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

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

APPLICANT'S APPLICATION FOR PERMISSION TO APPEAL

NAME AND ADDRESS OF THE PARTY AND OF ANY REPRESENTATIVE OF THE PARTY (Rule 107(2)(a))

1. The Applicant is Walter Hugh Merricks CBE, of a private residential address in London. The Applicant is represented by Quinn Emanuel Urquhart & Sullivan UK LLP (Attention: Boris Bronfentrinker), 90 High Holborn, London, WC1V 6LJ.

THE TRIBUNAL DECISION TO WHICH THE REQUEST RELATES (Rule 107(2)(b))

2. This application for permission to appeal relates to the Tribunal's judgment dated 21 July 2017 (the "**Tribunal's Judgment**") dismissing the Applicant's application for a collective proceedings order ("**CPO**").

INTRODUCTION

3. By this application, made under Rule 107 of the Competition Appeal Tribunal Rules 2015 ("the **Tribunal Rules**"), the Applicant requests permission to appeal the Tribunal's Judgment.

4. The Applicant contends, for the reasons explained below, that section 49(1A) of the Competition Act 1998 ("**CA98**") provides that an appeal lies to the Court of Appeal on a point of law in respect of the Tribunal's Judgment. The availability of an appeal is, however, an untested question and in light of this special circumstance the Applicant respectfully requests that the Tribunal (i) invites observations from Mastercard, and (ii) lists a hearing of this application pursuant to Rule 108 of the Tribunal's Rules.

5. The grounds on which the Applicant seeks permission to appeal are in summary as follows:

   (a) First, the Tribunal erred in concluding at para. 78 of its Judgment that the claims are not suitable for an aggregate award of damages because there is insufficient data available to determine the extent to which the MIF was passed on to members of the proposed class ("**Ground 1: Pass-on**"); and

   (b) Second, the Tribunal erred in concluding at para. 89 of its Judgment that the claims are not suitable to be brought in collective proceedings because it is not possible to distribute damages to individuals on a compensatory basis ("**Ground 2: Distribution**").

6. These grounds of appeal are particularised and explained below following the Applicant's submissions on the threshold question of whether a statutory appeal lies against the Tribunal's Judgment

EXISTENCE OF STATUTORY APPEAL

7. The Applicant contends that an appeal lies to the Court of Appeal against the Tribunal's Judgment pursuant to section 49(1A) CA98.

Relevant legislative provisions

8. Section 49(1A) CA98 provides as follows:

   > "An appeal lies to an appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings –
   >
   > (a) as to the award of damages or other sum (other than a decision on costs or expenses), or
   >
   > (b) as to the grant of an injunction."

9. Section 49(1B) provides:

"An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses)."

10. The "*appropriate court*" is the Court of Appeal: see section 49(3) CA98.

11. Section 47B CA98 defines collective proceedings at section 47B(1) as follows:

"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")."

12. The Tribunal's Guide to Proceedings states at paras. 6.91 to 6.92 as follows:

"6.91 Section 49 of the 1998 Act deals with appeals against Tribunal decisions in collective proceedings. Such appeals are limited to:

- points of law arising from a decision of the Tribunal as to:
  (i) an award of damages or other sum (other than a decision on costs or expenses);
  (ii) the grant of an injunction; or
  (iii) infringement findings in stand-alone claims; and
- decisions as to the amount of an award of damages or other sum.

6.92 However, there is no statutory provision for appeals against the Tribunal's decision on an application for a CPO. Therefore, any challenge to such decisions can only be brought by way of judicial review."

Submissions

13. The Tribunal's Guide to Proceedings takes the view that there is no statutory appeal against the Tribunal's decision on an application for a CPO and, at the brief hearing on the handing down of the Tribunal's Judgment on 21 July 2017, counsel for the Applicant assumed that this statement was correct. However, with the benefit of further consideration and analysis, the Applicant contends that the Guide is incorrect in this respect and that - properly construed - section 49(1A) CA98 does provide for a statutory appeal against a Tribunal decision refusing an application for a CPO. Plainly the Guide cannot determine the proper construction of the primary legislation and, indeed, the Foreword to the Guide expressly acknowledges that it may require amendment as regards collective proceedings given the novelty of the regime: "*As regards collective proceedings and collective settlements, the jurisdiction of the Tribunal is novel. In*

prescribing directions and providing guidance for such proceedings and settlements, the Tribunal therefore has no prior practice from any part of the United Kingdom on which to draw. While the Guide seeks to provide as much assistance as possible, it is expected that the Tribunal will further develop its approach on a case-by-case basis, and the Guide ***is likely to need revision accordingly in the light of experience****.*" (emphasis added).

