



Neutral citation [2023] CAT 38

Case Nos: 1441-1444/7/7/22

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 June 2023

Before:

BEN TIDSWELL
(Chair)
DR CATHERINE BELL CB
DR WILLIAM BISHOP

Sitting as a Tribunal in England and Wales

BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

- (1) **MASTERCARD INCORPORATED**
- (2) **MASTERCARD INTERNATIONAL INCORPORATED**
- (3) **MASTERCARD EUROPE SA**
- (4) **MASTERCARD/EUROPAY UK LIMITED**
- (5) **MASTERCARD UK MANAGEMENT SERVICES LIMITED**
- (6) **MASTERCARD EUROPE SERVICES LIMITED**

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

- (1) MASTERCARD INCORPORATED
- (2) MASTERCARD INTERNATIONAL INCORPORATED
- (3) MASTERCARD EUROPE SA
- (4) MASTERCARD/EUROPAY UK LIMITED
- (5) MASTERCARD UK MANAGEMENT SERVICES LIMITED
- (6) MASTERCARD EUROPE SERVICES LIMITED

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS I LIMITED

Applicant / Proposed Class Representative

- v -

- (1) VISA INC.
- (2) VISA INTERNATIONAL SERVICE ASSOCIATION
- (3) VISA EUROPE SERVICES LLC
- (4) VISA EUROPE LIMITED
- (5) VISA UK LTD

Respondents / Proposed Defendants

AND BETWEEN:

COMMERCIAL AND INTERREGIONAL CARD CLAIMS II LIMITED

Applicant / Proposed Class Representative

- v -

- (1) VISA INC.
- (2) VISA INTERNATIONAL SERVICE ASSOCIATION
- (3) VISA EUROPE SERVICES LLC
- (4) VISA EUROPE LIMITED
- (5) VISA UK LTD

Respondents / Proposed Defendants

Heard at Salisbury Square House on 3-5 April 2023

JUDGMENT (CPO APPLICATIONS)

APPEARANCES

Michael Bowsher KC, Derek Spitz, Conor McCarthy and Alaina Newnes (instructed by Marcus Parker Limited) appeared on behalf of the Proposed Class Representatives in Case Nos. 1441-1444/7/7/22.

Sonia Tolaney KC, Matthew Cook KC, Hugo Leith and Veena Srirangam (instructed by Freshfields Bruckhaus Deringer LLP and Jones Day) appeared on behalf of the Proposed Defendants in Case Nos. 1441-1442/7/7/22.

Brian Kennelly KC, Daniel Piccinin KC and Isabel Buchanan (instructed by Linklaters LLP and Milbank LLP) appeared on behalf of the Proposed Defendants in Case Nos. 1443-1444/7/7/22.

CONTENTS

A.	Introduction	6
B.	Background to the litigation	7
	(1) Summary of operation of the card schemes.....	7
	(2) A brief history of MIF regulatory decisions and litigation.....	10
	(3) The Umbrella Proceedings	11
C.	The applications.....	14
D.	Legal framework.....	18
	(1) Authorisation	19
	(2) Eligibility	22
	(3) Methodology	27
E.	Key features of the proceedings	30
	(1) Interregional and commercial card MIFs only	31
	(2) The profile of merchants.....	32
	(a) <i>Sectors – car rental, hotels and airlines</i>	<i>32</i>
	(b) <i>The rest.....</i>	<i>33</i>
	(c) <i>Geographic considerations</i>	<i>33</i>
	(3) MSC contracts	33
	(a) <i>IC+ and ++</i>	<i>34</i>
	(b) <i>Blended</i>	<i>34</i>
F.	The arguments of the parties.....	35
	(1) Methodology	35
	(a) <i>Infringement.....</i>	<i>36</i>
	(b) <i>Acquirer pass on</i>	<i>39</i>
	(c) <i>Merchant pass on.....</i>	<i>41</i>
	(d) <i>Other matters</i>	<i>42</i>
	(2) Eligibility	43
	(a) <i>Identifiable class</i>	<i>43</i>
	(b) <i>Same, similar or related issues</i>	<i>47</i>
	(c) <i>Suitability.....</i>	<i>48</i>
	(3) Authorisation	49
G.	Discussion	50
	(1) Methodology	50
	(a) <i>Infringement.....</i>	<i>52</i>
	(b) <i>Acquirer pass on</i>	<i>55</i>
	(c) <i>Merchant pass on.....</i>	<i>57</i>

	<i>(d) Other matters</i>	58
(2)	Eligibility	59
	<i>(a) Identifiable class – opt out claims</i>	59
	<i>(b) Identifiable class – opt in claims</i>	68
	<i>(c) Same, similar or related issues</i>	69
	<i>(d) Suitability generally</i>	71
	<i>(e) Conclusions on eligibility</i>	73
(3)	Authorisation	75
H.	Conclusion and disposition	76

A. INTRODUCTION

1. This judgment relates to four applications for Collective Proceedings Orders (or “CPOs”) by two different Proposed Class Representatives, Commercial and Interregional Card Claims I Limited and Commercial and Interregional Card Claims II Limited (“CICC I” and “CICC II” respectively or, together, “the PCRs”).
2. On 15 May 2023, we informed the parties by letter that we unanimously decided not to grant any of the CPO applications in their current forms and that all four proceedings would be stayed for a period of time to allow the PCRs to present revised proposals for any of the proposed collective proceedings (if so advised). These are our reasons for reaching that decision.
3. Two of the proposed collective proceedings are against Visa entities and two are against Mastercard entities (“Visa” and “Mastercard” respectively or, together, “the Proposed Defendants”). The proposed collective proceedings seek to combine claims concerning multilateral interchange fees (“MIFs”), which are charges incurred in Visa and Mastercard’s separate card schemes when consumers carry out transactions with merchants using credit or debit cards. In all four proposed proceedings, the MIFs are of two specific types – commercial and interregional card MIFs (and hence the choice of name of the PCRs). We explain these MIFs further below.
4. There are four separate proceedings because the PCRs seek to bring two different types of collective proceedings, on behalf of different classes of merchants, against each of the Proposed Defendants. One type is an opt out proceeding, in which merchants below a defined annual turnover of £100 million are automatically included in the class, unless they opt out. The other type is an opt in proceeding, where merchants with a defined turnover of £100 million or more can choose to join the class.
5. The claims are for damages caused by the Proposed Defendants’ alleged breaches of statutory duty in infringing Chapter I of the Competition Act 1998 (“CA 1998”) and/or Article 101 of the Treaty on the Functioning of the

European Union (“TFEU”), by reason of the way in which the commercial and interregional MIFs have been set in the Proposed Defendants’ respective card schemes.

6. These are not isolated claims against Visa and Mastercard. There are various other historic and current proceedings and regulatory activities involving MIFs which we will need to describe in some detail. First, however, we will draw from the Supreme Court’s outline in *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC and others* [2020] UKSC 24 (“*Sainsbury’s SC*”) to describe the way the Visa and Mastercard card schemes operate.

B. BACKGROUND TO THE LITIGATION

(1) Summary of operation of the card schemes

7. Visa and Mastercard each operate what are known as open four-party payment card schemes, under which they licence banks and other financial institutions to carry out issuer or acquirer services in relation to Visa or Mastercard branded cards. Issuers issue debit and/or credit cards to cardholder customers. Acquirers provide payment services to merchants, with whom the cardholders transact.
8. The following diagram summarises the four parties involved (noting that Visa and Mastercard do not provide issuing or acquiring services, but set the rules of their respective schemes and allow institutions to join as issuers or acquirers):

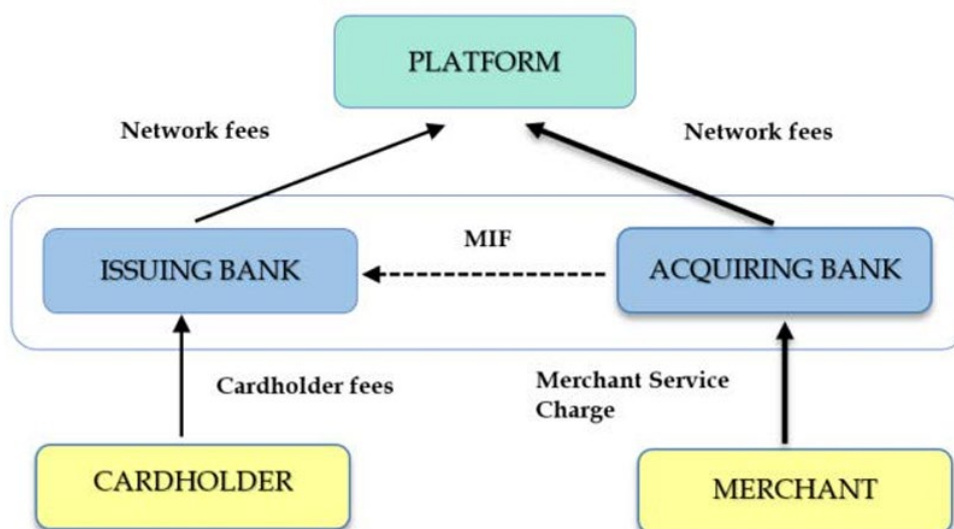


Figure 1¹

9. The scheme rules require that, whenever a cardholder uses a payment card to make a purchase from a merchant, the cardholder's issuer must make a payment to the merchant's acquirer to settle the transaction. The acquirer therefore receives payment from the issuer in respect of the transaction between cardholder and merchant. The acquirer then makes payment to the merchant, less the Merchant Service Charge ("MSC"). The MSC is consideration for the acquirer providing the payment services to the merchant and is negotiated between the acquirer and the merchant.
10. The scheme rules also include default rules specifying the terms on which issuers and acquirers (who are members of the scheme) are to deal with each other unless an issuer and acquirer have bilaterally agreed their own terms of dealing. Default rules provide for the payment by the acquirer to the issuer of an interchange fee on each payment card transaction.
11. The MSC is negotiated between the acquirer and the merchant and may take different forms, depending on the nature of the merchant and its business. Typically, an MSC will be set by an acquirer with some reference to the acquirer's own costs. These costs include fees which the acquirer has to pay

¹ Diagram in *Sainsbury's SC* at [9], with more detailed explanation at [10] to [18].

Visa or Mastercard (depending on the scheme which applies) and also the MIFs which are payable by the acquirer to the issuer in respect of each transaction in accordance with the scheme rules.

12. Under both the Visa and Mastercard schemes, the default interchange fee (i.e. the MIF) which is payable by the acquirer to the issuer on each transaction is expressed as a percentage of the value of the transaction, a flat figure in pence for each transaction, or a mixture of the two.
13. Different MIFs apply depending on the type of card (such as debit or credit and consumer or commercial); the type of transaction (such as contactless payments, or payments made where the card is not present, including internet payments); and the location of the merchant and issuing bank (i.e. whether they are in the same country (a “domestic” transaction), different countries in the same region, or countries in different regions).
14. The proposed proceedings concern the MIFs applicable to two specific types of transactions:
 - (1) Commercial MIFs – these apply to transactions made using a commercial payment card. Commercial payment cards are issued to businesses rather than individual consumers and encompass several types of cards, including charge cards (where the balance has to be paid off monthly), purchasing cards (debit cards designed for large corporate purchasing) and limited use cards such as fuel cards.
 - (2) Interregional MIFs – these apply to ‘Interregional’ transactions, which the PCRs define as transactions where the cardholder’s issuing bank is located in a different region (as defined in the Mastercard scheme rules) from the merchant – so, for example, where an American tourist uses their American bank card at a merchant in London while on holiday (the EEA at certain times being a ‘region’ for these purposes).
15. It should be noted that under Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-

based payment transactions (the Interchange Fee Regulation or “IFR”), maximum caps on interchange fees were introduced with effect from 9 December 2015. These did not however apply to interregional or commercial card MIFs. Those maximum caps are monitored and enforced in the UK by the Payment Systems Regulator (“PSR”).

(2) A brief history of MIF regulatory decisions and litigation

16. Both the Visa and Mastercard schemes have been subject to regulatory scrutiny by regulators at the national and European Commission (“Commission”) level over many years, including in relation to MIFs. There have also been cases in the UK Courts, in which the question of the legality of MIFs, and the consequences of any illegality, have been considered. In the proposed collective proceedings, the PCRs rely principally on three sets of investigations and proceedings:

- (1) An infringement decision of the Commission in COMP/34.579 Mastercard, 19 December 2007 (“*Mastercard P*”), that the prohibition in Article 101 TFEU had been infringed, which was upheld by the General Court² (“*Mastercard GC*”) and by the Court of Justice of the European Union³ (“*Mastercard CJEU*”) and has become final within the meaning of section 58A of CA 1998.
- (2) The decisions of the UK Court of Appeal⁴ (“*Sainsbury’s CA*”) and the Supreme Court⁵ (“*Sainsbury’s SC*”).⁶
- (3) A commitments decision of the Commission of 22 January 2019 in Case AT.40049 – Mastercard II (“*Mastercard II: Commitments*”) making binding the Commitments offered by Mastercard on 26 November 2018 in relation to Mastercard’s interregional MIFs; and a commitments

² Case T-111/08 *Mastercard, Inc. v Commission* EU:T:2012:260.

³ Case C-382/12P *Mastercard, Inc. v Commission* EU:C:2014:2201.

⁴ *Sainsbury’s Supermarkets Limited v Mastercard Incorporated and others* [2018] EWCA Civ 1536.

⁵ Cited at [6].

⁶ These were appeals brought in respect of the Tribunal’s decision in *Sainsbury’s Supermarkets Ltd v Mastercard Incorporated and others* [2016] CAT 11 (“*Sainsbury’s CAT*”) and two other proceedings heard in the Commercial Court.

decision of the Commission of 29 April 2019 in Case AT.39398 – Visa MIF (“*Visa Commitments Decision*”).

17. It will be necessary to deal with some of these decisions in more detail in due course. For present purposes, we note that the PCRs bring the proposed proceedings on a “standalone basis” (i.e. without relying on a pre-existing infringement decision as having a binding effect). This is because none of the earlier proceedings or investigations has determined, in the form of a binding decision, that commercial or interregional MIFs infringe Chapter I of CA 1998 or Article 101 TFEU.

(3) The Umbrella Proceedings

18. Following the decisions referred to above (and in particular *Sainsbury’s SC*), a large number of individual claims by merchants have been issued in the High Court. Generally, these have been and are still being transferred to the Tribunal and are being managed by the Tribunal pursuant to the Tribunal’s Practice Direction 2/2022 on Umbrella Proceedings. In practice, this means that all the ubiquitous issues, matters or features arising from the individual merchant claims can be grouped and managed together in a way that is effective and consistent. Orders, rulings and judgments made in the Umbrella Proceedings are treated as being made in each of the individual proceedings as well.
19. There is also a certified collective action, *Walter Hugh Merricks CBE v Mastercard Incorporated and others*⁷ (“*Merricks Collective Proceedings*”), which is brought by Mr Merricks, a class representative, against certain Mastercard entities on behalf of UK consumers who have made purchases from merchants accepting Mastercard cards. The *Merricks Collective Proceedings* have not to date been included in the Umbrella Proceedings, but have been ordered to participate in a hearing with the Umbrella Proceedings parties about the issue of pass on methodology (which will be explained in more detail below).

