Neutral citation: [2022] CAT 50

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1517/11/7/22 (UM)
1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

10 November 2022

Before:

SIR MARCUS SMITH
(President)
BEN TIDSWELL
LORD YOUNG

Sitting as a Tribunal in England and Wales

IN THE MATTER OF:

MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS

PARTIES TO THIS RULING:

(1) **THE UMBRELLA INTERCHANGE FEE CLAIMANTS** (as defined in the Tribunal's order dated 4 July 2022 in Case 1517/11/7/22 (UM) Merchant Interchange Fee Umbrella Proceedings

(2) **THE UMBRELLA INTERCHANGE FEE DEFENDANTS** (as defined in the Tribunal's order dated 4 July 2022 in Case 1517/11/7/22 (UM) the Merchant Interchange Fee Umbrella Proceedings)

(3) **THE MERRICKS CLASS REPRESENTATIVE** (as defined in the Tribunal's order dated 4 July 2022 in Case 1266/7/7/16 *Walter Merricks CBE v Mastercard Inc. & Ors*)

(4) **THE MERRICKS DEFENDANTS** (as defined in the Tribunal's order dated 4 July 2022 in Case 1266/7/7/16 *Walter Merricks CBE v Mastercard Inc. & Ors*))

RULING (PERMISSION TO APPEAL)

A. INTRODUCTION

1. Mastercard seeks permission to appeal the Tribunal's Judgment of 6 July 2022 ([2022] CAT 31). The Judgment followed a hearing on 22 and 23 May 2022, which was convened to consider the way in which the Tribunal and the parties should approach resolution in these proceedings of the question of the extent to which merchant retailers have passed on to consumers (or others) any element of any unlawful charge levied in accordance with the card schemes (in the form of the Merchant Interchange Fee, or "MIF"). This Ruling adopts the terms and abbreviations used in the Judgment.

2. Mastercard seeks permission to appeal on four grounds, all of which broadly concern the extent of disclosure and witness evidence which would be appropriate to deal with the issue of merchant pass on. However, Mastercard's application also gives rise to an anterior procedural issue. As Mastercard notes in its application, this is whether a right of appeal exists in respect of the decision which Mastercard challenges. If no such right exists, the question arises as to whether Mastercard can proceed to challenge the decision by way of judicial review.

3. It is obviously appropriate to consider this anterior question first, before we turn to consider, as appropriate, the substance of Mastercard's grounds of appeal.

B. THE PROCEDURAL QUESTION

4. Section 49 of the Competition Act 1998 is entitled "Further appeals from the Tribunal". Setting out materially all of the section – because context matters when engaged in a process of statutory construction – , section 49 provides:

> "(1) An appeal lies to the appropriate court –
>
> (a) from a decision of the Tribunal as to the amount of a penalty under section 36; and
>
> (b) …

(c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47.

(1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings –

(a) as to the award of damages or other sum (other than a decision on costs or expenses), or

(b) as to the grant of an injunction.

(1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses).

(1C) An appeal under subsection (1A) arising from a decision in respect of a stand-alone claim may include consideration of a point of law arising from a finding of the Tribunal as to an infringement of a prohibition listed in section 47A(2).

(1D) In subsection (1C) a "stand-alone claim" is a claim –

(a) in respect of an alleged infringement of a prohibition listed in section 47A(2), and

(b) made in proceedings under section 47A or included in collective proceedings.

(2) An appeal under this section –

(a) except as provided by subsection 2A, may be brought by a party to the proceedings before the Tribunal or by a person who has a sufficient interest in the matter; and

(b) requires the permission of the Tribunal or the appropriate court.

(2A) An appeal from a decision of the Tribunal in respect of a claim included in collective proceedings may be brought only by the representative in those proceedings or by a defendant to that claim.

(3) In this section "the appropriate court" means the Court of Appeal or, in the case of an appeal from Tribunal Proceedings in Scotland, the Court of Session."

5. It is readily apparent from the wording of section 49 that it was the intention of Parliament to circumscribe or limit the appeals that could be made from the Tribunal to the "appropriate court". Those limits take two forms:

(1) A requirement that permission to appeal be obtained, either from the Tribunal or from the "appropriate court". The permission requirement is not one that we need consider further.

