Neutral Citation Number: [2024] EWCA Civ 218

Case No: CA-2023-001991; 002005; 002017; 002018

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Mr Ben Tidswell, Dr Catherine Bell CB, Dr William Bishop
[2023] CAT 38

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2024

Before :

THE CHANCELLOR OF THE HIGH COURT
(Sir Julian Flaux)
and
LORD JUSTICE GREEN

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Between :

CA-2023-001991 & CA-2023-002018:	
(1) Visa Inc; (2) Visa International Service Association; (3) Visa Europe Services LLC; (4) Visa Europe Ltd; (5) Visa UK Limited - ("Visa")	**Appellants**
- and -	
Commercial and Interregional Card Claims I Limited & Commercial and Interregional Card Claims II Limited ("CICC")	**Respondents**
CA-2023-002005 & CA-2023-002017:	
(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 - ("Mastercard")	**Appellants**
- and -	
Commercial and Interregional Card Claims I Limited & Commercial and Interregional Card Claims II Limited ("CICC")	**Respondents**

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Sonia Tolaney KC, Matthew Cook KC, Veena Srirangam, Hugo Leith (instructed by **Freshfields Bruckhaus Deringer LLP & Jones Day**) for the **Appellants - Mastercard**
Brian Kennelly KC, Daniel Piccinin KC, Isabel Buchanan & Emily Neill (instructed by **Linklaters LLP & Milbank LLP**) for the **Appellants - Visa**

David Caplan, Ligia Osepciu & James White (instructed by **Harcus Parker Limited**) for the **Respondents - CICC I & II**

Hearing date: Friday 9th February 2024

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Approved Judgment

This judgment was handed down remotely at 12 noon on Thursday 7th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Julian Flaux, Chancellor of the High Court and Lord Justice Green:

A. Introduction: The applications for permission to appeal

1. This is the judgment of the Court arising from two applications for permission to appeal brought by Visa and Mastercard ("*the applicants*") in the long running litigation brought against them arising from alleged infringement of competition rules. The Court heard the applications in the course of an oral hearing on 9th February 2024. Both Visa and Mastercard seek permission to appeal the judgment of the Competition Appeal Tribunal ("*the Tribunal*" or "*the CAT*") of 8th June 2023 ("*the Judgment*") following the rejection of their applications for permission to appeal against the Judgment by reasoned order of the CAT dated 2nd October 2023.

2. The respondents are CICC I and CICC II. These are the proposed class representatives ("*the PCR*"). They are special purpose vehicles established to pursue collective proceedings against Visa and Mastercard. They allege that certain multilateral interchange fees applied by Visa and Mastercard in their payment schemes infringed competition law. It is said that this breach gave rise to financial losses for merchants. The PCR seek to bring collective proceedings on behalf of defined classes of merchants. CICC I filed separate claim forms against Visa and Mastercard in relation to inter-regional and commercial card interchange fees upon an opt-in basis for merchants with annual turnover exceeding £100m. CICC II filed separate claim forms against Visa and Mastercard seeking to pursue collective proceedings in relation to inter-regional and commercial card interchange fees upon an opt-out basis for merchants with annual turnover below £100m.

3. In the Judgment, the CAT refused, for a variety of reasons (see below) to make collective proceedings orders as sought by the PCR. Instead, it granted the PCR a period of eight weeks in which to decide whether to present revised proposals for the collective proceedings. The PCR subsequently indicated that they would be presenting such revised proposals but have indicated that they no longer pursue claims in relation to inter-regional interchange fees. Their claims now focus only upon commercial card fees. Their new applications are due to be heard before the CAT in April 2024.

4. As part of the reasoning in the Judgment the CAT concluded that individual proceedings were not more suitable than collective proceedings. Both Visa and Mastercard seek permission to appeal against this finding. Both contend that the CAT erred because, they say, on analysis, individual proceedings are *more* suitable than collective proceedings. If they are right then the CAT would have held that the proposed collective proceedings did not meet the statutory test of "*suitability*" and the applications by the PCR for certification would have been dismissed.

