Neutral citation: [2022] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1306-1325/5/7/19 (T)
1349-1350/5/7/20 (T)
1369/5/7/20 (T)
1373-1374/5/7/20 (T)
1376/5/7/20 (T)
1383-1384/5/7/21 (T)
1385-1400/5/7/21 (T)
1406/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

16 March 2022

Before:

SIR MARCUS SMITH
(President)
BEN TIDSWELL
ANDREW YOUNG QC

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) DUNE GROUP LIMITED & ORS
(2) WESTOVER GROUP LIMITED & ORS
(3) ALAN HOWARD (STOCKPORT) LIMITED & ORS

Claimants

- v -

MASTERCARD INCORPORATED & ORS

Defendants

AND BETWEEN:

(1) DUNE SHOES IRELAND LIMITED & ORS
(2) WESTOVER GROUP LIMITED & ORS
(3) ALAN HOWARD (STOCKPORT) LIMITED & ORS

Claimants

- v -

VISA EUROPE LIMITED & ORS

Defendants

(collectively "the HK Claims")

AND BETWEEN:

FURNITURE VILLAGE LIMITED & ORS

Claimants

- v -

MASTERCARD INCORPORATED & ORS

Defendants

AND BETWEEN:

SOHO HOUSE UK LIMITED & ORS

Claimants

- v -

VISA EUROPE LIMITED & ORS

Defendants

(collectively "the SSU Claims")

AND BETWEEN:

RICHER SOUNDS PLC

Claimant

- v -

MASTERCARD INCORPORATED & ORS

Defendants

(the "PMC Claim")

Heard at Salisbury Square House on 1 and 2 March 2022

RULING

APPEARANCES

Ms Kassie Smith QC and Ms Fiona Banks appeared on behalf of the Claimants in the HK Claims (instructed by Humphries Kerstetter LLP) and the Claimants in the SSU Claims (instructed by Scott + Scott UK LLP).

Mr Christopher Brown (instructed by Penningtons Manches Cooper LLP) appeared on behalf of Richer Sounds Plc.

Mr Matthew Cook QC and Mr Hugo Leith (instructed by Jones Day) appeared on behalf of the Mastercard Defendants.

Mr Brian Kennelly QC, Mr Daniel Piccinin and Ms Isabel Buchanan (instructed by Milbank LLP and Linklaters LLP) appeared on behalf of the Visa Defendants.

A. INTRODUCTION

(1) The proceedings

1. This Ruling is given in a number of proceedings before the Competition Appeal Tribunal (the "Tribunal"), by which a substantial number of claimants have brought claims against Mastercard and/or Visa entities in relation to the operation of their respective card payment schemes. The claimants are all merchants, operating across a wide variety of sectors, or local authorities that accepted payment by Visa and/or Mastercard payment cards of various types. For convenience, we will refer to them collectively as "merchants".

2. The history of the various proceedings is set out in previous judgments of the Tribunal, which can be found (in reverse chronological order) in *Dune Group Limited & Others v Mastercard Incorporated & Others* [2021] CAT 35 at [5] onwards, *Westover Limited & Others v Mastercard & Others* [2021] CAT 12 at [4] onwards, and *Dune Shoes Ireland Limited & Others v Visa Europe Limited & Others* [2020] CAT 26 at [4] onwards. For present purposes, we record that the claims concern the open four-party payment schemes for credit and debit cards (including commercial cards) and the rules of operation of those schemes set by Visa and Mastercard respectively. Of particular area of focus is the default Multilateral Interchange Fees (known as "MIFs") which are payable by one of the members of the four-party scheme, the acquiring bank, to another, the issuing bank. In very broad terms, the merchants allege that:

   (1) The MIFs (which appear in various forms depending on the geographies and card types involved) were set anticompetitively, in breach of article 101(1) of the Treaty of the Functioning of the European Union ("TFEU") and under the corresponding domestic UK law in Chapter I of the Competition Act 1998 ("CA 1998").

   (2) The rules of the respective schemes amount to an abuse of a dominant position under article 102 TFEU and Chapter II of the CA 1998.

(3) The unlawful MIFs and/or the abusive conduct had the consequence of inflating the charges which the acquiring banks imposed on their customers, the merchants, through the Merchant Service Charge or "MSC".

(4) There was no justification for the inflated charge which is represented by the MIFs and in particular no proper basis for exemption under article 101(3) TFEU.

(5) The merchants are entitled to recover loss and damage from Mastercard and/or Visa respectively.

3. Some of the MIFs which are the subject of the present proceedings have been the subject of regulatory decisions which are determinative of the question of liability (for example, the European Commission's decision of 19 December 2007, concerning Mastercard's MIFs set in the EEA, which has been the subject of unsuccessful appeals to the General Court ((Case T-111/08) *MasterCard Inc v European Commission* [2012] 5 CMLR 5) and the Court of Justice of the European Union ((Case C-382/12 P) *MasterCard Inc v European Commission* [2014] 5 CMLR 23)). Other questions of liability remain to be decided, including the article 102 issues. There are a range of quantum issues to be resolved in the proceedings, including the extent to which losses caused by the MIFs might have been "passed on" by acquiring banks to merchants and then from merchants to consumers.

(2) Current and anticipated claims

4. The number of claimant merchants currently before the Tribunal in relation to MIFs claims is large and has expanded over the course of the proceedings. By the time of the second case management conference ("CMC") on 1 and 2 March 2022, there were 704 claimants in 24 separate claims issued in four waves represented by Humphries Kerstetter (the "HK claimants"); 254 claimants in 20 separate claims represented by Scott & Scott (the "SSU claimants"); and a single claimant represented by Pennington Manches Coopers (the "PMC claimant").