⁷ Case No:1266/7/7/16.

20. The current position in the Umbrella Proceedings is that the Tribunal has ordered the parties to prepare a list of issues (“the List of Issues”) arising in the case, specifying the manner in which it is proposed each issue should be determined by the Tribunal, including whether the determination involves legal argument, factual witness evidence or expert evidence. The List of Issues has been used to determine the timetable for trials or hearings about groups of issues as follows:
- (1) A “Pass On Evidential Hearing” took place in May 2023, to discuss the approach to determining pass on issues.
 - (2) Trial 1, to take place in the first quarter of 2024, to deal with liability issues in relation to UK and Irish domestic MIFs.
 - (3) Trial 2, to take place in October or November 2024, to deal with all issues relating to acquirer and merchant pass on.
 - (4) Trial 3, to take place at a future unspecified date, to deal with all other issues including liability issues arising in relation to non-UK and non-Irish domestic MIFs.
21. Trial 1 will deal with questions of infringement in relation to commercial card and interregional MIFs which are the subject of individual merchant claims. The List of Issues sets out at Issues 4 and 5 a number of sub-issues, by reference to the pleadings in the Umbrella Proceedings, such as whether the facts relating to interregional and commercial MIFs can be materially distinguished from *Sainsbury’s SC* and *Mastercard CJEU* about domestic and EEA MIFs, and if so whether these interregional and commercial MIFs had the object or effect of restricting competition on a relevant market, whether any restrictions are objectively necessary and (for interregional MIFs only) whether the commitments given by the Proposed Defendants to the Commission set a lawful level of MIF. The parties have proposed in the List of Issues the extent to which each of these questions turn on legal, factual or expert evidence.

22. This position reflects the outcome of an application made by a number of individual claimants (prior to the designation of Umbrella Proceedings) seeking summary judgment against certain Mastercard and Visa entities on the question of liability in relation to interregional and commercial card MIFs. In *Dune Group Limited and others v Mastercard and others*⁸ (“Dune”), the claimants argued that the question of liability in relation to (among others) interregional and commercial card MIFs had been resolved by the UK Courts in *Sainsbury’s CA* and *Sainsbury’s SC*, following *Mastercard CJEU*, since the essential factual basis of the claims was materially indistinct from the basis of those UK Court decisions.
23. The Tribunal refused the application for summary judgment, finding that it was arguable that there were potential factual differences between the claims that these MIFs infringed competition law and the claims that were determined in relation to other types of MIFs in *Sainsbury’s CA* and *Sainsbury’s SC*. These differences require exploration and determination at trial.
24. In relation to pass on, the Tribunal has already considered this issue in the Umbrella Proceedings and has noted a number of challenges which arise⁹. The Tribunal has described pass on as follows at [3] and [4]:
- “3. One of the issues that gives rise to clear differences between the parties is that of “pass on”. Where there has been a competition law infringement by infringer *A*, and as a result party *B* has paid more for a good or service than *B* would, but for the infringement, have paid, then *prima facie* it appears to be the case that *B* has a claim, against *A*, for the amount of the overcharge. However, *A* may contend that the *prima facie* case does not hold, in that *B* has passed on the loss (sustained by *B*), in whole or in part, to party *C*. *C* could be someone who bought a good or service from *B* where the price paid by *C* to *B* included, in whole or in part, the overcharge which was originally paid by *B* to *A*. Matters are complicated by the fact that *if* the overcharge was indeed passed on by *B* to *C*, then *C* has a self-standing claim against *A*, as the party who has in fact borne the loss arising out of *A*’s infringement.
4. Naturally, questions of over- and under-compensation loom large. *B* should not recover at the expense of *C*, and *A* should not pay out to *B* and *C* in respect of the same loss.”

⁸ [2021] CAT 35.

⁹ Merchant Interchange Fee Umbrella Proceedings [2022] CAT 31 (Pass On) (the “MIFs Pass On Judgment”).

25. In the Umbrella Proceedings, as in these proposed proceedings, there are two distinct areas of potential pass on:

- (1) The extent to which an acquirer passes on to merchants any MIF overcharge which the acquirer is required to pay the issuer. We refer to this as “acquirer pass on”.
- (2) The extent to which a merchant passes on to consumers the element of any MIF overcharge which the merchant has had to pay the acquirer in cases where acquirer pass on has occurred. We refer to this as “merchant pass on”.

C. THE APPLICATIONS

26. The PCRs seek CPOs for the following proceedings:

- (1) An opt out proceeding against Visa on behalf of a class of merchants with average annual turnover of less than £100 million per annum in the period 2016 - 2019 who have paid an MSC in respect of interregional and/or commercial card transactions which took place in the UK after 1 June 2016 (Case No. 1444/7/7/22).
- (2) An opt out proceeding against Mastercard on behalf of a class of merchants with average annual turnover of less than £100 million per annum in the period 2016 - 2019 who have paid an MSC in respect of interregional and/or commercial card transactions which took place in the UK after 1 June 2016 (Case No. 1442/7/7/22).
- (3) An opt in proceeding against Visa on behalf of a class of merchants with average annual turnover of £100 million or more per annum in the period 2016 - 2019 who have paid an MSC in respect of interregional and/or commercial card transactions which took place (a) in the EU (including the UK) after 1 June 2016 and prior to 1 January 2021 or (b) in the UK on or after 1 January 2021 (Case No. 1443/7/7/22).

- (4) An opt in proceeding against Mastercard on behalf of a class of merchants with average annual turnover of £100 million or more per annum in the period 2016 - 2019 who have paid an MSC in respect of interregional and/or commercial card transactions which took place (a) in the EU (including the UK) after 1 June 2016 and prior to 1 January 2021 or (b) in the UK on or after 1 January 2021 (Case No. 1441/7/7/22).

27. In all material respects for the purposes of this judgment:
 - (1) The pleadings for the opt out proceedings against Visa and Mastercard are the same.
 - (2) The pleadings for the opt in proceedings against Visa and Mastercard are the same.

28. The applications were made, in four sets of proposed collective proceedings, by Collective Proceedings Claim Forms dated 1 June 2022 and treated as filed on 6 June 2022 (each “Claim Form”, and together “Claim Forms”). The applications were supported by:
 - (1) A witness statement from Stephen Allen, sole director of the PCRs.
 - (2) A witness statement from Adrian Chopin, a managing director of Bench Walk Advisors LLC, who are providing funding for the proposed proceedings.
 - (3) Witness statements from Damon Parker and Thomas Ross, partners at Marcus Parker Limited, solicitors to the PCRs.
 - (4) An expert statement from Nils von Hinten-Reed, an economist (we shall call this expert statement “VHR1”).

29. The applications were supported by a Litigation Plan, which was largely identical for all four proposed proceedings, along with Litigation Budgets, which were prepared as a single budget for the two opt in proceedings and as

separate budgets for each of the opt out proceedings. The headline figure for the opt in proceedings was £18,349,000, described as the “Total Funded”, and for each of the opt out actions the “Total Funded” figure was £7,180,000.

30. There was a dispute between the parties as to whether that correctly described the estimated total costs of the action, as the Proposed Defendants asserted that the “Total Funded” figure did not include deferred fees agreed with the PCR’s legal team, which would increase the overall costs to in excess of 40 million. The PCRs disputed this but have not clarified the position relating to deferred legal fees.
31. The PCRs also subsequently served further witness statements from Mr Ross (his third and fourth), which related to a Ruling by the Tribunal dated 13 January 2023¹⁰ and a Reasoned Order made by the Tribunal on 3 March 2023 for disclosure of certain information about contact between the PCRs and prospective class members.
32. Mastercard filed a composite Response, opposing the applications, dated 20 February 2023. It also filed evidence in the form of:
 - (1) A witness statement from Nicholas Cotter, a partner at Jones Day, solicitors for Mastercard.
 - (2) An expert report from Gunnar Niels, an economist.
33. Visa filed a composite Response, opposing the applications, on 20 February 2023. It also filed evidence in the form of:
 - (1) A witness statement from Timothy Steel, a consultant to and former employee of Visa.
 - (2) A witness statement from Sarina Williams, a partner at Linklaters, solicitors to Visa.

¹⁰ [2023] CAT 1.

- (3) An expert report from Derek Holt, an economist.
34. The PCR's filed a composite Reply on 14 March 2023, supported by:
 - (1) A further witness statement from Mr Allen.
 - (2) A further witness statement from Mr Chopin.
 - (3) A further witness statement from Mr Ross (his fifth).
 - (4) Two further expert reports (dated 15 March 2023) from Mr von Hinten-Reed, one responding to Dr Niels and one responding to Mr Holt ("VHR2" and "VHR3" respectively).
35. Ms Williams also filed a further statement, in response to Mr Ross's fifth statement. Visa requested, and was granted, permission to adduce this evidence.
36. Controversially, the PCR's also sought permission to rely on a further report from Mr von Hinten-Reed ("VHR4"), which was provided on 21 March 2023 (after the date fixed for service of the Reply in these proceedings) and which had been prepared and filed by the PCR's for use in the Pass On Evidential Hearing in the Umbrella Proceedings. This was highly unsatisfactory. It ignored the timetable set by the Tribunal in these proceedings for evidence in the applications and arrived with Mastercard and Visa in the context of the Umbrella Proceedings only shortly before skeleton arguments for these proceedings were due to be filed. Permission to use the report in these proceedings was only sought by the PCR's just over a week before the actual joint hearing of the applications (the "CPO hearing").
37. At the CPO hearing, we granted permission, with considerable reluctance, to admit VHR4 as evidence in these proceedings, but with the proviso that we would be alert to any question of prejudice as a result of the short period of time the Proposed Defendants had to consider it properly. We comment in more detail on VHR4 below.

38. The applications were heard over three days between 3 and 5 April 2023.

D. LEGAL FRAMEWORK

39. It is now well established that there are two broad questions arising from section 47B CA 1998 and rules 78 and 79 of the Competition Appeal Tribunal Rules 2015 (“the Rules”) which the Tribunal is required to consider for CPO applications. They are:

(1) Authorisation of the class representative under section 47B(5)(a) CA 1998 and rule 78.

(2) Eligibility of the claims for inclusion in collective proceedings under section 47B(5)(b) CA 1998 and rule 79.

40. There is a further requirement, which emerges from the reference in various recent cases to a decision of the Canadian Supreme Court in the case of *Pro-Sys Consultants Ltd v Microsoft Corporation*¹¹ (“*Pro-Sys*”). This is the requirement for a proposed class representative to provide to the Tribunal, for the purposes of an application for a CPO, a methodology for the proceedings.

41. The starting point for any analysis of the Tribunal’s approach to CPOs is *Mastercard Incorporated and others v Walter Hugh Merricks CBE*¹² (“*Merricks SC*”), in which the Supreme Court considered the collective proceedings regime for the first time. Mr Merricks issued collective proceedings against certain Mastercard entities, seeking to represent claims by 46.2 million UK consumers who made purchases in the UK over a 16 year period, regardless of whether they owned or used a Mastercard branded card. The claim was based on the infringement found by the Commission in *Mastercard I* and asserted that any price increases by which merchants passed on the costs of the MIFs in question was applied to all purchasers, not just those using particular cards.

¹¹ [2013] SCC 57.

¹² [2020] UKSC 51.

42. The main issues in the appeal concerned the eligibility provisions of section 47B(6) and rule 79. However, the majority set out in some detail the policy settings behind the collective proceedings regime, making it plain that the statutory provisions were intended to promote several important factors. For convenience, we will not rehearse those fully here, but instead respectfully adopt the following summary from a recent Court of Appeal decision, *BT Group plc v Justin Le Patourel*¹³ (“*Le Patourel CA*”) at [29]:

“Pulling the threads together, the principal object of the collective action regime is to facilitate access to justice for those (in particular consumers) who would otherwise not be able to access legal redress. Embraced within this broad description is the proposition that the scheme exists to facilitate the vindication but not the impeding of rights. Also included is the proposition that a scheme which facilitates access to redress will increase *ex ante* incentives of those subject to the law to secure early compliance; prevention being better than cure. Finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims.”

43. We will return to *Merricks SC* in more detail in relation to eligibility and methodology.

(1) Authorisation

44. The requirement for authorisation of a class representative is set out in sections 47B(5) and (8) CA 1998:

“(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) ...

...

(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

¹³ [2022] EWCA Civ 593.

- (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.”

45. Rule 78 provides further detail on the issue as follows:

“Authorisation of the class representative

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;
- (c) if there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
- (d) will be able to pay the defendant's recoverable costs if ordered to do so; and
- (e) where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.

(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.”

46. There was an exchange between the parties about the significance of rule 78(3)(b), and in particular the extent to which a corporate who was not a pre-existing body was a negative factor in the authorisation assessment.
47. In *Michael O’Higgins FX Class Representative Limited v Barclays Bank plc and others*¹⁴ (“FX”), the Tribunal considered competing applications from two proposed class representatives, one of whom was a body corporate, and the other an individual. At [263] to [266], the Tribunal considered rule 78(3)(b):

“(c) Not a “pre-existing body”

263. This is a factor specifically mentioned in the Tribunal Rules. It will have been articulated for a reason.
264. If a PCR is a pre-existing body, then it must immediately be asked “Why does it exist?” and “What are its purposes?”. If the reason for or purpose of the pre-existing body is to further the interests of the class concerned—for instance, if the pre-existing body is a trade association or a consumer protection organisation—then that, as it seems to us, is a material factor in favour of that particular PCR.
265. In this case, neither PCR is a pre-existing body in this sense. Both PCRs have come forward specifically for the purposes of these Applications and, indeed, at the invitation of the solicitors who they are now instructing.
266. Thus, this factor is neutral as between the O’Higgins PCR and the Evans PCR; but it is not irrelevant. It is a factor to take into account against both PCRs equally.”

48. The Tribunal decided¹⁵ that a proposed class representative’s robustness, in the face of their own legal team’s advice and funder’s interests, was a matter that should be considered under the broader rubric of whether the PCR can fairly and adequately represent the interests of the class members, rather than as a point about conflict of interest.

¹⁴ [2022] CAT 16.

¹⁵ At [270].

49. After considering the features in that case, the Tribunal reached this final conclusion at [360]:

“Although the relevant factors do not all point in a single direction, in the case of both PCRs it is clear that the Authorisation Condition is met. We reach that conclusion with no real hesitation: the contra-indicators (specifically, funding levels and level of ATE insurance) do not come close to outweighing the factors pointing the other way.”

