



Neutral Citation Number: [2018] EWCA Civ 2527

Case No: C3/2017/2778

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION TRIBUNAL
Mr Justice Roth (President), Professor Colin Mayer CBE and Ms Clare Potter
[2017] CAT 16

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 November 2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HAMBLÉN
and
LORD JUSTICE COULSON

Between :

WALTER HUGH MERRICKS CBE

Appellant

- and -

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

Respondents

Case No: CO/5003/2017

AND IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Between :

THE QUEEN on the application of
WALTER HUGH MERRICKS CBE

Applicant

- and -

THE COMPETITION APPEAL TRIBUNAL
- and -

Respondent

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

Interested
Parties

Mr Paul Harris QC, Ms Marie Demetriou QC, Ms Victoria Wakefield and Ms Emma
Mockford (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf
of the Appellant/Applicant

Mr Mark Hoskins QC, Mr Matthew Cook, Mr Hugo Leith and Mr Jon Lawrence (instructed
by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Respondents/Interested
Parties

Hearing date : 31 October 2018

Judgment Approved

Lord Justice Patten :

1. As a result of amendments introduced by the Consumer Rights Act 2015 (“CRA”) it is now possible to bring collective proceedings in the Competition Appeal Tribunal (“the Tribunal”) for damages and other relief arising out of an infringement of the prohibitions contained in ss.2 and 18 of the Competition Act 1998 (“the CA”) (anti-competitive agreements affecting trade within the UK and abuse of dominant position) and those imposed by Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”).
2. The power to bring collective proceedings is contained in s.47B of the CA which provides as follows:
 - “(1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies (“collective proceedings”).
 - (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.
 - (3) The following points apply in relation to claims in collective proceedings—
 - (a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings,
 - (b) the proceedings may combine claims which have been made in proceedings under section 47A and claims which have not, and
 - (c) a claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim.
 - (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.
 - (5) The Tribunal may make a collective proceedings order only—
 - (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
 - (b) in respect of claims which are eligible for inclusion in collective proceedings.
 - (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.

(7) A collective proceedings order must include the following matters—

(a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,

(b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and

(c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).

(8) The Tribunal may authorise a person to act as the representative in collective proceedings—

(a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a “class member”), but

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

(9) The Tribunal may vary or revoke a collective proceedings order at any time.

(10) “Opt-in collective proceedings” are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.

(11) “Opt-out collective proceedings” are collective proceedings which are brought on behalf of each class member except—

(a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and

(b) any class member who—

(i) is not domiciled in the United Kingdom at a time specified, and

(ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.

(12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified.

(13) The right to make a claim in collective proceedings does not affect the right to bring any other proceedings in respect of the claim.

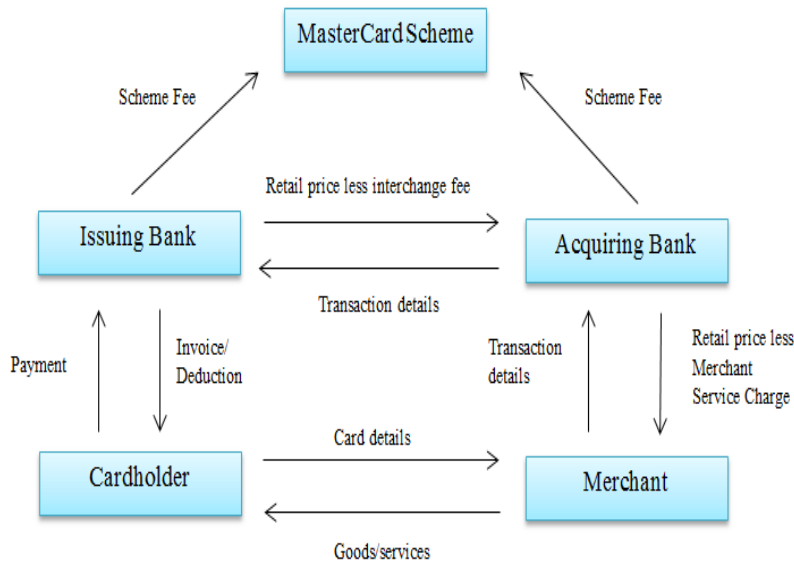
(14) In this section and in section 47C, “specified” means specified in a direction made by the Tribunal.”