14. In its judgment in *Enron Coal Services Ltd (in liquidation) v English Welsh and Scottish Railway Ltd* [2009] EWCA Civ 647, the Court of Appeal considered the version of section 49 CA98 that was in force before it was amended to include reference to collective proceedings, and which provided materially as follows:

   "(1) An appeal lies to the appropriate court... (b) from a decision of the Tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A or included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum..."

15. The claimant in that case conceded that a decision by the Tribunal striking out a claim for damages would be appealable because "*it would amount to a rejection of the claim*". However, the claimant argued that the decision at issue, namely a decision of the Tribunal refusing to strike out a claim for damages under section 47A, could not be the subject of an appeal because it was not a decision "*as to the award of damages or other sum*".

16. The Court of Appeal rejected this argument holding as follows at paras. 23 to 24:

   "23. The question is whether the rejection of a rule 40 application to strike out a claim is a decision "*as to the award of damages or other sum*" under section 47A. Mr Beard accepts that a decision to strike out such a claim would be a decision as to the award of damages because it would amount to a rejection of the claim. But a refusal to strike out does no more than to leave the pleaded claim intact and to allow it to proceed to an adjudication at a full hearing. He therefore submits it is not a decision as to the award of damages because it is not determinative of the claim.

   24. I think that this is too literal an approach to the construction of section 49(1). The reference in it to a decision of the tribunal "*as to the award of damages or other sum in respect of a claim made in proceedings under section 47A*" is simply descriptive of the type of relief available in such claims. It is not in my view intended to limit the disappointed party's right of appeal to decisions of the tribunal either awarding or refusing an award of damages following a full hearing. As mentioned earlier, Mr Beard accepts that the wording is apt to include an interlocutory determination under rule 40 that a section 47A claim to damages should be struck out and it seems to me that the concession is rightly made. However, it is difficult to

believe that Parliament intended an unsuccessful claimant to be able to appeal against the dismissal of his claim after a full hearing but not to do so against its dismissal under rule 40. Once one accepts that the wording of section 49(1) is wide enough to cover a rule 40 determination against the viability of the claim it is hard to identify any linguistic or policy barrier to the inclusion of a decision to the opposite effect. In my view, the language of the subsection covers both."

17. The words interpreted by the Court of Appeal ("*decision of the tribunal... as to the award of damages*") are the same words that appear in the current version of section 49(1A) CA98 which govern the circumstances in which an appeal may be brought in collective proceedings.

18. The Applicant contends that there is no cogent basis for interpreting those words differently in the present context so as to exclude an appeal against a decision of the Tribunal refusing a CPO. On the contrary, the logic of the Court of Appeal's reasoning makes clear that section 49(1A) is to be interpreted as providing for an appeal against a decision of the Tribunal refusing an application for a CPO and that the provision is not intended to limit a party's right of appeal to decisions of the Tribunal either awarding or refusing an award of damages following a full hearing. In particular:

(a) The same provision (i.e. section 49(1A)) governs both appeals against decisions of the Tribunal in proceedings under section 47A and appeals against decisions of the Tribunal in collective proceedings. This is unsurprising given that section 47B(1) defines collective proceedings as "*two or more claims to which section 47A applies*".

(b) The Court of Appeal has held in relation to proceedings under section 47A that the reference to a "*decision of the tribunal...as to the award of damages*" is "*simply descriptive of the type of relief available in such claims*" and is not intended to restrict appeals to appeals against a final decision of the Tribunal either awarding or refusing to award damages. There is no basis for construing those words differently in the context of collective proceedings. The words "*decision of the tribunal...as to the award of damages*" is equally descriptive of the type of relief available in collective proceedings which are defined as being two or more claims for damages brought under section 47A. There is no basis for construing those words in a different manner in the context of collective proceedings so as to preclude appeals against decisions of the Tribunal taken at a preliminary stage of proceedings, in respect of whether to allow claims for damages under section 47A to continue.

