Neutral citation [2025] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1266/7/7/16

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

20 May 2025

Before:

THE HONOURABLE MR JUSTICE ROTH
(Acting President)
HODGE MALEK KC
PROFESSOR RACHAEL MULHERON KC (HON)

Sitting as a Tribunal in England and Wales

BETWEEN:

WALTER HUGH MERRICKS CBE

Class Representative

- and -

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

Defendants

- and -

INNSWORTH CAPITAL LIMITED

First Intervener

- and -

THE ACCESS TO JUSTICE FOUNDATION

Second Intervener

Heard at Salisbury Square House on 19 to 21 February 2025

NON-CONFIDENTIAL JUDGMENT (CSAO APPLICATION)

APPEARANCES

Mr Mark Brealey KC (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Class Representative.

Ms Sonia Tolaney KC, Mr Matthew Cook KC, and Mr Owain Draper (instructed by Freshfields LLP) appeared on behalf of the Defendants.

Mr Charles Béar KC and Mr Bibek Mukherjee (Instructed by Akin Gump LLP) appeared on behalf of the First Intervener.

Mr Gerard Rothschild (instructed by Clare Carter of the Access to Justice Foundation) on behalf of the Second Intervener (written submissions only).

Note: Excisions in this Judgment (marked "[✂]") relate to confidential information.

A. INTRODUCTION

1. Mr Merricks as the class representative ("the CR") and the Defendants ("Mastercard") have together applied to the Tribunal pursuant to s. 49A of the Competition Act 1998 ("CA") for an order approving their proposed collective settlement of these collective proceedings. We shall refer to them jointly as "the Settling Parties".

2. The application by the Settling Parties for a collective settlement approval order ("CSAO") was issued on 16 January 2025 ("the Application"). The next hearing in these collective proceedings, being held together with the so-called Merchant Umbrella Proceedings, was due to commence on 24 March 2025. For that reason, the hearing of the Application was held very swiftly, and on the last day of the hearing we announced that we would approve the settlement agreement (subject to a minor clarifying amendment) which the Settling Parties had concluded ("the Settlement Agreement"), for reasons to follow. However, we reserved our decision as to how the sum to be received by Mr Merricks from Mastercard pursuant to that agreement was to be paid out and distributed. This judgment accordingly addresses both those matters.

3. The Application had effectively been trailed by public statements. Innsworth Capital Ltd ("Innsworth"), which has been funding the proceedings for several years, had publicly stated its opposition to the settlement and applied to intervene. By order of 23 January 2025, that application was granted and Innsworth was represented by Counsel at the hearing. The Access to Justice Foundation ("the Foundation") was also granted permission to intervene, limited to written submissions only.

4. On 22 January 2025, a notice was published on the website which has been operated regarding the proceedings notifying all represented class members ("CMs")[1] of the Application, and informing them that a CM may apply to make

[1] There is formally a distinction between members of the class, as defined in the collective proceedings order, and *represented* class members, or "represented persons", being all class members who have not opted out of the proceedings and those non-UK domiciled class members who have opted in. However, the number of such opt-outs and opt-ins in the present case is extremely small, and we therefore do not think it necessary to reflect this distinction expressly. It should be clear from the context whether a

submissions either in writing or orally at the hearing, pursuant to rule 94(7) of the Competition Appeal Tribunal Rules 2015 ("the CAT Rules").[2] Such a notice, with non-confidential versions of the Application and accompanying documents, was also posted on the website of the Tribunal. One CM contacted the Tribunal following this notice, but in the event did not seek to make any submissions.

5. It is in the nature of such an application that the Tribunal will receive a number of confidential documents and privileged information, in particular from the Settling Parties. In part, those documents and information comprise details of the without prejudice negotiations between them which led to their settlement agreement. Those documents are obviously common as between the Settling Parties, but their confidence had to be preserved through the hearing of the Application since if the Tribunal refused to make a CSAO the proceedings would continue, and necessarily would thereafter be heard by a differently constituted panel of the Tribunal. But each of the Settling Parties also chose to disclose to the Tribunal advice from their legal representatives regarding their prospects of success and the terms of the settlement. In that regard, they waived privilege towards the Tribunal but not as regards each other, again in case no CSAO was granted and the proceedings continued. Innsworth, as the funder of Mr Merricks and under the terms of their funding agreement, was privy to material emanating from Mastercard that was available to Mr Merricks. However, there were also documents and information in witness statements concerning exchanges and then the dispute between Mr Merricks and Innsworth in which they did not waive privilege as regards Mastercard but which they disclosed to the Tribunal. There were accordingly overlapping but distinct areas of confidentiality and privilege. The Tribunal is grateful to all solicitors and Counsel for navigating this process effectively in the course of a concentrated hearing.

6. This judgment includes some matters which are subject to legal professional privilege. Mr Merricks, Mastercard and Innsworth have, for many of those

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reference to "the class" or to "CMs" is to the class and CMs as defined in the collective proceedings order or to those represented CMs after excluding opt-outs and including opt-ins.

[2] All references to rules in this judgment are to the CAT Rules, unless otherwise stated.

matters, helpfully waived their respective privilege to the extent only that information or statements otherwise subject to privilege are set out in the judgment. Those waivers do not extend to the underlying documents and evidence. The redactions in the published version of the judgment relate to such privileged matters and, in one instance, a figure is redacted as being commercially confidential.

7. A settlement of collective proceedings requires the approval of the Tribunal only when those proceedings are conducted on an opt-out basis: s. 49A(1) CA. That reflects the fact that for opt-in proceedings, the CR can obtain instructions from the CMs whether or not to agree to a proposed settlement, whereas this course is self-evidently not possible for opt-out proceedings. In opt-out proceedings, therefore, the Tribunal has a particular responsibility to protect the interests of the absent CMs: see *Merricks v Mastercard Further Judgment (Application for a CPO)* [2021] CAT 28 at [20]; *Le Patourel v BT Group PLC* [2022] EWCA Civ 593 at [48], quoting the Tribunal's Guide to Proceedings. Since an application for a CSAO is made jointly by the class representative and the relevant defendant, that can give rise to what has been described in some of the Commonwealth cases as an "adversarial void", where everyone before the court (absent an objecting CM) is a 'friend of the deal'. However, the intervention of Innsworth, objecting strongly to the settlement, has given the Tribunal in this instance the benefit of adversarial argument. Since such a scenario is likely to be unusual, we comment at the end on how applications for a CSAO might be addressed in the future.

B. BACKGROUND

8. These proceedings began as long ago as September 2016, when Mr Merricks issued his claim form seeking a collective proceedings order ("CPO"). The original claim form stated that the class numbered some 46.2 million people, comprising, in effect, everyone who was resident in the UK and over the age of 16 at any time between 1992 and 2008 who purchased goods or services in or from the UK (excluding persons who were no longer alive at the time of the commencement of the proceedings). The damages were to be calculated on all purchases made by CMs from outlets that accepted Mastercard credit or debit

cards (irrespective of how the CMs had paid for those goods or services[3]). The aggregate damages were broadly estimated in the claim form at around £14 billion, including a substantial amount of interest (calculated on a compound basis) to September 2016 from the time when the alleged loss had been suffered. By any standard, this was a gargantuan claim for a vast class.

9. To explain the basis of the settlement, it is necessary to describe the nature of the claims in the proceedings. The factual background is the arrangements between banks that underlie credit and debit card transactions. A merchant that supplies goods or services purchased by card receives payment for the transaction from its bank ("the acquiring bank"), which is in turn reimbursed by the bank which issued the card to the cardholder ("the issuing bank"), and the issuing bank then bills the cardholder. The issuing bank charges the acquiring bank a fee for processing and reimbursement, known as the interchange fee ("IF"), which is generally a very small percentage of the price. The acquiring bank charges the merchant a fee for processing the transaction and making the payment, known as the merchant service charge ("MSC").

10. As between domestic banks within a country, IFs may be bilaterally negotiated, especially as there may be a limited number of acquiring banks, but for the system to work (at least, absent regulation) there needs to be a default IF that applies for all banks in the absence of agreement, i.e. a multilateral interchange fee ("MIF"). Moreover, for cross-border transactions, where the issuing and acquiring bank are in different countries, it is difficult for issuing banks to negotiate IFs with the multitude of potential acquiring banks abroad, and therefore Mastercard, like Visa, set a default MIF for cross-border transactions to enable its scheme to operate. In fact, there were a series of MIFs, some for particular kinds of card (e.g. business cards) or regions. This case concerned the EEA cross-border consumer default MIFs ("EEA MIFs"), which were set by Mastercard under its scheme rules to apply for consumer card transactions where the issuing and acquiring banks were in different EEA member states. Although set as a default (i.e. applicable in the absence of bilateral agreement),

[3] Therefore the damages were not restricted to purchases made using a Mastercard, or indeed a credit or debit card.

it is well-recognised that for the reason just described, in practice the EEA MIFs were the rates applied in EEA cross-border transactions.

11. By a decision adopted on 19 December 2007 ("the Commission Decision"), the EU Commission held that the setting by Mastercard of the EEA MIF was a decision of an association of undertakings which had the effect of restricting competition. The Commission Decision found that Mastercard had infringed Article 101 of the Treaty on the Functioning of the European Union ("Article 101"). The period of the infringement was found to have started on 22 May 1992 and Mastercard was required to bring it to an end by 21 June 2008. Mastercard's appeal against the Commission 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.

12. The cause of action in the present proceedings is the breach of statutory duty arising under Article 101, by reason of the infringement established by the Commission Decision. It covers transactions carried out in the period of just over 16 years from 22 May 1992 to 21 June 2008 ("the infringement period"). It is purely a follow-on action: i.e. the damages claimed are alleged to result from the EEA MIFs. That is in sharp contrast to the large number of actions commenced by merchants, which are stand-alone actions alleging that the UK MIFs directly breach Article 101 (alongside the Chapter I prohibition under the CA).

13. A small proportion of the transactions on which the calculation of damages is based were EEA cross-border purchases, to which the EEA MIFs applied directly.[4] But it is now common ground that approximately 95% by value of the transactions, and therefore much the greatest part of the claims, were domestic transactions to which the EEA MIFs would not directly apply.

[4] I.e. purchases from UK merchants by customers whose cards were issued by foreign European banks. Presumably these were almost entirely foreign customers from other European countries. Although those customers are not in the class (unless they were resident in the UK at the time), the MSCs charged to merchants by their UK banks are alleged to have included these EEA MIFs and to have been passed on in the merchants' prices to all their customers, and thus to CMs.

14. It follows that as regards all but about 5% of the damages, in order for the claims covered by the present proceedings to succeed, Mr Merricks would have to show:

(1) that the applicable UK interchange fees were caused by the EEA MIFs;

(2) that those UK interchange fees were passed on by the acquiring banks to their UK merchant customers by way of higher MSCs ("acquirer pass-on" or "APO"); and

(3) that those merchant customers passed on this charge by way of higher prices to consumers ("merchant pass-on" or "MPO").

15. As regards the EEA cross-border transactions that give rise to about 5% of the damages claimed, steps (2) and (3) would similarly apply, mutatis mutandis.

16. The calculation of damages is based on the value of purchases in the UK made using a Mastercard credit or debit card and affected by interchange fees over the whole claim period ("the value of commerce" or "VoC"). On the assumption that no interchange fee (or a zero fee) should have applied to those transactions, the alleged "overcharge" is calculated by applying the percentage interchange fee that was charged to the VoC.

17. Mr Merricks' application for a CPO was only the second to be issued after the collective proceedings regime came into effect on 1 October 2015. Following a contested certification hearing, on 21 July 2017 the Tribunal dismissed the application on two grounds. First, although the Tribunal found that Mr Merricks was eminently suited to be authorised as the CR, it held that the claims were not suitable to be included in collective proceedings because there was no realistic prospect of Mr Merricks obtaining the necessary data for his experts to apply their proposed methodology to estimate the degree of MPO. Those experts readily acknowledged that MPO might well not be complete and may vary significantly as between, for example, different sectors of the economy. Secondly, the Tribunal held that certification should be refused because Mr

Merricks could not put forward a method for distribution of damages to the CMs that bore any relation to their individual loss: [2017] CAT 16.

18. The Tribunal's judgment was reversed by the Court of Appeal, and then, on further appeal by Mastercard, by the Supreme Court on 11 December 2020: *Mastercard Inc v Merricks* [2020] UKSC, [2021] 3 All ER 285 ("*Merricks SC*"). The Supreme Court was unanimous that the Tribunal had applied the wrong approach to the question of distribution; and, by a majority, held that that the Tribunal was wrong also on the first ground since it had misinterpreted the statutory requirement of 'suitability'.

19. Following the Tribunal's judgment refusing certification, the original funder, Colfax Funding Co LLC ("Colfax") pulled out from funding the litigation in late July 2017. Mr Merricks, through his solicitors, was able to secure replacement funding, first to fund the appeal to the Court of Appeal, and then after the Court of Appeal judgment Innsworth entered into a litigation funding agreement on 5 June 2019 to fund the proceedings through to a conclusion. That agreement was slightly amended and restated in comprehensive form on 12 February 2021 ("the 2021 LFA"). On 26 July 2023, the Supreme Court issued its judgment in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594, holding that a litigation funding agreement under which the funder is entitled to recover a percentage of any damages recovered constituted a "damages-based agreement" for the purposes of the governing legislation, and would therefore be unenforceable unless it satisfied various requirements. Following *PACCAR*, Mr Merricks and Innsworth entered into an amended litigation funding agreement on 4 August 2023, changing the basis of calculation of Innsworth's return ("the 2023 LFA").

20. Following *Merricks SC*, the proceedings were remitted to the Tribunal. In light of the Supreme Court judgment, Mastercard no longer opposed certification but Mr Merricks sought to amend the claim form to add claims of persons who had died before the commencement of the proceedings, and there was also a dispute as to whether the proceedings could include a claim for compound interest. Addition of such deceased persons would have increased the class size by approximately 13.6 million. The Tribunal refused Mr Merricks permission to

amend the class definition to bring in such deceased persons, and further held that the claim for aggregate damages could not include compound interest: judgment of 18 August 2021, [2021] CAT 28.

21. The making of a CPO was further delayed by a dispute as to whether the specified domicile date should be the date of the claim form or the date of the Tribunal's judgment deciding that a CPO should be granted (i.e. 18 August 2021), a distinction that was significant in this case because of the way the class had been defined. The Tribunal accepted Mr Merricks' contention that it should be the date of the claim form, thereby avoiding the exclusion of over 3 million individuals from the class: judgment of 9 March 2022, [2022] CAT 13. Mastercard's appeal against that decision was dismissed by the Court of Appeal: [2022] EWCA Civ 1568.

22. A CPO was duly made on that basis on 18 May 2022, and the parties served further pleadings. On 5 September 2022, Mr Merricks applied to re-amend the claim form to allege an extended run-off period of inflated domestic interchange fees and higher charges to merchants, potentially for over eight years to the date of issue of the claim form. That would have increased the total period covered by the claims by over 50%. As might be expected, this was strongly disputed by Mastercard. The Tribunal decided to allow an amendment to add a run-off period but for a much shorter duration than had been sought by Mr Merricks: judgment of 14 October 2022, [2022] CAT 43.

23. The addition of the run-off period and application of simple instead of compound interest would each obviously affect the total quantum of the claim, and the effect of the continued running of interest, even on a simple basis itself was very significant given the size of the principal claim. The Re-Amended Claim Form estimated the aggregate damages at £16.7 billion[5] *excluding* any estimate for the run-off period. Interest to 28 September 2022, now claimed at 5% over prevailing Bank of England ("BoE") base rate,[6] accounted for £9.5

[5] However, it had emerged that the original calculation of the principal sum had included claims of deceased persons: [2021] CAT 28 at [37]. This was not adjusted in the revised calculation for the Re-Amended Claim Form so the figure is an over-statement.
[6] In the original Claim Form the rate used was 2% over BoE base rate.

billion of that sum. The principal amount was expressly calculated on the basis of 100% pass-on (both APO and MPO), while expressly recognising that this might need adjustment depending on the view of Mr Merricks' expert when developed for trial.

24. Given the complexity of the proceedings, and after discussion with the parties, the Tribunal decided that the trial would proceed in stages. Mastercard had raised a limitation defence, contending that in the case of claims covered by English (and Northern Irish) law, insofar as they were based on transactions prior to 20 June 1997 they were time-barred; and in the case of claims covered by Scots law, insofar as they were based on transactions prior to 20 June 1998, they were time-barred. Mr Merricks' response to the limitation/prescription defence was based on a number of distinct grounds and, for reasons that it is unnecessary to explain here, those were determined in several separate hearings and judgments.

25. On 21 March 2023, the Tribunal determined a number of preliminary issues, [2023] CAT 15 ("the Preliminary Issues Judgment"):

    (1) Mr Merricks' case that the general legislation on limitation/prescription was precluded by the CAT Rules was rejected.

