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

(the "Collective Proceedings")

JOINT APPLICATION FOR A COLLECTIVE SETTLEMENT APPROVAL ORDER

Category A Confidential Information is confidential vis-à-vis third parties only and is highlighted in green

A. INTRODUCTION AND SUMMARY

1. This is a joint application for a collective settlement approval order ("**CSAO**"), pursuant to Rule 94 of the Competition Appeal Tribunal Rules 2015 (the "**Rules**") ("**CSAO Application**"), made by the Class Representative ("**CR**") and the Defendants ("**Mastercard**") (together, the "**Parties**" and/or "**Applicants**").

2. For the reasons set out more fully below and in the evidence in support of the CSAO Application, both the CR and Mastercard believe that the terms of their settlement are just and reasonable, and they request that the Tribunal make the CSAO on the terms set out in the draft CSAO at Annex 2A.

3. This CSAO Application is signed by the firms of solicitors acting for the CR and for Mastercard, respectively, in accordance with the requirement in paragraph 6.99 of the Competition Appeal Tribunal Guide to Proceedings 2015 (the "**Guide**").

4. The CSAO Application is supported by the following documents (some of which contain information that is confidential to the Settlement Tribunal only and some of which is confidential to the Settlement Tribunal and the Parties):
   a. at **Annex 2A**, the draft CSAO;
   b. at **Annex 2B**, a draft notice pursuant to Rule 94(13) to publicise the making of the CSAO to the Class (as defined below), if granted by the Tribunal pursuant to this CSAO Application;
   c. at **Annex 3**, the settlement agreement dated 3 December 2024 between the CR and the Mastercard (the "**Settlement Agreement**"); and
   d. at **Annex 4**, a confidential note prepared jointly by the CR's and Mastercard's economic experts, respectively Compass Lexecon and Frontier Economics; and
   e. the fourth witness statement of Mr Walter Hugh Merricks CBE, the CR ("**Merricks 4**") and the eighth witness statement of Mark Farnell Sansom ("**Sansom 8**"), the partner (along with Ricky Versteeg) at Freshfields LLP with conduct of these Collective Proceedings for Mastercard, together with corresponding exhibits.

5. The CSAO Application is also supported by the following documents that are confidential and legally privileged and are therefore being made available to the

Settlement Tribunal only and not to the other Parties to the Collective Proceedings, and without any waiver of that privilege by the Party to whom it belongs:

a. A memorandum from Boris Bronfentrinker, the partner (along with Nicola Chesaites) at Willkie Farr & Gallagher (UK) LLP with conduct of the Collective Proceedings for the CR, appending various advice from the CR's counsel in the Collective Proceedings on outstanding issues; and

b. An opinion from Matthew Cook KC, one of Mastercard's leading counsel who has represented Mastercard in the Collective Proceedings since they commenced.

6. The remainder of this application is structured as follows:

a. **Section B** sets out the factual background to this CSAO Application;

b. **Section C** sets out the terms of the proposed collective settlement;

c. **Section D** summarises the reasons why the Applicants believe that the proposed collective settlement is just and reasonable, taking account of the factors set out in Rule 94 and paragraph 6.125 of the Guide; and

d. **Section E** addresses the proposals for noticing and distribution of damages to the Class should the CSAO Application be granted.

B. FACTUAL BACKGROUND

(1) Background to the Collective Proceedings

7. The Collective Proceedings were filed in September 2016 and combine 'follow-on' claims for damages under section 47A of the Competition Act 1998 on behalf of a class of UK consumers in respect of the Mastercard's breach of statutory duty by reason of their infringement of Article 101 of the Treaty on the Functioning of the European Union (the "**TFEU**") (then Article 81 EC), as determined in the European Commission decision of 19 December 2007 in cases COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580 Commercial Cards (the "**EC Decision**").

8. The EC Decision found that from 22 May 1992 until 19 December 2007 (the "**Infringement Period**"), the Defendants infringed Article 101 TFEU (then Article 81 EC) "…*by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the European Economic Area, by means of the Intra-EEA*

fallback interchange fees for MasterCard branded consumer credit and charge cards and for MasterCard or Maestro branded debit cards…".[1] Since Mastercard did not make any changes to the Intra-EEA fall back MIF arrangements between 19 December 2007 and 21 June 2008, the CR contends that the period of infringement was 22 May 1992 until 21 June 2008 (the "**Full Infringement Period**").[2]

9. The infringement found in the EC Decision is, therefore, limited to the Mastercard's Intra-EEA fallback multilateral interchange fees ("**EEA MIFs**"). The EEA MIFs applied to EEA cross border Mastercard consumer credit and debit card transactions, certain of which are covered by the Collective Proceedings. In addition, the CR contends that the EEA MIFs indirectly inflated UK domestic interchange fees ("**UK domestic IF(s)**") for Mastercard card transactions. Since a far greater proportion of card transactions in the UK were undertaken by UK cardholders than EEA cardholders, approximately 95% of the claim value is based on this alleged indirect effect on UK domestic IFs.

10. Certification of the proposed collective action was initially refused by the Tribunal,[3] but that ruling was set aside by the Court of Appeal on 16 April 2019,[4] a decision that was upheld by the Supreme Court.[5] The Collective Proceedings were eventually certified to continue as collective proceedings by the Tribunal on 18 May 2022, when the Collective Proceedings Order ("**CPO**") was made.

11. The Collective Proceedings are brought on behalf of a class of "[i]*ndividuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted Mastercard cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over; together with the personal/authorised representative of the estate of any individual who meets that description and was alive on 6th September 2016, but subsequently died*" (the "**Class**", and each a "**Represented Person**").[6] The Class, therefore, does not include a substantial number of individuals

[1] EC Decision, Article 1.
[2] Re-Re-Amended Claim Form ("**Claim Form**"), paragraphs 94(c)-(d).
[3] *Merricks v Mastercard Incorporated and others*, [2017] CAT 16.
[4] *Merricks v Mastercard Incorporated and others*, [2019] EWCA Civ 674.
[5] *Merricks v Mastercard Incorporated and others*, [2020] UKSC 51 ("***Merricks UKSC***"). This judgment was handed down by a 3-2 majority.
[6] Claim Form, paragraph 5.

who purchased goods and services from UK merchants during the Full Infringement Period, including individuals who died before 6 September 2016, tourists and people no longer resident in the UK on the domicile date. A very small number of eligible class members opted out, and a slightly larger number opted in to the Collective Proceedings.[7]

12. Thereafter, the scope of the claims was amended in two material respects:

    a. The CR was permitted to amend the claim to plead two potential run-off periods. First, a one-year run-off period (June 2008 to June 2009) which is said to arise on the basis that if the EEA MIFs did have an effect on UK domestic IFs, then it would have taken time for inflated UK domestic IFs to return to normal competitive levels (the "**Domestic IFs Run-off Period**"). Second, a run-off period of two years (June 2008 to June 2010) on the basis that it would have taken time for inflated merchant service charges ("**MSCs**") to return to normal competitive levels (the "**MSC Run-off Period**").[8] The Defendants dispute these claims. The Defendants also contend in any event that any run-off claim would be fully offset by at least an equivalent run-in period at the start of the claim, as to which the CR's position is that there was no run-in period because the interchange fee arrangements and the levels at which they were at the start of the Infringement Period existed prior to 22 May 1992 in the same or materially similar manner, but that they were not found to be unlawful.

    b. While the original claim related to debit and credit card transactions, the CR withdrew his claim relating to UK domestic transactions using Solo Debit[9] on 26 January 2023, and in relation to transactions using Debit Mastercard[10] on 23 June 2023. Consequently, the Collective Proceedings relate almost exclusively to *credit*

[7] CPO, paragraphs 4-5. There were 218 opt-ins and 12 opt-outs.
[8] [2022] CAT 43, at paragraphs [43] - [45].
[9] At the time the CR withdrew his pleaded claim in respect of Solo Debit cards, it was estimated to have a value of approximately £500 million as pleaded: [2023] CAT 53, para 20. The CR withdrew his claim in relation to Solo Debit cards by way of a letter dated 26 January 2023.
[10] The CR's pleaded claim in respect of Debit Mastercard from 2007 onwards related to transactions comprising less than 0.01% of the volume of commerce ("**VoC**"). The CR withdrew his claim in respect of domestic Debit Mastercard transactions from 2007 onwards in his written opening submissions for the Causation Trial, dated 23 June 2023. The CR maintains his claim in respect of cross-border Debit Mastercard transactions.

card transactions: 99.9% of the claim value as currently pleaded relates to credit card transactions during the Total Claim Period (as defined below).

13. Following the Tribunal's rulings on limitation (which are addressed at paragraph 19.b below), and in combination with the pleaded run-off claims, the claims now cover:

    a. the period from 20 June 1997 (rather than 22 May 1992) until 21 June 2010 in respect of class members resident in England, Wales and Northern Ireland (the "**Shorter Claim Period**"); and

    b. the period from 22 May 1992 until 21 June 2010 for class members resident in Scotland (the "**Total Claim Period**")

    (together, the "**Relevant Claim Periods**").[11]

14. The basis of the allegation of loss is summarised in paragraph 6 of the Claim Form, which states that class members "*suffered loss and damage as a result of paying prices to businesses that accepted Mastercard cards which prices were higher than they would otherwise have been had the defendants not committed the infringement of Article 101 established by the EC Decision, or the representatives of the estates of such consumers where relevant*".[12] Specifically, the CR alleges that the unlawfully inflated EEA MIFs and allegedly inflated UK domestic IFs resulted in higher MSCs paid by merchants that accepted Mastercard cards to their acquiring banks, and that those merchants passed on those higher MSCs to all UK consumers (not just Mastercard cardholders) by increasing the prices of their goods and services, regardless of the method of payment used by consumers. Aggregate damages are claimed based on that proportion of increased retail prices that is alleged to have been paid by the members of the Class.

[11] The distribution will take account of the eligibility of class members following the Tribunal's judgments in respect of limitation (see: [2023] CAT 15 and [2024] CAT 41), i.e. the individuals will be asked to confirm that they satisfy the class definition after 20 June 1997 if they are resident in England, Wales or Northern Ireland. For the period 22 May 1992 – 20 June 1997, class members are only eligible if they were resident in Scotland.
[12] Claim Form, paragraph 6.

(2) Summary of key issues and procedural history to date

15. To provide context to the Settlement Agreement, the key issues in the Collective Proceedings are summarised below, followed by a brief summary of the significant hearings and judgments to date, and the issues that remain unresolved.

