Neutral citation [2025] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1441/7/7/22
1442/7/7/22
1443/7/7/22
1444/7/7/22

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
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(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

RULING (REVISED CPO COSTS)

A. INTRODUCTION

1. By a judgment ([2024] CAT 39) dated 7 June 2024 (the "Revised CPO Judgment"), following the hearing on 17 and 18 April 2024 of revised applications for Collective Proceedings Orders (the "Revised CPO Applications") pursuant to section 47B of the Competition Act 1998, the Tribunal made four Orders certifying the opt-in and opt-out collective proceedings on 9 August 2024. As is apparent from the Revised CPO Judgment, the Class Representatives put forward alternative class definitions as part of the Revised CPO Applications, one of which was successful and one of which was not.

2. The parties agreed that issues of costs would be determined on the papers, without an oral hearing. By applications dated 10 September 2024 and responses dated 24 September 2024, the Class Representatives and the Defendants exchanged costs applications and schedules of costs. The Class Representatives seek costs of the Revised CPO Applications and payment on account and the Defendants seek a portion of costs of the Revised CPO Applications and the remaining costs of the Class Representatives' first, unsuccessful attempt at obtaining collective proceedings orders (the "Original CPO Applications"), which costs were partially reserved by Order dated 12 October 2023 ([2023] CAT 61) (the "Original Applications Costs Order"). By further submissions dated 5 September 2024 and 29 September 2024 respectively, the parties made representations as to the application of the indemnity principle to the Class Representatives' costs of the opt-in proceedings.

3. On 2 December 2024, the Class Representatives filed and served an updated costs schedule and made further submissions about the indemnity principle. On 12 December 2024, Visa's solicitors wrote on behalf the Defendants objecting to the filing of further submissions on the indemnity principle issue, but they did not otherwise object to the filing of the updated costs schedule.

B. SUBMISSIONS

4. The Class Representatives seek their costs of the Revised CPO Applications in the sum claimed of £5,076,672.30, on the basis that:

(a) They were the successful party as they have won something of value, namely the Collective Proceedings Orders (see *Houssein v London Credit* [2024] EWCA Civ 721 at [91] per Asplin LJ; and *Medway PCT v Marcus* [2011] EWCA Civ 750; [2011] 5 Costs LR 808 per Tomlinson LJ at [46]).

(b) It is the practice of the Tribunal that the unsuccessful party should pay the successful party's costs (see *Merricks v Mastercard* [2017] CAT 27 at [11-17])

(c) There is no reason to depart from that starting point, given the Class Representatives' acceptance that an element (15%) of the Revised CPO Applications costs should be treated as costs in the case in accordance with previous practice (see for example *Alex Neill Class Representative Ltd v Sony (Costs Ruling)* [2024] CAT 13 ("*Neill v Sony*")). The Tribunal should not depart from the usual rule simply because the successful party did not succeed on every aspect of its case (see *Sharp v Blank* [2020] Costs LR 835, [7]). In addition, substantial costs in getting the case up and going were incurred (but not recoverable) by the Class Representatives in the Original CPO Applications.

(d) The Defendants have chosen to fight every point "line by line" and should face the costs consequence of that.

(e) The class definition argument on which they were unsuccessful (the "Revised Class Definition"), was one prong of a two pronged attack, was largely a matter of statutory construction and would only justify a small reduction (in respect of which the Class Representatives offer 5%).

(f) While the Class Representatives only appreciated (and advanced) at a late stage the argument about the Interchange Fee Regulation (the "IFR"), which meant that the second prong of the class definition argument was ultimately successful, the Defendants continued to challenge that point once it was identified, and so there should be no costs consequences associated with the timing of the point. In any event, the Defendants have not been as constructive as they should have been on the issue of identification of merchants in the

class and should not benefit from that. The evidence and arguments relating to statements of account given by acquirers to merchants was part of a package of evidence and an important part of the overall picture, even if the IFR provided the eventual answer.

