Merricks v Mastercard: UK Class Actions Back Under the Spotlight

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05 / 08 / 19

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The English Courts have reignited the prospects of a £14 billion class action against Mastercard.

In a much anticipated ruling, on 16 April 2019, the Court of Appeal of England and Wales (the Court) granted an appeal by Walter Merricks, the representative for over 46 million U.K. consumers, against Mastercard in relation to alleged overcharging of interbank fees between 1992 and 2008. The Court favoured a broad approach to class certification, lowering the standard of scrutiny favoured by the lower court, the Competition Appeal Tribunal (CAT). The Court found that class claimants need only show a real prospect of success to secure class certification. Detail as to how the class would substantiate its proposed economic model (in this case, a relatively complex theory as to what credit card surcharges would be passed on by merchants to consumers) or scheme of award distribution, if successful, was not required.

Subject to a possible appeal to the U.K. Supreme Court, the case will now return to the CAT, which will decide whether the class action should proceed through the "certification stage" to a full trial and, if so, whether Mastercard is liable to pay any damages.

The *Mastercard* case places U.K. class actions back under the spotlight, refuelling the debate as to whether such actions may gain prominence after a slower than anticipated start and, in turn, raising questions as to how English law and practice will develop in this area.

Background

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 European Economic Area (the "Multilateral Interchange Fees", or MIFs), Mastercard restricted price competition between the banks and violated EU competition law. Mastercard's appeals against the EC Decision to the European courts were unsuccessful.

EC Decisions are treated across the EU Member States as *prima facie* evidence of anti-competitive conduct in "follow-on" private actions for damages. As a result, Merricks relied on the 2007 EC Decision when commencing the U.K. class action in September 2016. On behalf of approximately 46.2 million U.K. consumers, Merricks sought damages for the allegedly inflated prices paid by those consumers because the unlawful MIFs were either mostly or entirely passed on to them. Damages for the overcharge and interest were estimated at over £14 billion — reportedly the largest civil damages claim ever brought in the U.K.

Merricks' claim was brought on an "opt-out" basis. Opt-out class actions in relation to competition/antitrust infringements — collective actions on behalf of everyone matching a certain description unless they expressly opt out of the proceedings — were only introduced in the U.K. in October 2015. They contrast with "opt-in" class actions — consisting only of members matching the description who expressly elect to join the action — which had already existed for several years.

Both opt-out and opt-in claims must be (i) brought by an appropriate authorised representative and (ii) "certified" by the CAT as eligible for inclusion in collective proceedings. Certification requires, amongst other things, that the claims are brought on behalf of an

identifiable class of persons, raise common issues and are "suitable" to be brought in collective proceedings. If the CAT is satisfied that the conditions are met, it *may* make a "collective proceedings order" (CPO), thus allowing the claim to proceed to a full trial.

For two principal reasons, in July 2017 the CAT refused to grant Merricks a CPO. First, the CAT was unconvinced that expert evidence could adequately demonstrate the "pass-on" of MIFs from merchants to consumers, so as to justify the aggregate damages claimed. Merricks had attempted to rely on a "top-down" approach to calculate the total overcharge to consumers, and therefore the total damages appropriate, but the CAT was not persuaded that sufficient information to support this approach existed. Second, Merricks' proposed method of distributing damages — calculating the aggregate amount attributable to each year from 1992 through 2008 and distributing that on a *per capita* basis to each individual falling within the class in the given year — would not have correlated to each individual's loss, thus contradicting the compensatory principle of damages for torts under English law.

Court of Appeal Decision

Pass-On

The Court said that a proposed class representative need only demonstrate that a claim has a "real prospect of success" at the certification stage. In support, the Court cited several Canadian authorities (*Pro-Sys v. Microsoft*, in particular), noting that the similarities with the English class action regimes were "obvious". The Court endorsed top-down calculations of aggregate damages even though they did not require proof of individual losses — to insist on such proof would "run counter to the provisions" of the U.K. regime.

Applying this standard, Merricks only needed to convince the CAT that both (i) the expert methodology concerning pass-on of MIFs to consumers was "capable" of assessing the level of pass-on and (ii) the data to operate that methodology would, or would likely, exist at trial. Merricks did not need to produce or identify all of the relevant evidence. Instead, an analysis of pass-on to consumers on an individual basis is "unnecessary when what is claimed is an aggregate award", and pass-on to consumers "generally satisfies the test of commonality of issue necessary for certification". Nor did the certification stage require a "mini trial", which was, in the Court's opinion, "more or less what occurred" before the CAT. In sum, the Court said the CAT had misdirected itself as to the applicable test for certification and "demanded too much" of Merricks for that stage of the case.

Distribution of Damages

The Court noted the absence in the relevant legislation of any requirement that aggregate damages should be distributed according to what an individual claimant has lost. Although such a compensatory system "will probably be the most obvious and suitable" distribution method in cases where each individual's loss is readily calculable, it is not mandatory. If such a prerequisite did exist, then the power to make an aggregate award would be "largely negated" in class actions of this kind.

As the CAT "clearly did" consider that an aggregate award had to be distributed to claimants so as to restore individual loss suffered by them, the Court concluded that its approach was both "premature and wrong".

Comment

The Court's judgment appears to significantly lower the initial threshold for class actions to proceed in the U.K. Class representatives need only establish a "real prospect of success" — a relatively low bar to overcome, particularly given the significant time and costs incurred in class actions.

Although the Court's judgment endorsed the Canadian view that certification is a continuing process, in practice this may provide cold comfort to parties. The suggestion by the Court that terminating a class action "once the pleadings, disclosure and expert evidence are complete and the Court is dealing with reality rather than conjecture" does not fully reflect the fact that completing the pleadings, disclosure and expert evidence stages in litigation is a costly and time-consuming exercise. Class representatives and their funders should take note of the potentially significant liability to pay adverse costs if the CPO is revoked after completing such expensive steps in the process.

Only time will tell whether the Court's judgment results in an increase in the number of class actions commenced in the U.K.; however, developments should be monitored closely. Thus far, no opt-out claim has proceeded beyond the certification stage. However, with a low bar to entry, and in a climate where the subject matter for anticompetitive behaviour continues to be widened by the U.K. anti-trust regulator, the Competition and Markets Authority, there may follow a noticeable uptick in U.K. class action litigation.

Of further note is the Court's departure from the compensatory principle of damages for torts under English law, by allowing a distribution of damages that does not correspond to a particular individual's loss. The acceptance of this principle is a significant development in English law and creates novel ground for the English courts and practitioners alike.

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Finally, the case confirms the increasingly welcoming approach of the English courts and U.K. Parliament towards third-party funding. The Court specifically noted, for example, that the revised U.K. class action regime was "obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding". The U.K. litigation funding market has grown significantly in recent years, with current estimates indicating that the capital available for funding now stands at over £1.3 billion. Third-party funding is a particularly valuable avenue for U.K. consumers, given that opt-out class actions cannot be funded by arrangements whereby lawyers receive a portion of any damages received. In the U.S., by contrast, a material part of class settlements can be awarded as fees to counsel for the class.

On a number of fronts, the Court's judgment provides, at least temporarily, some much-needed clarification. Given the infancy of the U.K. class action regime, such clarity should be welcomed whilst also expecting further twists and turns. Mastercard has already indicated that it intends to appeal the Court's decision, and separate opt-out CPO applications due to be heard by the CAT later this year are likely to supplement the issues decided by the Court. In the first opt-out case to go before the CAT, it commented about the process that "everyone is learning on the way". For the moment at least, this still seems apposite.

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