



Neutral citation [2024] CAT 37

Case No: 1517/11/7/22 (UM)

1266/7/7/16

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

31 May 2024

Before:

SIR MARCUS SMITH
(President)

BEN TIDSWELL

PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS

(the "Merchant Interchange Fee Umbrella Proceedings")

AND BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

(the "Merricks Class Representative")

- v -

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

Merricks Defendants
(the “Merricks Collective Proceedings”)

Heard at Salisbury Square House on 22 May 2024 and at various case management hearings
prior to 22 May 2024

RULING
(AMBIT OF QUANTITATIVE DISCLOSURE IN TRIAL 2)
(MERRICKS TRIAL 2 PARTICIPATION)

APPEARANCES

Mark Simpson, KC and Jack Williams appeared on behalf of the Merricks Class Representative

Matthew Cook, KC and Owain Draper appeared on behalf of the Mastercard Defendants

Daniel Piccinin, KC and Aislinn Kelly-Lyth appeared on behalf of the Visa Defendants

Mehdi Baiou appeared on behalf of the Stephenson Harwood and Scott & Scott Claimants

Tristan Jones, KC appeared on behalf of the Primark and Allianz Claimants

A. THE RELEVANT PROCEEDINGS

1. The Umbrella Proceedings Order of the President dated 4 July 2022 in the Merchant Interchange Fee Umbrella Proceedings designates various individual merchant fee proceedings as “Host Cases” and designates all issues therein as ubiquitous matters within the meaning of the Tribunal’s Umbrella Proceedings Practice Direction 2/2022. The defendants to the Host Cases are entities from within the Mastercard and Visa groups, and we refer to them as the “Mastercard Defendants” and the “Visa Defendants”, without reference to any particular company within these groups. We refer to the claimants in the Host Cases as the “Retailer Claimants”.
2. The ubiquitous matters in the Umbrella proceedings include the issue of pass-on of merchant interchange fees (both “acquirer pass-on” and “retailer pass-on”). The issue (or issues) of pass-on will be the subject of the second trial in these proceedings, listed to commence on 11 November 2024 (“Trial 2”).
3. The Merricks Collective Proceedings, heard by a separate and differently constituted panel as against the Mastercard Defendants only (the claim is not advanced against the Visa Defendants), also involve multilateral interchange fees and broadly comprise collective proceedings seeking compensation on behalf of UK resident purchasers of goods and services. They are brought by a class representative (the “Merricks Class Representative”) on behalf of a certified class. The Merricks Collective Proceedings will involve consideration of the extent to which merchant interchange fees were passed-on to purchasers of goods and services.
4. Although there is a substantial temporal disconnect between the Host Cases and the Merricks Collective Proceedings – the Merricks Collective Proceedings involve transactions substantially pre-dating the transactions with which the Host Cases are concerned – there is obviously considerable similarity in the pass-on issues arising in both sets of proceedings, such that a question of ensuring consistency arises.

B. ISSUES ARISING

5. This Ruling deals with two matters. First, certain questions of data production for the purposes of Trial 2. This is considered in Section C. Secondly, the participation of the Merricks Class Representative in Trial 2, with the consequent incorporation of the pass-on issues arising in the Merricks Collective Proceedings into Trial 2. This is considered in Section D.

