



Neutral citation [2023] CAT 33

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1266/7/7/16

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

25 May 2023

Before:

THE HONOURABLE MR JUSTICE ROTH  
(Chair)  
THE HONOURABLE LORD ERICHT  
JANE BURGESS

BETWEEN:

**WALTER HUGH MERRICKS CBE**

Class Representative

- and -

**(1) MASTERCARD INCORPORATED**  
**(2) MASTERCARD INTERNATIONAL INCORPORATED**  
**(3) MASTERCARD EUROPE S.P.R.L.**

Defendants

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**RULING: APPLICATIONS FOR PERMISSION TO APPEAL**

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1. On 21 March 2023, the Tribunal handed down judgment in these proceedings on four preliminary issues: [2023] CAT 15 (“the Judgment”). This ruling uses the same abbreviations as the Judgment.
2. One of those issues was decided in favour of Mastercard: the Limitation/Prescription issue. The other three issues were decided in favour of the CR. The CR applies for permission to appeal against the decision on the Limitation/Prescription issue. Mastercard applies for permission to appeal against the decision on two of the other three issues: the Proper Law issue and the Exemptibility issue. As is customary before the Tribunal, the permission applications were made in writing and the other side served written submissions in response.

**A. THE LIMITATION/PRESCRIPTION ISSUE**

3. This concerns the interpretation of rule 119 of the CAT Rules 2015, rule 31(1)-(3) of the CAT Rules 2003 and s. 47A CA 1998.
4. The construction of the rule 119 and the other relevant rules was the subject of full consideration by the Tribunal in *DSG Retail Ltd v Mastercard Inc* [2019] CAT 5 (“*DSG CAT*”) and then by the Court of Appeal, largely reversing the Tribunal’s conclusions, in [2020] EWCA Civ 671 (“*DSG CA*”). Although the view expressed by the Court of Appeal in *DSG CA* on the matter which arises in the present case may be *obiter*, the Judgment reached the same conclusion, in the light of the construction of the transitional provisions in the CAT Rules in *DSG CA* which is binding. While the CR argued the contrary and submitted that the *obiter dicta* of the Court of Appeal were wrong, those dicta were clearly the considered view of the Court of Appeal and meant that the limitation provisions in the CAT Rules operated in a coherent and just way: Judgment at [34] and [40]-[41].
5. The construction of s. 47A CA in the relevant respect relied on by the CR was the subject of the judgment of the Tribunal in *Deutsche Bahn AG v Mastercard Inc, Peugeot Citroen Automobiles UK Ltd v Pilkington Group Ltd* [2016] CAT 14. That decision was not appealed and the CR does not suggest that it was wrongly decided. However, the construction of s. 47A which the CR urged in the present case is

inconsistent with the interpretation of the statutory provision applied in that case: Judgment at [36]-[38].

6. By Ground 1, the CR contends that the Tribunal erred in law in holding at [43] that it was unnecessary to consider why rule 31(4) had been included in the 2003 Rules and, on the contrary, that the Tribunal should have considered the meaning and purpose of rule 31(4). This argument is misconceived. The observation in the Judgment at [43] was made when rejecting a submission by Mastercard relying on rule 31(4) and upholding the submission of the CR that this sub-rule has no application to the present claims: see the full text of [43].
7. Ground 2 misrepresents the Judgment. We did not say that there was anything illogical in a clear abrogation of accrued limitation rights. The illogicality referred to in the Judgment is quite distinct, as set out at [42]. The Tribunal held that the CR's case produced the illogical consequence that for claims under English law arising prior to 20 June 1997 or claims under Scots law arising prior to 20 June 1998:
  - (a) proceedings issued before 1 October 2015 might be time-barred (as they would be subject to the 2003 Rules), whereas
  - (b) proceedings issued after 1 October 2015 would not be time-barred (as they would be subject to the 2015 Rules).

In other words, if the CR's construction of the rules and statute were correct, the later those claims were commenced, the better the claimants' prospects on limitation/prescription. We considered that the drafters of the legislation cannot have intended that illogical result.

