Neutral citation [2022] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

18 February 2022

Before:

THE HONOURABLE MRS JUSTICE FALK DBE
(Chairwoman)
DR WILLIAM BISHOP
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

MARK McLAREN CLASS REPRESENTATIVE LIMITED

Applicant /
Proposed Class Representative

- v -

(1) MOL (EUROPE AFRICA) LTD
(2) MITSUI O.S.K. LINES LIMITED
(3) NISSAN MOTOR CAR CARRIER CO. LTD
(4) KAWASAKI KISEN KAISHA LTD
(5) NIPPON YUSEN KABUSHIKI KAISHA
(6) WALLENIUS WILHELMSEN OCEAN AS
(7) EUKOR CAR CARRIERS INC
(8) WALLENIUS LOGISTICS AB
(9) WILHELMSEN SHIPS HOLDING MALTA LIMITED
(10) WALLENIUS LINES AB
(11) WALLENIUS WILHELMSEN ASA
(12) COMPANIA SUDAMERICANA DE VAPORES S.A.

Respondents /

Proposed Defendants

Heard at Salisbury Square House on 29, 30 November and 1 December 2021

JUDGMENT

APPEARANCES

Sarah Ford QC and Emma Mockford (instructed by Scott +Scott UK LLP) appeared on behalf of the Applicant / Proposed Class Representative.

Mark Hoskins QC and David Bailey (instructed by Arnold & Porter Kaye Scholer (UK) LLP) appeared on behalf of the First to Third Respondents.

Tony Singla QC and Anneliese Blackwood (instructed by Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Fourth Respondent.

Marie Demetriou QC and Daniel Piccinin (instructed by Steptoe and Johnson LLP) appeared on behalf of the Fifth Respondent.

Josh Holmes QC and Michael Armitage (instructed by Baker Botts (UK) LLP) appeared on behalf of the Sixth to Eleventh Respondents.

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A. INTRODUCTION

1. This is the Tribunal's judgment on an application ("the CPO Application") by Mark McLaren Class Representative Limited ("the Applicant") pursuant to s. 47B of the Competition Act 1998 ("CA")[1] for a collective proceedings order ("CPO"). The CPO Application seeks to combine claims under s. 47A for damages caused by the Respondents' breach of statutory duty in infringing Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 53 of the Agreement on the European Economic Area ("EEA Agreement"). The claims are "follow-on" claims, because the existence of a breach of duty was determined by the European Commission ("the Commission") in an infringement decision adopted on 21 February 2018 in Case AT.40009 – Maritime Car Carriers ("the Commission Decision"). The Commission Decision followed settlement discussions with the Respondents.

2. The CPO Application was heard in person on 29 November to 1 December 2021. The hearing included consideration of applications for strike-out or reverse summary judgment contained in the response to the CPO Application made by the Fourth Respondent and in the joint response made by the First to Third, Fifth and Sixth to Eleventh Respondents. All parties filed written submissions and participated at the CPO Application hearing, save for the Twelfth Respondent which took a neutral position as to whether the CPO Application should be granted. In advance of the CPO Application hearing, the Tribunal informed the parties that it did not require their experts to be available for questioning at the hearing.

B. BACKGROUND

(1) The parties

3. The Applicant is a company incorporated under the laws of England and Wales specifically for the purposes of bringing the proposed collective proceedings.

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[1] Unless otherwise stated, all statutory references in this judgment are to the CA.

Its sole director and sole member is Mr Mark McLaren, who as discussed below has substantial experience of working in consumer-related roles.

4. The Respondents are providers of, or are engaged or involved in the provision of, international ocean shipping services. They are each addressees of the Commission Decision. By way of shorthand, this judgment refers to various individual Respondents collectively by reference to the undertaking to which they were treated as belonging by the Commission Decision. As such, the First to Third Respondents are referred to as "MOL", the Fourth Respondent as "KK", the Fifth Respondent as "NYKK", the Sixth to Eleventh Respondents as "WWL" and the Twelfth Respondent as "CSAV".

(2) The Commission Decision

5. The Commission Decision concluded that the Respondents had infringed Article 101 of the TFEU and Article 53 of the EEA Agreement by participating in a single and continuous infringement consisting of the co-ordination of prices and the allocation of customers with regard to the provision of "deep sea"[2] carriage of new motor vehicles (cars, trucks and high and heavy vehicles) on various routes to and from the European Economic Area ("EEA"). The infringement lasted from 18 October 2006 to 6 September 2012 ("the Cartel Period"), during which the Respondents participated for the following periods:

(1) MOL: from 18 October 2006 to 24 May 2012 (the date when it applied for immunity);

(2) KK: from 18 October 2006 to 6 September 2012;

(3) NYKK: from 18 October 2006 to 6 September 2012;

(4) WWL: from 18 October 2006 to 6 September 2012; and

[2] Described in the Commission Decision as "interoceanic or intercontinental". In contrast, "short sea" car carriage services are explicitly excluded.

(5) CSAV: from 18 October 2006 to 6 September 2012 (limited participation).

6. The Commission Decision describes the activities of the cartel members as being involved in varying degrees in conduct that "sought to: (i) coordinate the prices of certain tenders, (ii) allocate the business of certain customers and (iii) reduce capacity by coordinating the scrapping of vessels" (recital (29)). The conduct followed the "rule of respect" as a guiding principle, respecting the business of an incumbent carrier (recital (30)). The conduct had the aim of restricting competition, maintaining the status quo and maintaining or increasing prices (recital (51)).

7. The start date of 18 October 2006 is explained in recital (42). It was the earliest date on which the Commission could exercise jurisdiction to sanction the conduct of the parties, by reason of the entry into force of Council Regulation (EC) No 1419/2006 on that date. The end date of 6 September 2012 was the date on which the Commission's inspections started (recital (43)).

(3) The CPO Application

8. The CPO Application was filed on 20 February 2020 by way of a collective proceedings claim form. It was supported, amongst other documentation, by a witness statement by Mr McLaren, industry expert evidence by Mr Andrew Goss and Mr Anthony Whitehorn ("Goss & Whitehorn 1"), and economic expert evidence by Mr Tom Robinson ("Robinson 1"). Mr Goss and Mr Whitehorn both have experience working in the automotive industry. Mr Goss is currently Chairman of Vertu Motors plc (a substantial dealership group) and has previously held senior roles at Jaguar Land Rover, Porsche and Toyota. Mr Whitehorn has held senior roles at Hyundai and Toyota. Mr Robinson is a Director in the forensic practice of BDO LLP.

9. On 16 March 2021, the Applicant filed an amended collective proceedings claim form. The Respondents consented to the amendments.

10. The CPO Application seeks to combine on an opt-out basis the claims of UK-domiciled[3] consumers and businesses who "Purchased or Financed, in the United Kingdom," a "New Vehicle" or a "New Lease Vehicle", excluding those of "Excluded Brands", during the period from 18 October 2006 to 6 September 2015 ("the Relevant Period"). The claims are for unlawfully inflated delivery charges that it is alleged that class members were required to pay in respect of their vehicles because of the Respondents' anticompetitive conduct.

11. The Relevant Period combines the Cartel Period with a run-off period during which it is alleged that the cartel continued to have an impact, currently assumed to be three years in length. The concept of "Purchased or Financed in the United Kingdom" covers outright purchase (other than for the purpose of providing vehicle finance) and acquisition by hire purchase, personal contract purchase or contract hire leasing arrangement. "New Vehicles" are cars and light and medium weight commercial vehicles first registered in the name of the purchaser or a related party, and "New Lease Vehicles" are such vehicles first registered in the name of a contract hire lessor. The "Excluded Brands" are a list of brands that the Applicant has excluded on the basis that vehicles produced under those brand names were not shipped intercontinentally into the EEA during the Relevant Period. The list of Excluded Brands includes a number of well-known brands such as Alfa Romeo, Audi, Fiat, Jaguar, Land Rover, Mini, Skoda and Volvo.

12. The proposed class members ("PCMs") obviously did not contract directly with any of the Respondents. The claims therefore depend on the class members having suffered loss as a result of the "passing-on" of any overcharge down a supply chain. It is uncontroversial that the relevant supply chain in this case is, at least in most cases, as follows. Original equipment manufacturers ("OEMs") enter into agreements with vehicle carrier operators such as the Respondents to transport vehicles to a central distribution location for the relevant national market. Once transported, vehicles are generally passed down the supply chain to national sales companies ("NSCs"). NSCs are typically, but not always,

[3] Non-UK domiciled persons would be entitled to participate on an opt-in basis, as contemplated by s. 47B(11).

members of the same corporate group as the relevant OEM. NSCs in turn supply retailers (dealerships). It is the dealerships that sell the vehicles to private or business purchasers, such as the PCMs. In essence, the Applicant claims that the full effects of the cartel were passed down the supply chain to PCMs via delivery charges which were either paid directly or were borne via lease or other financing payments on the vehicles they acquired. As discussed below, although delivery charges are levied by dealers, recommended delivery charges are set by the NSCs.

13. The preliminary estimate of the PCMs' aggregate loss (before interest) according to Robinson 1 is in the region of between £57m and £115m, depending on the applicable overcharge figure, or between £71m and £143m if simple interest is included. The methodology which the Applicant proposes to use to calculate the extent of loss passed on to and suffered by the PCMs is set out in Robinson 1. The modelled scenarios in Robinson 1 are based on the factual information from Goss & Whitehorn 1, and the data that will be needed to apply the proposed methodology is identified in Robinson 1.

14. The CPO Application also seeks compound interest by way of damages.

(4) The responses to the CPO Application

15. On 30 June 2021, KK filed a response to the CPO Application ("KK's Response") and MOL, NYKK and WWL (together, "MNW") filed a joint response ("the MNW Joint Response"). KK's Response was supported by witness statements by Mr Neil Cunningham and Mr James Dent, and by an expert report by Dr Adrian Majumdar. Mr Cunningham is a self-employed consultant in the vehicle rental and credit hire sector. Mr Dent is employed as a Retail Sales Leader at a franchisee retailer of BMW. Dr Majumdar is a partner at RBB Economics. The MNW Joint Response was supported by an expert report by Dr Nicola Tosini. Dr Tosini is a Director in NERA Economic Consulting's Antitrust and Competition Practice.

16. CSAV did not file a response on the basis that it is neutral as to whether the CPO Application should be granted. Accordingly, references in this judgment

to arguments or submissions made by the "Respondents" refer to those advanced by KK and MNW.

17. In brief, and insofar as the matters raised in the MNW Joint Response and KK's Response were live issues at the CPO Application hearing, KK and MNW contended that the CPO Application should be dismissed on the basis that there are fundamental flaws with the Applicant's proposed methodology. At the hearing, counsel for KK and MNW confirmed that they were making a strike out or reverse summary judgment application on that basis.

18. MNW contended that the fundamental flaws in the Applicant's methodology are that: (i) it does not measure loss at all because it only considers delivery charges, rather than the overall vehicle prices that PCMs actually paid; and (ii) in any event it measures changes over time to delivery charges, rather than differences between the claim period and a period that was not affected by the cartel. As a result, the methodology has no logical connection with whether PCMs paid more in the real world than they would have paid in the counterfactual world.

19. KK added that the Applicant's methodology, which assumes 100% pass-on to every PCM, is wholly unsound as a matter of fact. KK contended that, in reality, significant variations are likely to have existed between different vehicles, time periods and PCMs, and there would have been individual negotiations at multiple levels of the supply chain. The Applicant's proposed methodology was arbitrary and did not correct for the erroneous assumption of 100% pass-on. Accordingly, the methodology was not credible and did not meet the test set out in *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 ("*Microsoft*").

20. However, in the event that the Tribunal were to make a CPO on an opt-out basis, MNW submitted (supported by KK) that it should not include "Large Business Purchasers", which MNW suggested should be defined as covering any business that either purchased or financed in the UK at least 20,000 new vehicles during the Relevant Period. MNW submitted that it would be more appropriate for

collective proceedings on behalf of Large Business Purchasers to be brought on an opt-in basis.

21. MNW further argued that the CPO Application did not deal adequately with class members who were deceased individuals or defunct (dissolved) companies, and that compound interest should not be certified as a common issue.

22. MNW also contended that the Applicant should not be authorised until it rectified defects in its relationships with Mr McLaren and the litigation funder.

