Neutral citation [2021] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 August 2021

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
JANE BURGESS
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

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

Heard remotely on 25-26 March 2021

FURTHER JUDGMENT
(APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Ms Marie Demetriou QC and Ms Victoria Wakefield QC (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Mr Mark Hoskins QC, Mr Matthew Cook QC, Mr Hugo Leith and Mr Jon Lawrence (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Respondents/Proposed Defendants.

A. INTRODUCTION

1. The collective proceedings regime introduced into the Competition Act 1998 (the "CA 1998")[1] by the Consumer Rights Act 2015 was a notable innovation. In particular, this regime enables such proceedings to be brought on an 'opt-out' basis and allows the Competition Appeal Tribunal ("the Tribunal") to award damages on an aggregate basis. The regime provides a means whereby consumers and small businesses can obtain redress for the harm they have suffered from anti-competitive conduct, which otherwise is likely to go uncompensated. As Lord Briggs stated in giving the judgment of the majority of the Supreme Court at an earlier stage of the present proceedings, *Mastercard v Merricks* [2020] UKSC 51 ("the SC Judgment"), at [1]:

> "Proof of breach, causation and loss is likely to involve very difficult and expensive forensic work, both in terms of the assembly of evidence and the analysis of its economic effect. Viewed from the perspective of an individual consumer, the likely disparity between the cost and effort involved in bringing such a claim and the monetary amount of the consumer's individual loss, coupled with the much greater litigation resources likely to be available to the alleged wrongdoer, means that it will rarely, if ever, be a wise or proportionate use of limited resources for the consumer to litigate alone."

2. Lord Briggs proceeded, at [4], to note that under the legislation:

> "The CAT is given an important screening or gatekeeping role over the pursuit of collective proceedings."

See also per Lords Sales and Leggatt (dissenting on other grounds) at [86]. The most significant aspect of this role is that collective proceedings cannot continue beyond the issue of a claim form without the Tribunal's permission in the form of a Collective Proceedings Order ("CPO"). There are two conditions for the grant of a CPO set out in s. 47B. The first concerns authorisation of the person seeking to bring the proceedings as the representative of the proposed class ("the authorisation condition"). The second requires that the claims are eligible for inclusion in collective proceedings ("the eligibility condition"). We set out the statutory criteria for both these conditions below. It is perhaps inevitable for such a new form of proceedings that certification of collective proceedings by a CPO raises issues that are novel.

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[1] All statutory references in this judgment are to the CA 1998 unless otherwise stated.

3. The present proceedings are one of the first brought under this statutory regime and, by any measure, amount to a massive claim. The original claim form stated that the class comprised some 46.2 million people, comprising, in effect, everyone who purchased goods or services in the UK when he or she was resident in the UK and over 16 years of age between 1992 and 2008. It should be emphasised that the damages are calculated on all purchases made by members of the class from outlets that accepted Mastercard and are not confined to purchases made using a Mastercard credit or debit card. The aggregate damages were broadly estimated at around £14 billion, including a substantial element of interest given the time since the alleged loss had been suffered.

4. By a judgment given on 21 July 2017, the Tribunal decided that Mr Merricks satisfied the authorisation condition but that the claims did not meet the eligibility condition and therefore dismissed the application for a CPO: [2017] CAT 16 ("the CAT Judgment"). The underlying facts and nature of the claims are fully set out in the CAT Judgment and will not be repeated here.

5. The Court of Appeal, in a judgment issued on 16 April 2019, allowed Mr Merricks' appeal and held that the Tribunal had failed properly to apply the eligibility condition, as well as criticising the approach the Tribunal had taken to the certification hearing: [2019] EWCA Civ 674 ("the CA Judgment").

6. On further appeal by the respondents ("Mastercard"), by the SC Judgment issued on 11 December 2020, the Supreme Court dismissed the appeal, while rejecting the criticisms made in the CA Judgment of the Tribunal's approach in the certification hearing.

7. The case has now been remitted to the Tribunal for the CPO application to be determined in accordance with the appellate judgments.

8. Some further issues have arisen regarding the authorisation of Mr Merricks to be the class representative. As regards the eligibility of the claims, in light of the SC Judgment certification is no longer opposed by Mastercard but there are outstanding disputes (a) as to whether Mr Merricks can amend the claim form to extend the class to include persons who died before the claim form was issued

("the deceased persons issue") and (b) whether these collective proceedings can include a claim for compound interest ("the compound interest issue").

B. THE LEGISLATIVE FRAMEWORK

9. Under s. 47A as it stood at the time these proceedings were commenced, a person may claim in the Tribunal for financial loss or damage in respect of infringement of the competition prohibitions in the CA 1998 (i.e. the Chapter I prohibition and the Chapter II prohibition) and the corresponding prohibitions in Art 101(1) and Art 102 of the Treaty on the Functioning of the European Union ("TFEU").[2]

10. Sections 47B-47C provide, insofar as material:

> "**47B Collective proceedings before the Tribunal**
>
> (1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").
>
> (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.
>
> …
>
> (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.
>
> (5) The Tribunal may make a collective proceedings order only—
>
> (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
>
> (b) in respect of claims which are eligible for inclusion in collective proceedings.
>
> (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.
>
> …

[2] S. 47A has been amended to remove reference to Arts 101(1) and 102 with effect from 31 December 2020 but under transitional provisions it applies in its unamended form to a claim in relation to an infringement of Art 101(1) and Art 102 TFEU which occurred before 31 December 2020: the Competition (Amendment etc) (EU Exit) Regulations 2019, Sch 4, para 15 (as amended by the Competition (Amendment etc) (EU Exit) Regulations 2020, reg 39).

(8) The Tribunal may authorise a person to act as the representative in collective proceedings—

(a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but

(b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

…

47C Collective proceedings: damages and costs

…

(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

11. The Competition Appeal Tribunal Rules 2015 ("the CAT Rules") contain further provisions governing collective proceedings.[3] By rule 73(1), "the same, similar or related issues of fact or law" (i.e. the term used in s. 47B(6)) are defined as "common issues".

12. Rule 78 sets out the considerations which apply in determining whether the proposed class representative satisfies the authorisation condition prescribed by s. 47B(8)(b). They include, whether that person:

"(2) …

(a) would fairly and adequately act in the interests of the class members;

(b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;

…

(d) will be able to pay the defendant's recoverable costs if ordered to do so;"

13. Rule 79 concerns certification of the claims as satisfying the eligibility condition. It provides, insofar as relevant:

[3] All references to rules in this judgment are to the CAT Rules, unless otherwise stated.

"(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—

(a) are brought on behalf of an identifiable class of persons;

(b) raise common issues; and

(c) are suitable to be brought in collective proceedings.

