Neutral citation [2024] CAT 12

Case No: 1517/11/7/22 (UM)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 February 2024

Before:

SIR MARCUS SMITH
(President)

Sitting as a Tribunal in England and Wales, Scotland and Northern Ireland

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

Claimants

- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS

Defendants

Heard remotely on 24 January 2024

RULING (UMBRELLA PROCEEDINGS COST SHARING ORDERS)

APPEARANCES

Jamie Carpenter, KC and Oscar Schonfeld (instructed by Stephenson Harwood LLP and Scott & Scott UK LLP) appeared on behalf of the Stephenson Harwood and Scott & Scott Claimants

Christopher Brown (instructed by Freeths LLP) appeared on behalf of the Inchcape Retail Limited and Others Claimants

Tristan Jones (instructed by Hausfeld & Co. LLP and Mishcon de Reya LLP) appeared on behalf of the Primark and Ocado Claimants

Ben Lask, KC (instructed by Pinsent Masons LLP) appeared on behalf of the Allianz Claimants

Daniel Jowell, KC (instructed by Linklaters LLP) appeared on behalf of the Visa Defendants

Owain Draper (instructed by Jones Day) appeared on behalf of the Mastercard Defendants

A. INTRODUCTION

1. On 3 November 2023, the Claimants represented by Stephenson Harwood LLP and Scott + Scott UK LLP in the Merchant Interchange Fee Umbrella Proceedings (**Interchange Fee Proceedings**) made an application for an order setting out directions for sharing of costs liability seeking, *inter alia*, that any liability of the Claimants for the Defendants' costs be several and not joint. The application was considered at a remote hearing held in these proceedings on 24 January 2024.

2. The Interchange Fee Proceedings, in respect of which this Ruling is given, comprise a large number of proceedings before the Competition Appeal Tribunal (the **Tribunal**), in which a substantial number of claimants have brought claims against Mastercard and/or Visa entities in relation to the operation of their respective card payment schemes. The Interchange Fee Proceedings have a long history, beginning (for the purposes of this Ruling) with the Tribunal's Ruling in *Dune Group Limited v. Mastercard Incorporated*, [2022] CAT 14 (the **2022 Ruling**).

3. The 2022 Ruling began a process whereby the various claims comprising the Interchange Fee Proceedings were managed not by reference to "lead" cases, but by reference to "issues" common to all cases in the Interchange Fee Proceedings.

4. The Interchange Fee Proceedings are not the only proceedings that are being managed in this way. What I will refer to as the **Trucks Proceedings** are being managed similarly. I refer, in this regard, to the Tribunal's Ruling in the Trucks Proceedings under *The Trucks Second Wave Proceedings*, [2024] CAT 2 (the **Trucks Ruling**).

5. The Trucks Ruling describes two methods of case managing large multi-party proceedings such as these: a **Sequential Approach** (at [5] of the Trucks Ruling) and an **Issues-Based Approach** (at [6] of the Trucks Ruling). Both these proceedings (the Interchange Fee Proceedings and the Trucks Proceedings) are being managed in accordance with an Issues-Based Approach.

B. PRINCIPLES

6. This Ruling is not a ruling at all, in that it does not purport to decide any issue in the Interchange Fee Proceedings (still less in any other proceedings). It does seek to provide non-binding guidance, not merely in these proceedings but in other proceedings also being managed according to the Issues-Based Approach, in order to generate a degree of consistency in like cases. It goes without saying that this Ruling will be given such weight by other panels in other cases as those panels see fit.

7. The issue in respect of which I was asked to make orders – alternatively, give guidance – concerned the sharing of costs liability. Even in ordinary, bilateral civil proceedings, where *A* claims against *B*, the court's general discretionary approach to costs can be fraught with difficulty and complexity. That is all the more so where multiple claims are being handled on an Issues-Based Approach.

8. It is probably best to begin by enumerating certain characteristics of proceedings such as these (which I will refer to as **Issue-Based Proceedings**):

   (1) First, it must be stressed that Issue-Based Proceedings will generally involve a large number of claims, brought by a large number of claimants against a number of deep-pocketed defendants. Typically, the claimants will vary as to their commercial significance and the value of their claims. They make common cause (albeit not by using the Tribunal's collective proceedings regime) because they are united by similar or identical claims against various defendants. Generally speaking, the defendants will be far less numerous than the claimants and – by reason of their deep-pockets – worth claiming against.

