IN THE HIGH COURT OF JUSTICE **Claim No [ ]**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN

on the application of

WALTER HUGH MERRICKS CBE

Claimant

- and -

THE COMPETITION APPEAL TRIBUNAL

Defendant

- and -

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

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

Interested Parties

STATEMENT OF FACTS AND GROUNDS

INTRODUCTION

1. This is an application for judicial review of a judgment handed down by the Competition Appeal Tribunal (the **Tribunal** or the **CAT**) on 21 July 2017 in Case No 1266/7/7/16 *Walter Hugh Merricks CBE v Mastercard Incorporated & Ors* [2017] CAT 16 (the **Judgment**).

2. By its Judgment, the Tribunal dismissed an application brought by Mr Walter Hugh Merricks CBE, the Claimant in the present proceedings, for a "collective proceedings order" (a **CPO**) under section 47B of the Competition Act 1998 (the **CA 1998**), as amended by the Consumer Rights Act 2015 (the **CRA 2015**).

3. Mr Merricks was seeking a CPO in order to continue opt-out collective proceedings that he commenced in September 2016 on behalf of approximately 46 million individuals claiming substantial damages for breaches of EU competition law from Mastercard Incorporated, Mastercard International Incorporated and Mastercard Europe S.P.R.L. (together **Mastercard**). Those three entities, who were the Defendants to the CPO application, are Interested Parties in the present judicial review proceedings.[1]

4. As a result of the Judgment, the Claimant is now prevented from pursuing those collective proceedings. The consequences are that: (i) the millions of individuals on behalf of whom the collective proceedings were commenced will receive no compensation for loss and damage that the Claimant believes they have suffered as a result of Mastercard's unlawful anti-competitive conduct;[2] and (ii) Mastercard will retain the benefits of its wrong-doing. These consequences are particularly stark given Mastercard's position in other pending proceedings has been that any overcharges were passed on to the very class of proposed claimants in this action.

5. The Claimant contends that the Tribunal's refusal of his CPO application was wrong in law. The Claimant advances three grounds of review which are developed below. The grounds are, in a nutshell:

   a. the Tribunal erred in law in its approach to the issue of pass-on;

   b. the Tribunal erred in law in its approach to distribution; and

   c. the Tribunal erred in law in its assessment of the degree to which the claims raise common issues.

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1 As per §§2.2.2.3 and 2.2.3.2 of the Administrative Court Judicial Review Guide 2017.

2 There is no realistic prospect of any individual claim proceeding both because of the scale, complexity and cost of the issues raised, evident from the fact that no individual consumer claims have been brought; and the limitation period has now almost expired.

6. These grounds raise fundamental questions about the operation of the new collective proceedings regime for competition claims, introduced by the CRA 2015. The Claimant's application for a CPO is only the second such application to be brought, and the only one to have proceeded to a final determination by the CAT. There is plainly a strong public interest in these questions being ventilated and determined given the infancy of the collective actions regime.

7. The remainder of this document is structured as follows:

   a. Section A addresses the jurisdictional question of whether the Claimant has a statutory appeal against the Judgment (§§9-11 below);

   b. Section B provides a summary of the new statutory regime for collective proceedings (§§12-27 below);

   c. Section C provides a summary of the present collective proceedings (§§28-37 below);

   d. Section D contains the Claimant's submissions in relation to Ground 1, namely, that the Tribunal erred in its approach to the issue of pass-on (§§38-63 below);

   e. Section E addresses Ground 2, namely, that the Tribunal erred in law in its approach to distribution (§§64-79 below);

   f. Section F addresses Ground 3, namely, that the Tribunal erred in law in its assessment of the degree to which the claims raise common issues (§§80-89 below);

   g. Section G addresses the issue of the appropriate remedy (§§90-91 below); and

   h. Section H sets out the Claimant's proposed directions (§§92-93 below).

8. The Claimant has filed, with this application for judicial review, a bundle of supporting documents as required by §§5.6 and 5.7 of PD54A. The Claimant also applies, out of an abundance of caution, for permission to adduce expert evidence under CPR r. 35.4(1), in the form of a supplemental expert report of Dr Cento Veljanovski of Case Associates and

Mr David Dearman of Mazars (see section 8 of the claim form and tab 5 of the accompanying bundle).

A. EXISTENCE OF STATUTORY APPEAL

9. A threshold question arises as to whether or not judicial review is the appropriate procedure by which to challenge the Judgment. The Claimant's primary position is that judicial review is not available because he has a statutory right of appeal on a point of law to the Court of Appeal pursuant to section 49(1A) of the CA 1998. However, Mastercard takes a different view, as did the Tribunal:

    a. on 10 August 2017, the Claimant applied to the Tribunal for permission to appeal to the Court of Appeal;

    b. on 6 September 2017, Mastercard filed submissions opposing the grant of permission, on (*inter alia*) the ground that section 49(1A) of the CA 1998 does not confer a right of appeal on the Claimant in respect of the Judgment and that any challenge to the Judgment must be made by way of judicial review;

    c. on 28 September 2017, the Tribunal refused the Claimant's application for permission to appeal, finding (*inter alia*) that the Claimant does not have a statutory right of appeal under section 49(1A) of the CA 1998.

10. As matters stand, on 11 October 2017 the Claimant renewed the application for permission to appeal to the Court of Appeal. He contends that the Tribunal erred in its interpretation of section 49(1A) of the CA 1998. His (proposed) appeal raises the same grounds as those raised in the present judicial review proceedings (and the relevant pleadings and associated documents are, so far as possible, substantively identical).

11. However, the Claimant has filed this application for judicial review in order to protect his position should he, in fact, have no right of statutory appeal. The Claimant sets out in §92 below the directions which he proposes would best allow for the most efficient resolution of the challenges he now seeks to bring.

B. SUMMARY OF THE STATUTORY REGIME

12. Parliament's intention in introducing the collective proceedings regime was to provide individuals and small and medium sized enterprises (**SMEs**) that had been victims of anti-competitive behaviour with more effective means of redress.

13. The difficulties previously faced by consumers and SMEs in this context were explained in an initial consultation document produced by the then Government in 2012:

> "*3.12 Currently it is rare for consumers and SMEs to obtain redress from those who have breached competition law, and it can be difficult and expensive for them to go to court to halt anti-competitive behaviour. …*
>
> *3.13 A further difficulty is that competition cases may involve large sums but be divided across many businesses or consumers, each of whom has lost only a small amount. This means that a major case, with aggregate losses in the millions or tens of millions of pounds, can nevertheless lack any one individual for whom pursuing costs makes economic sense.*"[3] (emphasis added)

14. Opt-out collective proceedings (in which victims are part of the claimant class unless they positively decide not to be: see §22 below) were proposed by the Government as a solution to these problems for (*inter alia*) the following reasons:

> "*5.26 In an opt-out case, the action would be brought on the basis of an estimation of the total size of the group with claimants coming forward after quantification of damages to claim their share. This has at least two principal advantages. Firstly, it is the type of regime that is most likely to deliver redress to most of those wronged: claimants only have to step forward after the judgment and amount of award are decided and the publicity of winning an award likely to generate publicity to make potential claimants aware. …*
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> *5.27 Secondly, in cases where the amount of damages per claimant is very low, only an opt-out action is likely to succeed in delivering redress. Because the action is brought on the basis of an estimation of the total size of the group, the damages can be calculated accordingly and a fund created to deliver redress to claimants. This can then be used in case-specific ways to deliver redress ....*" (emphasis added).[4]

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[3] Department for Business, Innovation & Skills, 'Private Actions in Competition Law: a consultation on options for reform', 24 April 2012 at §§3.12-3.13.