(c) Indeed, the position is *a fortiori* that in *Enron* in that it falls within the scope of the concession made by the claimant in that case. A decision, such as the Tribunal's

Judgment, refusing a CPO is a decision as to the award of damages because – like a decision striking out a claim - it amounts to a rejection of the claim for damages under section 47A.

(d) Had Parliament intended a more restrictive appellate regime to apply to collective proceedings, it would have made that clear when amending section 49 CA98. Instead, Parliament chose to make the same provision for appeals in relation to decisions of the Tribunal in collective proceedings as it had made for appeals in relation to decisions of the Tribunal in proceedings under section 47A.

(e) The absence of an appeal for the refusal of an application of a CPO would lead to arbitrary results. In particular, an appeal would be available to the Applicant had Mastercard applied to strike out the claims on the ground, for example, that the Applicant had not demonstrated that there is sufficient data available to determine the issue of pass-on. It would be very odd if Parliament had provided for an appeal in those circumstances but no appeal in circumstances where precisely the same issue had led to a CPO being refused by the Tribunal rather than the claims being struck out. Further, given the possibility for a defendant to apply to strike out the claims or part of them at the CPO stage, it is quite conceivable that part of the claims could be struck out by the Tribunal and that application for the CPO is also refused. In those circumstances, if para. 6.92 of the Tribunal's Guide were correct, the perverse result would be that an applicant would have to bring both an appeal before the Court of Appeal and a claim for judicial review in the Administrative Court, potentially addressing the same or very similar issues.

19. It follows that, on a proper construction of section 49(1A) CA98, an appeal lies against the Tribunal's Judgment to the Court of Appeal.

GROUND 1: PASS-ON

20. The Applicant contends that the Tribunal erred in concluding at para. 78 of its Judgment that the claims are not suitable for an aggregate award of damages because there is insufficient data available to determine the extent to which the MIF was passed on to members of the proposed class.

21. More specifically, the Tribunal determined that:

(a) On an application for a CPO, the Applicant has to do more than show that he has an arguable case on the pleadings as if, for example, he were facing an application to strike out: para. 57.

(b) The proper approach for the Tribunal to take to the expert evidence is that set out by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp.* In particular, "*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 to demonstrate that it is common to the class (i.e. 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*": para. 58.

(c) Pass-through is not a "*common issue in any meaningful sense*": para. 66.

(d) No weight was to be placed on the fact that Mastercard has, in a variety of claims brought against it by merchants, alleged that there was complete or almost complete pass-through of any loss: para. 65.

(e) The proposal of the Applicant's experts to calculate global loss through a weighted average pass-through was "*methodologically sound*": para. 77.

(f) However, the Tribunal was "*unpersuaded on the material before [it] that there is sufficient data available for this methodology to be applied on a sufficiently sound basis*": para. 77-78.

22. The Applicant divides his submissions into three sub-grounds of appeal.

A. *The Tribunal applied too stringent a test in concluding that the Applicant had failed to demonstrate that there was sufficient evidence of the availability of data for the determination of pass-on*

23. First, the Tribunal erred in applying a test that is more onerous than that which would apply had Mastercard applied to strike out the Applicant's claim: see para. 57 of the Judgment. Such a test is inconsistent with the purpose of the certification procedure which is confined to determining whether the claims (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. The Tribunal's Rules specifically make provision at Rule 79(4)

for the defendant to bring an application to strike the claims out at the certification stage. Mastercard did not make any such application in this case. Had Mastercard made an application to strike out the claims (or any part of them) on the ground that the Applicant had not established an arguable case in relation to pass-through, then the Applicant would have responded to the specific grounds raised. The Tribunal has wrongly circumvented that process by holding the Applicant to a higher standard than would have applied on a strike-out application. Moreover, it is difficult to see why a defendant would ever bring a strike out application at the certification stage (as the Tribunal's Rules envisage it can do) if it could seek to persuade the Tribunal to refuse certification on precisely the same grounds as it would otherwise raise on a strike-out application, knowing that the Tribunal would hold the Applicant to a higher standard.

