



Neutral citation [2024] CAT 44

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1517/11/7/22 (UM)

1266/7/7/16

BETWEEN:

UMBRELLA INTERCHANGE FEE CLAIMANTS

- v -

UMBRELLA INTERCHANGE FEE DEFENDANTS

(the “Merchant Interchange Fee Umbrella Proceedings”)

AND BETWEEN

WALTER HUGH MERRICKS CBE

Class Representative

(the “Merricks Class Representative”)

- v -

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

(3) MASTERCARD EUROPE S.P.R.L.

Mastercard Defendants

(the “Merricks Collective Proceedings”)

REASONED ORDER
(UMBRELLA PROCEEDINGS ORDER) (ADDITIONAL HOST CASE)

UPON the Umbrella Proceedings Order of the President dated 4 July 2022, in the Merchant Interchange Fee Umbrella Proceedings, which designated various individual merchant interchange fee proceedings as “Host Cases” and designated all issues, matters or features arising out of the Merchant Interchange Fee Umbrella Proceedings as Ubiquitous Matters (the “Umbrella Proceedings Order”)

AND UPON the further Order of the President dated 4 July 2022, in the Merchant Interchange Fee Umbrella Proceedings and the Merricks Collective Proceedings (the “July 2022 Order”), which ordered that the issue of pass-on is designated a Ubiquitous Matter in accordance with the Tribunal’s Practice Direction 2/2022 on Umbrella Proceedings

AND UPON Mr Merricks’ application for a UPO dated 25 October 2022 (the “First UPO Application”) and Mr Merricks’ renewed application to participate in Trial 2 dated 7 March 2024 (the “Renewed Merricks Application”)

AND UPON paragraph 9 of the Order of the President made on 23 December 2022 (as amended pursuant to the Orders of the President dated 10 May 2023 and 20 October 2023) (the “Future Conduct Order”) providing that a seven-week trial (“Trial 2”) shall take place in October or November 2024 to address all issues relating to acquirer and retailer pass-on

AND UPON hearing from counsel in relation to the First UPO Application at the CMC on 7-8 November 2022 and the Pass-on Evidential Hearing on 23-25 May 2023

AND UPON reading the written responses, submissions and evidence filed in relation to the Merricks Application and hearing from counsel for Mr Merricks and the Umbrella Proceeding parties at the hearing of the Merricks Application on 22 May 2024

AND FURTHER TO the Tribunal’s Ruling (Ambit of Quantitative Disclosure in Trial 2) (Merricks Trial 2 Participation), handed down on 31 May 2024 [2024] CAT 37

IT IS ORDERED THAT:

1. The Umbrella Proceedings Order and the schedule thereto are varied to include the Merricks Collective Proceedings with case number 1266/7/7/16 as a Host Case in case name and number “1517/11/7/22 (UM) Merchant Interchange Fee Umbrella Proceedings” in relation to the question of pass-on including both “acquirer pass-on” and “merchant pass-on”:
 - (a) “acquirer pass-on” – the extent to which the interchange fee overcharge was passed on from acquirers to merchants in the form of an elevated merchant service charge (“MSC”); and

- (b) “merchant pass-on” – the extent to which elevated MSCs were reflected in higher retail prices paid by customers of the merchants.
- 2. The Future Conduct Order shall apply to the Merricks Collective Proceedings.
- 3. The scope of Trial 2 of the Merchant Interchange Fee Umbrella Proceedings shall be extended to include the pass-on issues arising out of the Merricks Collective Proceedings.
- 4. Costs of the First UPO, the Renewed Merricks UPO and the costs of and incidental to the hearing of the Renewed Merricks UPO application on 22 May 2024 be provided for as follows:
 - (a) The costs of the First UPO be costs in the case.
 - (b) The costs of the Renewed Merricks UPO, save for the costs of and incidental to the hearing of the Renewed Merricks UPO application on 22 May 2024, be costs in the case.
 - (c) The costs of and incidental to the hearing of the Renewed Merricks UPO application on 22 May 2024 be costs in the case save that:
 - (i) There is no order as to the costs of the Mastercard Defendants (which are for their own account).
 - (ii) The Mastercard Defendants pay 50% of the assessed costs (unless agreed) of Mr Merricks.
- 5. There shall be liberty to apply.

REASONS

- 1. Following the hearing of the Merricks Application on 22 May 2024, the Tribunal granted Mr Merricks permission to participate in Trial 2 by its Ruling dated 31 May 2024 (*[2024] CAT 37*). By letter dated 17 June 2024, Mr Merricks applies for the costs

of and incidental to the First UPO Application and the Renewed Merricks Application from the Mastercard Defendant. The Mastercard Defendants' position is that costs be in the case. The SSH Claimants, Allianz, Primark and Visa are neutral.

2. Applying usual principles, Mr Merricks would be entitled to his costs of the First UPO and the Renewed Merricks Application from Mastercard, having made the application, Mastercard having unsuccessfully resisted it and costs normally following the event.
3. However, this is a matter under a specific regime, set up under the Umbrella Practice Direction dated 6 June 2022, with additional oversight and scrutiny required of the Tribunal in making a UPO. The Tribunal would not make a UPO without satisfying itself that it was the appropriate way to manage the proceedings. In these particular proceedings that is all the more the case, given the significant potential impact on Trial 2 of adding the Merricks Collective Proceedings to the MIF Umbrella Proceedings.
4. It is therefore likely that the Tribunal would have convened an oral hearing regardless of whether there was opposition to the Renewed Merricks Application, simply to satisfy itself that all relevant considerations had been aired and considered. This has been a difficult and delicately balanced case management decision, discussed over many months, which had the capacity to significantly affect the scope of Trial 2, on which it was likely to be helpful and instructive to hear from all parties, and in particular Mastercard (regardless of whether it opposed the application or not).
5. That suggests that the appropriate order should in fact be costs in the case. However, it is necessary to recognise that Mastercard's opposition undoubtedly extended both the preparation for the hearing and the hearing itself. That was because Mastercard raised issues not just about the general impact of the UPO, but also issues particular to its own position. To that extent, those costs should follow the event.
6. It is difficult to assess accurately what the extent of those additional costs caused by Mastercard's approach might have been, but taking a broad view I assess that they were likely to be in the region of 50% of the costs of the preparation for the hearing and of the hearing itself.

7. Accordingly, the Mastercard Defendants' costs of and incidental to the hearing are for their own account and the Mastercard Defendants' are to pay 50% of the costs of and incidental to the hearing of Mr Merricks, to be assessed if not agreed.

8. The costs of the First UPO Application and the Renewed Mastercard Application, save for the costs of the preparation for and of the hearing of the Renewed Mastercard Application as above, should be costs in the case. The Tribunal stayed the First UPO Application on the basis that, at that juncture, it was premature in circumstances where there was a need to understand how the evidence on pass-on would be framed. This was a finely balanced case management decision made by the Tribunal in managing these complex proceedings, which decision continued to be closely case managed up until and including the Renewed UPO Application

Sir Marcus Smith
President of the Competition Appeal Tribunal

Made: 1 July 2024
Drawn: 1 July 2024