[4] Department for Business, Innovation & Skills, 'Private Actions in Competition Law: a consultation on options for reform', 24 April 2012 at §§5.26-5.27 and Box 5.

15. The statutory scheme that Parliament subsequently enacted is contained in the CA 1998, as amended by the CRA 2015.

The primary legislation

16. Section 47B(1) of the CA 1998 introduces the concept of collective proceedings in the following terms:

> "*(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").*"

17. "*Claims to which section 47A applies*" means (in summary terms) a claim for damages which "*…a person who has suffered loss and damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement…*" of EU or UK competition law (per section 47A(2) of the CA 1998).

18. Under section 47B(2) of the CA 1998 "*…collective proceedings must be commenced by a person who proposes to be the representative in those proceedings…*", but per section 47B(4) of the CA 1998:

> "*(4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.*" (emphasis added)

19. The principal statutory requirements that govern when a CPO can be made are contained in section 47B(5) of the CA 1998 which provides that:

> "*(5) The Tribunal may make a collective proceedings order only –*
>
> *(a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and*
>
> *(b) in respect of claims which are eligible for inclusion in collective proceedings."*

20. The first of the section 47B(5) of the CA 1998 requirements (that the person who brought the proceedings must be authorised to act as the representative by the Tribunal) is elaborated upon at section 47B(8) of the CA 1998 which provides as follows:

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

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

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

21. The second of the section 47B(5) CA 1998 requirements for a CPO (that the claims be eligible for inclusion in collective proceedings) is elaborated upon at section 47B(6) CA 1998:

"*(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings*."

22. Under section 47B(7)(c) of the CA 1998, the CPO also has to specify whether the proceedings will be "*opt-in collective proceedings or opt-out collective proceedings*". Those terms are defined in sections 47B(10) and (11) respectively:

"*(10) "Opt-in collective proceedings" are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.*

(11) "Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except –

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who-

(i) is not domiciled in the United Kingdom at a time specified; and
(ii) does not, in a manner and by the time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."

23. Section 47B(12) of the CA 1998 sets out the consequences of a judgment or order made in collective proceedings:

"*Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified.*"

24. Finally, section 47C(2) of the CA 1998 also expressly permits the making of an aggregate award of damages in opt-out collective proceedings in the following terms:

> "*The Tribunal may make an award of damages in collective proceedings <u>without</u> undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.*" (emphasis added)

The Tribunal Rules and the Guide to Proceedings

25. The Tribunal's Rules of Procedure and its Guide to Proceedings were both updated in respect of the new collective proceedings regime. The Tribunal's 2015 Rules of Procedure take effect as a statutory instrument (SI 2015 No. 1648); the 2015 Guide to Proceedings constitutes a Practice Direction issued by the President of the Tribunal pursuant to Rule 115(3) of the Tribunal's 2015 Rules.

26. Both the 2015 Tribunal Rules and the Guide add substantial flesh to the relatively skeletal provisions of the CA 1998. However, as the Preface to the 2015 Guide expressly acknowledges, the guidance it provides may require amendment as regards collective proceedings given the novelty of the regime:

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

27. For present purposes, the following features of the 2015 Tribunal Rules and Guide are particularly important:

    a. Tribunal Rule 79 elaborates upon the requirement in section 47B(5)(b) of the CA 1998 that the claims be eligible for inclusion in collective proceedings. In particular, under Rule 79(1), the Tribunal may certify claims as eligible where it is satisfied that those 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…";

b. a non-exhaustive list of matters which the Tribunal may take into account in determining whether the claims are suitable to be brought in collective proceedings then appears at Rule 79(2). That list includes factors such as "…*whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues…*" (Rule 79(2)(a)); "…*the costs and benefits of continuing the collective proceedings…*" (Rule 79(2)(b)); and "…*whether the claims are suitable for an aggregate award of damages…*" (Rule 79(2)(f));

c. under Rule 79(3), the Tribunal also has to determine whether the proceedings should be opt-in or opt-out. In doing so, the Tribunal may also take into account "…*the strength of the claims…*" and "…*whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover…*". Paragraph 6.39 of the Guide states that the Tribunal will usually expect "*the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case*", but that this should not be a "*full merits assessment*". Instead, it should be based on a "*high level view of the strength of the claims based on the collective proceedings claim form*" and that follow on claims[5] will generally be considered of sufficient strength;

d. under Rule 79(4), there is express provision "…*at the hearing of the application for a collective proceedings order…*" for the Tribunal to also hear an application by the proposed defendant to the collective proceedings for summary judgment or to strike out in whole or in part "…*any or all of the claims sought to be included in the collective proceedings…*"; and

e. finally, Tribunal Rule 75 and §§6.10-6.14 of the Guide also contain a large number of requirements relating to the manner of commencement of collective proceedings with which any proposed class representative must comply. Those requirements are detailed and prescriptive in nature. For example:

[5] A "follow on" claim is one which seeks damages for the consequence of an infringement which is covered by a decision of a competition authority.

i. Rules 75(2) and (3) stipulate in great detail the contents of the collective proceedings claim form;

ii. §6.13 of the Guide also requires the proposed class representative to provide any evidence relied on in support of the application for a CPO with the collective proceedings claim form, which "…*may include, for example, a witness statement by or on behalf of the proposed class representative addressing the considerations raised by Rules 78 and 79; and an expert's report regarding the way in which the* ***common issues*** *identified in the claim form may suitably be determined on a collective basis…*" (emphasis added); and

iii. §6.30 of the Guide makes clear that the Tribunal will expect the proposed class representative to have prepared a plan for the collective proceedings which addresses "…*how the proposed class representative and its lawyers intend that the collective proceeding will be effectively and efficiently pursued in the interests of the class…*".

C. THE PRESENT COLLECTIVE PROCEEDINGS

28. The Claimant is a qualified solicitor who (in the words of the Tribunal) has had a "…*long and distinguished career in fields concerned with consumer protection…*".[6] He sought to become Class Representative in the collective proceedings.

29. The claims that the Claimant sought to combine in the collective proceedings are "follow on" claims. They rely on a decision of the European Commission adopted on 19 December 2007 (the **EC Decision**)[7] which established that Mastercard infringed Article 101 of the Treaty on the Functioning of the European Union (the **TFEU**). Mastercard twice sought to appeal the EC Decision (first to the General Court and subsequently to the European Court of Justice) but was unsuccessful on both occasions.[8]

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6 Judgment at §93.

7 Case COMP/34.579 *MasterCard*, COMP/36.518 *EuroCommerce* and COMP/38.580 *Commercial Cards.*

8 Case T-111/08, *MasterCard Inc., MasterCard International Inc. and MasterCard Europe v Commission*, ECLI:EU:T:2012:260 and Case C-382/12 P, *MasterCard Inc., MasterCard International Inc. and MasterCard Europe v Commission* ECLI:EU:T:2012:260.

