Neutral citation number: [2023] EWHC 1336 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. BL – 2022 - 001415**
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)

MASTER MARSH (sitting in retirement)
Rolls Building
Fetter Lane
London EC4A 1NL

BETWEEN

MF TEL SARL

Claimant

and

VISA EUROPE LIMITED

Defendant

JUDGMENT

on the Defendant's application dated 31 October 2022

ADAM CLOHERTY KC instructed by Bird & Bird LLP appeared for the **Claimant**
CHLOË BELL instructed by DLA Piper UK LLP appeared for the **Defendant**

Hearing 3 May 2023

Judgment handed down remotely on 5 June 2023

1. The defendant applied by application notice dated 31 October 2022 to strike out the claim under CPR rule 3.4(2)(a) or, alternatively, for summary judgment under CPR rule 24.2.
2. At the time the application was issued the claim was pleaded solely on the basis that the cause or causes of action were subject to the laws of France. Subsequently, the claimant amended the claim and particulars of claim, with the consent of the defendant, to plead in the alternative that the claim is subject to the laws of England.
3. On 18 April 2023 the defendant amended its application notice[1] into the following form:

> "The Claimant has amended its Claim Form and Particulars of Claim retaining its existing French law claim but adding an English law claim in the alternative. As such, the Defendant continues to pursue an application for the Amended Claim Form and Amended Particulars of Claim to be struck out insofar as they refer to or rely upon French law pursuant to CPR 3.4(2)(a), or alternatively under the court's inherent jurisdiction; and additionally or in the alternative for summary judgment to the same extent in favour of the Defendant pursuant to CPR 24.2; a declaration that the Claimant's claim is governed by English law; and for the court to make any consequential orders it considers appropriate."

4. So far as the claim form is concerned, the defendant seeks to strike out the following words:

"(1) "by French law, alternatively";

[1] Strictly permission to amend the application notice was needed but no point is taken about the absence of permission.

(2) “interest on all sums due pursuant to French law at the “taux legal” [legal rate], pursuant to Articles 1231-6 and 1231-7 of the French Civil Code; alternatively”; and

(3) “; and (iv) a sum for management time pursuant to French law Articles 1231-1 and 1231-2 of the French Civil Code (as interpreted and applied by case law of the Cour de Cassation)”; and”

5. In addition, the defendant seeks to strike out paragraphs 21 to 35, 35A, 36.1 and 37 of the amended particulars of claim.

6. When the application was heard the court considered two witness statements made by David Winfield-Chislett, who is a solicitor and in-house counsel to the defendant, and a witness statement made by Jonathan Speed, who is a partner with Bird & Bird LLP the claimant’s solicitors.

7. At the hearing I observed that Mr Speed had failed to comply with CPR rule 32.8 and paragraph 18.2(2) Practice Direction 32. The latter provides that:

> “**18.2** A witness statement must indicate:
> (1) which of the statements in it are made from the witness’s own knowledge and which are matters of information or belief, and
> (2) the source for any matters of information or belief.”

8. A witness statement that contains information provided by another person must provide the source of any matters of information and belief. The point is not without importance because the accuracy of this information may be challenged at the hearing of an application or at the trial. The source of the information needs to be clear.[2] It is of particular importance on applications made under CPR rule 24.2 where the court may be required to exercise a

[2] See further my remarks in *Punjab National Bank (International) Ltd v Techtrek India Ltd* [2020] EWHC 539 (Ch) at [14]-[20].

judgment about the quality of the evidence, both in what it says and does not say, and whether it makes out a claim or a defence with a real prospect of success.

9. During the hearing Mr Cloherty KC, who appeared for the claimant, accepted that the witness statement was defective and the claimant offered to provide a corrective statement. On 10 May 2023 Mr Speed filed a further statement providing the source of the evidence given in his first statement. In addition, he took the opportunity to clarify a point made in his first statement. This has proved to be controversial and on 12 May 2023 DLA Piper UK LLP on behalf of the defendant invited the court to disregard Mr Speed's second statement describing it as not only providing late evidence but also a pleadings alteration. On 17 May 2023 Bird & Bird LLP responded saying, amongst other things, that the statement did not affect the case set out in the amended particulars of claim.

10. There are in fact few material issues of fact between the parties arising from the witness evidence relating to the defendant's application. At this stage I have in mind two points:

(1) For the purposes of the application under CPR rule 3.4(2)(a) the court will usually proceed on the basis that the pleaded facts are true. The claim usually stands or falls based upon the case set out in the statement of case. The witness statements add little or nothing for the purposes of considering whether the statement of case shows reasonable grounds for bringing the claim. They may have a greater bearing on the alternative application under CPR rule 24.2.

(2) The defendant's application is focussed upon whether the claimant is able to pursue a claim based upon the applicable law being the law of France. The witness evidence is not, and does not purport to be, a more comprehensive review of all aspects of direct and indirect dealings between the parties.

11. I will return to the question of whether I should have regard to Mr Speed's second statement later in this judgment.

12. I will approach this judgment in the following way. I will:

(1) Provide the background to the claim and the legal issue that falls to be considered.

(2) Summarise the previous proceedings between the parties in France.

(3) Summarise the principles that apply to applications made under CPR rule 3.4(2)(a) and CPR rule 24.2.

(4) Consider the relevant parts of the amended particulars of claim.

(5) Summarise the legal framework and the submissions made by each party.

(6) Provide my decision on the application and my reasons for it.

Background

13. The claimant is a French company based in France which operated a pre-paid payment card programme under the 'Transcash' brand. The defendant is a payments technology provider incorporated in the United Kingdom.