(a) The disputed issues in the Collective Proceedings

16. The main disputed issues in the Collective Proceedings have been as follows:

a. **The VoC**: Determining the total VoC in the UK in which a relevant Mastercard card was used, i.e. to which a relevant interchange fee would have applied, during the Total Claim Period (the "**VoC Issue**"). Quantification of the VoC was a necessary first step in the quantification of damages and was largely agreed between the Parties before trial at a lower level than in the original Claim Form.[13]

b. **Limitation**: Whether the claims were time-barred prior to 20 June 1997[14] (the "**Limitation Issue**"). This is an important issue not only because it relates to five of the approximate 16-year Full Infringement Period, but also because it relates to the part of the claim to which the most substantial potential interest claim attaches (albeit the interest is significantly smaller in respect of the EEA MIF transactions as compared to the UK domestic IF transactions).

c. **Exemptibility**: Whether the Defendants are entitled to argue in the Collective Proceedings that in the counterfactual, the lawful EEA MIF would not have been appreciably different to that which it in fact was, because an alternative level of EEA MIF would have been exemptible, pursuant to Article 101(3) of the TFEU (the "**Exemptibility Issue**").

d. **Causation**: Whether the unlawful EEA MIFs resulted in inflated UK domestic IFs, and if so, by how much (the "**Causation Issue**"). This affects 95% of the

[13] The one area of a disagreement between the parties was whether transactions that involved the same issuing and acquiring bank incurred an interchange and/or formed part of the claim (see further below at paragraph 17 and footnote 18).
[14] Or prior to 20 June 1998 for claims governed by Scots law.

transactions, and therefore 95% of the claim value, making it the most important issue in the Collective Proceedings from the perspective of the CR. In order for the claim to be valued significantly in excess of the Settlement Sum, the CR would need to prevail on the Causation Issue. If the CR does not, then the claim would have a maximum potential value of hundreds of millions before consideration of the likely or realistic outcome of any of the other issues.

e. **Changes to scheme rules, switching and benefits in the counterfactual**: Whether a reduction in interchange fees would have resulted in: (i) changes to Mastercard's scheme rules in the counterfactual in relation to matters such as fraud, cardholder default and time of payment, which would have offset (in whole or part) any such reduction (the "**Scheme Changes Issue**"); (ii) issuers and cardholders switching to other payment schemes or payment methods in the counterfactual, resulting in similar or higher charges being incurred in any event by the Class (the "**Switching Issue**"); and/or (iii) Mastercard cardholders who are also Represented Persons paying higher prices or receiving lower benefits as a result of interchange fees being lower in the counterfactual, and the value of such benefits (the "**Benefits Issue**").

f. **Remote purchases**: Whether in respect of remote[15] purchases from merchants based in EEA Member States selling to consumers in the UK ("**Remote EEA Transactions**"): (i) the applicable law was English law and Scots law, or the law of the EEA Member State in which the merchant was based or the law of some other State (the "**Applicable Law Issue**"); and (ii) the extent to which the alleged loss arising from the EEA MIF applicable to Remote EEA Transactions would have been incurred by Represented Persons (the "**Remote EEA Transactions Issue**").

g. **Debit card transactions**: Whether: (i) the UK Solo debit card scheme operated under Mastercard interchange network rules in respect of domestic UK transactions, such that transactions on Solo debit cards were affected by the unlawful EEA MIFs

[15] "Remote" purchases refer to the situation in which consumers situated in the UK purchase goods or services from merchants who are situated in EEA Member States. For example, where UK consumers purchase goods and/or services via the internet, the telephone, or from a catalogue, from a merchant based in France (or any other EEA Member State).

(the "**Solo Issue**"); and (ii) whether UK domestic IFs on Debit Mastercard cards were inflated by the unlawful EEA MIFs (the "**Debit Mastercard Issue**").

h. **Acquirer pass-on:** To what extent (if at all) were the MSCs paid by merchants higher than they would otherwise have been as a result of the unlawful EEA MIFs and UK domestic IFs (to the extent inflated by the EEA MIFs) (the "**Acquirer Pass-on Issue**").

i. **Merchant pass-on:** To what extent (if at all) were the retail prices paid by consumers higher than they would otherwise have been as a result of any such inflated MSCs (the "**Merchant Pass-on Issue**").

j. **Run-off:** Whether, and the extent to which, each of the run-off periods that the Tribunal permitted to be pleaded (see paragraph 12.a above) have been established by the CR and, if so, whether and the extent to which they must be offset by any "run-in" period at the beginning of the Infringement Period (the "**Run-Off and Run-In Issues**").

k. **Class membership**: Whether, and the extent to which, claims of deceased persons and/or their estates were to be included within the class (the "**Deceased Persons Issue**"), and the extent to which the claimed aggregate damages need to be reduced to account for those and other non-Represented Persons (the "**Aggregate Damages Exclusions Issue**").

l. **Interest**: Whether the CR is entitled to advance a claim for compound interest or could only claim simple interest (the "**Compound Interest Issue**"), and what is the applicable rate of interest (the "**Interest Rate Issue**").

(b) Procedural history of the Collective Proceedings

17. Following certification, the Tribunal decided: (i) in September 2022 that the trial of the Collective Proceedings should proceed in stages,[16] including preliminary issues trials in respect of the Exemptibility Issue, the Applicable Law Issue, and the Limitation Issue; and (ii) by an Order dated 14 October 2022, that the Causation Issue should proceed by way of a trial on whether there was in fact any causal connection between the unlawful EEA MIFs and the UK domestic IFs[17] ("**Causation Trial**"), which it ordered should be tried alongside the question of the relevant VoC.[18] As set out below, the Causation Trial did not consider but-for causation/the counterfactual.

18. The CR also applied for and obtained an Umbrella Proceedings Order ("**UPO**") to have the Acquirer Pass-on and Merchant Pass-on Issues tried alongside the ongoing merchant claims against both Mastercard and Visa in case 1517/11/7/22 (UM) *Merchant Interchange Fee Umbrella Proceedings* (the "**Merchant Umbrella Proceedings**").[19]

19. To date, Mastercard have prevailed on the following issues:

    a. **Causation**: The Tribunal issued its judgment on 26 February 2024[20] in which it found that the EEA MIFs had "*no significant causative influence…on the level of interchange fees, whether bilateral or multilateral, that applied to UK domestic transactions*"[21] (the "**Causation Judgment**") at any time during the relevant period. The CR's application for permission to appeal the Causation Judgment was refused

[16] See the Tribunal Order dated 14 October 2022. See also, for example, transcript of the September 2022 CMC, day 1, page 81: "… *if causation is decided in favour of Mastercard, then a lot of VOC and overcharge falls away and that's a huge amount of work and expert analysis. I mean the overcharge is going to be hotly contested, no doubt, between the experts because it involves considering the counterfactual and one of the reasons for having it as a split issue to be heard earlier is that it may produce a lot of saving*".

[17] The question set by the Tribunal was: "*During the period 22 May 1992 to 21 June 2009 was there a relevant causal link between the levels of EEA MIFs and the levels of domestic interchange fees?*"

[18] The VoC issue was a dispute regarding what the total value of commerce in the United Kingdom in which a relevant Mastercard card was used, i.e., to which a relevant interchange fee would have applied. The amount of VOC (£634 billion) was eventually agreed between the Applicants, save for the question of whether a certain category of so-called "on-us" transactions (where the acquiring and merchant banks are the same), accounting for £86 billion of VOC, should be excluded. The Tribunal decided that it should not.

[19] See Order of the President dated 1 July 2024.

[20] [2024] CAT 14.

[21] Causation Judgment, para 171.

by the Court of Appeal on 9 June 2024. As outlined in paragraph 36.b below, and in the evidence supporting this application,[22] the Causation Judgment and the refusal by the Court of Appeal for permission to appeal it were material developments – and probably the *most* material developments – in the Collective Proceedings to date, as they go to approximately 95% of the claim value. However, the Causation Judgment did not determine but-for causation: whether in the counterfactual world, where the EEA MIFs would have been zero (see paragraph 20.a on the Exemptibility Issue), UK domestic IFs would also have been lower, or indeed zero[23] (the "**Counterfactual Causation Issue**").[24] It also did not consider the Defendants' counterfactual arguments as regards the Scheme Changes, Switching and Benefits Issues.[25] All of these matters, covering issues pleaded by both sides, would need to be the subject of further argument and, on the CR's case as regards Counterfactual Causation, a further trial or trials (the "**Future Counterfactual Trial(s)**").

b. **Limitation**: Save in relation to claims governed by Scots law, in judgments of the Tribunal handed down on 21 March 2023,[26] 26 July 2023,[27] and 19 June 2024,[28] the Tribunal determined that the claims were time-barred prior to 20 June 1997 (the

[22] See Merricks 4 at paragraphs 15 -16 and Sansom 8 at 3.46 – 3.50.
[23] Causation Judgment, para 172 notes that this may depend, inter alia, on "*assumptions made about that counterfactual world, including whether the levels of Visa MIFs would have been different", and that "the extent to which such allegations are open to the parties, and what their implications might be, are not matters for this trial*".
[24] The CR's position is that factual and legal causation remain to be determined. The Defendants' position is that the terms "factual" and "legal" causation have the potential to obscure the Counterfactual Causation Issue as set out in paragraph 172 of the Causation Judgment.
[25] For example, Causation Judgment paragraph 172 notes that need for any counterfactual to consider, inter alia, "*whether the Eurocard/Mastercard rules would have been the same (e.g. as regards fraud protection and chargebacks)*", whether the "*structure whereby UK MIFs were set could have been different*", and the suggestion in the evidence of a Mastercard witness (Mr Sideris) that "*if issuing banks lack the income from interchange fees in respect of consumer cards, they might have imposed fees on cardholders*", all of which were "*not matters for this trial*".
[26] [2023] CAT 15. The judgment followed the preliminary issues hearing in March 2023 during which the statutory interpretation question relating to limitation under the Rules was decided (the "**First Limitation Trial**").
[27] [2023] CAT 49. This judgment addressed the CR's argument that s.32 of the Limitation Act 1980 must be interpreted in accordance with the EU law principle of effectiveness pursuant to which, in accordance with the European Court of Justice's decision in Case C-267/20 Volvo AB and DAF Trucks NV v RM Case No 1445/5/7/22 (T) ("**Volvo**"), limitation periods applicable for damages for infringements of competition law cannot begin to run until the infringement has ceased (the CR has a separate EU law argument regarding the "knowledge requirement" which was not addressed in this judgment).
[28] [2024] CAT 41 (the "**Further Limitation Judgment**"). The judgment followed a limitation trial in January 2024 (the "**Further Limitation Trial**").

"**Limitation Rulings**"). The CR sought permission to appeal the judgment of 21 March 2023 on the interpretation of the Competition Act 1998 and the Rules, but permission to appeal was refused by the Tribunal[29] and subsequently also by the Court of Appeal.[30] The CR did not seek permission to appeal the Tribunal's judgment of 26 July 2023. However, the claimants in the Merchant Umbrella Proceedings did.[31] The Court of Appeal dismissed the claimants in the Merchant Umbrella Proceedings' appeal on 19 December 2024.[32] In relation to the Tribunal's judgment of 19 June 2024, the CR obtained permission to appeal in respect of his argument that the requirement that concealment must be deliberate under s.32(1)(b) Limitation Act 1980 is inconsistent with EU law and therefore should be disapplied in accordance with the principle of effectiveness. The Tribunal granted permission to appeal stating that *"[a]lthough we do not doubt the correctness of our view, we accept that a contrary argument has a real chance of success"* (the "**Limitation Appeal**").[33] The Court of Appeal has not yet listed the Limitation Appeal. The effect of the limitation judgments (subject to appeal) was to reduce the Total Claim Period by approximately 28%.

c. **Debit Cards**: In January 2023, following the provision of disclosure relevant to the Solo Issue evidencing that the Solo debit card scheme did not operate under Mastercard interchange fee network rules, the CR confirmed that he would withdraw his claim in respect of transactions undertaken using Solo debit cards. On 23 June 2023, following the provision of witness evidence, the CR also withdrew his claim with respect to domestic transactions using Debit Mastercard.[34] The effect of withdrawing claims in relation to domestic transactions using debit cards was to reduce the potential claim value at the time by over £500 million.

