Neutral citation [2023] CAT 39

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

12 June 2023

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- and -

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

Defendants

Heard at Salisbury Square House on 6 June 2023

JUDGMENT (ADMISSIBILITY OF EVIDENCE)

APPEARANCES

Ms Marie Demetriou KC, Mr Paul Luckhurst, and Mr Crawford Jamieson (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative.

Mr Matthew Cook KC, Mr Hugo Leith, and Mr Stephen Donnelly (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

1. In the course of a Case Management Conference ("CMC") in this matter on 6 June 2023, I granted the Class Representative ("CR") permission to adduce the evidence of Mr Leon Dhaene as a witness of fact, which was not opposed, but declined permission as regards those aspects of his evidence which I considered were properly to be regarded as expert evidence, save in limited respects. In usual circumstances, I would have given the reasons straight away for my decision as regards the application to adduce his expert evidence, which was strongly contested. However, as the CMC was under considerable time pressure, I said that I would deliver them afterwards in writing. This judgment sets out those reasons.

2. These proceedings started as long ago as 6 September 2016. The period up to December 2020 was taken up with the question of certification as collective proceedings, which went on appeal all the way to the Supreme Court. Following further hearings and disputes, a collective proceedings order was finally made on 18 May 2022.

3. The trial of the proceedings is now proceeding in stages, split by issues to make the process more manageable for everyone concerned. Pursuant to an order made on 14 October 2022, following a CMC on 20 and 22 September 2022 ("the September CMC"), the trial of two specific issues of (a) the causal link between EEA MIFs and domestic interchange fees, and (b) the volume of commerce, is due to commence at the start of July.

4. On 18 January 2023, the Tribunal made an order ("the January Order") giving directions for that trial, fixed for a duration of four weeks. As regards evidence, the Tribunal directed that:

   (1) the parties exchange factual witness statements by 17 March 2023;

   (2) any factual witness statements in reply be exchanged by 12 April 2023; and

   (3) the parties exchange primary experts reports by 11 May 2023.

There were further provisions for reply expert reports and the filing of an agreed/disagreed statement by the experts in advance of trial, in the usual way.

5. With some agreed extensions, factual evidence was served by the Defendants ("Mastercard") and on 17 May 2023 each party served a primary expert's report from an economist. The CR filed no factual evidence.

6. At the September CMC, the discussion regarding experts concerned only economic experts. Although the CR had suggested in his skeleton argument for that CMC that he might potentially seek to call an industry expert, no further reference was made to that in the course of the CMC.

7. However, on 11 May 2023, the CR's solicitors wrote to Mastercard's solicitors to say that he would seek to serve evidence from a further witness who would give both factual and industry expert evidence. There was no indication in that letter as to what particular industry issues that evidence would address.

8. On 25 May 2023, the CR made a formal application for permission to adduce that evidence, with a witness statement in support from Mr Bronfentrinker of the CR's solicitors. Mr Bronfentrinker explained that the CR had always had in mind that he may need an industry expert and that he had indeed engaged an industry expert in 2016 who, however, had to withdraw in August 2022. Mr Bronfentrinker explained the considerable difficulties which the CR had encountered thereafter in finding an appropriate expert who was independent of Mastercard and willing to give evidence against Mastercard. He says that after engaging with a succession of individuals who then were unable to act, only on 5 May 2023 was the CR's legal team finally able to establish that they had found a suitable and willing expert, and that it was on that basis that the CR made what was recognised to be a very late application. However, Mr Bronfentrinker in his witness statement still did not give any clear indication of the particular issues which as a matter of expert evidence that witness would seek to address.

9. As noted at the outset, that witness is Mr Dhaene, who was employed by Mastercard in the period 1989-2004 and has considerable expertise in the payment services sector. At my direction, a draft witness statement by him was

served late on 30 May 2023, and this application came to be heard as a matter of urgency.

10. Despite the extreme lateness of the factual evidence, Mastercard realistically did not object to that, provided that it was given time to serve evidence in reply. By factual evidence, Mastercard meant evidence as to what Mastercard did and understood at the time. That aspect of the application was accordingly granted on that basis, on condition that Mr Dhaene appends to his statement a list of any documents or material on which he has relied.

