The (excessive) cost of a cashless society: the myth or MIF of 'pass on' issues

WALTER HUGH MERRICKS CBE V MASTERCARD INCORPORATED AND OTHERS; (UM) MERCHANT INTERCHANGE FEE UMBRELLA PROCEEDINGS [2022] CAT 31

Introductory comment

In approximately 600 BC, King Alyattes of Lydia ordered the royal blacksmiths to mint small metal discs made from an alloy of gold and silver, onto which the royal crest of a lion was stamped. Since then, as any six-year-old waiting for the tooth fairy will tell you, money has meant cash. But cash did not prove costless. The minting, sorting, storing and distribution of cash has been estimated to cost about 0.5% of GDP in rich countries, before taking into account the effects of forgeries.

The electronic payment systems developed principally by Mastercard and Visa aimed to eliminate this inefficiency. The dematerialisationof money helped shops tackle theft, governments track fraud, and customers to develop a credit history.

The promise was to streamline payments and for money to be saved by those using card technology. Yet, the shift to card payments resulted in many of the benefits being marginal after the collection of fees set by the major card scheme operators, MasterCard and Visa.

These fees have been the catalyst for an array of competition litigation. Were the prices paid by consumers inflated as a result of the anti-competitive default fees set by MasterCard and Visa? If so, had merchants passed on the overcharge to their customers?

The recent judgement handed down in the *Merricks v MasterCard* umbrella proceedings seeks to shed some light on this question.

This judgment, issued on 6 July 2022, has served as a clear indicator as to how the Tribunal go about dealing with the issue of "pass on", and has provided clarification on the threshold of evidence that must be adduced by the claimants. Notably, the Tribunal has acknowledged that the rules set out in the Supreme Court judgment of *Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others*[1] constitutes the correct application of how to meet legal and factual causation in relation to pass on.

Background

Of principal concern in the recent judgement handed down by the CAT on 6 July 2022[2] was the issue of pass on. This concept essentially concerns questions of causation and quantum: notwithstanding a *prima facie* case against the defendants, has the claimant in fact suffered loss or has it passed on such loss to its consumers?[3] The CAT, at this stage, was seeking to establish the manner in which pass on damages might be calculated, rather than any findings of fact.[4]

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[1] [2020] UKSC 24.

[2] This affects all parties to the umbrella claims. See the CAT's Practice Direction relating to Umbrella Proceedings (6 June 2022) available at https://www.catribunal.org.uk/sites/default/files/2022-06/Practice%20Direction_Umbrella%20Proceedings_06%20June%202022_0.pdf

[3] Walter Hugh Merricks CBE v Mastercard Incorporated and Others; (UM) Merchant Interchange Fee Umbrella Proceedings [2022] Cat 31.

[4] ibid, paras 5-6.

The CAT found three distinct difficulties in their analysis of pass on, namely: (1) the evidential difficulty, (2) the definitional difficulty and (3) the legal difficulty.[5]

The evidential difficulty

The Tribunal stated that pass on is "extremely difficult to show", and recognised that it is not straightforward even to identify what constitutes evidence to prove this issue.[6] The Tribunal provided a useful example illustrating the difficulties:

> "*If a direct claimant were to pay the overcharge, as the overcharge is part of the cost item, it is questionable as to how the direct claimant's reaction to the overcharge can be evidenced. If the direct claimant were to react by increasing their prices, would there be specific documentation to show this? Similarly, if the direct claimant were to reduce their prices, again would this reduction be documented? However, if the direct claimant were to absorb the overcharge, it would not be possible to evidence this without considering the previous two points first. Yet, even if documentation was to be provided, there will remain great difficulty in reliably confirming where the overcharge ended up.*"[7]

Thus, the Tribunal acknowledged the difficulties and how the framing of the question may help or hinder the answer, however ultimately the Tribunal found that parties to these proceedings must clearly understand what evidence they must produce.[8]

The definitional difficulty

Under this second heading, the Tribunal sought to tackle how the claimants may have reacted to "the overcharge". In the *Sainsbury's v Mastercard* case,[9] the claimants each had four potential responses to the overcharging (none of which are mutually exclusive):

1. Make less profit (i.e. make no changes to the business, and keep consumer prices unchanged);
2. Cut back on spending (i.e. reduce expenditure elsewhere in the business to compensate for these costs);
3. Reduce costs (i.e. reduce expenditure on the product in question); or
4. Pass on the increased cost (i.e. raise prices for consumers).[10]

The boundaries between Options 2 and 3 are likely to be blurred in practice. For example, it is difficult to categorise marketing spend which encompasses both a specific product as well as the brand generally. But the Supreme Court suggested, *obiter dictum*, that pass on may occur in Options 2, 3 and 4. If so, the obvious difficulty of categorising claimants' conduct between Options 2 and 3 may not prove critical to the outcome of the claims. However, the issue cannot be dodged entirely; the Tribunal accepted that it was still open for them to determine whether reactions under both Option 2 and Option 3 are actionable once it comes to assess the facts.[11]

The definitional questions generated some tension between the claimant groupings. The consumer groups argued that the typical reaction by businesses was Option 4 (as this is essential for their claim

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[5] ibid, para 18.
[6] ibid, para 21.
[7] ibid, paras 22-24.
[8] ibid, para 27.
[9] Sainsbury's Supermarkets Limited v. Mastercard Incorporated & Others [2018] EWCA Civ 1536, para 338.
[10] Merricks (n 3) para 28.
[11] ibid, paras 29-33.

to succeed). Mastercard and Visa agreed with this analysis. By contrast, the business claimants (the so-called 'direct claimants' who paid fees to Mastercard/Visa) adopted a more cautious approach as to which Option applied.[12]

The legal difficulty

The third problem with pass on issues is that, as demonstrated by the tensions between the various groupings at the definitional phase, the concept can be relied upon as a claim (by the 'indirect claimants') but also as a defence (by Mastercard/Visa against the 'direct claimants'). The CAT acknowledged this complexity but held that there have already been clear legal findings identifying what constitutes pass on.[13]

The question of who holds the burden of proof on a given issue will be a question for a later day.

Concluding remarks

Establishing how pass on claims and defences might be established is certainly a difficult task, and one that remains to be fleshed out by the courts. The CAT's judgment is to be welcomed as a frank assessment of the implications and difficulties arising from this issue, well in advance of any trial. However, much is still left to be decided, specifically when adducing the evidence required to prove such claims. It waits to be seen whether the payment system first devised by King Alyattes may, after all, have been just as efficient as that which the modern kings of the payment system devised.

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[12] ibid, paras 34-35.
[13] ibid, paras 36-48.