Neutral citation [2023] CAT 5

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

3 February 2023

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

Heard at Salisbury Square House on 12 January 2023

JUDGMENT (AMENDMENT No. 2)

APPEARANCES

Ms Marie Demetriou KC, and Ms Victoria Wakefield KC (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative.

Ms Sonia Tolaney KC, Mr Matthew Cook KC and Mr Daniel Benedyk (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. In these collective proceedings, the Class Representative ("CR") filed an Amended Claim Form on 9 March 2022 following the Tribunal's decision that a collective proceedings order ("CPO") would be granted and its decision as to the domicile date. Following some discussion as to the precise terms of the CPO, in view of the indication from the Defendants ("Mastercard") that they would seek to appeal the decision as to the domicile date, the Tribunal made the CPO on 18 May 2022. That appeal by Mastercard was dismissed by the Court of Appeal on 29 November 2022: [2022] EWCA Civ 1568.

2. In essence, the Amended Claim Form seeks damages resulting from alleged overcharges in the prices of goods and/or services purchased in the UK by individuals who were resident in the UK between 22 May 1992 and 21 June 2008 ("the claim period") from businesses which accepted Mastercards. By a further and subsequent amendment, the end date of the claim period was extended to allow for a run-off of the overcharge period, but that is not material for present purposes.

3. On 9 May 2022, Mastercard served their Defence to the Amended Claim Form. By paras 9-10 and 25-26 of their Defence, Mastercard raised a limitation defence as regards the earlier part of the claim period. Insofar as the claims related to transactions with merchants in the UK, Mastercard said that it was prepared to admit that the entire claim is governed by English law. On that basis, it contended that claims based on transactions prior to 20 June 1997 are time-barred pursuant to rule 31(4) of the Competition Appeal Tribunal Rules 2003 ("the CAT Rules 2003"), the original s. 47A of the Competition Act 1998 ("CA 1998") and ss. 2 and/or 9 of the Limitation Act 1980 ("LA 1980"). Mastercard further stated, at para 25:

> "… Alternatively, insofar as the Class Representative wishes to pursue claims under Northern Irish or Scottish law, Mastercard will rely on the equivalent limitation provisions of these national laws, which impose limitation periods of 6 years (Northern Ireland) and 5 years (Scotland) respectively."

4. Mastercard contended that insofar as the claims related to transactions with foreign merchants (i.e. merchants outside the UK), those claims were governed by the law of the country where those merchants were based, and that they would rely on the relevant foreign limitation periods.

5. On 15 July 2022, the CR filed his Reply. The present application to amend does not concern foreign limitation periods so we need say nothing more about them in this judgment. But so far as transactions with merchants in the UK are concerned, the Reply contended that Mastercard's reliance on rule 31(4) of the CAT Rules 2003 is misplaced and that the claims were in time on the basis of rule 31(1)-(3). Further, it stated, at para 5:

> "As is clear from the Claim Form generally and paragraph 95 in particular, the Class Representative's case is that: for loss suffered in England and Wales, the applicable law is the law of England and Wales; for loss suffered in Scotland, the applicable law is Scots law; and for loss suffered in Northern Ireland, the applicable law is the law of Northern Ireland (subject to amended paragraph 7 below). For the avoidance of doubt, as to the correct legal test for determining applicable law within the United Kingdom, paragraph 8 below is repeated *mutatis mutandis*. It is accordingly not open to Mastercard to "*admit*" in paragraph 9 that, insofar as the claim relates to transactions at merchants in the UK, it is governed by English law."

6. So far as English law is concerned, the Reply stated, in para 4(b):

> "alternatively, the six-year limitation period pursuant to s.2 and/or 9 of the Limitation Act 1980 was suspended under s.32 of the Limitation Act 1980. The reasonable typical consumer would not have recognised that they had a worthwhile claim prior to June 1997 (nor indeed subsequently, including up to the date of the Statement of Objections in 2006, and including up to the date of the EC Decision in 2007)."

