



**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”)

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**REASONED ORDER**  
**(REPLACEMENT OF EXPERT)**

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**UPON** the Order of the President made 30 January 2024, which provided permission for the parties to rely on the evidence of named economic experts (the “Directions to Trial 2 Order”)

**AND UPON** paragraph 9 of the Order of the President made on 23 December 2022, as amended on 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** the Order of the President made on 1 July 2024 extending the Umbrella Proceedings Order to include the Merricks Collective Proceedings in relation to questions of pass-on

**AND UPON** the application of the Mastercard Defendants dated 6 June 2024 seeking permission to rely on expert evidence from Ms Rachel Webster (the “Webster Application”)

**AND UPON** reading the written responses to the Webster Application from Mr Merricks, the Visa Defendants and Primark dated 14 June 2024, 18 June and 19 June 2024 respectively

**AND UPON** reading the reply of the Mastercard Defendants dated 19 June 2024

**AND UPON** reading the signed statement of Ms Webster dated 14 June 2024 regarding the differences between her proposed approach to analysing acquirer and/or merchant pass-on and the approach set out by Dr Niels in the Joint Expert Statement dated 22 December 2023

**IT IS ORDERED THAT:**

1. The Mastercard Defendants shall have permission to rely on the evidence of Ms Webster for Trial 2 and paragraph 2 of the Directions to Trial 2 Order is varied to replace “Dr Gunnar Niels” with “Ms Rachel Webster”

**REASONS**

2. By application dated 6 June 2024, the Mastercard Defendants have applied for permission to rely on the expert evidence of a single expert in competition economics for Trial 2, replacing Dr Niels, upon whom the Mastercard Defendants have relied to date. The application is opposed by Mr Merricks. Primark does not object to the Webster Application in principle, though takes the view that the level of detail in the statement of Ms Webster dated 14 June 2024 as to her proposed methodology is inadequate. The Visa Defendants take a neutral position.

1. Mr Merricks' principal concern is that Mastercard may be engaging in "expert shopping", in particular because:
  - (a) Mastercard has the potential difficulty at Trial 2 of seeking to argue a high level of pass-on by merchants in responding to merchant claims portion of the Umbrella Proceedings and a low level of pass-on by merchants in responding to the Merricks Collective Proceedings;
  - (b) Dr Niels has given evidence in previous cases which appears to support a high level of merchant pass-on; and
  - (c) it has therefore (says Mr Merricks) become inconvenient for Mastercard to rely on the evidence of Dr Niels in these proceedings, which is why Mastercard has sought to switch experts to Ms Webster.
  
2. Mr Merricks urges the Tribunal to adopt the well-established process set out in previous cases,<sup>1</sup> in which a party that wishes to change its expert is only given permission once the reasons for the change in expert have been explored, including a clear explanation about the reasons for the change and details of any differences of view and, in many cases, the production of draft reports from the expert who is being "retired". Such processes militate against the possibility of a party "expert shopping". Mr Merricks notes that the authorities state clearly that conditions should not be imposed after permission has been granted, and conditions should therefore be considered and ordered upfront as part of any grant of permission.
  
3. In this context, Ms Webster has produced a signed statement dated 14 June 2024 which confirms, albeit at a very high level, that her approach to analysing acquirer and merchant pass-on in Trial 2 is aligned with Dr Niels. Both Mr Merricks and Primark have sought further explanation from Ms Webster about her proposed approach to analysing pass-on issues, and any areas of disagreement between her and Dr Niels.

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<sup>1</sup> See for example *Beck v Ministry of Defence*, [2003] EWCA Civ 1043, [2005] 1 WLR 2206; *Vasiliou v Hajigeorgiou* [2005] 1 WLR 2195, [2005] EWCA Civ 236; *Edwards-Tubb v JD Wetherspoon plc* [2011] 1 WLR 1373, [2011] EWCA Civ 136; and *Guntrip v Cheney Coaches Ltd* [2012] EWCA Civ 392.

4. The present circumstances are unusual, in that:
  - (a) the decision to include the Merricks Collective Proceedings in the Umbrella Proceedings in respect of pass-on issues is relatively recent;
  - (b) Ms Webster has apparently been involved for some time in the Merricks Collective Proceedings by way of instruction from Mastercard and there is no suggestion that she should not be allowed to give expert evidence in the Umbrella Proceedings now that the Merricks Collective Proceedings have been incorporated into those (the issue being whether Ms Webster should replace Dr Niels in the Umbrella Proceedings).
  - (c) Mastercard is entitled to decide to use a single expert if it wishes to do so, including in order to save costs and more efficiently conduct Trial 2; and
  - (d) there is very little time before Ms Webster's report will have to be served on 19 July 2024, the deadline for the filing of Positive Cases for Trial 2.
5. It is clear that any exercise to ask Ms Webster to explain her position, and any areas of disagreement with Dr Niels more fully is likely to distract her (and the other parties) from the very tight timetable for Positive Cases and is unlikely to produce any useful result given the very short time until those cases are due, in which to discuss the outcome of such an exercise. It is also important that Ms Webster is not unreasonably put in a position where she feels pressured to give an opinion that is constrained by positions taken by previously instructed experts, and which does not fully reflect her own views.
6. The Tribunal has discretion to depart from the usual approach as set out in the authorities and in my judgment that is the appropriate course in this circumstance. Mastercard should have permission to adduce expert evidence from Ms Webster. Once that is filed, the extent to which her opinions do depart from those expressed by Dr Niels (in the Joint Expert Statement in the Umbrella Proceedings and, potentially, in previous cases) will be capable of scrutiny. It will be open to Mr Merricks (or indeed any other party) to apply to investigate any differences, including by seeking

information about views previously expressed by Dr Niels and or seeking to compel his attendance at trial to be cross examined. Those are matters which, if such a situation arises, may well go to the credibility of Ms Webster's evidence and the weight which the Tribunal attaches to the Mastercard Defendants' submissions.

7. Of course, if there is no material variation between the evidence of Ms Webster and the opinions previously expressed by Dr Niels, the potential issue of expert shopping will have been resolved.
8. Finally, if Mastercard do become aware that Ms Webster intends to take a materially different view from those previously expressed by Dr Niels then it would be prudent for them to notify all parties at the earliest opportunity. That would avoid any complaints from other parties' experts that they were taken by surprise by such a departure.

**Mr Ben Tidswell**

Chair of the Competition Appeal Tribunal

Made: 5 July 2024

Drawn: 5 July 2024