Case No: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

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

MASTERCARD'S SKELETON ARGUMENT FOR THE COLLECTIVE PROCEEDINGS ORDER HEARING

Reference is made in this skeleton to the bundles for the hearing

in the format: [Bundle/Tab/Page]

PART I: INTRODUCTORY REMARKS AND APPLICABLE LEGAL PRINCIPLES

A: INTRODUCTORY REMARKS

1. For the purposes of this hearing, Mastercard continues to rely on its CPO Response. This skeleton argument will therefore not repeat all the points previously made; instead, it will identify and address what are the main issues for consideration by the Tribunal at this hearing. The fact that any particular argument made by the Applicant is not addressed in this skeleton should not be understood as indicating acceptance of that argument.

2. Mastercard submits that the Tribunal should dismiss the application for a CPO in its entirety because *inter alia*:

   a. the individual claims which the Applicant seeks to group together raise different issues;

   b. the individual claims which the Applicant seeks to group together are not suitable for an aggregate award of damages;

   c. the Applicant has failed to provide a satisfactory (or any) proposal as to how an aggregate award of damages would be distributed amongst the class;

   d. the issue giving rise to the majority of the value of the claims is far from straightforward; and

   e. the nature of the Funding Agreement means that the Tribunal cannot be satisfied that the Applicant would be able to fund the proceedings, were they to run their full course.

B: APPLICABLE LEGAL PRINCIPLES

(a) Conditions for making of a CPO

3. There are two principal conditions that must be satisfied before the Tribunal may make a CPO. A CPO may only be granted:

   a. if the Tribunal considers that it is just and reasonable for the applicant to act as the class representative (the "Class Representative Condition"); and

   b. in respect of claims which are eligible for inclusion in collective proceedings (the "Eligibility Condition").[1]

4. Mastercard submits that neither of these cumulative conditions is satisfied in the present case. Both are considered in turn below, with the Eligibility Condition being addressed first.

(b) The Eligibility Condition

5. The Eligibility Condition will only be fulfilled if two sub-conditions are satisfied:

   a. first, the individual claims which the Applicant seeks to group together must raise the same, similar or related issues of fact or law (the "Common Issue Sub-condition"); and

   b. second, the individual claims must be suitable to be brought in collective proceedings (the "Suitability Sub-condition").[2]

6. Both of these sub-conditions must be satisfied before a CPO can be made.

[1] Section 47B(4), (5) and (8) of the Competition Act 1998 (the "1998 Act") **[D/10/50-52]**.
[2] Section 47B(6) of the 1998 Act **[D/10/50]**.

(c) The Class Representative Condition

7. **Sub-conditions** In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal must consider whether, *inter alia*, the applicant:

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

   b. be able to pay the defendant's recoverable costs if ordered to do so.[3]

8. **Acting fairly and adequately** In determining whether the proposed class representative would act fairly and adequately in the interests of the class members, the Tribunal must "take into account all the circumstances".[4]

9. **Funding** The Tribunal will expect the applicant to have prepared a plan for the collective proceedings which addresses the matters set out in Rule 78(3)(c). Matters that "may appropriately be set out in the plan" include, if it is proposed that the collective proceedings should result in an aggregate award of damages, how that award would be distributed as between members of the class.[5] The proposals for distribution are therefore clearly a circumstance that the Tribunal may take account of in determining whether to make a CPO.

10. The Tribunal will consider not just whether the applicant would be able to pay the defendant's recoverable costs if ordered to do so; by extension, the applicant's ability to fund its own costs is also relevant. In considering this aspect, the Tribunal will have regard to the proposed class representative's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers.[6]

11. It is therefore appropriate for the Tribunal to give careful consideration to the Funding Agreement that the Applicant has entered into in regard to these proceedings in order to determine his suitability to act as the class representative.

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[3] Rule 78(2)(a) and (d) **[D/13/87]**.
[4] Rule 78(3) [**D/13/87**].
[5] Tribunal *Guide to Proceedings* (2015) ("**Guide**") para 6.30, 3rd bullet [**D/14/123**].
[6] Guide para 6.33 [**D/14/124**].

(d) Aggregate damages

12. If the necessary conditions for the grant of a CPO are met, and the Tribunal believes that it is appropriate to make a CPO, then, but only then, the Tribunal may award damages on an aggregate basis.[7]

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[7] Section 47C(2) of the 1998 Act [**D/10/53**].

PART II: THE ELIGIBILITY CONDITION IS NOT SATISFIED

13. Mastercard submits that the Tribunal should refuse to make any CPO because:

    a. the Common Issue Sub-condition is not satisfied; further or alternatively

    b. the Suitability Sub-condition is not satisfied.

14. If either of these sub-conditions is not satisfied, then the Tribunal does not have jurisdiction to make a CPO.

A: THE COMMON ISSUE SUB-CONDITION IS NOT SATISFIED

(a) Introduction

15. The core notion of collective proceedings is that they group together similar claims which raise common issues.[8]

16. Mastercard submits that the CPO should be refused in its entirety given the lack of common issues in relation to quantum. Para 171 of the Applicant's CPO Reply accepts that, "As a practical matter,…,if quantum is excluded from the scope of the collective proceedings, then the proceedings cannot be taken forward" [**C/3/192]**.

17. The application seeks a CPO in respect of the alleged claims of an estimated 46.2 million claimants over a period of around 16 years. The claims are alleged to arise on the basis that every business that accepted Mastercard cards in the UK during the claim period would have passed on the unlawful cost of the MIF to its customers by way of increased retail prices.

18. The Applicant suggests that during the claim period there were over 500,000 merchants that accepted Mastercard cards.[9]

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[8] Guide, para 6.37, 2nd bullet [**D/14/125**].
[9] Applicant's CPO Reply para 54(b) [**C/3/148**]. Mastercard does not know the precise number but is happy to accept the Applicant's figure for the purposes of the CPO hearing.

19. One of the necessary sub-conditions that must be fulfilled before the Tribunal has power to make a CPO is that the individual claims which the Applicant seeks to group together "raise the same, similar or related issues of fact or law".[10]

20. Mastercard submits that, far from raising common issues, the individual claims in this case raise a myriad number of different factual issues.

(b) Lack of common issues

21. Claim Form para 46 [**C/1/15**] accepts that an assessment of the damages suffered by each member of the proposed class would require both:

    a. the determination of the actual purchases of goods and/or services made by each member of the proposed class during the infringement period; and

    b. an assessment of the extent to which each of the businesses from which those purchases were made passed on the higher charges to their customers.

(i) Purchasing history

22. It is common ground that determination of an individual claim would require consideration of the purchasing history of the claimant throughout the claim period. The purchasing history of each and every claimant in the proposed class will be different; within the class there will also be significant differences in the nature and extent of expenditure. As recognised at para 51(a) of the Applicant's CPO Reply, "consumers will have made purchases from a range of different categories of merchants and from a range of different merchants within those categories" [**C/3/145**].

23. The Applicant seeks to push these differences aside on the basis that it would be "impracticable" to carry out such an assessment for each member of the proposed class and therefore aggregate damages should be awarded to the class as a whole.[11]

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[10] Section 47B(6) of the 1998 Act [**D/10/50**].

24. This misses the point and demonstrates an error of law on the part of the Applicant.

25. In order to grant a CPO, the Tribunal must be satisfied that the individual claims which are sought to be grouped together are eligible for inclusion in collective proceedings.[12] Individual claims are only eligible if the Tribunal considers that *inter alia* they raise the same, similar or related issues of fact or law. This is a necessary pre-condition for the grant of a CPO. Unless it is satisfied, the Tribunal cannot make a CPO. In the absence of a CPO, the Tribunal has no power to award aggregate damages.[13]

26. The suggestion that an award of aggregate damages is necessary or appropriate does not relieve the Applicant of the legal obligation to demonstrate that the Common Issue Sub-condition is fulfilled.

27. This point on its own is fatal to the CPO application.

(ii) Pass-on

28. The rate of pass-on, and its impact on consumer prices, differs between different businesses depending on *inter alia* their size, the importance of the merchant service charges ("MSCs") relative to their overall cost base, their profitability and margins, whether they trade online or in traditional shops, their specific business model and practices, the competitiveness of the market(s) in which they operate and the extent to which they receive payments by way of payment cards as opposed to other forms of payment, e.g. cash.