   (2) Secondly, and following on from the first point, Issue-Based Proceedings will be large scale and expensive. The costs incurred by all – whether viewed at the aggregate claimant level or the aggregate defendant level or in total – will typically run to many millions of pounds. It is not surprising that the parties in both the Interchange Fee

Proceedings and the Trucks Proceedings have expressed a desire to understand how the Tribunal will approach the question of costs.

(3) Thirdly, when it comes to questions of costs, two general points can be made:

(i) The Tribunal has extensive jurisdiction to "at any stage of the proceedings, make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings": see Rule 104 of the Competition Appeal Tribunal Rules 2015, SI 2015 No 1648.

(ii) Of course, that jurisdiction must be exercised judicially, so as to reach a just and fair outcome.

In short, the Tribunal has an extremely broad judicial discretion in relation to costs.

(4) The problem, and this is the fourth characteristic to be enumerated, is that Issue-Based Proceedings are far more complex and nuanced in terms of substantive outcomes than even very heavy proceedings in other jurisdictions. In those jurisdictions, it might well be possible to say that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to a series of "carve outs" where the general rule does not apply. The Interchange Fee Proceedings provide a rich source of variable contingencies that will need to be taken into account. By way of example:

(i) *Claimants who claim against only some defendants.* The defendants in the proceedings are the Mastercard and the Visa entities. It is very likely that it will be impossible to separate the costs of Visa and the costs of Mastercard in defending the Interchange Fee Proceedings. Obviously, Visa and Mastercard will have an absolutely clear understanding of the costs that they have incurred: but defendants, in the interests of saving costs and

time, are encouraged to co-operate in their defences, and the fact is that Issue-Based Proceedings tend to revolve around issues between claimants (or groups of claimants) and the defendants collectively. Inevitably, this involves a "commingling" of costs on both the claimant and the defendant sides. In the Interchange Fee Proceedings, some claimants have claimed against only Visa and some claimants have claimed against only Mastercard, whereas others (the majority) have claimed against both. It is also very likely – given the fact that some claimants are nominally leading the litigation by reason of actively participating, and some are taking a "back seat" where stayed or electing to be unrepresented at certain phases – that it will not be possible to fairly differentiate between the costs individual claimants are responsible for – whether their own or the defendants'. These points will all make the framing of a costs order (whatever the outcome) extremely difficult.

(ii) *Settlements.* The Tribunal, like any court, encourages settlement between litigating parties. It is, in substantial Issue-Based Proceedings, perfectly possible for one defendant to settle as against a limited corpus of claimants, leaving other claimants to continue to litigate against it. This raises difficult questions as to who is or should be responsible for what costs following a settlement.

(iii) *Stays.* The Tribunal has been concerned to ensure that the number of active claimants before it in both the Interchange Fee Proceedings and the Trucks Proceedings remains within the bounds of the manageable, without however excluding any party wishing to be heard. In the Interchange Fee Proceedings, this question has been managed by intense and frequent (if informal) case management hearings, and this is likely to be a hallmark of the Trucks Proceedings. In the Trucks Ruling, the importance of "lead" claimants has been identified: at [14(4)]. One way of achieving this is to encourage stays of the claims of claimants

prepared to accept the outcome of any determinations in the proceedings, without participating. Stays are – and are intended to be – extremely flexible, with claimants emerging and departing according to the issues in which they have an interest more than the merely passive. Thus, in the Interchange Fee Proceedings, two major trials have been listed for 2024 (unsurprisingly named **Trial 1** and **Trial 2**). The participants in these trials are different: some Claimants are participating in Trial 2 but have no desire to involve themselves in Trial 1. This sort of fluid participation presents serious challenges in framing any costs order.

It would doubtless be possible to expand on these examples: but that would be pointless. The fact is that it is impossible, justly and fairly, to frame in absolutely explicit and set in stone terms how the Tribunal's costs jurisdiction might appropriately be exercised in the future.

9. In light of the foregoing, it is easy to see why – in the course of the hearing – I indicated that I was not prepared to make any firm ruling as to how, in the Interchange Fee Proceedings, the Tribunal would exercise its discretion in terms of costs:

(1) As I have already stated, it is impossible, justly and fairly, to frame in absolutely explicit and set in stone terms how the Tribunal's costs jurisdiction might appropriately be exercised in the future. That, in and of itself, is reason enough for declining to make any order as to costs liability. I was pressed to make an order that the costs exposure of claimants in the Interchange Fee Proceedings should be several and not joint and several. Even going so far is a dangerous hostage to fortune. For example, it immediately exposes a potentially successful defendant to an increased risk that costs ordered to be paid to them are not paid. The mooting of such an order also exposed a potential and perhaps theoretical divergence of interest (which I do not propose to address further, but do note) between "lead" claimants, who wanted such a "several" order, and other claimants, including some "stayed" claimants,

who did not want an order as to costs liability at all, though even among those claimants, all of those who expressed a view on the principle supported a "several" order were the Tribunal to make an order.