3. As appears from s.47B(1), collective proceedings may be issued in respect of two or more claims falling under s.47A and therefore may include both follow-on and stand-alone claims. But, in order to continue as collective rather than individual proceedings, the proposed representative must obtain a collective proceedings order (“CPO”) under s.47B(4) which can only be granted if the eligibility conditions set out in s.47B(6) are satisfied. This therefore provides a filtering mechanism which is designed to ensure that what would otherwise be individual claims for infringement are suitable to be continued to trial on a collective basis. The obtaining of a CPO is likely in many of these cases to be a critically important decision for both claimants and defendants because it may determine whether any infringement proceedings are possible at all. Individual claimants (particularly if members of the public rather than commercial organisations) are unlikely to be able or willing to fund the cost of proceedings in order to obtain what may be relatively modest compensation. But the damages payable to a large class of claimants may enable funding to be obtained and make the claim both financially viable and worthwhile. Conversely the costs of significant collective proceedings will be a considerable burden for the defendants and an assessment of suitability is therefore called for at an early stage.
4. The present proceedings are no exception. They arose from a decision of the European Commission of 19 December 2007 concerning multilateral interchange fees (“MIFs”) charged in respect of cross-border and some domestic transactions. Mr Merricks, as the proposed representative, has issued a collective proceedings claim form against the three relevant companies in the Mastercard group in which he seeks an aggregate award of damages and interest totalling some £14.098bn on behalf of all individuals who had been over 16 years of age and resident in the UK for a continuous period of at least 3 months and who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK who accepted Mastercard cards. This is estimated to be some 46.2m people.
5. The background to the claim was summarised by the Tribunal (Roth J; Professor Colin Mayer CBE and Clare Potter) in its decision of 21 July 2017 ([2017] CAT 16) in these terms:

“8. Mastercard operates what is commonly known as a four party payment card scheme, since payments made under the scheme generally involve four parties: (1) a cardholder; (2) the cardholder’s bank (known as the “Issuing Bank”); (3) a merchant; and (4) the merchant’s bank (known as the “Acquiring Bank”). Issuing and Acquiring Banks are licensed by

Mastercard. They must pay fees to Mastercard to participate in the scheme and comply with the Mastercard Scheme Rules.

9. The scheme operates on a contractual basis as between all four parties, and in addition Mastercard as the scheme operator, which may be represented diagrammatically as follows:



10. In order to pay for goods or services using Mastercard, the cardholder presents his or her card to the merchant. Details of the transaction are passed by the merchant to its Acquiring Bank, and then by the Acquiring Bank to the cardholder’s Issuing Bank. In the case of credit cards, the Issuing Bank sends an invoice to the cardholder, typically on a monthly basis, and the cardholder either pays the whole of that invoice or takes advantage of further credit under the terms of his or her arrangement with the Issuing Bank. In the case of debit cards, the Issuing Bank deducts the amount chargeable to the cardholder for the transaction from the balance in the cardholder’s account. In the meantime, the Issuing Bank transmits payment to the Acquiring Bank, less a transaction fee known as the interchange fee (“IF”). The Acquiring Bank in turn generally deducts the amount of the IF, along with a fee for its acquiring services, from the payment it makes to the merchant. The total deduction made by the Acquiring Bank from the amount paid to the merchant is called the merchant service charge (“MSC”). However, the IF accounts for the vast majority of the MSC.

11. The Issuing Bank and the Acquiring Bank may have bilaterally agreed the level of IF that will apply to transactions between them, or in some cases they may be the same bank. But except for those situations, the level of the fee defaults to one set

by Mastercard. This default fee is known as the multilateral interchange fee: the MIF.

