**Class Representative**
**W H Merricks**
**Fifth Witness Statement**
**Exhibit WHM5**
**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")**

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# FIFTH WITNESS STATEMENT OF WALTER HUGH MERRICKS CBE

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**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, **WALTER HUGH MERRICKS CBE**, of a private residential address in London, United Kingdom will say as follows:

1. I am authorised by the Tribunal to act as the class representative in these Collective Proceedings under Section 47B(8) of the Competition Act, pursuant to paragraph 99(1) of the Tribunal's judgment dated 18 August 2021.

2. This is my fifth witness statement in these Collective Proceedings, which I make in response to Innsworth's statement of intervention (the "**SOI**") and supporting evidence including the first witness statement of Ian Garrard (**"Garrard 1**") and its exhibit of documents (together, the "**Intervention Documents**"). I have sought to limit this witness statement to a response to what I consider should be the most important issues arising from the Intervention Documents, mindful that the Tribunal has indicated that it will not allow the CSAO Application hearing to turn in to a mini-trial and that it does not propose to resolve all disputed factual matters between myself and Innsworth. However, in so limiting this statement, it should not be taken to mean that I agree with or accept any points I do not address.

3. I address the following matters in this witness statement, in reply to what is contained in the Intervention Documents:

    3.1 Why I consider the settlement to be in the best interests of the Class;

    3.2 The regard I had to leading counsel's advice as part of my settlement decision;

    3.3 The £10m facility that Mastercard provided me to deal with the arbitration against me that has been commenced by Innsworth;

    3.4 [redacted]

    3.5 Innsworth's views on its return;

3.6 Refusal to engage the non-binding KC process and decision to pursue arbitration;

3.7 My distribution proposal; and

3.8 Other inaccuracies in Garrard 1.

4. Unless otherwise stated, I use the same defined terms as in my Fourth Witness Statement in these Collective Proceedings dated 16 January 2025 ("**Merricks 4**").

5. 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. I have been assisted by my solicitors in the preparation of this witness statement but the contents of the statement constitute my evidence.

6. Nothing in this witness statement is intended to waive the legal privilege or without prejudice privilege protections attaching to the information exchanged between me (or my legal representatives) and (i) Mastercard (or its legal representatives) or (ii) Innsworth (or its legal representatives). All correspondence or documents exchanged between the aforementioned parties which is privileged but has been exhibited to this witness statement is provided to the Tribunal on a limited basis only. That privilege is otherwise maintained as against all third parties and/or Mastercard, on the basis that: (i) in regard to material protected by without prejudice privilege, Mastercard has agreed to this limited waiver of privilege; and (ii) Innsworth has no right to waive privilege over documents for which I own the privilege.

7. There is now shown and produced to me marked "**WHM5**" a bundle of documents to which I refer in this witness statement by page numbers in square brackets in the form [**WHM5/tab/page**], which comprise true copies of the documents that I refer to in this witness statement. I have also had sight of a near final draft of the eight witness statement of Mr Bronfentrinker ("**Bronfentrinker 8**") of Willkie Farr & Gallagher (UK) LLP ("**Willkie**") and

documents from the accompanying exhibit ("**BB8**") to which I refer as appropriate below.

**Background**

8. At paragraphs 7 – 39 of Merricks 4, I set out what I consider to be a clear explanation regarding the CSAO Application and the merits of the key remaining issues in the Collective Proceedings. At paragraphs 40 – 60.6, I then provide evidence on the key events leading to settlement, including the negotiations and dealings with Innsworth, which led me to consider that the settlement was just and reasonable. In light of the matters set out in that evidence, it is unfortunate and disappointing that Innsworth has gone to such lengths in the Intervention Documents to, in essence, portray a narrative that I have not acted diligently and properly as the class representative in these Collective Proceedings. These lengths have extended to presenting matters in an incomplete, inaccurate and misleading manner. In circumstances where I have spent over eight years dedicating myself to the successful pursuit of the claims of the Class, having overcome various setbacks, and attempts by Innsworth to influence me through threats and ultimately an arbitration, I strongly object to the narrative now presented by Innsworth. Further to that, I address various of the matters that arise out the Intervention Documents.