14. The claimant operated its pre-payment cards using the defendant's card transaction services. However, the claimant never had a contractual relationship with the defendant. Instead, the claimant operated through a 'sponsor', R Raphael & Sons plc ("RRS"), a bank based in London, which was a member of the Visa system. The claimant entered into contractual arrangements with RRS on 25 June 2009 and later on 5 December 2014. Both agreements were subject to English law.

15. RRS was a member of the Visa System by virtue of a membership agreement dated 14 April 2009 which was subject to an English choice of law and exclusive jurisdiction clause. The Visa System was defined in that agreement as being:

> "… the information technology and other systems and platforms for data processing and payment authorisation, clearing and settlement services owned and/or operated by Visa Europe or Visa Inc from time to time".

16. RRS was the issuer of cards that were branded as Transcash cards and the cards were operated using the Visa System. As the above definition makes clear, the defendant does not handle the money that is processed using its system. It provides the technology to enable transactions to operate.

17. Two further agreements were appended to the membership agreement between Visa and RRS: (i) a Technology Licence Agreement and (ii) a Trade Mark Licence agreement. Both those agreements were also subject to an English law and exclusive jurisdiction clause.

18. The intention of the Transcash Programme is to provide prepaid electronic cash cards to individuals who would usually fall outside the traditional electronic banking system. It allows cardholders to keep their money safe and gives them access to online services that require electronic payments. The Transcash Programme can also be used as a means of gifting or sending money securely. Once the card has been loaded with credit, the card holder can withdraw cash from an ATM machine or use the card to make payments via an Electronic Payment Terminal ("EPT") connected to the VISA network in the same way as other bank cards.

19. The stores that participated in the claimant's scheme are located mainly in France and Francophone countries in West Africa, including Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, Togo, Gabon, Cameroon, Central African Republic, Republic of the Congo, Equatorial Guinea and Chad. Stores selling Transcash cards and top-up vouchers would receive an invoice from RRS and were required to pay RRS the value of the vouchers prior to selling them to cardholders. RRS received the funds into a 'trust account' in its name

with Barclays Bank in England. RRS had the responsibility of settling the Transcash users' transactions on behalf of the claimant, including the collection of transaction fees. Settlement would involve RRS remitting funds from its trust account (i) to the bank accounts of merchants on the other side of the card user's transaction and (ii) to the claimant's bank account in France for the transaction fees.

20. The claim concerns an alleged failure by the defendant to apply "Optional Issuer Fees" ("OIFs") to specific transactions entered into by cardholders in the currencies of a number of countries ("the Currencies"). OIFs are defined in the defendant's Core Rules as being:

> "A fee that an Issuer[3] may charge a Cardholder by the application of a percentage increase to the Currency Conversion Rate, which the Visa Systems use to determine the Transaction Amount in the Billing Currency for each International Transaction".

21. The claimant's principal claim is for €2,540,752.69 being the amount of OIFs which it says should have been applied to the transactions in question. Put simply, the failure by the defendant to apply OIFs led to them not being received by the claimant.

22. Mr Winfield-Chislett's second statement provides a summary of the way in which OIFs are applied through the defendant's VisaNet system:

> "22. The manner in which OIFs are applied is through the Defendant's VisaNet processing switch which enables individual financial transactions:
>
> 22.1 When a consumer puts their card in a merchant's terminal the Defendant sends an authorisation message to the payor's bank/card issuer for the total amount of the transaction (provisionally converted into the payor's native account currency) including any applicable OIF …

[3] Under the agreement between the defendant and RRS, RRS is the Issuer.

22.2 The payor's bank/card issuer confirms that the payor has sufficient funds to cover the total amount of the transaction (which includes any applicable OIF);

22.3 Later the same day the Defendant sends a transaction level clearing message to the payor's bank/card issuer for the confirmed converted amount of the transaction at the relevant FX rate to facilitate the movement of funds to settle with the merchant. This transaction level clearing message will include any applicable OIF as a separately marked item.

23. In the context of this case …

23.1 Where an individual was loading funds onto a Transcash branded pre-paid card, their funds would be transferred to an RRS trust account … (Step 1). I understand that the pre-payment loading of funds by individuals was largely made in France in Euros for use (by friends or relatives) in former French colonies;

23.2 Where an individual sought to spend funds previously loaded onto the pre-paid card by way of a transaction using that card, the Defendant would send an authorisation message from England (its place of incorporation and central administration), to RRS as the card issuer, also in England, to check that the payor was good for the transaction amount by reference to the amount in the relevant RRS trust account. Where relevant, the Defendant will have included the OIF in the transaction amount authorisation message (Step 2);

23.3 RRS, in England, would confirm whether this was the case by a message to the Defendant, in England (Step 3);

23.4 The Defendant would later send a clearing message from England to RRS in England (Step 4) and RRS would then facilitate the movement of funds to the

merchant including collection of the OIF for subsequent transfer to MFTEL (Step 5)."

23. The claimant accepts this summary as being accurate subject to two points. First, the claimant's factual case is that set out in the amended particulars of claim and to the extent there is any difference between Mr Winfield-Chislett's summary and the pleaded claim, the facts as set out in the amended particulars of claim are relied upon by the claimant. Secondly, Mr Winfield-Chislett says nothing about the claimant's role other than that at step 5 OIF collected by RRS is transmitted to the claimant.

