



Neutral citation [2024] CAT 74

Case No: 1517/11/7/22 (UM)
1266/7/7/16

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 November 2024

Before:

THE HONOURABLE JUSTICE MICHAEL GREEN
(Chair)
BEN TIDSWELL
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS

(the “Merchant Umbrella Proceedings”)

AND BETWEEN:

WALTER HIGH MERRICKS CBE

Class Representative
(the “Merricks Class Representative”)

-v-

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED

(3) MASTERCARD EUROPE S.P.R.L

The Merricks Defendants
(the “Merricks Collective Proceedings”)
(together, the “Proceedings”)

Heard at Salisbury Square House on 5 November 2024

RULING (EXPERT SHOPPING)(COSTS)

APPEARANCES

Ben Lask KC and Thomas Sebastian on behalf of Allianz (Instructed by Pinsent Masons LLP)

Sonia Tolaney KC, Matthew Cook KC, Owain Draper and Daniel Benedyk on behalf of Mastercard (Instructed by Jones Day and Freshfields Bruckhaus Deringer LLP)

Tristan Jones KC on behalf of Primark (Instructed by Hausfeld & Co. LLP)

Daniel Jowell KC and Isabel Buchanan on behalf of Visa (Instructed by Linklaters LLP and Milbank LLP)

Philip Woolfe KC, Kieron Beal KC, Oscar Schonfeld and Reuben Andrews on behalf of the SSH Claimants (Instructed by Stephenson Harwood and Scott+Scott)

Mark Simpson KC and Jack Williams on behalf of Mr Walter Merricks CBE (Instructed by Willkie Farr & Gallagher (UK) LLP)

A. INTRODUCTION

1. By Application dated 29 October 2024, heard at the Pre Trial Review ('PTR') in these proceedings held on 5 November 2024, the Merricks Class Representative ("Mr Merricks") sought an order to set aside the Tribunal's Reasoned Order of 5 July 2024 whereby the Mastercard Defendants ("Mastercard") were granted permission to use a single expert, namely Ms Webster of Frontier Economics, as its economics expert in the trial on pass-on that is due to start in less than two weeks time.

B. EXPERT SHOPPING

2. I will not set out any of the background or explain the issues in the proceedings. These are all very familiar and have been set out in previous decisions of this Tribunal.
3. It was only on 31 May 2024 that the Tribunal decided that Mr Merricks should be participating in the trial of these pass-on issues. There was originally going to be a trial in just the Merchant Umbrella proceedings against Visa and Mastercard. Mastercard had opposed the consolidation of the proceedings predominantly on the basis that it was too close to trial for this to happen. Mastercard originally had separate experts for each set of proceedings, namely Dr Niels on the Merchant Umbrella proceedings, and Frontier Economics in the form of Ms Webster since October 2023 for Mr Merricks' proceedings. Mastercard is in the tricky position of arguing in the Merchant Umbrella proceedings that there were high rates of pass-on whereas in relation to Mr Merricks' proceedings, which are concerned with a different time period, it will want to argue that there were much lower rates of pass-on.
4. Seizing on this dilemma in which Mastercard has been placed by the consolidation of the proceedings for this trial, Mr Merricks seeks to argue that Mastercard is engaged in what is called "expert shopping" in wishing to use Ms Webster as its expert. Mr Merricks, in fact, goes much further than this and says that the Tribunal has been misled about the need and reasons for the alleged

change in expert and as to the extent of the alleged differences in the approach of Dr Niels and Ms Webster.

5. These are serious allegations of misconduct by Mastercard's legal team, and even though they were not ultimately pursued to that extent in the hearing before us, we do question the appropriateness of raising them in this way. Mr Mark Simpson KC, leading Mr Jack Williams, has appeared on behalf of Mr Merricks and put in extensive and, we thought, rather too extensive written submissions both for this hearing and the case management conference ('CMC') that was heard on 22 October, when the point was first formally raised.
6. While Mr Simpson has made engaging oral submissions in support of the Application, we are of the unanimous view that the Application fails and there should now be concentration on preparing for a trial starting very soon and which has, as we discussed this morning, a very tight timetable, which the parties will have to abide by if we are to get through what we need to get through before Christmas.
7. Mastercard is represented on this occasion by Ms Sonia Tolaney, KC, together with Mr Matthew Cook KC, Mr Owain Draper and Mr Daniel Bedyk. The other parties have remained neutral on this Application.
8. Mastercard's position is that there has been no expert shopping, that Ms Webster has always been Mastercard's expert in Mr Merricks' proceedings, that all possible questions raised by Mastercard's decision to go with Ms Webster and not Dr Niels as its expert have been answered by the witness statements, particularly the second witness statement dated 28 October 2024 of Mr Nicholas Cotter, the partner in Jones Day instructed by Mastercard in the Merchant Umbrella proceedings.
9. Mr Simpson submitted that evidence from Mr Cotter was insufficient and there ought to have been evidence from someone at Freshfields also, as they are acting for Mastercard alongside Jones Day but in relation to Mr Merricks' proceedings. This rather demonstrates, in our view, the extent to which Mr Merricks is prepared to go in pursuing this Application.

