Neutral citation [2017] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Victoria House
Bloomsbury Place
London WC1A 2EB

21 July 2017

Before:

THE HON. MR JUSTICE ROTH
(President)
PROFESSOR COLIN MAYER CBE
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Applicant/
Proposed Class Representative

- and -

(1) MASTERCARD INCORPORATED
(2) MASTERCARD INTERNATIONAL INCORPORATED
(3) MASTERCARD EUROPE S.P.R.L.

Respondents/
Proposed Defendants

Heard at Victoria House on 18 to 20 January 2017

JUDGMENT
(APPLICATION FOR A COLLECTIVE PROCEEDINGS ORDER)

APPEARANCES

Mr Paul Harris QC, Mr Nicholas Bacon QC and Ms Victoria Wakefield (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Mr Mark Hoskins QC, Mr Ben Williams QC, Mr Matthew Cook and Mr Tony Singla (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Respondents/Proposed Defendants.

Note: Excisions in this Judgment (marked "[…][✂]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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A. INTRODUCTION

1. This is an application for a collective proceedings order ("CPO") under sect 47B of the Competition Act 1998, as amended, (the "CA") to enable the continuation of collective proceedings on an opt-out basis claiming damages for breach of what is now Art 101 of the Treaty on the Functioning of the European Union ("TFEU"). The proceedings are brought on behalf of a class of some 46.2 million people. The class is defined in the application as follows: [1]

> "Individuals 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."

2. As appears from this definition, the period during which alleged loss was suffered ("the claims period") is said to be some 16 years (although there is an alternative, slightly shorter period ending on 19 December 2007)[2]. On that basis, the Applicant seeks an aggregate award of damages for the class, broadly estimated in the claim form at around £14 billion, including a substantial element of interest calculated on a compound basis. Although it emerged during the hearing of the application that this figure was almost certainly an over-estimate, whatever may be the correct computation it is clear that these proceedings seek recovery of a very substantial sum.

3. The claims which form the subject of the application are expressly brought on a follow-on basis, following the decision of the EU Commission of 19 December 2007 in *MasterCard* ("the EC Decision"). The Respondents to the application and proposed defendants to the proceedings are the three addressees of the EC Decision. It is unnecessary to distinguish between them, and we shall refer to them collectively as "Mastercard". The appeal against the EC Decision was dismissed by the General Court on 24 May 2012: Case T-111/08 *MasterCard and others v Commission* EU:T:2012:260; and a further appeal was dismissed by the Court of Justice on 11 September 2014: Case C-382/12P, EU:C:2014:2201. Further explanation of the

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[1] Save that persons falling within the class definition who are not domiciled in the United Kingdom on a date to be specified in the CPO, would need to opt in to the proceedings for their claims to be included: sect 47B(11) CA, set out at para 16 below.

[2] 19 December 2007 is the end date of the period of infringement found in the EC Decision: para 3 above; 21 June 2008 is the date on which it is said that Mastercard changed the EEA MIF as a result of the EC Decision.

EC Decision is given below, but in summary it was found that the setting of the intra-EEA fallback multilateral interchange fee (the "EEA MIF") was a decision of an association of undertakings in breach of Art 101 TFEU. The EC Decision found that in the absence of that violation, the interchange fees charged between banks for cross-border transactions and certain domestic transactions would have been lower.

4. The present case alleges damages that are largely the result of Mastercard's setting of the multilateral interchange fee ("MIF") which applied as a fallback as between banks in the UK (the "UK MIF"). The UK MIF was not at issue in the EC Decision which concerned only the EEA MIF, but in the present proceedings it is alleged that the UK MIF was directly influenced by the EEA MIF. Further, to the limited extent of cross-border transactions involving UK merchants (to which the UK MIF did not apply), the alleged damages are said to result directly from the EEA MIF. There have been a large number of non-collective actions for damages against Mastercard brought by merchants in both the High Court and this Tribunal: e.g. the claim by Sainsbury's which resulted in an award of damages by the Tribunal on 14 July 2016: *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2016] CAT 11 ("*Sainsbury's"*); and the claims by ASDA, Morrisons and several other major retail chains which led to a judgment in the High Court in favour of Mastercard on 30 January 2017: *ASDA Stores Ltd and others v MasterCard Inc* [2017] EWHC 93 (Comm) (*"Morrisons"*). None of the other actions are close to trial. The *Sainsbury's* and *Morrisons* claims are stand-alone claims alleging that the UK MIF breaches Art 101 TFEU and/or the Chapter I prohibition under sect 2 CA. The present proceedings are different since it is here alleged that the level of the UK MIF was itself the consequence of the EEA MIF and that the loss said to result from the UK MIF was therefore caused by the infringement established by the EC Decision.

5. The application is strongly resisted by Mastercard on various grounds, including distinct grounds relating to the arrangement entered into by the Applicant (and proposed class representative), Mr Merricks, to fund the proceedings. One objection concerned limitation but this related to only part of the claims period, i.e. the period prior to 20 June 1997. By consent, that issue was adjourned, to be determined subsequently if the CPO is granted. On that basis, the application for the CPO was heard over 2½ days, in which the Applicant was represented by Mr Paul Harris QC,

Mr Nicholas Bacon QC and Ms Victoria Wakefield; and Mastercard was represented by Mr Mark Hoskins QC, Mr Ben Williams QC, Mr Matthew Cook and Mr Tony Singla. Together with the collective proceedings claim form and application, the Applicant served a joint experts' report (the "Experts' Report") from Dr Cento Veljanovski, an economist from Case Associates, and Mr David Dearman, an accountant from Mazars LLP. The two experts gave evidence at the hearing, when they responded to questions from the Tribunal and were cross-examined to a limited extent by Mr Hoskins. Witness statements were served by Mr Merricks and by the managing director of Gerchen Keller Capital LLC, the group owning the third party funder (which, by the time of the hearing, had been acquired by Burford Capital) but neither was cross-examined. We are grateful to all Counsel and to both experts for the assistance given to the Tribunal and the efficient way in which the hearing was conducted.

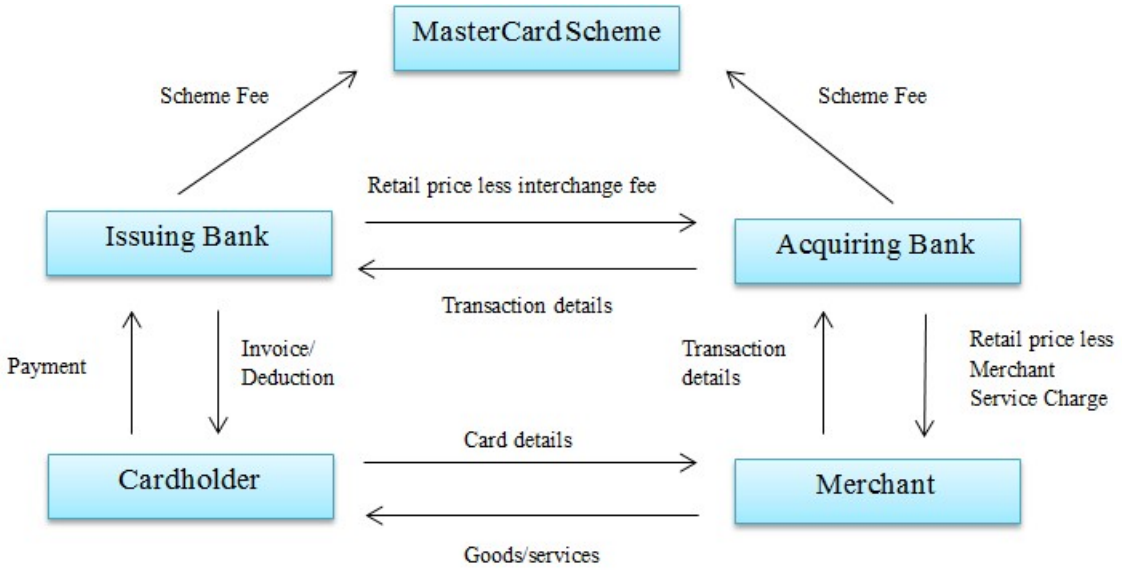
6. By order of 21 November 2016, the three members of the Tribunal hearing the application, and all experts instructed by either side for these proceedings, were excluded from the proposed class, so as to avoid the appearance of any conflict of interest.

B. THE MIF AND THE EC DECISION

7. For the purpose of the present application, it is sufficient to provide a summary explanation of the Mastercard scheme and the MIF. A more detailed account is set out in the *Sainsbury's* judgment at [6]-[10] and [42]-[69], and in the *Morrisons* judgment at [4]-[17].

8. Mastercard operates what is commonly known as a four party payment card scheme, since payments made under the scheme generally involve four parties: (1) a cardholder; (2) the cardholder's bank (known as the "Issuing Bank"); (3) a merchant; and (4) the merchant's bank (known as the "Acquiring Bank"). Issuing and Acquiring Banks are licensed by Mastercard. They must pay fees to Mastercard to participate in the scheme and comply with the Mastercard Scheme Rules.

9. The scheme operates on a contractual basis as between all four parties, and in addition Mastercard as the scheme operator, which may be represented diagrammatically as follows:



10. In order to pay for goods or services using Mastercard, the cardholder presents his or her card to the merchant. Details of the transaction are passed by the merchant to its Acquiring Bank, and then by the Acquiring Bank to the cardholder's Issuing Bank. In the case of credit cards, the Issuing Bank sends an invoice to the cardholder, typically on a monthly basis, and the cardholder either pays the whole of that invoice or takes advantage of further credit under the terms of his or her arrangement with the Issuing Bank. In the case of debit cards, the Issuing Bank deducts the amount chargeable to the cardholder for the transaction from the balance in the cardholder's account. In the meantime, the Issuing Bank transmits payment to the Acquiring Bank, less a transaction fee known as the interchange fee ("IF"). The Acquiring Bank in turn generally deducts the amount of the IF, along with a fee for its acquiring services, from the payment it makes to the merchant. The total deduction made by the Acquiring Bank from the amount paid to the merchant is called the merchant service charge ("MSC"). However, the IF accounts for the vast majority of the MSC.

11. The Issuing Bank and the Acquiring Bank may have bilaterally agreed the level of IF that will apply to transactions between them, or in some cases they may be the same bank. But except for those situations, the level of the fee defaults to one set by Mastercard. This default fee is known as the multilateral interchange fee: the MIF.

12. Different MIFs apply for different territories and card types. As to the territorial aspect, it is important for present purposes to note that:

(i) where a card issued in one EEA Member State is used at a merchant based in a different EEA Member State, a cross-border MIF applies. This is the EEA MIF referred to above which was the subject of the EC Decision;

(ii) where a card issued in the UK is used to pay a merchant based in the UK, the domestic UK MIF applies. We were told that around 95% of the value of the present claim is based on the UK MIF; and

(iii) outside of the EEA, where a card is used at a merchant based in a different global region from the Issuing Bank, for example if a US tourist uses a card issued by a US bank to make purchases in London, a different cross-border MIF applies.

13. As already mentioned, the EC Decision held that the setting of the EEA MIF by Mastercard constituted a decision of an association of undertakings. The EEA MIF was found, in effect, to set a minimum price which merchants had to pay to their Acquiring Bank for accepting Mastercard branded consumer credit and charge cards and Mastercard or Maestro branded debit cards. On that basis it had the effect of inflating the base on which Acquiring Banks set their MSC charged to merchants, thereby restricting competition between Acquiring Banks to the detriment of merchants (and subsequent purchasers). It was held that in the absence of the EEA MIF, the MSC set by Acquiring Banks would be lower both for cross-border transactions and for domestic transactions in those Member States where no separate domestic MIF had been agreed or where local banks had specifically agreed to adopt the EEA MIF. Further, some banks viewed the EEA MIF as a benchmark for setting domestic IFs. The EEA MIF was not objectively necessary, since a payment system such as Mastercard's could operate without a MIF. The EC Decision stated, at recital para 411:

> "A further consequence of this restriction of price competition is that customers making purchases at merchants who accept payment cards are likely to have to bear some part of the cost of MasterCard's MIF irrespective of the form of payment the customers use. This is because depending on the competitive situation merchants may increase the price for all goods sold by a small margin rather than internalising the cost imposed on them by a MIF."

