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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1517/11/7/22 (UM)
1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 July 2022

Before:

SIR MARCUS SMITH
(President)
BEN TIDSWELL
LORD YOUNG QC

Sitting as a Tribunal in England and Wales

IN THE MATTER OF:

THE MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS

PARTIES TO THIS JUDGMENT:

(1) **THE UMBRELLA INTERCHANGE FEE CLAIMANTS** (as defined in the Tribunal's order dated 4 July 2022 in Case 1517/11/7/22 (UM) Merchant Interchange Fee Umbrella Proceedings

(2) **THE UMBRELLA INTERCHANGE FEE DEFENDANTS** (as defined in the Tribunal's order dated 4 July 2022 in Case 1517/11/7/22 (UM) the Merchant Interchange Fee Umbrella Proceedings)

(3) **THE MERRICKS CLASS REPRESENTATIVE** (as defined in the Tribunal's order dated 4 July 2022 in Case 1266/7/7/16 *Walter Merricks CBE v Mastercard Inc. & Ors*)

(4) **THE MERRICKS DEFENDANTS** (as defined in the Tribunal's order dated 4 July 2022 in Case 1266/7/7/16 *Walter Merricks CBE v Mastercard Inc. & Ors*))

Heard at Salisbury Square House on 23 and 24 May 2022

JUDGMENT (PASS ON)

APPEARANCES

Ms Kassie Smith QC, Ms Fiona Banks and Alexandra Littlewood (instructed by Humphries Kerstetter LLP and Scott + Scott UK LLP) appeared on behalf of (some of) the Umbrella Interchange Fee Claimants.

Philip Woolfe (instructed by Stephenson Harwood LLP) appeared on behalf of (some of) the Umbrella Interchange Fee Claimants.

Mr Matthew Cook QC and Mr Ben Lewy (instructed by Jones Day and Freshfields Bruckhaus Deringer LLP) appeared on behalf of (some of) the Umbrella Interchange Fee Defendants and for the Merricks Defendants.

Mr Laurence Rabinowicz QC, Mr Brian Kennelly QC, Mr Daniel Piccinin and Mr Jason Pobjoy (instructed by Milbank LLP and Linklaters LLP) appeared on behalf of (some of) the Umbrella Interchange Fee Defendants.

Ms Victoria Wakefield QC and Anneliese Blackwood (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Merricks Class Representative.

A. INTRODUCTION

(1) The Merchant Interchange Fee Proceedings

1. In a Ruling (the "Ruling") dated 16 March 2022,[1] this Tribunal articulated how multiple claims, all made by various merchants against one or both of Mastercard and Visa entities, should be progressed. We shall refer to these various claims – and there are many of them, both present and anticipated – as the "Merchant Interchange Fee Proceedings". For the reasons given in the Ruling, and as set out in the order consequential on that Ruling (the "Order")[2], the Merchant Interchange Fee Proceedings that are before (or subsequently make their way to) the Tribunal are to be tried by reference to a series of issues. Although a sampling of claims may, in due course, be necessary, sampling has yet to be directed. The Order sets out a detailed process for the formulation of the issues in the Merchant Interchange Fee Proceedings.

2. Subsequently, and in light of the Tribunal's Practice Direction 2/2022 on Umbrella Proceedings, an Umbrella Proceedings Order was made on 4 July 2022 in respect of all issues arising out of the Merchant Interchange Fee Proceedings before the Tribunal (referred to collectively as "the Host Claims" as listed in the Schedule to the Umbrella Proceedings Order). This does no more than formalise the position that previously pertained.

3. One of the issues that gives rise to clear differences between the parties is that of "pass on". Where there has been a competition law infringement by infringer *A*, and as a result party *B* has paid more for a good or service than *B* would, but for the infringement, have paid, then *prima facie* it appears to be the case that *B* has a claim, against *A*, for the amount of the overcharge. However, *A* may contend that the *prima facie* case does not hold, in that *B* has passed on the loss (sustained by *B),* in whole or in part, to party *C*. *C* could be someone who bought a good or service from *B* where the price paid by *C* to *B* included, in whole or in part, the overcharge which was originally paid by *B* to *A*. Matters are complicated by the fact that *if* the overcharge was indeed passed on by *B* to *C*,

[1] [2022] CAT 14.
[2] Also dated 16 March 2022.

then *C* has a self-standing claim against *A*, as the party who has in fact borne the loss arising out of *A*'s infringement.

4. Naturally, questions of over- and under-compensation loom large. *B* should not recover at the expense of *C*, and *A* should not pay out to *B* and *C* in respect of the same loss.

5. This is no more than a framing of the question that is the subject-matter of this Judgment. Our Ruling noted that "*there is a real lack of clarity as to how "pass on" questions are to be resolved*",[3] and the Order provided that "[*t]here shall be a one-day hearing on the first convenient day after 29 April 2022, where the Tribunal will determine…the precise method whereby the pass on issue is to be determined…*".

6. For the purposes of this Judgment, we will assume – for the sake of convenience and clarity of exposition – that the Merchant Interchange Fee Proceedings succeed against one or both of the Mastercard and Visa entities against whom they are directed and that an overcharge has been paid by these claimants. We stress that there are two assumptions implicit in this statement:

   (1) First, that there has indeed been an *unlawful* overcharge. There are a number of points taken by Mastercard and/or Visa disputing this (for instance, exemption under Article 101(3) TFEU is contended for), and nothing in this Judgment should be taken as any kind of suggestion that we are rejecting such contentions.

   (2) Secondly, that the unlawful overcharge we are assuming was in fact borne by these claimants. Again, this is a point of potential controversy, depending upon the precise nature and composition of the Merchant Service Charge that was paid by the claimants, which we propose to ignore for present purposes only.

7. On this basis, Mastercard and Visa are *A* in the scenario described in paragraph 3 above, and that is the term we shall use from hereon in order to emphasise the

[3] Ruling at [20(1)].

point that we are, in this Judgment, not finding facts (although it will sometimes nevertheless still be necessary to differentiate between "Mastercard" and "Visa"). Instead, we are articulating the law in relation to pass on so as to enable appropriate evidence to be adduced, and so as to enable us to find the relevant facts in due course. The claimants in the Merchant Interchange Fee Proceedings are, collectively, *B*. They are "direct" claimants against *A*.[4] We also had before us "indirect" claimants, to whom we shall attach the term *C*. It is to the identity of *C* that we now turn.

(2) Merricks Collective Proceedings

8. By an order dated 18 May 2022, the Tribunal certified that certain claims brought against three Mastercard entities were authorised to be continued as collective proceedings under section 47B of the Competition Act 1998;[5] and that Mr Walter Hugh Merricks, CBE was authorised to act as the class representative in these proceedings in accordance with section 47B(8) of the 1998 Act.[6] We shall refer to these proceedings as the "Merricks Collective Proceedings" and observe only that the claimant class represented by Mr Merricks are indirect claimants on to whom – so it is contended – an overcharge, initially borne by *B*, has been passed.

