Neutral Citation Number: [2023] EWHC 1827 (Comm)

Case No: CL-2022-000657

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Date: 19/07/2023

Before :

MR JUSTICE FOXTON

- -

Between :

DELIVERY HERO SE	**Claimant/ Applicant**
- and -	
MASTERCARD ASIA/PACIFIC PTE LTD	**Defendant/ Respondent**

- -
- -

Sa'ad Hossain KC and **Harry Stratton** (instructed by **Goodwin Procter (UK) LLP**) for **the Claimant**
Richard Millett KC (instructed by **Bird & Bird LLP**) for **the Defendant**

Hearing dates:10 July 2023
Draft Judgment Circulated: 12 July 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 19 July 2023 at 10:30am.

The Honourable Mr Justice Foxton:

Introduction

1. This is an application by the Claimant (**Delivery Hero**) for summary judgment on its claim for payment of the "Sign-On Bonus" pursuant to its Client Business Agreement (**the CBA**) with the Defendant (**Mastercard**).

2. Delivery Hero carries on the business of online food ordering and delivery to customers, in association with vendors who provide food, and riders who transport it to customers.

3. Mastercard is a Singaporean company and subsidiary of Mastercard Incorporated. It provides payment processing services in various countries in the Asia Pacific region to merchants such as Delivery Hero, including the Mastercard Payment Gateway Service (**MPGS**).

4. Delivery Hero and Mastercard entered into the CBA which set out terms which would apply to Delivery Hero's use of MPGS. Mastercard would receive fee revenue when orders were processed through MPGS. In return, Mastercard undertook various obligations to Delivery Hero, including an obligation to pay an upfront sign-on bonus (**the Sign-On Bonus**).

5. It is common ground that the CBA was terminated in 2022:

   (1) Mastercard says that this occurred on either 9 or 12 October 2022, following service by it on 9 September 2022 of a notice under the terms of the CBA requiring breaches of the CBA by Delivery Hero to be remedied within 30 days, which Mastercard says was not done.

   (2) Delivery Hero says that the CBA was terminated on 31 December 2022, because Mastercard's notice and purported termination were a repudiatory breach of contract.

6. Delivery Hero claims that it had acquired an accrued right to the Sign-On Bonus before termination even on Mastercard's case, and it seeks summary judgment pursuant to CPR 24.2 in respect of the Sign-On Bonus, in the sum of USD40 million and interest in the sum of USD 4,512,624.66.

7. I have spared the parties the usual citations to the summary judgment test, but have had it well in mind.

The relevant terms of the CBA

8. Clause 1 of the CBA addressed the support which Mastercard agreed to provide to Delivery Hero:

   (1) Clause 1.2 states that the support would be "paid by Mastercard to the Client over five (5) Contract Years commencing from the succeeding quarter from the Commencement Date" (defined as the **Support Period**) but that "for the avoidance of doubt, notwithstanding the Support Period, the Sign-On Bonus specified in Clause 1.4 below will be payable from the Commencement Date".

   (2) Clause 1.3 provides that "where Support payments are due under this Agreement, Client … shall submit a request for payment to Mastercard in an amount equal to the relevant support payment due" (a **Payment Request**). Clause 1.3 went on to provide that "the validity of the Payment Request shall be determined by Mastercard in accordance with the terms of this

> Agreement. Support payments will be made to the Client … within forty-five (45) days of receipt by Mastercard of a valid Payment Request."

9. Clause 1.4.1 provides that the Sign-On Bonus specified in Exhibit A (USD40m) would be payable upfront on the Commencement Date (which it is agreed is 28 March 2022) in the following terms:

> "The Sign-On Bonus specified in Exhibit A will be payable to Client at the Commencement Date, subject to receipt by Mastercard of a valid Payment Request".

10. Clause 1.4.2 provides:

> "If Client fails to comply with the MPGS Order Target (as defined in Clause 2.5.2 below), Mastercard will be entitled to recover the Sign-On Bonus in accordance with clause 3.5 below."