14. The infringement was found to last from 22 May 1992 until the date of the EC Decision (i.e., 19 December 2007), and Mastercard was directed to bring it to an end within six months.

15. Since the appeals before the European Courts against the EC Decision have been dismissed, that decision is binding on the Tribunal: sect 58A CA.

C. THE COLLECTIVE PROCEEDINGS REGIME

16. The Consumer Rights Act 2015 ("CRA") made substantial amendments to the CA as regards private actions in competition law. The new sect 47A CA entitles a person to make a claim in the Tribunal for loss or damage in respect of an infringement of, inter alia, Art 101 TFEU determined by a decision of the EU Commission, or an alleged infringement of Art 101 TFEU. The new sect 47B is entitled "Collective proceedings before the Tribunal" and includes the following provisions:

> "(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies ("collective proceedings").
>
> (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings…
>
> (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.
>
> (5) The Tribunal may make a collective proceedings order only—
>
> (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
>
> (b) in respect of claims which are eligible for inclusion in collective proceedings.
>
> (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.
>
> …
>
> (8) The Tribunal may authorise a person to act as the representative in collective proceedings—
>
> (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but
>
> (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.
>
> …

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

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

(b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."

17. Further, sect 47C(2) provides:

> "The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

18. The claims which are combined in collective proceedings must each be claims "to which section 47A applies". The statutory regime for collective proceedings therefore constitutes a new procedure not a new form of claim.

19. Moreover, the grant of permission to pursue such claims by way of collective proceedings is expressed in discretionary terms in sect 47B(5) and requires two distinct aspects to be satisfied: (a) the Tribunal must authorise the person bringing the proceedings to act as the class representative; and (b) the Tribunal must certify the claims as eligible for inclusion in such proceedings. This is reflected in rule 77(1) of the Competition Appeal Tribunal Rules 2015 (the "CAT Rules").[3] The two requirements are addressed in separate rules: rule 78 (authorisation of the class representative); and rule 79 (certification of the claims). The CAT Rules are supplemented by the Tribunal's *Guide to Proceedings 2015* (the *"Guide"*), which has the status of a practice direction pursuant to rule 115(3).

20. The CAT Rules refer to the same, similar or related issues of fact or law as "common issues" and to an award of damages under sect 47C(2) CA as an "aggregate award of damages": rule 73(2). Rule 92 addresses questions concerning assessment. It provides, insofar as material:

[3] All references hereafter in this judgment to a rule are to the CAT Rules, unless otherwise stated.

"(1) Where the Tribunal makes an aggregate award of damages, it shall give directions for assessment of the amount that may be claimed by individual represented persons out of that award.

(2) Directions given may include—

(a) a method or formula by which such amounts are to be quantified …"

21. Although the CAT Rules, reflecting sect 47B(5) CA, address the authorisation of the class representative first, in the present case the primary objection advanced by Mastercard was to the certification of the claims, with a secondary objection to the authorisation of the class representative based on the funding arrangements. Accordingly, we will follow that order in considering the two statutory conditions and their application.

D. CERTIFICATION OF THE CLAIMS

Requirements

22. Certification in turn involves two aspects: (i) that the claims raise 'common issues'; and (ii) that the claims are suitable for collective proceedings: sect 47B(6) CA. That is reflected in rule 79(1):

"(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—

(a) are brought on behalf of an identifiable class of persons;

(b) raise common issues; and

(c) are suitable to be brought in collective proceedings."

23. The suitability condition is addressed in rule 79(2), which states (omitting immaterial considerations):

"(2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—

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

(b) the costs and the benefits of continuing the collective proceedings;

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

(d) the size and the nature of the class;

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

(f) whether the claims are suitable for an aggregate award of damages; …"

24. Pursuant to rule 79(3), further considerations apply where, as here, the application is to pursue the proceedings as opt-out collective proceedings:

"(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—

(a) the strength of the claims; and

(b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

The present claims

25. Before examining the application of these conditions, it is important to explain the basis on which the Applicant has defined the class. The MIF and IF are charged as between the Issuing and Acquiring Banks. Assuming, as the Applicant contends, that a higher EEA MIF caused a higher UK MIF, the consequence of the infringement of competition law was therefore a higher charge to the Acquiring Banks. However, it is not in issue that the IF, and thus any increase in that fee, was fully passed on by the Acquiring Banks by way of the MSC charged to merchants. That was accepted by Mastercard in the *Sainsbury's* and *Morrisons* cases, and similarly not challenged on the present application. What is very much in issue is the degree to which (if at all) merchants passed through this increase in the MSC in their retail prices charged to customers. In the period covered by the present proceedings, only a small number of merchants charged a differential price for transactions paid for by credit card as opposed to cash, cheque or debit card. Subject to that qualification, which Dr Veljanovski considered would not have a significant effect on the overall quantum claimed,[4] any pass-through would accordingly be on the price of the merchant's

[4] He accepted that if the quantum was to be calculated by sector (see below), it might be necessary to make an adjustment in that regard in the travel sector, where differential pricing was proportionately more frequent, especially in the later years of the claims period.

goods or services which could be purchased by credit card, or indeed, since payment by credit card was seldom restricted to certain products, spread across the prices of all the merchant's products. Therefore, insofar as there was pass-through by a merchant, the loss would be suffered not only by customers who paid by credit or debit card but by all its customers.

26. That is the basis for defining the class to encompass all those who purchased goods or services from merchants that accepted Mastercard cards, irrespective of whether the purchasers actually had or used a Mastercard card. But the claim is concerned only with those who purchased as individuals and not in the course of a business. This avoids the difficulty that the purchaser might in turn have been able to pass through the loss in the price which it charged to its own customers. The class is therefore intended to comprise only final consumers.

27. The class definition also excludes those under 16, on the basis that they are much less likely to have been spending their own money given the UK working age; and those who were not resident in the UK for at least three months, on the basis that purely temporary visitors were likely to have suffered much less material loss. The definition also excludes those no longer alive, a matter which was criticised on behalf of Mastercard but which is not central to the issues on this application: if necessary, consideration could be given to how the interests of the estates of those no longer alive might be accommodated. All these exclusions were put forward on the basis of seeking to create a clearly defined class, with parameters that could be easily understood, and so as to facilitate, in a proportionate manner, the assessment and administration of damages.

28. Next it is necessary to explain how the Applicant is seeking to quantify the damages. As explained in the Experts' Report, this is approached in three steps:

(i) the volume of commerce affected;

(ii) the overcharge percentages; and

(iii) pass-through.

(i) The Volume of Commerce

29. First, it is proposed to calculate the total value of payments made by consumers using, respectively, Mastercard credit cards and Mastercard debit cards to businesses selling in the UK each year during the claims period. This is referred to in the Experts' Report as the "volume of commerce" or "VoC". Because of the differences in the overcharge percentages, as we explain at step 2, it is necessary to calculate the VoC separately for domestic purchases and cross-border purchases.

30. In part, that data is publicly available, and the Experts consider that further data should be available by disclosure from Mastercard. However, it is accepted that, at least from the publicly available figures, it has not been possible to exclude the value of transactions made by UK cardholders while abroad: to that extent, the VoC is overstated.[5] At the same time, the VoC does not include purchases made in the UK with foreign issued Mastercards: to that extent, it is understated. In both of these situations, the relevant cross-border MIF would apply. Mr Dearman explained that it should be possible to correct the VoC accordingly after disclosure. Apart from those aspects, the figures used in the claim form are also an overstatement because they include payments on business cards as well as on cards held by private individuals. Mr Dearman suggested that the inclusion of business cards did not significantly affect the figures, because they represented a very small proportion of cards in issue. We were referred to the EC Decision, fn 801, where Mastercard is recorded as stating that commercial cards "do not represent a significant part" of its business. The percentage by value which Mastercard gave is redacted, but Mr Cook (appearing for Mastercard) indicated that another published source suggests it is about 5%.[6] Accordingly, if these proceedings were to continue, the figures for the VoC would clearly require adjustment on the basis of further data.

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[5] The claim form states that transactions made in other EU Member States are included but it was accepted at the hearing that the overstatement covers transactions entered into anywhere abroad.

[6] However, the source on which Mr Dearman relied, while stating that business cards represented only 3% of all MasterCards in issue in the UK in 2004 (as indicated by Mr Dearman in his evidence), reported that purchases on such cards represented 9.4% by value of all transactions made on such cards: Office of Fair Trading decision on MasterCard UK Members Forum Ltd (Case CP/0090/00/S) of 6 September 2005, fn 60.

(ii) Overcharge percentages

31. As regards the majority of the damages, the overcharge borne by the merchants (on the basis as explained above of complete pass-through by Acquiring Banks) is alleged to be the difference between the Mastercard UK MIF and the IF that would have been charged as between Issuing and Acquiring banks had there been no infringement, i.e. either no MIF at all or a lower level of MIF which qualified for exemption under Art 101(3) TFEU. The IF that would have been charged in the situation of non-infringement is referred to as the "Counterfactual IF".

32. However, the class is defined in terms of purchases from "businesses selling in the UK" and the quantification of damages is approached on that basis. The damages therefore cover also loss on sales by businesses based overseas to consumers in the UK, e.g. by telephone, mail order or online.[7] We will refer to these sales as cross-border transactions. In the case of cross-border transactions, the merchants' Acquiring Banks will be outside the UK and the claim form proceeds on the assumption that they will be elsewhere in the EEA. The overcharge to those foreign merchants from their foreign banks will accordingly be a direct reflection of the EEA MIF. Since the average domestic MIF was different from the average EEA MIF (albeit that it is fundamental to the claim that the level of the former was directly affected by the latter), the damage for cross-border transactions has to be calculated separately from the damage for intra-UK transactions.

33. Although we have referred to the UK MIF and the EEA MIF respectively in the singular, there were different MIFs set for credit cards and for debit cards. Accordingly, there will similarly be different Counterfactual IFs for credit cards and for debit cards. The Applicant fully recognises this and has approached quantification on that basis.

34. There are various possible ways in which the Counterfactual IFs can be arrived at, and this would no doubt be a significant issue in these proceedings were they to continue. The *Sainsbury's* judgment (where the claim was not brought as a follow-on case and concerned only the UK MIF) adopted one particular method for calculation of the

[7] It is not sought to include any loss which may have been suffered abroad by class members, e.g. on purchases made while on a foreign holiday.

Counterfactual IF, and the CAT in *Sainsbury's* was somewhat critical of the approach used in the EC Decision. Following the EC Decision and while it was under appeal, Mastercard gave undertakings to the European Commission to set the maximum weighted average EEA MIF for credit cards at 0.3% and for debit cards at 0.2% (the "Mastercard Undertakings"). The matter was finally resolved at EU level by legislation through Regulation No. 2015/751, OJ 2015 L123/1, which followed the approach of the Mastercard Undertakings. The Mastercard Undertakings of course are not in themselves Counterfactual MIFs, but they reflect another method by which a counterfactual could be arrived at. The main alternative approaches are summarised in the Experts' Report, which expresses the view that a case can also be made for no or "at par" Counterfactual IFs, noting that there is theoretical and empirical evidence for a number of schemes that do not levy an IF. The possibility of a "zero MIF" was also considered in the *Morrisons* judgment.

35. Further, the Experts' Report notes that there were in fact a number of different EEA MIFs and UK MIFs and that these changed over the 16 years of the claims period. The Counterfactual IFs would therefore also be likely to vary over time. The approach favoured by the two experts is to take an average MIF and an average Counterfactual IF in order to calculate the overcharge percentage rate, albeit that this rate will still vary over time. This was the approach accepted and applied by the Tribunal in *Sainsbury's*: see at [423]-[431].

36. However, we note that the Experts' Report further states as follows:

> "… if the available data suggests that the Overcharge was materially different across different market sectors, because we understand that there were 225 different IFs during the Full Infringement Period [i.e. 1992-2008], then it may be appropriate to calculate a weighted average MIF and Counterfactual IF (weighted by reference to the VoC and Overcharge applicable to each sector) when determining the aggregate Overcharge."