…

(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

(a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;

…

(f) whether the claims are suitable for an aggregate award of damages;

…"

14. It will be necessary to refer to further provisions in the CAT Rules below.

C. AUTHORISATION OF THE CLASS REPRESENTATIVE

15. As noted above, in the CAT Judgment it was held that Mr Merricks satisfied the authorisation condition to be the representative of the proposed class. However, since 2017 there have been further developments which now have to be considered.

16. First, one member of the proposed class, Mr Ian Stocks, has filed further and detailed written submissions contending that it is not just and reasonable for Mr Merricks to act as a class representative. Mr Stocks' submissions relate to the handling by Mr Merricks of a complaint which he and his wife made in about 2012 regarding the handling by the Royal Institute of Chartered Surveyors ("RICS") of their complaint concerning the conduct of an RICS regulated firm (Blundells) in connection with an overseas property transaction. Mr and Mrs Stocks lost a significant sum of money in what the Financial Ombudsman described as an "overseas property scam". Mr Merricks was at the time the independent reviewer of RICS regulation, and by a report dated 15 August 2012,

while observing that the handling of the matter by RICS Regulation "has not been entirely satisfactory", he dismissed Mr and Mrs Stocks' complaint.

17. Mr Stocks clearly remains strongly aggrieved by this. He points out that the Financial Ombudsman's Service ("FOS") also investigated the Blundells matter, as he complained to the FOS about the credit card firm through which he and his wife had paid monies in connection with the property purchase. Mr Stocks states that the FOS dismissed his complaint and points out that Mr Merricks was the inaugural Chief Financial Services Ombudsman.

18. We have carefully considered Mr Stocks' full submissions. We note that Mr Merricks was no longer involved with the FOS at the time of the complaint to the FOS referred to above. Whatever should have been done about the Blundells matter (as to which it is obviously not appropriate for us to express a view), we are satisfied that Mr Merricks' previous connection with the FOS is not relevant, and that his decision on the review of the handling of Mr and Mrs Stocks' complaint by RICS Regulation has no bearing on his suitability to act as a class representative in the present proceedings. Mr Merricks' role in reviewing the RICS' handling of the complaint concluded several years before the commencement of these proceedings. We do not consider that there is any ground in the materials submitted by Mr Stocks which can suggest that Mr Merricks has a conflict of interest with the members of the proposed class in these proceedings.

19. The second development since the CAT Judgment is that the third party litigation funder previously funding these proceedings has been replaced by a new litigation funder, Innsworth Capital Ltd ("Innsworth Capital"). As a result, there is a new litigation funding agreement ("LFA") in place. That is significant since in determining whether to authorise the applicant to act as the class representative the Tribunal will consider whether they can act fairly in the interests of the class, including through the management of the proceedings, which encompasses having access to sufficient funds for the proceedings, and also whether they might have a conflict of interest which could prevent them from acting in the best interests of the class, which could arise under constraints imposed under an LFA: see rule 78(2)(a)-(b) and (3), and the Tribunal's Guide

to Proceedings (2015) at para 6.30. Further, the Tribunal will consider whether the proposed class representative will be able to pay the defendant's recoverable costs if ordered to do so: rule 78(2)(d).

20. These aspects were fully considered in the CAT Judgment, in light of Mastercard's objections to the LFA then in place with the previous litigation funder and an amendment to that LFA was indeed required: see at [96]-[140]. It is necessary now to consider the position under the new LFA. We note that, subject to one qualification that we address below, Mastercard does not object to the terms of the LFA with Innsworth Capital. However, it is nonetheless for the Tribunal to be satisfied as to the position since the Tribunal has responsibility to protect the interests of the members of the proposed class, and their interests are of course not necessarily aligned with the interests of Mastercard.

21. We have accordingly scrutinised the LFA with Innsworth Capital. It was originally entered into on 5 June 2019 but subject to a deed of amendment on 1 February 2021, and was restated in a comprehensive form by way of an appendix to an Amendment and Restatement Deed on 12 February 2021 ("the 2021 LFA"). We should observe at the outset that although a detailed document, the provisions of the 2021 LFA are drafted much more clearly than those of the previous LFA.

22. One significant change is an increase in the amounts of funding available. Whereas the previous adverse costs cover was £10 million, the cover for adverse costs in the 2021 LFA is £15 million. In the CAT Judgment, the Tribunal rejected a challenge by Mastercard to the adverse costs cover of £10 million under the original LFA as insufficient, noting that this was a very large sum for the costs of a single action: see at [131]. Mastercard does not seek to challenge the significantly increased amount under the 2021 LFA and we consider that the criterion in rule 78(2)(d) is satisfied.

23. Further, under the 2021 LFA, Mr Merricks has access to funding for his costs and disbursements of £45.1 million (in addition to the adverse costs cover). That is a marked increase on the figure of £33 million under the previous LFA.

We are satisfied that this should enable Mr Merricks to pursue the proceedings adequately for the class members. In that regard, we note that the revised costs budget produced by Mr Merricks sets out costs which total just under £32.5 million. The funding therefore allows for significant excess over the budget, which could arise, for example, if third party disclosure proved to be extensive.

24. In addressing a CPO application where it is proposed that the proceedings will be funded by a commercial litigation funder, the Tribunal is concerned to ensure that the proceedings can be conducted in the best interests of the class members, which should prevail over the interests of the funder, while at the same time recognising that the funder is entitled to protect its legitimate commercial interests. There are two particular aspects where there is a potential for a conflict of interest between the funder and the class members: settlement of the proceedings and termination of the funding agreement.

25. As regards settlement, clause 7.2 of the 2021 LFA provides that if the applicant (i.e. Mr Merricks) wants to settle the claims or the proceedings for less than Innsworth Capital considers appropriate, or if Mr Merricks does not want to settle the claims or the proceedings or make an offer to do so when Innsworth Capital considers that it would be appropriate for him to do so, then Mr Merricks and Innsworth Capital shall refer their difference of opinion to an independent Queen's Counsel ("QC"). However, the QC's decision on the matter will not be binding and the decision as to whether to accept or reject a proposed settlement "will ultimately be solely for [Mr Merricks] to determine." We consider that this provision satisfactorily protects Mr Merrick's right to act in the best interests of the class.

26. As regards termination by Innsworth Capital, clause 12 of the 2021 LFA provides:

> "12.1 . The Funder is entitled to terminate this Agreement upon giving not less than forty-five (45) days' written notice to the Applicant if:
>
> i. the Funder reasonably ceases to be satisfied about the merits of the Claims and/or Proceedings; or
>
> ii. the Funder reasonably believes that the Claims and/or the Proceedings are no longer commercially viable for the Funder to fund because the Funder is

> unlikely to obtain at least £179 million as a return on its funding of the Proceedings;
>
> …
>
> 12.2. Should the Funder seek to exercise the right to terminate pursuant to clause 12.1, the Funder shall, before doing so, provide the Applicant a reasonable opportunity to address the Funder's concerns."