(g) While the Tribunal's practice has been to treat the costs up to the date of the proposed defendant's CPO response as costs in the case (see *Neill v Sony*), that should not be the approach here because it was plain from the Original CPO Applications that the Defendants would oppose the Revised CPO Applications (contrary to the position in cases like *Neill v Sony*). On that basis, the Class Representatives did not initially provide a breakdown of their costs incurred before and after the date on which the Defendants provided their responses to the Revised CPO Applications, being 20 February 2024 (the "CPO Response date").

(h) However, the updated schedule of 2 December 2024 did split out the costs for solicitors, counsel and experts by reference to before and after the CPO Response date. The schedule discloses £2,879,724.60 incurred before the CPO response date and £2,132,769.47 incurred afterwards. The difference between these sums and the overall amount in [4] above appears to be disbursements of £64,178.23, which have not been allocated.

(i) The Class Representatives seek a payment on account under Rule 104(4) of the Competition Appeal Tribunal Rules 2015 and in accordance with the principles set out in *Excalibur v Texas Keystone* [2015] EWHC 566 (Comm). They argue for a payment on account in the sum of £2,246,080.92, being 50% of the sum which they would obtain if they recovered 80% of their claimed costs.

(j) The costs claimed by the Class Representatives can be broken down as follows:

    (i) Solicitors - £1,477,479.50 (of which £908,912.55 relates to costs incurred before the CPO Response date and £568,566.95 is for costs incurred after that date).

(ii) Counsel - £1,254,877.07 (of which £439,205.80 relates to costs incurred before the CPO Response date and £815,671.27 is for costs incurred after that date).

(iii) Experts - £2,280,137.50 (of which £1,531,606.25 relates to expert costs incurred before the CPO response date and £748,531.25 is after).

5. In response to this, Visa submits that:

(a) The Class Representatives' conduct and approach, as described in the Revised CPO Judgment[1] justifies a departure from the usual position that the unsuccessful party pays the successful party's costs. In particular:

(a) The IFR argument was only advanced by the Class Representatives at a late stage.

(b) The Class Representatives argued unsuccessfully for the Revised Class Definition alongside an adjusted version of the original class definition (essentially, the IFR argument on which they were ultimately successful), having failed to plead or otherwise properly identify the adjustments proposed to the original class definition.

(c) Important issues were only raised for the first time in the Class Representatives' Reply or indeed as late as the hearing of the Revised CPO Applications.

(d) The Class Representatives have not at any stage provided proper revisions of their litigation budgets for the Tribunal's consideration.

(e) The Class Representatives' expert continually revised his opinion to meet issues put forward by the Defendants and generally overcomplicated matters, leading to wasted costs.

[1] Paragraphs cited include [11], [63], [74] to [77], [80], [90], and [118].

6. On that basis, Visa seeks an award of a proportion of its own costs, and also submits that the element of costs that should be deemed costs in the case should be higher than has been determined in earlier certification costs orders. In particular:

(a) The Class Representatives should pay Visa's costs of the Revised Class Definition and all evidence on class identification, which Visa estimates to be 50% of its costs up to the CPO Response date.

(b) The remainder of the costs up to the CPO Response date should be costs in the case, reflecting the costs necessary for the Class Representatives to remedy the defects in the Original CPO Applications and to satisfy the Tribunal to that effect.

(c) In relation to costs after the CPO Response date, a proportion of 35% should be ordered to be costs in the case, given the significant time required to satisfy the Tribunal that defects were remedied and that the future relationship of these proceedings with the Umbrella Proceedings had been properly addressed. Visa points to the outcome in *Justin Gutmann v London and South Eastern Railway and others (Consequential Matters)* [2021] CAT 36 as a precedent for this proportion to be costs in the case.

7. Visa says there should be no order for the remainder of the costs given:

(a) The time spent on the Revised Class Definition issue, on which the Class Representatives failed (Visa estimates that 25% of the time spent at the hearing was on this issue).

(b) The waste of costs in relation to evidence about merchant statements of account and Visa transaction data (given that the IFR provided the answer to the issue of identification).

(c) That the challenges raised by Visa added little to the costs which had to be incurred in any event to satisfy the Tribunal that the Revised CPO Applications should be granted.

