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

APPLICANT'S SKELETON ARGUMENT FOR CPO APPLICATION HEARING

References are given to the bundles prepared for this hearing in the following form:

[*Bundle / Tab / page number (if relevant)*]

Pre-reading

The Tribunal is respectfully asked to pre-read:

- *the skeleton arguments* **[C/13]** and **[C/14]**
- *the pleadings* (*Claim Form (without annexes)* **[*C/1*]**, *(with annexes)* **[*A/0-8*]**; *Response* **[*C/2*]**; *and Reply* **[*C/3*]**)
- *the Applicant's List of Common Issues* **[*C/5*]**
- *the First Witness Statement of Mr. Walter Hugh Merricks* **[*A/8*]**
- *the Applicant's Expert Report on Common Issues* **[*A/5*]**
- *the Draft CPO and Notice* **[*A/6*]**, **[*A/7*]**
- *the Witness Statement of Mr. Ashley Conrad Keller* **[*C/3/215*]**

If time is short, the comparative law material referred to in the pleadings may be de-prioritised.

*It is anticipated that the pre-reading set out above should take around **1 day.***

1. This is the Applicant's skeleton argument for the hearing of his Application for a Collective Proceedings Order ("**CPO**").

2. The issues between the parties have been canvassed at length in the documents already before the Tribunal. In this skeleton argument, the Applicant does not seek to repeat detailed submissions that are already made elsewhere. Rather, this document takes the following structure:

   A. The fundamental merits of the proposed collective proceedings and of the Application for a CPO;

   B. Summary of the parties' positions in respect of the CPO;

   C. Clarifications following lodging of the Applicant's Reply;

   D . Other miscellaneous issues.

A. The fundamental merits of the proposed collective proceedings and of the application for a CPO

3. This application for a CPO is fundamentally sound, both as a matter of substance and of procedure.

4. The starting point as a matter of substance is that the Tribunal and Mastercard are bound by the European Commission's finding that Mastercard has committed an infringement over the whole of the claim period. The proposed collective proceedings 'follow on' from that liability finding. There is an irreducible core of that follow-on claim that remains unaffected by the various substantive arguments raised by Mastercard and which is, in the Applicant's submission, unassailable. This core consists of damage caused to members of the proposed class by the application of the unlawfully high intra-EEA multilateral interchange fees that were the subject of the Commission's Decision (the "**cross-border MIFs**").

5. Notably in this regard, Mastercard has essentially accepted that its cross-border MIFs were too high for the duration of the proposed claim period - by significantly reducing those fees in its Undertaking to the European Commission so as to bring itself into compliance with the European Commission Decision that was later reflected in the Interchange Fee Regulation that capped interchange fees. It follows that there is no serious question about the unlawfulness of overcharges for cross-border transactions; the issue is really just about the size of the overcharge and what proportion of it was passed on to the proposed class.

6. The many millions of victims of the unlawful default cross-border MIFs are entitled to seek compensation from the wrongdoer. Realistically, however, for reasons that are both obvious and common ground between the parties, it is "*impossible*" for those victims to do so on an individual basis; the costs and complexity of such an action utterly dwarf the amount that any individual would recover.

7. The introduction by the Consumer Rights Act of collective competition law proceedings was, *inter alia*, intended to address just such a problem:

> "*…breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning that it is not cost effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs - as well as acting as a further deterrent to anyone thinking of breaking the law…"* (see Applicant's Reply, paragraph 31 [***C/3/139***]).

8. The Applicant submits that, against the background of a well-founded follow-on claim for (at least) a core part of the proposed collective proceedings, it is important that effect be given to the purpose of the new legislation. Otherwise, the victims of a proven wrongdoing will be denied a remedy for practical reasons, namely, the expense and complexity of launching an individual claim. In this case, if the CPO is not made, they are also likely to be denied a remedy for limitation reasons, given that these proposed collective proceedings were filed shortly before the expiry of the applicable Tribunal limitation period.

9. The Applicant submits that practical challenges to quantification of loss or to distribution (which in this case are all surmountable) should not defeat these proceedings, not least because such an approach would permit Mastercard to benefit from its proven wrongdoing, on a potentially massive scale. Nor should the Tribunal be swayed by exaggerated complaints about dilution of the compensatory principle.

