

# UK Class Actions Update: *Merricks* Secures Uncontested CPO, But the Competition Appeal Tribunal Shows It Retains Significant Teeth To Narrow Claims

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After protracted challenges to class certification status, in *Merricks v Mastercard*<sup>1</sup> the U.K. Competition Appeal Tribunal (CAT) granted its first collective proceedings order (CPO). The claim remains huge, comprising 46.2 million consumers, but Mastercard successfully persuaded the CAT to narrow the class, potentially reducing the claim by £5 billion.

### Key Takeaways From This Case and the CAT's CPO Pipeline:

- **The CPO order was uncontested.** This suggests Mastercard anticipated that the CAT would conclude that the case satisfied the U.K. Supreme Court (UKSC) certification test — in essence, whether the claim is better suited to collective rather than individual proceedings.
- **The CAT remains active in managing the breadth of claims.** The CAT decided in favour of Mastercard on the issues of interest compounding and claims by deceased consumers, reducing the value of the class action by around 35% (approximately £5 billion).
- **There are more opportunities for the CAT to play gatekeeper in the pipeline.** The CAT's appetite for playing a meaningful role as gatekeeper will become clearer from the forthcoming judgments concerning various CPO applications that have been heard in the last six months, including: *Boundary Fares*; *Trucks*; and *FX*.
- **The CAT has multiple tools with which to test the appropriateness of collective proceedings.** The upcoming *Boundary Fares* judgment will illuminate the CAT's approach regarding how precisely and individually would-be claimants need to demonstrate causation and liability in antitrust damages actions in order to obtain certification and survive strike-out. Those issues show that meeting the "suitability" test is not the end of the matter when a class action is pursued under the CPO regime.
- ***Lloyd v Google* may open up an additional opt-out class action regime.** The fate of those other CPO applications will shape the antitrust-specific regime for opt-out class actions. But the viability of opt-out class actions for non-antitrust claims remains an open question that the UKSC's anticipated judgment in *Lloyd v Google* is expected to address. That judgment could open the floodgates for opt-out class actions across the spectrum of disputes.

### The Class Action and UKSC's Test for Collective Claims<sup>2</sup>

In December 2007, the European Commission (EC) found that by setting default interbank fees whenever consumers paid for goods or services using their Mastercard in the EEA, Mastercard restricted price competition between the banks and violated EU competition law.

Walter Merricks, the proposed class representative, commenced an extremely broad U.K. class action based on the EC decision. It claimed on behalf of approximately 46.2 million U.K. consumers, seeking £16 billion (including interest). The claim was an indirect one, made not by retailers that actually paid Mastercard's fees,<sup>3</sup> but by U.K. consumers for the allegedly inflated prices they paid when retailers passed on allegedly unlawful charges.<sup>4</sup>

<sup>1</sup> *Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2021] CAT 28.

<sup>2</sup> The history of this litigation was discussed in two prior client alerts: "*Merricks v Mastercard* – UK Supreme Court Clarifies Low Bar for Class Action Certification" (7 Jan. 2021) and "*Merricks v Mastercard*: UK Class Actions Back Under the Spotlight" (8 May 2019). It is recapped here.

<sup>3</sup> Those retailers have made parallel claims, which are also before the English courts.

<sup>4</sup> See our client alert, "UK Supreme Court Eases Burden on Antitrust Defendants Pleading a Pass-On Mitigation Defence" (30 June 2020).

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The CAT, which must rule whether claims are suitable for collective proceedings, initially refused a CPO. It felt that the class was too wide, and the proposed distribution methodology inadequate. The English Court of Appeal, upheld by the UKSC, decided that the CAT had not applied the correct test.<sup>5</sup>

The UKSC held that the test for CPOs was a relative judgement as to whether claims are “suitable” for collective proceedings — whether the claims are more appropriately brought as collective proceedings rather than individual proceedings. The same logic was applied in deciding whether a claim is “suitable for an award of aggregate damages” (a relevant factor in the overall assessment of suitability). An aggregate damages award need only be more suitable than “a multitude of individually assessed claims for damages”. The UKSC judgment therefore significantly circumscribed the CAT’s gatekeeper role.

## The CAT’s Remittal Decision on *Merricks*

On remittal, Mastercard did not oppose certification. Nonetheless, it is instructive that Mastercard persuaded the CAT to narrow the claim.

## Compound Interest

The principal claim was estimated by Merricks to be worth up to £7.2 billion. As of January 2021, the interest relating to this claim amounted to: £6.6 billion in simple interest, or £8.8 billion in compound interest (*i.e.*, £2.2 billion more than the simple interest claim).

