Neutral citation [2022] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1405/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 March 2022

Before:

THE HONOURABLE MR JUSTICE BUTCHER
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EURONET 360 FINANCE LIMITED
(2) EURONET POLSKA SPÓŁKA Z O.O.
(3) EURONET SERVICES SPOL. S.R.O.
(4) EURONET CARD SERVICES S.A.

Claimants

- v -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.A.
(4) VISA EUROPE LIMITED
(5) VISA EUROPE SERVICES LLC
(6) VISA INC

Defendants

Heard at Salisbury Square House on 18 March 2022

RULING (SPLIT TRIAL)

APPEARANCES

Mr Jon Turner QC and Mr David Bailey (instructed by Constantine Cannon LLP) appeared on behalf of the Claimants.

Mr Matthew Cook QC and Mr Hugo Leith (instructed by Jones Day) appeared on behalf of the Mastercard Defendants.

Mr Daniel Jowell QC and Ms Khatija Hafesji (instructed by Linklaters LLP) appeared on behalf of the Visa Defendants.

1. This is the second CMC in this matter. The main issue which has been debated so far is the Claimants' application for a split trial. Their proposal is that issues 16 to 30 and 32 to 34, which they characterise as liability issues, should be tried separately and before the remaining issues, which they say are issues relating to quantum.

2. It is not necessary to set out in any detail the nature of the proceedings or the main complaints made. They are apparent from the summary of the claim in the case memorandum. It is necessary, however, to say something about the procedural background because it is of some relevance to the present application. These proceedings were commenced in the Commercial Court. The amended claim forms and particulars of claim were served in December 2019 to January 2020. After part 18 requests, defences and replies were served.

3. A case management conference was held in the Commercial Court before Mrs Justice Cockerill on 19 October 2020. At that CMC, directions were made. First of all, in relation to disclosure, it was ordered that the parties were to seek to agree a list or lists of categories of documents, to assist document reviewers and guide their implementation of standard disclosure, the temporal scope of extended disclosure, the geographic scope of disclosure, and the scope of disclosure to be given in respect of data relating to ATM transactions. Standard disclosure was ordered to be given by 30 April 2021, with inspection by 7 May 2021. Orders were made for the service of witness statements, with the Claimants' witness evidence due on 1 October 2021 and the Defendants' due on 25 February 2022. Permission was given for expert evidence in economics of the ATM industry, forensic accountancy and foreign law. The parties were to seek to agree lists of issues for the experts, and a direction was made for the trial to commence on or after 23 January 2023, with a time estimate of 12 weeks.

4. On 14 June 2021, the proceedings were transferred to this Tribunal. The timetable in the directions was subsequently amended. Disclosure was ultimately exchanged, in the main, on 30 September 2021. Extensions of time for the service of witness statements have been ordered and the parties have recently agreed a further amendment. Witness statements are now due to be served by the Claimants on 14 April 2022, with the Defendants' evidence due

on 11 August 2022, and reply statements from the Claimants to follow on 10 October 2022. The extensions have been agreed in the context of an intended trial in the Michaelmas term of 2023, with a time estimate of 12 weeks as things stand.

5. Before turning in detail to the application made by the Claimants, I do consider that the following general points arise, given that procedural history. First, I think it is fair to say that the proposal for a split trial is made late, namely more than two years after the commencement of the proceedings and nearly 18 months after the first CMC in October 2020, at which directions were given leading up to a single trial in 2023, which subsequently crystallised as October 2023. The first proposal of a split trial was on 8 December 2021. Secondly, as a result of the first point, most - although I am prepared to accept, not all - disclosure has already taken place in relation to all issues, and other preparations have been proceeding on the basis that there will be a full and unitary trial. Thirdly, it seems to me that the lead time ordered up to the trial date is such that there should be ample time for the parties to prepare for a trial on all issues.

6. I turn then to the legal principles involved. They are unsurprising and mandate a pragmatic approach, which seeks to achieve a way of dealing with the case which is just and proportionate.

7. The CAT Rules 2015 provide in Rule 4 as follows:

> (1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.
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> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) saving expense;
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> (c) dealing with the case in ways which are proportionate—
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> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
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> (iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal.

8. A non-exhaustive list of factors which are likely to be relevant to an application for a split trial was given by Mr Justice Hildyard in *Electrical Waste Recycling* [2012] EWHC 38 (Ch), and by Mr Justice Bryan in *Daimler AG v Walleniusrederierna Aktiebolag* [2020] EWHC 525 (Comm). This case law is applied by this Tribunal in considering applications for a split trial. (See *Churchill Gowns Limited v Ede & Ravenscroft Limited* [2020] CAT 22).