C. DATA PRODUCTION FOR TRIAL 2

6. Pass-on is both legally and factually complex, and gives rise to enormous difficulties in terms of identifying and rendering useable vast quantities of diffuse data. That is all the more so where, as here, the Host Cases comprise many Retailer Claimants, spanning many different sectors of the UK economy. Unsurprisingly, Trial 2 has been the subject of intense and frequent case management. The management of Trial 2 has involved no less than three, major, set-piece case management conferences, reported at [2022] CAT 14, [2022] CAT 31 and [2023] CAT 60, respectively the “First Ruling”, the “Second Ruling” and the “Third Ruling”, as well as multiple informal case management hearings.
7. We take these three Rulings as read, and touch upon them as necessary in the course of this Ruling, the “Fourth Ruling”.
8. Throughout the management of the Trial 2 proceedings, the parties to those proceedings have evinced two different approaches to the question of pass-on, which we described as “top down” and “bottom up”: Third Ruling at [14]ff. In extremely broad terms, a top down approach is more dependent on economic theory and econometric analysis, whereas a bottom up approach is more dependent on granular, quantitative data from industry participants. Whilst a bottom up approach would, in theory, involve some form of disclosure or data retrieval from each of the Retailer Claimants, everyone recognised (including the most ardent supporters of the bottom up approach) that given the sheer number of Retailer Claimants, a selective approach had to be undertaken. That, however, is as far as the common ground went. Although all parties subscribing

to a bottom up approach accepted that some form of sampling would be required, there was no agreement as to which particular claimants from the class of Retailer Claimants should constitute the sample.

9. The Tribunal has quite deliberately declined to resolve the differences in approach between the parties. The reason for this is set out in the Third Ruling:

29. It is quite clear from the written and oral submissions that we have heard, and from the materials that we have read and/or been referred to, that the parties will not be able to agree an approach – notwithstanding the attempts to provide clarity of direction in the First Ruling and in the Second Ruling. That is because the parties appear to consider that the method of establishing pass-on will, in and of itself, have an effect on the substantive outcome of the proceedings. Thus, the Active Claimants appear to consider that a “bottom up” approach will result in an outcome to their advantage; whereas the Class Representative in the Merricks Collective Proceedings appears to consider that a “top down” approach is to the advantage of the class. Equally, the positions of Mastercard and Visa – albeit more nuanced – appear to be similarly influenced.

30. It goes without saying that court procedures are intended to produce a fair and impartial trial, and not result in the outcome of that trial being in any way skewed by the procedural methodology adopted by a tribunal in seeking to bring a matter to trial.

10. Accordingly, the Tribunal has done its best to ensure that both top down and bottom up theories of pass-on are capable of being heard and tried at Trial 2; and that the bottom up selection of quantitative evidence from (in particular) the Retailer Claimants is done in a manner that does not favour any particular party, but enables each party to present their best case at trial. To quote again from the Third Ruling:

33. We are very conscious that, in collective proceedings, the Tribunal bears an important responsibility in case management and in ensuring that there is a “blueprint” to trial. We consider that a similar responsibility arises where – as here – there are many multiples of claims (albeit not in the form of collective proceedings) raising the same issues, which require collective case management. There are, in these circumstances, obvious attractions to a “top down” approach in a situation where there are so many Individual Claimants. Individualised evidence from each claimant is impracticable. But, once the “shape” of the issues is clear, there may well be room for some form of “bottom up” evidence to support particular factors, on a sample or high level survey basis. The most obvious example of this is where claimants engaged in an express surcharge to customers to cover the Merchant Service Charge (‘MSC’) approach in the present case.