12. Different MIFs apply for different territories and card types. As to the territorial aspect, it is important for present purposes to note that:

- (i) where a card issued in one EEA Member State is used at a merchant based in a different EEA Member State, a cross-border MIF applies. This is the EEA MIF referred to above which was the subject of the EC Decision;
- (ii) where a card issued in the UK is used to pay a merchant based in the UK, the domestic UK MIF applies. We were told that around 95% of the value of the present claim is based on the UK MIF; and
- (iii) outside of the EEA, where a card is used at a merchant based in a different global region from the Issuing Bank, for example if a US tourist uses a card issued by a US bank to make purchases in London, a different cross-border MIF applies.

13. As already mentioned, the EC Decision held that the setting of the EEA MIF by Mastercard constituted a decision of an association of undertakings. The EEA MIF was found, in effect, to set a minimum price which merchants had to pay to their Acquiring Bank for accepting Mastercard branded consumer credit and charge cards and Mastercard or Maestro branded debit cards. On that basis it had the effect of inflating the base on which Acquiring Banks set their MSC charged to merchants, thereby restricting competition between Acquiring Banks to the detriment of merchants (and subsequent purchasers). It was held that in the absence of the EEA MIF, the MSC set by Acquiring Banks would be lower both for cross-border transactions and for domestic transactions in those Member States where no separate domestic MIF had been agreed or where local banks had specifically agreed to adopt the EEA MIF. Further, some banks viewed the EEA MIF as a benchmark for setting domestic IFs. The EEA MIF was not objectively necessary, since a payment system such as Mastercard's could operate without a MIF. The EC Decision stated, at recital para 411:

“A further consequence of this restriction of price competition is that customers making purchases at merchants who accept payment cards are likely to have to bear some part of the cost of MasterCard's MIF irrespective of the form of payment the customers use. This is because depending on the competitive situation merchants may increase the

price for all goods sold by a small margin rather than internalising the cost imposed on them by a MIF.”

14. The infringement was found to last from 22 May 1992 until the date of the EC Decision (i.e., 19 December 2007), and Mastercard was directed to bring it to an end within six months.

15. Since the appeals before the European Courts against the EC Decision have been dismissed, that decision is binding on the Tribunal: sect 58A CA.”

6. The collective proceedings in this case are brought on an opt-out basis (see s.47B(11)) and are follow-on claims based on the finding that at least some part of the MIF costs was passed by the merchants to consumers. As mentioned above, the proposed representative seeks an aggregate award of damages representing the loss suffered by the class as a whole and not individual awards in respect of each class member who remains within the action. An award of this kind is provided for under s.47C(2) and (3) of the CA as follows:

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

(3) Where the Tribunal makes an award of damages in opt-out collective proceedings, the Tribunal must make an order providing for the damages to be paid on behalf of the represented persons to—

(a) the representative, or

(b) such person other than a represented person as the Tribunal thinks fit.”

7. The proposed representative’s position is that a top-down method of calculating the level of pass-through of MSC to consumers (based on a weighted average pass through) does provide an acceptable means of calculating the loss suffered by the members of the represented class as a whole even if it could not be used to produce a precise calculation of the loss incurred by each and every member of that class in terms of their own level of spend. It is therefore a legitimate basis for the calculation of an aggregate award of damages. Once that award is calculated and made then it stands as the award of damages in the collective proceedings and the proposed representative’s position is that Mastercard has no further locus to contest the basis on which it is distributed. The award is compensation for the loss suffered by the group as a whole and once the award is determined the requirement to compensate loss has therefore been satisfied. The distribution of the aggregate award is a matter for the Tribunal to supervise and determine on a pragmatic basis which recognises the near impossibility in consumer claims of this kind of making a precise calculation of loss in each individual case. Any part of the damages not claimed by members of the represented class becomes payable to charity: see s.47C(5).

