



Neutral citation [2023] CAT [61]

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1441/7/7/22
1442/7/7/22
1443/7/7/22
1444/7/7/22

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) MASTERCARD INCORPORATED
- (2) MASTERCARD INTERNATIONAL INCORPORATED
- (3) MASTERCARD EUROPE SA
- (4) MASTERCARD/EUROPAY UK LIMITED
- (5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
- (6) MASTERCARD EUROPE SERVICES LIMITED

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) MASTERCARD INCORPORATED
- (2) MASTERCARD INTERNATIONAL INCORPORATED
- (3) MASTERCARD EUROPE SA
- (4) MASTERCARD/EUROPAY UK LIMITED
- (5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
- (6) MASTERCARD EUROPE SERVICES LIMITED

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) VISA INC.
- (2) VISA INTERNATIONAL SERVICE ASSOCIATION
- (3) VISA EUROPE SERVICES LLC
- (4) VISA EUROPE LIMITED
- (5) VISA UK LTD

Respondents /
Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant /
Proposed Class Representative

- v -

- (1) VISA INC.
- (2) VISA INTERNATIONAL SERVICE ASSOCIATION
- (3) VISA EUROPE SERVICES LLC
- (4) VISA EUROPE LIMITED
- (5) VISA UK LTD

Respondents /
Proposed Defendants

REASONED ORDER (COSTS)

UPON the Tribunal having handed down its Judgment (*[2023] CAT 28*) on 8 June 2023 ('the Judgment'), following the hearing held on 3 to 5 April 2023

AND UPON the Proposed Class Representatives' confirmation to the Tribunal on 3 August 2023 of their intention to present a revised application for a Collective Proceedings Order in the Proposed Collective Proceedings ('these Proceedings')

AND UPON considering the costs applications from the Mastercard and Visa Proposed Defendants dated 14 July 2023, the Response of the Class Representatives dated 21 July 2023 and the Replies of the Proposed Defendants dated 28 July 2023 thereto

AND HAVING REGARD TO the power of the Tribunal under Rule 104 of the Competition Appeal Tribunal Rules 2015 (“the Tribunal Rules”)

IT IS ORDERED THAT:

1. The Proposed Class Representatives should pay to the Proposed Defendants their costs of and incidental to the Collective Proceedings Order applications heard in April 2023, subject to a consideration by the Tribunal of the proper treatment of the costs of those issues on which the Proposed Class Representatives were successful in the Judgment, such consideration to take place after the hearing of the revised applications.
2. The Proposed Class Representatives should not be entitled to their costs of any aspect of the Collective Proceedings Order applications heard in April 2023.
3. The Proposed Class Representatives should make to each of the Proposed Defendants an interim payment, on account of the costs awarded in (1) above, in the sum of 45% of the Proposed Defendants’ costs in their respective costs schedules, such payment to be made within 21 days of the date of this Order.

REASONS

1. In the Judgment, the Tribunal identified a number of features of the Proposed Class Representatives applications for Collective Proceedings Orders which meant that the Proceedings did not meet the requirements set out in the Competition Act 1998, the Tribunal Rules and relevant case law. We therefore declined to grant the applications and instead stayed the proceedings to allow the Proposed Class Representatives to reconsider their approach.
2. The Proposed Defendants now seek their costs of the April hearing, on the basis that they were successful (the applications not having been granted). The Proposed Class Representatives argue that the Proposed Defendants should not recover all of their

costs, on the basis that there are issues determined in the Judgment in the Proposed Class Representatives' favour.

3. As a secondary consideration, to the extent that a costs order is made in favour of the Proposed Defendants, they seek interim payments and there are arguments about what that should be.
4. All parties accept that the Tribunal's approach under Rule 104 of the Tribunal Rules is to make an order that reflects the overall justice of the circumstances of the case: *Royal Mail Group Ltd v DAF Trucks Ltd & Ors* [2023] CAT 31, at paragraphs [32]-[36]. It is also generally accepted that the Tribunal has a broad discretion under Rule 104 to achieve that objective.
5. There is also no real argument between the parties about who has been successful in relation to the Collective Proceedings Order applications (that is, the Proposed Defendants). The main arguments between the parties turn on whether, in exercising its discretion, the Tribunal should:
 - (a) Simply adopt the approach that the unsuccessful party pays the successful party's costs, in which case the Proposed Defendants should have all of their costs and should receive an interim payment of 50% (the Mastercard position).
 - (b) Alternatively, adopt some degree of an issues based approach, recognising that revised proceedings may be filed, and further Collective Proceedings Order applications made and determined, at which time it will be possible to determine whether the Proposed Class Representatives' success on some issues in the Judgment has created a degree of costs efficiency in the hearing of the revised applications. Under this approach, the Tribunal would allow the Proposed Defendants some of their costs now and reserve the remainder until such time as the outcome of the revised applications is known. In this regard:
 - (i) Visa suggest an award of 50% of their costs, to be paid now as an interim payment, and the remainder reserved until later.