27. By contrast with the provision on settlement, we had concerns that this appeared to give too broad a discretion to Innsworth Capital, who were under no obligation to take independent advice, since a decision to terminate funding could obviously create very serious difficulties for the class representative, leaving him to seek alternative funding in the midst of the proceedings. After we raised this concern on the first day of the remitted CPO hearing, Mr Merricks requested and Innsworth Capital agreed to amend clause 12.1 by inserting at the end of both sub-clauses (i) and (ii) set out above (and before the word "or"), the words:

> "such a view to be reached based on independent legal and expert advice that has been provided to the Funder".

This was helpfully communicated to the Tribunal before the second day of the hearing. We consider that this amendment fairly addresses our concern.

28. Under rule 78(2)(d), the consideration of adverse costs involves not only the amount of cover for such costs but the ability of the proposed class representative to pay them. If an award of costs were made in favour of Mastercard, the award would in the normal course be against Mr Merricks. It is common ground that he does not personally have the means to pay the very substantial costs that may be incurred in this case but would have to request Innsworth Capital to pay them pursuant to their obligation under clause 3.1 of the 2021 LFA.

29. Mastercard has no right to enforce the 2021 LFA since by clause 26.1 any rights it might otherwise have under the Contracts (Rights of Third Parties) Act 1999 ("the CRTPA 1999") are expressly excluded. It could apply for a third party costs order, but Innsworth Capital is a Jersey company and therefore outside the jurisdiction. In those circumstances, Mastercard sought an undertaking by

Innsworth Capital to the Tribunal that it would discharge a liability for costs ordered against Mr Merricks.

30. We consider that Mastercard's position is understandable. As indicated above, the anticipated costs of these proceedings are vast. Mr Merricks is a private individual who lacks the means to pay such costs. It is no disrespect to Mr Merricks to say that, as with any individual party facing a potential liability of such magnitude, the other party to whom the liability might arise has a concern about personal risks, whether of insolvency or, indeed, an untimely death. The former would leave Mastercard as an unsecured creditor and the latter would greatly complicate recovery.

31. An analogous issue arose in the CPO application in the Trucks litigation where the potential adverse costs liability was covered by an ATE insurance policy in the name of the funder, which was a Guernsey company, and the concern was the risk that the funder could go into liquidation. The applicant there addressed the risk by obtaining an endorsement to the insurance policy whereby the respondent could enforce the policy pursuant to the CRTPA 1999: see *UK Trucks Claim Ltd v Fiat Chrysler Automobiles NV and ors.* [2019] CAT 26 at [90] and [96].

32. In light of the Tribunal's indication during the hearing, Ms Demetriou QC informed the Tribunal that Innsworth Capital had no objection to giving a suitable undertaking along the lines sought by Mastercard. It is not appropriate for the Tribunal to draft the terms of the undertaking. If the parties are unable to agree on suitable terms, we will resolve the issue on the basis of written submissions following this judgment.

D. THE DECEASED PERSONS ISSUE

33. Rule 75(1) and (3) provide, insofar as material:

> "(1) An application to commence collective proceedings shall be made by the proposed class representative filing a collective proceedings claim form.
>
> …

(3) The collective proceedings claim form shall contain—

(a) [a] description of the proposed class;

…

(c) an estimate of the number of class and any sub-class members and the basis for that estimate;"

34. The collective proceedings claim form issued by Mr Merricks on 6 September 2016 stated:

"**Description of the class** *(Rule 75(3)(a))*

22. The proposed class is: *"Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the United Kingdom that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the United Kingdom for a continuous period of at least three months, and (2) aged 16 years or over"*. All individuals who are living in the United Kingdom as at the domicile date, to be determined by the Tribunal in the CPO, and who meet this definition, are proposed to be included within the proposed class unless they choose to opt-out of the proposed Claim. All individuals who are living outside the United Kingdom at the domicile date, but meet this definition, will be able to opt-in to the proposed Claim.

23. The purpose of the class definition is as follows:

….

d. the proposed class representative is aware that this class definition excludes some individuals who might have good claims, in particular, …(iii) the estates of individuals who meet the proposed class definition but who passed away before the domicile date. However, these exclusions are the consequence of seeking to create a clearly defined class, with parameters that can easily be understood by potential class members in order to determine whether they are within the class. Further, it is important that these exclusions are designed to facilitate, in a proportionate manner, the assessment of damages and the administration of any damages that are received.

…

Estimate of the number of class members *(Rule 75(3)(c))*

25. The estimated size of the proposed class is approximately 46,200,000 million individuals. The basis for this estimate is publicly available information from the Office of National Statistics, Population Estimates Unit. This information provides the total population number in the United Kingdom annually and also specifies the size of the population that is over 16 years of age. Accordingly, in 1992 the number of individuals in the United Kingdom that were aged 16 and over was 45,792,882, to which has been added (for the purposes of this proposed Claim) all those people under 16 years of age but who reached that age during the infringement period (see paragraph 94 below), as well as the number of immigrants entering the United Kingdom. A deduction

> was then made for all those individuals that have died from 1992 through to 2015 (data for 2016 not being currently available)."

35. Moreover, the experts' report filed as part of the CPO application gave more details in section 4 as to the computation of the size of the class. At para 4.1.3 and in the detailed figures in Table 4.1, the report set out how the Office of National Statistics data was used, stating that deductions were made both for people who died during what is referred to as the "Full Infringement Period" (i.e. 1992-2008) and also for those who had died since the end of that period. This removed, respectively, 9.7 million and 4 million people from the class, to produce the estimated class size of just under 46.2 million.

36. We therefore consider that it would be clear to anyone reading the CPO claim form and CPO application that Mr Merricks intended to exclude people who were no longer alive. Moreover, that was brought home to potential class members in the notice about the proceedings which was placed before the Tribunal in 2017 in draft for approval before being publicised. Under the heading, "Who would be in the proposed class?" the notice stated:

> "The Collective Proceedings Order Application asks the Tribunal to allow the proposed claim to proceed on an "opt-out" basis on behalf of all individuals who are living in the UK at the time the claim is allowed to proceed and …"

37. However, it was recognised that the calculation of aggregate damages made by the experts did not allow for the exclusion of deceased persons. In its pleaded Reply (at para 170(b)), two alternatives were put forward on behalf of Mr Merricks: either the estates of deceased persons could be included in the class definition or an appropriate reduction could be made to the quantum claimed at a suitable stage to reflect the purchases by persons since deceased. It was submitted that such a reduction did not need to be made at the certification stage.

38. Both Mr Merricks and Mastercard made further written submissions during the course of the hearing in January 2017 dealing with the deceased persons issue. However, since the CPO application was refused by the Tribunal on other grounds, this issue was not addressed in the CAT Judgment.

