Neutral Citation Number: 2015 EWHC 3749 (CH)

Case No: HC-2012-000196

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 December 2015

Before :

The Honourable Mr Justice Barling

- -

Between :

Deutsche Bahn AG and others	**Claimants**
- and -	
MasterCard Incorporation and others	**Defendants**

- -
- -

Kieran Beal QC, Tristan Jones and Eesvan Krishnan (instructed by **Hausfeld LLP**) for the **Claimants**
Matthew Cook (instructed by **Jones Day LLP**) for the **Defendants**

Hearing dates: 30 October and 11 November 2015

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JUDGMENT

(Approved)

MR JUSTICE BARLING:

Introduction.

1. This judgment relates to the claimants' application dated 7 August 2015 made pursuant to CPR 17.4, for permission to amend their claim to plead a new cause of action against the defendants. They also seek an order that, for limitation purposes, the new claim shall be deemed to have been commenced on the same date as the existing action.
2. Extraordinarily, the claimants indicated a time estimate of one hour in their application notice. The hearing, in fact, took about a day and was followed by a flurry of supplementary written submissions from both parties.
3. It is common ground not just that the proposed amendment constitutes a new cause of action but also that there is at least a prima facie case that if permission to amend is not granted with "relation back", the defendants would be able to claim the benefit of a limitation defence in respect of the new claim for part of the period to which the existing claims relate. The parties are therefore agreed that I am only able to grant permission to amend, pursuant to CPR 17.4(2) so that the new claim relates back to the date the original claim was brought, if the new claim "arises out of the same facts or substantially the same facts" as a claim in respect of which the claimants have already claimed a remedy in the proceedings.
4. The defendants, represented by Mr Matthew Cook, dispute that this condition is satisfied in respect of the new claim. Therefore, while they do not object to the new claim being included in the amended particulars of claim, their position is that if it is included, it cannot benefit from the doctrine of "relation back", so as to be deemed to have been commenced for limitation purposes when the original proceedings were issued. The defendants submit that such a claim can only relate back to 7 August 2015, when the claimants' application to amend was served. This was the approach adopted by Mr Justice Field in *William Morrison v*

MasterCard [2013] EWHC 3271 (Comm) to avoid the necessity of the claimants there having to commence a new claim with resultant waste of costs, where he had found that the new claim did *not* arise out of the same or substantially the same facts.

5. The claimants, who are represented by Mr Kieron Beal QC, Mr Tristan Jones and Mr Eesvan Krishnan, submit that if their primary contention is not accepted, the appropriate date for this purpose would be 27 March 2015, when the new cause of action was first pleaded pursuant to a consent order permitting service of amended particulars of claim.

Background

6. As this is, so far as I am aware, the first significant contentious issue to have reached the court in this particular action, which is one of several separate proceedings brought against the defendants in respect of default bank interchange fees, it is appropriate to set out in summary the background to the present claims.

The parties

7. The claimants are retailers operating in 18 European countries (17 EEA countries and Switzerland) who contend that MasterCard's interchange fee arrangements were in breach of EU/EEA and domestic competition law, and that as a result they have suffered loss. The defendants are or include the principal legal entities which own and/or operate the worldwide MasterCard credit and Maestro debit card schemes.

The MasterCard scheme.

8. The MasterCard scheme is what is known as a four party payment card scheme. Such a scheme separates the function of dealing with merchants (referred to as "acquiring") from the function of dealing with cardholders (referred to as "issuing"). Each transaction generally involves a merchant, the merchant's bank (referred to as an “acquirer”), a cardholder and the cardholder's bank (referred to as an “issuer”).

9. MasterCard itself does not fulfil the issuing and acquiring functions of the scheme. It owns the MasterCard trademarks and licenses them to thousands of financial institutions around the world. These licensees operate them in accordance with rules established and administered by MasterCard. The licensees will be either acquirers or insurers or both. The scheme rules impose an obligation upon acquirers (and, through them, upon merchants which wish to accept MasterCard cards) to accept all MasterCard branded cards, regardless of the identity of the issuing institution. This is referred to as the "Honour all cards" rule or HACR.

10. Because, by reason of the HACR, a merchant must accept all types of MasterCard issued by any issuer, acquirers have to deal with all issuers and issuers have to deal with all acquirers. Although issuers and acquirers are free to negotiate bilateral arrangements, such arrangements are by no means always put in place. To do so would result in a huge volume of bilateral agreements. The scheme rules, therefore, provide default terms of dealing which apply only where there is no bilateral agreement between an acquirer and an issuer. I am told that, in practice, the majority of transactions are conducted under the default terms.

11. Under the current default rules, issuers are generally liable to pay acquirers (and therefore acquirers to pay merchants) regardless of fraud or cardholder default. Furthermore, issuers are required to pay acquirers shortly after the transaction takes place, whereas the cardholder will not normally pay the issuer for some time. MasterCard state that, at least in part because of these factors, issuers' costs are greater than acquirers' costs, and that for this reason the default rules make provision for the payment of a multilateral interchange fee or "MIF" by acquirers to issuers. It is this MIF which is at the heart of the claimants' claims in these proceedings.