11. Clause 3.5 dealt with the subjects of set-off generally, and potential claw back of the Sign-On Bonus, as follows:

> "Support Refund
>
> 3.5.1 With the exception of the Sign-On Bonus, which is covered under Clause 3.5.2, Mastercard will be entitled to set-off or recover any amount which:
>
> (a) Mastercard may have paid if it is later determined that Client is not entitled to such amount whether as differential or whole, due to material breach, nonperformance or violation of the terms of this Agreement; or
>
> (b) is otherwise due to Mastercard under or arising out of this Agreement.
>
> Mastercard may make that recovery or set-off at any time during the Term and for a period of one year from the expiry of this Agreement.
>
> 3.5.2 The Client agrees that the following claw back terms will apply for the Sign-On Bonus:
>
> (a) MPGS annual schedule outlined in Table 3 of Exhibit A will be utilised for tracking and management. To give sufficient time for technical integration, Contract Year 1 for purposes of determining achievement of the MPGS Order Target shall commence six (6) months from the Commencement Date ("**MPGS Integration Period**"). Subsequent Contract Years will follow thereafter.
>
> (b) It is expressly clarified that any shortfall for MPGS Order Target in a Contract Year (where the Contract Year shall be prior to Contract Year 5) will not trigger a clawback, however, it will require the Parties to discuss plans for a catch-up schedule.
>
> (c) At the end of Contract Year 5, if the MPGS Order Target is not met, both Parties can mutually decide to extend the contract by 12 months.

(d) If after Contract Year 6, the MPGS Order Target is still not achieved, pro-rata clawback will become applicable.

Notwithstanding the above, the clawback amount shall be calculated using the following formula in the event the provisions of Clauses 2.5.4, 2.5.5 and 2.5.6 become applicable.

Percentage of Achievement = [Actual number of Orders processed at the end of Contract Year 5 or Contract Year 6 (if applicable)] / [MPGS Order Target minus actual number of Orders from acquirer(s) that Mastercard did not equalize (if applicable) minus actual number of Orders from acquirer(s) in cases of interruption of MPGS (if applicable) minus actual number of Orders from acquirer(s) in case of sub-standard performance of MPGS in any Country (if applicable)]

Clawback Percentage = One (1) minus the Percentage of Achievement

Pro-rata Clawback Amount = Sign-On Bonus multiplied by Clawback Percentage. For the avoidance of doubt, the Pro-rata Clawback Amount shall only apply if the Clawback Percentage is a positive number.

Notwithstanding the above, Mastercard shall have the right to claw back the entire Sign-On Bonus in the event of breach of Clauses 2.7, 2.8, 2.11.2, 3.6 or 3.8. Mastercard will in good faith analyse the impact of breach of Clause 3.8 and its resulting loss prior to the claw back of the Sign-On Bonus."

12. The provisions referred to in that last quoted paragraph were as follows:

(1) clause 2.7: agreeing not to encourage holders of Mastercard branded card to move to competing cards or converting Mastercard branded cards to competing cards;

(2) clause 2.8: agreeing to ensure the provisions of the CBA are complied with in relation to any cards where Delivery Hero divests of the relevant cardo portfolio;

(3) clause 2.11.2: agreeing not to use Support from Mastercard for the benefit of any competing brand;

(4) clause 3.6: agreeing to comply with anti-bribery and corruption legislation; and

(5) clause 3.8: a confidentiality obligation.

13. Contract Year 6 would have been the year from 29 September 2028. This was never reached, due to the termination of the CBA in 2022.

When did the right to the Sign-On Bonus accrue?

14. It is common ground that the termination of the CBA did not affect rights which had already accrued – or earned, or unconditionally acquired, as it sometimes put – although the effective termination of the CBA would prevent primary obligations accruing due thereafter: *Bank of Boston Connecticut v European Grain and Shipping Ltd (the Dominique)* [1989] AC 1056, 1098-1099, 1096 and 1111; *Chitty on Contracts* (34th ed), [27-079]. The issues between the parties in this case are:

(1) what had to occur for Delivery Hero to acquire an accrued right to the Sign-On Bonus?; and

(2) had those matters occurred prior to 9 October 2022?

What had to occur for Delivery Hero to acquire an accrued right to the Sign-On Bonus?

15. As it appeared from the skeleton arguments, the issue between the parties was limited to a dispute as to whether, as a matter of timing, all the events which had to occur before Delivery Hero acquired an accrued right to the Sign-on Bonus had occurred before termination.

16. However:

(1) Mr Millett KC raised a further argument in a supplemental note before the hearing, the gist of which was that Mastercard would arguably have had the right to recover the Sign-On Bonus, had it been paid, on the ground that there had been a total failure of consideration, which provided a defence to the claim for payment.

(2) At the hearing, Mr Millett KC developed that argument, to contend that Delivery Hero's right to the Sign-On Bonus was conditional upon it not being in material breach of the CBA when the Payment Request was made and/or when the 45-day period elapsed, which condition was not satisfied.

17. It makes more sense to deal with those arguments first, and then turn to the timing arguments.

(i) When did Delivery Hero's right to the Sign-On Bonus accrue?