37. In the claim form, the particulars of damages are given on an indicative basis and in the alternative, applying (a) a Counterfactual IF of zero for both categories of card, and (b) Counterfactual IFs of 0.3% and 0.2% for credit and debit cards respectively, reflecting the Mastercard Undertakings. These alternatives are applied on a constant basis for the full claims period. That indicative and simplified basis (since it ignores changes over time and does not reflect the further caveat quoted at para 36 above) produces the following overcharge percentage rates:

Credit Cards	***Domestic***	***Cross-border***
Est. average MIF	1.3%	1.1%
Counterfactual IF (a)	0.0%	0.0%
Counterfactual IF (b)	0.3%	0.3%
Overcharge %ge	1.3% or 1%	1.1% or 0.8%

Debit Cards	***Domestic***	***Cross-border***
Est. average MIF	0.7%	0.6%
Counterfactual IF (a)	0.0%	0.0%
Counterfactual IF (b)	0.2%	0.2%
Overcharge %ge	0.7% or 0.5%	0.6% or 0.4%

38. On that basis, the alleged total increase in the IF paid by Acquiring Banks to Issuing Banks can be estimated as the VoC multiplied by the overcharge percentage, calculated separately for credit cards and debit cards, and also for domestic and for cross-border transactions.

(iii) Pass-through

39. The first level of pass-through is from Acquiring Banks to merchants. However, as we have already observed, it is accepted that complete pass-through would have occurred in the MSC. It is assessment of the next level of pass-through, from merchants to individual customers through increased retail prices, which is challenging and which was the focus of much scrutiny and argument on this application. It is therefore necessary to describe in some detail the approach adopted by the Applicant. In the Experts' Report, this pass-through is referred to as the "MSC Pass-On".

40. The Experts' Report addresses this issue as follows:

> "6.2.1 In our opinion, in the absence of evidence to the contrary, it is appropriate to assume a single, but not necessarily constant over time, weighted average MSC Pass-On rate across the United Kingdom economy…. The averaging of the MSC Pass-On rate takes account of any data limitations and the computational complexity of determining MSC Pass-On across the United Kingdom economy for over one and a half decades.

6.2.2 For the reasons set out … below, the MSC Pass-On is likely to be high (50%-100%) and could have been fully passed-on."

41. The experts emphasised that this was a preliminary report and that more investigation and research would be required. They said that would include published market studies and various competition authority decisions, such as the detailed reports on the groceries and motor fuel sectors; and the evidence and analysis filed by different businesses from many different sectors that are bringing damages claims against Mastercard, including the *Morrisons* claim (in which the judgment of the High Court came after the hearing of this application: para 4 above). The Experts' Report continues:

"6.2.3… (b)…Assuming the MSC Pass-On rate is consistent across Businesses operating in the same sector, which we consider is a reasonable economic assumption at this preliminary stage, then, based on the evidence from those claims, it may be possible to estimate the MSC Pass-On across key sectors such as food and drink, clothing, household goods, motoring, entertainment, travel and other retailers. This covers approximately 70% of all payments processed with a card in the United Kingdom[8] …;

6.2.4 If MSC Pass-On rates are ultimately found to be significantly different for different sectors of the United Kingdom economy, then we may be able to calculate a weighted average MSC Pass-On rate (weighted by reference to the VOC and pass-on rate associated with each sector during each year of the Infringement Period). This approach will depend on the availability of evidence and whether that evidence relates to the same period as the Full Infringement Period.

6.2.5 We note that, whether we are quantifying the loss suffered by the proposed class as defined, or sub-groups of the proposed class, or even an individual consumer, the approach we will adopt would be the same. In other words, MSC Pass-On is a common issue amongst the proposed class."

42. In response to questions from the Tribunal, Dr Veljanovski explained that the rate of pass-through will be determined by such factors as the market structure, conditions of supply and demand, and type of pricing regime adopted. He accepted that within the broad sectors referred to at para 6.2.3, there was a wide variety of businesses which may have quite different rates of pass-through. For example, "Motoring" covered fuel, new vehicle sales, car rental, and garage repair. In "Food & drink", the rate of pass-through by major supermarket chains may be significantly different from the rate of local greengrocers, butchers, etc. Further, Dr Veljanovski accepted that some of

[8] During the hearing, Mr Dearman corrected this percentage to 81%.

the parameters he outlined as affecting the rate of pass-through may also vary geographically across the UK.

43. In his evidence, Dr Veljanovski explained how he would expect to approach this problem:

> "Obviously within each category there will be different types of businesses, and we will have to make a decision about how that is going to be handled, if we get the data that underlies it…"

Accepting that there will be many markets from which no retailer has brought a claim against Mastercard, he said:

> "We will have to rely on third party studies, Competition Commission reports, information that is available about market structure and demand and supply conditions in those markets and come to some judgment, but there is going to be a high degree of aggregation in dealing with this matter because the cost of looking at all these sectors at a very detailed level is going to be certainly more than the budget that we have been given to do this."

44. There is appended to the Experts' Report a schedule showing a breakdown of card expenditure by sector for each year between 1998-2008, obtained from the UK Payments Council. This breakdown is by 11 broad sectors,[9] although two of those sectors are "Other retailers" and "Other services", each of which accounts for some 11% of the total. It is obvious, and was of course readily accepted by Dr Veljanovski, that insofar as the rate of pass-through may vary for different markets, it will be necessary to calculate the proportion of total expenditure attributable to those respective markets, to produce the weightings for calculation of a weighted average rate of pass-through. In response to an inquiry by the Tribunal as to whether a more detailed breakdown of card expenditure by markets was available, Mr Dearman replied that it was for the final four years, 2005-2008, but the experts had not established whether any greater granularity was available for earlier years. He acknowledged that they might have to extrapolate backwards, albeit that the patterns of credit and debit card usage over the 16 year claims period have significantly changed. There was no evidence as to the nature of the further breakdown for the final years to which Mr Dearman referred. And Dr Veljanovski observed:

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[9] Food & drink, Mixed business, Clothing, Household, "Other retailers", Motoring, Entertainment, Hotels, Travel, Financial and "Other services". However, for the years 1998-2001, Financial was included in Other services.

> "… we will have to form our own judgment as to whether there are markets within these categories that need to be treated separately, but I cannot say at the moment – and some of these categories are obviously so broad as to be fairly meaningless like "Other services"…. I think one would – in some of these circumstances – have to make some broad-brush estimates of what the pass-on rate is likely to be."

(iv) Distribution

45. Once the total loss of the class has been determined, and therefore the aggregate damages to be awarded, the only subsequent issue would be how the total amount is distributed as between all the class members (save for those who opted out of the collective proceedings).[10] For the Applicant, it was submitted that this is not a matter which arises for the purpose of an application for a CPO and so did not require detailed scrutiny at this stage. Mr Harris pointed out that distribution is dealt with in rules 92-93, which apply only once the Tribunal makes an aggregate award of damages. It is then for the Tribunal to give directions for assessment of the amount that may be claimed by individual represented persons. In that regard, reference was also made to paras 6.82-6.83 of the *Guide.* Further, in rule 78(3)(c), dealing with the litigation plan which the proposed class representative should prepare, there is no requirement to set out the proposed arrangements for distribution.

46. However, Mr Harris very properly accepted that if it appeared at the outset that there is no methodology which can produce a fair distribution of an aggregate award of damages and therefore proper compensation, then that is a matter which the Tribunal can take into account in deciding whether to grant a CPO. He said that on the Applicant's side "considerable thought" had been devoted to the question of distribution. At the present stage, the method proposed was annualised distribution to all class members for the years that they are in the class: i.e., the aggregate loss would be calculated on an annual basis for each of the 16 years in the claims period, and be divided on an equal, per capita basis among all the members of the class for that year (effectively, all who were resident in the UK and over the age of 16 in that year).

47. When pressed on this matter by the Tribunal, Mr Harris responded that various methods of distribution had been considered. It was clearly inappropriate to expect individuals to produce receipts to show their actual spending on all products for each

[10] To reflect this qualification, in sects 47B-47C CA and the Tribunal Rules the class members who participate in the collective proceedings are referred to as "represented persons".

year. Theoretically, it might be possible to seek information about income brackets, or levels of disposable income, so as to use those as a proxy for relative levels of consumer spend. It might be possible to weight distribution by region, on the basis of statistics showing different regional levels of consumer spending. And another possibility would be to weight distribution by age brackets on the hypothesis that different age brackets have different average levels of disposable income which would be reflected in their relative level of spending. However, Mr Harris made clear that the Applicant did not regard any of these alternatives as attractive or indeed appropriate. The Applicant was concerned that take-up of the award by members of the class should be as high as possible, and all the experience with class actions in the United States showed that the more detailed and complicated the information required to prove eligibility to a share in the award, the lower the participation from members of the class, particularly when the individual share may be relatively small. Asking for details of earnings or disposable income would therefore be a significant deterrent, as well as presenting significant problems of verification. Weighting distribution by age or region was inevitably a crude measure and therefore both unfair to many individuals and likely to cause significant offence. While Mr Harris said that "other nuanced approaches" remain "under consideration", those were the approaches which he set out in response to the Tribunal's specific questioning, and the annualised per capita distribution was the only one put forward as appropriate and practicable.

Mastercard's response

48. Mastercard raised many objections to the contention that such claims could be subject to collective proceedings. Their fundamental challenge to certification of the claims was summarised in their written response as follows:

> "First, the Collective Proceedings Claim Form (the "Claim Form") seeks an award of aggregate damages and accepts that any other form of award would be "impracticable". However, an award of aggregate damages in this case would be inimical to the compensatory nature of damages and impossible to assess on any reliable basis.
>
> Second, the proposed distribution mechanism to individual members of the class would also be inimical to the compensatory nature of damages as the amounts received by individuals would bear no reasonable relationship to their actual loss."

49. In his oral submissions, Mr Hoskins stressed that damages were intended to be compensatory not punitive. He submitted that the Applicant has approached the

computation of damage the wrong way round. Conceptually, it was necessary to start by considering the individual losses of the claimants and how that might sensibly be aggregated. However, the Applicant was seeking to establish first the total overcharge paid by everyone in the country in aggregate, to produce a pot of money which it would then proceed to share out in a way that bore no relation to individual loss. Mr Hoskins' submissions concentrated on the differences in (i) pass-through rates of different merchants, (ii) purchasing history of different individuals, and (iii) benefits received by individual cardholders.

50. Even on the 'top-down' approach adopted by the Applicant and its experts, there was no practicable means of arriving at a realistic estimate of the total overcharge borne by consumers because of the issue of pass-through. Although the two experts had in their oral evidence moved away from the bold assertions in their Experts' Report that it was appropriate to assume "a single, but not necessarily constant over time, weighted average MSC Pass-On rate" across the UK economy (para 6.2.1), or even a rate that was consistent across businesses in the same broad sector (para 6.2.3(b))[11], their method ignored the wide variety of pass-through within these broad sectors. He pointed out that the Applicant's pleadings note that there were about half a million retailers accepting payment by Mastercard at the start of the claims period (i.e., 1992), rising to some 800,000 by the end (i.e. 2008). Moreover, it was necessary to address the rate of pass-through over time: given the length of the period, the rates were likely to have varied significantly in that time. They may well also have varied as between regions.

51. Mr Hoskins contended that it was very doubtful that the data were available to enable the basic analysis that was required, even by way of estimation. We were referred to the Report by RBB Economics on "Cost pass-through: theory, measurement, and potential policy implications" (2014) prepared for the Office of Fair Trading and cited in the Experts' Report. This detailed and thorough study discussed the various factors which determine the extent of pass-through. As stated in the Foreword, among the Report's principal findings are:

[11] See at paras 40-41 above.

"…that the extent of cost pass-through by a business depends on the responsiveness of the demand and supply conditions it faces; and that cost pass-through varies with the degree of competition between businesses up and down the supply chain."

