Neutral citation [2022] CAT 43

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 October 2022

Before:

THE HONOURABLE MR JUSTICE ROTH
(Chair)
JANE BURGESS
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- and -

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

Defendants

Heard at Salisbury Square House on 20 September 2022

JUDGMENT (AMENDMENT)

APPEARANCES

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

Mr Mark Hoskins KC and Mr Matthew Cook KC (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Defendants.

A. INTRODUCTION

1. On 9 March 2022, the Tribunal issued a judgment determining what should be the domicile date for the purpose of these collective proceedings and Mr Merricks, as the class representative, immediately filed an Amended Claim Form reflecting both the earlier decision of the Tribunal that a collective proceedings order ("CPO") would be granted and the determination of the domicile date. Following some discussion as to its precise terms, in view of the indication from the defendants ("Mastercard") that they would seek to appeal the decision as to the domicile date, the Tribunal made the CPO on 18 May 2022.

2. On 9 May 2022, Mastercard served their Defence to the Amended Claim Form. On 15 July 2022, Mr Merricks served his Reply.

3. However, on 5 September 2022, Mr Merricks applied to re-amend the Claim Form. In part, the application involved minor, corrective amendments that were not controversial and to which Mastercard consented. But one amendment, which effectively involves two limbs, was strongly contested. The application was heard as part of a case management conference ("CMC") and at the conclusion of the argument we informed the parties of our decision to allow such further amendment but on much more limited terms than Mr Merricks had sought. This judgment sets out our reasons for that decision.

B. BACKGROUND

4. These proceedings have a long history. In its first judgment, given on 21 July 2017 ("*Merricks 1*"), the Tribunal dismissed the application for a CPO. That decision was reversed by the Court of Appeal, in a judgment largely upheld by the Supreme Court which issued its decision on 11 December 2020 (*"Merricks SC"*) and remitted the matter back to the Tribunal. Mr Merricks then sought to amend the Claim Form to add claims of persons who had died before the commencement of the proceedings. By a judgment issued on 18 August 2021 ("*Merricks 2*"), the Tribunal held that a CPO would be granted but refused permission to add such claims of deceased persons and also held that the

proceedings could not include a claim for compound interest. As noted above, a third judgment dealing with the domicile date was given on 9 March 2022 ("*Merricks 3*"). As *Merricks 3* is under appeal, the position is that notice of the claim to the class members, enabling them to opt-out or (for those not resident in the UK) to opt-in, has still not been issued over a year after the Tribunal held that a CPO would be granted and six years after these proceedings were issued.

5. The parties have nonetheless sensibly agreed to make progress in the interim, and in the CMC the Tribunal accepted their proposals for certain preliminary issues, which the Tribunal held could proceed to a hearing early in 2023.

6. However, as stated above, there was no agreement regarding Mr Merricks' proposed reamendment. On any view, it is a substantial amendment which, as proposed, would have extended the period covered by the claims by over eight years. To appreciate the significance of the amendment, it is necessary to summarise the framework in which it would apply.

7. We do not need to repeat in this judgment a description of the operation of the Mastercard card payment scheme: see the detailed summary in *Sainsbury's v Mastercard* [2020] UKSC 24 at [9]-[10]. The abbreviations used there will similarly be used in this judgment. The Supreme Court significantly noted, at [10(x)]:

> "For most of the claim period, the MIF typically accounted for some 90% of the MSC. Acquirers pass on all of the MIF, and the scheme fee, to merchants through the MSC, with negotiation between acquirers and merchants in respect of the MSC being limited to the level of the acquirer's margin."

8. The Supreme Court explained and adopted the reasoning of the European Commission ("the Commission") and the EU Courts as to why the MIF appreciably restricted competition: see in particular at [74]-[79]; and the Court further stated:

> "99. On the facts as found, the effect of the collective agreement to set the MIF is to fix a minimum price floor for the MSC. In the words of Mr Dryden, AAM's expert economist, it sets a "reservation price".
>
> 100. That minimum price is non-negotiable. It is immunised from competitive bargaining. Acquirers have no incentive to compete over that part of the price.

