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Top Court MasterCard Ruling Lowers Bar For UK Class Suits

By **Louise Freeman and Harry Denlegh-Maxwell** (January 7, 2021, 3:48 PM EST)

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Widely seen as a litmus test for the nascent competition class action regime in England and Wales, on Dec. 11, 2020, the U.K. Supreme Court issued its hotly anticipated judgment dismissing MasterCard Inc.'s appeal in the collective action brought by Walter Merricks.

In doing so, the Supreme Court has given clear guidance on the test to be applied at the certification stage for collective actions, and has markedly lowered the bar. This judgment will likely have a significant impact on collective actions in England and Wales — which are still in their relative infancy — for years to come.

Following the Supreme Court's endorsement of the regime, claimant law firms and litigation funders will inevitably now seek more cases to pursue on a collective basis, and other collective action claims, which had either been stayed or were waiting in the wings pending the Supreme Court's judgment in Merricks, will also be able to proceed.

The claim brought by Merricks will now return to the Competition Appeal Tribunal, or CAT, which will decide again — with the benefit of the Supreme Court's guidance — whether to certify Merricks' claim by granting a collective proceedings order, or CPO.

Competition Collective Action Regime in England and Wales

The Consumer Rights Act of 2015 introduced the English and Welsh competition collective action regime. Perhaps the most significant aspect of that regime is the introduction of the ability to bring opt-out claims, similar to those seen in U.S. class actions.

Collective proceedings — whether opt-out or opt-in — may not proceed beyond the issue and service of a claim form without the permission of the CAT, in the form of certification of a collective proceedings order.

To certify a claim, the CAT must be satisfied that the two main criteria have been met: (1) that it is just and reasonable for the proposed representative to act as the class representative, Section 47B(5)(a) of the Competition Act 1998 as amended; and (2) that the claims are eligible for inclusion in collective

proceedings, Section 47B(5)(b) of the act.

The claims also need to raise the same, similar or related issues of fact or law.

Merricks v. MasterCard — Background

In December 2007, the European Commission found that MasterCard had infringed EU competition law from May 22, 1992, to Dec. 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."

In 2016, Merricks, the former head of the U.K. Financial Ombudsman Service, applied for a CPO to act as the class representative on behalf of approximately 46.2 million people who had, between May 22, 1992, and June 21, 2008, purchased goods and/or services from businesses in the U.K. that accepted MasterCard cards.

Merricks has valued that claim at in excess of £14 billion (approximately $18.97 billion) — and this sum will likely now be even greater, with interest having continued to run since the claim was filed in September 2016.

The CAT rejected Merricks' application, on the ground that the claims were not eligible for inclusion in collective proceedings, finding that the claims were not suitable for an aggregate award of damages, and that Merricks' proposed distribution of any award did not satisfy the compensatory principle at common law.

After clearing up a procedural question as to whether an appeal or judicial review was the correct recourse for a disgruntled Merricks — the answer being an appeal — he appealed to the Court of Appeal, which found that "the CAT demanded too much of the proposed representative at the certification stage" and had conducted "some form of mini trial," overturning the CAT's decision and sending the case back to the CAT for reconsideration.

Supreme Court decision

Following a further appeal by MasterCard, the Supreme Court has now found that the CAT made five errors of law in its rejection of Merricks' application for a CPO, and so has rejected MasterCard's appeal.

With a particular focus on the policy considerations underpinning the collective action regime introduced in England and Wales in 2015, namely to enable small businesses and consumers to bring claims in relation to anti-competitive conduct more easily, the Supreme Court held that collective proceedings are a special form of civil procedure, designed to provide access to justice and ensure private rights can be enforced where an ordinary individual claim would be inadequate. The importance of ensuring this access to justice underpins the Supreme Court's reasoning.

The five errors of law that the Supreme Court found that the CAT had made follow.

First, it failed to recognize that the pass-on of multilateral interchange fees was a common issue, as was overcharge. The Supreme Court identified this failure by the CAT as a flawed starting point, from which the CAT "never recovered." Had the CAT concluded that this was also a common issue, "then this would, or should, have been a powerful factor in favour of certification."

Second, the CAT placed great weight on its decision that the case was not suitable for aggregate damages. This is a relevant factor for certification, but it is not a condition. The Supreme Court held that this "is just one of many factors relevant to suitability of the claims for collective proceedings."

Third, the CAT should have applied a test of relative suitability. If forensic difficulties would have been insufficient to deny a trial to an individual claimant, they should not have been sufficient to deny certification for collective proceedings.

When considering whether claims are suitable to be brought in collective proceedings or for an aggregate award of damages, the Supreme Court held that the CAT should have asked itself whether the claims are more suitable to be brought in collective proceedings, as opposed to individual proceedings, and more suitable for an award of aggregate damages, as opposed to individual damages.

This substantially lowers the bar, since it will be more challenging to argue that it would be better for a claim to be brought by each individual consumer than on a collective basis — as opposed to not being suitable for other reasons.