[29] [2023] CAT 33.
[30] [2024] EWCA Civ 759, at [158].
[31] The Tribunal's hearing on from 24-26 April 2023, which resulted in its judgment of 26 July 2023, was a joint hearing which combined these Collective Proceedings and the Merchant Umbrella Proceedings as the claimants in the Merchant Umbrella Proceedings had also pleaded the effects of Volvo on s.32 of the Limitation Act 1980 in their respective claims against Mastercard (and also Visa).
[32] [2024] EWCA Civ 1559. By its sealed order dated 14 January 2025, the Court of Appeal dismissed the merchant claimants' application for permission to appeal to the UK Supreme Court.
[33] [2024] CAT 49.
[34] CR's written opening submissions for the Causation Trial, dated 23 June 2023.

d. **Compound interest**: In a judgment dated 18 August 2021,[35] the Tribunal ruled that the CR is not entitled to claim for compound interest and that the CR can claim for simple interest only. The issue that remains to be determined is what the applicable rate should be above the Bank of England ("**BoE**") interest rate.[36] The Tribunal's judgment had the effect of reducing the CR's maximum potential claim value at the time by £2.2 billion.

e. **Deceased persons:** In a judgment dated 18 August 2021,[37] the Tribunal ruled that persons who had died before the claim was issued on 6 September 2016, and their estates, were to be excluded from the class definition, and that the claim for aggregate damages was to be reduced by the CR accordingly to account for the exclusion of those persons (who numbered approximately 13.6 million, or 22.7% of the total proposed class).[38]

20. The CR has so far prevailed on the following issues:

a. **Exemptibility**: On 21 March 2023, the Tribunal issued its judgment finding that the Defendants were not entitled to argue that in the counterfactual the EEA MIF would have been set at a level above zero that would have been exemptible under Article 101(3) TFEU. It held that the EC Decision (which remains binding on UK courts) found that the Defendants had already argued, unsuccessfully before the European Commission, that the existence of an EEA MIF at any level was exemptible. As such, any attempt to advance any exemptible level of EEA MIF other than zero in the counterfactual would be an abuse of process (the "**Exemptibility Judgment**"). The Court of Appeal dismissed the Defendants' appeal on 5 July 2024.[39] The judgments mean that a zero EEA MIF is the relevant lawful level for the purposes of any counterfactual analysis in respect of transactions to which the EEA MIF

[35] [2024] CAT 41. [2021] CAT 28.
[36] 14 January 2022 Hearing, Extract of Ruling 1: "*Mr Justice Roth: … Whether 5 per cent can indeed be sustained will be a matter for argument at trial. We do not think the fact that either Mr Merricks or those representing him have been referring to this figure elsewhere is of any relevance. As regards an amendment, either it is a pleadable amendment or it is not. The same point could be said about the total amount of damages generally, even before interest*."
[37] [2021] CAT 28.
[38] See paragraph 16k above. See [2021] CAT 28, paragraph [39].
[39] [2024] EWCA Civ 759.

applied (roughly 5% of the VoC), and the difference between the unlawful EEA MIF and the counterfactual, legal, zero EEA MIF is therefore to be used to determine the quantum of the EEA MIFs claim (subject to adjustment for other issues that may impact the quantum).

b. **Applicable Law**: The Tribunal ruled in favour of the CR on the Applicable Law Issue[40] and the Court of Appeal dismissed the Defendants' appeal on 5 July 2024.[41] The judgments determined that English law applied to the claim for Remote EEA Transactions (such that, for example, foreign limitation periods would not apply to those transactions).

c. **Deceased Persons:** The Tribunal ruled that the estates of persons who died after the Claim Form was issued on 6 September 2016 (approximately 3 million persons up to the date the CPO was made on 18 May 2022) were to remain within the class definition.[42] The Court of Appeal dismissed the Defendants' appeal against this finding on 29 November 2022.[43]

21. There are two further issues relevant to the claim value that has been the subject of disclosure and/or witness and expert evidence:

a. The **VoC Issue**: Following disclosure, the CR agreed with the Defendants that the VoC during the Full Infringement Period needed to be reduced from the estimates originally pleaded in the Claim Form in September 2016 by approximately 14%. The Tribunal agreed with the CR that a further reduction was not needed in respect of "on us" transactions.[44]

b. The **Aggregate Damages Exclusions Issue**: The CR's expert proposed to reduce the claimed aggregate damages by approximately 25% during the Full Infringement Period and 15% during the run-off periods, to account for the proportion of the alleged overcharge that would have been incurred by deceased persons and other

[40] [2023] CAT 15.
[41] [2024] EWCA Civ 759.
[42] [2022] CAT 13.
[43] [2022] EWCA Civ 1568.
[44] Causation Judgment, para 181.

non-Represented Persons.[45] While the Tribunal has not determined whether Mr Coombs' proposed methodology is correct, and the Defendants consider that further downward adjustment would likely be required, the methodology has formed the basis for the quantum figures referred to in this Application.

22. The trial of Merchant Pass-on alongside the Merchant Umbrella Proceedings commenced on 18 November 2024 and is complete ("**Merchant Pass-on Trial**"), save for closing arguments which are to take place in the trial of Acquirer Pass-on. The trial of Acquirer Pass-on is listed to commence on 24 March 2025.

23. As noted above the issues of: (i) Counterfactual Causation; (ii) the Scheme Changes, Switching, Benefits Issues; (iii) the Run-Off and Run-In Issue; (iv) the Aggregate Damages Exclusions Issue; and (v) the Interest Rate Issue have yet to be determined in the Collective Proceedings.

(c) Costs position on the determined issues

24. Following the judgments on the issues that have been determined, the Tribunal has made costs orders in favour of the successful party. There have also been a number of other costs orders made over the course of the more than eight years of the Collective Proceedings. This has generally resulted in the Tribunal ordering interim payments on account, with the remaining sums to be determined by way of detailed assessment, if not agreed. Accordingly, if not for the Settlement Agreement, there would be significant outstanding cost liabilities.

25. The confidential **Annex 1** contains a table setting out the position with regard to costs of the most significant issues. For a number of the cost submissions that have been filed by the Applicants, the Tribunal decided that a "*costs in the case*" order was appropriate. Such orders are not covered in the table. Depending on the final outcome of the Collective

[45] These include: deceased persons, tourists, non-natural persons (trade unions etc), those who emigrated, under 16s, and opt-in / opt-outs. Coombs 9 expressly did not address natural persons making business transactions, including sole traders and partners who purchased goods or services in the course of or for the purpose of business, and employees who purchased goods and services on behalf of or for reimbursement by their employer; and successors in title, e.g. trustees in bankruptcy in respect of individuals/claim that would otherwise fall within the Class definition: Coombs 9, paragraph 4.4 and Annex B, paragraph 1.

Proceedings if there were no settlement, such orders could result in significant costs liabilities falling on one side or the other. Where for specific issues the Tribunal has not indicated the reasonable costs estimate, for illustrative purposes it is assumed that each party would be able to recover 70% of its costs. Where estimates are made this is identified in *italics.*

26. The table at **Annex 1** shows that with regard to recoveries currently outstanding, the Defendants are owed, on the basis of conservative estimates, a net sum of £1.3 million, having already made a net recovery of £4.8 million. This sum could be significantly higher if on detailed assessment it is found that the costs incurred by the Defendants were reasonable beyond what has been estimated by the Tribunal. For example, the most costly hearings to date have been the Limitation Trial and Causation Trial:

    a. With regard to the Causation Trial, the CR has made an interim payment on account to the Defendants of £5.37 million. The Tribunal directed that the "[CR] *is to pay Mastercard 93.6% of its costs …* ". The Defendants' costs schedule sets out that they incurred a minimum of £10,945,531.09 in relation to the Causation Trial.[46] Accordingly, while on the Tribunal's reasonable costs estimate of £6.75 million, the outstanding costs liability is around £948,000, that liability could rise to £4.875 million (or more) depending on how much of the Defendants' costs are found to have been reasonably incurred.

    b. With regard to the Further Limitation Trial, the CR has made an interim payment on account of £1.6 million. The Tribunal directed that "*Mastercard should recover its costs of and related to the Further Limitation trial*". The Defendants' costs schedule sets out that they incurred a minimum of £3,195,803.48 in relation to the Further Limitation Trial.[47] Accordingly, while on the Tribunal's reasonable costs estimate

[46] The sixth witness statement of Mark Farnell Sansom, dated 18 March 2024, states that the costs schedule annexed to it was for the purpose of supporting the level of interim payment on a conservative basis and did not include various costs that the Defendants incurred in relation to the Causation Trial. The Defendants expressly reserved the right to seek all its costs incurred in relation to the Limitation Trial in detailed assessment proceedings.

[47] As with the Causation Trial, the seventh witness statement of Mark Farnell Sansom, dated 19 June 2024, states that the costs schedule annexed to it was for the purpose of supporting the level of interim payment on a conservative basis and did not include various costs that the Defendants incurred in

of £1.6 million, the outstanding costs liability is around £240,000, that liability could rise to almost £1.835 million (or more) depending on how much of the Defendants' costs are found to have been reasonably incurred.

c. Accordingly, the CR's further liability with respect to just the Limitation and Causation trials is estimated at between £1.188 million and £6.71 million (or more).

27. Taking the above in the round, the CR's net liability for costs to the Defendants at this juncture is between approximately £1.3 million to £6.8 million and the CR does not have any outstanding entitlement to costs which need to be accounted for as part of the Settlement Sum. As part of the Settlement Agreement, the Defendants have waived their entitlement to the balance of costs in its favour. As a consequence, while the Settlement Sum is inclusive of all fees, costs and expenses – including those that have been ordered but not yet paid – that is on a 'drop hands' basis and the entire Settlement Sum constitutes the principal (including interest).

C. THE PROPOSED COLLECTIVE SETTLEMENT

(1) Details of the claims to be settled by the proposed collective settlement: Rule 94(4)(a)

28. The Settlement Agreement would result in a full and final settlement of the Collective Proceedings in their entirety. If granted, the CSAO would therefore bring to an end litigation that has been ongoing for over eight years. It would allow the CR to commence the process of notification and distribution of damages to Represented Persons.

(2) Terms of the proposed collective settlement: Rule 94(4)(b)

29. The Settlement Agreement is attached to this Application at **Annex 3**. Its terms are discussed in Merricks 4 at paragraphs 59-60 and Sansom 8 at paragraphs 4.1 to 4.17.