5. There is a gloss to this which was explored during the hearing. Whilst the CAT found that individual proceedings were not more suitable than collective proceedings (thereby inferring that collective proceedings were suitable) when setting out its final conclusions upon suitability and eligibility, in paragraph 241(5) of the Judgment, the CAT recorded that it was not satisfied that the suitability requirement was met. This has engendered a dispute as to whether the Tribunal has decided the point about the relative suitability of individual as against collective proceedings definitively (as the PCR contend) or whether it remains open to the CAT to re-consider the matter when it revisits the applications (as the applicants contend). In oral argument both parties posed

the question: "*Why do these applications matter*?" If the applicants are correct and they can argue, yet again, that individual proceedings are more suitable than collective proceedings, it is irrelevant whether they are granted permission to appeal. If the respondents are correct then, when the matter reverts to the CAT, the issues for determination will not cover the pros and cons of individual as against collective proceedings because this will already have been decided, in their favour.

B. Legislative context

6. It is not necessary to delve, in detail, into the law. Suffice it to say, pursuant to section 47B(5) Competition Act 1998 ("*CA 1998*") a PCR must satisfy the CAT that they should be authorised to act as a class representative and that the claims they seek to combine and pursue are eligible for inclusion. The eligibility condition is further addressed in section 47B(6) CA 1998 which stipulates that the eligibility condition comprises two cumulative requirements which are that the proceedings (i) raise common issues and (ii) are "*suitable*" to be brought in collective proceedings. This is replicated in Rule 79(1) of the CAT Rules. When considering suitability, Rule 79(2) provides that the CAT "*shall take into account all matters it thinks fit, including*…" seven factors which are then identified: whether collective proceedings are an appropriate means for the fair and efficient resolutions of the common issues; the costs and benefits of continuing the collective proceedings; whether there are separate proceedings making claims of the same or a similar nature which have already been commenced by members of the class; the size and nature of the class; whether it is possible to determine in respect of any person whether that person is or is not a member of the class; whether the claims are suitable for an aggregate award of damages; and, the availability of alternative dispute resolution and any other means of resolving the dispute. It is common ground that, according to case law, a part of the exercise requires a comparison between collective proceedings and individual proceedings that might otherwise constitute an alternative method of pursuing a remedy.

C. MIF Umbrella Proceedings

7. Relevant to this exercise is the fact that (as explained in the Judgment at paragraphs [20] – [25]) the CAT has issued a Practice Direction empowering the creation of "*umbrella proceedings*": PD 2/2022 "*Umbrella Proceedings*". This enables the Tribunal to direct that "*ubiquitous*" issues be managed and heard together. In the context of the ongoing litigation against Visa and Mastercard the CAT has exercised this power and directed a series of trials to resolve a multiplicity of issues arising in the MIF Umbrella Proceedings. The CAT has also granted claimants a range of options designed to facilitate low-cost participation in the proceedings. Claimants can, for instance, adopt the pleadings of other parties, plead only by selecting issues from a comprehensive list prepared by the existing parties, or apply for a stay subject only to the claimant committing to be bound by the outcome of the proceedings and upon the understanding that if disclosure from a claimant is considered necessary on a particular issue, it may be ordered notwithstanding the stay. These case management steps were described before us as "*innovative*", etc. In particular the applicants highlight how relatively easy and low cost it would be for an individual to join the MIF Umbrella Proceedings. These Proceedings comprise individual claims where, it follows, no direction for aggregate damages has been made.

