Merricks v Mastercard Inc[1]*: Collective Actions Re-invigorated*

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In Walter Merricks CBE v Mastercard Incorporated *& Ors* — [2019] EWCA Civ 674 — the Court of Appeal has provided the most significant guidance regarding the application of the UK's collective proceedings regime to date. The Court of Appeal held that the Competition Appeal Tribunal (the "CAT") applied the wrong legal tests when they made the decision to reject the claimant's application in 2017. The Court of Appeal allowed the appeal, but the UK Supreme Court has allowed MasterCard leave to appeal the Court of Appeal's decision .

1. Factual Background of the Mastercard collective action

In September 2016, Walter Merricks (Merricks) serving as the class representative issued follow-on proceedings against MasterCard. This proceeding was issued on an opt-out basis claiming damages following on from the European Commission's 2007 decision that MasterCard's EEA multilateral interchange fees (MIF) infringed EU competition law. This case was initiated on behalf of a class of individuals who purchased goods or services between 22 May 1992 and 21 June 2008 from businesses in the UK that accepted MasterCard.

The proposed class included approximately 46.2 million people,[2] the damages sought were in the region of £ 14 billion[3] and the class period covered some 16 years, from 1992-2008.[4] The costs and expenses of the action were funded, in part, by third-party funder Gerchen Keller Capital LLC.

The Merricks claim is one of a number of claims that have been issued against MasterCard with regard to the Commission's 2007 decision. This case differs from others, particularly because of its scale and the fact that it is brought on behalf of consumers. Several claims have been issued by retailers against MasterCard seeking compensation for the increased MIF. In these cases, it is asserted that the MIF impacted directly to the retailers and

[1] *Walter Merricks CBE v Mastercard Incorporated and Others*, [2019] EWCA Civ 674, https://www.catribunal.org.uk/sites/default/files/2019-05/1266_Walter_Judgment_Court_of_Appeal_EWCA_Civ_674_160419.pdf

[2] Mastercard [2017] CAT 16 at [1].

[3] Mastercard [2017] CAT 16 at [2].

[4] Mastercard [2017] CAT 16 at [2].

that the resulting overcharge was not passed on to end consumers. Merricks's class claims that the unlawful MIF was passed on to consumers entirely (or near entirely) and as a result of MasterCard's infringement, all consumers paid higher prices than usual throughout the claim duration.

The Consumer Rights Act 2015 considerably amended the UK procedural system for private damages claims in antitrust proceedings by including a collective action regime in revised sections 47A-E of the Competition Act 1998. Since 2015, the Competition Appeal Tribunal (the CAT) has been permitted to make a collective proceedings order (CPO) on an opt-in or an opt-out basis in suitable cases. Opt-in collective proceedings are brought on behalf of each class member who opts in by notifying the representative that he wishes to participate in the action. On the other hand, "opt-out" collective proceedings are brought on behalf of all class members except any class member who opts-out by notifying the representative. Class members who are not domiciled in the UK at a the relevant time may also opt in by notifying the representative that their claims should be included in the collective proceedings.

2. Issues Arising on Appeal: Aggregating the Damages and Distributing the Damages

The claimants' application for certification to the CAT was intended to create the first large-scale opt-out action under the new collective proceedings regime under the UK's Consumer Rights Act 2015. It would have reportedly been the largest damages claim ever brought in the UK.

In July 2017, the Competition Appeal Tribunal gave an important decision, denying certification of follow-on class action stemming from proven price-fixing infringements by MasterCard. The Certification was declined because the claims were 'not suitable to be brought in collective proceedings' under s.47B(6) of the Competition Act 1998. The reasons in detail why it is declined are:

(1) no sustainable methodology could be applied in practice to calculate aggregate damages across the proposed class of victims of that price-fixing for the period in question; and

(2) there was no reasonable or practicable means of estimating the individual loss per class member to enable aggregate damages to be distributed to those class members.