30. The EC Decision is binding on domestic courts as to Mastercard's liability for an infringement of Article 101 TFEU.[9]

31. A clear and concise summary of Mastercard's unlawful conduct is set out at §§7-15 of the Judgment. In brief, for a period of approximately 13 years, from 1 January 1994 to 19 December 2007, Mastercard unlawfully and artificially inflated the fees that (acquiring) banks which process payments for merchants are required to pay to the (issuing) banks of Mastercard card-holders whenever a card-holder pays for goods or services using his or her Mastercard. The fees paid by the acquiring bank to the issuing bank are known as "interchange fees" (**IFs**).[10]

32. It is common ground that IFs are typically passed on by the acquiring bank in question to the merchant with whom the transaction occurred, by way of a "merchant service charge" (**MSC**).[11] Consequently, by unlawfully inflating the level of the IFs payable by acquiring banks to issuing banks, Mastercard also inflated the level of the MSC payable by merchants. The Claimant's case is that those merchants passed on the inflated MSC to their customers by increasing the retail prices charged for their goods or services (irrespective of whether or not the customer used a Mastercard to effect the transaction).[12] In essence, the Claimant contends that the merchants treat the MSCs, including the unlawfully inflated IFs, as an overhead, the cost of which is factored in to the retail prices of all of the goods/services that merchants sell to consumers.

33. In the collective proceedings the Claimant sought to recover damages from Mastercard for the loss suffered by consumers in the UK who have paid an unlawfully inflated price for goods and/or services to merchants that accepted Mastercard payments.

34. Two particular features of the present collective proceedings should be emphasised here.

35. First, the collective proceedings sought an aggregate award of damages. This award – which is compensatory *to the class of victims as a whole* – would be calculated as follows:

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9 Per Article 16 of Council Regulation 1/2003, domestic courts are precluded from making a decision running counter to the EC Decision. See also section 47(A)(8) of the CA 1998.

10 Judgment at §§8-10.

11 Judgment at §10.

12 Judgment at §13 and EC Decision, Recital 411.

a. first, the experts proposed to quantify the total volume and value of all relevant Mastercard transactions accepted by businesses selling in the UK during the infringement period (the volume of commerce or **VOC**). This information is within Mastercard's possession and it was not contended by Mastercard that the data would be unavailable to the Claimant's experts on disclosure;

b. secondly, the experts proposed to quantify the extent to which the VOC was subject to an overcharge (caused by the infringement) in respect of the applicable Mastercard IFs for the infringement period. This was proposed to be done by way of economic modelling of different counterfactuals depending on what (if any) lawful IF should have been applied. It was not contended by Mastercard that such economic modelling could not be done if the CPO was granted; and

c. thirdly, the experts proposed to quantify the proportion of overcharge that was passed-on (by the merchants) to the entire proposed class (of end-consumers): in other words, how much of the unlawful overhead found its way into increased retail prices. The Tribunal accepted that the Claimant's experts had presented a "*methodologically sound*" basis for determining pass-on to the class.[13] The Tribunal's treatment of pass-on is the subject of Ground 1 below.

36. In a nutshell, the Tribunal found that the Claimant's proposal to calculate class-wide loss through a weighted, average, pass-on percentage was "…*in theory… methodologically sound*…".[14] However, the Tribunal held that it was unpersuaded that there was "…*sufficient data available for this methodology to be applied on a sufficiently sound basis…*".[15] It concluded, on that basis, that the claims were not suitable for an aggregate award of damages and should not be certified.[16]

37. Secondly, the Claimant had, at the time of making his CPO application, made a preliminary proposal that the aggregate award might be distributed to victims on a *per capita,* annualised basis. Notably, other possibilities remained under review, depending in large measure upon (1) the ultimate size of the class of victims, (2) the amount of the

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13 Judgment at §77.

14 Judgment at §77.

15 Judgment at §78.

16 Judgment at §78.

aggregated damages that may ultimately be awarded (with obviously the relevant budget for distribution varying accordingly), and (3) the impact of distribution proposals upon take-up rates (i.e. how much would actually find its way into victims' pockets). The Tribunal found against the Claimant on distribution (Judgment §§79-89): this conclusion is the subject of Ground 2 below.

D. GROUND 1: THE TRIBUNAL ERRED IN LAW IN ITS APPROACH TO THE ISSUE OF PASS-ON OF THE MSC

38. The Tribunal's approach to pass-on was vitiated by the errors of law set out below.

39. **First**, the Tribunal erred in applying too stringent a test to the sufficiency of data at the CPO stage.

40. The test the Tribunal purported to apply in assessing the Claimant's proposed methodology for determining whether the overcharge had been passed on to consumers was that articulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57 (***Pro-Sys***). In particular, the Tribunal said the following in reliance on *Pro-Sys* (at Judgment §§58-59):

> "*58. In that regard, an important aspect arising on the present application is the approach which the Tribunal should take to the expert evidence. As in the present case, the application will frequently be supported by an expert's report explaining the way in which it is considered that the common issues identified in the claim form can suitably be determined on a collective basis. In Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57 ("Microsoft"), the Supreme Court of Canada prescribed the test to be applied as follows, in the judgment delivered by Rothstein J (at para 118):*
>
> > *"...the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."*
>
> *59. By 2013, the Canadian courts had considerable experience with class actions, and the regimes governing certification of such proceedings in the Canadian provinces are closer to the new UK regime than are the rules in the United States. We consider that this passage from Microsoft sets out the appropriate approach to*

> *apply in this Tribunal, and when it was put to them neither side sought to argue the contrary on the present application. See also* Gibson v Pride Mobility Products Ltd *[2017] CAT 9, at [104]-[105] (decided after the hearing of the present application).*"

41. The Claimant accepts that *Pro-Sys* sets out appropriate principles to be applied to assess the question of whether the Claimant could establish loss on a common basis at trial. Indeed, it is no surprise that Canadian law provides the appropriate test here, since the UK collective proceedings regime took significant inspiration from the Canadian regime.[17]

42. However, as explained below, the Tribunal misinterpreted and/or misapplied the *Pro-Sys* test. This is apparent from a consideration of the Pro-Sys judgment itself, as well as from other Canadian jurisprudence (which must be relevant where the Tribunal expressly adopts a Canadian law test).

43. The proper interpretation of the *Pro-Sys* test is evident from the terms of the *Pro-Sys* judgment itself. In particular, §102 provides:

> "*…the "some basis in fact" standard … reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight". … The certification stage* <u>*does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action*</u>*; "rather it focuses on the* <u>*form of the action*</u> *in order to determine whether the action can appropriately go forward as a class proceeding…".* (emphasis added)

44. It is important that §118 of *Pro-Sys* is read in that context. Properly construed, §118 is merely one facet of the "*some basis in fact*" requirement, applying in the specific context of expert evidence adduced by the class representative to demonstrate commonality of loss.

45. Moreover, the overarching consideration, when assessing expert evidence on loss related issues at the point of certification, is whether that evidence is capable of establishing that the *class as a whole* has suffered some loss (rather than the extent to which the methodology is capable of quantifying that loss). As is clear from §118 of *Pro-Sys*, the

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[17] For example, in the Government's final impact assessment at the end of its consultation process on the statutory regime, it noted that "*our best model is Canada, where we have by far the most data for a comparable opt-out system*" (see Department for Business, Innovation & Skills, 'Private Actions in Competition Law: Final Impact Assessment', 29 January 2013 at §194).

critical issue at the CPO stage is whether there is a means for demonstrating that "*passing on has occurred*" and, therefore, that the class as a whole has suffered some loss. Thus, at §116 of its judgment, the Supreme Court of Canada explained the role of expert evidence in the following way:

> "*It is not necessary at the certification stage that the methodology establish the actual loss to the class, as long as the plaintiff has demonstrated that there is a methodology capable of doing so. In indirect purchaser actions, this means that the methodology must be able to establish that the overcharges have been passed on to the indirect-purchaser level in the distribution chain*".[18] (emphasis added)

46. Notably, the fact that the plaintiffs in *Pro-Sys* were alleging injury by multiple, separate instances of wrongdoing, occurring over a 24 year period, and connected to 19 different products,[19] did not give the Court any significant pause for thought in terms of certification:

> "*The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all class members*".[20] (emphasis added)

47. Further, it is clear from the *Pro-Sys* judgment, taken as a whole, that there is no separate, substantive requirement under Canadian law for a class representative to show, at the point of the certification, that there is a particular quantity or quality of data which *will* be available to the class representative at trial and can be relied upon in order to establish or quantify *all* of the types of loss sought to be recovered by the class as a whole. This point is demonstrated by the manner in which the Supreme Court in *Pro-Sys* actually assessed the expert evidence relied on by the representative (indirect purchaser) plaintiffs. The Supreme Court started by summarising the evidence submitted by the plaintiffs: i.e. three possible models for calculating overcharge and pass-on.[21] As to the availability of data for actual use in those models, the Court did not address that as a separate requirement at all, even though the lack of *any evidence at all* as to the existence

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18 *Pro-Sys* at §115.

