IN THE COMPETITION APPEAL TRIBUNAL **Case No 1266/7/7/16**

ON REMITTAL FROM THE SUPREME COURT [2020] UKSC 51

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant/Proposed Class Representative

- and-

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

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

Respondents/Proposed Defendants

SUBMISSIONS ON BEHALF OF MR. MERRICKS CBE FOR THE REMITTED CPO HEARING

References are given to the bundle accompanying these submissions in the form [Tab/Page]

1. Mr. Merricks respectfully contends that his application for a collective proceedings order ("CPO") meets the relevant statutory conditions and should be granted. Mastercard argues that the application should not be granted in the form proposed for two reasons: first, that deceased persons cannot / should not form part of the class; and, secondly, that the CPO should not include the issue of compound interest.

2. Both of these objections are unfounded. As explained in more detail below:

    a. It would be wrong in principle to exclude deceased persons from the class; "*domicile*" relates to jurisdiction as between countries, not to being alive or dead; there is no statutory bar to the inclusion of deceased persons, and their exclusion

would frustrate the aims of Parliament; and nor would inclusion of deceased persons give rise to practical difficulties that are of relevance at this stage.

b. The class representative proposes to establish the compound interest claim on an aggregate basis. Mastercard's objection proceeds from the premise that compound interest will need to be established on an individualised basis but this objection ignores the effect of s. 47C(2) of the Competition Act 1998 ("CA 1998") [**6/15-16**].

DECEASED PERSONS

3. Mastercard submits that deceased persons cannot, or alternatively should not, form part of any certified class (§10). In particular, it says:
    a. As a matter of law, deceased persons are excluded from the opt-out class since they are not "*domiciled*" in the United Kingdom on the domicile date (§15(a); §20).
    b. Further or alternatively, the inclusion of the claims of deceased persons would cause problems and complexity such that the statutory requirements of commonality and suitability would not be satisfied (§15(b); §23).

4. Mastercard's submissions are wrong and should be rejected by the Tribunal for the following reasons:
    a. There is no legal bar to the inclusion of deceased persons in the class. The domicile criterion in section 47B(11) of the CA 1998 [**6/14-15**] serves to establish which claims are within the jurisdiction of the UK courts. Its function is not to exclude estates from advancing claims under the collective action regime. Deceased persons can be domiciled on the domicile date, as is clear by looking at how estates are handled for other legal purposes.
    b. The inclusion of deceased persons in the class would not entail any practical problems or complexity. Claims in respect of loss caused by competition law infringements survive death and form part of the assets of the estate, and the estate can be represented in respect of those claims in just the same way as it is for any other asset. Furthermore, insofar as any additional steps may need to be taken to deal with the claims of estates when it comes to distribution, these are not matters

going to the statutory requirements of commonality and suitability and are not matters for this remittal hearing.

A. ***"Domicile" does not, as a matter of law, exclude deceased claimants***

5. S. 47B(11) CA1998 [**6/14-15**] provides as follows:

> " *'Opt-out collective proceedings' are collective proceedings which are brought on behalf of each class member except-*
>
> *(a) …*
>
> *(b) any class member who –*
>
> *i.* ***is not domiciled in the United Kingdom at a time specified****, and*
>
> *ii. does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.*" (emphasis added)

6. Mastercard argues that a deceased person cannot be "*domiciled in the United Kingdom*" at "*a time specified*", given that the time in question will normally post-date the CPO hearing.

7. Mastercard's argument is excessively literal and incorrect. The legislation has the objective of facilitating and enabling claims by consumers through collective proceedings.[1] It would be a very significant step to say that estates cannot benefit from this new form of action, even though they could bring individual claims. The tortious cause of action survives the death of the claimant: section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 [**2/6-7**] establishes the default position that "…*on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate…".* Claims for damages for breach of competition law do not come within any exception to that rule. Had Parliament wished to exclude such claims, and prevent recovery in respect of loss caused to persons who die before collective proceedings are certified, it would have said so expressly. S.47B(11) [**6/14-15**] certainly says nothing of the kind. That provision serves

[1] see *Merricks v. Mastercard* [2020] UKSC 51 (hereafter "***Merricks SC***") per Lord Briggs at [3], [45], [53].

the different purpose of ensuring that only claims within the jurisdiction of the UK courts are included within the opt-out class. The estate of a deceased person will be domiciled in the UK at the relevant date, if the person was domiciled in the UK at the time of their death.

8. That the purpose of s.47B(11) [**6/14-15**] is jurisdictional is evident from both the language of the regime and in the preparatory materials. In particular:
    a. The test of "domicile" in the collective action regime is the well-established statutory test: see s.59(1B) CA98 [**6/19**]:

        "*Sections 41, 42, 45 and 46 of the Civil Jurisdiction and Judgments Act 1982 apply for the purpose of determining whether a person is regarded as "domiciled in the United Kingdom" for the purposes of this Part*."

    b. As to the CAT's Guide to Proceedings (the "Guide"), §6.8 uses the shorthand of "*foreign*" to refer to class members who are not domiciled here, reflecting the fact that the test distinguishes between persons within and outside the jurisdiction (and not between the living and the dead):

        "*Where a class member opts in to opt-in proceedings, or (if he or she is domiciled in the UK on the domicile date) does not opt out of opt-out proceedings, that member becomes a "represented person". Similarly, a* ***foreign class member*** *who opts in to opt-out proceedings becomes a "represented person".*" (emphasis added)

    c. "*Private Actions in Competition Law: A consultation on options for reform – government response*", published by the Department for Business, Innovation and Skills in January 2013, [**17/345-346**] contains the following:

        "*Jurisdiction*

        5.56. The Government recognises that business would rightly have concerns if a claim could be brought against them in the UK courts on behalf of anyone in the world and that these concerns would be exacerbated if there was any risk of them paying compensation twice for the same offence. It notes that both the Civil Justice Council, in its Draft Court Rules for Collective Proceedings (2010) and the drafters of the Financial Services

> *Bill (2010), proposed that foreign claimants would have to actively opt-in to a claim, rather than automatically being included. The Civil Justice Council noted in the Explanatory Notes to the Rules that these provisions "were intended to avoid any arguments in relation to national sovereignty which might arise if the provisions purported to assert jurisdiction to decide cases for foreign domiciliaries who have taken no active part in the proceedings."*
>
> *5.57.* ***The Government has therefore decided that the 'opt-out' aspect of a claim will only apply to UK-domiciled claimants****, though non-UK claimants would be able to opt-in to a claim if desired.*" (emphasis in original)