50. Where the proposed class representative is a pre-existing body (for example a consumer organisation), that is obviously a positive factor in favour of authorisation. However, we do not read the Tribunal’s observation in *FX* at [266] as suggesting that a proposed class representative which is a newly formed entity will as a matter of course be viewed negatively by the Tribunal in assessing the authorisation condition.
51. Instead, it is necessary in each case to consider the arrangements which are in place, particularly as regards the control and ability of the proposed class representative to exercise its functions fairly and adequately in the interests of class members. That is likely to involve an inquiry into the management of the body corporate proposed as the class representative – in effect, who is the directing mind and how does that person or those persons exercise control?
52. Similarly, it is a feature of the regime that proposed class representatives might be approached by lawyers or funders, rather than the other way around. There is no presumption that this creates an inability on the part of the proposed class representative fairly and adequately to represent the interests of class members. The key question is again about control and the proper exercise of powers – whether the proposed class representative can be said to “call the shots”¹⁶, particularly in relation to settlement. That will need to be assessed by reference to the actual circumstances apparent to the Tribunal.

(2) Eligibility

53. The eligibility element of section 47B CA 1998 reads as follows:

¹⁶ See *FX* at [269].

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

- (a) ...
- (b) in respect of claims which are eligible for inclusion in collective proceedings.

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

54. Rule 79 provides:

“Certification of the claims as eligible for inclusion in collective proceedings

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, including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the 1998 Act or otherwise.

(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.

(4) At the hearing of the application for a collective proceedings order, the Tribunal may hear any application by the defendant—

(a) under rule 41(1), to strike out in whole or part any or all of the claims sought to be included in the collective proceedings; or

(b) under rule 43(1), for summary judgment.

(5) Any member of the proposed class may apply to make submissions either in writing or orally at the hearing of the application for a collective proceedings order.”

55. The items listed in rule 79(1) are hurdles which are a precondition to eligibility. The various items in rule 79(2) are factors which are to be weighed together in a suitability assessment¹⁷.

56. We note that the question of identification of the class appears twice in rule 79:

(1) Rule 79(1)(a), which requires us to be satisfied that the claims sought to be included in the collective proceedings are brought on behalf of an identifiable class of persons.

(2) Rule 79(2)(e), which requires us to consider whether, in the context of suitability of the claims to be brought in collective proceedings, it is possible to determine in respect of any person whether that person is or is not a member of the class.

57. In *Merricks SC*, the Supreme Court noted a similar overlap in relation to common issues, which is referred to in rule 79(1)(b) and rule 79(2)(a)¹⁸.

58. The Tribunal’s Guide to Proceedings 2015 (“the Guide”) notes the following at paragraph 6.37 in relation to rule 79(1):

¹⁷ See *Merricks SC* at [61].

¹⁸ At [62].

“To make a CPO, the Tribunal must be satisfied that the claims are eligible to be included in collective proceedings. The three requirements for determining eligibility are set out in Rule 79(1):

- *The claims must be brought on behalf of an identifiable class of persons*

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. However, although the claim form must give an evidence based estimate of the size of the class, it is not necessary to identify each class member (in an opt-out claim) or specify exactly how many persons are within the class.

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.”

59. In the *Trucks CPO* applications¹⁹, which were brought by two different proposed class representatives, the Tribunal noted at [188]:

“...the identifiability requirement in r. 79(1)(a) is concerned solely with the objectivity and clarity of the class definition: see the *Guide* at para 6.37. Therefore the definition should not be based on subjective or merits-based criteria. The requirement is not concerned with the manner in which a [potential class member] proves that they come within the objective class definition, a question which generally arises only at the time of distribution of damages. ...”

60. There is therefore a difference between an assessment of the objectivity and clarity of the class definition, on one hand, and the means by which a class member might later seek to prove that they meet the class definition, on the other. In that case, the challenge was to the possibility of establishing class membership through public records, such as the DVLA.

61. In *FX* at [62] the Tribunal noted (when considering the approach to competing CPO applications):

¹⁹ *UK Trucks Claim Limited v Stellantis N.V. and others* [2022] CAT 25.

“... whilst the requirements that the class be identifiable and that the issues raised be common can quite plausibly be seen as absolute “yes/no” requirements that would not permit of a relativistic analysis, the third requirement – suitability – is certainly one that contains sufficient shades of grey as to permit a relative (as well as an absolute) approach. ...”

62. We make the following observations about the interplay of rules 79(1)(a) and 79(2)(e):
- (1) In our view, these rules, while overlapping, perform distinct functions. As is clear from *Merricks SC* (by analogy with the test for common issues), *Trucks CPO* and *FX*, rule 79(1)(a) is a hurdle to bringing a collective action, while rule 79(2)(e) is a factor to consider among other factors when considering suitability.
 - (2) Rule 79(1)(a) asks whether an objective and clear class definition has been proposed (see *Trucks CPO* at [188]). It is about the design of the proposed class definition and whether, on its face, it is capable of sensibly identifying a class. This underpins important features of the collective proceedings regime, such as the assessment of common issues and the ability to identify those who are bound by the result of those proceedings.
 - (3) While rule 79(1)(a) is identified as a hurdle, we note the importance, as summarised in *Le Patourel CA* at [29], of collective actions facilitating access to justice. It should not easily be assumed that the existence of a hurdle, in the form of rule 79(1) generally, requires an overly prescriptive approach. There may well be some ambiguity or uncertainty permitted in a class definition and reasonable assumptions based on common sense might be required. In doing so, the Tribunal is required to “have regard to all the circumstances”.
 - (4) Rule 79(2)(e) is dealing with the mechanics of a particular person verifying whether or not they are included in the class. That is a question of methodology and seems important in relation to issues such as registration of class members and the distribution of any award of damages.

- (5) Rule 79(2)(e) is one of a number of factors relating to suitability under rule 79(2) (in order to meet the requirement in rule 79(1)(c)). Each factor is to be weighed along with the others and an overall judgment reached about suitability (see *Merricks SC* at [61] and [62]).
- (6) Despite having distinct functions, rules 79(1)(a) and 79(2)(e) are inherently linked. A poor class definition will make it more difficult to reach a reasonably evidenced conclusion about class membership of a person, while a well-thought-out one will likely lead to ease of verification of a person’s membership of the class.
63. Turning to the common issues test, this should be interpreted purposively, having regard to the objects of the collective proceedings regime. It is not necessary for common issues to predominate over non-common issues. The commonality refers to the question, not the answer, and there can be a significant level of difference between the position of class members. See the decision of the Tribunal in *Gutmann v First MTR South Western Trains Limited*²⁰ at [107], approved on appeal²¹ (“*Gutmann CA*”) at [41].
64. The suitability test is a relative one, which requires a comparison between collective proceedings and the individual proceedings that might otherwise be the alternative. Put another way, are individual proceedings a relevant alternative or do the same difficulties which might face a collective action apply in an individual claim as well? See *Merricks SC* at [64] and [70].

(3) Methodology

65. The methodology requirement is not expressly part of the statutory test, but it is nonetheless closely linked to the questions of common interest and suitability. In *Pro-Sys*, Rothstein J stated (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

²⁰ [2021] CAT 31.

²¹ *London & South Eastern Railway Limited and others v Justin Gutmann* [2022] EWCA Civ 1077.

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.”

66. In *Gutmann CA*, the Court of Appeal described the test in the following passage:

“24. To enable the CAT to form a judgment on commonality and suitability the class representative is required to put forward a “*methodology*” setting out how the issues that they have identified will be determined or answered at trial. In practice the methodology is prepared by an expert economist instructed by the proposed class representative. The methodology advanced will be counterfactual and therefore hypothetical in nature. It posits how the market would operate absent the alleged unlawful conduct and provides a benchmark against which to measure a defendant’s actual conduct. It constitutes a critical document that the CAT will examine when determining commonality and suitability. The test to be applied to a proposed methodology to determine whether it is up to standard was articulated by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57 (“*Microsoft*”) and was endorsed by the Supreme Court in this jurisdiction in *Merricks*. We address the test in paragraphs [45], [46] and [52] – [63] below.”

67. At [44], the Court of Appeal noted that the methodology acts as “a broad blueprint identifying the issues for trial and how they are to be resolved and provides important material from which the CAT can determine whether the issues are “*common*” and “*suitable*” for certification”. As a result, the methodology will be relevant to a range of issues including breach of duty, causation, proof of loss and quantum.

68. Between [52] and [61], the Court of Appeal then made the following observations which have particular relevance to these applications:

- (1) The test is not a statutory one. Judges are expected to use intuition and common sense and have a broad discretion as to how it is applied.
- (2) The test is a counterfactual one, based on a model of how the market would have operated absent the abuse. It may be quite hypothetical, but it should also disclose some factual basis for the assumptions used.
- (3) The test is applied at a relatively early stage in the proceedings and is necessarily provisional, pending disclosure and other steps.

- (4) The Court will bear in mind its ability to fill gaps and plug lacunae at trial – both in relation to liability and damages issues (this is referred to as the “broad axe”, which is defined as a well-established judicial practice whereby judges eschew artificial demands for precision and the production of comprehensive evidence on all issues and instead use their forensic skills to do the best they can with limited material to achieve practical justice).
- (5) The test is about practicable justiciability, and whether the methodology will allow the Court to determine issues at trial.
69. At [61], the Court of Appeal referred to what the PCRs referred to in these proceedings as the “low bar” established by *Merricks SC*:

“*The height of the bar*: In *Merricks* Lord Briggs, for the majority, stated of the test, that the threshold for certification was not onerous not least because it had to be formulated in advance of disclosure (*ibid* paragraphs [40] – [42]). We do not demur but it is necessary to put this into context. The Court was not intending to indicate that the [*Pro-Sys*] test was toothless, or that the CAT would not closely scrutinise the methodology proposed by class representatives for the purpose of obtaining certification. The aggregate damages regime represents a paradigm shift in the dynamics of tortious recovery. A defendant subject to an award is required to disgorge the total loss flowing from its breach. This contrasts with the pre-existing position whereby a dominant undertaking exploiting its position through the imposition of (say) unfair prices on consumers was in practice immunised from the adverse consequences of its breach by the lack of any realistic ability or incentive for a small consumer to take on the dominant undertaking in litigation. The introduction of the collective action and aggregation mechanisms reversed the landscape and has in consequence materially heightened litigation risk for undertakings. The CAT therefore plays an important gatekeeper role in certifying claims and will always vigilantly perform that function (judgment paragraph [12]). It will seek to strike an appropriate balance between the right of the class to seek vindication and the right of defendants not to be subject to a top down claim unless it is a proper one to proceed.”

70. In *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and others*²², the Tribunal applied these principles to a proposed collective action, concluding that the methodology test had not been passed. The Tribunal noted (at [40]) the potential for proposed class representatives to seek to avoid providing at least some form of methodology in reliance either on (1) the lack of access to material evidence

²² [2023] CAT 10.

prior to a disclosure exercise or (2) the inability to anticipate points of defence that might be advanced. While both might be good reasons for imperfection, they were not justifications for a failure to attempt any serious methodology.

E. KEY FEATURES OF THE PROCEEDINGS

71. There are a number of features of these proposed collective proceedings that require explanation at this stage, as they have a material bearing on the complaints made by the Proposed Defendants about the applications.

72. These features are largely driven by the way in which the PCRs have defined the proposed classes. The definitions are the same for the cases against Mastercard and Visa, but differ as between opt in and opt out claims. In all cases the “Claim Period” is defined as being from 1 June 2016 until the date of judgment. The split between opt in and opt out cases is achieved by specifying an average annual turnover between 2016 and 2019 of £100 million as a threshold from and above which a merchant would be a potential opt in class member and below which the merchant would be an opt out class member.

73. The relevant part of the opt in definition is as follows:

“The [proposed] Class is defined as follows:

All Merchants who paid a Merchant Service Charge (including a Multilateral Interchange Fee) in respect of one or more Inter-regional Transactions and/or Commercial Card Transactions:

- (i) during the Claim Period; and
- (ii) where the transaction occurred in (a) the EU (including the UK) prior to 1 January 2021 or (b) in the UK on or after 1 January 2021.

The [proposed] Class does not include Excluded Merchants ...”

74. The relevant part of the opt out definition is as follows:

“The [proposed] Class is defined as follows:

All Merchants who paid a Merchant Service Charge (including a Multilateral Interchange Fee) in respect of one or more Inter-regional Transactions and/or Commercial Card Transactions:

- (i) during the Claim Period; and

(ii) where the transaction occurred in the UK.

The [proposed] Class does not include Excluded Merchants ...”

(1) Interregional and commercial card MIFs only

75. The PCR's have chosen to include in the proposed class, in all of the proposed proceedings, only those merchants who have entered into transactions which have incurred interregional and commercial card MIFs. In other words, the claims sought to be combined exclude any overcharge relating to domestic or intra EEA MIFs. A number of things flow from this:

- (1) While there are decisions of Courts and regulatory authorities that establish infringement of Chapter I CA 1998 or Article 101 TFEU in relation to domestic and intra EEA MIFs in a way that would bind the Tribunal, there is no such decision to that effect in relation to interregional and/or commercial card MIFs. That means that the proposed proceedings do not relate to follow-on claims but concern claims where all elements of the claim alleged to give rise to liability have to be established by the PCR's.
- (2) The MIFs which a merchant incurs will depend on the cards which the merchant accepts when they conduct a transaction with a customer. Many merchants will, over time, accept a mix of some or all of domestic, intra EEA, interregional and commercial cards. A number of merchants in the Umbrella Proceedings have made claims in their individual proceedings for overcharge in relation to MIFs relating to all of these cards.
- (3) Given that interregional and commercial card MIFs are not subject to the IFR, they tend to be set at a higher level than the MIFs which are subject to the IFR. For example, in VHR1²³, Mr von Hinten-Reed estimated the average interregional MIF for Mastercard to be 1.81% and for Visa to be 1.75%, while the figures for commercial card MIFs were

²³ See VHR1 at paragraphs 20, 23 and 25.

1.56% and 1.58% respectively. By way of comparison, the IFR set a maximum weighted average rate cap of 0.2% on domestic and cross-border debit MIFs.

- (4) Although the value per transaction for interregional and commercial card MIFs is relatively high, they are heavily concentrated in a small number of sectors related to travel and hospitality and, overall, there are fewer transactions of those types in the UK than there are domestic and intra EEA card transactions. We explore that subject further in the next section.

(2) The profile of merchants

(a) Sectors – car rental, hotels and airlines

76. Perhaps unsurprisingly, analysis conducted by the PCRs suggests that a very considerable proportion of transactions which incur interregional or commercial card MIFs occur in sectors which are related to travel and hospitality. According to Mr von Hinten-Reed²⁴:

- (1) In relation to car rental, an estimated 22.0% of transactions are conducted with commercial cards and 34.0% with interregional cards.
- (2) In relation to hotels, an estimated 32.0% of transactions are conducted with commercial cards and 33.5% with interregional cards.
- (3) In relation to airlines, an estimated 32.0% of transactions are conducted with commercial cards and 33.5% with interregional cards.