19 *Pro-Sys* at §109.

20 *Pro-Sys* at §110.

21 *Pro-Sys* at §121.

of relevant Canadian data to which to apply the model was specifically raised by the defendant. Rather, the Court simply recited a statement from the plaintiffs' expert that there was "…*no theoretical reason … why the methods described above cannot be applied to the sales of Microsoft software in Canada…*" and concluded that "…*implicit in this evidence [from the plaintiff's experts] is that the data necessary to apply the methodologies in Canada is available…*" (emphasis added).[22]

48. In other words, the plaintiffs did not even attempt to show that actual Canadian data to which the methodologies would have to be applied was available, *but that was no impediment to certification*.

49. These principles are borne out by other Canadian certification cases decided since *Pro-Sys*. In both *Fairhurst v Anglo American Plc* [2014] BSCS 2270 and *Aria Brands Inc v Air Canada* [2015] ONSC 5352, for example, the defendants to the proposed class actions made substantial criticisms of the expert evidence adduced by the representative plaintiffs, including in relation to the availability of underlying data, which criticisms were roundly dismissed by the British Colombia Supreme Court and the Ontario Superior Court of Justice, respectively:

    a. in *Fairhurst* the Court set out (at §§55-58) the various criticisms made by the defendants of the plaintiffs' expert's evidence, which included that he had "…*not shown that the data needed … exists…"*.[23] However, its conclusion was still that §118 of *Pro-Sys* was satisfied: "… *the plaintiff has set out a credible methodology and demonstrated that the necessary data is available. The court is not in a position to assess conflicting affidavit material or to engage in a detailed analysis of expert opinions. This is not the time for the battle of the experts. … The motions judge does not have that assistance and is ill-equipped to resolve conflicts. The evidence in this case is sufficient to meet the threshold of "plausible methodology"…*" (emphasis added);[24] and

    b. similarly, in the *Air Canada* case, the defendants claimed that the proposed methodology for quantifying pass-on was theoretical and not grounded in fact.

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22 *Pro-Sys* at §124.

23 *Fairhurst v Anglo American Plc* [2014] BSCS 2270 at §57.

24 *Fairhurst v Anglo American Plc* [2014] BSCS 2270 at §64.

They highlighted what they described as "*erroneous speculation*" on the part of the plaintiff's expert that "…*the defendants can produce data in order to compare anti-competitive data to competitive data. … The defendants point to the fact that there is evidence from representatives of the defendants that this data is not available*…" (emphasis added).[25] However, even in the face of that positive evidence from the defendant that necessary data was not available, the Court certified the claim, concluding that the factual differences between the parties could not, and should not, be resolved at the certification stage.

50. Moreover, in *Godfrey v Sony Corporation* [2017] BCCA 302, the British Colombia Court of Appeal upheld a first instance decision to certify a class action in respect of a global price fixing cartel that was alleged to have raised the price British Columbians paid for optical disc drives and products containing those drives on the basis that "…*the plaintiff need only show that the defendants sometimes or always overcharged direct purchasers*…" and that "…*at least some direct purchasers passed on these overcharges*…" (emphasis added).[26] Imposing a higher standard would be "…*impractical and unduly burdensome*…" and would "…*undermine the purposes of class action proceedings … by too readily denying the potentially viable claims at a preliminary stage. The less onerous standard of commonality endorsed here recognizes the absence of pre-certification discovery, the information asymmetry between the parties, and the principle that a certification proceeding is not to be treated as a trial on the merits*…"[27] (emphasis added).

51. The Tribunal was therefore wrong to interpret *Pro-Sys* as requiring the Claimant to prove that there is a particular quantity or quality of data which *will* be available to the class representative at trial and can be relied upon in order to establish or quantify *all* of the loss sought to be recovered by the class. In so doing, the Tribunal strayed from the issue that the legislation requires it to consider (the suitability of collective proceedings, in circumstances where the legislation does not mandate the submission of expert evidence

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25 *Aria Brands Inc v Air Canada* [2015] ONSC 5352 at §114.

26 *Godfrey v Sony Corporation* [2017] BCCA 302 at §§148-149.

27 *Godfrey v Sony Corporation* [2017] BCCA 302 at §159

at the CPO stage) into the merits of the action, a matter which is properly one for trial (where conflicts between experts can properly be resolved).

52. Contrary to the Tribunal's approach, all that *Pro-Sys* requires is that the class representative is able to demonstrate at the point of certification that the fact of loss and pass-on is not "…*purely theoretical or hypothetical*…" – i.e. that there is some basis in fact for considering that the class as a whole has suffered *some* loss with the result that loss can properly be regarded as a common issue.

53. Had the *Pro-Sys* test been properly applied, the Tribunal would have concluded that the Claimant's evidence on pass-on fulfilled the requirements for the grant of a CPO (i.e. that there was "*some evidence*" of the availability of data), given:

    a. the Tribunal's own positive finding that it was in "…*no doubt that some sectors have been the subject of detailed study [of pass-on]…*" (emphasis added) which would, therefore, yield relevant data for use by the Claimant's experts in the application of their "*sound*" methodology;[28]

    b. the Tribunal's further finding that it would be "…*theoretically possible to make requests for disclosure of evidence [about pass-on] from third parties in various different sectors*…", albeit that could prove to be a "…*very burdensome and hugely expensive exercise…*"[29] (which caveat is in itself incorrect, since such disclosure would be available from the very substantial number of merchants across a wide range of different sectors of the economy who are already engaged in litigation, rather than traditional third parties);

    c. Mastercard's positive assertions in the various merchant claims currently proceeding against it, supported by Mastercard's own factual and expert evidence, that pass-on (to the members of the proposed class) had occurred, to at least some degree (see sub-ground 1(b)); and

[28] Judgment at §75. See also §18 of the Tribunal's decision refusing permission to appeal, in which the Tribunal confirmed its finding in the Judgment that there may well have been pass-through to the class.

[29] Judgment at §74.

d. the fact that there had not yet been any disclosure in the proposed collective proceedings and the issue of pass-on is not one that would be amenable to the sort of limited disclosure of the type referred to in the Guide, in any event.[30]

54. The Tribunal should have found that the collective proceedings could be authorised, so long as there was "*some evidence*" before it of the availability of data to establish that the Claimant's experts' "*sound methodology*" could be applied, at least in relation to part of the claims, thus establishing some commonality of loss across the class. Had the Tribunal taken that approach, it is clear that the Claimant's experts' evidence on pass-on of the MSC would have been considered sufficient.