10. In our view Mr Cotter's unequivocal statements in a witness statement verified by a statement of truth as a senior experienced solicitor and partner in Jones Day do provide an insuperable obstacle to Mr Merricks' Application. We were unclear exactly how far Mr Simpson was actually going in relation to those statements. From the skeleton arguments, it certainly appeared to be his case that the statements were false and should not be relied upon. However, as we have already made clear, we are not prepared to countenance any such allegation.

11. Mr Cotter made two important statements. First of all, in paragraph 20 of his second witness statement he said:

Without waiving privilege, I confirm that Dr Niels' views on pass on formed no part of Mastercard's decision to seek permission for Ms Webster as its single testifying expert in competition economics for trial 2.

12. In paragraph 29 he said:

I confirm that prior to Mastercard's application dated 6th June 2024 Dr Niels did not communicate to Mastercard or its lawyers in the context of these proceedings any materially different view on the substantive issues of merchant pass on to be determined at trial 2 to those set out in the JES, his evidence at the January hearing and his previous expert reports.

13. We have had a debate as to whether Mr Merricks was saying that this was deliberately false or not. Ms Tolaney, of course, submitted that it was quite outrageous to make such an allegation. Mr Simpson disavowed any reliance on saying that Mr Cotter was lying or acting dishonestly, but he did question the credibility of the statement, and said that it could be tested by reference to other material. However, he agreed that if we accepted the statements on their face and were not prepared to interrogate further or go behind those statements, that that would effectively be an end to the expert shopping allegation.

14. As we made clear, we are not prepared to go behind the statements. With such unequivocal evidence there cannot be any wider enquiry into what would inevitably be the privileged area of how the decision was made to go with Ms Webster alone rather than the two experts or just Dr Niels. What is slightly baffling about the Application is that Mr Merricks has plenty of material that contains Dr Niels' views on pass on, both from previous reports and also his

oral evidence in other proceedings and earlier in these proceedings. This can all be deployed, no doubt to good effect, by Mr Simpson in his cross examination of Ms Webster so as to undermine her evidence and therefore that of Mastercard. He has effectively divulged his cross examination in part by pointing out what he says are the differences between the two experts. There is no need for him or the Tribunal to know anything more about Mastercard's internal decision making and we are not prepared to require Mastercard to waive privilege in such respect.

15. Much was made of the chronology of this point being raised and whether it was Mastercard's or Merricks' fault that this had become such a big issue so late in the day. The position can be stated quite shortly.
16. First of all, Frontier Economics have been Mastercard's expert economists in Mr Merricks' proceedings since around 2016. For a longer period of time, Dr Niels of Oxera has been its expert in the Merchant Umbrella proceedings and he gave evidence in Trial 1 on liability.
17. As Mr Merricks had wanted to join in the pass on trial for some time, the Tribunal had permitted Mr Merricks' expert, Mr Coombs, to participate in inter-expert processes and meetings and Mastercard informed the other parties on 17 October 2023 that, rather than two experts attending such meetings on its behalf, Dr Niels would attend on behalf of both expert teams, that is on behalf of Frontier as well. No one objected to this, although something is made of that point by Mr Simpson in his submissions. Members of both economist teams were admitted also into the confidentiality ring. Mr Merricks has suggested that both of these steps, namely the attendance at expert meetings on behalf of Frontier and the admission into the confidentiality ring, were merely "window dressing", but we do not understand this allegation.
18. On 22 May 2024, against Mastercard's opposition, Mr Merricks was allowed to participate in this trial on pass on issues. Leading counsel for Mastercard at that hearing suggested that:

It may be appropriate to move to one expert, namely Ms Webster.

Nothing was said about this by Mr Merricks then. The Tribunal said that it may be willing to give Mastercard permission to rely on two experts at the trial.