(5) The Applicant's reply

23. The Applicant filed its reply on 1 October 2021 ("the Reply"), supported by a witness statement by Ms Belinda Hollway, who is a partner at Scott+Scott UK LLP (the Applicant's solicitors), a supplemental expert report by Mr Goss and Mr Whitehorn ("Goss & Whitehorn 2"), and a further expert report by Mr Robinson ("Robinson 2").

24. In the Reply, the Applicant responded to criticisms of the methodology, rejected the proposal that Large Business Purchasers should participate on an opt-in basis and denied that there were defects in the arrangements that the Applicant had entered into. In response to other criticisms, it narrowed the scope of the claim to compound interest and confirmed that claims were not being advanced on behalf of dissolved companies. However, it also sought to clarify that claims were being advanced on behalf of the estates of deceased class members.

C. LEGISLATIVE FRAMEWORK

25. Collective proceedings before the Tribunal refer to a collection of claims which it would have been possible to bring on an individual basis under s. 47A. Collective proceedings are governed by s. 47B, which sets out the requirements which must be fulfilled in order for the Tribunal to make a CPO. Section 47B(5) provides:

> "(5) The Tribunal may make a collective proceedings order only—

> (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
>
> (b) in respect of claims which are eligible for inclusion in collective proceedings."

26. These criteria are referred to below, respectively, as the "authorisation condition" and the "eligibility condition".

27. The Tribunal must therefore be satisfied that the proposed class representative ("PCR") meets the authorisation condition, which is set out in s. 47B(8):

> "(8) The Tribunal may authorise a person to act as the representative in collective proceedings—
>
> (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a "class member"), but
>
> (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings."

28. The factors which the Tribunal will take into account in determining whether it is just and reasonable for the Applicant to act as a class representative are set out in rule 78 of the Competition Appeal Tribunal Rules 2015 (the "CAT rules")[4]. Insofar as is relevant to these proceedings, rule 78 provides:

> "78.—(1) The Tribunal may authorise an applicant to act as the class representative—
>
> (a) whether or not the applicant is a class member, but
>
> (b) only if the Tribunal considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings.
>
> (2) In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person—
>
> (a) would fairly and adequately act in the interests of the class members;
>
> (b) does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
>
> ….
>
> (d) will be able to pay the defendant's recoverable costs if ordered to do so;

[4] Unless otherwise stated, all references to rules are to the CAT rules.

…

> (3) In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph (2)(a), the Tribunal shall take into account all the circumstances, including—
>
> (a) whether the proposed class representative is a member of the class, and if so, its suitability to manage the proceedings;
>
> (b) if the proposed class representative is not a member of the class, whether it is a pre-existing body and the nature and functions of that body;
>
> (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—
>
> (i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and
>
> (ii) a procedure for governance and consultation which takes into account the size and nature of the class; and
>
> (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide.
>
> (4) If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that sub-class."

29. The Tribunal must also determine whether the claims to be included within the proceedings satisfy the eligibility condition as set out in s. 47B(6). Section 47B(6) provides:

> "(6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings."

30. There are therefore two limbs in s. 47B(6), namely that the claims:

(1) raise the same, similar or related issues of fact or law (defined in rule 73, and referred to below, as "common issues"); and

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

31. Rule 79 governs the eligibility condition and the factors which the Tribunal must take into account when determining whether this condition is satisfied. Rules 79(1) and (2) provide as follows:

> "79.—(1) The Tribunal may certify claims as eligible for inclusion in collective proceedings where, having regard to all the circumstances, it is satisfied by the proposed class representative that the claims sought to be included in the collective proceedings—
>
> (a) are brought on behalf of an identifiable class of persons;
>
> (b) raise common issues; and
>
> (c) are suitable to be brought in collective proceedings.
>
> (2) In determining whether the claims are suitable to be brought in collective proceedings for the purposes of paragraph (1)(c), the Tribunal shall take into account all matters it thinks fit, including—
>
> (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues;
>
> (b) the costs and the benefits of continuing the collective proceedings;
>
> (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class;
>
> (d) the size and the nature of the class;
>
> (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class;
>
> (f) whether the claims are suitable for an aggregate award of damages; and
>
> (g) the availability of alternative dispute resolution and any other means of resolving the dispute ..."

32. Of relevance to the present CPO Application, the Competition Appeal Tribunal Guide to Proceedings 2015 (the "Guide") provides further detail regarding the three requirements for determining eligibility as set out in rule 79(1) (i.e. an identifiable class, commonality, and suitability). The Guide has effect as a practice direction pursuant to rule 115(3). Paragraph 6.37 of the Guide explains the requirement that claims are brought on behalf of an identifiable class of persons as follows:

> "It must be possible to say for any particular person, using an objective definition of the class, whether that person falls within the class. The need for an identifiable class of persons serves several purposes. It sets the parameters of the claim by clearly delineating who is within the class and who is not, thus determining who will be bound by any resulting judgment. It affects the scope

> of the common issues raised by the collective proceedings. And it has practical implications, such as in relation to the requirements to give notice. Indeed, it is the class definition which potential class members will read when considering whether to opt in or out of the proceedings. …
>
> Accordingly, class definitions based on subjective or merits-based criteria (for example "persons having suffered loss as a result of the defendant's conduct") should be avoided. Further, the class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim. If the class is too broad, the proposed collective proceedings may raise too few common issues and accordingly not be worthwhile."

33. In respect of common issues, the Guide continues:

> "Although the claims must raise common issues to satisfy the criteria for approval, the final resolution of the claims will often require assessment of individual issues. The existence of such individual issues is not fatal to an application for a CPO. … [t]he Tribunal may decide to approve collective proceedings in relation to only part of the claims (Rule 74(6))."

34. The Guide goes on to explain that when determining whether claims are suitable to be brought in collective proceedings, the Tribunal can take into account all matters it thinks fit and the specific factors within rule 79(2). It states:

> "By way of illustration, the Tribunal may consider the costs and benefits of continuing the collective proceedings in various ways (Rule 79(2)(b)) having regard to the likely loss incurred, any potential damages award and the financial cost of continuing proceedings collectively. Where the estimated legal fees and expenses appear disproportionate compared to the likely damages award, the costs of pursuing collective proceedings may outweigh the benefits. The Tribunal may also consider whether collective proceedings should be preferred, in the circumstances, to ordinary individual proceedings, or other ways of resolving the dispute. In this respect, the size and nature of the class may be relevant (see Rule 79(2)(d) – it may be that where the class is small, but each individual member's loss is significant, redress would be more effectively obtained by an ordinary individual action).
>
> Where only certain issues in the claims constitute common issues, there is no requirement that those must predominate over the remaining individual issues in order for it to be suitable for the part of the claims covering the common issues to be brought in collective proceedings. However, the common issues must be significant such that resolution of those issues will significantly advance the claims of the members of the class."

35. As discussed further below, the Supreme Court has made it clear that suitability for the purpose of s. 47B(6) and rule 79(2)(f) is to be interpreted in a relative sense.

36. The Tribunal's consideration of the eligibility condition does not, as a matter of course, involve an assessment of the merits of the claims. However, the strength of the claims will be assessed in circumstances where the Tribunal is considering:

(1) an application for strike out, in assessing whether there are reasonable grounds for making the claim (rule 41(1)(b)); and

(2) whether to grant summary judgment, in assessing whether there is no real prospect of succeeding on (or successfully defending) the claim, and no other compelling reason to proceed to a substantive hearing (rule 43(1)).

37. The strength of the claims is also relevant to the question whether proceedings should be brought on an opt-in or opt-out basis. Rule 79(3) provides:

> "(3) In determining whether collective proceedings should be opt-in or opt-out proceedings, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those set out in paragraph (2)—
>
> (a) the strength of the claims; and
>
> (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover."

38. Paragraphs 6.38 and 6.39 of the Guide address the choice between opt-in and opt-out proceedings. Paragraph 6.38 points out that a judgment in opt-out proceedings binds all persons within the class (save for those who have opted out or foreign class members who have not opted in), and that where the class representative seeks approval to bring opt-out proceedings it will need to make submissions "as to why that form of proceedings is more appropriate than opt-in proceedings". Paragraph 6.39 provides further commentary as to the factors which the Tribunal must weigh up in considering the appropriateness of opt-in versus opt-out:

> "- *Strength of the claims (Rule 79(3)(a))*
>
> Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class

members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment … Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion.

> *- Whether it is practicable for the proceedings to be brought as opt-in proceedings (Rule 79(3)(b))*
>
> The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members."

39. Should the Tribunal consider that the authorisation and eligibility conditions are satisfied, the Tribunal may make a CPO that authorises the PCR to act as representative in the proceedings. The CPO must among other things also include a description of the class of persons whose claims are eligible for inclusion in the proceedings, and specify the proceedings as opt-in collective proceedings or opt-out collective proceedings (s. 47B(7); rule 80).

40. There is an important provision concerning aggregate damages in s. 47C(2):

> "(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

D. AUTHORISATION CONDITION

41. As set out above, the Tribunal must be satisfied that it is "just and reasonable" for the PCR to act as such, taking into account the matters specified in rule 78(2).

42. Subject to the objections raised by the Respondents that are considered below, we are satisfied that this requirement is met. Rightly, no objection is taken to Mr McLaren as an individual, or the fact that a choice has been made to incorporate a special purpose vehicle to act as the PCR (of which Mr McLaren

is the sole director and shareholder) rather than Mr McLaren acting directly in his individual capacity. Mr McLaren has substantial experience in consumer protection, including nine years working for the consumer association "Which?", and is among other things a serving member of the Legal Services Consumer Panel.

43. Mr McLaren will be assisted by a consultative Advisory Committee which includes among others a former Lord Justice of Appeal and individuals with motor industry and consumer protection experience. An experienced claims administrator, Case Pilots, has also been engaged and a litigation plan has been prepared governing the matters referred to in rule 78(3)(c) (namely, the proposed method for bringing the proceedings and notifying represented persons of their progress, the proposed procedure for governance and consultation, and estimated costs and associated funding arrangements).

44. We are satisfied that, in the circumstances, the Applicant would fairly and adequately act in the interests of class members, as required by rule 78(2)(a). We are also satisfied that the Applicant has no material interest in conflict with the interests of class members (rule 78(2)(b)).

45. Substantial funding has been obtained from Woodsford Litigation Funding Limited ("Woodsford"), a member of the Association of Litigation Funders, providing funding of up to £14.85m, together with adverse cost cover of up to £15m. The Respondents will benefit from a direct undertaking in respect of adverse costs from Woodsford, which assists in addressing any concern that insolvency on the part of the Applicant could prevent recovery of costs.

46. The Respondents' written responses to the CPO Application raised two issues in relation to the authorisation condition. Although these were adopted in the Respondents' skeleton arguments, we did not receive oral submissions about them and can deal with them briefly.

47. First, the Respondents say that the lack of a service contract between Mr McLaren and the Applicant is a defect. There is therefore no guarantee that Mr McLaren would continue to be involved in the proceedings or as to how the

Applicant would protect the interests of class members if Mr McLaren ceased to be a director.

48. In our view it would be artificial, and not add material protection, to require a service contract to be entered into between Mr McLaren and a company solely owned by him, and of which he is the sole director. Better protection is provided through the power of the Tribunal to vary or revoke the CPO on the basis that the class representative no longer meets the criteria in rule 78. The Applicant has also confirmed to the Tribunal that it will inform it and the Respondents if Mr McLaren were to step down from his role as sole director or otherwise become unable to act. In our view that is adequate.

49. Secondly, concern is raised about influence that could be exerted by Woodsford on the Applicant. The Respondents point to a deed of adherence entered into between Mr McLaren and Woodsford and suggest that it shows that Mr McLaren does not have sole control of the Applicant, with the result that there is a question as to the ability of the Applicant to act fairly and adequately in the interests of the class, because Woodsford's own interest might be in conflict with those of class members.

50. We do not consider this to be a material concern. The deed of adherence does not permit Woodsford to interfere in the conduct of the litigation. It does provide that Mr McLaren will not take certain steps in relation to the governance and constitution of the Applicant without the consent of Woodsford. These include retiring as a director or withdrawing from membership, amending the Articles of Association or admitting new members. There are also limited undertakings designed to ensure that Mr McLaren will not cause the Applicant to take on financial liabilities unrelated to the proceedings or to breach its obligations to Woodsford or the legal team it has engaged. We do not consider these provisions to be inappropriate, or indeed surprising given the funding commitments being provided. They will not prevent Mr McLaren from having full control of the Applicant in relation to the conduct of the litigation.