29. This differentiation is confirmed by para 6.3.6 of the Expert Report of Dr Veljanovski and Mr Dearman (the "Expert Report"), which recognises that there is a "large body

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[11] Claim Form para 46 [**C/1/15**]; Applicant's CPO Reply para 51(c) [**C/3/145-146**].
[12] Section 47B(4), (5) and (8) of the Competition Act 1998 (the "1998 Act") [**D/10/50-51**].
[13] Section 47C(2) of the 1998 Act [**D/10/53**].

of empirical evidence on pass-on of input costs" which "shows a variety of costs pass-on rates ranging from low to many orders of magnitude of the cost increase." [**A/5**][14]

30. Therefore, as Claim Form para 46 accepts, determination of each of the individual claims which the Applicant seeks to group together would require assessment of the pass-on rates of each of the businesses from which each claimant bought goods or services [**C/1/15**]. The identity of these businesses would vary as between each of the claimants.

31. The lack of commonality is compounded by the acceptance, at para 6.2.1 of the Expert Report, that pass-on rates may also vary over time [**A/5**].

32. Confronted with these fundamental difficulties, the approach suggested at para 6.2.1 of the Expert Report is "to assume a single, but not necessarily constant over time, weighted average MSC Pass-On rate across the United Kingdom economy" [**A/5**].

33. However, applying a class-wide average cannot cure the fact that there are material factual differences between the individual claims which the Applicant is seeking to group together in one class.

34. Again, the Applicant's approach is fundamentally flawed. One cannot rely on the contention that aggregate damages are the only appropriate remedy as a means to side-step the legal preconditions for the grant of a CPO. It is a necessary pre-condition for the grant of a CPO that the individual claims which are to be grouped together raise common issues. That is not the case here.

(iii) Relevant benefits

35. Mastercard submits that, insofar as an individual claimant were a Mastercard card holder during the period of the infringement, they would be required to give credit for

[14] The suggestion at para 40 of the Applicant's CPO Reply [**C/3/141**] that Mastercard is claiming "complete pass-on" in all of the current merchant damages claims that it faces is not accurate. For example, as stated at para 37 of the Applicant's CPO Reply, Mastercard's position in the *Sainsbury's* case is that there was pass-on of between 50-100% [**C/3/140**].

the benefits that they received as a result of the MIF, e.g. reduced fees or charges and rewards.[15]

36. This issue only arises in relation to claimants who were Mastercard card holders, it would not arise in relation to those who were not.

37. The calculation of quantum is therefore not a common issue as between those members of the class who were Mastercard card holders and those who were not.

38. It would therefore be inappropriate to group the claims of these two classes of claimants into a collective action.

39. The Applicant makes a number of points in this regard at para 51(c) of his CPO Reply [**C/3/145-6**]. These points have no merit.

    a. First, the Applicant argues that the question of whether higher MIFs do give rise to benefits to cardholders and whether this is legally relevant in any event is a matter that could only be determined at trial. This misses the point. Mastercard intends to raise this issue for determination and, whether it is ultimately vindicated at trial or not, this issue is not common across the whole of the proposed class. It only arises in respect of members of the proposed class who were Mastercard card holders.

    b. Second, the Applicant suggests that this issue could be addressed by a reduction in the quantum awarded to the class as a whole (with, if appropriate, distribution being modified so that the reduction is then borne differentially by the members of the class). Yet again, this fails to address the point that this is not a common issue between members of the class. Before one even gets to the stage of assessing aggregate damages, the Applicant must show that the individual claims that he wishes to group together raise common issues.

[15] Mastercard's CPO Response paras 50-52 [**C/2/65-68**].

c. Third, the Applicant suggests that this issue only concerns Mastercard credit card holders as rewards were not offered on debit cards. In relation to that:

   i. This overlooks the fact that, whilst rewards are not generally associated with debit cards, debit card holders may benefit from the debit MIF through, e.g., their issuing bank setting banking fees and charges at a lower level than would be the case in the absence of the MIF.

   ii. In any event, even if correct, the Applicant's point does not assist him. It would still be the case that there were issues arising in respect of Mastercard credit card holders that were not common with the rest of the class.

d. Finally, the Applicant suggests that, if appropriate, a sub-class could be created for Mastercard credit card holders. No details are given as to how this might be done. In any event, this does not assist. The amount of benefits received by each individual Mastercard credit card holder will have differed according to the extent of their individual spending levels. There would therefore be no common issue as between Mastercard credit card holders in any event.

(iv) Conclusion

40. The Tribunal should refuse to grant a CPO because the individual claims which the Applicant seeks to group together do not satisfy one of the necessary statutory preconditions, i.e. the Common Issue Sub-condition. The individual claims do not "raise the same, similar or related issues of fact or law"; on the contrary, they raise a myriad of different factual issues.

41. This fundamental defect in the CPO application cannot be cured by the adoption of sub-classes. As the President observed during the *Mobility Scooters* CPO hearing:

> "The point is we have to be satisfied that there are common issues. There may not be common issues across the whole class, but there be may common issues across subclasses and that is sufficient. That is the point about the subclasses. So one may feel that if there is a common issue across the whole class, it is at such a level of generality it does not justify a CPO, but you can overcome that by saying, there are these two, three, four identifiable subclasses and there is sufficient common issue within the subclass such that this procedure makes sense. If the subclasses is of a significant size then the matter can go forward. That is how it is designed to work and that is why -- simply to say, has everyone in a broad class suffered loss, well, that does not really help anyone because you cannot make an aggregate award on that basis. You have to be satisfied that there is a common issue of how much loss an individual has suffered and you can do that by looking at subclasses as long as there are not too many of them."[16]

42. In the present case, given that each individual claimant will have their own unique purchasing history, and that the pass on rates of the business in the United Kingdom will have differed, each claim will be unique. The individual claims therefore are not capable of being divided into a limited number of sufficiently homogenous sub-classes.

B: THE SUITABILITY SUB-CONDITION IS NOT SATISFIED

(a) The Suitability Sub-condition

43. In determining whether the individual claims are suitable to be brought in collective proceedings, the Tribunal must "take into account all matters it thinks fit". This includes:

[16] Mobility Scooters CPO hearing, day 2 (13 December 2016), pages 74 (lines 30 to 34) and 75 (lines 1 to 10) [**D/55A/1628C-1628D**].

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

b. the size and nature of the class; and

c. whether the claims are suitable for an aggregate award of damages.[17]

44. Mastercard submits that the Suitability Sub-condition is not fulfilled in the present case because:

a. the claims are not suitable for an aggregate award of damages;

b. the Applicant's distribution proposals are inadequate; further or alternatively

c. the majority of the claims are far from straightforward.

(b) Claims not suitable for an aggregate award of damages

(i) Applicable principles

45. Mastercard submits that the claims in this case are not suitable for an aggregate award of damages.

46. An aggregate award of damages is one made without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.[18]

47. An aggregate award determines the amount the class as a whole is entitled to[19] (i.e. without having to establish, and then add together, the loss suffered by each individual member of the class).

[17] Rule 79(2)(a), (d) and (f) [**D/13/88**].
[18] Section 47C(2) of the 1998 Act [**D/10/53**]; Rule 73(2) [**D/13/83**].
[19] Guide para 6.78 [**D/14/132**].

48. Collective proceedings are a new form of procedure; they do not establish a new cause of action.[20]

49. The cause of action upon which the Applicant relies is breach of statutory duty.[21]

50. Establishing loss is an essential ingredient of breach of statutory duty. There is no claim unless the claimant can prove that the alleged breach caused him/her loss.[22]

51. As a matter of general principle, damages for breach of statutory duty are compensatory in nature.[23]

52. The fact that it is not possible for a claimant to prove the exact sum of his/her loss is not a bar to recovery. Restoration by way of compensation is often accomplished by "sound imagination" and a "broad axe".[24] This does not mean that the assessment of damages relies on pure guesswork on the part of the judge. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.[25] However, the fundamental premise remains untouched; damages are awarded to compensate for loss suffered. Damages are not at large and in the court's discretion.

53. An aggregate damages award "is likely to be more suitable where its calculation can be made without information from the class members, such as where the defendant's records are sufficient, or where there is a large class with largely identical individual claims."[26] Neither of these situations applies here.

