Neutral citation [2024] CAT 49

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

30 July 2024

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
THE HONOURABLE LORD ERICHT
JANE BURGESS

Sitting as a Tribunal in England and Wales

BETWEEN:

**WALTER HUGH MERRICKS CBE**

Class Representative

**- and -**

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

Defendants

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**RULING (PERMISSION TO APPEAL)**

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1. On 19 June 2024 the Tribunal issued its judgment on three issues concerning the limitation defence which Mastercard has raised in these proceedings in respect of loss suffered before 20 June 1997: [2024] CAT 41 ("the Judgment"). This ruling uses the same abbreviations as the Judgment and all paragraph references below are to the Judgment.

2. Those three issues are:

   (a) whether the operation of the primary limitation period was suspended pursuant to s. 32(1)(b) of the Limitation Act 1980 ("LA");

   (b) whether the operation of the primary limitation period was suspended pursuant to s. 32(2) LA; and

   (c) whether the EU principle of effectiveness imports a 'knowledge requirement' with the consequence that the claims are not out of time.[1]

3. All three of those issues were decided in favour of Mastercard. The CR's application for permission to appeal ("PTA Application") raises four grounds. Grounds 1-3 concern issue (c), i.e. the principle of effectiveness. Ground 4 concerns issue (a). The PTA Application is made in writing and Mastercard has served written submissions opposing the grant of permission.

4. We should state at the outset that we grant permission to appeal on ground 1 and, subject to an important qualification, ground 2. We refuse permission to appeal on the other two grounds on the basis that neither has any real prospect of success. We set out our brief reasons for each ground in turn.

**Ground 1**

[1] The CR also contends that by reason of the principle of effectiveness the limitation period cannot begin to run until the infringement has ceased. This "cessation requirement" is the subject of a separate judgment as that argument was heard in this case together with the individual claims against Mastercard: [2023] CAT 49 ("the *Volvo* limitation judgment"). An appeal against the *Volvo* limitation judgment is pending before the Court of Appeal.

5. A leading, pre-Brexit decision of the CJEU on the application of the principle of effectiveness to a national limitation period in the context of competition law claims is *Cogeco*: see Judgment at [77]-[78]. It was common ground that *Cogeco* is therefore binding in these proceedings. However, we rejected the CR's submission that *Cogeco* is authority for the proposition that a limitation period cannot start to run before the claimant knew that it has suffered harm as a result of the unlawful conduct: see at [93]-[94] and [97]. This has been referred to as the 'Knowledge Requirement.'

6. The CR contends that we took an "overly narrow view" of the ruling in *Cogeco*. Although we do not doubt the correctness of our view, we accept that a contrary argument has a real chance of success and accordingly grant permission on this ground.

**Ground 2**

7. The CR contends that the Tribunal erred in law "in holding that, in the context of collective proceedings, the reasonable discoverability requirement under s. 32(1) [LA] and/or the Knowledge Requirement flowing from the principle of effectiveness is to be applied by reference to the knowledge of the CR": PTA Application, para 4.

8. However, this is in part a misunderstanding of the Judgment. We did <u>not</u> hold that the reasonable discoverability requirement under the English statute is to be applied by reference to the CR. The CR's case under s. 32(1)(b) LA was rejected because we found that there was no deliberate concealment of relevant facts: [58]. We proceeded to consider whether, if we had come to a different conclusion, those facts were discoverable with reasonable diligence. In addressing that question, we noted that it seemed paradoxical to approach this question in collective proceedings by reference to the average class member and not to the CR; but we recognised that under the English statute that alternative interpretation is not permissible and held that if we had to decide the question of reasonable discoverability, we would find that the relevant facts were not commonly known or reasonably discoverable by the average class member: see at [64]-[65]. As the Judgment made clear, the reason the CR's case under s.

32(1)(b) failed was because of our conclusion on deliberate concealment: see at [66] and also [118(1)].

9. Accordingly, insofar as Ground 2 is directed at the conclusion in the Judgment on issue (a), it is misconceived, and we note that the PTA Application makes no reference to any paragraphs in the section of the Judgment addressing issue (a). Our grant of permission is therefore limited to the application of the EU principle of effectiveness.

10. The principle of effectiveness is a general principle of EU law and is not enshrined in precise statutory wording like the LA. Its application in the context of collective proceedings has never previously been considered. While we consider that our approach is clearly to be preferred, we recognise that the contrary position is well arguable. Moreover, given the growth of collective proceedings, this is a question of potentially wide implication. We therefore give permission also on the ground that there is some other compelling reason for the appeal to be heard.