7. So far as Scots law is concerned, the Reply pleaded reliance on the special provision in s. 11(2) of the Prescription and Limitation (Scotland) Act 1973 ("PLSA 1973"). But in the alternative, the Reply proceeded to rely on s. 6(4) of that statute stating, at para 6(c):

> "alternatively, the five-year prescription period pursuant to s.6(1) of the 1973 Act was suspended pursuant to s.6(4) of the 1973 Act, applying the test in *Glasgow City Council v VFS Financial Services Limited* [2020] CSOH 92 (in which it was held by Lord Tyre, in comparison to s.32 of the Limitation Act 1980, "*I am not persuaded that a materially different approach should be taken in Scotland to the question of what information is required to bring the operation of section 6(4) to an end*").

8. So far as Northern Irish law is concerned, the Reply as originally pleaded relied on a provision of the Limitation (Northern Ireland) Order 1989, but the parties have since agreed to treat claims which are governed by Northern Irish law as being governed by English law, so no further point arises under the law of Northern Ireland.

9. The Tribunal held a case management conference ("CMC") on 20 and 22 September 2022. That in part addressed a different application to amend the Claim Form to introduce a run-off period, which was decided at that hearing: see para 2 above and the judgment at [2022] CAT 43. Otherwise, the CMC was devoted to consideration of the management of these proceedings going forward. After discussion with the parties and taking account of their observations, the Tribunal decided that it was appropriate to split the trial of the action into a series of stages determining particular discrete issues. The first of those trials would cover three issues: limitation/prescription; proper law; and what was termed "exemptibility" (i.e. whether it was open to Mastercard to argue that in the counterfactual a different level of MIF would have been exempted under Art 101(3)). That trial was fixed to run over four days starting on 12 January 2023.

10. On 2 December 2022, the CR's solicitors notified Mastercard's solicitors that if Mastercard was contesting concealment for the purpose of s. 32 LA 1980, the CR would seek to amend his Reply; and on 16 December 2022 the draft Re-Re Amended Reply was served on Mastercard.

11. Mastercard strongly objected to the amendment. The application for permission to amend was the subject of written submissions, followed by oral submissions on the morning of 12 January. At the end of the argument, the Tribunal informed the parties that it would grant permission to amend for reasons to follow. This judgment sets out our reasons.

B. THE AMENDMENT

12. The Amendment of the Re-Amended Reply for which permission is sought effectively falls into three parts:

(1) amendment to para 4(c) concerning s. 32 LA 1980 ("the s. 32 amendment");

(2) a corresponding amendment to para 6(c) concerning s. 6(4) PLSA 1973 ("the s. 6(4) amendment"); and

(3) introduction of paras 9A-9F raising a legal argument on limitation based on the ruling of the Court of Justice of the EU ("CJEU") of 22 June 2022 in Case C-267/20 *Volvo AB v RM*, EU:C:2022:494 ("the *Volvo* amendment").

The s. 32 and s. 6(4) amendments

13. The s. 32 amendment introduces six new sub-paragraphs to para 4(b), and a series of sub-paragraphs. Sub-paragraph 4(b)(i) states:

> "A fact, or facts, relevant to the Represented Persons' rights of action was, or were, deliberately concealed from them by Mastercard, either by way of active or passive concealment (under s.32(1)(b) Limitation Act 1980) or, in relation to the facts involved in the breach of Article 101 TFEU, by way of deliberate commission of that breach of duty in circumstances in which it was unlikely that it would be discovered for some time (under s.32(2) Limitation Act 1980)."

The following sub-paragraphs essentially set out factual allegations and matters on which the CR will rely to show deliberate concealment for the purpose of s. 32(1)(b) and/or that the breach of statutory duty constituted by Mastercard's infringement of competition law was deliberate for the purpose s. 32(2).

14. The s. 6(4) amendment corrects a reference to relevant Scottish case law[1] but in material respects it introduces a cross-reference to the facts and matters pleaded in the s. 32 amendment. The argument before the Tribunal on the s. 32 and s. 6(4) amendments was made on the basis that they stood or fell together, and the focus of the parties' submissions was on the s. 32 amendment. We shall adopt the same course.

[1] Referring to the decision of the Inner House in *Adams v Thorntons WS (No 3)* 2004 1 SC 30, instead of the quotation from the *Glasgow City Council* case: para 7 above.