**Settlement Acceptance: Acting in the best interests of the class**

9. Throughout the Intervention Documents, Innsworth makes the claim that by accepting the settlement, I have not acted in the best interests of the Class. Innsworth seeks to make good this assertion by alleging that my decision to settle was based [redacted], but rather on: (i) my own position, given the offer from Mastercard of a £10m facility for the costs of arbitration; (ii) Innsworth's [redacted] and (iii) the distribution mechanism being on a non-per capita basis so that it appeared to Class members that they would get a meaningful recovery

of damages even though the total settlement sum is far less than what had been claimed in aggregate throughout the proceedings. This is a gross misrepresentation of matters. It also suggests that I had such little judgment that I considered I could settle the Collective Proceedings on the basis of a number of irrelevant considerations, or considerations of limited relevance, and not by reference to the assessment of the merits of the claim, and that I would subsequently be able to persuade the Tribunal that it should then approve such a settlement. This does me a great disservice.

10. The Intervention Documents seek to present a narrative that: (i) the realistic claim value was significantly above the £200 million at which I have agreed to settle; [redacted] Unfortunately, this is an entirely false narrative, that is divorced from the facts and entirely inconsistent with the position taken by Innsworth at the relevant points in time as shown by contemporaneous documents which the Tribunal will now have. The reality is that in an effort to now try and prevent the Tribunal from approving the settlement that I have agreed with Mastercard, Innsworth has sought to present matters in a way that are simply not correct.

11. In this witness statement, I address further the matters that arise from the Intervention Documents. It is, however, important for me to emphasise, that in deciding to agree the settlement, I took a very dispassionate assessment of how the Collective Proceedings had progressed over the course of more than eight years. It should go without saying that I had clearly hoped to be able to recover a much larger aggregate sum for the Class. My intention all along has been to maximise the recovery for the Class. This is why [redacted]

[redacted] Paragraph 39 of Garrard 1 quotes from an email in which I stated that Mastercard's first settlement offer of [redacted] was [redacted]. However, Mr Garrard is very selective in his quotation from my email and fails to put that comment in to its proper context. It is evident from that email that [redacted]

12. However, I have also had to be realistic and accept the implications of the various judgments that have been made by the Tribunal and the Court of Appeal along the way, [redacted] Having been presented with the relevant considerations, I took the decision that a settlement of £200 million is just and reasonable, and that it is in the best interests of the Class. It was a view I reached uninfluenced by irrelevant considerations, contrary to the suggestion now from Innsworth, despite the clear pressure and influence it was trying to exert on me, by threatening my personal livelihood. I continue to resolutely stand by my decision and there is nothing in the Intervention Documents that gives me any reason to doubt that decision.

**Leading counsel's advice on the settlement**

13. One of Innsworth's primary grounds of complaint is that [redacted] This is plainly wrong.

14. Mr Garrard implies, at paragraph 64 of Garrard 1, that [redacted] This is false. [redacted] Indeed, it is one of the most important considerations.

15. Innsworth was aware at the relevant time that [redacted] On the call held between Willkie, Ms Demetriou KC, Innsworth and myself on 16 November 2024 to discuss [redacted] I am now aware that a note of this call was prepared by Innsworth, and it is exhibited to Garrard 1 at **[IMG1/97]**. I had not previously seen that note. It does accurately record the fact [redacted]

[redacted]

16. Garrard 1 appears to suggest, albeit not expressly, that [redacted] The evidence of Mr Garrard at paragraphs 53 and 54 is partial and presents matters in a misleading manner, as it [redacted] As explained in Bronfentrinker 8 at paragraph 71, [redacted]

17. Mr Garrard seeks to [redacted]

18. As I have explained, I gave careful and proper consideration to [redacted]

[redacted] That is the end of the matter. [redacted]

19. For completeness, I also address [redacted] To that end, the assertions in paragraphs 5.2 and 5.3 of the SOI that there was "*no advice from the CR's own leading counsel*", are wrong. Given the fact that [redacted]

**The £10m facility**

20. At paragraphs 66 to 68 of Garrard 1 and paragraph 5.3 of the SOI, Innsworth contends that I wrongly took into consideration Mastercard's offer to provide me with a £10m facility to fight the arbitration, as that was for my own benefit and not the Class, and that my position on the facility in Merricks 4 is not born out

[1] An example of this, in relation to settlement, was the 30 September 2024 call between Willkie, Ms Demetriou, Mr Simpson, and I.

of the correspondence. I categorically reject this allegation. It is an insult to my integrity and should never have been alleged.