18. Clause 1.4.1 of the CBA provides that the Sign-On Bonus was payable "at the Commencement Date." Further, the language of the first sentence of clause 1.3.2 makes it clear that the submission of a Payment Request is a means of recovering "the relevant Support payment *due*" and that Payment Requests are to be submitted "where Support payments are *due* under this Agreement" (emphasis added). Failure to submit a Payment Request within the requisite period leads to "any such unclaimed Support payment" being "forfeited", language which is consistent with an accrued or "vested" amount being lost thereafter.

19. All of that language strongly suggests, putting payment mechanics on one side, that Delivery Hero's entitlement to the Sign-On Bonus was only conditional on the CBA reaching the Commencement Date, save for the express and limited right of forfeiture the CBA provides. That is wholly consistent with the nature of the payment – a bonus for "signing on". Further, where the CBA imposes conditions on payments, it does so in clear terms. Thus clause 1.8.3 provides "the Human Resource Support is conditional on Client remaining in compliance with its obligations under Clause 2.4 below" and clause 1.9.5 provides "the provision by Mastercard is conditioned upon Client matching Mastercard's Marketing Support on a dollar-for-dollar basis". Further, far from being expressed to be conditional on Delivery Hero not being in material breach of the CBA, the CBA expressly provides for a carefully defined regime for clawback of the Sign-On Bonus:

(1) by reference to a complex formula, for Year 6 only, where the MPGS Annual Schedule is not satisfied;

(2) by reference to particular breaches of the CBA which are not alleged here; and

(3) the Sign-On Bonus is carved out from the more general right for set-off or recovery for material breaches in clause 3.5.1.

20. This is not a promising background for the suggestion that Delivery Hero's right to the Sign-On Bonus is subject to a further condition of not being in material breach of the CBA when the Payment Request is received and/or falls due for payment. When I asked Mr Millett KC which provisions he relied upon to establish that condition he pointed to:

    (1) Recital (3), which recorded the parties' desire to enter into an arrangement by which Mastercard would provide Delivery Hero with support "subject to the achievement by the Client of the agreed performance targets on the terms specified below". However, absent a term imposing the desired conditionality "specified below", a recital expressed in such general terms does not take matters further.

    (2) Clauses 1.3.2 and 1.4.1, with their references to the need for a valid Payment Request. However, those references do not tell you what is required for a Payment Request to be valid.

    (3) Clause 3.5.2 which was said to reveal what the Sign-On Bonus was "really for". However, that provision cannot justify a wider conditionality or right of recovery of the Sign-On Bonus than appears from its express terms, which are not engaged in this case.

21. Mr Millett KC pointed to the fact that in the event of the early termination of the CBA, Mastercard would not be able to invoke the clawback provisions even if it were the case that Delivery Hero had made it impossible for it to reach the MPGS annual schedule over the remaining years of the contract. However, that was because the CBA had identified only a limited category of breaches which gave it the right to clawback the Sign-On Bonus in advance of Year 6. Further, the effect of Mr Millett KC's argument would be as follows:

    (1) A material breach would prevent a right to the Sign-On Bonus accruing, even if Mastercard chose not to serve a material breach notice (such that its options under clause 3.5.2 remained open to it).

    (2) A material breach would prevent Delivery Hero from recovering any part of the Sign-On Bonus, even though clause 3.5.2 provided for a proportionate recovery in many circumstances.

    (3) A material breach would relieve Mastercard of the obligation to pay the Sign-On Bonus and/or give it a right to recover it in the event of a material breach in Contract Years 1 to 5, even though clause 3.5.2 only provides for a claw back right in Year 6, save in certain limited cases.

    (4) A material breach would provide a complete answer to the claim for the Sign-On Bonus and/or a complete right to recover it if paid: an even broader right of recovery than that afforded by clause 3.5.1 from which the Sign-On Bonus was expressly excluded.

22. Mr Millett KC's alternative argument is that, had it been paid, the Sign-On Bonus could be recovered back on the grounds of a total failure of consideration which provided a defence to the claim for payment. Mr Millett KC relied upon the following passage in Edwin Peel, *Treitel: The Law of Contract* (15th), [18-020]:

    > "The effect of termination on the primary obligations of the party in breach is exactly the same as its effect on those of the injured party: normally the party in breach is released from primary obligations which had not yet fallen due at the time of termination, but he remains

> liable to perform those which had already fallen due at that time, except where a payment which should have been made before termination was one which he could, if he had so made it, have recovered, even on termination for his breach, *e.g. where there has been a total failure of consideration.* These rules can be excluded by contrary provisions in the contract or by other evidence of contrary intention."

(emphasis added).

23. The authority cited to support the italicised passage is *Mirimskaya v Evans* [2007] EWHC 2073 (TCC). I have not found any discussion of the issue in that case, but the proposition seems intuitively correct:

    (1) Contracts involving the transfer of goods will frequently require some part of the purchase price to be paid in advance of the time of transfer.