51. We have also considered the terms of the funding arrangements more generally and are satisfied that they would not prevent the Applicant from conducting the proceedings in the interests of class members.

52. Accordingly, we are satisfied that the authorisation condition is met.

E. SUMMARY JUDGMENT/STRIKE OUT

53. In the MNW Joint Response (also adopted by KK), MNW sought reverse summary judgment or striking out, arguing that the methodology proposed to demonstrate loss by class members was so flawed that it had no real prospect of success at trial. The Applicant maintained that those applications were not properly made because they failed to comply with the procedural requirements set out in the Guide, including that any application for summary judgment must be supported by evidence, be accompanied by a draft order and include a statement of belief that the Applicant had no real prospect of succeeding (paragraph 5.106).

54. During the course of the hearing a draft order and signed statement of belief were supplied, and the Applicant's objections were not pursued in reply. In any event, however, we would not have felt constrained from considering whether striking out or summary judgment was appropriate, given the Tribunal's power to act on its own initiative under rule 41 (power to strike out) and rule 43 (summary judgment).

55. There was no dispute as to the basis on which we should approach the question of summary judgment or strike out, namely in the same way as the High Court under the Civil Procedure Rules, or as to the test for summary judgment, in essence whether the claim has a realistic prospect of success: *Gutmann v First MTR South Western Trains Ltd* [2021] CAT 31 ("*Gutmann*") at [52].

56. We have concluded that the Applicant's case should not be struck out, in whole or in part, and that summary judgment is not appropriate. The reasons for these conclusions are set out in the discussion of the eligibility condition that follows,

and in particular our conclusion that the proposed methodology is sufficiently plausible to meet the common issues requirement.

F. ELIGIBILITY CONDITION

(1) Identifiable Class

57. As set out above, collective proceedings must be brought on behalf of an identifiable class of persons: rule 79(1)(a). The Tribunal is also required to take into account "whether it is possible to determine in respect of any person whether that person is or is not a member of the class": rule 79(2)(e). The Guide states both that an objective definition should be used, and that the class should be defined "as narrowly as possible without arbitrarily excluding some people entitled to claim".

58. Subject to one point, there was no material issue with the clarity of the proposed class definition, summarised at [10] and [11] above. It provides objective criteria for delineating clearly who is and who is not within the proposed class.

59. The point that arose relates to class members who acquired vehicles at a time when the application of the Applicant's proposed methodology would indicate that they had suffered no loss. This is because the effect of that methodology is to treat loss as having arisen only where a vehicle of a particular brand has been acquired after both: (a) the first affected shipping contract was entered into by the OEM after 18 October 2006; and (b) the NSC having then increased its delivery charge. KK claims that, as a result, the proposed methodology does not match the class definition, which relates to all acquisitions of vehicles of non-Excluded Brands throughout the Relevant Period. It says that there would be a significant number of transactions in respect of which no loss arose and there was therefore no sustainable cause of action. Even if it was possible to have some limited ambiguity as to whether all PCMs had suffered loss, that did not absolve the Applicant from properly defining the class in a way that excluded persons that it already knows have not suffered any loss.

60. At this stage, prior to disclosure and further evidence, the precise methodology can only be provisional. Further, and importantly, it would simply not be possible for the Applicant to narrow the class definition at this stage to exclude categories of persons as KK says it should have done, and to do so in a way which would allow persons to determine whether they are or are not members of the class as the CAT rules require. The Applicant would need details of the dates of all the relevant shipping contracts, which it will not have until disclosure has occurred, and it would also need details of delivery charges during the Relevant Period for all non-Excluded Brands. At present it only has details for a small sample of brands. Whilst it could have obtained further delivery charge details, that would be disproportionate in advance of certification and would not assist in narrowing the class definition without the affected contracts.

61. In the circumstances, a simple, clear definition is preferable. In our view it is not fatal that some of the class members have not suffered damage in a manner that would be quantified by the proposed methodology. All of them acquired vehicles during the Cartel Period, and the common issue (that is, the question) arises of the extent of pass-on to them. It is also clear from *Merricks v Mastercard Incorporated* [2020] UKSC 51; [2021] Bus LR 25 ("*Merricks SC*") that the power in s. 47C(2) to award aggregate damages is far-reaching, because it removes the need separately to assess each claimant's loss (judgment of Lord Briggs at [58] and [76]-[77], and of Lord Sales and Lord Leggatt at [120]).

62. The risk that the application of the proposed methodology may result in certain members of the class being found not to have suffered any quantified loss, and therefore (depending on the method of distribution) being potentially less likely than other class members to participate in any award of damages, can if appropriate be addressed in communications to class members. Those communications would in any event have to make clear that any award of damages would be subject to the outcome of the trial, as well as to decisions about the method of distribution. If it subsequently transpired that a very substantial proportion of class members were affected, consideration could be given at a later stage to the possible exercise of the Tribunal's power under rule 85 to vary the CPO by narrowing the class definition. As already indicated,

the manner of distribution of any award could also be affected. And of course the amount of any award of damages would in any event take account of the extent to which class members are found not to have suffered loss.

63. We have accordingly concluded that the proposed class definition meets the identifiable class requirement in rule 79(1)(a).

(2) Commonality

64. Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise "common issues", being the "same, similar or related issues" of fact or law: s. 47B(6). In *Gutmann,* the Tribunal considered the Canadian authorities in some detail and at [107] set out some principles derived from them, as follows:

> "As regards the common issues, the Canadian Supreme Court has set out the following principles which we think can appropriately be applied under the UK regime:
>
> (1) the common issues requirement should be interpreted purposively, having regard to the object of the collective proceedings regime: *Dutton*[5], *Microsoft*[6];
>
> (2) it is not necessary for common issues to predominate over non-common issues, but if several significant issues are common issues, that will favour certification: *Dutton*, *Microsoft*, and see *Merricks SC* at [65]-[66];
>
> (3) a common issue does not require that all members of the class have the same interest in its resolution. The commonality refers to the question not the answer, and there can be a significant level of difference between the position of class members. Therefore the question may receive varied and nuanced answers depending on the situation of different class members, so long as the issue advances the litigation as a whole: *Vivendi*[7], *Godfrey*[8]; and
>
> (4) the standard to be applied in assessing expert evidence designed to show a common issue is that it must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement and that it is not purely theoretical but grounded in the facts of the particular case in question, with some evidence of the availability of the data to which the methodology is to be applied, i.e. the *Microsoft* test; but this is not an onerous evidential test: see *Merricks SC* at [40]-[42]."

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[5] *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46
[6] *Pro-Sys Consultants Ltd v Microsoft Corpn*, 2013 SCC 57
[7] *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1
[8] *Pioneer Corp. v Godfrey*, 2019 SCC 42

65. There was no dispute that certain common issues exist. Apart from questions of jurisdiction, applicable law and limitation, the most material ones are: the impact of the cartel on the price at which deep sea carriage services were provided to OEMs, both by the Respondents and (by reason of the cartel having an "umbrella" effect on the rest of the market) by others; the extent to which the cartel had an impact after the end of the Cartel Period on 6 September 2012 (that is, the "run-off" period); and the volume of commerce affected.

66. The central dispute before us concerned whether the question of pass-on to PCMs of any price impact that the cartel had was capable of certification as a common issue, on the basis that the expert methodology proposed by the Applicant was sufficiently capable of determining whether PCMs had suffered loss as a result of the infringement.

67. All parties accepted that the issue of pass-on to the class was of principal relevance to the common issues requirement. In other words, was the question of whether loss had been suffered a common issue, such as to justify certification? Whilst in principle it is clearly a common question for PCMs (sub-paragraph (3) in the passage from *Gutmann* set out above), the Respondents disputed that it met the standard referred to in sub-paragraph (4), such as to justify certification.

68. The Respondents' position, which we did not understand the Applicant to challenge, was that if the issue of pass-on to PCMs could not be treated as a common issue, then the existence of other common issues would not be sufficient to justify certification. We agree. It is fundamental to establishing liability to class members, as well as the quantum of any award.

69. Two further potential common issues are discussed separately below, namely "downstream" pass-on by class members and compound interest.

(a) The legal test for scrutinising the methodology at the certification stage

70. It was common ground that, in line with *Gutmann* at [107(4)], the appropriate test to apply was that set out by Rothstein J in the Canadian Supreme Court's decision in *Microsoft* at [118]:

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

(We will refer to this, as the Tribunal did in *Gutmann*, as the "*Microsoft* test".)

71. This passage from Rothstein J's judgment was cited by Lord Briggs in *Merricks SC* at [40], who commented at [42] that he regarded the Canadian jurisprudence as being persuasive, although he added that he based his conclusions on the true construction of the UK legislation. We also note that the Tribunal's application of the Canadian jurisprudence was approved by the Court of Appeal in *Merricks v Mastercard Inc* ([2019] EWCA Civ 674; [2019] Bus LR 3025 at [40]), and was applied by the Tribunal on remittal, at [2021] CAT 28 ("*Merricks Remittal*").

72. Immediately before setting out the passage above Lord Briggs had described (at [39]) the two threshold tests established in *Microsoft*, namely that the pleadings satisfied the equivalent of a strike-out test in English civil procedure, and that there was "some basis in fact" for a conclusion that the other conditions for certification were met (one of which was the "common issues" requirement). He described the second of these tests as a "low threshold", which was not a merits test applied to the claim. Instead:

> "… the question was whether the applicant could show that there was some factual basis for thinking that the procedural requirements for a class action were satisfied, so that the action was not doomed to failure at the merits stage by reason of a failure of one or more of those requirements: see per Rothstein

> J at paras 99 to 105. The standard of proof at the certification stage came nowhere near a balance of probabilities."

73. Both Ms Demetriou and Mr Singla submitted that the dispute before the Supreme Court in *Merricks SC* was about the availability of data, and that the methodology was not in dispute. That is correct, but it does not follow that the guidance given by the Supreme Court is not of broader significance, and that it does not assist us in determining the correct approach to the methodology at the certification stage. It is clear from Lord Briggs' guidance, at [45] to [54] in particular, that forensic difficulties in quantifying loss which would not prevent an individual claim proceeding should equally not prohibit a collective claim. Lord Briggs did refer at [55] to the particular concern in *Merricks SC* about a probable dearth in data, but the points being made were broader ones.

74. A key point to bear in mind is that there can be no bright line distinction between methodology and data. The two are closely linked. In particular, the methodology chosen will be informed by the likely availability of data to which it can be applied. If it appears that data that would be required to apply a particular methodology will not be available, or will not be available without disproportionate cost, then that would indicate that that methodology is inappropriate. It would not meet the *Microsoft* test. A lack of data may therefore mean that a theoretically preferable methodology cannot be selected in practice.

75. In those circumstances the use of an alternative methodology which will be capable of being applied in practice should not be prevented simply because a better one might be available in economic theory. Any such alternative methodology will need to be assessed on its own merits, having regard to the availability of data to enable it to be applied. Further, any chosen methodology may need to be adapted as data becomes available, or perhaps proves not to be available in exactly the way that was previously anticipated. The possibility of this occurring does not preclude certification. As Lord Briggs also recognised at [74], some gaps in data may ultimately turn out to be unbridgeable, so that nothing might be recovered for part of a claim. But the Tribunal's task is to do the best it can with the evidence.

76. Further, there is no rule that confines the concept of methodology to a particular econometric technique or to the expert evidence of economists. The methodology is no more than a method, whether devised by economists or other experts or both, that is "sufficiently credible or plausible to establish some basis in fact for the commonality requirement". As discussed below it might, as in this case, be derived from a combination of industry expert evidence and expertise in economics.

(b) The Applicant's proposed methodology

77. In summary, the first stage of the Applicant's proposed methodology would use a comparator-based approach to estimate the size of any overcharge arising from the operation of the cartel during the Relevant Period, the aim being to demonstrate the extent to which shipping costs would have been lower in the counterfactual situation of no cartel having existed. Mr Robinson proposes to identify a control period after the Relevant Period and apply a regression technique to compare cartelised and non-cartelised pricing by controlling for movements in price attributable to extraneous factors. The analysis would use information that should be available from the Respondents on disclosure. Mr Robinson anticipates that this will enable him to calculate an aggregate overcharge per brand. The analysis could in due course be broken down between different periods of time if the effect of the cartel changed during it, and could if appropriate take account of the level of overcharge being different between different OEMs. As already indicated, the Relevant Period includes a run-off period after the Cartel Period because the cartel is expected to have continued to have some effect after the end of the Cartel Period, bearing in mind that shipping contracts entered into before it ended would have remained in place for a time. This additional run-off period is currently assumed to be three years. In making his preliminary estimate of loss, Mr Robinson has made adjustments to the proportion of vehicles assumed to be the subject of an overcharge during the run-off period, reflecting the fact that shipping contracts signed during the Cartel Period would gradually have been replaced.