(2) A restriction on the questions that can be appealed. Thus, section 49(1)(a) applies to a "…decision of the Tribunal as to the amount of a penalty under section 36…"; section 49(1)(c) applies to "…a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47…"; section 49(1A)(a) applies to "…a decision of the Tribunal in proceedings under section 47A or in collective proceedings…as to the award of damages or other sum…"; and section 49(1A)(b) applies to "…a decision of the Tribunal in proceedings under section 47A or in collective proceedings…as to the grant of an injunction…". What all of these provisions have in common is that they seek to restrict the ability of the "appropriate court" to consider, on an appeal, certain decisions of the Tribunal. To this extent, without employing the language of ouster, these provisions at least seek to limit and control the manner in which decisions of the Tribunal can be challenged.

6. We of course recognise that the ousters of the courts' review jurisdiction (even if not framed as such) by way of controlling rights of appeal are to be narrowly, and not widely construed. We also recognise that, even if an issue is "ousted" from appellate consideration, because of provisions such as these, a safeguard exists in the form of judicial review.

7. It cannot be presumed that where a right of appeal (we appreciate, of course, that permission is required, and that "right" is so qualified) is <u>excluded</u> by provisions such as these, a right of judicial review automatically arises. Judicial review, of course, requires permission in any event and, as *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28 shows, it is not a foregone conclusion that where a right of appeal does <u>not</u> exist there is an automatic and unqualified judicial review. Indeed, as *Cart* further shows, the judicial review process – if found to be open to an applicant – may be subjected to a special "streamlined" process.

8. "Streamlined" processes of judicial review are necessary, but do not resolve the problems created by limitations on or ousters of the appellate jurisdiction. That is because judicial reviews of tribunal decisions – in particular of the decisions of this Tribunal, where the process to trial is, and is intended to be, extremely fast – are (in contrast to appeals) – both disruptive (the processes are generally slower) and costly (the tribunal is involved, as a respondent, in the judicial review process, and that entails significant costs even if – as will be the norm – the tribunal in question takes a "neutral" stance).

9. The restrictions contained in section 49 have – in recent months – generated something of an industry before this Tribunal, in that careful and well-advised parties seeking to appeal Tribunal decisions also issue "protective" applications for judicial review. The amount of uncertainty engendered by the section 49 restrictions, and the costs thrown away on the part of the parties and the courts (including this Tribunal and the Administrative Court) are significant. This Ruling is just the latest example of this problem.

10. It therefore is appropriate to construe section 49 widely in permitting appeals to the "appropriate court", rather than narrowly in causing applications for permission to appeal to be refused because there is no jurisdiction to permit the appeal at all. That is appropriate both because appeals of Tribunal decisions are more appropriate than judicial review, and (as outlined above) a right to apply for judicial review may not exist in any event (particularly, in a circular twist, if section 49 is construed widely in permitting appeals to the "appropriate court").

11. We are also very conscious that, as a United Kingdom Tribunal, the "appropriate court" will not always be the English Court of Appeal, and that different approaches may be taken in appellate courts in Scotland, Northern Ireland and England and Wales. For example, there are differences between the supervisory jurisdiction of the Court of Session in judicial review, and judicial review in England and Wales. It cannot be assumed that parties would have access to identical remedies in the two jurisdictions in the event that section 49 was construed more narrowly. This seems to us to be another strong reason for the wider construction of section 49.

12. This issue has been considered in a number of cases, most importantly in *PACCAR Inc v Road Haulage Association Ltd* [2021] EWCA Civ 299. Generally speaking, section 49 has been construed as enabling appeals to the Court of Appeal, and *PACCAR* constitutes something of an exception. It is important to understand why that is the case. At [55] to [56] of the Court of Appeal's judgment, Henderson LJ considered whether the wording in section 49 (and, in particular, section 49(1A)) was "purely descriptive of the proceedings" (our emphasis) or "descriptive of the type of *decision* from which an appeal may be brought" (again, our emphasis). Henderson LJ (with whom Singh and Carr LJJ agreed) held that the latter was the case, and we respectfully agree (and even if we did not, we would be bound).

13. That, however, does not mean that the effect of section 49(1A) is to confine the "right" to appeal to final decisions as to the award of damages. It is quite clear that (by way of example) an interlocutory decision that is determinative is appealable under section 49: see *PACCAR* at [59].