9. Again, we stress, we are simplifying considerably. The <u>actual</u> overlap between *B* (as we have defined claimants in the Merchant Interchange Fee Proceedings) and *C* (as we define the class represented by Mr Merricks) is either nil or vanishingly small. That is because the overcharge each set of claimants alleges and seeks to recover for is likely to be a <u>different</u> overcharge. Again, it is

[4] Even this is an over-simplification. Merchant services are provided by intermediaries and charged for by way of the Merchant Service Charge. In *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2016] CAT 11 at [484(1)], the Tribunal observed that "it is worth bearing in mind that Sainsbury's claim is itself an indirect claim. It is simply that the passing on, by Acquiring Banks, of the UK MIF via the Merchant Service Charge to Merchants such as Sainsbury's, has so formed part of the "background" facts of this case – and has at no point been challenged by Mastercard – that the indirectness of Sainsbury's claim can easily be overlooked. Nevertheless, this is a case where the overcharge that we have identified has been 100% passed on by Acquiring Banks to Sainsbury's". That, as we have noted, is not necessarily so in the present cases: there may not, in the case of the Merchant Interchange Fee Proceedings, necessarily have been pass on, and the label "direct" claimant is in fact inapposite. Nevertheless, we use it for the sake of clarity.

[5] See paragraph 1 of the order.

[6] See paragraph 2 of the order.

unnecessary to go into the details, because we accept, for the sake of argument, that the direct claims of *B* and the indirect claims of *C* do not, as a matter of fact, overlap. In other words, even if the claims of *B* and the claims of *C* succeeded completely against *A* (that is, Mastercard and/or Visa) there would be no question of any overpayment by these defendants and no question of overcompensation of *B* or *C*. That may very well be an oversimplification, but it is one that we are quite prepared to make for present purposes.

10. Given the interest of the class in the Merricks Collective Proceedings, Mr Merricks (as the class representative) requested that he be permitted to participate, by way of written and oral submissions, in the hearing directed by the Order;[7] and such permission was granted by this Tribunal. Subsequently, in order to ensure that the position was appropriately formalised, an Umbrella Proceedings Order was made in the Merricks Collective Proceedings on 4 July 2022 also, but only so far as the issues dealt with in this Judgment are concerned.

(3) The hearing of the pass on issues

11. The hearing pursuant to our Order took place on 23 and 24 May 2022. It was, explicitly, a hearing to determine how, in general terms, the issue of pass on is to be determined by the Tribunal. We make no factual findings whatsoever. The purpose of this Judgment is to ensure that all of the parties to all of the proceedings before us know how the question of pass on will be determined so that our decision can inform the parties as to the evidence that they will, in due course, adduce, as they are advised.

B. THE PERILS OF BILATERAL DISPUTE RESOLUTION

12. The theoretical risks of over- or under-compensation of *B* or *C* or (which is the flipside of the same coin) the theoretical risks of over- or under-payment by *A* are clear where damages in respect of the same overcharge are claimed by *B* and *C*:

[7] Referred to in paragraph 5 above.

(1) It is perfectly possible for *A* to be faced by separate, self-standing, claims by *B* and *C* (a direct claim by *B*; and an indirect claim by *C*) in respect of the same overcharge. In such a case, if *B* and *C* both succeed to the full extent of their claims, there will – at one and the same time – have been no pass on (where *B*'s claim succeeds) and 100% pass on (where *C*'s claim succeeds). What is more, in this case, *A* will have paid twice over. There is a clear risk of over-compensation.

(2) Alternatively, it is perfectly possible for *A* to succeed in each of these separate, self-standing, claims by *B* and *C*. In *B*'s claim, *A* could contend for 100% pass on and, if successful, would pay nothing. In *C*'s claim, *A* could contend for no pass on and, if successful, would pay nothing. There is a clear risk of under-compensation.

13. Such are the perils of bilateral dispute resolution, where *B*'s claim and *C*'s claim in respect of the same loss are progressed in separate proceedings. Of course, the courts are alive to this risk, and will seek to avoid inconsistency of outcome by consolidating related proceedings or hearing them together. But that may not always be possible: *B* may commence proceedings in one jurisdiction, and *C* in another. Of course, courts of differing jurisdictions will conscientiously apply their own laws, but it is important that the principles by which this jurisdiction at least operates be articulated, so as to assist (if no more than that) in achieving consistency of outcome. Equally, it may be that *B*'s claim and *C*'s claim are commenced in the same jurisdiction, but so far apart in time that it is not practically possible to hear both claims together. Here, the importance of a clear articulation of the relevant principles is, if anything, even more important, so as to achieve consistency of outcome.

14. Accordingly, when framing the appropriate principles for dealing with pass on in relation to the same overcharge, it is incumbent upon the court to have regard to, and to seek to achieve, consistency of outcome so that *A* does not pay too much, and that neither *B* nor *C* receive too little.

15. Whilst recognising these concerns, some of the parties before us suggested that they were – given the simplifying assumption we have made in paragraph 9

above – unfounded in the present instance. That was because there was no risk of either over- or under-compensation because the overcharges being claimed did not overlap. Of course, we accept the point that there is not even a theoretical risk of overlap given the assumptions that we are making. But that does not mean to say that striving for consistency of outcome in the broader sense of deciding like cases alike is not a goal worth striving for. That is for two reasons, one founded in principle and the rule of law, and one practical:

(1) The first reason – founded in principle and the rule of law – is that it is important to the credibility of a legal system that similar cases have similar outcomes. One of the issues that competition law regularly gives rise to is that a single infringement (here, alleged overcharges in Merchant Interchange Fees) can give rise to multiple, independent, claims that are all, broadly speaking, the same. It is critical that such cases have similar outcomes, and that is why – in the passages cited in the Ruling at [17] – the Court of Appeal indicated that cases such as the interchange fee cases be heard under "one roof" in this Tribunal. Transfers of many such cases have occurred, and the process is an on-going one. But having a single tribunal hear similar cases is but the first step: it is incumbent upon that tribunal to take the necessary procedural steps to ensure consistency of outcome in all of these cases, to the extent this can be achieved in accordance with the other objectives that guide and inform that tribunal in the exercise of its functions.

(2) The second reason – a practical one – is simply this. Where a tribunal is faced with a claim brought by *B* against *A*, that tribunal cannot know whether, some time down the line, there will not also be a claim brought by *C* against *A* (whether before that or another tribunal). Such an outcome is certainly "on the cards" in any given case, and it is incumbent upon the tribunal seised of the first case to do all that it can to ensure that later cases can be decided consistently.

16. For these reasons, and notwithstanding our simplifying assumptions, we consider that it is necessary to regard the claims against *A* in the round, and to articulate the law so that – to the extent practically possible – consistency of

outcome is achieved in the broadest sense. That means that the objective is to ensure that *A* neither pays too little nor too much on the assumption that all possible claimants bring a claim against *A*. In other words, even if only *B* and not *C* brings a claim against *A*, there is over-compensation to *B* and over-payment by *A* if *B* recovers any part of the overcharge that has been passed on to *C*.