D. Reasons why certification was refused

8. The reason authorisation was refused was that in relation to both categories of class of claimant (above and below £100m) the CAT was concerned that the applications were insufficiently focused, and the PCR had advanced no sufficient methodology or analysis on key issues (such as the counterfactual) to enable the CAT properly to assess the applications including as to whether collective proceedings were suitable for disposing of common issues. Further, it was not possible for many merchants to determine whether they were in the class or otherwise. The applicants urged the CAT that it would be unfair (to them) to give the PCR "…*any further indulgence to resolve defects in the proposed proceedings*." (Judgment paragraph [257]). The Tribunal was mindful of these considerations (Judgment paragraph [258]). However, it considered that, given prior regulatory and Court decisions, members of the class might well have a claim which was "*generally well suited to collective proceedings*". Defects in the proposed proceedings could be capable of remedy. The Tribunal therefore balanced the need to vindicate individual rights against fairness to the proposed defendants. It accordingly allowed revised applications to be filed.

E. CAT's analysis on suitability

9. The applicants subjected the analysis set out in the Judgment to close and critical analysis. We set out the relevant paragraphs:

> (d) Suitability generally
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> 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.
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> 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.
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> 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.
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> 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."

F. Applicants' case on opt-in proceedings

10. Counsel for Mastercard developed the arguments in relation to opt-in proceedings and these were adopted by counsel for Visa. Mr Cook KC led the argument for the parties on this. The applicants criticise the Judgment for holding that individual claims were not more suitable than collective claims. When the matter returns to the CAT it might take this as its predicate for further analysis. This was wrong in law. In summary they make the following points:

11. **Scale, size and sophistication**: The CAT concluded (Judgment paragraphs [233] and [234]) that in relation to opt-in, it seemed consistent with policy for smaller merchants to have redress through collective proceedings. Many had quite small claims, "*in the tens or hundreds of pounds*" and it was "*highly likely*" that the administrative burden alone would deter them from issuing proceedings, even given the structures available in the MIF Umbrella Proceedings. There was also precedent for large corporates to participate in opt-in proceedings. The existence of larger members in a class did not make opt-in proceedings unsuitable. There was also a "*respectable case*" that costs and benefits favoured opt-in proceedings over Umbrella Proceedings.

12. The applicants argue that the purpose of collective proceedings is to enable individual claims to be pursued that would not otherwise be proportionate or practicable and thereby facilitate access to justice: *Mastercard Incorporated and others v Walter Hugh Merricks* [2020] UKSC 51 ("*Merricks*") at paragraph [45]. When considering whether collective proceedings promoted access to justice, the size and sophistication of proposed class members as well as the value of claims was highly relevant. There was no evidence establishing that individual claims in the present case would be disproportionate and/or impracticable. To the contrary, the evidence indicated that claims were valuable and capable of pursuit in individual proceedings, particularly *via* MIF Umbrella Proceedings. Such claims had been brought many times before.

13. The opt-in class comprised undertakings the turnover of which is, on average, greater than £100 million per annum in the period 2016 to 2019. Mastercard's expert evidence identified 38 corporate groups of the 70 estimated to come within the class. Of the 38 groups: 7 had a turnover of between £100m and £1 billion; 19 had turnover of between £1-5 billion; and 12 had a turnover above £5 billion.

14. As to value of the claims, these were substantial. A total opt-in value of >£256m was attributable to only a portion (overcharge in car rental, airline and hotel sectors) of the total claim which covered the entire economy. The PCR's evidence indicated that c.70 potential class members in the three identified sectors had individual claims totaling at least £3.65 million which was "*orders of magnitude*" above the typical average claims in the Trucks and FX litigation. In these circumstances the CAT erred in concluding that there was "*a degree of friction*" (Judgment paragraph [232]) for proposed class members pursuing individualised claims within the MIF Umbrella Proceedings.

15. ***Extent of prior litigation and settlement***: The extent of individual claims and settlements also demonstrated that such proceedings were realistic and viable. The CAT wrongly failed to take this into account. Evidence indicated that of a proposed potential class of 70 merchants across the three sectors identified by the PCR (see paragraph [14] above) between 34-43 had settled with Visa, or were still litigating. Some 50-60% of proposed class members had already pursued individualised claims.

