Arcadia Group Brands Limited and others v Visa Inc and others

Anneliese Blackwood, Monckton Chambers

Background

The Claimants are, or were, well-known high street retailers who seek damages for breaches of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), Article 53 of the European Economic Area Agreement and section 2 of the Competition Act 1998 in relation to the Defendants' imposition of multilateral interchange fees ("MIFs") in the course of operating the Visa payment-card system. When a cardholder makes a payment with a Visa credit or debit card the merchant has to pay its bank, known as the "Acquirer", a "Merchant Service Charge" that includes the MIF, which is then paid by the Acquirer to the cardholder's issuing bank. The Claimants' case is that Visa is responsible for setting and implementing the MIF arrangements between its member banks, which in effect set a minimum price or "floor" in the price that they as merchants have to pay the Acquirers to process payments by Visa card. In their view, MIFs are an unlawful arrangement which restricts or distorts competition in the acquiring market and, but for the arrangements, either no MIFs or MIFs equivalent to zero would have applied.

The proceedings in question comprise of 12 claims which were commenced on 23 July 2013 and 4 October 2014 respectively for breaches relating to an alleged infringement period commencing from 1977. The Defendants applied, pursuant to CPR 3.4(1)-(2) and CPR 24 for summary judgment and/or strike out of those parts of the Claimants' claims which alleged infringements of competition law in the period prior to 23 July 2007 and 4 October 2007 (the "Limitation Dates") , namely before the statutory limitation period of 6 years prior to the commencement of the proceedings.. The basis for this was that claims for breaches of competition laws prior to the Limitation Dates were time-barred under section 2 and 9 of the Limitation Act 1980. These provisions provide defences to tort claims and claims for breach of statutory duty brought *"after the expiration of six years from the date on which the cause of action accrued".*

In response to the applications the Claimants relied on section 32 of the Limitation Act 1980 which provides:

"(1) where in the case of any action for which a period of limitation is prescribed by this Act…(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant…the period of limitation shall not begin to run until the plaintiff has discovered the…concealment…or could with reasonable diligence have discovered it…(2) For the purposes of subsection (1) above,

deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

The Claimants contended that they were entitled to extend the limitation period pursuant to s.32(1)(b) as there were facts relevant to their claims which they did not know, or could not with reasonable diligence have been discovered, prior to the Limitation Dates. The Defendants contended that all facts relevant to the right of action were in the public domain before the Limitation Dates.

Applicable Legal Principles

(a) Section 32(1) of Limitation Act 1980

Simon J summarised the principles in the existing case law relating to section 32(1), in particular *Johnson v Chief Constable of Surry* (CA, unresported, 23 November 1992) and The *'Kriti Palm'* [2006] EWCA Civ 1601, as follows:

(1) Section 32(1)(b) is to be construed narrowly;

(2) Section 32(1)(b) is concerned with facts which found a cause of action not facts which improve the prospect of succeeding in the claim;

(3) The facts which have been concealed must be those which are essential for a claimant to prove in order to establish a prima facie case;

(4) Section 32(1)(b) does not apply to new facts which might make a claimant's case stronger, or to facts which are relevant to the claimant's ability to defeat a possible defence or to facts which established the precise quantum of the claim;

(5) What a claimant has to know before time starts running against him under section 32(1)(b) are those facts which, if pleaded, would be sufficient to constitute a valid claim not liable to be struck out for want of some essential allegation.

He stated that if a claimant is in possession of facts which are sufficient to enable a cause of action to be pleaded, and which cannot be struck out for want of some essential averment, the limitation period is not suspended. The Claimants argued that the mere fact that a party may have pleaded a sufficient case does not mean that it has 'discovered' everything relevant to it. Whilst the judge accepted this was true he said that the trigger for time running for limitation purposes is not the discovery of every potentially relevant fact in the broadest sense.

(b) Pleading in competition cases

Simon J recognised that the Court insists on the proper particularisation of competition claims (see for example Roth J in *Sel-Imperial Ltd v The British Standards Institution* [2010] EWHC 854 (Ch) [17]) but highlighted that it was clear from the decision of the Court of Appeal in *KME Yorkshire Ltd and others v. Toshiba Carrier Ltd (UK) and others* [2012] EWCA Civ 1190, Etherton LJ at [32] that on a strike out application the Court recognises that:

"... it is in the nature of anti-competitive arrangements that they are shrouded in secrecy and so it is difficult until after disclosure of documents fairly to assess the strength or otherwise of an allegation that a defendant was a party to, or aware of, the proven anti-competitive conduct of members of the same group of companies."

He said this 'generous approach' towards claimants when applications are made to strike out competition claims had two consequences. First, the Court will be less inclined to strike out a claim or enter summary judgment on the basis of the insufficiency of the pleading than it might in other types of case. Secondly, a claimant cannot wait until litigation risks are reduced to a level which it considers to be commercially acceptable before bringing proceedings or, if it does so, it must accept the confinement of the claim to losses within the primary limitation period.