39. On remittal, Mr Merricks made clear that he wishes to include deceased persons within the class. That is significant: it appears that this would increase the class size by approximately 13.6 million people to 59.8 million.

40. In her opening submissions on this issue, Ms Wakefield QC sought to argue that claims by deceased persons could be included on the basis of the class definition in the existing claim form.

41. We consider that argument is untenable. This is not simply a narrow question of the legal interpretation of the concept of "domicile" for the purpose of the words "the domicile date" in para 22 of the claim form: see para 34 above. First, rule 75(3) requires the claim form to include a description of the proposed class and an estimate of the number of class members and the basis for that estimate. As set out above, the claim form here does that on the express basis that deceased persons are excluded.

42. Secondly, it is important that the claim form in collective proceedings is clear, since it is among the documents made available to potential class members to enable them to decide whether to opt-out or opt-in as the case may be. The claim form was for that reason placed on the dedicated website created for the claim, as explained by Mr Merricks in his first witness statement, along with the notice quoted above, and those options are spelt out in para 22 of the claim form. Although the new notice placed on the website in connection with the remitted application is less specific on this point, there is nothing in the notice to indicate that the application is for a class that includes deceased persons. Indeed, under the heading "Who can object and what can I object to?" the notice states:

> "Any person with an interest (including anyone who would be a member of the proposed class) may object to the Collective Proceedings Order Application or to the authorisation of the proposed class representative."

There is nothing to explain how, if claims by deceased persons are included, an objection could be made on behalf of such a person.

43. Accordingly, and following a strong indication from the Tribunal on the first day of the hearing that the claim form cannot be interpreted as including deceased persons, there was produced on behalf of Mr Merricks that evening a

draft amended claim form. This seeks to make various changes, including deletion of the last two sentences of para 22 and of the exclusion of the estates of deceased persons in para 23(d): see para 34 above. Further, it amends the estimated size of the class specified pursuant to rule 75(3)(c) from 46.2 million to 59.8 million. However, the italicised wording in para 22 is unchanged, and the draft amended para 23(a)-(b) states as follows:

> "23. The purpose of the class definition is as follows:
>
> a. the potential claims, which it is proposed to combine, are those ~~that could be brought under~~ to which s.47A of the Act applies ~~by individual consumers who suffered loss and damage in the form of inflated retail prices caused by the proposed Defendants' unlawful conduct;~~
>
> b. this class definition contains the following criteria, all of which must be met in order for a claimant to fall within the class:
>
> i. members of the class must be individuals (i.e. natural persons), including persons who have since died. The intention of this criterion is to capture those individuals who purchased goods or services in their capacity as individual consumers (and not solely in the course, or for the purposes, of business) between 22 May1992 and 21 June 2008;…"

At the start of the second day of the hearing, Mr Merricks applied for permission to make those amendments.

44. The principles governing amendment of a claim form are well-established and were not in dispute. Permission to amend should not be granted if a plea in that form could be struck out and is subject to special rules if the application is made after the limitation period has expired.

45. Ms Wakefield emphasised that where individuals suffer loss by reason of an infringement of competition law which is determined by a competition authority, a not insignificant number of those people will have died by the time follow-on proceedings are brought. She submitted that as a matter of policy it should be possible to include them in collective proceedings.

46. We agree. However, the normal way of bringing proceedings where loss has been suffered by a person who has died by the time the proceedings are started is for the claim to be brought by his or her estate through those authorised to represent the estate. We see no difficulty in principle in having a class definition that includes the estates of deceased persons. The rights to opt-out or opt-in can then be exercised by the representatives of those estates. That is not, however, the position taken in the draft amendment which simply treats deceased persons as individuals within the class.

47. Two distinct objections are advanced by Mastercard to the proposed amendments:

(1) deceased persons cannot themselves be class members; and

(2) limitation.

We consider these in turn.

Claims by deceased persons

48. The effect of death on a cause of action is set out in the Law Reform (Miscellaneous Provisions) Act 1934 at s. 1(1), which states insofar as relevant:

> "… , 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."

Therefore, a claim by an individual for loss caused by Mastercard's infringement of competition law will, on their death, vest in their estate.

49. It is well-established that a claim cannot be brought in the name of a deceased individual. In *Kimathi v Foreign and Commonwealth Office (No 2)* [2016] EWHC 3005 (QB), Stewart J referred to this as a principle established since at least the early 19th century: see at [5]. There, in group litigation where a large number of claimants sought damages for physical and human rights abuses during the British Colonial administration in Kenya, the court struck out the claim brought by one of the test claimants on the grounds that he had died before

his claim was entered on the register. Since the claim had been brought in the name of the deceased individual personally and not in the name of his personal representative, the claim was a nullity.

50. Ms Wakefield accepted that a claim for damages accordingly could not be brought in the name of a deceased person under s. 47A. But she submitted that s. 47B is different. Collective proceedings pursuant to that provision are brought by the class representative and, as regards the opting-in or opting-out by potential class members, that can be done by the personal representatives or next-of-kin on behalf of a deceased person although they are not themselves class members.

51. We cannot accept that submission. In our view, the structure of the statutory provisions is clear. Proceedings under s. 47B constitute a collection of claims which could be brought under s. 47A. Such proceedings do not constitute one claim: they are a bundle of claims brought collectively by one representative and they retain their identity as distinct claims. Hence s. 47B(3) refers to the "claims" in collective proceedings and provides:

> "(a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings,
>
> (b) the proceedings may combine claims which have been made in proceedings under section 47A and claims which have not, and
>
> (c) a claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim."

See also s. 47B(6), set out in para 10 above, which refers to "claims" being eligible for "inclusion in collective proceedings".

52. Although the Tribunal may award aggregate damages in collective proceedings that is not necessary: it can instead award damages "in respect of the claim of each represented person": s. 47C(2). And we think the position is placed beyond doubt by the limitation provision in s. 47E[4], which states, inter alia:

[4] Although s. 47E does not apply to the present proceedings because of the transitional provision under para 8(2) of Sch 8, it was introduced into the CA 1998 at the same time as s. 47B and applies to collective

"(3) where a claim is made in collective proceedings at the commencement of those proceedings ("the section 47B claim"), subsections (4) to (6) apply for the purpose of determining the limitation or prescriptive period which would apply in respect of the claim if it were subsequently to be made in proceedings under section 47A.

(4) The running of the limitation or prescriptive period in respect of the claim is suspended from the date on which the collective proceedings are commenced.

(5) Following suspension under subsection (4), the running of the limitation or prescriptive period in respect of the claim resumes on the date on which any of the following occurs-

(a) the Tribunal declines to make a collective proceedings order in respect of the collective proceedings;

(b) the Tribunal makes a collective proceedings order in respect of the collective proceedings, but the order does not provide that the section 47B claim is eligible for inclusion in the proceedings;

(c) the Tribunal rejects the section 47B claim; …"

53. Indeed, in the SC Judgment, Lord Briggs referred at [45] to the claims pursued in collective proceedings as claims which "could all, at least in theory, be individually pursued by ordinary claim".

