Competition Appeal Tribunal 20th Anniversary Conference

Ships Passing in the Night: Proving Pass-on

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1. Introduction

1.1 In quantifying a competition damages claim, the parties usually need to ask: "what would have happened in the counterfactual world, absent the anticompetitive conduct"? What would the price have been absent the anticompetitive agreement or the abuse of dominance? As these questions necessarily involve a considerable degree of speculation, it is not particularly surprising that rival sides in litigation may come up with different ideas about how to tackle these questions. Different theories and rival methodologies will regularly be employed and the court must do the best it can to determine which side's argument carries the day.

1.2 However, the pass-on element of quantification involves asking what would appear to be a considerably more straightforward question: "what actually happened?" In an indirect purchaser claim, did any intermediaries pass the overcharge/excessive price down to the claimant? In a direct purchaser claim, did the claimant recoup the overcharge/excessive price from its downstream consumers? At first blush, it would appear that there should be nothing special about asking a "what happened?" question in the competition law context. The English legal system has over hundreds of years developed sophisticated procedures to do so, with reliance on documentary disclosure, written and oral witness evidence, written and oral expert evidence, and finally the testing of evidence at trial. These are all designed to try to get to the bottom of this fundamental "what happened" question across a variety of areas of law in a potentially infinite number of factual situations. When considering pass-on in a competition damages case, is it – or should it be – simply a matter of applying these tried and trusted techniques, or is there something about the pass-on question in competition cases which requires special handling?

1.3 This article looks at two current cases where there are fundamental disputes between the parties not just about the substantive question of whether or not there was pass-on, but about how it is appropriate to go about addressing this question. The cases are *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others*[2] (***McLaren***) and the *Merchant Interchange Fee*

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1 The views expressed in the article are the author's own and do not reflect the views either of Scott+Scott UK LLP or of any of Scott+Scott UK LLP's clients.

2 1339/7/7/20. Scott+Scott UK LLP acts for the Claimant in the *McLaren* proceedings.

Umbrella Proceedings[3] (***MIF UP***). As the issues are not yet resolved in either case at the time of writing, this article will provide an overview of the issues that are being raised and identify various questions of wider application that these cases throw up, but will not speculate as to the likely outcome.

2. McLaren

2.1 *McLaren* is a follow-on collective action in which the Class Representative seeks damages from the five global shipping groups that participated in the Maritime Car Carriers Cartel[4] relating to the intercontinental shipping of vehicles. The Class is comprised of individual consumers and businesses in the UK who purchased new cars during the relevant period, where the relevant car was a model made by a brand which shipped any of its cars intercontinentally into Europe.

2.2 As part of this claim, the Class Representative will have to prove that any overcharge caused by the cartel was passed through the supply chain from the original equipment manufacturer (***OEM***), through its national sales company (***NSC***), through the dealership, and was ultimately paid by the purchaser of the car. The Class Representative is seeking to do this, primarily, by way of industry expert evidence.

2.3 The industry expert evidence filed with the application for a collective proceedings order explained that delivery charges are treated as an entirely self-standing category of costs throughout the automotive supply chain. Essentially the industry experts stated that the OEM pays to get the vehicle from where it is manufactured to the UK and charges that costs to the NSC; the NSC additionally pays to get it from its point of UK entry to the dealership; the NSC then adds together all these costs for all models of car for a particular brand and averages them; adds some margin for the dealers; and then sets the delivery charge, which is generally the same for all models made by that particular brand regardless of whether the particular model has been shipped intercontinentally or manufactured in the UK.

2.4 The Court of Appeal subsequently gave this evidence the short-hand label of a "silo" approach to pricing. The Class Representative's argument was that the price of intercontinental shipping was passed through the supply chain in a silo, picking up other transport costs along the way (and sometimes other "on the road" costs) and was then recovered from the end purchaser of the car. For many brands of cars, a delivery charge or an "on the road" price including a delivery charge is separately identified in the price list for new cars. The Class Representative submitted that this delivery charge silo was entirely separate from the approach taken to the pricing of the car, and that pass-on should be assessed by looking at that silo.

2.5 By contrast, at the certification hearing and subsequently in the Court of Appeal, some of the Defendants argued that the Class Representative's silo approach was entirely misconceived. They argued that a consumer makes a single purchase – the purchase of a car – and negotiates the price

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3 1517/11/7/22 (UM). Scott+Scott UK LLP acts for a number of merchants in the *Interchange* proceedings.