9. In other words, s.47B(11) [**6/14-15**] is grappling with the issue of how, in an "opt-out" regime, the courts ensure that they do not purport to exercise jurisdiction over persons in respect of whom they have no personal jurisdiction. As Professor Rachael Mulheron remarks in her article "*Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom"* (2019) 15 Journal of Private International Law 445-489, 445 [**16/300-301**]:

> *"In an age where improvements in technology and transport mean that goods and services are extensively distributed and consumed across the globe, and when widespread grievances about those goods or services arise, cross-border class actions have proliferated. In the case of opt-out class actions, the question immediately arises: how is a court to assert personal jurisdiction over "non-resident class members" – ie those class members domiciled in places outside of the jurisdiction of the court ("the domestic court") in which the class suit has been filed? Those non-resident class members may be congregated in one foreign jurisdiction, or they may be resident in many. Precisely how class actions legislation, and the traditional case derived principles of private international law, should combine to handle this conundrum has raised considerable difficulties for legislatures and courts alike."*

10. Professor Mulheron goes on to consider how various different class action regimes have confronted this issue. Referring to s.47B(11) as *"the UK's Jurisdiction Provision*", she notes (at p.449) that "…*some very disparate views have emerged across the Comparator Jurisdictions as to how to "anchor jurisdiction", which are quite different from the thinking that underpinned the UK's Jurisdiction Provision…*" [**16/304**].

11. S.47B(11) [**6/14-15**] may readily be applied to ensure that a claim pursued by the estate of a person who has suffered loss as result of a defendant's breach of competition law is one over which the Tribunal has personal jurisdiction. In particular, an individual's domicile is fixed at the date of death and then endures for all relevant legal purposes. Accordingly, just as the domicile of the deceased person at the date of death will remain their domicile for inheritance tax purposes, so too does it remain their domicile at the so-called "domicile date" fixed by the Tribunal. All that is required is to ascertain what the deceased person's domicile was at the date of their death. If the person was domiciled in the UK at the date of their death, then that person (through their estate) will be domiciled in the UK at the date fixed by the Tribunal for the purposes of s.47B(11) [**6/14-15**], and the Tribunal can exercise personal jurisdiction over the estate's claim that is included within collective proceedings.

12. It is a relatively straightforward matter to determine whether the person was domiciled in the UK at the date of their death. As stated above, domicile in respect of individuals is determined by reference to s.41 of the Civil Jurisdiction and Judgments Acts 1982 ("CJJA") [**3/8-9**]. In summary, that provides that a person is domiciled in the United Kingdom if (a) he/she is resident here, and (b) the nature and circumstances of this residence indicate that he/she has a substantial connection with the UK. There is a presumption that a substantial connection exists where the person has been resident in the UK for the last three months or more. In Mr. Merricks' submission, this test is likely to be fulfilled in the case of the overwhelming majority of class members. In particular, having had regard to s.41 CJJA [**3/8-9**], the class definition itself applies a requirement that the class member must (during the infringement) have resided in the UK for a continuous

period of at least three months (see para 22 of Mr. Merricks claim form[2]). Accordingly, the proposed class is limited to those who have, at some point, fulfilled the s.41 CJJA test.

13. Mastercard seeks to persuade the Tribunal to adopt an excessively literal interpretation of a jurisdiction provision in order to achieve a very significant exclusion from the scope of the collective actions regime, namely, the exclusion of all claims for compensation where the person who has suffered loss has died before the date appointed by the Tribunal. It is worth recalling that, in this case, deceased persons *have* suffered losses at the hands of Mastercard. There is no indication anywhere in the statute that Parliament intended a wrongdoer to benefit from such a windfall. On the contrary, the purpose of the collective proceedings regime is to facilitate access to justice for all those individuals (including their estates) who have suffered loss.[3]

14. Many collective proceedings will involve claims where the claimant is deceased:
    a. Follow-on claims, in particular, may relate to infringements which took place and caused damage to the victims many years ago. The investigation and decision-making by the Commission or the CMA, together with the time taken for the appellate process, means that there will often be a significant time lag between the infringement and the collective proceedings even being issued, and yet victims of a cartel can die on any day of that long period. In the present case, the Commission began its investigation in 2004, issued its infringement decision in 2009, and then Mastercard appealed that decision, with the European Court of Justice finally dismissing Mastercard's appeal in 2014 – some 10 years after the Commission's investigation began.
    b. Any infringement – standalone or follow-on – may endure for many years (with the infringement period in the present case being 16 years).
    c. Even post-issue and pre-CPO (and similarly post-CPO), victims will die, in particular in a case such as the present, involving appeals from the refusal of a CPO.

[2] Which is contained in the main hearing bundle for the remittal hearing, at [A/1/7].
[3] see fn 1 above.

15. The collective action regime should accommodate that obvious reality, in accordance with the core legislative purpose of vindicating legal rights and dis-incentivising legal wrongs, and bearing in mind that "domicile" relates to jurisdiction. That deceased persons who are victims should not be arbitrarily excluded is particularly stark in respect of a "top-down" aggregate loss case such as the present, in which the total loss to the class as a whole (including the deceased person victims) will be quantified on a methodologically sound basis, using VoC that relates to their losses. It would mean that VoC relating to their losses would need to be excluded from the claim, even though recovering those losses is as methodologically sound as the recovery of the losses of all of the other victims. Again, there is no dispute that those deceased persons *did* suffer loss, and no dispute that Mastercard's infringement of competition law (which should be dis-incentivised) caused that loss. Those deceased persons are, therefore, plainly within the purposive intent of the regime. As Lord Briggs states: "… *justice requires that the damages be quantified for the twin reasons of vindicating the claimant's rights and exacting appropriate payment by the defendant to reflect the wrong done*…".[4] This submission has all the more force when, in a case such as the present, it is universally accepted that the estate of a deceased person could not as a practical matter have brought an individual claim because it would not have been economical to do so and, therefore, a collective action is the only means by which their estate can now recover the losses that they suffered.

B. *<u>There is no problem or complexity with the inclusion of the claims of deceased persons</u>*

16. Mastercard's alternative argument is that, even if the legislation does not exclude claims for loss suffered by persons who have since died, it would be too complicated as a matter of practicality to include such claims.

17. First and foremost, alleged practical problems simply asserted by a wrongdoing defendant at the CPO stage in order to avoid paying compensation for significant losses that it has caused should be disregarded by the Tribunal. The fact is that estates can and do pursue

[4] *Merricks SC*, [53].

other actions. That is all that the Tribunal need recognise in order to dismiss this alternative argument.