(d) The Class Representatives' conduct, especially in continually changing their case.

8. In response to the Class Representatives' costs submissions, Visa refers to *McKeown v Langer* [2022] 1 WLR, which they say makes it clear that costs should follow the issue, rather than the event, in order to encourage a more selective approach to points taken by parties to litigation.

9. Visa also expresses surprise at the size of the Class Representatives' costs, which are considerably greater than one would expect for a CPO application of any sort and materially exceed the figures in the Class Representatives' litigation budgets. Various points of detail are taken about the reasonableness of the costs.

10. Visa also advances an argument about the indemnity principle in relation to the opt-in collective proceedings. This is essentially that:

(a) Under Regulation 4 of the Damages-Based Agreement Regulations 2013, a solicitor cannot charge a claimant more than 50% of the damages recovered for their fees and counsel's fees.

(b) If no damages are ultimately recovered, the solicitor cannot charge anything for their fees and counsel's fees even if there is a costs order in the claimant's favour on an interim or final basis.

(c) While an order for costs may be made in the Class Representatives' favour for the opt-in proceedings, no interim payment should be ordered in that respect until the conclusion of the proceedings, when it will be apparent whether the Class Representatives have won and therefore what level of solicitor and counsel fees they are liable for.

11. In relation to the Original CPO Applications, Visa submits it should recover all of its remaining costs, given the extensive change in the Class Representatives' cases in the Revised CPO Applications, which made them essentially new applications, and given the Class Representatives' unsatisfactory conduct. Visa further says that the points on which the Class Representatives were successful in the original judgment are limited.

12. Visa seeks an interim payment in relation to both its costs up to the CPO Response date and the additional costs it says it should be awarded from the Original CPO Applications.

13. Mastercard submits that the Tribunal has a broad discretion as to costs and has shown itself more willing to make issues based costs orders than the High Court (see *CMA v Flynn Pharma Ltd* [2022] 1 WLR 2972, at [140]). That is borne out by the approach taken in *Neill v Sony*. On that basis, Mastercard submits that:

    (a) It should be awarded its costs for the discrete points on which it was successful, which it says were substantial. This includes:

        (i) The Revised Class Definition, which required significant and costly work from Mastercard, including both its legal and expert teams.

        (ii) The proposed use of scheme data to establish class membership, which was relegated to a backup or secondary method because of the practical issues identified by Mastercard.

    (b) The costs order should also reflect the late changes to the Class Representatives' expert methodology made in its Reply and thereafter.

    (c) It should also reflect the late introduction of the IFR argument on which the Class Representatives were ultimately successful.

14. Given that the Class Representatives should not recover costs of preparing the Revised CPO Applications and the costs of attending a hearing (which would have been required in any event), it is said to be likely that Mastercard is a net recipient, rather than a net payor, of costs.

15. Therefore Mastercard:

    (a) Seeks an award of 25% of its costs of the Revised CPO Applications.

(b) Submits that 75% of the costs of the Class Representatives prior to the CPO Response date should be costs in the case and the balance borne by the Class Representatives.

(c) Submits that otherwise the Class Representatives should bear their own costs.

(d) Seeks an interim payment on account of the sum in (a) above.

16. Responding to the Class Representatives' costs application, Mastercard notes the high level of costs claimed and the lack of alignment with the Class Representatives' litigation budgets. Mastercard advances various criticisms of the lack of detail content of the Class Representatives' costs schedules. Mastercard also advances an argument about the indemnity principle which is similar to that raised by Visa in relation to the opt-in proceedings.

17. In relation to the remaining costs of the Original CPO Applications, Mastercard seeks an award for all of its remaining costs and an enhanced payment on account. This is said to be justified because:

(a) The Revised CPO Applications differed significantly from the Original CPO Applications, including the abandonment of the case in relation to interregional cards.

(b) The point on which the Class Representatives were ultimately successful was not advanced in the Original CPO Applications at all.

(c) There were in any event only minor points on which the Class Representatives succeeded in the Original CPO Applications.