    (2) Insofar as the claims are governed by Scots law, it was held that they came within s. 11(2) of the Prescription and Limitation (Scotland) Act 1973. As a result, those claims were not time barred.

    (3) It was held that the binding effect of the Commission Decision meant that for the infringement period it was not open to Mastercard to contend that a lower level of EEA MIF would have qualified for exemption under Art. 101(3). This was referred to as the "Exemptibility issue". As a result, the counterfactual EEA MIFs to be applied for the purpose of calculation of damages was zero.

There was no appeal against the decision on Scots law. The Court of Appeal dismissed Mastercard's appeal on the Exemptibility issue and refused Mr Merricks permission to appeal on issue (1): [2024] EWCA Civ 759.

26. On 26 July 2023, following a hearing in the present proceedings together with the Merchant Umbrella proceedings covering the individual merchant MIF claims, the Tribunal held that the principle of effectiveness under EU law did not require that the limitation period for a competition law infringement could start only when the infringement came to an end: [2023] CAT 49, [2023] Bus LR 1879. The Tribunal held, inter alia, that it was bound by the Court of Appeal decision in *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883, [2015] Bus LR 1362, to hold that the English limitation rules complied with the EU principle of effectiveness (see at [28(4)]). On 19 December 2024, an appeal against that decision was dismissed by the Court of Appeal, which similarly held that it was bound by *Arcadia*: [2024] EWCA Civ 1559.

27. In July 2023, the Tribunal held a three-week trial covering two discrete issues: (a) causation, and (b) value of commerce. As regards causation, and as noted above, since these are purely follow-on proceedings, it is essential to Mr Merricks' case that the level of interchange fees charged to the acquiring banks of UK merchants were caused by the level of the unlawful EEA MIFs. Save only for the approximately 5% of transactions to which the EEA MIF applied directly (para 13 above), the claim form accordingly alleges that the levels of domestic UK IFs and, from November 1997 when a UK MIF was introduced, the levels of the UK MIFs were caused by the EEA MIFs. Specifically, it is alleged that the EEA MIFs "operated as a floor and/or guidance and/or a benchmark and/or a minimum price recommendation and/or a minimum starting point and/or a minimum level".

28. After hearing substantial evidence on the process by which UK IFs and then the UK MIFs were set, the Tribunal held that the EEA MIFs did not have any significant causative influence, as alleged, on the level of interchange fees, whether bilateral or multilateral, that applied to UK domestic transactions for the entirety of the claim period: judgment of 26 February 2024, [2024] CAT 14 ("the Causation Judgment"). However, counsel for Mr Merricks stressed in

their argument at the causation trial that even if he failed to show *actual* causation in fact of the level of UK interchange fees, he would seek at a subsequent trial to show that in the counterfactual, where the EEA MIFs were zero, they then would have had a causative effect on the level of UK interchange fees, and that he would thereby establish 'but for' causation.

29. As regards VoC, in the end the two parties' respective experts were agreed on the figures. The only question for decision concerned whether "on us" transactions[7] should be included; that issue was decided in favour of Mr Merricks. However, the overall figures agreed for VoC meant that a reduction was required of about 14% to the numbers previously used in calculating the value of the claims.

30. Following disclosure from Mastercard showing that Solo debit cards did not operate under the Mastercard interchange fee network rules, in January 2023 Mr Merricks had withdrawn his claim for damages resulting from transactions using Solo debit cards. In his skeleton argument of June 2023 for the causation trial, Mr Merricks also withdrew his claim based on domestic transactions on Mastercard debit cards. The combined effect of these developments was to reduce the potential claim value as at that date by over £500 million and thereafter 99.9% of the claim value related to credit cards.

31. In addition, Mr Merricks' expert proposed that the exclusion of claims by deceased persons, along with some other persons outside the class (e.g. non-natural persons), meant that the aggregate damages were to be reduced by about 25% during the infringement period and 15% during the run-off periods. Mastercard contended that the reductions should be greater. This matter has not been resolved but, adopting Mr Merricks' approach, the effect of these various adjustments was that the aggregate claim value of £16.7 billion in March 2022 (para 23 above) was reduced to around £11 billion (for the full infringement period, with interest up to December 2024).

[7] I.e. transactions where the issuing bank was also the acquiring bank.

32. Following the Causation Judgment, Mastercard's solicitors ("Freshfields") wrote to Mr Merricks' solicitors ("WFG") proposing that Mr Merricks' counterfactual causation case should proceed by way of listing preliminary issues. WFG replied that this was premature pending a potential appeal against the Causation Judgment. That view was effectively confirmed by the Tribunal in its response on 13 May 2024 to a request by Mastercard to list a case management conference ("CMC"): the parties were told that the Tribunal would not hold a CMC until the Court of Appeal had decided both Mr Merricks' application for permission to appeal the Causation Judgment and Mastercard's appeal on the Exemptibility issue.

33. On 19 June 2024, the Tribunal gave its final decision on limitation: [2024] CAT 41 ("the Further Limitation Judgment"). It held, first, that Mr Merricks could not postpone the limitation period for the claims governed by English (or Northern Irish) law under s. 32 of the Limitation Act 1980 ("LA 1980"); and, secondly, that the application of the domestic limitation rules is not precluded or modified by the EU principle of effectiveness. For the second conclusion, the Tribunal held that it was bound by *Arcadia,* and that in any event the EU principle of effectiveness would not avail Mr Merricks in this case. The Tribunal gave permission to appeal against the second, but not the first, conclusion.

34. By order of the Chancellor issued on 20 June 2024, Mr Merricks' application for permission to appeal against the Causation Judgment was refused.

35. Accordingly, the position as at the end of June 2024 was that:

    (1) For approximately 95% of the aggregate claims value that was based on transactions covered by English (and Northern Irish) law, the claims were time barred for the first five years, to 20 June 1997. This affected about 28% of the total claim period. However, Mr Merricks had permission to appeal as regards the application of the EU principle of effectiveness to s. 32 LA 1980.

(2) For all but cross-border transactions, it had been determined that the levels of UK interchange fees, whether bilateral or multilateral, had not in fact been caused by the levels of the EEA MIFs. However, Mr Merricks contended that in the counterfactual where the EEA MIFs were zero then that would have led to much reduced or zero UK interchange fees.

36. As regards the issue of pass-on, the Tribunal had directed that this issue in the present proceedings should be heard together with the Umbrella Merchant proceedings, since in those proceedings Mastercard, along with Visa, was arguing that there was a high degree of MPO whereas in the present proceedings, albeit covering an earlier period in time,[8] Mastercard was contending that Mr Merricks was unable to establish any MPO (for lack of evidence). The pass-on trial, covering both MPO and APO, was fixed to take place in two stages. The issue of MPO would be heard first, at a hearing to commence on 18 November 2024. The second stage would commence on 24 March 2025 to hear evidence on APO and closing submissions.

37. In addition to the fundamental question of whether there was any pass-on, and if so at what level, there were a number of issues in dispute which the Tribunal had not yet addressed. Those included, in particular:

(1) Mr Merricks contended that for APO there was a run-off period of one year, and for MPO a run-off period of two years: i.e. the time until which, respectively, the charges by acquiring banks to merchants, and the prices charged by merchants to customers returned to normal, competitive levels. Mastercard did not accept this and further alleged that any such effect was offset by a "run-in" at the start of the infringement period when the respective charges and prices had not yet shown the effect of the higher interchange fees.

(2) Mastercard contended that in a counterfactual world of zero (or much lower) MIFs: (i) there would have been major changes to the Mastercard scheme rules in relation to such matters as fraud, cardholder default and

[8] There was a very limited overlap with the starting time of some of the merchant claims.

time of payment (since issuing banks would no longer have the interchange fee income to cover the costs of such provisions) ("Scheme Change Issues"); and/or (ii) issuing banks, and therefore cardholders, would switch to other schemes, or payment methods, resulting in similar or higher charges being incurred in any event by merchants and therefore by CMs (the "Switching Issue"); and/or (iii) those CMs who held Mastercard credit cards would be charged for their cards or receive lower benefits, for which credit should be given (the "Benefits Issue").

(3) As mentioned above, in his Re-amended Claim Form, Mr Merricks claimed interest at 5% over BoE base rate. Mastercard contended it should be no more than 2% over BoE base rate (as originally pleaded in the claim form).

38. As regards the issue of counterfactual causation, following the refusal of Mr Merricks' application for permission to appeal against the Causation Judgment, on 5 July 2024 the Court of Appeal dismissed Mastercard's appeal on the Exemptibility issue. Accordingly, on 3 September 2024 Freshfields wrote to WFG proposing trial of two preliminary issues which it contended would be largely determinative of counterfactual causation:

(1) whether it was open to Mr Merricks to challenge other conduct by Mastercard that was not the subject of the Commission Decision; and

(2) whether it was open to Mr Merricks to challenge the lawfulness of the conduct of Visa and contend that damages should be assessed on the basis that its alleged unlawful conduct did not occur.

Mastercard's formulation of these issues derived from the way Mr Merricks had set out his case on counterfactual causation in his Re-Re-Re-Re-Re-Amended Reply and his Re-Re-Amended Claim Form, supplemented by the opening submissions of his counsel at the causation trial. In particular, as regards the second question, Mr Merricks had made clear that he would contend that in the counterfactual it should be assumed that the Visa MIFs would be zero or at some much lower level than their actual level.

39. By their reply of 25 September 2024, WFG did not dissent from the suggestion that there might be preliminary issues but pressed for Mastercard to clarify its position on the legal issues it had raised, and suggested that it would be appropriate first to have a round of pleading amendments.

40. However, by this stage, the parties had started to engage in 'without prejudice' negotiations, which eventually led to the Settlement Agreement.

41. The various judgments and appeals had led to numerous costs orders, often for costs to be subject to detailed assessment with a payment on account. There are also a number of orders for costs to be "costs in the case".

C. THE SETTLEMENT AGREEMENT

42. Mr Merricks had hoped to appeal against the Causation Judgment, and the refusal of permission to appeal notified on 20 June 2024 was regarded as a significant setback. Shortly afterwards, at a consultation with Ms Marie Demetriou KC, the leading counsel who had been acting for Mr Merricks for many years, attended by Mr Merricks himself, solicitors from WFG and a representative of Innsworth, it was agreed that Mr Merricks should seek to settle the case and avoid a trial on counterfactual causation which he was likely to lose. It was thought that there might be a window for settlement prior to the pass-on trial, since Mastercard would see a benefit in removing these proceedings (in which Mastercard was arguing that there was insufficient evidence to determine MPO) from that trial where, as against the merchant claimants Mastercard was arguing for a high degree of MPO.

43. Accordingly, WFG made a "without prejudice save as to costs" offer[9] on behalf of Mr Merricks on 12 August 2024 to settle for a payment of £985 million. This was on the basis that each side would bear its own costs, that the funder (Innsworth) would be paid according to the 2023 LFA out of undistributed damages, and that thereafter any undistributed damages would revert to

[9] All subsequent offers and counter-offers referred to were similarly made "without prejudice save as to costs".

Mastercard. The internal documents of Mr Merricks show that he was hoping that this might lead to a settlement of around £600-£700 million.

44. This offer was rejected by Mastercard, and by letter from Freshfields of 12 September 2024, Mastercard responded with an offer of £✂ million, inclusive of costs, explaining the various elements (pass-on, run-off period, interest, etc) which made up this sum. In particular, the offer was based on valuation of the claims only in respect of EEA MIFs ("the EEA claims"). No value was attributed to the claims based on the UK MIFs ("the UK claims"), on the basis that Mr Merricks' case on counterfactual causation would fail. The offer was exclusive of any liability of Mr Merricks for Mastercard's costs consequential to the Causation Judgment and the Further Limitation Judgment (i.e. if ordered, Mr Merricks would still have to pay those costs).[10]

45. WFG responded with a very full letter on 4 October 2024, making a revised settlement offer of £780 million on the same terms as before. In their letter, WFG sought to counter the various assumptions built into the £✂ million valuation. They stressed that Mr Merricks had a pending appeal on the EU limitation issue (against part of the Tribunal's Further Limitation Judgment: para 33 above). And as regards counterfactual causation (and therefore the claim in respect of UK MIFs), they stated:

> "If there are to be further preliminary issues on causation, and those are decided in the way that Mr Merricks expects, not only will Mastercard face a counterfactual causation hearing, it would do so without the benefit of reliance on Visa's interchange fees given the need for all illegality to be stripped from the counterfactual, and the absence of an asymmetric counterfactual. In those circumstances, there is a very real risk for Mastercard that Mr Merricks can then establish causation in respect of domestic transactions. If that were to be the case, then the damages that Mastercard would have to pay back would be back into the many billions. Mr Merricks considers that it is entirely unrealistic on Mastercard's part to ascribe no risk to such an outcome."

The letter proceeded to engage with and controvert each of the assumptions on which Mastercard had reduced its valuation of damages based on the EEA MIFs, but as regards the interest rate, for the purpose of settlement it offered to use a

[10] On 17 October 2024, the Tribunal held that Mastercard should recover 93.6% of its costs of the Causation and VoC trial and all its costs of and related to the Further Limitation trial. Mr Merricks was ordered to make an interim payment of £6.73 million on account of those costs: [2024] CAT 57.

rate of 3.5% over BoE base rate instead of 5%. WFG also pointed out that once outstanding costs liability was taken into account, Mastercard's offer was worth materially less than £✂ million.[11]

46. Freshfields replied on 17 October 2024. They set out detailed arguments rejecting all the points made by WFG, and as regards causation their letter stated simply:

> "The Class Representative's flawed causation 'counterfactual' arguments are bound to fail, whether on points of law or key findings of fact in the Causation Judgment that apply equally to the counterfactual."

Accordingly, the letter did not increase Mastercard's settlement offer and questioned the value of continued engagement given the gulf between the two sides.

47. Faced with this, Mr Merricks asked the partner in charge of his case at WFG (Mr Bronfentrinker) to contact the relevant partner at Freshfields (Mr Sansom) to see if negotiations might be moved forward. Those exchanges led to a further offer from Mastercard, by letter from Freshfields of 14 November 2024. That letter stated:

> "Mastercard has considered the matter at the most senior levels. It is prepared to make a single best and final offer to settle the Collective Proceedings for £200,000,000, subject to contract and approval by the Tribunal. This sum is inclusive of damages, interest, and all of the Class Representative's legal and other costs incurred in pursuing the Collective Proceedings including any appliable VAT. This offer will expire at 10.30 am on Monday, 18 November 2024 if not accepted. If this offer is not accepted, Mastercard will continue to litigate the Collective proceedings to their conclusion, whether as a result of decertification or otherwise, in reliance on the cost shifting effect of its existing Offer."

48. The letter said that this offer had increased the previous offer by applying interest at 3.5% (instead of 2%) over BoE base rate, as proposed by Mr Merricks in his offer of 4 October 2024, and a further £2 million. The offer, as before, was exclusive of the costs that had now been ordered by the Tribunal (see fn 10 above). Freshfields' letter further stated that if the offer is accepted:

[11] Mastercard had submitted costs schedules showing its total costs of the Causation and VoC trial at £11.42 million and of the Further Limitation trial at £3.196 million.

> "Mastercard is prepared to work with the Class Representative to structure and position the settlement publicly and to the Tribunal such that, given a realistic level of class uptake, it will result in a meaningful payment per consumer. Mastercard is confident that it will be possible to agree a mechanism of distribution that will be approved by the Tribunal, having regard to the expected level of class uptake, per capita recovery and funder return."

49. The deadline of 10.30 am on 18 November 2024 was the time that the pass-on trial would commence before the Tribunal. Freshfields' letter indeed stated that the scope for Mastercard to make this increased offer was to reach agreement, albeit subject to contract and the Tribunal's approval, before that trial began. This appeared to reflect the earlier view of Ms Demetriou KC that Mastercard might have an incentive to reach a settlement to avoid having to "face both ways" in its approach to pass-on: para 42 above. However, as it transpired, the negotiations took somewhat longer, Mastercard extended the time for acceptance, and it became clear that avoiding Mr Merricks' participation in the MPO pass-on trial ceased to be a determinative factor. However, Mr Sansom explains in his evidence that Mastercard continued to attribute value to obtaining a final settlement before the second stage of the pass-on trial (which would then also avoid the need for the Tribunal to give judgment on pass-on in these collective proceedings).

50. Mr Bronfentrinker contacted Mr Sansom again to explore whether there was scope for any increase on this offer if the settlement was on the basis that any unclaimed funds should revert to Mastercard. But Mr Sansom made clear that there was no scope for improvement and that if the offer was not accepted, Mastercard would revert to its previous offer of £✂ million. Mr Bronfentrinker says that it was clear to him that £200 million "was the only deal that was on the table and that Mastercard simply ascribed no litigation risk to the UK domestic claim, but that it was willing to litigate the further causation issues should a settlement not be agreed". Mr Sansom has confirmed in his evidence that Mastercard was not then prepared to consider an increased offer. We have no reason to doubt that evidence. Further to the paragraph quoted above from Freshfields' letter, the respective solicitors also discussed what was referred to as a "US style approach" to distribution, whereby a larger than per-capita individual payment was offered to CMs in order to attract a greater uptake, with

the possibility of some unclaimed monies going to charity. Innsworth was of course kept informed of these exchanges.