24. I observe that the evidence provided by Mr Winfield-Chislett on behalf of Visa does not sit comfortably with the claimant's pleaded case. In describing the processes operated by Visa he is at pains to make clear that Visa had no direct dealings with the claimant. He is right to the extent that there was no contractual agreement between the claimant and Visa. The claimant had to gain access to the VisaNet system by RRS acting as sponsor. The point of controversy that emerged during the hearing arose from paragraph 21 of Mr Speed's first witness statement where he says:

"… it is my understanding from the Claimant that it is the VisaNet system that is supposed to calculate, apply and accurately report to the Claimant all OIF and interchange fees as part of each authorisation request in respect of transactions, which the Claimant thereafter approves. Further, during the settlement process in a particular transaction the Defendant is the party who transmits the payment transaction information to the Issuer (i.e. RRS) who in turn – and based on the information provided to it by the Defendant – deducts the payment amount plus the fees (such as OIF) from the cardholder funds that were held in RRS's bank account. This account is the Collection Account referred to in the BCSA." [my emphasis]

25. The claimant is therefore saying that it approved authorisation requests. Mr Cloherty KC pointed out at the hearing that the claimant used the services of a "Processor" acting as an intermediary to manage authorisation. The existence of a third party Processor is not mentioned anywhere in the amended particulars of claim or in the evidence provided by either party. In his second statement, filed after the hearing, Mr Speed clarifies that approvals were given by a Processor who acted on behalf of the claimant although he does not say whether the Processor was based in England or elsewhere. It is clear however that Visa must have been aware of the use of a Processor, not least because the Sponsorship and Card Services Agreement dated 5 December 2014 made between the claimant and RRS makes it clear that "the Processor" as it is defined in the agreement manages authorisation and settlement of accounts on behalf of the claimant. That agreement is exhibited to Mr Winfield-Chislett's first statement. Plainly the defendant knew at a transactional level who it was dealing with but that is a subject about which the defendant's evidence is silent.

26. I do not see that there is any real prejudice to the defendant in admitting Mr Speed's second statement so far as it deals with the use by the claimant of a Processor (a) because it did not contain information which took the defendant by surprise and (b) it is irrelevant to the defendant's primary case that the amended particulars of claim, so far as it is seeks to make a claim under French law, should be struck out. The court is not being asked to make any findings about the defendant's knowledge of the claimant. The right approach is to focus upon the facts pleaded in the amended particulars of claim. There was no application by the claimant for permission to re-amend the claim.

Proceedings in France

27. The claimant first brought proceedings against the defendant in France. On 12 April 2019, the Claimant summonsed the Defendant to appear before the Commercial Court of Marseilles

("Marseilles Court") for payment of the sum of €2,544,204, and a further €10,000 pursuant to Article 700 of the French Code of Civil Procedure. The principal claim was said to represent the value of the OIF "commissions" which the Claimant claims in these proceedings plus interest under French law. In a judgment dated 17 February 2020, the Marseilles Court held that the Claimant's claim did not fall under its jurisdiction and instead fell under the jurisdiction of a foreign court.

28. On 5 March 2020, the Claimant appealed against the Marseilles Court's decision, and summonsed the Defendant to appear before the Court of Appeal of Aix-en-Provence for a hearing on 25 June 2020. In a judgment dated 3 July 2020, the Aix Court of Appeal upheld the decision of the Marseilles Court in its entirety. The judgment is short. Its central reasoning is that the court at first instance was correct to conclude that "… the causal event at the source of the damage ie the alleged failure to pay the fees concerned, was located in LONDON."

29. The decision of the Aix Court of Appeal was confirmed in a further judgment dated 2 September 2021.

30. This claim was issued on 1 September 2022.

Strike out and summary judgment

31. The primary basis for the application is that the material parts of the claim form and the amended particulars of claim should be struck out under CPR rule 3.4(2)(a). The power arises if it appears to the court that the statement of case "… discloses no reasonable grounds for bringing or defending the claim." The defendant also relies upon CPR rule 3.4(5) but in this case reliance upon the court's inherent jurisdiction adds nothing.

32. The test under CPR rule 3.4(2)(a) requires the court to be satisfied that the claim is "unwinnable" where continuance of the claim is without any possible benefit to the

respondent and would waste resources on both sides[4]. This sets a high hurdle for an applicant seeking to strike out a statement of case. There are some circumstances in which the applicant may not succeed in striking out a claim that is "bound to fail" where the relevant area of law is subject to some uncertainty and is developing such that it is desirable that the facts should be found at a trial so that any further development of the law should be on the basis of actual and not hypothetical facts.[5]

33. The defendant also applies in the alternative under CPR rule 24.2. Both sides rely upon the well known summary of the applicable principles set out in the judgment of Lewison J in *Easyair Telecom Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. The passage has been approved by the Court of Appeal[6] and is often cited and I do not need to set it out in this judgment. I need only refer to point g. in the summary and highlight that if the court decides to 'grasp the nettle' and decide a point of law or construction it must be satisfied that "… it has before it all the evidence necessary for the proper determination of the question…". The hearing proceeded without any serious disagreement between the parties that the defendant seeks judgment on an "issue" in the claim[7] and I accept that this is the correct approach to the application.

34. Ms Bell, who appeared for the defendant, suggests there is no material difference between the tests under CPR rule 3.4(2)(a) and CPR rule 24.2 despite them being "technically distinct" relying upon dicta in *High Commissioner for Pakistan in the UK v National Westminster Bank* [2016] EWHC 1465 (Ch) at [17] per Henderson J. It may be if the court is deciding a point of law where the court has before it all the facts it needs to make a determination, there is no practical difference between deciding whether the point is bound to fail or has no real prospect of success. However, that is only one example of the jurisdiction

[4] Harris v Bolt Burdon [2000] CP Rep 70
[5] Hughes v Colin Richards & C0 [2004] EWCA Civ 266
[6] AC Ward & Sons Ltd v Caitlin (Five) Ltd [2009] EWCA Civ 1098
[7] See Anan Kasei Co Ltd v Neo Chemicals & Oxides [2021] EWHC 1035 (Ch) [82]

being applied. Although it ultimately makes no difference in this case, I do not accept that Ms Bell's submission is right because:

(1) The focus under CPR rule 3.4(2)(a) is on the statement of case and for the purposes of the application the applicant is usually bound to accept the accuracy of the facts pleaded unless they are contradictory or obviously wrong.