The Claimants argued that another reason for not acceding to the Defendants' applications was that claims under Article 101(1) fall within a developing area of the law and there have been repeated and potent warnings about deciding cases in developing areas of the law on a summary basis, see for example, *Three Rivers DC v. Bank of England* (No.3) [2003] 2 AC 1, Lord Steyn at 237. Simon J noted that caution should be exercised where the Court is considering issues at the margins of the developed law but rejected the submission that this was such a case. He said the law was clear and competition cases, for all their potential complexity, did not fall within an exceptional category calling for a different approach to the application of s.32(1)(b).

(c) The Directive

The Claimants also sought to rely on the provisions of a proposed Directive of the European Parliament and the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, approved by the European Parliament on 17 April 2014, and approved in a form incorporating

technical corrections by lawyer-linguists on 21 October 2014 (the "proposed Directive"). Article 10 of the proposed Directive contains provisions relating to limitation periods. However the judge concluded that the effect of Article 22 of the proposed Directive was to preclude reliance on Article 10 in relation to actions which have been commenced before its coming into force. He consequently concluded that the terms of Article 10 of the proposed Directive provided no basis for allowing the case to go to trial in relation to claims which came into existence prior to the Limitation Dates.

Application of the principles to the facts of the case

The Claimants' case was that there were four key facts which were neither discovered nor discoverable with reasonable diligence at the time the proceedings were commenced and which were highly relevant to the issue of whether the MIFs in issue restricted competition. Simon J held that, in the light of the case law, the Defendants' application was unanswerable unless the concealed facts disabled the Claimants from pleading the cause of action which the Court was considering. He found that the Claimants had not identified any such facts and the Defendants were able to demonstrate how the Particulars of Claim, issued in 2013, were derived from material which was available before the Limitation Dates.

Simon J rejected each of the four key facts identified by the Claimants, on the basis that they were not material to pleading a statement of claim or were discoverable with reasonable diligence. As to the first alleged key fact, the 'manner' and 'mechanisms' by which the MIFs were set were not an essential matter of proof which had to be established in order to found the cause of action. The judge found that the essence of the cause of action was whether the arrangements had the object or effect of restricting competition, for which it was not necessary to know the precise means of their implementation. He stated that it was not clear how the 'precise nature' or even the 'scope' of the MIF arrangements were facts which the Claimants needed to be aware of before the limitation period could start running.

As to the second alleged "key fact", Simon J held that as the Claimants' case was that any MIF above zero was unlawful, the actual MIF levels were not material to the existence of the claim. All that the Claimants needed to know to bring the claim was that there was an MIF charge in existence. He acknowledged that information about the MIF levels was material to the quantum of the claim, and therefore to the commercial decision as to whether to bring the proceedings, but ,such matters were not relevant facts for the purpose of s.32(1)(b).

The Claimants argued that there were gaps in what it knew about the Defendants' conduct and the judge recognised that the full picture was not available to

the Claimants. However he concluded that the Claimants were focussing on matters about which they might want reassurance for commercial purposes before bringing a claim, not matters which were essential to pleading it. He noted that the current proceedings were not brought following the discovery of some new fact relevant to the Claimants' right of action. The trigger for the proceedings was the dismissal of the appeal against the 2007 MasterCard Decision by the General Court in May 2012.

He said that he accepted that it would be prudent as a matter of business commonsense for the Claimants to see whether the MIFs qualified for exemption under Article 101(3) before embarking on expensive litigation. However he said that the cases made clear that there is a distinction to be drawn between facts which found the cause of action and facts which improve its prospect of success. Matters which may be relevant to disproving a defence were not "relevant" for the purposes of s.32(1)(b).

Finally he said that he did not consider that there should have been any significant difficulty in identifying the appropriate Defendants in the present action. The Claimants' legal advisors, *"by the exercise of ordinary standards of diligence"*, could have discovered the identity of the proper defendants in the course of correspondence or by the use of the CPR process. He branded as *"unrealistic"* the proposition that *"sophisticated claimants (and their legal advisors) in modern commercial litigation are unable to identify the tortfeasor who is alleged to have caused damage running to hundreds of millions of pounds over a period of six years"*.

For the foregoing reasons Simon J granted the relief sought in the Defendants' applications.

In a further judgment, issued on 11 November 2014, Simon J dismissed the Claimants' application for permission to appeal and awarded Visa indemnity costs for the costs of their application, on the basis that it was clear from the outset that the pre-2007 claims were doomed to fail and the Claimants had acted unreasonably in pursuing the claims when the weaknesses of their case had been pointed out to them on a without prejudice basis.

Comment

This judgement brings into stark relief the need to commence claims for breaches of competition law promptly and for claimants to be pro-active in ascertaining facts in relation to a claim that it suspects it might have. It is understandable that claimants may wish to wait for further disclosure of information, or for judgements of the European Courts or European or national regulatory bodies to be published, to have a better understanding of the merits of their claim before commencing proceedings. However, they cannot sit by and

passively wait for all the pieces of the jigsaw to fall into place before they feel sufficiently comfortable to start proceedings. If a claimant has enough facts to support the pleading of a prime facie cause of action the judgement indicates that it would be advisable to do so as soon as possible. It also suggests that Claimants will be expected to have pro-active recourse to the procedures in the CPR to make requests for information and pre-action disclosure in order to advance their claim.

Anneli Howard was instructed by Linklaters LLP on behalf of the 3rd to 5th Defendants.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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