18. In any event, secondly, the assertions of complexity are incorrect. There are no problems or complexity with the inclusion of the claims of deceased persons in the proposed collective action, and certainly none that should prevent a methodologically sound claim for the pursuit of losses (which the Supreme Court considered Mr. Merricks has at least a reasonable prospect of proving at trial, at least to some degree[5]) to victims being held up at the CPO stage. Insofar as there may be particular requirements to enable estates to participate in the recoveries from Mastercard, these matters are for the distribution stage of proceedings, with detailed questions of likely evidential requirements patently inappropriate for consideration at the present CPO stage.

Overview of how estates are handled in practice

19. Where a deceased person has made a Will, there are named executors. Choses in action, including legal claims, vest automatically in the executors on death, along with the rest of the estate. In certain circumstances, though not for tortious claims, an executor needs to provide evidence of their authority to deal with the assets, which is fulfilled by a Grant of Probate.

20. Where a deceased person has not made a Will, there is no executor. Two alternative course may be taken here:

    a. The court may appoint an administrator pursuant to Letters of Administration. The administrator may be a professional. Alternatively, the administrator may be next of kin. In that regard, the order of priority to be administrator is set out in the Non-Contentious Probate Rules 1987, rule 22 [**5/12**]. That order mirrors the order of priority in respect of the right to inherit the estate under the intestacy rules, which are set out in the Administration of Estates Act 1925, s.46 [**1/3-5**]. Broadly speaking, the order is: wife/husband/civil partner, children, grandchildren, parents, siblings (whole), siblings (half), grandparents, uncles/aunts, etc.

[5] *Merricks SC,* [64(d)], [72].

b. In the majority of cases, no administrator will be appointed. Often, it is disproportionate and unnecessary for this step to be taken, for example, where the assets are low value or are held jointly (such as joint bank accounts or property) and pass automatically as a matter of law. In such circumstances, the pragmatic approach is taken that assets are paid to the next of kin (i.e. a colloquial term for the person who would inherit under the laws of intestacy and who has priority in the list of potential administrators[6]). This pragmatism is reflected by, for example, the approach of all major high street banks. They use forms, such as the example attached from HSBC [**19/354**], to allow claims by "*next of kin: no valid Will exists*", on the basis that the claiming next of kin indemnifies HSBC, should a competing claim subsequently be made.

21. Accordingly, the position is that – despite the fact that most estates do not have a Will or Letters of Administration – nevertheless they are dealt with perfectly satisfactorily by the next of kin in the real world. In Mr. Merricks' submission, so too should the claims of deceased persons in the present case be capable of sensible and pragmatic handling. During the "opt-out" process, following grant of a CPO, it should be not difficult for any estates, acting through an executor, administrator or next of kin (providing any documentary evidence in support), to opt-out if that is their choice. It should however be noted that, as a matter of practicality, estates represented by executors or administrators have an on-going duty to maximise the assets of the estate; it is reasonable to suppose that they are thus less likely to wish to opt-out than other members of the class. The position is likely similar for any next of kin, for the reasons adverted to at paragraph 23(c) below.

[6] The death of one next of kin will mean that the subsequent next of kin, in the order of succession, takes his place. By way of example, if a husband with a claim has died intestate and his wife is alive, she will be able to bring his claim. If the husband died and then the wife died, their next of kin would be their daughter. She would be next of kin both for her father's estate (and any future assets due to it) and for her mother's estate. The whole point of the laws of succession which address intestacy is to deal with this sort of issue. Accordingly, the suggestion by Mastercard that the potential for further deaths in a family cause some particular difficulty or problem when it comes to an estate participating in the damages that are recovered from the proposed collective proceedings is misconceived and wrong.

Mastercard's first argument: "…*impractical and highly complicated to identify the persons entitled to any share of the damages due to the deceased estate*…" (§25)

22. This issue does not even arise. Mr. Merricks does not propose to divide claims by estates into "shares" by reference to their ultimate beneficiaries. The distribution of estate assets is not a matter for him, but for the proper representative of the estate. Instead, Mr. Merricks is concerned only that such estates can participate properly in the claim, in particular (i) by exercising their right to opt-out, should they so choose; and (ii) by claiming their damages entitlement in the distribution phase of proceedings. They can do both without any legal or practical difficulties.

23. In relation to the practicalities of that participation, Mastercard asserts that "…*most executors and personal representatives will have completed their roles many years (if not decades) ago and are unlikely to have maintained the paperwork which would be required to prove their status and/or make a claim. Many will themselves now be retired (in the case of professionals), very elderly, dead or no longer living in the United Kingdom*…" (§25(a)). As to this assertion:

    a. The authority of an executor or personal representative (under a Will, Grant of Probate or Letters of Administration) does not cease. It continues indefinitely.[7] Mastercard is wrong to describe them as having "*completed their roles*". To the contrary, and as noted above, executors and personal representatives are under a duty to continue to collect assets due to the estate and distribute them accordingly, and it is reasonable to suppose that they are thus less likely to wish to opt-out, and arguably more likely to participate in a distribution, than other members of the class.[8]

[7] See (*inter alia*) s.39 of the Administration of Estates Act 1925 [**1/2**]which provides that, "*until the period of distribution arrives*" – meaning until the assets have all been collected in and distributed – a personal representative continues to enjoy all the various powers of disposition and dealing in the deceased's assets provided for in that Act. In addition, an executorship is an office of *personal* trust and cannot be assigned, see *Re Skinner* [1958] 1 WLR 1043 [**9/67-74**] and *Bedell v Constable* (1668) Vaugh 177 [**7/21-32**]. Only pursuant to s.50 of the Administration of Justice Act 1985 [**4/10-11**], which requires an Order of the High Court, can a personal representative be relieved of office.

[8] Although, as previously submitted to the Tribunal, it is difficult to see why any individual would opt out in this case, given the immense cost of an individual action versus the relatively low rate of individual recovery, such that the collective action is the *only* practical way forward (also see *Merricks SC* at [54]).

b. It is pure speculation on the part of Mastercard that executors / personal representatives will now, themselves, be dead, or elderly, or not have retained paperwork. Unsurprisingly, the death of an executor / personal representative is not an uncommon occurrence, and is provided for in well-established provisions, including statute and case law, which are routinely called upon in practice.[9] As to the assertion that they are elderly, even to the extent that is correct[10] (i) it does not follow that they cannot perform their duties, and (ii) there are just as likely to be elderly living class members, but they are not denied the ability to participate in the claim. As to any alleged failure to "[maintain] *the paperwork*", (i) the probate Registry has scanned all Wills and Grants of Probate issued since 1858 and they are readily available (in return for a very small fee) at the "find a will" service (https://www.gov.uk/search-will-probate) and (ii) it is scarcely a reason to deny the participation of a victim that paperwork may have been misplaced. The fact that a personal representative no longer resides in the United Kingdom is, similarly, not a reason to deny certification of the claims of estates of deceased persons.

c. Further, where an estate is being represented by next of kin, that person will have every incentive to engage with this process as they will stand to inherit the share of damages recovered, and will be able to make the claim for the estate at the same time as making their own claim, given that they will in many cases also be a member of the class.