10. Both the relevant statutory provisions and the common law need to be interpreted in a manner that is facilitative of the bringing of legitimate claims of the current type, as intended by the legislature. On Mastercard's approach, it is difficult to see how *any* mass consumer damages claim would succeed in getting a CPO. The Tribunal should not allow emasculation of the new regime in this manner, right at its inception.

11. Mr. Merricks feels strongly about the propriety of bringing this claim. He will be at the CPO hearing and is happy to explain his conviction to the Tribunal, as appropriate.

12. Turning to certain discrete issues of substance, Mastercard submits that it will take issue with the losses caused to members of the proposed class where domestic interchange fees applied (i.e. when acquiring and issuing banks are both in the UK). However, Mastercard's submission should be given no weight <u>at this certification stage</u>. In particular:

    a. Mastercard itself has not asked the Tribunal to determine now, at the CPO stage, the question of whether losses caused to the proposed class where domestic interchange fees applied were caused by the infringement established by the Commission;

    b. indeed, the question is not capable of being determined at this stage. In particular, the question of whether and, if so, the extent to which domestic MIFs were higher as a result of the illegal default cross-border MIFs is one of causation and quantum, is highly-fact dependent and is, therefore, quintessentially an issue for trial. Given the information asymmetry between the parties, considerable disclosure will be required from Mastercard before the Applicant would be in a position properly to address Mastercard's submission;

c. the question for the Tribunal at this stage is whether the proposed claim is a plausible one and not whether it is right or wrong. The proposed claim is plainly plausible:

i. *first*, the submission made by Mastercard in relation to domestic interchange fees does not affect the core of the claim that relates to the application of the unlawful default cross-border MIFs that were the direct subject of the Commission Decision;

ii. *secondly*, all other parts of the proposed claim stem from and are dependent on a determination of the issues pleaded in respect of the unlawful default cross-border MIFs, meaning that this aspect of the claim is the starting point for the determination of the totality of the claim;

iii. *thirdly*, the Applicant has pleaded a plausible claim in relation to losses following the application of domestic interchanges fees and Mastercard has chosen not to apply to strike out that part of the proposed claim at this stage.

13. Similarly, as to Mastercard's limitation objection (which in any event, relates only to the period 1992-1997), it is common ground that this issue should not be determined by the Tribunal now but that the proper course would be for Mastercard – if so advised – to issue an application in respect of part of the claim after certification. Mastercard's limitation argument must, therefore, be put to one side at this stage when the Tribunal is deciding whether to grant the CPO.

14. The other central, substantive complaint made by Mastercard is that, in seeking an aggregate award of damages, the claim for quantum is insufficiently compensatory. As explained in the Applicant's Reply, this criticism is unfounded. The Applicant's position is that the proposed approach to aggregate damages is entirely in keeping with (i) conventional tortious theory, including the "*sound imagination*" and "*broad axe*" and the flexibility demonstrated in other common law contexts, such as *Wrotham Park* and loss of a chance and (ii) the approaches in other jurisdictions that employ similar approaches to compensation. The proposed method of quantifying loss is

designed to ensure as accurately as possible, compensation for the loss suffered by the proposed class as a whole.

15. Nor do the various criticisms made by Mastercard of the scope of the class definition (the 'mismatch' points) present an obstacle to certification of the claim. As the Applicant has explained in his Reply, some of these objections are unfounded or overstated and/or fail to take account of other relevant principles, such as the need for clear "*parameters*". To the extent that any of the criticisms are valid, then they are either addressed below or can be addressed when quantum is determined at trial by making appropriate adjustments.

16. There are some further substantive issues between the parties, relating to pass-on, but these are of very limited relevance at this certification stage. Thus, there is no dispute about any overcharge in the MIF being passed on to a merchant in the form of the Merchant Service Charge ("**MSC**"); that pass-on was 100% (and was not argued to be otherwise by Mastercard in *Sainsbury's*)[1].

17. At the next stage of pass-on, the Tribunal is presented with a remarkable convergence of positions. The Applicant, and his independent experts, contend (on the information available to them at this stage) that all of the MSCs were passed-on to end consumers i.e. to members of the proposed class. Mastercard has consistently argued, and continues consistently to argue, including with its independent experts, <u>exactly the same thing</u>.