55. **Secondly**, a powerful indicator that the approach taken by the Tribunal to the availability of data issue was overly stringent is provided by its related finding that although "…*an application for a CPO is not a mini-trial and the Applicant does not have to establish his case in anything like the same way he would at trial…*", he does have to "…*do more than simply show that he has an arguable case on the pleadings, as if, for example, he was facing an application to strike out…*" (at Judgment §57).

56. The Claimant contends that the 'higher-than-strike-out' test applied by the Tribunal is wrong in law, inconsistent with the statutory scheme, and a further example of the unsustainable degree of scrutiny which the Tribunal appears to expect a CPO application to withstand in order for collective proceedings to be authorised.

57. In particular:

a. Tribunal Rule 79(4)(a) expressly provides that a proposed defendant can bring a strike out application at the CPO stage (as, indeed, Mastercard originally proposed to do in this case) and have it heard at the same time as the CPO application itself. The Tribunal's suggested approach would render that express provision redundant. Unless the test applied by the Tribunal on a CPO application is lower than a strike out standard, then there is no reason why a proposed defendant would *ever* seek to avail itself of a strike out application at the authorisation stage, since it would be

[30] Paragraph 6.28 of the Guide provides: "*The Tribunal does not encourage requests for disclosure as part of the application for a CPO. However, where it appears that specific and limited disclosure or the supply of information (cf Rule 53(2)(d)) is necessary in order to determine whether the claims are suitable to be brought in collective proceedings (see Rule 79(1)), the Tribunal may direct that such disclosure or information be supplied prior to the approval hearing.*"

safe in the knowledge that the CPO application will be held to a higher standard in any event under Rule 79(3), when the Tribunal is assessing the strength of the claims.

b. The Government's consultation on the draft 2015 Tribunal Rules is instructive as to the proper interpretation of Rule 79(3) and Rule 79(4). That consultation document relevantly provided as follows (emphasis added):

> "*3.16 The Government believes 'the strength of the claims' criteria (draft Rule 79(3)(a)) is particularly important for opt-out proceedings, as cases can be brought without class members' knowledge or consent, as they do not need to actively participate in the claim. As a result, we have decided to incorporate this into the Rules. This will not however amount to a full 'merits test' and the approach of the CAT will be clarified in the Guide.*
>
> *3.17 The remit of Strike Out will also be extended to cover all claims, including collective actions to ensure that cases do not progress if the CAT considers that there are no reasonable grounds for making the claim or that it is unlikely to succeed. In addition to the 'strength of the claims', this will act as a further safeguard against unmeritorious or vexatious claims being brought via opt-out collective proceedings*".[31]

In the Claimant's submission, the fact that strike out was introduced as a "*further safeguard… in addition to the 'strength of the claims'…*" requirement can only mean that the strike out test was intended to be the more intrusive standard of review. As such, the Tribunal misdirected itself when it suggested that a 'higher-than-strike-out' test should be applied to the determination of the Claimant's CPO application.[32]

c. It is wrong in principle and contrary to the legislative regime for the Tribunal to apply a more exacting standard to the determination of whether to allow a collective action to proceed than it would to a damages claim brought by an individual. Yet

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[31] BIS, 'Competition Appeal Tribunal Rules of Procedure, Government Response', September 2015 at §§3.16-3.17.

[32] For completeness, the Claimant notes that no mention of this "higher than strike out" test was made by the Tribunal in the *Pride* case (referred to at §63.d.ii below) notwithstanding that the proposed defendant in *Pride* had urged upon the Tribunal the submission that the proposed class representative must demonstrate "*a strong, or at least a credible, case for a substantial award of damages*" in order to obtain a CPO (at §94). In the face of that submission, the Tribunal simply said that the CPO application is "*not a mini-trial and the essential question is whether the Applicant has established a sufficiently sound and proper basis for the case to proceed, having regard to the statutory criteria*" (at §24). To this extent, the two judgments so far given by the Tribunal on CPO applications appear to take conflicting approaches.

this is the consequence of the Tribunal's approach. If an individual consumer brought a claim for damages, that consumer would have to prove that the overcharge had been passed on to him or her. However, there is no realistic prospect that Mastercard would succeed at a comparable interlocutory stage (i.e. pre-disclosure, pre-witness statements and pre-expert trial reports) in successfully striking out such proceedings on the basis that the individual had insufficient data available at that stage to make good his or her pleaded case on quantum at trial. By applying the 'higher-than-strike-out' standard to the issue of pass-on in these collective proceedings, the Tribunal has wrongly denied on a collective basis proceedings that would have been allowed to proceed, had they been pursued by individuals.

58. **Thirdly,** the Tribunal erred in failing to place any weight on Mastercard's position in relation to pass-on in the many merchant claims that are pending against it. In those claims, pass-on to the consumers operates as a defence and reduces any damages which Mastercard would pay. Accordingly, as Mastercard confirmed in its written submissions for the CPO hearing:

> "*Mastercard has argued that the rate of pass-on will be high, [although] it has not argued that that same on pass-on rate will apply across all merchants. Mastercard's consistent position has been to argue that the level of pass-on is a matter to be decided on the basis of the specific evidence available in relation to that merchant*".[33]

59. In addition, in its statements of case in those merchant proceedings (which are, of course, supported by a statement of truth), Mastercard has unsurprisingly particularised numerous sources of evidence which all suggest that there is a high level of pass-on in the sectors covered by those claims.

60. The Tribunal declined to place any weight on this in its assessment of the pass-on issues, saying simply that the "…*fact that Mastercard may have adopted a contrary position in other cases may of course be used by the Applicant forensically, but does not preclude Mastercard from contending in the present proceedings that pass-through was minimal or limited…*".[34] However, this statement misunderstands the Claimant's position. The

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[33] Mastercard's supplementary CPO skeleton argument at §5.

[34] Judgment at §65.

Claimant does not go so far as to say that Mastercard would be positively prevented by its position in the merchant claims from contending in the present proceedings that pass-on was minimal. Rather, the Claimant's submission is that Mastercard's position in the merchant claims is relevant and should have been taken into account by the Tribunal when assessing, for the purposes of the CPO application:

a. the strength of the collective proceedings and the likelihood that some degree of pass-on to consumers will be established at trial; and

b. the availability of data for use by the Claimant's experts in their proposed "*sound*" methodology for the calculation of pass-on.

61. The Tribunal's failure to place any weight on Mastercard's position in the merchant actions that there has been high pass-on cannot be right given, in particular, that:

a. in those actions, it is Mastercard that bears the burden of proof of establishing pass-on, since it is being invoked defensively. In each of the merchant claims Mastercard will, therefore, have to (if it has not already) particularise the pass-on rate that it says existed and provide evidence for that assertion, including expert evidence; and

b. such evidence will be in its possession (or will be provided to it via disclosure), or will be publicly available and will, therefore, also be available for use in the Claimant's action as/if it progresses.

62. It follows that pass-on of at least some of the overcharge by way of the MSC is not "*…purely theoretical or hypothetical…*" In other words, Mastercard's position in, and evidence from, the merchant claims is sufficient in itself to demonstrate that the requirements of the *Pro-Sys* §118 test are met.