    (2) In some cases, the correct legal analysis is that (as a matter of contract) the right to the early payment is not solely conditional on delivery of the goods, but also on the undertaking of preparatory work such as design and construction (*Stocznia Gdanska v Latvian Shipping Co* [1988] 1 WLR 574, 600). If so, the amount paid will not be recoverable even if the contract is terminated before the time for transfer arises.

    (3) However, the terms of the contract may provide that the only consideration for the payment is the transfer. This was the case in *Fibrosa Spolka Akeyjna v Fairbairn Lawson Come Barbour Limited* [1943] AC 32, in which one third of the price of machinery was payable on placing the order, and the balance against shipping documents. The case involved a successful claim to recover that payment. However, if it had not been paid, and Fairbairn Lawson had brought proceedings to recover it which had reached the court after the contract had been frustrated, its claim for the price would have failed because that amount would immediately have been recoverable by Fibrosa because the consideration for the payment had totally failed.

    (4) The legal basis for that outcome is the principle of circuity of action. In *Fibrosa*, 53, Lord Atkin considered the decision in *Chandler v Webster* [1904] 1 KB 493, which had rejected a claimant's claim to recover a payment made before a contract was frustrated on grounds of total failure of consideration, and entered judgment for the defendant judgment on its counterclaim for the balance of the price. Together with the other members of the panel, Lord Atkin held that the decision had been wrongly decided and should be overruled, and added:

> > "[I]f it was wrong in *Chandler v Webster* to refuse the plaintiff relief on his claim, it was also wrong to give the defendant judgment on his counterclaim. It is true that the right to receive the balance had accrued before frustration, but if the money had been paid it could have been recovered back as the £100 could, and the principles relating to circuity of action would afford a defence to the counterclaim."

24. However, my conclusion that Delivery Hero had done all it needed to do under the CBA to accrue the right to the Sign-On Bonus, subject only to the carefully calibrated contractual right to recover some or all of it in certain circumstances, means that it is simply not arguable that the consideration for that payment – in the *Fibrosa* sense – has failed. The CBA did not make the right to the Sign-On Bonus conditional on some event or activity occurring subsequent to the Commencement Date. I should in any event record that it is clear on the unanswered evidence before me that Delivery

Hero did undertake some activities pursuant to the CBA in the period between the Commencement Date and termination: marketing activity under clauses 2.3 and 2.11 of the CBA, carrying out negotiations and, in some cases, concluding agreements with MPGS-enabled utilisers under clause 2.5.4 and taking efforts to disburse rider salaries and make vendor payments using Mastercard-branded cards under clause 2.9. The extent or success of those activities is not a matter for this hearing, but there was no evidence before me establishing an arguable case that Delivery Hero had not undertaken any significant activity under the CBA, had that been a relevant enquiry.

25. There is a further reason why Mastercard's restitution claim is not arguable. As I have noted, clause 3.5 contains a carefully calibrated provision addressing the circumstances in which the Sign-On Bonus is recoverable. That contractual provision has significant implications for any claim in unjust enrichment to recover those amounts paid prior to the termination of the CBA. In *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161, 164, Lord Goff stated:

> "As between shipowner and charterer, there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate. Of course, if the contract is proved never to have been binding, or if the contract ceases to bind, different considerations may arise, as in the case of frustration (as to which see *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 4949 and now the Law Reform (Frustrated Contracts) Act 1943).With such cases as these, we are not here concerned. Here, it is true, the contract was prematurely determined by the acceptance by Pan Ocean of Trident's repudiation of the contract. But, before the date of determination of the contract, Trident's obligation under clause 18 to repay the hire instalment in question had already accrued due; and accordingly, that is the relevant obligation, as between Pan Ocean and Trident, for the purposes of the present case."

26. Whatever the limits of that principle, I am satisfied that it is applicable in this case, when the effect of such a claim would be to afford Mastercard a significantly more extensive right of recovery than the CBA permitted. It is well-established that the law of unjust enrichment cannot be used to achieve an outcome which directly contradicts the express terms of a contract (*Dargamo Holdings Limited v Avonwick Holdings Ltd* [2020] EWCA Civ 1149, [116] per Carr LJ) or to override express contractual obligations ([142] per Asplin LJ). That conclusion has recently been reinforced by the Supreme Court in *Barton v Morris* [2023] UKSC 3.

27. In these circumstances, it is not necessary to consider whether the effect of clause 3.5.1 would have been to preclude Mastercard from advancing a circuity of action defence in any event.