30. The Settlement Agreement follows a process of negotiation between the Applicants, both sides being represented by experienced solicitors and counsel. In summary:

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relation to the Further Limitation Trial. The Defendants expressly reserved the right to seek all its costs incurred in relation to the Further Limitation Trial in detailed assessment proceedings.

a. As set out in clause 2.1 of the Settlement Agreement, the CR and the Defendants agree that, in full and final settlement of the Collective Proceedings, and subject to the Tribunal making a CSAO, the Defendants shall pay the CR (on behalf of the class) £200,000,000, inclusive of all fees, costs and expenses incurred in the Collective Proceedings (the "**Settlement Sum**").

b. Clause 2.2 provides that the Settlement Sum shall be paid by the Defendants into a bank account set up by Epiq Systems Ltd ("**Epiq**") for the purposes of receiving payment of the Settlement Sum on behalf of the Class and distribution to the Class/Represented Persons, subject to appropriate escrow or any other arrangements, as approved by the Tribunal, and which will be available for inspection by the Defendants.

c. Clause 5 provides that, following the payment of the Settlement Sum, the maintenance and administration of the sum will be conducted by the CR.

d. Clause 8.1 provides that, subject to the Tribunal approving the CSAO, each of the Applicants will bear its own costs, fees and other expenses incurred in connection with the Collective Proceedings. As explained above, the effect of the Settlement Agreement is that, although the Settlement Sum is expressed as being inclusive of the Applicants' costs, fees and other expenses, no value is assigned to those items.

e. Clause 8.2 provides that, in the event that Innsworth Capital Limited ("**Innsworth**", the CR's litigation funder) refuses to cover any costs, fees or other expenses incurred by the CR that are necessary to obtain the CSAO and to give effect to the Settlement Agreement, the CR can recover those costs, fees or other expenses from the Settlement Sum (subject to any order or direction of the Tribunal). While Innsworth has a contractual obligation, under the litigation funding agreement it has in place with the CR (the "**LFA"**), to cover such costs, fees and other expenses, and there is an approved budget within the LFA for settlement (albeit that was not prepared on the basis that Innsworth would be opposing the settlement and so may prove to be insufficient), clause 8.2 protects the CR and the Class in the event that Innsworth refuses to meet all necessary and reasonable costs, as it provides the CR with the ability to recover them from the Settlement Sum.

f. Clause 8.3 confirms that nothing in the Agreement affects or reverses any costs payments that have already been made in the Collective Proceedings, which each of the CR and the Defendants shall retain.

g. Clause 9 provides that the Defendants will provide the CR with an additional sum of up to £10,000,000 for use exclusively in relation to any costs incurred and/or for the resolution of the arbitral proceedings that are being brought by Innsworth against the CR: see further Merricks 4 at paragraphs 56-58 and Sansom 8 at paragraphs 4.14 – 4.17.

h. Clause 18 provides that should the CR be required to pay VAT over the Settlement Sum in accordance with local tax laws, this shall not increase the liability of the Defendants, but will be paid out of the Settlement Sum. The Applicants consider that the CR will not be required to pay VAT on the Settlement Sum, and so the amount that is distributed to the Class will not be reduced as a result of VAT liability (see Sansom 8 at paragraphs 4.12-4.13).

D. THE APPLICANTS' BELIEF THAT THE TERMS ARE JUST AND REASONABLE: RULE 94(4)(C) (AND RULE 94(9))

31. For the reasons set out in the Applicants' evidence in support of this application, and 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), the CR and the Defendants believe that the terms of the proposed settlement are just and reasonable.

32. In the CR's case, this belief is based on the matters set out in Merricks 4 at paragraphs 59-60.

33. In the Defendants' case, this belief is based on the matters set out in Sansom 8 at Section 5 and (without waiver of privilege) in Mr Cook's opinion.

34. The Applicants' reasoning in respect of each of the factors set out in Rule 94(9)(a)-(g) is addressed below in turn.

(1) "*the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements*": Rule 94(9)(a)

35. The Settlement Sum of £200 million represents the amount that the parties consider to be just and reasonable in all of the circumstances.

36. As explained above, the Settlement Sum consists entirely of principal (including interest), with costs, fees and disbursements having been valued at zero on a 'drop hands' basis. Although there are a range of plausible assumptions that would individually and/or cumulatively result in an aggregate damages award at the amount of the Settlement Sum, the Settlement Sum is consistent with:[48]

    a. Adopting the relevant VoC that was agreed between the Applicants and determined by the Tribunal in the VoC Judgment, and the weighted average interchange fees and aggregate damages exclusions to account for non-Represented Persons that were proposed by the CR, via Mr Coombs.[49] The effect of this is to reduce the claim value from a maximum of approximately £16.7 billion in March 2022[50] to around £11 billion (with interest up to December 2024).

    b. The damages being limited to EEA MIFs, and no value being accorded in respect of UK domestic IF transactions. This has regard to the Causation Judgment and the Applicants' assessment of the prospects of a potential Future Counterfactual Trial that would involve complex issues of fact and law, potential substantial disclosure from third party acquirers and merchants, substantial costs and a further potential of up to two years of litigation (without accounting for any appeals). Removing UK domestic IF transactions reduces the maximum potential claim value from around £11 billion to £707 million.

[48] Except where stated, figures provided are inclusive of interest up to 3 December 2024.
[49] The Defendants provided weighted average interchange fees in a letter to Mr Merricks on 4 May 2023 which form the basis of Mr Coombs' calculations (and the quantum calculations in this Application). However, subsequent to this, the Defendants provided revised weighted average interchange fees for EEA MIFs prior to 1995 (the "**Revised MIFs**"). The correctness of the Defendants' Revised MIFs has not been agreed between the Parties, and the correctness of all weighted average interchange fees has not yet been determined by the Tribunal.
[50] This figure included interest up to that date and excluded the quantification of the CR's Run-off Overcharge claim.

c. A reduction to the EEA MIF claim value with respect of Remote EEA Transactions. In July 2024, the Defendants identified that the CR had miscalculated the claim value in respect of Remote EEA Transactions, which the CR accepts. Removing Remote EEA Transactions to account for this miscalculation reduces the potential claim value in respect of EEA MIFs from £707 million to [redacted]

d. The exclusion of claims prior to 20 June 1997, save for claims governed by Scots law, in recognition of the Limitation Rulings and the recent judgment of the Court of Appeal in the Merchant Umbrella Proceedings in which closely related EU law arguments were rejected. Indeed, the Court of Appeal affirmed that it was bound by its previous decision in *Arcadia*, which held that the Limitation Act 1980 complies with EU law.[51] The exclusion of these pre-20 June 1997 claims further reduces the potential claim value from [redacted] to [redacted]].

e. Giving effect to the Exemptibility Judgment, such that the entire value of the relevant EEA MIFs during the Relevant Claim Periods are regarded as the overcharge for the purposes of calculating damages, subject to any acquirer and/or merchant pass-on that has the effect of mitigating any such overcharge as set out below.

f. Recognising the litigation uncertainty arising from the ongoing trial of Acquirer and Merchant Pass-on.

    i. In relation to Acquirer Pass-on, while there has not been any expert evidence or legal submissions on the issue yet, the publicly available evidence suggests that the rate could be materially lower than 100%. For example, the CR's expert's preliminary assessment of a report by the Payment Systems Regulator[52] calculated that acquirers passed on 68% of the decrease of interchange fees associated with the Interchange Fee Regulation in 2015 to merchants on blended contracts,[53] albeit in the specific context of the

[51] *Umbrella Interchange Fee Claimants v Umbrella Interchange Fee Defendants* [2024] EWCA Civ 1559.
[52] Payment Systems Regulator "Market review into card-acquiring services", final report dated November 2021.
[53] Blended contracts involve a single MSC for both Mastercard and Visa (covering domestic, EEA and Inter-regional transactions).

CR's MSC Run-off arguments, which the CR considers gives rise to different considerations to the assessment of Acquirer Pass-on in the Full Infringement Period. For Acquirer Pass-on in the Full Infringement Period, in the CR's view the issue is the extent to which increases in interchange fees were passed on and in respect of which the CR argues that economic theory suggests high pass on. The Defendants consider that the relevant counterfactual for the consideration of pass-on is a decrease in the relevant interchange fees. Prior to around 2002, all merchants were on blended contracts, and no merchants were on interchange plus (IC +) or interchange plus plus (IC ++) contracts, for which it is agreed that there is likely to have been at or close to 100% pass-on.

ii. In relation to Merchant Pass-On, the CR's expert evidence quantifies pass-on at 91.1% (although this analysis indicates that pass-on may have taken years), and the CR considers that there is no basis for considering that pass-on rates in the period covered by the merchant claims (now spanning 2010-2024) should be different to the in the Claim Period (1992-2010). The Defendants argue that the CR has failed to discharge his legal onus to prove any pass-on during the Claim Period (such that Merchant Pass-on is zero per cent for the Claim Period), alternatively that merchant pass-on would have been much lower (i.e. lower than the 70%-100% identified by the Defendants for the majority of merchants in the UK economy during the merchant claim period) in the Claim Period and for certain sectors. In their claims against the Defendants, the merchants argue that they did not pass-on / that there was low pass-on by them during their claim periods (the economic experts for the merchants found sector pass rates of between 0% and 47.5%). If that is the case, given the CR submits that there is no reason for the merchant pass-on rates to be different between the two claim periods, if the Tribunal agrees with the merchants, then this would likely mean that the Tribunal would also find low pass-on in the Claim Period for at least those sectors represented by the merchants that have participated in the pass-on trial.

iii. Taking all of that uncertainty into account, and the novel circumstances of having pass-on determined across the Merchant Umbrella Proceedings and the Collective Proceedings, the Applicants consider that, for the purposes of this settlement, assuming a [ ] cumulative rate of pass-on to account for both acquirer and merchant pass-on would be just and reasonable.[54] This cumulative reduction would reduce the maximum potential claim in respect of EEA MIFs from [ ] to £229 million.

g. Giving full credit for the MSC Run-off period as regards the remaining EEA MIFs, despite the Defendants' position as summarised at paragraph 12.a above. (The UK Domestic IFs Run-off period does not apply to the EEA MIFs claim.)

h. Applying simple interest at the applicable BoE rate plus 3.5% in respect of the claim for damages. This is a generous level of interest for the CR in light of the Tribunal's recent ruling in *Le Patourel v British Telecom* that if interest had been awarded to the consumer class in that case then it would have been at a rate of BoE plus 2%.[55] Reducing the interest rate from the CR's claimed interest rate of BoE plus 5% to BoE plus 3.5% further reduces the potential claim value in this scenario from £229 million to £200 million.

37. The calculations in paragraph 36 above are set out in Table 1 of the confidential joint statement prepared by Compass Lexecon and Frontier at **Annex 4**.