16. ***Costs and benefits of opt-in proceedings / scope of claims***: The CAT had no basis for its conclusion (Judgment paragraph [234]) that a "*respectable case*" could be made for the costs and benefits favouring opt-in over Umbrella Proceedings. The MIF Umbrella Proceedings covered all MIFs whereas the opt-in proceedings concerned only commercial and interregional MIFs, such that opt-in proceedings would determine only a sub-set of any proposed class member's total claim leaving that member to pursue separate claims in respect of the residue. The CAT referred to this at paragraph [136] but failed then to conclude that opt-in proceedings would inevitably undermine judicial economy.

17. ***Judicial resources***: The Tribunal erred in concluding that the opt-in proceedings were preferable in terms of "*judicial resource*", since it wrongly assumed that the claims *could* be joined with the MIF Umbrella Proceedings and made its conclusion on suitability subject to the proviso that it *could* indeed be integrated. However, the CAT also complained that there was no proposal before the Tribunal explaining how such a joinder could occur (Judgment paragraph [241(4)(iv)]). As such the reasoning was inconsistent and illogical. In addition, in circumstances where the Tribunal had held that it was not in a position to conduct an assessment of the claims, absent a properly

developed methodology, it acted inconsistently in concluding that opt-in proceedings were an appropriate means for the fair and efficient resolution of common issues. The Tribunal erred yet again because, on its own reasoning, it was not in a position to form any view on this question.

G. Applicants' case on opt-out proceedings

18. Counsel for Visa developed the arguments in relation to opt-out proceedings before the Court and these were adopted by counsel for Mastercard. Mr Piccinin KC led the argument for the parties on this. In large measure these arguments aped those advanced in relation to opt-in proceedings but were adjusted to take account of the fact that the argument now concerned much smaller merchants.

19. ***Practicality and proportionality***: The opt-out class comprised undertakings the turnover of which is, on average, less than £100 million per annum in the period 2016 to 2019. It includes within the class a significant number of merchants with modest turnovers. There was copious evidence that, even in relation to smaller merchants, there were no real obstacles to the commencement of individual claims. Evidence submitted by Visa was that over 2300 UK claimants were in active litigation with Visa in relation to inter-regional and/or commercial card MIFs. More than 900 were known to have a turnover of less than £100m, of which almost 300 were known to have a turnover of less than £5m and in excess of 1000 were expected to have turnovers so low that they had received audit exemptions. Whilst it was accepted that opt-out class members were smaller than opt-in class members the experience of the MIF Umbrella Proceedings demonstrated that it was practicable for smaller class members to sue in their own names, in particular by joining the claims of other larger merchants. The Tribunal erred in failing to so conclude. In a witness statement before the CAT a partner of Linklaters, acting for Visa, set out the history of interchange litigation against Visa. She observed that the proceedings had been widely reported upon and publicised and had: "... *led to the creation of what is almost its own speciality practice, with sophisticated teams of lawyers, funders and other intermediaries actively marketing what amounts to pre-packaged litigation on a vast scale.*" She referred to the existence of over 900 merchant groups which had, to date, commenced interchange-related claims comprising over 4500 individual corporate entities. There were also over 610 merchant groups, comprising over 2500 individual claimants, with proceedings against Visa before the CAT, virtually all of which formed part of the MIF Umbrella Proceedings. Over 30 law firms were involved in representing different individual claimants and claimant groups. Many of the interchange-related claims benefited from litigation funding of some description. So aggressively proactive were these organisations that, as Mr Piccinin put it, "… *the ambulance comes to the claimant*". He also pointed to the costs implications of certifying yet further claims upon a collective basis. He pointed to footnote [38] of the Judgement where the CAT observed that the aggregate amount of costs for the proposed proceedings was estimated as between £30-42m.

20. ***Deprivation of the right to sue and settle:*** Over and above these reasons, an important submission advanced by Mr Piccinin was that certification deprived class members of rights they otherwise enjoyed, namely the right to sue and settle. Instead, they were being corralled by aggressive funders into group litigation which stripped them of their individual freedom of choice. This had been ignored by the CAT.