24. Mastercard suggests that these practical matters give rise to issues that are not "common" and (presumably), therefore, should not be certified. This suggestion is of no merit. The practical matters asserted by Mastercard are not legal issues that require resolution in these

[9] Precisely what happens on the death of an executor / personal representative will depend upon, in particular, when she dies, in what capacity she was acting or intending to act prior to death, and whether the appointment is a sole or joint appointment. Full details of the precise relevant provisions (which include in particular s.7 of the Administration of Estates Act 1925 [**1/1**]and the Non-Contentious Probate Rules, Rule 22 [**5/12**]) that apply in each case are beyond the scope of these submissions, but as noted they are well-established provisions which are routinely called upon in practice.

[10] In fact, Mr. Merricks understands that executors and personal representatives are often chosen from a younger generation precisely to circumvent such issues.

CPO proceedings. They are *possible* practical issues that *may* arise on distribution, at the point when a person seeking a distribution on behalf of an estate will need to provide evidence that she is entitled to act in that capacity. In other words, these practical issues are no different in nature to other practical issues that may arise at the distribution stage relating to the evidential requirements for demonstrating class membership.

25. It follows that the only question for the Tribunal is whether the entirely speculative practical difficulties identified by Mastercard mean that the inclusion of claims on behalf of deceased persons leads to the conclusion that the claims are not "suitable" to be brought in collective proceedings. With respect, that is plainly not the case. As Lord Briggs held (see *Merricks SC* at [80]), the question of suitability is a relative one, and it is clear that the practical issues identified by Mastercard would apply with equal force to claims that were pursued on an individual basis.

Mastercard's second argument: inheritance tax

26. In §28 of its submissions, Mastercard argues that "…*it would be necessary to take account of inheritance tax for any estate that was subject to such tax. The effect of inheritance tax would not be a common issue across the class: it would depend on the size of the estate and on a complex range of tax provisions (including concessions and tax relief). The effect and calculation of inheritance tax across the class would be made significantly more complex in view of the fact that many estates will have been split between different heirs, and the fact that many heirs may themselves have passed away, leading similar issues to arise once again…*".

27. This is a bad point. In particular:

    a. There is no need for inheritance tax to be calculated "across the class". Any payment of inheritance tax would be a matter for each individual estate once it is placed in funds from a recovery, and has nothing to do with the collective proceedings. For the avoidance of doubt, because the damages award is subject to inheritance tax in the normal way, there is no basis for a deduction of the amount

of inheritance tax from quantum to reflect proper compensation (as per the Rule in *Gourley's case* [**8/33-66**]).

b. Without prejudice to Mr. Merricks' primary position that inheritance tax is simply irrelevant for the purposes of calculating and distributing damages to the proposed class, even if it could be suggested that any complexity involving inheritance tax might pose a significant obstacle to claims being made on behalf of estates, such suggestion is not supported by any evidence and also does not reflect the proportion of affected estates. Only 3.9% of UK deaths resulted in an inheritance tax charge in 2017/18.[11] The overwhelming majority of deceased consumers' estates will not be taxable[12], nor is the estimated compensation in this case likely to put them over the taxable limit: a bequest of assets to the value of up to (but excluding) £325,000 attracts no inheritance tax.[13]

28. Accordingly, this point is irrelevant to commonality and suitability.

C. ***Exclusion of the claims of deceased persons***

29. For all the reasons set out above, Mr. Merricks says that deceased persons can and should be included in the collective proceedings. However, if the Tribunal decides otherwise then, as set out in his CPO Reply, there will need to be "…*an appropriate reduction to the quantum claimed in order to reflect the purchases made by persons now deceased…*" (§170(b)[14]). In §14(a) of its submissions for this hearing, Mastercard says that "*Subject to the question of what an "appropriate reduction" may be, this latter suggestion would be consistent with Mastercard's position at this hearing*."

[11] Inheritance Tax Statistics published 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903290/IHT_Commentary.pdf [**18/347-353**]

[12] For example, there is no inheritance tax payable whatsoever in respect of the passing of assets to a spouse or civil partner.

[13] This limit is even higher (by a further £175,000) where the estate comprises a home being passed to the deceased's child/children. In addition, a surviving spouse / civil partner can utilise their predeceased spouse / civil partner's inheritance tax allowances, giving him / her a tax-free threshold of up to £1 million. This demonstrates why Mastercard's arguments withstand no scrutiny when properly examined.

[14] Contained in the main hearing bundle at [A3/tab 20/p.755].

30. Mr. Merricks contends that there are two obvious approaches to the "appropriate reduction" question. Both approaches are consistent with the aggregate approach to loss, and thus the quantum of the excluded claims would be assessed at a non-individualised level. They are as follows:

    a. The first method is an adjustment based on the proportion of people who have died out of the total population of over 16s during the relevant year of the infringement period. It then applies a uniform average spend per person.

    b. The second method is similarly based on the proportion of people who have died out of the total population of over 16s during the relevant year of the infringement period. However, rather than assuming a flat rate of spend, it uses average spend per person per age group (calculated by reference to the average household expenditure per person by age group). When combined with data in respect of the relevant age groups of people who have died, this approach gives a closer estimate of their likely spend.

31. Mr. Merricks would suggest that the second method is to be preferred since it is more accurate (and, unlike the adoption of such an approach at the distribution stage, does not involve either additional levels of proof from class members nor adopting a regime in which older people receive less damages). However, there is no reason for the Tribunal to determine which approach should be used at present, since it impacts only on the quantum of the aggregate award. Accordingly, were the Tribunal to order that the claims of deceased persons were excluded from the collective proceedings, Mr. Merricks would revisit this issue in due course.

COMPOUND INTEREST

32. Mastercard submits that any CPO should not include compound interest. It argues that "*…compound interest is not a common issue and/or is not suitable to be resolved on a*

collective basis in this case…" (§2(b)). In overview, it says the following about compound interest:

a. It is not a common issue because it is necessary for each individual member of the class to prove their own specific loss and the position of class members will be different in respect of the type of loss that they suffered (§§38-42).
b. It is not suitable for determination on a collective or aggregate basis because (i) the claims assume that loss will have been suffered, which is said to be contrary to *Sempra Metals* [**12/133-226**]; and (ii) some class members may have mitigated their loss or have been unaffected by the loss (§§46-48).
c. Further, sub-classes do not resolve this problem because such an approach takes no account of (i) individuals who would have adjusted their spending, (ii) differences among those who borrowed or those who were in credit, or (iii) class members who would fall into more than one category. Further, there is no suggestion of how membership of any particular sub-class would be proven.