C. ANALYSIS

18. It is necessary to start with some observations about the level of the Class Representatives' legal costs. The sum put forward for the costs incurred in preparing the Revised CPO Applications and preparing for and attending the hearing of those

applications is £5,076,672.30[2]. This is an extraordinarily large amount, considering the tasks involved:

(a) The Revised CPO Applications were built on the foundations of the Original CPO Applications.

(b) While it can often be difficult and time consuming to adapt a document (as opposed to starting again), the primary task in this case was the removal of the claim relating to interregional cards from the applications, and the addition of the Revised Class Definition and some evidence about merchant identification. This should not have been a major exercise, given the work already done.

(c) The sheer size of the costs is, to adopt Mastercard's description, "astonishing". Just by way of one example among many, the number of partner hours said to have been spent on documents was 774, or the equivalent of twenty-two 35-hour weeks. It is difficult to understand how that level of work could have been necessary.

19. As it happens, and for reasons explained further below, it is not necessary at this stage to investigate further the apparent reasonableness of the overall figure. That should not be taken in any way as acceptance that the costs have been incurred reasonably and properly. As and when they are subject to any review for reasonableness, I would expect that to be done with considerable intensity.

20. In the meantime, however, it is apparent that there may be a serious problem in the way that the Class Representatives and their teams are managing the costs of the proceedings. It is plain therefore that some further oversight by the Tribunal of the costs management of the Class Representatives is required.

21. At the moment, the collective proceedings are in somewhat of a hiatus, while the outcomes of Trial 1 (liability) and Trial 2 (pass-on) in the Merchant Interchange Fee Umbrella Proceedings are awaited. The main current activity in which the Class

[2] This amount reflects various adjustments made in the further submissions and updated costs schedule received from the Class Representatives on 2 December 2024.It should also be noted that the figure includes a discount arising from the CFA arrangements, so the total amount incurred is in fact £6,959,208.30.

Representatives will be incurring costs is in the preparation for Trial 2B (acquirer pass on), which will take place in March 2025 and in which it has been ordered that they should participate.

22. As a first step in applying this greater oversight, I therefore direct that the Class Representatives should file a budget which deals with all incurred and anticipated costs between the date of the Judgment and the conclusion of Trial 2B. That should be done no later than 4 pm on 13 January 2025.

23. Turning to the issues between the parties, there are 4 questions to be determined:

(a) What should be the position for costs incurred before the CPO Response date?

(b) What should be the position for costs incurred after the CPO Response date?

(c) What should be done about the remaining costs from the Original CPO Applications?

(d) Should any further payments on account be ordered in favour of any party?

24. All parties accept that the Tribunal's approach under Rule 104 of the Tribunal Rules is to make an order that reflects the overall justice of the circumstances of the case: *Royal Mail Group Ltd v DAF Trucks Ltd & Ors* [2023] CAT 31, at paragraphs [32]-[36]. It is also generally accepted that the Tribunal has a broad discretion under Rule 104 to achieve that objective.

(1) Costs incurred before the CPO Response Date

25. It is the general practice of the Tribunal that costs incurred by a successful proposed class representative prior to the date of filing of any response objecting to the CPO application will be treated as being costs in the case, although the Tribunal may order an earlier date if it is shown that material costs were incurred in dealing with

objections from the proposed defendant prior to the response being filed[3]. Costs after the CPO Response date should be approached in the usual way by reference to the outcome and the discretion of the Tribunal to take into account other relevant factors. There are good reasons in principle for that approach:

(a) A proposed class representative needs to make an application which satisfies the Tribunal in relation to the criteria for making a collective proceedings order. These are largely set out in rules 78 and 79 of the Rules and, in practice in most cases, will require the submission of a reasonably substantial amount of material in order to allow the Tribunal properly to assess the application. These costs will therefore be incurred in any event by the proposed class representative and it seems right that any assessment of who should pay them should await the eventual outcome of the collective proceedings.