> It is a known common cost which acquirers know they can pass on in full and do so. Merchants have no ability to negotiate it down.
>
> …
>
> 103. There is a clear contrast in terms of competition between the real world in which the MIF sets a minimum or reservation price for the MSC and the counterfactual world in which there is no MIF but settlement at par. In the former a significant portion of the MSC is immunised from competitive bargaining between acquirers and merchants owing to the collective agreement made. In the latter the whole of the MSC is open to competitive bargaining. In other words, instead of the MSC being to a large extent determined by a collective agreement it is fully determined by competition and is significantly lower."

9. The decision of the Commission ("the Decision"), upheld by the EU Courts, concerned Mastercard's EEA MIFs whereas the cases under appeal before the Supreme Court largely concerned UK domestic MIFs, but the Supreme Court held that the same rationale applied. On that basis, it was held that the setting of the domestic MIFs appreciably restricted competition for the purpose of EU and UK competition law.

10. Unlike the cases on appeal before the Supreme Court and almost all the other cases brought by merchants now pending before the Tribunal, the present proceedings are purely follow-on proceedings: in other words, although most of the claims in these collective proceedings concern domestic interchange fees, it is not alleged that the determination of those interchange fess infringed competition law but that the level of the UK domestic interchange fees was caused by the EEA MIFs. Since Mastercard's collective agreement to set the EEA MIFs had been found by the Decision to infringe Art 101(1) TFEU, that infringement ("the Infringement") was causative not only directly of the EEA MIFs but also, it is alleged, indirectly of the domestic MIFs (or domestic bilaterally agreed interchange fees ("IFs")). Mr Merricks as the class representative alleges that EEA MIFs "operated as a floor and/or benchmark and/or a minimum price" for the setting of the domestic interchange fees. Thus the Claim Form states, at para 103(d):

> "…it follows that, even though Domestic MIFs were agreed in respect of United Kingdom Domestic Transactions, absent the Infringement, the interchange fees paid by acquiring banks (whether on a bilateral or a multilateral basis) in respect of United Kingdom Domestic Transactions would have been lower than they were because they would have been set in the

> absence of, and without reference to, an unlawfully high floor and/or starting point and/or benchmark."

11. This link between the EEA MIFs and the domestic MIFs/IFs is therefore critical to the claims in the collective proceedings.

12. The claims as previously pleaded covered the same period as the infringement found in the Decision, i.e. 22 May 1992 to 19 December 2007, save that the claim period extended to 21 June 2008 on the basis that Mastercard did not reduce the EEA MIFs until that date: Claim Form, para 94(d). Mastercard very properly accepted that a claim can be made in relation to the EEA MIFs for that full period, i.e. 22 May 1992 to 21 June 2008: Defence, para 79.

13. However, Mastercard strongly disputes the alleged link between the EEA MIFs and the domestic MIFs or IFs. Mastercard accordingly denies para 103(d) of the Claim Form, set out above, and the Defence states at para 100(f):

> "In the premises, paragraph 103(d) is denied. Further and in any event, even if the EEA MIFs had operated as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level for UK domestic interchange fees for credit cards, it is denied that UK domestic interchange fees (including the UK MIFs once set) would have been agreed/set at a lower level if the EEA MIFs had been set at a lower level…"

14. Mastercard's Defence proceeds to state that the domestic IFs and MIFs were set or agreed by reference to UK domestic costs and competitive conditions on the UK market, including in particular the comparable interchange fees of Visa, Amex and other payment schemes. Further, sub-para 100(f)(iv) states as follows:

> "Mastercard will also refer to and rely upon the fact that UK domestic interchange fees did not fall after June 2008 despite the EEA MIFs being reduced to zero between 12 June 2008 and July 2009 and then being set at a substantially reduced level from July 2009 to date."