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[20] Guide para 6.3 [**D/14/117**].
[21] Claim Form para 2 [**C/1/1**].
[22] *Clerk & Lindsell on Torts*, (21st edition) paras 9-04 and 9-60 to 9-61 [**D/66/2940-2941]**.
[23] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, per Lord Blackburn at 39 [**D/18/175**]; *Knauer v Ministry of Justice* [2016] UKSC 9, [2016] AC 908 at para 1 [**D/48/1229**].
[24] *Watson Laidlaw & Co Ltd v Pott Cassells and Williamson* [1914] S.C (H.L.) 18, per Lord Shaw at 29-30 [**D/22/223-224**]; *Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA & Ors* [2007] EWHC 2394 (Ch); [2008] 2 WLR 637, per Lewison LJ at paras 27-29 [**D/41/812-813**] and [2008] EWCA Civ 1086; [2009] Ch 390, per Arden LJ at para 110 and Longmore LJ at para 159 [**D/42/917, 926**].
[25] *Ratcliffe v Evans* [1892] 2 QB 524, per Bowen LJ at 532-533 [**D/19/188-189**]; *Devenish*, supra, per Lewison J at para 30 [**D/41/854**].
[26] Guide para 6.78 [**D/14/132**].

a. Mastercard's records are not sufficient because, in relation, in particular, to the issue of pass-on by businesses to consumers, all relevant records will be in the hands of third parties, i.e. UK businesses.

b. This is not a large class with largely identical individual claims. It is a massive class with disparate claims.

(ii) Applicant's suggested approach to quantum calculation

54. The approach suggested by the Expert Report is so high level that it will not bear any meaningful relationship to the loss actually suffered by the class. It is so abstract that it is not even consistent with the latitude permitted to courts by the broad axe.

55. As explained above, pass-on rates will vary between merchants. However, the approach to calculating pass-on suggested in the Expert Report is "to assume a single, but not necessarily constant over time, weighted average MSC Pass-On rate across the United Kingdom economy".[27] In other words, the Applicant intends to rely on an average in respect of the different pass-on rates of more than 500,000 merchants.

56. Para 6.2.3(a) of the Expert Report states that the experts will refer to "market studies, competition authority decisions and other research as described in Section 6.3 below". However, such general materials were before the Tribunal in the Sainsbury's trial, where the Tribunal found that **no** pass-on had been proven in respect of Sainsbury's.[28]

57. Para 6.2.3(b) of the Expert Report suggests that the experts will also refer to evidence and analysis filed by the different businesses that are bringing similar damages claims against Mastercard [**A/5**]. It then states:

> ***"Assuming the MSC Pass-On rate is consistent across Businesses operating in the same sector***, which we consider is a reasonable economic assumption at this preliminary stage, then, based on the evidence from those claims, it ***may be possible*** to estimate the MSC Pass-On across key sectors such as food and drink, clothing, household goods, motoring, entertainment, travel and other retailers. This covers

[27] Expert Report para 6.2.1 [**A/5**].
[28] *Sainsbury's Supermarkets v MasterCard* [2016] CAT 11, §485 [**D/49/1514**].

approximately 70% of all payments processed with a card in the United Kingdom (see **Appendix 3**);”. (Emphasis in italics added.)

58. Para 6.2.4 of the Expert Report states [**A/5**]:

“If MSC Pass-On rates are ultimately found to be significantly different for different sectors of the United Kingdom economy, then we ***may*** be able to calculate a weighted average MSC Pass-On rate (weighted by reference to the VOC and pass-on rate associated with each sector during each year of the Infringement Period). ***This approach will depend on the availability of evidence and whether that evidence relates to the same period as the Full Infringement Period***.” (Emphasis added.)

59. Para 54(b) of the Applicant’s CPO Reply suggests that Mastercard submits that “pass-on needs to be assessed separately in respect of each of these merchants” [**C/3/148**]. This is not correct. Mastercard submits that, in order to obtain a CPO, the Applicant must satisfy the Tribunal that a robust and workable quantum calculation for the class as a whole is achievable in this case.

60. Mastercard submits that the high-level and undetailed approach suggested in the Expert Report will not lead to a quantum figure which bears any realistic relationship to the loss suffered by the class as a whole for the following reasons *inter alia*.

61. First, Appendix 3 to the Expert Report refers to claims already issued against Mastercard in the food and drink sectors, the motoring sector, the “other retailers” sector, the household goods sector, the travel sector, the entertainment sector and the clothing sector. These sectors are said to represent “at least 70% of all card activity” during the Full Infringement Period [**A/5**].

62. However, even within these seven sectors, it cannot be reasonably assumed that the MSC pass-on rate is consistent across all businesses operating in each of those sectors. The seven sectors identified are very broad and there are material differences ***within*** each of the seven specific sectors identified in the Expert Report; e.g.

   a. In the “other retailers” category, given the different nature of their business, it cannot simply be assumed that the pass-on rates of John Lewis and WH Smith will be similar to each other, let alone to other merchants in that category.

b. Similarly, in the entertainment sector, it cannot be assumed that the pass-on rates of HMV would be similar to those of Comet. Equally, it cannot be assumed that the pass-on rates of a cinema group would be similar to the pass-on rates of a retailer of electronic goods.

63. Second, the seven sectors in Appendix 3 are said to represent at least 70% of all card activity. It cannot be assumed that pass-on rates for the remaining 30% will bear any relationship to whatever figures might be estimated for the 70%.

64. This point is common ground. Para 54(a) of the Applicant's CPO Reply states that it is not claimed that there is a relationship between the pass-on rates for the 70% and the remaining 30% and expressly acknowledges that further evidence will be needed in respect of the remaining 30% [**C/3/147-148**].

65. Para 6.2.4 of the Expert Report confirms that the viability of the suggested approach "will depend on the availability of evidence and whether that evidence relates to the same period as the Full Infringement Period" [**A/5**]. However, there is no realistic prospect of obtaining sufficient evidence from a sufficient number of different merchants for the Full Infringement Period, which runs from 1992 until 2008 (i.e. between 8 and 24 years ago). This is not a case in which all that is required is disclosure in order to allow the experts to produce a robust quantum figure; it is an exercise in impossibility. Attempting to assess the pass-on rates of over 500,000 merchants throughout the UK over a 16 year period ending 8 years ago is unrealistic. The claim is too overblown to give any realistic prospect of a sufficiently reliable quantum figure for the class as a whole ever being produced.

66. This practical problem is exacerbated by the acceptance in the Expert Report that any single weighted average pass-on rate will not necessarily be constant over time.[29] It would therefore be necessary to obtain sufficient evidence throughout the duration of the sixteen year claim period.

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[29] Expert Report para 6.2.1 [**A/5**].

67. Para 54(c)(ii) of the Applicant's CPO Reply suggests that it would be inappropriate to shut the Applicant out at this stage because of alleged evidential difficulties [**C/3/149**]. On the contrary, this is precisely the sort of issue that the CPO requirement is designed to deal with. Unrealistic claims should not be certified.

68. The present claims are very different from "straightforward" cartel damages claims. By way of comparison, it is instructive to note that similar issues of proof have led the US Courts to dismiss proposed class actions against Visa and Mastercard. For example, see *Kanne and Sherman v Visa U.S.A. and MasterCard International*[30] (at p.6 of the Westlaw report [**D/111/3870**]) and *Nass-Romero v Visa U.S.A. and MasterCard International*[31] (at p.8 of the Westlaw report [**D/116/3940**])

(iii) Departure from existing case-law

69. The Applicant puts forward a number of arguments at paras 17-29 of his CPO Reply in an attempt to justify the suggested approach [**C/3/133-138**].

70. First, Applicant's CPO Reply para 19 suggests that the general principles of tort law must be taken to be modified to the extent necessary to comply with, and indeed to further the purpose of, this new statutory regime.[32]

71. This argument is inconsistent with the fact that collective proceedings are a new form of procedure; they do not establish a new cause of action.[33] The relevant legal principles are well established by consistent case-law of the Court of Appeal and House of Lords/Supreme Court. The Tribunal should consider whether aggregate damages would be an appropriate remedy on the basis of those established principles; not on the entirely speculative and hypothetical suggestion that the established principles might be altered in some way. The Tribunal should apply the law as it is; not as it might be.

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[30] 272 Neb. 489 (2006) [**D/111**].
[31] *Nass-Romero v Visa U.S.A. and MasterCard International* 279 P.3d 772 (2012) (Court of Appeals of New Mexico) [**D/116**].
[32] Applicant's CPO Reply para 19 [**C/3/133**].
[33] Guide para 6.3 [**D/14/117**].