(2) By contrast under CPR rule 24.2 the court is considering the claim or an issue in it and may be required, without conducting a mini-trial, to examine the evidence that is relied upon to prove the claim. The court is permitted to evaluate the evidence before it and to consider the evidence that can reasonably be expected to be available at trial. Furthermore, there is a second limb to CPR rule 24.2 which the applicant must establish even if the respondent has no real prospect of success at a trial.

(3) The test for striking out as it has been interpreted leaves no scope for the statement of case showing a claim that has some prospect of success. The claim must be unwinnable or bound to fail. Under CPR rule 24.2 it is not good enough for a point to be merely arguable, it must have a real prospect of success. An application to strike out might fail whereas the same application for summary judgment might succeed.

(4) In *High Commissioner for Pakistan in the UK v National Westminster Bank* Henderson J merely observed that no one in the claim had submitted there was a material difference between the two tests. That is not the same as the point receiving full judicial consideration and being determined.

35. For the purposes of this application, the focus is on the defendant's primary case that the claim under French law should be struck out. I therefore turn to the amended particulars of claim, parts of which I will need to set out in full.

Amended particulars of claim

36. I will start with the duties that the claimant alleges arose between it and the defendant and its case under French law:

> "23. Visa owed to RRS a contractual duty to (a) apply and report OIF on all non-Euro denominated transactions on Transcash cards and (b) report to RRS (and MFTEL) the sums deductible in respect of OIF, in both authorisation requests and daily clearing reports, so as to enable RRS accurately to deduct those sums for onward transmission to MFTEL.
>
> 24. RRS in turn owed MFTEL a contractual duty (pursuant to Schedule II of the MFTEL – RRS Agreements) to transfer those sums to MFTEL.
>
> 25. By Article 1240 of the French Civil Code, any human action whatsoever that causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.
>
> 26. By Article 1241 of the French Civil Code, every person is liable for harm which they have caused not only by their actions but also by reason of their failure to act or their lack of care.
>
> 27. Further, as a matter of French law (as confirmed by the Assemblée plénière de la Cour de cassation), a non-party to a contract (such as MFTEL) may invoke, as the basis for tort / delictual liability, a failure of performance of a contract between others (such as in the RRS – Visa Agreement) which has caused it harm. For the avoidance of doubt, this concept includes a contract governed other than by French law.
>
> 28. Under French law, therefore, liability in tort will arise where:
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> 28.1. The defendant is relevantly at fault;

28.2. The claimant suffers damage; and

28.3. There is a legal link between the fault and the damage (causation).

29. Accordingly – and to use English legal parlance – Visa owed MFTEL a duty not to cause MFTEL harm (whether by act, omission or negligence) in and about Visa's operation of the Transcash programme and the collection of fees thereunder."

37. There is no attack made by the defendant upon the principles of French law that are relied on. Its case is simply that French law is not the applicable law. However, the defendant highlights the claimant's reliance in paragraphs 23 and 24 upon the receipt of OIFs by RRS (in England) and their onward transmission to the claimant in France.

38. The amended particulars of claim go on to make three separate claims which are put forward in the alternative:

(1) Under paragraphs 30 and 31 the claimant alleges breaches of duty by the defendant's failure to apply and report "whether in authorisation requests or daily clearing reports, the OIF chargeable …" in respect of transactions in certain currencies that are set out in the pleading and goes on to allege that the defendant's failure to apply and report OIF the claimant has lost €2,540,752.69.

(2) Under paragraphs 32 and 33 a claim for damages in the same amount is made on the basis of the defendant's fault by:

"32.1.1. leading MFTEL to believe that it was applying and reporting on OIF at the rates notified by MFTEL on all "International Transactions", which included all transactions in the Currencies;

32.1.2. failing to notify MFTEL and/or RRS at any time prior to or during the Transcash programme that it would not apply or report on OIF on transactions in the Currencies; and/or

32.1.3. issuing misleading invoices in respect of International Transactions which failed to identify the lack of OIF, but which showed total amounts payable by MFTEL in respect of International Transactions."

(3) Under paragraph 34 the claim is put forward in a quite different way, namely:

"34. Alternatively, if (contrary to MFTEL's case) transactions in the Currencies were not in fact "International Transactions", then Visa should not have charged MFTEL International Transaction Fees in respect of those transactions. On that hypothesis, therefore:

34.1. those fees had no proper basis and MFTEL paid them (and Visa charged) by reason of a mistake; and

34.2. MFTEL will claim repayment of all International Transaction Fees paid in respect of transactions in the Currencies". [my emphasis]

39. The first two ways in which the claim is pleaded are closely related. However, the third claim is quite different. It is not a claim for a failure to apply and report OIF and seek the OIF which should have been applied but rather a claim for the International Transaction Fees charged by the defendant to the claimant in respect of transactions in the Currencies. The claimant does not specify a sum that is claimed under the third head of claim.