15. The class as defined in the collective proceedings comprises consumers who purchased from retail suppliers of goods and services. Therefore in addition to the link between the EEA MIFs and the domestic MIFs/IFs, Mr Merricks has to show (a) that the domestic MIFs/IFs were passed through to retailers by acquiring banks in the MSC and (b) that the MSC was passed through by

retailers to consumers. Mastercard apparently disputes that any alleged overcharge on domestic MIF/IFs was passed-on to retailers through the MSC. Moreover, even if there was pass-through, since this is a claim for damages Mr Merricks has to show that in the counterfactual of no or lower EEA MIFs, and (on his case) consequentially lower domestic IFs/MIFs, the domestic MSC would have been lower. As Mr Merricks states in his Reply, at para 52(a):

> "the question – so far as pass-on from acquiring banks to merchants is concerned – is whether, absent the Infringement, the MSC would have been lower, and if so whether it would have been lower by the full amount of the Overcharge or some different amount."

16. Mastercard contends that this is to be answered in the negative for the vast majority of merchants (as we understand it, all except those very large merchants who operated on an interchange fee plus plus arrangement[1] with their acquiring banks): Defence, para 106.

17. As one of the circumstances relied on in support of its contention, Mastercard states as follows in its Defence:

> "105. Mastercard will refer to the Payment Systems Regulator's ("PSR") November 2021 report on the UK acquiring market which concluded that there was *"little or no pass-through"* of reductions in interchange fees as a result of the Interchange Fee Regulation into lower MSCs for both small and medium merchants and large merchants with an annual card turnover below £50 million. The PSR concluded that there was only clear evidence of pass-through in relation to those very large merchants which operated based on Interchange Plus Plus arrangements. Mastercard acknowledges that the PSR Report is dealing with a later period (i.e. 2014 to 2016) than the relevant period for this claim. However, since the changes which have taken place in the acquiring market since 1992 to 2008 (including multiple new entrants, publication of interchange fee rates, the general prohibition on blended rates in the IFR, increased card usage (and so the importance of MSCs as a cost) and the growth of Interchange Plus Plus arrangements) have increased competition, they would be expected to promote pass-through of cost reductions rather than the reverse.…"

C. THE DRAFT AMENDMENTS

18. The contested amendments are in paras 105A-105B of the draft Re-Amended Claim Form. It is appropriate to set them out in full:

[1] i.e. interchange fee plus scheme fee plus acquirer's margin.

"**Run-Off Overcharge**

105A. The Infringement continued to cause loss to class members after the Full Infringement Period came to an end, i.e. after 21 June 2008. In particular, the Infringement caused the following overcharges, which were then passed on to consumers (as pleaded to further below):

(a) Reductions in the interchange fees paid by acquiring banks on both Cross-Border Transactions and Domestic Transactions were not reflected (or not fully reflected) in the MSCs charged by acquiring banks to merchants. Instead, those MSCs remained at inflated levels as compared with the levels at which they would have been charged absent the Infringement (the "**MSC Run-Off Overcharge**"). The extent to which reductions in the interchange fees were not passed on to merchants in the MSCs (and, therefore, the extent of the MSC Run-Off Overcharge) will inter alia depend on the contractual arrangements between particular merchants and acquiring banks and it is recognised that the MSC Run-Off Overcharge may not have been incurred, or may have been incurred to a significantly smaller degree, in relation to purchases from merchants subject to IC++ pricing arrangements. Following disclosure of the various contractual arrangements, the Class Representative will provide further particulars of the claim in respect of the MSC Run-Off Overcharge.

(b) Further or alternatively, to the extent that, as averred by Mastercard at paragraph 100(f)(iv) of its Defence, the UK domestic interchange fees did not fall after June 2008 when the Intra- EEA fallback MIFs were reduced to zero between 12 June 2008 and July 2009 and then set at a substantially reduced level from July 2009 to date, those UK domestic interchange fees remained at the inflated levels which were caused by the Infringement … and continued to be higher than they would have been absent the Infringement (the "**Domestic IFs Run-Off Overcharge**").

Together, the MSC Run-Off Overcharge and the Domestic IFs Run-Off Overcharge are referred to below as the "Run-Off Overcharge".