19. On 6 June 2024 Mastercard applied to proceed just with Ms Webster as its expert economist. This would mean that she would have to replace Dr Niels in the Merchant Umbrella proceedings. Mr Merricks, however, for the first time suggested that this might be “expert shopping”, even though the expert in his proceedings was not actually being changed. It is one of the oddities of these proceedings that the claimants in the proceedings in which the experts have been changed are not objecting to the change.
20. This was first considered at the mini-CMC on 7 June 2024 and concerns were expressed as to the extent to which Ms Webster agreed to the views already expressed by Dr Niels. Mastercard agreed to provide a statement from Ms Webster, which it did on 14 June 2024. This explained that she had worked with Dr Niels’ team to develop Dr Niels’ approach and for the joint expert report of December 2023. That joint expert report had been prepared before the “actual universe of evidence” had been disclosed. Ms Webster confirmed that her approach “aligned with that set out by Dr Niels”.
21. Mr Merricks persisted in the allegation and wanted conditions imposed, including the disclosure of draft reports from Dr Niels. In the Tribunal’s reasoned order of 5 July 2024, the Tribunal did not impose conditions and granted permission to Mastercard to rely on Ms Webster as its sole expert. It left open the possibility, when Ms Webster’s report was received in August, to apply to investigate any differences between her and Dr Niels, “including by seeking information about views previously expressed by Dr Niels and/or seeking to compel his attendance at trial to be cross examined”. If, however, there was no “material variation”, the issue of expert shopping would have been resolved.
22. Ms Webster produced her report on 9 August 2024. There was no complaint at all for two months. Mr Merricks only raised again the issue of expert shopping in his legal wrapper to his responsive case, which was served on 9 October 2024. No Application was raised, and it was only a month until the trial.

23. Mr Merricks repeated those points in his skeleton argument for the CMC on 22nd October 2024, but it was only after those skeletons had been exchanged that an Application was made by letter on behalf of Mr Merricks for disclosure of privileged material. Mastercard complained about how little time it had to respond to those serious allegations.
24. Mr Simpson then made extensive submissions at the CMC lasting over an hour and which, because of other matters that had to be dealt with, left little time for Mastercard's counsel to respond fully. Mr Tidswell, who was chairing the CMC, offered a provisional view that Mr Merricks had "created enough smoke to suggest that there might be some fire somewhere" and he invited Mastercard to provide evidence to show that the decision to proceed with Ms Webster was not influenced by Dr Niels' views being adverse to Mastercard's interests in trial 2. Mastercard then produced Mr Cotter's witness statement, which I have already quoted from. This clearly did not satisfy Mr Merricks, and he proceeded with this Application in the face of it.
25. The authorities on expert shopping which were relied upon by Mr Simpson both at the last CMC and before us at today's PTR are based on the vice of changing an expert because they have expressed views that are contrary to the instructing party. We do have a problem with expert evidence in this jurisdiction in that we have an adversarial system in which parties choose the evidence they wish to call, but in relation to experts they have duties to the Tribunal to be independent and the Tribunal has the power to control expert evidence.
26. In cases where a party wishes to change their expert they will commonly be able to do so if the original expert's report is disclosed, but disclosure beyond that is much rarer and more difficult to justify in that it would probably amount to a significant invasion of privilege. It seems that from the original ruling of 5th July 2024 the Tribunal was concerned that there might have been a material variation from the views previously expressed by Dr Niels. If it appeared that there had not been, then there was no expert shopping issue and there was no other problem with Mastercard being able to rely on a single economics expert.

27. Much of Mr Simpson's complaint centred around the supposed lack of evidence adduced by Mastercard to explain its position. I have already mentioned Freshfields, but he also suggested that there should have been evidence forthcoming from Dr Niels himself and Ms Webster, but, as I have said, he has Ms Webster's evidence. It is contained in her reports. What more should she be required to put in at this stage? In relation to Dr Niels there is also much of his evidence available to the parties.
28. The main points raised by Mr Merricks were: (1) the reason for the change in expert; and (2) whether there are fundamental differences of approach between Ms Webster and Dr Niels.
29. As to the reason for the change, Mr Merricks focused on the statement in Mastercard's evidence and skeleton argument about the obvious saving of costs and efficiencies in the run-up to trial of only having one expert. Mr Merricks said that if that was the true reason for the change, then it would have been irrational to go for Ms Webster rather than Dr Niels. That costs savings reason was not repeated in Mr Cotter's witness statement, but that was not because it was being abandoned, as Mr Merricks suggested. Rather it was because it never was the reason, so Mastercard says. Mastercard says that it has never waived privilege over its reasons for wanting Ms Webster as its sole economics expert, and nor should it be required to do so now. It firmly rejects any allegation that it misled the Tribunal as to its reasons for this and it never actually said that cost savings was the reason. There could be many reasons for preferring one expert over another and Mr Merricks should not be able to invoke the expert shopping jurisdiction to require privilege to be waived and Mastercard's decision-making exposed to scrutiny.
30. We have sympathy for Mastercard's position. Privilege is incredibly important for the due administration of justice and should not be lightly waived. We do not believe that a party should be able to say, "We think you have been expert shopping and, because you have not explained how you chose one expert over another, you must be required to disclose privileged material that may or may not show an illegitimate reason for the change". In any event Mr Cotter has said

effectively on oath that the decision was not based on Dr Niels' views on pass-on and that is an end to the matter.