4 Case AT.40009 – *Maritime Car Carriers*.

without reference to different silos of costs that go into determining that final price. The Court of Appeal described this as the "overall pricing" approach.

2.6 In opposing certification, some of the Defendants argued that the "silo pricing" approach (as it subsequently came to be called by the Court of Appeal) was so misconceived that the *McLaren* claim ought not to be certified or should be struck out. It was suggested in submissions that the only way to assess pass-on was to consider the overall price of a car and seek to identify (presumably by way of regression analysis) the alleged overcharge within it. This would have led to a needle in a haystack analysis, with a hunt for, to take an example given by the Tribunal, a £20 overcharge in a £20,000 car, a price change of 0.1%.[5]

2.7 The Tribunal[6] and then the Court of Appeal[7] both rejected the Defendants' arguments on this issue. The Tribunal unanimously certified the claim and rejected the strike out applications, and was on these points unanimously upheld by the Court of Appeal. In the Court of Appeal's decision, it placed emphasis on the Tribunal's finding that the Class Representative had advanced credible evidence through the industry experts that delivery charges were treated as a discrete cost which was recovered separately.

2.8 However, the Court of Appeal went on to say that: "*we consider that the CAT did err in simply stopping in its tracks when confronted with two starkly opposing pricing theories and holding that they were for trial*."[8] It went on to remit the matter to the Tribunal to do more in exercising its gatekeeper role through its management of the case going forward.

2.9 On remittal, the Tribunal grappled with this problem and noted that the rival approaches to pricing were – appropriately given the Defendants' line of business – "*ships passing in the night*". It noted in its subsequent judgment that:

> "*Experience in the few cases that have actually come to trial shows that parties advance inconsistent yet plausible cases throughout, and that it is for the Court or Tribunal to determine which methodology works best after hearing all the evidence. It would certainly be unwise to assume methodological harmony will break out; and it would be in principle wrong for the Tribunal to seek to impose such harmony where none exists. Under our adversarial process, parties are entitled to advance the case they frame and formulate, subject always to the procedural control of the Tribunal*."[9]

2.10 To adopt and extend the Tribunal's analogy, the Tribunal recognised that it was not appropriate to order all parties to board the same ship, or to seek to determine at an early procedural stage which type of ship was most likely to reach its final destination still afloat. The Tribunal's case management

5 [2022] CAT 10 at 126.
6 [2022] CAT 10.
7 [2022] EWCA Civ 1701.
8 [2022] EWCA Civ 1701 at 51.
9 [2023] CAT 25 at 9.

solution was to order that all parties exchange their full positive cases (all witness evidence, expert reports, document on which they intend to rely, and position statements) simultaneously in December 2023. This approach has the benefit of forcing all parties to commit at the same time to the type of ship in which they will undertake their journey (i.e., which methodology they will adopt to prove pass-on), rather than giving the defendants the opportunity to hang back until the claimant is irrevocably committed and then tell them that whatever ship they have chosen is fundamentally inappropriate for the voyage.

2.11 Finally, the *McLaren* proceedings face an added complexity in that companies in the Volkswagen group, who were direct purchasers of maritime car carriers services from some of the cartelists, are suing a number of the cartelists in their own separate proceedings (the ***VW proceedings***)[10]. Unlike the *McLaren* proceedings which are strictly follow-on and related to cars purchased in the UK from 2006, the VW proceedings relate to the shipping of cars globally and extend to an earlier time period. Nevertheless, there is some overlap, and to the extent of that overlap, the positions of the claimants in *McLaren* and *VW* are inconsistent. *McLaren* argues that the alleged overcharge caused by the cartel was passed through the supply chain to the end-purchasers of the vehicles, while *VW* argues that any overcharge was borne by it and not passed on to end consumers.

2.12 The Tribunal recognised this potential overlap but has not currently made an Umbrella Proceedings Order between *McLaren* and the *VW proceedings*. Instead, it has indicated that a three-day case management conference will be listed for July 2024 at which "Ubiquitous Matters" (as per the Umbrella Proceedings Practice Direction 2/2022) will be considered and (if appropriate) conclusively defined and an Umbrella Proceedings Order made.[11]

3. MIF UP

3.1 The history of the interchange fee litigation is long and complex and well beyond the scope of this paper. At the risk of very considerable oversimplification, the claims relate to multilateral interchange fees (***MIFs***) which are set by Mastercard and Visa and are paid by merchants who accept payment on Mastercard and Visa credit and debit cards to acquirers who provide the merchants with the technology and systems needed to process card payments. The claimants allege that the MIFs (either in whole or in part) were set at anticompetitive levels. Among the multiplicity of issues thrown up by the interchange fee litigation, this paper considers only pass-on.

