Class Representative
B Bronfentrinker
Eighth
Exhibit BB8
12 February 2025

Case Number: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

and

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

(3) MASTERCARD EUROPE S.A. (formerly Mastercard Europe S.P.R.L)

Defendants

and

INNSWORTH CAPITAL LIMITED

First Intervener

and

THE ACCESS TO JUSTICE FOUNDATION

Second Intervener

(the "Collective Proceedings")

EIGHTH WITNESS STATEMENT OF BORIS BRONFENTRINKER

Key to highlighting:
Category A Confidential Information is confidential vis-à-vis third parties only and is highlighted in green
Category B Confidential Information is confidential vis-à-vis Mastercard and third parties (on the basis of confidentiality and legal professional privilege) and is highlighted in turquoise

I, **BORIS BRONFENTRINKER**, Partner at Willkie Farr & Gallagher (UK) LLP, 1 Ropemaker Street, London, United Kingdom, will say as follows:

1. I am a solicitor and partner of the firm Willkie Farr & Gallagher (UK) LLP ("**Willkie**"). I have had conduct of the Collective Proceedings since they were first commenced in September 2016 and overseen all aspects of the claim including all the appeals to the Supreme Court and the Court of Appeal. I have conducted the Collective Proceedings, along with my partner Nicola Chesaites, and have instructed and worked with various leading and junior counsel that have worked on different elements of the case over the last more than eight years. I am duly authorised by the class representative, Mr Walter Hugh Merricks CBE ("**Mr Merricks**"), to make this witness statement on his behalf.

2. This is my eighth witness statement in these Collective Proceedings and I make it in support of Mr Merricks' joint application with the Defendants to seek a collective settlement approval order (the "**CSAO Application**") and in response to Innsworth Capital Limited's ("**Innsworth**") statement of intervention ("**SOI**") and supporting evidence dated 3 February 2025, including: (i) the first witness statement of Ian Garrard (**"Garrard 1**") and accompanying exhibit ("**IMG1**"); (ii) [redacted]; (iii) the report of Mr Humphries; and a note from Seladore Legal and Colin West KC (together, the "**Intervention Documents**"). Where I do not address any points in the Intervention Documents, that should not be taken as my agreeing with those points.

3. In this statement, I address what I consider to be the most important and relevant matters for the Tribunal's consideration of the CSAO Application arising from the Intervention Documents, but given the decision by Innsworth to get into other matters and in a manner that seeks to unjustifiably criticise Mr Merricks and [redacted], I also need to briefly address such matters as well. This witness statement, therefore, addresses the following:

1) Overarching narrative sought to be presented in Garrard 1;

2) Innsworth's real view of the value of the Collective Proceedings;

3) Causation counterfactual;

4) Leading counsel advice;

5) Additional context to the settlement negotiations;

6) Realistic funder returns; and

7) The independent work commissioned by Innsworth.

4. The facts and matters set out in this witness statement are true to the best of my knowledge, information and belief. Where they are not within my own knowledge, I state the source of my information or belief.

5. Nothing in this witness statement is intended to waive the legal privilege or without prejudice privilege protections attaching to the information exchanged between Mr Merricks (or Willkie) and (i) Mastercard (or its legal representatives) or (ii) Innsworth (or its legal representatives). All correspondence which is privileged but has been exhibited to this witness statement, is provided to the Tribunal on a limited basis only, so that privilege is otherwise maintained as against all third parties. This is immensely important given the potential prejudice to Mr Merricks and the class he represents should the CSAO Application not be granted and the Proceedings need to continue.

6. There is now shown and produced to me a bundle "**BB8**" with page numbers in square brackets in the form **[BB8/tab/page]**. I have also reviewed a near final draft of the fifth witness statement of Mr Merricks ("**Merricks 5**") (there being no waiver of privilege over that draft) to which I refer as appropriate below.

Overarching narrative sought to be presented in Garrard 1

7. Mr Merricks' approach to the preparation of the CSAO Application was to avoid providing a long narrative of the many months and years of litigation and considerations within his legal and expert team that led to his decision to agree to settle with the Defendants. Furthermore, Mr Merricks took the view that the Tribunal needed to be provided with the most salient documents, being the advice available to him at the moment at which he chose to settle and the developments in the Collective Proceedings that necessarily inform the question the Tribunal has to answer, namely whether the settlement is just and reasonable, taking account of all relevant circumstances (including the factors set out in Rule 94(9)(a)-(g), and discussed at paragraph 6.125 of the Guide). To provide an exhaustive account of the last more than eight years of litigation would have been neither possible nor, I respectfully suggest, necessary for the purpose of the task now faced by the Tribunal. Nor did Mr Merricks set out in his fourth witness statement ("**Merricks 4**") and accompanying exhibit ("**WHM4**") all his interactions and dealings with Innsworth, as again that does not inform the just and reasonableness of the settlement. Mr Merricks also had regard to the Tribunal's clear direction that the settlement hearing should not become a mini-trial to resolve factual disputes between himself and Innsworth[1].

8. Innsworth through Garrard 1 has, however, unfortunately taken a different approach. Whilst not wanting to be drawn into a factual debate, I do need to address in detail the matters put forward in Garrard 1 that go to the matters in which I had a central involvement, for two reasons:

   (a) Garrard 1 presents evidence inaccurately, using snapshots in time and Innsworth's belief at particular junctures to create a narrative that the settlement represents an unexpected and dramatic change of position by Mr Merricks. That is simply wrong. As the Tribunal will be well aware, litigation, particularly where proceedings are determined

[1] [2025] CAT 7

by way of a series of issue trials, moves and changes over its lifetime and that is what has happened in these Collective Proceedings.