12. The scheme works in the following way. A cardholder uses her MasterCard credit or debit card to buy an item for £100 from a merchant. The issuer must pay the acquirer who then pays the merchant. The issuer deducts the MIF from the £100 before paying the balance to the acquirer. Thus, the MIF represents a cost to the acquirer which is generally deducted, along

with the sum representing the acquirer's own charge, from the payment made to the merchant. The total deduction made by the acquirer is called the merchant service charge or "MSC". In return for this, the merchant is protected against fraud, cardholder default and is guaranteed payment, typically on the day following the transaction. The cardholder will generally have a significantly longer period to make the payment of £100 to her card issuer.

13. Different MIFs apply depending on the nature of the transaction. Where a card issued in one EEA state is used at a merchant’s who is based in a different EEA state, and the relevant issuer and acquirer have not negotiated a bilateral interchange fee, the "EEA MIF" applies. Where a card is used to pay a merchant who is situated in the same country as the issuer of the card, then the relevant "domestic MIF" for that country applies, always assuming that the relevant issuer and acquirer have not negotiated a bilateral interchange fee. There is also a MIF applicable (in the absence of a bilateral arrangement) where the card is used at a merchant situated in a different global region from the issuing bank, for example, where a US tourist uses her card issued in the US to buy goods in London. This is sometimes known as an "international MIF".

The CAR

14. Relevant to the present application is a MasterCard rule known as the central acquiring rule or "CAR". Under MasterCard's network rules, a bank which offers its services as an acquirer to a merchant based outside the acquirer's country of establishment is called a "central acquirer". The network rules provide that, in the absence of a bilateral arrangement between a central acquirer and the relevant issuing bank, the MIF payable by a central acquirer for an intra-country transaction (i.e. where the issuer and the merchant are in the same country) is the domestic MIF (if there is one) of the state of the transaction. If there is no domestic MIF and no relevant bilateral arrangement, the network rule provides that the EEA MIF will apply.

The European Commission's decision.

15. I should now mention some important aspects of the regulatory background. In about 1992, a complaint was made to the European Commission by the British Retail Consortium. At about the same time, MasterCard notified its card payment scheme to the Commission under the former Council Regulation 17/62. These steps led to an investigation by the Commission into MasterCard's EEA MIF, which culminated in the Commission's decision dated 19 December 2007 ('the Decision').

16. The Decision, addressed to the first to third defendants, reached the following conclusions:

(a) The first, second and third defendants were representatives of an "association of undertakings" and consequently their decisions were capable of falling within Article 81 of the EC Treaty (now Article 101 TFEU).

(b) The MasterCard scheme could operate without any MIF.

(c) The EEA MIF restricted competition between acquiring banks by setting a floor under the MSC that acquiring banks charge to merchants, thereby inflating the MSC.

(d) The first, second and third defendants were therefore in breach of Article 81(1) of the EC Treaty (now Article 101(1) TFEU) by reason of the EEA MIFs in place between 1992 and December 2007.

(e) The first, second and third defendants had failed to produce satisfactory evidence that the levels of the EEA MIF met the conditions for exemption under what is now Article 101(3) TFEU.

(f) MasterCard was entitled to set an EEA MIF at a level which met those conditions for exemption.

17. The Decision required MasterCard to repeal the then current EEA MIF within six months. Thus, in June 2008 MasterCard reduced the EEA MIF to zero. In June 2009, following discussions with the Commission, MasterCard increased the EEA MIF from zero, but to a

lower level than those levels which were the subject of the Decision. The Commissioner responsible for competition indicated that the new levels of EEA MIF would not be challenged as (in the language of Article 101(3)) they would improve the efficiency and transparency of the MasterCard scheme and would provide a fair share of the benefits to consumers and retailers.

18. Appeals against the Decision to the General Court and later to the Court of Justice by the first to third defendants were unsuccessful. MasterCard, therefore, accepts that the Decision establishes that the EEA MIF in place between 1992 and December 2007 was in breach of Article 81(1), but points out that the Decision left open at what level the EEA MIF would have met the criteria for exemption under Article 81(3).

19. In each of their claims, the claimants rely upon the Decision, either directly where there is a normal follow-on claim in respect of the EEA MIF for the period 1992 to December 2007, or indirectly by analogy in relation to their other claims.

20. In April 2013 the Commission opened a further investigation in respect of which a statement of objections was sent to MasterCard on 9 July 2015. A Commission press release of the same date states that the statement of objections raises concern in two respects:

(1) that MasterCard's rules prevent retailers in a high MIF country from benefiting from lower MIFs offered by an acquiring bank in another state, thereby limiting competition between acquirers, and leading to higher prices for retailers and consumers. This concern appears to be, at least in part, directed at the CAR;

(2) that the high levels of international MIFs are not justified, thereby leading to higher prices for retailers and consumers.