C. THREE DIFFICULTIES

(1) Introduction

17. An overcharge like the one we are hypothesising – an unlawfully high Merchant Interchange Fee (hereafter, the "Overcharge") – is a cost (specifically: an increased cost) to *B*. Pass on concerns exactly what *B* does in response to that cost.

18. There are, as we see it, three distinct but related difficulties in the analysis of pass on. They may be labelled:

    (1) The "evidential difficulty".

    (2) The "definitional difficulty".

    (3) The "legal difficulty".

19. It is appropriate to quote an exchange recorded in the judgment of the Tribunal in *Sainsbury's Supermarkets Limited v. Mastercard Incorporated*.[8] The exchange was between the Tribunal in that case and an expert economist who gave evidence before the Tribunal, Dr Gunnar Niels:

> "**[1] Q (Mr Brealey)** Now, this is what Mr Harman is doing here. He is looking at the cost savings that Sainsbury's make and trying to work out whether the overcharge could have been absorbed in these cost savings. That's the relevance of it. Do you understand that?
>
> **[2] A (Dr Niels)** That seems to be the case, yes.

[8] [2016] CAT 11 at [432].

[3] Q (Mr Brealey) Clearly, if Sainsbury's absorbs an increase in interchange fees, it is not passing it on to the consumer in the form of higher prices, is it?

[4] A (Dr Niels) Yes. If the interchange fee is absorbed and therefore leads to a lower profit margin, then that's not pass on, correct.

[5] Q (Mr Brealey) Forget a lower profit margin. What about if it absorbs it into other cost savings, so it reduces? What Mr Harman is saying here is that you may make a saving elsewhere in order to absorb the increase in the interchange fee.

[6] A (Dr Niels) Yes, I can't really comment on that from an economic perspective. I think here it becomes a bit more complicated what one means by absorption or pass-on. Normally, as an economist, you think about MIF, MSCs as a cost. How is that cost reflected in price? I think here the analysis also turns to, well, how does one cost change maybe affect another cost change or a cost saving? So a higher cost here, would that lead to a cost saving here? And whether that's pass-on or not, I think from an economic perspective I can't really comment. I think if there is a causal relationship between the two, as there also has to be with pass-on, here the cost goes up, and therefore – not the price changes, but this other cost changes causally, then that is a form of pass-on perhaps, but it's not necessarily the way I look at pass-on.

[7] Q (Mr Brealey) You may as an economist say it is a form of pass-on, that's for the Tribunal to decide, but it is not pass-on in the form of lower prices or higher prices?

[8] A (Dr Niels) Indeed. Instead of pass-on in prices, it is through another mechanism.

…

[9] Q (Mr Brealey) [Quoting from Coupe 1/§§15-16.] "Should interchange fees go up or, indeed, any other costs in our business go up, our start point would not be to look to recover the money through the trading account, i.e. through the gross margin by raising prices. Our approach would always be to look at how we could absorb that increase in our cost base more widely. Of course, as I have said, as interchange fees are a tiny proportion of our overall costs it would be expected that any increase would be absorbed one way or another." Now, I suggest to you that if Sainsbury's did absorb an increase in interchange fees into its overall cost base, that's not an indication of pass-on. Do you accept that?

[10] A (Dr Niels) I think it is – one needs to be clear what is meant by "absorb" here, because there is scope for confusion. When you say absorb in the cost base, is it you just add it to the cost base, or do you reduce costs somewhere else? So maybe the question should be clarified?

[11] Q (Mr Brealey) Let's assume it is reduce the costs somewhere else.

[12] A (Dr Niels) So, again, from an economic perspective, if that's the case, I can't comment on it. I would say logically if there is a causal link between the two, so costs go up here and

therefore you reduce costs elsewhere, then that's a form of pass-on, but also absorption. I think it is still a little bit confusing, the concepts here.

[13] Q (Mr Brealey) You were here when, in opening, I gave my example of the sweetshop?

[14] A (Dr Niels) I read that in the transcript.

[15] Q (Mr Brealey) So, again, you've got a sweet shop, obviously buys the sweets wholesale, sells the sweets to the children, the wholesale price goes up by 10p because of someone's cartel, and rather than passing on the price – that 10p increase – to the children, the sweet shop reduces its marketing budget by 10p. So, it makes the same profit, the prices have not gone up, but it has just spent less on marketing. I suggest to you that is not pass on, whether in economics, in law, whatever. That is just simply not pass-on?

[16] A (Dr Niels) I think it is an interesting question. I find it difficult to comment on. Absorption or pass-on usually, as an economist, I would think of does it come out of the profit margin or not? So in this example actually the profit margin is still the same. So whether you increase the price or reduce the other – your marketing spend, for example, your profit margin stays the same. So from that perspective, you have not absorbed it in your profit margins, you have just cut costs somewhere else. I have to say it is an interesting question, but I haven't formed an opinion on whether one should label that pass-on, as an economist.

[17] Q (Prof Beath) Would it help to clarify our minds if we phrased the question more in terms of who bears the burden of a change? If it is the consumer, I think that's what you would mean by pass-on. But if, for example, rather than marketing, the sweet shop paid its worker a pound less an hour, then in some sense the labourer would be bearing the burden of the change. That might be a rather more helpful way of thinking about it.

[18] A (Dr Niels) Yes, that is a good way of thinking about it.

[19] Q (Mr Brealey) But even there, who bears the burden? The consumer in the marketing example is not bearing the burden of higher prices to the extent to which it extinguishes the loss to the sweet shop.

[20] A (Dr Niels) That I agree with. In that example, so clearly here the children don't bear the burden. Unless the cost saving by the sweet shop was in some other bit of the service they offer to the children, like the shop is less clean or something.

[21] Q (Mr Smith) I think what you are saying is that in Mr Brealey's example, the 10p increase in the wholesale price, if that results in a cut equivalent in the wages of the workers in the sweet shop, it has been passed, but has been passed on to the worker rather than to the purchasers of the sweets in the sweet shop?

[22] A (Dr Niels) Yes, correct. But I'm not labelling that – as an economist, I'm not labelling that as pass-on for legal purposes. But yes, that would be a way of passing it on, true, yes.

[23] Q (The Chairman)	So in economic terms the only pass on that's relevant is when it comes out of the profit?
[24] A (Dr Niels)	That's how we – yes.
[25] Q (The Chairman)	The only thing that's not a pass on, which is true absorption, is if it actually comes out of the margin?
[26] A (Dr Niels)	Yes, indeed." [numbering added]

We have numbered the questions and answers in this exchange for ease of reference, and will refer to this exchange as "Dr Niels' evidence".

20. Dr Niels's evidence clearly articulates two of the difficulties we have adverted to, namely the evidential difficulty and the definitional difficulty. We will describe these two difficulties first, before finishing with the legal difficulty, which has been much clarified by the decision of the Supreme Court in *Sainsbury's Supermarkets Limited v. Mastercard Incorporated*.[9]

(2) The evidential difficulty

21. The evidential difficulty (see [1] to [6] in Dr Niels's evidence at paragraph 19 above) is that pass on can be extremely difficult to show. Indeed, it is very difficult even to identify what that evidence might be, leaving on one side the altogether separate difficulties that arise when seeking to adduce that evidence in court.