H. Analysis: conclusions

Jurisdiction

21. Under section 49(1A) CA 1998, a right of appeal lies on a point of law as to the award of damages or other sum. The Court of Appeal has recently considered the scope of this provision in *Evans v Barclays PLC and Others* [2023] EWCA Civ 876 ("*Evans*"). An error of law can include, for example, the exercise of a discretion in an irrational manner outwith the margin of appreciation accorded to the decision maker. This might arise if the decision maker, here the CAT, drew an inference from the facts which was irrational, or otherwise made a material finding of fact upon the basis of non-existent evidence.

22. The applicants have framed their grounds of appeal in terms of failing to take into account and/or draw proper inferences from factual matters such as the size and sophistication of the proposed class, the extent of prior litigation and settlement, and the relative costs and benefits of the proposed opt-in proceedings over the MIF Umbrella Proceedings. In relation to opt-out proceedings it is said that the CAT failed to have any proper "*basis*" upon which to reach conclusions about relative costs and benefits of different types of proceedings. Arguments such as these press at the very boundary of what might, properly, constitute a point of law. They might be best analysed as challenges to inferences of fact drawn by the CAT from disparate factual evidence. In oral argument, when pressed as to how the proposed grounds amounted to points of law, counsel sought to reframe the analysis in terms of irrationality and decisions outside the bounds that a reasonable Tribunal, properly directed, could arrive at. For present purposes we treat the grounds as formulated as raising issues of law, though without deciding the matter. If we had decided that the proposed grounds justified permission to appeal, we would have required the parties to reformulate their grounds.

23. It is trite, though worth repeating, that merely because an argument is framed as a point of law does not mean to say that it is arguable, and thereby warrants being aired at a full appeal. It engages the jurisdiction of the Court to hear an appeal but not a right of the parties to have an appeal. Once permission is granted the Court does not revisit the question but proceeds to determine the appeal. If it concludes that the arguments are unfounded, the Court does not backtrack and revoke the permission; it simply dismisses the appeal.

24. In *Evans* the Court adopted a broad construction of the expression "*as to damages*". In the present case the logic of the CAT's reasoning included that if claimants were required to bring claims upon an individualised basis they would do so in smaller numbers, and thereby the quantum of damages that the applicants might ultimately be responsible for would be lower. As such the issue is capable of having an effect upon damages.

The test to be applied

25. In considering permission to appeal we take account of the breadth of discretion to be accorded to the Tribunal in matters of case management. We make four observations.

26. First, in *La Patourel v BT Group PLC and Another* [2022] EWCA Civ 593 ("*La Patourel*") at paragraph [57] this Court recognised that over time, the CAT would acquire an increasing well of experience in the handling of the weighing up exercise relevant to the choice to be made between opt-in and opt-out proceedings. The Court recognised further that the case management decisions of the CAT were exercises in pragmatism and that undue formalism and precision were not required. Considerations such as these broadened the margin of discretion or judgement of the CAT and the Court of Appeal would not interfere simply because it might, for the sake of argument, have drawn a different conclusion from the weighing exercise. Those considerations apply equally to a choice to be made between collective proceedings, on the one hand, and individual proceedings, on the other hand.

27. Secondly, the statutory test requires the CAT to form its *own* view of the factors relevant to suitability. In circumstances where the Tribunal has identified the factors *it*, as opposed to the parties, considers relevant and has provided a concise explanation for its conclusions which is consistent with the regulatory regime, then the hurdle confronting an applicant arguing that the Tribunal failed to take account of some further and different consideration is high. The decision being taken is one of case management. The Tribunal is not required to explore in its judgment every argument and permutation thereof raised by the parties.