21. As explained in Merricks 4 and above, I reached a view as to [redacted] At the time Mastercard made this offer of £200 million, I was aware that there was a risk that Innsworth could seek to commence an arbitration against me [redacted] This is significant, because when [redacted], that was done in the full knowledge that Innsworth was unhappy with a settlement at the level offered by Mastercard and that it was saying it would issue arbitration proceedings against me. Nonetheless, I gave the confirmation I did, because I considered that to be in the best interests of the Class and that it would be a just and reasonable settlement.

22. Having decided that I should accept the settlement, and at which point there was nothing at all from Mastercard as to an offer of assistance regarding the threatened arbitration from Innsworth, [redacted] I would have much preferred that Innsworth chose not to make it a personal attack on me and my family's financial position. If Innsworth disagreed with the settlement and considered that it needed to put its position on that forward, then I had no objection to it doing so before the Tribunal, but I could see no good reason for also starting an arbitration other than in the hope that this would put me under pressure and cause me to change my mind on the settlement (a matter that I address further below). However, recognising that I had to take seriously the threat of arbitration, [redacted]

[redacted] I note what is stated at paragraphs 76 - 79 of Bronfentrinker 8, and confirm that this accurately reflects what occurred as it was reported to me by Mr Bronfentrinker at the time.

23. I also need to point out that, when the settlement was concluded and agreed, the arbitration as filed by Innsworth with the LCIA on [redacted] included [redacted] This request for [redacted] This is significant because the offer of £10 million ensured that I would be able to properly defend myself with the assistance of solicitors and barristers – something I believe Innsworth had not bargained on when it decided to threaten and then commence the arbitration. However, [redacted] This of course was not lost on me at the time the settlement was concluded and documented. Nonetheless, in circumstances where I believed I had at all times acted in accordance with my obligations under the LFA and [redacted] the most important thing was having the assurance that I would be able to get suitable and appropriate legal representation to properly defend myself.

24. Any suggestion that the sum of up to £10m is in some way personally beneficial to me outside the context of this litigation is clearly wrong. It is also wrong to suggest that the £10m is inconsistent with my getting the highest possible amount for the Class, as that sum could have otherwise been made available to the Class. As I have explained, and as also set out in Bronfentrinker 8, [redacted] The request for a sum to deal with my arbitration costs and the subsequent offer of an amount of up to £10 million was an extraordinary measure brought about by the extraordinary decision of Innsworth to personally threaten me and go after my personal finances. [redacted]

[redacted] As it has turned out, and as I explain further below, it now seems that this is precisely what is likely to happen, with Innsworth accepting, at paragraph 71 of Garrard 1, that the determination of the CSAO Application is likely to *"supersede and/or resolve much if not all of the dispute"*.

**Innsworth's requirement to** [redacted]

25. I addressed in Merricks 4, at paragraphs 49 - 58, my position on [redacted] However, I need to address certain matters now raised in the SOI and Garrard 1 about this point.

26. Paragraph 5.3 of Innsworth's SOI states that [redacted] This is incorrect. As I set out in Merricks 4 at paragraph 53, [redacted]

27. I concluded it [redacted]

[redacted]

28. Whilst in the Intervention Documents Innsworth has now sought to suggest otherwise, I considered and continue to consider [redacted].This reflected a strategy that Innsworth had adopted not for the first time. [redacted] I consider that this change was motivated by a desire on the part of Innsworth to avoid that which has now happened, a settlement with which it disagrees being presented to the Tribunal.

29. On a proper consideration, it is clear that [redacted] Paragraph 59 of Garrard 1 refers to [redacted] Innsworth could have sought to [redacted] Despite paragraph 61 of Garrard 1 claiming that [redacted] The reason it did not is because [redacted]

[redacted]

30. As for the assertion at paragraph 60 of Garrard 1 that [redacted]

31. Garrard 1 at paragraph 59 states that [redacted]

However, that is not how it was presented to me at the time. Rather, Mr Garrard's email, which is exhibited at **[IMG1/116]** but not actually quoted from in Garrard 1, states that it would [redacted]

[redacted]

32. I also found it concerning that in the midst of such large and complex proceedings, with Mastercard looking to bring on new further preliminary issues on the Causation Issue, with a pending appeal on limitation, and in the midst of a pass-on trial, [redacted] To me that would have been reckless, but the fact is that Innsworth was pressing that I should make this decision quickly in order to secure funding to allow the claim to continue.