77. Mr von Hinten-Reed estimated that there are less than 14,000 merchants in the three sector areas above, of which there are 70 merchants who are potential opt in class members, by virtue of having average annual turnover of £100 million or more²⁵.

²⁴ VHR1 section 3.

²⁵ See Table 4-1 in VHR1.

(b) The rest

78. Outside those three sectors, there is uncertainty about the size of the merchant population. The PCRs suggest in their Claim Forms that there were over one million merchants who undertook card transactions in 2016, with Mastercard and Visa being the most common card brands. Mr Bowsher KC suggested in argument that there might realistically be 250,000 merchants who might be “viable” claimants, although it was not clear what this meant or how it related to the estimate of over one million merchants.

(c) Geographic considerations

79. The class definitions focus on the location of the transaction, rather than the merchant. For example, the opt out claims require the transaction to have taken place in the UK. That does not necessarily require the merchant to be domiciled in the UK – a French retailer with an outlet in London would qualify.
80. However, the opt in claims are considerably broader in geographical scope. The class definitions include transactions conducted in the EU prior to 1 January 2021. That means that the opt in classes will include merchants who have conducted transactions in any EU member state between 1 June 2016 and 1 January 2021.
81. That increases the potential number of class members – effectively, all merchants with average turnover of £100 million or more, who have transacted business in an EU member state during that period and where the card was an interregional or commercial one. It also brings into consideration the card acquiring markets in every EU member state where a class member contends that a relevant transaction was effected.

(3) MSC contracts

82. We have noted in section B above that merchants and acquirers enter into contracts by which they agree the MSC, typically including the component of that which represents MIFs. It is necessary to explain those contracts in greater

detail. For present purposes, there are three main types of contracts, two of which have similar characteristics and one which is materially different. The following summary comes from a November 2021 report of the PSR²⁶ (the “PSR’s November Report”), to which we were referred.

(a) IC+ and ++

83. Under interchange fee plus (“IC+”) and interchange fee plus plus (“IC++”) contracts, for any given transaction the acquirer automatically passes through to the merchant at cost the interchange fee applicable to that transaction or (in the case of IC++) the interchange fee and scheme fees applicable to that transaction. In other words, any given MIF is an identifiable and transparent part of the charging structure.

(b) Blended

84. For blended (also known as standard pricing) contracts, for any given transaction the acquirer does not automatically pass through at cost the interchange fee applicable to the transaction. In other words, any given MIF is not an identifiable and transparent part of the charging structure.

85. As Mr von Hinten-Reed noted in VHR3²⁷:

“... claimants that use standard pricing contracts are charged a blended headline rate and are not able to directly observe the individual components of the MSC. This means that data on the underlying transactions may not be readily available ...”.

86. Over 95% of merchants have blended contracts. These are mainly merchants with average annual turnover below £100 million, but we understand there will be some above that turnover figure who have blended contracts as well.

²⁶ See the PSR’s [Market review into card-acquiring services – Final report, November 2021](#) at paragraphs 3.63, 3.64, 4.4 and 4.55.

²⁷ See Appendix B to VHR3 at paragraph 308.

F. THE ARGUMENTS OF THE PARTIES

87. The Proposed Defendants oppose the granting of the CPOs on a broad range of grounds. These can usefully be separated into challenges to eligibility, authorisation and methodology, although the categories inevitably blur on a number of occasions.

88. There are some points of difference which emerge in relation to challenges to the opt in and the opt out proceedings. We will clarify those as necessary and will deal in more detail with these differences in the Discussion section below. Otherwise, our observations apply to both types of proposed proceedings.

(1) Methodology

89. The Proposed Defendants contend that significant elements of the PCR's cases contain no information at all about the methodology for important aspects in respect of which it is obvious that such work is required. This includes the issues of infringement, acquirer pass on, merchant pass on and a variety of other issues of lesser (but still material) importance.

90. To some extent, these alleged defects have been addressed by material filed with the Reply (and indeed after that, in the case of merchant pass on, in VHR4), but it is said that problems still remain. In other respects, and most notably the issue of infringement, the position has not changed since the Claim Forms were issued and it is maintained that there is no methodology presented at all on that subject.

91. The Proposed Defendants submit that the PCRs have had several opportunities to remedy the lack of adequate methodology and should not be given further indulgence. In this regard, the Proposed Defendants say that the persistent failings of the PCRs suggest a lack of credibility to be authorised as class representatives for these claims (that is, an overlap with the authorisation question).

92. The PCRs respond to much of these criticisms with the following general points:

- (1) At the time the Claim Forms and accompanying evidence were filed, many aspects of the likely defences of the Proposed Defendants were unclear.
- (2) To the extent that those defences have been clarified subsequently (by way of the Responses and supporting evidence), the PCRs have now set out a methodology which is adequate.
- (3) Many of the issues in the proposed proceedings coincide with issues in the Umbrella Proceedings, where there is a comprehensive process underway to resolve those issues. It is unnecessary and potentially wasteful to attempt to second guess the methodologies which will emerge from the Umbrella Proceedings, given the intention of the PCRs to apply to participate in the Umbrella Proceedings to the full extent of common issues.

93. Dealing with each of the areas of challenge in more detail:

(a) *Infringement*

94. The PCRs' primary case is that liability for overcharge for the interregional and commercial card MIFs is established by reference to the decisions (in particular) in *Mastercard I*, *Mastercard CJEU* and *Sainsbury's SC*, all of which are binding on the Tribunal. However, it has been plain since 26 November 2021 (over six months before these proceedings were issued) that the Proposed Defendants disputed the "read across" from those decisions to cases involving interregional and commercial card MIFs.
95. That is because, on that date, the Tribunal refused to grant summary judgment on precisely this point to the merchant claimants in a number of individual proceedings (which are now being managed within the Umbrella Proceedings)²⁸. The Tribunal held that it was not bound to apply these Commission, CJEU and Supreme Court decisions on a summary basis. Instead,

²⁸ See *Dune*.

it held that that there were sufficient questions about potential factual differences between interregional and commercial card MIFs, on the one hand, and the domestic and EEA MIFs (which were the subject of *Mastercard I*, *Mastercard GC*, *Mastercard CJEU* and *Sainsbury's SC*) on the other hand, that a trial is necessary in order to determine whether interregional and commercial card MIFs create a liability for an unlawful overcharge.

96. The Tribunal also decided that, following the implementation of the IFR in December 2015, there was an arguable case that counterfactuals relating to the way MSCs would have been determined in a non-infringing world would be different from the counterfactuals determined in *Mastercard I*, *Mastercard GC*, *Mastercard CJEU* and *Sainsbury's SC*, which did not deal with the position following the advent of the IFR.

97. Both conclusions were approved on appeal²⁹. As a consequence, say the Proposed Defendants, the PCRs were well on notice that a methodology to determine the issues of liability (some of which involve matters of factual and economic complexity) was required. This includes the questions of what counterfactual regime would govern the pricing for transactions between issuers and acquirers and to what extent the continuing existence of MIFs for interregional and/or commercial cards (which are said to give rise to different considerations than those arising from domestic and intra EEA MIFs) might affect the approach by acquirers to setting the MSC. Despite this, there has been no methodology whatsoever advanced by the PCRs, even by the time of the CPO hearing.

98. Instead, Mr von Hinten-Reed said this in VHR2:

“79. However, I understand that an effects analysis may not be necessary in these proceedings in light of the SC’s Judgment in *Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC and others* and *Sainsbury’s Supermarkets Ltd and others v MasterCard Incorporated and others*, in which the SC found that the Mastercard CJEU judgment was binding.

80. In its judgment, the SC stated:

²⁹ See *Dune Group Limited v Visa Europe Limited* [2022] EWCA Civ 1278.

“Whether Mastercard CJ is binding depends upon whether the findings upon which that decision is based are materially distinguishable from those made or accepted in the present appeals.” [SC ¶92]

“In our judgment, the essential factual basis upon which the Court of Justice held that there was a restriction on competition is mirrored in these appeals. Those facts include that:

- (i) the MIF is determined by a collective agreement between undertakings;*
- (ii) it has the effect of setting a minimum price floor for the MSC;*
- (iii) the non-negotiable MIF element of the MSC is set by collective agreement rather than by competition;*
- (iv) the counterfactual is no default MIF with settlement at par (that is, a prohibition on ex post pricing);*
- (v) in the counterfactual there would ultimately be no bilaterally agreed interchange fees; and*
- (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower.” [SC ¶93]*

81. Therefore, in addition to the effect analysis, I would assess whether the facts in these proceedings mirror the ones above.”³⁰

99. Mr Bowsher noted at the CPO hearing that the PCRs had advanced an alternative case to simple reliance on previous binding decisions, which was essentially to seek the determination of the items that cannot be “read across” from the previous decisions. That includes a number of the items set out in *Sainsbury’s SC* at [92] (as recorded by Mr von Hinten-Reed in VHR2 at paragraph 80 replicated above), such as:

- (1) Item (ii): it has the effect of setting a minimum price floor for the MSC.
- (2) Item (iv): the counterfactual is no default MIF with settlement at par (that is, a prohibition on ex post pricing).
- (3) Item (v): in the counterfactual there would ultimately be no bilaterally agreed MIFs.

³⁰ This was replicated in VHR3 at paragraphs 167 to 169.

(4) Item (vi) in the counterfactual the whole of the MSC would be determined by competition and the MSC would be lower.

100. Mr Bowsher accepted that these points would require factual and economic analysis at trial (including the question of the level of acquirer pass on, as to which see below), but suggested that the PCRs were adopting the methodology which had been employed in *Sainsbury's CAT*. Alternatively, he relied on the progression of issues for Trial 1 of the Umbrella Proceedings as being an adequate blueprint for the trial of these matters in the proposed collective proceedings.

(b) Acquirer pass on

101. In VHR1, Mr von Hinten-Reed recorded his instructions in relation to acquirer pass on as follows:

“5. In order to assist the Tribunal in considering these matters, I have been instructed to:

- ...
- Provide a preliminary estimate of the overcharge on the level of merchant service charges paid by merchants in these identified sectors ... on the assumption that the MIF is fully (i.e., 100%) passed through to merchants by acquirers ...”.

102. The Proposed Defendants complained in their Responses about this assumption (and the consequent lack of methodology). The PCRs, and Mr von Hinten-Reed, responded to this with a detailed appendix, replicated in VHR2 and VHR3. In essence, this proposed that a request for information about pass on rates and the commercial approach to those could be made from acquirer institutions, supported by an application for third party disclosure.

103. In relation to the opt in proceedings, it was suggested that this would be relatively straightforward, given that the potential class members were more likely (given their size) to be on IC+ or IC++ contracts, and there would be an expectation of full pass on (depending on the precise factual terms) and greater transparency about that. However, it was accepted that some opt in potential

class members would be on blended contracts, and it would be unclear and by no means certain what level of pass on had occurred from acquirer to merchant.

104. In relation to identifying the acquirer pass on rate for blended contracts (expected to comprise the vast majority of opt out class members), the PCRs noted that there were in excess of 100 acquirer institutions in the UK, but that the largest five acquirers represented nearly 90% of the volume and value of card transactions and the largest two represented “the vast majority” of the volume and value.

105. Mr von Hinten-Reed proposed³¹ that a sample of acquirers should be asked a number of questions, of which he gave some examples:

- “• What type of acquirer-merchant contracts do you offer?
- What proportion of merchants have opted for the different types of contract?
- What share of revenue is derived from the different types of contracts?
- How are acquiring margins determined?
- Has the method for determining acquiring margins changed over time (e.g., the last 5-10 years)?
- Do acquiring margins vary with the type of acquirer-merchant contracts?
- What pricing models/policies does the acquirer use?
- How are the interchange fee component of the headline rates determined?
- Has the method for determining the interchange fee component of the headline rates changed over time (e.g., the last 5-10 years)?
- What costs are taken into account when setting the acquiring margin?
- How do these costs vary with: i) the number of transactions, ii) the value of transactions?
- In response to a change in the relevant MIFs, would the acquirer: i) change prices, ii) absorb change into profit, or iii) adjust investment behaviour?
- Does the acquirer have recurrent documents related to KPIs?
- Does the acquirer have recurrent documents related to pricing?”

³¹ See paragraph 211 of Appendix B to VHR2 and paragraph 299 of Appendix B to VHR3.

106. The Proposed Defendants criticised this proposed methodology as being unrealistic, comprising extensive requests for not just documents but also information akin to witness evidence, which the acquirers were likely to be very uncomfortable about and would very likely resist. The Proposed Defendants questioned the jurisdiction (especially in relation to opt in class members in countries outside the UK) and appetite of the Tribunal to make an order compelling that extensive production of information. Additionally, they said the PCRs had made no allowance in the Litigation Plan or Budget for the extensive costs and delay inherent in the process that was now being suggested.
107. Mr Bowsher submitted, however, that the issue of acquirer pass on would be determined in the Umbrella Proceedings and it was to be expected that any methodology put forward now by the PCRs was unlikely to remain intact once the methodology in the Umbrella Proceedings was settled.

(c) Merchant pass on

108. As noted earlier in this judgment, the PCRs' position in relation to merchant pass on developed in an unsatisfactory way. The Claim Forms referred to the methodology in the *Merricks* Collective Proceedings and the developing discussion regarding methodology in the individual merchant claims. The Litigation Plan exhibited to the witness statement of Mr Allen and annexed to each Claim Form included a short proposal for sampling a test group of merchants in order to assess a pass on rate which could be applied more broadly. Mr von Hinten-Reed did not mention the subject at all in VHR1.
109. After the Proposed Defendants complained in their Responses about the adequacy of this, as a methodology, the PCRs addressed merchant pass on further in paragraph 107 of their Reply, in which they noted that the question was to be dealt with in the Umbrella Proceedings and indicated that Mr von Hinten-Reed was to provide a further supplemental report in anticipation of a hearing on the subject in May 2023 (the Pass On Evidential Hearing) in those proceedings (to which the PCRs were not then and are still not a party).

110. The PCRs then sought to have Mr von Hinten-Reed's report on this issue (i.e. VHR4) admitted at an unsatisfactorily late stage in these proceedings, depriving the Proposed Defendants of an adequate opportunity to deal with it in detail at the CPO hearing.

111. The Proposed Defendants were however able to make some observations about VHR4, which they criticised on a number of bases:

(1) Participation in the proposed sampling process would be onerous for opt in class members.

(2) The number of merchants required to participate, at least in the more general sampling exercise, would be significant (1,000 class members).

(3) Merchants would be unlikely to commit to participate in this way.

(4) This in itself undermined the collective proceedings by disinclining merchants to register to join them in case they were exposed to the burdens described above.

(5) The sample approach was disproportionate and inconsistent with the approach which the Tribunal had indicated it favoured in the Umbrella Proceedings, which was more generic and expert led.