28. Thirdly, uncertainty is inherent in many case management decisions of this sort. The CAT must crystal ball gaze as to how the litigation will unfold. This uncertainty is heightened by the complicated nature of the proceedings, dominated as they frequently are by detailed econometric modelling. The CAT will take into account that it can modify or revoke case management decisions in view of changing circumstances. Case management decisions are not counsels of perfection. They require the CAT to use its judgment and experience of this sort of litigation to take the best decisions that it can upon the information available to it at the relevant point in time knowing that it can adapt and adjust as the case progresses. It is therefore not a valid criticism to point to alternative solutions and contend that these "*would*" be preferable.

29. Fourthly, nothing in the statutory test attaches greater or lesser weight to any one particular consideration. For example, it is not the case that because individual natural or legal persons *could* bring individual proceedings, this is dispositive against collective proceedings. It is within the contemplation of the scheme that individual proceedings may be feasible but that, because of other factors, collective proceedings remain preferable. The relative weight to be attached to any one factor and the consequential weighing of that factor against others is a classic exercise of judgement by the Tribunal. The applicants relied upon case law suggesting that the rationale for the collective proceedings regime was to provide a remedy to those who, otherwise, would not have had one: *Merricks* (*ibid*) – see paragraph [12] above. This is a policy consideration found in admissible pre-legislative material which operated at a high level to explain why Parliament introduced the legislation in the first place. It does not guide, in a definitive manner, the rounded weighing exercise mandated by the statute and the CAT Rules as the approach to be applied to determining suitability issues. At this granular level it is but one factor to be taken into account, amongst others.

The adequacy of the CAT's reasons

30. We turn now to the analysis of the CAT's judgment. We are clear the CAT acted within its legitimate discretion. We start by summarising its reasons.

31. First, in paragraphs [229]-[232] the CAT weighed the relative merits of collective proceedings against MIF Umbrella Proceedings. There were features of the MIF Umbrella Proceedings which facilitated the bringing of individual claims and the differences between collective and individual proceedings were thereby narrowed. However, it was "*still the case*" that a merchant wishing to issue individual proceedings faced a "*degree of friction*" in relation to the cost of issuing, the risk of adverse costs, and the investment in time and effort to recover what may not be a substantial sum. The CAT had been shown no evidence as to the extent of any reduction in friction that it considered "*conclusive*".

32. Secondly in relation to opt-out proceedings (claimants with turnovers of <£100m) smaller merchants should have redress through collective proceedings and the class contained many who had quite small claims. The administrative burden alone would deter such merchants from issuing individual proceedings, notwithstanding the availability of MIF Umbrella Proceedings (Judgment paragraph [233]). The existence of large corporates within the class did not make opt-in proceedings unsuitable. There remained, overall, a "*respectable case*" for the costs and benefits favouring opt-in proceedings over MIF Umbrella Proceedings (Judgment paragraph [234]). And as was submitted by counsel for the PCR during the permission to appeal hearing, the claims were presented to the CAT to be heard together, as a package. It was artificial to analyse the opt-in and the opt-out proceedings as if they were severable and to be litigated separately. The CAT did not demur from this proposition, and its conclusion necessarily had to take account, in a rounded manner, of both types of claims.

33. Thirdly, certifying proceedings as collective would be easier for the Tribunal to manage. This was because of practical considerations such as the desirability of avoiding a proliferation of legal advisors and the burdens imposed upon the CAT administration caused by the management of very large numbers of individual proceedings (Judgment paragraphs [238] and [239]).

34. Fourthly, proposed collective proceedings would need to be properly integrated into the MIF Umbrella Proceedings both present and future. This should avoid any material increase to the costs of proposed defendants (Judgment paragraphs [235] – [237] and [241(4)(iv)]).

35. In conclusion the Tribunal considered that the existence of MIF Umbrella Proceedings did not confer a material benefit over either opt-in or opt-out proceedings.