22. The point may be illustrated in this way. Suppose *B* clearly pays the Overcharge, e.g., because Merchant Service Charge paid by *B* itemised the Merchant Interchange Fee as a specific and distinct cost item, and a court has conclusively found the extent of the Overcharge within the Merchant Interchange Fee. How does anyone (and we are not discussing the burden of proof here, to which we will come) demonstrate *B*'s reaction to the Overcharge:

(1) Has *B* increased its prices as a result of the Overcharge? If so, which prices and when? The fact is that a reaction to an Overcharge may not be immediate, and *B* may raise prices on a quarterly or monthly basis to avoid annoying customers with too frequent price changes, or even on

[9] [2020] UKSC 24.

an annual basis as part of a budget process. The reason for a price change is unlikely to be specifically documented; and, even if it is, such documentation is unlikely to reference each specific cost that may have occasioned it.

(2) Has *B* reduced its costs as a result of the Overcharge? If so, again the question arises, which costs and when? *B* will no doubt have many costs – wages, rent, materials – and *B* (presumptively an efficient operator, seeking to maximise profits and so minimise costs) will no doubt continuously be seeking to be as efficient as possible. Again, reasons for cost reduction will often not be documented; and, even if they are, unlikely to reference the reason for each specific cost reduction.

(3) Has *B* absorbed the Overcharge? This is the case where *B* sustains a lower profit because of the Overcharge (see [3] to [6] in Dr Niels' evidence at paragraph 19 above). Profit we would define as simply the difference between revenue and costs. It is immediately apparent, therefore, that it is not actually possible to understand whether the Overcharge has been absorbed without first having determined the answer to the two previous questions – "Has *B* increased its prices as a result of the Overcharge?" and "Has *B* reduced its costs as a result of the Overcharge?"

23. Even if *B* produced by way of disclosure all of its business documentation, and presented its finance director for detailed examination by an economist of Dr Niels's standing, we doubt whether that economist could reliably say where the Overcharge ended up.

24. Clearly, the evidential difficulty can be resolved by adjusting the answer to one or both of the two other questions. If, for instance, what matters is not how *B* has reacted to the Overcharge but *B*'s conscious reaction, then the evidential difficulties evaporate. It is simply necessary to consider what *B* decided to do in relation to a particular cost element. Of course, such a formulation of pass on brings with it its own difficulties – is *B*'s actual knowledge relevant or should

the test be more objective in focussing on what *B* should have known and should have done? – but at least the evidential difficulties are removed.

25. In *Sainsbury's*, the Tribunal was very conscious of what we now term the evidential difficulty,[10] and it resolved it in the following way at [484]:[11]

> "(4) We have already noted that whilst the notion of passing on a cost is a very familiar one to an economist, an economist is concerned with how an enterprise recovers its costs, whereas a lawyer is concerned with whether a specific claim is or is not well-founded. We consider that the legal definition of a passed on cost differs from that of the economist in two ways:
>
> (i) First, whereas an economist might well define pass-on more widely (i.e. to include cost savings and reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers.
>
> (ii) Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so."
>
> There is danger in presuming pass-on of costs to indirect purchasers (*pace* Article 14 of the Damages Directive), because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end-result is that the defendant retains the overcharge in default of a successful claimant or group of claimants. This risk of under-compensation, we consider, to be as great as the risk of over-compensation, and it informs the legal (as opposed to the economic) approach. It would also run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation "impossible or excessively difficult".
>
> (5) Given these factors, we consider that the pass-on "defence" ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground."

26. On this basis, *B* would almost always succeed in its claim to recover the Overcharge, and *A* would find it very difficult to assert a pass on "defence". That would also mean that persons in the position of *C* would rarely be able to

[10] See, for instance, [2016] CAT 11 at [433] to [435].
[11] [2016] CAT 11.

bring a claim. It was this fact that persuaded the Court of Appeal to overturn the Tribunal on this point:[12]

> "338. There was disagreement between Mr Hoskins [Counsel for Mastercard] and Mr Brealey [Counsel for Sainsbury's] as to whether the second point at [484] of the CAT's decision – viz that MasterCard was not able to identify any purchaser or class of purchasers of Sainsbury's to whom the overcharge had been passed – is a substantive point of law which must be satisfied in order to establish a pass-on and so distinct from the first point – viz that no identifiable increase in retail price was established. Although it is not necessary to resolve that issue on this appeal, we consider that it is not an essential condition for recovery: it would reflect the kind of policy decision which motivated the US Supreme Court in the *Hanover Shoe* case and is inconsistent with the principle that damages are compensatory rather than punitive. In any event, it is sufficient that MasterCard accepts on the appeal that the CAT was entitled to come to the conclusion that MasterCard failed to satisfy the CAT that there was no identifiable increase in the retail price attributable to the unlawful MIF."

27. The evidential difficulty is thus resurrected, and it was the reason why we directed this hearing: we cannot proceed to resolve the substance of these disputes without the parties having a clear understanding of what evidence they must adduce – indeed, what cases they must plead – in order for this Tribunal to resolve questions of pass on.

(3) The definitional difficulty

28. The question of how a firm like *B* might react to the Overcharge was considered by the Tribunal in *Sainsbury's*:[13]

> "[…] When faced with an unavoidable increase in cost, a firm can do one or more of four things:
>
> (1) It can make less profit (or incur a loss or, if loss making, a greater loss).
>
> (2) It can cut back on what it spends money on – reducing, for example, its marketing budget; or cutting back on advertising; or deciding not to make a capital investment (like a new factory or machine); or shedding staff.

[12] *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2018] EWCA Civ 1536 at [338].
[13] [2016] CAT 11 at [434].

(3) It can reduce its costs by negotiating with its own suppliers and/or employees to persuade them to accept less in payment for the same services.

(4) It can increase its own prices, and so pass the increased cost on to its purchasers."

29. This passage does not seek to define what pass on is. It is simply seeking to articulate in a reasonably comprehensive way how *B* might have reacted to the Overcharge in four distinct cases. Clearly, the fourth case is pass on *par excellence* and represents what the Tribunal found to be pass on at [484(4)(i)] of its judgment (quoted in paragraph 25 above: "*the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers*"). The Court of Appeal appears to have agreed.[14] But there is no reason why pass on should be so circumscribed:

(1) Suppose *B*, instead of raising prices, sheds staff (an aspect of the second case). Why should the employees – who are actually bearing the Overcharge, in the form of no wages – not have a claim?[15]

(2) Suppose *B*, instead of raising prices, reduces its employees' wages (as aspect of the third case). Why should the employees – who are actually bearing the Overcharge, in the form of reduced wages – not have a claim?

In reality, only the first case can unequivocally be said not to involve pass on.