The 45-day argument

28. The issue here is whether:

    (1) (as it contends) Delivery Hero acquired an accrued right to the Sign-on Bonus on the Commencement Date: **Construction 1**; or

    (2) (as Delivery Hero contends in the alternative) Delivery Hero acquired an accrued right to the Sign-on Bonus after it had served a valid and timely Payment Request; **Construction 2** or

(3) (as Mastercard contends) Delivery Hero would only acquire an accrued right to the Sign-on Bonus after it had served a valid and timely Payment Request **and** 45 days had elapsed: **Construction 3**.

29. In this case I am satisfied that Construction 3 (on which Mastercard's case depends) is not correct. Mr Millett KC's argument to the contrary rested on the assertion that if Delivery Hero could not have recovered judgment for the Sign-On Bonus before the 45-day period had elapsed, it must follow that its right to the Sign-On Bonus as a debt had not accrued prior to that point. As it was put in his skeleton:

> "The normal rule is that on termination of a contract the parties are excused further performance of their primary obligations which remain unperformed: see Chitty on Contracts (34th Edn) Vol 1 para 27-079; Treitel, the Law of Contract (15th Edn 2020) para 18-017, 18-020. Payment of the SOB is unquestionably a primary obligation, and so on its termination of the CBA Mastercard was excused from performing it when it would have fallen due. Put another way, DH could not sue for the SOB on 2 September 2022, and its cause of action did not accrue until the expiry of 45-day credit period thereafter. To hold otherwise would deprive Mastercard of the benefit of the 45-day credit period to which the CBA expressly entitled it."

30. However, there is a well-established distinction between a debt accruing, and that debt being payable, and the former may occur even though the conditions for the latter have not. The concept of a *debitum in praesenti solvendum in futuro* is no esoteric feature of the law of obligations, but is the correct characterisation of almost all bank deposits where, even for an instant access current account, the debt owed by the bank to its customer only becomes payable on a demand (*Joachimson v Swiss Bank* [1923] 3 KB 110).

31. There are cases in which the contract provides that the point of payment will arise on or after a certain event, and the contract is terminated before that event happens – for example when freight is "deemed earned" on shipment but only payable on the surrender of a bill of lading, and the charterparty is terminated for repudiatory breach before the bills are surrendered. This was the case in *The Dominique*, in which Lord Brandon (at 1099) explained the position as follows:

> "Applying those principles to the facts of the present case it is necessary to consider whether the owners' right to the freight had been 'unconditionally acquired' by them before the termination of the charterparty. The circumstance that, by reason of the first phrase of clause 16, the charterers' obligation to pay the freight was postponed until after the termination of the charterparty does not, in my view, mean that the owners' prior acquisition of the right to the freight was conditional only. The postponement of payment was an incident attaching to the right acquired, but it was not a condition of its acquisition. It follows that, in accordance with the principles of law referred to above, the owners' right to the freight, having been unconditionally acquired before the termination of the charterparty, was not divested or discharged by such termination. I would therefore answer question (2) by saying that the owners' right to the freight survived the termination of the charterparty."

32. The same outcome followed in a case in which freight was "deemed earned" on loading, but 5% was payable after completion of the voyage, and the vessel was lost during the voyage (*Vagres Compania Maritima SA v Nissho-Iwai American Corporation (The Karin Vatis)* [1988] 2 Lloyd's Rep 580), and in sale of goods cases in which risk passed on shipment, but the price was expressed

to be payable a certain period after arrival, and the goods were lost at sea (*Alexander v Gardner* (1835) 1 Bing N Cas 671 and *Fragano v Long* (1825) 4 B&C 219).

33. In this case, I am satisfied that the right to the Sign-On Bonus accrues or vests no later than the submission of a valid Payment Request, and that the 45-day period merely stipulated the time for payment of that accrued debt. That construction does not, as Mr Millett KC suggested, deprive Mastercard of its 45-day credit period: it retains that period in which to pay, termination or no termination. This is not even a case, like *The Dominique, The Karen Vatis* and the sale of goods cases, in which the termination of a contract prevents the occurrence of the event by reference to which the time for payment has been defined in the contract (requiring the court to fix an alternative payment date by requiring payment after a reasonable time).

34. As to the points made by Mr Millett KC:

    (1) He relied on the fact that clause 1.2 of the CBA provided that "Support will be paid commencing from the succeeding quarter from the Commencement Date (**Support Period**)" but "for the avoidance of doubt, notwithstanding the commencement of the Support Period, the "Sign-On Bonus specified in Clause 1.4 below will be payable *from* the Commencement Date" (emphasis added).

    (2) The principal purpose of the second part of this clause is to make it clear the Sign-On Bonus may become payable even though other Support payments only become due "commencing from the succeeding quarter from the Commencement Date".

