Neutral citation [2023] CAT [59]

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

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5 October 2023

Before:

SIR MARCUS SMITH
(President)
BEN TIDSWELL
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

THE UMBRELLA INTERCHANGE FEE CLAIMANTS

Claimants

- and -

THE UMBRELLA INTERCHANGE FEE DEFENDANTS

Defendants

AND BETWEEN:

WALTER HUGH MERRICKS, CBE

Class Representative

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE SPRL

Defendants

Heard at Salisbury Square House on 21 September 2023

RULING

(DISCLOSURE OF REQUESTED INFORMATION BY THE PAYMENT SYSTEMS REGULATOR)

APPEARANCES

Kieron Beal KC and Antonia Fitzpatrick (Instructed by Humphries Kerstetter LLP, Scott + Scott (UK) LLP & Stephenson Harwood LLP) on behalf of the HSS Claimants
Brian Kennelly KC and Isabel Buchanan (Instructed by Linklaters LLP) on behalf of Visa
Mathew Cook KC and Owain Draper (Instructed by Jones Day) on behalf of Mastercard
Victoria Wakefield KC (Instructed by Wilkie Farr & Gallagher (UK) LLP) on behalf of Walter Hugh Merricks
Richard Howell (instructed by the General Counsel, Payment Systems Regulator) on behalf of the Payment Systems Regulator

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A. INTRODUCTION

1. The Payment Systems Regulator (the 'PSR') is a body corporate established by the Financial Conduct Authority (the 'FCA') pursuant to section 40 of the Financial Services (Banking Reform) Act 2013 (the '2013 Act') as the UK regulator of payment systems.

2. In the discharge of its functions conferred by Part 5 of the 2013 Act, the PSR conducted a market review into the supply of card-acquiring services (MR18/1.8, the 'Market Review'). As part of the Market Review, the PSR gathered information and evidence (including pursuant to its compulsory statutory powers), published an interim report (with annexes) and a final report (again, with annexes).

3. The PSR is not a party to the above-titled proceedings. On 18 July 2023, the Tribunal (at the request of the parties) wrote to the PSR in the following terms:

> I am writing with regard to the Market review into card-acquiring services – Final Report, November 2021 (MR18/1.8) (the 'November 2021 Report').
>
> As you may be aware, there are currently a large number of claims before the Competition Appeal Tribunal (the 'Tribunal') relating to interchange fees. These claims are being case managed jointly as the Merchant Interchange Fee Umbrella Proceedings. Pursuant to an order of the Tribunal made on 23 December 2022, a seven-week trial will be listed to commence in late 2024 to determine, *inter alia*, issues relating to acquirer-pass on of interchange fees (or any reduction to them) to their merchant customers. As part of that trial, the Tribunal will establish acquirer pass-on rates in respect of the claimants and more widely.
>
> The parties to the Merchant Interchange Fee Umbrella Proceedings (the 'Parties') consider the findings of the November 2021 Report to be of material relevance to that trial. The Tribunal agrees, and anticipates that the Parties would be materially assisted by disclosure of the data underlying that report, and the full contents of the report. Accordingly, the President has requested that I write to you, pursuant to rule 53(3)(c) and (d) of the Tribunal's 2015 Rules…to ask that you provide the following information and documents to Humphries Kerstetter LLP (which firm has agreed to liaise with the PSR on behalf of all the Parties) at interchange@humphrieskerstetter.com:
>
> 1. The November 2021 Report including all annexes, in particular annex 2 (pass-through analysis) and annex 4 (scheme fees);
>
> 2. The Market review into the supply of card-acquiring services – Interim Report, September 2020 (MR18/1.7), including all annexes;
>
> 3. The Disclosed Material (as defined in Notice of the Payment Systems Regulator's intention to operate a confidentiality ring following publication of the interim report of the market review into card-acquiring services); and

4. Any underlying econometric analyses and calculations used by the Payment Systems Regulator in their November 2021 Report and/or its annexures.

The confidentiality of these materials could be preserved through their disclosure into a confidentiality ring in the Merchant Interchange Fee Umbrella Proceedings. There is presently no such confidentiality ring in place but suitable arrangements could be agreed (or ordered) prior to any disclosure.

We shall refer to this letter as the '18 July 2023 Letter'.

4. The PSR has indicated a desire to assist the Tribunal and the parties provided (i) that such assistance is consistent with its public duties and functions, (ii) that the PSR is not put to inappropriate expense in providing such assistance and (iii) that the PSR can lawfully provide such assistance. Unsurprisingly, these three provisos - or concerns - are both proper and substantially inter-linked.