30. The Tribunal's formulation received a measure of approval in the Supreme Court, but with a gloss suggesting that pass on might be <u>wider</u> than found by the Tribunal:[16]

> "205. In the present appeals, the merchants by paying the overcharge in the MSC to the acquirers have lost funds which they could have used for

[14] See the passage quoted in paragraph 26 above.
[15] So far as we are aware, this difficult point has never been addressed, and (to be clear) we propose to avoid any discussion of it, or any decision in relation to it, because (as matters stand) it is not a point that arises on the pleadings, and was not a matter addressed before us (save very peripherally).
[16] *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [205] to [206] (emphasis added).

> several purposes. As sophisticated retailers, which obtain their supplies from many suppliers and sell a wide range of goods to many customers, they can respond to the imposition of a cost in a number of ways, as the CAT pointed out in [434] and [455] of its judgment. There are four principal options: (i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or (iv) the merchant can pass on the costs by increasing the prices which it charges its customers. Which option or combination of options a merchant will adopt will depend on the markets in which it operates and its response may be influenced by whether the cost was one to which it alone was subjected or was one which was shared by its competitors. If the merchant were to adopt only option (i) or (ii) or a combination of them, its loss would be measured by the funds which it paid out on the overcharge because it would have been deprived of those funds for use in its business. Option (iii) might reduce the merchant's loss. Option (iv) also would reduce the merchant's loss except to the extent that it had a "volume effect", if higher prices were to reduce the volume of its sales and thereby have an effect on the merchant's profits.
>
> 206. **In our view the merchants are entitled to claim the overcharge on the MSC as the prima facie measure of their loss. But if there is evidence that they have adopted either option (iii) or (iv) or a combination of both to any extent, the compensatory principle mandates the court to take account of their effect and there will be a question of mitigation of loss**, to which we now turn." [emphasis added]

31. Clearly, the Supreme Court has reframed and abbreviated the four cases, by focusing the second case on internal costs and the third case on cost of supplies. There is no reference to employees, but they would appear to fall within the second case. If we may respectfully say so, this reframing is a helpful improvement, in that it appears to ensure that what is in fact the same case (the employee either being sacked or accepting reduced wages) falls within Option (ii) and does not straddle the Tribunal's cases (2) and (3). However, these are again matters that will need to be appropriately clarified as they arise in concrete terms. In this light, we would venture to suggest that the distinction between Option (ii) and Option (iii) is not watertight. Suppose *B*, in response to the Overcharge, seeks to cut back on its marketing budget, by negotiating a reduction in advertising agency *X*'s rates. Is this a case of Option (ii) or Option (iii)?

32. This might not matter – after all, *B* can react to the Overcharge in a myriad of ways, and they may not be easy to categorise – save for the fact that the Supreme Court, at [206] of its judgment, appears to have held that pass on exists not only in the case of Option (iv), but also in the case of Option (iii). Option (ii) – which is difficult to separate from Option (iii), as we have described – is stated to be the same as Option (i), which is the only case where it can unequivocally be said that there is no pass on.

33. It was suggested to us, when we raised this point, that the Supreme Court had determined the scope of pass on and that this definitional question was not open to us to consider. We do not consider this to be the case. Although, of course, we will treat what the Supreme Court said with the greatest of respect, and are bound to follow the *ratio* of the case, we do not consider this to be part of the *ratio* of the decision. This part of the decision is *obiter*, and no doubt for that reason at paragraph [206] of the Supreme Court's judgment is put as briefly as it is. As the Court of Appeal noted,[17] Mastercard accepted before the Court of Appeal that the Tribunal was entitled to come to the conclusion that Mastercard failed to satisfy the Tribunal that there was no identifiable increase in the retail price attributable to the Overcharge.

34. Accordingly, we consider the definitional difficulty to be live before us. Although we will seek to avoid resolving questions that do not arise in the cases before us, we are conscious that these various proceedings are at relatively early stages, and these matters could well arise in due course. As matters stand, on the pleadings in the Merchant Interchange Fee Proceedings, *A* is contending that this is an Option (iv) case (pass on by increase of price).[18] The position of *B* is, however, unclear. Although we accept that some pleadings in the Merchant Interchange Fee Proceedings are a little fuller, it is impossible to understand

[17] In the passage quoted at paragraph 26 above.

[18] Thus, paragraph 96 of Visa's Defence to some of the Merchant Interchange Fee Proceedings (in Case Nos 1312-1324/5/7/19 (T), *Dune*, we select it simply as an example) states: "…even if the Claimants paid an Overcharge that was not fully mitigated by the benefits referred to in paragraph 95 above, the Claimants passed on any such Overcharge to their customers…". This plea has been expanded by way of further information. We will consider that in due course.

from any of the pleadings what *B* is saying about how it did not pass on the Overcharge.[19]

35. In the Merricks Collective Proceedings, quite clearly, the class representative contends that Option (iv) is the case: otherwise, the class would have no claim. To this extent, the contentions of *A* and *C* were aligned before us.[20]

(4) The legal difficulty

36. Pass on is an interesting legal phenomenon in that it acts both as a defence (enabling *A* to contend that *B*'s claim against *A* should be reduced to the extent there has been pass on) and as the basis for a cause of action (enabling *C* to bring a claim against *A* by reason of *B*'s passing on of the Overcharge, or part of it, to *C*).

37. Beginning with the cause of action, in order to succeed against *A*, *C* will have to establish everything that *B* must establish (i.e., an infringement of competition law, resulting in the Overcharge) plus pass on of the Overcharge by *B* to *C*. The passed on Overcharge represents *C*'s loss and, of course, *C* will have to prove that loss, the burden being on *C*.

38. Turning to *B*, if *B* succeeds in establishing that there has been an infringement of competition law resulting in the Overcharge (which by definition will have been paid by *B*), then *B*'s loss is *prima facie* established in the amount of the Overcharge.[21] That is only the *prima facie* position, and it is uncontroversial that if there has been pass on (whatever that means!) *B*'s loss must be reduced by the extent to which the Overcharge has been passed on. *B* cannot, obviously,

[19] The Reply to the pleading set out in the previous footnote says at paragraph 58: "As to paragraph 96, as a matter of law, it is denied that the measure of damages recoverable by the Claimants may be reduced to reflect any increase in the prices charged by the Claimants to their customers unless such increase in the Claimants' prices (and therefore revenues) was legally caused by the Defendants' breaches of statutory duty. It is for the Defendants to prove the fact and amount of any pass on by the Claimants."

[20] It is worth noting that for this purpose, Visa cannot be regarded as part of *A*, since the Merricks Collective Proceedings name only Mastercard entities as defendant.

[21] See *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [206].

recover for a loss *B* has not suffered. As the Supreme Court put it,[22] "*the compensatory principle mandates the court to take account of*" pass on.