63. **Fourthly**, and exacerbating the errors highlighted above, the Tribunal adopted an unfair procedure at the CPO hearing in relation to pass-on in the following respects.

a. No advance notice was provided by the Tribunal of the matters that it wished to explore with the Claimant's experts at the hearing and no indication was given by the Tribunal that it had concerns about the sufficiency of availability of data to apply in the proposed methodology for establishing pass-on. This approach was unfair in circumstances where: (i) neither the legislation nor the Guide required the

Claimant to adduce at the CPO stage expert evidence designed to establish that he would, in fact, be able to establish at trial that the entire loss claimed had been passed on to consumers; (ii) the entire CPO procedure is novel and untested; (iii) the Tribunal applied a 'higher-than-strike-out' standard that is not adumbrated in the legislation or guidance; and (iv) no strike out application was before the Tribunal (indeed, Mastercard's strike out application had been deferred until after the CPO stage).

b. As in Canada, under the *Pro-Sys* approach, the fair course at the CPO/certification stage is simply to determine whether there is "some basis in fact" for the approach of the Claimant's experts and, if there is, then the Claimant should be allowed to proceed. That is the fair course because: (i) the CPO/certification stage is about determining whether there is some basis in fact for the form of the action (as a collective, with common issues), not about whether or not such an action can actually succeed in practice at trial; and (ii) the Tribunal is simply not in a position to decide at the CPO stage conflicts of expert evidence, which are quintessentially matters for trial. On this approach, the Tribunal should have accepted without more the opinion of the Claimant's experts at the CPO stage that they would be able to operate their methodology, particularly given that they were able to draw considerable comfort at that stage from the fact that Mastercard itself, together with its own experts, was also advancing (in other current litigation) a methodology – that would have to be populated with data – to show pass-on of the MSC from merchants to end-consumers. If the Tribunal was, contrary to this approach, correct to interpret the statutory regime as allowing for detailed scrutiny of the prospects for success at trial of the Claimant's expert evidence, including lengthy adversarial cross-examination of the Claimant's experts on the issue of sufficiency of availability of data, then the corollary in fairness ought to have been that Mastercard's evidential position also be subjected to some scrutiny. That was because it was highly germane to the opinion of the Claimant's experts at the CPO stage that they reasonably expected there to be minimal conflict with Mastercard and its experts on the approach to pass-on. To scrutinise the substantive prospects of success of the methodology of the Claimant's experts (by reference to the availability of data), and to reject their opinion as to their ability to proceed to trial, was unfair without also exploring the coincidence of approach between the parties

and their experts. In short, either the level of scrutiny of the Claimant's experts' opinion at the CPO stage ought to have been lower, or, if it were right to explore prospects of success in such detail, it was unfair to do so without also engaging in a more detailed scrutiny of Mastercard's position.

c. The Tribunal reached its conclusion on the basis of matters that ought to have been explored through expert evidence and cross-examination. For example, the Tribunal placed reliance in the Judgment on a report prepared by RBB Economics in 2014 (and relied upon by Mastercard at the CPO hearing) in which RBB Economics found that there was only a small body of empirical work that had considered pass-on at the firm level and that such evidence suggested significant differences between firms.[35] Yet the Claimant had no opportunity to cross-examine Mastercard's experts about Mastercard's reliance on the content of that report, in circumstances in which the Claimant does not accept the reliance placed upon that report by Mastercard and the Tribunal.

d. Finally, if – contrary to the above – the Tribunal applied the correct test to the issue of pass-on, it acted unfairly in failing to provide the Claimant with an opportunity to adduce further evidence. In particular:

    i. the legislative regime is new and the test applied by the Tribunal was not apparent on the face of the legislation. Specifically, it was not apparent to the Claimant, either before or during the CPO hearing, that the Tribunal would apply the *Pro-Sys* §118 test in the manner that it ultimately did; nor that he would be required to satisfy the Tribunal that the pleaded claims satisfied a standard higher than that which would apply on a strike out application;

    ii. in sharp contrast, the Tribunal *did* afford the proposed class representative in Case No 1257/7/16 *Dorothy Gibson v Pride Mobility Scooters Limited* (**Pride**) an opportunity to remedy areas of concern held by the Tribunal. That application ran almost in parallel with the Claimant's CPO application. The *Pride* CPO application was heard in December 2016, just ahead of the Claimant's CPO application being heard in January 2017, and judgment in

[35] Judgment at §51 and §75.

Pride was delivered in March 2017. In *Pride,* the Tribunal offered the proposed class representative the opportunity to amend her claim to propose revised sub-classes and a new methodology that would focus only on the effects of the agreements that were the subject of the domestic infringement decision in that case.[36] As the President of the Tribunal remarked in the hearing, when he invited submissions on the question of adjournment, "…*we are very conscious of the fact that this is the first application for a collective proceedings order and therefore, in a sense, everyone is learning on the way*…".[37] The present application was in a materially identical position but was treated differently. The Claimant reasonably expected that he would have been afforded a similar opportunity to remedy any concerns that the Tribunal might have had; and

iii. had the Claimant been given the opportunity to adduce further evidence, it would have made a material difference to the outcome. In particular, the Claimant would have instructed his experts to produce the kind of supplementary report which accompanies this application for judicial review (see §8 above).

E. GROUND 2: THE TRIBUNAL ERRED IN LAW IN ITS APPROACH TO DISTRIBUTION

64. The Claimant's second ground of review is that the Tribunal erred in law in concluding that the claims are not suitable to be brought in collective proceedings because it is not possible to distribute damages on a sufficiently compensatory basis.

65. The Tribunal's treatment of the distribution issues appears at Judgment §§79-91. In summary, the Tribunal held that:

a. even if the total loss suffered by the class can be calculated in an aggregate manner, it is nonetheless necessary for the Tribunal "…*to consider how that would translate*

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36 *Pride* at §117.

37 *Pride* Day 2 transcript, page 66, lines 28-30. The Tribunal was therefore, with respect, wrong to say (at §18 of its decision refusing permission to appeal in the instant case) that the decision to grant an adjournment to the proposed class representative in *Pride* was "*based on any misapprehension by the Applicant's experts as to the approach to be taken to the underlying infringement decision of the competition authority*".

into determination of the level of individual loss…". In particular, it is only "*permissible*" to "…*go directly to determination of a total sum for all claims … if there is then a reasonable and practicable means of getting back to the calculation of individual compensation*…";[38]

b. the problem with the Claimant's CPO application was that "…*there is no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated according to the [Claimant's] proposed method*…" (emphasis added);[39]

c. there are three sets of issues relevant to the calculation of payments to individuals, being: "…*individuals' levels of expenditure; the merchants from whom they purchased; and the mix of products which they purchased*…".[40] The Claimant had made "…*no attempt to approximate for any of those in the way damages would be paid out*…";[41]

d. the "…*governing principle of damages for breach of competition law*…" is restoration of claimants to the position they would have been in but for the breach. The Claimant's proposed distribution mechanism "…*would not result in damages being paid to those claimants in accordance with that governing principle at all*…";[42] and

e. accordingly, the claims were not suitable to be brought in collective proceedings.

66. The Claimant contends that the Tribunal erred in law in the respects set out below.

67. **First,** the Tribunal erred in law by holding that distribution must be compensatory on an individual basis. The Tribunal's approach:

a. is inconsistent with and undermines the availability of aggregate damages in section 47C of the CA 1998; and

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38 Judgment at §79.

39 Judgment at §84.

40 Judgment at §88.

41 Judgment at §88.

42 Judgment at §88.

b. is inconsistent with the role and purpose accorded to distribution by the legislation.

68. As to the availability of aggregate damages awards under the statutory scheme, the Government's own consultation documents explain (see §14 above) that the availability of aggregate damages was a critical feature of the new regime as it anticipated that an aggregate award would often be the *only* possible way of achieving redress where individual loss was low and would be too time-consuming or otherwise impracticable to quantify. That approach is reflected in the primary legislation (section 47C(2) of the CA 1998) which permits aggregate awards to be made "…*without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person*…" (emphasis added), as well as in the Tribunal's Rule 92 and §6.78 of the Guide.

