF had been significantly lower or reduced to zero, transactions would have been carried out instead using Visa or Amex, to which those low or zero MIFs did not apply, or would have been made using the PayPal payment system: see the Judgment at [13]-[14]. AAM did not object to this plea as regards Amex, which is not a four-party payment system like Mastercard. We permitted the amendment sought as regards PayPal to the extent that this did not depend on an asymmetric assumption regarding the Mastercard and Visa MIFs. But we struck out the plea advanced on the basis that in the counterfactual Visa would not have been subject to the same constraint as Mastercard, which was referred to as the “asymmetric counterfactual”. Mastercard now seeks permission to appeal against that decision.
4. The Tribunal’s decision was based on the holding of the CJEU in *Mastercard CJ* that a counterfactual must not rest on an unrealistic assumption (Judgment at [31]) and the reasoning and decision in the CA judgment in the present proceedings that the asymmetric counterfactual is completely unrealistic and improbable (Judgment at [32]). The argument advanced in Mastercard’s admirably succinct submissions seeking permission to appeal effectively repeats the submission made by Mr Cook QC at the substantive hearing.
5. A counterfactual, by definition, involves consideration of a hypothetical world, but still has to be realistic. For reasons set out in the Judgment, it is not realistic

to assume a world where Mastercard did not infringe competition law through the imposition of a MIF while its main competitor, using the same model (and which the competition authorities and regulators have sought to regulate in a broadly similar way: CA judgment at [202]) was permitted to infringe competition law by charging a significant positive MIF. We do not see that the rejection of such an asymmetric counterfactual makes Mastercard in any way liable for Visa's wrong or offends against the compensatory principle, as Mastercard seeks to suggest.

6. Accordingly, we do not see that this appeal has any real chance of success and permission to appeal is refused. This decision is unanimous.

The Hon Mr Justice Roth
President

Tim Frazer

Simon Holmes

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 23 July 2021