Neutral citation [2024] CAT 21

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

1266/7/7/16

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

21 March 2024

Before:

SIR MARCUS SMITH
(President)
BEN TIDSWELL
PROFESSOR MICHAEL WATERSON

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS
(1) THE STEPHENSON HARWOOD CLAIMANTS
(2) THE SCOTT + SCOTT CLAIMANTS

Claimants

- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS
(1) VISA DEFENDANTS
(2) MASTERCARD DEFENDANTS

Defendants

Heard at Salisbury Square House on 21 March 2024

RULING (LEGAL CAUSATION)

APPEARANCES

Laurence Rabinowitz, KC and Aislinn Kelly-Lyth (instructed by Linklaters LLP and Milbank LLP) appeared on behalf of the Visa Defendants

Owain Draper (instructed by Jones Day and Freshfields) appeared on behalf of the Mastercard Defendants

Mark Brealey, KC (instructed by Mischon de Reya LLP) appeared on behalf of the Ocado Claimants

Oscar Schonfeld (instructed by Stephenson Harwood LLP and Scott & Scott UK LLP) appeared on behalf of the Stephenson Harwood LLP and Scott & Scott Claimants

Tom Coates (instructed by Hausfeld & Co LLP) appeared on behalf of the Primark Claimants

Ben Lask, KC (instructed by Pinsent Masons LLP) appeared on behalf of the Allianz Claimants

1. By an application dated 6 February 2024, the Visa Defendants, as supported by the Mastercard Defendants, sought to strike out various passages in the pleadings of the Claimants which continue to seek to advance a point of causation in regard to "pass on" which, according to the Visa Defendants, is no longer open to the Claimants. Although the application is framed as an application to strike out, in reality, it is a request for clarification from the Tribunal as to the scope of the issues that will be arising for trial at what we call "Trial 2" in these proceedings. Trial 2 is to deal with the question of pass on, assuming that there has been an unlawful overcharge in respect of interchange fees. This question – overcharge – is the subject matter of "Trial 1", presently in trial before the Tribunal.

2. This Ruling says nothing about the outcome of Trial 1, which we do not seek in any way to anticipate. But it is a necessary assumption of this Ruling that the outcome of Trial 1 is adverse to the Visa and Mastercard Defendants, and that there is, therefore, an unlawful overcharge that might or might not have been passed on by the Claimants (all merchants) to their customers. Hence, we proceed on the basis of an assumption that there was an unlawful overcharge.

3. The point on which the Visa Defendants seek clarification on is set out in the first paragraphs of their written submissions dated 18 March 2024. The first three paragraphs of these submissions appropriately set out the battle lines:

> "1. This is Visa's skeleton argument for the hearing listed for 18 March 2024 concerning the test of causation for pass on to be established in these proceedings.
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> 2. The question for Trial 2 is fundamentally one of economic fact. That question is whether if the merchant service charges (MSCs) had been lower, the claimants would have charged lower prices to their customers and, if not, whether they would have agreed to pay higher prices to their customers. In other words, would the claimants have charged lower prices to their customers or paid higher prices to their suppliers but for the overcharge.
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> 3. Contrary to that established position, the claimants now appear to suggest that at the substantive trial they will argue that something over and above factual causation is required. In other words, they want to be able to deny that a pass on occurred, even if the aforementioned question of economic fact is answered in the affirmative. They make two core arguments in support of that proposition. One, that the tribunal has not excluded proximity as a relevant consideration in the test for causation in these proceedings or, two, that to the

> extent it has done so, the Tribunal's statements are not binding on the claimants or are not binding on all of them."

4. The scope of the issues to be determined in Trial 2 is a matter that has troubled the Tribunal on a number of previous occasions. It is time to put this emphatically to bed. We have considered whether we need to make an additional ruling at all and our judgment is, in fact, that no additional ruling is required beyond to say that what we have said in the past is clear and determinative of the scope of Trial 2.

5. We refer to our Judgment on Pass-on, reported under neutral citation number [2022] CAT 31, at [50]. We do not set that paragraph out in this Ruling (it is not a short paragraph), but it should be regarded as incorporated by reference into this Ruling, for we endorse exactly what was there said. In particular, we refer to [50(2)], which draws a distinction between factual causation and legal causation.

6. The first sub-sub paragraph – [50(2)(i)] – deals with factual causation, which is the subject matter of Trial 2. There is, ongoing before us, a debate about what evidence is needed in order to resolve the questions of factual causation articulated in [50(2)(i)]. Those questions are being considered elsewhere and are not for today. Nothing in this Ruling is intended to say anything about the evidence that is or ought to be admitted for the purposes of resolving the questions of factual causation articulated in [50(2)(i)].

7. Legal causation is the subject matter of the next sub-sub paragraph, [50(2)(ii)]. The intention of this paragraph – and we consider the wording to be very clear – was to state our conclusion that the questions of legal causation there articulated were not before the Tribunal because, as propositions, they were not arguable as a matter of law. That is the clear meaning of the last two sentences of [50(2)(ii)], where we referenced and adopted the Supreme Court's approach to questions of legal causation, going so far as to describe this approach as a "no brainer". We are comforted in this assessment by the endorsement of our statement by the Court of Appeal in *Royal Mail Group Limited v. DAF* ([2024] EWCA Civ 181) at [150], which states the law as it has previously been stated by the Supreme Court and this Tribunal.

8. Considerable emphasis was placed by the Claimants on the next paragraph in the Court of Appeal's decision at [151]. We do not regard [151] as in any way assisting in the construction of [150] or what that paragraph lays down. Of course, [151] is important: but it is only important in the context of the consideration the Court of Appeal was giving to the reasoning of the Tribunal at first instance in the decision under appeal in the DAF case. The paragraph is, therefore, an important paragraph in the specific context of the appeal in that case; but it says nothing about causation in the abstract. We consider that reference to or deployment of [151] in support of a general proposition to be quite simply erroneous and wrong.

9. We have asked Mr Rabinowitz, KC, who appeared for the Visa Defendants, whether a wholesale process of strike out is required in order to bring clarity to this matter. He indicated that provided we make things clear, as we think we have, such a process is not required.

10. There is one further point which concerns the nature of these proceedings and the fact that we have before us many claimants represented effectively as a single class. We are conscious of the potential that there may be very considerable deviation amongst the individual claims comprising the *de facto* class.

11. These are emphatically not collective proceedings, and we have in the past indicated that we are sensitive to the fact that there are a range of claimants with different claims who are being represented in the efficient way we have articulated. We have, in the past, discussed the need for what is termed an "exceptions process", a process whereby it is possible to deal with the exceptional case after Trial 2 has concluded. At the moment, no such exceptional cases have been identified; and we have made it clear that the exceptions process is one that we will visit after Trial 2 and not before.

12. At the moment, therefore, as matters stand, all claimants are going to be bound by the outcome of Trial 2, whatever that outcome might be. We want to make clear that we regard as intrinsic to the exceptions the early articulation of the exceptional case as soon as it is capable of identification. We will take a dim

view of someone contending, right at the end of Trial 2, that they are in some way exceptional and that, therefore, the general conclusion of Trial 2 does not in some way therefore apply to them. For an exceptional case properly to be run, then it must be articulated as early as it can be, so that we can take it into account and work out whether it can be dealt with within the scope of Trial 2 or thereafter.

Sir Marcus Smith
President

Ben Tidswell

Professor Michael Waterson

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

Date: 21 March 2024