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Merricks v Mastercard – Supreme Court Confirms Certification Test for UK Class Actions

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In one of the most anticipated rulings of recent years, on 11 December 2020 the UK Supreme Court handed down judgment in *Merricks v Mastercard*, dismissing (by a majority) Mastercard's appeal against the criteria established by the Court of Appeal for the certification of class actions by the UK's Competition Appeal Tribunal ("CAT"). The case is a landmark £14 billion opt-out collective proceeding which was started in 2016. The application for a Collective Proceedings Order will now be remitted to the CAT to be re-heard.

Mr Merricks' application was only the second to come before the CAT since the ability for a class representative to commence opt-out US-style class actions was introduced into the Competition Act 1998 by the Consumer Rights Act 2015. Unlike opt-in actions, which require potential claimants to explicitly sign-up, in opt-out actions anyone who falls within the scope of the proposed class definition will automatically be treated as a member of the class unless they explicitly withdraw.

In order to grant a Collective Proceedings Order, the CAT must be satisfied that the following four requirements are met: (i) it is just and reasonable for the applicant to act as the class representative; (ii) the application is brought on behalf of an identifiable class of persons; (iii) the proposed claims must raise common issues (that is, they raise the same, similar or related issues of fact and law); and (iv) the claims must be suitable to be brought in collective proceedings.

Background

In 2007, the European Commission ("EC") found that Mastercard had violated European Union competition laws in relation to the setting of multi-lateral interchange fees ("MIFs") that were charged between banks for transactions using Mastercard issued credit and debit cards (the "EC Decision").

In September 2016, Mr Merricks applied to the CAT for a Collective Proceedings Order ("CPO") on an opt-out basis under section 47B of the Competition Act 1998 in reliance on the EC Decision (the "Application"). The Application was made on behalf of all individuals over the age of 16 who had been resident in the UK for a continuous period of at least three months and who, between 22 May 1992 and 21 June 2008, purchased goods or services from merchants in the UK which accepted Mastercard (approximately 46 million consumers). The proposed class included all purchasers from those merchants during the relevant period regardless of whether or not they used a Mastercard payment card to make the purchase. Mr Merricks alleged that Mastercard's unlawful conduct resulted in merchants paying higher MIFs which merchants passed-on to consumers by increasing the prices for the products or services they provided. The damages sought from Mastercard were estimated at over £14 billion.

CAT Judgment (*Walter Hugh Merricks CBE v MasterCard Incorporated & Ors [2017]*

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In considering the requirements for certification, the CAT held that the expert methodology proposed by an applicant to calculate alleged loss had to: (i) offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge by Mastercard was eventually established at the full trial of the common issues, there was a means by which to demonstrate that it was common to the class (i.e., that passing on to the consumers who were members of the class had occurred); and (ii) the methodology could not be purely theoretical or hypothetical, but had to be grounded in the facts of the particular case and there had to be some evidence of the availability of the data to which the methodology was to be applied.

The CAT refused Mr Merricks' Application for two main reasons: (i) a perceived lack of data to operate the proposed methodology for determining the level of pass-on of the overcharges to consumers; and (ii) the absence of any plausible means of calculating the loss of individual claimants so as to devise an appropriate method of distributing any aggregate award of damages.

Court of Appeal Judgment (*Walter Hugh Merricks CBE v MasterCard Incorporated & Ors [2019] EWCA Civ 674*)

In April 2019 the Court of Appeal allowed an appeal by Mr Merricks on both issues. As to the first issue, the Court of Appeal held that:

- Demonstrating pass-on to consumers generally satisfies the test of commonality of issues necessary for certification (i.e., it was not necessary to analyse pass-on to consumers at a detailed individual level).
- At the certification stage, the CAT should only consider whether the proposed methodology is capable of establishing loss to the class as a whole.
- There should not be a mini-trial at the certification stage and it was not appropriate to require the proposed representative to establish more than a reasonably arguable case. There had been no requirement to produce all the evidence or to enter into a detailed debate about its probative value and the expert evidence had been exposed to a more vigorous process of examination than should have taken place.
- Certification is a continuing process and the CAT can revisit the appropriateness of the class action after pleadings, disclosure, and expert evidence are complete.