8. Mastercard's response at the hearing before the Tribunal was that an award of aggregate damages in this case would be inimical to the compensatory principle; i.e. the restoration of the members of the represented class to the position they would have been in but for the breach. It was necessary to start with the individual losses of the claimants and then to consider how they might sensibly be aggregated. There would be vast differences in the losses suffered by individual members of the class due in part to variations in their purchasing history. The proposed distribution mechanism was also inimical to the compensatory nature of damages because the amounts received would bear no reasonable relationship to their actual loss.
9. The proposed representative applied to the Tribunal for a CPO and supported his application with expert evidence from Dr Cento Veljanovski and Mr David Dearman. A three-day hearing took place before the Tribunal in January 2017 during which the expert witnesses were cross-examined and the Tribunal heard extensive oral submissions about the evidence and the approach which it should adopt to the evaluation of the eligibility criteria contained in s.47B(6). In its reserved judgment the Tribunal accepted that the two contentious issues relevant to whether the claims were suitable to be brought by collective proceedings were pass-through and distribution. On pass through, it accepted that the Tribunal should be guided by the approach to methodology adopted by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp.* [2013] SCC 57. The courts in Canada have been dealing with class actions of this kind for about 25 years and there are a number of reported decisions relevant to the approach to be taken in assessing suitability and, perhaps more importantly, as to the level of information and certainty about the expert methodology which needs to be demonstrated at what they refer to as the certification stage.
10. The Tribunal in this case said (at [67]) that even though the claim was for an aggregate award of damages, it was:

“... necessary to consider whether in practice the Applicant has put forward (1) a sustainable methodology which can be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages, and (2) a reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution.”
11. It accepted that the calculation of global loss through a weighted average pass-through put forward by Mr Merrick's experts in their oral evidence was methodologically sound:

“77. ... But making every allowance for the need to estimate, extrapolate and adopt reasonable assumptions, to apply that method across virtually the entire UK retail sector over a period of 16 years is a hugely complex exercise requiring access to a wide range of data. We certainly would not expect that analysis to be carried out for the purpose of a CPO application, but a proper effort would have had to be made to determine whether it is practicable by ascertaining what data is reasonably available. Given the massive size of the claim, a difference of even 10% in the average pass-through rate makes a very substantial difference in financial terms.

78. Accordingly, applying the *Microsoft* test (para 58 above), we are unpersuaded on the material before us that there is sufficient data available for this methodology to be applied on a sufficiently sound basis. It follows that we are not satisfied, and indeed very much doubt, that the claims are suitable for an aggregate award of damages: see rule 79(2)(f).

12. On distribution the Tribunal said:

“79. If the total loss could be calculated in the aggregate manner discussed above, it is nonetheless necessary to consider how that would translate into determination of the level of individual loss. That is particularly important since, as we have pointed out, the proposed methodology does not really go to determination of a common issue to the individual claims, but in a sense circumvents the problem of an issue which is not common by seeking to go directly to determination of a total sum for all claims. Such an approach can only be permissible, in our view, if there is then a reasonable and practicable means of getting back to the calculation of individual compensation.

...

84. The problem in the present case is that there is no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated according to the Applicant’s proposed method. The ‘broad axe’ which the Applicant seeks to deploy is not being used as a means to estimate actual compensatory loss at all.

...

86. Professor Mayer asked the experts whether household expenditure data could be used to show the distribution of individual expenditure and how it changed over time; so that then one could assess whether the majority of the class on average incurred a loss which is at least 50% of the damages they would receive on the annualised per capita distribution being proposed. In response, the experts said that they had not considered this: it was not being proposed on behalf of the Applicant and they thought that it would be extremely difficult. Since no analysis, or even argument, was presented on that basis, it is impossible for us to assess whether even this very basic test would be satisfied by the proposed distribution. That is aside from the question whether this test would be appropriate for determination of compensatory damages as a matter of law.