11. Mastercard points out that as regards the principle of effectiveness, Ground 2 is only relevant if the CR should succeed on Ground 1. That is correct, but we are granting permission to appeal on Ground 1 so this objection falls away.

**Gound 3**

12. The CR contends that the Tribunal made a finding as to the state of the CR's personal knowledge which was procedurally unfair: PTA Application at para 6. If we had found that Mr Merricks actually knew what we held to be the relevant facts for this purpose, we would agree. But that is not what the Judgment found.

13. This issue arises only on the basis that the principle of effectiveness in EU law includes a Knowledge Requirement, as the CR contended. As noted above, the Tribunal held that if, contrary to our finding, *Cogeco* did establish such a Knowledge Requirement, then in the case of collective proceedings brought by a class representative, under the EU general principle this requirement should apply to the class representative as the person bringing the proceedings and not

to the average class member. The CR seeks to challenge that conclusion by Ground 2 of the PTA Application. This point was put to counsel for the CR in the course of the hearing and there is no suggestion that it was procedurally unfair for the Tribunal to come to that conclusion.

14. The burden of showing that the principle of effectiveness requires displacement of a national rule of limitation rests on the CR as the party relying on that principle. Accordingly, if the Knowledge Requirement applies to the CR, it would be for him to show that he does not satisfy it. However, on the CR's own case the Knowledge Requirement concerns information which the relevant person knew *or could reasonably be expected to know*. See the CR's Re-Amended Reply at para 9D and para 56 of the CJEU *Volvo* judgment, quoted at [79], which the CR contended was restating established principles.

15. On that basis, the Judgment noted that the CR had not put forward any evidence or argument as to what he knew or could reasonably have discovered. Given that the burden was on him, that was sufficient to determine the point. But we added that we would be surprised if the CR did not satisfy the Knowledge Requirement. We see nothing unfair in that observation which flowed directly from the way the case was argued for the CR. The whole case of the CR was that an average consumer could not be expected to know the relevant facts because she would not read the articles about banks and interchange fees which appeared in the broadsheet press or the MMC Report on Credit Card Services. We indeed accepted that argument: see at [106]. But Mr Merricks is manifestly in a very different position from the average consumer in this respect.

16. The PTA Application, at para 6, notably says only that: "Mr Merricks' position is that he did not have knowledge of relevant facts as at 20 June 1997, notwithstanding his role as Chief Financial Service Ombudsman". That may be so. But that is distinct from a conclusion that the facts set out at [105] were facts which he could reasonably be expected to have discovered, given the sources in which they could have been found. Such a view does not depend on evidence as to Mr Merricks' state of mind.

**Ground 4**

17. This ground seeks to challenge the Tribunal's conclusion that Mastercard did not deliberately conceal the fact that the EEA MIKF was "appreciably above zero": Judgment at [53]-[54].

18. Although that is alleged to be an error of law, we think it is manifestly a finding of fact, whereas appeals from the Tribunal are restricted to points of law. The PTA Application does not allege that we applied the wrong test for what constitutes deliberate concealment. Instead, it appears to imply an *Edwards v Bairstow* challenge to the factual finding, contending that the finding was irrational as it was inconsistent with our finding that Mastercard intended to keep the actual levels of MIFs confidential. But there is nothing remotely inconsistent in a conclusion, on the evidence, that while Mastercard intended to keep specific MIF levels confidential it did not deliberately conceal the fact that they were appreciably above zero.

**Alleged further error of law**

19. At para 10 of the PTA Application, the CR seeks to reserve the right to pursue a further ground of appeal "at any later stage of the appeal". Mastercard objects that the CR has no right to adopt this position. Since the CR expressly states that he does not seek to pursue this argument now, we do not think this is a matter for us. It will arise if, and when, the CR seeks to advance that further ground.

**Hearing of the appeal**

20. At PTA Application, para 11, the CR points out that the Court of Appeal is due to hear the appeal against the *Volvo* limitation judgment (fn 1, above) on 22 November. He says that it would be efficient and in the interests of justice for the Court of Appeal to hear at least ground 1-2 of the present appeal together with that appeal. Mastercard in its submissions suggests that the appeal against the *Volvo* limitation judgment may not now proceed in light of the recent judgment of the Supreme Court in *Lipton v BA Cityflyer Ltd* [2024] UKSC 24. We do not know if that is so, but if it does proceed, we respectfully suggest that

the Court of Appeal may wish to list the present appeal to be heard together with that appeal.

The Hon. Mr Justice Roth
Chair

The Hon. Lord Ericht

Jane Burgess

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

Date: 30 July 2024