(2) Secondly, and relatedly, the reason it is not possible to make a just and fair order in advance (even one of limited scope) is because of the inevitability of the significant exceptional case or cases that simply does not fit into an order made in advance. In such circumstances, of course, a court might change the terms of a past order. But that should only occur where there is a material change in circumstance, and I am – quite consciously – trying to anticipate difficulties. The risk, in making an order, of embedding an unjust and unfair outcome, is extraordinarily high. It seems to me that the furthest that I should go is in articulating – by way of guidance – the values and considerations that will inform the Tribunal when the time comes to make a costs order.

(3) Thirdly, and finally, the Interchange Fee Proceedings are not the only substantial Issue-Based Proceedings presently before the Tribunal: there are also the Trucks Proceedings, in which the same (or very similar) costs issues and problems arise. The parties in the Trucks Proceedings were not represented before me; yet it clearly would be undesirable for similarly constituted proceedings to be radically differently managed – absent very good reason – in terms of costs orders made. (For this reason, I have circulated this judgment in draft not merely to the parties, but also to other interested chairs within the Tribunal. Although this ruling is mine alone, it seems to me important that I take this step.)

C. GUIDANCE

10. I turn then, to the guidance that can be offered in the case of Issue-Based Proceedings. I make clear that I am principally considering large scale multi-party proceedings like the Interchange and Trucks Proceedings. Very small cases, and perhaps even ordinarily large cases, may give rise to different considerations, which I am not considering:

(1) *The phased nature of Issue-Based Proceedings.* One hallmark of Issue-Based Proceedings is that common issues across all or most of the claims are heard at one trial and bind all claimants and defendants. It will be rare for all issues to be capable of determination at a single trial. As I have already adverted to, the Interchange Fee Proceedings will comprise at least three trials: I have already mentioned Trials 1 and 2, listed for the beginning and end of 2024. There will be a Trial 3, and maybe a Trial 4. The Trucks Proceedings will be similar. It must be recognised that with the parsing of issues across different trials, there is a certain fluidity in terms of who participates when. For costs purposes, it would be helpful if the claimant and defendant groups could agree – in advance of any final costs order – the temporal phases of the proceedings they are involved in, and how costs might be allocated to each phase. For example, in the case of the Interchange Fee Proceedings, Trial 1 has started, and Trial 2 is now generating very serious levels of work, because (whilst not imminent) it is looming large on the horizon. It would, as it seems to me, be helpful for the claimant and defendant groups to be able to allocate costs – in this example – to "Trial 1" or "Trial 2" or some other commonly agreed phase. This is a matter that should, in any given case, be discussed with the parties: but it is difficult to see why the parties should not, as a matter of course, record their costs in a manner capable of differentiating between phases in the proceedings.

(2) *Costs will be assessed on a phase-by-phase basis.* In the ordinary case, costs are considered at the end of the entire proceedings, and (absent special considerations) costs will follow the event. Assuming the feasibility of phase-by-phase assessment of costs – and this is a matter that will need to be specifically considered in every case – it would normally be appropriate to consider costs phase-by-phase. Again, this is a matter for specific consideration in the specific case, but the following points can be made:

(i) It may be appropriate to make a costs order at the end of a "phase" or to give some form of provisional indication. On the

other hand, whilst a phase-by-phase assessment may still be appropriate, all consideration of costs may – in some cases – safely be left to the end. I venture to suggest that such cases will be rare, and that there is much to be said for some consideration of costs to occur when judgment is handed down at the conclusion of any given phase.

(ii) It follows from this that issues-based costs orders are either the norm or (which is exactly the same thing) vanishingly rare. The fact is that phases will already be issue-based – that is how Issue-Based Proceedings are structured – and (given this fact and the fluidity of claimant participation) making issue-based costs orders within the context of an issue-based phase of litigation is likely to be unwise and not to be undertaken lightly.

(3) *Costs follow the event.* I am going to assume a straightforward "claimants versus defendants" dispute heard in a trial that is issue-based and one of a sequence of issue-based trials. Thus, there will be a group of claimants and a group of defendants participating in that trial:

(i) Assuming, for the moment, a clear winner and a clear loser, either the defendants will be entitled to a costs order in their favour or the claimants will be entitled to a costs order in their favour. It seems to me that costs should be payable to the winning party (i.e. to the claimants as a class or to the defendants as a class) without attempting to differentiate between the roles played by the various actors within the "winning" class.