69. Section 47C(2) of the CA 1998, therefore, gives effect to a policy decision to permit awards that, in the view of Parliament, *are* compensatory and deliver overall justice as between the defendant and *the claimant class taken as a whole*, even where that might result in imperfect compensation as between individual members of the class.

70. However, the erroneous approach taken by the Tribunal to the distribution issues in this case means that the benefits of an aggregate award being available are lost entirely, since (in the Tribunal's view), it is in any event necessary to "*translate*" that aggregate award "…*into determination of the level of individual loss*…". The Tribunal identified three criteria which would be relevant for each individual: level of expenditure; the merchants from whom they purchased; and the mix of products which they purchased (Judgment at §88). This approach would require detailed consideration of the loss suffered by individuals (even if it be done by way of approximation), notwithstanding that section 47C(2) of the CA 1998 expressly provides that individual assessment is not necessary. For that reason, the Tribunal's insistence that distribution must be individually compensatory undermines and frustrates the legislative scheme provided for by Parliament.[43]

[43] The Claimant notes that in *Pride* the Tribunal appeared prepared to accept a degree of mismatch between the level of individual loss and individual award that it would not tolerate in the Claimant's case. In particular, at §106 of *Pride* the Tribunal approved a methodology that "*does not depend on the establishing the actual prices paid by individuals in the class, but focuses on estimating the differential shift in prices across the various sub-classes*" notwithstanding that the prices paid by consumers were subject to individual negotiation.

71. Further, the Tribunal's approach is inconsistent with the role and purpose accorded to the process of distribution in the statutory regime.

72. The collective proceedings regime provides for the mechanics of distribution of aggregate awards to be determined and applied at the end of the proceedings once there is an aggregate award of damages. Indeed, there is no requirement in the Tribunal's Rules that a proposed class representative must address, in his or her litigation plan for a CPO hearing, matters of distribution; there is simply the suggestion, in §6.30 of the Guide, that "*matters that may appropriately be set out*" in the litigation plan include an explanation of how any aggregate award would be distributed as between members of the class. Typically, the mechanics of distribution will be decided on an *ex parte* basis, with the benefit of any written or oral submissions that class members may decide to make.[44] Thus, §6.83 of the Guide provides that (emphasis added):

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

73. The reason that distribution is determined at the end of the proceedings is because the manner in which any award of damages is ultimately distributed to class members is very likely to be affected by how the substantive issues in the proceedings are resolved. In particular, the complexity (and cost) of the distribution arrangements will inevitably be determined in large part by: (i) the ultimate size of the class; and (ii) the quantum of any award, neither of which factors either is or can be known at the CPO stage. Put bluntly, without knowing how much money there is to distribute and what amount is proposed to be given to each member of the class, it is very difficult to judge the appropriateness and proportionality of any proposed distribution mechanisms. Further, the reason that the defendant typically will play no part in distribution is precisely because the aggregate award *does* do justice as far as the wrongdoer is concerned; it means that the wrongdoer *is* paying out, in aggregate, an award equal to the losses that it has caused.

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[44] Tribunal Rules 92 and 93.

74. Contrary to the statutory scheme, the Tribunal's approach results in the imposition of substantive legal requirements relating to distribution that must be satisfied at the CPO stage and which a defendant can insist on, even in a case in which an aggregate award of damages to the class of victims is otherwise acceptable and may be the only viable way in which a class can pursue justice.

75. **Secondly**, the Tribunal erred by holding that there was "…*no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant*…".[45]

76. This conclusion is incorrect – and it is also inconsistent with other parts of the Judgment. In particular, §47 of the Judgment describes various different bases for distribution which *were* canvassed at the hearing, including seeking information about income brackets or levels of disposable income from class members, so as to use those as a proxy for relative levels of consumer spend (and see also §86). As is also outlined at Judgment §47, the Claimant's primary concern with those different methods at the very early CPO stage was that requiring class members to provide such information might inhibit the take-up of the award. However, the fact remains that different methods were considered by the Claimant prior to the CPO hearing and could have been re-visited (along with any further new methods) at the end of the trial process, when key substantive issues such as size of the aggregate award and size of the class had been determined. For that reason, the Tribunal was not correct to say that there was no plausible way of making the distribution process more compensatory, if that is what is required as a matter of law.

77. Moreover, and in any event, the Claimant's preferred model of distribution (at this stage, before the quantum of damages or the final size of the class are known) uses an annualised approach whereby individual class members recover a *per capita* sum for each year that they met the class definition. That annualised approach seeks to provide exactly the sort of "*rough and ready*" approximation of loss which the Tribunal directed itself was legally necessary. The longer an individual has been a member of the class and, therefore, the more spending by him/her in the UK as a consumer, the more he or she will recover. That point, however, was ignored by the Tribunal altogether.

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[45] Judgment at §84.

78. **Thirdly**, the Tribunal erred in failing to give the Claimant an opportunity to address any of the deficiencies identified by the Tribunal in relation to distribution before ruling on the CPO application.

79. This approach was unfair in light of the following factors:

    a. first, the legislative regime is new and it was not clear on the face of the legislation and, in particular, the wording of section 47C(2) of the CA 1998 and the absence of any reference in the Rules or Guide, that the Tribunal would require the Claimant to demonstrate at the CPO stage that distribution could be effected in such a way as to reflect the loss actually suffered by each member of the proposed class. As the Judgment itself records, at §86 "…*no analysis or even argument was presented on [the] basis*…" that distribution needed to be compensatory. That is precisely because the Claimant did not appreciate that the Tribunal would consider it to be necessary, at the CPO stage, at the urging of Mastercard; and

    b. secondly, the Tribunal did afford the applicant in the *Pride* case such an opportunity as explained at §63.d.ii above;

    c. had the Claimant been given the opportunity to adduce further evidence, it would have made a material difference to the outcome. In particular, the Claimant would have instructed his experts to produce the kind of supplementary report which accompanies this application for judicial review (see §8 above).

F. GROUND 3: THE TRIBUNAL ERRED IN LAW IN ITS ASSESSMENT OF THE DEGREE TO WHICH THE CLAIMS RAISE COMMON ISSUES

80. By his final ground of review, the Claimant submits that the Tribunal erred in its assessment of the degree to which the claims raise common issues and/or would be capable of litigation by individual class members. The issue is of central importance because, as the Tribunal's own Guide explains, "…*the core notion of collective proceedings is that they group together similar claims which raise common issues*…".[46] To the extent, therefore, that the Tribunal underestimated the degree to which the claims raised common issues (which, in the Claimant's submission it did for the reasons

[46] Guide to Proceedings at §6.37.

explained below), that failure is likely to have had a substantial impact on its view of the suitability of the claims for resolution by way of collective proceedings.

