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Certification of £14 billion Class Action Against MasterCard Refused

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Dispute Resolution/Antitrust

On Friday, July 21, 2017, the UK's Competition Appeal Tribunal (the "CAT") handed down its second class certification decision under the class actions regime introduced by the Consumer Rights Act 2015 (the "Act"). It dismissed the application for two reasons. First, the proposed representative failed to show that it could reasonably estimate damages in the aggregate for the class as a whole. Second, even if loss had been suffered and could be estimated across the class as a whole, there was no way to ensure that any payment to an individual class member would bear any reasonable relationship to actual losses. The decision is another indication that the CAT is scrutinizing applications carefully. On the other hand, the CAT's finding that undistributed proceeds may be used to provide a litigation funder's investment return will give the litigation funding industry comfort that a return can be made on cases in England.

Background

On December 17, 2007 the European Commission adopted a Decision finding that MasterCard had infringed EU competition law from May 22, 1992 until December 19, 2007 "*by in effect setting a minimum price merchants must pay to their acquiring bank for accepting payment cards in the [EEA] by means of … interchange fees*" and gave MasterCard six months to end the infringement. MasterCard then appealed against that Decision, its final appeal being dismissed on September 11, 2014.

Two years later, Walter Merricks applied for a "collective proceedings order", permitting him to act as the class representative in bringing follow-on collective proceedings on behalf of "*individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards, at a time at which those individuals were both (i) resident in the UK for a continuous period of at least three months and (ii) aged 16 years or over.*"

The Act provides that claims are eligible for inclusion in collective proceedings only if the CAT considers that (i) they raise the same, similar or related issues of fact or law and (ii) are suitable to be brought in collective proceedings.

Aggregate Damages

Merricks sought an aggregate award of damages, in other words an award without assessing the amount of damages recoverable by each individual member of the class. He asserted that an individual assessment of damages suffered by each class member would be impracticable because it would require (i) the determination of the actual purchases of goods and/or services

made by each class member and (ii) the assessment of the extent to which each of the businesses from which those purchases were made passed on the interchange fees. He proposed to make annualized distributions to all class members for the years that they were in the class. Each year, each class member would receive the same amount, although different amounts may be paid for different years.

MasterCard claimed that the CAT should refuse to certify the proposed collective proceedings because (i) an award of aggregate damages in this case would be inimical to the compensatory nature of damages; and (ii) the proposed distribution mechanism to individual members of the class would also be inimical to the compensatory nature of damages as the amounts received by individuals would bear no reasonable relationship to their actual loss.

The CAT reiterated what it stated in its first class certification judgment in *Gibson*, namely that the Canadian approach to certification is closer to the UK regime than are the rules in the U.S. and again referred to the Supreme Court of Canada judgment in in Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57: "… *the expert methodology [for establishing commonality] must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case is question. There must be some evidence of the availability of the data to which the methodology is to be applied.*"

The CAT considered this issue in connection with pass-through of the interchange fee by merchants. Merricks argued that the differences in pass-through rates could be addressed by making an aggregate award of damages which would then be distributed to class members. The CAT was prepared to accept that, in theory, this was a permissible approach. However, before adopting the approach, the CAT had to consider whether Merricks had put forward (i) a sustainable methodology which could be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages; and (ii) a reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution.

Merricks' experts took the approach that the difficulties concerning pass-through could be overcome by estimating the higher price paid by consumers as a result of the overcharge on a global basis by calculating a weighted average reflecting the different levels of pass-through in different sectors or markets. To do that they would have to consider (i) information from the claims being brought against MasterCard by retailers from a wide variety of sectors; (ii) disclosure from third parties; and (c) publicly available data.

The CAT concluded that the other claims against MasterCard were an inadequate source of data as they covered a different time period than the Merricks claim and that the extensive third party disclosure that would be required was "*wholly impractical as a way forward*". As to the publicly available data and studies on the passing on of input costs and on credit and debit card usage, the CAT accepted "*that in theory calculation of global loss through a weighted average pass-through … is methodologically sound. 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."…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" The CAT consequently concluded that the claims were not suitable for an aggregate award of damages.