33. Mastercard's submissions all ignore the ability to claim an aggregate award of damages under s.47C(2) CA1998 [**6/15**] "…*without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person*…" Mr. Merricks has a "*methodologically sound*" approach to seeking an aggregate award of the principal amount of damages without any reference to individual assessments, and similarly proposes to take the permitted and appropriate aggregate approach to the compound interest losses suffered by the class as a whole (or alternatively, at least for the borrower sub-class, as set out below); he does not propose to prove the loss suffered by each individual member of the class or sub-class, nor does he need to – as confirmed by both the Court of Appeal and the Supreme Court. In those circumstances, the claims for compound interest do raise common issues; moreover, those claims are suitable for determination in collective proceedings; just as with the remainder of the claims, interest could not sensibly be determined through individual litigation. Further, there is no sensible policy reason to refuse to certify the issue of compound interest at this stage, since similar issues are likely to arise in respect of simple interest and since the collective actions regime is sufficiently flexible to manage this issue going forward.

A. ***Aggregate damages under s.47C(2) are available in respect of compound interest damages***

34. Mastercard's arguments rest on its contention that it is necessary for each individual member of the class specifically to prove their individual compound interest losses. See, for example:
    a. The passages it sets out from *Sempra Metals* [**12/133-226**] (in §31), its summary of the requirement to prove loss (in §32) and its conclusion "…*a claim for compound interest therefore* ***requires*** *proof that the infringement* ***caused*** *a specific compound interest loss and the* ***quantum*** *of that loss…*" (§33, emphasis in original).
    b. Under the heading "*common issues*", "…*a claim for compound interest* ***requires*** *proof inter alia that the infringement* ***caused*** *a specific compound interest loss*…" (§39, emphasis in original).
    c. See, under the heading "*suitability"*, "…*the broad axe applies to the assessment of* ***quantum****; it cannot be wielded so as to overcome the need to determine that the infringement* ***caused*** *a particular type of loss in the first place…*" (§48, emphasis in original).

35. However, a requirement that each individual's loss be specifically proven is inconsistent with s.47C(2) CA98 [**6/15**] which confers a power on the Tribunal to make an award of damages "*without undertaking an assessment of the amount of damages recoverable in respect of the claim of each individual person*".

36. Indeed, all members of the Supreme Court agreed that s.47C(2) [**6/15**] dispenses with the requirement to prove constituent elements of the tort in respect of each member of the class. This was implicit in the reasoning of the majority, and Lord Sales and Lord Leggatt found that expressly. Even though they would have allowed the appeal, they held in terms at [95]-[97] that s.47C(2) dispenses with the requirement to prove liability as well as quantum in respect of each represented person on an individual basis:

> "*Section 47C(2) is phrased in broad terms and is properly read as dispensing with the requirement to undertake "an assessment of the amount of damages*

recoverable in respect of the claim of each represented person" for all purposes antecedent to an award of damages, including proof of liability as well as the quantification of loss. Such an interpretation better accords both with the language used and with the statutory objective of facilitating the recovery of loss caused to consumers by anti-competitive behaviour" (§97).

37. As to the majority, their implicit agreement with this position is apparent: (i) from the clear recognition that s.47C(2) [**6/15**] is a radical change[15] from the common law position, which has to be read purposively to facilitate access to justice[16]; (ii) from their rejection of the analogous re-emergence of individualised assessment at the distribution stage;[17] and (iii) from the absence of any suggestion that, in Mr. Merricks' application, there could be any surviving requirement that each class member prove that the infringement caused them individual loss so far as the principal sum is concerned. As to the latter point, the ruling of the majority would be entirely undermined if, in a claim for an aggregate award of damages, it were then necessary for each individual member of the class to prove causation.

38. Mastercard's submissions based on *Sempra Metals* [**12/133-226**] ignore this fundamental change to the common law brought about by s.47C(2) [**6/15**]. There is no need to prove that the infringement caused the individual any loss, provided that there is a sound methodology that has "*some basis in fact*"[18] for showing that compound interest losses have been caused to the class as a whole.

B. ***The claim for compound interest raises common issues***

39. At the aggregate level, the common issue[19] is whether the class members as a whole (or a sub-class of them) have suffered compounded losses, by reason of being kept out of monies that would otherwise have earned them compound returns, or by reason of having to access

[15] *Merricks, SC,* [58].
[16] *Merricks SC,* [54].
[17] *Merricks SC,* [58] [76].
[18] See *Hollick v. City of Toronto* [**14/237-262**] – as cited in *Pro-Sys* at [100], [**15/288**].
[19] As to which, see the discussion of "common issues" in the Court of Appeal's judgment (§§46 & 47) [**13.1/236.23-236.24**].

more monies for which they paid a compounded rate. Mastercard's submissions to the contrary are based wholly on its (incorrect) supposition that the claims for compound interest need to be proved on an individualised basis.

C. ***The claims for compound interest are suitable for determination on a collective or aggregate basis***

40. The loss suffered by the class will inevitably have been compounded. In *Sempra Metals* itself, Lord Nicholls said (§52) [**12/164**]:

> *"We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdrafts or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when assessing financial loss it must recognise and give effect to this reality."* (emphasis added)

41. To similar effect, Professor Mayer said as follows at the CPO hearing in January 2017 [Day 2/p.66/lines 1-21] [**10/76**]:

> *"PROFESSOR MAYER: If I could just pick up on the point you made about interest, and while I accept that, of course, people are in different positions regarding borrowing or saving, and how that may vary over time, it is still the case that there is a conventional time preference rate that is thought to apply, and that therefore it is reasonable to, at least in some respects, to take account of the time and value of money, so the notion that one is making some adjustment for that would, prima facie, seem to be a reasonable one to be putting forward.*
>
> *MR. HOSKINS: Sorry, the reason I laugh is that I have had this debate, or discussion, with economists on a number of occasions because I absolutely agree as a matter of economic principle the position you have put to me is correct as a matter of economic principle. The question then is whether the economic principle is the same as the legal principle, because the legal principle is established in Sempra Metals, if a claim is for compound interest it must be pleaded and proved as an actual loss, and the question there would be is whether -- well, if I come to court seeking compound interest and rely purely on the economic principle, will that be sufficient for the court. Now, sir, just -- I apologise but from personal experience, parties who come and claim compound interest do more than that, and it is a case that is based on evidence, and if it is a case based on evidence as opposed to economic principle, then one gets into the sorts of issues I have described, but I absolutely identify, and I recognise, the point you make to me as an economic one."* (emphasis added)

42. Accordingly, as the Tribunal has already accepted, the collective claim for compound interest has an obvious and solid "*basis in fact*". Put another way, it is obviously credible and plausible.