105B. Pending disclosure and/or expert and factual evidence, it is presently impossible to plead the duration of the Run-Off Overcharge, whether the MSC Run-Off Overcharge or the Domestic IFs Run-Off Overcharge (which may themselves be of differing lengths). Such particulars will be provided following disclosure and expert analysis. However, the Class Representative avers that he does not seek to include in the collective proceedings any loss incurred after the date on which these proceedings were issued, namely 6 September 2016. He further avers that it will be necessary to ensure that there is consistency, and in particular no double-counting, between the two types of Run-Off Overcharge."

19. Accordingly, Mr Merricks seeks to allege two distinct types of run-off, both for the same period. As the existing claim period is some sixteen years, from 22 May 1992 to 21 June 2008, and the proposed run off period is over eight years to 16 September 2016, the amendment would increase by over 50% the total period covered by the claims.

20. If Mr Merricks is correct in contending that prices in the UK were higher in this run-off period as a result of the Infringement, it would follow that everyone who made purchases in the run-off period has suffered loss. However, the class is defined to cover people who (at a time when aged 16 or over and resident in the UK for three months or more) made purchases in the UK between 22 May 1992 and 21 June 2008. Mr Merricks recognises that it is not now possible to amend the class to bring in further potential claimants, by reason of limitation. Accordingly, under the amendment sought, although the claim period would be extended by eight years, damages for that additional period would have to be calculated to reflect purchases by members of the existing class: for example, someone who became 16 only after 21 June 2008 would have no claim. The aggregate damages for the run-off period would therefore have to be calculated by excluding any overcharge on purchases by people who are outside the existing class.

D. THE ARGUMENTS

21. Ms Wakefield KC, appearing for Mr Merricks, submitted that the amendment was being put forward at a very early stage in the substantive litigation. Although the application for a CPO had been running for a prolonged period, as explained above, the claims themselves were only getting under way now that a CPO had been granted and the amendment was sought shortly after pleadings had closed. Both aspects of the amendment were plainly arguable, and under normal principles the amendment should therefore be allowed.

22. Further, Ms Wakefield submitted that both aspects of the amendment arose out of Mastercard's pleaded Defence. As regards the MSC Run-Off Overcharge, Mastercard relied on the PSR Report to argue that there was no effective pass-through of reductions in MIFs to the MSCs charged by acquiring banks to retailers, save for very large retailers where the MSC was expressly related to the MIF. The logic of that position, she argued, is that many retailers continued to pay the higher level of MSC that was the direct result of the previously inflated interchange fees. Accordingly, Mr Merricks should be able to allege that many MSCs remained higher by reason of the earlier MIFs notwithstanding that the EEA MIFs had been reduced to a lawful level and the UK MIFs were

no longer inflated. Such an overcharge run-off was indeed commonly alleged in competition damages claims.

23. As regards the Domestic Run-Off Overcharge, Ms Wakefield argued similarly that it was Mastercard that contended by sub-para 100(f)(iv) of its Defence that the UK domestic interchange fees did not fall when the EEA MIFs were reduced. Since the basic case advanced by Mr Merricks was that the high EEA MIFs had caused high UK domestic interchange fees, he should be entitled to argue that this effect continued beyond the fall in the level of EEA MIFs.

24. For both types of run-off, the period alleged to 6 September 2016 was said to be a "long-stop date". The Class Representative could not know at this stage the period for which the overcharge in the EEA MIF continued to have an effect – either on the UK Domestic MIF or, whether through the UK Domestic MIF or directly, on the MSC – and so he had taken a "pragmatic approach", ending with the date on which the collective proceedings were issued.

25. For Mastercard, Mr Hoskins KC emphasised that to allege a run-off period when claiming that a competition infringement caused an overcharge was a standard approach which Mr Merricks could readily have taken at the outset if he thought it appropriate: it did not depend on Mastercard's Defence. Raising this claim amounted to a far-reaching amendment which, Mr Hoskins said, would hugely complicate the proceedings by adding the requirement to disclose and analyse documents and data for a further eight years, including documents by way of third party disclosure since the contracts between acquiring banks and the multitude of merchants to determine the level of MSCs were not material held by Mastercard. It would therefore cause significant delay and extra costs.