14. Thus, for example, an application to strike out (and a refusal to grant an application to strike out) were considered to be decisions as to the award of damages: see *Enron Coal Services Ltd (in Liquidation) v English Welsh & Scottish Railway Ltd* [2009] EWCA Civ 647. There are of course many cases where a strike out application would only determine part of a claim, so it is apparent that the question is essentially whether the decision affects the amount of damages to be awarded in some causal way.

15. Equally, a case where no damages will arise at all because of an interlocutory decision will be a decision as to the award of damages. See *Merricks v Mastercard Inc* [2018] EWCA Civ 2527, where the Tribunal's decision not to grant a Collective Proceedings Order was held to be the "end of the road".

16. It is also important to note that section 49(1A) requires that the issue on which permission is sought be one of law. If one commences the consideration of jurisdiction under section 49(1A) with that requirement, it has potentially two effects:

(1) It filters out a variety of decisions in relation to which no view needs to be formed on the relationship between the decision and the final damages outcome.

(2) In relation to those decisions which give rise or arguably give rise to points of law, it gives some reassurance that the decision is one which has the potential to affect the final damages outcome, because (at least intuitively) a decision where the Tribunal made or arguably made a legal error suggests either that a wrong substantive outcome will be achieved, or at least that the substantive outcome may be different if the legal error were corrected. In saying this, we recognise that decisions on questions of fact and discretionary decisions can give rise to questions of law and so fall within and not without section 49(1A). By way of example, a decision on the facts may be challenged as an error of law: see the well-known decision in *Edwards (Inspector of Taxes) v Bairstow* [1956] A.C. 14. Equally, a discretionary decision is challengeable as a matter of law where the decision-maker failed to take account of a material factor, took account of an immaterial factor or breached a conclusion that is plainly wrong, in the sense that it is not rationally defensible.

17. There is, of course, an intrinsically difficult and unpredictable relationship between interlocutory decisions of the Tribunal and outcomes as to the award of damages. Even if a decision is wrong as a matter of law, it may be very difficult to make a direct causal link between an interlocutory decision which is more in the nature of general case management, and any predicted effect on the award as to damages.

18. The "counterfactual scenario" – how would the final decision look, if an interlocutory decision had been differently made? – is intrinsically hypothetical. We doubt the utility of the parties or the Tribunal agonising over hypothetical scenarios to determine whether a case management decision is sufficiently significant to affect substantively the award as to damages in the final outcome of a case. Parties before the Tribunal can proceed on the basis that, assuming a point of law arises, contested interlocutory decisions, even of a contested case management nature, can be presumed, for the purposes of permission to appeal

applications, to meet the requirement that they affect the final substantive outcome in terms of the level of damages awarded. If parties wish to provide reasons in their applications as to why the presumption should be upheld, they may of course do so. When it rules on a permission to appeal application, the Tribunal will clearly state if it has reached the conclusion that the presumption does not in fact apply, and that the jurisdictional requirements of section 49 are not met because the decision is not one which affects the final substantive outcome in terms of the level of damages awarded.

19. The decision in *PACCAR* is an example (and we expect a rare one) of such a case, by the Tribunal's own estimation. As Henderson LJ noted in [59], "…we should in my view be very slow to differ from the Tribunal's conclusion that a decision in favour of DAF on the DBA issue would not have marked the end of the road for the potential claimants in collective proceedings, and (by inference) that a solution would probably have been found which would have enabled them to continue with modified funding arrangements which the Tribunal would be able to approve".

20. Where the Tribunal does disapply the presumption and declines to find that it has jurisdiction to give permission to appeal, it will be open for a party to issue judicial review proceedings at that point in time, if so advised. We anticipate that such a course will be limited to rare cases like *PACCAR*, as parties will no doubt be reluctant to waste time and costs on judicial review proceedings of decisions which are likely to be case management decisions of a discretionary nature, and therefore very likely to fail at the permission stage anyway. Although future applications for permission to appeal will be dealt with by the specific Tribunal constituted to hear the case, it will likely be helpful to the parties for the Tribunal to state what its view would be on the application for permission to appeal even if it declines to find that it has jurisdiction to give permission to appeal. We anticipate that such an indication would be of assistance to either or both of the appellate court and the court with jurisdiction for judicial review challenges (for example, in England and Wales, the Court of Appeal and the Administrative Court respectively).