(d) *Other matters*

112. A number of other challenges were made to aspects of the PCRs' cases where the Proposed Defendants said that an adequate methodology had not been provided. These included:

(1) The proposed approach to class members from outside the UK in the opt in proceedings.

(2) The analysis of Mr von Hinten-Reed was limited to three sectors only and no methodology was put forward for other sectors.

- (3) Countervailing benefits, which Mr von Hinten-Reed accepted would need to be taken into account but for which no methodology had been provided.
- (4) Exemption, which was similarly accepted by the PCRs as being an issue relating to quantum (assessing the level at which the MIFs might have been exemptible under Article 101(3) TFEU), but again for which no methodology had been advanced.
- (5) Whether the proposed collective proceedings were suitable for an aggregated award of damages.

(2) Eligibility

(a) Identifiable class

113. The Proposed Defendants submit that there are real difficulties in determining whether a merchant is or is not a member of the proposed classes. The point needs to be considered separately for the opt in and opt out proceedings.

(i) Identifiable class in the opt out proceedings

114. The issue that arises is a function of the focus in the proceedings on interregional and commercial card MIFs (as opposed to MIFs generally) in combination with the prevalence of blended contracts across the greater proportion of the merchant population. This means that merchants will not necessarily know whether they have accepted payments to which an interregional or commercial card MIF applies. It is said that the PCRs have made no proposals of any kind to address this issue.

115. The Proposed Defendants also question whether the definition of turnover which is used to separate the proposed opt in and opt out classes is sufficiently clear to allow a merchant to know which class they are in. That argument is extended to the difficulty of distinguishing any non-UK turnover a business may have.

116. In the opt out Claim Forms, CICC II deals with the identification issue as follows³²:

““*Who paid a Merchant Service Charge*”

48. In order to fall within the Proposed Class a claimant must have paid a Merchant Service Charge in relation to a relevant transaction during the Claim Period. This is a key element of the Proposed Class definition since Merchants suffer losses by paying an MSC, the price of which has been increased by application of a Commercial Card or Inter-regional MIF as part of the MSC. Merchants will know, or readily be able to determine, whether they paid fees entailing an MSC during the Claim Period, by reference to their business records.⁴ Merchants will therefore readily be able to determine whether they fall within this aspect of the Proposed Class Definition.”

117. Footnote 4 to that paragraph provides as follows:

“In contrast to a Commercial Card Transaction, an Inter-regional Transaction does not pertain to a specific type of card. A Merchant will not be able to identify with certainty individual Inter-regional Transactions during the Applicable Class Period for purposes of determining its class membership. However, under the Mastercard Scheme Rules, it is not open to a merchant to refuse a payment card entailing an Inter-regional Transaction (nor does a merchant have the practical means of identifying cards involving such transactions). On this basis, a business which has a Mastercard Merchant Service Agreement with an Acquirer pursuant to which it accepted Mastercard payment cards during the Applicable Class Period consistent with the Honour All Cards Rule will be treated as falling within the class.”

118. In their composite Reply, the PCRs noted that the class definition is at least as clear as the definition in the *Merricks* Collective Proceedings.

119. At the CPO hearing, we pressed Mr Bowsher on how, in practice, a merchant would know that they had conducted a transaction to which an interregional or commercial card MIF applied. The response, as we understood it, was twofold:

- (1) Any merchant could ask their acquirer to provide them with the information.
- (2) A merchant would be likely to know that they had conducted transactions involving interregional or commercial cards because these

³² Taken from paragraph 48 of CICC II’s Mastercard opt out Claim Form.

types of cards could be differentiated by their appearance and the merchant would be able to see that at the time of the transaction.

120. Mr Bowsher also noted that accepting only one transaction of either type of card would be sufficient to establish the merchant as a class member.
121. After the CPO hearing, the PCRs' solicitors wrote to the Tribunal, seeking to advance a further argument about the information which Visa was said to have, which would allow it to identify what MIFs any particular merchant might have paid. This was based on material in the expert report of Mr Holt and the witness statement of Mr Steel, which were filed by Visa along with their Response.
122. The Proposed Defendants submitted in correspondence that these points were made too late and should not be permitted to supplement the PCRs' position. In any event, Visa argued that the PCRs mischaracterised the evidence of Mr Holt and Mr Steel. The correct position (as was apparent from their evidence) was that it was not possible for Visa precisely to identify all merchants that had paid the relevant MIFs. This is because the information Visa receives is dependent on the way the acquirer describes the merchant, and the merchant details provided may not correspond with an exact legal entity or allow one to be identified.
123. Following the CPO hearing, we asked the parties to provide written observations about a decision of the Canadian Supreme Court, *Sun-Rype Products Ltd v Archer Daniels Midland Company*³³ ("*Sun-Rype*") This case deals with identification of the class but was not cited to us or included in the authorities bundle. Submissions on *Sun-Rype* were provided on 12 May 2023 by the PCRs and Visa (with Mastercard adopting Visa's submissions).

³³ [2013] SCC 58. We understand that the case was heard together with *Pro-Sys* and decided the same day.

(ii) Identifiable class in the opt in proceedings

124. In the opt in Claim Forms³⁴, the PCRs take a similar position to the opt in class, asserting that a merchant would be able to consult its business records to determine whether or not it had a merchant services agreement with an acquirer and also that the definitions of terms used in the proposed class definition were precise and clear.
125. The Proposed Defendants argued that this was not the case:
- (1) There was no evidence to establish what records merchants might have.
 - (2) Many potential opt in class members would be on blended contracts (with the consequences discussed above).
 - (3) In any event, it was CICC I's own case that merchants generally received limited information about MIFs from their acquirers.
126. There was a further point about merchants from outside the UK who might opt in to the proceedings. Any analysis of the position of those merchants must be conducted by reference to the circumstances prevailing in their own markets (and not the UK) and there was no indication about what the position would be in any such market.
127. The PCRs explained in their composite Reply that opt in claimants on blended contracts would be instructed to request detailed MSC payment data from their acquirers. Mr von Hinten-Reed provided a methodology in VHR2³⁵, which was about acquirer pass on, but which was referenced by the PCRs in support of this point. It was apparent from this that the PCRs anticipated that merchants on IC+ and IC++ contracts would have information about the nature of the MIFs they had been charged.

³⁴ See for example CICC I's Mastercard opt in Claim Form at paragraph 59.

³⁵ At paragraphs 190 to 204 in Appendix B to VHR2, which is entitled "Method for assessing acquirer pass-on".

(b) Same, similar or related issues

128. The Proposed Defendants note that the proposed opt out classes, involving as many as one million merchants, are very diverse, in terms of the size of merchant and sector. This is in turn said to lead to significant variations between class members on issues such as acquirer and merchant pass on and the benefits received by merchants as a result of the use of interregional and/or commercial cards.
129. In the opt in class, there is additionally geographic diversity, as it includes merchants who accepted transactions in up to 27 EU member states prior to 1 January 2021. That causes a particular problem given the potential for variation in circumstances in each different market (it was accepted by the PCRs that, for non-UK merchants, the relevant markets will be the national acquiring market in each relevant EU member state).
130. In respect of both types of proposed collective proceedings, it is said that the lack of methodology makes it impossible to identify the extent and nature of common issues or to determine the most appropriate way of dealing with them.
131. As a result, the Proposed Defendants say that these are not claims which are suitable for resolution in collective proceedings, given the requirement for common issues in rule 79(1)(b) and the need to consider under rule 79(2)(a) whether the proceedings are an appropriate means for the fair and efficient resolution of the common issues.
132. The PCRs say that neither of these points is a concern. The collective proceedings regime is designed to cater for considerable class variation, as long as the issues are similar or the same (which they are here). Until it is clear how many non-UK merchants will be involved in the opt in claims, it would be premature to limit or prioritise particular jurisdictions and the necessary methodology can be developed in due course.

(c) *Suitability*

133. In reliance on the observations of the Supreme Court in *Merricks*³⁶, the Proposed Defendants argue that the existence of the Umbrella Proceedings, with all the features that have developed in those proceedings to allow merchants to bring their claims, mean that individual proceedings are in fact a more appropriate means of redress than any of the proposed collective proceedings. Visa, whose submissions were endorsed by Mastercard, argued that a merchant could easily join the Umbrella Proceedings, very likely for little incremental cost and effort, probably with the ability to take advantage of existing arrangements for funding and adverse costs protection, and could even halt their active participation in the proceedings in a form of stay particular to those proceedings³⁷.
134. In those circumstances, the Proposed Defendants argue that the cost and benefit analysis weighs against the proposed collective proceedings. The significant costs involved in the four proposed proceedings³⁸ stand in contrast to the small incremental costs by which individual merchants could join the Umbrella Proceedings.
135. Moreover, the existence of the collective proceedings, if certified, was likely to have a detrimental impact on the timetable for resolution of the Umbrella Proceedings. The PCRs' proposed timetable would cut across the Umbrella Proceedings timetable, which was already challenging, and could cause significant and unfair delay to the Umbrella Proceedings.
136. Further, merchants could be disadvantaged by the approach of the PCRs in carving off two types of MIFs (interregional and commercial card) from other

³⁶ See *Merricks* SC at [64] and [70] and the discussion at [64] above.

³⁷ The form of stay requires the merchant claimant to agree to be bound by the outcome of what is now common to the Umbrella Proceedings (and any appeals) and remain liable to provide information or disclosure if that is considered necessary for the conduct of the wider process. See Order of the Tribunal made on 16 March 2022 in Case Nos. 1306-1325/5/7/19 (T), 1349-1350, 1369, 1373-1374 and 1376/5/7/20(T) and 1383-1400 and 1406/5/7/21 (T) and *Dune Group Limited & Ors v Mastercard Incorporated & Ors* [2022] CAT 14 at [28].

³⁸ There was some lack of clarity about the correct aggregate amount for the proposed proceedings, but it was in excess of £30 million and possibly as much as c.£42 million. See also the discussion above at [29].

MIFs, when merchants tended to claim for all relevant MIF overcharges in the Umbrella Proceedings. This would prevent individual merchants who fall within the scope of the proposed collective proceedings from resolving all their MIF claims in one settlement.

137. The PCRs contended that only a relatively small number of merchants had actually joined the Umbrella Proceedings, which suggested that individual claims within the Umbrella Proceedings were not as effective a means of collective redress as the proposed collective proceedings. There was a large number of merchants who would likely never join the Umbrella Proceedings, for a range of reasons, and therefore would be denied access to justice if the proposed collective proceedings did not proceed. The precise point of the collective proceedings regime is to ensure that such claims can be and are brought.
138. The PCRs also emphasised in their submissions their intention to participate in an efficient and timely way in the Umbrella Proceedings, if certified.
139. There was also a point taken by the Proposed Defendants about settlements which have already taken place between them and merchants who CICC I had identified as potential opt in class members. It was argued that this might reduce the size of the opt in class in particular, such that it was not viable. There was considerable written material produced about this subject, but in the end it occupied minimal time in oral argument.

(3) Authorisation

140. The Proposed Defendants raised questions about the experience of the sole director of the PCRs, Mr Allen, both in relation to his experience outside the travel sector and internationally. They also questioned whether Mr Allen was really the controlling mind behind the proposed proceedings, or whether the real control was being exerted by the lawyers and funders who had apparently initiated the process of assembling the CPO applications and the proposed collective proceedings. It was said that alleged deficiencies in the way that the

proceedings had been assembled supported the proposition that there was insufficient control over the litigation at a client level.

141. The PCRs served alongside the composite Reply a witness statement from Mr Allen, which set out in greater detail his experience and also refuted the suggestion that he was not properly involved in managing the litigation.

G. DISCUSSION

(1) Methodology

142. We start by considering the adequacy of the methodology put forward by the PCRs, because that (and the inadequacies) inform our approach to the questions of eligibility and authorisation. In particular, the issues relating to aspects of the PCRs' methodology in this case have made it difficult, if not impossible, to form a view on some aspects of eligibility, as will be seen later in this judgment.

143. There was some debate at the CPO hearing about the potential for difference between "methods" and "methodology". We did not find this helpful. It is clear from the Court of Appeal's observations in *Gutmann CA* that we need to make a practical and common sense judgement about whether there is sufficient material available about how the case can be tried to be able to answer the questions underpinning the statutory tests and to be confident that the matter can be sensibly progressed to a trial and judgment.

144. That is, obviously, intended in part to protect the interests of the Proposed Defendants, who may be exposed to claims of significant magnitude by reason of the collective proceedings.

145. It is also, perhaps less obviously but in our view just as importantly, to protect the interests of the potential class members, as the certification of a collective proceedings affects their individual rights. For opt out proceedings, an individual claimant, unless they do opt out, loses the ability to pursue their own claim and becomes subject to how the class representative presents the case and bound by whatever outcome the class representative is able to secure. In an opt

in case, a class member similarly forgoes a degree of control over their claim once they opt in. It is part of the Tribunal's function, as a gatekeeper, to satisfy itself that the class representative is likely to be able to bring a claim to fruition, so as to fully assert the rights of class members which will be extinguished by whatever results from the collective proceedings.

146. One of the features of these applications is the reliance by the PCRs on the work done in the Umbrella Proceedings, which they submitted could, in effect, be used as a proxy for aspects of methodology in these proposed proceedings. We have some sympathy for the practical difficulties which the existence and progress of the Umbrella Proceedings create for the PCRs in formulating a methodology.
147. For example, the Tribunal in the Umbrella Proceedings has convened the Pass On Evidential Hearing between 23 and 25 May 2023 to discuss the approach to pass on issues in those proceedings and the *Merricks* Collective Proceedings. Once determined, that is likely to have the character of a methodology for resolving that issue. If these proposed proceedings are certified, we understand that the PCRs intend to adopt the Pass On Evidential Hearing methodology by way of participation in the Umbrella Proceedings. There could therefore be said to be an element of redundancy in the PCRs attempting to set out a comprehensive methodology on pass on for the purposes of the CPO applications.
148. However, the problems which arise in relation to methodology in these proposed proceedings are not (or at least not only) caused by that difficulty. The PCRs have in fact produced a methodology for both aspects of pass on (acquirer and merchant). The problems with those methodologies, as we discuss further below, are more about the likely consistency with the Umbrella Proceedings, and the degree of realism and practicality in the proposals.
149. Perhaps more concerning are the important areas of the PCRs' cases where no methodology at all has been put forward. To the extent that the PCRs seek to justify this by reference to the List of Issues, which has been formulated between the parties to the Umbrella Proceedings, this is misconceived:

- (1) The List of Issues cannot reasonably be described as a methodology. It is at the moment what it says – a list of issues.
 - (2) It may well be converted in due course into something which can reasonably be described as a methodology, but it is not acceptable for the PCRs to rely on an anticipated methodology – wherever it may be expected to appear. In the absence of a concrete methodology at the CPO application stage, the Tribunal is unable to fulfil its gatekeeper role, as required by the CA 1998 and the Rules. That scrutiny is the core reason why a methodology is required at the CPO application stage.
150. Mr Bowsher also submitted that various events since the filing of the Claim Forms in June 2022 meant that the PCRs were having to deal with a moving target as far as methodology was concerned, and some latitude should be given in relation to that. We accept that is the case in some respects (and particularly in relation to the progression of the Umbrella Proceedings). However, it is not a valid point in relation to other aspects, such as the failure to deal in the Claim Forms with the consequences of the Tribunal’s judgment in *Dune*. This was delivered some six months before the Claim Forms were filed.
151. Bearing those observations in mind, we now turn to the particular aspects of methodology which were challenged by the Proposed Defendants.
- (a) *Infringement***
152. The primary case of the PCRs on infringement is based on the applicability of the essential factual basis of the existing UK and EU decisions. That primary case is inconsistent with the judgment in *Dune*, which makes it plain that the findings in *Sainsbury’s SC* do not, as a matter of law, create a binding decision in relation to infringement for interregional and commercial card MIFs. Mr Bowsher did not seriously contest this point at the CPO hearing.
153. There was however a suggestion that a failure by the claimants in *Dune* to obtain summary judgment was not the same as finding that the outcome in *Sainsbury’s SC* does not apply. That may be correct, and indeed appears fairly plain from

the Tribunal's judgment in *Dune*, but it is beside the point – the consequence of *Dune* is that there will need to be a trial of various counterfactual points relating to interregional and commercial card MIFs. We need to understand how the PCRs intend to approach those issues, which involve some complex questions of fact and economics, as well as law.