26. Mr Hoskins pointed out that if this amendment were allowed, it would introduce an unattractive and inappropriate disjunct between the class and the claim period. The class was confined to those who made purchases before 21 June 2008. Although the claim period would be extended to cover purchases up to 6 September 2016 on the basis that an overcharge allegedly applied generally up to that date, the limitation on the class meant that only those who purchased in the earlier period could claim for damage in the later period. He pointed out

that in *Trucks (Collective)* [2022] CAT 25, the Tribunal had expressed concern about the similar approach to run-off by UK Trucks Claim Ltd ("UKTC"), stating that it arbitrarily excluded potential claimants: see at [206], [208]. Mr Hoskins submitted that although this was not determinative, it was a factor to be taken into account when deciding whether to permit the amendment.

27. Further, Mr Hoskins stressed that there was no expert or factual evidence supporting the contention of an eight year run-off. In *Trucks (Collective)*, where the Road Haulage Association ("RHA"), as a proposed class representative, sought in its application to claim an extended run-off period of eight years after the infringement ended, although the Tribunal decided to grant a CPO in favour of the RHA it limited the run-off to a much shorter period reflecting the particular facts of the case. In curtailing the period, the Tribunal noted that eight years would be unusually long for a run-off overcharge and that the end-date put forward by the RHA "is not based on any economic assessment": [210].

E. DISCUSSION

28. Rule 32(1) of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules") states:

> "A claim form may only be amended—
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> (a) with the written consent of all the parties; or
>
> (b) with the permission of the Tribunal."

29. Although the Class Representative is correct that in ordinary proceedings an amendment is usually allowed at an early stage, these are not ordinary proceedings. Collective proceedings have a very particular character in which the Tribunal has "an important gatekeeping role" (per Lord Briggs in *Merricks SC* at [4]). Unlike ordinary proceedings, collective proceedings cannot proceed unless the Tribunal gives approval by granting a CPO. The supervisory role of the Tribunal is particularly pronounced in opt-out proceedings. Hence, if the class representative and the defendants subsequently agree a settlement, that settlement is not effective unless the Tribunal approves it as "just and reasonable": Competition Act 1998, s. 49A. The Tribunal accordingly must

protect the interests of the represented class members, reflecting the fact that the class representative and his or her lawyers, although acting in good faith, are not acting on the represented persons' instructions.

30. Rule 4 of the CAT Rules, setting out the "Governing principles", provides at sub-rule (1) that the Tribunal "shall seek to ensure that each case is dealt with justly and at proportionate cost", and sub-rule (2) states:

> "Dealing with a case justly and at proportionate cost includes, so far as is practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate—
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> (i) to the amount of money involved;
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> (ii) to the importance of the case;
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> (iii) to the complexity of the issues; and
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> (iv) to the financial position of each party;
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> (d) ensuring that it is dealt with expeditiously and fairly;
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> (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases; and
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> (f) enforcing compliance with these Rules, any practice direction issued under rule 115, and any order or direction of the Tribunal."

Sub-rule 4(4) states:

> "The Tribunal shall actively manage cases."

31. Moreover, it has been recognised that collective proceedings require particularly active case management, because of both the need to protect the interests of the class as explained above and the potentially unfair risks which collective proceedings can create for defendants (see per Lords Sales and Leggatt in *Merricks SC* at [86]). Rule 88(1) of the CAT Rules states:

> "The Tribunal may, at any time, give any directions it thinks appropriate for the case management of the collective proceedings."

As Lords Sales and Leggatt observed in their judgment[2] at [90]:

> "Although claims to which section 47A applies can be brought in the CAT or in the courts, collective proceedings can only be brought in the CAT. It is clear from the terms of the Act and the CAT Rules that Parliament intended that the CAT should have a substantive role to play in deciding whether claims seeking redress for breaches of competition law may be pursued as collective proceedings and in actively managing such claims."