Discussing the availability of evidence for particular sectors, the Report found that:

- "Empirical work on cost pass-through issues in industrial organisation settings is relatively new, and analysis that attempts to quantify pass-through rates in this context is scarce. Most notably, we have identified few studies that shed light on the relationship between cost pass-through and market structure and competition. Moreover, the pass-through measures reported in the empirical literature, notably pass-through elasticities, are often difficult to interpret and compare.

- Nevertheless, there is a small body of empirical work that has considered pass-through at the firm level, both in response to industry-wide and firm-specific cost changes.

    - The evidence suggests that there may be significant differences between firms in the extent of cost pass-through, even in response to industry-wide cost changes. In other words, firm-level asymmetries appear significant…"

52. In summary, Mr Hoskins submitted that the experts had not made any proper examination of what data and material was available to produce appropriate and meaningful figures.

53. Secondly, even if sufficient data could be collected or estimates made to arrive at a weighted average pass-through rate for each year (for credit cards and for debit cards), and thus a calculation of the total overcharge paid by all members of the class, there were vast differences in the loss suffered by individual class members – effectively all adult consumers in the UK over the relevant period – because there would be very wide variations in their purchasing history. That would be the case not only as between different members of the class, but also for the same member over time: the nature of the expenditure by an individual who was 18 in 1992 was likely to be very different from his or her spend as a 33 year old in 2007. Given the variety in pass-through rates as between different markets, the issue was not simply that different consumers had greatly different levels of expenditure, but that the composition of that expenditure varied hugely. That problem arose even at the level of the 11 sectors in the Appendix to the Experts' Report (which sectors were themselves much too broad). The Applicant had no proposal to reflect, even in a basic way, the make-up of an individual's expenditure in the amount of damages he or she would receive. The Applicant himself recognised that any alternative methods which sought to take account of these factors would be either impracticable or involve the requirement of

so much information that it would be a significant deterrent to participation by class members.

54. Thirdly, Mastercard argued that on the compensatory principle the computation of damages should take account of the benefits received by class members who were Mastercard holders as a result of the higher MIFs. In that regard, it was pointed out that in the *Morrisons* trial, the two sides' experts agreed that at least a significant proportion of the MIF is passed through by the Issuing Banks to cardholders. Such benefits can take the form, for example, of lower rates of interest, loyalty reward schemes or 'cashback'. Indeed, Mastercard's Response asserted:

> "… once the value of such cardholders' benefits is taken into account, it is likely to result in a finding that some class members will not have suffered any net loss."

The nature and scale of such benefits varied significantly as between different Issuing Banks and so, it was submitted, their value would vary greatly as between class members.

55. Mastercard submitted that these problems were substantial and overwhelming. They could not be solved by the definition of sub-classes, whose damages would be calculated separately, and the Applicant did not suggest that approach. Accordingly, there was here an insufficient commonality in the claims and they were not suitable for a CPO.

56. In addition, it was argued for Mastercard that the basis of the claim for compound interest as a form of damage was dependent on the individual circumstances of the class member and therefore impossible to determine as a common issue on a class-wide basis. However, Mr Hoskins recognised that this aspect could be dealt with by declining to include that particular head of damage in the collective proceedings. That would leave any class member free to pursue a claim to compound interest (as an excess over simple interest) to be determined subsequently: see rules 74(6) and 88(2)(c).

Analysis

57. An application for a CPO is not a mini-trial and the Applicant does not have to establish his case in anything like the same way that he would at trial. However, the

Applicant has to do more than simply show that he has an arguable case on the pleadings, as if, for example, he was facing an application to strike out. Collective proceedings on an opt-out basis can bring great benefits, if successful, for the class members which those individuals (or small businesses) otherwise could never achieve; but like almost all substantial competition damages claims they can be very burdensome and expensive for defendants. The eligibility conditions set out in sect 47B(6) CA, and adumbrated in the CAT Rules, require the Tribunal to scrutinise an application for a CPO with particular care, to ensure that only appropriate cases go forward.

58. In that regard, an important aspect arising on the present application is the approach which the Tribunal should take to the expert evidence. As in the present case, the application will frequently be supported by an expert's report explaining the way in which it is considered that the common issues identified in the claim form can suitably be determined on a collective basis. In *Pro-Sys Consultants Ltd v Microsoft Corp.* [2013] SCC 57 ("*Microsoft*"), the Supreme Court of Canada prescribed the test to be applied as follows, in the judgment delivered by Rothstein J (at para 118):

> "…the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."

59. By 2013, the Canadian courts had considerable experience with class actions, and the regimes governing certification of such proceedings in the Canadian provinces are closer to the new UK regime than are the rules in the United States. We consider that this passage from *Microsoft* sets out the appropriate approach to apply in this Tribunal, and when it was put to them neither side sought to argue the contrary on the present application. See also *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, at [104]-[105] (decided after the hearing of the present application).

60. In order to determine to what extent the claims raise common issues, as required by sect 47B(6) CA, it is necessary to consider what are the issues which would arise on a

claim against Mastercard by a member of the class. An individual claimant would have to establish:

(1) that the level of the EEA MIFs had an effect on the level of the UK MIFs (for both Mastercard credit and debit cards);

(2) the amount by which those MIFs were higher than the counterfactual IFs that would have applied in the absence of an infringement;

(3) the level of pass-through of these MIF overcharges in the MSC charged by Acquiring Banks to the merchants where the claimant bought goods and services;

(4) for each merchant at which the claimant purchased goods and services, the degree to which that merchant passed through those overcharges and the percentage impact on its prices;

(5) the amount that the claimant spent at each of those merchants;

(6) if the claimant held a Mastercard credit card, what if any interest payments were made and what if any benefits were received under that particular card.

61. The matter raised at (6) above would arise by reason of the way Mastercard put its defence: see para 54 above. And the claimant would need effectively to address each of these issues for each year in the claim period for which he or she was over 16 and resident in the UK.

62. Of those six issues, only (1) is truly a common issue to all claims. But although (2) would in practice have varied because of the large number of banks and varying IFs, it can sensibly be approximated by looking at a blend of the fees: see the *Sainsbury's* case at [423]-[431], where that approach was adopted and approved. On the basis that that approach is appropriate for an individual claim, it becomes a common issue. Issue (3) could theoretically vary as between Acquiring Banks, but it is accepted that it is likely to be 100%. Therefore it is not really an issue at all, but if it is it receives a common answer.

63. However, issue (4) – pass-through – and issue (5) – level of spend – are clearly very different. As regards pass-through, the experts in their oral evidence accepted that there is likely to be significant variation not only as between different kinds of goods and services but also different kinds of retail outlet. As the Tribunal stated in *Sainsbury's*, at [434]-[435]:

> "434. When faced with an unavoidable increase in cost, a firm can do one or more of four things:
>
> (1) It can make less profit (or incur a loss or, if loss making, a greater loss).
>
> (2) It can cut back on what it spends money on – reducing, for example, its marketing budget; or cutting back on advertising; or deciding not to make a capital investment (like a new factory or machine); or shedding staff.
>
> (3) It can reduce its costs by negotiating with its own suppliers and/or employees to persuade them to accept less in payment for the same services.
>
> (4) It can increase its own prices, and so pass the increased cost on to its purchasers.
>
> 435. The picture becomes even more complex when it is borne in mind that an enterprise is unlikely to react to an unavoidable increase in costs immediately. In the short term, a firm may well bear an unavoidable increase in costs by making less profit (or incurring a loss or a greater loss), but that is most unlikely to be the firm's response in the medium or long term. In the medium or long term, the firm will seek to maximise its profit in one of the ways enumerated in paragraph 434(2) to (4) above."

64. Moreover, as Dr Veljanovski accepted in response to Professor Mayer, the financial impact of pass-through on the merchant's customers will depend on the proportion of sales made by that merchant paid for by card compared to cash, since the smaller proportion of payments made by card, the lower the actual overcharge sustained by the merchant which it has to spread over the prices of all its goods or services.

65. We should add that the Applicant emphasised that in its defences in the various actions brought by retailers, Mastercard has contended that there was complete, or almost complete, pass-through of any loss. In response, Mastercard submitted that this misrepresented its stance in those cases and that in any event it has never argued that the same rate of pass-through should apply across all merchants. Whatever the true position, we cannot accept Mr Harris' argument that those other actions show that there was no real issue between the parties on pass-through. The fact that Mastercard may have adopted a contrary position in other cases may of course be used by the

Applicant forensically, but does not preclude Mastercard from contending in the present proceedings that pass-through was minimal or limited. Moreover, in the *Sainsbury's* case, which is the only case so far where the issue of pass-through has been determined at trial, the Tribunal rejected Mastercard's argument that any increase in costs was passed on in the prices charged to consumers: see paras 4 above and 70 below.

66. Therefore pass-through cannot be described as a common issue in any meaningful sense; and the level of individual spend is manifestly not a common issue. We therefore reject the assertion in the Applicant's pleaded Reply (at para 57) that "the individual claims *are* largely identical". Save in purely theoretical terms at a high level of generality, that is far from the case.

67. However, that in itself does not mean that this case is unsuitable for a CPO. There is no requirement that all the significant issues in the claims should be common issues, or indeed – and by contrast with the position under the Federal Rules of Civil Procedure in the United States – that the common issues should predominate over the individual issues. What is required, in the words of sect 47(6) CA, is that the claims are nonetheless "suitable to be brought in collective proceedings". Here, the Applicant seeks to address the problem of pass-through by submitting that the Tribunal can arrive at an aggregate award of damages, which would then be distributed to the class members. We accept that in theory this may be a permissible approach. But before adopting this approach, it is necessary to consider whether in practice the Applicant has put forward (1) a sustainable methodology which can be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages, and (2) a reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution.

(1) Aggregate damages

68. The experts took the approach that the difficulties concerning pass-through could be overcome by estimating the higher price paid by consumers as a result of the overcharge on a global basis. Hence the proposal to apply to the VoC for each of credit and debit cards a percentage produced by multiplying the overcharge percentage (see paras 31 to 38 above) by a weighted average pass-through percentage.

The weighted average would reflect the different levels of pass-through in different sectors or markets, and the proportion which card expenditure in those respective sectors or markets bore to the total.

69. The experts expressed the view that it should be possible to carry out the necessary analysis to arrive at an estimated weighted average, on the basis of (a) information from the many claims brought against Mastercard by retailers from a wide variety of sectors; (b) disclosure from third parties; and (c) publicly available data. We comment on these methods in turn.

(a) Other actions against Mastercard

70. The *Sainsbury's* case covered a very different period: 19 December 2006-9 December 2015: see the judgment at [17(4)]. We also note that the Tribunal there found that Mastercard had failed to discharge the legal burden of establishing pass-through so as to reduce Sainsbury's damages, and stated, at [465]:

> "Because the way in which the costs constituting the UK MIF were dealt with is unknowable, it is our conclusion that it is impossible to say what proportion of this cost was (i) passed on in the form of higher prices; or (ii) paid out of cost-savings; or (iii) paid for by reducing expenditure and so service levels."

71. The various claims now covered by the *Morrisons* judgment came to trial on selected preliminary issues, which did not include the question of pass-through, and the expert evidence accordingly did not address pass-through: see the judgment at [115] and [422]. Since Popplewell J held that there was no breach of competition law, the issue of pass-through will not now be explored in those cases (save in the event of a further trial following a successful appeal). In any event, those actions relate to periods commencing only in May or October 2006 (as regards the UK MIFs), so there is minimal overlap with the claims period in the present proceedings.

72. Although the Experts' Report appends a list of a significant number of pending claims by retailers and suppliers of services in a range of sectors (and yet more claims have been filed since the hearing of this application), those actions are mostly at a very initial stage. There is no realistic expectation that they might progress to the point of producing evidence on pass-through until any potential appeals against the *Sainsbury's* and *Morrisons* judgments are resolved, and even then they may well

settle. Moreover, the majority of those claims also appear to cover mostly later periods.