The existing claims

21. Before turning to the proposed amendment, it is appropriate to outline the nature and extent of the existing claims. They cover MIFs applicable to relevant transactions in Austria, Belgium,

the Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, the Slovak Republic, Spain, Sweden, the United Kingdom and Switzerland. The claims can be broken down as follows:

First, claims for damages in respect of the EEA MIF. These comprise:

(a) EEA MIFs paid between May 1992 and December 2007, which the claimants contend were excessive and unlawful, and resulted in them paying higher MSCs than they would otherwise have done. This head is a follow-on claim, based directly on the Decision.

(b) EEA MIFs paid since December 2007 which the claimants contend were also excessive and unlawful, and resulted in them paying higher MSCs than they otherwise would have done. This head of claim relies upon the Decision by analogy.

The second category relates to claims for damages in respect of MIFs applied domestically:

(i) In countries where the EEA MIF was applied in the absence of a domestic MIF or a bilaterally agreed fee. In respect of these claims, the claimants rely principally on findings in the Decision.

(ii) In countries where the relevant domestic fee was set either bilaterally or in the form of a domestic MIF set by MasterCard licensees. The claimants argue that these fees were inflated by the EEA MIF. These claims, too, rely principally on findings in the Decision. Also, so far as transactions in Hungary are concerned, reliance is placed on the findings of the Hungarian competition authority.

(iii) In countries where the relevant domestic MIF was set by MasterCard. These claims are stand-alone claims, save in respect of transactions in Italy, in respect of which the claimants rely on the findings of the Italian competition authority.

Thirdly, and finally, damages are claimed for so-called "on us" payments. These are payments in circumstances where the acquiring bank was the same bank as the issuing bank, so that no

MIF was payable. The claimants contend that MSCs relating to such payments were inflated because the defendants' infringements led to a lack of competition in the acquiring market.

22. It is to the second main category, namely claims in respect of fees applied on intra-country transactions for which domestic MIFs or their substitutes are charged, that the proposed new claim based on the CAR, relates, albeit that the new complaint, as pleaded in the amended and consolidated particulars of claim (“APOC”), is framed in somewhat different terms, as will be seen.

23. The claimants claim damages in respect of the period from 1992, save in relation to the claim for transactions in the United Kingdom; the claimants accept that these claims are limited to the normal limitation period of six years, insofar as they are governed by English law.

24. The defendants seek to defend the claims on a number of grounds, including that of limitation. In that respect they argue that there are applicable limitation periods which considerably shorten the periods open to the claimants' claims. The defendants' limitation defences are closely related to issues between the parties as to the proper law of the various claims. The parties have now agreed directions (which I have approved) with a view to enabling the overall litigation to be resolved in more manageable chunks. The directions provide for a trial of preliminary issues of limitation and proper law in respect of claims for transactions in a limited number of the 18 countries which represents some 75 per cent of the total claim.

25. Unfortunately, the parties' happy meeting of minds has not extended to the claimants' proposed amendment to the claim, to which I therefore now turn.

The proposed amendment

26. The proposed amendment relating to the CAR is contained, in particular, in paragraphs 56 and 70 of APOC. Paragraph 56 states:

> "56. Under the MasterCard network rules forming part of the MasterCard MIF, a bank which acquires transactions outside of its Member State of establishment (i.e. a bank located in Country A which offers its services to a merchant transacting in Country B) is called a 'Central Acquirer'. The MasterCard network

> rules provide that, in the absence of bilateral agreement between a Central Acquirer and the relevant issuing bank, the interchange fee payable by a Central Acquirer for an intra-country transaction is the domestic fall-back interchange fee (if there is one) of the Member State of the transaction. Thus, a Central Acquirer is not permitted to choose to acquire intra-country transactions at the potentially lower rate set by the EEA fall-back interchange fee (the 'Central Acquiring Rule')."

27. Thus, the specific restriction apparently being emphasised is that the "potentially lower" EEA MIF is not applicable in such cases, as the central acquirer must pay the domestic MIF, if there is one. That paragraph does not go on to deal with the position where no domestic MIF exists. In such a case, as I have said, the MasterCard rules provide that the EEA MIF is to apply.

28. Paragraph 70 of APOC specifies what is alleged to be the anti-competitive object and effect of the CAR restriction. That paragraph of the pleading reads:

> "70. Further or alternatively, the object and/or effect of the Central Acquiring Rule was and is to restrict competition in the relevant product and geographic markets:
> 70.1. Acquirers (including Central Acquirers) may deviate from the domestic fall-back interchange fee of the Member State of the transaction by bilateral agreement. However, issuing banks would have no or little incentive to agree to bilateral rates lower than the applicable fall-back interchange fee;
> 70.2. Central Acquirers are prevented or hindered from offering their services in other Member States at prices reflecting the applicable EEA interchange fee;
> 70.3. Absent the Central Acquiring Rule, domestic acquiring banks would have an incentive to establish themselves in other countries in order to be competitive with existing central acquirers offering MSC rates based on lower interchange fees. Merchants engaging a Central Acquirer would pay an MSC based on the EEA fall-back interchange fee, rather than the domestic interchange fee in their country of operation;
> 70.4. The Central Acquiring Rule thus artificially partitions the EU into separate national markets by limiting the entry and price competition from Central Acquirers;
> 70.5. The absence of effective competitive constraints from Central Acquirers reduces the competitive constraints on, and thus inflates, domestic interchange fees (whether bilaterally or multilaterally agreed, or set by MasterCard)."