15. The s. 32 amendment arose in this way. In submissions leading up to and then at the September CMC, and with encouragement from the Tribunal, there was discussion as to what matters would be appropriate for the Tribunal to hear as preliminary or separate issues. Mastercard formally applied for a number of issues to be heard as preliminary issues or by way of a split trial, including limitation. If it should be determined, as Mastercard contended, that a significant part of the 16-year claim period was time-barred, that was likely to have a very material effect on the scope of disclosure and evidence required for the determination of such matters as the level of overcharge and pass-through. Moreover, as any time-bar would apply to the earlier period starting in 1992, that was precisely the period for which disclosure would be most challenging. It would also have a major effect on the quantum of the claims, in the context where the aggregate damages sought were pleaded as estimated at a staggering figure of £16.7 billion (excluding further damages for the alleged run-off periods).

16. Mr Sansom of Mastercard's solicitors accordingly stated in his witness statement of 5 September 2022:

> "Based on my review of the pleadings in this case … I understand that there is a clear limitation issue between the parties under English law that I believe is appropriate to be determined on a preliminary basis."

17. The CR agreed that limitation (along with some other matters) should be heard as a preliminary issue, as Mr Bronfentrinker of the CR's solicitors said in his witness statement of 12 September, "given the potential for them to alter the remaining scope of the dispute and thereby create significant efficiencies/savings". However, whereas Mastercard proposed that those issues should be heard in late 2023, the CR pressed for them to be heard earlier. In advancing his argument for an earlier hearing, the CR pointed out that they were "pure legal issues". Mr Bronfentrinker stated:

> "The Limitation Issue and Mr Merricks' Exemptibility Application are pure questions of law which do not require substantive factual or expert evidence (aside from, at most a solicitor's statement setting out the background). These are issues that could be heard in the coming months, while disclosure (and therefore factual and expert evidence) are advanced in parallel. Mastercard's trial proposal does not allow for early resolution of potentially dispositive legal issues."

And at the CMC, leading counsel for the CR said, in response to a question from the Tribunal as to whether determination of the s. 32 issue will involve factual evidence:

> "… I think that it can be dealt with by an agreed statement of facts because I think the question will be what was in the public domain -- rather than what could reasonably have been discovered by the class members. So I think it's capable of determination on the basis of an agreed statement of facts and then how the law applies to those facts, so it does come down to legal submissions."

Mastercard expressly did not dissent from this view or suggest otherwise.

18. Accordingly, at the September CMC there appeared to be effectively common ground between the two sides as to what was in dispute, save as to the time when this issue would be heard. It was on this basis, and with the assurance that the limitation issue between the parties was a pure question of law which could be resolved on agreed facts, that the Tribunal determined that it could be heard in January 2023. The Tribunal accordingly directed that the parties should file by 11 November 2022 "an agreed statement of facts addressing what information relevant to limitation was in the public domain" and further that they should file by 18 November 2022 a joint memorandum setting out the relevant principles of both English and Scottish law.

19. Following the CMC, there were a series of exchanges between the parties' representatives on the statement of facts with amended drafts sent back and forth. At the parties' request, the time for filing the statement was twice extended by the Chair, eventually to 25 November 2022. The parties finally reached a largely agreed statement, comprising 30 pages and 73 paragraphs, all comprising particularised facts as to what was publicly available and in what form.

20. S. 32 LA 1980 provides, insofar as relevant:

> **"32.— Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) … where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or

> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) 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."

21. The drafting and eventual agreement of the statement of facts was directed at the element of s. 32 concerning facts which were in the public domain, and what Mastercard contended that the claimants could therefore reasonably have discovered. That was the point raised by para 4(b) of the original Reply set out at para 6 above.

22. The parties also engaged on the much easier exercise of drafting the joint memorandum on the principles of law. Mastercard provided a draft for comment on 4 November 2022. That draft included a paragraph on the effect of s. 32 LA 1980 which effectively paraphrased s. 32(1) and (2) of the statutory provision. The CR responded with amendments on 15 November 2022 but, unsurprisingly, did not take issue with this particular paragraph.