72. Second, Applicant's CPO Reply para 20 refers to the need to provide effective remedies for breaches of fundamental EU principles [**C/3/133-4**]. However:

a. EU law does not require national courts to award damages in respect of losses that have not been proven to a satisfactory standard. [34]

b. The only relevant EU measure in relation to collective proceedings is Commission Recommendation 2013/396/EU.[35] None of its provisions suggest that a different standard of proof should be required in collective actions as opposed to individual ones.

73. Third, Applicant's CPO Reply para 22 states that the principle of "doing justice" ranks higher than the compensatory principle [**C/3/134-5**]. One aspect of "doing justice" is that a defendant should not be required to pay damages in respect of losses that have not been satisfactorily established by the claimant.

74. Fourth, Applicant's CPO Reply para 23 refers to *Parry v Cleaver*, which held that damages for personal injury should not be reduced to take account of moneys received under a contract of insurance [**C/3/135**]. There is nothing in *Parry v Cleaver* that affects the general principle that damages for statutory duty should be assessed on a compensatory basis.

75. Applicant's CPO Reply para 23 also refers to *Wrotham Park*, which concerned the basis upon which damages awarded in lieu of an injunction should be assessed [**C/3/135**]. Again, this case does not affect the general principle that damages for statutory duty should be assessed on a compensatory basis.

76. Applicant's CPO Reply para 25 refers to *Chaplin v Hicks*, again a decision in a very specific context, loss of a prize [**C/3/136**]. *Van der Garde* is similarly about loss of an opportunity.

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[34] Joined Cases C-295 to 298/04 *Manfredi* paras 60 – 64, EU:C:2006:461 [**D/53A/1621T-1621V**].

[35] Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ 2013 L 201, p.60 [**D/1A**].

77. The fact that the compensatory principle is not applied strictly in all situations is not contested. But nor can it be contested that the general principle is that damages should be compensatory and based on sufficient proof. The relevant question for the Tribunal is whether the Applicant has satisfied it that his proposed approach to quantifying damages (even assuming the necessary evidence could be established) is sufficiently robust in light of the applicable legal principles. The Tribunal has Mastercard's primary submission that applying a single weighted average pass-on rate across the whole United Kingdom economy (over 500,000 merchants) over a sixteen year period which ended over 8 years ago is not an acceptable basis for quantifying damages – particularly at the levels sought by the Applicant.

78. Fifth, Applicant's CPO Reply para 24 refers to the broad axe principle [**C/3/135**]. For the reasons set out above, the approach suggested in the Applicant's Expert Report goes way beyond what is permitted under the broad axe principle.

79. Sixth, Applicant's CPO Reply para 26 queries whether the court should err on the side of under-compensation when it wields the broad-axe [**C/3/136-7**]. This is a question for another day. It need not be determined now.

80. Seventh, Applicant's CPO Reply para 28 sets out a quote from *Devenish* [**C/3/137-8**]. It is not clear what it is said to add to the issues before the Tribunal.

(iv) Conclusion

81. For the reasons set out above, Mastercard submits that the claims here are not suitable for an aggregate award of damages.

82. It would be unfair, unjust and contrary to existing legal principles to assess aggregate damages in respect of claims on behalf of 46.2 million claimants over a claim period of 16 years on the basis of the superficially high-level gloss proposed by the Applicant.

(c) Applicant's distribution proposals are inadequate

83. As explained above, the proposal for distribution of any aggregate damages award is a factor that the Tribunal can, and should, take account of in determining whether to make a CPO. In this case, the Applicant has failed to provide any detailed proposals for distribution (other than that it would be conducted on an annualised basis).

84. The Applicant's position is as follows:

a. It is not proposed that there be an individualised assessment of damages for each member of the proposed class.[36]

b. It is not proposed that any class member will be required to prove the amount spent by him/her during the claim period and on what goods or services.[37]

c. It is not proposed to distribute any aggregate award of damages by reference to individual spend of the proposed class members.[38]

d. It is intended that each class member will be entitled to claim an amount for each year that he/she was in the class (with no further distinction being made).[39]

e. No other indication has been given of the basis upon which the entitlement of each class member would be determined.

85. The Applicant's approach is that consideration of the appropriate distribution mechanism can be left to a later date. Para 66 of the Applicant's CPO Reply suggests [**C/3/153-4**]:

> "…many issues will quite properly affect the suitable distribution mechanism: class definition and thus number of members; opt-in and opt-out; duration of the claim; causation; pass-on; overall aggregate award. The suitable time for detailed concrete proposals on distribution is once these issues have at least become much clearer, even if not completely resolved."

[36] Claim Form para 39 [**C/1/13**].
[37] Litigation Plan para 79 [**A/8F**].
[38] Litigation Plan para 64 [**A/8F**].
[39] Litigation Plan para 81 [**A/8F**].

86. This attempt to duck the issue should not be permitted.

87. The Tribunal is entitled to expect the Applicant to explain on what basis it envisages distributing damages if its claim were to succeed. In terms of the variables referred to in para 66 of the Applicant's CPO Reply [**C/3/153-4**]:

   a. The Applicant has proposed a class definition.[40]

   b. The Applicant has estimated the number of class members at approximately 46.2 million.[41]

   c. The Applicant is not seeking an opt-in CPO.[42]

   d. The duration of the claim is said to be 22 May 1992 until 21 June 2008.[43]

   e. The Applicant claims that the EEA MIF caused the domestic UK MIF to be higher than it would otherwise have been.[44]

   f. The Applicant has produced calculations on the basis that there was 100% pass-on.[45]

   g. The Applicant has valued the overall aggregate award at up to £14,098,000,000.

88. The suggestion that the Applicant should not be expected to put forward ***any indication*** to the Tribunal as to how it would distribute the aggregate damages claimed is untenable. The Tribunal should not make a CPO unless it is satisfied that proper thought has been given to all parts of the proceedings. That is why the Guide

[40] Claim Form para 5 [**C/1/2**].
[41] Claim Form para 25 [**C/1/10**].
[42] Claim Form para 7 [**C/1/2**].
[43] Claim Form para 94 [**C/1/33-34].**
[44] Claim Form paras 97-105 [**C/1/35-39**].
[45] Claim Form para 112(e) [**C/1//43**].

indicates that the Tribunal expects an applicant to produce a collective proceedings plan as part of its application for a CPO.

89. The failure of the Applicant to provide ***any*** details as to the criteria to be applied to distribute an aggregate award of damages (other than an annualised approach) is a further factor that should cause the Tribunal to refuse to make a CPO.

90. The failure to provide any distribution details again highlights the fundamental flaw which lies at the heart of this CPO application; it is simply too overblown. A collective action on behalf of 46.2 million people, who made purchases from over 500,000 merchants, over a sixteen year period which ended eight years ago, cannot reasonably be determined on a collective basis.

(d) Strength of the claims

91. The Guide identifies the strength of claims as a matter which should be taken into account in determining whether collective proceedings should be opt-in or opt-out.[46] The Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, based on a high level view of the strength of the claims.[47]

92. The fact that the strength of the claims is only expressly referred to in the context of a choice between opt-in or opt-out proceedings does not preclude the Tribunal from taking into account the strength of the claims when deciding whether to make any form of CPO at all. Indeed, the natural conclusion is that it should do so. In any event, the Tribunal must take into account all matters it thinks fit, which must include the strength of the claims.

93. The Applicant suggests that the fact that the Tribunal is not in a position finally to determine an issue means that no regard should be paid to it.[48] This is patently

[46] Rule 79(3)(a) [**D/13/88**].
[47] Guide para 6.39, 1st bullet [**D/14/126**].
[48] Applicant's CPO Reply, para 7 [**C/3/127**].

incorrect. The Tribunal is allowed to, and should, form a high level view of the strength of the case on the basis of the material before it.

94. In this regard, Mastercard submits that the Tribunal should take into account that the Commission Decision upon which the Applicant relies only establishes an infringement in respect of the EEA MIF. However, nearly 95% of the sums claimed by the Applicant are based on domestic UK IFs.[49] In respect of this part of the claim, the Applicant must prove, as a matter of fact and law, that the level of the EEA MIFs caused the level of Mastercard's UK domestic IFs to be higher than they otherwise would have been, and the extent to which they caused them to be higher.[50]

95. In considering whether to make a CPO in respect of highly complex claims of this nature, Mastercard submits that the Tribunal should take account of the fact that the position in relation to 95% of the value of the claims is far from straightforward.

(e) Conclusion

96. In light of the above, Mastercard submits that the Suitability Sub-condition is not fulfilled.

[49] Mastercard's CPO Response para 80 [**C/2/75**].
[50] Claim Form paras 103-105 [**C/1/37-39**]; Mastercard's CPO Response paras 78-90 [**C/2/75-79**].