40. Under heading "Operation of the Transcash programme and OIF" the claimant sets out the core of its claim in paragraphs 7 to 20. The claimant relies upon the definitions of OIF and International Transaction in Visa's Core Rules (paragraphs 10 and 11) and in paragraph 12 says that Visa charged International Transaction Fees in relation to any transaction which was not a Euro transaction made up of two elements. First, a 1% charge and, secondly, a fixed charge in Euros. Paragraph 13 explains that one of the main purposes of OIF is to offset Visa's international transaction fees. Paragraphs 14 and 15 set out the levels of OIF that were

agreed between RRS and Visa of 2.5% at the outset and later 3.5%. Then the amended particulars of claim continue:

> "16. Thus:
>
> 16.1. Visa accepted and acknowledged the requirement to apply and report OIF on all non-Euro denominated transactions on Transcash Cards, which included transactions in the Currencies (as defined below), at the rates set out above (2.5% and then 3.5%); and
>
> 16.2. Visa (through RRS) led MFTEL to believe that the changes had been effected and that OIF was being applied and reported within VisaNet and, therefore, would be deducted at those rates.
>
> 17. Accordingly, on every foreign currency i.e. non-Euro denominated International Transaction undertaken on a Transcash Card, Visa ought to have applied and reported the 2.5% or (from 31 March 2011) 3.5% OIF, so that those additional sums would be reported as chargeable on any given transaction at the time of clearing and settlement; and, in due course, to enable the deduction of those additional sums from the cardholder's account by RRS for onward transmission to MFTEL.
>
> 17A. One of Visa's main purposes is to provide a central and accurate record and reconciliation for all interested parties of the state of accounts in the payment system on any given day. In that regard, Visa has a central role in the effective operation of OIF: if Visa does not apply and report the correct OIF that is chargeable then in practice that sum will not be charged to or deducted from the cardholder's account and, therefore, will not ultimately be remitted by RRS to MFTEL.
>
> 17B. In particular:

B.1. When a cardholder uses their card e.g. to pay for goods or services, Visa will transmit to MFTEL (through VisaNet) an authorisation request in respect of the transaction. When approving (or disapproving) the authorisation request MFTEL relied on the total request amount reported by Visa (as Visa would or ought to have appreciated).

B.2. Where OIF is chargeable on a transaction that additional sum will or should be added to the amount of the authorisation request – such that, in this case, the relevant authorisation request should have been higher by 2.5% or 3.5% (as the case may be).

B.3. If OIF is not applied or reported in the authorisation request then those additional sums will not be recorded as deductible from the cardholder's account, leading to a situation where (i) it wrongly appears that there are more funds available on a cardholder's account than there should be and (ii) RRS and MFTEL do not know that the relevant additional amount should be deducted.

B.4. Visa is also responsible for reporting the amounts to be deducted in respect of OIF in its daily clearing reports (e.g. report VSS-210) provided as part of the settlement process. Visa's failure accurately to report the relevant OIF sums in the daily clearing report leads to a situation where (i) it wrongly appears that there are more funds available on a cardholder's account than there should be and (ii) RRS and MFTEL do not know that the relevant amount should be deducted – meaning in practice that those sums will not be deducted and remitted (by RRS) to MFTEL.

B.5. It follows that the effect of Visa's failure accurately to apply and report OIF, in both transaction authorisation requests and in the daily clearing reports, brings about a false reconciliation / reckoning. That in turn misleads RRS and MFTEL (and cardholders) about the true state of account on any given day, ultimately resulting in

cardholders having more available funds than they should – and MFTEL receiving correspondingly less.

17C. It is precisely because of Visa's role in applying and reporting OIF in relation to all relevant transactions as set out above that RRS and MFTEL were required to and did report the OIF rates to Visa and seek Visa's confirmation that the OIF rates had "gone live" in VisaNet, as set out in paragraph 15.4 above.

17D. Thus, in all cases where Visa did properly apply or report OIF for the Transcash programme (i) the relevant transaction authorisation request included the additional amount of OIF as an increase to the transaction amount and (ii) Visa's daily clearing report provided details of the sums to be deducted in respect of OIF." [my emphasis]

41. Paragraph 18 sets out the currencies in respect of which it is said that Visa failed to apply and report OIF and goes on:

"19. Under the Visa Core Rules, Visa should have applied and reported the 2.5%, and then 3.5%, OIF as a percentage increase to the "Currency Conversion Rate" because each of the Transactions relevant to this Claim was an "International Transaction". More particularly, Visa should have applied a "Currency Conversion Rate" when converting the "Transaction Amount", which was always in one of the Currencies, into the "Billing Currency", which was always EUR.

20. Notwithstanding that Visa apparently failed to treat transactions in the Currencies as "International Transactions" for the purpose of charging OIF, Visa nonetheless still charged MFTEL International Transaction Fees in respect of all transactions in the Currencies. It will be MFTEL's case that if each of the relevant transactions was an "International Transaction" for the purposes of International Transaction Fees, those

transactions must also have been "International Transactions" for the purposes of OIF." [my emphasis]

42. Paragraph 21 of the amended particulars of claim sets out the claimant's case that French law applies to its claim:

> "21. This Claim, which concerns a non-contractual obligation arising out of tort/delict, is governed by French law pursuant to Article 4 of the Rome II Regulation (as retained in English law) because France is the country where the damage about which MFTEL complains occurred.
>
> 21.1. France is the place where MFTEL is incorporated and exclusively carries on its business and operations, and is the place where MFTEL exclusively suffered the financial damage for which it seeks compensation in this Claim.
>
> 21.2. France is also the place where the Transcash Cards were exclusively marketed and sold, and was the designated country of issuance of the Cards giving rise to their denominated currency.
>
> 21.3. The essence of MFTEL's claim is that Visa should have, but failed to, apply or report OIF on Transactions in the Currencies. Had Visa done what it should have done, OIF would correctly have been reported in authorisation requests and daily clearing reports received by MFTEL by email in France, and in consequence RRS would have deducted and remitted the OIF sums to MFTEL in MFTEL's bank account in France.
>
> 21.4. Because of Visa's omissions, therefore, MFTEL failed to receive funds into its bank account in France (the place where MFTEL exclusively operated); and, therefore, France is the place in which the relevant damage – being MFTEL's purely economic loss consequent upon Visa's omissions – occurred." [my emphasis]

43. I have emphasised certain passages in the claimant's case. In paragraph 17B.B.1 it is asserted that the claimant authorised transactions and that the claimant relied upon information provided by Visa to the claimant. In paragraph 20 the claimant asserts that Visa charged it with International Transaction Fees and in paragraph 21.3 that the claimant received daily clearing reports by email in France.