78. In determining the aggregate overcharge, Mr Robinson would rely on data from the Society of Motor Manufacturers and Traders which specifies the country

where the vehicle was manufactured. In order to restrict the calculations to vehicles highly likely to have been transported via deep sea shipping, all EEA countries have been excluded, together with Morocco, Serbia and Turkey.

79. The second stage aims to determine how much of the overcharge was passed on to class members. What follows summarises aspects of the industry expert evidence adduced by the Applicant for the purposes of the CPO Application hearing and should not be taken as amounting to acceptance of it. That would be a matter for trial.

80. Starting at the top end of the supply chain, the shipping charges to OEMs will reflect the nature of the individual vehicles transported (and so, for example, are likely to be affected by the weight and size of a particular model), as well as other factors such as the length of the route. The OEMs will pass on these charges, together with other costs of transport to the relevant local market, to NSCs by charging them a price for each vehicle that includes those costs. This would therefore include any overcharge. Where vehicles of a particular model are manufactured in more than one location a blended cost will be used.

81. NSCs set not only basic list prices for vehicles but also a recommended delivery charge payable by the consumer to the retailer. The delivery charge might be identified as a separate item or as part of an overall "on the road price" which includes the basic price of the vehicle, the delivery charge and other charges such as vehicle excise duty, registration fees, number plates and fuel. (In the case of some NSCs, delivery charges are instead included in the list price.) It is the Applicant's position that the full cost of transporting the vehicle, including shipping costs, is passed to the end customer as part of the delivery charge. This is achieved by setting delivery charges at a level that covers: (a) the OEM's logistics charges to the NSC (including the OEM's margin); (b) the NSC's own costs at the point of import and of onward distribution; (c) the NSC's margin on the cost of delivery; (d) what the NSC considers to be a reasonable margin for retailers on the delivery element; and (e) an allowance for pre-delivery inspection by the retailer. The result is then benchmarked against delivery charges for equivalent brands, VAT is added and there is rounding up to the nearest £5 or £10.

82. Generally, recommended delivery charges are the same across all models of a particular brand, and the NSC adopts the same approach in determining its charge to the retailer. So whilst the charge by the OEM to the NSC will be model specific, the NSC's charge to the retailer, as well as the recommended delivery charge to the consumer, will be determined by a calculation that involves dividing total projected logistics costs by total projected unit sales across the brand in question, irrespective of the size and origin of the particular vehicle or model. This is the reason why the Applicant maintains that although only 13% of vehicles registered in the UK in the Relevant Period were manufactured outside the UK and Europe (and so were likely to be affected by excessive deep sea shipping charges), it had an impact on the delivery charge of 81.4% of all vehicles registered. It also explains the concept of Excluded Brands in the proposed class definition: that concept only comprises brands which did not ship any vehicles to the EEA during the Relevant Period.

83. The experience of the industry experts is that increases in vehicle carrier or other distribution costs are typically reflected in an increase in the delivery charge at the earliest opportunity. However, this will usually not occur if any cost increases are offset by decreases in other costs. Further, delivery charges will generally remain static if overall costs fall. In other words, a *minimum* margin, which the evidence indicates would be a fixed amount rather than a percentage, would be maintained but there would be no price reduction to remove any *increased* margin caused by falling costs.

84. Mr Robinson proposes to apply this evidence in the following way. Having measured the aggregate overcharge by brand for a given year (see above), he would divide it by the number of vehicles of that brand registered with the DVLA to arrive at an overcharge per vehicle. It is worth noting here that for brands where only a small proportion of vehicles were imported via a deep sea route the calculation would produce a lower per vehicle figure than that for a brand where a higher proportion were imported in that way (assuming a similar level of overcharge to each OEM), because the effect of the overcharge would be diluted by the proportion of vehicles that were not so shipped. The illustrative calculations indicate that the per vehicle figure could range from a few pence to approaching £60, depending on the brand and the level of overcharge.

85. Mr Robinson would then observe the next increase in the delivery charge for that brand, and would calculate the overcharge to the end customer as the *lower* of the overcharge per vehicle and the increase in the delivery charge per vehicle. This would provide figures for the overcharge per vehicle for each brand and for each year. Aggregate damages would be calculated by multiplying the figures by the number of vehicles affected and totalling the results.

86. The choice of the lower of these two numbers is designed to limit the amount claimed only to overcharges passed on, rather than overcharges that are absorbed higher in the chain through lower margins as compared to the counterfactual. This is best understood by examples.

87. The simplest scenario is where shipping costs increased as a result of the cartel and other costs remained the same. If the NSC raised delivery charges by an amount equal to the increase to restore the margin, then at that stage there would be full pass-on.

88. The position is more complex if the effect of the cartel was to *maintain* shipping costs at an artificially high level, when in the counterfactual they would have decreased. In that case, in the counterfactual the delivery charge would not have been reduced (because delivery charges are generally not reduced when costs fall: see above) so there would have been no pass-on at that point. Rather, a higher margin would be earned by the NSC in the counterfactual as compared to the actual position with the cartel in place. However, if other costs increased then in both the actual and counterfactual scenarios the NSC would increase the delivery charge by whatever amount was required to restore its margin. To the extent that the result was a higher delivery charge in the actual rather than counterfactual, Mr Robinson's approach would attribute that element to the overcharge.

89. Assume, for example, that the margin sought to be maintained is 100 and that, absent the cartel, shipping costs would have fallen by 25. If other costs remained the same then an increased margin of 125 would have been earned in the counterfactual as a result of the fall, and on Mr Robinson's approach there would be no pass-on to PCMs. Further, if other costs fell then there would also

be no increase in the delivery charge, and no pass-on, because the delivery charge would be the same in the actual and counterfactual.

90. However, an *increase* in other costs could cause an increase in the delivery charge. The extent to which the size of any increase is attributed to the overcharge will depend on the size of the cost increase. For example:

(1) If other costs increased by 50 then the delivery charge would increase by 50 in the actual and 25 in the counterfactual (so that the margin is or remains 100 in each case: in the counterfactual the decrease in shipping costs offsets half of the increase in other costs). The charge would therefore be 25 higher than it would have been in the absence of the cartel, equal to the amount of the overcharge.

(2) If other costs increased by 25 then the delivery charge would increase by 25 in the actual to restore the margin, but it would not increase in the counterfactual (because the increase in other costs would be fully offset by the reduction in shipping costs). The charge would therefore again be 25 higher than it would have been in the absence of the cartel, equal to the amount of the overcharge.

(3) If other costs increased by 10 then the delivery charge would increase by 10 in the actual (to restore margin to 100) but would not increase in the counterfactual. In this case the charge would be 10 higher than it would have been in the absence of the cartel, because in the counterfactual 15 of additional margin would have been retained (25 of shipping cost reduction less 10 of other cost increase).

91. Another feature of Mr Robinson's approach is that it is intended to capture overcharges reflected in shipping contracts entered into after the start of the Relevant Period ("affected contracts"), rather than contracts entered into before it. This means that the methodology would only catch delivery charge increases that occurred following the first affected contract to be entered into after 18 October 2006 (being the earliest date from which the Commission could exercise its jurisdiction and the start of the Relevant Period: see [7] above),

rather than increases that may have been affected by any earlier operation of the cartel which was reflected in the terms of contracts agreed before that date and continued to operate for a period after it. The relevant dates would obviously differ between OEMs.

92. As discussed further below, the Respondents point out that Mr Robinson's approach at the second stage is not one of the three quantitative methodologies set out in the Commission's *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* (2019/C 267/07) (the "EC Pass-on Guidelines"), namely a comparator-based approach, a passing-on rate approach or a simulation approach. In Robinson 2 he responded that those guidelines refer to the role of qualitative evidence, including expert as well as factual evidence, in determining "whether any, and if so which, of the [three] techniques can be used" (paragraph (84)).

93. We should add that Mr Robinson has made clear that the methodology is necessarily provisional at this stage. Data disclosed by the Respondents, or evidence adduced, could have an effect on the analysis required to assess the overcharge.

94. Ms Ford submitted that the proposed methodology combined qualitative evidence of the industry experts and quantitative evidence of Mr Robinson, in a way envisaged by the EC Pass-on Guidelines at paragraph (37). The grounding of the methodology in industry expert evidence avoided the difficulties that could arise where econometric evidence was provided that was divorced from industry practice.

(c) Challenges to the methodology

(i) <u>Summary of challenges and general observations</u>

95. Two key objections were raised on behalf of MNW and endorsed on behalf of KK. A third objection was raised on behalf of KK. The first objection (on which Ms Demetriou made submissions) was that the Applicant's methodology measured delivery charges when it should have measured the overall price for

the vehicle. The second (on which Mr Piccinin made submissions) was that, even if it was correct to focus on the delivery charge, the methodology measured changes in it over time rather than comparing it to a clean period untainted by the cartel. The third objection, raised by Mr Singla on behalf of KK, was that the methodology was entirely premised on what were said to be extreme factual assertions made by the Applicant's industry experts, and was not capable of dealing with any factual variations. The Tribunal needed to consider what would realistically happen when those assertions were challenged at trial, and in reality the methodology would not be capable of assessing loss on a class-wide basis. The Applicant's submissions wrongly conflated the *Microsoft* test with the test for strike-out or summary judgment.

96. We would make three initial observations. First, there was a tendency on the part of the Respondents to regard the "methodology" proposed by the Applicant as being confined to the method of calculation proposed by Mr Robinson, and indeed to one part of it. In our view, and as already indicated (see in particular [76] above), that is too narrow an approach. Mr Robinson's calculation method is based on the industry expert evidence about the method and extent of upstream pass-on of the overcharge (namely, a 100% pass-on through the delivery charge). Mr Robinson proposes, first, an uncontroversial basis for calculating the overcharge, and secondly a mechanism which aims to restrict the claim in a way that ensures that any impact of the cartel prior to the Relevant Period is excluded, and that increases in delivery charges that would have occurred in the absence of the overcharge are not passed on. At each stage he addresses the availability of the data required to allow the methodology to be applied, whether from disclosure or other sources.

97. Secondly, we would observe that the question whether the proposed methodology meets the *Microsoft* test is not a relative exercise. The Tribunal's role at the certification stage is not to determine what the best methodology would be in theory, but to assess the one that has been put forward by the Applicant.

98. Thirdly, in view of MNW's reliance on the EC Pass-on Guidelines we should comment on them briefly. As explained in those guidelines at paragraph (2),

they are non-binding, but they are obviously informative and clearly worthy of serious consideration. In addition to the points highlighted by the parties and referred to above, it is worth noting the following:

(1) At paragraph (6), there is a reminder that judges should pay particular attention to the principle of effectiveness, namely that the exercise of a right to full compensation for harm caused by an infringement of EU competition law should not be rendered practically impossible or excessively difficult.

(2) There is an emphasis on what is proportionate. In particular, a comparator-based approach is stated to be "preferable when it is feasible and proportionate to implement" (paragraph (120)). References are also made to proportionality in the context of disclosure.

(3) The court's power to estimate the level of passing on, and rely on assumptions, is stressed, subject to the point that the award must follow the compensatory principle (paragraphs (30) to (35)).

(4) Section 7, "Choice of Method", explains that no technique should be singled out as always being more appropriate, and makes clear that although econometric techniques may in most cases increase accuracy, they require significant amounts of data that may not be available, or there may be considerable costs in obtaining it. Other qualitative evidence might "play an important role" in determining whether "any or which" of the quantitative techniques described in the guidelines can be used (paragraphs (155) and (156)).

99. We address the specific objections raised by the Respondents in detail in the following sections. Since it relates to the nature of the test that we need to apply, it is convenient to deal first with KK's separate challenge (the third challenge) followed by the other two.

100. In summary, we have concluded that the methodology proposed does meet the *Microsoft* test, and that the first and second challenges raise issues that are

properly ones for trial. In particular, the grounding of the methodology in the evidence of the industry experts means that it is not purely theoretical or hypothetical. Mr Robinson has also carefully considered the likely availability of factual data to allow the methodology to be applied. What Lord Briggs described as the "low threshold" of "some basis in fact" for the commonality requirement, being in this context the issue of whether and to what extent there was pass-on to the class, is in our view met. The methodology offers a "realistic prospect of establishing loss on a class-wide basis".