54. If a s. 47A claim in the name of a deceased person is a nullity, then in our judgment it cannot be included in collective proceedings. The position is quite different from that of a child. If a child has a claim, then he or she can be included in the class and the Tribunal will give directions accordingly: see rule 77(2)(b) which expressly addresses that situation.

55. A claim could be made on behalf of the estates of deceased persons by their personal representatives, but that is explicitly not the form of amended class definition which Mr Merricks seeks.

56. Moreover, Mr Merricks seeks to bring opt-out collective proceedings. These are defined in s. 47B(11):

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proceedings concerning claims arising after 1 October 2015, provided that the infringing conduct took place before 9 March 2017: see further footnote 5 below.

> "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except-
>
> (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and
>
> (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."

The statute refers to the class members whose claims are included in collective proceedings as "represented persons": see e.g. ss. 47B(12) and 47C(2). This is defined in s. 59(1) as follows:

> ""represented person" means a class member who-
>
> (a) has opted in to opt-in collective proceedings,
>
> (b) was domiciled in the United Kingdom at the time specified for the purposes of determining domicile (see section 47B(11)(b)(i)) and has not opted out of opt-out collective proceedings, or
>
> (c) has opted in to opt-out collective proceedings"

57. As counsel for Mastercard put it in their written submissions, the requirement of domicile "is thus an essential part of the statutory scope of opt-out proceedings". Class members who are not domiciled in the UK at the time specified for the purpose of s. 47B(11)(b)(i) will only have their claims included in the proceedings if they opt in whereas the claims of class members who are domiciled in the UK at that time will be included in the proceedings unless they opt out. The CAT Rules accordingly provide that the CPO must specify the "domicile date", i.e. the date for the purpose of determining whether a person is domiciled in the UK: rules 73(2) and 80(1)(g). In the present application, it is proposed that the domicile date should be around the same time as the date when the CPO is granted: exhibit WHM2-3 to Mr Merricks' second witness statement.

58. Section 59(1B) provides that in determining whether a person is regarded as "domiciled in the United Kingdom" for the purpose of these provisions, ss. 41, 42, 45 and 46 of the Civil Jurisdiction and Judgments Act 1982 ("the CJJA") shall apply. CJJA s. 41(2) states:

> "An individual is domiciled in the United Kingdom if and only if-
>
> (a) he is a resident in the United Kingdom; and
>
> (b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom."

59. Ms Wakefield argued that for the purpose of these provisions, a person's domicile survives their death, potentially for many years. She submitted that a person can be "relevantly resident" in the UK long after their death. That is an imaginative concept for which no support was cited in any authority, whether legislative or case-law. We do not accept that argument. We give the word "resident" its ordinary meaning and do not see that a dead person can be said to be resident in the UK.

60. If a person dies intestate, his or her estate vests in the Public Trustee until the grant of administration: Administration of Estates Act 1925, s. 9(1). The regime for collective proceedings is set out in detailed legislative provisions supplemented by the CAT Rules. If it is thought to be inconvenient, because many die intestate and there are many small value estates for which administrators are never appointed and it may be impractical for the Public Trustee to represent their interests in collective proceedings, that is a policy issue for the legislature. It cannot be overcome by ignoring long-established principles and the specific legislative requirements. We therefore conclude that although a class can include the representatives of the estates of deceased persons, it cannot simply include persons who are no longer alive.

61. That is sufficient to dispose of the application for permission to amend. But as it was fully argued, we address also the limitation objection.

Limitation

62. The limitation period for follow-on claims based on the decision of the EU Commission in *MasterCard* expired on 11 September 2016 (i.e. two years after the judgment of the Court of Justice of the EU dismissing Mastercard's appeal). The claim form in the present proceedings was issued five days beforehand. Thus, by the time the CPO application was originally argued in January 2017, the limitation period had expired and, as at the time of Mr Merricks' application to amend, the matter is four years further on.

63. Rules 32 and 38 provide, insofar as relevant:

> "**Amendments to claim form**
>
> 32.—(1) A claim form may only be amended—
>
> (a) with the written consent of all the parties; or
>
> (b) with the permission of the Tribunal.
>
> (2) Where any relevant period of limitation has expired, the Tribunal may permit an amendment—
>
> (a) to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings;
>
> (b) to correct a mistake as to the name of a party, but only where the mistake was genuine and not one which would cause reasonable doubt as to the identity of the party in question; or
>
> (c) to alter the capacity in which a party claims, but only if the new capacity is one which that party had when the proceedings started or has since acquired."
>
> "**Additional parties**
>
> 38.—(1) The Tribunal may grant permission to remove, add or substitute a party in the proceedings.
>
> …
>
> (6) After the expiry of a relevant period of limitation, the Tribunal may add or substitute a party only if—
>
> (a) that limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.

> (7) The addition or substitution of a new party, as the case may be, is necessary for the purpose of paragraph (6)(b) only if the Tribunal is satisfied that—
>
> (a) the new party is to be substituted for a party who was named in the claim form by mistake;
>
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
>
> (c) the original party has died or had a bankruptcy order made against it and its interest or liability has passed to the new party."

64. Those rules are in Part 4 of the CAT Rules dealing with claims under s. 47A. The rules for collective proceedings are in Part 5 of the CAT Rules. Rule 74, in Part 5, states:

> "(1) Part 4 of these Rules applies to collective proceedings in accordance with this rule—
>
> (2) References in Part 4 to "claim form" and "claimant" are to be read respectively as "collective proceedings claim form" and "class representative"."

65. As so often, when provisions framed for a different context are incorporated by reference, there is some tension between the wording of the rules for individual proceedings when those are applied to collective proceedings. The interpretation of the rules is governed by rule 2(2) which states:

> "These Rules are to be applied by the Tribunal and interpreted in accordance with the governing principles set out in rule 4."

And rule 4(1) states:

> "The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost."

66. Ms Wakefield argued that the proposed amendment is governed by rule 32(2). Mr Hoskins QC for Mastercard argued that it is governed by rule 38(6)-(7).

67. In our judgment, the amendment sought here, which seeks to add a large number of parties to the class, cannot come within rule 32. Rule 32(2) mirrors rule 17.4(2)-(4) of the Civil Procedure Rules ("CPR") and rule 38(6)-(7) mirrors rule 19.5(2)-(3) of the CPR. As note 19.5.1 in the White Book points out, those provisions carry into effect s. 35 of the Limitation Act 1980 ("the LA 1980"),

which prescribes the protection for accrued limitation rights. Accordingly, it is well-established that for an amendment seeking to add a new party after the expiry of a limitation period, rule 17.4 is subject to rule 19.5. We consider that the same approach must apply to the CAT Rules. If it were otherwise, the restriction in rule 38(6) could be circumvented by reliance on rule 32.