5. Moreover, the number of claimants is liable to expand in the future:

(1) We have been told by Humphries Kerstetter that they anticipate being instructed to issue proceedings in the Tribunal by another wave of between 10 to 25 claimants.

(2) A large number of similar claims are also apparently in the process of being transferred from the High Court to the Tribunal. We were informed that Scott & Scott are acting in claims on behalf of Vodafone plc and Ideal Shopping Ltd against Visa and Mastercard (involving some 26 different claimants) but, due to issues relating to the adequacy of service, the transfer of these claims to the Tribunal has been delayed.

(3) In addition, the Tribunal has been informed by letter dated 14 February 2022 that Stephenson Harwood act for a group of approximately 1,750 claimants in 24 separate claims. Stephenson Harwood's clients have issued these claims in the High Court against both Mastercard and Visa with, we understand, an estimated total claim value of £670 million excluding interest. Stephenson Harwood anticipate service of these claims within the next two or three months and it is their intention to seek transfer to the Tribunal after service.

6. Further, we understand from Mastercard and Visa that there may be in excess of 350 other separate claims (involving various numbers of claimants in each claim) filed in the High Court but apparently not yet subject to any attempt to transfer to the Tribunal.

(3) Procedure leading up to the second CMC

7. A first CMC was held in respect of a number of the HK claimants on 2 February 2021, at which it was ordered that there would be joint case management of the proceedings then before the Tribunal. A fourth wave of HK claimants only became part of the current process after the first CMC by order of the Tribunal dated 23 March 2021. At the CMC in February 2021, the Tribunal stayed all issues with the exception of whether the MIF's infringed article 101 TFEU. The

parties were directed to liaise on the number and criteria for the selection of a manageable number of claimants whose claims would proceed as sample claims. In relation to the anticipated sampling process, parties were directed to lodge written submissions in relation to their proposals. It is also relevant to note that the HK claimants had a summary judgment application outstanding at the first CMC. The summary judgment application was subsequently heard by the Tribunal on 12 to 14 May 2021 and summary judgment was given in relation to the UK, Ireland, Gibraltar and intra-EEA MIFs for the period prior to the 9 December 2015 (*Dune Group Limited & Others v Mastercard Incorporated & Others* [2021] CAT 35). The HK claimants have been granted permission by the Court of Appeal to appeal in relation to intra-regional MIFs, and MIFs for the period post 9 December 2015. We were informed that the Court of Appeal is expected to hear the HK claimants' appeal in July 2022. We were also informed that Visa have an outstanding application for permission to appeal arising from the summary judgment application.

8. On 21 December 2021, the Tribunal ordered that the preparations for a sampling process should be extended to the SSU and PMC claimants. The existing submissions from the HK claimants and defendants were provided to the SSU and PMC claimants who, in turn, have produced their own submissions on the sampling exercise. All parties produced skeleton arguments setting out their proposals in relation to the selection of lead cases. The parties agreed that the current claims could be divided into ten categories. They also agreed that a single claimant should be selected from each of those ten categories. There was no agreement on the method of selection for the lead claimant in each of the categories. The parties also disagreed in relation to the need for a pre-selection questionnaire which the defendants proposed in order to better inform that selection process. On the face of the skeleton arguments, there was also a substantial disagreement as to whether the Tribunal should require a number of non-lead claimants to produce further information either through a request for information exercise ("RFI") or disclosure. Visa's position, based on two reports from their economist expert, Mr Holt, was that it would be necessary for a further 27 non-lead claimants to produce data in order that an appropriate assessment could be made in relation to the merchant benefit test (the "MBT")

which is advanced as relevant evidence in relation to the exemption under article 101(3). Mastercard proposed that a further five to ten non-lead claimants should be included in a disclosure exercise. These approaches were opposed by all of the claimant merchants who, in short, contended that there was publicly available information which, along with disclosure from the ten lead claimants, was sufficient for the economics experts to consider the article 101(3) issues.

B. A REVIEW OF THE APPROACH

(1) The Second CMC

9. The second CMC was set down for 1 and 2 March 2022 before a newly constituted Tribunal. At the outset of the second CMC, after having reflected on their written submissions, the Tribunal explained to the parties that there were certain factors which caused the Tribunal to question whether the anticipated sampling process should be carried out at this stage. The Tribunal set out – in broad terms – a different approach that it was minded to follow. The Tribunal rose for some time, to enable the parties to consider the implications of the Tribunal's suggestions, so as to be able to make submissions in relation to them.

10. The Tribunal does not order a change in the manner in which it has previously been determined to resolve proceedings lightly and will only do where good reason exists. In this case, the Tribunal made the suggestions that it did for the following reasons:

    (1) First, the scope of claims (both actual and potential) before the Tribunal had significantly expanded since the sampling exercise had been ordered.

    (2) Secondly, the sampling exercise was very far from agreed. Indeed, in light of the parties' written submissions, the areas of disagreement far outweighed the areas of agreement. There would be no prejudice to the parties in re-considering a contentious and unagreed process for determining a significantly expanding and changing group of claims.

(3) Thirdly, the Tribunal now has experience of a number of multi-claimant proceedings, including those in which a sampling approach has been followed. It is important to learn from that experience, as well as to recognise that there are a number of features peculiar to these proceedings that might suggest a different and better alternative approach.