87. This cannot be dismissed as a “mere” question of distribution, to be addressed only after an aggregate award has been determined. First, it is largely because of the methodology of seeking to calculate the loss on a top-down, aggregate basis,

and not on the basis of a common issue concerning loss suffered by each member (or most members) of the class, that the fundamental problem arises. As a result, if, hypothetically, a million people opted out of the proceedings, there would be no proper way of reducing the quantum of damages accordingly (and, conversely, of increasing it if a large number of people now domiciled outside the UK sought to opt in): it would simply lead to everyone in the class getting more (or less) money out of the total pot.

88. Secondly, even if it were possible to determine with some broad degree of accuracy the weighted average for pass-through and thus to estimate the aggregate loss for the class each year, it is the significance of the individual issues remaining which mean that it is impossible in this case to see how the payments to individuals could be determined on any reasonable basis. As we have explained above, there are three sets of issues which are relevant: individuals' levels of expenditure; the merchants from whom they purchased; and the mix of products which they purchased. There is no attempt to approximate for any of those in the way damages would be paid out. The governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in but for the breach. The restoration will often be imprecise and may have to be based on broad estimates. But this application for over 46 million claims to be pursued by collective proceedings would not result in damages being paid to those claimants in accordance with that governing principle at all.

89. Accordingly, in our judgment, these claims are not suitable to be brought in collective proceedings as required by sect 47B(6) CA. It follows that the Tribunal cannot make a CPO in this case: sect 47B(5)(b) CA."

13. I have attempted so far to summarise the principal issues between the parties as to whether the eligibility criteria have been met and the way in which the Tribunal dealt with them in refusing to make the CPO. I should emphasise for reasons which will become apparent in a moment that this analysis is provided simply as a description of the background and is not intended to be an exhaustive summary of every matter in dispute or of the parties' detailed arguments in relation to them. The refusal by the Tribunal to make a CPO is now challenged by proposed representative on a number of grounds. These include what are said to be the following errors of law:
- (i) the application of too stringent a test to the determination of whether the data relevant to the calculation of pass-through was sufficient for the grant of a CPO;
 - (ii) its holding that distribution of the aggregate award of damages must be compensatory on an individual basis and that this could not be calculated even on an approximate basis by the methodology proposed by the proposed representative's expert witnesses; and

- (iii) its determination that the issue of pass-on of MSC was not a common issue.
14. There are also issues raised about procedural unfairness at the CPO hearing and an application has been made to admit further expert evidence as to the availability of data which is opposed.
15. In deciding to bring these challenges to the Tribunal's decision the proposed representative was faced with something of a procedural dilemma. Section 49 of the CA provides (so far as material):

“(1) An appeal lies to the appropriate court—

(a) from a decision of the Tribunal as to the amount of a penalty under section 36; and

(c) on a point of law arising from any other decision of the Tribunal on an appeal under section 46 or 47.

(1A) An appeal lies to the appropriate court on a point of law arising from a decision of the Tribunal in proceedings under section 47A or in collective proceedings—

(a) as to the award of damages or other sum (other than a decision on costs or expenses), or

(b) as to the grant of an injunction.

(1B) An appeal lies to the appropriate court from a decision of the Tribunal in proceedings under section 47A or in collective proceedings as to the amount of an award of damages or other sum (other than the amount of costs or expenses).

(1C) An appeal under subsection (1A) arising from a decision in respect of a stand-alone claim may include consideration of a point of law arising from a finding of the Tribunal as to an infringement of a prohibition listed in section 47A(2).”

16. In the Guide To Proceedings (2015) published by the Tribunal, which has the status of a practice direction, the effect of these provisions in s.49 is summarised as follows:

“6.91 Section 49 of the 1998 Act deals with appeals against Tribunal decisions in collective proceedings. Such appeals are limited to:

- points of law arising from a decision of the Tribunal as to:

(i) an award of damages or other sum (other than a decision on costs or expenses);

(ii) the grant of an injunction; or

(iii) infringement findings in stand-alone claims; and

- decisions as to the amount of an award of damages or other sum.