73. As Dr Veljanovski himself put it in his evidence, the present claims cover "a long period where circumstances changed quite considerably." It would be impossible to extrapolate back from any findings or expert analyses of pass-through in around 2006 to derive meaningful figures for much of the claims period in the present action. Somewhat surprisingly in view of their suggestion that these other claims may be a fruitful source of relevant data, the experts had not made an attempt to ascertain the periods covered by any of those claims (apart from *Sainsbury's*).

(b) Disclosure from third parties

74. It would of course be theoretically possible to make requests for disclosure of evidence from third parties in various different sectors of the economy to gather data from which to try to calculate their various rates of pass-through. But in view of the number of markets to be considered, the long period involved, and the wide range of data required to arrive at a meaningful estimate, this would be a very burdensome and hugely expensive exercise. Given the commercial sensitivities involved, many such requests are likely to be resisted, and even if the applications were granted the Applicant would have to pay the various third parties' costs of compliance. We note that the costs budget filed with the application, although considerable, does not make any provision for this. In our view, such extensive third party disclosure is wholly impractical as a way forward.

(c) Published data

75. The experts emphasised that there is a lot of published data and studies on the passing on of input costs, and on credit and debit card usage. However, that is precisely the material surveyed in the RBB Report quoted above (see para 51), which found it incomplete and difficult to interpret. We have no doubt that some sectors have been the subject of detailed study, but there is nothing before us to contradict the overall finding of the RBB Report. We note that no real attempt appears to have been made to consider what data are available for each of the broad sectors over the relevant period.

76. Overall, we recognise that the methodology put forward by the experts in their oral evidence, in response to the Tribunal's questioning, is considerably more sophisticated and nuanced than that set out, rather briefly, in their Experts' Report. We have to say that it is unfortunate that the written report did not set out and explain their approach in this way. Indeed, the statement in their Report that at this preliminary stage the experts' starting position was that "it is likely that there was full pass-on of the MIF (including the Overcharge) to members of the proposed class" is unsustainable and was not adhered to in their oral evidence.

77. We accept that in theory calculation of global loss through a weighted average pass-through, as explained in the evidence and as summarised above, is methodologically sound. But making every allowance for the need to estimate, extrapolate and adopt reasonable assumptions, to apply that method across virtually the entire UK retail sector over a period of 16 years is a hugely complex exercise requiring access to a wide range of data. We certainly would not expect that analysis to be carried out for the purpose of a CPO application, but a proper effort would have had to be made to determine whether it is practicable by ascertaining what data is reasonably available. Given the massive size of the claim, a difference of even 10% in the average pass-through rate makes a very substantial difference in financial terms.

78. Accordingly, applying the *Microsoft* test (para 58 above), we are unpersuaded on the material before us that there is sufficient data available for this methodology to be applied on a sufficiently sound basis. It follows that we are not satisfied, and indeed very much doubt, that the claims are suitable for an aggregate award of damages: see rule 79(2)(f).

(2) Distribution

79. If the total loss could be calculated in the aggregate manner discussed above, it is nonetheless necessary to consider how that would translate into determination of the level of individual loss. That is particularly important since, as we have pointed out, the proposed methodology does not really go to determination of a common issue to the individual claims, but in a sense circumvents the problem of an issue which is not common by seeking to go directly to determination of a total sum for all claims. Such

an approach can only be permissible, in our view, if there is then a reasonable and practicable means of getting back to the calculation of individual compensation.

80. There remains the major individual issue as regards the degree and mix of expenditure with different merchants over time. We of course recognise that no one can be expected to keep records or receipts covering their expenditure at that level of detail. On an individual claim, this would necessarily be approached on the basis of an assessment of disposable income, and then broad estimation of how that income was spent as between various products and services, and between various kinds of merchants. Although very far from precise, such an exercise would nonetheless broadly reflect the individual circumstances. It would reveal the wide differences between individuals, having regard to such matters as whether for each year the individual was a student, employed or unemployed; living with their parents, in public housing, in rented accommodation or as an owner-occupier paying a mortgage; having a family and if so, how many children; owning a car; etc. We accordingly reject the assertion in the Applicant's List of Common Issues, that "the point would not be determined any differently were claims to be brought on an individual basis…."

81. Mr Harris referred to oft-cited judicial pronouncements that the courts should approach difficult problems of damages using "sound imagination" and "a broad axe." These expressions derive from the judgment of Lord Shaw of Dunfermline in *Watson, Laidlaw, & Co Ltd v Pott, Cassels & Williamson* [1914] SC (HL) 18 at 29-30. It is pertinent to set out what Lord Shaw said:

> "In the case of damages in general, there is one principle which does underlie the assessment. It is what may be called that of restoration. The idea is to restore the person who has sustained injury and loss to the condition in which he would have been had he not so sustained it. In the cases of financial loss, injury to trade, and the like, caused either by breach of contract or by tort, the loss is capable of correct appreciation in stated figures. In a second class of cases, restoration being in point of fact difficult – as in the case of loss of reputation – or impossible – as in the case of loss of life, faculty, or limb – the task of restoration under the name of compensation calls into play inference, conjecture, and the like. And this is necessarily accompanied by those deficiencies which attach to the conversion into money of certain elements which are very real, which go to make up the happiness and usefulness of life, but which were never so converted or measured. The restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe….

> In all these cases, however, the attempt which justice makes is to get back to the *status quo ante* in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed."

82. Lord Shaw accordingly used those expressions with reference to the court having to assess damages for non-pecuniary loss. Subsequently, they have been applied also to the assessment of financial damage when the task of quantification is difficult. Notably, in *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390, in follow-on competition law claims for damages resulting from the vitamins cartel, which was the subject of an EU Commission decision, the issue arose whether the claimants were entitled to a restitutionary award. The claimants were both direct and indirect purchasers from the cartelists, and they emphasised the great practical difficulties in quantifying the loss they had suffered. Hence, the skeleton argument for Devenish, quoted in the judgment of Arden LJ at [108], stated:

> "Given the passage of time and difficulties of proof which Devenish faces in relation to the sales and purchases which it made, it is faced with the real prospect that it may not be able to prove its losses in the face of an attack by the defendants to the effect that it must have passed on its losses to its customers, or failed, as a matter of law, to prove that it has mitigated its losses by passing them on."

The claimants argued that the difficulties of proof were such that the court should allow damages to be based on the profits earned by the defendant cartelists.

83. This contention was rejected, both by Lewison J at first instance and by the Court of Appeal. The difficulties relied on were practical and evidential. Lewison J, after quoting from Lord Shaw's judgment in *Watson, Laidlaw*, stressed that the governing approach was restoration, and that the courts take a pragmatic approach to the degree of certainty with which damages must be pleaded and proved: *Ratcliffe v Evans* [1892] 2 QB 524. And on appeal, Arden LJ, referring to Lord Shaw's formulation, stated, at [110]:

> "… the fact that damages will be very difficult to prove is not in my judgment enough to justify a gains-based remedy."

84. The problem in the present case is that there is no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated according to the Applicant's proposed method. The 'broad axe' which the Applicant seeks to deploy is not being used as a means to estimate actual compensatory loss at all.

85. The pleaded Reply served on behalf of the Applicant states that he worked with his experts, among others, in considering many different options of how to undertake distribution of the aggregate damages being sought before coming with the option presented: see at para 47 above. In fact, it emerged at the hearing that the two experts had not been asked to consider this at all. It is obviously unfortunate that the matter was put that way, and Mr Harris duly apologised for the misleading impression created. When the two experts were asked about this method by the Tribunal, they readily agreed that the proposed method (per capita distribution on an annualised basis) bore no relationship to the individual loss.

86. Professor Mayer asked the experts whether household expenditure data could be used to show the distribution of individual expenditure and how it changed over time; so that then one could assess whether the majority of the class on average incurred a loss which is at least 50% of the damages they would receive on the annualised per capita distribution being proposed. In response, the experts said that they had not considered this: it was not being proposed on behalf of the Applicant and they thought that it would be extremely difficult. Since no analysis, or even argument, was presented on that basis, it is impossible for us to assess whether even this very basic test would be satisfied by the proposed distribution. That is aside from the question whether this test would be appropriate for determination of compensatory damages as a matter of law.

87. This cannot be dismissed as a "mere" question of distribution, to be addressed only after an aggregate award has been determined. First, it is largely because of the methodology of seeking to calculate the loss on a top-down, aggregate basis, and not on the basis of a common issue concerning loss suffered by each member (or most members) of the class, that the fundamental problem arises. As a result, if, hypothetically, a million people opted out of the proceedings, there would be no proper way of reducing the quantum of damages accordingly (and, conversely, of increasing it if a large number of people now domiciled outside the UK sought to opt in): it would simply lead to everyone in the class getting more (or less) money out of the total pot.

88. Secondly, even if it were possible to determine with some broad degree of accuracy the weighted average for pass-through and thus to estimate the aggregate loss for the

class each year, it is the significance of the individual issues remaining which mean that it is impossible in this case to see how the payments to individuals could be determined on any reasonable basis. As we have explained above, there are three sets of issues which are relevant: individuals' levels of expenditure; the merchants from whom they purchased; and the mix of products which they purchased. There is no attempt to approximate for any of those in the way damages would be paid out. The governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in but for the breach. The restoration will often be imprecise and may have to be based on broad estimates. But this application for over 46 million claims to be pursued by collective proceedings would not result in damages being paid to those claimants in accordance with that governing principle at all.

89. Accordingly, in our judgment, these claims are not suitable to be brought in collective proceedings as required by sect 47B(6) CA. It follows that the Tribunal cannot make a CPO in this case: sect 47B(5)(b) CA.

90. We reach that view without addressing the alleged need to give credit for benefits received, and also the further issue raised by Mastercard concerning the exclusion from the class of the estates of those who met the class definition over the claim period but have since died. In the light of our conclusion, it is unnecessary to consider those additional issues, which the Applicant contested.

91. We should add that Mr Harris argued eloquently that since it would be totally impractical for members in the class to bring claims on an individual basis, if the Tribunal declined to grant a CPO a vast number of individuals who suffered loss would get no compensation. However, that is effectively the position in most cases of widespread consumer loss resulting from competition law infringements. It does not mean that an application to bring collective proceedings in such a case must always be granted. Every case has to be considered on its own terms, having regard to the statutory requirements.

E. AUTHORISATION OF THE CLASS REPRESENTATIVE

92. In the light of our conclusion regarding the certification of the claims, it is strictly unnecessary to address the second condition for a CPO. But it was fully argued, and we think we should deal with it.

93. Mastercard submitted as a separate and independent ground of objection that the Applicant should not be authorised as a class representative. The Applicant, Mr Walter Merricks CBE, is a qualified solicitor who has had a long and distinguished career in fields concerned with consumer protection. From 1996-1999, he was the Insurance Ombudsman, and between 1999 and 2009 he was the chief ombudsman of the Financial Ombudsman Service, which operates under the statutory framework of the Financial Services and Markets Act 2000. The Applicant has served on a number of public inquiries examining issues related to legal procedure and he is currently a commissioner on the Gambling Commission and a trustee and non-executive director of the legal charity, JUSTICE.

94. The Applicant is a member of the class covered by the proposed CPO but there is no suggestion in that respect that he has any conflict of interest with other class members. By his background, experience and qualifications, it is clear that the Applicant is well able to give appropriate instructions to the lawyers instructed on behalf of the class and is eminently suited to act as the class representative in these collective proceedings. Mastercard indeed did not suggest otherwise.

95. The opposition to authorisation of the Applicant related not to him personally but to the terms of the agreement (the "Funding Agreement" or "FA") which he had entered into with a third party funder, by which the collective proceedings and any liability in costs would be funded. It was argued by Mr Ben Williams QC for Mastercard and by Mr Nicholas Bacon QC for the Applicant in response.

96. The Funding Agreement dated 22 June 2016 (the "Agreement Date") is a closely printed document running to 10 pages, comprising seven clauses (called "sections") and numerous sub-clauses. It is governed by English law (sect 7.1), but the funder is incorporated in the United States and in its drafting the Funding Agreement resembles

a US-style contract. It is called a "Prepaid Forward Purchase Agreement". The Applicant is referred to as the "Seller" and the funder as the "Purchaser".