8. Ground 3 of the CR's application also seeks to rely on an inference drawn from the omission of the reference to rule 31(4) in rule 119(2) of the 2015 Rules. Moreover, the CR's argument under this ground is based entirely on the alleged implication as regards a time bar under the Limitation Act 1980 and ignores the fact that rule 31(4) clearly does not apply to a time bar under Scots law: Judgment at [29(1)]. If the CR's argument under this ground were correct, claims before the Tribunal governed by Scots law

would be subject to the statutory regime of prescription under Scots law whereas claims governed by English law would not be subject to the statutory regime of limitation under English law. We found it inconceivable that the drafters of the rules intended that consequence.

9. Accordingly, we do not see any real prospect that if the Court of Appeal were to consider these rules once again, it would find that the Tribunal's decision on this issue was wrong on the grounds put forward in the CR's application.

## **B. THE PROPER LAW ISSUE**

10. There were two discrete aspects to this issue because of the different legal regimes applicable to the two time periods involved: Judgment at [73].

### **(1) 1 May 1996 onwards**

11. It is common ground that ss 11-12 of PILMPA 1995 are the governing provisions for this period.
12. We held that the general rule under s. 11(2)(c) leads to the conclusion that the applicable law is English law for claimants in England and Wales, and Scots law for claimants in Scotland. That conclusion rested on the interpretation of what the criteria should be for the "significance" test in the sub-section, which we found was unclear: Judgment at [88]-[90]. If the decision had depended on this point, we would have given permission to appeal.
13. However, we proceeded to hold that even if our decision was wrong under s. 11(2)(c), this was an exceptional case where the general rule should be displaced under s. 12. The Judgment paid full regard to the high test for the application of s. 12. Mastercard suggests that the Judgment is at fault for not *quoting* the speech of Lord Clarke in *VTB Capital* although the Judgment makes express reference to the relevant paragraphs in Lord Clarke's speech at [92]. We do not see any merit in that argument and Mastercard cannot suggest that s. 12 should never apply.

14. By contrast with s. 11, and contrary to Mastercard's submission, s. 12 expressly requires 'appropriateness' to be assessed in the context of "determining the issues arising in the case". Moreover, the application of s. 12 depends on an evaluative analysis of a range of factors as to which the statute sets out a non-exhaustive list. That multi-factorial analysis is a matter for the judgment of the Tribunal and we do not think that there is any real prospect of the Court of Appeal setting aside that evaluation. Moreover, some of the grounds of challenge in Mastercard's application to that evaluation concerns questions of fact not errors of law. As for Mastercard's submission that the Tribunal was not entitled to take into account the prospect of a claimant's claim being governed by different systems of law because that factor is not included under s. 12, that argument is misconceived: the list of factors set out in s. 12(2) "which may be taken into account" is expressly stated to be non-exhaustive. Accordingly, there is no real prospect of finding that the Tribunal erred in law in having regard to that factor, among others.

(2) **From 22 May 1992 to 30 April 1996**

15. It is common ground that for this period the proper law is determined by the common law rule of double actionability.
16. As regards the general rule, Mastercard accepts that this would result in multiple answers as to the proper law for the claims of individual class members. It should be emphasised that each class member's claim lies against Mastercard in respect of all his or her purchases, and the tortious *act* on which that claim is based is Mastercard's system for determination of the MIF: the class member is not bringing different claims against different merchants in respect of his or her purchases. Accordingly, Mastercard's submission that the general rule produces a single answer for the claim of each class member, on the basis that each purchase constitutes a separate claim, is mistaken. If Mastercard were right, each CM would be bringing many thousands, or even (given the long claim period) millions of claims.
17. Mastercard does not suggest that the law as to application of the exception to the general rule is incorrectly stated in the Judgment. The Judgment expressly recognised, by way of quotation from *Dicey*, that the exception is designed for unusual cases and cited the

dicta from *Boys v Chaplin* that there must be clear and satisfying grounds to depart from the general rule.

18. Like s. 12 PLMPA above, application of the exception depends on evaluation of a range of factors related to the particular case. The application here is analogous to the challenge to the decision under s. 12. The exception is not to be applied in a mechanical way but is very fact-sensitive and, as with the decision under s. 12, we do not think that there is a real prospect of success in an appeal contending that the Tribunal's evaluation set out at [100]-[101] of the Judgment was wrong as a matter of law.