(b) Garrard 1 seeks to tarnish both Mr Merricks' reputation and that of myself, by suggesting that improper motives and considerations have brought about the settlement. I strongly reject any such assertion. The account of events put forward in Garrard 1 is misleading and incomplete. It is important that the Class understands that both Mr Merricks and I – along with the incredibly hard-working and committed team I have had first at Quinn Emanuel and then more recently at Willkie, as well as all the various barristers and experts that have worked on the Collective Proceedings over the last more than eight years – have at all times given everything to bring about the best possible outcome for the Class, whilst also ensuring that Mr Merricks acted in accordance with his contractual obligations as set out in the suite of funding documents. But for the immense hard work and commitment of the entire team of advisors, and the unwavering belief and focus of Mr Merricks, the Class would not be on the verge of a settlement of £200 million. Further to that, it is important to note that when the collective proceedings order was first refused by the Tribunal in 2017, it was I who never gave up, who secured the further funding from Innsworth within a matter of weeks to allow the appeals to proceed, and was a key architect of the arguments that prevailed before the Court of Appeal and Supreme Court. The suggestion from Innsworth and Mr Garrard that after having given so much time and effort to the Class and the success of the Collective Proceedings, that Mr Merricks and I would be overly ready to reach a settlement or would do a deal that was not in the best interests of the Class, is entirely misconceived and should not have been suggested.

9. Given the Tribunal is likely to be most interested in the evidence related to the assessment of the reasonableness of the settlement sum, I address this first. For completeness, I then address the various factual inaccuracies that

arise in Garrard 1. Given the Tribunal has indicated that it will not allow the hearing of the CSAO Application to turn into a mini-trial, and to allow the Tribunal to determine matters without trying to resolve factual disputes based on witness evidence, I set the record straight by reference to contemporaneous documents that allow the Tribunal to see for itself that the evidence put forward by Mr Merricks is accurate. I do not believe that this latter evidence is necessarily relevant to the Tribunal's task pursuant to Rule 94 but it is important for reputational reasons and to reassure class members that there is a response to the matters that have been misrepresented in Garrard 1.

Innsworth's view of the value of the Collective Proceedings

10. Section E of Garrard 1 sets out what Mr Garrard calls the "*Key developments leading to the proposed settlement*", purporting to address "*certain relevant developments leading to the proposed settlement*" (Garrard 1, para 24) to present a narrative that the settlement is neither just nor reasonable. Section E of Garrard 1, however, does little to assist in understanding the course of events because it is regrettably misleading in its omissions. Mr Garrard fails to accurately set out, by reference to the available contemporaneous documents which were all in the possession of Innsworth at the time of its decision to intervene, [redacted]. This is relevant because had Mr Garrard explained this, [redacted].

11. Garrard 1, para 26 refers to a [redacted] email from Mr Garrard to Mr Merricks and Willkie. The email exhibited at IMG1/47-48, however, is not a [redacted] email but rather a [redacted] email. The correct [redacted] email is at [**BB8/1/5-8**].

12. Mr Garrard points to the [redacted]. For context,

the causation hearing had just taken place but judgment was reserved (judgment did not come until February 2024).

13. What Mr Garrard does not draw the Tribunal's attention to, and the Tribunal will not have seen given the [redacted] email is not in IMG1, is that as at [redacted], Innsworth had [redacted]

14. [redacted] Innsworth was here acknowledging that [redacted]]. This is not addressed in Garrard 1. The impact of this on [redacted]

[redacted] I consider that Innsworth was [redacted]

15. At para 26 of Garrard 1, there is reference to an email exchange on 10 August 2023 in which [redacted] In explaining why Innsworth considered that there was [redacted], Mr Garrard said in his email of 10 August 2023 that [redacted]

16. [redacted]

[2] [2024] CAT 76

17. Accordingly, from the contemporaneous emails recording the position of Innsworth and Mr Garrard, it is clear that by summer 2023, Innsworth was [redacted]

18. Between summer 2023 and November 2024 when the settlement was agreed, there was in fact a negative judgment on the factual causation trial that was held in June 2023 [redacted] and Mr Merricks lost on English and Welsh (and consequentially Northern Irish) limitation. Furthermore, Ms Demetriou KC had advised, [redacted]

19. I met with Mr Merricks, Innsworth and Ms Demetriou KC on 26 June 2024 to discuss [redacted] It was at this meeting that [redacted]

[redacted]

20. As set out in Merricks 4, paras 47 and 48, [redacted]

21. It was against this factual backdrop that in September 2024 Mr Garrard sent a note to Mr Merricks, Willkie, Ms Demetriou KC and Mr Simpson KC (leading counsel in respect of merchant pass-on only) ahead of a call scheduled to take place on 30 September 2024 [**BB8/3/11-14**] (the "**September Note**"). The September Note is also not referred to in Garrard 1 and is not included within IAG1. At this point in the Collective Proceedings, Mr Merricks had made a WPSATC offer of [redacted] to Mastercard and Mastercard had countered with a WPSATC offer of [redacted]. The September Note [redacted]

[redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

22. As regards the UK domestic claims, the September Note states that [redacted]

23. Much is now made in Garrard 1 and the SOI of the potential impact that Innsworth sees of the causation counterfactual replead and the extent to

which, [redacted] Yet this is a position that has only now developed on Innsworth's part as it seeks to find reasons to oppose the settlement. It is not the view [redacted]. The September Note indicates [redacted] The September Note states that [redacted] There is no suggestion in the September Note [redacted] despite the fact that at this point Mastercard and Mr Merricks were already in correspondence as regards further causation preliminary issues [**BB8/22/89-91**]. At the time that Innsworth set out its views on [redacted], it was fully aware that the causation replead had not yet happened, and that [redacted]

24. What the September Note clearly demonstrates, and is significant as it impacts how everything must be viewed from then on, is that [redacted].