(ii) If there has been a less than total victory, then the appropriate course is for the total costs payable by loser to winner to be subject to a form of discount (most likely a percentage discount or a capped absolute amount), but for there to be no (countervailing) costs orders going the other way. That way, undue complexity can be avoided.

(iii) The harder question concerns how the costs order in favour of the winning party is discharged by the losing party. Here, as it seems to me, a distinction needs to be drawn between defendants' costs paid by the claimants and claimants' costs paid by the defendants. The latter case is the easier of the two instances.

(iv) Where the defendants must pay the claimants' costs, a joint and several costs order ought in general to be made. I am assuming defendants with deep pockets, and I am assuming that such defendants will (for that reason, if no other) assist the Tribunal in ensuring not only that the claimants are paid swiftly, but also that there is a fair sharing of the burden as between defendants.

(v) Where the claimants must pay the defendants costs, the position is altogether more difficult. The starting point must be that the costs order ensures, within reason, that the defendants are paid their (properly assessed) costs. The qualification "within reason" is important, because the incidence of costs as between the different claimants is itself important as a matter of justice and fairness. In this regard, the Tribunal will give significant weight to how the claimants, as a group, have chosen to allocate risk between themselves where they have formally done so. The Trucks Ruling envisages a **Claimant Protocol** (see [14(4)(ii)]) and a key part of this Claimant Protocol will be allocation of costs burdens.

(vi) Subject to that, and by way of general guidance, claimants who have either settled claims or agreed to the stay of claims before the commencement of the phase in question ought not to be exposed to a costs burden. The Tribunal will expect all settlements to consider how the costs to date are being dealt with and will expect that those provisions of the settlement agreement be available for the Tribunal's consideration in the event of an argument about costs. If there is a vacuum, in that these terms of

the settlement are undisclosed, then the parties to the settlement cannot expect that the settlement will provide the sort of protection against costs that would ordinarily arise.

(vii) Those claimants whose claims have been stayed before the commencement of any given phase are entitled to expect that their costs exposure as regards that phase will be either nil or limited to a nominal amount (e.g. £10,000 per claimant). Of course, where there has been not nil participation, but limited participation on the part of a claimant, this insulation from costs exposure cannot be guaranteed: but it remains a relevant factor, simply because in some cases a claimant participating in a later phase cannot completely insulate themselves from participating in an earlier phase.

(viii) Excluding settled claims and in substance stayed claims (which have just been considered), that will leave a body of claimants who have, to varying degrees, participated in that phase of the Issue-Based Proceedings. It is on this body of claimants that the substance of the obligation to pay the defendants' costs will fall and, subject to a number of qualifications to which I will come, the general rule ought to be that as against these claimants a joint and several order will be made, so as to incentivise the framing of a Claimant Protocol and sensible discussions between "exposed" claimants where a costs order against them is on the cards. The Tribunal will thus expect these claimants to consider, amongst themselves, how a just and fair outcome can be achieved.

(ix) The qualifications to this general rule are as follows: *(a)* funders of claimants will need to appreciate that they are "in the frame" and that they are exposed to a costs order against them if they unreasonably fail to participate in the burden falling on unsuccessful claimants. The Tribunal will not hesitate to consider third party costs orders early, and (in advance of this)

to order disclosure of relevant documents; *(b)* "lead" claimants should not be penalised for taking the lead. As I have described, the operation of Issue-Based Proceedings depends upon some parties appropriately not participating (through stays) and some parties appropriately participating (as "leads", whether formally or informally). Costs orders need to be sensitive to this; *(c)* the Tribunal will be sensitive to the dangers of a "rump-end" of claimants being exposed to disproportionate costs through settlement by one or more defendants with multiple claimants. Clearly, it is impossible to be more specific, for such matters are acutely fact dependent: but the general principle is easy to understand.

D. CONCLUSIONS

11. I conclude by stressing that costs in Issue-Based Proceedings raise extremely difficult discretionary questions and – first and last – it is expected that Tribunals will exercise their judgement. This ruling is intended as guidance, seeking to inform that judgement and seeking, in addition to justice and fairness in the individual case, a measure of consistency between similar types of proceeding.

12. For the reasons given above, no order as to the sharing of costs liability in the Interchange Fee Proceedings is made at this juncture.

Sir Marcus Smith
President

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 16 February 2024