As Justice Michael Briggs put it:

> the likely disparity between the cost and effort involved in bringing [an individual] claim and the monetary amount of the consumer's individual loss, coupled with the much greater litigation resources likely to be available to the alleged wrongdoers, means that it will rarely, if ever, be a wise or proportionate use of limited resources for the consumer to litigate alone.

Justice Philip Sales and Justice George Leggatt had concerns about this aspect of Justice Briggs' reasoning, noting that it could "very significantly diminish the role and utility of the certification safeguard."

Fourth, and most serious of the CAT's errors in the Supreme Court's estimation, the CAT was wrong to consider that difficulties with incomplete data and interpreting the data are a good reason to refuse certification.

The Supreme Court pointed to the creativity of the courts in dealing with data gaps and noted that the CAT is "probably uniquely qualified to surmount" these challenges by reason of its expertise and the case management tools open to it, noting again the policy considerations underpinning the collective action regime and that the CAT "owes a duty to the represented class" to carry out such an exercise.

Courts must make use of the best evidence available, which may require making broad assumptions and applying the "broad axe" principle. The Supreme Court held that a court cannot simply "throw up its hands and bring the proceedings to an end before the trial because the necessary evidence is exiguous, difficult to interpret or of questionable reliability."

Fifth, the CAT was wrong to require Merricks' proposed method of distributing aggregate damages to take account of the loss suffered by each class member. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss, and the act expressly modifies the ordinary requirement for the separate assessment of each claimant's loss.

The firm guidance provided by the Supreme Court on this point, that the compensatory principle is not an element of the test for granting a CPO, and that consideration of distribution methods at the

certification stage will often be premature, although not in every case, was also supported by Justices Sales and Leggatt, who took issue with other aspects of the court's judgment.

Unique Procedural Issue

An interesting challenge arose for the Supreme Court in this case. The judgment was delayed following the unfortunate passing of the former Supreme Court Justice Brian Kerr, who had presided at the hearing.

The judgment was going to be a 3-2 majority decision dismissing the appeal. However, following Justice Kerr's death, the panel for this appeal was reconstituted to include only Justices Briggs, Sales, Leggatt and Thomas, leaving the four judges split 2-2 — Justice Kerr having been part of the majority.

The dissenting judges, Justices Sales and Leggatt, agreed to change their position from dissenting to dismissing the appeal — while still expressing their reservations about aspects of the judgment — such that the 3-2 majority outcome could be given effect, in accordance with Justice Kerr's views.

Had they not done so, with the Supreme Court evenly divided, the case would have had to have been reargued before a different constitution of the court, at great expense and further delay.

What Next?

Although Merricks' case lives to fight another day, it has not yet been given the go-ahead as a collective claim. The gargantuan case will now return to the CAT, for a second attempt by Merricks to obtain a CPO, but this time with clearer guidance as to the threshold. That threshold has been lowered by the Supreme Court, making it more likely that CPOs will be made going forward, whether in this case or in others.

This judgment also breathes new life into the class action regime, under which no classes have been certified since it was introduced in 2015. The many cases waiting in the wings can now move forward to their own CPO hearings, with more certainty as to the bar the claimants must clear. The CAT will now need to consider each of these cases in turn, with the benefit of the Supreme Court's guidance.

Although this judgment, on the whole, provides for a more permissive approach and a lower bar than was previously articulated by the CAT, there are aspects of the Supreme Court's judgment that will provide comfort for defendants.

First, defendants will take note of the Supreme Court's acknowledgment that detailed questioning and cross-examination of experts at the initial CPO hearing can achieve "both greater clarity and a considerable improvement in the quantification methodology."

Second, emphasis was placed on strike out and summary judgment applications, making clear that arguments as to the merits should be made in that context and not in the context of CPO hearings. Defendants are likely to bring such applications either alongside, or subsequent to, defending CPO applications, in the future.

Third, there may be scope for arguing that claims brought on behalf of a class of businesses fail the relative suitability test, on the basis that those claimants are quite able to bring claims outside the CPO regime.

Fourth, the door has been left open to scrutiny of distribution proposals at the CPO stage, which will remain an area of focus for other CPO defendants.

Fifth, where a CPO is granted, defendants will no doubt watch as cases develop, to consider whether there are grounds to propose that it should be varied or revoked further down the line.

Although the Supreme Court has issued clear guidance, the second CPO hearing in the Merricks case — and CPO hearings in other cases — will remain hotly contested. Whether this judgment will, in fact, lead to more class actions being brought remains to be seen, but with numerous claims that have been on hold pending this judgment now able to proceed, we can expect to see further developments in the short-to-medium term, and more appeals of the CAT's decisions.

The Merricks case forms part of a wider picture of developments in class actions, including the Lloyd v. Google LLC representative action case going to the Supreme Court in 2021 and the EU Collective Redress Directive being adopted by the European Parliament, all of which should be followed closely by potential defendants.

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