    (3) Language as to when the Sign-On Bonus became *payable* does not answer when it was *due*, nor does the word "from" provide any support to Construction 3. The wholly equivocal nature of the word "from" is reinforced by clause 1.4.1, the clause specifically concerned with the Sign-On Bonus, which provides that it is payable "at the Commencement Date".

35. Mr Hossain KC had an alternative argument to support this part of Delivery Hero's case, viz that the 45-day payment period in clause 1.3.2 did not apply to the Sign-On Bonus. This was on the basis that a more specific provision, clause 1.4.1, provided that the Sign-On Bonus would be payable on the Commencement Date, subject only to the receipt by Mastercard of a valid Payment Request:

> "The Sign-On Bonus specified in Exhibit A will be payable to Client at the Commencement Date, subject to the receipt by Mastercard of a valid Payment Request."

36. On this issue, which is more finely balanced, I prefer Mr Millett KC's construction:

    (1) Clause 1.3.2 is prima facie concerned with *all* Support payments, including the Sign-On Bonus, providing the definition of the term "Payment Request".

    (2) Clause 1.4.1 is not wholly consistent with that, with its reference to "at the Commencement Date", but that statement is qualified by the words "subject to the receipt .. of a valid Payment Request", using a defined term, the definition of which appears in clause 1.3.2, where it is accompanied by the 45-day and forfeiture provisions.

(3) Once again, I am satisfied that the particular target which clause 1.4.1 has in view is the distinction between the Sign-On Bonus, and other Support payments which only become payable from the succeeding quarter from the Commencement Date (clause 1.3.2),

(4) It is unlikely, although not impossible, that the parties intended that Mastercard would be in breach of the CBA if the US$40m was not paid by return in response to a Payment Request.

37. Accordingly, under clause 1.4.1, the Sign-On Bonus was payable at least on 2 September 2022, when Mastercard accepts that a valid Payment Request was received.

38. In these circumstances, it is not strictly necessary to decide whether the submission of a valid Payment Request was necessary for Delivery Hero's right to the Sign-On Bonus to accrue, even if it was not necessary for the 45-day period to elapse. However, the point was argued and my conclusions are as follows:

(1) Clear words are generally required before the provision of an invoice or demand by a party seeking to recover money under a contract will prevent time running for limitation purposes (albeit the non-provision of such a document may provide the putative debtor with a defence): see the authorities collected in *Rolls-Royce Holdings Plc v Goodrich Corp* [2023] EWHC 1637 (Comm), [246(v)].

(2) Any suggestion that time can run for limitation purposes in respect of a claim of this kind, but that it is not an accrued right for the purposes of determining whether it survives termination, is highly improbable. Time can only run on an extant claim, even if there is a procedural defence to it.

(3) The language of clauses 1.4.1 and 1.3.2 strongly suggest that the submission of a valid Payment Request is not necessary to render the Sign-On Bonus due, only (on my construction) payable.

(4) In these circumstances, I am satisfied that Construction 1 is the correct construction.

Had the relevant matters occurred before the 9 October 2022?

39. It is common ground that Delivery Hero served a valid Payment Request on 2 September 2022. It follows that on both Construction 1 and on Construction 2, Delivery Hero had acquired an accrued right to the Sign-On Amount before 9 October 2022. That is sufficient for Delivery Hero's purposes.

40. A further issue arises as to whether valid Payment Requests were submitted by Delivery Hero on 14 April 2022 and 24 May 2022 (a matter which is relevant to the calculation of interest). Mr Millett KC's argument that they were not proceeds as follows:

(1) Under clause 1.3.2, the validity of a Payment Request is expressly to be "determined by Mastercard in accordance with the terms of" the CBA.

(2) Those words gave Mastercard a contractual discretion to determine what was required to render a Payment Request valid, which was limited only by considerations of honesty, rationality and (presumably) absence of extraneous purpose (applying cases such as *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 and *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 (SC)), alternatively impose an implicit requirement that the Payment Request has to contain such information as was objectively reasonably

required (i.e. what Rix LJ, commenting on Mr Millett KC's submissions in that case, referred to in *Socimer* as the "objective" determination).

(3) Those conclusions follow from the fact that clauses 1.4.1 and 1.3.2 refer to the concept of validity, and yet there are no provisions in the CBA which govern validity so far as the Sign-On Bonus is concerned, and "few if any clues as to what constitutes a valid Payment Request".

(4) The words "in accordance with the terms of this Agreement" do not assist, because, in the absence of any terms of the CBA addressing validity so far as the Sign-On Bonus is concerned, the court should assume that something has gone wrong with the language and delete those words to make sense of the CBA or interpret them as meaning "in accordance with the commercial purpose of the CBA and the particular Payment Request".