43. Mr. Merricks has sought the advice of his experts, Mazars, on likely methodology and data sources to allow for the calculation of the quantum of such loss (over which discussions privilege is not waived). Of course, a full expert report will be filed in due course, should compound interest be certified to go forward as part of the collective proceedings, but in overview there are two possible approaches.

44. The **first approach** would seek to calculate a blended interest rate which reflects the saving and borrowing rates during the relevant period, proportionate to the members of the class who saved and/or borrowed money. The methodology would thus take into account:
    a. the proportion of the class who (i) saved money, such that absent Mastercard's unlawful anticompetitive conduct they would have saved more, and earned compound interest on that increased amount of savings, or (ii) borrowed money, such that absent Mastercard's unlawful anticompetitive conduct they would have borrowed less, and thus avoided interest on the amount by which their borrowing would have decreased; and
    b. the interest rates prevailing, during the relevant period, in respect of each of savings and debt, which can be used to arrive at a blended compound interest rate across the class as a whole.

45. This would enable Mr. Merricks' experts to arrive at an interest percentage (on an annual basis) that can be applied on a compound basis to the aggregate losses suffered by the proposed class.

46. As to the likely data sources[20] (which again will be subject to ongoing consideration):

[20] Although not all of this data is available for all the years during and after the infringement period, Mr. Merricks' experts will be able to bridge any gaps by means of extrapolation and / or interpolation. Gaps in the data are a common facet of litigation, as was well-recognised by Lord Briggs at *Merricks SC*, [§74], but this does not alter the ability to present a plausible methodology that the Tribunal can then do the best it can with to assess the aggregate compound losses.

a. There is significant data in respect of prevailing interest rates for savers and borrowers (for example from the Bank of England and the Building Society Association). These relate to a spread of different types of savings accounts and deposits, and also different types of debt (mortgages, credit cards, overdrafts and other non-secured loans);
b. As to the proportions of savers and borrowers, there is Department of Work and Pensions data in respect of the percentage of UK households with a savings account and Office of National Statistics data in respect of household wealth and debt. By way of early indication, the data suggests that around an average of 50% of the population have savings and a similar percentage have debts.
c. However, at present there does not appear to be an obvious data source which addresses the overlap between savers and borrowers. It may be the case that further investigation reveals that there is such data available; but Mr. Merricks cannot presently point to a likely data source.

47. With that data limitation in mind, and in the eventuality that this position does not improve with further investigation, the **second approach** would limit compound interest only to the sub-class of borrowers. Mr. Merricks sets out in section D below the relevant provisions relating to sub-classes. There would be no need to address the overlap issue if this approach were taken, since debt is more expensive than savings and so it may be assumed (at least for present purposes) that the money lost by the sub-class members would have been used to reduce debt rather than build up savings. On this approach, the remainder of the class, who have no borrowings, would be entitled to simple interest at the appropriate rate.

48. It may be the case that, as the data position develops, further or alternative approaches are available. As set out further in section D below, the regime is flexible enough to accommodate this.

49. In §9 of its submissions, Mastercard accepts that Lord Briggs (at §§56-57 of his judgment in *Merricks SC*) found that "*suitable*" means suitable in a relative sense: i.e. suitable to be

brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages.

50. Lord Briggs explained that:

    a. Relative suitability is the right approach to "…*suitable to be brought in collective proceedings…*" in s.47B [**6/14-15**] since "…*collective proceedings have been made available as an alternative to individual claims, where their procedure may be supposed to deal adequately with, or replace, aspects of the individual claim procedure which have been shown to make it unsuitable for the obtaining of redress at the individual consumer level for unlawful anti-competitive behaviour…*" (§56).

    b. Relative suitability is the right approach to "…*suitable for an award of aggregate damages…*" under Rule 79(2)(f) since "…*the pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure, is both burdensome for the court and usually disproportionate for the parties. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically dissolves those disadvantages, both for the court and for the parties…*" (§57).

51. Mr. Merricks contends that, as with the principal amount of loss, this is a case in which an aggregate or collective approach to compound interest losses addresses the disadvantages posed by seeking to bring claims for compound interest individually (which would plainly be so costly for so little return that they are in no sense a realistic alternative course). The suitability requirement is, therefore, met.

52. Mastercard advances two arguments to the contrary. Its first argument (§45) is that *Sempra Metals* [**12/133-226**] establishes that each individual needs to prove loss. However, as explained above, this argument is inconsistent with what the Supreme Court has found to be the effect of s.47C(2) [**6/15**] which sweeps aside the requirement to prove liability in respect of each individual member of the class (or sub-class) where the collective proceedings are seeking aggregate damages.

53. Mastercard argues, secondly, that some class members may have mitigated their loss by spending less, or have been unaffected by the loss such that their conduct would not have altered at all (§§47-48). The objection to this argument is the same as to the first; it is wrong as a matter of law. Furthermore, Mr. Merricks accepts that, if the Tribunal were to determine at trial that there is a proportion of the overall consumer class which did not suffer any compound interest loss (for example because there is a proportion of the population which neither borrows nor saves; or because there is by that stage statistical and / or other evidence before the Tribunal in respect of how consumers respond to increased prices), then this finding of fact at trial should and can be reflected in the final aggregate damages award, by way of adjustment to the methodology for the calculation of compound interest so that it is not applied to the entire class.

54. It is important to note that those factual questions remain relatively more suitable for determination in collective proceedings, in the aggregate, rather than individually (not least since such individual determination is a practical impossibility: see e.g. Lord Briggs, §54).

D. ***Practical considerations speak in favour of compound interest being included in the CPO***

55. As Lord Briggs remarked (§28), a CPO is not either the beginning or the end of the CAT's case management. One example of obvious relevance is the statutory power to vary the CPO (s.47B(9) [**6/14**]; Rule 85). This power includes the establishment of sub-classes at a later point. As to this possibility:
    a. A "*sub-class*" is defined in Rule 2 as meaning "…*a member of a distinct class of class members, described in the collective proceedings order or a collective settlement order, as the case may be…*".
    b. As per Rule 78(4), "…if *the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that subclass…*".
    c. Rule 88 provides that the Tribunal may, at any time, give any directions it thinks appropriate for the case management of the collective proceedings. This power

includes an order that "…*the common issues for a sub-class be determined together…*".

d. Rule 91 provides that any judgment or order of the Tribunal made in collective proceedings may specify the sub-class of represented persons or individual represented persons to whom it shall not apply.

e. §6.79 of the Guide provides that: *"If it is not appropriate to make an aggregate award of damages for the entire class, it may be possible to proceed to determine the entitlement of sub-classes on a group basis, amending the CPO as appropriate to authorise the appointment of class representatives for those sub-classes.* (emphasis added).

