Neutral citation [2024] CAT [50]

Case No: 1441-1444/7/7/22

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

30 July 2024

Before:

BEN TIDSWELL
(Chair)
TIM FRAZER
DR WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

MASTERCARD INCORPORATED
MASTERCARD INTERNATIONAL INCORPORATED
MASTERCARD EUROPE SA
MASTERCARD/EUROPAY UK LIMITED
MASTERCARD UK MANAGEMENT SERVICES LIMITED
MASTERCARD EUROPE SERVICES LIMITED

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

MASTERCARD INCORPORATED
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MASTERCARD EUROPE SA
MASTERCARD/EUROPAY UK LIMITED
MASTERCARD UK MANAGEMENT SERVICES LIMITED
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COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

VISA INC.
VISA INTERNATIONAL SERVICE ASSOCIATION
VISA EUROPE SERVICES LLC
VISA EUROPE LIMITED
VISA UK LTD

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

VISA INC.
VISA INTERNATIONAL SERVICE ASSOCIATION
VISA EUROPE SERVICES LLC
VISA EUROPE LIMITED
VISA UK LTD

Respondents / Proposed Defendants

RULING (PERMISSION TO APPEAL)

A. INTRODUCTION

1. The Mastercard Proposed Defendants ("Mastercard") seek permission to appeal the Tribunal's Judgment of 2 June 2024 ([2024] CAT 39), by which the Tribunal granted the applications of the Proposed Class Representatives for collective proceedings orders. The Visa Proposed Defendants adopt Mastercard's application and seek permission to appeal on the same grounds.

2. The proposed grounds of appeal concern the Tribunal's approach to the identifiability of the class, which arises as questions under Rule 79(1)(a) and 79(2)(e) of the Competition Appeal Tribunal Rules 2015.

B. THE GROUNDS OF APPEAL

3. There are two grounds of appeal, each with two sub grounds:

(1) Ground 1: The Tribunal erred in its approach to identifiability

(a) In circumstances where the Tribunal held that there was no clear evidence showing the information which acquirers did in practice provide or make available to merchants in respect of the relevant period, the question of identifiability could not be determined by reference to a construction of the Interchange Fee Regulation ("IFR")[1] reached almost eight years after the event. This is particularly so where the Tribunal acknowledged that the construction of the IFR is not clear and the Tribunal departed from the express wording of the IFR (as per Ground 2 below), since this does not provide a reasonable basis for knowing what acquirers will in practice have provided to merchants, or what they will make available or be able to make available to merchants.

(b) Even if acquirers would make available the required information, the Proposed Class Representative's revised proposal would still involve

[1] The Interchange Fee Regulation 2015, as described in [25(1)] of the Judgment.

hundreds of thousands of merchants obtaining information from their acquirers in order to allow them to determine whether they accepted commercial cards or not. However, such a process is not realistic or workable for the reasons given in the Tribunal's 2023 Judgment, which was not appealed and is, therefore, binding.

(2) Ground 2: The Tribunal erred in its construction of the IFR

(a) First, whether acquirers are required to retain and make available historic data covering he period back to June 2016. There is no reference in the IFR to acquirers being required to retain or make available historic data and the terms and recitals of the IFR show that its purpose is to require acquirers to provide or make available information that is current or relatively recent. While the Tribunal relied on the Payment Systems Regulator's ("PSR") Barclays decision,[2] and its Guidance, neither document makes any reference to acquirers being obliged to provide or make available a merchant's transaction history going back many years, still less to 2016.

(b) Second, whether Article 12(1) requires acquirers to provide or make available information to merchants and, in particular, whether they are required under the first paragraph of Article 12(1) (as distinct from the alternative aggregation provision in the second paragraph) to specify the payment instrument category and the brand of the payment card used. Since Article 12(1)(a)-(c) identifies three specific pieces of information which need to be provided to merchants, without making any reference to the payment instrument category or brand, there is no good reason to depart from the natural meaning of the words used in the legislation, and none of the PSR materials cited support a wider construction.

4. Before turning to each of the grounds, we make the following observations about the approach of the Proposed Defendants to the question of identifiability.

[2] Payment Systems Regulator, Decision Note, December 2022.