(2) Key features of these proceedings relevant to case management

11. There are a number of features of these proceedings which we consider require careful consideration in determining the correct way to move forward:

(1) There is a very large number of claimants (some 959) already participating in the proceedings, with the immediate prospect of another large group joining within the next few months. It can also be anticipated that merchants will continue to file similar claims, either in the High Court (from where they are likely to be transferred to the Tribunal) or in the Tribunal directly.

(2) There is considerable variance in the nature of the enterprises within the current claimant group and the group represented by Stephenson Harwood which is apparently to be transferred to the Tribunal in the next few months. They range from large, international corporates, such as hotel groups, to independent store owners.

(3) There is a considerable range of sectors represented by the group. The indication from Stephenson Harwood is that their claimants operate across a wide range of sectors "some but not all of which" overlap with the HK claimants. It may also be that further claims will emerge over the next few months with greater variety in the sectors and other attributes of the claimants.

(4) The liability issues are complex and will likely involve disclosure, factual and expert evidence.

(5) The quantum issues are similarly complex, raising some novel questions of law and potential extensive disclosure, factual and expert evidence.

(6) It is common ground that many of the liability issues will be common to most, if not all, claimants and, given the joint management of the collective proceedings, can be determined in a way that resolves those issues for all parties.

(7) There is less agreement on the question of whether and to what extent the quantum issues will give rise to common issues across the claimant groups. More accurately, there was a consistent view among the parties that there were less likely to be common issues, and a scepticism by the Tribunal about whether that was correct. However, it seemed to be acknowledged that there are some quantum issues which might be described as generic across the claimant groups.

(8) While sampling would reduce the number of claims proceeding to an evidential hearing, the disclosure process is likely to result in substantial volumes of documentation being provided from a potentially wider group than the lead claimants and a prospect of multiple disputes (including hearings) on disclosure matters. The costs associated with the disclosure process, including the expert analysis of the documentation, are likely to be considerable. The trials in the lead cases are then likely to be listed for a number of weeks or even months.

(9) The appeal on the summary judgment application has the consequence that, until the Court of Appeal has handed down its decision later this year, the precise number of issues under article 101(1) for which an evidential hearing is required remains in doubt. For the same reason, there is now a window of time before the range of issues in the proceedings can be fully assessed, during which work to identify and refine the other issues to be decided can be carried out.

(10) It is a significant advantage that the HK claimants and the SSU claimants (that is, the bulk of the current claimant group) are brought within a

relatively small number of claims, represented by a single team of counsel and only two firms of solicitors. Even if Stephenson Harwood's group of claimants falls under the same joint case management regime, there will still be a manageable group of claims and legal representatives with conduct of the proceedings. While we cannot of course foresee how that might change if and when further claims are added (and would certainly not wish to indicate any preference as to how future litigants might wish to choose their legal representation), the position at the moment allows for the disposal of generic issues across a wide number of claimants in a practical way.

12. Bearing these points in mind, we have been keen to explore whether there is scope to adopt case management procedures which (i) reduce or limit, as far as sensible and appropriate, the time and costs involved in disclosure, (ii) bind as many claimants as possible to the outcome on common issues, and (iii) investigate whether a series of trials on grouped issues might be preferable to trials of lead claimant cases or, at the other extreme, a single trial on all issues.

13. These were the broad points raised by the Tribunal at the outset of the second CMC. Having outlined these thoughts, we invited the parties to reflect further on the procedures which might be best selected for these claims. The Tribunal greatly benefitted from the responses of the parties' representatives which the Tribunal took into account in formulating the order which followed the second CMC. The order as made (the "Order") is appended to this Ruling.

(3) Our preferred approach to case management

14. The objectives which the Tribunal seeks to achieve are not, we anticipate, controversial, although legitimate views will vary on the best way of achieving those objectives. Put briefly, the broad key objectives which the process adopted should meet appear to us to be: (i) the just and expeditious determination of the claims at a proportionate cost in accordance with the Tribunal's governing principles as set out in the Competition Appeal Tribunal Rules 2015; (ii) that re-litigation is to be avoided, or at least restricted, in relation to similar claims or issues brought by current claimants; and (iii) that future claimants should –

so far as is appropriate and possible – also be bound by decisions in relation to similar claims or issues, or at the very least be strongly assisted towards the resolution of their claims by the Tribunal's earlier decisions.

15. In order to achieve an expeditious determination of the claims currently before the Tribunal, we are particularly conscious that the current claimants should not be unfairly delayed in the progress of their claims simply to enable other claimants to catch up procedurally. In that regard, we are conscious that there is an in-built hiatus in the proceedings as they are presently constituted while some of the HK claimants proceed with their appeal to the Court of Appeal in relation to their summary judgment application, which was only partially successful before this Tribunal. As we have noted, that appeal is due to be heard in July 2022, and it is anticipated that a judgment will be handed down in October or November 2022.

16. It is the preliminary view of the Tribunal that there are potential benefits to the overall process if the additional claimants whose claims are likely to be transferred to the Tribunal in the near future can be included (so far as is appropriate) into the present process of joint case management of the collective proceedings. The potential benefits include a larger number of claimants having issues common to their claims determined. The wider pool of claimants may also include some claimants with helpful data resources which benefit the wider group. We will, however, be sympathetic to the views of the current claimants if it becomes apparent that the introduction of new claimants over the coming months will unfairly prejudice progress of the claims currently before this Tribunal.