11. However, Mastercard strongly objected to those aspects of his statement which it contends amount to industry expert evidence, i.e. evidence about general practice or features of the industry or Mr Dhaene's opinion as to the intention or purpose with which various things may generally be done in the industry. Some time was spent in the hearing going through Mr Dhaene's draft statement to identify the paragraphs or passages of that kind.

12. For the CR, Ms Demetriou KC relied on the governing principle in rule 4 of the CAT Rules 2015 ("rule 4"). She emphasised the extreme inequality of arms as between the CR and Mastercard in establishing the facts. She pointed to the great difficulties which the CR had experienced, over a prolonged period, in finding an appropriate and willing witness. The CR had no other witness than Mr Dhaene. And she said that out of fairness the CR needed an industry expert to counter some of the things said by Mastercard's witnesses, taking me by way of illustration to the statements of Mr Graham Peacop and Mr Keith Douglas.

13. I should make clear that the question arising on the application is not one of relevance. Had the CR applied for permission to call an industry expert at the September CMC, or indeed before the January Order, I expect that it would have been granted. But that is very different from the situation at the time when the application was made, under six weeks before the trial and when the exchange of expert reports had already taken place.

14. For Mastercard, Mr Cook KC submitted that this application engaged the *Denton* criteria regarding relief from sanctions, referring to *Denton v TH White*

Ltd [2014] EWCA Civ 906. The *Denton* criteria are applied similarly in the Tribunal: *Groupe Eurotunnel SA v Competition and Markets Authority* [2015] CAT 4 at [33]. Mr Cook referred to the observations of Rose J (as she then was) on the application of the culture encapsulated by the line of authority that led to *Denton* as regards a very late application for permission to adduce expert evidence: *Warner Retail Ltd v National Westminster Bank* [2014] EWHC 2818 (Ch) at [32]-[34].

15. I think Mr Cook may be correct in submitting that the *Denton* principles should apply to the CR's application. However, it is unnecessary to decide that question since I do not consider that this makes any practical difference to the outcome. I note that in *Warner Retail* Rose J similarly did not decide whether the case law establishing what became the *Denton* principles strictly applied: see at [26]; she there approached the matter applying the overriding objective under the CPR.

16. On any view, an application made on 25 May 2023 for permission to adduce factual and expert evidence is a serious and significant breach of the January Order as regards the dates for exchange of factual and expert evidence; and as regards expert evidence, for which the permission of the Tribunal is required under rule 55(1)(d), that Order is clearly to be interpreted in light of the September CMC which led to it, as covering a single economic expert on each side.

17. Further, it is obviously appropriate to consider whether there is a good explanation for this very late application and the manner in which it came to be made. I consider that the CR, by Mr Bronfentrinker's evidence, has given an adequate explanation of the difficulties which the CR encountered in finding a suitable expert, and the continuing effort which was made in that regard. But it is also clear from his evidence that already in 2016 the CR appreciated that he would wish to call an industry expert, and that from September 2022 when the expert with whom he had been working ceased to act, he would be seeking a replacement. However, not a word about this was said to Mastercard, despite the extensive and frequent exchanges between the two parties. There is no explanation as to why Mastercard was not told many months ago that the CR

was hoping to call an industry expert, but that such evidence might come late because of the problem of finding a suitable expert willing to act. Had Mastercard been told this, then it could, if it wished, have sought to locate an independent expert who could act in response – a task which the CR knew from his own experience was not easy – and so have someone ready to react to any such expert evidence if and when the CR might be able to put it forward. As it is, there is now no realistic opportunity for Mastercard to find and instruct an independent industry expert in the short time remaining until trial.

18. Ms Demetriou submitted, first, that the CR could not have applied for permission to call an industry expert at a time when he did not have one; and secondly, that for the CR to have notified Mastercard of its wish to call an industry expert in such circumstances would have been dangerous. I broadly accept the first submission, although I think that a precautionary application could have been made. However, I reject the second submission. If the CR had not been able to instruct an industry expert, such notice would not cause him any prejudice at all. On the other hand, if, as in fact has occurred, he found an industry expert late in the day, Mastercard would have been forewarned and could have taken preparatory steps to protect its position, as described above.