56. It could be appropriate at a later stage of this litigation to establish sub-classes in respect of compound interest (see e.g. the List of Common Issues[21]). As noted above, for instance, it may ultimately be the case that a single limited sub-class of borrowers is established for compound interest purposes, with the rest of the class entitled only to simple interest at an appropriate rate to be determined by the Tribunal[22].

57. In addition, as a practical matter, the Tribunal will in any event have to consider matters concerning interest and its quantification, whether on a simple or a compound basis, at trial and the inclusion of compound interest within the CPO will not materially add to the cost and time of the hearing, because the interest issue will be determined by reference to evidence from expert accountants relying on publicly available data. By way of example of assessment of simple interest in a non-commercial context, in *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1468 [**13/227-236**], Owen J considered the appropriate rate of simple interest in a claim brought by individuals against their former employer. The claimant individuals relied on the Quarterly Bulletin of the Bank of England Monetary

[21] Which is contained in the main hearing bundle at [A3/tab22/p.793].

[22] This reflects the way the issue is put in the list of common issues: "*Should interest be applied: (a) at a simple rate, and if so at what rate? (paragraph 116 and paragraph 112(g), Collective Proceedings Claim Form and section 5.5 of the Independent Expert Report on Common Issues); and/or (b) at a compound rate, and if so at what rate? (paragraphs 114-115, Collective Proceedings Claim Form and section 5.5 of the Independent Expert Report on Common Issues).*"

Assessment and Strategy Division and tables from the Bank of England showing the difference in effective interest rates on secured and unsecured loans, which "*…substantiated [their] contention that a rate of 5% over base is a fair and reasonable rate to reflect the costs of unsecured borrowing to an individual…*" (§3) [**13/229**]. The Defendants argued that the normal rate of 1% over base should apply. The Judge rejected that argument, holding that (§§4-5) [**13/229**]: "*…The claims are brought by the claimants as individuals against their former employer. There is no sound basis upon which to assume that they could borrow at the rates available to commercial concerns. I am satisfied that the appropriate rate at which to compensate the claimants for being kept out of their money is the cost of unsecured borrowing by individuals. There will therefore be an order for interest on damages at the rate of 5% above Barclays bank base rate…*".

58. Accordingly, the marginal additional time and cost of those experts assessing interest on a compound basis in addition to on a simple interest basis, in the context of a claim of this magnitude, is not significant. This too speaks in favour of compound issue sensibly being included in the present collective proceedings.

THE CPO SHOULD BE GRANTED

59. The application for a CPO should be granted in the form proposed by Mr. Merricks. Each of the eligibility and authorisation criteria is addressed below. Save for the two points addressed above (deceased persons and compound interest), Mastercard makes no further objection to the grant of a CPO. Nevertheless, the Tribunal must itself be satisfied that a CPO should be granted, taking particular account of the best interests of the class.

A. *The eligibility criterion*

60. The Tribunal is very familiar with the relevant provisions concerning the eligibility criterion: s.47B(5) and (6) [**6/14**], Rule 77(1)(b) and Rule 79.

61. Both bases on which the Tribunal decided not to grant a CPO in 2017 related to the eligibility criterion: §30, Lord Briggs' judgment [**11/90**].

62. In Mr. Merricks' submission, the consequence of his successful appeal is that the eligibility criterion is fulfilled. In particular, the Supreme Court did not merely identify the correct legal test, but determined how it applied on the facts of this application for a CPO. Mr. Merricks relies on the entirety of Lord Briggs' judgment in this regard, but sets out some key aspects of that judgment below.

63. First, having noted the Court of Appeal's un-appealed finding that merchant pass-on is a common issue (§16, §62), Lord Briggs held that this commonality "…*would, or should, have been a powerful factor in favour of certification…*" (§66).

64. Secondly, as to the structure of the assessment, Lord Briggs held that suitability for aggregate damages is not a hurdle (§§66-69), and *"…it may well be that it was the CAT's failure to recognise that the merchant pass-on was a common issue that led to it treating the aggregate damages question as being of decisive importance…*" (§69).

65. Thirdly, as to relative suitability:

> *"As Mr Paul Harris QC for Mr Merricks submitted, it useful to ask whether the forensic difficulties which the CAT considered made the class claim unsuitable for aggregate damages, would have been any easier for an individual claimant to surmount. His answer, with which I would agree, was that they would not be. The particular difficulties identified by the CAT lay in establishing the overall proportion of any overcharge passed on by merchants to consumers, by means of a weighted average of merchant pass-on in each sector of the retail market for goods or services, due to the probable dearth of relevant data for some sectors of the market. That overall amount is equivalent to the loss suffered by consumers as a class. But an individual consumer would still have to address the same issue, at least for the years in which he or she was making purchases from merchants, in every sector of the retail market in which that consumer was active. If that is right why, one asks, should a forensic difficult in quantifying loss which would not stop an individual consumer's claim going to trial (assuming it disclosed a triable issue) stop a class claim at the certification stage?"* (§55)
>
> "*It is clear that the CAT did not make any comparison between collective and individual proceedings when assessing the forensic difficulties lying in the path of the resolution of the merchant pass-on issue. In my view it is clear that they would have been equally formidable to a typical individual claimant, seeking compensation for increased retail prices over the sectors of the market in which he or she was*

accustomed to make purchases. That was Mr Harris's submission, and Mr Hoskins had no cogent answer to it.

If those difficulties would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not, in principle, have been sufficient to lead to a denial of certification for collective proceedings". (§§70-71).

66. Fourthly, under the heading "*Quantifying Damages – the Tribunal must do what it can with the available evidence*" (§§72-75):

    a. Lord Briggs first summarised the proposed approach of Mr. Merricks' expert team and the Tribunal's review of that approach. He concluded that "…*the CAT's assessment fell well short of suggesting that Mr Merricks would be unable at trial to deploy data sufficient to have a reasonable prospect of showing that the represented class had suffered any significant loss…*" (§72).

    b. His Lordship then summarised the applicable principles, in particular, that a court should not refuse a trial because the data is incomplete and difficult to interpret (§§73-74; see also §46 onwards).

    c. Applying those principles to the present case, he held that "…*The present case may well present difficulties of those kinds on a grand scale, but they are difficulties which the CAT is probably uniquely well qualified to surmount. It may be that gaps in the data will in some instances be able to be bridged by techniques of extrapolation or interpolation, and that some gaps will be unbridgeable, so that nothing is recovered in relation to particular market sectors or for parts of the Infringement Period. Nonetheless it is a task which the CAT owes a duty to the represented class to carry out, as best it can with the evidence that eventually proves to be available…*" (§74, emphasis added).