29. Again, there is emphasis on the fact that central acquirers are prevented from offering their services at the (implicitly lower) EEA MIF rate, and there is no reference to the position where no applicable domestic MIF exists. This inability to offer central acquiring services based on the EEA MIF rate is the restriction on competition alleged in the new claim, together with the consequent partitioning along national lines of markets for "acquiring". The resultant absence of competition from central acquirers is also said to inflate domestic interchange fees, whether set bilaterally or by default.

30. This complaint therefore, at least to some extent, appears to reflect one of the concerns identified by the Commission in the statement of objections recently sent to MasterCard.

The legal principles

31. The question for me is whether the new claim based on the CAR arises out of the same, or substantially the same, facts as the existing claim. That test, as I have said, is derived from CPR Rule 17.4, read together with section 35 of the Limitation Act 1980, and in particular subsection 35(5)(a).

32. Section 35 provides (so far as relevant):

> "(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced-
> (a) in the case of a new claim made in or by way of third party proceedings, on the date on which those proceedings were commenced; and.
> (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either-
> (a) the addition or substitution of a new cause of action; or
> (b) …..
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor any county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim.
> …..
> (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following-
> (a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
> (b) …...
>
> (6) ……
> (7) ……
>
> (8) …… "

33. CPR Rule 17.4 provides:

34. "(1) This rule applies where –
    (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
    (b) a period of limitation has expired under –
    (i) the Limitation Act 19801;
    (ii) the Foreign Limitation Periods Act 19842; or
    (iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

(3) …

(4) ….."

35. In *Ballinger v Mercer Ltd* [2014] 1 WLR 3597, Lord Justice Tomlinson explained at paragraph 25 of his judgment:

"If a new claim is permitted by way of amendment it is treated as having been made by way of a separate action commenced on the same date as the original action. So where an amendment is permitted to introduce a new claim which was in time at the date of commencement of the action but arguably out of time on the date on which permission to amend is granted, the defendant is thereafter precluded from reliance at trial on the arguable limitation defence."

36. It appears to be common ground that insofar as the doctrine of "relation back" applies, it applies to the same extent when the relevant limitation period is determined by reference to foreign law. That is the effect of section 1 of the Foreign Limitation Periods Act 1984.

37. In *Ballinger v Mercer*, Tomlinson LJ, in a judgment with which Briggs LJ and Lord Dyson MR agreed, helpfully drew together some of the leading authorities on the test of "arising out of the same or substantially the same facts". At paragraphs 34 to 37 of his judgment, he said this:

"34. Helpful guidance as to the proper approach to the resolution of this question was given by Colman J in *BP Plc v Aon Ltd* [2006] 1 Lloyds Rep 549, 558 where he said:

> "52. At first instance in *Goode v Martin* [2001] 3 All ER 562 I considered the purpose of section 35(5) in the following passage: 'Whether one factual basis is 'substantially the same' as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim.
> 53. In *Lloyds Bank Plc v Rogers* [1997] TLR 154 Hobhouse LJ said of section 35: 'The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely on any cause of action which substantially arises from those facts.
> 54. The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts.'

35. In the *Welsh Development Agency case* [1994] 1 WLR 1409 Glidewell LJ said, in an often quoted passage at p 1418, that whether or not a new cause of action arises out of substantially the same facts as those already pleaded is substantially a matter of impression.

> 36. Less well known perhaps is the cautionary note added by Millett LJ in the *Paragon Finance case* [1999] 1 All ER 400, 418, where he said, after citing the passage from Glidewell LJ to which I have just referred: 'In borderline cases this may be so. In others it must be a question of analysis.
> 37. I would also point out, as did Briggs LJ in the course of the argument, that 'the same or substantially the same' is not synonymous with 'similar'. The word 'similar' is often used in this context, but it should not be regarded as anything more than a convenient shorthand. It may serve to divert attention from the appropriate inquiry."

See also the very helpful analysis given by Park J in *Hoechst UK Ltd v Inland Revenue Commissioners* [2003] EWHC 1002 (Ch), at paragraphs 22 to 23.