41. I am unable to accept this construction:

(1) The concept of Support payments includes not just the Sign-On Bonus, but other kinds of payment as identified in clauses 1.5 to 1.14. Those provisions include detailed requirements for any claim for Support payments of the relevant kind:

(a) Customer Valuation Proposition Investment Fund support payments under clause 1.5 can only be used to offset costs incurred by Delivery Hero for particular purposes, were subject to a cap, were to be calculated on a particular basis and had to be supported by "such documents evidencing payment as Mastercard may, in its discretion, reasonably determine" (I note in passing that these parties knew how to create a contractual discretion when they wished to do so).

(b) Marketing Campaign Fund support payments under clause 1.6 are subject to similar conditions, save that there was no reference to the need to provide documents evidencing payment.

(c) Product Implementation Support under clause 1.7 is available up to USD1m, to reimburse expenditure undertaken for a specific purpose, by way of reimbursement of fees incurred "after presentation of such documents evidencing payment as Mastercard may, in its discretion, reasonably require."

(d) Human Resource Support under clause 1.8 provides time-limited support up to USD 500,000, by way of reimbursement of costs incurred for certain purposes, conditional on Delivery Hero remaining in compliance with clause 2.4 of the CBA on "presentation of such documents evidencing payment as Mastercard may, in its discretion, reasonably require."

(e) Marketing Support under clause 1.9 provides support for the promotion of "Relevant Cards", on detailed terms set out in Exhibit B to the CBA, by way of reimbursement using a complex formula, and based on Mastercard's "review of data from, among other things, the Issuing Bank's Quarterly Member Reports", Mastercard's clearing and settlement systems and "based on that review, Mastercard's determination of Client's performance". Support was conditional on agreement of a "written detailed marketing plan" and on Delivery Hero matching Mastercard on a "dollar-for-dollar in-kind basis".

(f) Advisors Support under clause 1.10 provides support on a "user pay" basis calculated by reference to the "Mastercard International GDV achieved by [Delivery Hero] during the relevant contract year." Once again, this was to be paid following Mastercard's review of a wide pool of data and "based on that review, Mastercard's determination of [Delivery Hero's] performance with respect to Mastercard International GDV." To access this support, Delivery Hero had to execute "a statement of work with Mastercard Advisors".

(g) Product Development Support under clause 1.11 is provided to offset certain types of product used to support the Relevant Card portfolio, once again to be calculated by reference to Mastercard International GDV following a determination by Mastercard based on a review of certain data. Payment is to be made by way of reimbursement of fees following "presentation of such documents evidencing payment as Mastercard may, in its discretion, reasonably require."

(h) Product Innovation Support under clause 1.12 is provided to offset costs incurred for certain purposes, to be calculated by reference to the Mastercard International GDV determined by Mastercard following a review of certain data, to be provided by way of reimbursement of fees following "presentation of such documents evidencing payment as Mastercard may, in its discretion, reasonably require."

(i) Core Issuance Fee Rebate under clause 1.13 provides a rebate calculated by reference to Mastercard Processed Domestic GDV in certain ratios and by reference to certain fees payable on Relevant Card use.

(j) These are supplemented by further contractual requirements in clauses 1.3.2, 1.3.3 and 1.3.4.

(2) It will be immediately apparent that for the vast majority of Support payments, there are complex eligibility and calculation criteria under the CBA, and in many cases a requirement for supporting evidence to Mastercard's reasonable satisfaction which will determine whether a Payment Request is "valid", and in relation to which Mastercard will need to make a determination. The reference to Mastercard "determining" the validity of a Payment Request "in accordance with the terms of this Agreement" therefore makes perfect sense. There is no gap in the CBA which requires to be filled, nor do the words "in accordance with the terms of this Agreement" require a strained construction, still less to be read out of the CBA altogether.

(3) I accept that there is more to be said on Mr Millett KC's part about the reference to a "valid Payment Request" in clause 1.4.1. However, even here, the concept of "validity" is not entirely without content, extending to the identity of the person seeking payment, the amount of the payment and the timeliness (for clause 1.3.2 purposes) of the request.

(4) Further, great care which has been taken in the CBA to identify what requirements apply to Payment Requests for particular types of Support payment, and to identify when payment requires a determination by Mastercard, either as to the calculation or the supporting evidence. That wholly undermines the suggestion that there is an implicit right on Mastercard's part to impose such requirements in relation to the Sign-On Bonus.

42. In these circumstances, I reject the suggestion that it was open to Mastercard to impose requirements for a Payment Request for the Sign-On Bonus which do not appear in the CBA before such a request can be valid. The only requirements which do appear in the CBA for a Payment Request for the Sign-On Bonus are that:

    (1) it is made by Delivery Hero itself, rather than an affiliate;

    (2) it is a demand for the Sign-On Bonus, rather than some other amount; and

    (3) it is made within 9 months of the applicable Contract Year.