34. Above all, however, we are satisfied that, in this case, it is imperative (particularly given the fact that issues of case management remain very much live issues, even following our First and Second Rulings) that the parties obtain a sufficiently clear steer from this Tribunal to enable effective steps to Trial 2 to be put in place as soon as is practicably possible. It is clear that this needs to be done with a high degree of specificity and with a clear direction to the parties as to how to differentiate between relevant and irrelevant fact. As we indicated during the course of the hearing, this appears to us to be one of the fundamental reasons why none of the parties was able to articulate precisely what it was they were inviting the Tribunal to direct. That is because none of the parties have been given sufficient clarity or direction as to how to differentiate between those factors that are relevant to the question of pass-on, and those which are not.
11. Although the Tribunal invited the parties to seek to agree the sectors from which samples might be drawn (Third Ruling at [39] to [44]), no such agreement was ever reached. At a hearing in January 2024, when Trial 2 was clearly in jeopardy given the state of the proceedings, the Tribunal suggested that quantitative data on pass-on be obtained from willing (i.e. self-selecting) Retailer Claimants, rather than proceeding down a sampling of potentially unwilling Retailer Claimants in circumstances where the sample was not agreed and had not been capable of agreement for many months, despite the Tribunal's interventions.
12. Since January 2024, the parties have been engaged in identifying and obtaining data from a number of willing Retailer Claimants. The parties' experts have been working collaboratively, under close supervision of the Tribunal, to obtain a common set of data that will be used by all experts at Trial 2 to estimate the rate of pass-on. The data collection process has broadly involved the selection of willing merchant claimants with usable data, screening of that data and cleaning of data before provision of datasets to experts for analysis. The data collection process is approaching its conclusion and will be comprised of the data of twelve merchant claimants across a variety of economic sectors.
13. The Tribunal has maintained a close eye on the proceedings and has held regular but informal case management hearings in order to do so. These hearings have involved the Tribunal providing non-binding guidance as to the data gathering process, and has enabled the parties (within the limits of what is an adversarial process) to ensure that data is obtained efficiently and appropriately from a representative range of Retailer Claimants.

14. We wish to place on the record our appreciation for the very considerable efforts on the part of the parties and their legal representatives in rendering this data gathering process as effective as it has been. The efforts of the parties to engage in this informal process has enabled swifter progress than through the exercise of the Tribunal's compulsory jurisdiction; and has enabled technical difficulties (as where data thought to be readily obtainable, has not been) to be navigated more easily. We say no more about this process in this Fourth Ruling, save to stress that it will be necessary, in the final judgment handed down after Trial 2, to be very clear about the process that has been undertaken. Inevitably, it has involved selection, and that selection has not been on a neutral, sample basis, but on the self-selecting basis that we have described. Equally, not all of the data from these self-selecting Retailer Claimants has been of the sort hoped for: that is no criticism – it is simply a fact that the evidence requested by the expert economists to deal with questions of pass-on is not necessarily the way in which the Retailer Claimants kept their records. The post-Trial 2 judgment will have to make clear both the strengths and weaknesses of the evidence that has been adduced, and no party should be closed out, during the course of the trial, from making points in regard to such strengths and weaknesses.

15. The end of this process is in sight, and there remain two Retailer Claimants whose position remains unresolved. We do not consider these questions can appropriately be resolved by informal guidance at case management hearings, but that the parties (given the limited disagreement that has emerged) are entitled to the benefit of a ruling from the Tribunal on these limited issues. Accordingly:
 - (1) By applications (invited by the Tribunal) dated 21 May 2024, the Mastercard and Visa Defendants and the Merricks Class Representative seek various orders from the Tribunal regarding the production of further data from two Retailer Claimants, World Remit and Pets at Home.

 - (2) We should make clear that we have entertained applications from the Merricks Class Representative even though the Merricks Class Representative is not (yet) a party to Trial 2. We will turn to the question

of the participation in Trial 2 of the Merricks Class Representative after we have resolved these applications. But we appreciate that the outcome of these applications will have a bearing on this, posterior, question.

- (3) World Remit and Pets at Home have already provided some data as part of the data collection process that we have described. The Retailer Claimants oppose these applications in their entirety on the basis that the applicants have not shown that such data, including that data already provided, is sufficiently useful to their experts nor to the resolution of issues at Trial 2 to justify the evidential and prospective costs burdens that would be imposed by their inclusion within the Trial 2 data set.
- (4) The position as regards the two Retailer Claimants is as follows, beginning with World Remit:
 - (i) The Mastercard Defendants contend that data from World Remit will be useful, if provided in short order. The Visa Defendants contend that the data from World Remit will not be necessary for their own analysis, but that disclosure is supported because it is proportionate to provide this data, which will be of use to the experts retained by other parties.
 - (ii) The Merricks Class Representative contends that the data would be very helpful for the expert retained by the Merricks Class Representative. The expert seeks the data to conduct gap-filling in a “Financial Services” sector in which he considers that there is insufficient public data or studies to conduct his analysis. Although Financial Services data is also being provided by Allianz, which could be used for this purpose, it is contended that the focus of the Allianz business (insurance) is distinct from World Remit (money transfer services).
 - (iii) As we have stated, the Retailer Claimants oppose the applications on proportionality grounds. They stress that proportionality concerns are not limited to the data collection