25. The suggestion in Mr Garrard's emails towards the end of October 2024 and early November 2024 [**BB8/4/15-20**] that [redacted] was raised in circumstances where [redacted],

and [redacted]. What is evident from contemporaneous documents is that the September Note states [redacted]

26. The meeting went ahead on 30 September 2024, as set out in Garrard 1 para 40. It is right that [redacted]. It is important, however, to emphasise that the [redacted] as at that stage [redacted] Since that meeting, there have been significant developments in respect of pass on, including Trial 2A addressing the evidence for merchant pass on, [redacted] The reliance on the views of [redacted] is just another example of Innsworth taking snapshots at a moment in time and then seeking to portray them as some definitive fact, which they are not.

27. As Mr Garrard rightly identifies at Garrard 1, para 41, on [redacted] Mr Garrard does not, however, address an exchange of emails between himself and Mr Merricks, to which I was copied, and unfortunately these too are omitted from IAG1. In those emails [redacted]

[redacted]. In an email dated 1 October 2024 **[BB8/6/26]**, [redacted]

[redacted]

28. That email was followed up some 3 minutes later with a further email from Mr Garrard saying: [redacted]. I did not agree with the views expressed by Mr Garrard, [redacted]

[redacted]

Before any of this could be expressed to Mr Garrard, he sent a third email a little over an hour later saying: [redacted]

[redacted]

29. It is important to note that in early November 2024 (and absent from Mr Garrard's 'key developments'), I wrote to Innsworth informing them that Compass (Mr Merricks' economic experts) had [redacted]. The result of that analysis, as summarised in Mr Garrard's email to me and Mr Merricks on 11 November 2024 [**BB8/9/33**], was that [redacted]

30. The position as set out in Garrard 1, para 45 is correct. [redacted]. Mr Garrard goes on to refer at para 47 to an email from Mr Merricks explaining that [redacted]. That instruction from Mr Merricks was off the back of discussions he and I had [redacted] In those discussions, I suggested that [redacted]

31. [redacted]

[redacted]

32. Mr Sansom and I are both experienced litigators, and we were [redacted]. I come back further on to the suggestion from Mr Humphries that had there been a mediation a higher settlement could have been achieved (a mistaken belief on his part). However, [redacted]

[redacted]. [redacted], and as referred to in Merricks 5, para 49, [redacted]

[redacted]

Nonetheless, through our discussions, [redacted]

[redacted].

33. [redacted]

[redacted]

34. Mr Garrard summarises in Garrard 1, paras 48-50, the [redacted] and Mr Merricks' reaction to that but he does not explain, and despite the volume of materials in IAG1, nor does he again exhibit the email he sent Mr Merricks on 15 November 2024 [redacted]. In that 15 November email **[BB8/10/35-36]**, Mr Garrard writes [redacted] It went on to say, [redacted] Innsworth's view as set out in that email was that [redacted]

35. What Innsworth had failed to appreciate in their seeking to now suggest that [redacted]

[redacted]

36. What followed were a number of emails and conversations between myself, Mr Merricks, Innsworth and Ms Demetriou KC, some of which are recorded in Mr Garrard's witness statement, [redacted] Much is made by Mr Garrard and Innsworth's legal team of the call on 16 November 2024 with Ms Demetriou KC [redacted]. I address the details of this at paras 57-60 below.

37. What it is important to understand is that by 19 November 2024 based on Innsworth's own contemporaneous documents, its position was that: [redacted]

[redacted]

38. Mr Garrard says at para 69 of Garrard 1 that the "*explanation for why £200 million should have been accepted (on 29 November 2024) when* [redacted] *was* [redacted] *(on 12 September 2024)* [redacted] *is not addressed in Mr Merricks' evidence. In that period, there had been no material change to the underlying case.*" However, in light of the position set out at para 37 above, the statements at para 69 of Garrard 1 do not reflect the reality of what had been discussed and known by Mr Merricks at the time he decided to settle.

39. The true and accurate position, as evident from the contemporaneous documents that Mr Garrard did not refer to and which are not included in IMG1, is that Mr Garrard (on behalf of Innsworth) had [redacted] However, Mr Garrard is now saying that [redacted] Mr Garrard's criticisms in this regard are entirely unjustified because: [redacted]

[redacted]

Causation counterfactual

40. Much is made in Garrard 1 of the impact of the counterfactual case and the causation issues in the Collective Proceedings. It is right that the outcome of the causation issues and the counterfactual case would have a huge bearing on the outcome of the Collective Proceedings because the UK transactions accounted for approximately 95% of the claim value. Without the UK transactions, the claim would go from being a multi-billion pound claim to a claim in the low hundreds of millions (Merricks 4, para 15). Mr Garrard does not disagree with the evidence put forward by Mr Merricks in this regard.

41. The issue that Mr Garrard takes with the causation counterfactual is the Innsworth perception that "*a major practical problem for Mr Merricks was the failure to develop the UK counterfactual case*" (Garrard 1, para 42) which Mr Garrard says [redacted] Mr Garrard is mistaken.