9. The list which was given by Mr Justice Bryan in the *Daimler* case, paragraph 27, citing the decision in *Electrical Waste Recycling*, was as follows:

> "Where the issue of case management that arises is whether to split trials, the approach called for is an essentially pragmatic one and there are various (some competing) variations (sic). These considerations seem to me to include:
>
> [Factor 1] whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary;
>
> [Factor 2] what are likely to be the advantages and disadvantages in terms of trial preparation and management;
>
> [Factor 3] whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;
>
> [Factor 4] whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues or place an undue burden on the judge hearing the case;
>
> [Factor 5] whether a split trial may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);
>
> [Factor 6] whether there are difficulties in defining an appropriate split or whether a clean split is possible;
>
> [Factor 7] what weight is to be given to the risk of duplication, delay, and the disadvantage of bifurcated appellate process;
>
> [Factor 8] generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.

> Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and pragmatic approach, may include:
>
> [Factor 9] whether a split trial would assist or discourage mediation and/or settlement and [Factor 10] whether an order for a split late in the day after the expenditure of time and cost might actually increase cost."

10. In addressing these issues, an important starting point is factor 6 because if there are difficulties in defining an appropriate split or a clean split is not possible, that is likely to count significantly against there being a split trial. To that factor, unsurprisingly, the parties devoted a considerable amount of their submissions today.

11. In my judgment, there are indeed real difficulties in defining an appropriate or convenient split and there are reasons to suppose that a clean split at the point which is now proposed by the Claimants is not possible. In relation to that, there has been a considerable amount of debate in the skeleton arguments and before me as to issue 31. I should read the terms of issues 30 and 31. They are as follows:

> 30. What is the appropriate counterfactual against which the alleged anti-competitive effects of the Contested Restraints are to be determined? In particular, is it to be assumed that neither Mastercard nor Visa adopted any of the Contested Restraints or should the effects of some or all of the Contested Restraints be tested separately (e.g. measuring the effect of the Visa ATM Restraints or some of them against a counterfactual in which Mastercard remained free to set its own rules)?
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> 31. In the appropriate counterfactual, how would the behaviour of the relevant market participants have differed? In particular:
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> (a) To what extent, if at all, would the Claimants have imposed different charges on ATM cash withdrawal services in the counterfactual and, if so, what would thosecharges have been?
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> (b) To what extent, if at all, would the Claimants have made different bilateral agreements with issuers in the counterfactual and, if so, on what terms?
>
> (c) To what extent, if at all, would the Claimants have installed additional ATMs in the counterfactual?
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> (d) To what extent, if at all, would the Claimants have retained ATMs in the counterfactual that they de-installed in the Relevant Period?
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> (e) To what extent, if at all, would the Claimants have offered additional functionality on their ATMs in the counterfactual?

> (f) How would the Claimants' competitors have reacted to any changes (including those of the kind referred to in (a) to (e) above) in the counterfactual?
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> (g) How would Visa and Mastercard have reacted to any changes (including those of the kind referred to in (a) to (f) above) in the counterfactual?
>
> (h) How would issuers have reacted to any changes (including those of the kind referred to in (a) to (g) above) in the counterfactual?
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> (i) How would cardholders have reacted to any changes (including those of the kindreferred to in (a) to (g) above) in the counterfactual?
>
> (j) How would governmental, legislative and/or regulatory bodies have reacted to any changes (including those of the kind referred to in (a) to (h) above) in the counterfactual?

12. The Claimants' position, when the split trial was first proposed in December 2021, was that issue 31 should be dealt with as part of the liability trial. That position was repeated on 17 February 2022. Only with the present application was it said that it should be part of the quantum trial; and it is now said that it should not appear under the heading that it does appear under in the list of issues, namely, "Alleged effects on competition", which itself appears under the more general heading "Alleged infringement of competition law". I find it difficult to accept that issue 31 was misplaced. Furthermore and in any event, it appears to me that the uncertainty and shift of position by the Claimants on this point tends to illustrate that there is not the clear and clean split at the point which it is now said that there is.

13. Mr Turner QC's argument for the Claimants was that, in relation to Article 101(1), at the liability stage it will be necessary only to look at the question of whether there was an adverse effect on competition, as such. It would not be necessary to look at the Claimants' particular position, costs or profits. He said that that assessment can be dealt with by reference to other material than detailed information relating to the Claimants.

14. Now, as to that, it appears to me that his argument may involve disputed questions of law, given that this is an effect not an object case and given that the Claimants' claim depends at least in part on saying that they could have charged more to consumers. There may be a need for more of an analysis at the liability

stage than Mr Turner contended for or admitted as to whether the adverse effect of the rules on certain parameters of competition is overbalanced by the detriments which consumers would have suffered of being charged more, even within the context of Article 101(1). Equally, in assessing the applicability of 101(3), there may need to be a greater degree of specificity in relation to the effect of the restraints by comparison with the alleged justificatory matters than Mr Turner was prepared to concede, and that it would not be enough to say simply that in the absence of the rules there would have been some more, or even appreciably more, ATMs. I express no views on those points other than to say that it appears to me that there may be arguable points there.