18. In *Sainsbury's,* and (to the best knowledge of the Applicant) when defending the many other retailer claims against it, Mastercard's position and expert evidence are that the retailers – no matter what sector they operate in - have no (or very limited) quantum in their claims because any overcharges were passed on by those retailers to members of the proposed class[2]. It is difficult to see why, in these circumstances, the issue of pass-on to the proposed class should give the Tribunal any pause for thought

[1] It is also implicit in Article 1 of the Commission Decision which provides that the proposed defendants "*have infringed Article [101] of the Treaty... by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards...*"

[2] See Applicant's Reply, paragraph 37 **[*C/3/140*]** and Claim Form paragraph 107(e) **[*C*/1/40]**.

at this certification stage[3]. Given Mastercard's position, the Applicant has clearly pleaded a plausible case on pass-on. Any re-positioning by Mastercard of its downstream pass-on stance (to the extent that it can do so, given that it has filed defences elsewhere under a statement of truth asserting full-pass on by retailers to the proposed class), and the implications of any change in position for the calculation of quantum, will be matters to be dealt with as the proposed collective proceedings progress and following the close of pleadings.

19. Accordingly, the proposed collective proceedings are fundamentally sound as a matter of underlying substance and should be certified and allowed to proceed, especially given that they are brought by such an eminently suitable person. None of the substantive objections to which Mastercard draws attention is an obstacle to the grant of certification at this stage.

20. Finally, the Tribunal will readily perceive how much resource has been devoted to getting this Application for a CPO to its current stage, not just as a matter of substance but also procedurally. A great deal of publicly available data about the infringing conduct and its effect has been assessed, non-confidential versions of evidence filed in the retailer actions have been obtained and considered, the position in other jurisdictions has been investigated, a large pre-CPO budget has been obtained to do the required work (not to mention a very large budget for the claim should the CPO be granted), considerable expert economic and accounting analysis has been carried out, a very comprehensive and professional litigation plan (including noticing and claims administration by experienced practitioners) has been put together, and an experienced legal team has provided comprehensive pleadings and arguments meticulously addressing all of requirements set out in the Rules and Guidance. This commitment shows the seriousness and ability of those seeking to represent the proposed class.

[3] The Tribunal will also recall that, in *Sainsbury's*, when looking at the issue of pass-on from a factual damages perspective (rather than "as a defence" for Mastercard to establish), another Tribunal found that a major retailer passed-on at least 50% of the interchange fee to end consumers and, therefore, reduced the interest awarded to the retailer.

21. Refusing this application for a CPO would, it is submitted, inevitably chill and deter future actions, especially those for mass end-consumer claims – the exact opposite of the legislative intention.

B. Summary of the parties' positions in respect of the CPO

22. Rule 77 of the 2015 Rules provides as follows:

"(1) The Tribunal may make a collective proceedings order, after hearing the parties, only—

(a) if it considers that the proposed class representative is a person who, if the order were made, the Tribunal could authorise to act as the class representative in those proceedings in accordance with rule 78; and

(b) in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with rule 79."

Rule 78 – authorisation of the class representative, Mr. Merricks

23. Under Rule 78(1), the Tribunal may authorise an applicant to act as the class representative only if it is "*just and reasonable*" for him or her so to act. The considerations which are relevant to this question are set out in more detail in Rules 78(2) and (3). The Applicant addresses these considerations in his First Witness Statement **[*A/8*]**, as summarised in paragraphs 27-31 of the Claim Form **[*C/1/10-12*]**. In very brief overview, Mr. Merricks is a qualified lawyer with extensive experience in senior positions of public responsibility, in particular in the field of consumer protection, most notably as Chief Ombudsman of the Financial Ombudsman Service (see in particular paragraphs 21-23 of his statement **[*A/8/7-12*]**). He has a laudable track record in consumer protection and is taking this current proposed role very seriously.

24. Mastercard appears to accept that Mr. Merricks meets the relevant criteria for authorisation, save for one principal objection. That objection is that Mr. Merricks is said to be conflicted, by virtue of his agreement with the Funders relating to undistributed damages: see Response paragraphs 200-204 **[*C/2/119*]**. This point is bad since (i) Mr. Merricks has sole control of the litigation and is entirely committed to

getting compensation into the hands of the class members without any interference from the Funders who (ii) have provided sufficient funds to see full distribution of any aggregate award and (iii) will be paid only, if at all, from any damages that nevertheless remain undistributed (see paragraphs 138-145 of the Applicant's Reply [***C/3/175-178***], paragraph 32 of Mr. Merricks' witness statement [***A/8/14-15***], and the First Witness Statement of Mr. Keller exhibited to the Reply [***C/3/215***]). There is no conflict here.