154. As noted above, this is all plain from the Tribunal's judgment delivered in *Dune* on 26 November 2021. The judgment deals at some length with the matters which are in dispute between those individual claimants and Mastercard and Visa defendants, including the articulation of theories for counterfactual analysis, supported by evidence submitted by experts instructed by a number of Mastercard and Visa entities that are also the Proposed Defendants in these proceedings. There can be no serious suggestion that the PCRs could not have anticipated those arguments.
155. As it happens, the PCRs advance an alternative case, which they say involves establishing the relevant facts that the interregional and commercial card MIFs constitute anti-competitive infringements. The PCRs seem to accept that a methodology for establishing infringement is required, even if only for an alternative case, though Mr Bowsher submitted that the requirement for that might be less than was required if it was a primary case. In fact, as far as we can tell, there is no methodology advanced at all for this alternative case. We were told that Mr von Hinten-Reed dealt with it in VHR2 and VHR3, but what that evidence amounts to is a recognition and recitation of the points of infringement that require a methodology, without proposing one.
156. When we asked Mr Bowsher about this at the CPO hearing, he confirmed that the methodology for infringement was not addressed anywhere in the collective proceedings³⁹. Instead, he submitted that the PCRs could rely on the methodology in the Umbrella Proceedings. We have dealt with this point above.
157. He also suggested that the methodology which led to the Tribunal's decision in *Sainsbury's CAT* provided a reference point for methodology in the PCRs'

³⁹ Transcript of CPO hearing, Day 3, page 98, lines 12-18.

cases. The arguments in *Sainsbury's CAT* did not concern interregional or commercial card MIFs, so it is difficult to see why they should provide the necessary assistance here. Indeed, it is merely another way of putting the point decided in *Dune*, to the effect that *Sainsbury's SC* on its own does not provide the answers to questions of infringement in these collective proceedings. The Tribunal in *Sainsbury's CAT*, which tried the infringement questions in relation to domestic MIFs, was also overruled on the counterfactual analysis in the Court of Appeal, as endorsed by the Supreme Court. Further, there was nothing we could identify in the collective proceedings documentation which articulated Mr Bowsher's submission.

158. In our view, it is necessary for the PCRs to provide a methodology for infringement, in particular dealing with the counterfactual issues which are apparent from the list in *Sainsbury's SC* at [93], but with reference to the aspects that apply specifically to interregional and commercial card MIFs.
159. This is not merely a failure by the PCRs to comply with a formality. It is a substantive failing with material consequences. It is plain that there are complex counterfactual issues of fact and economics, as well as questions about the overlap (or lack of) with counterfactuals in previous decisions, which will need to be determined in order to resolve the question of infringement in these proposed proceedings.
160. Despite having the benefit of the detailed explanation of the issues as a result of the Tribunal's judgment in *Dune* and acknowledging the need for a methodology in VHR2 and VHR3, the PCRs have made no effort to provide one. That leaves us entirely uninformed about both the precise issues and the way in which they are proposed to be dealt with.
161. This defect applies equally to the opt in and opt out proposed proceedings. It is, in our view, a material and substantive defect. We have no ability to assess the PCRs' proposals for approaching these complex issues, with particular reference to the MIFs they have chosen to focus on, in relation to the eligibility requirements, or to test whether the proposed proceedings can sensibly be taken forward to trial. We do not consider that we can grant any of the CPO

applications when there has been such a material failure to comply with the methodology requirement in this important area.

(b) Acquirer pass on

162. As noted above, Mr von Hinten-Reed assumed in VHR1 (on instructions) that acquirers would pass on 100% of any overcharge for interregional or commercial card MIFs to merchants. The PCRs said this reflected the position taken by the Proposed Defendants in previous litigation, so it was not unreasonable for them to maintain this assumption until corrected (in the Proposed Defendants' Responses, in this case).
163. It is not necessary to determine whether that submission is correct, although we note the reference in VHR2 and VHR3⁴⁰ to the PSR's November Report, which indicated that acquirers may not have fully passed on interchange fee savings to merchants following the introduction of the IFR. This suggests that the 100% assumption, provided in an expert report filed over six months after the PSR's November Report, was not necessarily valid.
164. In any event, Appendix B to VHR2 and VHR3 deal with acquirer pass on in detail and we have described above the general approach.
165. We agree with the Proposed Defendants that the PCRs' approach seems to impose a heavy burden on third parties, going beyond just disclosure, at considerable likely cost and in relation to highly sensitive material. It seems at least possible that acquirers might resist both the nature and extent of this sort of request. In that event, it might be necessary for the Tribunal to rule on an application for third party disclosure.
166. It is not necessary nor appropriate for us to determine now what the outcome of that third party disclosure application might be, but it is not obvious to us (in the absence of evidence or submissions) that the Tribunal would compel an acquirer to provide the full extent of the material which Mr von Hinten-Reed

⁴⁰ See for example paragraph 179 in Appendix B of VHR2.

suggests he would like to have, or even that we would have jurisdiction to make such an order in relation to acquirers who are based outside the UK (for example, in relation to any non-UK merchants who choose to participate in the opt in proceedings).

167. There is therefore a real question about how realistic and proportionate the PCR's proposed methodology for acquirer pass on is. Without pre-judging the feasibility of any potential proposed methodology in the future, there appear to be obvious ways in which the PCR's might have been able to advance this issue in a more proportionate and practical way. Non-exhaustive examples could include:

- (1) With a more focused set of suggestions for third party disclosure (as opposed to general requests for information). The obvious example of this is the material which the acquirers submitted to the PSR for the purposes of the PSR's November Report.
- (2) By providing some evidence about an approach to relevant acquirers and an indication of their reactions.
- (3) Through the gathering of data from other sources, including from some of the merchants who have expressed willingness to become involved in the opt in proceedings.

168. However, with the one exception below, we do not consider the PCR's methodology for acquirer pass on so defective that the applications should be refused outright. If the applications are to be continued, however, we expect to see improved proposals in this area before we would be willing to grant any CPOs in the opt out or opt in proceedings. We deal with this in more detail in the section on Disposition.

169. The exception is in relation to the proposed opt in collective proceedings and the potential for non-UK merchants who transacted in EU member states to join those proceedings. It was acknowledged by the PCR's that this would require analysis of acquiring markets in each country in which a class member was

present – involving, therefore, up to 27 other countries. The PCRs asserted (without providing any evidential basis) that there was unlikely to be any difference in approach required in these countries. We doubt that is correct as a general proposition. In any event, there was no attempt to set out a methodology to deal with this issue. This point is dealt with further below in the Discussion on common issues.

(c) Merchant pass on

170. As we have already noted, this issue was dealt with by PCRs in a highly unsatisfactory way. Instead of including any methodology on merchant pass on in VHR2 and VHR3, as the PCRs did with acquirer pass on, they chose to remain largely silent on the subject in their Reply and expert evidence in these proceedings and, after the date for filing those, to produce a detailed document which was served (in a redacted form) on the parties in the Umbrella Proceedings. The PCRs then sought to deploy that merchant pass on report (i.e. VHR4) in these proceedings, well after the date for their reply evidence.

171. As a consequence, the Proposed Defendants had relatively little opportunity to deal with the contents of VHR4 and we did not have as full a benefit of discussion of VHR4 at the CPO hearing as we would have wished.

172. We recognise that merchant pass on is an issue of considerable complexity, as is clear from the time and effort being directed towards it in the Umbrella Proceedings (including, on this issue, the participation of the *Merricks* Collective Proceedings). It is however notable that the methodology produced by the PCRs in VHR4 for the Umbrella Proceedings is not entirely consistent with the approach that the Tribunal has indicated it favours in its MIFs Pass On Judgment, where the Tribunal⁴¹:

- (1) Endorsed the Visa defendants' proposal to demonstrate pass on by the use of econometric evidence and by relying on existing studies of pass on rates.

⁴¹ At [61].

- (2) Expressed scepticism that the pass on defence can be established by claimant specific evidence adduced from a sample of many thousand claimants, which approach it described as “a disproportionate and, frankly, hopeless way of deciding the question of pass on”.
- (3) Indicated that it would be sympathetic to tightly controlled, expert led disclosure.

173. It seems to us, at least as we presently understand the proposed approach, that Mr von Hinten-Reed’s proposals in VHR4 fall more into the approach summarised at sub-paragraph (2) above than sub-paragraph (3), and not at all into sub-paragraph (1).

174. For present purposes, it may well be that the proposals in VHR4 are overly burdensome and disproportionate, but as with acquirer pass on, and even more so given the focus in the Umbrella Proceedings on merchant pass on, we do not consider this methodology so defective that the applications for CPOs should be refused outright. If the applications are to be continued, however, we expect to see improvements in this area before we would be willing to grant any CPOs. Again, we deal with this in more detail in the section on Disposition.

(d) Other matters

175. There were various other complaints from the Proposed Defendants about the PCRs’ methodology (or lack of it). All of them suggested that the PCRs had failed to take a sufficient approach to methodology generally.

176. A number of them are associated with the appropriate counterfactual, so largely rehearse the point made in relation to infringement about the lack of methodology in that area. Examples are questions about alternative payment methods and the reduction of benefits to merchants in the counterfactual setting. A similar point was made about exemption, and the identification of a non-infringing level of MIF at which exemption under Article 101(3) TFEU or section 9 CA 1998 might be available to the Proposed Defendants.

177. We agree with the Proposed Defendants that there has been failure by the PCRs to engage at all with a methodology for resolving these issues.
178. Other points advanced by the Proposed Defendants in relation to the proposed opt out proceedings were less convincing. We did not consider that the focus by the PCRs on three sectors created any particular difficulty, over and above the methodology issues we have already identified. Similarly, we were not overly concerned about criticisms about Mr von Hinten-Reed's approach to calculating the value of commerce or the risk of bias in his calculations, both of which were the subject of exchanges between the parties' experts. These are matters we anticipate could and would be developed in the course of the proceedings.
179. Finally, there was a point made about the need for a methodology for excluding settlements from any calculation of quantum. There was a proposal attached to Mr Ross's fifth statement which seemed satisfactory for present purposes.

(2) Eligibility

(a) Identifiable class – opt out claims

180. We are not satisfied that there is an identifiable class for the opt out proposed proceedings, as required by rule 79(1)(a), or that it will be possible in many cases for individual merchants to be able to determine, pursuant to rule 79(2)(e), whether or not they are class members.
181. This is a consequence of the complications caused by CICC II's choices (1) to include claims only in respect of interregional and commercial card MIFs and (2) to define the opt out class so broadly as to include large numbers of small merchants on blended contracts. CICC II has compounded those complications by failing to engage with them in any meaningful or sufficient way in the evidence supporting its applications.
182. The first choice referred to above creates the difficulty that a merchant cannot be presumed to be a class member just by reason of having conducted transactions which attracted MIFs under the Visa and/or Mastercard card

schemes. Unlike claims based on domestic or even intra EEA MIFs, it cannot reasonably be assumed that every merchant has in fact carried out an interregional or commercial card transaction.

183. The second choice means that merchants have no obvious way of determining that question themselves, as there is no reason for the acquirer to provide that type of transaction detail to merchants in the ordinary course, given that the MSC in blended contracts is not dependent on the transaction mix.

184. Outside the three travel and hospitality sectors in which most interregional and/or commercial card MIFs are paid, there is a very large potential class of merchants (on any view, many hundreds of thousands) on these blended contracts. This includes small and micro businesses across the UK – for example, any number of market traders in countless locations. Mr Bowsher was unable to provide us with any sensible means by which these merchants, or indeed anyone else, could determine whether or not they had accepted transactions to which interregional or commercial card MIFs would apply.

185. The high points of Mr Bowsher's argument during the CPO hearing were:

(1) That a merchant was likely to know if it had processed transactions from a non EEA card and could be asked to verify this when registering as an opt out class member. This seemed to depend on a visual recognition of the nature of the card at the time of the transaction, which is entirely unrealistic. It also fails to recognise that any number of merchants (or their employees) might not recall such a transaction, even though they may have been party to it. It also ignores the position in relation to commercial cards.

(2) That acquirers could be asked to verify the position. This seems equally unrealistic, given that we are talking about hundreds of thousands of merchants and dozens of acquirers. There was also no evidence at all that acquirers would themselves hold sufficient and readily available records for merchants on blended contracts.

186. We were also not persuaded that the supplemental submissions provided by the PCR's after the CPO hearing assisted CICC II. They asserted that the evidence of Mr Holt and Mr Steel for Visa demonstrated that Visa had data for every card transaction, which included both the nature of the MIF and the identity of merchant who accepted the card. The PCR's said this was plain from Mr Holt's evidence, where he recorded an exercise Visa had carried out to map transactions involving interregional and commercial card MIFs with the merchants who were claimants in the Umbrella Proceedings.
187. That is not in fact an accurate representation of the evidence of Mr Holt or Mr Steel. Both made it clear that, for various reasons, it was not easy, or indeed possible in some cases, for Visa to map data about MIF types to individual merchants. It was necessary to undertake a manual exercise to do this, which still resulted in failure in a substantial number of cases to make the relevant identification. While the mapping exercise was possible for a relatively small number of larger merchants, Mr Steel's evidence was that it would be impractical for greater numbers of smaller merchants. This evidence was not challenged by the PCR's and we have no reason to doubt the truth of what Mr Steel said in his witness statement. There was no evidence before us about the position for Mastercard.
188. That may be a convenient position for the Proposed Defendants, but it also, as far as the evidence before us is concerned, reflects the reality of the situation. For that reason, we are not able to accept the PCR's' submission that the Proposed Defendants themselves hold data which can reasonably be expected to resolve the identification question. If that is said to be the true position then the PCR's need to provide some evidence to support that proposition.
189. The problem that arises from the circumstances before us is, therefore, as follows. Some merchants on blended contracts may have every reason to think they will have accepted interregional and/or commercial cards since June 2016, and it will not be unreasonable to accept that proposition. For example, petrol retailers or business travel hotels in relation to commercial cards or hotels or restaurants in busy tourist areas for interregional cards.