68. We do not see that the proper construction of the rules is affected by the fact that the limitation provisions for private actions in the Tribunal have changed: previously they were subject to a special limitation period whereas now they are governed (for proceedings in England and Wales involving claims arising after 1 October 2015) by the LA 1980. The fundamental principle that accrued limitation rights should be protected remains: see *DSG Retail Ltd v Mastercard Inc* [2020] EWCA Civ 671.

69. When applied to collective proceedings, we consider that an amendment to add new members to the class after a limitation period has expired is to be regarded as involving the addition of new parties and so is governed by rule 38. This follows from the fact that each represented person is regarded as having his or her own claim, and that it is those claims which are being pursued on a collective basis: see para 51 above. This accords with the statutory scheme for limitation periods regarding such claims set out in s. 47E, introduced into the CA 1998 at the same time as s. 47B, and applying to claims arising after that point.[5] If the Tribunal makes a CPO, the running of the limitation periods in respect of the claims covered by it is suspended; and if the Tribunal should subsequently revoke the CPO or vary it so as to exclude certain claims, then the running of the limitation period in respect of each such claim resumes: s. 47E(3)-(5). By contrast, the class representative is not a party since the representative does not as such have a claim: the claims are those of the represented persons, and any damages recovered are paid out on their behalf: see s. 47C(3).

[5] Although repealed by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, s. 47E continues to apply in respect of claims to which Part 5 of Sch 8A does not apply: i.e. claims where the infringement occurred before 9 March 2017, other than claims that arose before 1 October 2015 (see the Consumer Rights Act 2015, Sch 8, para 8(2)). For limitation in claims where the infringement and damage took place on or after 9 March 2017, para 23 of Sch 8A contains equivalent provisions regarding the calculation of the limitation period for individual claims within the scope of collective proceedings.

70. In her submissions that rule 38 does not apply to the present application, Ms Wakefield pointed to rule 38(2), which states:

> "An application for permission under this rule shall be served on the parties to the proceedings and may be made by—
>
> (a) an existing party; or
>
> (b) a person who wishes to become a party."

She stressed that the application here was being made by the class representative not the persons whom it was proposed to add to the class, and that it was wholly impractical for such an application in collective proceedings to be served on all the class members.

71. However, it is clear that rule 38 does apply to collective proceedings: see rule 74(1). We consider that it therefore has to be construed, pursuant to rules 2(2) and 4(1), so as to fit with the collective proceedings regime. That regime includes rule 85, which provides that an application to vary a CPO may be made by the class representative as well as by a represented person. And as regards service, we consider that the requirement could be met in a just and proportionate manner by the Tribunal directing that such an application be publicised on the claims website, as with other notices for the attention of class members: see also rule 77(2)(a) which provides that the Tribunal may give such directions as it thinks fit, including as regards service of any pleadings, if it makes a CPO. On that basis, we see no particular difficulty in the effective application of rule 38 in collective proceedings. Moreover, we have no doubt that such issues cannot form a basis for overriding a defendant's accrued limitation rights, which rule 38(6) is designed to protect.

72. Even if it were possible, contrary to our holding above, to have claims by deceased persons included in collective proceedings, the application to amend is made after the limitation period has expired and an amendment to the class definition to add persons who were deceased before the claim form was issued cannot be allowed as it does not come within any of the categories in rule 38(7).

73. We should make clear that this is distinct from the issue of those persons who were alive when the claim form was issued but have subsequently died or should

die in the course of the proceedings. Nothing in this judgment is directed at the question of whether the class representative could apply to amend the claim form and/or any CPO to have those persons substituted by the representatives of their estates.

E. THE COMPOUND INTEREST ISSUE

74. A claim for compound interest was included in the claim form from the outset. Para 114 of the claim form states:

> "Compound interest, by way of damages, is claimed on the losses as set out in summary above. The members of the proposed class are entitled to full compensation for the loss and damage caused to them by the proposed Defendants' breach of statutory duty for the Full Infringement Period. In particular:
>
> a. those proposed class members, who effectively borrowed money and/or increased their borrowings in order to pay, and/or as a result of paying, the Overcharge (whether by using overdraft facilities, using credit cards, or using other forms of credit) suffered charges on a compound interest basis (as well as other financing costs) on those borrowed sums;
>
> b. those proposed class members who were in credit at any bank or savings institution lost, on a compound basis, the return on investment on the credit sums that they would have saved but which, instead, were used to pay the Overcharge (including by being unable to save that money in a bank account attracting interest, or by investing that money elsewhere);
>
> c. both groups set out above were kept out of and denied the use of their money, on a compound basis, either to decrease their borrowings or to increase their savings/investments;
>
> d. for the avoidance of doubt, some proposed class members may have fallen into both categories above (either sequentially or concurrently), although *it is averred that all class members will fall at least in to one or other of the categories above*." [our emphasis]

75. The claim form proceeds to state that the claim for compound interest is advanced on an aggregate basis, as with the other damages claimed, and that it is being put forward as a damages claim following *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 AC 561 ("*Sempra Metals"*).

76. The quantum of the principal claim is estimated in the claim form at "up to" £7.2 billion. Given that this alleged loss was incurred over the period 1992-

2008, compound as opposed to simple interest makes a very substantial difference to the total sum claimed. We were told that, as at January 2021, the claim with simple interest would be about £13.8 billion whereas with compound interest it is estimated at about £16 billion. Thus the claim for compound interest alone adds some £2.2 billion to the total award sought in these proceedings. However, on the basis that the class comprises some 46.2 million people and that damages will be distributed on a per capita basis, then if a straight per capita distribution were applied for the 16 year claim period,[6] compound as opposed to simple interest would add about £47.62 per head to the amount each individual class member would receive.[7]

77. Rule 74(6) states:

> "A collective proceedings order … may be limited to only some parts or issues in the claims to which it relates."

As we noted above, Mastercard is not now opposing the grant of a CPO (subject to the question of an undertaking from Innsworth Capital) but submits that it should exclude claims for compound interest.

78. Essentially, Mr Hoskins opposed the inclusion of claims for compound interest on the basis that this was not a common issue across the class and that no plausible or credible method had been put forward for calculating the loss suffered. Before addressing the issue, it is appropriate to set out the legal position governing claims for compound interest in English law.

79. At common law, it was held that there is no power to award interest on a debt or damages. This obvious injustice was eventually remedied by statutory intervention. By s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934, the courts were given discretion to award interest on any debt or damages, but only on a simple and not compound basis. This restricted approach to interest

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[6] In fact, it is proposed that the per capita distribution would be calculated on an annualised basis by reference to the aggregate loss and size of the class in each year of the claim period, so those in the class for the full period would receive more and those who became members of the class only in later years of the claim period would receive less: see the CAT Judgment at [46].