(ii) Conflation of *Microsoft* test with the test for strike-out or summary judgment/reliance on "extreme" assertions

101. Mr Singla for KK submitted that the Applicant's submissions wrongly conflated the *Microsoft* test with the test for strike-out or summary judgment. There were two separate routes to opposing a CPO application, being either to advance a strike out/summary judgment application or to challenge whether the requirements for certification were met. The *Microsoft* test was relevant to determining whether there was a sound methodology enabling the issues to be dealt with on an aggregate basis, and thus whether the requirement for common issues and the suitability requirement were met. In applying that test the Tribunal was required to discharge a gatekeeping role, and whilst there should not be a full determination of the merits the analysis should not be so superficial as to amount to "symbolic scrutiny" (*Microsoft* at [103]).

102. In essence, Mr Singla's point was that it was not sufficient that the methodology could work on the hypothesis that all of the Applicant's evidence was accepted at trial (in the way, for example, that a strike out application might be assessed) but rather that it had to be scrutinised having regard to what was realistically likely to happen at trial. He relied on the judgment of Lord Sales and Lord Leggatt in *Merricks SC*, including in particular their reference at [154] to whether "there was a realistic prospect that [the applicant's] experts' proposed methodology would be capable of application in a reasonable and fair manner across the whole width of the proposed class", and their comments at [158] distinguishing the question of real prospect of success and the question of

whether "the proposed methodology offered a realistic prospect of establishing loss on a class-wide basis".

103. Mr Singla criticised the fact that the methodology proposed in this case did not rely on econometric techniques to identify the impact of the alleged overcharge on the level of the delivery charge or to seek a causal link between the overcharge and any increase in the delivery charge. Mr Robinson's methodology simply comprised some mathematical computations of the level of pass-on based on a series of what Mr Singla described as extreme factual assumptions, the failure of any of which would cause the methodology to break down. Those assumptions included that OEMs passed on 100% of the overcharge to NSCs, that NSCs all adopted the same rigid strategy for setting the level of the delivery charge (using an asymmetric cost-plus pricing model where charges were never reduced, but would always be increased to maintain a minimum margin), that the same approach was adopted by those NSCs that did not separately itemise delivery charges, and that retailers always passed on 100% of the delivery charge. Mr Singla submitted that the methodology would not be capable of dealing with any material exceptions to this, and was therefore not sufficiently plausible.

104. We agree that the question of certification, including consideration of the proposed methodology, is separate from the power to strike out or grant summary judgment, and that the Tribunal's role is certainly one that involves more than "symbolic scrutiny" of the methodology. However, Mr Singla's criticisms of the proposed methodology go too far.

105. We have already made the point that there is no rule that confines the concept of methodology to a particular econometric technique or to the expert evidence of economists. With the exceptions described by Lord Briggs in *Merricks SC*, it is also not our role to determine the merits of the case at this stage. That includes the merits and robustness of the methodology: *Gutmann* at [155], which refers to the refusal of the Canadian Supreme Court in *Microsoft* to resolve conflicts between the experts, that being a question for the trial judge (*Microsoft* at [126]).

106. Ultimately, if the Applicant's expert evidence can be successfully challenged at trial, the claim may fail. But the *Microsoft* test is not so onerous that we should reject any methodology that may break down in the face of a challenge to evidence. That is not the "low threshold" that the test is intended to present.

107. Instead, we need to determine whether the methodology offers a "realistic prospect of assessing loss on a class-wide basis". "Realistic prospect" means just that. It does not mean that the Tribunal must satisfy itself that the methodology is bound to work, or will work on a balance of probabilities, whatever the evidential challenges. The Tribunal is not conducting a mini-trial.

108. Further, the object of the methodology is to establish loss on a class-wide basis. In assessing the methodology it is relevant to bear in mind that the power to award damages on an aggregate basis removes the need to assess loss individually, and that it is also not fatal that some class members may ultimately not be proved to have suffered loss.

109. Mr Singla relied on *Jensen and Abesdris v Samsung Electronics Co Ltd,* 2021 FC 1185 a decision of the Canadian Federal Court, but we do not consider that it assists him. It reiterates at [57] that certification is a low hurdle, and at [59] that the "some basis in fact" requirement is a low threshold, to be applied at a stage when the court is not tasked with resolving conflicts in the evidence. It does make clear at [60] to [62] that more than symbolic scrutiny is required, that the court has an important screening role and that the certification process exists in part to prevent defendants from facing actions that are not viable, but we do not read these comments as supporting Mr Singla's submission that the proposed methodology does not meet the *Microsoft* test because it depends on industry expert evidence that may be challenged.

110. We have scrutinised the proposed methodology, including the Applicant's industry expert evidence, in detail and have addressed the specific challenges raised by MNW. Both of the Applicant's industry experts have a great deal of experience in the motor industry. Their evidence is clear that any overcharge would have been passed on, and that NSCs would seek to maintain a minimum margin. We would not characterise those as extreme factual assumptions. In

principle, they are plausible. Further, whilst some evidence about practice in the industry has been adduced on behalf of KK we have seen nothing that obviously undermines key elements of the Applicant's evidence, such that the methodology would not meet the "realistic prospect" threshold in the *Microsoft* test. We specifically reject Mr Singla's submission that points of difference between the witnesses means that the Applicant's methodology cannot be "grounded in the facts" as the *Microsoft* test requires. Apart from that comment being directed at the availability of data, it is not our role at this stage to find the facts, beyond determining whether the threshold just referred to is met.

111. As discussed further below in relation to the criticism on which we were addressed by Mr Piccinin, Mr Robinson's proposed use of increases in the level of delivery charges is designed to ensure that an excessive amount is not claimed. At this stage we also have no basis to conclude that it would not be feasible for any successful evidential challenge to the quantum of loss claimed to be addressed, whether by adjusting the methodology or by making some other adjustment to the quantum of any award of damages to arrive at a reasonable estimate of loss. To take one example that Mr Singla relied on, if it were the case that it was established at trial that certain categories of class member (such as car rental companies) tended to achieve discounts that reduced or eliminated the effect of any overcharge, or that they negotiated away the effect of any increase in delivery charges, then that could be taken into account in determining the quantum of any award.

112. MNW and KK relied on the Tribunal's refusal in *Merricks Remittal* to certify the claim to compound interest in that case on the basis that it failed the *Microsoft* test. This was because, as the Tribunal explained at [92], both methodologies that had been put forward assumed that any saver or borrower would have used the amount by which their purchases would have been cheaper in the counterfactual to add to savings or to reduce borrowings, so assuming the answer to the relevant question, which was what they would have done with the money. Suggested modifications to the method were also considered at [94] and rejected because of the way in which cost savings would have been made, incrementally in small amounts, and because of wide divergences between members of the class. The Tribunal concluded at [95]-[97] that no credible or

plausible method had been put forward to estimate the part of the overcharge that would have been saved or used to reduce borrowings, that the defect was not remedied through the power to award damages on an aggregate basis under s. 47C(2), and that the absence of a plausible methodology meant that the claim for compound interest was not suitable for collective proceedings. The Tribunal left open at [98] whether recovery of compound interest was a common issue.

113. We do not consider that the compound interest issue discussed in *Merricks Remittal* is comparable to the methodology proposed here. The difficulty there was an assumption about the use of the amount that would have been saved on purchases, which there was no basis for the Tribunal to accept. Here, there is evidence from industry experts, key elements of which have not been obviously undermined.

(iii) Overall price vs. delivery charge

114. Ms Demetriou's overarching submission was that class members bought vehicles, and nothing else. They did not pay for a vehicle and also for a delivery service. The vehicles they bought were already in the country when they acquired them. The Applicant's proposed methodology was defective because it failed to address the fact that there was a single transaction for a single price. It did not therefore determine the question whether class members paid more for their vehicles than they would have done in the absence of the infringement. The fact that there might be a separate line item on an invoice for a delivery charge made no difference. Money is fungible, and the question whether loss was suffered could not turn on how an invoice might or might not be itemised. She described this as a hard-edged legal point that was fatal to the Applicant's case.

115. Ms Demetriou submitted that any overcharge was a small cost affecting a small proportion of vehicles and the Applicant was relying on pass-on to an indirect purchaser. She pointed out that the EC Pass-on Guidelines made clear that pass-on from a direct purchaser was less likely where that purchaser is heavily competing with firms unaffected by the cartel (paragraph (54)). Ms Demetriou relied on an example at paragraph (61) of the guidelines, which describes a

scenario where one of 10 producers of apple juice in the relevant market sources apples from a supplier involved in a price-fixing cartel. The affected producer would be constrained from passing on a cost increase attributable to the cartel because of the loss of sales that would follow.

116. We would make two responses to this point. First, while it is the case that only 13% of vehicles registered in the UK in the Relevant Period were likely to be directly affected by excessive deep sea shipping charges, on the Applicant's case any overcharge affected 81.4% of vehicles acquired, because delivery charges are uniform across a brand (see [82] above). It is arguable that the example given at paragraph (62) of the guidelines, where all 10 producers source apples from suppliers involved in a price-fixing cartel and the guidelines comment that it is more likely that overcharges would be passed on, may be somewhat closer to the facts of this case. (Obviously individual brands are likely to have been affected to a greater or lesser degree depending on the proportion of vehicles of that brand transported by deep sea methods.)

117. Secondly, and importantly, vehicles are not readily comparable to apple juice, which the EC Pass-on Guidelines rightly describe as a "rather homogenous" product. There is undoubtedly significant competition in the vehicles market, but nonetheless there are obvious differences between brands, and between models of different brands that compete with each other. Indeed, the MNW Joint Response accepts that the products are not homogenous. The lack of homogeneity is likely to have affected the extent of any constraint in passing on what would on any basis equate to a small element of the overall price, notwithstanding the competitive nature of the market. (See further below on this point.)

118. Ms Demetriou further submitted that, given the single transaction of acquisition of a vehicle, it could not be right for the methodology to consider only the delivery charge, even where that exists as a separate line item (which it does not in all cases). The proposed methodology was defective because it failed to permit any examination of whether the overall price was set in a way that resulted in overcharges not being passed on, or not being passed on in full. In particular, list prices might be set in a way that offset a higher delivery charge,

or the class member could receive a discount on the price of the vehicle with the same result.

119. For example, MNW point to the BMW X5, which is manufactured in South Carolina but which they say competes with models from Excluded Brands such as the Audi Q8 or Land Rover Discovery. List prices would need to be set, or discounts negotiated, to ensure that the X5 was competitive. The methodology had to be capable of investigating whether, notwithstanding the competition, higher overall prices were charged for X5s than would have been the case absent the cartel. The Applicant's methodology did not allow causation to be established by reference to the only transaction entered into, namely the purchase of the vehicle.

120. Ms Ford's primary response to this point was that the fact that a class member might have achieved a good price for the vehicle overall was not relevant, because it was a benefit conferred by a third party, and such benefits should not be taken into account unless in some sense caused by the breach of duty. She relied in particular on *Globalia Business Travel S.A.U. of Spain v Fulton Shipping Inc of Panama* [2017] UKSC 43 ("*Fulton*") where, following termination of a charterparty after a repudiatory breach, the defendant charterers sought to limit the claim against them by bringing into account the benefit the owners achieved by selling the vessel in 2007 at a higher price than would have been achieved had it been sold in 2009 after the charterparty had run its course. The Supreme Court, agreeing with Popplewell J at first instance, held that there was no requirement to give credit for the benefit.

121. We are not persuaded that this addresses the Respondents' point. Not only is there no separate transaction or event of the kind considered in *Fulton* (because class members entered into single transactions to acquire the vehicles), but it rather assumes the answer to the question posed. *Fulton* emphasises that the issue is one of causation. To be brought into account, a benefit "must have been caused either by the breach … or by a successful act of mitigation" (Lord Clarke's judgment at [30]). In *Fulton* the benefit of avoiding the fall in value of the vessel was not legally caused by the repudiation, nor was it an act of mitigation. This was because the vessel could have been sold at any time,

including during the charterparty, and the decision to do so was a commercial one at the owners' risk, independent of the charterparty and its termination.