PART III: THE CLASS REPRESENTATIVE CONDITION IS NOT SATISFIED

A. ISSUES

97. As set out above, the Tribunal must be satisfied that it is appropriate for the Applicant to be authorised to act as the class representative. This must include consideration of whether the Applicant would be able to fund the proceedings, were they to run their full course.

98. The Applicant's ability to fund the proceedings depends entirely on the Funding Agreement (see Exhibit WHM 4 to 1st Merricks [**A/8D**]).

99. In summary, there are a number of issues in relation to the funding secured by the Applicant which make it inappropriate for him to be authorised to act as the class representative:

   a. **The Funder's return** Two issues arise. Firstly, the Funding Agreement provides that the Funder's return should come from unclaimed damages. Mastercard submits that such an arrangement is not permitted under the relevant legislation as the Funder's return is not a 'cost or expense' within the meaning of s. 47C(6) of the 1998 Act [**D/10/53**]. Secondly, the Funder's return is not a liability 'incurred by the representative' and for this reason also recovery is not permitted under s.47C(6). In light of either or both of these points, the Funder therefore has a right to terminate the Funding Agreement. The witness statement of Ashley Conrad Keller (the "1st Keller") at para 17 asks the Tribunal to determine this issue at the outset (included following the Applicant's CPO Response at [**C/3/220**]). Mastercard agrees that this is the appropriate course. The viability of the proposed return is crucial to the Funder's willingness to continue to fund the proceedings. If it is not prepared to fund the proceedings, then it is in everyone's interest for this to be clarified as soon as possible.

b. **Conflict of interest** The terms of the Funding Agreement create a potential conflict of interest between the Applicant and the proposed class, which the Tribunal must consider.

c. **Insufficient cover** The cover provided by the Funding Agreement in relation to any liability on the Applicant's part to meet Mastercard's costs is potentially insufficient, and in any event is subject to an inflexible limit incapable of responding to the progress of the claim.

d. **Tribunal's power to make third party costs order** There is uncertainty over whether the Tribunal has the power to make a costs order directly against a third party funder, and this places further doubt on the Applicant's ability to meet Mastercard's costs if the claim fails.

100. These points are addressed in turn below.

B. THE FUNDER'S RETURN

(a) The applicable legislation

101. This has been set out in both Mastercard's CPO Response (paras 176 to 178 [**C/2/113**]) and the Applicant's CPO Reply (paras 74 to 78 [**C/3/156-160**]) and only the key aspects are summarised here.

102. Section 47C(6) of the 1998 Act provides that the Tribunal [**D/10/53**]:

> "may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings". (emphasis added)

103. Rule 93(4) of the Tribunal Rules contains a similar provision [**D/13/93**]. Although its language differs slightly from the statute, given that it is made under the vires of s.47C(6), the Rule cannot be any wider in scope than s.47C(6).

104. Rule 93(4) of the Tribunal Rules allows the Tribunal to make an order:

> "…directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings." (emphasis added)

105. Where the Tribunal makes an order under this provision, Rule 93(5) provides that it may either determine the amount payable itself, or (in England and Wales) refer the determination to a costs judge of the High Court [**D/13/93**].

106. Rule 93 is subject to the general definition of 'costs' under the Tribunal Rules. Rule 104 (in so far as relevant) provides that [**D/13/101-2**]:

> "for the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England & Wales…'

(b) The funding terms

107. The relevant funding terms are set out at paras 179 to 183 of Mastercard's CPO Response [**C/2/114**] and are repeated below.

   a. S. 2.5(b) of the Funding Agreement provides that [**A/8D**];

   > "In the event that the Litigation is successful or a collective settlement is approved…Seller will use his best endeavours to obtain from CAT that (i) the Total Investment Return be paid to the Purchaser and (ii) MasterCard pay the Seller's fees and costs in connection with the Litigation."

   b. 'Total Investment Return' is defined (pg.2) as [**A/8D**]:

   > "…an amount of the Undistributed Proceeds and any Costs Award equal to the sum of; (a) the greater of (i) £135,000,000; or (ii) 30% of the Undistributed Proceeds up to £1billion plus 20% of the Undistributed Proceeds in excess of £1 billion; plus (b) the Late Payment Interest, if any. In calculating the Total Investment Return, credit will be given for any Costs Award that is paid by the Seller to Purchaser."

c. The ‘Seller’ is the proposed representative. The ‘Purchaser’ is the third party funder.

d. ‘Undistributed Proceeds’ appears to be synonymous with *‘damages not claimed by the represented persons’* (‘unclaimed damages’) as referred to in the 1998 Act and ‘*undistributed damages’* as referred to in the Tribunal Rules.

108. The following analysis of the effect of the terms, set out in Mastercard’s CPO Response, is not disputed in the Applicant’s CPO Reply:

“the basic operation of the agreement therefore is that:

(i) Any costs the CAT may award to the representative are to be paid over by the representative to the funder (see definition of ‘Costs Award’ and section 2.1 of the agreement). This is (or is intended to be) revenue neutral for the funder – it is a repayment of sums the funder will have deployed;

(ii) The funder’s ‘reward’ is a lump sum or a percentage of unclaimed damages, but is in either event reliant on payment out of, and therefore the CAT approving a payment out of, the unclaimed damages to the funder – or to the representative for onward payment to the funder;”

109. The Tribunal will note the level of reward anticipated by the Funding Agreement in contrast with the level of funding provided. Given the amount of damages anticipated by the Applicant, the Funder’s reward is potentially massive. For example, if damages were £14 billion, and 30 per cent were ultimately undistributed, the Funding Agreement provides for the Funder to appropriate up to £940 million – a return on investment of 2,065 per cent.[51]

110. Two specific aspects of the Funding Agreement are material and are summarised below:

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[51] The calculation of the reward is set out under the definition of ‘Total Investment Return’ – Funding Agreement page 2 – and provides for a payment to the funder of ‘an amount of the Undistributed Proceeds and any Costs Award equal to the sum of (a) the greater of £135,000,000 or (ii) 30% of the Undistributed Proceeds up to £1billion plus 20% of the Undistributed Proceeds in excess of £1billion’ – credit is then to be given for any Costs Award, so the Costs Award may in fact be ignored when identifying the sum of the funder’s reward for its investment, which is a minimum of £135 million and potentially many times higher. In the example given above, the undistributed damages would be £4.2 billion (30% of £14 billion), giving a reward of (30% of £1 billion) + (20% of £3.2 billion) = £940 million – for a maximum investment of £43 million. If the undistributed proceeds were 50% of the same aggregate damages sum, the funder’s reward would be £1.5 billion – a return on maximum investment of 3,356%.

a. the Funder's reward[52] is only payable out of undistributed damages. The Funder has an ability to terminate the unfunded portion of the agreement in the event of any disapproval of or 'negative commentary' regarding the terms of the Funding Agreement (section 2.4(b)(iv) or in the event that the Funder reasonably believes that the Litigation is no longer commercially viable (2.4(b)(ii)) [**A/8D**];

b. the Funder's reward is not a liability incurred by the Applicant. Although the Applicant describes the Funder's reward as a '*fee incurred by the Applicant*' (Applicant's CPO Reply, para 107(a) [**C/3/168**]), he does so only in reliance on Section 2.5(c) of the Funding Agreement [**A/8D**]. Section 2.5(c) is, however, simply an obligation to account to the Funder in the event that the Total Investment Return – contrary to the other terms of the Agreement – is paid to the Applicant rather than to the Funder directly. This is subordinate to the core terms of the Agreement in this respect, which provide for the Applicant simply to use his best endeavours to obtain orders from the Tribunal for the Funder to be rewarded out of unallocated damages, so that a defined share of these damages is paid directly to the Funder so as to create the return on investment – see section 2.5(b). Hence, no personal liability for the Funder's reward is ever placed on the Applicant.

111. The Applicant himself accepts that this model of third party funding differs from the conventional model (Applicant's CPO Reply, para 83 [**C/3/160-1**]) in that it does not provide for payment of the Funder's reward from damages recovered by the successful claimants, but rather from undistributed damages. The other way in which it differs is in that just adverted to: it makes no charge to the Applicant for the funding provided. The whole focus of the arrangement is on persuading the Tribunal itself to release undistributed damages to the Funder so that it may obtain a (potentially massive) return on investment from that source.