24. Second, the Tribunal wrongly applied the test laid down by the Canadian Supreme Court in *Pro-Sys*. The judgment in that case simply requires that the methodology for establishing that the overcharge has been passed on is not "*purely theoretical or hypothetical*" and that there is "*some evidence of the availability of the data to which the methodology is to be applied*". The evidence adduced by the Applicant fulfilled those requirements. However, the Tribunal held the Applicant to a much higher standard, requiring him to demonstrate that there was sufficient data to apply the proposed methodology over the entire UK retail sector over a period of 16 years: see para. 77.

25. This approach was flawed. The Tribunal should have found that so long as there is some evidence of the availability of data to establish that the methodology could be applied, at least in relation to part of the proposed claims, then that is sufficient to permit the collective proceedings to be certified. In particular, the Applicant would – on that basis – be compliant with the requirements of *Pro-Sys* because he would have demonstrated that the pass-on (at least to some extent) of the overcharge was not theoretical and that there was data that could establish that pass-on had occurred at least to some extent. Indeed, on no view can it be concluded that the overcharge was purely theoretical or hypothetical in this case given Mastercard's pleaded position in a large number of merchant claims that there was, at least to some degree and often to a very large degree, pass-on of the overcharge by merchants to consumers (see below). Indeed, the Tribunal itself found (para. 75 of its Judgment) that it had "*no doubt that some sectors have been the subject of detailed study*". This should have been sufficient for the Tribunal to find that there is available data to establish that the overcharge has at least to some extent been passed on. However, the Tribunal misdirected itself in finding that it was necessary for the Applicant to demonstrate, at this early stage of the

proceedings, the availability of data for all sectors. This error led the Tribunal to dismiss the relevance of the various sources of data referred to by the Applicant's experts, including the UK Government's own consultation that concluded that reduced interchange fees would save consumers £480 million annually.

26. Were it to have become apparent at trial that there was insufficient data to make good the Applicant's allegation of pass-on in relation to part of the claims (e.g. in relation to certain sectors or over certain periods of time), then the consequence of this would have been to reduce the amount of damages recoverable, as Mastercard would have succeeded on those parts of the claim. The Applicant's methodology for the calculation of damages would allow for such adjustments by reducing the affected volume of commerce spent with certain retail sectors or in certain years. No prejudice would be caused to Mastercard given, especially, the adequate adverse costs cover obtained by the Applicant. Instead, the Tribunal wrongly held that the likelihood of there being insufficient data to prove the whole of the loss claimed (which the Applicant does not accept as being a correct finding) was sufficient reason to exclude the entirety of the claim at the outset. This approach leads to substantial unfairness as it permits a wrongdoer (such as Mastercard, which has admitted in a substantial number of merchant claims that its actions have led to consumers suffering loss) avoiding any liability for its actions simply because of a concern at the CPO stage that a class representative may not be able to make good the entirety of the claim that is advanced. Further, the Tribunal's approach is inconsistent with the statutory scheme, which does not require an applicant to adduce any expert evidence at the certification stage; indeed, any expert evidence that may be adduced at this stage is for the purpose of demonstrating the existence of common issues; and there is no suggestion that the expert evidence need address the existence of other sources of evidence.

B. The Tribunal erred in failing to place any weight on Mastercard's pleaded position in relation to pass-on in multiple retailer claims

27. First, the Tribunal erred in failing to place weight on Mastercard's pleaded position (supported by statements of truth) in a large number of merchant claims that there was pass-on (in some cases, complete or near-complete pass-on) in the relevant sector for the relevant periods covered by those claims. That evidence is sufficient in itself to demonstrate that the requirements of *Pro-Sys* are met. Mastercard has produced (or no doubt will produce) evidence to support its pleaded position in the trials of those actions. Such evidence establishes that the pass-on of at least some of the overcharge is not purely theoretical or hypothetical. The Tribunal was wrong to dismiss this factor (at para.