122. Ms Ford also relied on a discussion in *Sainsbury's Supermarkets Ltd v Mastercard Incorporated* [2020] UKSC 24; [2020] 4 All ER 807 ("*Sainsbury's*") from [192] onwards which also referred to *Fulton* (see [202], [213] and [219]). But in that case there was no dispute that the overcharge was passed *to* the merchants. The discussion was about the relevance of the merchants' *response* to the overcharge that was undoubtedly imposed on them, whether by reducing their margins, raising prices or cutting other costs. It was held that the merchants could plead the overcharge as the *prima facie* measure of their loss without proving a consequential loss of profit (at [199]) because profitability was not the relevant measure of damage (at [203]). However, in some scenarios steps taken would be taken into account in determining the question of mitigation, in respect of which the merchants did not have the burden of proof (at [206]-[216]). That is different to the point being made by the Respondents here, which relates to whether and how a *prima facie* measure of loss can be established, in the form of an overcharge passed on to class members.

123. If it was the case, for example, that any discount that a class member was able to negotiate would have been the same amount irrespective of any overcharge, then in principle the discount would not affect the class member's claim. However, if it was the case that pass-on did not occur because discounts were negotiated, or list prices were set, in a way that would have differed in the counterfactual as compared to the actual, such that any overcharge was not passed on or was passed on a lower amount, then it is likely that the claim would be affected.

124. The Applicant submitted that this could only be demonstrated in a case where the customer specifically negotiated away the delivery charge, which the industry expert evidence indicates would be a rare occurrence, rather than achieving a discount on the overall price. Again, however, this rather assumes the answer to the question, namely whether list prices or any discounts on the overall price were affected by the cartel.

125. We do however agree with Ms Ford that questions of causation are matters for trial. They are acutely fact-sensitive. For now, the test is whether the methodology satisfies the *Microsoft* test, namely that it offers a realistic prospect of establishing loss on a class-wide basis. The Applicant's industry expert evidence is that it is "highly unlikely" for OEMs and NSCs not to recover their delivery costs in full and "rare" for a retailer to discount the delivery charge, there being "no customer expectation to do so". Importantly, the evidence of the Applicant's industry experts is that delivery charges are considered to be a separate cost item which must be recovered, such that increases in delivery costs are not absorbed. In other words, they are not simply wrapped up in, or considered as part of, a single undifferentiated price, but are considered separately. Whether that is correct or not, and whether delivery charges are discounted in other ways, can only properly be tested at trial.

126. Further, as Mr Robinson points out in Robinson 2, the negotiating characteristics of the parties are the same in the counterfactual and actual scenarios. The seller's motivation to recover costs (and maintain margins) would be the same. As already indicated, the industry expert evidence indicates that delivery charges are considered to be a separate cost item which must be recovered. For a purchaser, the amounts are likely to be very small as compared to the overall price: for example a £20 increase in the delivery charge of a £20,000 vehicle would represent a price change of just 0.1%. In order to show an impact on the purchaser's position there would need to be high elasticity of demand associated with small changes in price, meaning that customers would have to be very sensitive to price changes such that sellers would lose customers if they tried to recover the increased cost. Mr Robinson suggests, based on a previous study, that it is unlikely that buyers of vehicles would be as sensitive as would be required to make a difference. The obvious differences that exist between models of different brands, even where those models are in direct competition with each other, reinforces this.

127. Whilst the evidence adduced so far by the Respondents challenges the Applicant's evidence in part, it does not persuade us that the methodology fails the *Microsoft* test. We note that no evidence has been provided which indicates that discounts would have differed in amount in the counterfactual, and there

was no evidence about how list prices are set. The expert economic evidence of Dr Majumdar, produced for KK, does not have the same grounding in evidence of practice in the industry as that of Mr Robinson. Further, and as we have already commented, KK's industry-related evidence does not obviously undermine key elements of the Applicant's evidence (see [110] above). It does, unsurprisingly, suggest that discounts could be negotiated, particularly by large business customers, and also that the delivery charge element may not be immune from that negotiation. However if that were so, and it appeared that the discount would have been lower in the counterfactual (as might be the case if, for example, discounts were calculated in percentage terms by reference to the overall price, or increases in delivery charges were negotiated away) then an adjustment could be made to any award to reflect the lower level of pass-on that that would imply.

(iv) Changes in delivery charge vs. clean period comparison

128. Mr Piccinin submitted that, even if the Respondents were wrong in maintaining that what should be considered is the impact of any overcharge on the overall price rather than its impact on the delivery charge, the proposed methodology adopted the wrong approach. What it did was measure changes in the delivery charge over time, whereas what it should do was determine the difference between the level of delivery charges in the actual and counterfactual scenarios. That could be done by comparing delivery charges in the period affected by the cartel to those in a clean period untainted by the cartel using a regression analysis, or by using some other accepted method such as the passing-on rate approach discussed in the EC Pass-on Guidelines at section 5.2.1.

129. Two specific objections were raised. First, even on the basis of the Applicant's expert evidence, the proposed methodology could not demonstrate that delivery charges would be lower but for the cartel. This was because the industry experts had explained that, in setting delivery charges, NSCs undertook a benchmarking exercise against equivalent brands and also rounded up to the next £5 or £10. They also "often" increased delivery charges in line with increases in those of competitors, even if costs had not increased. Bearing in mind that the illustrative calculations produced very low per vehicle overcharges for a number of brands,

any overcharge could readily be lost in the benchmarking or rounding exercise. In other words, "but for" causation could not be established because it could not be shown that but for the overcharge the delivery charge increase would have been lower, or not made at all.

130. Secondly, Mr Robinson's approach was inconsistent with demonstrating a legal or proximate causative link between an increase in the delivery charge and any overcharge. The proposed methodology tied the claims to price increases that were proximately caused by other things, rather than demonstrating that the overcharge was the effective or legal cause of the increase.

131. Mr Piccinin's submissions, like those of Ms Demetriou, were very attractively put. However, in our view they suffer from the flaw of focusing too narrowly on one element of the methodology, rather than standing back and considering it as a whole.

132. It must be borne in mind that the central evidence of the industry experts is that shipping costs, and therefore overcharges, would have been passed on in full via the delivery charge. But rather than simply assuming that the full overcharge can therefore be claimed, the methodology makes material adjustments that will have the effect of substantially scaling back the amount claimed by: (a) excluding from consideration any overcharge already reflected in shipping contracts in place at the start of the Relevant Period; and (b) further excluding any overcharge reflected in shipping contracts entered into after the start of the Relevant Period, except to the extent that there is an increase in the delivery charge. Mr Piccinin's criticisms really concentrate on the way in which the claim is scaled back.

133. With this point in mind, Mr Piccinin's first point is clearly a matter for trial. The Applicant will need to meet any challenge that benchmarking and rounding had such a material effect in practice that it is not possible fairly to apply the methodology either at all or in respect of particular brands to give a reasonable determination of the amount of the loss to the class. But at this stage we do not see that this challenge prevents the methodology from offering a realistic prospect of establishing loss on a class-wide basis. We reiterate that the focus is

on the loss to the class, that is on an aggregate basis. It is not necessary for the methodology to provide an accurate assessment of loss on an individual basis, provided that the aggregate award provides a just level of compensation.

134. As to Mr Piccinin's second point, whether legal causation can actually be established, will also be a question for trial. But to our minds the methodology provides a plausible way of establishing pass-on. Mr Piccinin's submissions concentrated on a situation where shipping charges would have *reduced* in the counterfactual. In that case the immediate cause (or trigger) for an increase in delivery charges would inevitably be something other than the overcharge. But it cannot follow that legal causation could never be established where the effect of the cartel was to maintain shipping charges rather than increase them. The examples at [90(1)-(3)] above illustrate how the level of the increase, or whether it is needed at all, can plausibly be attributed to the overcharge.

135. Mr Piccinin referred to other possible methodologies. As already mentioned, the Tribunal's role at the certification stage is to assess the methodology put forward by the Applicant, rather than to determine what the best methodology might be. But it is worth noting Mr Robinson's evidence that it is unlikely that the composition of the delivery charge will be observable by him, given that it is not publicly available and that disclosure from the Respondents would address shipping costs only. The methodology that has been selected is based on data that Mr Robinson considers will be available. An alternative methodology that interrogates the delivery charge in detail would require additional data that could not be obtained without extensive, and no doubt costly, disclosure from numerous NSCs. As discussed at [74] above, that is a relevant consideration to bear in mind.

(d) Downstream pass-on

136. Downstream pass-on, meaning the extent of pass-on from class members to their own customers, is also in dispute between the parties. However, the Respondents did not rely on this issue as a reason to refuse certification, so we will limit our comments to a brief record of the parties' positions and confirmation of our view that this issue does not preclude certification.

137. In summary, the Applicant relies on evidence of its industry experts that delivery charges are borne entirely by the first registered keeper of a new vehicle, and are not relevant to the used car market. It therefore claims that there is no downstream pass-on via sales of used vehicles. The Respondents say that this is unrealistic but have not so far adduced any evidence to the contrary, other than that some OEMs would be prepared to agree buy-back terms with car rental companies that covered the delivery charge. To the extent that the Respondents did adduce evidence then that could be addressed at trial.

138. In relation to class members that are businesses rather than private customers, the Respondents also criticise the lack of a proposed methodology for assessing downstream pass-on through increased prices charged for goods and services that those businesses supplied. In Robinson 2, Mr Robinson responded to this by proposing a high-level approach involving determination of a weighted average level of pass-on across affected sectors, potentially distinguishing between businesses where vehicles represent a variable cost, where there is likely to have been a higher degree of pass-on (for example, car rental companies), and those where vehicles are an overhead or fixed cost, and where pricing may not be so clearly affected by the precise level of that cost.

139. One legal question that arose in relation to downstream pass-on related to the burden of proof. It was common ground that the legal burden is on the Respondents: *Sainsbury's* at [216]. However, the Applicant sought to distinguish the Supreme Court's comment in that paragraph that, "once the defendants have raised the issue of mitigation, in the form of pass-on, there is a heavy evidential burden on the [claimant] merchants to provide evidence as to how they have dealt with the recovery of their costs in their business". This was because the justification for that comment was that most of the relevant information would be held by the merchant, and it would need to produce it to forestall adverse inferences. The Applicant's position is that this point has no application to opt-out collective proceedings, where the PCR holds no relevant information, such that both the legal and evidential burden should fall on the Respondents.

140. We do not need to decide this point and do not do so. Given that the legal burden is on the Respondents, we do not think it is fatal that a detailed methodology has not yet been developed to address the extent of downstream pass-on to business customers. For now, we are satisfied that the Applicant has done enough to demonstrate that the issue of downstream pass-on should not prevent certification on a basis which includes that issue as a common issue. The Applicant has adduced evidence about a lack of impact on the second-hand market (evidence which can of course be challenged at trial) and has suggested what appears to us to be a plausible approach for assessing other kinds of downstream pass-on by business customers.

141. We would add one point. At [188] below we refer (in the context of compound interest) to the provision made in the CAT rules for sub-classes to be identified where a claim raises issues that are not common to all class members. We can see that this point also arises in relation to business customers in respect of downstream pass-on through increased prices charged for goods and services. As with the compound interest issue, before granting the CPO we will invite brief submissions from the parties about any steps that should be required in respect of this.

(3) Suitability

142. As already explained, the Tribunal may only certify claims as eligible for inclusion in collective proceedings if they are "suitable" to be brought in collective proceedings, s. 47B(6) and rule 79(1)(c). In determining that question rule 79(2) requires that the Tribunal must take into account all matters it thinks fit, including those set out in that provision. Following the sub-paragraph numbering in rule 79(2) set out at [31] above, of particular relevance in this case are: (a) whether collective proceedings are an "appropriate means for the fair and efficient resolution of the common issues"; (b) costs and benefits; (d) the size and nature of the class; (e) whether it is possible to determine whether a person is or is not a class member; and (f) whether the claims are suitable for an aggregate award of damages.

143. *Merricks SC* establishes that the question of suitability, both generally for the purposes of the eligibility condition in s. 47B(6) and for the purposes of rule 79(2)(f), is a relative concept. It means suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages.

144. Leaving to one side the specific points discussed below, the size and nature of the class, and the relatively low potential claim per vehicle, clearly weigh in favour of collective rather than individual proceedings. The collective proceedings claim form estimates that the proposed class will "certainly number in the millions". Mr Robinson has calculated that around 17.8 million vehicles of non-Excluded Brands were registered during the Relevant Period, of which around 6.9 million (or 39%) were registered to private purchasers. Further, the class definition in principle allows a relatively straightforward determination of whether a person is or is not a class member.