44. I observe that there is a degree of unevenness in the manner in which the amended particulars of claim are drafted. Oddly, there is no mention of the claimant using the services of a Processor which provided authorisations. However, it is tolerably clear the claimant asserts that it authorised transactions, it received and relied upon reports from the defendant and it set the level of OIFs. It appears to be accepted that fees were received by RRS and remitted to the claimant.

45. The defendant's application is not based upon an assertion that the amended statement of case is defective and that due to the manner in which it is pleaded it is bound to fail. It is therefore only a matter of observation that in part the claim lacks a degree of clarity. The issue before the court is whether there is any possibility of French law being the applicable law.

The Law

46. Article 4(1) of the Rome II Convention provides that:

> "*... the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*"

47. "Damage" is partially defined in Article 2(1) as covering "any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo" and in Article 2(3)(b) as including "damage that is likely to occur". Recital 17 specifies that:

> "The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur…".

48. Article 4(1) distinguishes three elements, first the damage, secondly the event giving rise to the damage and thirdly the indirect consequences of the event. The court's task is to find the place where the damage occurred. That place may or may not coincide with the place where the event giving rise to the damage occurred and/or where the indirect consequences of the event occurred. The place where the damage occurred is the determining factor.

49. The claimant does not rely upon Article 4(3) of Rome II.

50. The parties are agreed that, adopting Cockerill J's observation in *FM Capital Partners v Mariano* [2018] EWHC 1769 (Comm), the case law under the jurisdiction provision in (what is now) Article 7(2) of the Brussels Regulation is "likely to be useful". This accords with similar observations by Gloster LJ in *Erste Group Bank AG v JSC* [2015] 1 CLC 706 at [90-1] and Flaux J in *Fortress Value Recovery Fund LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm) at [44]. However, Mr Cloherty KC is right to say that the read across is not decisive, merely useful, and it only applies to the damage limb of Article 7(2) of the Brussels Regulation because jurisdiction can be established in the courts of the place either where the harmful event occurred or where the damage was suffered. The former is excluded under Article 4(1) of Rome II. It seems to me that this should lead the court to be cautious about over-reliance on cases under Rome II and its predecessor.

51. Ms Bell relies upon Professor Briggs' commentary at p551 of *Private International Law* (OUP 2023) where he states that the task is to identify where the "direct" damage occurred and:

> "the question is what did the defendant actually do, or what did he actually damage as distinct from what his damage then led to and as distinct from which is the damage for which compensation is claimed".

52. *Dicey & Morris* at 35-025 states:

> "the court should seek to identify and locate the outward consequences of the defendant's conduct—or of an event for which the defendant is claimed to be legally responsible—and then to treat as the relevant "damage" those consequences which are closely and foreseeably linked to that conduct etc., which are in some sense irreversible and which do not simply reflect or follow from other consequences occurring in another country".

53. The important focus is where the damage occurred and Article 2(1) directs the court to look for consequences arising out of the tort. It is therefore not a question of what the defendant did, in the sense of looking at the event or events which preceded the damage, but rather what consequences resulted from the wrong, ignoring indirect consequences. In my judgment the extract from Dicey & Morris gets closer to the spirit of Article 4(1) although I struggle with the idea of looking for consequences that are "in some sense irreversible" since the meaning of irreversibility is normally seen as being binary: either an event is reversible, or irreversible, or it is not.

54. The notion of reversibility was discussed by Marcus Smith J in *MX1 Ltd v Farazad* [2018] 1 WLR 5553 at [38(8) to (11)]. However, the loss in that case was the cost of hiring investigators and lawyers in England to investigate the unlawful means conspiracy that was the basis of the claim brought by the claimant. Marcus Smith J concluded at [40] that the £100,000 incurred by the claimants in entering into agreements with the investigators and

lawyers was “irreversible or concrete loss”. On the facts in that case the conclusion was unsurprising. The expenditure had been incurred and damage had been occasioned.

55. Visa’s primary case is that the direct damage occurred at the time when Visa messaged RRS with transaction amounts that are said to be incorrect, because OIF was not included, leading to approval being given for a lower amount than should have been. This is the process at steps 2 and 3 as they are described by Mr Winfield-Chislett. These steps in the transaction process are said to have taken place in England. Visa invites the court to follow a line of cases dealing with negligent misstatement. In *London Helicopters v Heliportugal* [2006] EWHC 108 (QB) Simon J concluded for the purposes of establishing jurisdiction under article 5(3) of Council Regulation 44/2001 that “in a case of negligent misrepresentation the damage will occur at the place where the misstatement is received and relied upon.” The defendant says that the claim is analogous because the claim is based upon the provision of inaccurate information in authorisation requests and daily clearing reports and the loss became irreversible at the point the transaction was completed and the cardholder’s funds were spent. This analysis overlooks the importance of the place of reliance. It is the claimant’s reliance that is important and reliance cannot have taken place until the claimant received the inaccurate information from the defendant, even if the route by which it was sent was via RRS. Furthermore, reliance is a factual issue that will normally need to be explored at a trial.

56. The defendant’s alternative case is that direct damage occurred when RRS failed to collect an OIF, as a result of the defendant’s inaccurate messaging, for onward transmission to the claimant in France.

57. On either case the defendant says that damage occurred in England being the “direct” damage resulting from the wrong and that the loss felt ultimately in the claimant’s bank

account in France is indirect damage. It is the former that matters for the purposes of Article 4(1). Particular reliance was placed by Ms Bell upon the decision of the CJEU in Case C-12/15 *Universal Music International Holding BV v Schilling* [2016] 3 WLR 1139. It concerned a share purchase agreement between UMI and a record company in the Czech Republic. One of UMI's Czech lawyers failed to implement an amendment to the agreement and as a result the price at which UMI was obliged to purchase the shares was five times higher than the price originally intended. UMI and the record company settled their dispute in relation to the sale price before an arbitration board in the Czech Republic, with UMI being obliged to pay a settlement amount of around EUR 2,000,000 from its bank account to the record company pursuant to that agreement. The CJEU at [31] considered that the damage in that case occurred when the amount of the settlement became certain and irreversible. That was when the settlement was agreed between the parties before the arbitration board in the Czech Republic.

