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Webinar: "More Hits from the Supreme: *Sainsbury's* and *Merricks* – classics for the ages?"

Date: Thursday 18 February 2021
Speakers: Christopher Brown, Prof. Rachael Mulheron (Chair) and Victoria Wakefield QC

Christopher Brown, Retailer Interchange Litigation: The Supreme Court and Beyond

(i) *The Interchange Fee in Outline*

- The Interchange fee is paid by the merchant's bank (the acquiring bank) to a cardholder's bank (the issuing bank) each time a card effects a payment. The Scheme allows issuers and acquirers to bilaterally agree the Interchange Fee ('IF') level. In default of such agreements, the Multilateral Interchange Fee ('MIF') set by the Scheme applies. In practice, bilateral agreements are unheard of.

(ii) Key Issue: Restriction of Competition, Article 101(1)

- Effects cases require a counterfactual. The counterfactual was default settlement at par; if there were no default MIF banks would settle at the face value of a transaction and would not enter into bilateral agreements. The Schemes had argued at trial that settlement at par would not be more competitive than MIFs: it still set a floor (of 0) to the fee. The Court of Appeal (CA) rejected this argument, finding that there were no differences in the essential facts between Mastercard's EEA MIF condemned by the European Commission (whose decision was upheld by the EU Courts) and the MIFs the subject of the domestic litigation: accordingly, the courts were bound to find a restriction of competition. The Supreme Court agreed.

- The Supreme Court added that even if it were not formally bound to reach that conclusion, it would have followed the CJEU's *MasterCard* decision in any event. The MIF agreement set a collective price floor for the merchant service charge (MSC) paid by merchants, immunising most of the MSC from competitive bargaining by merchants. In the counterfactual, there would be no bilaterally agreed interchange fees and the MSC would be determined by competition, making the MSC lower.

(iii) Key Issue: Exemption

- The Supreme Court upheld the CA's finding that parties relying on Article 101(3) need to adduce cogent factual and empirical evidence. Economic theory is insufficient by itself. The Court observed that the application of the first and second conditions of Article 101(3) requires a balancing of the burdens from the restrictive agreement against the benefits said to arise.
- The Court also agreed with the CA that, under the "fair share" condition of Article 101(3), merchants (being the adversely affected consumer group) needed to be left no worse off as a result of the agreement than in its absence: it was insufficient that consumers as a whole were left no worse off.

(iv) Key Issue: Pass-on

- The Court provided valuable guidance on the important question of passing-on. It noted that a firm suffering an overcharge may respond to that increase in a number of ways, two of which would amount to legally relevant passing on: negotiating cost reductions with suppliers or increasing retail prices. The Court held that whilst the legal burden is on the party asserting pass-on, the other party will bear a "heavy evidential burden" to provide evidence as to how it has dealt with the recovery of their costs in its business, given that most of the relevant documents will be in its hands.

Victoria Wakefield QC

(i) Overview of Merricks v MasterCard

- Merricks v MasterCard is an interchange claim brought on behalf of indirect purchasers. Retailers, direct purchasers, pay an unlawfully elevated interchange fee. This is then passed on to consumers. The class constitutes everyone who shopped at a merchant accepting MasterCards; essentially the entire adult population.
- Damages are calculated for the entire class on a top-down basis. The overcharge is found by multiplying the total value of commerce by the difference between the unlawful interchange fee and the lawful counterfactual fee. The claim is pleaded at 14 billion pounds; 7 billion in damages and 7 billion in interest.

(ii) Merricks v MasterCard: Application for CPO

- A CPO must be granted by the CAT for a collective proceeding to go ahead. This claim is still at the CPO application stage. Two conditions need to be fulfilled: (i) an authorisation condition and (ii) an eligibility condition.

- At the CAT, the application failed. It was seen as unsuitable for an aggregate award of damages; the CAT felt there were too many difficulties in the way of reliably calculating pass-on. Secondly, proposals for distribution of an award were deemed insufficiently compensatory at an individual level.

- This decision was appealed. The Court of Appeal held that the CAT had committed errors of law: (i) it had held that merchant pass-on was not a common issue, (ii) had set an illegitimately high merits threshold at the CPO stage, (iii) had wrongly concluded that aggregate damages must be distributed on a basis that has a relation to compensation, (iv) had prematurely reached an adverse conclusion about the proposed method of distribution.

(iii) The UKSC Judgement

- MasterCard appealed. This appeal went to the UKSC where it was dismissed. The majority judgement, written by Lord Briggs, reasons as follows: (i) an individual claimant who passes the summary judgement test has the right to a trial, (ii) a court must do its best to calculate damages on the evidence available, (iii) and that nothing in the statutory scheme suggests these principles of justice should be watered down or applied differently in collective proceedings. (iv) He also held that the word ‘suitable’ in the phrasing of the conditions for a CPO means ‘preferable’ to individual claims.

- Lord Briggs concluded that (i) relative suitability means that if the difficulties would have been insufficient to deny trial to an individual claimant then they should not lead to a denial of certification. (ii) Even if data is incomplete and difficult to interpret, Lord Briggs asserts that the trial should go ahead, if the same issues would apply on an individual basis.

(iv) Consequences of the UKSC Judgement in Other Claims

- There is an observable opening up through collective redress in our courts and tribunals. The bringing of more such claims is the likely consequence. It is also likely that basic principles of Common Law and civil procedure as they would apply to an individual claim will be used in other cases going forwards.

- In his judgement, Lord Briggs recognised that the CAT regime can serve the statutory purpose of providing effective access to justice for claimants for whom the pursuit of individual claims would be impracticable. Though the CPR 19.6 regime differs from the CAT and has a materially narrower test for class actions, the policy objective is also providing a viable route to the court.

Prof. Rachael Mulheron

- Prof Mulheron noted that it is 25 years since Lord Woolf, in his 1996 *Access to Justice* Report, recommended that an opt-out class action be introduced to the Law of England and Wales. It is almost fifteen years since the Civil Justice Council recommended generic opt-out class action. Prof Mulheron would welcome such a regime but it is pleasing that meanwhile progress is finally being made on the specific regime for competition class actions.

- Nevertheless, the UKSC judgements (both majority and minority) were notably supportive of the concept of opt-out class actions;

- Competition law cases contain unique legal, evidentiary, and economic issues, which this case of Merricks v Mastercard had to address squarely;

- Lessons will be learnt from the competition law class action, re framing of any generic regime to follow – and one of those lessons may well be in the framing of a suitable preliminary merits criterion (has intention translated to actuality here?);

- The judgment in Merricks contains important lessons for drafters of future regimes, and demonstrates how learned judges can interpret wordings and phrases differently – there were a few examples of differences in statutory interpretation between the majority and minority judgements;

- One area of significance is the requirement for common issues in Class Actions. There have been many interpretations and this issue has troubled judges around the Common Law World. The UK legislation is silent on how similar or identical the issues for each claimant/class member need to be if they are to be regarded as 'common'. Lord Briggs makes some interesting observations on common issues in paragraph 62 of his judgement, including mentioning that it may be a potential plus factor in the suitability balance 'when all of the big issues in a dispute are common issues. '