Neutral citation: [2022] CAT 3

IN THE COMPETITION APPEAL TRIBUNAL

Cases Nos: 1306-1325/5/7/19 (T)
1349-1350/5/7/20 (T)
1383-1384/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

2 February 2022

Before:
THE HONOURABLE MR JUSTICE ROTH
(Chairman)
TIM FRAZER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

DUNE GROUP LIMITED AND OTHERS

Claimants

- and –

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SA
(4) MASTERCARD/EUROPAY UK LIMITED

Defendants

AND BETWEEN

DUNE SHOES IRELAND LIMITED AND OTHERS

Claimants

- and –

(1) VISA EUROPE LIMITED
(2) VISA EUROPE SERVICES LLC
(3) VISA UK LIMITED

Defendants

RULING: PERMISSION TO APPEAL

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1. On 26 November 2021, the Tribunal issued its judgment on the Claimants' application for summary judgment and the application by the Visa Defendants for permission to amend their defence: [2021] CAT 35 ("the Judgment"). This ruling uses the same abbreviations as the Judgment. As explained in the Judgment at [1], it was given in eight sets of proceedings, four of them being the Visa Actions and four of them the Mastercard Actions. The application for summary judgment covered all eight actions. The application for permission to amend concerned three of the four Visa actions.

2. As set out in the Judgment at para [29], the applications raised seven distinct issues. Four of those seven issues arose in both the Visa and Mastercard actions and were resolved in favour of those defendants. The remaining three issues arose only in the Visa actions and were resolved in favour of the claimants. Visa has made a written application pursuant to rule 107 of the CAT Rules for permission to appeal against the decision of the Tribunal on each of those three issues (the "PTA Application"). We understand that the claimants have made an application direct to the Court of Appeal for permission to appeal regarding the other issues.

(1) Acquisition of Visa Europe by Visa Inc.

3. This issue is addressed in the Judgment at [90]-[103].

4. On 21 June 2016, Visa Europe was acquired by Visa Inc. The Judgment recognises that thereafter it is well arguable that Visa Europe ceased to be an association of undertakings, such that the setting of the various MIFs was not a decision of an association of undertakings. However, the Judgment held that the acquisition does not in itself constitute an arguable defence to the claims that the implementation and maintenance of the rules of the Visa scheme as regards the obligation to pay a MIF infringed Art 101 TFEU and the Chapter I prohibition under the CA 1998. That is because we held, in accordance with the decision of the CAT in *Sainsbury's v Mastercard* and the view expressed by Popplewell J (as he then was) in the *AAM* case, that the Visa arrangements constituted an agreement and/or a concerted practice. Whether that agreement or concerted practice had an adverse effect on competition is of course a distinct question. Indeed, we held that both Visa and Mastercard had arguable defences

that, after the entry into force of the caps on the MIFs on 9 December 2015 under the IFR, their respective arrangements did not appreciably restrict competition (and on that basis refused to grant the claimants summary judgment for their claims after that date). That is therefore a matter for trial. But the Judgment holds that it is not arguable that there was no adverse effect on competition *only* because Visa Europe ceased to be an association of undertakings.

5. By the PTA Application, at paras 7-11, Visa essentially submits that there is no anti-competitive agreement or concerted practice if the banks that were members of the Visa system did not collectively determine *the level* of the MIFs. As explained in the Judgment, this is fundamentally misconceived. It is not in dispute that all the banks agreed with Visa Europe that (in the absence of bilateral agreements) they would conduct transactions with one another under the scheme rules and charge the MIF that was determined by Visa: see the analysis of the equivalent Mastercard arrangements by the CAT in *Sainsbury's* quoted in the Judgment at [96]. The PTA Application does not set out any basis for contending that this analysis was flawed or that the Visa scheme is materially different.

6. The PTA Application again seeks to rely on the airline analogy rejected in the Judgment at [100]. We emphasise:

   (a) Airlines which independently agree with an airport operator to pay its landing fees do not carry out transactions with one another at all; still less do they charge that fee to each other.

   (b) Where competitors all enter into a common arrangement whereby, for their transactions with each other, they charge a common fee (i.e. here positive MIFs) set by a third party, there is manifestly an agreement or concerted practice that may have an anticompetitive effect.

   See also the law on what constitutes an agreement or concerted practice referred to in the Judgment at [95].

7. Accordingly, we do not consider that Visa has a real prospect of success on this ground of appeal.

(2) Visa Inc.

8. This issue is addressed in the Judgment at [104]-[108].

9. This issue concerns only the claims as regards inter-regional MIFs, but for those MIFs it is relevant for the total claims period and not only for the period after 21 June 2016. That is because Visa Inc set the inter-regional MIFs throughout.

10. As the PTA Application recognises at para 14, the basis of this ground of appeal is essentially the same as under Ground (1). For the same reasons as set out above in respect of Ground (1), we do not think that it has any real prospect of success.

(3) The Asymmetric Counterfactual

11. This issue was not argued in the hearing which led to the Judgment, since it had been argued previously by Visa in these proceedings and had been rejected: see the Judgment at [30]-[33]. Visa, but not Mastercard, sought to raise the asymmetric counterfactual again in opposition to the application for summary judgment. Having rejected the asymmetric counterfactual, we gave summary judgment in respect of the UK and Irish domestic and intra-EEA MIFs for the period up to 8 December 2015 (i.e. before the IFR came into force).

