IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2006-485-2535

BETWEEN	COMMERCE COMMISSION Plaintiff
AND	CARDS NZ LIMITED First Defendant
AND	VISA INTERNATIONAL SERVICE ASSOCIATION Second Defendant

Hearing: 30 March 2007
(Heard at Auckland)

Counsel: D Goddard QC and L Theron for Commerce Commission
JL Land for DSE (NZ) Limited
AR Galbraith QC and JF Anderson for Cards NZ Limited
MN Dunning for Visa International Service Association
JG Miles QC and AM Peterson for ASB Bank Limited
MC Sumpter for Mastercard International Incorporated
RJC Partridge for ANZ National Bank Limited
J Palmer for Westpac New Zealand Limited, Westpac Banking Corporation and Warehouse Financial Services Limited
SR Willetts for GE Finance and Insurance

Judgment: 5 April 2007

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 5 April 2007 at p.m. , pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date: ………………………….

AND	ASB BANK LIMITED BANK OF NEW ZEALAND WESTPAC BANKING CORPORATION WESTPAC NEW ZEALAND LIMITED ANZ NATIONAL BANK LIMITED AND TSB BANK LIMITED Third Defendants
AND	KIWI BANK LIMITED THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED AND NEW ZEALAND POST LIMITED Fourth Defendants
AND	MASTERCARD INTERNATIONAL INCORPORATED Fifth Defendant
AND	ASB BANK LIMITED BANK OF NEW ZEALAND WESTPAC BANKING CORPORATION WESTPAC NEW ZEALAND LIMITED ANZ NATIONAL BANK LIMITED KIWIBANK LIMITED AND THE WAREHOUSE FINANCIAL SERVICES LIMITED Sixth Defendants
AND	GE FINANCE AND INSURANCE Seventh Defendant

CIV 2006-485-2693

AND BETWEEN	DSE (NZ) LIMITED First Plaintiff
AND	THE FARMERS TRADING COMPANY LIMITED Second Plaintiff
AND	FOODSTUFFS (AUCKLAND) LIMITED FOODSTUFFS (WELLINGTON) COOPERATIVE SOCIETY LIMITED FOODSTUFFS SOUTH ISLAND LIMITED AND JAMES GILMOUR & CO LIMITED Third Plaintiffs
AND	MISSISSIPPI LIMITED Fourth Plaintiff

AND	NOEL LEEMING GROUP LIMITED Fifth Plaintiff
AND	PROGRESSIVE ENTERPRISES LIMITED AND GENERAL DISTRIBUTORS LIMITED Sixth Plaintiffs
AND	WHITCOULLS GROUP LIMITED Seventh Plaintiff
AND	CARDS NZ LIMITED First Defendant
AND	VISA INTERNATIONAL SERVICE ASSOCIATION Second Defendant
AND	ASB BANK LIMITED BANK OF NEW ZEALAND WESTPAC NEW ZEALAND LIMITED ANZ NATIONAL BANK LIMITED AND TSB BANK LIMITED Third Defendants
AND	KIWIBANK LIMITED THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED AND NEW ZEALAND POST LIMITED Fourth Defendants
AND	MASTERCARD INTERNATIONAL INCORPORATED Fifth Defendant
AND	ASB BANK LIMITED BANK OF NEW ZEALAND WESTPAC BANKING CORPORATION WESTPAC NEW ZEALAND LIMITED ANZ NATIONAL BANK LIMITED KIWIBANK LIMITED AND THE WAREHOUSE FINANCIAL SERVICES LIMITED Sixth Defendants
AND	GE FINANCE AND INSURANCE Seventh Defendant

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Introduction

[1] In these proceedings the Commerce Commission and DSE (NZ) Limited and nine other retailers allege that the setting of interchange fees in the Visa and MasterCard credit card schemes is in breach of the Commerce Act 1986. They sue the credit card service companies and the member banks of each scheme seeking declarations and injunctive relief. The Commission also seeks pecuniary penalties and the retailers seek an enquiry for damages.

[2] Both proceedings were filed in the Wellington Court where the first defendant in each proceeding, Cards NZ Limited (Cards), has its registered office. Cards applies to transfer both proceedings to the Commercial List at Auckland. The application is opposed by the Commerce Commission. Other parties either support or are not opposed to the application.