51. In addition, Mastercard realised that Mr Merricks' expenditure on the proceedings to date had exceeded the relevant estimates in the originally approved budget, while Mr Merricks had also been subject to a recent significant order to pay most of Mastercard's costs of the causation and VoC trial, and all Mastercard's costs of the Further Limitation trial. On 14 November 2024, Freshfields wrote an open letter to WFG asking them urgently to confirm that Mr Merricks had sufficient funding in place to cover his and Mastercard's potential recoverable costs of the next stages in the proceedings, including both stages of the pass-on trial and any further trials on the counterfactual causation issues. This letter gave rise to a concern among Mr Merricks' legal advisors that unless the confirmation of funding were provided, Mastercard might apply to the Tribunal to have the CPO revoked.

52. As may be expected, the communications from Mastercard's solicitors generated considerable discussion between Mr Merricks, WFG and Innsworth. It emerged that Mr Merricks and WFG on the one hand, and Innsworth on the other hand, viewed the situation very differently. Mr Merricks and WFG were primarily dealing with Mr Ian Garrard, the managing director of Innsworth Advisors Ltd, who acted as managers for the Innsworth company that was party to the 2023 LFA. Mr Garrard had expressed dissatisfaction with the way the matter was being handled, contending that an amended pleading on counterfactual causation should have been drafted and served on behalf of Mr Merricks and that this would have strengthened his hand in negotiations. In particular, Innsworth considered that value (of around £200 million) should be given to the UK claims, and that a settlement which gave no value to those claims was much too low. Further, Innsworth became very concerned at the prospect of a distribution of the settlement fund on other than a simple per capita division across the class. Increasing the proposed amount of individual payment to CMs in order to promote take-up would be likely to leave insufficient monies for it to be paid anything approaching its return as set out in the 2023 LFA.

53. The Tribunal has been shown the flurry of privileged emails as between Mr Garrard, Mr Bronfentrinker and Mr Merricks discussing, and arguing, the various issues over November 2024. It is unnecessary to refer to them in any detail save to highlight two points of significance:

(1) On 18 November 2024, Mr Garrard wrote to Mr Merricks confirming that Innsworth regarded £200 million as too low. He stated:

> "We oppose both the amount and the proposed distribution. If, in spite of this, you choose to accept the settlement on the basis you propose, we will oppose it both before the CAT (if it comes to be presented to the CAT) and in arbitration under the LFA…."

The reference to arbitration is presumably in the context of cl. 18.3 of the 2023 LFA which provides for any dispute or claim arising out of the agreement to be referred to arbitration under the rules of the London Court of International Arbitration ("LCIA"). Mr Garrard further stated:

> "If … you wish to propose settling at £200m, please treat this email as the Funder invoking the reference to an independent KC under clause 7 of the LFA.

Cl. 7 provides that if the CR wishes to settle for less than the Funder considers appropriate, they will refer the matter to an independent KC; but the decision of the KC would not be binding and the decision whether or not to accept a proposed settlement "will ultimately be solely for the Class Representative to determine."

(2) On 19 November 2024, Mr Garrard informed Mr Merricks that Innsworth would provide additional funding only if Mr Merricks instructed other solicitors to take over from WFG, save only that WFG would continue to be funded to represent him through to the end of the pass-on trial. Mr Garrard said that Innsworth would propose a new law firm for Mr Merricks' approval.[12] Mr Merricks responded by saying that

[12] Cl. 5.7 of the 2023 LFA provides: "If the Manager requests, for cause, that the Class Representative appoint other solicitors selected by the Funder in place of the Lawyers, provided … the other solicitors are acceptable to the Class Representative (such agreement by the Class Representative not to be

he was not persuaded that this was in the overall interests of the class and that he would need to get independent legal advice on that, which could not be done in a matter of days. He said that confirmation of further funding, so that a reply could be sent to Mastercard's letter, should not be conditional on agreement to change solicitors.

54. On the evening of 20 November 2024, Mr Bronfentrinker told Mr Sansom that Mr Merricks was minded "in principle" to accept the offer of £200 million but that he considered he would have to go through the KC process under his LFA and so he could not actually accept the offer. Mr Bronfentrinker asked Mr Sansom if Mastercard would hold open the offer pending the KC referral process. On 22 November 2024, Freshfields wrote to say that it was not prepared to await the outcome of the KC referral process given the time that would take, but to give an opportunity for Mr Merricks and the funder to resolve their differences Mastercard agreed to extend the deadline for acceptance of its offer to 5 pm on 29 November 2025.

55. The letter of 22 November stated that Mastercard would not countenance any counter-offer or further extension, but that in return for an agreement by that deadline it offered to waive its entitlement to the balance of the costs of the Causation and Further Limitation trials under the Tribunal's order of 17 October 2024.[13]

56. The following day, Saturday, 23 November 2024, Mr Bronfentrinker spoke to Mr Sansom and repeated that Mr Merricks was willing in principle to accept the offer, but told Mr Sansom that Innsworth was threatening to sue Mr Merricks under the 2023 LFA if he accepted the offer against their wishes. Mr Bronfentrinker asked if Mastercard would give Mr Merricks an indemnity against any contractual exposure he may have to Innsworth as a result of accepting the settlement.

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unreasonably withheld or delayed), those solicitors will become the Lawyers for the purposes of this Agreement in place of the previous Lawyers."

[13] And also not to seek costs of the dismissal of an 'expert shopping' allegation raised by Mr Merricks and dismissed in advance of the start of the pass-on trial.

57. On the evening of 27 November 2024, Mr Bronfentrinker was informed that Mastercard was not prepared to agree to what might be an unquantifiable exposure. However, following further telephone conversations between the parties' respective solicitors the next day, 28 November, Mr Bronfentrinker was finally told that Mastercard would agree to provide an indemnity to Mr Merricks of £10 million as a term of the settlement.

58. The deadline for acceptance of Mastercard's revised offer was 29 November 2024. That morning, Innsworth's solicitors wrote to Mr Merricks stating that they would be commencing arbitration against him and that they would be seeking expedited formation of a tribunal under the LCIA rules. When the arbitration claim was filed, it included a claim for unquantified damages. (The damages claim was dropped on 13 December 2024.)

59. Also on 29 November 2024, WFG wrote to Freshfields stating that Mr Merricks accepted the offer on the terms set out in Freshfields' letter of 22 November 2024, subject to the condition that Mastercard made available to Mr Merricks the sum of £10 million that he could use in respect of the arbitration against him. Explaining this request, the letter stated:

> "Mr Merricks trusts that despite their adversity over a period of some nine years, Mastercard will understand that Mr Merricks considers that he cannot and should not be put in a position whereby having obtained an offer of settlement that he considers is in the best interest of the class and consistent with his obligations under the LFA, that his personal assets are put at risk."

By reply the next day, Freshfields on behalf of Mastercard agreed to this condition.

60. We should add that the KC referral process referred to at para 53 above never got under way once Mastercard had refused to extend the deadline for acceptance beyond 29 November 2024, because Innsworth considered that it was not practicable to get a considered decision by a KC new to the case in that short timeframe and Mr Merricks felt he had to take a decision by the deadline.

61. On 3 December 2024, Mr Merricks and Mastercard signed the Settlement Agreement. This provides, by cl. 2.1, that subject to the Tribunal granting a

CSAO pursuant to rule 94 that includes what are called "the Primary Terms", Mastercard will pay in full and final settlement of these proceedings the sum of £200 million inclusive of interest and all costs and expenses ("the Settlement Sum"), within 28 days of the CSAO.

62. The Primary Terms are defined as the terms in cls. 4.2(a) and 4.2(b), which provide:

> "The Parties agree that the Settlement Approval Application or Applications will seek approval of:
>
> (a) The Settlement Sum, and no other total settlement amount, as just and reasonable in all of the relevant circumstances;
>
> (b) a CSAO that has the effect of:
>
> (i) discontinuing the Proceedings; and
>
> (ii) to the maximum extent permitted by law:
>
> (A) fully releasing and forever discharging Mastercard and the Mastercard Related Parties from time to time from all or any Claims that any Represented Person may have against Mastercard and the Mastercard Related Parties; and
>
> (B) waiving any Claims that any Represented Person may have against Mastercard and the Mastercard Related Parties and the Mastercard Members."

"Claims" is defined to mean claims arising out of the Commission Decision or as alleged in these proceedings.

63. At the hearing of the Application, the Tribunal drew to the Settling Parties' attention that the combined effect of these provisions does not clearly exclude from the scope of the agreed release and waiver those CMs who choose to opt-out of the collective settlement, for which provision must be made in a CSAO pursuant to the statutory scheme. The Settling Parties confirmed that they indeed intended such an exclusion, and that the agreement could be amended accordingly. On 6 March 2025 they duly entered into a deed of amendment to the Settlement Agreement which incorporated a new definition of "CSAO Represented Persons", being those CMs in the proceedings who do not opt-out of the collective settlement in the period to be fixed by the Tribunal in the

CSAO.[14] The release and waiver in the amended cl. 4.2(b)(ii) now applies only to those CSAO Represented Persons.

64. By cl. 4.4 of the Settlement Agreement, the Settling Parties agreed to work together to secure a CSAO from the Tribunal expeditiously and prior to the commencement of the second stage of the pass-on trial in March 2025.

65. By cl. 5.3, the costs of maintenance and administration of the Settlement Sum, once it has been paid over, are to be borne by Mr Merricks.

66. By cl. 8 of the Settlement Agreement, each side agreed to bear all their own costs of the proceedings up to the granting of a CSAO. Cl. 8.2 further provides:

> "In the event that the Funder refuses to cover any costs, fees or other expenses incurred by Mr Merricks that are necessary to obtain the CSAO and to give effect to this Agreement, subject to any order or direction of the Tribunal, the Parties agree that such costs, fees, or other expenses, may be paid out of the Settlement Sum."

67. The indemnity to Mr Merricks for costs of the arbitration started against him by Innsworth is dealt with in cl. 9 of the Settlement Agreement. Cl. 9.1-9.2 provide:

> "9.1 Mastercard agrees to make available to Mr Merricks a sum of up to ten million pounds (£10,000,000.00) for use exclusively in relation to any costs incurred and/or for the resolution of the Arbitration.
>
> 9.2 Mastercard agrees to pay the fees, expenses and costs and/or sum(s) incurred by Mr Merricks in relation to the Arbitration up to the level of [£10 million] at the later of: (i) the Tribunal granting a CSAO that contains the Primary Terms; or (ii) within twenty-eight (28) days of written notice by Mr Merricks to Mastercard that those fees, expenses and costs and/or sum(s) have been incurred."

68. The Settlement Agreement does not contain any provisions regarding distribution of the Settlement Sum. Indeed, Recital (K) expressly states:

> "Matters of distribution of the Settlement Sum to the Class are matters for the Tribunal approval process pursuant to Rule 94 of the Tribunal Rules and are therefore not addressed by this Agreement."

[14] And for non-UK domiciled CMs, who do not opt-in to the collective settlement.

D. THE APPLICATION

69. In the Application, the Settling Parties set out the issues in the proceedings and the procedural history of the proceedings to date. The Application then summarises the terms of the Settlement Agreement. The Application next sets out in some detail the basis on which the Settling Parties consider that the terms of the Settlement Agreement are just and reasonable. That is supplemented by witness statements from Mr Merricks, who exhibits a detailed legal memorandum by Mr Bronfentrinker that in turn annexes a written Advice by Ms Demetriou KC and an Opinion by Mr Jack Williams; and from Mr Sansom, accompanied by a lengthy written Opinion from Mr Matthew Cook KC. As noted above, Ms Demetriou has been representing Mr Merricks in these proceedings for many years (but not in the pass-on trial); Mr Williams was junior counsel for Mr Merricks in the pass-on trial; and Mr Cook has been part of Mastercard's counsel team from the outset. The respective legal advice, along with parts of these witness statements, were privileged and confidential as between Mr Merricks and Mastercard and were shown only to the Tribunal (save that Mr Merricks' privileged advice was disclosed to Innsworth).

70. The Application then has a final section addressing proposals for distribution and payment of the Settlement Sum. The class size as of today is estimated at just over 44 million people. The Application states, at para 69:

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

71. In summary, the proposal in the Application is for the £200 million to be split into three pots:

(1) One half of the total amount, i.e. £100 million, would be ring-fenced for CMs. Mr Merricks has taken advice from Epiq Class Action & Claims

Solutions, Inc ("Epiq"), which he has engaged to act as the claims administrator and is a company that has extensive experience of administering class action settlements internationally. Epiq's advice is that if a significantly higher sum than £4.50 were available, a realistic uptake percentage from a consumer class of this size would be about 5%, i.e. around 2.2 million people. That would lead to a payment per claimant of £45. However, there would need to be flexibility in the advertised amount, making clear that the amount could be lower (if a much greater number seek to claim) or higher (if much less than 5% should claim). Thus if the take-up was 10% (i.e. around 4.4 million people), which Epiq regards as unlikely, the individual payment out of pot (1) would be only £22.50. However, should far fewer than 5% come forward to claim, then to prevent excessive individual recovery Mr Merricks proposes that there should be a maximum cap of £70 per head.[15]

(2) The second pot would amount to £45,567,946.28, ringfenced as a minimum return to Innsworth. This very precise sum has been calculated as comprising the costs, fees and disbursements paid by Innsworth (net of any recovery by way of adverse costs awards against Mastercard) up to 30 November 2024 and "total costs, fees and disbursements incurred until the end of the distribution phase that are budgeted for and anticipated in respect of the settlement, noticing and distribution under the LFA."

(3) Pot 3 is constituted by the remaining sum of £54,432,053.72. As to that sum, the Application states at para 73(c):

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

[15] This means that if only 3.24% of CMs claimed, pot (1) would be used up at £70 a head.

charity or the Access to Justice Foundation so that more than half of the Settlement Sum is distributed to the Class (or proxies for the Class)."

The Foundation is the prescribed charity to received undistributed funds in the event of a judgment in opt-out collective proceedings: s. 47C(5) CA. Mastercard puts forward as an alternative charity to receive any residual funds, the Good Things Foundation, a digital inclusion charity which focuses on addressing barriers to digital and financial inclusion by assisting disadvantaged people across the UK with connectivity, access and skills.

72. On the basis that the unclaimed residue would go to charity, Mastercard does not support the proposal of a cap as high as £70 on individual claims but considers that the cap should be £45.

73. With the Application, the Settling Parties have put forward a draft order for the Tribunal, that approves the Settlement Agreement and provides for distribution of the settlement sum as set out above, with alternatives for the Tribunal to consider.

74. Subsequent to filing the Application but as foreshadowed with it, the Settling Parties served a report commissioned from Portland Communications ("Portland") setting out the results of an opinion survey conducted across a sample of about 5,000 eligible CMs. Although this was an impressively structured survey, we consider that the results, as explained in Portland's report, serve to highlight the degree of uncertainty as to the proportion of the class that would claim. They suggest that if CMs were told that the individual recovery was likely to be £45, although it could be as low as £2.50, then it is plausible that around 10% would claim. Take-up at that level would lead to a distribution of £22.50 per head from Pot (1).

75. Innsworth strongly opposed the settlement, contending forcefully that £200 million was significantly too low. In particular, it considered, as it had in its discussions with Mr Merricks and WFG during the negotiations, that value should be attributed to the UK claims. We will address the particular objections to the Settlement Sum when considering the level of settlement below.

76. However, if (contrary to its submission) the Settlement Agreement were to be accepted by the Tribunal, Innsworth strongly opposed the proposal for distribution, which it stigmatised as being "demand led", i.e. fixed at an amount per head selected only to produce a higher take-up. Innsworth submitted that the only appropriate and principled method for distribution was on a simple per head basis out of the Settlement Sum. Innsworth's primary position was that the costs which Innsworth has incurred or is liable to have to pay (i.e. in respect of Mr Merricks' legal and other costs) should first be deducted and reimbursed, and the balance should then be made available for CMs to claim on a per capita basis. This means that if the payments made by Innsworth came to, say, £48 million, the balance of £152 million would be offered to the class on a per capita basis (i.e. £3.46 per head).[16] Innsworth's written submissions state: "if there are any takers on that basis, then they should be paid." Thereafter, Innsworth should be paid out of the undistributed balance up to £179 million (inclusive of the costs reimbursed), which it described as its "agreed minimum return". Any remaining balance should be paid to the Foundation.