23. Mastercard's solicitors then wrote to the CR's solicitors on 17 November 2022 saying that it was unclear what was the short point of law on which the limitation issue was said to turn. In the absence of a response, they wrote again six days later asserting, for the first time, that since the CR had failed to allege any of the three criteria in s. 32(1) for suspending limitation, i.e. fraud, deliberate concealment or mistake, and failed to plead several of the necessary elements for the application of s. 32(2), it was "clear" that paragraph 4(b) of the Reply is "not arguable". Mastercard's solicitors there cited the (unreported) judgment in *WM Morrison Supermarkets plc v Mastercard* (30 September 2014), of which they attached a copy, where Hamblen J (as he then was) said:

> "A properly pleaded reliance on section 32(2) would require four elements to be averred.
>
> (1) the alleged breach of duty;

> (2) that the breach was in circumstances in which it was unlikely to be discovered for some time;
>
> (3) that the breach was deliberate; and
>
> (4) the identification of the facts involved in that breach of duty.
>
> It is axiomatic that the details of any allegation of deliberate breach have to be pleaded."

And their letter stated that the CR's pleading failed to allege the second, third or fourth of these elements. The letter concluded by asking the CR to confirm that he was withdrawing reliance on s. 32 LA 1980 and on s. 6(4) PLSA 1973, failing which Mastercard would apply for the relevant paragraphs of the Reply to be struck out.

24. The next day, 24 November 2022, the CR's solicitors wrote back to ask whether Mastercard was contesting deliberate concealment, referring to the position it had adopted in a limitation hearing of other MIF cases before the Tribunal: *DSG Retail Ltd v Mastercard* [2019] CAT 5. Mastercard's solicitors replied on 30 November 2022, stating:

> "Mastercard cannot address a case which is unpleaded and wholly unparticularised (although, for the avoidance of doubt, it is unlikely that Mastercard would admit any allegation of deliberate concealment)."

They also pointed out that the judgment in *DSG* was on an application for summary judgment which had been heard on the basis that deliberate concealment was not admitted but remained in dispute should Mastercard fail on the issue of reasonable discoverability. The letter referred to the transcript of the hearing in *DSG* where this was made clear.

25. This letter prompted the response two days later in which the CR gave notice of his intention to seek to amend his Re-Amended Reply: see para 10 above.

The *Volvo* amendment

26. In its ruling in *Volvo*, on a reference from the Spanish court, the CJEU made observations regarding the requirement of national rules of limitation as

applicable in damages claims for breach of EU competition law, in order to comply with the principle of effectiveness: judgment at paras 52-61.

27. In addition to the present proceedings, there are a large number of actions pending before the Tribunal in which merchants claim damages on the basis of the MIFs against Mastercard and the operators of the Visa card scheme. Since there are many common issues as between those cases and for the purpose of efficient case management (and in an effort to avoid conflicting judgments), an umbrella proceedings order, pursuant to the Tribunal's Practice Direction 2/2022, was made on 4 July 2022 covering multiple pending proceedings brought by merchants.

28. A CMC in those umbrella proceedings was held on 7-8 November 2022, in which the CR in the present proceedings was invited to participate as it was clear that there may be some issues in the merchant umbrella proceedings that were also common with the present action such that they might be heard together. At that CMC, the merchant claimants made clear that they sought to rely on *Volvo* in response to limitation arguments raised against them, and it was determined that there would be a preliminary issue to determine the *Volvo* point, to be heard in the spring of 2023. Counsel for the CR said there that her client was also considering the point. Mastercard was of course involved in and represented at that hearing.

29. In their letter to Mastercard's solicitors a week later, on 15 November 2022, the CR's solicitors said that this point remains under consideration. Mastercard's solicitors responded by letter dated 17 November stating if the CR wished to rely on *Volvo* that should have been pleaded in the original Reply and that the CR cannot now do so without the permission of the Tribunal.

30. Having decided that he does wish to rely on *Volvo*, like the merchant claimants, the CR therefore included the *Volvo* amendment in the draft Re-Re Amended Reply.