- (ii) The Proposed Class Representatives suggest an award of 25% of the Proposed Defendants' reasonable and proportionate costs now and in any event, to be assessed on a summary basis as being recoverable at a rate of 60%, with the remainder of the costs to be reserved generally (including leaving open the possibility that the Proposed Class Representatives might in the future be awarded some of their costs to reflect the fact that the Proposed Class Representatives succeeded on some issues which will not need to be relitigated if revised applications are made and are successful).
6. A certain amount of case law was cited in support of both approaches. We found this of limited value, beyond confirming that any of the proposed approaches would be a legitimate one for the Tribunal to follow if we thought it would achieve overall justice. The relatively unusual nature of the Collective Proceedings Order procedure, and the even more unusual outcome of partly determined applications which are being revised for further consideration at a hearing in April 2024, mean that previous decisions have little value beyond setting out well established principles.
7. The only other similar situation of which we are aware arose in *Gormsen v Meta* (Case No 1433/7/7/22), in which the Tribunal made a Reasoned Order dated 24 March 2023 in circumstances where the Proposed Class Representative had failed to satisfy the requirements for a Collective Proceedings Order, but the proceedings were stayed to allow the Proposed Class Representative to consider how she might address the shortcomings identified.
8. The Tribunal in that case made an award of an interim payment to the Proposed Defendants. It also ordered that the Proposed Class Representative's costs relating to the Collective Proceedings Order application would be irrecoverable. There was some criticism of the reasoning supporting that order by the parties in these proceedings, on the basis that the Tribunal reserved the question of the Proposed Defendants' costs, which was inconsistent with ordering an interim payment.
9. It seems to us however that the Tribunal's approach in *Gormsen v Meta* is, with respect, an effective way to achieve overall justice in a situation where the Collective

Proceedings Order application has not been granted, but the proposed proceedings may be revised for further consideration:

- (a) First, the Tribunal in *Gormsen* recognised that the Proposed Defendants had been substantially successful and should be entitled to their costs to follow that event (see paragraph [5]).
- (b) Secondly, it was desirable to leave an element of the Proposed Defendants' costs as "costs reserved" (see paragraph [6], we presume on the basis that the full picture would not be apparent until the eventual outcome of any revised application was known).
- (c) In the meantime, the Proposed Defendants should be paid a broad brush sum which at least reflected the costs pointlessly incurred by the Proposed Defendants in responding to a defective CPO application.
- (d) Finally, the Tribunal wished it to be clear that in no circumstances should the Proposed Class Representative recover her costs of the failed application.

10. We consider that a similar approach is appropriate here:

- (a) The Proposed Defendants have been substantially successful and should in principle be entitled to their costs of opposing the Collective Proceedings Order applications at the April hearing.
- (b) It is however possible that there are some costs arising from those applications which it may not be just for the Proposed Defendants to recover from the Proposed Class Representatives. An example is costs relating to issues where the Proposed Class Representatives were in fact successful, if and to the extent that such costs do not need to be incurred again in any revised applications, if those are eventually successful.
- (c) It is not possible to predict either the existence or extent of such costs until the revised applications are determined. We have considered whether it would be appropriate to make a determination of a minimum level of the costs which we

are awarding, but we have concluded that would be inconsistent with the uncertainty inherent in the exercise. Our best assessment at present is that the level of costs which might not be payable to the Proposed Defendants is likely to be fairly limited. However, we wish to retain the ability to make a further order to reflect the part played by certain issues in the final outcome, once that is known. To that extent, we are leaving open some degree of an issues based approach.

- (d) We will therefore order that the Proposed Defendants should be awarded a significant amount of their likely recoverable costs, with the remainder of the costs reserved to be considered further and determined at a later date.
 - (e) We do not consider that the Proposed Class Representatives should in any circumstances be entitled to recover their costs of the issues on which they were successful in the Judgment. In the Judgment, we described the Proposed Class Representatives' approach to the collective proceedings as being unsatisfactory in various respects, and this aspect of our costs order is intended to reflect that conduct. Instead, the best outcome that the Proposed Class Representatives can achieve is that they may not have to pay a proportion of the Proposed Defendants costs relating to certain issues on which the Proposed Class Representatives were successful in the Judgment, depending on how those issues play out in the revised applications and any further judgment.
11. All parties agree in principle that some partial payment of the Proposed Defendants' costs should be made now. The Proposed Class Representatives encourage us to make a summary assessment of the Proposed Defendant's costs now, while Mastercard seeks an interim payment against the costs it says it is entitled to. Visa's suggestion is a payment of a proportion of the Proposed Defendants costs to take account of the fact that a further proportion of the costs is reserved, and also that there will also need to be either agreement between the parties on the level of recovery or some form of assessment before the final amount payable to the Proposed Defendants is known.
12. Mastercard has served a schedule of costs up to 29 June 2023, in the sum of £1,902,231.56. Visa's schedule of costs is in the sum of £1,761,305.42. The Proposed Class Representatives raise a number of issues about the recoverability of those costs,

including the use by each of the Proposed Defendants of two solicitors' firm, leading to potential duplication, and the application of hourly rates well above the guideline rates. We do not propose to resolve those issues now, or to carry out a summary assessment of the Proposed Defendant's costs, as the Proposed Class Representatives invite us to do. That exercise should await the determination of the final position on costs after the revised applications (if pursued) are resolved.

13. In the meantime, we agree with the approach suggested by Visa, subject to a reduction in the amount of the interim payment. We order that the Proposed Class Representatives make an interim payment to each of the Proposed Defendants of 45% of the amounts set out in their respective costs schedules, such payment to be made within 21 days of the date of this order. This level seems to us to meet the need to estimate the reasonable costs likely to be determined on detailed assessment, with appropriate margin to allow for an overestimate (*Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm)), as well as to reflect the potential for the Proposed Defendants not to recover some elements of the costs that have been reserved for further consideration.
14. This Reasoned Order represents our unanimous decision.

Ben Tidswell
Chair

Dr Catherine Bell CB

Dr William Bishop

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

Date: 12 October 2023