77. Innsworth put forward some alternative proposals for distribution. Its second alternative was that its "return" of £179 million should be ring-fenced, with payment out to the class from the balance (i.e. £21 million). That would of course mean that on a per capita distribution, which is the principle Innsworth urged should be applied, CMs would be offered 0.48p each. Innsworth stated in its written submissions that this would not be unfair but would "simply require[ ] the class to pay the agreed price for the benefit received." In its skeleton argument, Innsworth further asserted that "the agreed minimum floor" of £179 million "represents the best estimate of the market price" for the benefit to the class of obtaining the funding they received.

[16] Innsworth's written submissions stated that this would be £4.50 a head, but that appears to be an error since it fails to reflect the prior reduction of the total sum to reimburse Innsworth for its costs incurred. The draft order produced by Innsworth during the hearing correctly calculated the amount available per head on the *net* settlement fund after deduction of Innsworth's costs (there estimated at about £55 million, leading to a per capita amount for CMs of £3.29).

78. Innsworth produced to the Tribunal its own draft order, comprising provisions which would give effect to its primary distribution proposal, and in the alternative a further distribution proposal, which it is unnecessary to describe.

79. The Foundation, by its written intervention, submitted that to further the policy underlying collective proceedings, a figure well exceeding 50% of all sums recovered should go to CMs and good causes. It contended that the guiding principle should be that to the extent that there are any settlement monies which are undistributed to the class and to which the funder "has not clearly demonstrated entitlement by way of reward", those monies should go to charity; and by clear entitlement it means that the funder must show that it is a more worthy recipient than a charity from which the public would benefit.

80. Subsequent to the hearing of the Application, both Mr Merricks and Innsworth sent a series of written submissions, and responsive submissions to the other's submissions, to the Tribunal concerning in particular questions of costs which were raised in the course of the hearing. Further, following the judgment handed down on 16 April 2025 by the Court of Appeal in *Gutmann v Apple Inc and ors* [2025] EWCA Civ 459, with permission granted by the Tribunal, both Innsworth and Mr Merricks submitted brief written notes on the implications of that decision.

E. ARE THE TERMS OF THE SETTLEMENT "JUST AND REASONABLE"?

81. This is the statutory test which the Tribunal has to apply: s. 49A(5) CA. It prompts the question, just and reasonable for whom? Innsworth submitted that it has to be just and reasonable to all stakeholders involved, including the funder. We do not accept that submission. In our judgment, the focus of the statutory test is on the class members. It is because the CMs are not actually involved in the proceedings, and neither the CR nor the CR's lawyers can take instructions from them, that the Tribunal has to scrutinise a proposed settlement, by which every CM will be bound (unless he or she expressly opts out) and the settlement will not be effective without the Tribunal's approval. The situation is not dissimilar to the case of a settlement of a case brought on behalf of a child,

where the settlement requires the approval of the court: CPR 21.10. Indeed, this is why it is only settlement of opt-out collective proceedings which require such approval. There is no such control over settlement of opt-in collective proceedings, although they of course may also be subject to third-party funding.

82. Rule 94(9) of the CAT Rules provides that in determining whether the terms of the collective settlement are just and reasonable the Tribunal shall take into account all relevant circumstances. The rule proceeds to set out a non-exhaustive list of circumstances which the Tribunal should take into account. Materially for present purposes, the list includes the following:

> "(a) the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements;
> (b) the number or estimated number of persons likely to be entitled to a share of the settlement;
> (c) the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement;
> (d) the likely duration and cost of the collective proceedings if they proceeded to trial;
> (e) any opinion by an independent expert and any legal representative of the applicants;
> (f) …
> (g) the provisions regarding the disposition of any unclaimed balance of the settlement, …"

83. These considerations are amplified in the Tribunal's Guide to Proceedings 2015 ("the Guide").[17] In that regard, we emphasise what is stated in the Guide: that the Tribunal will not require the settlement to be "perfect" and that "there is likely to be a range of settlements which could be approved by the Tribunal." Still less is the Tribunal concerned to evaluate the negotiating tactics of the CR which led to the conclusion of the settlement. Here, much of the criticism of Innsworth was directed at the negotiating strategy of Mr Merricks and WFG. We have set out above some of the steps in those negotiations in more detail than would be appropriate on a CSAO application, largely because of the allegation that Mr Merricks had a conflict of interest, which we address below. But the only question for the Tribunal is whether the final terms of the settlement agreed are just and reasonable.

[17] The Guide has the status of a Practice Direction under rule 115(3).

84. Taking factor (b) first, the number of CMs likely to be entitled to a share of the settlement is estimated to be 44,154,157. By any measure, and even after the various judgments in the proceedings which somewhat contracted the size of the class, the number of CMs entitled to participate in the settlement is vast, showing the potential reach of the settlement.

85. Factors (a) and (c) can conveniently be considered together. The way that the Settlement Sum was arrived at is set out in the Application and a confidential annex prepared jointly by the experts to Mr Merricks and Mastercard. As stated above, it does not attribute any value to the UK claims. Removing those claims reduces the maximum potential damages to £707 million. The steps and assumptions involved in reducing that figure to £200 million were as follows:

(1) It is now common ground between Mr Merricks and Mastercard that the value of remote EEA transactions (see para 13 above) had been miscalculated. Correction for that error reduces the potential claim value to £✂ million.

(2) Exclusion of claims prior to 20 June 1997, except for claims governed by Scots law, on the basis that they are time-barred in accordance with the Tribunal's judgments on limitation, reduces the claim value to £✂ million.

(3) In accordance with the determination of the Exemptibility issue, the entire value of the relevant EEA MIFs during the claim period is regarded as the MIF overcharge.

(4) Reduction for pass-on: as a compromise between the position of Mr Merricks and Mastercard, a cumulative rate of ✂% was applied to account for both APO and MPO. This reduces the maximum potential claim to £229 million.

(5) Full allowance was given for the run-off period for the MSC, consistent with Mr Merricks' case.

(6) Interest: reducing the simple interest from the BoE rate plus 5% as most recently claimed by Mr Merricks to BoE rate plus 3.5% reduces the maximum claim value to £200 million.

86. Considering the EEA claims alone, the two notable variables in the calculation are the rate of pass-on and the rate of interest.

87. As regards the rate of pass-on, while APO may well have been high (although that is an issue currently before the Tribunal in the Merchant Umbrella proceedings), the rate of MPO was altogether uncertain. The merchants in the pass-on trial were arguing strongly that there was little or no MPO, largely because the MSC was in fact treated as an overhead and not as a variable cost. Moreover, that was almost entirely in respect of a later period, when credit card usage was much more widespread, leading to a higher MSC cost to merchants which it could be argued would create a greater incentive to pass-on that cost. As regards the merchants, the burden of showing MPO rests on Mastercard since it is raised by way of mitigation of loss. By contrast, in the present proceedings, the burden of showing MPO rested on Mr Merricks since it was an essential step in the causation of damage. Although Mr Merricks' economic expert, in his report for the pass-on trial, estimated that MPO would be 91.1% (using a weighted average across 12 sectors of the economy), he appeared to recognise that in some of those sectors the pass-on would take place only incrementally and in some sectors would take over a decade to occur. That would significantly reduce the degree of pass-on to CMs in the later years of the claim period, which was also the period when the value of commerce using credit cards was at its highest. And in the only case involving MIFs which had gone to trial and resulted in a judgment, in a case where the burden of showing pass-on rested on Mastercard, the Tribunal had held that Mastercard had failed to establish any level of MPO: *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11 at [465]. The rate of ✂% used to arrive at the settlement sum reflects a number of possible scenarios, each of which corresponds in our view to a reasonable compromise.[18]

[18] E.g., as noted in the Application, it is consistent with APO of ✂% and MPO of ✂%, or APO of ✂% and MPO of ✂%.

88. As regards the rate of interest, as noted above, Mastercard was arguing that this should be at the BoE rate plus 2%, which was also the rate for which Mr Merricks had contended in his original claim form. If that rate was applied, the damages would be reduced to £171 million. In its recent judgment in a consumer collective proceedings case where the rate of interest was contested, the Tribunal determined that the appropriate rate is the BoE rate plus 2%: *Le Patourel v BT Group PLC* [2024] CAT 76. Therefore, applying the BoE rate plus 3.5% may well be a better result than Mr Merricks would have achieved at trial.

89. Accordingly, we reject the submission advanced in the skeleton argument for Innsworth that £200 million is "at the bottom of any range that might be contemplated" for the EEA claims. We consider that it is well within the reasonable range. Indeed, we note that in the internal discussions with Mr Merricks and WFG during the course of the negotiations, Mr Garrard wrote to Mr Merricks on 15 November 2024 on behalf of Innsworth saying that:

> "… based on our own calculations it seems to us £200m may be a reasonable settlement amount for your EEA claims once discounts are applied for litigation risk and an acknowledgement of a realistic interest rate is made."

90. The more substantive ground for scrutiny of the settlement sum is that it attributes a nil value to the UK claims. There is no doubt that the Causation Judgment, finding that the actual level of EEA MIFs had no causative effect on UK IFs and MIFs, and then the failure to get permission to appeal that judgment, was a very significant setback for Mr Merricks. The UK claims were then dependent on success in a counterfactual causation trial. Mr Merricks had consulted Ms Demetriou KC and her oral advice, which she confirmed in a short written advice on 24 November 2024, was that Mr Merricks would probably lose such a counterfactual causation trial, and that he should not fight the case through such a trial. In her written advice, she estimated the prospects of success at such a trial were "probably no more than 40%".

91. We are of course not determining the UK claims in this judgment. But we note two points which we think were of significant consequence:

(1) Mr Merricks' counterfactual case was that if the EEA MIFs had been zero, then that would have had an effect on the level of the UK IFs and MIFs. However, in its Causation Judgment, the Tribunal noted at [170]:

> "… the dramatic example of what happened in June 2008, when all Mastercard's EEA MIFs were reduced to zero following the Decision, but the UK MIFs were not changed. Ms Demetriou emphasised that an influence of the EEA MIF on the UK MIF was not necessarily immediate and submitted that there might be a degree of lethargy or time lag in adjusting the latter. The reduction to zero was seen as temporary, and a year later Mastercard set its EEA MIFs at 0.05 plus 0.26% standard and 0.05 + 0.20% electric. However, the corresponding UK MIFs remained unchanged at 1.20% and 0.90% respectively up to at least June 2010. That provides, in our view, a striking example of the lack of connection, whether as benchmark or guidance, between the two sets of MIFs, and shows that the EEA MIFs were not regarded as a floor in any meaningful sense, notwithstanding that at this point the EEA MIFs and the UK MIFs were being set by the same body."

That is not a propitious factual background for an argument that in a counterfactual world of zero EEA MIFs, those MIFs would have influenced the UK MIFs.

(2) If there was a real possibility of zero UK MIFs, then Mastercard's own counterfactual case on Scheme Change Issues and Benefits Issues (para 37 above) was likely to assume significance. Hence in the Causation Judgment at [172] the Tribunal noted that:

> "Mr Sideris [who was Head of Interchange at Mastercard Europe] suggested in his evidence that if issuing banks lacked the income from interchange fees in respect of consumer cards, they might have imposed fees on cardholders."

Therefore, even if counterfactual causation was established, these issues may well have led to a substantial set-off against any benefits which CMs would have had. And Mr Merricks had discovered for the factual causation trial how difficult it was to find witnesses who could give appropriate and effective evidence against Mastercard. That problem was likely to be compounded when seeking to address how Mastercard would probably have revised its rules in a hypothetical world where its issuing banks received no interchange fees.

92. Mr Béar KC, appearing for Innsworth, stressed that Ms Demetriou had also advised that an amended pleading setting out the counterfactual case would be likely to survive any strike out application. However, we do not think that a

strike-out was realistically a relevant question. As was clear from the correspondence between the parties' solicitors to which we refer above, Mastercard would have pressed for preliminary issues which would have largely determined the outcome of the counterfactual causation trial. Given the way these proceedings have been handled to date, we think it likely that the Tribunal would have directed a trial of suitably framed issues. In particular, there was the fundamental issue of what assumption should be made about the level of the Visa MIFs in the counterfactual scenario.

93. It was Mr Merricks' position that if the counterfactual Mastercard EEA MIFs were zero, the same assumption should be made as regards the Visa MIFs, to avoid what has been called an "asymmetric counterfactual". However, that fails to have regard to the sole reason why the lawful Mastercard EEA MIFs during the infringement period covered by the Commission Decision must be assumed to be zero. That was determined in the Preliminary Issues Judgment (section F), where the Tribunal explained that this assumption was required because of the way the Commission Decision was expressed, due to Mastercard's failure to argue that a lower level of MIFs could qualify for exemption under Art 101(3): that led the Commission to decide that Mastercard MIFs as such did not satisfy the criteria for exemption. The Tribunal was then obliged under EU law not to take a decision that was inconsistent with a decision of the Commission. See also the judgment of the Court of Appeal, dismissing the appeal from this conclusion: [2024] EWCA Civ 759 at [160].

94. By contrast, Visa did seek exemption from the Commission on the basis of particular levels of its EEA MIFs, and duly obtained an exemption in the Commission's *VISA II* decision[19], as explained in the Preliminary Issues Judgment at [163]. Accordingly, the Commission declared that positive Visa EEA MIFs for its credit cards, on the basis that they reduced over the 5 year period from July 2002 to an average of 0.7%, did not infringe Art. 101.

95. Just as the Tribunal was bound by EU law not to take a decision inconsistent with the Commission Decision in *Mastercard*, so it was bound not to take a

[19] Case COMP/D1/29.373 of 22 November 2002.

decision inconsistent with the Commission decision in *VISA II*. And although *VISA II* granted exemption only prospectively, Mastercard would have been able to argue powerfully that a level of Visa MIF that was lawful after July 2002 would similarly have been lawful in the previous years.[20] The particular levels of lawful Visa MIFs are not particularly relevant. What is relevant is that if Visa had to be assumed to have positive MIFs in the counterfactual, that threatened to undermine Mr Merricks' case on counterfactual causation because the Tribunal found in the Causation Judgment that:

(1) at least from November 1997 onwards, a significant factor in the setting of Mastercard's UK MIFs was to remain competitive with the level of Visa's UK MIFs: see at [132], [145]-[146]; and

(2) most UK issuing banks had licences under both the Mastercard and Visa schemes and so could issue credit cards under either scheme, and there was evidence that a difference of about 5 basis points (i.e. 0.05%) in the rate of interchange fee was likely to cause issuers to switch to the alternative scheme: see at [34].

96. As we have observed above, we are of course not deciding the counterfactual causation issue in this judgment. But in assessing the reasonableness of the settlement it is necessary to take a view of the strength of Mr Merricks' argument on that issue. We consider that his argument faced very substantial obstacles and, in our view, Ms Demetriou's final advice, apparently given at short notice, that his chance of success was "probably no more than 40%" was optimistic. We are not surprised that Mr Cook, in his confidential and detailed opinion prepared for Mastercard in support of the Application, takes a very different view.

97. Given the issues discussed above in respect of both the surviving EEA claims and the question of counterfactual causation, in our view the likelihood of

[20] Although prior to May 2004 only the Commission could grant exemption, Visa had notified its rules, to the Commission already in 1977, although the Commission's 2001 decision giving clearance to various rules in the Visa scheme explicitly did not address interchange fees: OJ 2001, L293/24.

judgment being obtained for an amount significantly in excess of £200 million was low.

98. The Settlement Agreement also included provisions on costs. As set out above, cl. 8 provided that neither side would seek to recover any further costs related to the proceedings from the other. In light of the costs orders made by the Tribunal, under which there was a net liability for adverse costs to be paid by Mr Merricks, the waiver of costs is a provision in Mr Merricks' favour. Since detailed assessment had not yet taken place (and obviously will not now take place), it is impossible to put a precise value on this provision but it is estimated in the Application as worth between about £1.3 million and £6.8 million.

99. Although cl. 8.2 provides that any costs and expenses of obtaining and giving effect to the Settlement Agreement which Innsworth refuses to cover may be paid out of the settlement sum, that is expressly subject to any order or direction of the Tribunal. Accordingly, the Tribunal will be able to scrutinise those costs and ensure that they were properly incurred and are reasonable in amount. Mr Merricks cannot be expected to pay those costs himself. Accordingly, we consider that this provision is just and reasonable.

100. Factor (d) is "the likely duration and cost of the collective proceedings if proceeded to trial". In the absence of the Settlement Agreement, Mr Merricks would have continued to participate in the pass-on trial, where the second stage commenced in late March 2025. It is a complex trial, so judgment could not be expected before late 2025. He would also then have faced a counterfactual causation trial, perhaps with preliminary issues in late 2025 or early 2026. From either of the resulting judgments, there was a prospect of an appeal, causing yet further delay. Given that the class comprises consumers, we think that it was just and reasonable to consider that there is a real benefit to CMs in securing a payment of damages now, rather than waiting potentially a further two years for the uncertain prospect of potentially a higher amount. Furthermore, and as set out in more detail below, the costs of these proceedings have been enormous. The fact that any further costs which Mr Merricks might incur are paid by the funder does not make that an irrelevant consideration from the perspective of the class, since Innsworth will seek reimbursement for those payments out of

any settlement. In the present case, that includes any adverse costs ordered against Mr Merricks since those are paid directly by Innsworth as there is no ATE insurer.

