IN THE COMPETITION APPEAL TRIBUNAL **Case No 1266/7/7/16**

ON REMITTAL FROM THE SUPREME COURT [2020] UKSC 51

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

SKELETON ARGUMENT ON BEHALF OF MR. MERRICKS CBE FOR THE REMITTED CPO HEARING

References are given to the hearing bundle in the form [Volume/Tab]

1. This is Mr. Merricks' skeleton argument for the remitted CPO hearing listed for 25 and 26 March 2021. As the Tribunal knows, Mr. Merricks lodged his detailed submissions for the hearing on 12 March 2021 [**C/10**]. He relies on those submissions in full, as he does on his application for a CPO and the documents lodged in support [**A**], as updated on 12 February 2021 [**C/3-7**][1]. As Mr. Merricks is not currently aware of the points Mastercard will raise in response to his submissions, he will need to address such matters orally at the hearing.

2. In this skeleton argument, Mr. Merricks seeks:
    a. to provide a short summary of his position on the issues for consideration at the hearing; and

[1] Following correspondence [**C/15 &17**], a slightly amended costs budget has been filed by Mr. Merricks: [**C/14**].

b. to provide an update on miscellaneous issues.

Summary of issues for consideration at the hearing

Issues raised by Mastercard

3. Mastercard is no longer objecting to a CPO being granted in these proceedings. Instead, its position is that the CPO should not be granted *"in the form proposed*" for two reasons: (1) the claims of deceased persons should not be included; and (2) the issue of compound interest should not be included (MC subs, §2 [**C/8**]).

4. In Mr. Merricks' submission, neither of these is a good point.

Deceased persons

5. As to deceased persons, Mastercard makes two points. First, it asserts that there is a legal bar on their claims being included in opt-out collective proceedings. This is said to arise from the word "*domiciled*", which Mastercard says cannot be fulfilled in respect of the claims of deceased persons (MC subs, §§16-22 [**C/8**]). As Mr. Merricks sets out in his submissions (§§5-15 [**C/10**]), this is a misreading of a criterion which serves to establish which claims are within the jurisdiction of the UK courts. Its function is not to exclude the claims of deceased persons. Further, deceased persons, and their estates, are able to be "*domiciled*" in the UK; tortious claims survive death, and the domicile of a deceased person is fixed at the date of death and endures for all relevant legal purposes. Had Parliament intended to exclude estates from this new form of redress for competition law infringements, which sought to facilitate the ability for individuals to recover, then it would have expressly done so in the legislation.

6. Second, Mastercard says that including the claims of deceased persons would involve very significant practical problems and complexities that would not satisfy the commonality or suitability requirements (MC subs, §§23-29 [**C/8**]). But its wholly unevidenced assertions as to complexity are groundless. In practice, estates are routinely handled in a perfectly satisfactory way (see §§19-21 of Mr. Merricks' subs [**C/10**]). There is no reason why the same should not apply here (§§22-23 [**C/10**]). Moreover, this does not raise questions of commonality (it not being either an issue of fact or law in the claims); and on the question of suitability the claims remain better resolved in aggregate than individually (§§24-25 [**C/10**]).

Compound interest

7. Mastercard argues that compound interest is not a common issue and/or is not suitable to be resolved on a collective basis because it is necessary for each individual member of the class to prove their own specific loss and the position of class members will be different in this regard; indeed, some class members may not have suffered such loss at all.
8. Mastercard's argument is inconsistent with section 47C(2) CA98 which establishes that it is not necessary, where an aggregate award of damages is sought, for each member of the class to prove their own specific loss. Mastercard's position appears to be that section 47C(2) is concerned with quantification of loss only and does not remove the need to prove that the infringement caused every individual member of the class to suffer loss. Mastercard's approach, which would emasculate section 47C(2), is incorrect and certainly so on the facts of this case, where the Tribunal itself found that there is a "*methodologically sound*" approach to showing that damage has been done to the entire class. Properly understood, based on the facts of this case, the judgment of the majority of the Supreme Court proceeded on the basis that section 47C(2) dispenses with the requirement to prove causation as well as quantum in respect of each proposed class member on an individual basis. Had the majority considered that there could be any surviving requirement for each proposed class member to prove that the infringement caused them individual loss so far as the principal sum is concerned, they would have said so. Lord Sales and Lord Leggatt (in a part of their judgment which did not dissent from the majority reasoning) said this explicitly: see at [95]-[97].
9. Just as there is no need to prove in relation to the principal sum that loss was caused to each individual member of the class, there is no such requirement in relation to Mr. Merricks' claim for compound interest. His compound interest claim raises common issues because, just as Mr. Merricks does for the principal amount of loss, he seeks to prove, by reference to identified available data, and a sound methodology, that in aggregate, the class suffered compound losses. The claim is suitable to be determined in an aggregate manner in collective proceedings because, as with the principal amount of loss, the collective determination of the aggregate loss is preferable when assessed relative to the alternative of compound interest being claimed individually (which is not realistic in this case). In addition, as a practical matter, the Tribunal will in any event have to consider matters concerning interest and its quantification, whether on a