112. The issue for determination at this stage therefore is whether, as a matter of law, the Tribunal has power to order payment of the Funder's reward out of any undistributed damages under s.47C(6). The short answer is that the Tribunal does not, because:

[52] As opposed to repayment to the funder of any sums it has paid out in respect of the Applicant's own legal costs.

(i) the proposed reward it is not a 'cost or expense' within the meaning of the section; and

(ii) it is not in any event a 'cost or expense' incurred by the Applicant.

(c) The ordinary meaning of 'costs or expenses'

113. As stated above, s. 47C(6) allows the Tribunal to make an order in respect of 'costs or expenses'. Rule 94(4) allows the Tribunal to make an order in respect of 'costs, fees or disbursements' [**C/13/93-94**]. No explanation is provided for the slightly different terminology used. But Rule 94(4) is made under the jurisdiction of s.47C(6) and cannot be any wider in scope.

114. The term 'costs and expenses' is a familiar one, which gives rise to no difficulty of definition.

115. 'Costs' is a reference to costs incurred by a representative in respect of their legal representation. This would include solicitor's profit costs and any disbursements incurred by the solicitor on their behalf (for example, experts' fees).[53] In this context, this would include a solicitor's success fee under a CFA, or an ATE insurance premium, as these are now well-established items of legal costs, albeit that they are no longer recoverable from the opposing party in litigation (see the Hansard extracts below).

116. 'Expenses' refers to the out of pocket expenses of the representative himself. This would include such things as travel expenses, and experts' fees incurred by the representative directly rather than through solicitors.[54]

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[53] See, for example, the trite recitation by Bowen LJ of the history of the recoverability of 'costs' in litigation in *London Scottish Benefit Society v Chorley* (1884) 12 QBD 872 at 876-877 [**D/18A/179A**] which makes clear that recoverable costs are 'legal costs and expenses' (a case cited with approval many times, most recently by the Court of Appeal in *R v Disciplinary Tribunal of the Council of the Inns of Court* [2016] 1 WLR 4506 [**D/52A/1615A**].

[54] A further explanation for the use of the term 'expenses' in the 1998 Act would lie in its territorial application. The Act applies to the United Kingdom as a whole. In Scotland, the term 'costs' is not used. Instead, what would in England & Wales be referred to as 'costs' or 'legal costs' are instead referred to as 'expenses'. See, for example, the reference to the same by Lord Neuberger in *McGraddie v McGraddie* [2015] UKSC 1, [2015] 1 WLR 560 at paragraph 12 [**D/46A/1184E**]. Accordingly, it may well be that in referring to 'costs and expenses', s.47C(6) of the 1998 Act is simply ensuring that it covers 'legal costs' in England & Wales and the same – referred to as 'expenses' in Scotland. This would further indicate that the use of the term is a narrow one, intended to reflect conventional legal 'costs' and not open ended as the Applicant suggests.

117. The overall effect of s.47C(6) is to allow the representative (at the discretion of the Tribunal) to recover reasonable legal costs of a solicitor-and-own-client nature, and his out of pocket expenses, from undistributed damages, so that he may be held harmless from the usual shortfall on costs recovery which occurs on between-the-parties assessment. The potential value of such a facility to a representative is obvious. But this has nothing to do with what is attempted in this case, which is for a third party funder to be allowed to appropriate a significant part of any undistributed damages on its own account, so that it may maximise the return for its investors. This is a fundamentally different arrangement, and on any view it is outside the ambit of s.47C(6).

118. Here, the Funder's reward is not a legal cost. Nor is it an expense of the Applicant. It is therefore irrecoverable under s.47C(6).

119. The conclusion is the same if the position is analysed under the slightly different terminology of Rule 93(4). The fundamental point has been made already: the jurisdiction under the Rule must be the same as under s.47C(6), or else it exceeds its *vires*. But in any event, the core function of the Rule, like the statute, is to enable the representative (at the discretion of the Tribunal) to be held harmless from legal expense which, although reasonable, is irrecoverable between the parties because of its solicitor-and-own-client nature. The Rules state expressly that it relates to costs, fees or disbursements 'incurred' by the representative himself. Each of the terms used is a familiar one in the context of legal funding: 'costs' – the charges of a solicitor; 'fees' – the charges of experts and (if instructed by the representative directly) counsel; and 'disbursements' – other expenses incurred to third parties[55]. None of this encompasses the arrangement provided for by the Funding Agreement, whereby the Funder aims to appropriate undistributed damages on its own account in order to secure its investors' return.

(d) The Applicant's Case

120. The Applicant takes as its starting point that s.47C(6) allows costs to be recovered which exceed those recoverable between the parties. This is not controversial. In circumstances

[55] See, for example, the definition in *Buckland v Watts* [1970] 1 WB 27 at 37G – 'disbursement; that is to say money which he [the solicitor] has actually had to pay out to other people such as witnesses, counsel, professional advisers and so forth' [**D/23A/281K**] – as cited by Dyson LJ in *Agassi v Robinson* [2006] 1 WLR 2126, at paragraph 67 [**D/39A**].

where s.47C(6) is engaged, a representative will almost always have obtained a between-the-parties costs order. As stated above, section 47C(6) may allow a representative to be held harmless from legal costs which are not recovered under such an order – for example, a charge of a solicitor-and-own-client nature such as a success fee.

121. The fallacy in the Applicant's argument is to suppose that because s.47C(6) allows such legal costs to be recovered, it allows all expenses incurred by a representative to be recovered, even if not legal in nature, and even if those expenses are beyond the powers of either the Tribunal or a costs judge to assess (as required by Rule 93(5)).

122. Here, the Funder's return on investment is not a charge of a legal nature. It is a return for the Funder's speculation of its funds. It is neither 'costs' nor an expense of the Applicant. The Applicant incurs no liability from which to be held harmless.

123. If the Funder's return were recoverable under s.47C(6), its amount would have to be determined under Rule 93(5) by either the Tribunal or a costs judge. This again demonstrates that what the regime provides for is the recovery of shortfalls on legal expense, which are amenable to judicial assessment. By contrast, how is the Tribunal, or a costs judge, to determine what is a reasonable return on investment for the Funder? That is an impossible task, which (with respect) would put the Tribunal or a costs judge in an impossible position. It would fall to them to decide what profit the Funder should be entitled to make from its speculation. It is a statement of the obvious that this is not the function of the Tribunal or of a court. Indeed, it would be entirely novel for a court or tribunal to conduct an assessment of the reasonable return on third party litigation funding. Third party funding has been common in the English courts for around a decade. But the cost is never subject to assessment, even on solicitor-and-own-client assessment under the Solicitors Act. Such funding is not a legal expense, and its cost has never been subject to judicial control.

124. In these circumstances, it is impossible to accept that Parliament intended s.47C(6) to encompass the recovery of an entirely new, non-legal, cost, not recoverable in any other forensic context, and not amenable to judicial assessment. If Parliament had so intended, it would unquestionably have used very clear words – and not the unexceptional

terminology of 'costs and expenses' with its settled association with conventional legal expense.

125. In response to Mastercard's case that the costs of commercial funding are not a legal expense, the Applicant asserts that 'historically, the courts have allowed the costs of funding to be recoverable', and cites two cases.

126. The first is *KNE 1 Kos Ltd v Petroleo Brasiliero SA* [2011] 2 All ER (Comm) 57 [**D/44**]. However, this does not support the Applicant's proposition. It merely establishes that, by virtue of <u>express provision</u> in the CPR, the cost of providing a security (by bond or guarantee for example) is a recoverable item of costs. It would otherwise have been irrecoverable: see paras 45 and 50 of the judgment of Sir Mark Waller [**D/44/1090, 1091-2**].

127. The Applicant also seeks to rely on *Essar Oilfields v Norscot* [2016] EWHC 2361, where a deputy judge allowed third party funding costs to be recovered in an arbitration [**D/51**]. However, even if that case is correct, it results from specific terminology in the Arbitration Act which has no bearing here.

<u>(e) Attempted recourse to extrinsic material</u>

128. The Applicant also contends that s.47C(6) of the 1998 Act [**D/10/53**] must permit the recovery of a funder's 'reward' from undistributed damages on a purposive construction, so as to reflect parliamentary intention. However, he does not set out any proper basis for this assertion.

129. There is no ambiguity in the wording of the 1998 Act or the Rules which warrants recourse to secondary material to aid construction.[56] Nor does the construction advanced by Mastercard result in an absurdity requiring the use of such material.[57] As explained below, the correct construction admits of a workable solution for the funding of collective actions, consistent with the established meaning of 'costs and expenses'.