97. The objection was based on three grounds, which can be summarised as follows:

(i) the Funding Agreement would not enable the Applicant to continue to fund the litigation or pay Mastercard's recoverable costs, if he were ordered to do so, since it could be terminated by the funder;

(ii) even if it could not be so terminated, the limit of £10 million for funding a liability for Mastercard's recoverable costs was inadequate;

(iii) the terms of the Funding Agreement gave rise to a conflict of interest on the part of the Applicant.

Mastercard contends that these are very material considerations on the question of authorisation of the class representative. See in that regard rule 78(2)(d) and (3)(c)(iii).

98. To explain the arguments addressed on these point, it is necessary to refer to several of the detailed provisions of the Funding Agreement. To assist the reading of this judgment, fuller quotations from the material provisions are set out in an Appendix.

(1) Termination of the Funding Agreement

99. Sect 1 FA contains definitions. The "Total Investment Return" is defined to mean an amount of the proceeds of the action not distributed to claimants in the class ("Undistributed Proceeds") *and* any costs ordered to be paid by Mastercard to the Applicant, equal to:

> "the greater of (i) £135,000,000; or (ii) 30% of the Undistributed Proceeds up to £1 billion, plus 20% of the Undistributed Proceeds in excess of £1 billion"

plus any contractual interest on late payment by the Applicant of this principal amount.

Further, sect 1 FA states that:

> ""Transferred Undistributed Proceeds Rights" means, subject to an order of CAT that Seller will use best endeavours to obtain, the amount of Undistributed Proceeds payable to Purchaser in accordance with the terms and conditions of this Agreement."

Since this appears in a definition section of the Funding Agreement, it cannot in itself give rise to an obligation. The relevant obligations arise under subsequent provisions of this convoluted and verbose contract.[12]

100. Thus, sect 2.1 FA creates the obligation (defined as the "Commitment") of the funder to fund the proceedings up to a maximum amount of £35,642,250 (incl. VAT).[13] The clause then includes the following:

> "In consideration of the Commitment, Seller, subject to any order of CAT, … (b) agrees to use his best endeavours to ensure Purchaser obtains the full benefit of the Transferred Undistributed Proceeds Rights."

101. Further, sect 2.5(b)-(c) FA provides:

> "(b) In the event that the Litigation is successful or a collective settlement is approved pursuant to Rule 94 of the CAT Rules, Seller will use his best endeavours to obtain orders from CAT that (i) the Total Investment Return be paid to Purchaser; and (ii) MasterCard pay Seller's fees and costs in connection with the Litigation.
>
> (c) In the event of an order from CAT that the Total Investment Return be paid to Seller, subject to the terms of such an order, and receipt of the Total Investment Return, Seller will immediately arrange for payment of the same to Purchaser."

102. Sect 2.4(b) FA states, insofar as material:

> "If …(iv) CAT disapproves, or provides any negative commentary regarding, the transactions contemplated by this Agreement or the terms hereof, then, at any time thereafter and upon written notice to Seller, Purchaser may terminate Purchaser's obligations with respect to any unfunded portion of the Commitment, and permanently reduce the Commitment to the Purchase Price, although Purchaser will pay all Deployments owing as of the date of termination and will continue to cover Seller's liability for any costs related to defendant(s) or third parties in the Litigation, if any, incurred up to the date of termination."

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[12] Since the purpose of the Funding Agreement is to enable these proceedings to be brought for the benefit of a large class of consumers, who are entitled to see a copy (save for confidential sections), it is unfortunate that it is drafted in such an impenetrable manner.

[13] In the event that costs of administration of monies recovered in the action (i.e. distribution to the class) exceed £3.5 million, this sum is subject to corresponding increase: see the full clause in the Appendix hereto.

103. Mastercard submits that there is no basis under the statute on which the Tribunal could order that the "Total Investment Return" is paid to the funder as envisaged by sects 2.1 and 2.5(b) FA, or to the Applicant as envisaged by sect 2.5(c) FA. Since the Tribunal would therefore be making a negative comment or disapproving transactions contemplated by (and indeed fundamental to) the Funding Agreement within the terms of sect 2.4(b) FA, the funder will be entitled to terminate the Funding Agreement. That would leave the Applicant without funds to continue the litigation thereafter or pay Mastercard's further costs.

104. There is, in our view, an element of self-fulfilment by Mastercard in advancing this submission. Although sect 2.5(a) FA provides that the Applicant is to "seek approval" from the Tribunal of the Funding Agreement and all other related documents, including expressly a "Litigation Counsel Letter" between the Applicant and his solicitors relating to the payment of the Undistributed Proceeds to the funder, it is not a breach by the Applicant if he fails to obtain such approval. In the ordinary way, we would have had no reason to consider (and would not now have considered) or comment on the particular aspects of the Funding Agreement which Mastercard has drawn to our attention. The Tribunal's primary concern would be to ensure that the Funding Agreement provides sufficient funding to the Applicant to pursue the litigation and bear any liability in costs to Mastercard should the action fail. Indeed, the Tribunal has not been shown the Litigation Counsel Letter. However, since these clauses of the Funding Agreement have been drawn to our attention and both sides invite us to consider whether they are effective, it seems clear that the termination right under sect 2.4(b)(iv) FA is potentially engaged.

105. The foundation of Mastercard's argument is sect 47C(5)-(6) CA, which provides:

> "(5) Subject to subsection (6), where the Tribunal makes an award of damages in opt-out collective proceedings, any damages not claimed by the represented persons within a specified period must be paid to the charity for the time being prescribed by order made by the Lord Chancellor under section 194(8) of the Legal Services Act 2007.
>
> (6) In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

106. Reference was also made to rule 93(4)-(5):

> "(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.
>
> (5) In exercising its discretion under paragraph (4), the Tribunal may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session."

Rule 93(6) provides that subject to any order under rule 93(4), the Tribunal shall order that all or part of any undistributed damages is paid to the charity prescribed under sect 47C(5) CA.

107. Then rule 104(1) states, insofar as material:

> "For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England and Wales, the Court of Session or the Court of Judicature of Northern Ireland, as appropriate, …."

108. Mastercard advanced two arguments:

(a) the "Total Investment Return" under the Funding Agreement does not constitute "costs or expenses" within the meaning of sect 47C(6) CA;

(b) even if (a) is wrong, it is not a cost or expense "incurred" by the Applicant, in view of the terms of the Funding Agreement and in particular sects 2.1 and 2.5(b)-(c).

(a) <u>"costs or expenses"</u>

109. Mr Williams submitted that the term "costs or expenses" in sect 47C(6) CA cannot cover a liability to pay the charge of a third party funder in consideration of its funding of the litigation. He referred to authorities on the scope of what was encompassed in the court's power to award costs as between the parties (*inter partes* costs). However, we do not accept that this is the appropriate approach or even analogy. The power of the courts of England and Wales to award *inter partes* costs

has a statutory foundation, currently set out in sect 51 of the Senior Courts Act 1981 ("SCA").[14] Sect 51(1) provides:

> "Subject to the provisions of this or any other enactment and to rules of court, *the costs of and incidental to* all proceedings in –
>
> (a) the civil division of the Court of Appeal;
>
> (b) the High Court;
>
> (ba) the family court; and
>
> (c) the county court
>
> shall be in the discretion of the court." [emphasis added]

110. Many of the cases to which we were referred were accordingly concerned with what came within the expression we have highlighted. In *Motto v Trafigura Ltd* [2011] EWCA Civ 1150, the Court of Appeal held that the costs incurred by the solicitors and others in establishing and setting up after-the-event ("ATE") insurance cover were not recoverable. That was not because they could not be described as "costs": they obviously were such – see at [104]; but because, as Lord Neuberger MR summarised the position at [114], they were "not so much a cost of the litigation as a cost which was collateral to the litigation…." By contrast, in the admiralty case of *ENE 1 Kos Ltd v Petroleo Brasileiro SA* [2010] EWCA Civ 772, where the owners successfully resisted a claim by the charterers for wrongful withdrawal of the vessel, the costs which the owners had incurred in putting up a guarantee to avoid the vessel's arrest were held to be recoverable as costs in the action. As Sir Mark Waller (with whose judgment on this issue Longmore and Smith LJJ agreed) put it at [52]: "The question is whether such costs are 'incidental to the proceedings'." And he proceeded, at [55], to hold that they were: "The costs of putting up a guarantee are very little different from the costs incurred to protect the subject matter of an action which, on any natural reading of the words are costs 'incidental to the proceedings'."

[14] The right of the courts in Scotland to award what are there called expenses is not based on statute but is a common law right imported from the *jus civile.*

111. No doubt further illustrations could be given from decided cases falling on one side of the line or another. As the Court of Appeal stated in an earlier case (which was not cited to us), *Contractreal Ltd v Davies* [2001] EWCA Civ 928, at [41]:

> "… authorities show that the expression "of and incidental to" is a time-hallowed phrase in the context of costs and that it has received a limited meaning, and in particular that the words "incidental to" have been treated as denoting some subordinate costs to the costs of the action."

112. For the Applicant, Mr Bacon referred us to an arbitration case, *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm), where the payment due to a litigation funder under the terms of a litigation funding agreement was held to be recoverable as part of the costs of the arbitration. However, as Mr Williams pointed out, that conclusion was based on sects 59 and 63(3) of the Arbitration Act 1996, which allowed the arbitrator to award "costs of the arbitration" defined as "legal or other costs": judgment at [49] and [68].

113. The issue now before the Tribunal is governed neither by the SCA nor by the Arbitration Act 1996. The determining provision is sect 47C(6) CA where the expression used is: "costs or expenses incurred … *in connection with* the proceedings" [emphasis added]. In our view, on its ordinary meaning, "in connection with" is a wider expression than "of and incidental to". Moreover, the interpretation to be given to the statutory wording is dependent on its context. The context here is not *inter partes* costs but, on the contrary, costs for which the class representative needs reimbursement out of the unclaimed portion of the damages recovered precisely because they are *not* recoverable from the other party.

114. Accordingly, as Mr Williams very properly recognised, the cost of an ATE insurance premium can be paid out to the class representative under sect 47C(6) CA. But that is revealing, since in the civil courts such a cost became recoverable only because of express statutory provision: sect 29 of the Access to Justice Act 1999, subsequently repealed by sect 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which replaced it with a much more limited statutory provision for recovery of an ATE premium in an award of costs). Absent such express statutory provision, it would not otherwise be recoverable as costs "of and incidental to the proceedings",

and it is similarly not recoverable as expenses in Scotland: *McGraddie v McGraddie* [2015] UKSC 1.

115. Sect 47C CA introduced new and distinct provisions concerning the costs of collective proceedings. We see no reason to give the words used a special meaning or to treat them as terms of art governed by jurisprudence on very different statutory provisions. In the ordinary sense, if a third party agrees to provide substantial monies in order to fund litigation, the payment which has to be made to that third party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings.

116. As for the supposed difficulty of the lack of expertise of the Tribunal in deciding what is an appropriate price for litigation funding, on which Mr Williams sought to rely, that is no less novel a task than the process of approving a collective settlement under sects 49A or 49B CA. There is now a developing market in litigation funding, and the Tribunal can if necessary hear evidence as to what would represent an appropriate return. We note that this appears to be what Sir Philip Otton did as the arbitrator faced with such a question in the *Essar Oilfields* case: see at [22].

117. Mr Williams submitted that the CAT Rules cannot give the Tribunal a broader power than the governing statute. That is clearly correct, but our conclusion is entirely consistent with the CAT Rules. Rule 104(1) defines "costs" in terms of the costs and expenses recoverable in proceedings in the civil courts. As the further sub-paragraphs of rule 104 show, that is clearly referring to an adverse costs order (e.g. *inter partes* costs). This definition is expressly "for the purpose of these rules." Rule 93(4) addresses specifically the operation of sect 47C(6) CA. It provides that an order can be made for payment in respect of the class representative's "costs, fees or disbursements". Since the word "costs" in that expression accordingly has the meaning defined by rule 104(1), "fees or disbursements" clearly refer to additional matters. They are apt to cover, for example, an ATE premium or the fee of a commercial funder.