31. As to the alleged inconsistencies between their views on pass-on, Mr Merricks has spent much time in his skeleton argument and in oral submissions explaining the five main alleged inconsistencies. These are: (i) the approach to sectors; (ii) whether in the long run all fixed costs are variable, which is what Dr Niels appeared to have said; (iii) whether MSCs are a variable cost; (iv) Dr Niels' views that pass-on across the whole economy would be expected to be very high; and, (v) whether pass-on rates might change over time.
32. Together with Mr Cotter's unequivocal statements as to Dr Niels' evidence and Mastercard's convincing responses to the alleged inconsistencies, we do not feel it is necessary to deal with these points in any detail. We do not accept at this stage that there are such inconsistencies, but the important point is that Mr Merricks will have every opportunity to use these alleged inconsistencies at the trial to undermine Mastercard's evidence and case. The fact that they were able to make such detailed submissions only goes to show that they already have so much material from Dr Niels such that his views are well known and able to be deployed at trial.
33. In short, we do not think it is appropriate to overturn the order made on 5 July 2024 permitting Mastercard to rely on Ms Webster as its single economics expert, nor do we think it is appropriate to attach conditions to that permission, such as disclosure of further documents or requiring Dr Niels to attend for cross examination. That latter suggested condition would not only be disruptive for the tight trial timetable, but also it is difficult to see what Mastercard and Dr Niels should be expected to do to prepare for such cross examination and what the status of that evidence might be.
34. I add, by way of coda, that I do consider that Mr Merricks has gone too far in this Application and has made inappropriate allegations that the Tribunal has been misled by Mastercard in relation to its expert evidence. The Application has an extremely tactical feel to it, with Mr Merricks opportunistically seeking to ensure that Mastercard has to use his preferred expert, but because of the way

these proceedings have evolved, it was understandable that Mastercard would want to go with one rather than two experts and the allegation of expert shopping was never as strong as Mr Merricks suggested. When Mr Cotter's evidence came in, he should have realised that that was really the end of it. I therefore dismiss the Application.

C. RELATED COSTS

35. In relation to the costs of Mr Merrick's Application, which has failed for the reasons that I set out above, I now have to decide the costs question.

36. The first issue is whether costs should be paid by Mr Merricks or, as was submitted by Mr Simpson, that the same course should be adopted as in relation to the earlier Application, namely that this was an Application that had to be made at the PTR. We were here anyway. Briefs have been delivered and so it should be just costs in the case.

37. I disagree. This was an Application that is on quite a different scale to that other one. It should probably have been brought on a bit earlier, but it is a self-contained Application, a somewhat extraordinary Application. We don't consider that that is normal PTR business. So, therefore, I am going to be ordering Mr Merricks to pay the costs of the Application.

38. The next question is Ms Tolaney's Application that those costs should be assessed on the indemnity basis and that means I need to apply the well known test as to whether the conduct of Mr Merricks was out of the norm.

39. Now there are various stages to the Application, but what I have concluded is that there should be an order for indemnity costs after the service of Mr Cotter's second witness statement. It was at that stage that I consider Mr Merricks should have realised that it was inappropriate to proceed with the Application.

40. Furthermore, there should not have been the allegations of dishonesty and misleading of the court which were quite clearly made at some point, including potentially during the course of this hearing. I think that was completely

inappropriate in the circumstances, and it is appropriate, therefore, for the Tribunal to mark its disapproval of such allegations being made by the award of indemnity costs.

41. In relation to the period before Mr Cotter's second witness statement was served I am just persuaded by Mr Simpson's submissions and explanation as to the chronology that those should be paid or assessed on the standard basis. There is a reason why the Application was only made in October at the CMC. More notice could have been given to Mastercard that the Application was going to be made, but at the CMC, and despite Mastercard feeling that it had been ambushed certainly by the oral submissions that were made at the CMC, nevertheless it was the conclusion of that CMC that Mastercard had some questions to answer and had to really decide how to answer those questions and put in a witness statement, as it did in the form of Mr Cotter's witness statement.
42. There was justification in the Application being made at that stage and, despite some misgivings as to the way Mr Merricks approached that and the timing of it, I am persuaded that the costs should be assessed just on the standard basis for that period.

The Hon Mr Justice Michael Green
Chair

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

Date: 10 December 2024