38. In addition, I was taken to a number of other authorities, including *Goode v Martin* [2002] 1 WLR 1828, cited in the quotation above. In that case, the claimant suffered injury whilst a guest on the defendant's yacht. She issued a claim for negligence based upon a particular factual account of a witness. The defence pleaded a different factual account of the accident. After the limitation period had expired, the claimant sought to amend her statement of claim to plead an alternative case, based on the defendant's version of the facts. Brooke LJ, in a judgment with which both Latham and Kay LJJ agreed, held that the amendment should be allowed. He prayed in aid subsection 3(1) of the Human Rights Act 1998 and the overriding objective in Rule 1 of the CPR, in order to interpret Rule 17.4(2) consistently with the language of subsection 35(5)(a) of the 1980 Act. This meant interpreting the rule as if the words "are already in issue on" in the corresponding passage in subsection 35(5)(a) were also present in the rule (see paragraph 46 of Brooke LJ's judgment). At paragraph 42, he said:

> "The 1998 Act, however, does in my judgment alter the position. I can detect no sound policy reason why the claimant should not add to her claim, in the present action, the alternative plea which she now proposes. No new facts are being introduced: she merely wants to say that if the defendant succeeds in establishing his version of the facts, she will still win because those facts too show that he was negligent and should pay her compensation."

39. Other cases were shown to me, but the assistance that they provide is limited by the self-evident truth that the application of the test in question is highly fact-dependent.

The proposed new complaint.

40. I have already referred to the admitted fact that, as pleaded, the new claim is different from any of the existing ones. To a greater or lesser extent the latter all rely upon the Decision and

an allegation that the application or existence of *the EEA* MIF directly or indirectly constitutes a restriction on competition. Similarly, insofar as the CAR is relied upon in the original claim, it is to underscore the fact that in certain countries the EEA MIF "automatically applied" when central acquirers were seeking transactions outside their member states of establishment, with the result that the EEA MIF constituted a "floor" to the MSCs, which central acquirers could offer to merchants in other countries (see paragraph 54.4.2 of the original particulars of claim). Thus, in the existing claim the CAR is relied upon as the mechanism by means of which the EEA MIF is applied. That MIF is the essential subject of the complaint.

41. Contrast the proposed new claim. There, the existing claim is, on the face of it, turned on its head. In paragraph 70 of APOC, the CAR itself is alleged to be a restriction on competition by object and/or effect, not because it applies the EEA MIF, but essentially because it prevents the application of that MIF. Thus, the new claim focuses on a different aspect of the CAR – namely, that part of the rule which deals with the situation of the central acquirer where there is either a relevant bilateral arrangement or a domestic MIF. The existing pleading does not, as far as I can see, expressly complain of the EEA MIF being excluded.

42. It seems odd, in one part of a pleading, to complain of the application of a particular MIF and, in another part, to complain of the non-application of that MIF. The explanation may be that the EEA MIF was at one point, namely after the adoption of the Decision, fixed at zero and at some other points in time, it may have been lower than the bilateral or domestic MIFs in one or more of the 18 or so countries involved in these claims. Whether this is the reason for the apparent paradox is speculation, as no explanation has been given in the pleadings. In any event, the reason may not matter. The issue for me is whether the test discussed earlier is satisfied, so that the amendment may be permitted.

“The same or substantially the same facts”

43. In summary, MasterCard submits that the claimants' new claim is dependent upon an entirely new set of facts which formed no part of the claimants' case before. They state that, in particular, in the new claim it is argued: (1) that the CAR was established by a decision of an association of undertakings, whereas previously the claimants did not advance any case in relation to how the CAR was established; (2) that the object or effect of the CAR was to restrict or distort competition, and there was no such case previously; and (3) that the CAR inflated domestic interchange fees, and, again, there was no such case previously.

44. Mr Cook submits that the claimants' approach really depends on one standing back from the claim, and saying that both the existing claim and the new claim are really about the MasterCard scheme. However, he submits that CPR 17.4 does not operate on that basis. The claimants have advanced specific claims about specific features of the MasterCard scheme which they contend are unlawful, whereas the new claim is in relation to a different feature of the MasterCard scheme, which depends on establishing a different set of facts. Therefore, he submits, it cannot be advanced as though it has always been part of the original claim. The amendment relates to a new cause of action which does not arise out of the same, or substantially the same, facts; and permission to pursue the claim by way of an amendment should only be allowed on terms that the doctrine of relation back does not apply.

45. As the argument developed, both sides have, in my view correctly, approached this application by considering whether and to what extent allowing the amendment would place the defendants in the position where, after the expiration of the limitation period, they would have to investigate facts and obtain evidence on matters outside the ambit and unrelated to those which they could reasonably be assumed to have investigated for the purpose of defending the unamended claim. That is a paraphrase of the helpful guidance of Colman J in *BP Plc v Aon Ltd*, to which Tomlinson LJ referred in the quotation from his judgment in *Ballinger v Mercer Ltd* above.

46. With this in mind, I turn to examine the parties' submissions more closely.

47. The defendants submit that certain aspects of the new claim require additional and unrelated investigations and evidence. The claimants have sought to show that such evidence as would be required for the new claim will be in play in the existing claim.

(i) The restriction on competition

48. The defendants argue that to show that the object and effect of the CAR was to inflate the rates payable on domestic transactions would involve (a) evidence as to whether, if central acquirers had been able to pay lower (for example EEA MIF) rates rather than domestic rates, and if those lower charges were reflected in the central acquirers' MSCs, merchants would have chosen to use those central acquirers, and (b) evidence as to whether such lower rates would have led to lower domestic charges through the operation of the competitive process.