36. In the round, all these matters are relevant to the exercise of the discretion. We would describe issues such as: the procedural benefits and disbenefits of different types of proceedings; the ease with which proposed class members, or subsets thereof, could commence individual proceedings; costs; and the ease and ability of the Tribunal, in the future, to manage and administer the litigation, as core. In our judgment, and put bluntly, the Tribunal was four-square within the scope of its discretion in arriving at these conclusions. This was a judgment by a Tribunal whose task is to handle and administer exceedingly complex litigation raising novel and knotty problems about

which the Tribunal has a growing and highly specialised body of experience. This Court will be very slow to interfere with this sort of evaluation. It is worth standing back. If, as the applicants contend, there is no material difference between individualised and collective proceedings then it is hard to see why the applicants should be objecting to collective proceedings. The real answer is likely to be that the applicants consider that individualised proceedings will be more difficult to mount and thereby fewer claims will be brought against them. And indeed it is for this reason that the grounds raised upon this appeal may be said to be "*as to damages*" (see paragraph [24] above). This conclusion, however, tends to support, not undermine, the analysis of the CAT which pointed out that collective proceedings were a better way of vindicating the claims of the affected merchant class, than individual claims (Judgment paragraph [256]).

37. As to the particular points raised by the applicants these do not alter our conclusion.

38. First, as to the scale, size and sophistication of the class members (see paragraph [11] above) this *was* addressed by the CAT. It underpinned its conclusion about the limitations inherent in the MIF Umbrella Proceedings which it described as "… *an imperfect solution to a difficult problem*" (Judgment paragraph [283])). The objections of the applicants are really disagreements with conclusions on the facts made by the Tribunal. We reject the submission that suitability is about no more than the proportionality and practicability of individual proceedings (see paragraphs [12] and [29] above). It is also, importantly, about the ease with which the Tribunal can manage different types of proceedings. It does not follow that, even if a large number of persons could bring individualised claims, they should be required to do so thereby obviating real advantages the Tribunal identifies in terms of judicial economy and efficiency in bringing claims upon a collective basis. This Court will not readily interfere with a conclusion of the Tribunal as to the sort of procedure *it* judges to be the easiest or most efficient to manage.

39. Secondly, as to the argument about the extent of prior litigation and settlement (see paragraph [15] above) this is a variant upon arguments relating to the MIF Umbrella Proceedings which, by their nature, involve individualised claims and settlements. It is said that this was ignored by the CAT. We disagree. Whilst it is not expressly articulated as part of the Tribunal's conclusions, it is referred to in paragraph [139] of the Judgment as a matter raised in argument. Before the Tribunal it was said that settlements might reduce the size of the opt-in class rendering it non-viable. The Tribunal observed that it received considerable written material about the subject but in the end it occupied minimal time in oral argument. This is not an argument that, in our view, necessitated detailed, separate, treatment.

40. Thirdly, in relation to the narrower scope of the collective proceedings (see paragraph [16] above) the CAT referred to this in paragraph [136] of the Judgment. It is evident from paragraphs [260ff] that the Tribunal was aware of the need, going forward, to reconcile the various proceedings, so this concern falls away as merely an incident of future case management. And, we add, there is no reason to assume the CAT cannot case manage any proceedings it certifies to ensure consistency with the outcomes of MIF Umbrella Proceedings so as to avoid the proliferation of similar disputes, using its broad powers under CAT Rule 4.

41. Fourthly, as to the argument that certification involves a deprivation of the right to sue and settle (see paragraph [20] above), the argument was intriguing but, ultimately,

unconvincing. It is of the nature of collective proceedings that certification involves a deprivation of the rights of class members to bring individual claims. In the vast majority of cases, particularly where consumers are involved, class members may have no knowledge of the proceedings and/or will never have contemplated bringing individual claims. In a real and practical sense, they are given a right they could never otherwise have enjoyed. Given the industrial scale of the claims farming that the applicants have drawn attention to and been critical of (see paragraphs [19] above), if an individual merchant has not, yet, commenced an individual claim it is not unreasonable to infer that it will not do so and, it follows, a collective action might be the best means of vindicating rights. Further, an entity that really wishes to exercise individual rights can be extricated from the collective proceedings pursuant to the regime in CAT Rule 82, which includes CAT oversight. The objection is in our view more theoretical than practical.