### **C. THE EXEMPTIBILITY ISSUE**

19. This issue was determined in the Judgment on two independent grounds: (a) the binding effect of the Decision; and (b) abuse of process. Either of those two grounds was sufficient to support the determination.
20. If the only ground for the determination of this issue was abuse of process, we would have given permission to appeal. We recognise that the present case is different from *Trucks – CA*, since that concerned a settlement decision of the Commission. The principles of abuse of process were here being applied in a somewhat novel situation and we could not say that an appeal on this ground would not have a real chance of success.
21. However, the determination was also reached on the independent and very different ground of the binding effect of the Decision. There is no doubt about the legal principle that the Tribunal is precluded from making a decision that is inconsistent with the Decision reached by the Commission. This is a purely follow-on case where the infringement alleged is precisely the same as, and for the same time period as, that which is the subject of the Decision.
22. The question for the Tribunal was therefore to determine the scope of the Decision, properly analysed and understood. It is clear that the Decision was that the Mastercard infringed Art 101 over the period in question by reason of its network rules and EEA MIF: i.e. that this restricted competition within Art 101(1) and did not qualify for

exemption under Art 101(3). Mastercard accepted that the former is of general application (as it had to do in light of the Supreme Court judgment in *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2020] UKSC 24); but argued that the latter was confined to the actual level of Mastercard's EEA MIFs considered by the Commission. Thus Mastercard sought to argue that while lower level of EEA MIFs would still have restricted competition and fallen within Art 101(1), they would have qualified for exemption under Art 101(3).

23. However, the Decision did not rest on the level at which the MIF was set. Nowhere in the detailed analysis in the Decision of the first three<sup>1</sup> of the four cumulative conditions for the application of Art 101(3), as summarised and quoted from in the Judgment, is there consideration of the *level* of MIFs set by Mastercard. That was not the basis of the Decision on Art 101(3), since that was not the way in which Mastercard argued its case. It is of course very possible that if Mastercard had argued its case on a different basis, then the basis and effect of the Decision might have been different. But the Tribunal is bound by the Decision which the Commission made, not a decision which it might have made.
24. The argument at para 28(1) of the application is fundamentally misconceived in a manner that goes to the heart of Mastercard's case on exemptibility. The position is explained in the Judgment at [133], quoting the relevant words in Art 1 of the operative part of the Decision, but in view of what is said in Mastercard's application we set out Art 1 in full:

“From 22 May 1992 until 19 December 2007 the Mastercard payment organisation and the legal entities representing it, that is MasterCard Incorporated, MasterCard International Incorporated and MasterCard Europe S.p.a., have infringed Article 81 of the Treaty and, from 1 January 1994 until 19 December 2007, Article 53 of the EEA Agreement by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards.”

25. Thus:

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<sup>1</sup> Having found that none of the first three were satisfied, the Commission did not trouble to consider the fourth: Judgment at [131].

- (a) Art 1 of the Decision is applying the whole of Art 101 (then Art 81): it is not restricted to Art 101(1).
  - (b) Art 1 of the Decision therefore encompasses a holding that the conditions of Art 101(3) are not fulfilled (as explained in the recitals).
  - (c) The basis of the holding as regards both Art 101(1) and Art 101(3) is the same: that Mastercard through the EEA MIFs were “in effect setting a minimum price merchants must pay to their acquiring banks for accepting payment cards”.
  - (d) That holding of course concerns the EEA MIFs subject to the Decision but it applies irrespective of the level of those MIFs since any positive MIF has the effect which is referred to.
26. The analysis in the Judgment of the sections of the Decision in which the Commission addressed the criteria for exemption demonstrates that this was indeed the foundation of the Commission’s reasoning which forms the basis for Art 1.
27. Indeed, we think it is precisely because of the scope of the operative part of the Decision that recital (13) makes clear that for a future period Mastercard may be able to adopt a new MIF and provide “solid empirical evidence” to show that it satisfies the criteria for exemption.
28. In para 28(2) of Mastercard’s application, as in its argument before the Tribunal, Mastercard again seeks to rely strongly on recital (13) of the Decision, quoted in the Judgment at [137]. Mastercard expressly accepts that this was “a forward-looking statement”. It does not qualify the effect of the Decision for the previous years which the Decision covers and which constitute the relevant period for the present case.
29. Apart from its argument regarding recital (13), Mastercard’s application does not identify any sections of the Decision which it contends the Judgment misconstrued. At para 28(2)(b), the application sets out a long list of recitals from the Decision. It is correct that the Judgment does not discuss every one of the, literally, hundreds of



recitals in the Decision<sup>2</sup> which analysed Mastercard's EEA MIFs: the Judgment concentrates on those which are most relevant to the argument on the Exemptibility issue. Moreover, recitals (731) and (733), which Mastercard there refers to, are fully set out in the Judgment at [126].