21. Finally, we note for completeness (as is apparent from section 49), that decisions as to costs and expenses are specifically excluded from any right of appeal, so the presumption described above would not, of course, apply to those matters.

22. Although in future it will be unnecessary to say so, given the discussion in the foregoing paragraphs, we consider that we should state in terms that the grounds of appeal in this case can – if permission is given – all be appealed to the Court of Appeal. In short, there is jurisdiction to give permission to appeal; and the question is whether we should exercise it.

C. COMMON OBSERVATIONS ON THE GROUNDS OF APPEAL

23. By way of preliminary observation common to all four grounds, we note the following:

(1) The purpose of the hearing and the Judgment was to provide basic and quite fundamental guidance to the parties on how the Tribunal expected pass on to be dealt with in a later substantive hearing. It was clear that the Tribunal was articulating the law as to pass on so as to enable appropriate evidence to be adduced ([7] of the Judgment). No factual findings whatsoever were made in the Judgment ([7] and [11] of the Judgment). Rather, the Judgment was concerning itself with the fundamentals of how such cases are to be tried.

(2) The proceedings are complex and substantial. Many hundreds (and possibly soon, thousands) of individual claims are being dealt with together, along with common issues arising in the collective proceedings brought by the Merricks Class Representative. It is of course true that each claim is an individual one, but that is to distort reality. The cases cannot be viewed singly. Instead, the Tribunal is faced with mass litigation, which must be case managed as such, recognising the constraints on the resources of the Tribunal and the interests of swift and efficient justice for all parties involved.

(3) There was ample material before the Tribunal to indicate that any close analysis of an individual retailer's approach to managing the costs represented by the alleged unlawful overcharge (the "MIF") was likely to be unproductive in most cases (the "evidential difficulty", as described in the Judgment). The likely position is that retailers will have dealt with the MIF as one relatively small cost among many, and an inquiry into the specific approach taken to the MIF as a cost is unlikely to yield useful information.

(4) Finally, we have made it plain that we are sympathetic to expert-led and focused disclosure, provided it can also be shown to be proportionate and cost effective. In that light, our orders in the Judgment do not foreclose the prospect of further disclosure from specific retailers, or other forms of evidence gathering, such as surveys.

24. We now turn to the grounds on which permission is sought.

D. GROUND 1 – THE JUDGMENT IS CONTRARY TO THE SUPREME COURT'S RULING IN *SAINSBURY'S V MASTERCARD*

25. The observations of the Supreme Court at [216] of *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] UKSC 24 concern the evidential burden of proof. That principle applies once a defendant has established a *prima facie* case on an issue (in this case, pass on). At that point, the burden shifts to the claimant to satisfy the court why the defendant's prima facie case is not correct.

26. Mastercard contends that, in [216], the Supreme Court "clearly envisaged that Mastercard (and Visa) would need evidence (and disclosure) from the Claimants in relation to how they dealt with the recovery of costs in their business in order to discharge this burden."

27. We do not agree that [216] establishes any such principle. It would not be appropriate, either as a matter of law or as a practical matter, to treat the principle concerning the evidential burden of proof as dictating a universal entitlement to disclosure. As the Supreme Court noted, the consequences for a

claimant who fails to discharge the burden is an adverse inference, not an order for disclosure. While it may be the case, in proceedings like *Sainsbury's*, that there is a fairly linear connection between the principle and the appropriate order for disclosure, that does not follow in a matter like this with all the complications of mass litigation. We do not consider the Supreme Court to have laid down any rule, or even guidance, about what disclosure might be appropriate in any particular case. Accordingly, we do not consider that this ground has a real prospect of succeeding on appeal.

E. GROUND 2 – BREACH OF ARTICLE 6(1) OF THE ECHR AND THE COMMON LAW RIGHT TO A FAIR TRIAL

28. Mastercard relies on cases such as *Hentrich* v *France* (A/296-A) (1994) 18 EHRR 440 and *Dombo Beheer BV v The Netherlands* (A/274-A) (1944) 18 EHRR 213 in arguing that the refusal of disclosure requested by Mastercard and the Tribunal's permissive approach to evidence from the merchant claimants prevent Mastercard from achieving a fair trial and create an imbalance in the relative positions of the parties, thereby infringing Mastercard's Article 6 ECHR rights.