Additionally, the CAT found that the proposals for distribution (each year, each class member would receive the same amount) were not in accordance with the governing principle of damages for breach of competition law, namely restoration of the claimants to the position they would have been in but for the breach.

Funding

The CAT also addressed funding. Damages-based agreements, where a law firm is paid a percentage of the damages recovered, are not permitted for opt-out collective proceedings. Class actions are therefore likely to be backed by funders, who will require an uplift on their investment if the claim is successful. If, at the conclusion of a case, not all the damages awarded have been claimed by the class members, the class representative may apply to the CAT to have some or all of the remaining sum (Undistributed Amounts) paid to the representative in respect of costs or expenses incurred by the representative in connection with the proceedings.

Merricks' funding arrangements provided that, in the event that the claim succeeded, he was to apply to the CAT to seek payment of what was referred to as the "Total Investment Return" ("TIR") from Undistributed Amounts. The TIR was defined as the greater of (i) £135,000,000; or (ii) 30% of the Undistributed Amounts up to £1billion plus 20% of the Undistributed Amounts in excess of £1 billion. MasterCard argued that the TIR was not a cost or expense incurred by Merricks (because his only obligation was to ask the CAT to make those sums available) and hence that Undistributed Amounts were not available for payment to the funder. If that was the case, MasterCard argued that it was likely that the funder would withdraw funding. If that argument was accepted, it would have provided a further reason to hold that the claim was not suitable for collective proceedings.

The CAT accepted that the wording of the funding agreement did not create any liability on the part of Merricks in respect of the TIR. However, it indicated that it would have been prepared to accept the amendment of the agreement to create a direct, albeit conditional, liability to pay the TIR, subject to recovering it from the Undistributed Amounts and would have considered such an obligation one to which Undistributed Amounts could be applied.

Comment

This judgment confirms what the CAT indicated in its *Gibson* judgment, namely that it will scrutinize applications for collective proceedings carefully. Some commentators considering the new collective proceedings rules anticipated that the CAT would be keen to encourage use of the new mechanism and that a relatively permissive approach might well characterize its early years. It is clear from *Merricks* and *Gibson* that that is not the case.

Since the introduction of the collective actions mechanism, two cases have been brought and neither has survived the certification phase. In *Gibson*, the application for certification was adjourned (meaning the hearing was suspended) to enable the representative to amend the claim and obtain further expert evidence, but in practice, the CAT's interpretation of the rules rendered that action uneconomic, and hence it was withdrawn. In *Merricks*, by contrast, there

was no adjournment, and he was not afforded the opportunity to gather and make submissions on the sufficiency of data, nor to consider potential methodologies to ensure that distributions did bear some relation to actual losses. The CAT's failure to adjourn in this case may simply be a consequence of the fact that Merrick himself had stated that his proposed way of calculating and distributing damages was the only "practicable" way of compensating the members he was seeking to represent. Given, however, that the regime is new and that any attempt to bring a further claim on behalf of these consumers would be time-barred, it may be thought somewhat surprising that Merricks was not afforded the same kind of opportunity as Gibson. This sends the clear message that, whilst the CAT has again confirmed that it does not intend that class certification in England will be the same kind of full scale battle that it is in the U.S., a proposed representative will need to collect (or at least identify) a significant amount of data and to have a clear and well-substantiated plan for identifying and distinguishing between any different classes and/or members and to allocate any awards to individual members in order to satisfy the CAT that any awards will be properly compensatory. These standards will present challenges for proposed representatives pursuing claims and opportunities for defendants in responding to them.

On the other hand, the CAT's finding that undistributed proceeds may be used to provide a litigation funder's investment return will give the litigation funding industry comfort that a return can be made on cases in England.

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