17. We observe that the Court of Appeal in *Sainsbury's Supermarkets Ltd v. Mastercard Inc and Ors*, [2018] EWCA 1536 (Civ) considered the jurisdiction of the Tribunal to hear claims for damages under section 47A of the CA 1998 (which is what the claims under consideration in these proceedings are). The Court of Appeal was addressing the question of remittal to the Tribunal of three cases, one of which was an appeal from the Tribunal and two of which were cases which had been decided in the High Court. The Supreme Court later

disagreed with the Court of Appeal's decision, but did not challenge the following statement in the Court of Appeal's judgment:

> "[356] …The current position, therefore, is that claims in respect of infringement decisions or alleged infringements of Ch I of the 1998 Act, Ch II of the 1998 Act, art 101 of the TFEU or art 102 of the TFEU (but not of arts 53 and 54 of the Agreement on the European Economic Area, since these fall outside the wording of s 47A) may be transferred to the CAT.
>
> [357] As it seems to us, such claims should in normal circumstances be transferred to the CAT. We say this because of the specialist nature and other advantages enjoyed by the CAT, which were appropriately summarised in Barling J's transfer judgment, as follows:
>
> > "[15] The 1998 Act recognised that competition law was an area which justified a specialist court to deal, not just with appeals in cases concerning public enforcement of the competition rules, but also with some private law claims for damages. One obvious feature of competition litigation is the almost ubiquitous presence of expert economic evidence, often of a complex and technical nature. Another common feature, related to the last one, is evidence as to the characteristics and dynamics of specific industries and markets. Mindful of these features, Parliament provided for the specialist competition tribunal to have a multi-disciplinary constitution. In this way panels have the potential to include not just lawyers but also, for example, distinguished economists, accountants or industry experts, selected for each case from the members appointed to the CAT by reason of their knowledge and experience in these areas. Expertise of this kind is of considerable assistance in understanding and resolving the difficult issues which are a common feature of competition litigation. This has long been recognised in the UK, the former Restrictive Practices Court having had a similar constitution. Although it is not impossible for a judge sitting on a case in the High Court to enlist the assistance of a court expert, this is relatively uncommon, and there are resource and other obstacles to the adoption of that course on more than very exceptional occasions.
> >
> > [16] Furthermore, CAT panels benefit from outstanding logistical and legal support provided by the CAT staff and legal assistants ("referendaires"). This is of particular value in lengthy and complex actions …
> >
> > [17] …the CAT has the best of both worlds, in that it is also able to tap into the expertise of the High Court in this field. For many years High Court judges of the Chancery Division have been appointed as CAT Chairmen, and have regularly sat in the CAT. In this way the CAT is in a position to draw on the assistance of experienced judges who have

> heard competition law cases in both the High Court and the CAT…""

18. We agree with those observations and also note that the significant number of claims already subject to the Tribunal's jurisdiction create an opportunity to dispose of those and other claims, using the Tribunal's flexible powers of case management and specialist expertise, in the most efficient way possible. In order to ensure appropriate case management of the widest number of cases, we will be sending a copy of this Ruling and our Order to the Chancellor of the High Court and the Judge in Charge of the Commercial Court.

19. As noted above, it is common ground between the parties that a number of generic issues arise in these cases, such issues being generic either to all claims or within groups of claims. Quantum has traditionally been viewed as an issue specific to each claim advanced. In broad terms, we do not doubt that is correct. Ultimately, if any of these claims are successful, the quantum of the particular claim may well depend on the level of MIFs paid via the MSC by the particular claimant, and after considering whether the particular claimant passed on all or part of the MSC to their customers.

20. We ventured to suggest to the parties that some aspects of quantum might be viewed as generic, or at least, "category generic". For example, we suggested that the difficult issue of "pass on" of the MSC from claimants to their customers may largely be determined by the market sector in which they operate. While we did not understand the parties to agree that "pass on" would involve a more generic approach, it was acknowledged that some elements of quantum might be viewed as generic. We consider that it is important to note two points:

    (1) First, there is a real lack of clarity as to how "pass on" questions are to be resolved at a substantive hearing. For reasons explained further in this Ruling, we have asked the parties to provide written submissions on the evidential issues relating to "pass on" with a view to the Tribunal considering whether further guidance can be provided to parties on the issue of "pass on" at an early stage. Therefore, it would not be appropriate to say a great deal more in this judgment about "pass on". However, in the context of whether evidence in relation to "pass on" will

be claimant specific, we are conscious that the Supreme Court in *Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC & Others* [2020] UKSC 24 at [217], [225] and [226] noted that, in accordance with the overriding objective that legal disputes are dealt with at proportionate cost, it is likely that estimates will be made in assessing the extent of "pass on" by a merchant since individual merchants are unlikely to have specifically addressed the individual cost of the MSC or indeed the MIF component of that. On that basis, if estimates and approximations are likely to be the best evidence in relation to "pass on" of the MSC, that may well be an issue which moves from the specific towards the generic.

(2) Secondly, since there is real uncertainly – and, indeed, disagreement – about which issues may be generic and which specific, it is important to adopt a process that does not commit too early to one categorisation or another.

21. As is well known, the outcome of a trial is usually only binding on the actual parties to the trial. We acknowledge that it is anticipated that the outcomes from the proposed sampling process may result in decisions which have persuasive authority, encouraging the settlement of other claims of a similar or identical nature. However, given the significant number and variety of current and potential claimants and the range and complexity of the issues involved, we are concerned that the risk of re-litigating similar or identical issues in non-lead claims is unacceptably high.