65 of its Judgment) on the basis that it would be open to Mastercard to take a different position in these proceedings and/or that Mastercard "*has never argued that the same rate of pass-through should apply across all merchants*". In particular:

(a) Even if Mastercard were to argue that different rates of pass-through applied across different merchants, its pleaded position and evidence in the merchant claims are sufficient to establish that there is sufficient data available on which to determine that the overcharge has been passed on at least to some extent. No doubt Mastercard must have pleaded this positive defence on which it bears the burden of proof (and which is supported by statements of truth), on the basis of evidence in its possession or that is publicly available.

(b) In any event, where Mastercard has, in a particular merchant claim, contended that the overcharge has been passed on at least to some extent it is impossible to see how it could (consistently with its obligations to the Tribunal) contend in the present proceedings that there has been no pass-on at all in respect of that portion of the loss relating to sales made by the same merchant. In these circumstances, the Tribunal should have held that Mastercard could not plead zero pass-on in relation to the entirety of the proposed claims and that, in those circumstances, the Applicant's claim that loss had been caused to the class as a consequence of the overcharge was not purely theoretical or hypothetical.

28. Second, before dismissing the application for a CPO on the basis of pass-on, the Tribunal should – at a minimum – have explored with Mastercard and its experts, Mastercard's position on pass-on in light of its pleadings and expert reports in the merchant claims with a view to establishing the extent to which pass-on was likely to be an issue in these proceedings.

C. The Tribunal acted unfairly in failing to give the Applicant an opportunity to adduce further evidence in relation to pass-on

29. Without prejudice to the Applicant's primary submission that it did adduce sufficient evidence to satisfy the *Pro-Sys* test, the Tribunal erred in failing to give the Applicant an opportunity to adduce further evidence in relation pass-on to address the deficiencies identified by the Tribunal. Its failure to accord the applicant this opportunity was unfair in light of the following factors:

(a) The legislative regime is new and the tests applied by the Tribunal were not apparent on the face of the legislation. More particularly, it was not apparent to the Applicant

before the hearing that the Tribunal would apply the *Pro-Sys* test in relation to pass-on in the manner that it did; nor that he would be required to satisfy that test to a standard higher than would apply on a strike-out application.

(b) The Tribunal did afford the applicant such an opportunity in *Dorothy Gibson v Pride Mobility Products Limited.* As the Tribunal knows, that application for a CPO ran almost in parallel with the present application. The application in *Dorothy Gibson v Pride Mobility Products Limited,* was received by the Tribunal on 25 May 2016. The CPO Application was heard on 12-14 December 2016. Judgment was given on 31 March 2017, at which the Tribunal did as it had intimated at the hearing, and decided to give the applicant in that case the opportunity to amend her claim to propose revised sub-classes and a methodology that narrowed the claim to focus only on the effects of the agreements that were the subject of the decision in that case (para 117). As the President said in the hearing, when he invited submissions on the question of adjournment: "*We are very conscious of the fact that this is the first application for a collective proceedings order and therefore, in a sense, everyone is learning on the way*" [Day 2/ p.66/ lines 28-30]. The present application was in a materially identical position. Having been received by the Tribunal on 8 September 2016, the CPO Application was heard on 18-20 January 2017, and judgment given on 21 July 2017. The Applicant submits that, just as Ms Gibson was given the opportunity to address the deficiencies in her case, so should that same opportunity have been afforded to him.

GROUND 2: DISTRIBUTION

30. The Applicant contends that the Tribunal erred in concluding at para. 89 of its Judgment that the claims are not suitable to be brought in collective proceedings because it is not possible to distribute damages to individuals on a compensatory basis.

31. The Applicant divides his submissions into three sub-grounds of appeal.

A. The Tribunal erred in law in holding that distribution must be individually compensatory

32. The Tribunal held that:

(a) it should consider "*whether the Applicant has put forward... (2) a reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution*" (para. 67).

(b) loss on an aggregate basis must be "*translate[d] into determination of the level of individual loss*" and that there must be "*a reasonable and practicable means of getting back to the calculation of individual loss*" (para. 79).