[7] The figures will all need adjustment to reflect the exclusion of those who had died before the claim form was issued: see para 72 above. But even as reduced the aggregate claim figures remain vast.

remains in the statutory provision which currently applies, s. 35A of the Senior Courts Act 1981.

80. However, building on some previous judgments, the landmark decision of the House of Lords in *Sempra Metals* established the basis on which compound interest may now be awarded, not *on* damages but as part of the damages. But, interest on that basis must be specifically claimed and justified as part of the claimant's loss for breach of contract or tort. *Sempra Metals* itself concerned a restitutionary claim for reimbursement of tax which, it had emerged, had been demanded contrary to overriding provisions of EU law. The Revenue did not dispute liability to make restitution or to pay simple interest pursuant to statute, so the only issue concerned compound interest. In his speech, Lord Nicholls expressed the position as follows:

> "94. … the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.
>
> 95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.
>
> 96. But an unparticularised and unproved claim simply for 'damages' will not suffice. General damages are not recoverable. The common law does not assume that delay in payment of a debt will of itself cause damage. Loss must be proved. To that extent the decision in the *London, Chatham and Dover Railway* case remains extant. The decision in that case survives but is confined narrowly to claims of a similar nature to the simple claim for interest advanced in that case. Thus, that decision is to be understood as applying only to claims at common law for unparticularised and unproven interest losses as damages for breach of a contract to pay a debt and, which today comes to the same, claims for payment of a debt with interest. In the absence of agreement the restrictive exception to the general common law rules prevails in those cases.
>
> 97. The common law's unwillingness to presume interest losses where payment is delayed is, I readily accept, unrealistic. This is especially so at times when inflation abounds and prevailing rates of interest are high. To require proof of loss in each case may seem unduly formalistic. The common law can bear this

> reproach. If a party chooses not to prove his interest losses the remedy provided by the law is to be found in the statutory provisions.
>
> …
>
> 100. For these reasons, I consider the court has a common law jurisdiction to award interest, simple and compound, as damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort."

81. All the other members of the Appellate Committee agreed with this approach. Thus, Lord Scott stated, at [132]:

> "I shall content myself with expressing my concurrence with the conclusion which appears to me to have been reached by all my noble and learned friends, that interest losses caused by a breach of contract or by a tortious wrong should be held to be in principle recoverable, but subject to proof of loss, remoteness of damage rules, obligations to mitigate damage and any other relevant rules relating to the recovery of alleged losses."

82. The claims in these proceedings are for sums equivalent to the multilateral interchange fees ("MIFs") paid on transactions using Mastercard cards that were passed through to consumers by an increase in the prices paid for goods and services, referred to in the claim form as "the Overcharge". As noted above, the claim form alleges that all class members will either have incurred borrowings or financing costs to fund the Overcharge or have lost interest that they would otherwise have earned through deposit or investment of the Overcharge, or some combination of the two.

83. Ms Demetriou, who conducted this part of the argument on behalf of Mr Merricks, said in her oral submissions:

> "It is difficult to imagine … that there will be any member of the class who did not, at least at some point during the 16-year period covered by the claim, either borrow money or have savings. And if they did either of those things it's our case that they would have been caused some loss as a result of having been charged an overcharge.
>
> And so the starting point in relation to this issue is therefore that the inclusion of a claim for compound interest is much more likely to be reflective of the true loss to the class than the exclusion of such a claim."

84. However, as Ms Demetriou then accepted, it is not sufficient for a claim to compound interest to show that an individual had borrowing and/or savings. It is necessary to show, on the balance of probabilities, how they funded the

additional expense or what they would have done with the additional money if there had been no Overcharge. They may have been able to pay the additional amount out of their earnings and/or might simply have used the additional money (if there had been no Overcharge) to spend a bit more and not to reduce borrowings or add to a savings account.

85. That observation is particularly pertinent in the present case. While the aggregate claim for 46.2 million people is enormous, the claim on an individual basis, in each year of the claim period, is very small. By way of illustration, applying a per capita distribution, the aggregate principal loss quantified in the claim form at £7.2 billion amounts to £155.80 per class member, which for a claim period of 16 years is under £10 per year.[8] Of course, that figure is a simple average (i.e. the mean), and like any average disguises the fact that in reality some class members will have suffered significantly more loss and others significantly less. Nonetheless, even for those with higher income who may have had correspondingly higher expenditure, the principal loss suffered is not a large amount and it would have been incurred not as a lump sum but, in effect, day-by-day as they made purchases of goods and services, and therefore in a very small amount each week.

86. It is important for present purposes to recognise that the development of the law by the House of Lords in *Sempra Metals* still leaves compound interest available on a restrictive basis, as Lord Nicholls pointed out. Considering the implications of *Sempra Metals*, the author of *McGregor on Damages* (20th edn, 2018) observes that it is now not necessary to implement the recommendation of the Law Commission in its Report on *Pre-Judgment Interest on Debt and Damages* (2004) that there should be a rebuttable presumption in payments of £15,000 or more in favour of compound interest and in payments of less than £15,000 that interest is simple. Justice Edelman comments, at para 19-067:

> "This could be said to fit, very roughly, with the cases where claimants are likely to be able, or wish, to make a claim for compound interest, but it is far better to take the *Sempra Metals* route than to have such legislative amounts and presumptions imposed."

[8] These figures will need adjustment downwards: see footnote 7 above.

And he adds, at para 19-070:

> "It is of course the truth that the great majority of cases will be unaffected by the *Sempra Metals* breakthrough. This is particularly true of personal injury and fatal accident cases, which probably account for most of the awards of interest on damages today. These will remain under the statutory umbrella. Yet should a claimant in a particular case be able to bring proof that he has borrowed extensively to cover his medical expenses, or has been unable to invest earnings which he has lost, compound interest ought to be available to him."

87. We therefore do not accept as an accurate reflection of the legal position the submission of Ms Demetriou that compound interest is "parasitic" on primary loss. That is correct only in that if there is no primary loss, then there can be no claim for compound interest. But under the *Sempra Metals* principle, compound interest constitutes a distinct head of loss, which must be separately established and cannot be presumed. In that regard, it is fundamentally different from the award of simple interest under statute.

Plausible or credible method of calculating the loss

88. In the SC Judgment, Lord Briggs accepted as persuasive for the issue of certification the criteria set out by Rothstein J, giving the judgment of the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corpn* [2013] SCC 57 ("*Microsoft*"), in a passage that the Canadian courts have applied repeatedly:

> "In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (ie that passing on has occurred). The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

89. As Lords Sales and Leggatt observed in their judgment (dissenting on other grounds) at [136], neither side in the present proceedings had sought to argue before the Tribunal that this was not an appropriate approach. Nor have they done so on the remitted CPO hearing.