12. Although formally seeking to appeal against that summary judgment, Visa is in effect seeking to challenge (as it had reserved the right to do) the earlier decision rejecting its counterfactual argument when we refused to make a reference to the CJEU: [2020] CAT 26 ("the Reference Judgment").[1]

[1] Subsequently, the CAT also rejected Visa's similar argument of an asymmetric counterfactual in the proceedings commenced by Sainsbury's, which had been remitted to the CAT by the Supreme Court: *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2021] CAT 17.

13. As we understand it, Visa does not seek to suggest that the CAT would not be bound to find that there was an infringement of TFEU Art 101/the Chapter I prohibition in view of the Supreme Court judgment, in the absence of the decision of the CJEU in *Budapest Bank.* The whole foundation of Visa's argument is that *Budapest Bank* has effectively overruled the rejection of the asymmetric counterfactual in the CA judgment: PTA Application, paras 16.2 and 20; and that, since this aspect of the CA judgment was not challenged in the Supreme Court, the Supreme Court judgment is irrelevant: PTA Application, para 16.1.

14. We considered *Budapest Bank* in detail in the Reference Judgment and explained why Visa seeks to read far too much into that judgment. Much of the PTA Application recycles Visa's arguments from that hearing and for reasons set out in the Reference Judgment we consider that the implications Visa seeks to draw from *Budapest Bank* are untenable and misconstrues the role of the CJEU on a reference under Art 267 TFEU.

15. Further, the attempt in the PTA Application to sweep aside reference to the Supreme Court judgment is mistaken. Although the asymmetric counterfactual argument was not pursued in the Supreme Court, Visa did there rely on *Budapest Bank* and the Supreme Court then distinguished that case on fundamental grounds at [88]:

> "In our judgment the case can clearly be distinguished in that: (i) it concerned restriction by object rather than effect; (ii) it involved a different type of MIF agreement and, in particular, one which was said to prevent escalating interchange fees; and (iii) it involved a different counterfactual, namely one where each scheme had its own MIF rather than there being no MIF."

The observations at (i) and (ii) are of general application and Visa is wrong in implying that the Supreme Court distinguished *Budapest Bank* only on ground (iii): PTA Application, para 21.3.

16. Moreover, the Supreme Court judgment held that the essential factual basis for the conclusion in *Mastercard CJ* that there was a restriction of competition is mirrored in the Visa and Mastercard schemes, such that *Mastercard CJ* is binding on the UK courts: Supreme Court judgment at [93]-[94]. Visa is accordingly seeking to challenge that conclusion on the basis of *Budapest Bank,*

which was considered by the Supreme Court in reaching that conclusion, albeit in the context of a different argument.

17. While Visa is correct that the counterfactual was no longer in issue before the Supreme Court, that was because it had been determined by the CA Judgment, which, in that regard, held that the national courts were bound by *Mastercard CJ* to find that the correct counterfactual was a no default MIF and a prohibition on *ex post* pricing: CA Judgment at [185], cited in the Supreme Court judgment at [47]. That interpretation and application of *Mastercard CJ* was not challenged by either Visa or Mastercard in their appeals to the Supreme Court. Moreover, the CA judgment stated, at [202]:

> "We consider that a realistic counterfactual would assume that, if one of the schemes was unable (whether for commercial or legal reasons) to set default MIFs, the other scheme would be similarly constrained."

The Court of Appeal proceeded to hold that the asymmetric counterfactual was "completely unrealistic and improbable": CA judgment at [203].

18. That conclusion was a general one based on the factual and legal context in which the schemes operated: it was not dependent on whether the question of the counterfactual arose at any particular stage of the analysis. As the CJEU stated in *Mastercard CJ* at para 108:

> "… irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic".

Unsurprisingly, there is nothing in *Budapest Bank* which is inconsistent with that general statement or which suggests that an asymmetric counterfactual would somehow be realistic.

19. Finally, Visa acknowledges in the PTA Application at fn 1 to para 22 that in *Asda Stores Ltd v Mastercard*, where the CAT had rejected an attempt (there by Mastercard) to advance the asymmetric counterfactual, permission to appeal has been refused by the Chancellor in his ruling of 25 October 2021. Visa seeks to distinguish that ruling on the basis that Mastercard's argument was different and had not sought to rely on *Budapest Bank.* However, that ignores one of the grounds on which the Chancellor refused permission to appeal:

> "… the consequence of accepting Mastercard's case on the asymmetrical counterfactual would be that each of Mastercard and Visa could avoid liability in damages in whole or in large part, for operating an unlawful scheme by relying on the effects of competition arising from the other's unlawful scheme."

That echoes the view of Philips J (as he then was) in *Sainsbury's v Visa* [2017] EWHC 3047 (Comm), referred to in the CA judgment at [53], where Visa had advanced the asymmetric counterfactual on the question whether there was an unlawful restriction. The point is unaffected by *Budapest Bank* and clearly applies as much to Visa's attempt to rely on the asymmetric counterfactual in the present case.

20. Accordingly, we do not think that this ground of appeal has any real chance of success.

Conclusion

21. For the reasons set out above, we refuse Visa's application for permission to appeal. This ruling is unanimous.

The Hon Mr Justice Roth
Chairman

Tim Frazer

Paul Lomas

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

Date: 2 February 2022