As a matter of English tort law, compound interest can be awarded as damages, provided that it is specifically claimed and justified. Merricks argued that all members of the class at some point during the 16-year period would have borrowed money or had savings, so they would have paid interest and/or lost the opportunity to earn interest to the extent that they were deprived of money due to Mastercard’s alleged overcharges.

The CAT considered that, in the context of a “gargantuan” interest claim worth up to £8.8 billion, a plausible or credible methodology needed to be put forward at the certification stage; and no such methodology had been put forward as to the amount of the overcharge that would have been saved and/or used to reduced debt, rather than spent, by consumers. This was particularly significant given that the average class member’s loss is thought to be in the region of £10 per year, accruing over the course of the year, so it was not readily inferable that the money would not simply have been spent.

<sup>5</sup> See “*Merricks v Mastercard* – UK Supreme Court Clarifies Low Bar for Class Action Certification”.

The CAT, therefore, found the compound interest claim not to be “suitable” for collective proceedings and excluded it from the CPO. Instead, the class may seek simple interest on a statutory basis.

## Class Definition – Deceased Persons

Merricks’s claim form expressly acknowledged that the class definition excluded the estates of individuals who met the substantive definition but died before the “domicile date”.<sup>6</sup> The notice of the CPO application made specific reference to the claim being on behalf of individuals “who are living in the UK at the time the claim is allowed to proceed”.

Upon the remittal of the case to the CAT, Merricks confirmed that he wished to include deceased persons in the class, thereby increasing the class size by approximately 13.6 million, to 59.8 million (*i.e.*, by 29%). Merricks also recognised that the expert calculation of aggregate damages included losses allegedly suffered by now-deceased persons and, therefore, to the extent they are not included in the class, the damages calculation would need to be reduced. The CAT rejected the argument that the existing class definition included deceased persons and, consequently, Merricks sought permission to amend the claim form so as to include “persons who have since died”.

The CAT refused permission, on various grounds. In particular, whilst the CAT saw no difficulty in principle in a class definition including the estates of deceased persons, claims could not be brought on behalf of deceased persons themselves, as opposed to their estates, and, therefore, Merricks’ proposed amendment was incoherent. The CAT also decided that, in the present case, limitation rules precluded the inclusion of persons who were deceased before the claim form was issued. However, the CAT remarked that Merricks could apply again to amend the claim form and CPO to include the claims of the representatives of estates of persons who die/have died during the course of the proceedings.

## Litigation Funding Arrangements

Merricks has entered into a litigation funding agreement (LFA), pursuant to which Merricks has access to £45.1 million for his costs and disbursements, and has adverse costs cover of £15 million. Mastercard did not challenge the adequacy of the quantum of adverse costs cover, but objected on the basis that the LFA expressly excluded third-party rights, arguing that it might not be able to enforce a costs award in its favour. The CAT was sympathetic to Mastercard’s concerns and, accordingly, Merricks’s funder agreed to undertake to the CAT that it would discharge a liability for costs ordered against Merricks.

<sup>6</sup> The date to be determined by the CAT as being the date upon which an individual must have been resident in the UK in order to be a member of an opt-out class.

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The CAT also emphasised that, despite the limited nature of Mastercard's objection, it would scrutinise the LFA more fully, saying it is "for the Tribunal to be satisfied as to the position since the Tribunal has responsibility to protect the interests of the members of the proposed class, and their interests are of course not necessarily aligned with the interests of Mastercard". The CAT found that, following some amendments, the *Merricks* LFA was satisfactory.

## Collective Proceedings Cases and Issues To Watch

Looking beyond *Merricks*, we are likely to see judgments on numerous other applications for CPOs before the end of 2021 raising interesting and novel issues:

### Class Actions in Non-Follow On Claims

*Boundary Fares* involves alleged double-charging by passenger train operators. There was no prior competition authority decision, and the nature of the alleged violation is an obscure one, so this CPO application is brought on a standalone basis.

An opt-out class action without any underlying infringement decision is arguably the most extreme category of antitrust class action that could proceed under the CPO regime, particularly where such action relates to behaviour that, even if established, is not readily identifiable as anticompetitive. That is relevant to the CAT's decision on whether claims should be opt-in (where individuals only form part of the class if they expressly elect to join the action) or opt-out (where individuals are part of the class unless they expressly opt out), because one factor is the strength of the claims. The CAT's Guidance states that follow-on claims, where a competition authority has decided that there was an infringement, generally will be strong enough for this criterion not to be in question. For a standalone claim, however, showing the strength of the claim is a potentially significant hurdle, to the extent that proceedings may only be permitted to proceed on an opt-in basis.