6.92 However, there is no statutory provision for appeals against the Tribunal's decision on an application for a CPO. Therefore, any challenge to such decisions can only be brought by way of judicial review."

17. The proposed representative therefore issued an Appellant's Notice in this Court seeking permission to appeal but then also issued proceedings seeking judicial review of the Tribunal's decision to refuse the CPO on essentially the same grounds. Quite apart from the issues raised by the judicial review claim form and the Appellant's Notice, the parties are divided on the jurisdictional issue of whether the proposed representative has a right of appeal to this Court against the Tribunal's CPO decision on a point of law or whether, as the Guide suggests, it must bring that challenge by way of judicial review. We have therefore heard argument on this preliminary issue about jurisdiction and have given directions for a rolled up hearing of either an application for permission to appeal or an application for permission to seek judicial review depending on the outcome of this preliminary issue. The Tribunal was asked to grant permission to appeal but in a ruling on 28 September 2017 ([2017] CAT 21) held that it had no jurisdiction to do so.
18. The dispute about the jurisdiction of this Court to entertain an appeal on a point of law from a decision of the Tribunal refusing to make a CPO centres on s.49(1A) of the CA. It is common ground that the decision in question is not within the terms of s.49(1B) (which is limited to a decision in collective proceedings about the amount of an award of damages) or s.49(1C) which relates to stand-alone claims where the Tribunal is required to make a finding not only about quantum but also about liability. But both these sub-sections are relevant to understanding and determining the structure of s.49 and, as part of that, the scope of s.49(1A).
19. Put shortly, the question of jurisdiction turns on the meaning and effect of the words "as to the award of damages" in s.49(1A)(a). The decision of the Tribunal not to make a CPO was clearly "a decision of the Tribunal ... in collective proceedings" within the first part of s.49(1A). As explained earlier, Mr Merricks commenced the collective proceedings when he issued the collective proceedings claim form and the scheme of s.47B is that collective proceedings so commenced continue at least up to the point when the Tribunal decides whether to make a CPO. If the CPO is made then the collective proceedings continue (subject to further order): see s.47B(4), (9). But if the order is refused, the Tribunal has the power to stay the collective proceedings leaving individual claimants with the option of taking follow-on proceedings in their own name.
20. The case for the proposed representative on jurisdiction is that the words "as to the award of damages" in s.49(1A)(a) are merely descriptive of the nature of the claim made in the collective proceedings and do not limit the right of appeal to a decision whether or not to award damages made at the trial. Section 49(1A) therefore confers on the parties a right to appeal in effect against any decision of the Tribunal made in s.47A or in collective proceedings other than ones on costs or expenses which are expressly excluded by the words in parenthesis. In the alternative, Ms Demetriou QC submits that, even on a narrower reading of s.49(1A)(a), the decision of the Tribunal to refuse to make a CPO was a decision in collective proceedings as to the award of damages

because it had the effect of barring the claim to an aggregate award of damages under s.47C(2) which was the only type of relief sought in the collective proceedings and is not, of course, otherwise obtainable.

21. The position of Mastercard, again shortly stated, is that the words “as to the award of damages” limit the right of appeal either to a trial decision refusing to make an award of damages or an interlocutory decision made on an application to strike out or for summary judgment either dismissing or refusing to dismiss the claim. The right of appeal does not, it is said, extend to a decision refusing to make a CPO because that leaves individual claims under s.47A intact and does not therefore bar the claim to an award of damages. This argument was accepted by the Tribunal when it held that it had no jurisdiction to grant permission to appeal. The Tribunal said (at [13]-[14]):

“13. ... Contrary to what the Applicant states at para. 18(c) of the Application, it is not “a rejection of the claim for damages under section 47A”. The Tribunal has made no determination as regards the individual claims for damages under section 47A. The decision refusing a CPO is a decision either that the proposed class representative should not be authorised or, as in the present case, that the conditions for combining the individual claims in collective proceedings as proposed do not satisfy the requirements of sect. 47B(6) CA.