19. Ms Demetriou also submitted that Mastercard did not need an industry expert since several of the witnesses it was already calling had broad industry experience and expertise. However, they are all individuals who worked for prolonged periods for Mastercard (which is indeed why they are giving evidence) and Mastercard should have the right, like any party facing independent expert evidence, to adduce evidence itself from an independent expert who owes the duties to the Tribunal of such an expert.

20. However, my view that the CR has not given a satisfactory explanation for the circumstances surrounding this application is not decisive of this application. Although it is a very relevant circumstance, it is necessary to consider all the circumstances of the case so as to enable the Tribunal to deal justly with the application. That is also the third *Denton* criterion.

21. As noted above, Ms Demetriou referred to the governing principle in rule 4 that the Tribunal should ensure, so far as practicable, "that the parties are on an equal footing", and emphasised the extreme inequality of arms between the CR and Mastercard. She said that the CR would be severely prejudiced if he could not call evidence to counter various assertions made by the Mastercard witnesses.

22. Rule 4(1) requires the Tribunal to "seek to ensure that each case is dealt with justly and at proportionate cost". However, although sub-rule 4(2)(a) refers to remedying an inequality of arms, that is not the only element set out for this governing principle. Sub-rule 4(2)(d) prescribes "ensuring that [the case] is dealt with expeditiously and fairly". The requirement of fairness applies as much to Mastercard as to the CR. And sub-rule 4(2)(f) prescribes "enforcing compliance with … any order or direction of the Tribunal." Inequality of arms is not a trump card which enables the late admission of evidence in any circumstances: cp *Warner Retail* where inequality of arms was also relied on (see at [9]), but the application was refused.

23. No doubt the CR will suffer prejudice if Mr Dhaene's evidence is not admitted. That is almost always the case when an application to admit relevant evidence is refused. But in my view Mastercard would also be prejudiced if that evidence were admitted in its entirety, because of its inability in the short time available properly to respond. Aside from the point about potentially responding with an expert unconnected to Mastercard, even to the extent that some of its witnesses no longer work for Mastercard but have positions elsewhere and may have great experience of the industry (which I accept), in the first place it is in my view unreasonable to expect them to be suddenly available to devote themselves to preparing evidence on general industry practice over the next two weeks; and in the second place, someone giving such evidence may well wish to search for and consider publicly available studies and reports as sources to support their evaluation, a task that takes time. That process has been hindered by the further delay between 17 May when the CR's legal team had a full meeting with Mr Dhaene, and 30 May when the CR served his draft statement, in informing Mastercard of the particular matters concerning the industry generally, as opposed to Mastercard's decision-making in particular, on which Mr Dhaene

would give evidence. In the present tight timeframe, even a period of a fortnight is significant.

24. Nonetheless, I carefully considered with Counsel the particular passages in Mr Dhaene's draft statement which constitute broader industry evidence based on his general experience. I have borne in mind that the great majority of his evidence is factual evidence concerning Mastercard on which his statement is being admitted. I also had regard to the experience of three of Mastercard's witnesses in particular: Mr Sideris, who is now an independent management consultant based in Dubai and who left Mastercard in 2014 to work for Visa (although not covering the UK); Mr Douglas, who has worked in the Mastercard group since 2005 but who previously had several years' experience working in UK banks that were issuers of cards; and Mr Hawkins, who was for many years head of card schemes at a major UK bank, which would have given him experience of both the issuing and acquiring side of the bank's card business. It is on that basis, that I determined that the CR should be permitted to give the evidence from Mr Dhaene set out in the passages in his draft statement specified in the ruling given at the CMC. I consider that Mastercard will not be seriously prejudiced in countering that evidence (if it so wishes) from its existing witnesses, and that in all the circumstances the restricted permission for Mr Dhaene to give expert evidence strikes a fair balance between the interests of the parties so as to do justice in this case.

The Hon. Mr Justice Roth
Chair

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

Date: 12 June 2023