67. Fifthly, as to distribution, Lord Briggs held that "…*s.47C CA98* [**6/15-16**] *radically alters the established common law principle by removing the requirement to assess individual loss in an aggregate damages case, and that nothing in the Act or the Rules puts it back again, for the purposes of distribution…*" (§76). As to timing *"…in many cases the selection of the fairest method will best be left until the size of the class and the amount of*

aggregate damages are known…" (§77) and "…*In the present case there was nothing in the proposals for distribution which militated against certification, and an inappropriate element in the distribution proposals would normally be better dealt with at a later stage*…" (§80).

68. In conclusion, for all the reasons set out in Mr Merricks' application for a CPO and accompanying documents, and in reliance on the findings of the Supreme Court, he respectfully asks that the Tribunal finds that the eligibility criterion is fulfilled, namely, that these are claims which are eligible for inclusion in collective proceedings.

B. *The authorisation criterion*

69. The Tribunal is very familiar with the provisions relating to the authorisation criterion, namely s.47B(5) and (8) [**6/14**] and Rules 77 and 78.

70. In the Tribunal's judgment of 21 July 2017, it held that "…*if, contrary to (a) [the finding that the claims should not be certified under rule 79 as eligible for inclusion in collective proceedings], we had certified the claims, then on condition that the Funding Agreement was amended as we proposed, we would have authorised the Applicant under rule 78 to act as the class representative…*" (§141(b)) [**11/127**]. In particular:
    a. Having set out an overview of Mr. Merricks' "…*long and distinguished career…"*(§93), the Tribunal held that "…*By his background, experience and qualifications, it is clear that the Applicant … is eminently suited to act as the class representative in these collective proceedings. Mastercard did not suggest otherwise...*" (§94).
    a. The bulk of the Tribunal's judgment related to the funding arrangements, since "…*The opposition to authorisation of the Applicant related not to him personally but to the terms of the agreement (the "Funding Agreement" or the "FA") which he had entered into with a third party funder…"* (§95) [**11/112**]. In overview, the Tribunal considered and rejected arguments (i) that the funder's return did not constitute "*costs or expenses*" within the meaning of s.47C(6) CA (§§109-117) [**11/116-119**]; (ii) that the drafting of the funding agreement meant that the funder's

return was not "*incurred*" by Mr. Merricks (§§118-127) [**11/120-123**]; (iii) that the limit of £10 million for funding a liability for Mastercard's recoverable costs was inadequate (§§128-132) [**11/124-125**]; and (iv) that the terms of the funding agreement gave rise to a conflict of interest on the part of Mr. Merricks (§§133-140) [**11/125-127**].

71. There was no appeal by Mastercard against this determination. It is, therefore, binding on this remitted application, save where there has been a material change of circumstance which requires some fresh consideration.

The updated factual position

72. By his second witness statement dated 12 February 2021, Mr. Merricks provided relevant updates to the matters set out in his first witness statement and the documents exhibited to that statement.

73. **First**, Mr. Merricks set out his funding arrangements (§§6-8; Exhibit WHM2-1). In overview:
    a. Following the Tribunal's judgment refusing to grant a CPO, the funding arrangements in place at the time were terminated by the funder. New funding was secured from Innsworth Capital Limited ("ICL").
    b. An entirely unredacted copy of the ICL Funding Agreement (restated on 12 February 2021, in line with the Tribunal's observations at the CMC on 5 February 2021) is exhibited to Mr. Merricks' second witness statement and published on the website www.mastercardconsumerclaim.co.uk.
    c. The Tribunal may wish to be taken through that agreement at the CPO hearing, but in overview:
        i. Whereas the previous adverse costs cover was £10 million (which the Tribunal held was *"…on any view a very large sum for the costs of a single action…*" (§131)), out of an abundance of caution, the adverse costs cover has now been increased to £15 million.

ii. Whereas previously Mr. Merricks had access to £33 million in respect of the costs of pursuing the proceedings, once again out of an abundance of caution and with the benefit of the experience of how costly it has been to get through the CPO stage, he has secured increased funding for his costs and disbursements of £45.1 million (in addition to the adverse costs cover).

74. Even though the Tribunal considered the prior funding arrangements to be adequate, on any view the new funding arrangement is enhanced, in that it provides even greater levels of funding to ensure that Mr. Merricks can see the proposed collective proceedings though to their conclusion. It is notable that Mastercard, unlike at the original CPO hearing, is *not* now raising any challenges to the funding arrangements.

75. **Secondly,** Mr. Merricks updates two aspects of his litigation plan (see, in this regard, Rule 78(3)(c) and §6.30 of the Guide):
    a. He has provided an updated costs budget (WHM2-2), to replace the budget at annex 2 of the litigation plan. As Mr. Merricks sets out in §11.1 of his second witness statement, "…*while this budget reflects the current estimate of the time (and therefore costs) that will be incurred in the proceedings, I note that the budget may need to be revisited in due course as the proceedings progress, not least given the Proposed Defendants' indication that they may make an application to the Tribunal to hear certain preliminary issues should the Tribunal make a CPO. …[T]here is scope for further amounts to be added to the budget from the total funding that is committed in the ICL Funding Agreement…*". Indeed, the Tribunal will see that the sums involved are very significantly below the total available under the total amount of funding committed by ICL.
    b. He has provided an updated litigation timetable (WHM2-3), which reflects the passage of time. Again, this update is intended to be as accurate as presently possible, but it may need revisiting in due course.

76. Accordingly, Mr. Merricks asks the Tribunal to find that – consistent with its judgment in July 2017 – the authorisation criterion is fulfilled.

Conclusion

77. The Tribunal is respectfully asked to make the collective proceedings order. and order that Mastercard pay forthwith Mr. Merricks' costs of and occasioned by the application for a CPO, in an amount to be assessed by the Tribunal if not agreed by the parties.[23]

MARIE DEMETRIOU QC
VICTORIA WAKEFIELD QC

QUINN EMANUEL URQUHART & SULLIVAN UK LLP

12 MARCH 2021

[23] The Tribunal's ruling dated 23 November 2017 on matters of costs, states (at [16]): "*We think it is desirable that there should be a level of consistency as regards the approach to costs on CPO applications. We would emphasise that a starting point is no more than that: it is subject to displacement or qualification on the basis of the various factors set out in Rule 104(4): see para 12 above. Having considered the Applicant's submissions,* ***we are not persuaded that there are good grounds why the Tribunal should not adopt as a starting point on a contested CPO application that the loser is in principle liable for the relevant costs of the successful party***." (emphasis added.)