22. We note that, in the context of a multi-claimant process, a final decision in one of the lead claims may preclude a non-lead claimant subsequently proceeding with their own claim. The principal authority in that regard is *Ashmore v. British Coal Corporation*, [1990] 2 QB 338, in which 14 sample cases proceeded to trial out of 1,500 claims under the Equal Pay Act 1970. When the representative sample was selected before the Industrial Tribunal, it was agreed that the decisions in any of the sample cases would not be binding upon the applicants or the respondents in any of the non-selected claims, although it was hoped that the decisions would assist with the resolution of the other claims. The 14 sample

cases were dismissed after a hearing before the Industrial Tribunal and subsequent appeals by the employees were unsuccessful. Mrs Ashmore subsequently sought to proceed with her own claim, which had been stayed pending determination of the sample claims. Her employers successfully obtained a strike-out order on the basis that it was an abuse of process to seek to re-litigate issues determined in the sample claims. Mrs Ashmore's appeal to the Court of Appeal was refused. In the course of the leading judgment from Stuart-Smith L.J., it was stated at [352] and [354]-[355]:

> "On the contrary, I prefer the views of the other members of the court that it is dangerous to try to define fully the circumstances which can be regarded as an abuse of the process, though these would undoubtedly include a sham or dishonest attempt to relitigate a matter. Each case must depend upon all the relevant circumstances. In the present case there was a large number of claims which raised similar issues against the same employers. The tribunal went to great length to devise arrangements which would enable the legal representatives of the parties to put forward their best cases so that as many issues of fact as possible could be raised and decided upon after the fullest inquiry and investigation. If the applicant or her advisers wished her case to be one of the sample cases, they could have applied at any time before the hearing for that to be done; she did not do so.
> …
> As it is, if the matter were relitigated on the applicant's claim, she would merely invite the tribunal to reach different findings of fact on the same evidence, as a result perhaps of different arguments being addressed to it. That, in my judgment, is not in the interests of justice, nothing could be calculated to cause a greater sense of injustice in those who lost in *Thomas v. National Coal Board*, [1987] I.C.R. 757, if some other tribunal reached a different result on the same evidence. Alternatively, there is a risk, after so long a time, that the employers would be unable to call the same witnesses who had convinced the tribunal in *Thomas's* case; that would be a grave injustice to them…"

23. The decision was considered by Lord Hobhouse in *Re Norris*, [2001] UKHL 34 at [26]:

> "The Ashmore case is essentially a case of the marshalling of litigation. Where a civil court (or tribunal) is faced with an incident for which a defendant may be liable and which injured a large number of people or some situation where a large number of people similarly placed wish to make a contested claim against another, as was the case with the sex discrimination claim against the British Coal Board being made in the *Ashmore* case, the court, as a necessary part of the administration of justice, has to be prepared to make orders requiring the interested parties to come forward so that appropriate cases can be selected for trial and the parties can address the court upon whether their case raises any different issues from those selected. Each party has an opportunity to persuade the court that its case requires special treatment and should not follow the result of the selected cases. Any aggrieved party may seek to appeal such a procedural order. Where some interested party has been content not to intervene and

> awaits the outcome of the substantive trial, he must abide by the result, even if adverse, save possibly for seeking belatedly to intervene in order to support an appeal against the substantive decision. Simply to seek to relitigate the whole thing over again is an abuse of process and will not be allowed, as is more fully explained in the judgment of Stuart-Smith LJ in that case, [1990] 2 QB 338, at 345-355. These are illustrations of the principle of abuse of process. Any such abuse must involve something which amounts to a misuse of the litigational process..…... Attempts to relitigate issues which have already been the subject of judicial decision may or may not amount to an abuse of process. Ordinarily such situations fall to be governed by the principle of estoppel per rem judicatem or of issue estoppel (admitted not to be applicable in the present case). It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse."

24. Abuse of process may be appropriately relied upon following decisions in any lead cases to prevent non-lead claimants or defendants from seeking to re-litigate common issues determined in those lead cases. However, it is an exceptional remedy. One party's reliance on an abuse of process argument is likely to invite a response that different legal or factual issues are involved in the subsequent case, or that new evidence is available and ought to be heard. It is also likely to be of less (or quite possibly no) application in respect of claimants who are not currently part of the pool from whom the sample claims are taken. That is likely to include the claimants represented by Stephenson Harwood, as well as any other claims which may emerge in due course.

25. We would prefer that there is a degree of certainty introduced into the case management of these claims whereby the greatest number of current and future parties are bound by determination of all issues which can sensibly be identified as common between claims. We envisage a process of joint case management in which, once the issues have been comprehensively identified for determination, the parties to this process will, so far as is appropriate and fair, be bound by the determination of issues common to their claims. The extent and ambit of these common issues is, of course, something that itself needs to be determined, but we intend to proceed on the basis that at least some defined issues of quantum may constitute generic rather than specific issues.

26. We therefore intend, in the first instance, to put in place a process for the detailed identification of the issues in the cases before us, by reference to their suitability for management in a generic way across the wide pool of claimants. This

process will allow for and encourage merchants who are not yet currently claimants before the Tribunal to have time to join in, allowing them to participate in the process of identifying generic issues and trying those, thereby obtaining the benefit of the collective resolution of issues. That includes the claims issued by merchants represented by Stephenson Harwood, other merchants who have already issued proceedings but have not yet transferred those to the Tribunal, and any other merchants whose cases find their way to the Tribunal in time.