25. Mastercard also submits that the adverse costs cover is insufficient (paragraphs 205-215, Response) which, strictly speaking, goes to Mr Merricks' authorisation (by virtue of Rule 78(2)(d)). The Applicant sets out his response in Reply, paragraph 147-149 **[*C/3/179*]**; essentially £10 million cover for *recoverable* costs is a very significant sum; it should be ample for Mastercard to defend these collective proceedings. In particular:

    a. Mastercard has been dealing with the key factual, economic, accounting and legal issues that arise in these proceedings with the European Commission and before the EU courts for over 14 years and has also been through a full OFT investigation and appeal to the Tribunal; it is intensely familiar with the issues;

    b. Mastercard is *currently* engaged in multiple pieces of domestic litigation (both follow-on and standalone) which raise identical or similar issues to those raised here, having recently taken one of those claims through to judgment in the Tribunal (and now pursuing it on appeal);

    c. Mastercard's counsel team in the current proposed proceedings is essentially the same team as that representing it in the other retailer actions. Its newly-appointed solicitors, Freshfields Bruckhaus Deringer, have a detailed knowledge and understanding of interchange fee issues. It is on the public record that Freshfields acted for VISA Europe going back to its original commitments decision with the European Commission, and then intervened on the part of VISA Europe in the Tribunal appeal by Mastercard against the OFT decision;

d. if Mastercard's costs really are forecast to be of a significantly higher order than would lead to an adverse costs order of more than £10 million of *recoverable* costs[4], then this case may well be one in which active costs management is required, promptly after certification. In this event, the Tribunal would respectfully be invited to keep a careful eye upon the size and seniority of the solicitor and counsel team acting for Mastercard, especially in light of their existing, accumulated experience of relevant issues;

e. there is no sensible comparison between the Applicant's currently budgeted costs and the very broad asserted costs that Mastercard has referred to in its Response, at paragraphs 212-214 **[*C/2/121*]**, since the two sides do not begin from even close to the same place in terms of background knowledge and information, familiarity with the documents, or analysis of the issues;

f. in recent correspondence, Mastercard has raised a concern about whether the Funders would actually be in a position to pay any adverse cost award (see Freshfield's second letter of 21 December 2016 **[*B/93/243*]**). In response, Burford Capital Limited (the ultimate parent company of the relevant funding vehicle) has confirmed in writing that it will ensure that the funding vehicle makes any payment of adverse costs that it is ordered to pay by the Tribunal up to the amount of £10 million (see Quinn Emanuel's letter dated 5 January 2017 **[B/95/248]**). Further, following the recent Burford acquisition of Gerchen Keller Capital, the Funders now operate in accordance with, and subject to, the rules of the Association of Litigation Funders, of which Burford is a member.

26. For completeness, whilst on the subject of funding, Mastercard's Response includes various complaints in respect of the Funding Agreement. The Applicant has dealt with these complaints at length in his Reply (paragraphs 67-153) **[C/3/154-180]**. In overview, the Funding Agreement is not only lawful, but it positively furthers the statutory purpose by allowing for collective proceedings to be brought (in a case in

[4] Which would only appear even conceptually possible if *every* aspect of the proposed collective proceedings were to fail - which seems very unlikely given that this claim is 'follow-on' and there is a irreducible core of the claim that is unassailable, in the Applicant's submission, on the substance.

which, if there were no funding, it would be simply impossible to continue). Respecting the legislative aversion to damages-based agreements, the Funder will seek to make a commercial return by only looking to any undistributed damages, if there are any. As the Tribunal knows, any payment of costs, fees or disbursements out of undistributed damages *can only* be made on the order of the Tribunal (Rule 93(4)), and so (even were this not to be the express intention of Parliament: s.47C(6) of the Act) such an order would be unobjectionable, since the power to allow any such payment lies entirely in the hands of the Tribunal. The Applicant has engaged specialist Leading costs counsel, Mr Nicolas Bacon QC to address the Tribunal on these and any related issues at the CPO Application hearing.[5]

27. Save for these discrete funding-related points, it would appear that Mastercard agrees that Mr. Merricks meets the Rule 78 criteria and should be authorised to carry out the role of class representative.