14. The introduction of a regime for collective proceedings (sects. 47B-47C) and for collective settlements (sects. 49A-49B) involved major changes to the CA. It appears indisputable that the novel form of decision by the Tribunal making or refusing an order approving a collective settlement under sect. 49A(1) or 49B(1) is not susceptible to appeal, although such a decision may undoubtedly be very significant for the parties. Having regard to the structure and framing of the reformulated sect. 49 CA, we consider that if the legislature had intended that the novel form of decision by the Tribunal making or refusing a CPO should be subject to appeal, the section would have included express provision enabling an appeal to the appropriate court from a decision as to the grant of a collective proceedings order.”

22. The provisions of s.49 of the CA have changed over time as the jurisdiction of the Tribunal has increased. As originally enacted, s.49(1) granted a general right of appeal “on a point of law arising from a decision of an appeal tribunal” or from a decision as to the amount of a penalty. Between July 2004 and September 2015 (in the period pre-dating the introduction of collective proceedings) s.49(1) was in the following terms:

“49 Further appeals

(1) An appeal lies to the appropriate court –

(a) from a decision of the tribunal as to the amount of a penalty under section 36;

(b) from a decision of the tribunal as to the award of damages or other sum in respect of a claim made in proceedings under section 47A or included in proceedings under section 47B (other than a decision on costs or expenses) or as to the amount of any such damages or other sum; and

(c) on a point of law arising from any other decision of the tribunal on an appeal under section 46 or 47.

(2) An appeal under this section-

(a) may be brought by a party to the proceedings before the Tribunal or by a person who has a sufficient interest in the matter; and

(b) requires the permission of the Tribunal or the appropriate court.

(3) In this section” the appropriate court” means the Court of Appeal or, in the case of an appeal from Tribunal proceedings in Scotland, the Court of Session.”

23. Section 47B then provided for “consumer claims” which were s.47A claims brought by certain specified bodies on behalf of the individual claimants. It did not, however, provide for an aggregate award of damages: see s.47B(6). In *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2009] EWCA Civ 647 this Court had to consider a challenge to its jurisdiction in relation to a decision of the tribunal refusing to strike out part of a follow-on claim under s.47A. It was conceded by the defendant that had the claim been struck out, the defendant would have been entitled to appeal on a point of law under s.49(1)(b) as it then was. But the defendant submitted that a decision not to strike out was not “a decision of the Tribunal as to the award of damages”. The Court rejected that submission. In my judgment (with which the other two members of the Court concurred), I said:

“[23] The question is whether the rejection of a r 40 application to strike out a claim is a decision “as to the award of damages or other sum” under s 47A. Mr Beard accepts that a decision to strike out such a claim would be a decision as to the award of damages because it would amount to a rejection of the claim. But a refusal to strike out does no more than to leave the pleaded claim intact and to allow it to proceed to an adjudication at a full hearing. He therefore submits it is not a decision as to the award of damages because it is not determinative of the claim.

[24] I think that this is too literal an approach to the construction of s 49(1). The reference in it to a decision of the tribunal “as to the award of damages or other sum in respect of a claim made in proceedings under section of 47A” is simply descriptive of the type of relief available in such claims. It is not in my view intended to limit the disappointed party's right of appeal to decisions of the tribunal either awarding or refusing an award of

damages following a full hearing. As mentioned earlier, Mr Beard accepts that the wording is apt to include an interlocutory determination under r 40 that a s 47A claim to damages should be struck out and it seems to me that that concession is rightly made. However, it is difficult to believe that Parliament intended an unsuccessful Claimant to be able to appeal against the dismissal of his claim after a full hearing but not to do so against its dismissal under r 40. Once one accepts that the wording of s 49(1) is wide enough to cover a r 40 determination against the viability of the claim it is hard to identify any linguistic or policy barrier to the inclusion of a decision to the opposite effect. In my view, the language of the subsection covers both.”