30. As regards para 28(3) of Mastercard's application, the Judgment does not seek to extend the findings in the Decision. It seeks to determine what those findings were. For that purpose, it is clearly appropriate to consider the operative part of the Decision as a whole.
31. Mastercard's reliance on *Crehan v Inntrepreneur* [2006] UKHL 38 is misplaced. That was a case where the English court was asked to apply the analysis of the effect of pub ties in the Commission's decisions regarding the application of Art 101 to the pub ties of Whitbread, Bass and Scottish & Newcastle, in proceedings in which none of those brewers were parties but which concerned pub tie agreements of Inntrepreneur. The House of Lords held that the trial judge was right to hold that the English court in the case involving Inntrepreneur was not bound by those Commission decisions. Those decisions addressed agreements which were wholly distinct from the Inntrepreneur agreements and so no conflict arose. In his speech, Lord Hoffmann referred to Art 16 of Regulation 1/2003 which, although not in force at the time of the dispute in that case, he held codified the relevant law. That has no relevance to the present case, which is a follow-on claim based on the Commission decision itself and therefore concerns precisely the infringement found by the Commission. The Exemptibility issue concerns determination of the scope of the Decision, which is a very different question from that which arose in *Crehan*.
32. As for Mastercard's reliance on the judgments of Popplewell J and the Court of Appeal in the *ASDA* and *Sainsbury's* cases, the Judgment recognised that in *ASDA* at first instance Popplewell J had expressed a different view, and quoted the relevant passage from the *ASDA* judgment: Judgment at [149]. Contrary to what Mastercard contends, the Tribunal is not bound by that view and we explained the basis on which it was appropriate to depart from it: Judgment at [150]. As regards the Court of Appeal's

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<sup>2</sup> The Decision comprises 776 recitals.

judgment in *Sainsbury's*, Mastercard is mistaken to contend that the Court of Appeal ruled on this point: it did not, but set out general principles regarding the burden and standard of proof as regards exemption: Judgment at [146]-[148]. In its application, Mastercard now seeks to rely also on para [174] of the Court of Appeal judgment, which does not concern exemption at all but the distinct question of restriction of competition. The Court there simply noted that the CJEU judgment in *Mastercard* does not mean that any very small default MIF will necessarily be a restriction of competition. That is manifestly correct, but does not assist on the question of construction of the Decision as applicable to Mastercard's MIFs over the period which the Decision addressed.

33. As regards Mastercard's tenth ground of appeal and its allegation of over-compensation, it is a commonplace to say that if a company investigated by the Commission had argued its case differently, relying on different evidence, it might have succeeded and the Commission may have found that there was no infringement. That is not a basis on which the English court or the Tribunal can deny giving effect to a Commission decision finding that there was an infringement, and produce a judgment inconsistent with the Commission decision, so as to avoid giving a claimant compensation to which, in that alternative scenario, they would not be entitled. In the counterfactual world used for the assessment of damages, the Tribunal must strip out Mastercard's unlawful conduct as determined by the Decision. That is the standard approach to computation of damages in tort. Thus this ground adds nothing to the fundamental point about the proper construction of the Decision.
34. We should add that we do not see that there is any substance in the other grounds of appeal set out by Mastercard. We therefore do not consider that Mastercard has a real prospect of success on any of the grounds put forward under this head.
35. Finally, we note that the Judgment on the Exemptibility has no implication beyond the claims in the present case. It has no bearing on the many other MIF cases pending before the Tribunal which are stand-alone cases (and which concern periods subsequent, or largely subsequent, to the infringement period in these proceedings).

**D. CONCLUSION**

36. Accordingly, we dismiss both the CR's and Mastercard's applications for permission to appeal.
37. This ruling is unanimous.

The Hon. Mr Justice Roth  
Chair

The Hon. Lord Erich

Jane Burgess

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

Date: 23 May 2023