The would-be defendants in *Boundary Fares* have also argued that, whilst *Merricks* shows that individualised damages calculations are not necessary, it does not follow that causation and liability need not be established on an individual basis. This shows another respect in which, for standalone cases, the onus on the proposed class representative will be greater.

Alongside the CPO application, the CAT heard summary judgment and strike-out applications brought by the proposed defendants. This follows the UKSC's remarks in *Merricks* that the CAT's summary judgment and strike-out powers are an appro-

priate mechanism for the CAT to exercise "merits-based control over collective proceedings" at a pre-trial stage (e.g., at the CPO hearing). This gives rise to the possibility that the claims could be found eligible for inclusion in collective proceedings but simultaneously are struck out or dismissed summarily.

Finally, the CAT expressed concerns that, where small amounts are due to class members and it is difficult to establish that they are entitled to a share of an award, the real winners may be litigation funders, who might profit from any unclaimed portion of an award. Therefore, the proposed class representative was requested to provide information about the funder's remuneration structure and the typical level of "take-up" by class members in North American class actions.

### Carriage Disputes

In *FX* and *Trucks*, the CAT is facing a "carriage dispute" between two competing CPO applications. In March 2020, the CAT decided in the *FX* case that the carriage dispute should not be addressed as a preliminary issue, so both CPO applications were heard in July 2021. In each of *FX* and *Trucks*, it will be interesting to see whether one, both or neither of the competing applications is successful, and to gain greater insight about the CAT's approach to competing applications.

### Other Class Action Mechanisms

*Merricks* is the first English opt-out class action to be certified, but the CPO regime is not the only avenue through which opt-out class actions may emerge. Last year's decision by the English Court of Appeal in *Lloyd v Google*<sup>7</sup> suggested a generous approach to pursuing a representative action under CPR 19.6, deciding that four million iPhone users had the "same interest" in claims for alleged data protection breaches. The UKSC recently heard Google's appeal in this case, and the judgment is expected later this year. The UKSC's decision in *Lloyd v Google* regarding the meaning of "same interest" will have implications across the spectrum of disputes. A broad approach to CPR 19.6 could open the floodgates to opt-out class actions in the U.K.

### Comment

Each aspect of the CAT's decision shows that, whilst the UKSC has established a threshold for "suitability" of claims for collective proceedings, the CAT should be expected to take a proactive and rigorous role in considering whether to grant a CPO and, if so, what scope is appropriate.

<sup>7</sup> *Richard Lloyd v Google LLC* [2019] EWCA Civ 1599.

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- On compound interest, the CAT made it clear that the issue is distinct from the question of whether the principal claim is suitable for inclusion in collective proceedings. Therefore, a claimant must offer a plausible and credible methodology for estimating the amount of compound interest it claims is due to the various members of a class. A further hurdle, which the CAT noted but did not need to decide in *Merricks*, is whether compound interest is a “common issue” across class members. The CAT recognised that this “is not an easy question”, but stated that, “if only a minority of class members suffered loss by way of compound interest ... , we would find it difficult to see how a claim for compound interest can raise a common issue across the class”.
- The CAT’s refusal to allow *Merricks* to amend his claim form presents a reminder that claim forms and pleadings must be carefully considered and precisely worded. The CAT has been clear that, particularly in cases where billions of pounds may be at stake, it will not allow CPOs to be granted on the basis of imprecise pleadings.
- The CAT’s sympathy towards Mastercard’s concerns regarding the LFA is a significant warning to claimants whose funding arrangements for adverse costs are not readily enforceable by the defendant. Although no binding decision was made in this

regard, the CAT’s comments signalled that claimants will be expected to ensure that defendants have adequate recourse to adverse costs cover. This approach potentially has ramifications beyond antitrust actions, given the increasing presence of third-party funding across litigation.

Notwithstanding Mastercard’s success in the present judgment, *Merricks* illustrates a noteworthy feature of the developing U.K. class action system: Indirect claims by a huge consumer base seeking very substantial sums can proceed to certification with relatively few obstacles. Those indirect claims can be (and often are) pursued in parallel with claims brought by commercial counterparties against the same defendants. Mass consumer classes may increase pressure on defendants to come to terms with the class rather than expose themselves even to a low risk of an adverse judgment at trial. The risk of these *in terrorem* settlements was recognised by the UKSC in its *Merricks* ruling.

## Conclusion

*Merricks* shows that the CAT’s gatekeeper function will be a significant feature of the CPO regime, notwithstanding the UKSC’s suitability test for certification. The upcoming decisions, both in the antitrust sphere and beyond, will be formative in the development of the U.K.’s class action landscape.