5. We are very grateful to the PSR – and counsel instructed by them (Mr Richard Howell) – for the helpful written and oral submissions made at a case management conference which the PSR voluntarily attended in order to assist the Tribunal. As we have noted, the PSR is not a party to these proceedings; nor has any application been made against the PSR.

6. The approach that has been adopted – with the agreement of all concerned – is for the Tribunal set out in a ruling the position regarding the provisos or concerns articulated by the PSR; and for the PSR then to respond to that ruling in whatever manner it considers appropriate. That is, of course, without prejudice to any formal application that might be made in the future; but we anticipate that – whatever the terms of the ruling – no such formal application is likely to be necessary.

7. This is that Ruling. It is structured in the following way:

(1) Section B considers whether – assuming such an application had been made – the documents specified in the 18 July 2023 Letter would be disclosable by the PSR under Rule 63 of the Competition Appeal Tribunal Rules 2015, SI 2015 No 1648 (the 'Tribunal Rules').

(2) Section C considers the legal constraints that exist, which may preclude the PSR from providing inspection of documents in response to an application under Rule 63.

As we shall explain – and as is entirely unsurprising – there is a close link between these two areas of consideration.

B. APPLICATION FOR DISCLOSURE UNDER RULE 63

8. Rule 63 of the Tribunal Rules would apply in a case such as this, where a party applies for disclosure by a person not a party to the proceedings. No such application has (presently) been made in these proceedings. As the 18 July 2023 Letter makes clear, the parties and the Tribunal have proceeded (to date) under Rule 53(3)(c) of the Tribunal Rules, which permits the Tribunal of its own initiative to ask third parties for information. The PSR has, entirely understandably, given the concerns we have summarised at [4] above, sought to have clarified the position if an application under Rule 63 had in fact been made.

9. Rule 63 provides that the Tribunal may only make an order under this Rule where two conditions are met:

(1) The documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(2) Disclosure is necessary in order to dispose fairly of the claim or to save costs.

10. Any order made, must:

(1) Specify the documents or classes of document which the respondent must disclose: Rule 63(4)(a); and

(2) Require the respondent to specify any of those documents in respect of which it claims a right or duty to withhold inspection: Rule 63(4)(b)(ii).

11. The documents that the PSR is being asked to disclose are those specified in the 18 July 2023 Letter, namely:

(1) The November 2021 Report, including all annexes.

(2) The Interim Report (including annexes).

(3) The Disclosed Material.

(4) Any underlying econometric analyses and calculations used by the PSR for the purposes of the November 2021 Report.

12. As Rule 63 makes clear, this material may only be disclosed if the two conditions specified at [9] are met. This Section considers whether those conditions are, or are not, met.

13. Assuming, for the moment, that these conditions are met, the PSR is entitled to assert a right and or duty to withhold inspection: Rule 63(4)(b)(ii). The PSR has, very helpfully, identified such a right and or duty which it considers applies in this case, and has invited the Tribunal to state the law as to the nature and validity of this right and or duty to withhold inspection. This question is considered in Section C.

14. The Tribunal has already (in the 18 July 2023 Letter) expressed a provisional view that the disclosure of the documents and information sought pursuant to that letter would "materially assist" the parties. That, of course, is very far from saying that the requirements of Rule 63 are met. That is the question to which we now turn:

(1) Acquirer pass-on is a major and important issue in the matters that will have to be resolved by the Tribunal in either Trial 1 or Trial 2 of these proceedings. The question is the extent to which – assuming an unlawful overcharge – that overcharge was passed on by an Acquirer to a Retailer. In describing this issue, we adopt and use the terms described in the Tribunals' Ruling *(Evidence on Pass-On), [2023] CAT [60])*. We do not propose, in this Ruling, to traverse ground already covered in prior Rulings of the Tribunal dealing with the evidence that will be needed to resolve the issues arising in Trial 1 and – more

particularly – Trial 2, which is intended specifically to deal with pass-on. We take these prior Rulings as read.

(2) It is clear that the extent to which Acquirer pass-on is an issue and the degree of Acquirer pass-on where it is an issue will both be areas that will require careful exploration at trial. The extent to which disclosure from the parties (specifically, the Claimants) will assist is limited:

(i) The Defendants in these proceedings are unlikely to have many documents that will assist, not being party to the relevant agreements. The Claimants or (in the case of the Merricks class action) class members are unlikely to have very significant data beyond the Acquirer/Retailer agreements themselves, which will be disclosed on a "sample" basis and which may or may not be representative. In short, whilst disclosure from the parties will of course be sought and ordered as appropriate, our view is that it is unlikely, in and of itself, to provide a safe or satisfactory basis for the resolution of this particular issue. Although we will not go into details, an effort at surveying the information held by Claimants has already been undertaken, with an outcome that (in our judgement) underlines the importance of information from relevant third parties. The process is by no means complete, and whilst the surveying and sampling exercise will continue, under the supervision and direction of the Tribunal, this is not a factor that in any way suggests that the information held by the PSR can be obtained from parties to these proceedings. In short, this is not a case where a "wait and see" approach has any benefit.