101. Accordingly, taking all these factors into account, we consider that there were sound reasons for Mr Merricks to decide at the end of November 2024 that the settlement proposed, on what we are satisfied were the best terms then available from Mastercard, was in the best interests of the class.

102. What is the effect of the indemnity of up to £10 million offered to Mr Merricks personally and incorporated in cl. 9 of the Settlement Agreement? As set out above, the prospect of Mastercard providing financial support to Mr Merricks against a claim by Innsworth was first raised in general terms on 23 November 2024, was initially rejected by Mastercard on 27 November, but was then accepted on a more specific and limited basis in a conversation between solicitors on 28 November: para 57 above. It was confirmed in the exchange of letters on 29 November 2024. This was therefore a few days before the Settlement Agreement was executed on Tuesday, 3 December 2024.

103. On the basis of these exchanges, it is not clear whether Mr Merricks would have been prepared to conclude the settlement if Mastercard had refused to provide any indemnity. We can well understand that Mr Merricks felt personally very vulnerable. Nonetheless, since the Settlement Agreement was formally concluded on 3 December 2024, and the indemnity was agreed to on 28-29 November 2024, it is evident that at the time the Settlement Agreement was entered into Mr Merricks may be regarded as having a conflict of interest. However, we have subjected the terms of the settlement to careful scrutiny to satisfy ourselves that they are just and reasonable, and we do not place much weight here on the fact that it was negotiated at arms' length between parties with sophisticated legal representatives. Moreover, any concern about conflict is mitigated by the following considerations:

(1) We find that Mr Merricks had reached the view that the offer of £200 million was in the best interests of the class on 20 November 2024, *before*

requesting an indemnity from Mastercard and eight days before he learnt (on 28 November) that Mastercard was prepared to provide an indemnity.

(2) Once Mr Merricks had reached that view, when Innsworth then threatened and indeed started arbitration proceedings against him, Mr Merricks was in a very difficult position. If he pulled back from the settlement because of the arbitration, he would not be acting in what he considered were the best interests of the class, particularly since Mastercard had refused his request to keep its offer open pending operation of the KC referral process under the LFA: see para 54 above. But if he proceeded with the settlement without any financial support, he was at risk of significant financial consequence personally. We know nothing about Mr Merricks' personal circumstances,[21] but we can imagine that arbitration against him by a well-funded and powerful opponent could threaten financial ruin.

104. Accordingly, we find that the personal indemnity to Mr Merricks, in the unusual circumstances of this case, does not in any way impugn our view of the settlement.

105. Furthermore, the Tribunal has to consider the settlement as at the time of the hearing of the Application, not as at 3 December 2024. By the date of the hearing, there had been two further developments:

(1) The Court of Appeal gave judgment on 19 December 2024 dismissing the appeal against the Tribunal's decision that the EU principle of effectiveness did not mean that the limitation period could only begin to run on the date when the infringement ceased: para 26 above. Although an appeal against the Tribunal's Further Limitation Judgment was still pending, the reasoning of the Court of Appeal in that 19 December judgment, and its holding that it was bound by *Arcadia* to find that the English limitation rules complied with the principle of effectiveness, made it exceptionally unlikely that Mr Merricks would have prevailed in his pending appeal to overturn the Tribunal's decision which had also

[21] Save only that he does not appear to have had insurance against this risk.

followed *Arcadia*. This meant that for Mr Merricks to obtain damages for English MIFs in the period prior to 20 June 1997 he would have had to take his case all the way to the Supreme Court and succeed there.

(2) The first stage of the pass-on trial, which started on 19 November 2024, had concluded. Therefore all the evidence, both expert and factual, on MPO had been heard. Although the Tribunal panel hearing that case had not yet heard closing submissions at the time the present Applications were heard, Mr Merricks has provided us with a privileged opinion dated 15 January 2025 from Mr Jack Williams, his junior counsel in that case, analysing Mr Merricks' prospects in light of the way the trial had gone. Mr Williams advised, with the proviso that no closing submissions had yet been filed, that the likely outcome is ✂ for the Merricks claim period; but that ✂. The burden of proof of MPO as against Mastercard rested on Mr Merricks. If Mr Merricks should have failed to establish MPO for his claim period, that would have led to the dismissal of his action in its entirety, with no recovery at all for the EEA claims.

106. Innsworth drew attention to factor (e) under rule 94: "any opinion by an independent expert and any legal representative of the applicants." Mr Béar stressed that no legal opinion from independent counsel had been provided in this case, in contrast to the other recent CSAO applications to the Tribunal: cp. *McLaren v MOL (Europe Africa) Ltd (CSAV Collective Settlement)* [2023] CAT 75; *Gutmann v First MTR South Western Trains Ltd* [2024] CAT 32; and *McLaren v MOL (Europe Africa) Ltd (WWL/Eukor and K Line Collective Settlement)* [2025] CAT 4 (*"McLaren (2025)*"). However, there is no requirement for there to be an independent opinion. Given the multiple judgments in these proceedings to date, and the complexity of the proceedings, we agree with the Settling Parties that it would have been very difficult to obtain a meaningful opinion in the short period between the settlement on 3 December 2024 and the filing of the Application on 16 January 2025, especially as this spanned the Christmas holiday period. But the Tribunal has the short Advice of Ms Demetriou, the Opinion of Mr Williams, a legal memorandum from Mr Bronfentrinker and a very full legal Opinion from Mr Cook. We have not been short of legal analysis of the relative strengths and weaknesses of the case. In

addition, many aspects of the proceedings have been analysed in the Tribunal's past judgments so that the Tribunal is much more familiar with the various issues than is likely on many other settlement approval applications. The absence of a comprehensive Opinion from Ms Demetriou is explained by the fact that at the relevant time she was deep in preparation for the trial of another case before the Tribunal that commenced on 13 January 2025, and is not, in our view, a basis for criticism.

107. As we understood the position of Innsworth, it was not advocating that Mr Merricks should have carried on with the litigation through to trial, but that he should have gone through the pass-on trial and amended his pleadings to set out a full counterfactual causation case which would have put him in a better position to obtain a higher offer from Mastercard. Adopting that strategy, Innsworth argues, could have secured a significantly higher settlement by attributing some value to the UK claims. As we observed above, the Tribunal is not concerned to decide the best negotiating strategy but to determine whether the settlement itself is just and reasonable. However, in that regard it is appropriate to note that there may be a difference in perspective as between a class representative and a funder. A commercial litigation funder has a portfolio of cases and seeks to make a high return on that portfolio. To continue an individual case which has, for example, a 30% chance of achieving £500 million as opposed to settling it for £200 million may therefore be a commercially sensible approach for the funder, since a much higher settlement is likely to bring it a much higher return. However, for the class representative, even a 15% chance that the case will fail altogether may be an unacceptable risk: that would be a disaster for the CMs, for whom this is their only case.

108. Although Innsworth produced an opinion in the form of an expert report from Mr Mark Humphries, an experienced commercial litigation solicitor, addressing the reasonableness of the Settlement Sum, he does not suggest that Mr Merricks would have been likely to succeed on the UK claims but only that Mr Merricks committed a "tactical error" in not first repleading his case on counterfactual causation, on the basis that only then could it be established whether settlement on substantially improved terms could be achieved. Moreover, although he gave his report on 2 February 2025, Mr Humphries does not even address the risk

confronting Mr Merricks on MPO, although that is a subject with which Mr Humphries would be familiar as he had acted for several merchant claimants who contended in their claims that there was no, or very limited, MPO. It appears from his report that Mr Humphries did not see, or presumably ask to see, the transcripts of the evidence regarding MPO in the pass-on trial, including the cross-examination of Mr Merricks' expert which had taken place in early December 2024. We did not get much assistance from Mr Humphries' report.

109. We should add that the falling out between Mr Merricks and Innsworth means that it is difficult to see how the proceedings could continue with Innsworth as the funder and Mr Merricks as the class representative. If Mr Merricks had sought to withdraw as class representative under rule 85, the Tribunal would have had to consider whether to vary the CPO so as to authorise a new class representative. In view of the various developments in the proceedings, it might be anticipated that Mastercard would have seized the opportunity to seek an order revoking the CPO altogether, on the basis that the costs and benefits of continuing the proceedings now are so very different from what was presented at the time of the original CPO application: see rule 79(2)(b). We appreciate that reliance on this consideration in support of a decision to approve the settlement is somewhat self-fulfilling, but that is the reality of the current situation.

110. For all these reasons, some of which are of much greater weight than others, we are entirely satisfied that the terms of the settlement are just and reasonable such that the settlement should be approved under s. 49A(5) CA.

F. DISTRIBUTION AND PAYMENTS

Principles

111. Before considering the proposals put forward by the Settling Parties as regards distribution of the Settlement Sum, we address a preliminary objection raised by the funder. Innsworth contended that the terms of the Settlement Agreement and the Settling Parties' proposals for distribution of the Settlement Sum by payment to CMs, to Innsworth, and potentially to charity, were a single package,

presented together in the draft Order which the Settling Parties had submitted with the Application. Innsworth submitted that the Tribunal therefore has a binary choice: it can either make the Order sought granting approval or dismiss the Application. But the Tribunal cannot approve the Settlement Agreement and direct a different basis of distribution of the Settlement Sum.

112. We do not accept that submission. The argument that when there is an application before the Tribunal and the parties provide a draft order then the Tribunal must either accept or reject the terms of that order is in our view fundamentally misconceived. The Tribunal must determine the application, but just because the parties have agreed on the terms of the order which they seek, that does not tie the hands of the Tribunal. The Tribunal must itself decide what is the appropriate order to make in the circumstances, in accordance with the governing statutory provisions.

113. Further, on the question of distribution, the Settling Parties themselves have put forward alternatives. Mr Merricks proposes that there should be a cap on individual payments to CMs of £70; Mastercard suggests that it should be £45. And as regards Pot 3, Mr Merricks proposes that this should be reserved for payment to Innsworth towards its return, but he expressly recognises that the Tribunal may decide that "at least some of this pot is used to either make up any shortfall in Pot 1", if there is higher take up by CMs so that the payment to each individual CM is not reduced, or by payment to charity "so that more than half the Settlement Sum is distributed to the Class (or proxies for the Class)": see para 71(3) above. Mr Merricks suggests that this charity should be the Foundation, whereas Mastercard for its part suggests an alternative charity. We see nothing wrong with the Settling Parties putting forward various alternatives to the Tribunal. And although Mastercard has commented on the proposals by Mr Merricks, its primary concern is the total amount it has to pay (i.e. the Settlement Sum), which is not affected by the arrangements which may be directed for distribution of that sum. Therefore, aside from the fact that arrangements for distribution are not part of the Settlement Agreement, this is not a case where the settling parties have in their application comprehensively prescribed the way they propose the settlement sum should be distributed; on the contrary, while proposing that the Settlement Sum should be divided into

three pots, they have left considerable discretion to the Tribunal as regards the disposition of Pot 3.

114. Under the statute, the governing provision on a settlement (after a CPO has been made) is s. 49A CA. Pursuant to s. 49A(1), the Tribunal may make an order approving a collective settlement "in accordance with this section and Tribunal rules …"; and s. 49A(2) states:

> "An application for approval of a proposed collective settlement must be made to the Tribunal by the representative and the defendant in the collective proceedings."

115. The relevant Tribunal rule is r. 94. Rule 94(4) is as follows:

> "(4) The application [for a collective settlement approval order] shall—
>
> (a) provide details of the claims to be settled by the proposed collective settlement;
>
> (b) set out the terms of the proposed collective settlement, including any related provisions as to the payment of costs, fees and disbursements;
>
> (c) contain a statement that the applicants believe that the terms of the proposed settlement are just and reasonable, supported by evidence which may include any report by an independent expert or any opinion of the applicants' legal representatives as to the merits of the collective settlement;
>
> (d) specify how any sums received under the collective settlement are to be paid and distributed;
>
> (e) have annexed to it a draft collective settlement approval order; and
>
> (f) set out the form and manner by which the class representative proposes to give notice of the application to—
>
> (i) represented persons, in a case where it is expected that paragraph (11) will apply; or
>
> (ii) class members, in a case where it is expected that paragraph (12) will apply."

116. Accordingly, the distinction between (b) the terms of the proposed settlement and (d) the distribution of sums to be received is made clear in the CAT Rules. We think it is implicit in the CAT Rules that not only the terms of the settlement but also the distribution arrangements proposed in the Application require the approval of the Tribunal. Indeed, the position is the same for the proposals for notifying CMs required by r. 94(4)(f). The Tribunal may require amendments

to the proposed arrangements for notification, but that does not affect the decision to approve the terms of the proposed settlement between the parties to the proceedings.

117. We note that what we find to be the correct approach appears to be reflected in the 2023 LFA which, as usual for a funding agreement, provides for a stipulated return for the funder. Here, that return comprises both the net costs which the funder has expended and a graduated multiple of its overall costs commitment ("the Return").[22] Clauses 8.2-8.3 provide:

> "8.2 The Class Representative undertakes to use his best endeavours to obtain approval by the CAT (in the course of the Proceedings and Settlement) for the payment, out of the Undistributed Damages, of the Return, less any costs recovered by the Class Representative pursuant to Clause 8.1.
>
> 8.3 Subject to such approvals and orders as may be made by the CAT, the Class Representative undertakes to immediately pay to the Funder the Return, *limited to such amount as determined by the CAT to be payable to the Class Representative* pursuant to the Competition Act 1998, s.47C(6) or s.49A(5) (and/or rule 94 of the Competition Appeal Tribunal Rules)…." [emphasis added]

118. It is there expressly recognised that it is for the Tribunal to determine to what extent the Return should be paid to Innsworth. Indeed, that is stated even where the payment is to be made out of undistributed damages pursuant to s. 47C(6) CA. There can hardly be a lesser need for the Tribunal to decide on the amount to be paid in respect of the Return when it is proposed that this amount should be ring-fenced and paid in any event, irrespective of the level of undistributed damages.

119. It seems to us that the matter can be tested by considering what would happen if the Tribunal, having found that £200 million with the related provisions regarding waiver of costs (i.e. the terms of the Settlement Agreement) is a just and reasonable settlement of the proceedings as between Mr Merricks and Mastercard, then refused to approve the settlement and grant a CSAO only because it considers that the total amount which Mr Merricks proposes should be deducted from the Settlement Sum for payment to the funder in respect of the Return is unreasonable since it leaves too little for the class. Mr Merricks

[22] See further para 133 below.

is obliged to act in the interests of the CMs, subject to his obligation under cl. 8.2 of the 2023 LFA to use his best endeavours to obtain the Tribunal's approval of payment to Innsworth of the Return. However, he has failed in his endeavour to secure a large payment for Innsworth. It seems to us obvious that the proposals for distribution (which have no impact on Mastercard) would then be amended to conform to the basis which the Tribunal has stated it would approve. As those proposals are not part of the Settlement Agreement, that agreement would not require amendment; there would only be an amended Application and a revised draft Order. In our judgment, the statutory regime does not require the Settling Parties to go through such an additional exercise.

120. On that basis, we proceed to consider the proposals put forward by the Settling Parties, and the objections raised by Innsworth.

Payment to CMs

121. We regard it as fundamental that the collective proceedings regime should operate for the benefit of CMs and not primarily for the benefit of lawyers and funders. At the same time, the regime could not function effectively without the CR having good legal representation and commercial litigation funding to pay for it. That presents a particular challenge when, as in the present case, the damages recovered are so very far below the amount envisaged when the proceedings were launched. In its settlement approval judgment in *McLaren (2025)*, the Tribunal stated, at [86]:

> ".. it is imperative to support the highest possible take-up by Class Members. It would be unsatisfactory if, after considerable expense and effort, only a small proportion of Class Members makes a claim, or the amount of claims is tiny, which would be a bad outcome for the collective actions regime in general."

122. It is in that context that Mr Merricks has been keen to put forward a distribution plan which achieves the maximum take-up of a reasonable sum by way of payment to individual CMs. We consider that he is to be commended for pursuing that objective.

123. In *Merricks SC,* in giving the majority judgment, Lord Briggs stated at [77]:

> "A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be so difficult and disproportionate, e.g. because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just…. In many cases the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known."

Lords Sales and Leggatt agreed with these observations, and said at [149]:

> "We can see nothing wrong in principle with a conclusion that the fairest method of distribution is, in the circumstances of a particular case, an equal division among all the members of the class (or, as proposed by the applicant in this case, an equal division among all the relevant class members of the damages referable to each year of the claim period)."