    I accept that it is also an implicit requirement that Delivery Hero had identified the bank account into which the payment is to be made.

43. There is no suggestion that any of those requirements were not satisfied in relation to any of the Payment Requests whose validity Mastercard seeks to challenge.

44. Delivery Hero focussed its alternative argument on Payment Requests dated 14 April and 24 May 2022, and I will briefly consider what is said about those.

45. As to the 14 April request:

    (1) This was an email with Delivery Hero's bank account details for transferring the Sign-On Bonus. The email said, "please find the Delivery Hero SE (Germany) bank account request for transferring the Sign-On Bonus". This was clearly a Payment Request for the Sign-On Bonus.

    (2) The fact that Mastercard had taken the position in correspondence (including in Ms Soh's email to Ms Yasadi of 2 March 2022) that it was going to prepare a PowerPoint document setting out what had to be submitted for each claim does not avail Mastercard, there being no right under the CBA for Mastercard to impose such requirements.

    (3) Accordingly, the registration form which Ms Soh asked Delivery Hero to complete on 22 April 2022 and the PowerPoint pack and forms sent through on 29 April 2022 had no contractual status.

46. As to the 24 May request:

    (1) This was sent after Delivery Hero had provided its bank details and tax information in a letter (as requested by Mastercard) on 5 May and on 24 May signed the registration form sent through by Mastercard on 29 April 2022.

    (2) This communication clearly fell to be read against the background of Delivery Hero's (still unfulfilled) request for payment, and the ongoing correspondence as to what Mastercard said it required before payment would be made. I am satisfied that, to the extent that the absence of the registration form meant that the prior request for payment was somehow not valid, it was clearly perfected at that point.

    (3) Mastercard's response to that request did not come for more than two months, and then in apologetic terms which suggested the document had been overlooked, and everything was being arranged at its end (emails of 27 July). It was only on 5 August that further administrative requirements were communicated, seeking a change to the name of the Mastercard addressee of the template letter to reflect an "organization change" within

Mastercard. This was a fresh request – Delivery Hero had not previously been asked to address the template letter to that particular individual.

47. Had it been necessary for Delivery Hero to rely upon earlier Payment Requests, then on the construction of the CBA I have reached, Mastercard has no realistic prospect of establishing that they were not complied with, nor is there any realistic prospect of the case presenting itself any differently at trial to the position as it appears before me.

The claim for interest

48. This is a claim for USD. In *Lonestar Communications Corporation LL v Kaye and ors* [2023] EWHC 732 (Comm), I reviewed the authorities on interest rates awarded on USD amounts under the Senior Courts Act 1981 in the Commercial Court following the discontinuation of LIBOR and held at [14]-[16] that:

    (1) The default interest rate for US$ awards in the Commercial Court going forward should be US Prime, irrespective of whether the claimant has a US place of operations or not and irrespective of whether the claim is a maritime claim or not, absent evidence to support the use of another rate.

    (2) There is no default rule that there will always be an uplift over and above US Prime in an interest award. In some cases, even without evidence, it will be obvious from the general characteristics of the claimant that it would have to pay a higher rate to borrow US$ than a bank's most creditworthy customers. In such cases, the court may well be persuaded to order interest at US Prime plus 1% or US Prime plus 2% for certain types of claimant.

    (3) Higher uplifts than that are likely to require evidence to justify them.

49. In this case, Delivery Hero initially sought interest under the Senior Courts Act 1981 at a rate of 9.09 per cent. This rate reflected Delivery Hero's actual costs of funds by reference to debt financing raised under a senior debt facility entered into on 12 May 2022 with an interest rate of the three-month term Secured Overnight Financing Rate plus 5.75 per cent. I am told that this interest is paid in cash on a quarterly basis and is not compounded. That is unusual in commercial borrowing, and it is possible that the rate reflects this. However, under s.35A of the Senior Courts Act 1981, the court only awards simple interest, and it does not raise the rate awarded to provide a proxy for a compound interest rate. No copy of the facility has been provided and I am not in a position to determine its duration, terms or whether it has any special features.

50. In these circumstances, I accept that the facility suggests that a borrower with Delivery Hero's general characteristics is likely to have to pay an uplift over US Prime to borrow, but not that the facility establishes the actual rate appropriate for a s.35A award. In these circumstances, I am satisfied that US Prime plus 1% is the appropriate rate. On my conclusions, that rate will run from 45 days after the 14 April Payment Request. It is agreed that that the amount of interest payable in respect of the period up to judgment is USD 3,583,013.70.