38. There are a range of other, potentially equally likely, scenarios and/or combinations of assumptions that would result in an aggregate damages award at or below the amount of the Settlement Sum (including scenarios in which damages would be zero), and that have

[54] This cumulative pass-on rate would be broadly consistent with a range of potential combinations of Acquirer and Merchant Pass-on, including: (i) Acquirer Pass-on rate of [ ] and a Merchant Pass-on rate of [ ] for the Claim Period or vice versa (i.e., overall [ ]); (ii) Acquirer Pass-on rate of [ ] and a Merchant Pass-on rate of [ ] for the Claim Period or vice versa (i.e., overall [ ]); or (iii) Acquirer Pass-on rate of [ ] and a Merchant Pass-on rate of [ ] for the Claim Period or vice versa (i.e., overall [ ]). Indeed, even a combination of Acquirer Pass-on at [ ] and Merchant Pass-on at [ ] for the Claim Period (or vice versa) would amount to a cumulative pass-on rate of [ ]. While none of these combinations of outcomes is necessarily more or less likely than others, they would all be consistent with a cumulative pass-on rate of approximately [ ]

[55] [2024] CAT 76 at [1427].

contributed to the overall view of the Applicants that the Settlement Sum is fair and reasonable. For example:

a. Applying a simple interest rate of BoE plus 2% in accordance with the Tribunal's recent ruling in *Le Patourel v British Telecom* (instead of the generous assumption of BoE plus 3.5%) further reduces the maximum potential claim to £171 million. This additional calculation is also shown, for completeness, in Table 1 of the confidential joint statement by Compass Lexecon and Frontier at **Annex 4**.

b. Other combinations of Acquirer Pass-on at and Merchant Pass-on[56] would amount to a cumulative pass-on rate of approximately [redacted], which is not materially different to the cumulative pass-on rate in paragraph 36(f)(iii) above.

c. The Defendants' position is that the other counterfactual issues, namely the Scheme Changes Issue, the Switching Issue and the Benefits Issue, have the potential to eliminate entirely, or at least reduce substantially, the claim value. The CR recognises that the Scheme Changes Issue, the Switching Issue and the Benefits Issue are at least arguable and that he would face litigation risk that could have a negative impact on the claim value. However, the assumptions in paragraph 36 are premised on the CR taking the benefit of the litigation uncertainty regarding those other counterfactual issues.

39. In the event of an aggregate damages award that is considerably less than the Settlement Sum as a result of litigation developments on these or other issues, the Defendants consider that they would likely invite the Tribunal to review the costs and benefits of the litigation continuing and therefore the continued certification of the Collective Proceedings. In the event of decertification of the Collective Proceedings, no damages would be payable.

40. The Settlement Sum also includes "*all of the Parties' fees, costs and expenses that have been or will be incurred in the future in pursuing the Proceedings*". The Defendants thereby waive their net entitlement to adverse costs owed by the CR to the Defendants in relation to determined issues, estimated at between approximately £1.3 million and £6.8

[56] For example, Acquirer Pass-on rate of [redacted] and Merchant Pass-on rate of [redacted] for the Claim Period or vice versa (i.e. overall [redacted]).

million.[57] The effect of the Settlement Agreement is that, although the Settlement Sum is expressed as being inclusive of the Applicants' fees, costs and expenses, no value is assigned to such fees, costs and expenses. Given the CR's liability for costs to the Defendants at this juncture, as outlined in paragraphs 26-27 above, the Settlement Agreement avoids a significant costs liability for the CR (which would fall on Innsworth).

(2) "*the number or estimated number of persons likely to be entitled to a share of the settlement*": Rule 94(9)(b)

41. The CR's best estimate of the number of eligible Represented Persons is 44,154,157.[58]

(3) "*the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement*": Rule 94(9)(c)

42. As summarised at paragraphs 17-23 above, the Collective Proceedings have been tried in phases and by issue, with a number of key issues already having been determined, and some of the remaining issues in the litigation being capable of reducing the level of aggregate damages to below the amount of the Settlement Sum, including down to zero. The outstanding issues to be addressed are: (i) the Pass-on Issues; (ii) the Counterfactual Causation Issue; (iii) the Defendants' pleaded counterfactual issues, namely the Scheme Rules Issue, the Switching Issue and the Benefits Issue; (iv) the pending appeal against the Further Limitation Judgment; (v) the Run-Off and Run-In Issues; (vi) quantum adjustments for certain non-Represented Persons; and (vii) the Interest Rate Issue. Out of these issues, the only ones that would be capable of resulting in an amount of damages in excess of the amount of the Settlement Sum are the Counterfactual Causation Issue along with the pending appeal against the Further Limitation Judgment.[59]

43. For the reasons set out in Merricks 4, having carefully considered the litigation risk of all

[57] This estimate reflects the Defendants' net entitlement to adverse costs after deducting for adverse costs owed to the CR.
[58] Merricks 4 at paragraph 54 and Letter from Mr Coombs of Compass Lexecon to Mr Merricks dated 16 January 2024 at paragraph 5.4.
[59] See, however, paragraph 36d above, Merricks 4 at paragraphs 14-24, and Sansom 8 at paragraphs 5.33 – 5.37, regarding the impact of the Court of Appeal's December 2024 judgment in the Merchant Umbrella Proceedings.

the issues having regard on the privileged advice the CR has been provided, he has concluded that the Settlement Sum is just and reasonable. This is further addressed in Merricks 4, at paragraphs 14 to 60.

44. For the reasons set out in Sansom 8 and the (confidential and legally privileged) Opinion of Mr Cook KC, the Defendants consider that that, given the substantive judgments that have been handed down to date and the Defendants' assessment of the merits of the outstanding issues to be determined in the Collective Proceedings, the Settlement Sum is just and reasonable and in excess of any realistic award of damages that Mr Merricks could achieve by continuing to litigate the Collective Proceedings, as addressed in Sansom 8 at Section 5.

(4) "*the likely duration and cost of the collective proceedings if they proceeded to trial*": Rule 94(9)(d)

45. The Collective Proceedings have been ongoing for more than eight years, and proceeding to trial of all remaining issues summarised immediately above, at paragraph 42, would involve substantial further time and cost.

46. In relation to trials and appeals that are currently listed:

    a. The Pass-on Issues will finish being heard in April 2025. In light of the complexity and length of this trial and based on experience to date, the Applicants consider that the Tribunal is unlikely to issue a judgment until late 2025 at the earliest. Given the experience in the Collective Proceedings to date, the Applicants also anticipate that the unsuccessful party in the pass-on hearing (or indeed any of the remaining issues) will appeal the outcome of the of Tribunal's decision, and there is a good chance permission to appeal would be granted (or at least given a full oral permission hearing). Any appeal to the Court of Appeal would be unlikely to be listed until mid-2026 at the earliest, and a judgment delivered no earlier than late 2026 or early 2027. Should one of the Applicants then appeal to the Supreme Court, the Pass-on Issues may not be resolved until 2028.

    b. The CR's appeal of the Further Limitation Judgment has a hear-by date in the Court

of Appeal of 9 July 2025.[60] Given the Court of Appeal's quick judgment in the related limitation appeal in the Merchant Umbrella Proceedings, in which closely related EU law arguments were considered, the Court of Appeal would likely issue a judgment by around October 2025, with any appeal to the Supreme Court being determined by late-2026.

47. There is a range of ways in which the Tribunal may decide to case manage the remaining counterfactual issues which have not yet been listed:

a. The Defendants indicated in correspondence prior to settlement that there could be a further preliminary issue hearing to determine discrete issues of law in relation to the remaining causation issues, prior to the Tribunal considering whether or not to order a Future Counterfactual Trial. The CR and the Defendants had agreed that there would need to be a round of further repleading to address the counterfactual causation issue. If there were to then be this preliminary issue hearing on any discrete points of law, this would likely take place in mid-2025, with judgment in late-2025 and any appeal being determined by late-2026.

b. Following any further preliminary issue hearing on remaining causation issues, the Parties would then need to consider what further counterfactual issues remained open to them. Alternatively, the Tribunal may determine that there is nothing to be saved by having a further preliminary issue hearing and that all the remaining causation and other counterfactual issues should go to trial. Based on the timeline set down by the Tribunal for the Causation Trial, if there were a further preliminary issue trial from which there was an appeal that is not decided until late-2026, the Tribunal is unlikely to set down a Further Counterfactual Trial until late-2027, which would result in judgment being delivered in mid-2028. Should the parties appeal the decision, the Court of Appeal would hear the appeal in mid-2029, and, should the parties appeal to the Supreme Court, such an appeal would likely not be determined before 2030. If there was no further preliminary issue hearing, then this would bring the dates forward by around 12 months.

[60] Although due to counsel availability issues, the Parties have jointly proposed to the Court of Appeal listing dates until 25 July 2025.

48. Based on the above, the Applicants consider that the earliest that the Collective Proceedings will be resolved, should the Parties not appeal any of the Tribunal's decisions, would be mid-2027. The Applicants consider, however, that it is highly unlikely that the Collective Proceedings will be resolved by mid-2027 as, based on experience to date, the Parties are highly likely to appeal (and are likely to be granted permission to appeal). If the parties do appeal the decisions of the Tribunal, the Collective Proceedings would likely not be fully resolved until 2029-2030, which is 13-14 years after the original Claim Form was filed. There is considerable value to the Class in being able to recover damages by mid-2025, rather than waiting for a potential damages pay-out (which could be less than the Settlement Sum) at least some two-and-a-half years later, and potentially up to five years later.

49. In light of the litigation spend by both parties to date, and considering the costs of the Causation Trial alone were no less than £17.2 million for both Applicants,[61] the Parties consider that the total costs of litigating these Collective Proceedings to conclusion, including any appeals, would result in a further combined legal spend of at least £45 million. That is a very substantial amount, which needs to be weighed against the litigation risk of all the remaining issues that goes to the prospect of obtaining judgments that will result in an amount significantly in excess of the Settlement Sum.

[61] See The CR's Costs Schedule dated 18 March 2024 showing that the CR incurred around £6.248 million; the Defendants' Costs Schedule dated 18 March 2024 showing that the Defendants incurred around £10.945 million.

(5) "*any opinion by an independent expert and any legal representative of the applicants*": Rule 94(9)(e)

50. The Applicants rely on the advice they have each received from time to time from their solicitors and independent counsel in which privilege is not hereby waived (the "**Privileged Advice**"). The Privileged Advice is summarised and relied upon in Merricks 4 and Sansom 8 and is contained in the (confidential and legally privileged) opinion of Mr Cook KC and the memorandum from Mr Bronfentrinker. The Applicants have concluded that in light of: (i) the Privileged Advice they have received; (ii) the fact that there have already been judgments on many of the issues that were in dispute; and (iii) the time, cost and difficulty of identifying an independent expert and then that person familiarising themselves with the current status and merits of the Collective Proceedings, which have been ongoing for eight years, that it would be disproportionate to obtain further independent expert advice from another third party and unlikely, in the particular circumstances of this case, to provide substantial additional assistance to the Settlement Tribunal (which will have the Acting President as the Chair, who is intimately familiar with the Collective Proceedings).

(6) "*the views of any represented person*": Rule 94(9)(f)

51. The Settlement Agreement was announced publicly in the Tribunal during the Merchant Pass-on Trial and was picked up by the mainstream media.

52. Only a very small number of (potential) Represented Persons contacted the CR through the claims website[62] with practical queries / expressing their interest in coming forward to collect damages.