190. However, a very large number of other merchants may have no reason to assume, one way or another, and no ability to verify the position. That gives rise to the serious risk that some merchants will not register as class members, even though in fact they are valid class members, and that some merchants will register when in fact they should not, with no easy way to determine the validity of their position. They will additionally not be able to exercise their opt out rights, because they will not know if they are included in the class. The idea that hundreds of thousands of merchants could request and receive this information from the acquirers they deal with is, in our view, entirely unrealistic. Nor, for the reasons given above, are we satisfied that the same merchants can reasonably expect the Proposed Defendants to provide that information.
191. For these reasons, we think that serious problems about identification apply in relation to both rules 79(1)(a) and 79(2)(e). There is a problem about the design of the class definition and also a problem about the mechanism by which class members can verify their membership at any stage.
192. Turning first to rule 79(1)(a), it appears that the design of the class is flawed (through the combination of the selection of MIFs underlying the claims to be combined and the breadth of the merchants included in the proposed class). That is apparent from the basic factual circumstances surrounding the merchants in question, as they were apparent to us, and in particular the difficulty that any merchant on a blended contract might have in understanding whether they are a member of the class.
193. We read rule 79(1)(a) as allowing for a degree of uncertainty, in the sense that there need not be an absolutely rigid definition of the class, so that no doubt might arise at the certification stage about who is included or not included. To that extent, we agree with Mr Bowsher that the class definition in the *Merricks* Collective Proceedings is instructive.
194. In the *Merricks* Collective Proceedings, the class definition was as follows at the time the collective proceedings claim form was issued by Mr Merricks⁴²:

⁴² See *Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2021] CAT 28 at [34].

“Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the United Kingdom that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the United Kingdom for a continuous period of at least three months, and (2) aged 16 years or over.”

195. The inclusion in that class of all consumers who purchased from merchants who had accepted Mastercard cards reflects the premise that merchants who paid an overcharge as a result of MIFs set under the Mastercard scheme will have put up their prices. Accordingly, it is said, any consumer who dealt with those merchants is likely to have had the overcharge passed on to them.
196. There is no detailed discussion of the identification requirement in the original and the further certification judgments or indeed on appeal. It seems a reasonable assumption, given the widespread use of Mastercard cards and likely purchasing patterns of consumers, that the vast majority of consumers will meet the class definition. While it is theoretically possible that there will be consumers who have never made a qualifying purchase, it seems unlikely that will be a material number. Most importantly, it is reasonable to expect that an individual will know whether they have bought goods or services from a merchant who accepts cards (and is therefore likely to accept Mastercard). Most people will therefore be able, with some confidence, to reach the conclusion that they are (or are not) a member of the class.
197. However, that is not the case in these proposed opt out proceedings. Here, there is no obvious basis on which it is reasonable to assume that smaller merchants in large parts of the UK will know they have accepted a commercial card or a card from outside the EEA in the last six years. On the contrary, it seems likely that there will be a significant number of merchants, outside the sectors where commercial and non-EEA cards are extensively used, who have not accepted such a card.
198. Further, there is in practice a very high likelihood that a significant number of merchants will have no view about whether they accepted such cards and will be unable to determine whether they are class members, because they are on blended contracts and have no visibility of the actual types of MIFs which their

acquirers have paid the issuers of the cards which those merchants have accepted.

199. It is convenient at this point to turn to the decision of the Canadian Supreme Court in *Sun-Rype*. That case concerned allegations of price fixing by the manufacturers of a sweetener which was commonly used in food products. The question that arose for the Court was whether the indirect purchasers (which included both retailers of food products and the ultimate consumers) constituted an identifiable class.
200. The relevant Canadian legislation required the indirect purchasers to show that there was “an identifiable class of two or more persons”. The relevant case law required them to show “some basis in fact” for this requirement. The majority, in a judgment delivered by Rothstein J, held that the indirect purchasers did not meet this test, because there were sweeteners other than the cartelised product used in food products. There was no requirement to label the products to identify which type of sweetener was used. As a result, a consumer who purchased such a product would have had no way of determining whether the product contained the cartelised sweetener, even if they had bothered to check the label.
201. Even the class representative (in that case, a class member) was unable to say that she had purchased the relevant cartelised product. There was “no evidence to show that there is some basis in fact that she would be able to answer this question. On the evidence presented on the application for certification, it appears impossible to determine class membership”⁴³.
202. There was therefore no basis in fact to demonstrate that the information necessary to determine class membership was possessed by any of the putative class. The majority refused to certify the class action.
203. A minority judgment was given by Karakatsanis J, which focused on the policy consideration of class actions influencing the behaviour of market participants, even where establishing class membership was difficult, and the extent to which

⁴³ See *Sun-Rype* at [66].

the evidence available in the case did in fact meet the “some basis in fact” test. The judge noted that there was evidence in the case that the cartelised product was considerably more prevalent in the supply chain than other sweeteners and he concluded that evidence of this nature was sufficient to meet the hurdle required for certification.

204. In its post CPO hearing submissions, Visa argued that the reasoning of the majority in *Sun-Rype* applies to these proposed proceedings with even greater force. That is because rule 79(1)(a) embodies, in its terms, a stricter standard than the Canadian test of “some basis in fact”. In addition, the suitability requirement in rule 79(1)(c) brings in the question of class membership in rule 79(2)(e), which the Canadian jurisprudence does not. Further, Visa argued that the facts in these proceedings were clearer than in *Sun-Rype*, where there was some evidence of the ubiquity of the cartelised product in the supply chain.
205. The PCRs, in their post CPO hearing submissions, accepted that the principles articulated in *Sun-Rype* (by which we understand them to mean the majority judgment) were relevant to the question arising under rule 79(1)(a). They argued that, applying these principles, the requirements of rule 79(1)(a) are satisfied. This is because there was no evidence in *Sun-Rype* that any direct purchaser had purchased the relevant product, so the answer to that question was unknowable.
206. By contrast, the PCRs argue that in these proceedings there is already evidence that some merchants (for example, those on IC+ and IC++ contracts) will know they paid interregional and/or commercial card MIFs. Further, there is a way for merchants on blended contracts to find out the answer to that question, through the records that Visa has (and Mastercard can be assumed to have). Unlike in *Sun-Rype*, the answer to the relevant question in these proposed proceedings is inherently knowable, rather than unknowable.
207. There are a number of differences between the Canadian system for class actions and the system in the UK for collective proceedings, including in relation to the requirements for class identification. For example, there is no equivalent of the Canadian “some basis in fact” test under rule 79(1)(a), and we see no reason to

seek to establish one for the purposes of these proceedings⁴⁴. Some caution is therefore appropriate in applying the *Sun-Rype* decision.

208. However, all parties accepted that the decision is relevant and it seems to us that there are some important similarities between the purpose behind rule 79(1)(a) and the approach to class definition in the relevant Canadian legislation. For example, Rothstein J identified⁴⁵ three distinct purposes for the class definition:

- (1) To identify those persons who have a potential claim for relief against the defendants.
- (2) To define the parameters of the lawsuit so as to identify those persons who are bound by its result.
- (3) To describe who is entitled to notice of the action.

209. There is some correspondence between these points and paragraph 6.37 of the Guide, the relevant part of which we repeat for convenience:

“... 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. ...”

210. We therefore find the logic underpinning the majority’s decision helpful in considering an analogous situation in these proposed proceedings. We do not think it necessary to deal with Visa’s arguments about the comparative height of the hurdle to be overcome in Canada and the UK.

211. In relation to the PCRs’ arguments, we have already rejected the argument that Visa’s ability to identify the types of MIFs relating to merchants on blended contracts resolves the position. Mr Steel’s evidence makes it plain that it is not a straightforward exercise to obtain that information. The PCRs’ submission also seems to miss the point in relation to rule 79(1)(a), which is that a merchant

⁴⁴ Noting that rule 79(1) requires us to have regard “to all the circumstances”.

⁴⁵ At [57].

has no access to Visa's records at this stage, and therefore no way of knowing if they are a class member.

212. As was made clear in *Trucks CPO* (on which the PCRs rely, mistakenly in our view), the verification of a class member's claim is a different question from the ability of a merchant to know whether they are, or are even likely to be, a class member. The PCRs seem to be confusing the two points. The problem which arises under rule 79(1)(a) in these proposed proceedings is a consequence of both the focus on types of cards which would not necessarily be apparent to a merchant at the time of transacting and the nature of their contracts with acquirers, which is opaque as to the type of MIF involved.
213. It makes no difference (as the PCRs argue) that some members of the class may not face this problem. There are hundreds of thousands of merchants on blended contracts who will face it and have no sensible means (as far as we are aware) to deal with it.
214. There seems from the outset to have been an assumption by the PCRs that the apparent simplicity of the class definition inevitably leads to the presumption of inclusion of most, if not all, merchants. We do not agree with either aspect of that conclusion. First, the class definition is not at all simple when one understands the background circumstances and in particular the complications caused by the nature of the MIFs and the prevalence of blended contracts. Secondly, there was no material before us on which we could make any reasonable assumption about the incidence of acceptance of non EEA and commercial cards outside the three sectors in which most such transactions occur.
215. We recognise the possibility that there might be factual matters which could demonstrate that the class design (or some variant of it) is workable. For example, we were provided with very little evidence about blended contracts and how they work. There was no evidence about the transactional or administrative⁴⁶ experiences of a merchant outside the three sectors in which

⁴⁶ By which we mean the information flows and other interactions between a merchant and their acquirer.

the interregional and commercial card MIFs are prevalent. It may be that deeper investigation by the PCRs might produce a different picture.

216. In relation to rule 79(2)(e), we are far from satisfied that it will ever be possible in many cases for individual merchants to establish that they are class members. This is because we have been presented with no workable methodology about how that might happen. There was a distinct lack of evidence on the subject and we are not able to make common sense assumptions to fill the gap.
217. While rule 79(2)(e) represents but one of a number of factors to consider in relation to suitability, it is in our view a serious problem. It therefore has significant weight in our assessment of suitability under rule 79(2). We would in any event have declined to grant the CPO applications as a result, pending the provision of a proper and adequate methodology.

(b) Identifiable class – opt in claims

218. The position with the opt in claims is potentially different. These are larger businesses (by definition with a turnover of £100 million or more) and common sense suggests that it is more likely that they will undertake transactions involving interregional and commercial cards and will be aware of and able to evidence that. More of the potential opt in merchants are likely to be on IC+ or IC++ contracts, in which case they will have records of the MIFs which they have been charged.
219. It is anticipated that the class size will be considerably smaller than that in the opt out proceedings – with the expected number of class members opting in being in the low hundreds. This makes the process of requesting information from acquirers considerably easier.
220. The consequences of uncertainty are also different from the position in the opt out proceedings. The uncertainty might affect the decision of a merchant to opt in to the proposed proceedings, but a failure to take action will not have the same consequences as a merchant in the opt out proceedings, who will be bound by the result if they do not opt out.

221. Bearing in mind the burden placed on the PCRs to satisfy us on this point, it would have been helpful to have some more detailed evidence from potential class members, including for example a sample IC+ or IC++ agreement and, perhaps, some indication of what information flows are available from acquirers in practice. However, we are prepared to accept that there is an identifiable class and that it is likely to be possible for individual merchants to establish their class membership for the proposed opt in proceedings.
222. Finally, we consider the points made by the Proposed Defendants about the ability of merchants to determine whether they are in the opt in or opt out classes. This point was not pursued with any vigour at the CPO hearing and we did not view it as a significant problem. We anticipate that entities which are in the region of £100 million average annual turnover would find a way to determine which class they should be in and we do not anticipate any real difficulty in the parties (or if necessary the Tribunal) resolving any issues that might arise.

(c) Same, similar or related issues

223. We consider that the requirement in rule 79(1)(b) is, for the most part, met for both the opt in and opt out proposed proceedings. While it is true that there are some considerable variations in the character of merchants, including size, sector, product and geography, there are also issues which are broadly common to all proposed class members in each type of proceedings, most obviously in relation to liability.
224. In relation to the question in rule 79(2)(a) as to whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues, we agree with the Proposed Defendants that the PCRs' approach to setting out a methodology makes this a more difficult assessment than it ought to be. The failure to set out any methodology for infringement, coupled with the way in which acquirer and merchant pass on have been developed, have made our task of assessing this factor more difficult.

225. That is particularly the case in relation to the proposed opt in class and the potential for EU claimants to opt in. The PCRs have provided no analysis or methodology about the position in any of the potential non-UK markets. The PCRs' answer to criticism on this point seemed to be that the question to be asked is the same as for UK merchants. We are not persuaded that is the case. For example, in relation to acquirer pass on for a Polish domiciled merchant, the relevant question may not be: "was there acquirer pass on?"; but instead it might be: "was there acquirer pass on in the Polish market?". Given the lack of any information from the PCRs about how EU markets might differ from, or be the same as, UK markets, we are left in a state of uncertainty as to what the relevant question should be and therefore to what extent there are common issues.
226. As a consequence of the issues we have identified in relation to the adequacy of the PCRs' methodology, we have been unable to carry out a proper analysis under rule 79(2)(a). We suspect that there is a commonality of issues between UK-based merchants on many of the issues in the proposed opt out proceedings, but we have serious doubt as to whether that is correct for non-UK merchants and we are not prepared to make that assumption in respect of the proposed opt in proceedings in the absence of proper evidence.
227. We would not therefore be willing to certify the opt in case in respect of this aspect, which leaves open the question of whether the PCRs could reformulate the claim to focus only on UK-based merchants, or whether they are able to develop further analysis and methodology to satisfy us that there are in fact sufficient common issues.
228. As we have already indicated that we are not currently prepared to grant CPOs for any of the proposed proceedings, we do not consider it necessary at this point to say anything further about whether the proposed opt in or opt out collective proceedings are otherwise an appropriate means for the fair and efficient resolution of the common issues. It may be that this question will need to be revisited at some stage, as is described in more detail in the Disposition section below.