42. On 26 February 2024, the Tribunal handed down its judgment in respect of the factual causation hearing (Merricks 4, para 15). Given its importance, Mr Merricks sought to appeal that judgment [redacted]

[3] As explained at para 56 below, [redacted]

[redacted] As it turned out, Mr Merricks' application for permission to appeal was refused by the Court of Appeal on 9 June 2024 (and communicated to Mr Merricks by the Court of Appeal on 20 June 2024). The criticism levied by Mr Garrard is that Mr Merricks and his legal team failed to progress the counterfactual case, [redacted] This suggestion is bizarre. It would have made no sense [redacted] This can be seen from the contemporaneous documents and was known to Innsworth. It would also have been entirely inconsistent with Mr Merricks' obligation in the LFA to conduct the Collective Proceedings efficiently[4] for him to have [redacted]

[4] Clause 4.2 of the Litigation Funding Agreement provides that "*the Class Representative shall:… (iv) diligently prosecute the Claims and the Proceedings and do all things necessary to enable the Lawyers to ensure that the Claims and the Proceedings are conducted consistently with the Overarching Purpose, unless the Class Representative has proper and reasonable grounds for not doing so*" and clause 4.3: "*The Class Representative agrees to instruct Lawyers to: … (ii) conduct the Proceedings* ***efficiently and effectively*** *within the Approved Budget and in accordance with the Overarching Purpose*" (emphasis added) [**WHM4/5/58**] . Overarching Purpose is defined as *"[t]o facilitate the just resolution of the Claims and the Proceedings according to law and as quickly,* ***inexpensively and efficiently as possible*** *in accordance with the Approved Budget with the aim of maximising Settlement or judgment proceeds net of Project Costs and minimising all risks, including in particular the risk of the Proceedings being unsuccessful*" (emphasis added) [**WHM4/5/54**].

[redacted]

43. On 14 March 2024, Mastercard wrote to Mr Merricks regarding the resolution of the remaining causation issues [**BB8/12/43-45**]. On 21 March 2024, Mr Merricks responded to that letter highlighting that he had "*until 2 April 2024 to seek permission from the Court of Appeal to appeal the [causation judgment]*" and that he intended to seek permission to appeal and that therefore *"[u]ntil at least the permission to appeal has been determined, it is premature to consider Mastercard's proposal for the determination of any further preliminary issues in respect of causation. It is also premature to suggest, as Mastercard has done it is costs submissions, that there ought to now be a case management conference*". That letter went on to say that due to the timing of Trial 2, it was unlikely that any further causation trial would be able to be listed before 2025 and that the "*shape of that trial is a matter that should be considered in light of any appeal from the Judgment*". Mr Merricks did indicate in that letter that he would consider Mastercard's proposals in its 14 March 2024 letter and would revert in due course to see whether agreement could be reached in principle as to the further determination of the causation issue [**BB8/13/46-47**].

44. On 29 April 2024, Mastercard wrote to the Tribunal requesting that the Tribunal list a case management conference to take place as soon as practicable to consider the next steps in the Collective Proceedings, primarily as regards the remaining causation issues [**BB8/14/48-51**]. Mr Merricks wrote to the Tribunal on 1 May 2024 reiterating his position that there was no basis for a case management conference at this stage, it was premature and the "*appropriate course is for the parties and the Tribunal to await the determination of the PtA Application and then consider what would be the appropriate case management steps in respect of the determination of the outstanding causation issues*" [**BB8/15/52-55**]. Further letters were sent to the Tribunal by Mastercard and Willkie on 7 and 8 May 2024 respectively [**BB8/16/56-57**] and [**BB8/17/58-59**]. On 13 May 2024, the Tribunal wrote to the parties agreeing with Mr Merricks that a case

management conference would be premature noting that the "*Chair is not prepared to direct an urgent CMC as requested by Mastercard. He considers that this matter cannot sensibly be considered before Mr Merricks' application for permission to appeal to the Court of Appeal against the Tribunal's decision on causation has been determined (and then the appeal decided if permission is granted), and further it is sensible to await the judgment on Mastercard's appeal against the Tribunal's preliminary issues judgment on exemptibility, [2023] CAT 15, which was heard very recently. Moreover, whatever the Tribunal may determine is the correct way forward on causation, whether by preliminary issues or otherwise, there is no prospect of a further substantive hearing in these proceedings before the summer. Therefore, on any view there will not be a further judgment by the Tribunal on causation before the question of Mr Merricks' participation in Trial 2 of the Merchant Umbrella Proceedings, due to start in November, has to be resolved*" [**BB8/18/60**]. The relevant correspondence was shared with Innsworth at the time.

45. Garrard 1, para 30 refers to a 3 June 2024 assessment of the merits, which is unfortunately not exhibited to Mr Garrard's witness statement, albeit it is included in the index and a blank page appears in its place in the exhibit [IMG1/58]. I exhibit the document **[BB8/19/61-62]**. That email from myself to Innsworth was in the context of [redacted] Innsworth's complaint was that [redacted] I responded that [redacted]

[5] The Court of Appeal's judgment on exemptibility was [redacted]

[redacted] There can have been no doubt in Innsworth's mind that as at [redacted] There was no further pushback from Innsworth on the timing of this at this time, nor was it suggested that [redacted].

46. As evidenced by the quote from the 3 June 2024 email in Garrard 1, para 31, there was [redacted]. Nevertheless, as the quoted extract from that email shows, [redacted].

[redacted]

Garrard 1, para 32 is therefore misleading. [redacted]

47. Garrard 1, para 34 is right that following the meeting on 26 June 2024, and [redacted] (see para 18 above), [redacted]

48. As to the timing for developing the counterfactual, para 35 of Garrard 1 is unfortunately selective in its quotation and fails to draw the Tribunal's attention to [redacted] In that email. I stated that [redacted]

[redacted] As it transpired, due to Trial 2A and counsel availability (in particular Ms Demetriou KC who was under brief and preparing for a heavy 7 week trial in *Kent v Apple* that commenced at the start of January 2025), we proposed a timetable on 30 October 2024 [redacted]

49. In his narrative of events as regards the causation counterfactual in Garrard 1, Mr Garrard [redacted] For completeness, I provide the Tribunal with the full accurate summary of what occurred at this point in time:

a) On 3 September 2024, following the customary summer vacation period, Mastercard wrote to Mr Merricks further to the correspondence summarised at paras (43 and 44) above in spring 2024, raising further preliminary issues on causation [**BB8/22/89-91**]. [redacted]

[redacted] the letter was sent to Mastercard on 25 September 2024 [**BB8/25/95-97**].