C. THE ARGUMENTS

31. For Mastercard, Ms Tolaney KC said that requirements for pleading s. 32 LA 1980 are clear and well-established. An allegation of fraud, deliberate concealment or mistake must be specifically pleaded and particularised. She relied further on the enunciation of the pleadings requirements for s. 32(2) set out in the *Morrisons v Mastercard* judgment (para 23 above). The CR had failed to plead any of those requirements other than the breach of duty (i.e. the infringement of Art 101) and his pleading of s. 32 in the Reply was therefore manifestly defective. That should have been evident to the CR who had very experienced legal advice, and Mastercard was under no obligation to assist in correcting their opponent's case. She also pointed out that there had been no response when Mastercard first sought clarification of this point in their solicitors' letter of 17 November 2022 until the further more detailed letter was sent on 23 November 2022: para 23 above; and that the draft Re-Re Amended Reply was sent only on 16 December 2022, the very day when Mastercard had to serve its skeleton argument.

32. Ms Tolaney emphasised that the hearing of the preliminary issue on limitation was part of the trial, not an interim hearing. This was accordingly a very late amendment, and Ms Tolaney relied on the summary of the principles now applicable to late amendments by Carr J (as she then was) in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38]:

> "Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

Refusing Mrs Quah permission to amend on the basis of those principles, Carr J added, at [96]:

> "This may be seen as a harsh decision given its consequence for Ms Quah. But this is modern-day commercial litigation. Very late applications for permission to amend in circumstances where a) there is no good reason for the delay and b) amendment would result in real disruption or prejudice to the parties and/or the Court are unlikely to be allowed, irrespective of the merits of the proposed amendment."

33. Ms Tolaney said that if the s. 32 (and s. 6(4)) amendments were allowed, it was clear that this part of the limitation issue could not now be heard as it involved disclosure and factual evidence. The amendment would therefore significantly disrupt the conduct of the trial in these proceedings and the directions the Tribunal had made at the September CMC.

34. As regards the *Volvo* amendment, Mastercard's objection was less vigorous, but it pointed out that the CJEU judgment in *Volvo* was given as long ago as June 2022 and submitted that there was no good reason why an amendment to plead that point was only sought six months later and shortly before the trial of the limitation issue.

35. For the CR, Ms Demetriou KC did not dispute any of the *Quah* principles. But she submitted that the s. 32/s. 6(4) amendments should not properly be regarded as a late amendment in the sense referred to in *Quah*. She said that it was self-evident that the CR's legal team were aware of the necessary elements of s. 32 and she referred to the discussion at the September CMC to say that it appeared that the dispute between the parties on s. 32 concerned only reasonable discoverability. She referred to the Tribunal's judgment in *DSG* at [61] which says:

> "The Defendants did not suggest that this was not a case involving deliberate concealment of relevant facts. The focus of the argument between the parties was as to whether there were any facts relevant to the Claimants' right of action within the meaning of sect 32(1)(b) which could not with reasonable diligence have been discovered by them by 20 June 1997…."

Ms Demetriou acknowledged that examination of the transcript would have shown that this was the basis on which Mastercard sought summary judgment on limitation and not a concession otherwise, but she explained that this had not been appreciated at the time of the CMC, when the CR's advisors had looked only at the judgment.

36. Ms Demetriou said that this was the basis on which the hearing of the limitation issue in January 2023 was fixed. It was why so much effort was put into drafting the agreed statement of facts. On the position adopted by Mastercard, hearing s. 32 as a preliminary issue was effectively futile as the CR's pleaded reliance on s. 32 was unarguable and could be struck out as defective on its face. Mastercard should have made its position clear at the CMC but it said nothing to that effect. Once Mastercard did make its position on deliberate concealment clear, the CR immediately said that he would seek permission to amend to plead the additional elements of s. 32. The draft Re-Re Amended Reply was then served in two weeks, which was entirely reasonable considering the work involved.

37. Ms Demetriou submitted that allowing the amendments did not mean that the January hearing was aborted. The Tribunal could proceed to determine the distinct limitation/prescription issues concerning the CAT Rules and s. 11(2) PLSA 1973 and it could also determine reasonable discoverability for the

purpose of s. 32 LA 1980, just as the Tribunal had decided this as a distinct question in *DSG*.

38. As regards the *Volvo* amendment, Ms Demetriou said that this was a purely legal argument and therefore "squarely" within the scope of the existing pleading. She accepted that the amendment could have been put forward sooner, but said that the *Volvo* argument would not have been heard at the January hearing in any event but together with that argument in the umbrella merchant proceedings.