39. It is worth bearing in mind that, even if *B* has passed on the Overcharge to 100%, *B* may still have a claim against *A*. If the pass on took the form of increases to the prices *B* charged for the products *B* sold, with the result *B* sold less of these products, then *B* will be able to recover the lost profits on those lost sales.[23]

40. Obviously, *B* bears the burden of proving loss, but that burden will be satisfied if *B* can show an infringement of competition law resulting in the Overcharge. If pass on is alleged, the burden of proof rests on the party who asserts it, which is *A*.[24] That is because pass on is properly to be regarded as a <u>defence</u> and not an aspect of the claim that *B* needs to make good. In terms of legal rubric, the pass on defence is characterised as mitigation of loss.[25]

41. Mitigation of loss is – as we will come to consider further – closely related to contributory negligence and causation. It is a principle that has two aspects:

    (1) First, a claimant is under a duty to mitigate the losses resulting from the defendant's tort.[26]

    (2) Secondly, damages are not recoverable for such losses as the claimant has avoided by taking action subsequent to the tort.[27]

42. Only the second aspect is relevant here. As to the first aspect, of course, a plea by *A* that *B* should have mitigated the loss caused by the Overcharge by raising prices, when in fact *B* did not, can (at least in theory) be pleaded (and, in some

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[22] See *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [206].
[23] This is the so-called "volume effect": *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [205].
[24] *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [211].
[25] *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [211] to [212].
[26] See Jones (ed), *Clerk & Lindsell on Torts*, 23rd ed (2020) at [27-09]. Mitigation is, of course, also a principle of contract law, but we are here concerned with statutory torts not damages arising out of a breach of contract.
[27] See Jones (ed), *Clerk & Lindsell on Torts*, 23rd ed (2020) at [27-09].

cases, appears as a plea in the proceedings before us). Any such plea would (at some point) have to deal with a point of public interest that might arise. The notion that an (by definition) unlawful Overcharge should oblige *B* to increase the prices of the products *B* sells would introduce an unwelcome additional consideration on sellers in markets, and one that might be said to be against the public interest, in that the public interest is served through competition, and artificial stimulants that cause prices to increase are to be deprecated. If there was a duty to mitigate, and *B* unreasonably failed to do so, then it would follow that such a failure would affect *B*'s recoverable damages without causing any claim in *C* to arise (since, by definition, there would be no pass on, the essence of the allegation being that *B* failed to pass on). Accordingly, this aspect of the doctrine of mitigation is for present purposes unimportant, and we consider it no further.

43. The second aspect is concerned with actual steps taken by the claimant which have had the effect of mitigating the claimant's loss. The effect of mitigation is all that needs to be shown. There is no need, where there is in fact mitigation, to show that the claimant was under a duty to mitigate.

44. The two aspects of mitigation were clearly stated by Lord Haldane LC in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London Limited*:[28]

> "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James LJ in *Dunkirk Colliery Co v. Lever*, "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."
>
> As James LJ indicates, this second principle does not impose on the plaintiff any obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. **But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has**

[28] [1912] 1 AC 678 at 689.

> **suffered may be taken into account even though there was no duty on him to act**." [emphasis added]

45. The second aspect of mitigation is, quite simply a question of causation, although that is a proposition which will need to be unpacked further.[29]

46. On the face of it, as one would expect, the decision of the Supreme Court in *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others*[30] makes clear the law in this area. It was, therefore, somewhat surprising to be told at the Case Management Conference in March 2022 that there was "a legal issue that is still not clarified".[31] The precise nature of this legal issue has never been clarified. Paragraph 12 of Mastercard's written submissions on pass on states:

> "This alleged issue was not explained at the time, nor was it identified in the draft List of Issues prepared by the Claimants. In order to allow this issue to be addressed in these submissions, on 12 April 2022, Mastercard's solicitors wrote to the Claimant's solicitors asking them to set out clearly what is said to be the issue in dispute. Regrettably, the response from the Claimants' solicitors dated 19 April 2022 did not provide the clarification sought, merely suggesting that the relevant issue for the list of issues is "what the Defendants must prove to establish pass on of interchange fees by merchants to their customers", which does not provide any indication of the nature of the issue said to be in dispute."

47. Having carefully considered the written submissions of all the parties, and heard two days' argument, it comes as something of a surprise to discover that we are no closer to understanding the legal issue that needs to be determined. That is because we are satisfied that there is, in fact, no legal issue requiring of clarification at all, save to the extent that there is a question as to what needs to be pleaded, and by whom. Since we consider that this point is conclusively and bindingly resolved by the law that we have already described, we propose to treat the issue that the Umbrella Interchange Fee Claimants are raising as a pleading point, although we recognise that (as with many pleading points) there is a point of law lurking beneath. But, in essence, the Umbrella Interchange Fee

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[29] See, for instance, *Fulton Shipping Inc of Panama v. Globalia Business Travel SAU (formerly Travelplan SAU) of Spain*, [2017] UKSC 43.
[30] [2020] UKSC 24 at [211].
[31] To quote from leading counsel for (some of) the Umbrella Interchange Fee Claimants.

Claimants are contending that Mastercard and Visa have failed properly to plead their pass on defence, and they want this Tribunal to say so.[32]

48. We will proceed to explain why we consider no legal issue to arise in Section D below. Section E then considers the question of pleading which, we consider, is actually the question before the Tribunal.

D. THE LEGAL DIFFICULTY

49. The legal issue is said to arise out of a lack of clarity in two paragraphs of the Supreme Court's decision. We set them out below:

> "215. **[Proposition [a]]** We are not concerned in these appeals with additional benefits resulting from a victim's response to a wrong which was an independent commercial decision or with any allegation of a failure to take reasonable commercial steps in response to a loss. The issue of mitigation which arises is whether in fact the merchants have avoided all or part of their losses. In the classic case of *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, at 689 Viscount Haldane described the principle that the claimant cannot recover for avoided loss in these terms:
>
> > "[W]hen in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account …" (Emphasis added)
>
> **[Proposition [b]]** Here also a question of legal or proximate causation arises as the underlined words show. But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting. The relevant question is a factual question: has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein? The merchants, having acted reasonably, are entitled to recover their factual loss. If the court were to conclude on the evidence that the merchant had by reducing the cost of its supplies or by the pass-on of the cost to its customers (options (iii) and (iv) in para 205 above) transferred all or part of its loss to others, its true loss would not be the prima facie measure of the overcharge but a lesser sum.
>
> 216. **[Proposition [c]]** The legal burden lies on the operators of the schemes to establish that the merchants have recovered the costs incurred in the MSC. **[Proposition [d]]** But once the defendants have raised the issue of mitigation, in the form of pass-on, there is a heavy evidential burden on the merchants to provide evidence as to how they have dealt with the recovery of their costs in

[32] This becomes tolerably clear from paragraphs 29 to 37 of the Umbrella Interchange Fee Claimants' written submissions.

> their business. Most of the relevant information about what a merchant actually has done to cover its costs, including the cost of the MSC, will be exclusively in the hands of the merchant itself. The merchant must therefore produce that evidence in order to forestall adverse inferences being taken against it by the court which seeks to apply the compensatory principle."