Rule 79 – certification of claims as eligible for inclusion in collective proceedings

28. Rule 79(1) provides that the Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied that 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.

29. Rule 79(2) provides that, in determining the suitability of the claims to be brought in collective proceedings, the Tribunal "*shall take into account all matters it thinks fit*" and goes on to set out a list of such matters. These are:

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

[5] Mastercard and the Tribunal have the full, unredacted Funding Agreement **[*C/8/242*].** Despite Mastercard raising issues about the redactions in correspondence, purportedly with the interests of the proposed class in mind, no member of the proposed class has raised any issue.

b. the costs and the benefits of continuing the collective proceedings;

c. whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;

d. the size and nature of the class;

e. whether it is possible to determine in respect of any person whether that person is or is not a member of the class;

f. whether the claims are suitable for an aggregate award of damages; and

g. the availability of alternative dispute resolution and any other means of resolving the dispute, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

30. The Applicant's case in respect of Rules 79(1) and (2) is set out in paragraphs 32-48 of Claim Form **[C/1/12-16]** (and supplemented in respect of common issues by the List filed following the CMC **[C/5]**). He does not repeat it here. In very broad overview:

a. the class has been defined deliberately so as to allow for easy and ready identification of its membership (paragraph 34, Claim Form **[C/1/12]**);

b. the claims raise almost entirely common issues (as set out, in particular, in the List at **[C/5]**, as well as in paragraphs 35-39, Claim Form **[C/1/13]**). The sole issue on which commonality may need to be revisited in due course is compound interest[6];

c. every single factor listed in Rule 79(2) points in favour of these claims being heard collectively (paragraph 40-48, Claim Form **[C/1/13-16]**). Indeed, collective proceedings are the <u>only</u> realistic way for the claims to be heard and for the proposed class members to be granted access to justice. This fact flows

[6] Issues of distribution of any aggregate award that may be ordered are for a later stage and do not arise for consideration at all in the context of the Application for a CPO.

from the combination of the large size of the class, the likely low *per capita* recovery, and the complexity of the points in issue.

31. The various objections to the proposed proceedings made by Mastercard in its Response have been addressed in detail in the Applicant's Reply and in summary form in Section A above.

C. Clarifications following lodging of the Applicant's Reply

32. There are two issues in the Applicant's Reply that the Applicant would like to address further. One arises in respect of Australian law, and the other concerns the proper treatment of persons now deceased.

Australian Law

33. In paragraph 221(c) of the Reply, the Applicant submitted that, even if there is a distinction between Federal law and State law, "*it is not clear why this assists. Even if State law does adopt a different approach, there is no reason to prefer that approach*" **[C/3/213]**. In fact, the Applicant would go further. "Representative Proceedings", can be commenced in the Federal Court of Australia by a representative applicant in circumstances where seven or more people who have claims that arise out of the same or related circumstances and give rise to a substantial common issue of fact or law and that concern claims arising under a law made by the Federal Parliament. The Competition and Consumer Act 2010 (previously known as the Trade Practices Act 1974), is the relevant Federal law that prohibits anti-competitive conduct and agreements. Accordingly, in Australia, a claim of the nature and scope of the present proposed collective proceedings would fall within the jurisdiction of the Federal Court of Australia and be brought in that Court under Federal law. The Federal jurisdiction is the oldest and most important for representative actions in Australia. Available court filing statistics indicate that the Federal Court of Australia is overwhelmingly the forum of choice in Australia for class actions (on average there are 300% to 400% more representative actions being filed annually in the Federal Court of Australia as compared to the Supreme Court of Victoria and the Supreme

Court of New South Wales).[7] Accordingly, the law of any individual State in Australia is simply irrelevant in considering a claim of the type proposed by the Applicant.

Treatment of persons now deceased

34. In paragraph 93(b) of the Response **[C/2/81]**, Mastercard complains that purchases by persons now deceased form part of the quantum of the claim (given that quantum is calculated by reference to consumer purchases made on Mastercard issued cards in the relevant period), even though such persons fall outside the proposed class. This point is one of Mastercard's 'mismatch' points.