simple or a compound basis, at trial and the inclusion of compound interest within the CPO will not materially add to the cost and time of the hearing, and nor will significant (if any) disclosure flow from its inclusion within the proceedings at this stage.

10. Mr. Merricks accordingly contends that his claim for compound interest should be certified, and has suggested a fall-back position, whereby compound interest is only claimed in respect of a sub-class of borrowers (§47 of his submissions [**C/10**]). The CPO procedure is sufficiently flexible to allow certification and/or the establishment of sub-classes can (as more fully explained in Mr. Merricks' submissions at §§55-56 [**C/10**]) always be revisited once Mr. Merricks has served his expert evidence, in the event that proves necessary.

The CPO should be granted

11. Although Mastercard makes no further objection to the granting of a CPO, of course the Tribunal must be satisfied that a CPO should be granted, taking particular account of the best interests of the class. Mr. Merricks addresses this issue at §§59-77 of his submissions [**C/10**]. In particular, he submits that (i) the eligibility condition is fulfilled (in particular in reliance on the Supreme Court's judgment), and (ii) the authorisation condition is fulfilled (in particular in reliance on the (unappealed) judgment of the Tribunal of 21 July 2017, and the updated funding position, which is materially improved in terms of the amount available as compared to the first CPO hearing, and otherwise broadly equivalent to the arrangements that the Tribunal was satisfied with). He of course stands ready to assist the Tribunal on these issues at the hearing.

12. In the event that the CPO is granted, Mr Merricks will seek his costs of the CPO Application, relying upon §16 of the Ruling (Costs) in these proceedings [2017] CAT 27. Mr. Merricks will also want to address the Tribunal at the hearing on appropriate directions regarding matters such as the filing of a Defence by Mastercard prior to the next case management conference in these proceedings.

Update on miscellaneous issues

13. First, as to objections and permission to make submissions (§§5-7 CMC Order [**C/1**]):
    a. Mr. Merricks' understanding is that there were no applications for permission to make submissions received by 5 March 2021 (or at all); and

b. The only objection received by 15 March 2021 (or at all) was a written objection received from a Mr. Ian Stocks. Mr. Stocks objected in similar terms in 2016 [**A3/24**] and, of course, the Tribunal considered and determined that Mr. Merricks was appropriate to be authorised as the class representative in its judgment of 21 July 2017. Accordingly, Mr Stocks' objection should not be accorded any weight, because the Tribunal already considered it in its judgment (this aspect of which was not appealed) and because, even if the Tribunal were to consider the matter afresh, it should reach the same conclusion it did last time, namely, that the authorisation criterion is fulfilled.

14. Second, whilst the Tribunal had stated at the CMC on 5 February 2021 that it hoped that the parties would be able to make progress regarding Mastercard's request for an undertaking in respect of the payment of any adverse costs ([**C/2/p.6/lines 22-26**]), Mastercard waited some five weeks to write to Mr. Merricks regarding the matter. When it did write on 11 March 2021, its request had changed to now be for an undertaking from the funder rather than from Mr. Merricks, and there was no explanation of the request. Mr. Merricks responded on 15 March 2021 asking that Mastercard set out the factual and legal basis for its request, so he can properly consider it. The relevant letters are at [**C/15-17**]. Mastercard responded to that letter on 19 March 2021 [**C/20**], only very shortly prior to the filing of this skeleton argument, and Mr. Merricks is considering the points raised therein. He expects that the parties will be able to provide an update on this matter by the time of the hearing.

MARIE DEMETRIOU QC

VICTORIA WAKEFIELD QC

QUINN EMANUEL URQUHART & SULLIVAN UK LLP

19 March 2021