process *per se*, but should also take into account ongoing burdens (given in particular the requirement to produce data in a short period of time, which will place pressure on their resources) and costs that will accumulate up to and throughout Trial 2. In this context, the Retailer Claimants submit that the case for including World Remit is not strong enough to justify the burdens imposed by their inclusion.

- (iv) The Retailer Claimants contend that not only should no further data be provided, but also that any data already provided should be deleted by all involved parties and not used at all for the purposes of Trial 2.
- (5) As regards Pets at Home, the position is broadly the same:
- (i) The Mastercard Defendants maintain that the data would be useful, but that it would be produced too late for use within the trial timetable, and accordingly does not apply for production of this data. The stance of the Visa Defendants is as in the case of World Remit.
 - (ii) The Merricks Class Representative contends that the data is high priority and required as a minimum by their expert. The data is sought to conduct gap-filling in the “Other Retail” sector in which the expert considers that there is insufficient public data or studies to conduct his analysis. Without data for Pets at Home, pass-on analysis will need to be read across from other merchants, which is unsatisfactory.
 - (iii) As in the case of World Remit, the application is opposed by the Retailer Claimants and we do not repeat what we have already said other than to note that there is said to be considerable pressure on resources because of end of year commitments, meaning that the data could not be produced until the beginning of June, at the very earliest.

16. We consider that sufficient data has already been assembled through the very considerable efforts of all parties to enable pass-on properly and fairly to be tried without the additional data from World Remit or Pets at Home. Whilst we do not doubt that this additional data is data that would be of material benefit to at least some of the experts retained by the parties, we do not consider that it is so material as to oblige the Retailer Claimants to continue to seek to provide this data. The purpose of the exercise has never been either to conduct a sampling exercise with the necessary volume of participants that entails, or to provide complete coverage of all sectors which may be relevant to the claim. All of the parties have more than enough to do in order to be prepared for Trial 2, and we consider that the provision of additional data from World Remit and Pets at Home now constitutes a distraction. Furthermore, there is real doubt as to whether the data could be provided in time to enable its effective use by the experts, at least not without disrupting the timetable to trial in a significant way.
17. For these reasons, therefore, the applications fail. However, we want to make clear that we do not consider that it would be appropriate to require the deletion of data that has already been provided. That would, we consider, impose too much of a burden on the receiving experts, who may have integrated this data into their work streams and thinking. We accept that this is very much “half a loaf” so far as the applications are concerned, and that there must be real questions over the usefulness of the data from World Remit and Pets at Home that has already been provided, if un-supplemented. Nevertheless, we consider that an obligation to delete would be unduly onerous and should not be directed.
18. Finally, the Visa Defendants sought an order requiring those Retailer Claimants that have withdrawn their evidence from use during the course of the evidence gathering process on or after 8 May 2024 to provide witness statements to explain the reasons for their initial inclusion in the process; the steps taken to collate, provide and examine their data; and the reasons for their withdrawal. We consider that it will be necessary – for the reasons given in paragraph 14 above – for such information (and, indeed, other information) to be provided. We do not understand there to be any opposition to this. Accordingly, we make no order in this regard at this stage: but we note the importance of the Tribunal

being able to articulate the processes by which the evidence before it at Trial 2 was shaped.