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[56] See *R v Secretary of State for the Environment ex parte Spath Home Ltd* [2001] 2 AC 349, 397H (afterwards, '*Spath*') [**D/30**].
[57] See *Spath*, at 398D and E [**D/30/462**].

130. However, if any such ambiguity did exist, such as to warrant reference to relevant secondary material, then the correct approach is stated by Lord Nicholls in *Spath* at 397 to 398 [**D/30/461-2**]:

(i) the rule of statutory interpretation is to seek the meaning of the words which Parliament has used (397A);

(ii) the starting point is that the language bears its ordinary meaning in the context of the statute (397B). As set out in the Applicant's CPO Reply, the ordinary and common meaning of costs and expenses does not include a funder's reward;

(iii) the next recourse is to internal aids – other provisions within the same statute (397D). Here, as noted, an express definition is provided by Rule 104; and

(iv) the court may also have recourse to external aid, such as reports of advisory committees, the Law Commission and, of course, Hansard, particularly where the same contains a clear statement by the government sponsor of the relevant legislation as to the purpose of a particular section (397D) & 399C / *Pepper v Hart* [1993] AC 593 at 640.

131. In relation to (iv), on familiar principles considerable caution must be adopted (see 397F-G & 398C-D [**D/30/461-2**]).

132. Here, the Applicant does not rely on any Government White Paper, statement by a minister (in Hansard or elsewhere) or other arguably admissible material to support his case on construction, but on a comment by Professor Mulheron in her personal capacity[58] in a paper in the Law Quarterly Review[59] as to her understanding of what Parliament intended when amending the draft Bill to include what is now s.47C(6) (see Applicant's CPO Reply para 103 [**C/3/166**]).

133. Despite Professor Mulheron's expertise in this field, this is not an admissible resource for construing the legislation. It is simply a statement of her own assumption as to the intention of the legislature.

[58] As Professor Mulheron rightly makes clear in footnote 1 [**D/67/2958**].
[59] Law Quarterly Review [2015] 131 LQR 291 [**D/67**].

134. If such an issue of construction exists, the proper source of material would be Committee Reports or extracts from Hansard citing authoritative statements by the promoter of the relevant provision as to its intent.

135. Some such limited references do exist. In the Public Bill Committee hearing on the Consumer Rights Bill on the 11th March 2014 and, in particular, in the process of promoting Government Amendment 116, which in turn became s.47C(6), the Parliamentary Under Secretary of State for Business, Innovation & Skills recorded that the purpose (and the only stated purpose) of the proposed amendment was to allow (column 588 [**D/55D**]):

> "the Competition Appeal Tribunal to order that any unclaimed damages be used to cover a claimant's legal costs." (emphasis added)

136. It was stated that this would allow the use of unclaimed damages (column 588 [**D/55D**]):

> "to cover all or part of a claimant's costs, which could include any success fee agreed with a legal representative and any insurance taken out…" (Emphasis added)

137. The Under Secretary went on to note that (column 588 [**D/55D**]):

> "…if there are cases that do not result in any unclaimed damages, the representative will not be able to recover their legal costs from the damages pot." (emphasis added)

138. This is the most authoritative statement as to the purpose which lay behind what became s.47C(6) and therefore as to Parliament's intention in approving this amendment.

139. They support the following propositions, which are consistent with the submissions made by Mastercard above:

    a. the amendment was of limited scope and was only intended to allow recovery from undistributed damages of what were properly to be regarded as 'legal costs', whether incurred directly by the claimant ('expenses') or through a solicitor ('costs');

b. the amendment was specifically intended to include within this success fees and ATE premiums. There was no indication of any intention to allow a funder's reward, or indeed any other legal cost, to be recovered; and

c. the amendment was limited to such liabilities incurred by the representative directly or through a solicitor.

140. In accordance with the principles in *Spath*,[60] these observations should also be considered in line with the wider legislative context that applied at the material time.

141. By virtue of the amendments to s.58 Courts & Legal Services Act 1990 [**D/7**] and the omission of s.29 Access to Justice Act 1999 [**D/10A/73A**] by virtue of ss. 44 and 46 Legal Aid, Sentencing & Punishment of Offenders Act 2012 (the "2012 Act") [**D/10A/78A**], with effect from the 1st April 2013, the ability to include success fees (under conditional fee agreements) and ATE insurance premiums as part of the recovered costs in between the parties costs award had been removed for all but a small rump of cases.

142. Accordingly, when Parliament was considering Amendment 116, as the references illustrate, the Government was aware that opt-out collective actions may well be funded by way of conditional fee agreement (with a success fee) and that the claimant in such a case may well seek to take out ATE insurance in order to be able to pursue such a case,[61] but that such costs[62] were no longer recoverable between the parties by virtue of the 2012 Act.

143. Accordingly, a decision appears to have been taken to allow such costs to be paid out of unclaimed damages – at the court's discretion and subject to any assessment.

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[60] [2001] 2 AC 349 [**D/30**].

[61] And satisfy the Tribunal as to his suitability to be a class representative in light of the obligation to consider whether he will be able to pay the defendant's recoverable costs if ordered to do so.

[62] Although success fees and ATE premiums relate to a form of funding, they are items which, prior to April 2013, had, by express statutory provision, been capable of being included in an order for 'costs'. Whilst the express statutory provisions have been removed for all bar a minority of cases, it can nevertheless clearly be seen that success fees and ATE premiums are matters traditionally viewed as an item of recoverable 'cost' in a way that a funder's reward has never been.

144. This therefore further supports the proposition that s.47C(6) was enacted for a specific purpose, namely to allow the Tribunal to order that unclaimed damages may be used to pay a representative claimant's shortfall[63] legal costs and expenses and that, for such purposes, success fees and ATE premiums were to continue to fall within the definition of '*legal costs and expenses*' despite the introduction of the 2012 Act.

145. This is also consistent with the change of terms from '*costs and expenses*' in s.47C(6) of the Act to '*costs, fees or disbursements*' under Rule 93(4) – the same being consistent with a legislative understanding that what was being referred to in both cases were costs of a legal nature, *viz* 'costs' (encompassing solicitor's profit costs), 'fees' (such as court fees, for example) and 'disbursements' (other payments to third parties). As stated, these terms are apt to include success fees and ATE premiums, which had, until recently, been a recoverable item of legal cost, which were amenable to judicial assessment.[64] But there is no indication at all that there was an intention to include third party funding charges, which are not legal in nature, had never been recoverable, and which were not subject to assessment by the courts.

(f) The viability of collective actions

146. The Applicant contends that Mastercard's approach to third party funding would stifle collective claims. This submission is untenable. Mastercard's submissions relate exclusively to the funding arrangement in this case, which appears to be unique. The issue for the Tribunal is simply whether the Applicant is a suitable person to be authorised to act as class representative in accordance with Rule 78, and it is in this context that the viability this particular funding method must be considered.

147. Clearly, there is no intrinsic difficulty with third party funding in collective actions. The difficulty in the instant case is in the funder desiring to take its award from the appropriation of undistributed damages.

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[63] 'Shortfall' is a reference to the difference between the costs incurred and those recovered from an opposing party

[64] See, for example, CPR 43.2 as in force prior to 1st April 2013 which made clear that 'costs' included 'any additional liability' – a term separately defined (CPR 43.2(1)(o)) to mean a success fee or ATE premium.

148. Moreover, and as the extracts from Hansard above illustrate, collective claims may also be funded via CFAs supported by ATE insurance, and, in enacting s.47C(6), Parliament was careful to take measures to ensure that these arrangements are attractive in the collective action context. Indeed, the Tribunal has already seen examples of other collective actions being funded in this exact way - see the mobility scooters litigation.[65] Therefore, there is ample scope for collective claims to be brought by this mechanism (in just the same way as CFAs and ATE insurance has in recent years facilitated the pursuit of large scale consumer claims in the courts via group litigation).

149. It should also be noted that Parliament's desire for access to justice in this area was not unqualified. Contingency fee agreements (known as 'damages based agreements') with lawyers or claims management companies are unlawful in opt-out collective proceedings, in contrast to the position in normal litigation – see s.47C(8) of the 1998 Act. Hence, it cannot be said that 'access to justice' is a Joshua's trumpet which defeats all objections to funding arrangements. Such objections must be considered on their merits. Here, the funding arrangement selected by the Applicant is not viable, as its return depends on appropriation of undistributed damages which neither the governing legislation nor the Rules permit.