124. As there stated, Mr Merricks' proposal at the time of the CPO application was for the distribution to be calculated for each year as between the CMs who were in the class in that year. The class is defined as comprising UK residents who were aged 16 or over between 22 May 1992 and 21 June 2008. Since the total sum of £200 million is calculated on the basis that claims (save for Scottish CMs) for loss prior to June 1997 are time-barred (see para 85(2) above), if that original proposal were to be followed someone who was 16 in 2007 (i.e. aged 34 today) would be entitled to a minute amount, whereas someone who was at least 16 in June 1997 (i.e. aged at least 44 today) would receive significantly more, with an ascending scale in between.

125. Accordingly, although the annual per capita division of the damages referrable to each year of the claim period may have been a reasonable approach when the total damages were expected to amount to several billion pounds, it would be disproportionately complex now that the claims of 44 million CMs can be paid only from the vastly lower sum of £200 million. All the parties, including Innsworth, appear to accept that a simpler arrangement, with each CM entitled to the same amount irrespective of the number of years in respect of which they have a claim, is now more appropriate. We agree.

126. However, if the amount that any CM could recover was limited to a simple per capita division of the total sum, that would produce an entitlement of just £4.50 each. The advice from Epiq, unsurprisingly, is that this would lead to a very

low take-up. Hence the proposal from the Settling Parties that the primary amount offered to each CM would be £45 per head, which the experience of Epiq and the survey by Portland indicate would probably lead to take-up of around 5% or possibly more, but this would necessarily be reduced if a much greater number of CMs should submit claims, and may be increased if, contrary to expectation, less than 5% should claim.

127. As noted above, Innsworth objects to this as a "demand-led" approach, stressing that £45 is a somewhat arbitrary figure. In the sense that £45 bears no particular reflection of individual loss, that is correct; but nor does £4.50 since, as we have explained, the loss of older CMs would account for a significantly greater share of the £200 million whereas the loss of those in their mid-thirties will account for much less than £4.50. Instead, £45 represents, as we understand it, an appropriate modest sum given the low aggregate amount obtained for the class, but an amount that is likely to be sufficiently high to attract a likely take-up of at least 5% and thus to be achievable out of the total recovery.

128. Innsworth also argued that this proposal was unreasonable and unfair to it, since its agreement to fund the proceedings was on the basis of a simple per capita division between the total number of CMs. We reject that argument. There is nothing to that effect in the 2023 LFA (or indeed the 2021 LFA), which is clearly a carefully drafted agreement. Moreover, already in 2017, in seeking permission to appeal to the Court of Appeal from the Tribunal's original refusal to grant a CPO, it was stated in Mr Merricks' skeleton argument:

> "… the Appellant's *preferred* model of distribution (*at this stage, before the quantum of damages or the final size of the class are known*) uses an annualised approach whereby individual class member receive a per capita sum for each year that they met the class definition" [emphasis added].

As Mr Brealey KC pointed out, that was clearly an indication that the final method of distribution will not be determined until a later stage when, inter alia, the quantum of damages recovered is known. That approach was subsequently approved by Lord Briggs in his judgment in *Merricks SC* in December 2020: see para 123 above.

129. There is no one right answer in these circumstances regarding the amount to be offered to each CM. In *Merricks SC* the Supreme Court held that the compensatory principle is radically modified in collective proceedings when aggregate damages are awarded, and that applies to the distribution of those damages. As Lord Briggs stated at [58], the only requirement is that the distribution should be fair and reasonable. In our view, for the reasons given by Mr Merricks, the distribution now proposed satisfies that requirement: we consider that £45 is a reasonable and fair amount on the basis of 5% take-up; but, as the Settling Parties propose, in the event of lower take-up the actual payments should in fairness be subject to a cap to ensure that the individual payments are not excessive.

130. If, as envisaged, some 5% of the class (i.e. 2.2 million) should submit claims, then at just over £45 each the payments will total £100 million. However, if 10% should claim, then the whole £200 million would be required, with obvious gradation in between. Once this approach is adopted, it would not be appropriate to leave any payment of Innsworth's return (including reimbursement of its expenditure on legal costs and expert's fees) to be recovered only out of undistributed damages since the amount of undistributed damages may prove insufficient. Therefore we agree that once this approach is followed, it is necessary and appropriate to reserve a sum out of the £200 million for payment to Innsworth.

131. That is the basis for the proposal for a pot of £100 million to be reserved for CMs. However, if only 2% of the class should claim and this pot were divided equally, that would lead to payment of a little over £113 per head. We agree with the Settling Parties that this would be excessive in the circumstances. Hence the proposal of a cap to be applied to individual distributions out of the £100 million. Mr Merricks has proposed £70. On that basis, if 3.24% of the class came forward, the £100 million would go entirely to the class; put another way, only if the take-up was less than 3.24% would there be an undistributed surplus in Pot 1. In our view, this strikes a fair and reasonable balance between the objective of distributing at least half of the damages to CMs and the need to avoid excessive distribution to individual CMs if only very few should claim.

132. On this basis, if between 3.24% and 5% of the class should submit claims, each CM will receive between £45 and £70, depending on the number who claim. If more than 5% of the class should submit claims, they will get less than £45 each out of Pot 1, and we address below the question whether, and to what extent, the remainder of the settlement sum should be used to top-up the payments to CMs. But first it is necessary to address the funder's return and costs.

The funder's return

133. The Return is defined in Schedule 4 of the 2023 LFA:

> "The Return shall be an amount equal to the sum of
>
> (i) Project Costs and Adverse Costs Orders incurred by the Funder, less any costs recovered by the Class Representative and paid to the Funder pursuant to Clause 8.1;
>
> and
>
> (ii) an amount equal to the Total Commitment Amount multiplied by the applicable factor below:
>
> x6, where the date of Judgment or Settlement is on or before 1 July 2024;
>
> x8, where the date of Judgment or Settlement is after 1 July 2024 and on or before 30 September 2025;
>
> x10, where the date of Judgment or Settlement is after 30 September 2025 and on or before 31 December 2026;
>
> x15, where the date of Judgment or Settlement occurs at any time thereafter."

134. As is recognised in the above definition, there are two aspects to Innsworth's return: (i) reimbursement of the net amount paid in respect of costs, fees, and disbursements; and (ii) what can conveniently be called a profit return.

135. Under cl. 1.1 of the 2023 LFA, "Project Costs" are comprehensively defined as follows:

> "The costs and expenses of the Project, after [11 December 2020], comprising:
>
> (a) all costs and expenses referred to in the Approved Budget, including the reasonable legal costs and disbursements of the Lawyers, at all times within and subject to the Approved Budget for the sole purpose of prosecuting and resolving the Claims;

(b) any other costs stated to be treated as Project Costs according to the terms of this Agreement;

(c) the costs involved in the provision and maintenance by the Funder of any Security for Costs, which are in addition to the Approved Budget;

(d) any costs incurred by the Funder in quantifying, challenging or referring to assessment, any Adverse Costs Order(s), which are in addition to the Approved Budget;

(e) any costs and expenses including premium and IPT incurred in connection with ATE Insurances or such fees as the Guarantors may charge for underwriting the adverse costs, in either case such costs and expenses being in addition to the Approved Budget;

(f) any third party direct expenses incurred by the Funder or the Manager in connection with the investigation, evaluation, development and promotion of the Project, such as fees paid to experts (including loss assessors and/or economists), counsel (including independent counsel or lawyers providing a second opinion) and investigators, which are in addition to the Approved Budget;

(g) any VAT or other taxes charged to or assessed against the Funder associated with the costs and activities described above."

136. The "Total Commitment Amount" is defined in cl. 3.2 as £60.1 million.

137. Innsworth's evidence, as updated, shows that to date it has incurred Project Costs and paid Adverse Costs orders, less costs received from Mastercard, of a little over £40 million.

138. Accordingly, given the date of the settlement, the total Return specified under the 2023 LFA amounts to over £520 million, plus any future Project Costs that may be paid by Innsworth (e.g. Epiq's fees for notification and distribution, and the costs of stage 1 of the pass-on trial).

139. Manifestly, it is impossible for Innsworth to be paid its agreed Return. And if Innsworth were to be paid as much of the Settlement Sum as possible towards that Return, it would receive the entire £200 million with nothing left for the class. Understandably, Innsworth did not submit that it should receive payment on that basis.

140. Instead, Innsworth contended that if, contrary to its primary submission, the settlement were to be approved, then it should be paid £179 million (inclusive

of its costs and expenses), which Mr Béar described as "the agreed minimum floor" for its return. Innsworth proposed that this would be paid out of undistributed damages, but that was on the basis that each CM could claim only a per capita division across the class of the Settlement Sum, i.e. £4.50 each (see para 70 above). As noted above, if the individual pay-out was so limited, it is likely that the take-up would be extremely low. Therefore, on this basis, Innsworth would be likely to receive 89% of the Settlement Sum.

141. However, there is, in our judgment, a more fundamental objection. Contrary to Innsworth's submission, £179 million was not its "agreed minimum return" under the 2023 LFA. That agreement does include a specified Return, defined under cl 1.1 as being the amount "determined in accordance with Schedule 4". Schedule 4 is set out at para 133 above, and the consequent "agreed return" is over £520 million: para 138 above. The figure of £179 million appears only in the termination provisions under cl. 12. One of the grounds on which Innsworth is entitled to terminate the 2023 LFA, as set out in cl. 12.1(ii), is if:

> "… the Funder reasonably believes that the Claims and/or the Proceedings are no longer commercially viable for the Funder to fund because the Funder is unlikely to obtain at least £179 million as a return on its funding of the Proceedings, such a view to be reached based on independent legal and expert advice that has been provided to the Funder …."

142. Moreover, if Innsworth should terminate in reliance on that provision, not only will it *ex hypothesi* not receive £179 million, but the return which it then will receive, in lieu of the Return set out in Schedule 4, is specified in cl. 12.4(b):

> "… the Funder will be entitled to (i) any and all sums to be distributed to it pursuant to clauses [*sic*] 8.1 and (ii) subject to giving credit for any such sums received by the Funder, and in lieu of the Return, all costs funded by the Funder (including Project Costs) plus interest thereon at the rate of 3 month LIBOR as published by Reuters plus two per cent from the effective date of termination until the date of payment to the Funder of all such costs, in respect of which the Class Representative undertakes to use his best endeavours to obtain approval by the CAT for the payment of such sums to the Class Representative out of the Undistributed Damages."

143. Clause 8.1 deals with costs recovered from the defendants or a third party. Accordingly, in those circumstances Innsworth would be entitled to receive only payment of costs recovered from Mastercard and such amount as is approved by the Tribunal by way of reimbursement of its net expenditure, plus interest

from the date of termination of the agreement (at a rate which currently would be just over 6.85%).

144. Another ground on which Innsworth may terminate is if it reasonably believes that there has been a material breach of the 2023 LFA by Mr Merricks: cl 12.1(iii). Although Innsworth has commenced arbitration proceedings against Mr Merricks, presumably alleging that he is in breach of the 2023 LFA, we note that it has not sought to terminate the agreement under cl. 12.1(iii). If it had, then the payment it would receive would have been limited to the amount calculated in accordance with cl. 12.4(b).

145. Furthermore, even if a sufficient sum was recovered in the proceedings, the contractually specified Return under Schedule 4 was in no sense guaranteed. As set out in para 117 above, cl. 8.3 of the 2023 LFA very properly recognised that it would be for the Tribunal to determine pursuant to s. 47C(6) CA (in the event of a judgment for damages) or s. 49A(5) CA (in the event of a settlement) at what amount a return for the funder should be approved.

146. As explained above, the Application proposed that, after ring-fencing half the Settlement Sum for the class in Pot 1, the return to Innsworth would be dealt with through Pots 2 and 3. Pot 2 is designed to deal with reimbursement of costs, fees and disbursements which Innsworth has or will pay, and we address this first.

Pot 2: costs, fees and disbursements

147. Pot 2 is intended to provide a ring-fenced amount to be paid to Innsworth in respect of the Project Costs which it has paid to date plus Mr Merricks' estimate of further elements of Project Costs to be paid, less any payments of costs recovered from Mastercard. Accordingly, although the Application specifies Pot 2 as comprising the very precise sum of £45,567,946.28, that precision is rather specious since the anticipated future costs are estimated. Moreover, we think that there is some inconsistency in the Application since para 73 states that Pot 2 is intended to provide "a 100% recovery in respect of Innsworth's … total costs, fees and disbursements", whereas at footnote 89 to that paragraph it is

stated that the figure excludes Innsworth's own costs because Mr Merricks had not had time to assess the reasonableness of those costs. In his subsequent 9th witness statement dated 18 February 2025 (the day before the hearing), Mr Bronfentrinker on behalf of Mr Merricks has indeed disputed the level of those costs.[23]

148. The expenditure which therefore comes within Pot 2 appears to us to fall into three parts:

(1) Innsworth's total payment in respect of the costs, fees and disbursements on behalf of Mr Merricks, less costs recovered from Mastercard, to 30 November 2024.[24] This amounts to £40,682,007.17.

(2) Innsworth's payment of its own costs, including the costs of taking independent legal advice on counterfactual causation, incurred to 18 February 2025. As set out in a letter to the Tribunal of 21 February 2025, following the hearing, this amounts to £446,012.34 (incl VAT). That figure does not include Innsworth's costs of contesting the settlement and of the CSAO hearing.

(3) Anticipated costs which have not yet been quantified or paid. Mr Merricks estimates those costs at about £4.4 million. Innsworth estimates those costs at about £5.7 million.

149. We address each of these categories separately. In doing so, we note the importance of the Tribunal exercising close control over costs in collective proceedings, which has been emphasised by the Court of Appeal: see *London & South Eastern Railway v Gutmann* [2022] EWCA Civ 1077, where Green LJ referred at [83] to the "risk that the system perversely incentivises the incurring or claiming of disproportionately high costs."

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[23] Para 73, fn 89 says that those costs amount to £352,765. However, those were the costs up to 30 November 2024. The additional costs incurred by Innsworth since then increased the total to £446,012.34 (incl of VAT), as at 18 February 2025.

[24] This figure includes £1,044,312.96 in respect of the appeals phase, including the appeal to the Court of Appeal, prior to the judgment in *Merricks SC* on 11 December 2020.

(1) Costs, fees and expenses paid on behalf of Mr Merricks

150. Out of the total figure of some £40.7 million, £6.73 million comprises adverse costs paid to Mastercard pursuant to orders of the Tribunal. Those are accordingly party-and-party costs which were either assessed or agreed.

151. The majority of this category therefore comprises solicitor-own client costs, and expert fees. We raised concerns in the hearing about the reasonableness of this figure. However, by written submissions received since the hearing, Innsworth has referred to cl. 4.4 of the 2023 LFA, whereby it was authorised by Mr Merricks "to take all appropriate actions" to tax or assess any of the lawyers' invoices, and Innsworth has stressed that it did indeed scrutinise all the invoices presented by Mr Merricks in detail and raised numerous queries, in some instances elevated to formal disputes. The Application seeks to ring-fence those costs and expenses for Innsworth and we have approved the settlement on that basis.

(2) Innsworth's payment of its own direct costs

152. We are satisfied that this category falls within sub-clause (f) of the definition of Project Costs: para 135 above. However, although the principle that such costs fall within the return to be paid to Innsworth is accepted, in the Application the Settling Parties, and Mr Merricks in particular, reserved their position regarding the reasonableness of this sum, and by the time of the hearing it was disputed: see para 147 above. In particular, almost £300,000 out of the total of just over £446,000 comprises costs which Innsworth incurred since mid-October 2024 taking independent legal advice on the question of counterfactual causation, and Mr Merricks challenges the reasonableness of that figure. This has been the subject of a series of written submissions and reply submissions between Mr Merricks and Innsworth since the conclusion of the hearing.

153. We consider that it was reasonable and understandable for Innsworth to take independent advice regarding the counterfactual causation issues. However, we do not consider that the 2023 LFA should be interpreted as entitling Innsworth to recover unreasonable costs. We have considerable concern as to whether

costs of almost £300,000 purely for legal advice on this question from other solicitors and counsel are reasonable, but we are in no position to determine this. Accordingly, we have concluded that this element of Innsworth's costs (i.e. costs described by Innsworth as attributable to "Second opinion advice on counterfactual causation") should be referred to expert assessment by the procedure set out in para 160 below. To the extent that they are reasonable, together with the balance of Innsworth's own costs (i.e. about £146,000), they will fall in Pot 2.

(3) Further anticipated costs

154. This category appears to include[25] the following heads:

(a) Epiq's fees for notification of the Settlement to the class and processing claims and distribution to CMs;

(b) Mr Merricks' own costs and fees (solicitors, counsel and expert) of his participation in phase 1 of the pass-on trial;

(c) Costs awarded, and that may be ordered, against Mr Merricks by the Tribunal in favour of the merchant claimants and/or Visa caused by his participation in the pass-on trial;

(d) Mr Merricks' own costs and fees (solicitors, counsel and expert) of initial preparation for phase 2 of the pass-on trial;

(e) Mr Merricks' own costs (solicitors, counsel and share of experts' fees) of the Application; and

(f) Mr Merricks' own costs (excluding Epiq's fees) related to the settlement notification and distribution process.