(c) there are three sets of issues which are relevant to such calculation: *"individuals' levels of expenditure; the merchants from whom they purchased; and the mix of products which they purchased.*" It held that there was "*no attempt to approximate for any of those in the way damages would be paid out*" (para. 88).

(d) "*The governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in but for the breach. ...[T]his application ... would not result in damages being paid to those claimants in accordance with that governing principle at all.*" (para. 88)

33. In so holding, the Tribunal committed material errors of law.

34. First, the Tribunal's approach undermines, and renders redundant, the availability of aggregate damages under the collective proceedings regime. Section 47C CA98 provides that:

> "*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.*"

35. Para. 6.78 of the Guide to Proceedings says:

> "*An aggregate award determines the amount the class as a whole is entitled to and is designed to be a practical and proportionate method of assessing damages in collective proceedings. For example,* ***the Tribunal may calculate the damages on a class-wide basis****; this could be [by] way of a lump sum award against the defendant,...*" (emphasis added)

36. The Tribunal's conclusion is inconsistent with section 47C CA98 as its consequence is to require an assessment of the amount of damages recoverable in respect of the claim of each represented person. Moreover, the Tribunal's conclusion frustrates the clear legislative intent of section 47C CA98 which is to provide a means for the collective recovery of damages in circumstances where it would be impracticable and/or disproportionate to assess the loss suffered by individual members of the class.

37. Second, the Tribunal's approach is inconsistent with the role and purpose accorded by the statutory regime to the process of distribution. The collective proceedings regime provides for the mechanics of distribution of aggregate awards to be determined and

applied at the end of the proceedings, and typically to be decided on an ex parte basis (with the focus shifting to the members of the class and their interests inter se), with the benefit of any written or oral submissions that class members may decide to make regarding distribution: see Rules 92 and 93. There is no requirement in Rule 78(3)(c) that distribution feature in the Applicant's litigation plan for the CPO hearing. See further para. 6.83 of the Guide, which provides that:

> "*Typically, the defendant will not be involved in the process of determining how the award is to be distributed among the class. Accordingly, subject to submissions from any members of the class, the determination by the Tribunal as to the entitlement of the individual class members will not follow adversarial argument. The Tribunal will be concerned to ensure that the method proposed by the class representative is fair to the interests of all class members.*"

38. The Tribunal has misdirected itself by holding that, contrary to the role and purpose of distribution in the regime, there are substantive legal requirements which the proposed distribution model must meet and which the defendant can insist upon at the time of the CPO application.

39. The Tribunal seeks to deflect this criticism (that this is "*a "mere" question of distribution*") in paras 87 and 88 of the Judgment. But these justifications are wrong in law. They largely repeat the errors set out above, namely that where quantum is calculated on a class-wide basis, the *quid pro quo* is that distribution must be individually compensatory. Moreover, the Tribunal's statement that the Applicant calculates loss "*on a top-down, aggregate basis, and not on the basis of a common issue concerning loss*" (and also its reference to the "*significance of the individual issues remaining*") contains a further fundamental error of law. The aggregate damages in the present case do fall within the statutory definition of a common issue (as indeed is envisaged by the statutory regime that permits aggregate damages in collective proceedings). They are, at the very least, "*related*" issues in each claim (section 47B(6) CA98). Further, the last sentence of para 87 is simply factually wrong (since the Applicant expressly proposed that the quantum be reduced if the class reduced in scope: see e.g. paragraph 170 of the Applicant's Reply and paragraph 38 of the Applicant's skeleton for the CPO hearing).

40. For all the reasons set out above, the Tribunal erred in law in holding that distribution must be individually compensatory.

B. The Tribunal erred in law in holding that there was "no plausible way" of making distribution compensatory

41. At para. 84 of its Judgment, the Tribunal held that "*there is no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated according to the Applicant's proposed method.*"

42. To the extent that the Tribunal is here suggesting that a CPO must be refused if it is not possible to distribute an aggregate award of damages on a basis that is compensatory for each individual member of the proposed class, then this is an error of law for the reasons set out in the previous sub-ground of appeal. Subject to the availability of evidence to establish pass-on (which is addressed above), it was not contended by Mastercard that the total overcharge paid by all members of the class would not be compensatory for the class as a whole (see para. 53 of the Tribunal's Judgment which summarises that Mastercard's criticism was entirely in relation to the need to establish individual losses for each class member).