58. The CJEU said at [38] that:

> "… purely financial damage which occurs directly in [UMI's] bank account cannot, itself, be qualified as a "relevant connecting factor" pursuant to article 5(3) of Regulation No 44/200. In that respect, it should also be noted that a company such as Universal Music may have had the choice of several bank accounts from which to pay the settlement amount, so that the place where that account is situated does not necessarily constitute a reliable connecting factor".

59. The CJEU held at [40] that the place where the harmful event occurred may not be construed:

> "… failing any other connecting factors, the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which

materialises directly in the bank account of [UMI] and is the direct result of an unlawful act committed in another Member State."

60. Ms Bell also relies upon other cases which she submits adopted a similar reasoning:

(1) Case-220/88 *Dumez France* [1990] ECR I-49, the CJEU was tasked with deciding where the harmful event occurred for the purpose of determining jurisdiction in a dispute where two French parent companies sought compensation for the damage which they claimed to have suffered as a result of the insolvency of their subsidiaries established in Germany. The insolvency was caused by the suspension of a property development project in Germany which was in turn caused by the cancellation by German banks of loans granted by them to finance the development. The CJEU held that the place where the harmful event occurred was Germany. The losses suffered by the parent companies was merely the "indirect consequence of the financial losses initially suffered by their subsidiaries" following the cancellation of the loans and the suspension of the property development at [13].

(2) Case C-364/93 *Marinari v Lloyd's Bank* [1996] QB 217, the claimant sought to sue the defendant bank in Italy for the acts of staff in the bank's Manchester branch involving the impounding of promissory notes which he had deposited with them, asserting that he had suffered the financial consequences in his bank account in Italy, where he was domiciled. The ECJ rejected the claimant's contention holding at [14-15] that "damage" under Article 5(3) of Brussels I: "cannot … be construed so extensively as to encompass any place where the adverse consequences of an event that has already caused actual damage elsewhere can be felt. Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial

damage consequential on initial damage arising and suffered by him in another contracting state".

(3) In *Raiffeisen Zentral Bank Osterreich v Tranos* [2001] ILPr 9 Longmore J observed: "That does not mean, however, that a claimant can select any place where the adverse consequences of an event which has already caused actual damage elsewhere can be first. It is initial damage rather than consequential damage that is critical..." at [15]. This authority was approved and adopted by Foxton J in the context of applicable law in *Sweden v Serwin* [2022] EWHC 2706 (Comm) at [77].

61. In *Pan Oceanic Chartering Inc v UNIPEC UK Co Ltd* [2017] 2 All ER (Comm) 196, Carr J drew attention to the fact (see [195] and [200]) that the *Dumez France* principle has no application where, in substance, there is really only one form of damage caused by the unlawful act and in truth only one victim. That is the position in this case.

62. At this point it is helpful to note the observations made by Sir Geoffrey Vos MR in *Kwok v UBS London* [2023] EWCA Civ 222 at [45]-[46] in a case that concerned article 5(3) of Lugano II:

> "45. It seems clear to me that the judge was right to hold, as she did, that the place where the damage occurred for the purposes of article 5(3) has indeed been held by the CJEU to be "where the alleged damage actually manifests itself" (see *Löber* at [27] and *VEB* at [31]). The remaining guidance to be obtained from the CJEU cases is somewhat dependent on the facts of those cases. I am not certain that there is any rule that is universally applicable to financial loss cases as UBS London seeks to establish. The answer will depend on the facts of those cases as the contrast between the

outcomes in *Kronhofer* and *VEB* on the one hand and *Kolassa* and *Löber* on the other hand, demonstrates.

46. It is, in my judgment, dangerous to seek to define the test for where damage occurs in a wide range of financial loss cases, because they are likely to be so fact dependent. There will of course, need to be factors connecting the dispute to the jurisdiction in question (see *Marinari* at [11], and *UMI* at [26]). But relevant factors will, of course, vary. It is also clear that loss must manifest itself in the jurisdiction in question." [my emphasis]

63. A similar observation was made by Males J in *Griffin Underwriting Ltd v Varouxakis* [2018] EWHC 3259 (Comm). After referring to a number of authorities he observed:

> "76. It is apparent that the determination of the place where the damage occurred may call for a finely balanced exercise of judgment, particularly in a case of economic or financial as distinct from physical damage. Indeed, as Sales LJ observed in the Court of Appeal in *JSC BTA Bank v Ablyazov (No 14)* [2017] QB 853, para 71, there may be cases where there is a rational basis for more than one view and no single right answer."

64. The Master of the Rolls in *Kwok v UBS* refers to decisions in *Kolassa* and *Löber* as providing examples of a particular outcome on their own facts. Mr Cloherty KC relies upon them as examples of decision where there has been a negligent misstatement in an investment loss case:

(1) In *Kolassa v Barclays Bank plc* [2016] 1 All ER (Comm) 733, the CJEU held (at [55] and [57]) that an investor who suffered loss in respect of a failed bond that he purchased in reliance on defective information, suffered the relevant 'damage' in the place of his domicile, because that is where his economic interests were ultimately damaged: "the loss occurred in the place where the investor suffered it".