As to the second issue, the Court of Appeal held that:

- An aggregate award of damages is not required to be distributed on a compensatory basis and it is only necessary at the certification stage for the CAT to be satisfied that the claim is suitable for an aggregate award. Distribution is a matter for the trial judge to consider following the making of an aggregate award.

The Court of Appeal's judgment was therefore viewed to have "lowered the bar" to certification by comparison with the narrower approach that the CAT had originally taken. Mastercard was granted permission to appeal the judgment to the Supreme Court.

Supreme Court Judgment

Mastercard's appeal was heard in May 2020 and the Supreme Court had to consider two main issues:

1. What is the legal test for certification of claims as eligible for inclusion in collective proceedings?
2. What is the correct approach to questions regarding the distribution of an

aggregate award at the stage at which a party is applying for a CPO?

Delivering the majority judgment, Lord Briggs emphasised that the collective proceedings regime is "*a special form of civil procedure for the vindication of private rights, designed to provide access to justice for that purpose where the ordinary forms of individual civil claim have proved inadequate for the purpose*" and that it follows that "*it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose*".

With this in mind, on the first main issue, Lord Briggs ruled that, when the CAT is considering the question as to whether claims are suitable to be brought using the collective proceedings procedure, the question that must be answered is whether the claims are more suitable to be brought as collective claims rather than individual claims. In particular, if difficulties identified with the claims forming the basis of the collective proceedings were themselves insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, then those same difficulties should not be sufficient to lead to a denial of certification for collective proceedings.

As to whether the certification stage should involve an assessment of the underlying merits of the claim, Lord Briggs emphasised that, *"the certification process is not about, and does not involve, a merits test*". The Court recognised an exception to this general approach only in circumstances where: (i) a proposed defendant brings a separate application for strike-out (or an applicant seeks summary judgment); or (ii) where the court is required to assess the strength of the proposed claims in the context of a choice between opt-in and opt-out proceedings.

In relation to the second main issue, Lord Briggs made clear that the compensatory principle of damages was "*expressly, and radically, modified*" by the collective proceedings regime and, where aggregate damages were to be awarded, the ordinary requirement to assess loss on an individual basis was removed. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. In particular, there will be cases where the mechanics of approximating individual loss are so difficult and disproportionate (for example because of the modest amounts likely to be recovered by individuals in a large class) that some other method may be more reasonable, fair and just. As to whether it is necessary for an applicant to demonstrate that evidence needed to calculate loss is available, Lord Briggs was clear that "*the fact that data is likely to turn out to be incomplete and difficult to interpret, and that its assembly may involve burdensome and expensive processes of disclosure are not good reasons for a court or tribunal refusing a trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established breach of statutory duty*". In reaching this conclusion, Lord Briggs noted that incomplete, or difficulties interpreting, data are everyday issues for the courts and that, even if the task of quantifying loss was very difficult, "*it is a task which the CAT owes a duty to the represented class to carry out, as best it can with the evidence that eventually proves to be available*".

In their dissenting judgment, Lord Sales and Lord Leggatt agreed with the majority about the point on the compensatory principle, but otherwise considered that the CAT made no error of law in its assessment that the claims were not suitable for collective proceedings. In their view, the CAT's decision to refuse certification should have been respected on that separate ground and they raised concerns that the approach of the majority risked undermining the CAT's role as a gatekeeper for these types of actions.

Comment

It remains to be seen to what extent the Supreme Court's judgment will affect the UK's fledgling class action regime. However, whilst the majority judgment has provided much needed clarification as to what is the correct approach for the CAT to take when considering whether claims are suitable for collective proceedings, the dissenting judges

have warned that the approach set out in the majority judgment has the potential to "*very significantly diminish the role and utility of the certification safeguard*". If they are correct, this will lead to an increase in large scale opt-out collective actions being commenced in the UK.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following authors in London:

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