



Neutral citation [2021] CAT 22

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No: 1288/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 July 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
TIM FRAZER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

SAINSBURY'S SUPERMARKETS LTD

Claimant

- v -

**(1) VISA EUROPE SERVICES LLC
(2) VISA EUROPE LTD
(3) VISA UK LTD**

Defendants

RULING – PERMISSION TO APPEAL AND COSTS

1. This ruling concerns (a) permission to appeal against the decision set out in the Tribunal’s judgment of 28 June 2021: [2021] CAT 17 (“the Judgment”), and (b) costs. The ruling uses the same abbreviations as the Judgment.

A. PERMISSION TO APPEAL

2. The Judgment set out our reasons for acceding to Sainsbury’s application that Visa should not be permitted to contend at the quantum trial in these proceedings that damages should be assessed on the basis of what has been called the “asymmetric counterfactual” as regards Mastercard: see the relevant paragraph of Visa’s defence quoted in the Judgment at [12]. Visa seeks permission to appeal that decision.
3. In the Judgment, the Tribunal rejected Visa’s independent submissions (i) that the asymmetric counterfactual was not precluded by the terms of the CA judgment in this case; and (ii) that the CA judgment as regards the asymmetric counterfactual cannot stand in light of the CJEU decision in *Budapest Bank*. Since submissions by Visa on (ii) had previously been advanced and fully considered in the judgment of the Tribunal with the same composition in another group of credit card cases, *Dune Shoes Ireland Ltd v Visa Europe Ltd* [2020] CAT 26 (the “*Dune* judgment”), Visa sensibly did not repeat in the present case the arguments it had advanced in *Dune*; and, in following its decision in *Dune*, the Tribunal did not repeat in the Judgment its extensive analysis of *Budapest Bank* but incorporated its reasoning in the *Dune* judgment by reference. We note that there was no attempt to appeal the *Dune* judgment.
4. The Judgment further held (iii) that it would be an abuse of process for Visa to advance in the present proceedings its argument based on *Budapest Bank*, since Visa had not sought to advance that argument when making submissions based on *Budapest Bank* to the Supreme Court.
5. Visa’s present application challenges each of those three conclusions, respectively, by the three grounds of appeal which it seeks to put forward.

6. As regards Ground 1, the Court of Appeal analysed and applied the judgment in *Mastercard CJ*. The CJEU there held that the assumption on which a counterfactual is based, for whichever purpose it is used, must not be unrealistic: see the Judgment at [34]. The CA judgment rejected the asymmetric counterfactual as unrealistic and improbable: see the Judgment at [35]. We do not see that there is a meaningful distinction between a counterfactual involving a zero MIF (equivalent to no MIF) and a counterfactual in which Visa was constrained to set a low level of MIF which met the criterion for exemption under Art 101(3): in either case it is unrealistic to assume that Mastercard would not be subject to the same constraint.
7. As regards Ground 2, Visa's application simply refers back to its arguments which the Tribunal rejected without hesitation in the *Dune* judgment.
8. Accordingly, we consider that neither Ground 1 nor Ground 2 have any real prospect of success. We acknowledge that the position regarding Ground 3 is less clear-cut, although we note that Visa does not suggest that it made any attempt to advance before the Supreme Court the argument which it now wishes to advance before the Tribunal. However, if Ground 2 cannot succeed, then Ground 3 does not assist Visa as it will not then lead to the decision being reversed.
9. If the appeal stands no real chance of success, we do not accept that there is nonetheless a compelling reason for an appeal within CPR rule 52.6(b). It is of course correct that there are many other credit card claims, but the points have been decided by the Tribunal and if the arguments are bad ones it does not assist the other claims for those arguments to be taken further on appeal. As regards Ground 3, we do not accept that the case before the Supreme Court comprised "separate proceedings": it was, indeed, an appeal in this very case (along with two others), albeit that this case has now moved to the quantum stage. The circumstances of this case were that a potentially relevant judgment of the CJEU came out after the case before the Supreme Court had been argued but before judgment was given, with the result that the appellant was then given permission to provide further written submissions to the Supreme Court on that CJEU

judgment. That is extremely unusual. We therefore do not see that this aspect of the Judgment has any wider significance that could, in itself, justify an appeal.

10. Accordingly, permission to appeal is refused. This decision is unanimous.

B. COSTS

11. Sainsbury's asks for its costs on the basis that its application succeeded. Visa submits that it "adopted a reasonable and proportionate approach" by suggesting that the application be determined on the papers and keeping the written submissions relatively brief, and that the appropriate order is therefore costs in the case. Although Sainsbury's submits that Visa should not have advanced the argument at all, in light of the Tribunal's previous rulings in some of the other credit card cases, we accept that Visa's approach was proportionate: that presumably had the effect that the costs of both sides were lower than they otherwise would have been. However, that is distinct from the question of who should be liable for those costs. There is no doubt that on this application Sainsbury's was the successful party and we see no reason to deny it recovery of its costs. Those costs will be subject to detailed assessment if not agreed. This decision is unanimous.

The Honourable Mr Justice Roth
President

Tim Frazer

Paul Lomas

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

Date: 23 July 2021