42. Fifthly, the argument (see paragraph [17] above) that the Tribunal acted illogically when approving collective proceedings because the condition for approving such proceedings (i.e. that they be integrated into the MIF Umbrella Proceedings scheduled for early 2024) could not be met, does not stack up. The CAT did say that collective proceedings were preferable to individual proceedings *provided* they could be fitted into the ongoing framework of MIF Umbrella Proceedings (Judgment paragraph [241](4)(iv)]) and it is true that certain MIF Umbrella Proceedings are now ongoing so that collective proceedings, if certified in the future, cannot be integrated into *those* claims. However, the CAT was not referring to these particular proceedings. It was making a broader point. In Judgment paragraphs [260] – [264] the CAT acknowledged that there was little prospect of any certified collective proceedings being combined with the ongoing (2024) MIF Umbrella Proceedings. Its position was that any future proceedings would need to be case managed to be consistent with, and take into account, Umbrella Proceedings and findings which might be made in such cases, whether existing or future. To this end the Tribunal indicated that the PCR should, when the applications returned, explain how the proposed proceedings would take account of such existing and future MIF Umbrella Proceedings. This approach was obviously sensible.

Postscript: The why are we here point.

43. Finally, we address the implications of paragraph [241(5)] of the Judgment (see paragraph [9] above) where the CAT stated: "*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*." The basis for the conclusion that the suitability requirement was not met is based upon the CAT's "*overall*" analysis, in particular taking into account concerns relating to the failure of the PCR to advance an adequate methodology. The parties disagree as to the consequences of this statement (see paragraph [5] above).

44. Having considered this matter we do not think that there is any inconsistency in the Judgment. Under CAT Rule 79(1)(b) and (c), the CAT can only certify proceedings if they, *inter alia*, raise common issues and are suitable. Under CAT Rule 79(2)(b) in determining whether claims are suitable, one matter to be considered is whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues. There is, accordingly, an overlap between the requirements in Rule

79(1)(b) and (c). Here, the Tribunal concluded that as a result of a lack of clarity as to methodology it was not in a position to determine whether collective proceedings were an appropriate means for the fair and efficient resolution of the common issues (under (b)), this therefore also became an issue relevant to suitability (under (c)) (see Judgment paragraphs [241(4)(i) and (ii)]). As such, the CAT was bound to conclude that, as of the date of Judgment, the PCR had not established suitability, notwithstanding that along the way, as part of its broader analysis, it had expressed a view as to the relative suitability of collective and individual proceedings.

45. Within this context we read the CAT as laying down a clear position on individual versus collective proceedings. When refusing permission to appeal it did not indicate that its view was provisional and therefore open to reconsideration such that an appeal was academic. We would add only that, in circumstances where the Tribunal intends to re-review authorisation and suitability in the light of new material submitted by the PCR, we do not think that the CAT has bound itself irrevocably to adhere to its existing analysis and it would not be an abuse of process for it to reconsider its position. We emphasise that we are not, however, inviting or encouraging the CAT to do so, given that we have endorsed its assessment of individual versus collective proceedings. How the Tribunal deals with this is for it to decide, in its discretion, in due course.

Conclusion

46. In conclusion, we refuse permission to appeal on both applications. We underline the observations made in *La Patourel*, summarised above, that this Court will accord the CAT a broad margin of discretion over case management decisions of this nature. It will be rare for the Court of Appeal to grant permission to appeal in such cases. The CAT was right to refuse permission to appeal.

47. We make one final observation with the admitted benefit of hindsight. In future the CAT might, should similar circumstances arise, reserve its position on all aspects of suitability pending a ruling upon a re-submitted application. In other words, determine everything in one go. This would enable the CAT to view the question of suitability in the round, taking into account re-formulated methodologies and developments in MIF Umbrella Proceedings occurring prior the date of the new applications. If this had happened in this case it would have removed certain of the arguments advanced before us that the CAT erred because it took its decision upon, in pith and substance, a premature basis.