35. The Applicant responded (in Reply, paragraph 170(b) **[C/3/189]**) that, if the Tribunal were concerned by this asymmetry, notwithstanding the other considerations referred to in paragraph 168 of the Reply **[C/3/185]**, and notwithstanding that any such asymmetry would substantially be affected (reduced) by any success that Mastercard may have on its limitation arguments, then any such significant asymmetry could be addressed by either (i) including estates within the proposed class (subject to their right to opt-out) (ii) by reducing aggregate quantum commensurately at the appropriate point.

36. As to the former point, strictly speaking, estates are not currently excluded from the class definition; that definition is silent on the issue of whether estates are included as there is no reference to proposed class members needing to still be alive. Rather, the Applicant took the view that estates are excluded by dint of the domicile date; a deceased person is not (at least on one view) domiciled in the UK (on the domicile date). To overcome this issue would involve the Tribunal declaring that anyone whose death is registered in the UK or having had an estate administered in the UK is within the definition of "*domicile*", for the purposes of the domicile date and thereby included within the proposed class.

[7] Vince Morabito, An Empirical Study of Australia's Class Action Regimes, Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions in Australia (29 July 2016) **[D/142]**

37. Having investigated the issue further, including taking advice from a specialist trust and estate practitioner (over which privilege is not waived), the Applicant believes that there is no legal impediment to his pursuing a claim on behalf of an estate and that claims by estates can be administered without any undue complexity and with little to no cost to the individuals seeking to claim for the estate, irrespective of whether that claim is made by the administrators of an estate or by beneficiaries of a deceased person that has died intestate. The Applicant can confirm that, should the Tribunal decide to provide for estates to be included within the class definition, then, as part of the claims administration process at the conclusion of the proceedings, he will instruct specialist lawyers to provide guidance to those seeking to claim on behalf of an estate. If the Tribunal is concerned by the estates issue, then this proposal is the easiest solution and ensures that all those affected by Mastercard's unlawful conduct are able to benefit from any damages recovered – though the Applicant again draws attention to the factors in his Reply at paragraph 168 which weigh against the need for any concern.

38. As an alternative, if the Tribunal considers that estates cannot or should not be included within the proposed class, the Tribunal would be able to make a reduction of quantum so as to ensure that the class is not overcompensated. However, such reduction does not arise for determination now (just as it does not arise now in relation to opters-in and opters-out, for example). Adjustments of quantum, if made, arise well after certification. In that regard, the Applicant notes that the methodology that his experts have proposed for the calculation of the quantum does not rely upon or give rise to any consideration of the class size up until the last stage when it comes to assessing the actual aggregate award for the proposed class, which is the point at which consideration needs to be given to whether losses owing to estates or their beneficiaries are included in the aggregate award. In other words, the issue is a long way off down the track.

39. In short, the point about deceased persons (and the various other points raised by Mastercard about the scope of the class definition) do not represent insuperable obstacles to ensuring a properly compensatory approach to quantum. These points certainly do not constitute any reason to prevent a clearly meritorious and well-formulated proposed collective proceedings to move forward beyond certification.

D. Other miscellaneous issues

The domicile date and opting-in/opting-out

40. If the Tribunal grants a CPO, it must specify the domicile date (see Rule 80(1)(g)). The domicile date is defined as "*the date specified in a collective proceedings order... for the purposes of determining whether a person is domiciled in the United Kingdom*" (Rule 73(2)). "*Opt-out*" proceedings may only be brought on behalf of a class member who is domiciled in the United Kingdom at the domicile date, unless s/he opts-in (see s.47B(11) of the Competition Act 1998).

41. The Applicant suggests that the date on which the CPO is granted should be used as the domicile date, as this is the point at which there is an actual claim that is proceeding before the Tribunal in which the class members are included.

42. The Tribunal must also "*specify the time and the manner by which – ... (ii) in the case of opt-out collective proceedings, a class member who is domiciled in the United Kingdom on the domicile date may opt out; and (iii) in the case of opt-out collective proceedings, a class member who is not domiciled in the United Kingdom on the domicile date may opt in*" (Rule 80(1)(h).

43. The Applicant has addressed the method of opting in or out in the draft Notice annexed to the draft CPO Order (see paragraph 5 of that Order **[A/6/3]**) which accompanied the Claim Form. However, he has not previously proposed a date by which class members should opt in or opt out.