Aggregating Damages

The CAT considered the proposal of Mr Merricks to calculate aggregate damages on a 'top-down approach' to calculate the global overcharge.[5] This aggregate loss calculation was to be grounded on three elements: (1) the volume of commerce affected; (2) the overcharge percentages; and (3) the extent of the pass-through to consumers.[6] In response to the representative claimant's proposed methodology for calculating the global overcharge for the consumer class, the CAT recognized that 'in theory, calculation of global loss through a weighted-average pass through…is methodologically sound'.[7] However, the CAT emphasized that this methodology was 'a hugely complex exercise requiring access to a wide range of data'. Of the types of data available, the CAT was clear to give most reliance (at the 'certification' stage of the proceedings) to published data on the passing on of input costs and on credit and debit card usage, instead of requesting disclosure of such evidence from third parties, or relying on the pass-through rates which had been demonstrated in other litigation against Mastercard.[8]

Even though the Experts' Report included a list of a substantial number of pending claims by retailers and suppliers of services in a range of sectors, those actions are largely at a very initial stage. There is no realistic expectation that they might progress to the point of producing evidence on pass-through until any potential appeals against the Sainsbury's and Morrisons judgments are resolved, and even then they may well settle.[9] Moreover, the majority of those claims also appear to cover mostly later periods.[10] According to CAT, in theory, it would be possible to make requests for disclosure of evidence from third parties in various sectors to gather data from which to try to calculate their various rates of pass-through. But in consideration of the number of markets, the long period involved, and the wide range of data required to arrive at a meaningful estimate, this would be a very difficult and excessively expensive exercise.[11]

The inadequacy of available data to determine the various degree of pass-through in separate sectors or markets, and the ratio of card expenditure in those particular sectors or

[5] Mastercard [2017] CAT 16 at [50].

[6] Mastercard [2017] CAT 16 at [28].

[7] Mastercard [2017] CAT 16 at [77].

[8] Mastercard [2017] CAT 16 at [68]- [77].

[9] Sainsbury's v MasterCard; AAM v MasterCard; Sainsbury's v Visa [2018] EWCA 1536 (Civ).

[10] Mastercard [2017] CAT 16 at [72].

[11] Mastercard [2017] CAT 16 at [74].

markets to the total volume of trade throughout the infringement period prevented the CAT from calculating the weighted average pass-through percentage. Therefore, no aggregate damages assessment was possible by the 'top-down approach'.[12]

The defendant proposed a 'bottom-up approach' to damages calculation. In other words, 'it was necessary to start by considering the individual losses of the claimants and how that might sensibly be aggregated'.[13] The CAT acknowledged Mastercard's submission that it was necessary to aggregate the class members' individual losses, rather than by calculating class-wide damages by the top-down approach. However, the individual losses per class member may be so different and variable across the 46 million class members that it would not be possible to embrace that 'bottom-up approach' and impossible to calculate. The CAT emphasized that 'the level of individual spend is manifestly not a common issue'.[14] Thus, it was not possible to multiply an average loss-per-class-member by 46 million to calculate the global sum of damages sustained during the infringement period to arrive at a compensatory aggregate amount.

On the question of whether it is necessary to prove the loss suffered by each individual class member, the Court of Appeal took a different view and held that if an applicant seeks an aggregate award of damages reflecting the overall loss to the class, then it is not necessary to prove any individual's loss or to prove that any individual class member suffered loss at all. [15] The key point is that there is a methodology so that the overall loss can be calculated.

Distribution of Damages

The second reason for declining certification is linked with the distribution of that aggregate award, i.e. its allocation among the class members. 'A reasonable and practicable means of getting back to the calculation of individual compensation' should have been existing.[16] If damages were aggregated on a class-wide basis and then allocated to individual class members, then according to the CAT, the case had to assure 'the governing principle of damages for breach of competition law, restoration of the claimants to the position they would have been in but for the breach'.[17] That was the 'compensatory principle' in action.

[12] Mastercard [2017] CAT 16 at [68].

[13] Mastercard [2017] CAT 16 at [49].

[14] Mastercard [2017] CAT 16 at [66].

[15] Walter Merricks CBE v Mastercard Incorporated *& Ors* [2019] EWCA Civ 674, 61-62.

[16] Mastercard [2017] CAT 16 at [80].

[17] Mastercard [2017] CAT 16 at [88].

The Court of Appeal held that distribution is a matter for the trial judge to consider after making an aggregate award, such that it was "premature and wrong" for the CAT to have refused certification for this reason.

3. Approach to Collective Proceedings Applications

Since the Court of Appeal has provided comprehensive guidance regarding the application of the UK's collective action regime to date for the first time, the Court of Appeal's decision is a landmark collective action ruling in the UK and gives important guidance on how the collective proceedings order should be approached..