(ii) By contrast, the work done by the PSR in relation to the Market Review is almost certain to shed significant light on the question of relations between Acquirers and Retailers, and the extent to which costs were transmitted by the former on to the latter in the form of the prices charged by them. Whilst it is not possible to say which party grouping will be advantaged and which disadvantaged by the disclosure of this material, we regard the work done by the PSR as essential to the proper resolution of this issue, and so consider the requirements set out at [9] to be satisfied.

(iii) In this regard, it is significant that all of the parties before us supported the writing of the 18 July 2023 Letter; and all urged the appropriate disclosure of material from the PSR under Rule 63.

(3) Accordingly, subject to certain qualifications set out below, we consider that the material identified in the 18 July 2023 Letter would be subject to disclosure under Rule 63 and – subject to what we say in Section C – should be disclosed by the PSR. Our qualifications are as follow:

(i) We do not consider that the Interim Report (Item (2) in the 18 July 2023 Letter) would be subject to disclosure. Mr Howell made the fair – and we think correct – point that interim reports are almost by definition overtaken by final reports. The PSR said that this was the case here, and we accept that submission. We do not consider the Interim Report to be disclosable under Rule 63;

(ii) Mr Howell suggested that the disclosure of the November 2021 Report should be confined to the annexes, which contained the data that really mattered. We do not consider that the distinction between the November 2021 Report and the annexes to it is sufficiently clear to render the latter subject to the Rule 63 jurisdiction, but the former not. Accordingly, although, we have carefully considered Mr Howell's submissions, we consider that the entirety of Item (1) in the 18 July 2023 Letter is disclosable under Rule 63 because there is an inevitable nexus between the content of the Report and the content of the annexes to it.

(iii) For the present, we consider that Item (3) in the 18 July 2023 Letter should not be disclosed. There is potential for significant overlap between Item (3) and Item (4) (which we consider should be disclosed under Rule 63), in that the latter is the output or consequence of the former. Our view is that the parties should consider whether, in due course, a request for Item (3) should be renewed, and we certainly do not close out that course in this Ruling.

Accordingly, Items (1) and (4) are presently disclosable under Rule 63; and we refer to that material as the Rule 63 Material. Item (3) may also be disclosable, but (for the reasons given above) we would be minded to take a "wait and see" approach in regard to this Item.

15. We now turn to the PSR's right and or duty to withhold inspection under the rule set out at [10(2)] above.

C. RIGHT OR DUTY TO WITHHOLD INSPECTION

16. The PSR asserted that the Rule 63 Material contained confidential information that the PSR was obliged to withhold. We will turn to the nature of that obligation in due course. Before we do so, we make the following points regarding the question of confidentiality:

(1) We accept – as did all of the parties – the PSR's assertion of confidentiality. It seems to us that where a regulator like the PSR makes such an assertion, it should be accepted at face value. In this case:

(i) The PSR has already disclosed non-confidential versions of the Interim Report and the November 2021 Report (including annexes).

(ii) Mr Howell very helpfully articulated in greater detail the nature of the confidentiality that the PSR was seeking to protect. We are very grateful to him (and the PSR) for doing so, but this does not change the essential point that where a regulator asserts a right and or duty to withhold inspection, this Tribunal will be slow to second-guess that assertion, unless (as here) invited to do so.

(2) In this case, the PSR frankly accepted (again, we are grateful to the PSR and Mr Howell for their assistance on this point) that the confidential information in the Rule 63 Material could (through redaction and other forms of manipulation of data) be rendered non-confidential. In this way, the PSR's obligations of confidence could be side-stepped. However, this could only be achieved at considerable effort by the PSR. Whilst there may be some cases where such effort on the part of a public body can be required, none of the parties contended

that we should make an order along these lines, and we proceed on the basis that the Rule 63 Material is confidential and can only be provided by the PSR for inspection pursuant to Rule 63 if the PSR can lawfully disclose that confidential information.