D. DISCUSSION

39. We consider that neither side has covered itself in glory in their handling of this matter. There is no doubt that an allegation of deliberate concealment for the purpose of s. 32 LA 1980 has to be pleaded, as Ms Demetriou very properly acknowledged. The Reply was accordingly seriously defective in that regard. Moreover, the CR had no proper basis for advancing its case on s. 32 on the assumption that deliberate concealment was not in issue and that the only dispute would be as regards what facts could reasonably have been discovered.

40. We have some sympathy with the CR's interpretation of what occurred in *DSG*. Although that was a summary judgment application, the statement at para [61] of the Tribunal's judgment, quoted at para 35 above, supports the CR's understanding and it would be unusual to comb through the transcript to check what counsel may have said in the hearing. But more particularly, although this was not a point made in argument, the Tribunal's decision in that case as regards domestic transactions was that the claimants could not reasonably have discovered the factual basis for bringing a case and that "the running of the period of limitation as regards those claims *was therefore postponed*" [our emphasis]: see at [125] and [126(3)(ii)]. That conclusion is inconsistent with there still being a question of deliberate concealment that had to be determined. It appears that the Tribunal then was under the same misapprehension as the CR more recently. And although the case went on appeal and the Tribunal's decision was reversed ([2020] EWCA Civ 671), in giving the leading judgment the Master of the Rolls similarly observed, at [82]:

> "If the Tribunal was right on the point, the claimants will be able to rely on section 32(1)(b) in order to extend the limitation period for pre-20 June 1997 claims in respect of domestic transactions."

41. However, that is all incidental. Even if it had admitted deliberate concealment in *DSG*, Mastercard was fully at liberty to contest the point in these proceedings and the CR was not entitled to assume otherwise.

42. Nonetheless, we consider that Mastercard should have made clear at the September CMC, if not before, that its position was that the failure to allege or particularise deliberate concealment was fatal to the CR's reliance on s. 32 LA 1980 in answer to its limitation plea. As Mastercard considered that the s. 32 point could be summarily struck out (as it subsequently asserted in its solicitors' letter of 23 November 2022), it should have said so there and then. On that basis, the direction to the parties to agree a statement of facts and the extensive efforts to produce that document were, at least potentially, unnecessary. It is telling that in its skeleton argument for the hearing of the limitation issue, Mastercard says that "it is not necessary for the Tribunal to consider discoverability"; saying, in effect, that the agreed statement of facts is irrelevant.

43. The problem arose because the CR's case on s. 32/s. 6(4) was inevitably taken in the Reply to the limitation argument raised by Mastercard in its Defence, so that there was no automatic provision for a further pleading in response where Mastercard would have had to set out its position. However, in our view, that made it all the more important that Mastercard should explain its position to the Tribunal, and to the CR, at the CMC so that the Tribunal could make an appropriate direction accordingly. We consider that the CR is clearly correct that if Mastercard had stated its position at (or before) the September CMC, the CR would then have said that he would apply to amend his Amended Reply to allege (and particularise) this element of s. 32 (and the equivalent as regards s. 6(4) of the Scottish statute) and the trial of this limitation question would not then have been fixed for January.

44. Ms Tolaney submitted that this subverts the adversarial principle, on the basis that Mastercard is not required to plead the CR's case for him or correct his errors. We reject that submission as fundamentally misconceived. Rule 4 of

the Competition Appeal Tribunal Rules 2015 sets out the "Governing principles" for proceedings before the Tribunal (corresponding largely to the overriding objective in the CPR). Rule 4 provides, insofar as relevant:

> "(3) Each party's case shall be fully set out in writing as early as possible.
>
> (4) The Tribunal shall actively manage cases.
>
> (5) Active case management includes—
>
> > (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
> >
> > (b) identification of and concentration on the main issues as early as possible;
> >
> > …
>
> (7) The parties (together with their representatives and any experts) are required to co-operate with the Tribunal to give effect to the principles in this rule."

