English Competition Appeals Tribunal to Reconsider £14 Billion Class Action Against MasterCard

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Class Actions

UK Class Actions under the Spotlight

Although well-established in the U.S., the class action regime is in its relative infancy in the UK. Only two applications for collective proceedings orders (the UK equivalent introduced by the Consumer Rights Act 2015) have been heard by the Competition Appeals Tribunal (the "**CAT**") to date, with three more awaiting a hearing. The first, brought by Dorothy Gibson against Pride Mobility Products Limited in relation to mobility scooters, failed to achieve certification by the CAT. The second, *Walter Merricks v MasterCard Inc & Ors* [2019] EWCA 674, was also rejected at the certification stage.

However, a change may now be underway. On April 16, 2019, England's Court of Appeal decided that the CAT had erred in rejecting certification of the claim brought by former financial ombudsman Walter Merricks against MasterCard. It came to its decision for two principal reasons. First, it was not necessary for the applicant to produce full supporting evidence for its estimate of quantum at the certification stage. Second, the issue of distribution did not need to be considered at the certification stage. As a result, the Court of Appeal set aside the order of the CAT refusing certification; the CAT will now effectively have to start again and reconsider whether to certify the claim.

Although the future of the claim in achieving certification, and then on the substance, remains uncertain, the Court of Appeal's decision has lowered the bar that will be applied to collective actions to achieve certification.

Background

On December 17, 2007, the European Commission found 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*" (paragraph 1)[1]. Concerned that interchange fees may have been passed on to consumers by merchants, in 2016, Mr. Merricks applied for a collective

[1] Summary of Commission Decision of 19 December 2007 (*Case COMP/34.579*, *Case COMP/36.518*, *Case COMP/38.580*), notified in the Official Journal of the European Union under *Document C(2007) 6474, 2009/C 264/04*.

proceedings order to act as the class representative on behalf of individuals who had, between May 22, 1992 and June 21, 2008, purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards, when they were both resident in the UK for a continuous period of at least three months and aged 16 years or over.

If Mr. Merricks' application to the CAT had been successful, it would have seen the launch of the first major opt-out class action under the new regime brought in by the Consumer Rights Act 2015, creating a class that could include as many as 46 million consumers. Valued by Mr. Merricks in excess of £14 billion, the claim would also have been the largest ever brought in the UK.

Mr. Merricks sought an aggregate award of damages by claiming that individually assessing damages suffered by each class member would be impracticable, due to both the quantum of the claim and the estimated number of claimants in the class. He proposed to make annualised distributions to all class members for the years that they were in the class. His proposed methodology involved:

(1) Quantifying the total volume and value of all relevant MasterCard transactions accepted by businesses selling in the UK during the infringement period (the "**Volume of Commerce**" or "**VOC**");

(2) Quantifying the extent to which the VOC was subject to the overcharge in respect of MasterCard domestic or EEA multilateral interchange fees; and

(3) Quantifying the proportion of the overcharge that was passed on to the proposed class.

The CAT dismissed the application for certification for two reasons. First, Mr Merricks had failed to show that he could reasonably estimate damages in the aggregate for the class as a whole on the available data, in particular, in connection with the level of pass-on of interchange fees. Second, to plausibly calculate the proposed method of distribution did not represent appropriate compensation, as each class member would receive the same for each year.

Court of Appeal's Decision

Mr. Merricks appealed to the Court of Appeal. In a decision that surprised many, the Court found that "*the CAT demanded too much of the proposed representative at the certification stage*" (paragraph 47) and had conducted "*some form of mini trial*" (paragraph 52). As a result, it set aside the order of the CAT refusing certification.

In connection with the CAT's concern that there was insufficient data for assessing quantum, the Court confirmed that "*at the certification stage the proposed representative must be able to demonstrate that the claim has a real prospect of success,*" which here meant satisfying the CAT that "*the expert methodology was capable of assessing the level of pass-on to the represented class and that there was, or was likely to be, data available to operate that methodology. But it was not necessary at that stage for the proposed representative to be able to produce all of that evidence, still less to enter into a detailed debate about its probative value.*"

The Court noted that the purpose of a certification hearing "*is to enable the CAT to be satisfied that (with the necessary evidence) the claims are suitable to proceed on a collective basis and*

that they raise the same, similar or related issues of fact or law: not that the claims are certain to succeed… [or]… that the collective claim has more than a real prospect of success" (paragraph 45).

The Court also rejected the CAT's suggestion that "*a loss-based method of distribution is mandated*" (paragraph 57), finding that the "*making of an aggregate award does not… require the Court to calculate individual loss or importantly to assess the damages included in that award on an individual basis*" (paragraph 60). Further, it found that at the certification stage the CAT is not required to consider "*more than whether the claims are suitable for an aggregate award of damages which, by definition, does not include an assessment of individual loss. Distribution is a matter for the trial judge to consider… therefore… it was both premature and wrong for the CAT to have refused certification by reference to the proposed method of distribution: an error compounded by their view that distribution must be capable of being carried out by some means which corresponds to individual loss*" (paragraph 62).

After the Court of Appeal's judgment had been handed down, MasterCard applied orally for permission to appeal. This application was denied. MasterCard has publicly indicated that it will now apply to the Supreme Court for permission to appeal, but has made no such application to date.

The Future of Mr. Merricks' Claim

The Court of Appeal's judgment does not mean that Mr. Merricks' claim has been approved to move forward. Rather, subject to any appeal to the Supreme Court, the CAT will now reconsider whether to certify the claim. Mr. Merricks' claim is effectively back to "square one," but this time the CAT has clear guidance from the Court of Appeal as to the initial certification hurdle that must be overcome.

Separate claims have also been brought against MasterCard in connection with interchange fees by other retailers, for example by Sainsbury's. This has resulted in conflicting decisions regarding interchange fees and an appeal to the Court of Appeal, itself headed by the Supreme Court.

Implications for Class Action Certifications in the UK

Whether or not Mr. Merricks' claim ultimately succeeds, the Court of Appeal's decision clarifies the requirements for future certification applications.

Claimants and litigation funders who seek certification for collective actions before the CAT, and companies who may be required to respond to such claims, will be taking note of the decision.

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