D. INCORPORATION OF THE MERRICKS PASS-ON ISSUES INTO TRIAL 2

19. By an application dated as long ago as 25 October 2022, the Merricks Class Representative applied to vary the Umbrella Proceedings Order to designate the Merricks Collective Proceedings as an additional host case in respect of two of the ubiquitous matters, (i) acquirer pass-on and (ii) merchant pass-on. That application was heard at a case management conference, including responses thereto by the existing parties to the proceedings, on 7 to 8 November 2022. At that stage, the application was stayed on the basis that it was premature in circumstances where there was a need to understand how the evidence on all issues, particularly pass-on, would be framed with a considerable degree of precision and the ability of Mastercard to make good their Defence.
20. However, the Merricks Class Representative was permitted to participate in the expert led process to the provision of pass-on data that we have described in Section C. That was necessary in order to ensure that the question of Trial 2 participation was not decided against the Merricks Class Representative by default. In short, the Merricks Class Representative participated in the data collection process in order to enable (if appropriate) a further umbrella proceedings order being made, incorporating into Trial 2 the pass-on issues in the Merricks Collective Proceedings.
21. Now that the pass-on data collection process has substantially run its course, such that the evidential shape of Trial 2 is much clearer, it is now appropriate to decide the application of the Merricks Class Representative to vary the Umbrella Proceedings Order to designate the Merricks Collective Proceedings to participate in Trial 2. On 7 March 2024, the Merricks Class Representative filed a renewed application seeking either:

- (1) an order that the Umbrella Proceedings Order be extended to cover the ubiquitous matters regarding the questions of acquirer pass-on and merchant pass-on in the Merricks Collective Proceedings; or
 - (2) an order that the questions of acquirer pass-on and merchant pass-on in the Merricks Collective Proceedings be heard at Trial 2.
22. Clearly, no criticism can be made (and none was made) of lateness: the application has been heard at the earliest point appropriate in the trial process, given the very considerable difficulties in regard to data collection that we have described.
23. According to Rules 38 and 54 of the Competition Appeal Tribunal Rules 2015, the Tribunal has a broad margin of discretion over case management decisions and has discretion to add parties to proceedings if that addition is desirable and conducive to assisting the Tribunal in resolving a matter in dispute. The Tribunal has consistently maintained that it was not prepared to add the Merricks Class Representative unless and until the evidential basis to determine pass-on was sufficiently clear and it was in the interest of fairness to all that the Umbrella Proceedings regime be applied. Considerations of fairness would extend to the existing parties to the regime and, in particular, the Mastercard Defendants who are the party principally affected.
24. We consider that the application of Merricks Class Representative should be granted, and the scope of Trial 2 extended so as to embrace the pass-on issues arising out of the Merricks Collective Proceedings, notwithstanding the opposition of the Mastercard Defendants for the following reasons:
 - (1) We have noted that the actual overlap between the pass-on issues in Trial 2 and the pass-on issues arising out of the Merricks Collective Proceedings is in fact small: see paragraph 4. Nevertheless, the importance of consistency of approach is one that was stressed in the Second Ruling. It would be most unfortunate, even as between temporally segregated claims, for questions of pass-on to be decided differently, when those questions are (in substance) quite possibly the

same. That risk is best avoided if the pass-on questions in the two sets of proceedings are heard together, in Trial 2. We accept that there are other ways of attempting to avoid inconsistency – namely to hear the Merricks pass-on issues on the same evidence but later – but it seems to us that the most natural case management solution is to grant the application; and that good reason needs to be shown in order for the application not to be granted.

- (2) We also note that the application by the Merricks Class Representative has been flagged for a long time, and that the Merricks Class Representative has been quasi-incorporated into the Trial 2 process for a number of months. That in no way precludes us from deciding the application against the Merricks Class Representative, but it does mean that all of the parties participating in Trial 2 have been able to consider the substance of the application and to render (if so advised) informed opposition. It is significant that none, apart from the Mastercard Defendants, have done so. It is true that all registered concern at the potential for Trial 2 to be disrupted and indicated that the Tribunal would need to be particularly alert to the rigorous case management of the proceedings. We agree with that; but, for ourselves, like all of the parties apart from the Mastercard Defendants, see no insuperable obstacles to the application of the Merricks Class Representative being granted in terms of case managing Trial 2 to trial.
- (3) We consider this to be a safe conclusion because the incorporation of the Merricks pass-on issues will not involve the inclusion of sufficient additional evidence to create unfairness or to jeopardise Trial 2 preparations or the trial timetable. As we have noted, the Merricks Collective Proceedings are temporally anterior to the issues in Trial 2, and pass-on in the Merricks Collective Proceedings will primarily be determined using the evidence that has been (and is in the process of being) adduced for the purposes of Trial 2. It is true that it may be necessary to extrapolate to earlier time periods data from the Trial 2 time period, but we think Mastercard exaggerate the extent of that, as it appears to be limited to a small number of sectors where contiguous data