90. In the CAT Judgment, the Tribunal held that Mr Merricks had, by his experts, set out a valid methodology for calculating the principal loss on an aggregate basis across the class. However, the Tribunal erred, as held by the SC Judgment, in demanding much too high a standard for the "some basis in fact" test set out in *Microsoft*, whereas that required only "a minimum evidentiary basis" and the court "must do what it can with the evidence available when quantifying damages": see the SC Judgment at [51] and [64].

91. The written submissions on behalf of Mr Merricks for the remitted CPO hearing set out by way of summary methodology two alternative approaches to estimation of the compound interest claim, based on the advice of his accountancy expert. It is appropriate to set these out in full (omitting the footnote):

> "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 (which again will be subject to ongoing consideration):
>
> 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."

92. The problem with both approaches is not any limitation on the data that might be available. As the SC Judgment made clear, that is not a basis for denying certification: the Tribunal has to do its best with the data that is available. But the first approach is based on the assumption that anyone who was a saver or a borrower would have used the small amount by which each of their purchases would have been cheaper (i.e. in the absence of the Overcharge) to reduce their borrowings or add to their savings. The second approach rests on the same assumption limited only to borrowers. However, as Ms Demetriou recognised in her oral submissions, the relevant question is: "if [the class members] hadn't suffered the overcharge, what would they have done with the additional money that they would have received?" Both the above approaches assume the answer to this question and fail to take account of the need to show, as a matter of probability, that the money would not have been used simply for a little extra expenditure. Indeed, if either approach was valid, it would mean that most claims for monetary loss by individuals in the courts would result in an award of compound interest. But that is manifestly not the position.

93. It is true that Mr Merricks' submissions proceed to state, at para 48, that "it may be the case" that alternative approaches are available. However, the claim for compound interest is put forward as amounting, on updated values, to up to £8.8 billion (i.e. £16 billion - £7.2 billion). Even if reduced by reference to the

proportion of the adult population who are borrowers and to exclude those who had died before the claim was issued, this head of damages is still a gargantuan amount. Since the Tribunal is being asked to include this issue in the collective proceedings, and given that the *Microsoft* test has now been recognised in the context of the UK regime, we expect a plausible or credible methodology to be put forward at this stage, even if it may need refinement later.

94. In the course of argument, Professor Waterson suggested that a method might be to conduct a controlled experiment by giving a sample cross-section of individuals £10 and observing what proportion used the money to reduce debt or increase savings, as opposed to simply spending it. Counsel for Mr Merricks was quick to adopt this as suggesting a possible methodology. But on reflection, we do not think that this could be an appropriate method. In the first place, as noted above, the alleged Overcharge was not incurred as a lump sum, even on an annualised basis, but incrementally in small amounts on the price of virtually every single purchase of goods and services. Secondly, while the method of distribution of damages on a per capita basis may provide a fair and practical way forward after aggregate damages have been recovered, by definition it represents an average. In reality, there will be a wide divergence in the expenditure of individuals, with a minority spending much more than the average and the majority spending less. The controlled experiment on use of money therefore will not provide a guide to the proportion of class members who actually suffered a loss of compound interest or, which is critical, to the proportion of the aggregate Overcharge which would have resulted in the loss of compound interest.

95. We should emphasise that the issue addressed here is quite different from that regarding the Overcharge itself. The Overcharge represents the aggregate of the MIFs that were passed through to the class members (in effect, the general population over the age of 16) by retailers and suppliers. Mr Merricks, by expert evidence, has put forward a plausible and credible method for estimating that loss on an aggregate basis, and that estimation can be approached using a "broad axe". This serves to quantify the loss which the class as a whole actually suffered (and it has been held by the appellate courts that it does not matter that the distribution of that loss as between class members cannot be determined).

By contrast, no credible or plausible method has been put forward to arrive at any estimate, even by "informed guesswork" (per Lord Briggs, SC Judgment at [48]), of the extent of the Overcharge that would have been saved or used to reduce borrowings rather than spent, which is the essential basis for the claim to compound interest as a distinct head of loss.

96. In this regard, s. 47C(2) which enables the Tribunal to award damages on an aggregate basis and on which Ms Demetriou placed great emphasis, does not assist. If there was a credible or plausible means of estimating the aggregate Overcharge paid each year by the proportion of the class that is likely to be entitled to compound interest on a *Sempra Metals* basis, we do not suggest that each relevant class member would have to establish his or her claim to compound interest on an individual basis.

97. In the SC Judgment, Lord Briggs, for the majority, held that the requirement of suitability of a claim for aggregate damages in rule 79(2)(f) is to be interpreted in a relative sense, meaning "suitable for an award of aggregate rather than individual damages." We consider that in the absence of a credible or plausible method of estimating what loss by way of compound interest was suffered on an aggregate basis, this head of claim is not suitable for an aggregate award. We have regard to the various factors set out under rule 79(2). It is accepted, in the light of the SC Judgment, that the claim for the principal loss is suitable for collective proceedings. But unlike the claim for the Overcharge, we consider that the claim here for loss by way of compound interest cannot be fairly resolved in these collective proceedings. Accordingly, we find that it is not suitable for collective proceedings and should be excluded. The class members will of course remain entitled to seek simple interest under statute.

98. In the light of that conclusion, it is unnecessary to consider the distinct question whether recovery of compound interest constitutes a "common issue" raised by the claims of all the class members. That would involve consideration of the proper interpretation of what constitutes a common issue pursuant to the CA Judgment. We think that is not an easy question but would merely observe that if only a minority of class members suffered loss by way of compound interest

within the terms of *Sempra Metals*, we would find it difficult to see how a claim for compound interest can raise a common issue across the class.

F. CONCLUSION

99. For the reasons set out above, we therefore decide that:

(1) Mr Merricks should be authorised as the class representative under s. 47B(8) provided that a suitable undertaking as to liability for costs is given by Innsworth Capital as set out in para 32 above;

(2) permission to amend the claim form to include deceased persons in the class is refused; and

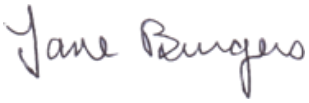
(3) the claims in the claim form are eligible for inclusion in collective proceedings pursuant to s. 47B(6), excluding the claims for compound interest.

100. Subject to the condition in para 99(1) being satisfied, we will therefore make a CPO pursuant to s. 47B(4) on an opt-out basis.

101. We will hear further submissions from the parties as to the domicile date and date for opt-in and opt-out notifications to be set out in the CPO, and as to the means by which the CPO should be publicised to class members, pursuant to rule 81(1).

102. This judgment is unanimous.

The Hon. Mr Justice Roth
President



Jane Burgess

Prof. Michael Waterson

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 18 August 2021