17. We turn to the regime for the protection of confidential information which the PSR asserts entitles or obliges it to withhold inspection of the Rule 63 Material. We stress that in considering this regime, we bear in mind that the PSR invited us to express our views as regards the scope and operation of this regime. The PSR, entirely rightly, wished to ensure that it was acting at all times lawfully and properly, and to that end Mr Howell advanced submissions that the statutory regime that we will come to describe obliged the PSR to withhold inspection. For the reasons we give below, we do not accept those submissions: but we could not have framed our disagreement without Mr Howell's careful parsing of the legislation, and we are again extremely grateful for the responsible way in which the PSR has approached this entire question.

18. Section 91(1) of the 2013 Act provides that the PSR (as "primary recipient") must not disclose confidential information without the consent of the person from whom that information was obtained and (if different) the person to whom it relates. That obligation is buttressed by criminal sanctions: see section 93 of the 2013 Act.

19. "Confidential information" is broadly defined in section 91(2) as information which:

(1) Relates to the business or other affairs of any person;

(2) Was received by the primary recipient (i.e. the PSR) for the purposes of, or in the discharge of, any functions of the Payment Systems Regulator "under this Part" of the 2013 Act; and

(3) Has not been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by section 91 or is in the form of a summary or a collection of information that is framed in such a way that it is not possible to ascertain from it information relating to any particular person.

20. Section 92 provides that section 91 does not prevent a disclosure of confidential information which:

(1) Is made for the purpose of carrying out a public function; and

(2) Is permitted by regulations made by the Treasury under this section. The scope of provision for making regulations is set out in section 92(3). The permitted scope of those regulations is broadly stated: but of course it is the terms of the Treasury regulations as enacted that is determinative.

21. It was accepted that disclosure for the purpose of complying with Rule 63 was disclosure for "the purpose of carrying out a public function", and that is clearly so. The critical question was the scope of the Treasury regulations. The regulations in question are the Financial Services (Banking Reform) Act 2013 (Disclosure of Confidential Information) Regulations 2014, SI 2014 No 882 (the 'Treasury Regulations').

22. The relevant regulation is Regulation 5, which materially provides as follows:

> (1) A primary recipient of confidential information, or a person obtaining such information directly or indirectly from a primary recipient, is permitted to disclose such information to –
>
> (a) a regulator or the Secretary of State, for the purpose of initiating proceedings to which this regulation applies, or of facilitating a determination of whether they should be initiated; or
>
> (b) any person, for the purposes of proceedings to which this regulation applies and which have been initiated, for the purpose of bringing to an end such proceedings, or of facilitating a determination of whether they should be brought to an end.

More specifically:

(1) The "proceedings to which this regulation applies" extends to proceedings before this Tribunal: Regulation 5(3)(b). The Tribunal is therefore a court and obviously not a "regulator" for the purposes of Regulation 5(1)(a).

(2) The PSR is, as we have noted, a "primary recipient of confidential information".

(3) Regulations 5(1)(a) and (b) must be considered together. The first – Regulation 5(1)(a) – is concerned with the initiation of proceedings before the Tribunal (to confine consideration to the facts of this case), whereas the second – Regulation 5(1)(b) – is concerned with their ending. This explains the very different scope of the persons to whom the PSR may make disclosure:

(i) When it comes to the initiation of proceedings, the provision of information is limited to "a regulator or the Secretary of State". A regulator or the Secretary of State will be acting in the public interest when considering initiating or the actual initiation of proceedings before the Tribunal, and the Treasury Regulations understandably confine the provision of information to such persons.

(ii) By contrast, where proceedings before the Tribunal have been initiated, there is a general public interest in bringing such proceedings to an end, and the Treasury Regulations accordingly permit the provision of information to "any person". It should be noted that "any person" includes a regulator or the Secretary of State. That is necessary because Regulation 5(1)(a) only provides for the provision of information to the regulator or the Secretary of State for the purposes of initiating proceedings and not for any other purpose.

(4) Regulations 5(1)(a) and (b) make clear that information may be provided:

(i) To enable proceedings to be initiated or (as the case may be) ended.

(ii) To facilitate a determination (that is, a decision) by the intended recipient of the information as to whether to initiate or (as the case may be) end proceedings.

These are two, very different, purposes. There is a question, to which we will return, as to whether the purposes under Regulation 5(1)(b) are altogether wider than this, and embrace a third purpose (which we shall come to describe). But it is clear, at the very least, that the Regulations extend at least this far.

(5) Clearly, this is a case under Regulation 5(1)(b). None of the parties making the putative Rule 63 application are either a regulator or the Secretary of State. Equally clearly, this is not a case where the information is being disclosed to facilitate a determination of whether the proceedings should be brought to an end. The purpose of the provision of information in this case is described by the putative Rule 63 application which – as we have made clear – furthers the purpose of the disclosure of material supporting and or being adverse to the parties' cases and necessary to dispose fairly of the claim. It is not the primary function of Rule 63 to enable the parties to make better decisions about the ending of proceedings; given that this point did not arise in argument, we say nothing more about this particular aspect of Rule 63.

