



IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1306-1325/5/7/19 (T)
1349-1350/5/7/20 (T)
1369/5/7/20 (T)
1373-1374/5/7/20 (T)
1376/5/7/20 (T)
1383-1384/5/7/21 (T)
1385-1400/5/7/21 (T)
1406/5/7/21 (T)

BETWEEN

DUNE GROUP LIMITED & ORS v MASTERCARD INCORPORATED & ORS
DUNE SHOES IRELAND LIMITED & ORS v VISA EUROPE LIMITED & ORS
WESTOVER GROUP LIMITED & ORS v MASTERCARD INCORPORATED & ORS
WESTOVER GROUP LIMITED & ORS v VISA EUROPE LIMITED & ORS
RICHER SOUNDS PLC v MASTERCARD INCORPORATED & ORS
FURNITURE VILLAGE LIMITED v MASTERCARD INCORPORATED & ORS
CAPRICE HOLDINGS LIMITED & ORS v MASTERCARD INCORPORATED & ORS
PENDRAGON PLC & ORS v MASTERCARD INCORPORATED & ORS
ALAN HOWARD (STOCKPORT) LIMITED & ORS v MASTERCARD INCORPORATED
& ORS
ALAN HOWARD (STOCKPORT) LIMITED & ORS v VISA EUROPE LIMITED & ORS
SOHO HOUSE UK LIMITED & ORS v VISA EUROPE LIMITED & ORS
JL AND COMPANY LIMITED & ORS v MASTERCARD INCORPORATED & ORS

ORDER

UPON hearing Leading Counsel for the parties at a case management conference (“CMC”) on 1 and 2 March 2022

AND UPON READING the written submissions filed by the parties for the CMC

AND UPON the Tribunal considering the parties’ proposed amendments to a draft Order circulated at the CMC on 2 March 2022

HAVING REGARD TO paragraph 2 of the Order of the Tribunal dated 2 February 2021 (the “February Order”) imposing a stay on all issues, save the issues concerning whether MIFs infringe Article 101 TFEU, in relation to Cases 1306-1325/5/7/19 (T), 1349/5/7/20 (T) and 1350/5/7/20

(T); and the Order of Hon. Mr Justice Roth dated 23 March 2021, which extended the application of the Tribunal’s directions in the February Order, including the stay, to Cases 1383-1384/5/7/21 (T) (the “Issues Stay”)

AND HAVING REGARD TO paragraph 1 of the Order of Hon. Mr Justice Roth dated 6 July 2021 imposing a stay in Case 1369/5/7/20 (T) (the “Richer Sounds Stay”)

AND HAVING REGARD TO the Tribunal’s judgment in *Dune Group Limited & Others v Mastercard Incorporated & Others* [2021] CAT 35

AND HAVING REGARD TO the Order of the President dated 21 December 2021 as to the conduct of these proceedings

IT IS ORDERED THAT:

1. The Issues Stay, the Richer Sounds Stay and (for the avoidance of any doubt) any other stay of any issue made in the course of the proceedings, are lifted.
2. The proceedings before the Tribunal shall be tried by reference to a series of issues (the “Issues”) that are to be articulated in accordance with the process set out below and in the form of the example table set out at Annex 1 to this Order (the “Table”):
 - a. The Issues comprise all issues in the proceedings including without limitation: (i) any and all issues that have been stayed; and (ii) issues that have been determined by way of summary judgment, but which are on appeal to the Court of Appeal.
 - b. By no later than 4:00pm on 1 April 2022 each party will populate its own version of column 2 of the Table with its formulation of the Issues. In particular:
 - i. The Issues must be set out with sufficient specificity so that the Tribunal (and the parties) can identify each and every issue that the Tribunal will have to decide in order to determine these proceedings.
 - ii. The Issues will, in due course, inform the evidence that each party will be permitted to lead at trial, and should be framed with that purpose in mind.
 - iii. The Issues must be framed without reference to the party bearing the burden of proof. (For the avoidance of any doubt, the Tribunal will of course pay due regard to the burden of proof when determining the substance of the Issues. However, unless a party to the proceedings intends

to rely solely on the burden of proof, adduce no evidence, and simply put the opposing party or parties to proof, then that party will be obliged to identify the evidence it proposes to lead.)

