Neutral citation: [2021] CAT 27

IN THE COMPETITION APPEAL TRIBUNAL

Cases Nos: 1349-1350/5/7/20 (T)
1383-1384/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

30 July 2021

Before:
THE HONOURABLE MR JUSTICE ROTH
(President)
TIM FRAZER
PAUL LOMAS

Sitting as a Tribunal in England and Wales

BETWEEN:

WESTOVER LIMITED & OTHERS v MASTERCARD INCORPORATED & OTHERS

WESTOVER LIMITED & OTHERS v VISA EUROPE LIMITED & OTHERS

ALAN HOWARD (STOCKPORT) LIMITED & OTHERS v MASTERCARD INCORPORATED & OTHERS

ALAN HOWARD (STOCKPORT) LIMITED & OTHERS v VISA EUROPE LIMITED & OTHERS

RULING - COSTS

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1. On 7 June 2021, the Tribunal issued its judgment on a preliminary issue in these four sets of proceedings concerning the governing law which is to apply to the claims included in the proceedings brought by Italian claimants: [2021] CAT 12 ("the PI Judgment"). This ruling uses the same nomenclature as the PI Judgment.

2. The hearing of the preliminary issue took one day, and was argued as between the Italian claimants on the one side and Visa and Mastercard, who were separately represented, on the other side. Each of the Italian claimants, Visa and Mastercard contends that they were successful, or substantially successful, on the preliminary issue and asks for an award of costs in their favour. Each has served a schedule of costs. The Italian claimants and Mastercard accept, respectively, that they were not wholly successful and acknowledge that there should therefore be a reduction in their recoverable costs - of 25% in the case of the Italian claimants and of 30% in the case of Mastercard. Visa seeks all of its costs.

3. Under rule 104 of the Competition Appeal Tribunal Rules 2015, the Tribunal has a broad discretion regarding the award of costs. Pursuant to rule 104(4)(c), in making an order for costs the Tribunal may take account of whether a party has succeeded on part of its case, even if it has not been wholly successful.

4. The claims of the Italian claimants concerned domestic Italian MIFs, intra-EEA MIFs and inter-regional MIFs: see the PI Judgment at [6]. The Italian claimants contended that, under Art 6(3) of Rome II, they could choose to apply English law to their claims for loss resulting from all of these MIFs. Visa and Mastercard argued that on the proper application of Rome II, English law could not apply to any of the claims of the Italian claimants which were therefore governed by Italian law. The point was of significance since the relevant limitation period under Italian law is one year shorter. For reasons set out in the PI Judgment, we held that the Italian claimants were not entitled to choose English law for their claims in respect of domestic Italian MIFs but could do so for their claims in respect of intra-EEA or inter-regional MIFs. Visa and Mastercard both emphasise that the Italian MIFs account in financial terms for much the greater part of the claims of the Italian claimants.

5. Looking at the position overall, it could be said that the Italian claimants should recover their costs referable to argument about the intra-EEA and inter-regional MIFs whereas Visa and Mastercard should recover their costs referable to argument about the Italian domestic MIFs, with the awards set off against each other. However, the argument was not framed or conducted in terms of the different MIFs, not least because the parties adopted an 'all or nothing' approach and did not seek to distinguish between them. The terms of the argument concerned (i) the question of what was the "restriction of competition" constituting the infringement, and (ii) the proper interpretation of Art 6(3)(b) of Rome II. On (i), the Tribunal essentially rejected the submissions of the Italian claimants while not entirely accepting the arguments of Visa and Mastercard; and on (ii) the Tribunal interpreted the provision in a manner that no party had put forward.

6. Having regard to the outcome of the preliminary issue, we consider that it is clear that the Italian claimants had only limited success. In particular, the extent to which they succeeded can benefit only a small part of their financial claims. Visa and Mastercard, for their part, have succeeded in securing the rejection of the Italian claimants' attempt to apply English law to the majority of their financial claims. Rather than making cross-orders for costs, we think it is more satisfactory and easier of application to make a single order that takes into account the relative measure of success of the different parties.

7. On that basis, taking a broad brush approach to reflect the time and effort which appeared to us to be devoted to the different parts of the argument and also the financial significance of the outcome, we consider that the fair order is that each of Visa and Mastercard should recover 50% of their costs of the preliminary issue from the Italian claimants, those costs to be assessed on the standard basis.

8. No party has asked the Tribunal summarily to assess the costs and they will be subject to detailed assessment if not agreed. However, as the Tribunal which heard the preliminary issue and to assist the process of detailed assessment if needed, we will comment on two aspects of the costs schedules of Visa and Mastercard. The hearing was conducted remotely. That doubtless makes it easier for a larger number of lawyers at the solicitors involved to "attend" the

hearing. Nonetheless, in order to be recoverable from the other side, the costs of lawyers attending the hearing must be reasonably and necessarily incurred. We see no objection to either Visa or Mastercard's solicitors having four lawyers (and a trainee solicitor) working on the case, if the work is therefore shared between them according to their seniority. But that does not justify the costs of four solicitors attending the hearing, for which leading and junior counsel (and in the case of Visa, two junior counsel) have also been instructed. Additional lawyers may of course choose to attend the hearing, but we consider that the recoverable costs under our order should be limited to the partner responsible and a junior (i.e. grade C) associate. Secondly, we note that among work on documents, Visa has included almost 28 hours for work by the solicitors on skeleton arguments. Again, where experienced leading and junior counsel are instructed, we regard that as excessive and disproportionate.

9. This ruling is unanimous.

The Hon Mr Justice Roth
President

Tim Frazer

Paul Lomas

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

Date: 30 July 2021