(a) Relevance of methodology to suitability

145. Mr Singla submitted that the proposed claims fail to satisfy the suitability requirement by reference to rules 79(2)(a), (b) and (f). Sub-paragraph (b), costs and benefits, is discussed below. As regards the other sub-paragraphs, Mr Singla submitted that the Respondents' criticisms of the methodology were relevant to suitability because, even if certain common issues could be identified, a trial of those issues would not significantly advance the claims in the absence of a workable methodology, such that the proceedings would not be an appropriate means for the fair and efficient resolution of the issues. Further, the absence of a credible methodology meant that the claims were not suitable for an aggregate award of damages.

146. We accept that criticisms of the methodology are relevant to suitability, because if it is not workable then it is unlikely that the proposed collective proceedings would be an appropriate means for the fair and efficient resolution of the issues. It would also have an impact on costs and benefits, and obviously on suitability for an aggregate award of damages. However, we have concluded that the methodology meets the *Microsoft* test.

(b) Cost-Benefit

147. Mr Singla further submitted that the costs of collective proceedings would outweigh the benefits. The costs estimate was significant, as was the funder's entitlement (subject to any order of the Tribunal), but in contrast it was likely that an extremely low number of class members would apply to collect damages. The proceedings and any damages award would appear to be principally for the benefit of lawyers and the funder. Mr Singla relied on *Gutmann* at [165]-[178], where the Tribunal concluded that the cost-benefit analysis came out "slightly against" the grant of a CPO.

148. We would be concerned, as the Tribunal was in *Gutmann*, if the principal beneficiaries of collective proceedings proved to be lawyers and funders rather than class members. But as also pointed out in that decision, third-party funding is often a necessary feature of collective proceedings, and collective proceedings also play a role in ensuring that wrongdoers modify their behaviour. So the level of take-up by class members is not the only measure of benefit.

149. We note that, unlike the rail ticket information considered in *Gutmann*, it is likely that most PCMs would have or be able to retrieve information about vehicle purchases. For most class members it would have been a significant and occasional outlay. Whilst the per vehicle amount is likely to be relatively modest, the ease with which most class members should be able to establish their membership of the class and the acquisition or acquisitions that they made should be taken into account. The total claim value is also substantial. Using overcharge estimates of between 10% and 20% the Applicant estimates it at between £71m and £143m including simple interest.

150. As in *Gutmann*, the litigation funder is Woodsford. We have reviewed the litigation funding arrangements and do not consider that those arrangements weigh materially against certification. The cost of the proceedings will undoubtedly be material. Under the arrangement Woodsford would also be entitled to a significant recovery in the event of success, but it is also taking material risks. Further, it would be for the Tribunal to determine whether

Woodsford should be permitted to recover from undistributed damages and the level of its recovery (rules 93(4) and (5)), and the Tribunal would also have to approve any proposed settlement under rule 94, including in respect of costs and fees.

G. OPT-IN OR OPT-OUT: LARGE BUSINESS PURCHASERS

151. The Respondents submitted that, if the Tribunal was inclined to certify the claim, then collective proceedings in respect of "Large Business Purchasers" should only be permitted on an opt-in basis. They suggested that Large Business Purchasers should be defined as "a business that either Purchased or Financed, in the United Kingdom, at least 20,000 New Vehicles or New Lease Vehicles, other than one produced by an Excluded Brand, during the period 18 October 2006 to 6 September 2015". However, they invited the Tribunal's views as to whether 20,000 was the appropriate threshold number.

(1) The Tribunal's powers

152. In summary, the Respondents' analysis is as follows. Under s. 47B(7)(c) the Tribunal is required to specify whether collective proceedings are to be opt-in or opt-out. This is reflected in rule 80(1)(f). Rule 79(3) (set out at [37] above) requires that, in determining that question, the Tribunal may take into account all matters it thinks fit, including the strength of the claims and whether it is practicable for the proceedings to be brought on an opt-in basis, as well as the matters set out in rule 79(2). The Guide contains important guidance at paragraphs 6.38-39, which among other things makes clear that the PCR must explain why opt-out proceedings are more appropriate, and points out the greater complexity, cost and risks of opt-out proceedings and the fact that class members will not have conducted their own assessments of the strength of the claims. This requirement for an explanation reflects the significance of opt-out proceedings in allowing persons to become claimants without their knowledge or consent, and the risk of misuse (*Merricks SC* at [92] and [98]).

153. The Respondents submit that the Tribunal correctly concluded in *Le Patourel v BT Group plc* [2021] CAT 30 at [110] that the PCR was not absolved from

demonstrating that an opt-out basis was more appropriate simply by not presenting it as an alternative.

154. We see force in this submission. It would be very surprising if, by framing the application in a particular way, the Tribunal was precluded from refusing to certify proceedings on an opt-out basis in circumstances where it considers that they should properly be brought on an opt-in basis. This is notwithstanding the Applicant's point that this would require consideration of the merits in each case where certification is sought on an opt-out basis, pursuant to rule 79(3)(a), contrary to what it claims was contemplated in *Merricks SC*.

155. We note that in *Gutmann*, where the applicant sought to bring opt-out proceedings, the Tribunal similarly considered at [182]-[184] whether opt-in proceedings should be ordered and earlier commented at [51] that it was probably correct that the strength of the claims should be considered under rule 79(3)(a) even though no opt-in alternative had been put forward (albeit that it did not add to the assessment required for summary judgment/strike out in that case).

156. However, even assuming for present purposes that the Tribunal must consider in all cases whether proceedings should be opt-in or opt-out, the question whether it is permissible for the Tribunal to conclude that proposed collective proceedings should be bifurcated between opt-in and opt-out proceedings is a separate matter. The Applicant reserved its position on the former point but challenged the Respondent's attempt to achieve the latter as misconceived. Ms Ford submitted that it was not contemplated by the legislation or CAT rules, which only envisage a choice between opt-in or opt-out for the "collective proceedings" as a whole, rather than part of them.

157. We see real force in Ms Ford's submission. We would also expect that, if it is correct, any potential for abuse (for example, by manipulation of a class whose claims are otherwise suitable to be certified on an opt-out basis to include additional claimants) could readily be addressed through the Tribunal's more general powers to determine whether claims should or should not be certified.

However, for the reasons discussed below, it is not necessary for us to reach a final conclusion on the point.

(2) The basis for seeking certification on an opt-in basis

158. The Respondents maintain that opt-in proceedings would be practicable for Large Business Purchasers for the following reasons:

(1) The number of Large Business Purchasers is material, estimated at 45 at the suggested threshold of 20,000 vehicles.

(2) The total value of claims by Large Business Purchasers would render opt-in proceedings economically viable. Based on the Applicant's case and illustrative overcharges, Dr Tosini has estimated aggregate claim values by Large Business Purchasers, including simple interest, of between around £29.6m and £59.2m, or on an individual basis between around £59,000 and £119,000 at the threshold level. (The individual claims of Large Business Purchasers who acquired significantly more than 20,000 vehicles would potentially be higher, and on Dr Tosini's calculations could be in the region of £1.2m to £2.4m for the very largest.)

(3) The value of individual claims would be sufficiently high to incentivise opt-in.

(4) The costs would not render opt-in claims impracticable, because there was no reason to expect that they would exceed the estimate for opt-out proceedings.

(5) The existing proposals for publicity and engagement demonstrated that it would be practicable to attract a sufficient number of Large Business Purchasers to opt in.

(6) It would be simple for Large Business Purchasers, for whom buying vehicles was an area of expertise, to decide whether to opt in. If it was

practicable for non-UK domiciled businesses to do so then it was equally practicable for UK-based large businesses.

(7) The fact that it may be impractical for some class members to bring individual claims was irrelevant.

159. The Respondents submit that a significant benefit of opt-in proceedings for Large Business Purchasers is that it would be more straightforward for disclosure to be obtained from class members who have opted in. That disclosure would be important in determining the issue of pass-on to Large Business Purchasers, and also the issue of pass-on by them to their customers (or other mitigation techniques). In particular, the Respondents say that disclosure by Large Business Purchasers of prices paid for vehicles (including any itemised delivery charges) during and after the Relevant Period could allow standard comparator techniques to be used to determine the extent of pass-on to Large Business Purchasers.

160. The Respondents further submit that opt-out proceedings for other PCMs would remain practicable, based on the Applicant's estimates of class size and loss, and that the issues they have raised about the Applicant's methodology were relevant to the issue, because they went to the strength of the claims for the purposes of rule 79(3)(a).

(3) Discussion

161. Irrespective of whether we would have had jurisdiction to accede to the Respondents' proposal, we have concluded that it should be rejected, for the following reasons.

162. We would first observe that the Respondents' argument that opt-in proceedings would be practicable for Large Business Purchasers has an element of bootstraps. It is based only on a division of an otherwise single class in a way that splits out a relatively small number of members that might be expected to have suffered higher losses. It is likely that, within any large class, sub-groups

of that kind may be found to exist. The mere fact that they exist cannot mean that it is the right approach to sub-divide the class.

163. Secondly, we would seriously question the efficiency of conducting claims sought to be combined by a single PCR, that raise common issues and are otherwise suitable for certification, on both an opt-in and opt-out basis. It seems to us that, even if they were jointly case managed, the effect would be bound to increase overall costs. Whilst the Respondents point out that they could be expected to be liable for costs if the claims succeed, that is not a complete answer. The claims may not succeed and, even if they do, costs recovery is rarely complete. The Tribunal is obliged under the governing principles of the CAT rules (rule 4) to seek to ensure that cases are dealt with justly and at proportionate cost, saving expense so far as is practicable.

164. Thirdly, the Respondents do not dispute that, if certification is appropriate at all, then it should be on an opt-out basis for the majority of the class. This is clearly correct. There are a large number of claimants, the great majority of whom are likely to have small claims. Taken as a whole they are unlikely to be readily contactable. Opt-in proceedings would not be practicable for the vast majority. Further, as regards the strength of the claims we note that the Guide recognises that follow-on claims, seeking damages for infringement covered by a decision of a competition authority, will "generally be of sufficient strength" (paragraph 6.39).

165. Fourthly, and significantly, we do not see how the class could be sub-divided in a way that is both sufficiently clear and does not lead to arbitrary distinctions and potential unfairness. In particular:

(1) Any choice of a threshold will appear arbitrary. There is no obviously good reason to require an acquirer of 20,000 vehicles to opt in if they wish to benefit, but to allow an acquirer of 19,999 vehicles to participate on an opt-out basis.

(2) It will not necessarily be apparent to class members which category they are in. They may not hold or have retained records in a way that enables

them straightforwardly to determine the number of relevant vehicles acquired, or at least not without material work. The analysis would also be made more difficult by the need to carve out Excluded Brands.

(3) There is no assurance that, even with Excluded Brands carved out, members of the opt-in class would have suffered larger losses than other businesses who are in the opt-out class. Whether that is the case would depend heavily on the mix of brands acquired, and in particular whether a significant proportion of vehicles of the brand or brands in question were imported using deep sea routes. On the Applicant's methodology it would also depend on when OEMs entered into shipping contracts and increased delivery charges. The result might be that losses suffered by some members of the opt-out class could materially exceed those suffered by members of the opt-in class. Bearing in mind that, as a minimum, the funding position would be different (since a funder of opt-in proceedings would not be able to recover its fee from unclaimed damages but would instead look to opted-in class members) this could lead to a justified perception of unfairness.

166. The Applicant relied on Ms Hollway's witness statement. This raised a number of practical concerns about the Respondents' proposal, including the absence of a central industry body that could be used to identify and communicate with Large Business Purchasers, challenges in persuading Large Business Purchasers to opt in and the consequential difficulty in "book-building" class members cost effectively, and the absence of benefit to members of the class. We do not propose to comment on the points she raises in detail. However, we would observe that the need to persuade class members to join opt-in proceedings is not by itself a good reason for choosing an opt-out approach. The preference that the Guide expresses for opt-in proceedings reflects the fact that it is generally a positive thing for there to be a critical assessment of claims. More persuasive are the points Ms Hollway makes about the broad range of businesses that may fall in the Large Business Purchaser category, such that communication through one or a limited number of industry bodies is unlikely to be feasible and book-building more difficult, with a consequential effect on

costs and, potentially, viability. Since the CAT rules pose the question whether opt-in proceedings are "practicable", that point is relevant.