(b) However, once the proposed defendant has made a decision to contest a CPO application, it also seems right that there should be costs consequences of that decision. Contested CPO applications are expensive, as well as delaying the collective proceedings (if they are in due course certified). Proposed defendants should face a costs risk in making a decision to contest the CPO application and should feel the consequences if they are not successful.

(c) The natural date from which a proposed defendant should be on risk is usually the date on which they serve the response to the CPO application. It is normally only at that stage that the proposed class representative will be forced to incur material costs in responding to the decision of the proposed defendant to contest the application. In the event that there has been significant interaction between the parties prior to that date then there can be an adjustment made to reflect that.

26. I see no reason to depart in this case from the general practice. I do not accept the argument put forward by the Class Representatives that the backdrop of the Original CPO Applications changes the position. In my view, it was open to the Defendants to

[3] See for example *Neill v Sony* at [14], *Le Patourel (Consequential Matters)* [2021] CAT 32 at [6]; *Gutmann* at [43]; *McLaren (Consequentials Ruling)* [2022] CAT 18 at [26]-[28]

decide not to oppose the Revised CPO Applications and, if they had taken that approach, there would have been no reasonable basis to require them to pay the Class Representatives' costs of preparing the Revised CPO Applications. The fact that the Defendants did decide to contest the Revised CPO Applications should not change that position.

27. It may well be that the Defendants could have been more helpful in providing the Class Representatives with certain information about merchant identification, which might have caused the Class Representatives to save costs. However, the Defendants were under no obligation to do that, and it is quite a different circumstance from one where a proposed defendant materially increases a proposed class representative's costs in an active way prior to the CPO response.

(2) Costs incurred after the CPO Response Date

28. There can be no serious question about the outcome of the revised CPO Applications – the Class Representatives were the successful parties and the Defendants were unsuccessful. It follows that, from the CPO Response date, the Defendants should be responsible for the Class Representatives' reasonable costs, subject to:

(a) Any issues in respect of which the Tribunal determines that the Class Representatives should not recover their costs, notwithstanding their overall success.

(b) An amount which represents the costs which the Class Representatives would need to incur in any event in order to satisfy the Tribunal that the Revised CPO Applications should be granted.

(a) Issues in respect of which the Class Representatives should not recover their costs

29. In my judgment the Class Representatives should not recover their costs relating to the Revised Class Definition. This argument was fundamentally flawed and that should have been plain to the Class Representatives from the CPO Responses. It does

therefore seem appropriate to make a deduction from the Class Representatives' recoverable costs to reflect their failure on this issue.

30. It is probably correct that this issue was a relatively small one, in terms of the amount of time expended by the Class Representatives in their preparation for the hearing of the Revised CPO Applications and the time spent at the hearing. The Class Representatives suggest 5%, while the Defendants argue for much greater proportions (Visa suggests 50%, the actual amount put forward by Mastercard is unclear). In my view the appropriate figure is 10% of the Class Representatives' costs after the CPO Response Date, which should be treated as referrable to the Revised Class Definition issue and should not be recoverable.

31. Both Visa and Mastercard seek payment of their own costs in relation to the Revised Class Definition issue. I do not consider that appropriate, given that:

    (a) The Class Representatives were overall the successful party.

    (b) It is possible to deal with the relatively small costs consequences of the Revised Class definition issue by refusing the Class Representatives recovery of their costs.

    (c) That in my judgment is a fair outcome which reflects the relative successes and failures of the parties.

32. Visa and Mastercard also seek deductions from the recoverable costs of the Class Representatives (and, in Mastercard's case, an award of costs in their favour), in relation to other issues such as the witness and documentary evidence dealing with the statements provided to merchants, the attempts to rely on the data available from the Visa and Mastercard schemes and the work arising from the changes to the Class Representatives' case after the CPO Responses were served, including the late introduction of arguments about the effect of the IFR.

33. In my view those are not discrete issues which can or should be separated from the issues on which the Class Representatives were successful, and therefore no separate treatment of these costs is warranted.