24. What is now s.49(1A) adopts much of the terminology used in s.49 prior to the amendments made by the CRA. The differences are that appeals on quantum are now dealt with separately in s.49(1B) and liability in stand-alone claims in s.49(1C). But s.49(1A) continues to use the phrase “a decision of the Tribunal as to the award of damages” and there is nothing in the structure or terminology of s.49(1A) which suggests that it was intended to be given a more restricted meaning. What has changed is the inclusion in the opening words of s.49(1A) of a reference to collective proceedings so that the words in dispute now govern both s.47A and collective proceedings and must be given effect accordingly.
25. The concession by Mr Hoskins QC on behalf of the Defendants that s.49(1A)(a) would extend to both the grant or refusal of an application to strike out is necessitated by the decision in *Enron*. But that decision, he submits, is limited to saying that a “decision as to the award of damages” can include a strike out decision because that involves a determination of the viability of the claim. A decision whether or not to grant a CPO is purely procedural in character and, as the Tribunal accepted, does not bar individual s.47A claims. It merely determines whether or not those claims should proceed individually or on a collective basis.
26. I accept, of course, that the Court in *Enron* was only concerned to decide whether s.49(1)(b) as it then was extended to a decision not to strike out a s.47A claim. It was not necessary in that case to decide whether the right of appeal extended to any interlocutory decision. A strike out decision, whether positive or negative, is a decision on the arguability of the claim and must be a decision as to the award of damages.
27. The present case is said to be of a different kind because it does not address the viability of the underlying claims. But it is, in my view, nonetheless a decision in collective proceedings as to the award of damages within the meaning of s.49(1A)(a). The refusal of a CPO is a determination by the Tribunal that the eligibility criteria have not been met and the proposed representative is not therefore entitled to seek an aggregate award of damages under s.47C(2) which is a remedy unique to collective proceedings. As explained earlier in this judgment, this class remedy has been introduced by legislation as part of the collective proceedings regime in order to address some of the difficulties inherent in the bringing of individual claims and, as the experience in comparable jurisdictions has shown, is likely to be a critical component for addressing s.47A claims in the collective proceedings regime. As the Tribunal itself observed in [91] of its CPO decision, a refusal of a CPO is likely to prevent individual members of the represented

class who have suffered loss from obtaining any compensation. It is therefore the end of the road for a class action of this kind and, as such, a decision as to the award of s.47C(2) damages. The fact that class members are left with their individual claims is nothing to the point. The disputed words in s.49(1A)(a) have now to be considered and construed in the light of the addition to the Tribunal's jurisdiction of collective proceedings and in a way which accommodates the introduction of collective proceedings and the particular remedies available in them. It is not therefore necessary for us to decide whether Ms Demetriou is right in her wider submission that s.49(1A)(a) applies (as it originally did) to any decision of the Tribunal. For the reasons I have given, it does operate to provide a right of appeal on a point of law arising from the s.47B(4) decision in this case.

28. For these reasons, the Court of Appeal does in my judgment have jurisdiction to hear and determine this appeal so far as it raises a point of law. I should make it clear at this stage that Mastercard do not accept that all (or perhaps any) of the grounds of appeal fall within this category particularly in relation to questions of procedural fairness. But these are points to be developed and decided at the hearing of the appeal.

Lord Justice Coulson :

29. I agree with Patten LJ that the Court of Appeal has jurisdiction to determine this appeal. As he explains in paragraph 27 above, the decision not to grant a CPO is a decision as to the award of damages within the meaning of s.49(1A)(a) because it denies the unique remedy of an aggregate award of damages under s.47C(2). It is not merely procedural in character.

Lord Justice Hamblen :

30. I agree with both judgments.