(b) On 9 October 2024 Mastercard responded to Mr Merricks' letter [**BB8/26/98-100**]. There was continued disagreement between the parties as to whether Mastercard should set out its position in response on the counterfactual first or whether Mr Merricks should go first and make amendments to his primary case on the counterfactual. Mastercard proposed a timetable for repleading that in Mr Merricks' opinion applied a level of urgency that was unnecessary in circumstances where both parties would be tied up in Trial 2 for the remainder of 2024, and that is where the increasingly strained resources needed to be focused. On 16 October 2024, Mr Merricks sent a holding response to Mastercard whilst he [redacted]. Further exchanges occurred between [redacted].

50. The statements made by Mr Garrard at para 44 are wrong. [redacted]

[redacted] As regards the matters set out at Garrard 1, para 42 [redacted] As regards Garrard 1, para 42 [redacted] There was also the fact, contrary to the impression given in Garrard 1, and as addressed in Merricks 4 (see para 18), identifying a credible counterfactual and evidencing that, was for the most part going to require witness evidence. Getting individuals with relevant knowledge of interchange fees to come forward and assist Mr Merricks has proven very difficult throughout the course of the Collective Proceedings. We have engaged expert consultancies to assist us in locating potential witnesses, and even they have found it very difficult. At various point we have located individuals who could potentially be witnesses, and they have then indicated whilst they would be willing to give Mr Merricks assistance in the background, they were not willing to be a witness because of the concern that this would have a negative impact on their ongoing consultancy work

within the industry. In the case of another person, it became apparent that he was likely in possession of information that we determined meant we could not work with him. Given these challenges, beyond Mr Jenkins, I had serious doubts as to our ability to find witnesses, whereas I was aware that Mastercard had throughout had no difficulty in getting factual witnesses, whose evidence had been accepted by the Tribunal.

51. Mr Garrard's accusation that [redacted] (Garrard 1, para 72) is a gross misrepresentation of events. As explained above, it is simply not true that [redacted] Mr Garrard also has no basis for asserting that "*Mastercard would be well aware of the lack of work from the correspondence referred to*" (Garrard 1, para 44). To the contrary, we had substantively engaged with Mastercard in correspondence on the scope of the preliminary issues [**BB8/25/95-97**]. Mr Merricks was also working on a timetable to agree with Mastercard for his repleading a counterfactual that reflected the need to deal with Trial 2 in circumstances where unlike Mastercard which had the resources of both Jones Day and Freshfields for Trial 2, Mr Merricks did not, and also the unavailability of Ms Demetriou due to Kent v Apple. This was then overtaken by the settlement negotiations.

52. As set out at para 34 above, the reality is that even on Innsworth's [redacted] and based on Innsworth's contemporaneous correspondence with Mr Merricks, there was [redacted] Mr Merricks had made clear to Innsworth that he was [redacted]

[redacted]

Leading counsel advice

53. Garrard 1, para 50 appears to suggest that Mr Merricks had [redacted] Any such criticism is misplaced and unfounded. As Innsworth is aware, [redacted]. The statement made by Mr Merricks and quoted at Garrard 1, para 50 does not give rise to any criticism. At that stage, Mr Merricks [redacted].

54. As regards [redacted] this was the subject of further discussions on a call on 16 November 2024, as identified in Garrard 1, para 53. [redacted]

55. Furthermore if, by para 64 of Garrard 1, [redacted].

56. I also strongly reject the suggestion at paragraph 12.2 of the SOI that [redacted]

[redacted]

57. As to [redacted]:

(a) [redacted]

(b) [redacted]

58. [redacted]

59. [redacted]

60. [redacted]

61. Mr Garrard seeks to assert that Mr Merricks had [redacted] That is

simply misleading and does not follow. First and foremost, [redacted]

62. Garrard 1, para 40 makes the point that on 30 September 2024 Mr Simpson KC [redacted] I have two short points in response. First, [redacted] Second, [redacted] Therefore, it was Innsworth's view at the time that [redacted]

63. Mr Garrard is therefore wrong when he says at Garrard 1, para 72 that Mr Merricks and Willkie have adopted Mastercard's "*pessimistic approach*" in an effort to now cast doubt on the settlement. As can be seen, [redacted]

[redacted] It is notable that Mr Garrard does not address at all [redacted]. Whilst I recognise that this [redacted] Mr Garrard simply ignores [redacted] I address the independent expert work submitted by Innsworth further below, however, [redacted]

Additional context to the settlement negotiations

64. Mr Garrard seeks to make a point out of Mr Merricks' presentation of his case to Mastercard in the WPSATC correspondence. By way of example, in Garrard 1 at para 41, it is stated that [redacted] It is not entirely clear what point Mr Garrard is seeking to make. [redacted]

[6] It is also worth noting that the figures set out in Annex 1 of Garrard 1 [redacted]

[redacted]

65. Garrard 1, para 48, suggests that the additional [redacted] that went towards the [redacted] offer was [redacted] Mr Garrard is wrong on this also for a number of reasons. First, Mr Garrard and Innsworth are well aware that reaching a settlement with Mastercard would not bring the Collective Proceedings to an immediate halt, as the Tribunal would need to approve the settlement. Given that Innsworth wrote to the Tribunal a number of times suggesting that the settlement approval hearing should occur in March 2025, they will have known that agreeing a settlement as Trial 2A was starting meant that there was no possibility of Trial 2A not proceeding and [redacted].