(b) Costs that would have been incurred in any event

34. The Class Representatives suggest a deduction of 15% to represent the costs that would be incurred in any event in the hearing of the Revised CPO Applications. Visa suggests that a deduction of 35% would be more appropriate. Mastercard take a more extreme position and argue that the Class Representatives should bear all of their costs of the Revised CPO Applications (and that Mastercard should receive an award of costs, as described above).

35. In *Neill v Sony* the Tribunal reviewed the previous practice of the Tribunal in relation to this question. It noted that the assessment is ultimately one which turns on the particular circumstances of the case. In these proceedings, there are some specific and unusual aspects which are relevant to the assessment. The hearing of the Revised CPO Applications followed a failed attempt by the Class Representatives to obtain certification. On the one hand, that meant that all parties and the Tribunal had already traversed the subject matter by the time of the hearing of the Revised CPO Applications, arguably leading to some efficiency in the matters the Tribunal needed to consider. For example, the background of the Class Representatives and their suitability to represent the class.

36. On the other hand, the mere fact of the failure at the first attempt and the obvious defects in the way in which the Revised CPO Applications were put forward (for example, the pleading issues relating to the class definition) indicate that the robust scrutiny of the Tribunal was always going to be required, and probably to a greater level than would normally be the case.

37. My assessment is that the proportion of costs which would have been incurred in any event, absent the CPO Responses, is fairly substantial, in the order of 30%. That amount should therefore be deducted from the Class Representatives' costs which are recoverable from the Defendants following the CPO Response Date and should be treated as costs in the case. The 30% deduction does not include the 10% deduction I have ordered in relation to the Revised Class Definition issue, which should be an additional deduction from the costs recoverable by the Class Representatives from the Defendants.

(3) The remaining costs of the Original CPO Applications

38. In relation to the remaining costs from the Original CPO Applications, the background is that the Tribunal reserved a portion of the costs from the Original CPO Applications (which were otherwise awarded to the Defendants) against the possibility that some of the costs of the Original CPO Applications might, once the Revised CPO Applications had been determined, be seen to warrant no order for costs.

39. I agree with the Class Representatives that there are some matters which did not need to be traversed again in relation to the Revised CPO Applications and which were therefore usefully incurred in the pursuit of a successful outcome by the Class Representatives. Most notable among these is the argument about the relative suitability of the proposed collective proceedings compared with the Umbrella Proceedings, which was substantially resolved in the Class Representatives' favour at the hearing of the Original CPO Applications.

40. This issue was the subject of a significant amount of evidence and written submission and occupied a significant amount of time at the original hearing. My assessment is that this matter and other more minor issues which may fall into this category will have occupied in the region of 10% of the costs which the parties will have incurred up to and including the original hearing.

41. I therefore order that the Original Applications Costs Order should be varied at [1] to provide that Defendants should recover 90% of their reasonable costs, to be assessed if not agreed, in relation to the Original CPO Applications

(4) Payments on account

42. There are two aspects to this issue:

    (a) Whether the Class Representatives should be entitled to a payment on account in respect of the costs awarded to them in relation to the Revised CPO Applications.

(b) Whether the Defendants should be entitled to a further payment on account, to reflect the concluded view of the Tribunal as to the costs recoverable by them in relation to the Original CPO Applications.

(a) Payment on account for the revised CPO Application costs

43. In relation to the costs of the Revised CPO Applications, two practical issues arise:

(a) First, the sheer size of the Class Representatives' costs creates real difficulty in making a determination of the reasonable costs likely to be determined on detailed assessment, with an appropriate margin to allow for an overestimate (the test from *Excalibur,* which all parties agree is applicable).

(b) Secondly, the Defendants have advanced arguments about the application of the indemnity principle to the opt-in collective proceedings, which they say means that a costs award in principle can be made but no payment should be ordered until the outcome of the collective proceedings is known. If correct, it is assumed that this would apply to half of the Class Representatives' costs.

44. I am not prepared to make an order for a payment on account in relation to the opt-in proceedings in these circumstances. The issue about the indemnity principle appears to be a complex one, and I would wish to hear oral argument about it before making any determination.