[25] The listed categories are not comprehensive but we consider account for the great majority of this category. E.g. Mr Merricks has been paid for his own time at £150 per hour, which costs are additional to the lawyers' and experts' fees.

155. As regards (a), Epiq's fees, those have been quantified in the Application at £2,883,573 if 5% of the class should submit claims to be processed. It will be slightly higher if the take-up is greater. That figure is well in line with the approved budget as considered by the Tribunal before the CPO application was granted in January 2017. We have no reason to question it as unreasonable.

156. As regards (c), on 6 March 2025, after we had informed the parties that we would approve the proposed settlement, Mr Merricks made an application in the pass-on proceedings for an order that he was not liable for any costs of the merchants or Visa as a result of his participation in the pass-on trial prior to the settlement ("the No Adverse Costs Application"). On 10 March 2025, Green J, as chair of the Tribunal hearing those proceedings, rejected the No Adverse Costs Application as premature on the basis that this cannot be determined before judgment in the pass-on trial: [2025] CAT 21; and Mr Merricks was ordered to pay Visa's costs occasioned by the No Adverse Costs Application. Accordingly, the total costs for which Mr Merricks is and may be liable regarding the pass-on trial will not be quantified for some considerable time. However, those costs will be subject to assessment on a party-and-party basis in the usual way.

157. Heads (b), (d), (e) and (f) largely comprise Mr Merricks' solicitor-own client costs and disbursements. Although they appear to come within the definition of Project Costs, now that the proceedings are at an end, Innsworth will effectively be acting as a conduit if it pays those costs, since it will receive immediate reimbursement out of Pot 2. Although Innsworth had been disputing some elements of the costs in (d), as in excess of the revised agreed budget, since Pot 2 is to be ring-fenced for Innsworth, it now knows that it will receive reimbursement of whatever further costs it pays and therefore has no incentive to challenge any of those costs as unwarranted or unreasonable. The position is in sharp contrast to the costs in category (1); there is now no risk that the proceedings will fail completely such that nothing would be recovered from which to reimburse Innsworth for costs still to be paid.

158. In the light of that, we regard it as important in the interests of the class to ensure that the costs in category (3) are reasonable. That concern applies also to Mr

Merricks' solicitor-own client costs of his failed application made on 10 March 2025: para 156 above. We do not accept that Mr Merricks alone can be expected effectively to scrutinise and challenge those costs for reasonableness. Mr Merricks is in a very different position from an ordinary claimant conducting large commercial litigation since here it was the solicitors (then Quinn Emanuel Urquhart & Sullivan UK LLP) who approached Mr Merricks and asked him to act as the proposed CR, rather than the other way round. Indeed, that appears to be not unusual in collective proceedings.[26] In our view, that is likely to affect the dynamic as between solicitor and client. And we note that in some of its previous rulings on costs in these proceedings, the Tribunal expressed the view that the solicitors' fees charged to the CR were unreasonably high: [2022] CAT 27, at [26]; [2023] CAT 53, [2023] Costs LR 1563 at [11].

159. It is impossible for us to assess the reasonableness of all those costs. We therefore consider that those unpaid costs, some of which may not have yet been billed, should be referred to independent assessment. CAT Rule 53[27] provides, insofar as relevant [with emphasis added]:

> "(1) The Tribunal may *at any time*, on the request of a party *or of its own initiative*, … give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.
>
> (2) The Tribunal may give directions –
>
> …
>
> (e) for the appointment and instruction of experts, whether by the Tribunal or by the parties…"

160. Pursuant to this provision, we will appoint retired judge Andrew Gordon-Saker as an independent expert to assess the reasonableness of these legal costs on a solicitor-own client basis and of the expert fees. Mr Merricks will be ordered to instruct WFG to submit detailed bills to the expert and to cooperate with the assessment. Mr Gordon-Saker will also be instructed to assess the reasonableness of Innsworth's costs of the "Second opinion advice on

[26] See e.g. *Selecting Litigation Funders and Negotiating Funding Agreements*, a report by the Class Representatives Network (20 September 2024).
[27] Applicable to collective proceedings by rule 74.

counterfactual causation" (para 153 above) and Innsworth will similarly be ordered to cooperate with the assessment and to procure and provide detailed bills from the outside lawyers from whom it sought this advice. WFG and Innsworth will be entitled to recover their reasonable costs of the assessment process, which costs will also be assessed by the expert. Mr Gordon-Saker will submit his report to the Tribunal in due course, on which the parties may comment, and the Tribunal will then determine in the light of that report what sums to allow for these costs, to be included in Pot 2.

161. In their written submissions filed after the hearing, both Innsworth and Mr Merricks contend that the Tribunal has no power to order an assessment of costs. However, those submissions appear to be directed at an assessment by the Court under the Solicitors Act 1974. We emphasise that the process directed by this judgment is wholly different. We should add that no part of our decision involves any lawyers being required to repay fees they have already received.

162. We make two further observations:

(1) The decision of the Tribunal to appoint an independent expert under the CAT Rules to assess the reasonableness of unpaid costs which will fall to be deducted from the Settlement Sum is similar to the practice of the Australian courts to appoint what there is called a costs referee to advise the court on the level of costs to be deducted from a settlement of class proceedings: see e.g. the judgment of the Federal Court in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842, esp at [90] et seq. The Australian courts have acquired substantial experience of class actions over three decades. Although obviously not binding on the Tribunal, their practice is instructive for what here, in particular as regards the appropriate approach for the settlement approval process, is still a developing jurisdiction.[28]

[28] In seeking to distinguish the Australian authorities, Innsworth states that s. 33ZF of the Federal Court of Australia Act 1976 gives the court specific authority to assess the costs and funding costs in the event that a settlement is approved. However, s. 33ZF states: "(1) In any proceeding (including any appeal) conducted under this Part, the Court may, of its own motion or on application by a party, or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding." That provision is not materially different from rule 53(1) of the CAT Rules.

(2) We remarked above that the Tribunal's responsibility towards the CMs when asked to approve a proposed settlement of opt-out collective proceedings bears some analogy to the responsibility of the court when asked to approve the proposed settlement of a claim by a child. It is notable that CPR r. 46.4 provides:

> "(1) This rule applies to any proceedings where a party is a child or protected party and-
>
> (a) money is ordered or agreed to be paid to, or for the benefit of, that party; or
>
> (b) money is ordered to be paid by that party or on that party's behalf. …
>
> (2) The general rule is that-
>
> (a) the court must order a detailed assessment of the costs payable by, or out of money belonging to, any party who is a child or protected party;…"

This provision is not restricted to adverse costs but applies also to the own solicitor costs of a child (or protected party). And the fact that the child appears by a litigation friend who may have authorised the costs does not affect the operation of the rule. Indeed, where a litigation friend has paid the costs on behalf of the child and seeks reimbursement, the same principle applies: CPR r. 21.12. Not only is there accordingly some analogy with the course we are adopting for these opt-out collective proceedings, but this shows that Innsworth is mistaken in its submission that the power of the High Court to make orders about or for the assessment of solicitor-own client costs "are restricted to solicitor-own client costs proceedings under Part III of the Solicitors Act 1974."

163. Further, as regards head (e), by his post-hearing written submissions Mr Merricks states that once this judgment is issued, he will be applying for part of his costs of the Application to be paid by Innsworth. If we were to make such an order, then since head (e) comprises Mr Merricks' costs of the Application those costs would be reduced to the extent that any part was awarded against Innsworth.

164. Pot 2 will therefore comprise all these costs on the basis which we have set out. The aggregate amount cannot now be determined but, on the estimates put

forward by Innsworth, even with assessment of the reasonableness of certain elements of those costs, the total may well exceed the estimated figure put forward by Mr Merricks in the Application (i.e. almost £45.6 million).

165. However, there is one aspect of Mr Merricks' costs which does not fall within Pot 2. On 21 January 2025, Mr Merricks made an urgent application to the Tribunal for an order as against Innsworth to prevent confidential information in the Application being disclosed to Innsworth's advisors or used by Innsworth for the purpose of its intervention ("the Documents Application"). By reasoned order of 29 January 2025, the Acting President refused the Documents Application and ordered Mr Merricks to pay Innsworth's costs, those costs to be summarily assessed. By a ruling of 28 March 2025, those costs were assessed in the sum of £22,000: [2025] CAT 22. We consider that neither Mr Merricks' own costs of making the Documents Application, nor the costs of £22,000 which he has to pay to Innsworth, properly come out of Pot 2. Mr Merricks of course should not be expected to pay them personally but they should come out of Pot 3, to the extent that Mr Merricks' own costs are reasonable. The assessment of Mr Merricks solicitor-own client costs of the Documents Application will accordingly form part of the costs referred to Mr Gordon-Saker: para 160 above.

Innsworth's profit return

166. For reasons set out above, we reject the submission that Innsworth has any entitlement to an "agreed return" or "agreed minimum floor" of a return of £179 million (inclusive of reimbursement for costs, fees and expenses).

167. The Application expressly leaves the decision of what return should be paid to Innsworth by way of profit return out of Pot 3 to the discretion of the Tribunal. As noted above, cl. 8.3 of the 2023 LFA expressly recognises the discretion of the Tribunal to determine the extent of Innsworth's return. That is in line with the statutory scheme, as analysed by the Court of Appeal in its recent decision in *Gutmann*. Although the specific question on appeal in that case was whether following a judgment for damages the Tribunal could order payment of costs and a funder's fee in priority to distribution to the class or only out of unclaimed damages, the Court there stressed (a) that the power of the Tribunal on an award

of damages should not differ from its power on approval of a settlement, and (b) that the Tribunal had a broad discretion to determine how any award or settlement should be dealt with in terms of distribution to CMs, and payment of costs and expenses including any return to the funder, in the exercise of its wide supervisory jurisdiction: see at [93] and [97].

168. We are satisfied that Innsworth should be paid a profit return out of Pot 3, and we therefore have to determine the appropriate return in all the circumstances. As the Court of Appeal also stated in *Gutmann* at [81]:

> "The supervisory jurisdiction of the CAT will ensure that what is recovered is not excessive."

169. This is not a matter on which the Tribunal has had the benefit of adversarial argument. However, we consider that valuable guidance can be obtained from the jurisprudence in Australia and Canada, where the courts have much greater experience of class actions, in neither case limited to competition law, and where, as in the UK, the settlement of an opt-out class action requires the approval of the court.

170. As mentioned above, Australia has had representative class actions for over 30 years. In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148, the full Federal Court gave guidance for the approval of a reasonable funding commission rate. That case was a shareholder class action where the representative plaintiff sought an order from the court at an early stage of the proceedings approving a funding commission rate of 30% of any settlement or judgment of damages. The court declined to make that order, stating at [11]:

> "…Court approval of a reasonable funding commission rate is to be left to a later stage when more probative and more complete information will be available to the Court, probably at the stage of settlement approval or the distribution of damages."

Then, under the heading "The benefit of judicial approval of the funding commission rate", the court stated, at [80]:

> "We do not seek to and cannot predetermine the relevant considerations for the approval of a reasonable funding commission rate. They will be a matter

> for the judge hearing the approval application and it will depend upon the circumstances. However, it seems likely that the relevant considerations would include the following:
>
> (a) the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. That can be said to show acceptance of a particular rate by astute class members;
>
> (b) the information provided to class members as to the funding commission. That may be important to understand the extent to which class members were informed when agreeing to the funding commission rate;
>
> (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market. It will be relevant to know the broad parameters of the funding commission rates available in the market;
>
> (d) the litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding;
>
> (e) the quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding;
>
> (f) the legal costs expended and to be expended, and the security for costs provided, by the funder;
>
> (g) the amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;
>
> (h) any substantial objections made by class members in relation to any litigation funding charges. This may reveal concerns not otherwise apparent to the Court; and
>
> (i) class members' likely recovery "in hand" under any pre-existing funding arrangements."

171. The references at [80(a)-(b)] to the funding rate agreed by class members or about which class members were informed relate to the fact that the class comprised both funded class members who signed up to the litigation funding agreement and "unfunded" class members who, under the Australian regime, would be bound by the proceedings unless they opted-out (i.e. a form of hybrid, opt-in/opt-out proceedings). The order sought was for a so-called "common fund order", specifying a common rate which would then be applied across all

class members. Those consideration are accordingly not relevant to the present proceedings.

172. The court continued, at [82]-[83]:

> "We expect that the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.
>
> "The position of litigation funders in Australian class actions has some parallels with the position of plaintiff attorneys in class actions in the United States of America (USA). Both carry the substantial costs and disbursements of a class action in return for a contingent percentage fee based on the common fund of damages obtained and any settlement is subject to court approval at the end of the litigation. There is little sign in the USA that the requirement for court approval of the contingent percentage fee at the end of a class action has so reduced attorneys' returns that they are reluctant to bring class action litigation."

173. As noted by Murphy J in the recent case of *Street v State of Western Australia* [2024] FCA 1368 at [281], the non-exhaustive list of relevant considerations set out in *Money Max* has subsequently been applied or approved by the Australian courts in numerous decisions.

174. In Canada, the position was considered in the recent case of *Breckon and Sills v Cermaq Canada Ltd* [2024] FC 225, to which Mastercard referred. That was a competition class action claiming damages for alleged price-fixing. The statement of claim alleged damages of up to $1 billion, but the settlement which the court was asked to approve provided for aggregate damages of $5.25 million, and the proposed deductions for legal fees, funding commission and other disbursements would have left about $2.36 million for distribution to the class members. Gascon J in the Federal Court in Quebec noted, at [136], that, relative to the value of the claim as pleaded, the result "represents an abysmally low recovery rate for the Class Members, and what is ultimately contemplated for the Class Members themselves (namely, a little more than $2,360,000) is an even lower one". However, although the court approved the settlement sum it significantly reduced the permissible reductions.

175. Since the lawyers, as is common in Canada, were on a contingency fee, separate payments were sought out of the settlement sum for the lawyers and for the funder (which had essentially funded disbursements). But that distinction with the present case, where payment of the lawyers is made by the funder and forms part of the funder's return, did not materially affect the Canadian court's overall approach, which considered that it is the combined impact of the lawyers' fee and litigation funding fee that should be considered (see at [140]-[141]). On that basis, Gascon J stated, at [112]:

> "The jurisprudence has established "a presumptive range of validity" of 30% to 35% of the recovery proceeds, for a combined return to the litigation funder and class counsel [citations omitted]".

As regards specifically the return, the judge heavily criticised the funder's proposed commission, which was not modulated to reflect the actual result of the proceedings but amounted to a return of 2.5 on its investment.

176. We fully recognise the importance of litigation funding to this action, as to most collective proceedings. As Lord Sales stated in his judgment in *PACCAR* (with which the majority of the Supreme Court agreed), at [12]:

> "… the effectiveness of group litigation may depend on the use of third party funding, since such litigation often involves high numbers of claimants who have individually suffered only a small amount of loss, where the pursuit of claims on any other basis would be uncommercial."

And the Court of Appeal has often referred to the role played by litigation funding for collective proceedings: see e.g. *BT Group PLC v Le Patourel* [2022] EWCA Civ 593 at [77]. In *Road Haulage Association Ltd v Traton SE and ors* (*Trucks: CPO*) [2024] CAT 51, the Tribunal said at [87]: "third party funding from commercial funders provides the fuel which enables the vehicle of collective proceedings to operate".

177. At the same time, the Tribunal has made clear that it is generally not practicable to assess the reasonableness of a funder's return under an LFA at the time of certification; that is a matter that can more appropriately be addressed after a judgment for damages or a settlement: e.g. *Gormsen v Meta Platforms Inc*

[2024] CAT at [35];[29] *Gutmann v Apple Inc* [2025] CAT 459 at [12]. This reflects the approach of the Australian jurisprudence set out in *Money Max*: para 170 above. Significantly, the Tribunal's adoption of this approach in *Gutmann* was endorsed by the Court of Appeal in that case, where the Chancellor stated in his judgment (with which Green and Birss LJJ agreed) at [90]:

> "Any issue as to the reasonableness of the funder's return is to be addressed at the time of distribution."

178. Turning to the present proceedings, they involved significant risk. Although a follow-on case, they involved a vast class, claiming for an extended period, and were highly ambitious in terms of the causal link (as events proved). This was also an early case in the UK's new collective proceedings regime, which came into effect in October 2015.

179. Innsworth agreed to provide funding under the 2019 LFA up to a total amount of £44.6 million, increased under the 2023 LFA to £45.1 million. Instead of funding a premium for ATE insurance against adverse costs liability, it undertook to cover, on the basis of a guarantee from Elliott group companies, adverse costs liability up to £15 million. On Mr Garrard's evidence, a premium for equivalent ATE insurance would have cost £9.75 million. The value of Innsworth's notional funding commitment was therefore about £54.85 million, which is a very significant sum.

180. Innsworth provided funding over a period of some 5½ years, although it would seem that much of the expenditure it occurred was in the final two years with the Limitation and Causation trials.