66. It is the case that in the course of the settlement negotiations between myself and Mr Sansom, I said, [redacted]

[redacted]. However, getting to a very prompt settlement approval would have required Innsworth to not oppose the settlement. When it became clear that Innsworth would oppose the settlement, even before it was concluded, it was clear that the CSAO Application would not be considered before Trial 2A, and therefore consistent with his obligations to do the best for the Class and account for the possibility that the settlement is not approved, Mr Merricks pursued his case in Trial 2A fully and [redacted]. The reality is that Mastercard offered the additional [redacted], in response to Mr Merricks' efforts to get an improved offer, and it was said to [redacted].

67. Garrard 1, para 48, also seeks to criticise Willkie [redacted]. As this stage, [redacted]

68. Garrard 1, para 49 says that [redacted] Nonetheless, my views over a year ago should not now influence the Tribunal's consideration of the CSAO Application on the evidence and information now before it. Additionally, any suggestion that Mr Merricks had committed himself from the outset to a strict per capita distribution is simply incorrect. This much can be seen from the passage in his skeleton argument dated 11 October 2017, for permission to appeal to the Court of Appeal. Paragraph 10 of Garrard 1, cites this passage, but Mr Garrard appears to have not appreciated precisely what is stated there, given the wording that I now emphasise:

"89. Moreover, and in any event, the Appellant'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." (emphasis added)*

The language that I have emphasised clearly demonstrates that Mr Merricks was leaving open the possibility of alternative distribution approaches, and that key considerations in determining distribution would be the final quantum of damages and the size of the class.

69. By the time Mr Merricks agreed a settlement with Mastercard, it was clear from the settlements that had been approved, that the Tribunal considered that it had significant flexibility as regards distribution. By way of example of how things have evolved and why I confess my prior views were not

correct, the original White Paper[7] rejected *cy pres* distribution, yet it has now become clear that the Tribunal considers that alternative approaches to distribution are permissible[8]. [redacted]

70. In any event, the distribution is not actually a part of the settlement agreement. There is no mention at all of distribution. [redacted] This is clear from the Settlement Agreement itself. Recital K of the Settlement Agreement records that matters of distribution were not addressed and were instead agreed to be a matter for the CSAO Application. [redacted] and this too is reflected in the CSAO Application. So it is just wrong for Mr Garrard to state that the distribution proposal advanced by Mr Merricks, [redacted]

[7] Civil Justice Council (2008) "Improving Access to Justice through Collective Actions" – Developing a More Efficient and Effective Procedure for Collective Actions".

[8] *Gutmann v First MTR South Western Trains Limited and Stagecoach South Western Trains Limited (Judgment SSWT Collective Settlement)* [2024] CAT 32

71. Garrard 1, para 53, refers to the discussion on 16 November 2024 with Ms Demetriou KC, Mr Merricks, Mr Garrard and myself. I have addressed the substance of that discussion above. It is, however, worth noting that in addition to the points I have made regarding [redacted] if that is the point that Mr Garrard is seeking to make at para 53 of Garrard 1.

72. Garrard 1, para 54, purports to record statements that I made on the 16 November 2024 call, based on notes taken by Mr Garrard's colleague Isabel Lewin Smith. It is important to note that these notes were not shared with me at the time and I was unaware of their contents until Garrard 1 was served on Mr Merricks. I have a very clear recollection of the 16 November 2024 call. [redacted]

[redacted] My recollection of what I said is in fact entirely consistent with the email quoted at Garrard 1, para 56, where Mr Merricks says that [redacted]

73. Garrard 1, para 67 and para 68, wrongly and entirely unjustifiably seek to slur Mr Merricks' reputation and standing, by stating that his decision to settle has been improperly influenced by some fictitious personal gain out of the settlement by having Mastercard agree to make available to him up to £10 million to deal with the arbitration that was commenced against him personally by Innsworth. Any such suggestion is absolutely false and I strongly refute it. It is very important to put this issue in its true and proper context.

74. This all comes about because of the decision taken by Innsworth to commence an LCIA arbitration against Mr Merricks personally, including a claim for [redacted], at the point in time where he indicated that he was going to agree the settlement with Mastercard at £200 million. Contrary to the way in which Mr Garrard seeks to portray the arbitration, I am firmly of the view that it was intended as a means to seek to improperly influence and pressure Mr Merricks to not agree a settlement that he considered to be in the best interests of the Class. Innsworth misjudged Mr Merricks' strength of character and conviction, in that he was prepared to agree a settlement even in the face of a claim by Innsworth. Knowing that Mr Merricks would not have the means to defend such an action, Innsworth wrongly assumed in my opinion, that this would force Mr Merricks to back down. The fact that the arbitration was a tactical move aimed at improperly

trying to get Mr Merricks to back down, is evident from an email exchange between Mr Merricks and Mr Garrard. [redacted]

75. [redacted]

[redacted]

76. [redacted]. Mr Merricks undertook a detailed assessment of all relevant factors, including having regard to the advice he received from his legal team Mr Merricks concluded that he would accept the settlement offer despite the threat of an arbitration [redacted]. It was only at this point, having decided that he would settle as it was in the best interests of the Class, at my suggestion,

[redacted]

[redacted]

that Mr Merricks had [redacted]

77. The timing of Mr Merricks' decision and his request to Mastercard for assistance are very important. Mr Merricks was acutely aware that he needed to reach a decision on whether to settle completely unaffected by Innsworth's threats and attempts to intimidate him by way of the arbitration. [redacted] Mr Merricks should be credited for the way in which he reached his decision, being able to take such a decision under the immense pressure he was being placed by Innsworth. It was only after he communicated his desire to accept the £200 million, [redacted]

78. [redacted]

[redacted]

79. It is also absolutely wrong for Garrard 1, para 68, to suggest that there "*could have been another £10 million made available for the Class*". The £10 million has been offered as the maximum amount available which the parties [redacted]. If it is the case, as Innsworth has now indicated in Garrard 1, para 71, that the arbitration proceedings will fall away as either the Tribunal grants the CSAO Application or it does not and the Collective Proceedings continue, then Mr Merricks [redacted]

[redacted] The £10 million served its purpose, in demonstrating to Innsworth that Mr Merricks would not be bullied into capitulating on the settlement. As at the time of this witness statement, Mr Merricks has incurred approximately [redacted] in costs in respect of the arbitration, no further costs are expected before the determination of the CSAO Application. It is entirely wrong of Innsworth having put Mr Merricks in a position that he needed to turn to Mastercard to assist him in defending himself against Innsworth after having agreed to settle the Collective Proceedings, and where the £10 million is likely not to be used (save for the small sum that has been incurred), to then use the situation it has created to try and suggest that more money could have been obtained for the Class.

