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UK Supreme Court hands down new guidance for collective claim certification

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On December 11, 2020, the U.K. Supreme Court remitted for reconsideration the Competition Appeal Tribunal's (CAT) denial of claim certification for a £14 billion ($18.5 billion) collective proceeding against Mastercard for the alleged overcharging of more than 46 million U.K. consumers over a 15-year period.[1]

As the collective proceeding regime continues to develop, the *Merricks* judgment marks some of the earliest CPO guidance from the U.K. Supreme Court, in particular regarding the suitability requirement.

The judgment provides important guidance to the CAT and to parties to proposed collective proceedings about when a Collective Proceedings Order (CPO) to certify collective claims may be suitable, establishing a standard likely to invite more collective proceedings going forward.

COLLECTIVE PROCEEDINGS IN THE U.K.

Thirteen years after an unsuccessful attempt to introduce a regime for collective proceedings in 2002, a class action (or "collective proceeding") regime, including both opt-out and opt-in proceedings, was introduced through the Consumer Rights Act 2015, which amended the Competition Act 1998 and the Enterprise Act 2002.

The Consumer Rights Act 2015 marked the culmination of reform proposals that aimed to: (1) increase growth by empowering small businesses to tackle anticompetitive behavior; and (2) promote fairness by enabling consumers and businesses who have suffered loss due to anticompetitive behavior to obtain redress.

To this end, a key proposal was to "[i]ntroduce an opt-out collective actions regime for competition law to allow consumers and businesses to collectively bring a case to obtain redress for their losses."

Through the Consumer Rights Act 2015, the U.K. Parliament nominated the CAT to oversee the new opt-out regime for breaches of U.K. and European Union competition law. Under this regime, a person who proposes to be the class representative may bring before the CAT a collective proceeding combining two or more valid claims, which need not be against all of the defendants in the proceeding.

To proceed to trial, the class representative must ask the CAT to certify the claims by issuing a CPO. The CAT will grant a CPO if: (1) it is just and reasonable for the named plaintiff to act as the class representative (the "representative requirement"); and (2) the claims are eligible for inclusion in collective proceedings.

As part of the eligibility requirement, a claimant seeking to certify a collective proceeding must establish that: (1) the proceedings are brought on behalf of an identifiable class of persons (the "identifiable class requirement"); (2) the claims raise common issues of fact or law (the "commonality requirement"); and (3) the claims are suitable to be brought in collective proceedings (the "suitability requirement").

In determining suitability, the CAT may consider all matters it deems fit, including seven enumerated factors.[2]

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MASTERCARD V. MERRICKS: CASE BACKGROUND

In 2014, the European Court of Justice upheld an earlier decision by the European Commission that Mastercard had breached competition law by charging businesses that accepted Mastercard payments an excessively high multilateral interchange fee for cross-border transactions between 1992 and 2008.

In 2016, relying on this decision, class representative Walter Merricks CBE applied to the CAT to commence an opt-out collective proceeding, alleging that Mastercard's excessive interchange fees were passed on to U.K. consumers through increased prices, resulting in those consumers being overcharged by £14 billion.

Reasoning that the increased prices were paid by all consumers — not just Mastercard holders — damages of approximately £300

were sought for every person who was over 16 and lived in the United Kingdom during the 16-year period.

The CAT declined to issue a CPO. In denying claim certification, the CAT reasoned that the claim failed the commonality requirement because interchange fee pass-on issues were not sufficiently common.

The CAT further reasoned that the claim failed the suitability requirement because, under the Competition Appeal Tribunal Rules 2015 (SI 2015/1648) (the "CAT Rules"): (1) absent sufficiently reliable data to calculate aggregate loss, the claims were not suitable for an aggregate damages award; and (2) the proposed equal division of total damages without regard to each class member's actual loss undermined the common law compensatory principle.

> Consumer advocates say that *Merricks* will set the standard for collective claims of this nature to proceed.

Mr. Merricks appealed the CAT's decision to the Court of Appeal, which found that the CAT had misinterpreted the law and ordered it to reconsider its CPO decision.[3] Mastercard appealed the Court of Appeal's judgment to the U.K. Supreme Court.

THE UK SUPREME COURT'S JUDGMENT

In December 2020, the U.K. Supreme Court (by a 3 to 2 majority) upheld the Court of Appeal's ruling and dismissed Mastercard's appeal.

The Court largely followed the approach of the Court of Appeal and held that the CAT made five errors of law in declining to grant a CPO to certify the collective proceeding:

(1) The CAT failed to recognize that merchant pass-on of interchange fees was a common issue that, when combined with the common issue of overcharge, weighed importantly in favor of certification.

(2) The CAT placed too much weight on its decision that the case was not suitable for aggregate damages. The Court explained that suitability for aggregate damages is one of many factors to be taken into account for the purposes of certification, but not a necessary condition.

(3) The CAT failed to apply a test of relative suitability. In other words, in considering suitability of the proposed collective proceedings, the CAT failed to do so by reference to whether individual proceedings would be a suitable alternative. In this case, the Court held that it was "clear that [collective proceedings] would have been equally formidable to a typical individual claimant, seeking compensation for increased retail prices over the sectors of the market in which he or she was accustomed to make purchases," noting that if the forensic challenges to the resolution of the merchant pass-on issue "would have been insufficient to deny a trial to an individual claimant who could show an arguable case to have suffered some loss, they should not, in principle, have been sufficient to lead to a denial of certification for collective proceedings."