Supporting the application

[3] For Cards, Mr Galbraith QC submitted that the proceedings are of an intensely commercial character, precisely the kind of case for which the Commercial List is suited. The proceedings involve serious allegations that go to the heart of the operation of the Visa and MasterCard systems in New Zealand. The factual, economic and legal issues will be complex. There are likely to be numerous expert economic witnesses and, even with some parties jointly represented, over twenty counsel appearing. Mr Galbraith submitted that the proceeding would benefit from the experience and "hands-on" management available in the Commercial List. He also questioned whether, given the likely scale of the hearing, it could be accommodated in the Wellington Court.

[4] Mr Galbraith submitted that the overall balance of convenience favours a transfer. Six of the ten local defendants are registered at Auckland or their executives responsible for the conduct of the litigation are based in Auckland. Nine

of the eleven retailers involved in the DSE proceeding are registered in Auckland and they are represented by Auckland solicitors. The majority of solicitors and counsel are in Auckland. Mr Galbraith also said that Auckland, as the main point of entry into the country, would be the most convenient forum from the point of view of witnesses travelling from overseas.

[5] Mr Galbraith submitted that the convenience and saving in costs for the Commerce Commission of having the proceeding heard in Wellington is an insufficient reason to refuse transfer. He said that a refusal to transfer on the basis of the Commission's cost and convenience would create an unfortunate precedent and the incentive for gaming. He foresaw the possibility of the Commission manipulating r 107 of the High Court Rules to issue proceedings in Wellington no matter how suitable the case may be for inclusion in the Commercial List.

[6] Mr Galbraith said the additional travel, accommodation and overhead costs that the Commission would incur should be placed in context. If successful, the Commission will be able to recover a proportion of such costs. On the other hand, if the proceeding remained in Wellington and the Commission were unsuccessful, it would be exposed to a much larger claim for disbursements. He argued that a transfer would achieve savings for all parties through the enhanced efficiencies of the Commercial List. In any event, he said that any issue of additional costs should be determined at the end – not at the very beginning – of the proceedings.

[7] The application for transfer is supported by four of the defendants. The remainder do not oppose or abide the decision of the Court. The plaintiffs in the retailers' proceeding do not oppose transfer provided that both proceedings are heard together. There is an outstanding application for such an order.

Opposed to the application

[8] Mr Goddard QC explained that the Commission had made a considered decision to file the proceeding in Wellington. As Cards was the logical first defendant, the choice of Wellington or the Commercial List in Auckland was reasonably available. Wellington was chosen primarily for reasons of cost and

convenience. The Commission took the view that both Courts could provide the "hands-on" management required of complex multi-party litigation provided that in each case the proceedings were assigned to a Judge with relevant experience.

[9] The Commission would, however, find it much more costly if the proceedings were in Auckland. Its litigation team is based in Wellington. Its presence in Auckland is minimal. Counsel are based in Wellington. If the proceedings were in Auckland, the Commission would face the additional costs of travel and accommodation expenses of counsel and support staff and of needing to establish a presence in Auckland for the duration of the trial.

[10] Mr Goddard pointed out that some of the additional costs would not be recoverable even if the Commission were successful. In *Air New Zealand v Commerce Commission* (2005) 17 PRNZ 786, I allowed the Commission's claim for counsel's travel and accommodation expenses but not the travel and accommodation costs of Commission staff: at [86]. I also disallowed a claim for the costs of operating an office in Auckland for the duration of the hearing: at [88].

[11] Mr Goddard acknowledged that because most of the legal teams engaged in the litigation are Auckland-based, there is a case for transfer in the interests of reducing aggregate costs of travel and accommodation. He said in the event of a transfer the defendants should be required to share some of the savings they achieved by meeting the extra costs which the Commission would incur. He asks therefore that if transfer is ordered, the defendants who support transfer should be ordered to meet the Commission's actual and reasonable costs of the proceedings taking place in Auckland.

Discussion

[12] It is not in issue that the proceedings are quintessentially of a character for which the Commercial List is intended to cater. In the past, before the advent and refinement of case management systems in all registries, an application to transfer the proceedings to the Commercial List could not have been resisted and, in all probability, would not have been required. The discipline offered by the

Commercial List made efficiencies possible that would have outweighed the disadvantages in cost and convenience of which the Commission complains.

[13] The Commercial List will continue to offer advantages in some cases – see the comments of Paterson J in *Cellier Le Brun Limited v Le Brun* (2002) 16 PRNZ 376 at 380. But when a proceeding is assigned to a Judge for management through the interlocutory stages to trial, as all agree should occur in this case, there is no reason to think that the Commercial List will offer any tangible advantages.