Realistic funder returns

80. Further to what is said in Merricks 5 (paras 43 to 45), I wish to address one specific point about how one considers what is a reasonable return for a funder. In an effort to support its position that even on a £200 million settlement, Innsworth should receive £179 million because that is what is provided for in the LFA, the SOI at paragraph 24.7(a) urges the Tribunal to consider what price a reasonable funder would obtain from a hypothetical willing client for a commitment of c. £60 million (as here) extended over 7½ years, and an actual outlay of £45 million, with no guarantee of recovering anything. I agree that the Tribunal ought to consider what a reasonable price is for Innsworth's investment, having regard to the inherent risk of litigation. The proposal set out in the CSAO Application, is that Innsworth receives £100 million (i.e., 50% of the Settlement Sum) which represents an absolute return of around 120% on its £45 million outlay, with a profit of around £55 million for its investment despite important issues in the case being lost that substantially reduced the realistically available quantum.

81. To further aid the Tribunal's consideration of what would be a reasonable commercial return on an investment of this kind, rather than just rely on the broad assertions in Garrard 1, para 19, Mr Merricks' economic experts,

Compass Lexecon, were asked to run some analysis [**BB8/30/114-125**] which address the following scenarios:

a) The return that Innsworth would have received had it invested its funds over the same period in a low risk investment such as UK Gilts. Compass Lexecon's analysis shows that the total return would have been around £1.5 million. Therefore, for the risk it has taken in investing in the Collective Proceedings, on Mr Merricks' proposal, Innsworth would receive a return of over 36 times what it would have achieved with a low risk investment; and

b) The effective annualised rate of return that Innsworth would receive if it is awarded £100 million by the Tribunal. Compass Lexecon calculates this to be an annual rate of return of 44.07%. This is on any view, a very significant rate of return, even accounting for litigation funding being a riskier asset class.

Independent work commissioned by Innsworth

82. Exhibited to Mr Garrard's witness statement are three reports/notes: i) the first expert report of Mark Humphries ("the **Humphries Report**");ii) [redacted]; and iii) a note from Seladore Legal following discussions with Colin West KC in respect of the counterfactual (the "**Seladore Note**"). I address briefly the key points of principle in respect of each of these three reports/notes. However, before doing so, I note that Innsworth does not in fact have permission to adduce any expert evidence, let alone three reports/notes without even giving prior notice to the Tribunal and the parties that it intended to do so.

83. Innsworth's role in the settlement hearing is as intervener, and at no point has Mr Merricks objected to Innsworth's participation in the hearing, however, that participation must be proportionate and in line with the expected role of an intervener. The Tribunal granted Innsworth permission

to intervene because the Tribunal considered it important to hear Innsworth's views on the matter of settlement in part because the parties, for reasons that had been explained to the Tribunal, had not adduced an independent expert report in support of the settlement. The Tribunal also made clear that the settlement hearing should not become a mini-trial.[11] Rather than just provide its own views as allowed by the Tribunal, Innsworth has included three reports which it seeks to rely on as the views of independent experts, in particular Mark Humphries who is presented as a CPR Part 35 expert. I consider that having seen the Tribunal's reasoned order allowing Innsworth to intervene, it should have been clear to Innsworth at least at that stage, that it ought to have raised with the Tribunal and the parties a desire to also rely on expert evidence. It remains unclear why Innsworth chose not to do so.

84. This has put Mr Merricks in the unenviable position of having seven days to respond to Innsworth's statement of intervention, that includes three reports/notes that are said to represent the views of independent experts. As regards the Humphries Report and Seladore Note, for the reasons set out below that is less of an issue. However, as regards [redacted]. This is not very satisfactory. Nonetheless, I now turn to the three reports/notes.

85. The Humphries Report is presented as an independent expert report, as allowed for by Rule 94(9)(e), and Mr Humphries presents himself as an expert within the meaning of CPR Part 35 and includes the customary confirmations that an independent expert must provide in paragraph 3 of his report. Specifically, Mr Humphries states that he understands that he owes "*a duty to the Tribunal to exercise reasonable skill and car in carrying out [his] instructions, that [he] must provide unbiased evidence*" and he then goes on to state in paragraph 4 that he confirms that he has "*complied with*

[11] [2025] CAT 17

the above-mentioned duties in preparing this expert report and will continue to do so; (b) this expert report includes all matters within my knowledge and area of expertise relevant to the issues on which this expert report is given….(d) the opinion I have expressed represent ***my true and complete professional opinions*** *on the matters to which they refer; and (e) I have given details in this expert report of* ***any matters which, to my knowledge, might affect the validity of this expert report****.*" (emphasis added). Mr Humphries then explains in paragraph 5 that his instructions are to express his "*expert opinion*" on the "*reasonableness of the settlement sum given the state of play in the Proceedings*" and then surprisingly to also comment on the process followed by Mr Merricks.