3.2 Central to pass on is that there are claims at two different levels of the supply chain (albeit with minimal overlap in the periods to which the rival claims relate): (a) the merchant level; and (b) the end consumer level.

3.3 At the merchant level of the supply chain, large number of merchants have, and continue to, bring proceedings against both Visa and Mastercard, in which they allege that they suffered loss by paying

10 Case No. 1528/5/7/22 (T) *Volkswagen AG and Others v MOL (Europe Africa) Ltd and Others*.
11 [2023] CAT 25 at 15(8).

anticompetitive MIFs and that they did not – or did not fully – pass those fees on to end consumers. There are also four collective actions in which certification is being sought by proposed class representatives seeking to act on behalf of various groups of merchants in relation to various types of fees.[12]

3.4 At the consumer level of the supply chain, there is a collective action by Mr Walter Merricks (***Merricks***) against Mastercard alleging that all MIFs were, in fact, passed on to end consumers through increased prices of downstream goods, whether purchased on a card or not.[13]

3.5 To further add to the complexity, in addition to there being claims at two different levels of the supply chain, pass-on is also being considered at two different levels of the supply chain: (a) pass-on from acquirers to merchants; and (b) pass-on from merchants to their customers.

3.6 All claimants – merchant, proposed merchant class representatives, and Mr Merricks – are aligned in seeking to show that MIFs were passed on by acquirers to merchants. However, at the next level of the supply chain down of merchant to consumer, the merchants and the proposed merchant class representatives take the position that they did not pass on the MIFs to their customers. *Merricks* takes the opposite position and argues that the MIFs were passed on by merchants to end consumers.

3.7 In the face of this proliferation of claims with overlapping and partly overlapping issues, the Tribunal made an Umbrella Proceedings Order on its own initiative so that Ubiquitous Matters could be managed together. One of those Ubiquitous Matters which the Tribunal is seeking to resolve is pass-on.

3.8 As in *McLaren*, in the *MIF UP*, the card companies, merchants, proposed merchant class representatives and Mr Merricks do not disagree only on whether or not there was pass-on and to what extent, but they have fundamentally different views about how to resolve the pass-on questions through the litigation. If *McLaren* has two ships passing in the night as regards the approach to determining pass-on, a whole flotilla of different vessels have been proposed in the *MIF UP*. The parties have at various times proposed various approaches and combinations of approaches, including direct claimant witness evidence, surveys of claimants, sampling of claimants, third party factual evidence, documentary disclosure, pre-existing publicly available material, industry expert evidence, pricing expert evidence, and competition economist expert evidence.

3.9 At the heart of the dispute about how to prove pass-on is the question of to what extent the "what actually happened?" question should be resolved wholly by reference to factual evidence (at one end of the spectrum) or wholly by economic theory (at the other end of the spectrum). While no party to the *MIF UP* appears to take the extreme end of either position, there is considerable dispute about where along the spectrum the appropriate balance lies. The question of how the balance ought to be struck is likely to be influenced not just by which approach or approaches are likely to produce the

12 Cases 1441/7/7/22, 1442/7/7/22, 1443/7/7/22 and 1444/7/7/22.
13 1266/7/7/16 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*.

most accurate and probative evidence but also the need for the Tribunal to adopt an approach which is procedurally practicable in light of ever-increasing number of claimants before it and the complexity of the claims.

3.10 These issues will be ventilated before the Tribunal in the Pass-On Evidential Hearing listed for three days from 23 May 2023. This hearing is intended to determine the factual and expert evidence on which the parties should be permitted to rely to demonstrate their respective cases on pass-on.[14]

4. Unresolved questions

4.1 Both *McLaren* and the *MIF UP* highlight, albeit in different ways, an overarching question as to why it is so difficult not just to work out whether pass-on occurred and if so to what extent, but the precursor question of how these questions are even to be approached. Why is there so much dispute about how to work out the answer to the "what actually happened" question as regards pass-on?

4.2 The short answer to this would seem to be that there are a very substantial number of uncertainties which contribute to the uncertainty around the overarching question of how to prove pass on. These include:

(a) **Legal uncertainty**. There remains uncertainty around the legal test for pass-on and how it should be implemented in practice. The parties' differing position on these issues influence what they believe they need to prove factually and therefore the relevant and necessary evidence. To what extent does it matter whether the cost component containing the overcharge was explicitly considered by a business alleged to have (or have not) passed that cost on? Can a price be looked at in a silo or must the whole price the consumer pays be considered? Should the focus be on a tracing-style exercise trying to follow the money through the supply chain? Or ought the focus to be on the profit margins of a party alleged to have passed-on to try to determine whether the overcharge simply came out of that party's profit margin? Is there a remoteness element whereby the link between the overcharge and the downstream prices is so tenuous that an absence of pass-on is assumed for legal purposes?