(2) In *Löber v Barclays Bank plc* [2019] 4 WLR 5, the CJEU held (at [31] – [36]) that the claimant's home court had jurisdiction because the "damage the investor claims to have suffered consists in financial loss which occurred directly in that investor's bank account with a bank established within the jurisdiction of those courts".

65. The claimant also relies upon Christopher Clarke J's analysis in *Dolphin Maritime & Aviation Services Ltd v Sveriges Angfartygs Assurans Forening* [2010] 1 All ER (Comm) 473. In that case the claim was that the defendant had induced a third party to breach its contract with the claimant, such that money was not received by the claimant in England as it should have been. At [30-31] he observed:

> "[30] In some cases the place where the damage occurred may not be difficult to discern. If a claimant's person or property is injured that place is likely to be the place where his person or property was at the time of the injury. In the case of economic loss, however, the issue is not so clear-cut. In one sense a corporation's economic loss is suffered in the place where its accounts are prepared because it is in them and there that its monetary loss is calculated and felt.
>
> [31] However, as the jurisprudence of the ECJ makes clear, the fact that a corporation's loss is felt where its books are made up does not mean that that is the place where the damage occurred for the purpose of art 5(3). If that were so a corporation would in most economic loss cases be able to sue in the courts of its own domicile."

66. He went on at [60] to analyse the difference between loss of money or goods and a complaint that the claimant has not received a sum which he should have received. After a reminder of the danger of conflating the place where the damage occurred with the place where the loss was suffered, he went on to say:

> "[60] There is, however, a difference between a case in which the claimant complains that he has lost his money or goods … and a case in which the claimant complains that he has not received a sum which he should have received. In the former case the harm may be regarded as occurring in the place where the goods were lost … or the place from or to which the moneys were paid … , although the loss may be said to have been suffered in the claimant's domicile. In the latter case the harm lies in the

non-receipt of the money at the place where they ought to have been received, and the damage to him is likely to have occurred in the place where he should have received it. That place may well be the place of his domicile and, therefore, also the place where he has suffered loss."

67. In *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [481] – [510] Cockerill J considered the *Dolphin Maritime* principle at some length, in the context of a loss-based claim in relation to secret commissions taken by the defendants in breach of fiduciary duty. She accepted that the decision in Dolphin provides a principle of general application and applied it. The place of the damage was the place where, but for the defendant's wrongdoing, the commissions would ultimately have been paid, namely to the claimant in its English bank account.

Decision

68. I can state my conclusions briefly:

(1) The court is asked to determine a point at an early stage of the claim based upon the claimant's pleaded case applying a test that is fact dependant. (*Kwok v UBS London* per Sir Geoffrey Vos MR)

(2) The court's decision about where damage occurred is one which calls for a finely balanced exercise of judgment. (*Griffin Underwriting v Varouxakis* per Males J)

(3) In light of those judicial observations, which I respectfully adopt and endorse, the defendant's application is ambitious although I accept that there must be cases where there is no scope for doubt about where the damage occurred for the purposes of Article 4(1).

(4) It is also clear that the authorities do not speak with one voice. Claims for pure economic loss due to non-payment may be in a different category to claims for financial loss that has been incurred and a liability created. In *UMI* there was a liability to pay a sum that fell due in the Czech Republic. It is understandable that the place from which payment of the liability was made was treated as being

secondary. Payment from an account in France can be seen as an indirect consequence of the liability that was incurred in the Czech Republic. Similarly, in *MX1 Ltd v Farazad* Marcus Smith J was able to conclude that irreversible damage had occurred by virtue of the liability to pay fees to enquiry agents and lawyers.

(5) In this case, where the claim is for the non-receipt of OIFs, the wrong only has a direct economic effect upon the claimant by non-receipt of OIFs. That effect is likely to have been felt by the claimant in France. It is not at all obvious that the effect of the wrong as it resonated in financial terms should be seen as an indirect consequence of the previous events.

(6) I do not consider that the reversability test is an easy one to understand and to apply based upon the facts the defendant wishes to rely upon (albeit that they do not match the facts pleaded by the claimant). However, in my judgment it is not possible to conclude that the claimant's case that French law is the applicable law is bound to fail if the test is applied. The claimant may well succeed, when the issue is fully explored, in establishing that its loss became irreversible at times when RRS accounted to the claimant without including OIFs. Put another way, the claimant may well succeed in establishing that the *Dolphin Maritime* approach is the right one in this case.

(7) It is, in any event, quite impossible for the defendant to establish that the claims pleaded in the amended particulars of claim, based upon the facts that are pleaded, inevitably lead to the applicable law being English law. The defendant has sought to pursue an application to strike out that claim based upon the claimant's incomplete version of events which is plainly inappropriate. The claimant may be successful in establishing that the applicable law in respect of all three ways in which the claim is put is French law when the facts are fully examined. It might

be the claim for wrongly charged international fees points more obviously to English law being the applicable law than the non-receipt of OIFs. However, this element of the claim rated little mention by the defendant at the hearing and it would not be right to single it out for separate treatment. I am unable to conclude that the claimant's contention about the applicable law relating to international fees is bound to fail.

(8) The defendant is not able to establish that the claimant's case about where the damage occurred is bound to fail and therefore the first limb of the application fails.

(9) Turning to CPR rule 24.2, the court does not have all the facts it needs to make a determination of the issue of law. As the authorities show the decision about where the damage occurred is fact sensitive and calls for a finely balanced exercise of judgment. The decision should be made at a trial when the trial judge will have made findings of fact about the dealings between the parties, both direct and indirect.

(10) The claimant's case has a real prospect of success at a trial. It is unnecessary to consider the second limb of CPR rule 24.2.

(11) I would add that I have not found it to be necessary to rely upon Mr Speed's second statement although had it been necessary to do so I would have been willing to admit the additional evidence it contains.

69. I will dismiss the application and give directions for the progress of this claim on the handing down of this judgment.