53. Further, the CR will be publishing advanced notice of the CSAO Application and approval hearing on the claim website as soon as the settlement hearing notice is approved by the Tribunal.[63] In addition, the Applicants have arranged for global

[62] Between 3 December 2024 and 12 January 2025, Epiq received four emails from potential Represented Persons through the claim website.
[63] The draft settlement hearing notice was filed with the Tribunal for its consideration on 14 January 2025.

communications consultants Portland to carry out a survey of several thousand UK consumers, to be completed ahead of the hearing of the CSAO Application. The CR and the Defendants will make submissions in advance of and/or at the hearing of the CSAO Application in relation to any views provided to the Settlement Tribunal by any Represented Person and on the outcome of the Portland survey.

(7) "*the provisions regarding the disposition of any unclaimed balance of the settlement, but provision that any unclaimed balance of the settlement amount reverts to the defendants shall not of itself be considered unreasonable*": Rule 94(9)(g)

54. The proposal as to the distribution of the funds is set out at paragraphs 67 to 74 below. However, it is noted that the Defendants are not seeking the reversion of any unclaimed balance of the settlement.

(8) *Other Matters*

55. The Guide at paragraph 6.127 notes that the Tribunal will wish to be satisfied that the CR and its lawyers had sufficient information to assess the reasonableness of the settlement to Represented Persons. As set out in the supporting evidence and in this CSAO Application, the CR has carefully considered all of the information available to him in concluding that the Settlement Agreement is just and reasonable. In particular, the Settlement Agreement was agreed at a juncture in the Collective Proceedings at which the CR had the benefit of the knowledge of: (i) the judgments that had already been delivered covering many of the issues that were in dispute; (ii) the experience of the factual and legal issues and challenges that have arisen and that would arise if the litigation were to continue; and (iii) the Privileged Advice, to enable him to assess the reasonableness of the Settlement Agreement.

E. NOTICING AND DISTRIBUTION

(1) How any sums received are to be paid and distributed: Rule 94(4)(d)

56. The practical details as to how Settlement Sum will be held and paid, and as to how the Settlement Sum will be distributed, are set out in detail in the notice and administration plan (the "**NAP**") exhibited to Merricks 4.

(a) How the Settlement Sum will be held and paid

57. In accordance with the CR's original Litigation Plan[64] and as updated and elaborated on in the NAP, the Settlement Sum will be held and paid by Epiq. Specifically:

    a. in accordance with clause 2.1 of the Settlement Agreement, the Defendants will pay the Settlement Sum to the Payment Account set up by Epiq for the purposes of receiving payment of the Settlement Sum on behalf of the Class and distribution to the Class, subject to appropriate escrow or any other arrangements, as approved by the Tribunal, and which will be available for inspection by the Defendants;

    b. the Settlement Sum will be paid within twenty-eight days of the date of the CSAO (clause 2.1 of the Settlement Agreement);

    c. the Settlement Sum will be held in the Payment Account and not released except:

        i. "*on the Settlement Final Date and in accordance with any CSAO*";[65] or

        ii. "*in the event that any CSAO is overturned or quashed following a challenge, in which case the Settlement Sum shall be returned to Mastercard within twenty-eight (28) days of the date on which the CSAO is overturned or quashed, including any interest earned on the Settlement Sum, less any*

[64] First Witness Statement of Walter Hugh Merricks dated 6 September 2016 and Exhibit WHM1/6, Collective Proceedings Litigation Plan (the "**Litigation Plan**").
[65] Settlement Agreement, clause 2.2(a).

charges, taxes or any amount that was paid in respect of the Settlement Sum as a result of it being held until the Settlement Final Date."[66]

58. As set out in the NAP, Represented Persons will be directed to the existing claim website, where they will be able to claim their damages through a straightforward and user-friendly process, which seeks to make it as easy as possible for Represented Persons to recover their share of the Settlement Sum. To this end, Represented Persons or the legal representatives will be required to self-certify on the understanding that they would be committing an offence if they were not being truthful, that they are eligible to claim, and no further proof or documentation will be required. This follows advice from Epiq, that given the individual amount that Represented Persons may receive, they would likely be deterred from claiming their damages if the exercise is administratively burdensome or time-consuming.[67] However, despite relying on self-certification, Epiq will use well-established fraud prevention algorithms and measures to digitally identify where attempts are made to make multiple claims. These measures include website-level activity including ReCAPTCHA, blocking traffic from known bad actors, assigning unique identifiers to Represented Persons under which claims will be grouped, monitoring the number of claims made from a single IP address, identifying claims filed from foreign IP addresses, reviewing non-standard domains and monitoring payment information for duplication.[68]

(b) How the Settlement Sum will be held and paid for deceased Represented Persons and to Represented Persons who lack mental capacity

59. In the event that a Represented Person lacks mental capacity or are deceased, a personal or authorised representative will be able to submit a claim on behalf of the Represented Person.

60. For personal or authorised representatives claiming on behalf of a Represented Person who lacks mental capacity, they will be asked to self-certify that they have legal authority

[66] Settlement Agreement, clause 2.2(b).
[67] See Epiq memo dated 16 January 2024, paragraphs 22-23.
[68] See paragraph 8.9 of the NAP.

to be the personal or authorised representative of the Represented Person and will be given the option to upload proof of legal authority, such as a power of attorney.[69]

61. For personal or authorised representatives claiming on behalf of the estate of a Represented Person who is deceased, and (i) the deceased had a valid will, or (ii) where there has been a grant of letters of administration ("**Grant**") for estates in England, Wales and Northern Ireland, or where confirmation has been obtained, for estates in Scotland, the personal or authorised representative will be asked to self-certify that they have legal authority.[70] The personal or authorised representative will also have the option to upload proof that they have legal authority, such as a copy of the death certificate, the will, the Grant or confirmation.

62. Where the Represented Person died intestate and where no Grant or confirmation has been obtained, in England and Wales the estate vests in the Public Trustee[71], and in Northern Ireland in the Probate Judge.[72] For these estates, the CR proposes that those who would be entitled to obtain a Grant or confirmation (i.e. next of kin) will be able to make a claim on behalf of the deceased Represented Person if they self-certify that they would be so entitled. They would also have the option to upload proof that they would be entitled to obtain a Grant or confirmation, such as proof of their relationship to the deceased (e.g. a birth, marriage or civil partnership and a death certificate). [73]

63. It will be explained on the claim website that the option for personal or authorised representatives to provide proof of legal authority is there to allow Epiq to make a decision as to who should be paid on behalf of the mentally incapacitated or deceased estates of Represented Persons in the event that more than one claim is made in respect of the same estate of a deceased or mentally incapacitated Represented Person.[74] This

[69] See NAP, paragraph 8.6-8.7 and Appendix H..
[70] Whilst there are often two personal representatives appointed under a will or Grant, with the Tribunal's approval, we propose to only make payment to one of the personal representative. On this proposal a payment will have been made to someone with the correct authority on behalf of the estate and no obligation exists to pay the second personal representative.
[71] Section 9(1) of the Administration of Estates Act 1925.
[72] Section 3 of the Administration of Estates Act (Northern Ireland) 1955. We understand that Scotland does not have an equivalent entity or court in which such estates vest.
[73] See NAP, paragraph 8.7 and Appendix H.
[74] See NAP, paragraph 8.7 and Appendix H for details on the kind of documentation that may be required.

will be in addition to Epiq's general fraud checks and verification that no claim is made on behalf of a *bona vacantia* estate that has vested in the Crown.

64. The CR will write to the Public Trustee ahead of the hearing of the CSAO Application to explain the distribution proposal with respect to distribution to personal or authorised representatives of intestate, pre-Grant estates of Represented Persons in England and Wales.[75] Given that when the Public Trustee declined to opt out intestate, pre-Grant estates from the Collective Proceedings, she made clear that she proposed to adopt a passive role in the Collective Proceedings,[76] the CR has now asked the Public Trustee to confirm that that remains the Public Trustee's intention and to confirm she has no concerns with the proposed approach. The CR will update the Settlement Tribunal once he receives a response.

65. By the Settlement Tribunal's approval of the above distribution proposal in respect of intestate, pre-Grant/pre-confirmation estates, the Settlement Tribunal would be authorising Epiq to obtain 'valid receipt'[77] by paying compensation to one or more individuals[78] who self-certify that they are entitled to be the personal or authorised representative on behalf of, and as a trustee for, the intestate, pre-Grant/ pre-confirmation estate. The CR believes that these proposals present a pragmatic and proportionate approach to ensuring that the greatest number of estates of Represented Persons are enabled to benefit from the Proposed Settlement. The CR considers that it would be disproportionate to require individuals entitled to be the personal or authorised representative on behalf of an intestate estate to obtain a Grant or confirmation where this has not already been obtained solely to allow them to claim between £45 to £70 (or potentially a smaller sum). In any event, obtaining a Grant or confirmation can be a time-consuming process and requiring this would effectively exclude those intestate estates from the distribution process.

[75] There is no equivalent of a Public Trustee for Scotland or Northern Ireland, and the CR has been advised that it would be reasonable given the amounts in question, for trustees to forego an application to the Court of Session in Scotland and the Chancery Court in Northern Ireland in respect of distribution of such a small payment.
[76] By email to the CR dated 29 November 2021.
[77] Similar to the protection granted pursuant to an application made under CPR Part 64.
[78] If two individuals come forward to claim as a personal representative, it may be more cost effective to pay those two individuals rather than pay Epiq to verify the competing claims.

66. The NAP sets out in detail the steps being taken by the CR to ensure sufficient notification of the Proposed Settlement to Represented Persons and personal representatives, and will also seek to place an advertisement specifically to professional personal representatives and others in the probate community through an advertisement in STEP Journal and the Law Society Gazette, which the CR understands are widely circulated among those involved in probate.

(c) How the Settlement Sum will be distributed

67. The Settlement Agreement does not address how sums received should be paid and distributed.[79] This is a matter that falls to the CR, having regard to his overriding obligation to act in the best interests of the Class, and his obligations to Innsworth under the Litigation Funding Agreement dated 5 June 2019 (as amended and restated on 8 November 2024). Accordingly, the CR advances the following proposal for how the Settlement Sum could be distributed, subject to the Tribunal's approval, whilst noting the possibility for other alternatives, albeit ones that the CR cannot positively advance given his obligations to Innsworth (obligations to which he is particularly alive given Innsworth has commenced arbitration against the CR claiming he has not acted with best endeavours to secure its return).

68. The Applicants note that the issue of distribution has been considered by the Supreme Court in these Collective Proceedings. Lord Briggs, giving the judgment for the majority stated:

> "*A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be so difficult and disproportionate, e.g.* ***because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just***"[80] (emphasis added).

[79] See, in particular, Settlement Agreement, Recital K.
[80] *Merricks UKSC,* paragraph 77.

69. Accordingly, the Applicants consider that it would be just and reasonable to adopt a distribution model that proceeds on the basis of a realistic assessment of the circumstances as they are now. This means not proposing a distribution under which the Settlement Sum would be divided by 44 million, that being the number of Represented Persons, so that each individual Represented Person would be entitled to a sum of approximately £4.50. Proceeding in this way is unlikely to result in a substantial amount (or proportion) of the Settlement Sum getting into the hands of Represented Persons given the likely low number that will come forward to participate, and most or all of that amount will be left as undistributed damages. For the avoidance of doubt, Mastercard is not seeking reversion of any of the Settlement Sum and does not propose that the Tribunal consider ordering a reversion mechanism.