15. Further, I do not accept that there is a clear division in the factual investigation. For one thing the position of the Claimants themselves appears relevant in looking at the market as a whole. That is particularly obvious in the case of Poland. Euronet had some 30 per cent of the ATM market, or at least that is the Claimants' position; and it may be that Euronet was the largest individual participant in that market. Poland amounts, as I understand it, to some 96 per cent of the Claimants' claimed quantum. Indeed, as Mr Jowell QC points out, the Claimants, in their pleadings, appear to use their own position as an example of or a basis for drawing conclusions as to the wider market position and the wider market effect of the rules. Further, as he also pointed out - and not just in relation to Poland - the Defendants will be carefully looking at the data from the Claimants as evidence in relation to competition in the market as a whole because other data may not be readily available. Though the Claimants may be able to point to some of the Defendants' documentation, which does not relate to the Claimants' own position or costs or profits, to support their case it seems to me that, as the Defendants say, it is likely that they will wish to contest any such case by reference to the Claimants' documents and the Claimants' position.

16. More generally it seems to me that there are at least some advantages in the investigation of the effects of the restraints on the market as a whole being carried out at the same time as the detailed investigation of the position of one of the participants, namely here, the Claimants. The investigation in each case is of the same market and the evidence will be of the same nature.

17. Turning then to the other factors identified in *Daimler*:

(1) Factor 1: partly because of the difficulties of splitting off quantum issues, I am not persuaded that there would be a very significant saving of costs if quantum were now split off and then did not arise, while it seems inevitable that there would be significant additional costs if liability was investigated and there were then the need for an additional trial dealing with quantum. This is especially the case as the application is made late, as I have described, and many costs relevant to quantum will already have been incurred. These include most of the costs of disclosure, and they must also include many of the costs of witness statements which, as I said, in the Claimants' case are due to be served shortly. Further, as I was told on behalf of the Defendants, their experts have already begun to consider the points which arise in relation to the Claimants' specific position.

(2) Factor 2: I consider that preparation for a unitary trial is entirely manageable, and it is what the parties have been aiming for. I also do not see that it will very significantly elongate the trial on liability alone. Mr Turner estimates liability alone at some nine weeks. Quantum is estimated as adding some three weeks. Although there may be some debate about whether that estimate is correct, there is not, as it appears to me, a very significant difference in trial length. As I say, I regard the preparation for such a trial, given the lead time available, as entirely manageable.

(3) Factor 3: I consider that a split trial may well lead to the inconvenience of witnesses having to give evidence twice. This would, in my judgment, be a significant inconvenience and, as it seems to me, an unnecessary one as the case is currently proceeding towards a unitary trial of which everyone has had good notice.

(4) Factor 4: I do not consider that a single trial would lead to there being such a number of issues or such a complexity in the case as to mean that the Tribunal will not be able to manage it. The Tribunal will of course

require the parties to present their cases as efficiently and economically as is consistent with a fair hearing.

(5) Factor 6 I have already dealt with.

(6) Factor 7: for reasons which I have already given, I consider that there is a significant risk of duplication of effort on the part of the Tribunal, the parties, witnesses and experts, if there is a split trial. Furthermore, the split trial proposal has the potential of very significantly delaying a final resolution of this matter, even though the present timetable could comfortably accommodate a final resolution. Thus, to fix a second trial, if necessary, might mean that a final resolution was not reached for perhaps 18 months later than it would have been with a unitary trial.

(7) Factor 9: I consider that a split trial would actually make settlement less likely, even if not, as Mr Cook QC put it, "dramatically less likely". I accept what Cotter 1 says, that settlement discussions are unlikely to be productive until the detailed work is done to analyse the basis of the quantum of the claim.

(8) Factor 10 is of significance in this case because, as I have said, the application is made late in the day. A considerable part of the costs associated with quantum will have been incurred. There is a very clear risk that any remaining savings from a liability only trial would be more than offset by the increased costs which would result if both trials were necessary.

(9) I do not consider that factor 5 is a significant independent consideration. Clearly, however, there will be prejudice if and to the extent that a split trial results in increased costs and a delayed resolution.

(10) Factor 8 is an overall assessment of the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible. In my view, that is achieved by proceeding to the unitary trial to which all parties have hitherto been working.

18. For those reasons I reject the application for a split trial.

The Hon. Mr Justice Butcher
Chairman

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

Date: 18 March 2022