33. It is also stated at paragraph 15.2 of the SOI that [redacted] This is not true. I considered [redacted]

[redacted]

34. [redacted]

35. I also need to address the suggestion at paragraph 60 of Garrard 1 that [redacted]

[redacted]

36. For completeness, I address the [redacted]

[redacted]

[redacted]

**Refusal to engage the non-binding KC process and decision to pursue arbitration**

37. I was conscious from the outset that in the event that Innsworth disagreed with the settlement, the LFA provided for a non-binding KC process that is to be followed, and I considered that this was the appropriate way in which to try to resolve any difference between me and Innsworth. [redacted]

38. I confirmed to Mr Garrard [redacted]

Further to what is stated at paragraph 57 of Merricks 4, I also instructed Willkie to start preparing my submissions for this process, whilst Mr Bronfentrinker identified four potential leading counsel who were said to be available and conflict free [redacted]

[2] See CSAO Application, paragraphs 25-27 and CSAO Application, Annex 1.

[redacted] and in an email from Mr Garrard to me dated 23 November 2024, it stated: [redacted]. Paragraph 63 of Garrard 1 also states that Mr Garrard considered there was only a [redacted]

39. Unfortunately, rather than engage with the non-binding KC process, Innsworth chose to go down a far more adversarial route and commence arbitration proceedings against me. At paragraphs 70-71 of Garrard 1, Mr Garrard suggests that [redacted] I disagree. I consider the arbitration was tactical, intended to put me under pressure [redacted] This is illustrated by paragraph 71 of Garrard 1 where he states that Innsworth *"recognises that in practice, the decision of the Tribunal at the forthcoming settlement approval hearing is likely to supersede and/or resolve much if not all of the dispute".* Given Innsworth has now rightly acknowledged that the settlement hearing would be determinative of the issue, there was no reason for it to commence arbitration proceedings against me other than to seek to put pressure on my decision making.

40. Garrard 1 at paragraph 70 also states that [redacted] However, at the time that Innsworth commenced the arbitration, [redacted]. In the CSAO Application that was submitted, my proposal specifically states that *"I also propose that the amount in Pot 3, which could be up to £54,432,053.72, is made available to give Innsworth a further return of more than 100% on its investment"* (see also Merricks 4, paragraph 61.4).[3]

41. Contrary to the position taken by Innsworth in the Intervention Documents, [redacted]

[3] Paragraph 79 of Garrard 1 again strangely suggests that my proposal is that Innsworth is only made whole, and that it does not achieve a gross return of £100 million.

[redacted]

42. In response to Innsworth's [redacted] ], that is, it could have been avoided and all issues are likely to be determined by the Tribunal at the CSAO Application hearing. I consider this is something that Innsworth must have understood at the outset when it commenced the arbitration, and so it did not do so because it considered it could resolve any relevant issues, but rather because it wanted to try and influence my decision making by the fact of an arbitration being filed against me (see also on the arbitration, Bronfentrinker 8 at paragraphs 73 to 79).

**Innsworth's 'agreed' return**

[4] There are contemporaneous documents evidencing the matters which I address in this paragraph. However, in circumstances where Garrard 1, footnote 14, asserts that I have breached the confidentiality of the arbitration proceedings, which is not accepted and incorrect, out of an abundance of caution, the document has not been exhibited. Willkie will liaise with Akin Gump to clarify whether they will object to the document being provided to the Tribunal on a confidential basis.

43. In its SOI, at paragraph 24, Innsworth argues that it should receive £179 million of the Settlement Sum as that is the minimum return that was agreed with me in the LFA.[5] In support of this, paragraph 19 of Garrard 1 provides that the original LFA (pre-*Paccar* amendments) stated that there was a floor to the funder's return which *"effectively set a threshold, agreed with the claimant, that would inform any settlement to the extent that if there was any settlement triggering the floor… a lesser share of the damages".* [redacted] that was not my understanding, as I believed and understood that the question of what Innsworth would get was always ultimately a matter for the Tribunal to determine based on how the Collective Proceedings concluded. It was never my understanding that Innsworth as an investor, was somehow immune from, and protected against, the fortunes of the litigation, so that its return was not somehow dependent on the relative success of the claim.