49. It is clear that, on the new claim, such matters would need to be investigated. The claimants accept that this is so. However, in my view, it is also clear that such investigation will need to take place and be evidenced in respect of the existing claims in any event.

50. In the Decision, which is very much relied upon by the claimants in their existing heads of claim, the Commission deals in some detail with the CAR, although no findings are made as to the lawfulness or otherwise of the rule (see recitals 413 to 415 of the Decision, which are set out in the Annex to this judgment).

51. In the second half of recital 413, the Commission makes a point which is reflected in the claimants' existing claim, at paragraph 54.4.2 of the original particulars of claim. There the claimants allege that, by virtue of the requirement that a central acquirer pay the EEA MIF if there is no relevant bilateral fee or domestic MIF in the country in question, the EEA MIF sets a floor for the MSCs that the central acquirer can offer merchants in that country. The requirement in question is, of course, contained in the CAR. So it is the CAR which, in essence, enables the floor to be set in those circumstances. The existing case appears to be

that, by setting a floor, the CAR causes a cost disadvantage to be imposed on central acquirers which prevents or distorts competition in the acquiring markets in question by enabling the central acquirers to be undercut by domestic acquiring banks who have entered into bilateral arrangements, and/or by inflating those bilateral fees beyond the level at which they would be agreed, absent the restriction on competition from central acquirers.

52. Therefore, the claimants' existing case will require investigation and evidence as to the extent to which the EEA MIF, imposed through the CAR, is likely to have increased the bilateral fees agreed between banks and/or the extent to which the EEA MIF has imposed a cost disadvantage on central acquirers, such that, had the EEA MIF been lower, the central acquirers would have acquired transactions in other countries and thereby increased competition with the effect of reducing domestic rates.

53. In these respects therefore, the facts and issues required to be investigated under the new claim are already the subject of the existing one.

(ii) Exemption

54. The defendants also state that if and to the extent that the proposed amendment to include a claim based on the CAR is allowed, they will argue that the CAR satisfied the conditions for exemption under Article 101(3). They submit that, in that event, new expert evidence would be required to deal with those conditions.

55. I do not consider that this factor helps the defendants.

56. First, whilst it is true that an assertion of entitlement to exemption under Article 101(3) would call for evidence to be adduced to substantiate the conditions under that provision, the requirement for such substantiation would arise from the defendants' own defensive case. Whether or not it is necessary for a claimant alleging breach of Article 101 formally to assert the absence of entitlement to exemption, the evidential burden of establishing that right would admittedly be upon the person seeking to rely upon it.

57. Second, at the hearing of this application the defendants made clear that the rationale or justification for the CAR was as a means of ensuring that the costs incurred by issuers operating within the MasterCard scheme could be recovered via the interchange fees payable by acquirers in the scheme. Thus, (and I express the position in what are no doubt very oversimplified terms), it is said to be necessary to set the MIF applicable to domestic transactions in a particular country at a level which enables the costs specific to that country to be recovered by issuers. Those costs, covering payment guarantees in the event of fraud, credit risks, et cetera, et cetera, differ from country to country depending on the legal, financial and regulatory environment. The CAR is therefore said to be necessary in order to ensure recovery of those costs in circumstances where the acquirer is based in a different country from that in which the issuer and merchant are both based.

58. On this basis, the MIF applicable in such transactions on the one hand (whether it be the domestic MIF set by MasterCard licensees or by MasterCard itself, or the EEA MIF which applies to such transactions in the absence of a domestic MIF or a bilateral arrangement) and the CAR, on the other hand, appear to be simply two sides of the same coin, as the claimants contend. In those circumstances any justification (and evidence in support) put forward in order to establish the right to exemption under Article 101(3) in respect of the relevant interchange fees would be equally, or very substantially, applicable to the CAR, and *vice versa*. On any view the two would be inextricably linked.

59. The defendants already contend that the EEA and domestic MIFs covering the full period of the alleged infringement are entitled to exemption under Article 101(3) (see the amended consolidated defence at paragraphs 134 and 140). Therefore, in that context the same justification as would be put forward in relation to the CAR is already in issue in these proceedings.

60. The defendants further submit that the proposed new claim would require the court to consider whether the CAR is exempt in the context of each country's domestic interchange fees, including those countries and periods in respect of which there is presently no allegation that the domestic MIFs are themselves unjustified and unlawful, and therefore where there is no issue about the legitimacy of those fees. It is contended that this would involve extensive factual and expert evidence which would not otherwise be required.

61. However, it is not at all clear why the issue of exemption in the proposed new claim should have wider scope, in temporal or geographical terms, than the scope of the evidence in respect of the exemption already claimed for the EEA and domestic MIFs which are the subject of the existing challenge.

62. In my view, therefore, it is clear that all or most of the material which would be likely to be required on the issue of exemption in relation to the new CAR claim is needed for existing issues in any event.