70. The Applicants therefore consider that it is appropriate to proceed in a different way, which will not result in the funders (or advisors) being the main beneficiaries by reason of there being a large amount in undistributed damages. It is therefore proposed as a first step that half the Settlement Sum (£100 million) is ringfenced for Represented Persons. To determine what should be offered to Represented Persons so as to seek to maximise payment to them of the ringfenced Settlement Sum, consideration is to be given to the percentage of Represented Persons who are realistically likely to come forward to claim damages during the distribution period. Having regard to the views and experience of Epiq (the claims administrator), the realistic uptake percentage figure is up to 5% – 2.2 million people. The CR proposes to use this as the basis upon which the per Represented Person damages is calculated, which amounts to £45 per Represented Person that is realistically considered will come forward. The CR also proposes that there is flexibility within the distribution model to adjust the amount to be actually paid to individual Represented Persons based on the actual numbers that do come forward to participate in the distribution, so as to ensure nobody is precluded from benefiting from the settlement. The £45 amount will feature in the noticing to the Class (albeit with the notices also explaining that the figure could be more on the CR's proposal, or less, depending on the actual number of Represented Persons that come forward to participate in the distribution). Epiq is one of the leading global providers of class action administration

services whose views are therefore relevant and credible.[81] The CR considers that proceeding in this way will maximise the distribution to Represented Persons, providing meaningful compensation that will encourage them to come forward and claim their damages.[82]

71. The Applicants also note that in addition to reliance on Epiq's advice and opinion, Portland has been engaged to undertake a survey of UK consumers to inform the extent to which the views of Epiq, which relate to consumers in other jurisdictions, apply to UK consumers who may be members of the Class. As at the date of the Application, as noted above at paragraph 53 above, Portland is in the process of carrying out the survey, which will involve several thousand UK consumers, so the Applicants will update the Settlement Tribunal on the results of the survey ahead of the hearing of this Application. To the extent that it impacts any of the proposals for noticing and distribution, the Settlement Tribunal will also be informed of this.

72. The distribution proposal set out below is underpinned by the following considerations:

    a. Epiq, relying on its own extensive experience in distributing claims to consumer classes and further research it has undertaken of publicly available information about distribution participation in collective actions in the United States, Canada and Australia, considers that the realistic take-up rate is up to 5% of the total Class, i.e. 2.2 million people.[83]

    b. Evidence from a 2019 study by the Federal Trade Commission '*Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*', which founded a weighted average uptake of 4%[84], which the Tribunal had regard to when

[81] For example, the Tribunal was "*assisted by the additional material provided, since the original application, by the parties on estimated take-up by class members, as well as by the CR's expert on the distribution plan, Epiq*" in *Gutmann v First MTR South Western Trains Limited* [2024] CAT 32, paragraph 55.
[82] Merricks 4, paragraphs 62-64.
[83] See Epiq memo dated 16 January 2025, paragraph 18.
[84] FTC, '*Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*', September 2019. Note that the 4% average includes 21 class actions where consumers were just automatically sent cheques in the mail or account credits etc and as such inflates the average uptake as no action was required by class members to come forward and claim their damages.

it considered the settlement proposed in *Gutmann v Stagecoach South Western Trains Limited.*[85]

c. Epiq has advised, although it is also a matter of common sense, that increasing the potential compensation for each Represented Person should encourage greater take-up by Represented Persons.[86]

d. That an estimated 5% uptake is the reasonable and appropriate basis on which to proceed for distribution as reflected in the fact that this is what the CR and Innsworth have budgeted for in the LFA. There is a sum of £2,883,573 available for noticing and distribution to 2.2 million Represented Persons, as of 30 November 2024. If there was to be an uptake of materially more than 5%, then either Innsworth would need to make funds available to cover the costs of distribution to a larger number of individuals or those costs would need to be paid for out of the Settlement Sum, as explained further below.

e. Innsworth has invested a substantial sum in the Collective Proceedings and is entitled to receive the entirety of the amount invested, plus a return on that investment, albeit in proportion to the outcome and success of the Collective Proceedings.

73. The CR therefore proposes a distribution model whereby the Settlement Sum is divided into three pots:

a. Pot 1: an amount of £100 million is to be initially ring-fenced for distribution to Represented Persons as a single pro rata payment depending on the level of class uptake (irrespective of the length of time each Represented Person was a member of the Class). Assuming 5% of Represented Persons (2.2 million people) come forward to participate in the distribution, this would mean each of them will receive £45.[87] If fewer than 5% come forward, those that do come forward would receive an

[85] [2024] CAT 32 at paragraph 90.
[86] See Epiq memo dated 16 January 2025 advising on distribution.
[87] A maximum of 2,222,222 Represented Persons could come forward (a take up rate of 5.03%) in order for each Represented Person who comes forward to receive a payment of £45 using Pot 1 only. This number is used as the base figure for the settlement approval.

increased amount up to a maximum cap of £70.[88] If the uptake is low such that once the cap is reached for those individuals who do participate and there remain damages that have not been claimed, then any residue would be undistributed damages. In relation to any undistributed damages out of this £100 million, given the CR's obligations under the LFA, he must propose that this amount be made available to Innsworth as part of its return. However, the CR recognises that arguments could be advanced that ensure that at least half of the Settlement Sum is paid (directly or indirectly) to Represented Persons and non-participating Represented Persons, the undistributed damages from this Pot 1 could be awarded to an appropriate charity (for example focusing on financial literacy or inclusion) to be approved by the Tribunal or to the Access to Justice Foundation. Alternatively, if the take-up is higher than 5%, then each Represented Person would have a pro rata adjustment down from £45. By way of example, if the take-up was 10% (4.4 million people), then this would result in each Represented Person receiving £22.50. The CR recognises that an alternative way that a higher take-up can be accommodated without necessarily reducing the amount each Represented Person gets is to make use of some or all of the amount in Pot 3. However, as this reduces the amount that would be available to give Innsworth as a return, and given his contractual obligations under the LFA, the CR is not in a position to advocate such an approach.

b. Pot 2: the sum of £45,567,946.28 is to be ringfenced as a minimum return to Innsworth, representing a 100% recovery in respect of Innsworth's (i) total costs, fees and disbursements incurred in the Collective Proceedings up until 30 November 2024; (ii) total costs, fees and disbursements incurred until the end of the distribution phase that are budgeted for and anticipated in respect of the settlement, noticing and distribution under the LFA; minus (iii) any payment of costs by the Defendants by way of adverse costs awards.[89] This sum is intended to guarantee a 100% return for

[88] A maximum of 1,428,571 Represented Persons could come forward (a take up rate of 3.24%) in order for each Represented Person who comes forward to receive a payment of £70 using Pot 1 only.
[89] The figure of £45,567,946.28 is based on the costs, fees and disbursements paid by Innsworth for the period up to 30 November 2024 and also the CR's best estimate of anticipated costs in the Collective Proceedings. It also reflects a credit for the payments received from the Defendants by way of adverse costs orders, up to 30 November 2024. However, there are further sums which may fall within Pot 2, thereby reducing the funds available in Pot 3: (i) Innsworth is seeking £352,765.00 in respect of its own costs, the reasonableness of which the CR has not been able to assess at the time of this CSAO; (ii) a

Innsworth; it does not represent payment of any entitlement as such to any costs, fees or expenses, given that the CR has already sought and where appropriate been awarded costs at all stages throughout the litigation to date.

c. Pot 3: as to the remaining sum of £54,432,053.72 , given the CR's simultaneous obligations to act in the best interest of the Class and to Innsworth under the LFA, the CR proposes that this pot be made available to give Innsworth its return, subject to any further sums that need to be used to effect distribution to more than 5% of the Represented Persons, should Innsworth not agree to make additional funds available. However, the CR also recognises, as noted above, that the Tribunal may decide that at least some of this pot is used to either make up any shortfall in Pot 1 where there is a higher take-up than 5% (if the Tribunal concludes that the amount received by each class member should not be reduced in those circumstances to maintain a payment at the level of Pot 1 only), or it could be used to pay non-participating class members indirectly through a payment to a consumer charity or the Access to Justice Foundation so that more than half of the Settlement Sum is distributed to the Class (or proxies for the Class).

74. The Defendants consider that the distribution of the Settlement Sum is principally a matter for the Tribunal and the CR. The Defendants nevertheless agree with the principles of the distribution model proposed by the CR, and the choices that are open to the Tribunal in respect of it. Without prejudice to that position, the Defendants note that:

a. Should the Tribunal be minded to order that any residual funds ***are*** to be paid to charity, the Defendants propose **Good Things Foundation**[90] as the recipient. Good Things Foundation is the UK's leading digital inclusion charity, and focuses on addressing barriers to digital and financial inclusion by assisting disadvantaged

sum of £2,396,611 being sought in respect of the costs paid by the CR's previous funder, which Innsworth states it has agreed to repay to the previous funder under a contract but that contract and its details have not been provided to the CR at the time of this CSAO Application; and (iii) a sum of £151,585.20 has been incurred by the CR but Innsworth is refusing to pay and the sum remains the subject of a discussions between the CR and Innsworth. The figure will be subject to a further update when the Tribunal issues the CSAO as it is not currently possible to estimate the exact figure, for example depending on when the CSAO is issued the CR may have to incur further, currently unaccounted for, costs in relation to the Acquirer Pass-on Issue.

[90] https://www.goodthingsfoundation.org/; registered charity no. 1165209.

people across the UK with connectivity, access and skills. Good Things Foundation has confirmed to the Defendants that it is content to be proposed as recipients of any residual funds, and that any funds received could be distributed across the UK and significantly contribute to their ongoing work.

b. In a scenario where residual funds are paid to Good Things Foundation (or, should the Tribunal so order, the Access to Justice Foundation), the Defendants do not consider that it would be necessary for the £45 payment to each Represented Person (which is already 10 times the pro-rata amount if every class member were to come forward for the entire Settlement Sum) to be able to increase to up to £70 in the event of there being residual Pot 1 (or Pot 3) funds. In those circumstances, a payment to charity would be sufficient to protect the public interest and the interests of the non-participating Represented Persons, while avoiding an excessive sum to individual class members of more than £45 given the ultimate merits of the claim.

c. Should the Tribunal ***not*** wish to provide any role for residual funds to be paid to charity or the Access to Justice Foundation, the Defendants would be neutral as to the treatment of any residual Pot 1 funds as between Represented Persons and the funder in the event of class uptake of less than 5%. The Defendants recognise that this could result in individual payments in excess of £45 (for example, up to £70), but also recognises the preference that has previously been expressed by members of the Tribunal and the policy objective for the Funder Return not to form the majority of the Settlement Sum.

d. In relation to Pot 2, the Defendants re-emphasise that the £45,567,946.28 sum does not represent a payment of "costs, fees and disbursements" (as that term is used, for example, in Rule 94(9)(a) of the Rules) as a separate component of the Settlement Sum, given costs orders have typically already been made on an issue-by-issue basis in the Collective Proceedings to date and have resulted in a net costs payment being outstanding to the Defendants (which they have agreed to waive as part of the settlement). Any payment from Pot 2 would therefore represent the first £45,567,946.28 of any Funder Return out of undistributed damages (i.e. principal) rather than the recovery of *inter partes* costs to that effect. In any event, the Defendants note that the £45,567,946.28 sum is said to include all "Project Costs"

as defined in the LFA, including: adverse costs awards made against the CR in the Collective Proceedings, and costs incurred by the CR which have not yet been assessed by the Tribunal.