The Court of Appeal accepted the applicant's appeal from the CAT's decision refusing to grant a CPO on the basis that the CAT had erred in law its approach to the issue of pass-on and its approach to distribution. In short, according to the Court, the CAT had "..demanded too much of the proposed representative at the certification stage…"[18]

The Court indicated that Canadian case-law is useful guidance on the proper attitude to claims for aggregate damages in the UK by highlighting the Canadian jurisprudence: "*the function of the Tribunal at the certification stage is to be satisfied that the proposed methodology is capable of or offers a realistic prospect of establishing loss to the class*".[19]

The CAT had stated that Merricks had been unsuccessful in presenting a satisfying or plausible expert methodology to create some basis in fact for the commonality requirement. According to the CAT, there are some common issues to satisfy that were not analysed adequately in the application, in particular, the extent to which overcharges were passed to consumers in the form of price increases.

However, the Court of Appeal concluded that it was not necessary for the applicant, at the certification stage, to define in detail what data would eventually be available. The Court commented that if it later appears obvious that it will not be possible to calculate the overall loss, the Tribunal can reconsider whether to let the class proceedings continue at any point during the procedure. The Court of Appeal underlined that distribution is a matter for the trial judge to contemplate after making an aggregate award.

In addition, the Court highlighted the reason behind the 2015 legislation that introduced the collective actions regime, which was "to facilitate a means of redress which could attract and be facilitated by litigation funding, and had Parliament considered it necessary to limit this

[18] Mastercard [2017] CAT 16 at [48].

[19] Pro-Sys Consultants v Microsoft Corp [2013] SCC 57.

new type of procedure by what would be required for the assessment of damages in an individual claim".

It is not also necessary to prove the loss suffered by each individual class member according to the Court. In other words, if a CPO applicant claims an aggregate award of damages, reflecting the overall loss to the class, it is not necessary to prove any individual's loss at certification.[20] In the case, the applicant acknowledges that it will not be possible to give each consumer a sum representing their individual loss, and the proposal in the application is that each one of the 46.2m consumers will get a defined sum depending on the period of time when they were in the class. The Court of Appeal acknowledged that the changes introduced by the collective action regime in the Consumer Rights Act allowed a court to award aggregate damages by reference to the loss suffered by the represented class as a whole, even if this resulted in certain individuals being over or under compensated. Thus, the vindication of the rights of individual claimants is achieved by the aggregate award itself. [21]

4. Conclusions

As a whole, the Court of Appeal's judgment in the Merricks collective proceedings application against MasterCard is a notable milestone for the applicant and should (subject to the decision of the Supreme Court) reinvigorate the collective proceedings regime, which has seen discouragingly few cases brought since its enactment in 2015. The Court of Appeal analysed the CAT's order so comprehensively and instructive way that it may serve potentially to encourage claimants and litigation funders in the application of the new class action regime.

Moreover, the Court of Appeal's judgment may possibly have an impact by facilitating the initial certification procedure that CPO applicants must overcome and open the door to more collective actions progressing to a full trial or settlement. The Court of Appeal's judgment significantly downgrades the preliminary certification obstacle that the CAT had indicated CPO applicants must surmount. In particular, according to the Court of Appeal's decision, certification is a continuing process under which CPO may be varied or revoked at any time.

The Court of Appeal criticised CAT's decision for 'over-analysing' the application at the very first hurdle. Resolving concerns about sufficiency of data would be more convenient once pleadings, disclosure and expert evidence were complete.[22] So, it was not appropriate to require Merrick's experts to specify in detail what data would be available for each of the

[20] Mastercard [2017] CAT 16 at [46].

[21] Walter Merricks CBE v Mastercard Incorporated *& Ors* [2019] EWCA Civ 674, 61.

[22] Walter Merricks CBE v Mastercard Incorporated *& Ors* [2019] EWCA Civ 674, 53.

relevant retail sectors in respect of the infringement period, nor to conduct a cross-examination of experts at a pre-disclosure stage on evidence that had been identified but had not yet been fully analysed or assessed.[23]

On the other hand, the judgment may be considered as having some concerning elements from a claimants' perspective. The Court of Appeal confirmed that certification is an ongoing process rather than a once for all assessment. For that reason, it may be that this approach could cause redundant time and costs if a claim is later unable to proceed because the CPO is amended or withdrawn. Nevertheless, this approach may be also seen as a process in which parties may see their positions roughly outlined to facilitate to reach a settlement of a class action.

Supreme Court have granted MasterCard leave to appeal. The decision of the Supreme Court would decisively shape the future of UK collective proceedings regime. We are awaiting the outcome of the Supreme Court with interest.

[23] Walter Merricks CBE v Mastercard Incorporated *& Ors* [2019] EWCA Civ 674, 52.