27. We also indicated to the parties that we intend to be flexible about how hearings are conducted, making use of the technology for virtual hearings to allow participation from claimants who wish to have representation that is separate from existing claimants but who may be concerned about the costs of attending all aspects of every hearing.

28. If a claimant, for no doubt perfectly sound and sensible reasons, wishes to obtain the benefit of the jointly case managed process but to have its claim stayed, we consider that a stay ought – more or less automatically – be granted subject to two continuing obligations. In the first place, the stayed claim would continue to be bound by decisions on the issues common to that claim in accordance with the joint case management of the proceedings. In the second place, the claimant whose claim is stayed would remain potentially liable to provide information or disclosure, by way of partial or full lifting of the stay, if that is considered necessary for the conduct of the wider process. We had before us at the CMC an application for stay of one of the claims – Case No: 1391/5/7/21 (T) *Grandvision v. Visa Europe Limited and Ors* – which was consented to by the defendants. We indicated to the parties that we would grant the stay requested, but on these terms only.

29. At a future point in the proceedings, it is likely to be appropriate to return to the question of whether to use sampling to resolve non-generic issues in the case. The process of identifying the issues described above is intended to assist in determining if, when and in relation to what issues such an approach might be adopted. In that event, it is likely that the parties will, if anything, have available a wider pool of sectors and merchants to select lead claimants from. If, for

example, sampling is undertaken to identify differences in approach by sector, the increased range of claimants can only assist.

30. Finally on this point, we have identified the disclosure process in other multi-claimant actions as being a source of considerable delay and cost. We accept that the current claims will inevitably involve case managing the disclosure of extensive volumes of documents and data. Given the nature of the issues, we propose to exert some additional control over the disclosure procedures by obtaining at the outset as clear a picture as possible of the evidential needs of the parties. Our suggestion is that disclosure should, insofar as possible, be informed by the parties (with the benefit of input from their experts) setting out precisely what disclosure they require and why they need that information, by reference to a detailed list of issues in the case. The aim would be for parties to produce targeted requests for information and only in relation to matters which are not already adequately in the public domain.

31. In addition, the Tribunal will consider requests for information in the context of the parties stated intentions as to proving related matters. By way of an example, we have been provided with two reports from Mr Holt in relation to the information which he considers is relevant to the fair sharing element of the merchant benefit test. That is the second condition under article 101(3) TFEU and it only falls to be considered if the first condition under article 101(3) is satisfied (*Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC & Ors* at [172]). The Supreme Court in *Sainsbury's Supermarkets Ltd* (see [120], [128] and [129]) determined that empirical evidence was required to demonstrate that the first condition was satisfied. In relation to the first condition, this requires the defendants to demonstrate by empirical evidence that the MIFs incentivised issuers to take steps which they otherwise would not have taken, and that those steps resulted in economic or technical progress leading to objective benefits for customers. This Tribunal is likely to find it beneficial to understand the defendants' proposed evidential approach to satisfying the first condition in article 101(3) in order to gauge the appropriate disclosure of information going towards proof of the second condition in article 101(3).

C. CONCLUSION

(1) Order following the second CMC

32. In order to identify the most advantageous approach to the various issues arising in the present claims, this Tribunal would greatly benefit from a better understanding of the overall shape of the likely evidence which parties propose to lead. Therefore, our Order sets out a timetable for identification of the issues with explanations of the parties' respective approaches to establishing their position on each issue. As a first step, we will lift the stay which applies to all issues (including the article 102 issues). Secondly, we will order the parties to proceed to identify each and every issue which arises for determination in these claims. In this regard, we consider that all issues raised in the pleadings should be identified and this would include both issues stayed at the first CMC and those issues currently before the Court of Appeal.

33. Thereafter, we propose that the parties initially identify in general terms what mode of determination they propose for each issue. What we envisage in that regard is that each party will identify whether the issue will be determined on legal argument or through expert, factual witness or documentary evidence (either alone or in combination). The process will then continue such that the parties will then provide greater specification of the nature and extent of the expert, factual witness or documentary evidence on each issue. This will include, in relation to expert evidence, identification of the expert relevant to the particular issue and a statement from that expert as to how the expert proposes to resolve the issue in question. In relation to documentary evidence to be led, the parties should specify precisely what disclosure they will be seeking from the other parties and what disclosure they will be making. For factual witness evidence, the parties should identify the witnesses which they intend to call on each individual issue.

34. The precise manner in which this process will be conducted is set out in the Order, and we do not repeat those provisions here.

35. Given the submissions of the parties, we have chosen to accelerate consideration of one particular issue, namely the issue of "pass on" of the MSC by the merchants to their customers. Ms Smith, QC on behalf of the HK and SSU claimants, addressed us briefly on [205] and [215] of the Supreme Court's decision in *Sainsbury's Supermarkets Ltd,* and she sought a short hearing in relation to the "pass on" issue. She argued that there was a legal issue on the correct approach to "pass on" issues which ought to be clarified before experts become engaged in the granular detail. We agree that the "pass on" issue is a difficult one. Whether this is truly a causal issue, as Ms Smith seemed to be suggesting, or a broader issue of how loss is established and the evidence necessary to establish (or negate) that loss, is a matter which may need to be determined later in this process. However, since "pass on" presents particular difficulties in a system in which the defendants are vulnerable to both direct and indirect claims, it is desirable that there be a consistent and logical approach to establishing "pass on". Therefore, we were persuaded that the timetable following this CMC should include a step whereby the parties should provide detailed submissions on how this particular issue might substantively be resolved at an early stage, so as to inform later case management directions.