32. It is common ground between the parties that the Class Representative should not be able to achieve by amendment after a CPO has been granted something that would not have been permitted if sought in the application for a CPO. In that respect, we are concerned by the duration of the run-off period sought under both heads. It seems to us not "pragmatic" but arbitrary, and therefore subject to the same objection as concerned the Tribunal in *Trucks (Collective)*: para 26 above. We do not consider that a period of anything like eight years can be supported by the terms of Mastercard's Defence or the PSR Report.

33. As regards the MSCs charged to merchants, the PSR Report found specifically that when the Interchange Fee Regulation introduced caps on most MIFs in December 2015, that reduction was not passed through in the MSCs to, in particular, small and medium sized merchants. Mastercard relies on this as showing that lower MIFs do not necessarily lead to lower MSCs, and as supporting its denial of the link which Mr Merricks seeks to establish.

34. The PSR Report may suggest that there is no automatic pass-through of a reduction in MIFs to a reduction in MSCs charged to many merchants, although whether that assists Mastercard's basic argument is a matter for trial. But we think it is self-evident that there are various costs and considerations that go into acquiring banks' determination of the level of the MSCs that they charge, of which the interchange fees that they pay to issuing banks is only one. The longer the time after June 2008, the less significant the level of the interchange fees as at June 2008 will have been in influencing those MSCs. By way of obvious example, the financial crisis from September 2008 is well-known to have had significant implications for the financial position of many banks and is likely to have influenced their decision-making. The PSR Report also found that there

[2] Although in part a dissenting judgment, on this point there was no division in the Supreme Court.

was relatively little switching by merchants as regards their acquiring bank, and that over 70% of small and medium sized merchants had been with their provider for over two years, and that over half of merchants with an annual card turnover of £1-10 million have been with their provider for over five years. But that of course does not mean that the MSCs charged to those merchants remained unchanged over those periods, still less that the factors influencing those MSCs remained the same.

35. As regards the domestic interchange fees, it is Mastercard's case that there was no causal link between the EEA MIFs and the domestic interchange fees and as evidential support they plead that the domestic interchange fees did not fall after June 2008 when the EEA MIF was reduced and remained at a reduced level to date. Whether or not that may support Mastercard's contention that there was no link between the level of EEA MIFs and domestic interchange fees is again a matter for trial. But it does not in our view lend support to the argument that if there was in fact a link between the level of EEA MIFs and domestic interchange fees up to June 2008, the level of EEA MIFs as at June 2008 continued to influence the level of domestic interchange fees many years thereafter and, indeed, continues to do so "to date".

36. We are not suggesting that it is not reasonably arguable that, under both heads, there was some run-off period for which the Class Representative should be able to claim. But we consider that there is scant basis for alleging an extended run-off period of eight years. And we think that there is considerable force in Mastercard's argument that to permit the claim period to increase by over 50% would add very substantially to the complexity and cost of what are already extremely complex proceedings, and give rise to further delay. That applies both to the significant additional extent of disclosure and then to the scope of expert analysis of all the additional information and data generated. Given the prolonged course of these proceedings to date, further delay is a cause of particular concern, having regard to the interests of represented class members.

37. In our view, if such eight year run-off periods had been alleged in the original Claim Form, the Tribunal would not have granted a CPO for the claims in those terms but, as in *Trucks (Collective),* it would have significantly reduced the

periods to a scope which it considered reasonable and proportionate, having regard to the Governing principles. As the Tribunal said in that judgment (at [213]), any cut-off "will inevitably be imperfect"; but it is necessary to come to a view.

38. We should add that we do not accept Mastercard's further submission that to allow any run-off at all would involve holding that the MIFs charged after June 2008 were unlawful, which would take these proceedings outside the scope of a follow-on claim. That mischaracterises Mr Merricks' argument. His case on run-off is purely one of causation: i.e. the EEA MIFs prior to June 2008 were at an unlawfully high level, and it is *those MIFs* which continued to have an effect on domestic interchange fees and MSCs for many years after June 2008 and therefore caused continuing damages.

39. Accordingly, we turn to consider for what run-off periods Mr Merricks should be permitted to claim. In that regard, we think that the two forms of alleged run-off need to be addressed separately and it is convenient to do so in the reverse order from the pleading in para 105A of the draft Re-Amended Claim Form.