(4) The CAT improperly concluded that the difficulties with the loss data were sound reasons to deny certification, failing to give sufficient weight to the general principle that, where a claimant has shown a real prospect of demonstrating that he has suffered (more than nominal) loss as a result of a breach of duty by the defendant(s), the court should do what it can with the evidence available when quantifying damages in order to do justice.

(5) The CAT incorrectly relied on the compensatory principle to require the proposed method of distributing aggregate damages to consider the loss suffered by each class member. The Court noted that the collective proceedings regime expressly and radically modifies the compensatory principle.[4] Indeed, one reason to award aggregate damages in collective proceedings is to overcome the forensic and practical challenges of assessing loss at an individual level.

The Court remitted the case to the CAT to reconsider whether to certify the collective proceeding, which would allow the case to proceed to a trial on the merits.

TAKEAWAYS AND POTENTIAL CONSEQUENCES

As the U.K.'s opt-out collective proceeding regime continues to develop, the U.K. Supreme Court's highly anticipated *Merricks* judgment provides essential guidance to practitioners and foreshadows a number of potential consequences:

New guidance for claim certification. This is the first collective proceedings case of its kind to reach the U.K. Supreme Court. It addresses important questions about the correct legal requirements, in particular the suitability requirement, for certifying a claim.

Consumer advocates say that, although it was a split decision, with divergent views on, in particular, the approach to be taken to the assessment of the suitability requirement, and the proposed approach to the assessment of damages, the U.K. Supreme Court's ruling will set the standard for collective claims of this nature to proceed.

It remains to be seen, however, how the CAT will apply the principles set out in the *Merricks* judgment both in the *Merricks* case itself, and in other proposed collective proceedings: after the ruling, a Mastercard executive indicated they "will be asking the [CAT] to avert the serious risk of the new collective

proceeding regime going down the wrong path with a case which is fundamentally flawed."

There is no doubt that there remains plenty of scope for innovative legal argument in relation to certification by both Claimant and Respondents, whether grounded in the English common law principles referred to by the Supreme Court, or otherwise.

Back to first principles. The U.K. Supreme Court's decision to set a lower certification threshold than the one applied by the CAT reflects the Court's view that doing so will give effect to the original aims of the reform proposals that led to the Consumer Rights Act 2015, including to facilitate the vindication of the rights of consumers which arise out of a proven infringement.

> Competition class actions are expected to increase as a result of the ruling, including a number of substantial claims which have been stayed pending the decision.

A class of most U.K. adults. Although the U.K. Supreme Court's judgment in *Merricks* only concerns the threshold issue of certification, if the claim ultimately goes on to succeed at trial, almost every adult in the U.K. — even if they never had a Mastercard — could receive a payout of up to £300 from the credit card company.

More competition class actions. Lawyers in the U.K. have called the ruling, "a revolution in English law." Competition class actions are expected to increase as a result of the ruling, including a number of substantial claims which have been stayed pending the decision.

Collective proceedings in the U.K. are in their infancy compared with the much more developed class action regime in the United States, but many believe the *Merricks* judgment will encourage the growth of collective claims in the U.K.

More applications for summary judgment and strike out. As the U.K. Supreme Court notes in its decision, the certification process does not involve a merits test, subject to two exceptions under the CAT Rules: (1) the power of the CAT to strike out or grant summary judgment, including at the time at which a CPO is sought; and (2) the choice between "opt-in" and "opt-out" proceedings.

Given the U.K. Supreme Court's approach to certification, Respondents are likely to be inclined, where possible, to bring applications for summary judgment and strike out during the certification process.

More focus on revisiting certification. Under the CAT Rules, the CAT may vary or revoke certification at any time. Thus, even after certification, Respondents are likely to keep certification requirements under scrutiny, with an eye toward launching applications to vary or revoke a collective proceeding order.

Canadian jurisprudence. The Court aligned with the Court of Appeal in treating Canadian jurisprudence on certification[5] as persuasive, explaining that this was "not only because of the greater experience of their courts in the conduct of class actions but also because of the substantial similarity of purpose underlying both their legislation and ours."[6]. Given this, practitioners in the U.K. will likely place more reliance on Canadian precedent moving forward.

Notes

[1] *Mastercard Inc. and others v. Walter Hugh Merricks CBE* [2020] UKSC 51.

[2] These factors include: (a) whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues; (b) the costs and the benefits of continuing the collective proceedings; (c) whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class; (d) the size and the nature of the class; (e) whether it is possible to determine in respect of any person whether that person is or is not a member of the class; (f) whether the claims are suitable for an aggregate award of damages; and (g) the availability of alternative dispute resolution and any other means of resolving the dispute.

[3] Mastercard challenged the reasonableness of Merricks as a class representative before the CAT but did not pursue this objection in the Court of Appeal.

[4] *Merricks*, UKSC 51 at [76]; *see also* Competition Act 1998, § 47C.

[5] *Pro-Sys Consultants Ltd. v. Microsoft Corp.* [2013] SCC 57. In the *Microsoft* case, the Canadian Supreme Court concluded, in relevant part, that: (1) the threshold test for establishing that the pleadings disclosed a cause of action was the equivalent of the strike-out test in English civil procedure, where the pleadings must enable the opposing party to know what case is being made against them; and (2) the threshold for the establishment of other conditions for certification was that there should be "some basis in fact" for a conclusion that the requirement was met.

[6] *Merricks*, UKSC 51 at [42].

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