36. The Order has, quite deliberately, left out any reference to certain other matters discussed with the parties. We have not, at this stage, imposed any limits on the numbers of experts which each side may use (that is a matter to be considered further at the CMC scheduled for later in the year). Nor is it necessary in this Ruling to discuss further how any appeals would operate in the event that the issues in this case would be determined in a series of hearings, as opposed to a single hearing. These are matters for later consideration and determination.

(2) Closing observations

37. We see an opportunity to manage these proceedings in a way that recognises their particular characteristics and brings efficient and proportionate outcomes across a wide range of complex claims, for the benefit of both claimants and defendants. We are not satisfied that a sampling approach to identify lead claimants is the correct approach, at least at this stage. We have instead directed an approach by which the Tribunal will seek to resolve as many generic issues

as possible across the whole set of claims, binding as many parties as possible to those outcomes and reducing the potential for re-litigation in relation to those issues. This will require close case supervision on a joint case management basis, with early identification of issues and means of proof of those, with the involvement of experts. In that way, we intend to control the process of disclosure and bring focus to the factual and expert evidence, thereby reducing costs and time spent.

38. We are mindful of the need to progress claims which are already before the Tribunal in these proceedings, but there is a window created by the appeal on certain article 101 issues. We are encouraging other claimants who may have issued in the High Court to take advantage of that window, by expediting their transfer to the Tribunal so that they can participate in the process. The Tribunal will assist with those transfers insofar as it is able.

39. This Ruling represents the unanimous views of the Tribunal.

Sir Marcus Smith
President

Ben Tidswell

Andrew Young QC

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

Date: 16 March 2022

ANNEX

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1306-1325/5/7/19 (T)
1349-1350/5/7/20 (T)
1369/5/7/20 (T)
1373-1374/5/7/20 (T)
1376/5/7/20 (T)
1383-1384/5/7/21 (T)
1385-1400/5/7/21 (T)
1406/5/7/21 (T)

BETWEEN

DUNE GROUP LIMITED & ORS v MASTERCARD INCORPORATED & ORS
DUNE SHOES IRELAND LIMITED & ORS v VISA EUROPE LIMITED & ORS
WESTOVER GROUP LIMITED & ORS v MASTERCARD INCORPORATED & ORS
WESTOVER GROUP LIMITED & ORS v VISA EUROPE LIMITED & ORS
RICHER SOUNDS PLC v MASTERCARD INCORPORATED & ORS
FURNITURE VILLAGE LIMITED v MASTERCARD INCORPORATED & ORS
CAPRICE HOLDINGS LIMITED & ORS v MASTERCARD INCORPORATED & ORS
PENDRAGON PLC & ORS v MASTERCARD INCORPORATED & ORS
ALAN HOWARD (STOCKPORT) LIMITED & ORS v MASTERCARD INCORPORATED & ORS
ALAN HOWARD (STOCKPORT) LIMITED & ORS v VISA EUROPE LIMITED & ORS
SOHO HOUSE UK LIMITED & ORS v VISA EUROPE LIMITED & ORS
JL AND COMPANY LIMITED & ORS v MASTERCARD INCORPORATED & ORS

ORDER

UPON hearing Leading Counsel for the parties at a case management conference ("CMC") on 1 and 2 March 2022

AND UPON READING the written submissions filed by the parties for the CMC

AND UPON the Tribunal considering the parties' proposed amendments to a draft Order circulated at the CMC on 2 March 2022

HAVING REGARD TO paragraph 2 of the Order of the Tribunal dated 2 February 2021 (the "February Order") imposing a stay on all issues, save the issues concerning whether MIFs infringe Article 101 TFEU, in relation to Cases 1306-1325/5/7/19 (T), 1349/5/7/20 (T) and 1350/5/7/20

(T); and the Order of Hon. Mr Justice Roth dated 23 March 2021, which extended the application of the Tribunal's directions in the February Order, including the stay, to Cases 1383-1384/5/7/21 (T) (the "Issues Stay")

AND HAVING REGARD TO paragraph 1 of the Order of Hon. Mr Justice Roth dated 6 July 2021 imposing a stay in Case 1369/5/7/20 (T) (the "Richer Sounds Stay")

AND HAVING REGARD TO the Tribunal's judgment in *Dune Group Limited & Others v Mastercard Incorporated & Others* [2021] CAT 35

AND HAVING REGARD TO the Order of the President dated 21 December 2021 as to the conduct of these proceedings

IT IS ORDERED THAT:

1. The Issues Stay, the Richer Sounds Stay and (for the avoidance of any doubt) any other stay of any issue made in the course of the proceedings, are lifted.