50. We have taken the liberty of inserting letters to enable clearer parsing of these paragraphs. We consider that these paragraphs contain four propositions, which we have labelled [a] to [d]:

(1) *Proposition [a].* This is no more than a statement that the relevant aspect of mitigation is what we have described as the second aspect. The first aspect does not arise. In short, the question is not should *B* have mitigated the effect of the Overcharge, but as a matter of fact did *B* mitigate the effect by passing the Overcharge on.

(2) *Proposition [b].* This is a reference to the fact that causation (which, as we have said, the second aspect of mitigation turns on) itself has two aspects, "legal" causation and "factual" causation:

(i) Factual causation is the more obvious of the two: it involves consideration of whether the effect of the alleged mitigating conduct was, as a matter of fact, to reduce or eliminate *B*'s loss.

(ii) Legal causation concerns the question of whether – even if the effect of the alleged mitigating conduct was, as a matter of fact, to reduce or eliminate *B*'s loss – as a matter of legal policy it should serve to reduce or eliminate the amount of damages that *A* should pay *B*. The question arises quite frequently and is an elusive one. Thus, the fact that a claimant receives an indemnity by virtue of a contract of insurance is regarded as "collateral" to the defendant's liability and thus will not affect it. In personal injury cases, the fact that the claimant receives some benefits as a result of his or her injury is also generally regarded as "collateral".

Having identified the two aspects of causation, the Supreme Court the proceeded to say – in a single sentence in paragraph [215] – that no issue of legal causation arose:

> "…But the question of legal causation is straightforward in the context of a retail business in which the merchant seeks to recover its costs in its annual or other regular budgeting."

It seems to us very difficult to identify any policy reason why *B* should nevertheless continue to be able to claim the Overcharge from *A*, despite having passed it on to *C*. Indeed, one can see very strong reasons for not permitting *B* to persist in such a claim, because (as we have described) on these facts *C* will have a claim against *A*, and *A* should not be obliged to pay twice over. Frankly, we can see exactly why the Supreme Court regarded this as a "no brainer". As the Supreme Court noted, the difficult question is that of factual causation.[33]

(3) *Proposition [c].* This does no more than repeat the conclusion earlier reached by the Supreme Court that the legal burden of proof in relation to factual causation lies on *A*.[34]

(4) *Proposition [d].* In proposition [c], the Supreme Court was careful to refer to the "legal" burden, and in proposition [d] the Supreme Court identifies the separate concept of the "evidential" burden. The legal burden is the obligation imposed on a party by a rule of law to prove (or disprove) a fact in issue to the requisite standard of proof.[35] In the case of the pass on defence, that burden will always rest on *A*. The evidential burden refers to the need to adduce evidence so as to satisfy the tribunal

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[33] The Umbrella Interchange Fee Claimants relied on the Tribunal's decision in *Royal Mail Group Limited v DAF Trucks Limited* [2021] CAT 10, as approved by the Court of Appeal in *NTN Corporation v Stellantis* [2022] EWCA Civ 16, to support their argument on the requirements for establishing legal causation. However, both those cases involved pleaded cases directed at Option (iii) scenarios (reductions in supplier costs offsetting an overcharge). In *Royal Mail*, the Tribunal specifically noted (at [44]) the plausible basis for legal causation that arose for a merchant facing a transparent service charge, such as was the case in *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others*.

[34] We doubt whether a burden of proof question arises in relation to legal causation because this is a question of law not a question of fact. If we are wrong about this, then the burden of proof will again lie on *A*.

[35] See Malek (ed), *Phipson on Evidence*, 20th ed (2022) at [6-02].

of fact that the legal burden has been discharged to the requisite standard. Generally, that burden falls on the party on whom the legal burden falls (i.e., *A*) but, in a civil action, all parties are permitted to lead evidence, and in proposition [d] all the Supreme Court is saying is that because the relevant evidence on pass on will be in the hands of *B* and not *A*, it will be for *B* to adduce the relevant evidence "in order to forestall adverse inferences".

51. We consider that there is no point of law that we need to resolve. Although the Supreme Court was referring to retail businesses, we consider exactly the same to be true of the other types of business (for example, councils, local authorities and universities) that feature in the proceedings before us. We turn to the question of the pleadings.

E. THE PLEADING POINT

(1) The objection of the Umbrella Interchange Fee Claimants

52. We have described the state of the pleadings in the case of Visa in footnotes 18 and 19 above. It is fair to say that the plea in paragraph 96 of Visa's Defence is very short, but it has been expanded in the further information provided. Mastercard's plea, in its Defence, is altogether fuller.

53. The state of the pleadings is helpfully set out in the written submissions of the Umbrella Interchange Fee Claimants:

> "27. It is apparent from Visa's RFI response served on 11 April 2022…that Visa:
>
> a. infers that any Overcharge was likely incorporated in annual or other regular budgeting/reporting processes designed to ensure that the Claimants recovered their costs given that MSCs were a variable cost of which the Claimants were well aware;
>
> b. alleges that the Overcharge was a common cost in the sense of being incurred by the Claimants and their competitors and seeks to rely on general statements made by the OFT, the Commission and the British Retail Consortium…that MIFs were being passed on by retailers. On that basis, Visa infers

that the Claimants and their competitors were likely to believe that MIFs were reflected in their competitors' prices; and

c. positions the question of proximate causation to establish pass on as a question of whether in the counterfactual without an Overcharge, the Claimants would have offered lower prices. In that regard, Visa intimate that they will rely on econometric analysis *inter alia* using cost and price data relating to the Claimants obtained through disclosure, to demonstrate both the fact and the extent of the factual causal link between any Overcharge and the Claimants' prices at trial.

28. Mastercard also asserts that each of the Claimants cannot recover damages for such increased costs as it passed on that increased cost to its customers either in its retail prices or through surcharging. Mastercard has indicated that it "will seek disclosure from the Claimants in relation to how they dealt with the recovery of costs in their business" and asserts that it is unable, pending disclosure, to plead further but avers that "as a business seeking to recover their costs in their annual or other regular budgeting, it is likely that the Claimants mitigated their loss to a material extent". In that regard, Mastercard, like Visa, alleges that card costs are common to the Claimants and their competitors and relies upon similar generalised public statements by regulators and the BRC."

54. The Umbrella Interchange Fee Claimants contend that these pleas are insufficient. The essence of their objection is that a properly pleaded defence of pass on requires *A* to plead – and then prove – that *B* decided to pass on the Overcharge. Their written submissions say this (emphasis added):

"32. The burden is on the Defendants to show that the Claimants have taken action arising out of the imposition of default MIFs to diminish their loss **by deciding to pass on that specific cost to their customers**…It is only when (and if) the Defendants are able to prove that a Claimant **has taken a mitigating action specifically in response to the imposition of such MIFs** that "the effect in actual diminution of the loss [it] has suffered may be taken into account".

33. The Claimants accept that to the extent they **surcharged their customers for paying pay card** that such a surcharge would amount to pass on: in such a scenario the entity in question **would have taken a deliberate decision as a result of facing the cost of the MIF to recover that cost from their customers**. In those circumstances, the Claimants accept that the effect of the surcharge may be taken into account as relevant mitigation.