[14] I have enquired into whether there is any logistical reason why the proceedings could not be managed and heard in Wellington. I have been assured there are not. The largest court can accommodate the projected number of counsel and witnesses and the large volume of documents expected.

[15] The application then turns on questions of cost and convenience and, ultimately, as the overriding consideration, of fairness. This broadly coincides with the approach to be taken to an application for change of venue under r 479, which is the essential character of the application now that the advantages of the Commercial List can be set to one side.

[16] Such applications place an onus on the party seeking transfer, but not one that is particularly difficult to discharge. A change of venue should be ordered if, on an overall consideration of questions of relative convenience and fairness, the Court is affirmatively satisfied that the proceeding can be more conveniently and fairly tried elsewhere: *Consumer Council v Pest Free Service Limited* [1978] 2 NZLR 15 (CA) at 18.

[17] On the information available to me, the parties (other than the Commerce Commission) will collectively incur significantly greater costs if the proceeding remains in Wellington. As I have previously noted, six of the ten New Zealand defendants have their registered office in Auckland or their executives responsible for the conduct of the litigation are in Auckland; nine of the eleven retailer plaintiffs are Auckland-based. With two exceptions, the defendants have instructed Auckland-based solicitors (although some have Wellington offices) and most have briefed

Auckland counsel. Only two of senior counsel engaged are from Wellington. The retailer plaintiffs have instructed Auckland solicitors.

[18] Even if the defendants take all reasonable steps to achieve savings and efficiencies, for example, by arranging joint representation and instructing local counsel for interlocutory hearings, it is apparent they (and the retailer plaintiffs) will incur significantly greater costs if the proceedings remain in Wellington.

[19] It is also clear that the combined costs of travelling to Wellington will substantially exceed those which the Commission would incur if the proceedings are transferred to Auckland including, in the case of the Commission, the cost of establishing a presence in Auckland for the duration of the hearing. The latter cost is not one I include in the costs of the defendants and retailer plaintiffs, most of whom either themselves or through their solicitors will have office facilities available to them in Wellington.

[20] In comparing costs, I also disregard the additional costs of ferrying overseas witnesses from Auckland, their likely port of entry, to Wellington. The additional costs are likely to be minimal in the overall scheme of things.

[21] As I understand it, the Commission accepts that the additional costs incurred by the other parties if the proceedings are heard in Wellington will exceed the additional costs incurred by the Commission if the proceeding is transferred to Auckland. Its concern is that a transfer should not be made simply for the financial advantage and convenience of the defendants. That concern is behind the suggestion that any order for transfer should be associated with a costs order which would ensure that savings are shared.

[22] In *Consumer Council v Pest Free Service*, the Court said that the convenience referred to in the predecessor to r 479 is not the convenience of the parties, it is convenience having regard to the case in all its bearings. Costs for this purpose are encompassed by convenience as, in the contemporary setting, are notions of efficiency. Setting to one side the financial cost to the parties, it is appropriate to

weigh the efficiency losses that flow from the avoidable depletion of limited resources.

[23] Mr Goddard emphasised the Commission's concern to ensure the responsible management of public funds. That is entirely appropriate and there can be no criticism of its decision to file in Wellington. But there are other important interests to be considered, both public and private. Achieving convenience and fairness in all its bearings is not to be measured only by the short term financial implications for the parties.

[24] There is merit in Mr Goddard's plea for the benefits of a move to Auckland to be shared, but not in the way he proposes to achieve it. The Commission may well have a stronger case for recovering the additional costs of litigating in Auckland than it had in *Air New Zealand v Commerce Commission* where it was not an unwilling litigant. Apart from the wide discretion to award costs so as to do justice between the parties, the Court has powers under r 446L(3) and (4) to achieve savings for or ameliorate the extra costs of a plaintiff who has been forced to leave the registry of its choice through the wishes of the defendants: see *Natural Gas Corporation of New Zealand v Horowhenua Energy Limited* [1994] 3 NZLR 493 at 495.

[25] But these are steps to be taken as and when the interests of justice require. That does not necessarily mean that no relief is available until the conclusion of the litigation but an award that fairly takes account of but is not determined by the additional costs of litigating in Auckland must clearly await the final determination of the proceedings.

Result

[26] I make an order that the proceedings be entered on the Commercial List in the Auckland Registry. A conference is to be convened by the Registry after consultation with the parties for the purpose of making any necessary timetable orders.