86. At the outset, it is unclear that Mr Humphries meets the requirements of an expert as provided for in CPR Part 35. Be that as it may, there are a number of significant and fundamental issue with the Humphries Report. In paragraph 9.d. Mr Humphries sets out some highlights of his professional experience and refers states: "*As a litigation lawyer, I have extensive experience of settling disputed, including six sets of "*interchange*" litigation for Tesco, WH Smith and several large groups of retailers*". However, what Mr Humphries fails to indicate at all in his expert report, is that in these proceedings for retailers, not only did his clients advance arguments that they did not pass on the interchange fee overcharge to consumers, but that Mr Humphries himself signed statements of truth to replies filed in those proceedings where it was expressly denied that retailers passed on any interchange fee overcharge [**BB8/31/165**] and [**BB8/32/238**]. This is a stark omission, given the confirmations given by Mr Humphries in paragraph 4 of his report and set out above.

87. Furthermore, it also explains why despite identifying in paragraph 13 of his report that the major issues remaining in the litigation are "*the causation issues*" and "*the merchant pass-on issue*" – it is unclear why Mr Humphries considers acquirer pass on is not a major issue – and "*(perhaps to a lesser extent) the limitation issue*", there is then no further mention whatsoever in the Humphries Report about pass on. What then proceeds is 19 paragraphs

under the heading "*C. Process followed bv Mr Merricks*", in which there is not a single mention of the [redacted] or the [redacted] despite confirming at paragraph 12 of his report that he received Merricks 4 and its exhibits, which included [redacted] Mr Humphries then concludes at para 46 of his report that "*in my opinion the settlement of these proceedings was made on the basis of a settlement sum that was unreasonable because it has not yet been established by further steps in the litigation whether settlement on very substantially improved terms could have been achieved*".

88. I find this a remarkable conclusion for an independent expert to reach, in circumstances where he has not considered any issues other than causation, and having expressly identified pass on as an important unresolved issue, not addressed the merits of that issue. It is even more remarkable, where Mr Humphries appears to recognise that he is offering an opinion on the basis of everything that is now known and before the Tribunal, which [redacted]. However, the most remarkable aspect of Mr Humphries' conclusion at para 46 of his report is that he reaches the conclusion that the settlement sum is unreasonable, yet his personal view as verified by the statement of truth that he signed for the merchants that he represented in the very same interchange fee proceedings, is that there is no merchant pass on to consumers.

89. Given Mr Humphries' own experience of interchange litigation and the arguments that he advanced for his merchant clients, which he believed to be true – and which he chose to not disclose to the Tribunal in the Humphries Report – it seems that the only conclusion he could reasonably reach is that the settlement sum is reasonable. The only way he concludes otherwise is by ignoring pass on, which is understandable given his stance on that issue for merchants he has represented, but entirely inappropriate for a person that holds himself out as an independent expert.

90. The lack of disclosure regarding his stance on merchant pass on is unfortunately not the only omission made by Mr Humphries. [redacted] Given the CPR Part 35 confirmations stated in the Humphries Report and the acknowledgement about the need to disclose relevant matters that could call into question his expert opinion, it is impossible to understand how this was not disclosed by Mr Humphries. [redacted] This further calls into question his independence and whether any weight can be given to the Humphries Report.

91. Whilst I believe that in light of the above, no reliance can be placed on the Humphries Report, for completeness I address his treatment of the causation issue. First, unlike Mr Garrard and the SOI who seek to [redacted]. In circumstances where Mr Humphries also indicates at para 13 of his report that he does not "*seek to substitute any views of my own as to the underlying merits for those that have been formed by those representing the parties to the proceedings*", which means he [redacted], and yet very surprisingly Mr Humphries considers at para 45 that "*continuing the litigation would appear to be objectively to be a better option for the class*

as a whole" which would have resulted in the class forgoing [redacted] that was on offer.

92. As for Mr Humphries believing that had Mr Merricks continued on with the litigation and [redacted]. However, that is wrong. [redacted]. I have already addressed this matter in detail (see paras 21-24 above).

93. Nor has Mr Humphries acknowledged anywhere in his report that Innsworth's [redacted].

94. For completeness, I also consider that Mr Humphries' speculation on the value of a mediation, should be given no weight. The views he offers are not grounded in any relevant facts of the actual settlement process. The suggestion that Mr Merricks should have forced Mastercard into a mediation, just demonstrates the misconceived views of Mr Humphries on this issue. Making a party mediate that does not want to, rarely, if ever, in my experience produces a successful outcome. Mediations work where both sides want to mediate. Finally, the suggestions at para 37 to 39 that Mr Merricks failed to make use of the difficult position that Mastercard was in with having to defend both merchant and consumer claims, is entirely

wrong. It was entirely for this reason that Mr Merricks sought a UPO in respect of pass on, and in seeking the UPO Mr Merricks relied on the fact that Mastercard was facing two ways, as was explained at para 27 of Merricks 4. This too appears to have been overlooked or ignored by Mr Humphries.

95. As regards the Seladore Note, [redacted]. I have addressed both of these in detail at paras 37 and 57 above and do not propose to repeat the points already made, save for two points. [redacted]

96. [redacted]

97. [redacted]

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings of contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. I am duly authorised to sign this statement on behalf of Mr Merricks.

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Boris Bronfentrinker

Dated: 12 February 2025

CONTAINS CONFIDENTIAL INFORMATION

Case Number: 1266/7/7/16

IN THE COMPETITION APPEAL TRIBUNAL

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

and

(1) MASTERCARD INCORPORATED

(2) MASTERCARD INTERNATIONAL INCORPORATED

(3) MASTERCARD EUROPE S.A. (formerly Mastercard Europe S.P.R.L)

Defendants

and

INNSWORTH CAPITAL LIMITED

First Intervener

and

THE ACCESS TO JUSTICE FOUNDATION

Second Intervener

(the "Collective Proceedings")

EIGHTH WITNESS STATEMENT OF BORIS BRONFENTRINKER

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