(6) It was submitted that the words in Regulation 5(1)(b) "for the purposes of proceedings to which this regulation applies and which have been initiated" gave the scope of this sub-paragraph a very wide meaning, namely that information could be provided for any and all purposes, provided (i) that the proceedings were proceedings to which the regulation applies and (ii) that those proceedings had been initiated. We consider this submission to be correct.

(7) The question is whether Regulation 5(1)(b) – in contrast to Regulation 5(1)(a) – contains a third purpose, in addition to the two articulated in Regulation 5(1)(a). As to this:

(i) Disclosure of information under Regulation 5(1)(a) is permitted in only two cases. First, for the purpose of initiating proceedings; and secondly, for the purpose of facilitating a determination of whether they should be initiated.

(ii) These are both purposes that find their equivalent in Regulation 5(1)(b): (i) ending proceedings is covered by the words "for the purpose of bringing to an end such proceedings"; and (ii) deciding whether the proceedings should be ended is covered by the words "or of facilitating a determination of whether they should be brought to an end".

(iii) That leaves the earlier words "for the purposes of proceedings to which this regulation applies", which have no equivalent in Regulation 5(1)(a), but which are express in Regulation 5(1)(b). We do not consider that these words can have the purpose of confining the ambit or operation of Regulation 5(1)(b) to "proceedings to which this regulation applies", because that outcome is mandated by the words "…such proceedings…" which can only refer to proceedings initiated. The natural and inevitable meaning of these words is that information can be disclosed for any and all purposes of proceedings before the Tribunal, provided only that those proceedings have been initiated.

(8) On this basis, proceedings before the Tribunal have three, distinct, phases:

(i) Initiation, which is the sole province of Regulation 5(1)(a), as we have described.

(ii) Ending, which constitute the second and third purposes under Regulation 5(1)(b), as we have described.

(iii) Everything taking place between initiation and ending, which falls within the general wording "for the purposes of proceedings to which this regulation applies and which have been initiated".

(9) Not only is this the natural construction of Regulation 5(1)(b), it also fits with the purpose of that Regulation. Provided they have been initiated, it would be very odd if the PSR were precluded from providing under Rule 63 of the Tribunal Rules information that could assist in determining proceedings generally, and without reference necessarily to the ending of such proceedings.

(10) Any other construction requires extremely difficult lines to be drawn between the provision of information for the purposes of proceedings and the provision of information for the bringing to an end to proceedings. In an sense, every provision of information after initiation of proceedings is intended to bring those proceedings to an end, whether by settlement or determination of the Tribunal. But for the words here under consideration, we would have been minded to

attach a very wide meaning to "end", so as to embrace all information provided after initiation. The words "for the purposes of proceedings to which this regulation applies and which have been initiated" means that such a construction is unnecessary. But to be clear, absent these words, such a construction would have been needed, if only to enable a regulator or the Secretary of State to obtain information post-initiation of proceedings.

23. We have, in reaching this conclusion, borne in mind the PSR's point that the content of the Regulations should be narrowly construed. We certainly accept that – given the importance attached to confidential information (as we have said, that confidentiality is buttressed by criminal sanction) – exceptions to the confidentiality regime should not be unduly wide. But where – as here – we consider the meaning of the relevant provisions to be clear, adopting an artificially narrow construction runs the risk of a lack of clarity, which is in and of itself undesirable, particularly where the sanction for breach of the rules is criminal. Of course, the Tribunal is sensitive to the disclosure of confidential material, and is well used to handling it. We anticipate that the parties and the PSR will be able to agree a regime into which the Rule 63 Material can appropriately be disclosed and if the PSR has any concerns in this regard, it should approach the Tribunal.

24. Accordingly, provided the requirements of Rule 63 are satisfied (as they are in the case of the Rule 63 Material) – and if it would assist the PSR, we are prepared to make an order to this effect – there is no additional statutory constraint on the PSR requiring or obliging it to withhold inspection of the Rule 63 Materials.

D. DISPOSITION

25. Because the PSR are not a party, and there is no application before us for disclosure under Rule 63, we make no order at this time. However, we stand willing to make any order the parties consider appropriate; and we make clear that this Ruling is unanimous.

Sir Marcus Smith
President

Ben Tidswell

Professor Michael Waterson

Charles Dhanowa OBE, KC (Hon)
Registrar

Date: 5 October 2023