44. The Applicant suggests that the relevant date should be 90 days after the making of the CPO. This date should give ample time for publicity of the claim to permeate throughout the class, and for class members to take a considered decision in respect of whether to participate in the claim or not.

Other timetabling

45. Paragraph 6.44 of the Tribunal's Guide to Proceedings, which concerns the hearing of

a CPO application, provides as follows:

> *"The Tribunal may invite the parties to make submissions on the future conduct of the case at the approval hearing, as if the claims had been made the subject of a CPO. Therefore, the parties should be prepared to assist the Tribunal in drawing up a timetable for the next steps in the proceedings, such as the time for filing the defence and any reply. In this sense, there is an overlap between the approval hearing and what would be considered at the first CMC in an ordinary section 47A claim."*

46. Accordingly, the Applicant proposes the following in respect of a timetable, should a CPO be granted:

    a. the Respondents to file and serve their Defence within 4 weeks of the date on which the CPO is made, together with any applications for strike out/summary judgment/trial of preliminary issues (if so advised);

    b. the Applicant to file and serve his Reply, if so advised, within 8 weeks of service of the Defence, with his responses to any applications for strike out/summary judgment/trial of preliminary issues a further 2 weeks thereafter;

    c. a CMC be listed for further directions, within 4 weeks of the Reply.

47. The Applicant makes three comments in respect of the proposed timetable.

48. *First*, the dates proposed for Mastercard must of course be seen in the context of their having received the Claim Form in early September 2016.

49. *Secondly*, the timetable is premised on the pleadings progressing regardless of (and in parallel to) any strike-out etc. applications that Mastercard may file. In the case of the domestic interchange fee issue, this course is essential because the Applicant will need to see precisely what Mastercard's case is on causation and quantum before reaching a view as to whether causation of domestic interchange fee overcharges is, indeed, an appropriate issue to be determined at a preliminary stage. Further, this course has the obvious benefit of allowing for efficient progression of the claim, whilst causing no prejudice (since there will be very little extra work required of

Mastercard in, for example, pleading a limitation defence whilst also bringing an application for summary judgment on limitation).

50. *Thirdly*, by way of general proviso, the proposed dates are put forward without knowledge of matters such as the availability of the Counsel teams at the relevant times (since the date on which the CPO is made is not yet known and may be unknowable, given that a period may be required for a reserved judgment on the application for a CPO). It may be the case that the dates accordingly need to be reasonably revisited when the CPO is made.

51. Mastercard has indicated in recent correspondence that, should the Tribunal grant the CPO, then the next step should be the determination of the "*limitation issue and the causation issue in relation to UK domestic interchange fees, as raised the Response, by way of a strike out or summary judgment application or preliminary issues trial*" [**B/97**]. It has also stated that the preparations of the pleadings should be limited to those issues according to the timetable proposed above. Mastercard has provided no indication of when it considers it can file any strike out etc. application.

52. Whilst the Applicant reserves his position on the suitability of the "*causation issue*" to be dealt with by way of a strike out, summary judgment or as a preliminary issue, there is no efficiency or cost-saving in Mastercard's proposal of only pleading to the 'strike out issues'. The issue of causation in respect of losses resulting from UK domestic interchange fees is central to a large part of the Applicant's pleaded case and directly depends on the claims and defences in respect of cross-border MIFs. It is not clear that a Defence can sensibly be pleaded in respect of just the "causation issue" as Mastercard suggests i.e. limited to domestic interchange fees – the Applicant's submission is that the whole causation picture should be seen by both the Applicant and the Tribunal. Furthermore, in pleading a Defence in respect of causation and limitation, Mastercard will be pleading to a substantial part of the claim and there is no reason why it should not plead to the remainder of the claim. The Applicant also notes that Mastercard implicitly accepts that the remainder of the claim (as to which it makes no strike-out etc. application) will need to progress irrespective of any applications that it brings and that it will, therefore, need to plead its Defence to those parts of the claim nonetheless. In the circumstances, there is no reason why the

pleadings should not be progressed in their entirety on the timetable proposed above so that the claim is ready to proceed without delay after the Tribunal determines any applications that Mastercard may bring.

PAUL HARRIS QC

Monckton Chambers

MARIE DEMETRIOU QC

VICTORIA WAKEFIELD

Brick Court Chambers

And also NICOLAS BACON QC

4 New Square

11 January 2017