(b) "incurred" by the Applicant

118. For Mastercard, it was submitted that even if the amount due to the funder under sect 2.5(b) FA constitutes "costs or expenses" within the terms of sect 47C(6) CA, given the nature of the contractual obligations on the Applicant under sects 2.1 and 2.5 FA, it was not a cost "incurred" by the Applicant. The obligation under sect 2.1, which appears to be somewhat duplicated in sect 2.5(b), is only a "best endeavours" obligation and in any event does not impose any liability on the Applicant to pay the "Total Investment Return". As we understood it, the objection to the obligation under sect 2.5(c) was that it is entirely contingent: there is no obligation at all until the Tribunal has made an order for payment of these monies to the Applicant. As regards either form of obligation, it was therefore submitted that since this is not a cost incurred by the Applicant, there is no basis on which the Tribunal could order that it be paid to him, and the primary position of payment to the prescribed charity under sect 47C(5) CA would therefore apply.

119. For the Applicant, it was emphasised that payment of the fee charged by the funder was essential for the operation of the Funding Agreement. Clearly, no commercial funder would provide substantial funding and assume the significant financial risk of major litigation without consideration, and the structure of the collective proceedings regime for opt-out proceedings was to enable that consideration to be paid out of the unclaimed damages awarded to the class of claimants. The Applicant could not be expected to assume an independent personal liability to the funder for its fee. The statute should accordingly be given a purposive interpretation to encompass a funding structure such as the present. In that regard, we were referred to a range of extra-judicial material which recognised the importance of third party funding in enabling access to justice.

120. We accept that sect 47C(6) CA should be given a purposive construction to further the effective operation of the collective proceedings regime introduced by Parliament. However, such a purposive approach has limits and cannot do violence to the language of the statute. We do not see how the obligation in sect 2.1 and/or sect 2.5(b) FA can be viewed as an obligation on the Applicant to pay the fee of the funder and thus come within the ambit of sect 47C(6), even if broadly interpreted. The

obligation in sect 2.5(c) FA comes closer, but since it does not arise until after the Tribunal has made an order for payment, we still consider that it would not constitute an incurred liability for which the Tribunal has power to make an order.

121. Thus, in its present form, we consider that the Funding Agreement would not entitle or enable the Tribunal to order the payment of the "Total Investment Return" in the manner envisaged. It follows that the funder could terminate under sect 2.4 FA; and given that it faces the prospect of failing to recover the consideration for which substantial funds would be advanced, that must be, at the very least, a realistic possibility. As things stand, therefore, we would not authorise the Applicant to act as the class representative.

122. However, faced with this submission, Mr Bacon said that the Applicant was prepared to amend the Funding Agreement so as to provide for an obligation on him to pay the Total Investment Return, subject to recovering it out of the unclaimed damages pursuant to an order of the Tribunal. That would create a conditional liability, but nonetheless a direct liability. Although this offer was made only towards the end of the oral argument, it clearly would not be right to refuse to authorise the class representative if the obstacle to that authorisation could be readily overcome Accordingly, the Applicant was permitted to put in a short note after the conclusion of the hearing, setting out the terms of the proposed amendment, with permission for Mastercard to submit its observations in writing in response.

123. This was duly done, and the Applicant informed the Tribunal that he had agreed with the funder that sect 2.1 FA could be amended so as to read:

> "In consideration of the Commitment, Seller, agrees to pay the Purchaser the Total Investment Return, limited to such amount of the Total Investment Return as determined by the Tribunal to be payable to the Seller pursuant to Competition Act 1998, s.47C(6) and, subject to any order of CAT, (a) absolutely assigns, conveys, sells, sets over, transfers, and warrants to Purchaser the Transferred Costs Rights, free and clear of any Encumbrance; and (b) agrees to use his best endeavours to ensure Purchaser obtains the full benefit of the Transferred Undistributed Proceeds Rights."

Somewhat surprisingly, no corresponding amendment was proposed to sect 2.5(b) FA. Nonetheless, the additional wording inserted into sect 2.1 imposes an obligation

on the Applicant to pay the funder, conditional upon the Tribunal making an order to pay the Applicant the equivalent amount under sect 47C(6) CA.

124. In his written observations, Mr Williams argued that this does not solve the problem as it is circular: no costs are incurred by the Applicant unless an order is made by the Tribunal; therefore the Tribunal has no power to make an order since no costs have been incurred. He submitted that to encompass such a situation sect 47C(6) CA would need to contain wording analogous to those inserted by amendment in sect 51(2) SCA and the consequential rule of the Civil Procedure Rules ("CPR") to enable the recovery of costs covered by conditional fee agreements. CPR rule 44.1(3) thus provides:

> "Where advocacy or litigation services are provided to a client under a conditional fee agreement, costs are recoverable under Parts 44 to 47 notwithstanding that the client is liable to pay the legal representative's fees and expenses only to the extent that sums are recovered in respect of the proceedings, whether by way of costs or otherwise."

125. However, sect 47C(6) CA is not an *inter partes* costs rule and it is not dependent on a strict application of the indemnity principle as that applies to recovery of costs. As we have already observed, this is a specific rule designed for a new and discrete procedural regime. The question is whether the statutory reference to a cost or expense being "incurred" is broad enough to cover a conditional liability. In our judgment, it is. Given the purpose of the CRA and the new collective proceedings regime, that is the correct and appropriate construction. Indeed, we think it is similarly the basis on which this provision, in conjunction with rule 93(4), enables the recovery out of unclaimed damages of the success fee or 'uplift' element of legal costs "incurred" under a conditional fee agreement, which is not recoverable as costs in the High Court (and therefore does not fall within rule 104: see also rule 113). Put another way, if a funding agreement contained a clause stating:

(a) the class representative is obliged to pay the funder's fee of £x;

(b) the obligation under sub-clause (a) is reduced to the extent that the amount which the Tribunal orders should be paid to the class representative in respect of this obligation falls below £x"

then we consider the obligation to pay the funder's fee of £x would be a cost "incurred" within the meaning of sect 47C(6) CA. And on that basis, we do not see

that the different formulation used in the amendment here should produce a fundamentally different result: that would elevate form over substance.

126. We accordingly do not think that this is a case of statutory ambiguity so as to justify resort to Hansard under the principle of *Pepper v Hart*. However, in the course of argument both sides took us to different passages in the Parliamentary debates on what became the CRA. We did not find the passage relied on by Mr Williams advanced matters either way. But Mr Bacon referred us to the House of Lords debate on 3 November 2014, when the Parliamentary Under Secretary of State for Business, Innovation and Skills resisted a proposed backbench amendment to what became sect 47C CA that would have prohibited the use of third party funding in collective proceedings. Baroness Neville-Rolfe stated:

> "We have thought carefully about this. The Bill already contains restrictions on the financing of claims as it prohibits damages-based agreements and does not provide for a claimant to be able to recover any uplift in a conditional fee agreement. Therefore there is a need for claimants to have the option of accessing third-party funding so as to allow those who do not have a large reserve of funds or those who cannot persuade a law firm to act pro bono to be able to bring a collective action case in order to ensure redress for consumers.
>
> Blocking access to such funding would result in a collective actions regime that is less effective. This would bar many organisations, including reputable consumer organisations such as Which?, from bringing cases as Parliament hoped in 2002. Restricting finance could also create a regime which was only accessible to large businesses. This would weaken private enforcement in competition law, which is of course not the Government's wish or intention."

127. The Government in promoting the legislation therefore clearly envisaged that many collective actions would be dependent on third party funding, and it is self-evident that this could not be achieved unless the class representative incurred a conditional liability for the funder's costs, which could be discharged through recovery out of the unclaimed damages. Accordingly, insofar as it might be thought that the statutory provision is ambiguous, we consider that the statement from the relevant Minister in the House of Lords on the passage of the Bill supports the conclusion we have reached. In the form in which it is proposed to be amended, the Funding Agreement is therefore not rendered ineffective by sect 47C(6) CA.

(2) Insufficient cover for liability in costs

128. The protection provided under the Funding Agreement in respect of potential liability for Mastercard's costs is limited to £10 million (excl VAT): sect 2.2(a)(iv) FA. Mr Williams pointed out that unlike the other allocations of monies ("Deployments") in sect 2.2 FA, there is no flexibility within the Funding Agreement for this sum to be increased.

129. Mastercard referred to the Applicant's own costs budget, as revised before the hearing of the CPO Application, in the total amount of just over £19.5 million (excl VAT). Given the scale and complexity of these proceedings, the sum of £10 million by comparison was unlikely to be adequate to cover Mastercard's costs. Therefore, it was submitted, the Applicant cannot show, in the words of rule 78(2)(d), that he "will be able to pay the defendant's recoverable costs if ordered to do so."

130. However, we do not think that there is a necessary equivalence between the costs of the Applicant and Mastercard. As was pointed out for the Applicant, Mastercard has already been involved in several actions concerning the MIF, including the trials in this Tribunal in *Sainsbury's* and in the High Court in *Morrisons*. Economic experts instructed by Mastercard have already done substantial work and given evidence regarding the counterfactual, and also regarding pass-through in *Sainsbury's* and possibly in advice on several of the other claims which have settled. By contrast, the Applicant is starting from scratch, and can be expected to incur substantially higher costs accordingly.

131. The present proceedings would indeed be substantial and complex, but at the same time £10 million is on any view a very large sum for the costs of a single action. Mastercard has not put forward any estimate for its own costs, let alone a proper costs budget. If it wanted to challenge the adequacy of the costs cover arranged by the Applicant, we consider that would be the first step in the process. The Tribunal has no basis at this stage to find that £10 million is likely to be inadequate for Mastercard's potential recoverable costs, which (on the standard basis) would have to be proportionate and reasonable. We would point out that the Tribunal can always subsequently vary or revoke a CPO, or stay the collective proceedings on the

application of the defendant after a CPO has been granted: rule 85. If at some later stage Mastercard considered on the basis of the costs already expended and its estimated future costs that £10 million was inadequate, it could apply to the Tribunal accordingly. The Applicant and his third party funder would then have the opportunity to respond by resisting the application or increasing the cover for adverse costs liability under the Funding Agreement.

132. Accordingly, we reject this ground of objection.

(3) Potential conflict of interest

133. The opposition under this head rested on sect 2.5(b) FA, pursuant to which the Applicant is obliged to use his best endeavours to obtain an order that the Total Investment Return is paid to the funder: see para 101 above. The argument was expressed as follows in Mastercard's Response to the Application:

> "Under the Funding Agreement, the Applicant is required to seek to ensure that the Total Investment Return is paid to the Funder. In order to do so, the Applicant therefore has an obligation to ensure that there is a sufficient amount of unclaimed damages so that the Funder will receive the Total Investment Return. This is in conflict with the interest of the class, which is to maximise the amount of damages which are claimed and distributed to them."

134. In oral argument, Mr Williams put the point somewhat differently by directing the concern more towards the situation where the proceedings may approach settlement. He said:

> "…the difficulty may arise where a settlement that is reasonable vis-à-vis the participating claimants, could founder upon the Applicant's contractual obligation to secure the payment of the Total Investment Return out of undistributed damages. It would require MasterCard to agree to potentially a billion pounds or more being deducted from undistributed damages where … one of the principal incentives for settlement under the opt-out scheme is that if you settle, the undistributed damages can revert to the defendant…"

135. This objection can be briefly disposed of. The Funding Agreement contains clear acknowledgment that the Applicant is to act independently and have sole control of the litigation in the best interests of the class: see sects 3.2(g) and (i), and 4.2. It is correct that in such a detailed agreement, one might have expected to find an obligation on the Applicant to use his best endeavours to distribute any damages

recovered (there defined as "Proceeds") to the class. But we do not consider that the absence of such an express provision gives rise to any real conflict of interest as regards distribution to the class members.