(iii) Counterfactual analysis/causation

63. The claimants submit that evidence relating to the impact of the CAR on the level of domestic charges is already relevant to existing issues of causation and counterfactual analysis.

64. The claimants refer to the amended consolidated defence. Here, the defendants deny that the EEA MIF had any material effect upon domestic MIF rates in the relevant countries, and state that if the EEA MIF had been set lower or at zero, the domestic rates would not have materially altered. In that respect they rely on what they state to be the fact that the rates for domestic transactions did not reduce following a reduction in the EEA MIF to zero in June 2008, and the positive but lower levels applicable from July 2009 (see paragraph 29 of that pleading).

65. In their amended consolidated reply, the claimants suggest that the CAR is one possible reason for this lack of downward response, on the basis that it has prevented competition from central

acquirers (see paragraph 23.6 of that pleading). They acknowledge that this point was not in their original reply, but refer to the statement there that there were various possible reasons for the lack of responsive downward movement in domestic MIFs post-June 2008, which would require investigation following disclosure. The claimants state that the CAR has now been added as one such additional reason, and submit that the rule is therefore relevant to an issue which will require evidence (including expert evidence) namely, whether, as the defendants argue, the lack of downward movement in domestic rates demonstrates that the EEA MIF did not inflate the domestic MIF, or whether, in accordance with the claimants' position, the EEA MIF did inflate domestic rates, and other factors, including the CAR, are responsible for the lack of downward response to the events of June 2008.

66. The claimants submit that even if and to the extent that the CAR is not challenged as a separate cause of action, they are nevertheless entitled to argue by way of reply that the CAR is unlawful and should form no part of any counterfactual analysis when it comes to determining what would have happened in the "but for" world of causation.

67. In support of this submission they rely upon the decision of the Court of Appeal in *Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Brothers* [2004] EWCA Civ 215. There, the claimant sued its solicitors for negligent advice given in respect of a share purchase scheme. The solicitors contended in their defence that the scheme would have failed in any event, because anti-monopoly clearance under Russian law had not been obtained. An issue arose as to whether the claimant could argue in reply that failure to obtain anti-monopoly clearance also represented negligence on the part of the solicitors, or whether, given that no such allegation had been made in the original pleadings and that limitation had expired, it could not now be raised. At paragraphs 46 to 47 of his judgment, Waller LJ said:

> " ... It is [the solicitors] who want to reduce the value of the chance by asserting they failed to do something which would have lowered the chance. Is there a principle which disallows a defendant from relying upon a wrong which he has committed, in order to reduce the damages that would otherwise flow from a tort or

> breach of contract? It seems to me that there should be such a principle and that is what Lord Browne-Wilkinson was recognising. It is quite difficult to say why it should be so, other than that it flows from public policy where it is a principle that a person should not be entitled to rely on their own wrong in order to secure a benefit ...
>
> 47. Furthermore, I am not sure it is right to categorise allowing IML to stop [the solicitors] relying on their own negligence as providing IML with a claim which is statute barred. IML are not seeking to recover damages for the failure to secure anti-monopoly permission. They are simply seeking to prevent [the solicitors] breaking the chain of causation of the damages which flow directly from the loss of a chance which they should have provided to IML. That is something surely they are entitled to do by way of reply, as they have pleaded in this case."

68. Lord Justice Laws said, at paragraph 64:

> “First, although I entertained considerable doubts about the matter while the case was being argued, I have reached the clear conclusion that, in principle, a defendant should not be allowed to rely on a wrong perpetrated by himself in order (in whole or in part) to break the chain of causation put forward by the claimant to establish and quantify the damage sustained by him by reason of the defendant's breach of contract or tort. This may be seen (as Waller LJ expresses it: paragraph 46) as an application of the general rule of the common law that a party may not rely on his own wrong to secure a benefit and I agree that some support is to be found for that approach in the speech of Lord Browne-Wilkinson in *Bolitho*. But I think it is also consonant with modern ideas of causation now being developed in the cases. Authorities support the proposition that the resolution of causation issues, certainly in the law of tort, is by no means merely a fact finding exercise; in many instances it is an evaluative judgment concerned to establish the extent to which a defendant should justly be held responsible for what has befallen the claimant ..."

See also the decision of the Competition Appeal Tribunal in *Enron Coal Services Ltd (In Liquidation) v EW&S Railway Ltd* [2009] CAT 36, at paragraphs 89 to 90, a passage referred to with approval in *Albion Water Ltd v Dwr Cymru* [2013] CAT 6 at paragraphs 60 to 61.

69. On this basis, the claimants contend that since the point is anyway raised via the reply, to include it as a freestanding cause of action would make no difference to the evidential requirements at trial, as the same evidence would be needed in any event.

70. In response to these points, the defendants submit that the claimants are attempting to pull themselves up by their own bootstraps: the CAR was not raised in the original reply and it has only been raised now because of the new claim that the CAR is unlawful, because unless the CAR is unlawful, the claimants' contention that domestic MIFs would have been lower without the CAR is irrelevant.