34. Equally, the Claimants accept that if the MSC was **explicitly considered as part of a Claimant's price setting process**, this could amount to pass on, depending on the factual evidence (for example, depending on the evidence as to whether any such Claimant subsequently increased its prices as a result)".

55. Whilst we have no doubt that a deliberate decision to increase prices in the face of the Overcharge constitutes pass on, we do not agree that pass on is so limited. Any increase in price, occurring as a result of the Overcharge, is sufficient to constitute pass on. The intention of *B* to increase prices in response to the Overcharge, whilst it constitutes evidence that may be helpful, is not a necessary part of the defence.

56. The Umbrella Interchange Fee Claimants identify no authority in support of their proposition that intention is an aspect of the pass on defence which therefore needs to be pleaded, and the assertion is flatly contradicted by Lord Haldane LC's statement of the law in *British Westinghouse*.[36] Moreover, there are cogent reasons of policy why the Umbrella Interchange Fee Claimants' proposition cannot be right. The Court of Appeal, in *Sainsbury's*, made clear that the Tribunal's approach to pass on was wrong, and that the *Hanover Shoe* approach to pass on (namely to close it out) did not reflect the law of this jurisdiction.[37] The Supreme Court has made clear that it would be wrong to place insurmountable burdens on a claimant seeking to vindicate a claim, and that such burdens would probably offend the principle of effectiveness.[38] If pass on only exists where there has been a decision to pass on, the prospects of *C* ever being able to make good a claim against *A* would be vanishingly small.

57. The Supreme Court also addressed the evidential difficulty we have described in paragraphs 21*ff* above:[39]

> "The loss caused by the overcharge included in the MSC was an increased cost which the merchants would in all probability not address as an individual cost but would take into account along with a multiplicity of other costs when developing their annual budgets. The extent to which a merchant utilised each of the four options, which the CAT identified and we described in [205] above, can only be a matter of estimation. In accordance with the compensatory principle and the principle of proportionality, the law does not require unreasonable precision in the proof of the amount of the *prima facie* loss which the merchants have passed on to suppliers and customers."

[36] See the **bolded** passage in the quotation at paragraph 44 above.
[37] See paragraph 26 above.
[38] *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [209].
[39] *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others* [2020] UKSC 24 at [223].

58. Again, this makes clear that a decision to pass on is unnecessary, and that the sort of counterfactual and econometric analysis advanced by Visa (and, to an extent, by Mastercard) is a proper way to plead the defence of pass on. We find that there is nothing objectionable in the way in which Visa and Mastercard have pleaded the pass on defence, and that the Umbrella Interchange Fee Claimants' objections to the pleadings are unfounded in law and wrong.

(2) The framing of the issues and the adducing of future evidence

59. Pleadings in competition cases are exceedingly important, given the very difficult issues that arise for determination in such cases.[40] In particular, pleadings serve the very important purpose – at least in competition cases – of not only defining the issues that arise for determination, but the way in which those issues are going to be proved. In *NTN Corporation v. Stellantis NV*,[41] the Court of Appeal said this in relation to pass on:

> "…the burden of proof when pleading causation is on the defendant to demonstrate: (a) that there is a legal and proximate, causal, connection between the overcharge and the act of mitigation; and (b) that this connection is "realistic" or "plausible" (the two phrases being interchangeable) and carries some "degree of conviction"; and (c) that the evidence is more than merely arguable…"

We respectfully agree that this statement captures what pleadings are intended to achieve.

60. The Tribunal, as part of its extensive case management powers as set out in rule 4 of the Competition Appeal Tribunal Rules 2015, can control the evidence that it receives in order to determine the issues that arise for determination in the cases before it. The Order makes use of these case management powers in requiring the parties to frame, in some detail, the issues arising out of the Merchant Interchange Fee Proceedings and the manner in which those issues are to be proved.

[40] See Section E in Part VI of *Michael O'Higgins FX Class Representative Limited v. Barclays Bank plc*, [2022] CAT 16.
[41] [2022] EWCA Civ 16 at [33].

61. As we made clear in the Ruling, these are complex claims, not least because of the sheer number of claimants. Given the nature of the Merchant Interchange Fee Proceedings and the pass on defence, it is appropriate that we give a clear direction to the parties as to how we intend to determine the pass on defence:

(1) We note that Visa, in contrast to Mastercard, in substance proposes to demonstrate pass on by the use of econometric evidence and by relying on existing studies of pass on rates. We consider that approach to be, *prima facie*, the correct one to adopt. Mastercard, whilst not eschewing econometric evidence, also wishes to rely on disclosure from the Umbrella Interchange Fee Claimants. Given the sheer number of claimants, that will involve sampling.

(2) Sampling is also the approach that the Umbrella Interchange Fee Claimants wish to adopt in demonstrating that the Overcharge was not passed on.

(3) We propose to make an order refusing Mastercard permission to rely upon specific fact evidence to make good its pass on defence. Given the evidential difficulty we have described, we are entirely sceptical that the pass on defence can be established by claimant specific evidence adduced from a sample of many thousand claimants and we consider that such an approach would be a disproportionate and, frankly, hopeless way of deciding the question of pass on. That said, the Tribunal would be entirely sympathetic to some form of tightly controlled, expert-lead, disclosure, provided that it was focussed, cost-effective and proportionate. Such an approach might include a survey or questionnaire directed to *B* or certain elements within the class that constitutes *B*. We make no further direction in this regard, because we are conscious that the parties are in the process of completing the list of issues described in the Ruling, and we wish only to provide clear guidance as to how this process is to be conducted. We do not propose to anticipate further how, in light of this judgment, parties in the position of *A* might wish to make good their cases.

(4) We are conscious that precluding a party from adducing evidence that it wishes to adduce is an extreme exercise of the Tribunal's case management powers. Nevertheless, given the view we have taken about the nature of pass on, we consider that to permit or oblige parties in the position of *A* to seek extensive and expensive factual disclosure is a cost we are not prepared to entertain.

(5) However, we are not going to preclude the Umbrella Interchange Fee Claimants from adducing any evidence that they might wish to produce in support of their claim that the Overcharge was not passed on. We are, as we have said, confident that claimant specific evidence will not take the resolution of the pass on defence any further, but if we are wrong on this point, this will be demonstrated by the evidence that the Umbrella Interchange Fee Claimants adduce. The intention to adduce such evidence will be controlled by the Tribunal's case management powers, and in the first instance the intention to adduce such evidence will need to be specifically referenced in the list of issues directed by the Tribunal in the Merchant Interchange Fee Proceedings. If we are wrong on the utility of this evidence, then we will of course re-visit the question of sampling and of Mastercard's (and Visa's) right to have disclosure of claimant specific evidence. For the present, however, sampling is not a process that we are prepared to entertain in order to resolve the pass on issue.

62. This Judgment represents the unanimous views of the Tribunal.

Sir Marcus Smith
President

Ben Tidswell

Lord Young QC

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

Date: 6 July 2022