(b) **Burden of proof**: Formally, the burden of proof lies with the party alleging pass-on. A claimant who seeks to show an overcharge was passed on to it (i.e., using it as a "sword") bears the onus of proving pass-on, while a defendant invoking pass-on as a defence (i.e., using it as a "shield") bears the onus of proving pass-on, albeit that the claimant has a "heavy evidential burden" to provide the relevant materials. In practice, how important are these burdens of proof going to be?

(c) **Presumptions**: Are there any presumptions to be invoked in English/UK law as regards pass-on? The EU Damages Directive provided for various presumptions, but how relevant will they continue to be, even informally, in a post-Brexit environment?

[14] Order dated 8 March 2023.

(d) **Factual v expert evidence**: When making case management decisions about what evidence to allow, should one type of evidence be presumed, even weakly, to be more likely to be probative than another? Are the businesspeople who dealt with the costs and price-setting the people best placed to provide probative evidence, as they were at the coal face and can speak to the "what actually happened" question from first-hand experience? Or do experts have objectivity and an ability to see the wider context that makes their evidence more robust?

(e) **Industry experts v economic experts**: If expert evidence is to be used as well as or instead of client-specific factual evidence, is economic theory king? Is it the purist and most intellectually rigorous form of analysis because it is a respected academic discipline built up on a much wider foundation than the facts of the particular case? Or are industry experts who have a deep experience of the relevant industry to be preferred as being able to more effectively consider pass-on in the factual context in which it arises rather than relying on theories that are too broad brush to grapple with industry specifics?

(f) **Availability of data**: To what extent can a party elect to use a "second-best" methodology to seek to prove its case because the data needed to employ the "best" methodology is unobtainable? Is the answer different if the data is not unobtainable but simply very expensive or difficult to gather or both?

(g) **Who chooses the methodology**: If the parties elect to use entirely different methodologies can or should either side be compelled to seek to run their opponents' methodology as well as their preferred methodology? For example, if Party A believes that regression analysis is the best approach while Party B believes it is insufficiently probative, can or should Party B nevertheless be expected to run its own rival regression analysis or can it content itself by attacking the relevance and reliability of the regression analysis done by Party A?

(h) **Volume of evidence v procedural efficiency**: How far is it fair or appropriate to curtail the rights of a party to call the evidence (factual or expert) that it wishes to call due to considerations of procedural efficiency? How is the balance struck between ensuring a party's right to seek to prove its case in the way it believes best on the one hand, with the practical reality of a tax-payer funded court system that does not have unlimited resources on the other hand?

(i) **Access to justice**: How relevant is it that some of the various approaches may be very considerably more expensive than others? Is it a denial of access to justice if the approaches that are accepted for determining pass-on are so expensive that only high value claims can afford them? Does there have to be a one-size fits all approach, or can the approach be varied in light of the value of the claim? How do you protect individual claimants' right to make their case in an UPO context?

(j) **UPOs and relevance of claims at different levels of the supply chain**: To what extent should the Tribunal be seeking to ensure that there is a single consistent answer on pass-on questions across different levels of the supply chain in unrelated claims? Is the Tribunal's role to try to find one unified answer to the "what actually happened?" question for all claims, or is it to let the adversarial system play out before it in a case-by-case basis even if that results in different outcomes in different cases? Is it in fact to be expected that there will be different outcomes in different cases as regards pass-on because it is an intensively claimant-specific question?

4.3 Many of these questions above will not have the same answer in every case. Indeed, most may be said to be case-specific and only capable of being answered in context. However, even accepting that point, at present there is comparatively little case law to guide parties as to how the courts and Tribunal will go about answering these questions. This is by no means a criticism of the courts or the Tribunal, rather it is an inevitable reflection of the comparative lack of case law due to the very small number of competition damages claims that have proceeded to trial and judgment.

4.4 Over time, the case law will develop and some of the questions above will be answered. Some pass-on methodology ships will sink on or shortly after launch, while others will set sail confidently across the globe. With increased experience, parties can be expected to have a much clearer framework of guidance within which to determine how to go about answering the "what actually happened" question as regards pass-on.

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