2. The proceedings before the Tribunal shall be tried by reference to a series of issues (the "Issues") that are to be articulated in accordance with the process set out below and in the form of the example table set out at Annex 1 to this Order (the "Table"):

    a. The Issues comprise all issues in the proceedings including without limitation: *(i)* any and all issues that have been stayed; and *(ii)* issues that have been determined by way of summary judgment, but which are on appeal to the Court of Appeal.

    b. By no later than 4:00pm on 1 April 2022 each party will populate its own version of column 2 of the Table with its formulation of the Issues. In particular:

        i. The Issues must be set out with sufficient specificity so that the Tribunal (and the parties) can identify each and every issue that the Tribunal will have to decide in order to determine these proceedings.

        ii. The Issues will, in due course, inform the evidence that each party will be permitted to lead at trial, and should be framed with that purpose in mind.

        iii. The Issues must be framed without reference to the party bearing the burden of proof. (For the avoidance of any doubt, the Tribunal will of course pay due regard to the burden of proof when determining the substance of the Issues. However, unless a party to the proceedings intends

to rely solely on the burden of proof, adduce no evidence, and simply put the opposing party or parties to proof, then that party will be obliged to identify the evidence it proposes to lead.)

c. By no later than 4:00pm on 22 April 2022, the parties will produce a synthesised list of Issues in a single version of the Table:

   i. The parties shall make every effort to agree the list of issues, bearing in mind that the purpose of the list of Issues is not to narrow points in dispute but to articulate what each party contends will have to be resolved in order to determine these proceedings.

   ii. The fact that one party does not consider that an issue arises for determination is not, in and of itself, a reason for failing to include that issue in the list of Issues.

   iii. The synthesised list of issues shall identify the areas of agreement and disagreement in relation to the list of Issues, so that the Tribunal can determine any areas of disagreement.

d. By no later than 4:00pm on 29 April 2022, the parties will provide to the Tribunal and exchange with each other:

   i. written submissions on the areas of disagreement in relation to the list of Issues in column 2 of the Table.

   ii. each party will provide detailed submissions as to how, in general terms, the issue of pass-on is to be determined by the Tribunal. Such submissions should cover or deal with: (i) the facts that are relevant and available in order to determine the issue of pass-on and that will inform the evidence that will in due course be adduced by the parties, (ii) the type of evidence necessary to show and quantify pass-on in this context, indicating whether this is quantitative (for example, data on revenues, prices or margins and/or financial reports) and/or qualitative (for example, this could include information on merchant's pricing or business strategy), (iii) a high-level description of the economic methods which may be appropriately employed using such quantitative and/or qualitative evidence to estimate the amount of pass-on, and an indication of any methods/approaches

which are plainly inappropriate in this case, (iv) any and all points of law. The submissions should contain a worked example explaining how the proposition pleaded in paragraphs 82 and 83 of the Reply in Case 1376/5/7/20 (T) Pendragon Plc and Others v. Mastercard Incorporated and Others (filed under Claim No CP-2020-000012) would be made good and/or refuted (as the case may be). Whilst the submissions may set out a party's reliance on the burden proof in determining the issue of pass-on, which the Tribunal will, of course, consider when determining the substantive issue, unless that intends to rely solely on the burden of proof, adduce no evidence, and simply put the opposing party or parties to proof, then that party will be obliged to identify the evidence it proposes to lead or be debarred from doing so.

e. There shall be a one-day hearing on the first convenient date after 29 April 2022, where the Tribunal will determine (i) those areas of disagreement in relation to the list of Issues, and (ii) the precise method whereby the pass-on issue is to be determined will so far as possible and so far as the Tribunal is advised be resolved. This will include (if the Tribunal is so advised) any and all points of law that are in dispute.

f. By no later than 4:00pm on 10 June 2022, each party will populate its own version of column 3 of the Table, setting out the manner in which it is proposed each Issue in column 2 shall be determined by the Tribunal. The Tribunal does not expect, require or want a detailed statement of methodology. Rather, without being prescriptive, the Tribunal would prefer each party to identify the method of determination under one or more of the following heads: *(i)* legal argument (where there is a point of law only); *(ii)* expert evidence (identifying the discipline of the expert); *(iii)* factual witness evidence (stating how it is envisaged the relevant witnesses are proposed to be identified); and/or *(iv)* documentary evidence (stating how it is proposed that the relevant documents are going to be identified).

g. There shall be a case management conference before the end of the summer term, to resolve any issues in dispute, if any.

h. Save in relation to those issues that are on appeal to the Court of Appeal, by no later than 4:00pm on 7 October 2022, each party will populate its own version of column 4 of the Table setting out with precision the manner in which party will

seek to persuade the Tribunal that that Issue should be resolved by the Tribunal. As to this:

i. Where the method of determination is legal argument only no further particulars need be provided.

ii. Where the method of determination includes the adduction of documentary evidence, each party must state precisely what disclosure it will be seeking from the other party or parties and what disclosure it will itself be making. The level of precision must be such that the Tribunal can, if so advised, make on order providing for such disclosure.

iii. Where the method of determination includes the adduction of factual witness evidence, each party must identify the witness or witnesses it would be minded to call.

iv. Where the method of determination includes the adduction of expert evidence, each party must identify: *(i)* the expert in question; *(ii)* a statement from that expert as to how that expert proposes to resolve the Issue in question.

3. There shall, after 17 October 2022, be a two-day hearing at which the Tribunal will approve or disapprove the parties' proposals under Rule 4(5)(b), (d) and (e) of the Tribunal Rules and make any further directions for the trial of these proceedings.

4. Any Claimant is at liberty to apply to the Tribunal to have their claim stayed (a "Stayed Claimant**"**) on the condition that (i) all Stayed Claimants agree to be bound by the outcome of these proceedings (including any appeals); and (ii) any party that is not a Stayed Claimant may apply for disclosure and information from any of the Stayed Claimants, and stay shall not apply for such purpose.

Sir Marcus Smith **Ben Tidswell** **Andrew Young QC**
President

Made: 16 March 2022
Drawn: 16 March 2022

ANNEX 1

1 No.	2 List of Issues	3 Method of determination	4 Precise articulation of the manner in which the Issue is to be determined