45. As regards the opt-out proceedings, the size of the Class Representatives' costs means that it is very difficult to assess the reasonable sum which amounts to an estimate of the likely level of recovery, subject to an appropriate margin of error (the *Excalibur* test). It is necessary to make a very substantial deduction from the level at which a payment on account might usually be made, to reflect the (it seems to me, highly likely) possibility that the Class Representatives' costs may be substantially reduced on assessment. At this stage, there has been relatively little said by the Class Representatives about the reasons for the extent of their costs and by way of justifying what otherwise look like extremely high numbers.

46. I consider that the appropriate sum for an interim payment at this stage is 20% of the Class Representatives' costs of the opt-out proceedings after the CPO Response date and after the deductions which I have ordered in this judgment. Given that the costs of the opt-out proceedings are said to be 50% of the total costs incurred by the Class Representatives, that means that the Class Representatives should receive an interim payment of 20% of the sum of £639,830.84 (that is £2,132,769.47, being the total opt-out costs after the CPO Response date, divided in half and with a 40% deduction then being applied). The interim payment which the Class Representatives should receive is therefore £127,966.17, to be paid in equal shares by Visa and Mastercard.

47. I therefore order that the Defendants should make an interim payment on account of the Class Representatives' costs of the opt-out proceedings after the CPO Response date, by each of Visa and Mastercard paying the sum of £63,983.10 to the Class Representatives within 21 days of the date of this judgment.

48. I also order that the application by the Class Representative for a payment on account of the costs of the opt-in proceedings should be adjourned, so that it may be renewed at the next suitable in-person hearing before the Tribunal if the Class Representatives so wish.

(b) Further payment on account for the original CPO Applications

49. In the Original Applications Costs Order, the Tribunal ordered that an interim payment on account of the costs of the original CPO Applications should be made in the sum of 45% of the Defendants' costs in their respective costs schedules. Given that it is now possible to identify the full entitlement of the Defendants to their costs (being 90% of their reasonable costs, as identified above), it is appropriate to increase the level of payment on account. In my judgment an overall sum of 55% (being an additional sum of 10% of the Defendants' costs as shown in their costs schedules over and above the amount awarded in the Original Applications Costs Order) should be paid by the Class Representatives to the Defendants, such payment to be made within 21 days of the date of this judgment.

D. CONCLUSIONS

50. For the foregoing reasons, I order that:

(a) The Class Representatives' costs of and incidental to the preparation of the revised CPO Applications up to and including the CPO Response date are to be costs in the case.

(b) The Class Representatives' costs of and incidental to the preparation of the revised CPO Applications after the CPO Response date should be payable by the Defendants on a standard basis, such costs to be assessed if not agreed, subject to:

(i) A deduction of 30% to reflect costs which would have been incurred in any event, which costs should be costs in the case.

(ii) A further deduction of 10% to reflect the Revised Class definition issue, which costs should not be recoverable in any event.

(c) The Original Applications Costs Order is varied at [1] to provide that Defendants should recover 90% of their reasonable costs, to be assessed if not agreed, in relation to the Original CPO Applications.

(d) The Class Representatives should make to each of the Defendants a further interim payment, on account of the costs awarded in the Original Applications Costs Order, in the sum of 10% of the Defendants' costs in their respective costs schedules, such payment to be made within 21 days of the date of this judgment.

(e) The Defendants should make an interim payment on account of the Class Representatives' costs of the opt-out proceedings after the CPO Response date, by each of Visa and Mastercard paying the sum of £63,983.10 to the Class Representatives within 21 days of the date of this judgment.

(f) The application by the Class Representatives for a payment on account in respect of the opt-in proceedings shall be adjourned pending a hearing of the

indemnity principle issue, to be included on the agenda for a future CMC if the Class Representatives wish to pursue the application further.

(g) The Class Representatives should, by 4 pm on 13 January 2025, file a budget which deals with all incurred and anticipated costs between the date of the Judgment and the conclusion of Trial 2B.

Ben Tidswell Made: 2 January 2025

Chair of the Competition Appeal Tribunal Drawn: 6 January 2025