136. On an award of damages, notification must be given to all represented persons in a manner approved by the Tribunal: rule 91(2). The Tribunal will determine whether the damages are to be paid to the Applicant or to some other entity: rule 93(1). In deciding to whom the damages are paid, the Tribunal will need to be satisfied that the recipient is able and willing to make all reasonable efforts to achieve the fullest distribution to members of the class, and may seek appropriate undertakings if necessary.

137. If, on the other hand, the Applicant and Mastercard negotiate a settlement, it is reasonable to assume that the principal concern of Mastercard is the total amount it has to pay at the end of the day. If the Total Investment Return is to come out of the unclaimed proceeds of settlement, then to the extent that those unclaimed proceeds would otherwise revert to Mastercard that will reduce the amount which Mastercard is willing to pay. But this is no different in principle from other costs not separately recovered from a defendant: e.g., an ATE premium, or the success fee of the class representative's solicitors if they are on a conditional fee agreement, which would therefore be well above the amount a defendant is willing to pay on account of costs. Those items can also be substantial. These considerations may therefore lead the parties to agree a lower settlement figure. But a collective settlement of opt-out proceedings requires the approval of the Tribunal: sect 49A CA. The Tribunal will only approve the settlement if it is satisfied that the terms are just and reasonable: sect 49A(5). That will include consideration of the amount being paid in respect of costs, fees and disbursements: rule 94(4)(b).

138. As stated in the Guide, at para 6.125:

> "The Tribunal's consideration of the amount and terms of the settlement will include the monetary and non-monetary benefits offered by the settling defendant, as well as any related provisions as to the payment of costs, fees and disbursements. In particular, the Tribunal may consider the amount allocated to costs, fees and disbursements as a proportion of the overall settlement. Where legal costs make up a significant proportion of the settlement funds, the Tribunal will scrutinise whether this allocation is appropriate and

will be alert to any potential conflict of interest between the class (or settlement) representative and its lawyers on the one hand and the class members on the other hand."

139. If the Tribunal considers that the settlement is not reasonable because the amount the funder can recover out of the unclaimed proceeds is excessive having regard to the total amount of the settlement, the Tribunal would decline to approve the settlement on that ground. That should create an incentive for the Applicant and Mastercard to renegotiate different terms; but if Mastercard considered that the Applicant was failing to do so because he was placing the interests of the funder above those of the class members, Mastercard could apply to the Tribunal to vary the collective proceedings order by appointing a substitute class representative: rule 85.

140. We have set out the formal position and the protection of the interests of class members incorporated into the statutory scheme and the CAT Rules. However, the Applicant has made a witness statement showing his concern to act in the best interests of the class, and there is no suggestion that he is not an individual of probity acting in good faith. Although we think that a term in the Funding Agreement to the effect that the Applicant would use his best endeavours to distribute the "Proceeds" to the class would have been desirable, given the powers of the Tribunal and the position adopted by the Applicant in his unchallenged evidence, we do not consider that there is any realistic prospect that the Applicant would be constrained from acting throughout in the best interests of the class, including as regards any negotiation with Mastercard and distribution of any monies recovered by way of judgment or settlement.

F. CONCLUSION

141. For the reasons set out above, we conclude that:

(a) the claims should not be certified under rule 79 as eligible for inclusion in collective proceedings;

(b) if, contrary to (a), we had certified the claims, then on condition that the Funding Agreement was amended as proposed, we would have authorised the Applicant under rule 78 to act as the class representative.

142. Accordingly, this application for a CPO is dismissed.

The Hon. Mr Justice Roth
President

Professor Colin Mayer C.B.E.

Clare Potter

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 21 July 2017

APPENDIX

EXTRACTS FROM THE

"PREPAID FORWARD PURCHASE AGREEMENT"

"This Prepaid Forward Purchase Agreement (as amended, supplemented, or otherwise modified from time to time in accordance with the terms hereof, this "**Agreement**"), dated as of 22 June 2016 (the "**Agreement Date**"), is made by and between [X] ("**Purchaser**"), and Walter Merricks, an individual domiciled in England ("**Seller**"). In consideration of the agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser agree as follows:

ARTICLE I
DEFINITIONS

Section 1. ***Definitions***. The following terms shall have the following meanings when used in this Agreement:

….

"**Claimants**" means United Kingdom consumers on whose behalf the Litigation is brought and who are eligible to participate in the distribution of Proceeds.

….

"**Costs Award**" means any amount ordered to be paid by any other party to the Litigation in respect of the Representative's fees and costs incurred in the Litigation.

….

"**Funding Completion Date**" means the earlier of (i) the date on which the Purchase Price has reached the Commitment Amount; and (ii) the conclusion of the Litigation.

….

"**Litigation Counsel**" means Quinn Emanuel Urquhart & Sullivan UK, LLP, a UK limited liability partnership.

….

"**Litigation Counsel Letter"** means the letter, in a form approved by Purchaser, from Seller to Litigation Counsel, that relates to the payment of the Undistributed Proceeds and any Costs Award to Purchaser pursuant to this Agreement and subject to any order of CAT.

…

"**Proceeds**" means any and all proceeds, receivables, property, cash, and other consideration payable to, or on behalf of, Seller or the Claimants in connection with the Litigation (whether by suit, judgment, settlement or otherwise), including (a) any consequential or actual damages on account thereof, and (b) any interest awarded or later accruing on the foregoing. Subject to any order of CAT, the Proceeds will be calculated and determined without taking into consideration and prior to deduction of (i) any taxes payable by Seller or the Claimants in connection with the Proceeds; (ii) setoffs of any kind, including setoffs in respect of any claim or counterclaim asserted against Seller or the Claimants by any Entity; or (iii) fees and/or expenses incurred in connection with the Litigation or the collection of any Proceeds. The Proceeds exclude any Costs Award.

"**Purchase Price**" means the aggregate amount of Deployments.

….

"**Total Investment Return**" means an amount of the Undistributed Proceeds and any Costs Award equal to the sum of: (a) the greater of (i) £135,000,000; or (ii) 30% of the

Undistributed Proceeds up to £1 billion, plus 20% of the Undistributed Proceeds in excess of £1billion; plus (b) the Late Payment Interest, if any. In calculating the Total Investment Return, credit will be given for any Costs Award that is paid by Seller to the Purchaser.
"Transaction Documents" means, collectively, this Agreement, the Litigation Counsel Letter, and any other documents, instruments, or certificates entered into or delivered in connection with this Agreement.
"**Transferred Costs Rights**" means all of Seller's right, title, and interest in and to any Costs Award.
"**Transferred Undistributed Proceeds Rights**" means, subject to an order of CAT that Seller will use best endeavours to obtain, the amount of Undistributed Proceeds payable to Purchaser in accordance with the terms and conditions of this Agreement.
"**Undistributed Proceeds**" means Proceeds that are not distributed to the Claimants….

ARTICLE II
TERMS OF INVESTMENT

Section 2.1. ***Commitment and Deployments.*** Subject to the terms and conditions of this Agreement, Purchaser commits (the "**Commitment**") to make payments to Seller or on Seller's behalf (each payment, a "**Deployment**"), at any time and from time to time from the Agreement Date until the Funding Completion Date (unless (a) the Commitment is terminated earlier in accordance with the terms of this Agreement; or (b) Purchaser agrees in writing to make Deployment(s) after the Funding Completion Date), in the maximum aggregate amount of £35,642,250, inclusive of any VAT (the "**Commitment Amount**"); provided, however, that the foregoing reference to £35,642,250 assumes that Deployments for costs related to administration of any Proceeds under Section 2.2(a)(iii) equals £3,500,000 (exclusive of VAT) and, in the event that Deployments under Section 2.2(a)(iii) are in excess of £3,500,000 (exclusive of VAT), the Commitment Amount shall increase by the amount of such excess (e.g., if Deployments under Section 2.2(a)(iii) were equal to the maximum of £10,000,000 (exclusive of VAT), the Commitment Amount would instead be £43,442,250 (inclusive of VAT)… In consideration of the Commitment, Seller, subject to any order of CAT, (a) absolutely assigns, conveys, sells, sets over, transfers, and warrants to Purchaser the Transferred Costs Rights, free and clear of any Encumbrance; and (b) agrees to use his best endeavours to ensure Purchaser obtains the full benefit of the Transferred Undistributed Proceeds Rights.

Section 2.2. ***Use of Deployments***. […][✂]
[…][✂] (a) […][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
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[…][✂]

[…][✂][…][✂]; (iv) up to £10,000,000 to provide for any fees and costs awarded to the defendant(s) or any third party in the Litigation (if applicable); […][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
[…][✂]
….

Section 2.4. ***Termination and Reduction of Commitment.***

….

(b) If: (i) Purchaser reasonably ceases to be satisfied about the merits of the Litigation, provided that Seller has been given a reasonable opportunity to address Purchaser's concerns about the merits of the Litigation; (ii) Purchaser reasonably believes that the Litigation is no longer commercially viable because the quantum likely to be recovered is less than would allow recovery of the Total Investment Return, such a view to be reached based on independent legal and expert advice that has been provided to Purchaser and Purchaser has provided Seller a reasonable opportunity to address Purchaser's belief regarding the Litigation no longer being commercially viable; (iii) Purchaser reasonably believes that there has been a material breach by Seller of this Agreement that has not been remedied within the applicable time period provided in this Agreement with respect to such breach; or (iv) CAT disapproves, or provides any negative commentary regarding, the transactions contemplated by this Agreement or the terms hereof, then, at any time thereafter and upon written notice to Seller, Purchaser may terminate Purchaser's obligations with respect to any unfunded portion of the Commitment, and permanently reduce the Commitment to the Purchase Price, although Purchaser will pay all Deployments owing as of the date of termination and will continue to cover Seller's liability for any costs related to defendant(s) or third parties in the Litigation, if any, incurred up to the date of termination.

….

Section 2.5. ***Investment Return.***

(a) Seller agrees to seek approval of this Agreement and the other Transaction Documents from CAT at the earliest opportunity in the Litigation although any failure to obtain a decision or any comment from CAT on approval or otherwise does not give rise to any breach of this Agreement…

(b) In the event that the Litigation is successful or a collective settlement is approved pursuant to Rule 94 of the CAT Rules, Seller will use his best endeavours to obtain orders from CAT that (i) the Total Investment Return be paid to Purchaser; and (ii) MasterCard pay Seller's fees and costs in connection with the Litigation.

(c) In the event of an order from CAT that the Total Investment Return be paid to Seller, subject to the terms of such an order, and receipt of the Total Investment Return, Seller will immediately arrange for payment of the same to Purchaser.

….

ARTICLE III
REPRESENTATIONS AND WARRANTIES

….
Section 3.2. ***Seller's Representations.*** Seller represents and warrants to Purchaser as of the Agreement Date that:
….
(g) Seller will have sole control of the Litigation and any settlement decisions related thereto, subject to the approval and any orders of CAT, and will not delegate such control to any Entity.
….
(i) Seller proposes to bring and continue to pursue the Litigation in the exercise of his independent judgment in connection with Litigation Counsel. Purchaser has not prompted or encouraged initiation of any Litigation…
….

ARTICLE IV
CONVENANTS

….
Section 4.2. ***Litigation***. At all times, Seller will maintain complete control of the Litigation and any settlement decisions related thereto, subject to the approval and any orders of CAT. Seller will consult with Purchaser before accepting or rejecting any settlement offer in connection with the Litigation, but Seller will have no obligation to follow Purchaser's advice. Seller will: (a) use his best efforts to prosecute the Litigation with all due skill, care and speed; (b) use his best efforts to prevail in the Litigation; (c) use his best efforts to obtain an outcome in the Litigation that maximizes the amount of Proceeds and any Costs Awards; (d) use his best efforts promptly to collect any Proceeds and any Costs Award payable in connection with the Litigation and obtain approval from CAT to distribute Undistributed Proceeds and any Costs Award in accordance with this Agreement; and (e) promptly and fully assist Litigation Counsel as reasonably necessary in connection with the foregoing; provided, however, that nothing in this Agreement shall require Seller to continue the Litigation to the extent Seller reasonably determines that the Litigation no longer has merit.
…."