

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant/Proposed Class Representative

and

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

Respondents/Proposed Defendants

**MASTERCARD'S SUPPLEMENTAL SKELETON ARGUMENT
FOR THE COLLECTIVE PROCEEDINGS ORDER HEARING**

1. One of the main issues for the Tribunal to consider at the CPO Hearing is whether the rates of pass-on by the 500,000 or so United Kingdom businesses which accepted Mastercard during the period of the claim is a common issue.
2. At paragraphs 17-18 of its skeleton argument, the Applicant suggests this issue should not give the Tribunal "any pause for thought" because, in other proceedings, "Mastercard's position and expert evidence are that the retailers – no matter what sector they operate in – have no (or very limited) quantum in their claims because any overcharges were passed on by those retailers to members of the proposed class"

[C/13]. The Applicant also suggests that Mastercard has “filed defences elsewhere under a statement of truth asserting full pass-on by retailers to the proposed class”.

3. This suggestion is inaccurate and has no merit in any event for the following reasons:
 - a. In the various retailer claims, Mastercard’s pleadings and submissions are not simply that there has been 100% pass-on.
 - b. In any event, Mastercard’s submissions are not determinative of the rate of pass-on by merchants to consumers. The actual rate of pass-on is a matter for the court or Tribunal hearing the claim, based on all the evidence before it. In *Sainsbury’s*, the Tribunal rejected Mastercard’s submissions on pass-on.

Mastercard’s pleadings and submissions

4. Mastercard’s position on pass-on in the various retailer claims against it has been to deny “that the Claimant has suffered any loss to the extent to which any such overcharge was passed-on by the Claimant to its customers”. By way of example, see Mastercard’s defences in the following claims (extracts attached for ease of reference, full copies to be added to bundles):
 - a. *Sainsbury’s* paras 79-81;
 - b. *Record Shop 2 Limited* paras 117-120 (the representative pleading from the *Arcadia* trial);¹
 - c. *Ocado* paras 54-56.
5. Whilst Mastercard has argued that the rate of pass-on will be high, it has not argued that that same pass-on rate will apply across all merchants. Mastercard’s consistent position has been to argue that the level of pass-on is a matter to be decided on the basis of the specific evidence available in relation to that merchant.

¹ An extract from the Re-Re-Re Amended Particulars of Claim is included for context; see para 1(ii) under the hearing “Particulars of breach in relation to the EEA MIF”.

6. In *Sainsbury's*, extensive disclosure relating to pass-on was provided by Sainsbury's. Sainsbury's also relied on witness evidence as to the detailed operation of the business and its pricing practice. This documentary and witness evidence was subject to detailed consideration by the expert economists. Paras 438-454 of the *Sainsbury's* judgment give a flavour of some of the evidence before the Tribunal (but not a complete picture) [D/49/1488-1494].

The Sainsbury's judgment

7. As indicated above, whatever the nature of Mastercard's pleadings and submissions, ultimately only a court or Tribunal can determine what the rate of pass-on for a particular merchant is.
8. In *Sainsbury's*, the Tribunal entirely rejected Mastercard's submissions, holding (at para 485 [D/49/1514]):

“It follows that MasterCard's pass-on defence must fail. No identifiable increase in retail price has been established, still less one that is causally connected with the UK MIF. Nor can MasterCard identify any purchaser or class of purchasers of Sainsbury's to whom the overcharge has been passed who would be in a position to claim damages.”

9. Mastercard has sought permission to appeal from the Court of Appeal (permission having been refused by the Tribunal). In its skeleton argument in support of its appeal, Mastercard has not argued that the Tribunal should have found that pass-on was 100%; see paras 97 to 109 of the skeleton (extracts attached for ease of reference, full copy to be added to bundles). The argument put is rather that:
 - a. For the purposes of assessing Sainsbury's primary loss, the Tribunal found that no pass-on had been established.²
 - b. For the purposes of assessing compound interest, the Tribunal found that 50% of the MIF would have been passed-on to consumers.³

² Judgment para 485 [D/49/1514].

³ Judgment para 525(1) [D/49/1528].

- c. In order to be consistent, the Tribunal should have found that 50% of the MIF had been passed-on to consumers when assessing Sainsbury's primary loss.⁴

Conclusion

10. In light of the above, the Tribunal will see that the impression given at paras 17-18 of the Applicant's skeleton argument for this CPO hearing is not accurate. Either the Applicant's legal team has obtained copies of the relevant documents but has not represented their content accurately or it has not obtained copies of the relevant documents but has nonetheless purported to have knowledge of their contents.
11. In any event, the short point is that the question of whether the degree of pass-on amongst the 500,000 or so United Kingdom businesses which accepted Mastercard during the period of the claim is a common issue is a fundamental one for the Tribunal.

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⁴ Mastercard's appeal skeleton paras 105 and 108.