29. We have made plain our preference for the defendants to approach the exercise of demonstrating a *prima facie* case of pass on by the use of generic, rather than specific, means. This reflects the practical reality of the need to manage the large number of claims and the nature of the evidence which we anticipate will be available. As a matter of case management, it is our view that approaching that exercise on an individual, or even a sample basis (with a sample size which would be meaningful) is an impractical exercise which would be unacceptably slow, expensive and cause undue demands on the Tribunal's resources, while likely yielding no useful result.

30. The Judgment recognises the evidential burden on the claimants (see the discussion above in relation to Ground 1) and leaves open the possibility of the claimants seeking to rely on evidence specific to a retailer. The Judgment makes it plain that any such approach will be tightly controlled by the Tribunal and that Mastercard (and Visa) will be entitled to revisit the question of retailer

specific disclosure if it becomes apparent (contrary to expectations) that such evidence is meaningful.

31. Those circumstances do not give rise to any "inequality of arms", as described in *Hentrich* and *Dombo*. Indeed, they provide for the contrary, in that we have made it plain that the position will be revisited from the perspective of all parties, if it is revisited at all.

32. This is a pragmatic decision reflecting the competing considerations arising from the particular circumstances of this matter, which is subject to further consideration and potential revision. Accordingly, we do not consider that this ground has a real prospect of succeeding on appeal.

F. GROUND 3 – THE JUDGMENT WRONGLY IGNORED MASTERCARD'S PLEADED CASE ON SUPPLIER PASS ON

33. Mastercard complains that the Tribunal has ignored an aspect of Mastercard's pleaded case as to pass on, in relation to the pass on by a merchant of its costs by negotiation with its suppliers.

34. The Judgment does not purport to deal with all issues, factual or legal, in relation to pass on. It expressly notes that there are broader pleading issues to be considered in due course (see for example footnote 18 to [34] of the Judgment). Nothing in the Judgment precludes Mastercard from advancing a case based on merchants passing on costs to suppliers.

35. During the May hearing, Mastercard did not in fact raise any issue particular to merchant pass on to suppliers or seek to persuade us that this type of pass on deserved a different approach from the one to be applied to pass on to customers. It is not clear to us why it failed to do so, if there are points which are specific to that type of pass on which require particular consideration.

36. Nonetheless, to the extent that Mastercard believes that evidence of a particular type is necessary in order to progress such a claim, and that there are reasons

why a different approach from that relating to merchant pass on to customers is warranted, the Tribunal will hear any such application.

37. In the meantime, there is nothing to appeal, as the Tribunal has made no determination in relation to this aspect of the case. Accordingly, we do not consider that this ground has a real prospect of succeeding on appeal.

G. GROUND 4 – THE JUDGMENT WRONGLY REJECTS THE ARGUMENT THAT THE CLAIMANTS WERE UNDER A DUTY TO MITIGATE

38. In [41] and [42] of the Judgment, we noted the distinction between a duty to take action to mitigate losses and the need to account for losses avoided by reason of mitigating action actually taken. Mastercard asserts that our observations in [42] about public interest aspects of the duty to take action to mitigate wrongly, and without hearing argument on the point, amount to a conclusion about the application of those public interest aspects.

39. As the Judgment makes plain at [42], the question of any duty on the claimants to mitigate was not relevant to the matters under consideration by the Tribunal at that stage. It is correct that we have indicated some of the difficulties which a defendant arguing such a case might face, but it is incorrect to say that the Judgment decides this point.

H. CONCLUSION

40. We do not consider any of the grounds advanced by Mastercard to have a real prospect of success. For the most part, they are complaints about a case management decision which is necessary and proportionate in light of the nature of the proceedings (in aggregate) before the Tribunal. Nor do we consider that any arguable point of law arises, let alone one of sufficient interest that justifies permission to appeal.

41. We therefore refuse permission to appeal on all four grounds. This decision is unanimous.

Sir Marcus Smith
President

Ben Tidswell

Lord Young

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

Date: 10 November 2022