- c. By no later than 4:00pm on 22 April 2022, the parties will produce a synthesised list of Issues in a single version of the Table:
 - i. The parties shall make every effort to agree the list of issues, bearing in mind that the purpose of the list of Issues is not to narrow points in dispute but to articulate what each party contends will have to be resolved in order to determine these proceedings.
 - ii. The fact that one party does not consider that an issue arises for determination is not, in and of itself, a reason for failing to include that issue in the list of Issues.
 - iii. The synthesised list of issues shall identify the areas of agreement and disagreement in relation to the list of Issues, so that the Tribunal can determine any areas of disagreement.
- d. By no later than 4:00pm on 29 April 2022, the parties will provide to the Tribunal and exchange with each other:
 - i. written submissions on the areas of disagreement in relation to the list of Issues in column 2 of the Table.
 - ii. each party will provide detailed submissions as to how, in general terms, the issue of pass-on is to be determined by the Tribunal. Such submissions should cover or deal with: (i) the facts that are relevant and available in order to determine the issue of pass-on and that will inform the evidence that will in due course be adduced by the parties, (ii) the type of evidence necessary to show and quantify pass-on in this context, indicating whether this is quantitative (for example, data on revenues, prices or margins and/or financial reports) and/or qualitative (for example, this could include information on merchant's pricing or business strategy), (iii) a high-level description of the economic methods which may be appropriately employed using such quantitative and/or qualitative evidence to estimate the amount of pass-on, and an indication of any methods/approaches

which are plainly inappropriate in this case, (iv) any and all points of law. The submissions should contain a worked example explaining how the proposition pleaded in paragraphs 82 and 83 of the Reply in Case 1376/5/7/20 (T) Pendragon Plc and Others v. Mastercard Incorporated and Others (filed under Claim No CP-2020-000012) would be made good and/or refuted (as the case may be). Whilst the submissions may set out a party's reliance on the burden proof in determining the issue of pass-on, which the Tribunal will, of course, consider when determining the substantive issue, unless that intends to rely solely on the burden of proof, adduce no evidence, and simply put the opposing party or parties to proof, then that party will be obliged to identify the evidence it proposes to lead or be debarred from doing so.

- e. There shall be a one-day hearing on the first convenient date after 29 April 2022, where the Tribunal will determine (i) those areas of disagreement in relation to the list of Issues, and (ii) the precise method whereby the pass-on issue is to be determined will so far as possible and so far as the Tribunal is advised be resolved. This will include (if the Tribunal is so advised) any and all points of law that are in dispute.
- f. By no later than 4:00pm on 10 June 2022, each party will populate its own version of column 3 of the Table, setting out the manner in which it is proposed each Issue in column 2 shall be determined by the Tribunal. The Tribunal does not expect, require or want a detailed statement of methodology. Rather, without being prescriptive, the Tribunal would prefer each party to identify the method of determination under one or more of the following heads: (i) legal argument (where there is a point of law only); (ii) expert evidence (identifying the discipline of the expert); (iii) factual witness evidence (stating how it is envisaged the relevant witnesses are proposed to be identified); and/or (iv) documentary evidence (stating how it is proposed that the relevant documents are going to be identified).
- g. There shall be a case management conference before the end of the summer term, to resolve any issues in dispute, if any.
- h. Save in relation to those issues that are on appeal to the Court of Appeal, by no later than 4:00pm on 7 October 2022, each party will populate its own version of column 4 of the Table setting out with precision the manner in which party will

seek to persuade the Tribunal that that Issue should be resolved by the Tribunal.

As to this:

- i. Where the method of determination is legal argument only no further particulars need be provided.
 - ii. Where the method of determination includes the adduction of documentary evidence, each party must state precisely what disclosure it will be seeking from the other party or parties and what disclosure it will itself be making. The level of precision must be such that the Tribunal can, if so advised, make an order providing for such disclosure.
 - iii. Where the method of determination includes the adduction of factual witness evidence, each party must identify the witness or witnesses it would be minded to call.
 - iv. Where the method of determination includes the adduction of expert evidence, each party must identify: (i) the expert in question; (ii) a statement from that expert as to how that expert proposes to resolve the Issue in question.
3. There shall, after 17 October 2022, be a two-day hearing at which the Tribunal will approve or disapprove the parties' proposals under Rule 4(5)(b), (d) and (e) of the Tribunal Rules and make any further directions for the trial of these proceedings.
4. Any Claimant is at liberty to apply to the Tribunal to have their claim stayed (a "Stayed Claimant") on the condition that (i) all Stayed Claimants agree to be bound by the outcome of these proceedings (including any appeals); and (ii) any party that is not a Stayed Claimant may apply for disclosure and information from any of the Stayed Claimants, and stay shall not apply for such purpose.

Sir Marcus Smith
President

Ben Tidswell

Andrew Young QC

Made: 16 March 2022
Drawn: 16 March 2022

ANNEX 1

1 No.	2 List of Issues	3 Method of determination	4 Precise articulation of the manner in which the Issue is to be determined