167. Ms Hollway's witness statement criticises the Respondents' proposal as an attempt to reduce the value of the overall claim and threaten viability. The Respondents have not filed evidence in response to that, but maintain that the fact that a separation of Large Business Purchasers may be commercially advantageous to the Respondents makes no difference. That may be correct, but it emphasises the need for the Tribunal to determine what benefits or advantages could actually flow from the Respondents' proposed approach and which the Tribunal ought to take into account. If they do not exist or can be achieved in another way then that is also a relevant factor. This is addressed in the next section.

(4) Disclosure

168. Apart from increased scrutiny of the claim by Large Business Purchasers when deciding whether to opt in, the key benefit that the Respondents rely on as achievable through opt-in proceedings relates to disclosure. In our view this is not a good reason to accede to the Respondents' proposal, and any genuine issue that arises in relation to disclosure should be capable of being dealt with in another way.

169. The Tribunal has power under rule 89(1)(c) to order disclosure by any represented person, defined in rule 73(2) to include class members who have not opted out of opt-out proceedings as well as those who have opted in to opt-in proceedings. No distinction is drawn between those who participate on an opt-in or opt-out basis. Rather, the Tribunal has a broad discretion. It may well be that disclosure would not ordinarily be ordered from members of an opt-out class, but nothing precludes it. If an order for disclosure against certain class members was determined to be reasonably necessary and proportionate (*Ryder Ltd v Man SE* [2020] CAT 3 at [35(7)]), then we would expect that a way could and would be found to achieve that so as to ensure that the proceedings can be disposed of fairly. Examples might include some form of costs protection so that the burden is not shouldered unfairly as between class members, or

potentially giving the relevant class members the option of being excluded from the claim by removing them under rule 85(3) (if not rule 82(2)), if the opportunity to opt-out would otherwise have expired.

170. We would also observe that disclosure from certain Large Business Purchasers may be of limited relevance. Whilst it could assist in relation to the levels of discount that they were able to negotiate (whether in relation to the overall price or any delivery charge element) and potentially in relation to pass-on by certain types of businesses to their customers, it would not obviously assist in determining the levels of discount obtained by other purchasers or, for example and if relevant, the approach to setting vehicle list prices.

H. DECEASED PERSONS

171. As currently drafted in the CPO Application, the description of the class would extend to any person who acquired a New Vehicle or a New Lease Vehicle (other than an Excluded Brand) during the Relevant Period, irrespective of whether that person has died or (if it was a corporate entity) has been dissolved. The Applicant accepts that the class definition needs to be amended to exclude companies that have since been dissolved. However, it takes a different approach in respect of deceased persons. Its primary position is that claims vested in the estates of deceased persons are included and that no amendment to the class definition is required. Alternatively, it seeks to amend the wording of the class definition to include an express reference to personal representatives of persons who died since they acquired the relevant vehicle.

172. The Respondents submit that the claim was not framed in a way that captured claims vested in the estates of persons who had died before the claim was issued (on 20 February 2020), and that because the limitation period has expired it cannot be amended now to cover them. As we understand it, they do not object to the claim being clarified to make clear that it does extend to claims vested in the estates of persons who were alive at the date on which the claim was issued, but have since died or die in the course of proceedings.

173. Both parties relied on *Merricks Remittal*. As explained there at [48]-[49], proceedings commenced in the name of, or on behalf of, deceased persons are a nullity. Instead, any claim that a deceased person had would vest in their estate on their death. In *Merricks Remittal* the Tribunal decided that this principle also had the effect that claims in the name of deceased persons cannot be combined in collective proceedings under s. 47B, because collective proceedings comprise a bundle of claims which could have been brought individually under s. 47A, and they retain their identity as distinct claims (see at [51]-[54]). The Tribunal also recognised at [73] that persons who were alive when the collective proceedings claim form was issued but have died or die subsequently are in a distinct position.

174. This conclusion was not challenged before us. Instead, the Applicant pointed to the fact that the Tribunal in *Merricks Remittal* acknowledged the fact that claims could have been brought on behalf of the estates of deceased persons by their personal representatives. Whilst that did not assist on the facts of that case because it was always clear that Mr Merricks did not intend to commence proceedings on behalf of deceased persons or their estates (at [43]), that was not so in this case. Ms Ford submitted that in this case the class definition did not exclude deceased persons, and this was supported by the fact that the provisional calculations that had been done estimated all acquisitions of relevant vehicles during the Relevant Period, in other words including acquisitions by persons who had since died.

175. We accept that there are factual differences between the class definition in this case and that in *Merricks Remittal*. However, in our view that does not assist the Applicant. The basic principle remains that proceedings in the name of or on behalf of deceased persons are a nullity. The class definition refers to persons who acquired vehicles in the Relevant Period, and only those persons. It does not refer to their estates or their personal representatives, and we do not consider that it can be construed to extend to them. Class definitions should be clear on their face, and we do not think there is room to interpret this definition in the expansive way suggested. On its terms the class does encompass claims of deceased persons, but insofar as it does those proceedings are a nullity. It makes

no difference that acquisitions by deceased persons may have been taken into account in provisional calculations.

176. Accordingly, the amendment put forward by the Applicant to amend the class definition to refer to personal representatives is not simply a clarificatory amendment, as the Applicant submitted, but amounts to the addition of new class members. In this case the limitation period has expired, and so the specific requirements of the CAT rules that relate to amendments to claims outside a limitation period must be complied with.

177. As explained in *Merricks Remittal* at [63] and [64], amendments to claim forms are governed by rules 32 and 38, which are applied to collective proceedings, in common with other provisions contained in Part 4 of the CAT rules, by rule 74. We note that the discussion in *Merricks Remittal* on this point was not strictly necessary for its decision, but in any event we agree that it is rule 38 rather than rule 32 that is the relevant provision. What the Applicant is seeking to do is to add new parties to the collective proceedings, in the form of personal representatives. Whilst the effect of rule 74(2) is that references in the CAT rules to the "claimant" are to be read as the "class representative", we do not consider that this means that the PCR/Applicant is to be treated as the relevant "party" for the purposes of rules 32 or 38. That interpretation would not properly reflect the nature of collective proceedings as a collection of individual claims conducted by the class representative on behalf of class members, and if correct could also allow limitation periods to be avoided through the mechanism of collective proceedings.

178. We should add, for the avoidance of doubt, that it would not be right to construe the existence of a power by the Tribunal to add parties under rule 85(3) as allowing the restrictions imposed by rule 38 to be avoided. It is clearly intended that those restrictions apply.

179. This is therefore not a case of an existing party adding an additional claim that they have, and that arises out of the same facts, within rule 32(2)(a)), a correction of a mistake as to the name of a party within rule 32(2)(b), or an alteration in capacity within rule 32(2)(c). All of those provisions relate to a case

where there is an *existing* party whose claim is sought to be amended. As the Tribunal in *Merricks Remittal* pointed out at [67], the restriction in rule 38(6) (set out below) could otherwise be circumvented by relying on rule 32.

180. Rule 38 deals with additional parties and relevantly provides as follows:

> "38.—(1) The Tribunal may grant permission to remove, add or substitute a party in the proceedings.
>
> …
>
> (6) After the expiry of a relevant period of limitation, the Tribunal may add or substitute a party only if—
>
> (a) that limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.
>
> (7) The addition or substitution of a new party, as the case may be, is necessary for the purpose of paragraph (6)(b) only if the Tribunal is satisfied that—
>
> (a) the new party is to be substituted for a party who was named in the claim form by mistake;
>
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
>
> (c) the original party has died or had a bankruptcy order made against it and its interest or liability has passed to the new party."

181. Since the limitation period has expired, rule 38(6) must be satisfied. What is "necessary" is exhaustively defined by rule 38(7). In our view the Applicant has not demonstrated that any of the provisions of that rule apply. It was not suggested that there was a mistake in the collective proceedings claim form within sub-paragraph (a). Both of sub-paragraphs (b) and (c) require there to be an "original party". But where a claim is brought on behalf of a person who is already dead, there is no such original party because claims brought on behalf of deceased persons are a nullity.

182. As recognised in *Merricks Remittal* at [73], the position is different where death occurs after the commencement of proceedings. In that case rule 38(7)(c) can apply. As already indicated, we did not understand the Respondents to object to this point, either as a matter of principle or insofar as the Applicant seeks an amendment to include the personal representatives of such a person.

183. In the circumstances, we consider that it would be helpful for the class definition to be amended to clarify that it does not extend to persons who died before the issue of the collective proceedings claim form on 20 February 2020, but can encompass the personal representatives of those who died thereafter.

184. Mr Robinson has proposed a methodology for excluding from the claim losses attributable to dissolved companies. A methodology will also need to be developed to address our decision in respect of deceased persons. We propose to invite the Applicant to put forward a proposal for consideration by us before the grant of the CPO, so that we can satisfy ourselves that a plausible methodology exists.

I. COMPOUND INTEREST

185. The Applicant indicated in its collective proceedings claim form that it was intending to claim compound interest on an aggregate and average basis for the proposed class. In the light of *Merricks Remittal* the claim for compound interest has been narrowed to those PCMs who acquired New Vehicles using finance rather than cash, using a personal contract purchase ("PCP") or hire purchase arrangement. For those class members the Applicant contends that it would be able to prove on a common basis that they incurred interest on a compound basis and to quantify the extent of that claim. Mr Robinson proposes to do this by identifying from publicly available data the proportion of vehicles purchased using finance rather than cash, and obtaining information about the average period over which new vehicles are held under a financing arrangement and the average rates of interest for new car finance during the Relevant Period.

186. The Respondents contend that compound interest should not be certified as a common issue. They point out that only a fraction of the proposed class acquired vehicles using external financing and that, within them, there would be wide disparities in the proportion of the price financed, interest rates and capital repayment profiles (and in particular in relation to the latter, differences between PCP and hire purchase). The methodology also proposed to calculate interest in a way that ignored the impact of the reduced balance outstanding as capital was

repaid, instead assuming that compound interest was paid throughout on the totality of the initial financing.

187. We are not persuaded that these criticisms justify refusing to certify compound interest as an issue common to those class members who acquired New Vehicles using finance. The points made by the Respondents could if appropriate be dealt with as refinements to the methodology or, to the extent that data is not available, by adjustments on the broad-axe basis. For example, it seems unlikely that no evidence could be obtained as to the relative proportions of PCP and hire purchase in the market at relevant times, or about average deposits or typical repayment profiles, or to allow a determination of some form of weighted average of interest rates if that would produce a fairer result. But we do not regard it as necessary for the methodology to be developed to this level of detail for the purposes of the CPO Application.

188. The CAT rules make provision for sub-classes to be identified where a claim raises issues that are not common to all class members, and indeed requires any sub-classes to be identified in the collective proceedings claim form (rule 75(3)). The Tribunal has power to make separate provision for authorisation of a representative of a sub-class and to direct determination of issues affecting a sub-class (rules 78(4) and 88(2)). As now put forward, the claim to compound interest affects a sub-class, namely those members of the class that acquired New Vehicles using finance rather than outright purchase. Before granting the CPO we will invite brief submissions from the parties about any steps that should be required in respect of this. However, our current view is that it should not have any substantive impact on the way that the proceedings are case managed or heard.

J. CONCLUSIONS

189. For the reasons set out in this Judgment, the Tribunal unanimously concludes as follows:

    (1) The Applicant meets the authorisation condition.

(2) The claims meet the eligibility condition. There is an identifiable class, the claims raise common issues and they are suitable to be brought in collective proceedings.

(3) The Applicant's case should not be struck out or summarily dismissed.

(4) The collective proceedings should be brought on an opt-out basis and there should be no sub-division of the class such as to require Large Business Purchasers to participate on an opt-in basis.

(5) The CPO Application does not extend to the estates of persons who died before the collective proceedings claim form was issued, and cannot be amended to add the personal representatives of those deceased persons.

(6) Compound interest should be certified as a common issue for class members who acquired New Vehicles using a PCP or hire purchase arrangement.

190. Accordingly, and subject to the point raised at [184] above about the need for a plausible methodology to exclude losses attributable to certain deceased persons and the possible need to address the sub-class issues raised at [141] and [188] above, the CPO Application will be granted.

The Hon. Mrs Justice Falk DBE Chairwoman

Dr William Bishop

Eamonn Doran

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

Date: 18 February 2022