(i) The Domestic IFs Run-Off Overcharge

40. Mr Merricks' case is that throughout the period of the Infringement the EEA MIFs operated as a starting-point or floor or benchmark, which thereby affected the level of the UK domestic IFs and MIFs. If there was no such link between the levels of the EEA MIFs and the domestic interchange fees the claims fail as a matter of causation.

41. There were several different domestic MIFs and possibly more domestic IFs prior to 1999. They did not fluctuate daily like currency values but were set periodically. It is unclear how often they were revised or reviewed. We note that the table of average domestic interchange fees for credit cards annexed to Mastercard's Defence show them frequently changing on an annual basis, although they were sometimes unchanged for a couple of years. Since those figures are averages, it appears that at least some of the constituent interchange

fees were changed. We think it is therefore reasonable to assume that the banks would have reviewed the interchange fees at least once a year and possibly more often. Assuming that Mr Merricks' case of the effect of the EEA MIFs on domestic IFs/MIFs is correct, we can envisage a delay until a change in the level of EEA MIF led to re-evaluation of the level of domestic IF/MIF. We think that period of delay may well be less than 12 months but we shall allow a year. On that basis, the level of the EEA MIFs as at June 2008 could reasonably continue to serve as a starting point or floor or benchmark for the domestic MIFs for a year thereafter.

42. Beyond June 2009, Mr Merricks wishes to argue that successive re-evaluations of the Domestic MIFs related, in a causative sense, to the EEA MIFs as they had been in June 2008. Not only do we find that wholly implausible, but we think it is contrary to the thrust of Mr Merricks' basic case that the current EEA MIFs serve as the starting point or floor or benchmark for the level of domestic interchange fees. Moreover, as a matter of commercial common sense, we think that the setting of Mastercard's domestic interchange fees would be affected by other considerations, notably the current domestic interchange fees of competing payment schemes, in particular Visa and Amex. Therefore to seek to determine the extent to which the level of Mastercard's domestic interchange fees in 2010, let alone in 2015, might have been affected by the level of the EEA MIFs back in June 2008 would be an exceptionally complex exercise.

43. Accordingly, we think that the appropriate Domestic IFs Run-Off period for the purpose of these claims is one year.

(ii) The MSC Run-Off Overcharge

44. Unless a merchant's contract with its acquiring bank determines its MSC on a MIF-plus-plus basis, its MSC will not automatically change as the MIF changes. As regards other merchants, we recognise that acquiring banks may well not review the fixed MSC which they charge immediately when there is a change in either the EEA MIFs or the domestic interchange fees they have to pay, particularly if the interchange fees are reduced. In our view, it is reasonable and proportionate to allow a further year to be claimed as the effect of those prior,

and higher, MIFs on the MSCs. Thereafter, we consider that, given the many other factors likely to affect the level of MSCs (including, on Mr Merricks' case, the then current level of MIFs), it becomes disproportionate to investigate forensically whether and to what extent the former EEA MIFs and former domestic interchange fees raised the level of the MSCs being charged years later.

45. Accordingly, we think that the appropriate MSC Run-Off period for the purpose of these claims is two years.

46. Increasing the claims period in this way will lead to a disjunct between the scope of the claims and the scope of the class, but clearly to a lesser extent than under the amendment urged by Mr Merricks. We do not consider that this is in itself a valid objection. As Ms Wakefield pointed out, in *Trucks (Collective),* where the Tribunal was faced with a choice, this served as a reason for preferring the proposed proceedings put forward by the RHA (subject to curtailment of the overrun period) to those of UKTC. The Tribunal there did not hold that the disjunct in the UKTC claims precluded them from being certified. In the present case, the disjunct is the result of the limitation period. We do not see that persons within the class should be prevented from claiming for potential loss just because others who may also have suffered similar loss can no longer be included in the proceedings because of limitation.

47. This judgment is unanimous.

The Hon. Mr Justice Roth
Chair

Jane Burgess

Prof. Michael Waterson

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

Date: 14 October 2022