71. The defendants emphasise two points which they say distinguish the present case from the causation cases relied upon by the claimants: first, that the defendants did not raise the CAR in their defence and so the claimants cannot contend that they are just responding to an issue that

the defendants have raised; second, the CAR claim is primarily a stand-alone cause of action aimed at the periods from June 2008 to July 2009 when the EEA MIF was zero, and from July 2009 to date when the EEA MIF has been set at a level which the defendants submit was essentially blessed by the Commission. The defendants submit that the CAR claim is designed to give a remedy in those periods when the EEA MIF was clearly lawful and gives rise to a new counterfactual, i.e. what would have happened during this period, absent the CAR but with the EEA MIF? They contend that, in contrast, the existing EEA MIF claim only requires consideration of what would have happened without the EEA MIF. It is submitted that the claimants would not have a basis for contending that the counterfactual should exclude the CAR without advancing their new claim that the CAR is unlawful, and that by advancing it as a new claim extensive factual and expert evidence will be required in relation to that new counterfactual.

72. I do not agree with the defendants' arguments in this regard. Whilst it is true that the defendants did not raise the CAR in their defence, they did there raise an issue of causation, by denying that the EEA MIF had any material effect upon relevant domestic rates and by relying on the absence of downward movement in domestic rates following the reductions in the EEA MIF from June 2008 onwards. The claimants have raised the CAR in response to that contention as an alternative reason for the lack of downward movement. Although I agree with Mr Cook that the cases to which I was taken on this issue do not precisely reflect the position here, it nevertheless seems to me that on the basis of that case law, it is at the very least arguable that the claimants are entitled to allege the unlawfulness of the CAR as material to their response on causation. If the CAR was a causative factor in maintaining domestic rates, then its unlawfulness would arguably be relevant to the appropriate counterfactual. For this reason, I am of the view that the issue of the CAR's lawfulness (with related evidence) is within the scope of the existing issues in the proceedings, and the addition of a stand-alone

claim based on the CAR is unlikely to add significantly to the ambit of investigation or evidence.

73. Further, the defendants' submission that for the period since July 2009 the new CAR claim would require a counterfactual in which there is no CAR but there is an EEA MIF, because since then the MIF was set at a level "essentially blessed by the Commission", does not appear to be correct. The lawfulness of the EEA MIF since July 2009 is an issue in these proceedings as presently constituted.

Conclusion

74. Although other points were canvassed by both sides, the matters discussed above have been sufficient to persuade me that, despite the very able submissions of Mr Cook to the contrary, the proposed new claim based on the CAR arises out of the same or substantially the same facts as are already in issue on the existing claims. No other ground on which I should refuse permission to make the amendment sought has been raised. The claimants' application to amend is therefore granted with the benefit of the "relation back" doctrine.

75. I invite the parties to agree the terms of an order reflecting this judgment, together with any consequential orders and directions. The draft of such an order should be sent to me for approval.

76. I understand that the parties have already indicated that they are content for any consequential matters that cannot be agreed in that way to be dealt with on a later occasion.

ANNEX

(Extract from the Decision, as referred to in paragraph 50 of this judgment)

"413. 'Central acquirers' are acquiring banks that acquire payment card transactions outside their home country. According to MasterCard's network rules and as already set out in section 3.1.1, central acquirers are to respect the domestic rules of the target country in the sense that they must pay local issuing banks the applicable domestic MIF unless local issuers agree to negotiate bilaterally a diverging set of interchange fees. If no domestic MIF exists and if no bilateral agreements are concluded, then the Intra-EEA fallback interchange fees automatically apply to the central acquirer for the acquisition of domestic card payments in the target country. This MIF then effectively determines a floor for the merchant fees which the central acquirer can offer to local merchants. This situation is prevalent at least in: i. Sweden; ii. France; iii. Spain; iv. The Netherlands.

414. In addition to raising the cost base of central acquirers and thereby inflating the prices such acquirers can offer to local merchants, the interplay of the Intra-EEA fallback interchange fees (or a domestic MIF) and bilaterally agreed interchange fees may have the additional effect of hindering entry of foreign acquiring banks.

415. Central acquiring banks that are unable to agree bilaterally with local issuers on domestic interchange fees are automatically subject to the default MIF that applies in the target country. This can be the Intra-EEA fallback interchange fees or -- where adopted -- a domestic MIF. Where the applicable default MIF is higher than interchange fee rates that are bilaterally agreed between local banks, a central acquirer will incur an artificial cost disadvantage for acquiring transactions in that country because it must pay the default MIF to the local issuers. The right of MasterCard member banks to agree bilaterally on interchange fees that undercut a default MIF in the target country (be it the Intra-EEA fallback interchange fees or a domestic MIF) combined with the obligation on the foreign bank to pay the local default MIF may act as deterrent for new entrants. This was, for instance, the case in [EU MEMBER STATE] where local issuing banks agreed on a set of bilateral interchange fees for certain key merchant segments that effectively undercut the applicable default MIF in that country. This hampered the entry of a central acquirer to [EU MEMBER STATE]."