(g) Conclusion on statutory construction

150. The Funding Agreement operates on a basis whereby the anticipated return is not one which can be achieved under the relevant legislation and therefore the Agreement is vulnerable to premature termination.

151. Moreover, the Funder's reward is not a liability incurred by the Applicant and therefore is not recoverable under the relevant legislation. Again, the commerciality of the Agreement is frustrated and the Agreement – including the cover for adverse costs – is at almost inevitable risk of premature termination.

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[65] Dorothy Gibson v Pride Mobility Products Limited, 14th December 2016, Transcript, Day 3, page 34, lines 3 to 25 where counsel for the Claimant confirms that the claim is being funded on a 'straight CFA' basis with the solicitors paying disbursements and any adverse costs risk being covered by an ATE policy with a deferred premium [**D/55C/1628R**]. See also Mrs Gibson's skeleton for the CPO hearing in that case, at §§135-142 [**D/55A/1628A**].

152. The Applicant could not fund this litigation in the absence of the Funding Agreement and offers no alternative source for payment of Mastercard's costs if ordered.

C. CONFLICT OF INTEREST

153. The position is summarised at paras 200 to 204 of Mastercard's CPO Response [**C/2/119**]. The Tribunal must consider whether the Applicant has a material interest which is in conflict with the interests of the class members (Rule 78(2)(b) [**D/13/87**]).

154. The concern that arises is that the operation of the Funding Arrangement is reliant on there being a sufficiently large element of undistributed damages to meet the Funder's reward – that reward apparently being a minimum of £135 million (for a maximum funding commitment of £43 million, increasing to a potential total reward many times greater (for the same commitment)). The agreement may be terminated if the Funder considers that the agreement is not commercially viable because the return may not be recovered – section 2.4(b) [**A/8D**].

155. It is in the interests of the Applicant that the Funding Arrangement functions and he is required to use his best endeavours to obtain orders from the Tribunal that the total Funder's reward is paid to the Funder.[66] The Applicant thereby has an interest in maximising the amount of undistributed damages, which is not in the interests of the class. This also ties in with the concerns that Mastercard has expressed in paras 83-90 above about the general failure of the Applicant to address how it is intended that any damages will be distributed.

156. In the Reply, four reasons are given why a conflict is said not to exist between the Applicant and the class as a whole.

157. The first is that the 'obligation' on the Applicant is only consistent with Rule 93(4). That, of course, rests on the Applicant's construction of Rule 93(4) / s.47C(6). However, even if the Applicant were correct on construction, the fact that the Tribunal would have the

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[66] Section 2.5(b) [**A/8D**].

power to make such an order does not address the point that the Funding Agreement places an obligation on the Applicant to use his best endeavours to seek payment of the total of the Funder's reward – and places the commercial viability of the arrangement at risk if it is considered that this may not be achievable.

158. The second - and effectively also the fourth - reasons are that the making of such an order is ultimately in the discretion of the Tribunal and the power, if there is one, can only be exercised after notification that there are undistributed damages. It is accepted that this provides some safeguard. However, the fact that there is a safeguard against the conflict which may mitigate the risk, does not remove the conflict and the safeguard does not fully address the concern as to the conflict between the need to ensure a probability of an adequacy of undistributed damages in order to ensure the viability of the agreement and the duties of the class representative. Moreover, the impossible position in which this puts the Tribunal itself, by making it the arbiter of the amount of the Funder's return, has already been adverted to.

159. The third reason is that the Agreement – as one would expect – provides that it is the Applicant and not the Funder that is to have control of the litigation. Again, this does not address the point that the Applicant is committing the application of his best endeavours to an end which appears to favour maximising undistributed damages to ensure the continued commercial viability of the Funding Agreement and the subsequent payment of the totality of the Funder's reward.

160. Mastercard raises these issues in light of the obligation on the Tribunal's part under Rule 78 to consider whether a conflict exists. Whether such a conflict does exist and, if so, its effect, are of course matters for the Tribunal.

D. ADEQUACY OF ADVERSE COSTS FUNDING

161. The relevant terms of the Funding Agreement are set out at paras 205 to 211 of Mastercard's CPO Response [**C/2/120-121**]. The conclusion that the Applicant's adverse costs cover is limited to £10 million under the Funding Agreement is not disputed in the Applicant's CPO Reply.

162. There does not appear to be any scope under the Funding Agreement for the element in respect of adverse costs cover to be increased. It is the only apparent source from which the Applicant could satisfy an adverse costs award.

163. The Applicant has produced a budget for his costs totalling £19,505,000 (excluding VAT). Such budget is, in any event, fringed with uncertainties and contingencies. Mastercard considers that, whilst its own costs are unlikely to be as high as the Applicants, those costs are in themselves likely to exceed £10 million and therefore the level of cover presently available.

164. One of the difficulties is that the level of Mastercard's costs will be heavily dependent on the Applicant's approach to the proceedings. There is no facility for the sums available to the Applicant in respect of adverse costs to be increased if subsequent events justify this.

165. As such, the Applicant's present arrangements in respect of Mastercard's costs are unsuitable.

E. THIRD PARTY COSTS ORDER

166. Mastercard's concerns in this regard were set out at paras 216 to 221 of Mastercard's CPO Response [**C/2/121-122**]. In summary, they are that the statutory power which exists in other forms of litigation (s.51 Senior Courts Act 1981 [**D/6**]) to make third party costs orders against funders is not apparently available here and that the statute which does apply (the 1998 Act) does not appear to contain any comparable power to make such an order.

167. Given that the only source of funding for adverse costs is the Funding Agreement, which for the reasons given in the previous section is inadequate in this respect ***[replaced text here no longer relied on in light of inter-partes correspondence]*** there is a substantial concern as to the basis on which the Tribunal can be satisfied that adverse costs would be paid if ordered.

168. ***[No longer relied on in light of inter-partes correspondence.]***

169. [No longer relied on in light of inter-partes correspondence.]

170. [No longer relied on in light of inter-partes correspondence.]

CONCLUSION

171. For the reasons given above, the issues relating to funding make it inappropriate for this Applicant to be authorised to act as the class representative.

PART IV: NO CPO FOR COMPOUND INTEREST

172. If, contrary to the above, the Tribunal is minded to grant a CPO, Mastercard submits that it should not do so in relation to the compound interest claim.

173. The Applicant seeks to include the claims of individuals to compound interest in the CPO on the basis that the MIF may have caused (i) some class members to increase their borrowings and (ii) some class members to earn less interest on their savings/investments.[67]

174. It is accepted that some proposed class members may have fallen into both categories, either sequentially or concurrently.[68]

175. Mastercard submits that no CPO should be made in respect of the claim for compound interest for the following reasons.

    a. The Claim Form demonstrates on its face that this is not a common issue by virtue of the two suggested categories of alleged loss, which are very different in nature (i.e. charges for increased borrowing versus interest foregone on investments).

    b. Even if any members of the class did suffer actual compound interest losses (which is not admitted[69]), the loss profile of each member would be radically different depending on their own personal circumstances. Even the Claim Form admits that "some proposed class members may have fallen into both categories above (either sequentially or concurrently)". In fact, the profile of each and every claimant will be different. This is not a common issue. Nor is it a matter that can be resolved by establishing sub-classes, as suggested in the Applicant's List of Common Issues. Each individual's position will be different.

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[67] Expert Report para 5.5.2 [**A/5**]; Claim Form para 114 [**C/1**].
[68] Claim form para 114(d) [**C/1/45**].
[69] See Mastercard's CPO Response para 110 [**C/2/85**].

PART V: CONCLUSION/ORDERS SOUGHT

176. In light of the above, Mastercard submits that the Tribunal should dismiss the application for a CPO.

177. If, contrary to Mastercard's submissions, a CPO is granted, the Applicant seeks an award of costs in his favour.[70] Mastercard submits that the appropriate order would be costs in the case.

   a. The requirement to obtain CPO is established by statute. It is a necessary part of the procedure that must take place in any event, regardless of any act or argument by Mastercard.

   b. In deciding whether a CPO is appropriate, the Tribunal will be assisted by the arguments put forward by the proposed defendant, even if it does not ultimately accept them.

   c. In such circumstances, it would be neither fair nor appropriate to require Mastercard to pay the costs of a successful CPO application.

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11 January 2017

[70] Applicant's CPO Reply para 189 [**C/3**].