43. If, however, the Tribunal's criticism is that the Applicant has failed to put forward "*even a very rough and ready*" means of ensuring fair distribution of the aggregate award, this too is an error. Indeed, it is inconsistent with other parts of the Judgment: para 47 of the Judgment describes various different bases for distribution which were canvassed at the hearing. Moreover, the Applicant's preferred model (at this stage, before the quantum of damages or the final size of the class are even known) uses an annualised approach which seeks to provide exactly the sort of rough and ready approximation of loss which the Tribunal directed itself was legally necessary. As the Applicant made clear at the hearing, the reason why he had not put forward a more detailed plan for distribution at the certification stage was precisely because the most reasonable and proportionate approach to distribution is likely to be affected by the substantive issues determined in the trial, such as the size of the aggregate award and the size of the class, balancing the desirability of obtaining detailed information from class members with the need to make the distribution process accessible to class members, so as to allow as much of the aggregate damages as possible to be distributed to the class. Indeed, that is precisely why the legislation leaves the mechanics of the distribution of an aggregate award of damages to be determined at the end of the trial process.

C. The Tribunal acted unfairly in failing to give the Applicant opportunity to address any of the perceived inadequacies of the distribution

44. The Tribunal erred in failing to give the Applicant an opportunity to address any of the deficiencies identified by the Tribunal in relation to distribution before ruling on the CPO application. Its failure to provide the Applicant with that opportunity was unfair in light of the following factors:

    (a) The legislative regime is new and it was not clear on the face of the legislation, and particularly in light of section 47C CA98, that the Tribunal would require the Applicant to demonstrate, at the CPO stage, that distribution could be effected in such a way as to reflect the loss actually suffered by each member of the proposed class.

    (b) The Tribunal did accord the applicant a second opportunity in *Dorothy Gibson*: see para. 29(b) above.

CONCLUSION

45. For these reasons, the Applicant respectfully requests the Tribunal to grant him permission to appeal its Judgment to the Court of Appeal on the grounds set out above.

46. Not only does the appeal have a real prospect of success, but moreover there are other compelling reasons why the appeal should be heard. In particular, as the Tribunal is aware, the collective proceedings regime is brand new and it is in the public interest that the Court of Appeal has an early opportunity to rule on these important features of the statutory regime. Accordingly, whether under the first or second limb of the test for permission to appeal (applied by the Tribunal: see *Hutchinson 3G and BT v OFCOM* [2009] CAT 17), the Applicant asks that the Tribunal grant his application for permission to appeal.

WHETHER THE PARTY REQUESTS A HEARING OF ITS REQUEST AND ANY SPECIAL CIRCUMSTANCES RELIED UPON (Rule 107(2)(d))

47. As per paragraph 4 above, the availability of a statutory appeal in respect of the determination of a CPO application is an untested question. The Applicant therefore respectfully suggests that (i) Mastercard should be invited to provide its observations on this issue (as envisaged by paragraph 8.26 of the Tribunal's Guide to Proceedings); and (ii) a short oral hearing of this issue should be listed, in exercise of the Tribunal's power under Rule 108 of the Tribunal's Rules. In that way, the issue will have been fully

explored, in order both to assist the Tribunal in its decision, and to assist the Court of Appeal in any renewed application for permission to appeal.

PAUL HARRIS QC

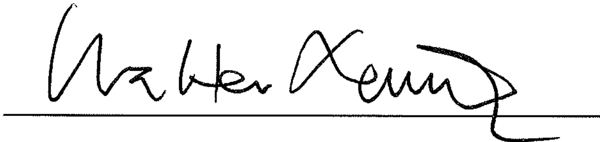
Monckton Chambers

MARIE DEMETRIOU QC

VICTORIA WAKEFIELD

Brick Court Chambers

10 August 2017



Walter Hugh Merricks CBE

Applicant / Proposed Class Representative