181. Innsworth's actual expenditure is anticipated to be approximately £46 million, including net payment of adverse costs, although not all this money has been paid at risk since the total costs incurred pursuant to the LFAs before the Settlement Agreement was approved amount to £41.1 million.[30]

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[29] Innsworth is also the funder of the CR in *Gormsen*.
[30] This figure includes Innsworth's costs of £0.4 million incurred in taking independent advice, which may be subject to reduction: para 153 above.

182. Although the settlement has secured a positive payment, the outcome of the present case is very far from a success for a class of some 44 million claimants. The Settlement Sum is only a little over 1.4% of the original value placed on the claim of £14 billion (with interest only to September 2016), and under 1.2% of the revised claim value of £16.7 billion (with interest only to September 2022).

183. Innsworth, like all funders, operates on a portfolio basis.[31] If a case in its portfolio fails, it will receive nothing back and loses its investment on costs and fees. But if a case is largely or wholly successful, it stands to make a very significant return, as exemplified by the Return specified in Schedule 4 to the 2023 LFA: para 133 above. However, some cases will not fail altogether but achieve a very poor result. This case is one of them. While the outcome enables Innsworth to recover all its reasonable expenditure, that does not mean that it is reasonable for it to achieve also what Mr Garrard describes as "a minimum reasonable return".

184. Mr Béar relied on the passages in the *Street* judgment on the danger of engaging in hindsight bias when assessing a funder's return. The need to avoid such bias was indeed expressed by the full Federal Court of Australia in *Money Max*: para 170 above. But at the same time the return cannot disregard the degree of success or failure of the proceedings. We see nothing in Murphy J's judgment in *Street* to weaken the observations made by the same judge in *Petersen*, when scrutinising the proposed settlement of a class action arising out of a fraudulent Ponzi scheme. He there said, at [5]-[6]:

> "The Part IVA regime[32] is intended to provide access to justice to the applicant and class members and it is not intended solely for the benefit of service providers such as lawyers and funders. The legitimate use of the Court's processes should not be undermined by proceedings that disproportionately benefit the funder and/or solicitor rather the litigants.
>
> For the reasons I explain, in the particular circumstances of the case, it is appropriate to approve the settlement but to disallow a substantial amount of the legal costs and funding charges sought."

[31] This is indeed emphasised in Innsworth's supplementary submissions on the recent *Gutmann* judgment.
[32] I.e. the class actions regime set out in Part IVA of the Federal Court of Australia Act 1976.

185. The simplest way to reflect the outcome of the case in assessment of the funder's return (including all legal costs and other fees) is by a percentage of the damages recovered. That would also align the funder's interests with those of the class. In the light of *PACCAR*, that course is not open to us. But another very relevant metric is the funder's return on investment ("ROI"): see *Breckon and Sills* (Canada) and *Street* (Australia). In *McLaren (2025)*, the Tribunal observed at [100] that when considering what profit return or commission to allow a funder on settlement, it would be helpful to be provided with its rates of return. However, although Innsworth is doubtless aware of that judgment, as Mr Malek KC remarked in the course of the hearing, it has chosen not to provide any information as to the range of, or average, returns which it achieves.[33]

186. We should add that although Mr Béar submitted that Innsworth's internal returns were irrelevant, relying on the Supreme Court judgments in *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938, we do not regard that decision, concerning unjust enrichment and quantum meruit, as relevant to the matter we have to decide here.

187. Many funders operate internationally, and the evidence from Mr Garrard is that Innsworth indeed funds litigation in other jurisdictions apart from the UK, and that one of Innsworth's directors chairs the Association of Litigation Funders of Australia. In *Street* (a judgment of 29 October 2024), Murphy J referred at [362] to another 2024 Australian case where the evidence showed for a substantial litigation funder that its:

> "ROI on all completed cases (including those on which it loses some or all of its capital) is 1.2 and approximately 1.9 on those cases which did not produce a negative return. Approximately 15% of its cases have an ROI exceeding 4.0, with some cases having an ROI exceeding 9.0."

188. On that basis, in our judgment a ROI of 1.5 is here appropriate, taking account of all the above factors, and recognising the significant risk but reflecting also the poor outcome. If the reimbursement of costs and expenses (i.e. Pot 2) should

[33] Mr Garrard in his witness statement quotes a 2021 study on US litigation funding which found from publicly available LFAs that "funders frequently *seek* a return of roughly two to six times investment" [our emphasis]. But that does not indicate what they actually achieve if funding returns have to be approved by the court.

amount to £45.5 million as estimated in the Application, then, applying a ROI of 1.5 will provide Innsworth with a total return of £68 million. Although as the law stands funders cannot conclude a LFA providing for a percentage-based return, and we therefore have not determined the return on that basis, it nonetheless serves as a useful cross-check. A payment of £68 million constitutes 34% of the Settlement Sum. That contrasts with the much lower percentage of 16% determined by Murphy J in *Street* (where the circumstances were exceptional), and is within the "presumptive range of validity" established by the Canadian jurisprudence: para 175 above.

189. We considered whether the ROI should more properly be applied to the amounts paid by Innsworth prior to the settlement (i.e. £41.1 million), on the basis that this was the total incurred while the investment was still at risk. We recognise that an argument could therefore be made for adopting this lower figure. However, in the end we concluded that it is appropriate to apply the ROI to the total which Innsworth is in fact obliged to spend on costs fees and disbursement, and that the ROI should therefore apply to the total sum in Pot 2. The portion of Innsworth's return which exceeds the sum in Pot 2 (i.e. 0.5 of the 1.5) will necessarily come out of Pot 3: see further below.

190. We have taken account of the total commitment made by Innsworth, including the value of the guarantee against adverse costs liability up to £15 million provided by Elliott group companies (see para 179 above), as a relevant factor in arriving at our decision that a ROI of 1.5 is just and reasonable in this case. Since there was no ATE cover against Mr Merricks' potential liability for adverse costs, Innsworth itself paid the adverse costs ordered in favour of Mastercard in the amount of £6.73 million: see para 150 above. That figure is included in Pot 2 and accordingly is subject to the ROI. Since no ATE premium was paid, it was not suggested that the notional cost of such a premium should be part of Pot 2. And in our view, it would be wholly inappropriate to give Innsworth a return both on the adverse costs of £6.73 million which it has actually paid and additionally on the notional cost of a premium for ATE insurance which it has not paid and would have covered Mr Merricks' liability for adverse costs. Accordingly, we do not consider that the ROI of 1.5 should

be applied to the notional cost of a premium for ATE insurance which Innsworth did not incur.

191. We should add that Innsworth has highlighted an additional and discrete item of expenditure which it has incurred. Mr Merricks' original litigation funder, Colfax, terminated its funding arrangements with Mr Merricks in July 2017: para 19 above. By an agreement dated 4 February 2021, Colfax released Mr Merricks from any rights it may have had against him under that original LFA and assigned its rights to Innsworth. Mr Garrard states that under this agreement, Innsworth "is obliged to pay out of any sums it receives in excess of the costs it has funded the sum of £✂ plus interest of ✂ per annum from 11 December 2020."[34] He says that this amounted to £✂ as at 3 February 2025.

192. Innsworth no longer contends that this sum should form part of Pot 2, but submits that it should be paid this amount out of Pot 3. Mr Merricks strongly disputes that there is any such liability. However, Innsworth is not seeking to enforce the original Colfax LFA of 2016 against Mr Merricks and it seems to us that the terms of that LFA are irrelevant. On Mr Garrard's evidence quoted above, the liability Innsworth assumed to Colfax is to be discharged *out of* the profit return Innsworth receives. In effect, this amounts to an agreed but limited sharing of that profit return. Accordingly, we consider that the approximately £✂ which Innsworth may now become liable to pay Colfax does not give rise to any liability of Mr Merricks on behalf of the class. Innsworth does not now suggest that this payment comes within the broad definition of Project Costs under the 2023 LFA and no further agreement was entered into between Innsworth and Mr Merricks imposing any such additional right or liability.

193. On this basis, we address the elements of Pot 3 and the 'waterfall' or order of distribution.

[34] Although Mr Garrard has exhibited this agreement to his witness statement, the payment terms are wholly redacted.

Pot 3

194. Since Pot 3, by definition, is the balance of £100 million after deduction of the total of Pot 2, the exact amount in Pot 3 cannot now be ascertained. It will not be known until all the costs within Pot 2 have been determined, including any costs award that might be made following judgment in the pass-on trial. However, if Pot 2 should amount to around £45.5 million, it follows that there would be about £54.5 million in Pot 3.

195. As we have observed above, the Application does not prescribe one means of distribution of Pot 3 but leaves discretion to the Tribunal.

196. In our judgment, the Pot 3 sum should first be used to pay costs and expenses for which Mr Merricks is liable which do not fall within Pot 2. They will include:

(1) the costs of the Documents Application, comprising the liability to pay £22,000 to Innsworth and Mr Merricks' own reasonable solicitor-client costs, to be determined following assessment by Mr Gordon-Saker;

(2) Mr Gordon-Saker's fees for preparing his report to the Tribunal on his reasonable assessment of the costs referred to him pursuant to this judgment; and

(3) WFG's reasonable costs of participating in the expert assessment process, such costs also to be assessed by Mr Gordon-Saker.

197. If there should be an appeal against the present judgment, Mr Merricks' costs of resisting any appeal, insofar as not recovered, will also come out of Pot 3.

198. Next, we think that what we have called the profit element of Innsworth's return should be paid: i.e. 50% of the amount of Pot 2. Since the model of distribution to the class proposed by the Settling Parties, which we have approved, involves a ring-fenced sum with a higher per capita amount to attract higher take-up, we

consider that it is just and reasonable that Innsworth's return is here also protected.

199. Thirdly, Pot 3 should be used to supplement Pot 1 in the event that more than 5% of the class submit claims, to the extent that further monies are needed to enable each CM to receive £45 (or such lesser sum as Pot 3 permits). To be clear, the £70 cap applies only until the £100 million in Pot 1 is exhausted: para 131 above.

200. To the extent that money remains in Pot 3 after the three stages set out above, it should go to charity, as proposed by the Settling Parties. As noted above, the CR proposed that this charity should be the Foundation and, with the permission of the Tribunal, the Foundation intervened in the proceedings. Along with its written submissions, the Foundation served a witness statement from its chief executive, Ms Clare Carter. Ms Carter explains that the Foundation is engaged in giving grants to a wide range of organisations engaged in giving legal advice or assistance without charge, to people in need of such legal support or assistance, including e.g. law centres.

201. Mastercard proposed that the selected charity should be The Good Things Foundation ("TGTF"), and the Tribunal received a helpful letter from TGTF summarising the work that it does in helping vulnerable people across the UK in having effective access to online services.

202. We have no doubt that the TGTF is a very worthwhile charity doing valuable work. However, in our judgment the Foundation is the appropriate charity to receive the residue of money out of the Settlement Sum. The Foundation is the only charity prescribed under CA s. 47C(5) to receive unclaimed damages in the event of a judgment. The class in the present proceedings comprises almost the entire adult population of the UK over a certain age. Since the justification of the collective proceedings is that the CMs could not in practice bring these claims otherwise, a charity which has as its object the provision of assistance to a very wide range of bodies across the UK to help the disadvantaged pursue or protect their legal rights seems to us an appropriate recipient of residue funds in these proceedings.

203. Moreover, we think there is considerable force in the Government's observation, in its response to the consultation on *Private Actions in Competition Law* (January 2013), which led to the introduction of the regime for collective proceedings in the Consumer Rights Act 2015, that "there would be frequently substantial difficulties in determining a suitable candidate for organisational distribution and that this in turn would likely lead to the lobbying of judges and potentially also satellite litigation disputing the party chosen" para 5.64). The Government's response recognised that alternatives might be appropriate on a settlement "providing that this was the most satisfactory way of ensuring that as many persons as have suffered loss receive redress" (para 5.65). In that regard, we accept that there might sometimes be a charity which, in the circumstances or nature of particular collective proceedings, is more closely aligned with the interests of the class than the Foundation. That will be a matter for determination by the Tribunal when addressing settlement on the particular facts of the case.

204. In addition to a residue under Pot 3, if take-up is very low despite the cap of £70 such that there remain unclaimed funds under Pot 1, those monies should also go to the Foundation.

205. We illustrate in an Appendix the way distribution to the class would apply under three alternative scenarios of take-up by CMs.

G. NOTIFICATION TO THE CLASS

206. The period proposed in the draft notice submitted with the Application is three months. In our view, that is much too short, given the size and range of the class. We consider that six months is more appropriate in this case. Since the total available for the class will not be known until the size of Pot 2 is ascertained, and the potential individual payments depend in any event on the degree of take-up, it is for Mr Merricks to consider with Epiq whether the distribution arrangements should provide an initial payment with potentially a subsequent top-up, or delayed distribution of a single payment once these uncertainties are resolved. These matters will have to be clearly explained in

the notice. Mr Merricks should submit to the Tribunal a revised draft notice, reflecting the decisions in this judgment, for approval.

H. CONCLUSION

207. We have therefore approved the Settlement Agreement, as announced in the course of the hearing, and will grant a CSAO with provisions for payment and distribution incorporating the three pots as set out in this judgment. The Settling Parties are asked to submit a revised CSAO accordingly.

208. We emphasise that the approach to settlement set out in this judgment is determined by the exceptional circumstances of this case, where the settlement is at an extraordinarily low proportion (under 1.5%) of the claim as originally advanced in 2016, and under 1.2% of the claim as revised in late 2022. This approach should not be regarded as a guide for more positive settlements of cases that reflect better the public policy behind the introduction of collective proceedings.

209. This judgment is unanimous.

POSTSCRIPT

210. In *McLaren (2025)*, the Tribunal said that Settling Parties submitting a proposed settlement agreement for approval owe a duty of full and frank disclosure. The judgment stated, at [65]:

> "This obligation tracks through to the supporting documentation put before the Tribunal by the parties and their experts, which must be rigorous in their assessment of both the points in favour and the against the approval of a settlement."

211. In the present case, the Tribunal heard sustained contrary argument from an intervener, but that will often not be the position. We consider that an application for a CSAO, just like an application without notice for an injunction or freezing order in the High Court, should in future have a section specifically addressing full and frank disclosure, setting out and addressing the arguments that might be raised objecting to the proposed settlement.

212. Secondly, while we recognise at para 106 above the explanation in the particular circumstances of the present case, ordinarily the Tribunal will expect the CR to provide a comprehensive opinion from its counsel (who we apprehend will usually be a KC) setting out the considerations on the basis of which counsel has advised that the proposed settlement is reasonable in the interests of the class. Obviously, that opinion will be privileged and protected from disclosure to the defendants.

213. Thirdly, it is not infrequent for parties to settle litigation very shortly before trial or "at the door of the court". However, mutually agreed settlements do not normally depend on the court's approval. Since agreement between the parties to resolve opt-out collective proceedings can produce only a proposed settlement agreement which the Tribunal will need to scrutinise carefully, achieving settlement at short notice will generally not be possible in such proceedings. If the proposal is presented shortly before trial, the parties need to recognise that the likely outcome is that the trial will have to be adjourned and will be refixed if the settlement is not approved. In the present case, because of the unusual situation where one aspect of the present proceedings was due to be heard at trial with the independent Merchant Umbrella Proceedings, that course was not possible, and there are similarly difficulties in the case of a partial settlement with only some of the defendants to collective proceedings. Settling parties need to bear this in mind, since the Tribunal will always require a proper opportunity, on full submissions and evidence, to determine whether a proposed settlement is just and reasonable.

APPENDIX

Distribution to the class under three alternative scenarios

(1) *If only 200,000 CMs come forward to claim*

Of the £100 million in Pot 1, each claiming CM would receive £70 (para 131). There would be a residue of £86 million in Pot 1 which would pass to the Foundation (para 204). Pot 3 would be unaffected as it would contain sufficient funds to pay the relevant costs (paras 196-197) and Innsworth's profit return (para 198). Any residue in Pot 3 would also go to the Foundation (para 204).

(2) *If 2 million CMs come forward to claim*

Of the £100 million in Pot 1, each claiming CM would receive £50. Pot 1 would be entirely exhausted. And there would be no top-up from Pot 3 (paras 132 and 199).

(3) *If 22 million CMs come forward to claim*

Of the £100 million in Pot 1, each claiming CM would receive £4.54. Pot 1 would be entirely exhausted. Then under Pot 3, the amount remaining after payment of the relevant costs (paras 196-197) and Innsworth's profit return (para 198), would be divided by 22 million and that amount added to the £4.54 to increase the distribution to each CM (para 199). E.g. if £33 million were left in Pot 3, the distribution to each claiming CM would be topped up by £1.50 to reach £6.04. Nothing would pass to the Foundation.

The Hon. Mr Justice Roth Acting President	Hodge Malek KC	Prof Rachael Mulheron KC (Hon)

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 20 May 2025