81. The Tribunal's approach to common issues is set out at Judgment §§60-66. Of the six issues which it considered an individual claimant suing Mastercard would have to establish,[47] the Tribunal concluded that only one could properly be classified as a common issue (namely "…*whether the level of the EEA MIFs had an effect on the level of the UK MIFs*…"), but that a further two could be answered in common (being the "…*amount by which those MIFs were higher than the counterfactual IFs that would have applied in the absence of an infringement*…" and "…*the level of pass through of these MIF overcharges in the MSC charged by Acquiring Banks to the merchants*…").[48]

82. However, in the Tribunal's view, the "…*degree to which [each] merchant passed through those [MIF] overcharges*…" to consumers was not "…*a common issue in any meaningful sense*…" (emphasis added) because, for each individual, "…*there is likely to be significant variation not only as between different kinds of goods and services but also different kinds of retail outlets*…" in which they shopped.[49] The Tribunal did not consider the lack of commonality to be fatal to the Claimant's application for a CPO, however, because there is, in the CA 1998, "…*no requirement that all the significant issues in the claims should be common issues, or indeed … that the common issues should predominate over the individual issues*…". It took the view that this meant that, in theory, the Claimant could have addressed a lack of commonality by showing that he had a "*sustainable methodology*" by which the Tribunal could arrive at an aggregate award of damages.[50]

83. The Tribunal made two substantial errors in its analysis of commonality that infected its analysis of the suitability of the proposed collective actions to proceed on a collective basis:

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47 Judgment at §60.

48 Judgment at §62.

49 Judgment at §§63-66.

50 Judgment at §67.

a. the Tribunal's list of issues at §60 wrongly fails to make reference to the volume of commerce (the VOC, as defined above) being a common issue; and

b. the Tribunal wrongly concluded that the issue of pass-on of the MSC was not a common issue because it took an overly narrow view of what constitutes a common issue, effectively requiring issues to be identical in order to be common, contrary to the statutory definition.

84. The reason for the Tribunal's omission of VOC as a common issue is not clear. However, the Claimant submits that this omission may be the result of a fundamental misunderstanding, on the part of the Tribunal, of the "top-down" nature of the calculation of aggregate damages. In particular, in the course of the hearing, the Tribunal appeared to take the view that an individual's spend at merchants would give rise to the relevant VOC for that individual's claim. For example, the President at one point remarked "*Volume of Commerce, for an individual claimant, is not an issue at all, if you had an individual claim they would be just looking at how much they spent. It is only an issue when you are asking what are the aggregate damages*".[51] This is wrong. The relevant VOC is the total number of Mastercard transactions (on which the relevant IF overcharge was charged) across the relevant merchants, not the amount spent by any individual consumer. The correct VOC approach holds on both an individual and a collective basis: without knowing the volume of Mastercard transactions on which an unlawfully inflated IF was charged, it is not possible for an end consumer to establish the extent of the unlawful overhead incurred by merchants, and then go on to establish what proportion of it was passed-on to him or her by merchants. More particularly, it would not be open to an individual claimant, when quantifying his or her individual claim, to substitute, for the relevant VOC, the total volume of his or her specific purchases. The Claimant sought to correct the Tribunal on this issue, both orally and via a note on VOC which it handed up on the third day of the hearing. But the omission of VOC from the list of issues which would need to be decided in an individual claim (at Judgment §60) indicates that these attempts were unsuccessful. In the Claimant's submission, the determination of the VOC should have been included in the list at §60, and should then have been held to be an issue which was common across the class.

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[51] See Day 2 transcript / p.68 / lines 21-24.

85. For that reason, the Tribunal's list of issues at §60 of the Judgment is incomplete and liable to give the mistaken impression that there are fewer common issues across the class than there are. This mistake in turn is liable to have affected the Tribunal's perception of the suitability of the claims for collective proceedings.

86. As to pass-on, the Tribunal erred in concluding at Judgment §66 that the issue of pass-on of the MSC "…*cannot be described as a common issue in any meaningful sense*…".

87. This error of law stemmed from the Tribunal adopting an overly narrow view of what constitutes commonality. In particular, the Tribunal appears to have considered that issues need to be identical in order to be common. That this approach was taken by the Tribunal becomes clear if one looks at what it said in relation to the first issue listed at §60 (namely "…*whether the level of the EEA MIFs had an effect on the level of the UK MIFs*…"). The Tribunal said that only that issue could be regarded as "…*truly a common issue to all claims*…".[52] It did not explain why it considered that to be the case. However, the implication is that only that question is capable of a binary answer – either the EEA MIF did have an effect on the level of the UK MIF or it did not – which will necessarily be the same for all individual members of the class.

88. Assuming that was the Tribunal's approach, it ignores altogether the statutory definition of common issues at section 47B(6) of the CA 1998 and is, therefore, wrong, both as a matter of law and of principle. That section provides that "…*claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law*…" (emphasis added). That definition of commonality is, in the Claimant's submission, extremely broad. It makes it obvious that an issue does not have to be identical across individual class members in order for it to be common under the CA 1998. On the contrary, the consequence of the statutory definition is that, even if the issues raised by one claim are merely *"related*" to the issues raised by another claim, that is enough to mean that there is commonality such that those related (but not identical issues) can be properly resolved by way of collective proceedings.

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[52] Judgment at §62.

89. Had the Tribunal applied the statutory definition of commonality properly, it would have concluded that the extent of pass-on of the MSC was common as between each member of the class because it is, at the very least, a related issue across all claims. (Indeed, in the earlier stages of its calculation it is identical, as explained above.) The Tribunal's error in finding otherwise was liable to have affected its view of the suitability of the claims to be brought in collective proceedings.

G. REMEDY SOUGHT

90. In light of the errors of law identified above, the Claimant asks that the Judgment be quashed.

91. In addition, the Claimant respectfully asks the Court to exercise its power under section 31(5A) of the Senior Courts Act 1981 to substitute its view for that of the Tribunal and grant the CPO application. In the Claimant's submission, absent the errors of law identified above, there is no other decision that the Tribunal could have reached and no purpose would, therefore, be served by remitting this matter to the Tribunal. This submission holds good despite the fact that the Tribunal did not give judgment in respect of Mastercard's submissions regarding the need to give credit for cardholder benefits received by some members of the class and the need to exclude from the class the estates of those who met the class definition over the claim period but have since died (Judgment §90). Even if Mastercard were able to make good on its submissions, they would not give reason to refuse the CPO application, as they are matters going to what is included in the VOC and adjustments to the quantum to reflect the alleged benefits based on evidence that would be in Mastercard's possession or control. The Tribunal will need to manage and make any adjustments to the class definition as required as the collective proceedings progress. This will also be the case if Mastercard were to successfully bring a strike-out application over part of the claim (as it has indicated it would do should the CPO be granted). In those circumstances, and to avoid further unnecessary delay and cost, this Court should grant the CPO application and then allow the Tribunal to address any matters going forward as part of its active case management of the collective proceedings.

H. DIRECTIONS

92. As per §10 above, the present application for judicial review is made in parallel with an application to the Court of Appeal for permission to appeal. The Claimant respectfully

suggests that the following directions might best decide his twin challenges speedily and efficiently:

a. the present application for judicial review be listed for a 'rolled up' hearing before a three-Judge Divisional Court;

b. that the same three-Judge court also sit as a Court of Appeal;

c. that the Court would first hear argument on the threshold question of the existence of a statutory right of appeal, and would then move directly to hear argument on the Grounds set out above (and the identical Grounds raised in the appeal); and

d. judgment could then be given either as a Divisional Court in respect of the Claimant's judicial review, or as a Court of Appeal in respect of the appeal, depending on the decision of the Court in respect of the statutory right of appeal.

93. The alternative is simply to stay the present application for judicial review (with the leave of the Court) but the Claimant respectfully submits that this alternative is likely to generate (should there not be a statutory right of appeal) a multiplicity of hearings and unnecessary delay in the consideration of what are novel and highly important questions regarding the operation of the new collective actions regime as they apply to a proposed class of 46 million consumers which could otherwise be avoided.

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20 OCTOBER 2017