from the mid-1990s to the 2020s is not available.¹ It is also true that the Mastercard Defendants will want to analyse events in payment systems during the course of this anterior period, with a view to identifying facts and matters that will have rendered pass-on rates different, so challenging the extrapolation process. However, the Merricks Class Representative has no independent data to adduce on this subject and it seems that this is an exercise that will have to be conducted largely through Mastercard’s responsive case, which is not due to be filed until late September 2024. Given that:

- (i) The Mastercard Defendants know a great deal about their own payment system and the history of technical developments relating to it;
- (ii) The Merricks Collective Proceedings have been on-foot for a number of years;
- (iii) The Mastercard Defendants have retained an additional expert (Ms Webster) to deal with the issues, which are being raised by Mr Merricks; and
- (iv) Visa’s expert, Mr Holt, is conducting a very similar exercise to that proposed by Mr Merrick’s expert, suggesting that to some extent Mastercard will have to deal with the “economy wide” calculation of pass-on in any event,

we can see no particular prejudice to Mastercard sufficient to refuse the application. We invite Mastercard to apply, in short order, to add Ms Webster as an additional expert, in addition to Dr Niels. Whilst we cannot presume to prejudge such an application, we can provide a preliminary indication that it seems to us an appropriate direction to give in circumstances where the burdens on Mastercard in Trial 2 are – to an

¹ Where the data is available, we understand it will provide a single source of data set that allows the examination of pass on rates throughout both periods of the Merricks Collective Proceedings claim and the Trial 2 claims, so obviating the need for any extrapolation between periods.

extent at least – being increased. It is, of course, a matter for Mastercard whether such an application is in fact moved.

(4) Aside from the very considerable advantages of consistency already adverted to, this is the most efficient outcome in terms of case management. Instead of two major trial, we deal with common pass-on questions together, with some savings of cost and time. Moreover, Trial 2 is already structured around two hearings: an evidential hearing at the end of this year, and substantial time for closing submissions in 2025. This provides a degree of flexibility in terms of case management, should things go unexpectedly. Whilst we do not expect to need this flexibility, it is helpful to know that it is there.

(5) We are therefore confident that the inclusion of the Merricks Collective Proceedings in Trial 2 as a fully participating party is unlikely to cause any party material prejudice in preparing for trial; unlikely therefore to materially affect the timetable to Trial 2; and unlikely to disrupt the Trial 2 timetable. The proceedings have been and will continue to be subject to exceptionally close case management, so we are also confident that we have the ability to manage preparations for the timetable to trial (and the timetable itself) so that all parties have a fair opportunity to present their cases.

25. There remains a question about the mechanism by which the Merricks Collective Proceedings should be incorporated into Trial 2. The parties appear to be agnostic as to whether that is by joining those proceedings to the Umbrella Proceedings, by way of a further Umbrella Proceedings Order, or whether to order that the issues of pass-on in the Merricks Collective Proceedings should be heard together with the Trial 2 issues. Our view is that a further umbrella proceedings order should be made, but we are prepared to review any order that the parties agree amongst themselves.

E. DISPOSITION

26. We unanimously determine the applications before us in the manner set out above.

Sir Marcus Smith
President

Ben Tidswell

Professor Michael Waterson

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

Date: 31 May 2024