(d) Suitability generally

229. We have already addressed some aspects of the suitability test in rule 79(2) in the discussion above, because of the overlap of those items with the hurdles in rule 79(1). We now turn to other arguments advanced by the Proposed Defendants about suitability.
230. There was a considerable effort by Mr Kennelly KC to persuade us that a relative assessment of the proposed collective proceedings and the Umbrella Proceedings demonstrated that the Umbrella Proceedings were more suitable for the resolution of the claims sought to be combined in the various proposed collective proceedings. We agree that there are features of the Umbrella Proceedings which mean that the usual comparison – between collective proceedings and individual claims, as articulated in *Merricks SC* – needs some adjustment.
231. It is correct that there are features of the Umbrella Proceedings which make it easier for claimants to bring their claims than would normally be the case for individual claims. As a result, it is true that the differences which normally exist between collective proceedings and individual proceedings are narrowed, and in some respects quite considerably so.
232. However, it is still the case that a merchant who wishes to issue individual proceedings faces a degree of friction in doing so – whether that be by reason of the costs of issuing, the risk of adverse costs, or just the investment in time and effort to recover what may not be a substantial sum. Although Mr Kennelly suggested that many of these points of friction have been reduced (such as by the establishment of structures for funding and adverse costs protection among the existing claimant groups that are currently in the Umbrella Proceedings) we were shown no conclusive evidence of the extent of this and we do not think the structures he referred to can be presumed to have removed these issues from consideration.
233. Certainly, as far as the opt out cases are concerned, it seems consistent with the policy behind collective proceedings, as articulated in *Merricks SC*, for smaller

merchants to have redress through collective proceedings, where the costs and benefits should (and we believe would) favour that. Many merchants may have quite small claims, in the tens or hundreds of pounds. It seems highly likely that the administrative burden alone would deter these merchants from issuing their own proceedings, even given the structures which may be available to individual merchant claimants in the Umbrella Proceedings.

234. There is also precedent for large corporates to participate in opt in proceedings (see for example *Trucks CPO*) and we do not accept that this feature makes the opt in cases unsuitable. We also consider that there is a respectable case to be made for the costs and benefits favouring the opt in proceedings over the Umbrella Proceedings.
235. We were concerned about the size of the litigation budgets proposed by the PCRs. Mr Kennelly submitted that the likely overall costs of merchants joining the Umbrella Proceedings would be more cost effective than the collective proceedings. It is difficult to compare the two processes, given our lack of knowledge of the terms on which individual merchants might join the Umbrella Proceedings and the uncertainty about how many of them might actually do so.
236. More fundamentally, we found it hard to reconcile the size of the proposed budgets with the proposition that the PCRs would themselves join the Umbrella Proceedings to the greatest extent possible, bearing in mind the likely common issues. In those circumstances, we would expect the PCRs to be sharing the costs with the other Umbrella Proceedings claimants to a significant degree. The proposed budgets seemed not to recognise that position and we would expect them to be redone to demonstrate that effect before we would have granted any CPO application.
237. We would also expect that the proposed proceedings ought not to materially increase the Proposed Defendants' costs if the proposed proceedings were properly integrated in the Umbrella Proceedings.
238. From the perspective of the management of judicial resource, the position is, we think, even clearer. The measures taken by the Tribunal in the Umbrella

Proceedings to deal with the large number of individual merchant MIF claims reflect the lack of mechanisms in the Rules to deal with such situations in the way collective proceedings can. It is (despite the strong endorsement by Mr Kennelly of the Umbrella Proceedings) an imperfect solution to a difficult problem.

239. We think it likely that the expansion of claimant groups in the Umbrella Proceedings would be easier for the Tribunal to manage if there were collective proceedings representing many, if not all, additional merchant claimants, rather than those merchants issuing their own proceedings. This is because of practical considerations, such as the risk of proliferation of legal advisers in the Umbrella Proceedings as more merchants issue claims and the burdens on the Tribunal's Registry through managing large numbers of individual proceedings (which have to be accounted for individually, despite the Umbrella Proceedings).
240. We are not therefore convinced that the existence of the Umbrella Proceedings confers sufficient advantages on a potential claimant to make individual proceedings more suitable than collective proceedings. This applies to both the opt in and opt out proposed proceedings.

(e) Conclusions on eligibility

241. By way of summary of our views on the eligibility tests set out in rule 79:
- (1) We are not satisfied that the proposed opt out proceedings are brought on behalf of an identifiable class of persons (rule 79(1)(a)).
 - (2) We are satisfied that the proposed opt in proceedings are brought on behalf of an identifiable class of persons (rule 79(1)(a)).
 - (3) We are satisfied that all of the proposed proceedings raise common issues so as to satisfy rule 79(1)(b).
 - (4) In relation to suitability (rules 79(1)(c) and 79(2)):

- (i) We have not been provided with a methodology for the important issue of infringement and several other issues relating particularly to the counterfactual.
 - (ii) We are therefore unable to form a view in relation to any of the proposed proceedings as to whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues under rule 79(2)(a).
 - (iii) We have particular concern about the inclusion in the proposed opt in proceedings of merchants who have conducted transactions in EU member states, and the extent to which the issues relating to them are common to UK merchants.
 - (iv) In principle, we consider that the existence of separate proceedings (the Umbrella Proceedings) is a point in favour of all of the proposed collective proceedings, providing it is clear how the collective proceedings are to be integrated into the Umbrella Proceedings. That is not the case at present and the budgets for the proposed collective proceedings are not aligned with that outcome (rule 79(2)(b) and (c)).
 - (v) We have concerns about the size and nature of the opt out class and do not consider it likely that it is possible to determine whether any person is or is not a member of the opt out class (rule 79(2)(d) and (e)).
 - (vi) We consider that the claims are suitable for an aggregate award of damages, providing the issues we have identified elsewhere can be addressed satisfactorily (rule 79(f)).
- (5) Overall, and also taking into account the concerns we have expressed about the failure of the PCRs to provide an adequate methodology for large parts of the proposed proceedings, we are not satisfied that the suitability requirement is met.

(3) Authorisation

242. The various complaints made by the Proposed Defendants about Mr Allen, the sole director of each of the PCRs, were largely based on:

(1) His lack of experience internationally and outside the three travel and hospitality sectors which formed the main focus of the proposed proceedings.

(2) The way in which it appeared that the collective proceedings had been initiated by lawyers and funders and therefore the extent to which Mr Allen was actually directing them himself.

243. We were not unduly concerned about the first point. We were satisfied from the evidence given in Mr Allen's second witness statement that he has sufficient experience to act as the controlling mind of the PCRs.

244. In relation to the question of whether Mr Allen was acting as the controlling mind, we had more concern. We do not attach any material importance to the sequence of events which led to the CPO applications being commenced. We think that is probably a fairly normal sequence and in our view nothing flows from that feature alone.

245. Nor do we consider the incorporated status of the PCRs to be a material factor. As we have explained earlier in this judgment, we consider that to be largely a neutral point when considered in isolation from other factors.

246. We do agree with a submission advanced by Ms Tolaney KC at the CPO hearing, to the effect that the long list of defects in the CPO applications suggested that they were not being directed as well as they might be.

247. We are concerned that significant decisions on the configuration of the proposed proceedings have been made with a material (and not positive) effect on the CPO applications. For example, the decisions to focus on claims in respect of interregional and/or commercial card MIFs only, to include a wide class of

merchants who are on blended contracts in the proposed opt out class, to include EU claimants in the opt in class, and the failure to address important aspects of methodology. It seems to us that the consequences of these decisions have not been fully appreciated or considered by the PCRs and, as a result, the proposed proceedings suffer from defects which mean they should not be permitted to proceed in their current form.

248. It is difficult to say why these problems have arisen, and we will resist the temptation to speculate on the reasons. However, they are a signal that the overall direction and key elements of the proposed proceedings are not what they should be, and the PCRs (and their controlling mind, Mr Allen) need to take responsibility for that.
249. We also note that the applications anticipated the formation of an advisory panel to support the PCRs in their management of the proposed proceedings. This group had not been appointed by the time of the CPO hearing. In our view, that is a shortcoming. We would expect the advisory panel to be able to provide a useful challenge to both the professional advice to the PCRs and their consequent strategic decision making. An advisory panel is of little utility if it is not appointed in time to deal with key decisions, or indeed if it is not consulted on such decisions once appointed.
250. It becomes somewhat circular to consider whether the defects in approach which have caused us not to grant the applications on eligibility grounds would also cause us to decline to grant the application on authorisation grounds. It suffices to say that, were any further or revised applications for collective proceedings to be filed by the current team supporting the PCRs, we would hope for and expect a considerably more thoughtful and compliant approach.

H. CONCLUSION AND DISPOSITION

251. There are a number of unsatisfactory aspects to these proposed collective proceedings. They do not meet the requirements set out in the CA 1998, the Rules and the case law to bring forward coherent proposals and to show a practical way forward to develop evidence to take the case to trial. We are

therefore unable to grant any of the applications for CPOs. This is despite what is referred to by the PCRs as the “relatively low bar” set by *Merricks SC*.

252. We are unable to grant the CPO applications for the proposed opt out proceedings in their current form:

(1) In relation to identification of the class, there is a defect which arises from the decision of CICC II to pursue a claim for interregional and/or commercial card MIFs only, alongside the opaque nature of the blended contracts which most merchants are subject to. This has the consequence that it is not, on the evidence before us, possible to determine whether any given merchant is a class member or not.

(2) In relation to the methodology requirement, there has been a disregard for the clear requirements arising from the *Pro-Sys* test, even making allowances for the development of case law on that subject since June 2022. In any event, the requirements were abundantly clear by the time the Reply was filed, with some elements still not addressed by the time of the CPO hearing. As a consequence, there is no methodology at all for infringement and the important counterfactual for that, which we would expect to see developed in expert evidence. We also have concerns about the practicality and proportionality of the methodology advanced for resolving acquirer and merchant pass on issues.

253. We are unable to grant the CPO applications for the proposed opt in proceedings in their current form:

(1) There are issues which flow from the class definition extending to transactions conducted in EU member states. This can be expressed as an issue with the identification of class members, as to whether there are common issues, or more generally a failure to provide sufficient methodology.

- (2) There is no adequate methodology for infringement and the important counterfactual for that, which we would expect to see developed in expert evidence.
254. While some of the methodology defects in all four proposed proceedings may to some extent be explained by the complication of the overlap with the Umbrella Proceedings, the PCRs have exhibited a casualness about the methodology requirement which is concerning. The methodology requirement exists precisely because of concerns that proposed class representatives might issue proceedings in less than fully developed form.
255. Otherwise, class members will potentially be disadvantaged. Their individual rights are constrained by collective proceedings and part of the Tribunal's task is to ensure, as far as reasonably possible, that class members do not lose those rights in circumstances where the collective proceedings cannot sensibly be taken to trial.
256. Against that, we have been concerned that a large number of merchants will not obtain the benefit of these proposed collective proceedings in circumstances where previous regulatory and Court decisions and the prevalence of existing proceedings suggest they may well have a claim which is generally well suited to collective proceedings. That is even more of a concern where the defects in the proposed proceedings should, at least in part, be capable of remedy. For example, there seems no sensible reason why a methodology for infringement which is adequate for the purposes of a CPO application cannot be prepared.
257. We were urged by the Proposed Defendants not to give the PCRs any further indulgence to resolve defects in the proposed proceedings. It was said that they had already had ample time to get it right, that they had failed to discharge the burden placed on them by the Rules and that it would be unfair to the Proposed Defendants to allow the proposed proceedings to continue.
258. We are very mindful of all of those points, but we have reached the conclusion that we should allow the PCRs a further period to address the concerns set out in this judgment. We propose therefore to allow the PCRs a period of eight

weeks from the date of this judgment to notify us and the Proposed Defendants whether they intend to attempt to address our concerns by making adjustments to any of the proposed proceedings. In the meantime, we will stay all four applications.

259. If and to the extent that the PCRs notify the Tribunal of such an intention, we will set a timetable in the relevant proceedings to deal with any applications to amend, any applications by the PCRs to adduce further evidence, the ability of the Proposed Defendants to respond to any amendments and evidence that is permitted, and a further hearing to resolve any revised CPO application.
260. We are also mindful that the Pass On Evidential Hearing in the Umbrella Proceedings and the *Merricks* Collective Proceedings will, very likely, produce some form of methodology for dealing with the issues of acquirer and merchant pass on in those proceedings. The PCRs will not be able to participate in that hearing, but we would encourage them, if they wish to pursue any of the proposed collective proceedings, to follow that hearing carefully and to consider how the outcome can assist them in providing an adequate methodology on those points.
261. More generally, the PCRs need to give further thought to the relationship between any collective proceedings they wish to seek to continue and the Umbrella Proceedings. The trial of liability issues in the Umbrella Proceedings is scheduled for early 2024. We think it unlikely that any proposed collective proceedings that might in due course be certified could reach that stage in time for the PCRs to participate fully in that trial. The PCRs may well be faced with a reality of accepting the outcome of certain issues decided in the Umbrella Proceedings, without any meaningful input into those, or choosing not to join the Umbrella Proceedings. The Tribunal has previously indicated in correspondence to the PCRs that any decision by them not to join the Umbrella Proceedings is likely to result in a de-prioritisation of judicial resource to deal with the proposed collective proceedings, if any CPO is ultimately made.
262. Accordingly, the role which the PCRs might play in the Umbrella Proceedings, if any proposed collective proceedings are ultimately certified, could be

considerably reduced. In any revised application, we would expect to understand the PCRs' position on this issue, not least in terms of the consequences for the budgets in the proposed collective proceedings.

263. Finally, we observe that some of the defects we have identified in this judgment may not easily be capable of remedy. For example, it is not clear to us whether the PCRs will be able to find a solution to the class identification issues in the proposed opt out proceedings. We do not know for example whether further factual investigation might establish greater clarity in respect of the class definition or produce a workable methodology for easily identifying whether a merchant is a member of the class.
264. We also envisage that an attempt to broaden the scope of MIFs which are subject to the proposed proceedings might be said by the Proposed Defendants to cross the line from seeking amendment to making an altogether new case, for which permission should not be given. Indeed, the lawyers for the PCRs advised the Tribunal, shortly before the CPO hearing, that there were plans to issue further proposed collective proceedings in relation to consumer credit card and debit card MIFs.
265. We expect there are a number of complicating factors relating to funding and sunk costs which may determine any way forward by the PCRs in that respect. We simply note that any revised proposed proceedings which the PCRs wish to present in response to the invitation above will need to overcome a number of hurdles in order for CPOs to be granted.
266. We therefore decline to grant the applications for a CPO in all four cases:
 - (1) The Visa opt out case (Case No. 1444/7/7/22);
 - (2) The Visa opt in case (Case No. 1443/7/7/22);
 - (3) The Mastercard opt out case (Case No. 1442/7/7/22); and
 - (4) The Mastercard opt in case (Case No. 1441/7/7/22).

267. The PCRs will have eight weeks from the date of this judgment to notify the Tribunal and the Proposed Defendants of any intention to present revised proposals for any of these collective proceedings. The Tribunal will set a timetable for the resolution of any such proceedings at that stage. In the meantime, all four proposed proceedings are stayed.

268. This decision is unanimous in all respects.

Ben Tidswell
Chair

Dr Catherine Bell CB

Dr William Bishop

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

Date: 8 June 2023