75. For the benefit of the Settlement Tribunal in its consideration of these matters, Section 2 of the joint statement of Compass Lexecon and Frontier at **Annex 4** sets out various scenarios as to potential per person distribution amounts depending on: (i) the level of class uptake; (ii) whether a £45 or £70 cap is adopted; and (iii) potential usage of "Pot 3" at class uptake rates of greater than 5%. It also indicates in those different scenarios any residual that may be available to Innsworth and/or charity, depending on the determination of the Settlement Tribunal. The outcome of the survey by Portland, as referred to at paragraph 53 above, will also assist with the Settlement Tribunal's consideration of these matters once available.

(1) The draft CSAO: Rule 94(4)(e) (and Rule 94(10))

76. The draft CSAO is annexed to this CSAO Application at **Annex 2A.**

(2) Form and manner by which the CR proposes to give notice to represented persons: Rule 94(4)(f)(i), Rule 94(11) and Rule 94(13)

(a) Notice of the Settlement Hearing: Rule 94(4)(f)(i)

77. The CR will publish a notice of the hearing listed for 6 and 7 February 2025 (with 10 February 2025 in reserve) on the claim website in the form filed with the Tribunal on 14 January 2025 (the "**Settlement Hearing Notice**") or in any amended form as required and approved by the Settlement Tribunal. Informing members of the Class about the settlement approval hearing in this way reflects what the CR did to publicise his application for the CPO in 2016, in accordance with the order the Tribunal made on 21 November 2016.

78. An email update summarising the Settlement Hearing Notice will also be sent to those who have registered their interest on the claim website. The Collective Proceedings have been on foot for over eight years and during that time the proceedings have garnered

significant coverage in the mainstream press, both print and online. Further, the CR undertook significant noticing during the opt-in / opt-out period in December 2022 to March 2023 which further increased the public profile of the case. Given this public profile and the efforts made to notify Represented Persons of the claim, the Applicants are confident that those Represented Persons who wished to take an active part in the Collective Proceedings will have signed up to the claim website and will also have the benefit of the Notice of the Application.

(b) Notice of option to opt-in and opt-out of the Collective Settlement: Rules 94(11)

79. The draft CSAO provides for a period of three months in which any Represented Person that:

a. is domiciled in the UK on the domicile date[91], as determined by the Tribunal, may opt out of the Collective Settlement by giving the CR notice in writing; and

b. is not domiciled in the UK on the domicile date, as determined by the Tribunal, may opt into the Collective Settlement by giving the CR notice in writing.

(together, the "**Opt-in / Opt-out Period**").

80. To ensure that Represented Persons understand the consequences of opting out of the Collective Settlement, the draft CSAO notice (the "**CSAO Notice**") makes clear that Represented Persons that choose to opt out of the Collective Settlement will not be able to recover any sum of money from the Defendants under the Collective Settlement nor will they have the option to commence an individual claim against the Defendants as the time limit for doing so has expired.

[91] The domicile date in the CSAO is the domicile date stated in the CPO. The Applicants note that in case 1304/7/7/19 *Justin Gutmann v First MTR South Western Trains Limited and Another,* the Tribunal adopted a different domicile date in the collective settlement approval order to that in the collective proceedings order, which was referred to as the "settlement domicile date". The Applicants respectfully consider that not to be the correct approach in these Collective Proceedings.

(c) Draft CSAO Notice: Rule 94(13)

81. The draft CSAO Notice is appended to the draft CSAO that is at **Annex 2B**. If the Tribunal grants the CSAO Application, the CR shall, in accordance with Rule 94(13), give notice of the terms of the settlement and its approval, in the form and manner approved by the Tribunal, to the Represented Persons for a period of three months (the "**CSAO Notice Period**"). The CR proposes that any online media noticing be limited to the start and end of the CSAO Notice Period rather than being conducted throughout the entirety of the CSAO Notice Period to ensure costs remain proportionate, whilst encouraging Represented Persons to claim at the start and again reminding them to claim before the period ends.

82. During the CSAO Notice Period, the CSAO Notice will be published on the claim website in the form approved by the Tribunal, and an email update will be sent to all those who have registered their interest on the claim website.

83. The CR proposes to undertake further measures to give notice of the CSAO to Represented Persons for the purposes of distribution as set out in Epiq's NAP, exhibited to Merricks 4 [**WHM4/10**]. These further notice measures will comprise:

    a. a public relations campaign, which will be led by public relations litigation specialist James Baxter Media Limited, which has been involved throughout the Collective Proceedings as public relations advisor to the CR;

    b. paid newspaper advertisements, which will run once in 14 of the UK's top newspaper titles on the day of the week with the widest circulation for each title. There will be an estimated total circulation of 6.65 million people;

    c. online internet banner advertisements, which will be purchased and displayed for two months on the Google Display Network and *The Daily Mail*;

    d. paid internet banner advertising, which will run for two months on Facebook, Instagram and X (formerly Twitter), as well as a dedicated Facebook page, which will also be set up with links to the CSAO Notice and claim website; and

e. sponsored search listings or paid listings featured on a search engine results page, which will run for the entire CSAO Notice Period to drive online searches to the claim website.

84. The Applicants propose that the CSAO Notice Period, the Opt-in / Opt-out Period and the period during which Represented Persons can make a claim for damages under the Collective Settlement run simultaneously (together the "**Notice and Damages Claim Period**"). Such an approach will ensure that Represented Persons who receive a notice and want to opt-in to the claim and / or make a claim can do so immediately. Such an approach will help to streamline and reduce the burden on non-UK domiciled Represented Persons by ensuring that those persons able to opt in and claim damages under the collective settlement at the same time, rather than opting into the collective settlement at one point in time and then having to make a claim for damages at a later point in time.

85. Once the Notice and Damages Claim Period is closed, Epiq will complete all necessary fraud checks, determine the actual take-up there has been, and calculate the payment to each participating Represented Person based on what the Tribunal approves as being the appropriate approach. At this point, distribution to third parties, including Innsworth, will be made.

F. CONCLUSION

86. For all the reasons above, and the supporting evidence and materials, the Applicants respectfully invite the Tribunal to grant the application and make the CSAO.

For the CR:

Signature: [redacted]

Name: Boris Bronfentrinker

Position: Partner

Date: 16 January 2025

For the Defendants:

Signature: [redacted]

Name: Mark Sansom

Position: Partner

Date: 16 January 2025

ANNEX 1 – APPLICANTS' COSTS

Order / Agreed	Issue	Payment to CR	Payment to Defendants	Outstanding costs to CR	Outstanding costs to Defendants
TRIBUNAL					
Costs Ruling[92]	CPO	£416,495	£190,000	£88,757.62	£20,000
Costs Ruling[93]	First Limitation Trial		£82,590.36	-	-
	Applicable Law and Exemptibility	£369,440.13	-	-	-
Costs Ruling[94]	Solo	-	£75,000	-	*£112,269.94*[95]
Costs Ruling[96]	Causation Trial	-	£5,370,000	-	£950,000
Costs Ruling	Further Limitation Trial	-	£1,360,000	-	£240,000
Reasoned Order[97]	UPO	-	-	*£95,304.72*	-
Ruling[98]	Expert Shopping	-	-	-	*£250,000*
APPEALS					
Agreed in correspondence	Appeal on the CPO	£521,000	-	-	-
Agreed in correspondence	Appeal to the UKSC on CPO	£520,000	-	-	-

[92] [2022] CAT 27. Costs were awarded in favour of each of the Applicants. The CR was granted his costs related to the period from service of the Defendants' response to the CPO on 30 November 2016 to 23 November 2017, to the period 18 August 2021 and 23 March 2022 during which principally the issue of the domicile date was in dispute, and the costs of preparing the costs submissions. The Defendants were awarded their costs for the period December 2020 to March 2021 where the principle issues in dispute were the Compound Interest Issue and the amendment to include deceased persons within the class.

[93] [2023] CAT 53.

[94] [2023] CAT 53.

[95] *Ibid*. The CR initially included a claim in respect of Solo cards. The claim was dropped following disclosure and the Defendants sought costs in the sum of £267,528.48. The Tribunal concluded that it cannot summarily assess those costs as they relate to an issue on which the Tribunal has not heard any argument but ordered an interim payment of £75,000. Assuming recovery at 70% and taking account of the payment on account, the outstanding liability is £112,269.94.

[96] [2024] CAT 57.

[97] [2024] CAT 44: "*The Mastercard Defendants pay 50% of the assessed costs (unless agreed) of Mr Merricks*." Assuming recovery of UPO costs and costs of preparing the application are both recoverable at 70% x 50% x £272,299.20 = *£95,304.72*.

[98] [2024] CAT 74: "*… that there should be an order for indemnity costs after the service of Mr Cotter's second witness statement*." The Defendants have not filed a costs schedule but given the indemnity costs order against the CR, the Defendants' current estimate of their incurred costs, following an initial review of their solicitors' narratives, is £250,000.

Order / Agreed	Issue	Payment to CR	Payment to Defendants	Outstanding costs to CR	Outstanding costs to Defendants
Costs Order[99]	Appeal on domicile date	£100,000	-	*£52,757.77*[100]	-
Costs Order[101]	Appeal on Applicable Law Issue and Exemptibility Issue	£144,396.72[102]	-	*£24,066.12*[103]	-
Subtotal		£2,071,331.85	£6,887,590.36	£260,886.23	£1,572,269.94

[99] Court of Appeal Order dated 29 November 2022: "[Defendants] *shall pay the* [CR's] *costs of and caused by the Appeal, to be subject to detailed assessment if not agreed...* [the Defendants] *shall make a payment on account of £100,000 ….*".

[100] The CR claimed costs of £218,211.10 including VAT, at 70% that is £152,747.77. However, account needs to be taken of the £100,000 interim payment. Accordingly, the outstanding sum is around *£52,747.77*, i.e. (£218,211.10*0.7) *minus* £100,000.

[101] Court of Appeal Order dated 29 October 2024.

[102] Ibid: "*The Court considers that … there should be a payment on account by Mastercard to* [CR] *of £144,396.72 including VAT.*"

[103] Ibid: "*Mastercard shall pay* 75% of [CR's] *costs of and occasioned by Mastercard's appeals on the Applicable Law Issue and the Exemptibility Issue to be subject to detailed assessment if not agreed*". Assuming a 70% recovery rate from that 75%, the CR would be entitled to a further £24,066.12 (0.7*0.75*(267,401.34+VAT)-£144,396.72).