45. Active case management as set out in the governing principles applies to all proceedings before the Tribunal. Furthermore, as the Tribunal's *Guide to Proceedings 2015* makes clear (at para 6.7), opt-out collective proceedings require particularly intensive case management. See also the recent observations of the Court of Appeal in *MOL (Europe Africa Ltd) v Mark McLaren Class Representative Ltd* [2022] EWCA Civ 1701 at [46]. Accordingly, the parties are required to make clear to the Tribunal, and to each other, the position they will adopt on the various issues arising in a case. Nor is this fundamentally contrary to the approach in the civil courts. As Birss LJ stated in the Court of Appeal (in a judgment with which Coulson and Nicola Davies LJJ agreed) in *ABP Technology Ltd v Voyetra Turtle Beach Inc* [2022] EWCA Civ 594 at [2]:

> "The system of civil justice includes the idea that litigation is conducted with cards on the table - face up. Parties are required to spell out their case to their opponents not least because opposing parties are entitled to know what case they have to meet. The system permits parties to amend their statements of case, which is for the benefit of all parties, always subject to the overriding objective of enabling the court to deal with cases justly."

46. In proactively seeking to identify the various key issues in these massive proceedings which could appropriately be heard in stages, the Tribunal was

carrying out its role of intensive case management. However, that cannot be done effectively if a party does not elucidate for the Tribunal what position it adopts regarding those issues. Mr Cook KC explained, in answer to a question from the Tribunal, that Mastercard's legal team thought that the CR was possibly seeking to argue that s. 32 LA 1980 could be engaged in a claim by consumers simply on the basis that consumers could not reasonably have discovered the relevant facts, without any need to show fraud, deliberate concealment or mistake – a contention which Mastercard had regarded as completely misconceived. Mastercard was of course not required to set out what the CR's case should be. But it should have made clear *its own* position: i.e. that the CR's s. 32 argument could not succeed because he had not alleged or set out any basis for deliberate concealment (or either of the other two threshold requirements under s. 32). Had Mastercard done so, that would have led to clarification as to whether this (untenable) proposition was indeed the CR's case or whether the CR had (mistakenly) assumed that deliberate concealment was not disputed. We cannot emphasise too strongly that it is only by the parties setting out the respective cases they intend to advance that appropriate case management directions can be made.

47. Accordingly, although this might be termed a "late amendment", it was so only in the most formal sense. The trial of all the limitation questions, including s. 32 LA 1980, was only fixed for January on the basis of a misunderstanding of the position as at the September CMC, which Mastercard could have avoided. We therefore regard what happened before and at the September CMC as much more significant in deciding on the application to amend than the correspondence between the parties' solicitors in November-December. In these circumstances, we do not regard this as a late amendment in the sense that is referred to in the principles set out in *Quah*. But if it is governed by those principles, in our view there is here a good explanation for the delay.

48. Furthermore, although it was common ground that allowing the amendment meant that hearing the argument on deliberate concealment had to be postponed for further pleading, disclosure, etc, the fixture of the present January hearing was not wasted. The Tribunal has been able to hear full argument on the distinct limitation/prescription points under the limitation provisions of the CAT Rules

and under s. 11(2) PLSA 1973. And since further stages of these proceedings will be held only in mid-2023 and 2024, it is not as though allowing the amendment would prejudice the subsequent stages of these proceedings. Altogether, we therefore concluded that the balance of justice clearly favours granting permission to amend.

49. Contrary to the submission of Ms Demetriou, we did not think it would be appropriate or fair to Mastercard to proceed now to hear the reasonable discoverability point. That is effectively a sub-issue under s. 32 which in these proceedings should be heard more sensibly with the rest of the s. 32 arguments. Moreover, the CR addressed its arguments on reasonable discoverability in a supplementary skeleton for which permission had not been given and Mastercard, in view of the position it had adopted, did not address the point in its skeleton argument at all.

50. We can address the *Volvo* amendment much more briefly. Once the CR sought permission to make that amendment, it was in our view evident that if the amendment were allowed, the CR's case on *Volvo* would be heard together with the argument on *Volvo* by the claimants in the merchant umbrella proceedings and not as part of the January 2023 preliminary issues hearing that was confined to these proceedings. Accordingly, although Mastercard is correct that this amendment could have been sought some months earlier, allowing it now does not give rise to any delay. A hearing of the *Volvo* issue has indeed now been fixed for 24-26 April 2023.

51. This judgment is unanimous.

The Hon. Mr Justice Roth
Chair

The Hon. Lord Ericht

Jane Burgess

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

Date: 3 February 2023