5. The Proposed Defendants' application fails, in our view, properly to recognise the points made in [62] of the Tribunal's Judgment of 8 June 2023 ([2023] CAT 38 (the "2023 Judgment"), refusing the CPO applications as first formulated, and repeated in [67] of the Judgment itself. These are that:

(c) Rules 79(1)(a) and Rule 79(2)(e) perform distinct functions, with the former being about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class, and the latter being one of a number of factors about suitability, with particular reference to the methodology for resolving issues like registration of class members and the distribution of any award of damages.

(a) In light of the observations made by the Court of Appeal in Le Patourel v BT Group PLC ([2022] EWCA Civ 593*)* at [29] about the objective of the collective action regime being to facilitate access to justice, the Tribunal in the 2023 Judgment found that: "It should not easily be assumed that the existence of a hurdle, in the form of Rule 79(1) generally, requires an overly prescriptive approach. There may well be some ambiguity or uncertainty permitted in a class definition and reasonable assumptions based on common sense might be required. In doing so, the Tribunal is required to "have regard to all the circumstances"."

6. Neither of these points have been the subject of any appeal in relation to the 2023 Judgment, and, in the view of the currently constituted Tribunal, the Proposed Defendants are bound by those findings of law.

(3) GROUND 1(A)

7. Ground 1(a) fails to recognise that it is a reasonable assumption that, pursuant to the IFR, acquirers make information available so that it is possible for a merchant to identify whether they have accepted a commercial card. This is a finding of fact, not one of law. In any event, the Proposed Defendants are seeking to impose a requirement of a level of precision which is inconsistent

with the guidance of the Court of Appeal in Le Patourel and the findings of law in the 2023 Judgment.

8. On that basis, we consider there to be no point of law which is capable of being appealed and no real prospect of such an appeal succeeding on Ground 1(a).

(4) GROUND 1(B)

9. Ground 1(b) fails to recognise the distinction between Rule 79(1)(a) and Rule 79(2)(e). The former is satisfied by reasonable assumption that the data will generally be available. The latter is satisfied by a combination of the IFR (including the active communication requirement set out by the PSR in the Barclays Decision), Merchant IDs or Card Acceptor IDs and the statements that show material can and has been provided, all of which satisfied the Tribunal that it was credible to think that there would be an effective methodology for distribution which could be developed in due course, while recognising that there may be material complications which would need to be dealt with in that methodology.

10. These are findings of fact and/or an exercise of discretion (balancing the factors under Rule 79(2)) and therefore not capable of, or appropriate for, appeal.

11. On that basis, we consider there to be no point of law which is capable of being appealed and no real prospect of such an appeal succeeding on Ground 1(b).

(5) GROUND 2(A)

12. The Tribunal did not in fact make a specific finding that the IFR required banks to keep historical information, although it seems an entirely reasonable inference that banks (which are heavily regulated) do keep historical data and, if they do, clear from the IFR that they are obliged to make that available if it is not already provided. In the absence of express evidence on the point, the Tribunal was entitled to make a reasonable assumption about the availability of information to merchants.

13. The assumptions made by the Tribunal are findings of fact, not law.

14. On that basis, we consider there to be no point of law which is capable of being appealed and no real prospect of such an appeal succeeding on Ground 2(a).

(6) GROUND 2(B)

15. It seems entirely unrealistic to think that the IFR would require greater detail in aggregated data than it requires for unaggregated data. That is borne out by the statements, which are at least a reasonable indication of how the IFR is being applied and in which there is clear evidence of the level of detail showing which card scheme and what type of card was involved in a transaction. We consider the point (to the extent it is a matter of construction) to be obviously without merit, and all the more so in the context of an assessment of the application of Rule 79(1)(a) and Rule 79(2)(e).

16. On that basis, we consider there to be no real prospect of such an appeal succeeding on Ground 2(b).

C. DISPOSITION

17. For the reasons given above, we consider there to be no real prospect of any appeal succeeding on the very limited points of law which the grounds contain, and we therefore refuse the application in its entirety.

18. This decision is unanimous.

Ben Tidswell
Chair

Tim Frazer

William Bishop

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

Date: 30th July 2024