44. Innsworth also assert that following the LFA's amendment, that the minimum expected return of £179 million remained. However, I note that the only time £179 million is mentioned in the LFA is the termination clause (Clause 12.1(ii)), which provides that Innsworth can terminate the agreement, based on its advice, if it considers it could not achieve that return. While I do have certain obligations under the LFA in regard to the return, as far I am concerned and aware, none of them require that I resolve the Collective Proceedings on the basis that Innsworth gets a 'minimum' return. This is obvious as there would be no return if the case was lost, or similarly, there would be no return if there was 100% uptake by the Class so that there are no undistributed damages. Furthermore, the way in which Innsworth now seeks to put it, namely that it has an absolute contractual entitlement to £179 million at a minimum and I could not agree a settlement that fails to provide for such a return, is at odds with the

[5] Innsworth advances that it should either receive this sum from the undistributed damages if there is first a distribution on a per capita basis, or that the £179 million should be ringfenced on the basis that this was the 'bargain' agreed with me.

fact that at paragraph 20 of Garrard 1 describes Innsworth's floor as the minimum expected return.

45. Given my interest in the collective action regime, and also my role as the Chair of the Class Representatives Network, which is a body that includes most class representatives, I keep up to speed with certification decisions. To that end, it has been my understanding that generally the Tribunal takes the approach at the certification stage, of light touch consideration of funder returns on the basis that this is a matter for consideration at the distribution stage once collective proceedings are resolved. Indeed, there are a number of instances where the Tribunal has specifically considered that the funder return is too high, but still certified the proceedings to continue as collective proceedings. Indeed, in *Gormsen v Meta*,[6] where Innsworth are also the funders, the Tribunal stated that the return claimed for was not *"on the face of it defensible"*, but that it would certify even on the basis that Innsworth agreed to a lower return and the appropriate level of funder return will need to be considered at the end of a case when the damages sum was clear (see *Gormsen v Meta,* paragraph 35). Furthermore, in these Collective Proceedings, the amendments made to my LFA post the Supreme Court decision in *PACCAR* have not been considered by the Tribunal, let alone approved. If it were the position, as now advocated by Innsworth, that returns provided for in an LFA are guaranteed to a funder and a class representative can settle a collective action only on the basis that the funder gets that minimum return, this would require a fundamentally different approach to the consideration of LFAs at the certification stage.

**Distribution**

46. A major complaint of Innsworth's about the settlement is that the distribution I have proposed is not on a strict *per capita* basis. It seeks to portray the distribution plan as an illegitimate 'about-face' and argues that I am obliged to only use a strict *per capita* distribution. It is correct that my initial proposal back in 2016 when I was hoping to recover in excess of £14 billion from Mastercard,

[6] [2024] CAT 11

was that any damages would be distributed on a strict *per capita* basis. However, I never stated that I would not consider other distribution mechanisms if I thought it appropriate, and it would be contrary to my obligation to act in the best interests of the class, if I were to have closed off from the outset any other alternatives depending on how the proceedings evolved.

47. It is also the case, as referenced in footnote 10 of Garrard 1, that when Innsworth had raised the possibility of a non-*per capita* distribution in or around 2023, [redacted]

48. It is also necessary to make clear that there is a distinction between the settlement, which is reflected in the Settlement Agreement, and the related but separate issue of distribution. [redacted] Paragraph 49 of Garrard 1 refers to an email I sent to Mr Garrard and in which [redacted]

[redacted]

49. At paragraph 27 of Garrard 1, it states that [redacted] It is unclear how this is of any relevance in the Tribunal's consideration of the CSAO Application, which is based on different circumstances.

**The potential damages scenarios**

50. Paragraph 74 of Garrard 1 states that paragraph 46 of Merricks 4 refers to a 'lowest case scenario' on damages was £85 million. To clarify, paragraph 46 and the reference to £85 million concerns some work which was done by Compass Lexecon to model *"possible scenarios of the potential aggregate damages that could be recovered* ***based on various assumed outcomes*** *on the issues that were in dispute between myself and Mastercard"* (emphasis added). The models were to illustrate potential damages that could be achieved based on certain outcomes, as suggested by my legal team. [redacted]

[redacted]

…….

**Walter Hugh Merricks CBE**

Dated: 12 February 2025

**Case Number: 1266/7/7/16**

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