

Merricks v Mastercard U.K. Competition Appeal Tribunal Gives Green Light for First Ever ‘Opt-out’ Class Action

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Key Takeaways

The United Kingdom's Competition Appeal Tribunal (CAT) recently granted the U.K.'s first ever Collective Proceeding Order (CPO), on an “opt-out” basis, in *Walter Hugh Merricks CBE v Mastercard Incorporated & Ors [2021] CAT 28*, thus allowing Mr. Merricks to proceed with the collective proceeding against Mastercard.

The CAT's judgment raised mainly three technical but economically significant points of detail, which are summarized below. But the real significance of the judgement is the milestone nature of the granting of a CPO, both in the context of this very significant claim and as a pathfinder for a pipeline of future high-value claims for breach of competition law across a range of industries and sectors.

Background

The unanimous judgment of the CAT in *Merricks v Mastercard* is the latest development in this legal saga. In 2016, Mr. Merricks, as proposed class representative, filed a £14 billion (\$19.4 billion) claim for the alleged overcharging of more than 46 million U.K. consumers over a 15-year period. Mr. Merricks filed the claim as an “opt-out” collective proceeding (a mechanism introduced by the Consumer Rights Act 2015) against Mastercard, meaning the action would be pursued on behalf of a class unless individual members opted out.

Mr. Merricks relied on the European Court of Justice's decision that Mastercard had breached competition law by charging businesses excessively high multilateral interchange fees for cross-border transactions between 1992 and 2008.

In 2017, the CAT declined to certify the claim¹. The CAT concluded that Mr. Merricks had satisfied the condition to act as class representative (known as the “authorization condition”), but had failed to satisfy the “eligibility condition” (the requirement that the claims are eligible for collective proceeding). Following appeals to the Court of Appeal of England and Wales and the U.K. Supreme Court, the landmark Supreme Court judgment² held that the CAT had misinterpreted the law and remitted the case to the

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CAT for reconsideration. For the background to and implications of that judgment, see this prior [article](#).

The “Authorization Condition” – Legal Funding

Although the CAT had, in 2017, already found that Mr. Merricks satisfied the authorization condition, it reconsidered the question in light of Mr. Merricks’ new litigation funder and litigation funding agreement (LFA).

The CAT focused on the terms of the LFA, citing the requirement that Mr. Merricks act fairly in the interests of the class, and noted the suitability of (i) the value of the adverse costs cover (£15 million) and (ii) the value of the costs and disbursements cover (£45 million, well exceeding the budgeted £32.5 million).

Noting also that the risk of a conflict of interest between a funder and class members is most acute at the time of settlement of claims and termination of the funding agreement, the CAT proceeded to consider those corresponding terms of the LFA.

With regard to a potential settlement, the CAT was satisfied that the LFA mechanism, whereby a difference of opinion between the funder and Mr. Merricks would be submitted to a Queen’s Counsel for consideration—but where the final decision rested solely with Mr. Merricks—adequately protected Mr. Merricks’ right to act in the best interests of the class.

As to terminating the funding agreement, the CAT raised concerns during the hearing over a unilateral termination clause in favor of the funder and the funding difficulties that it could cause the class mid-proceedings. However, the CAT ultimately concluded that an addendum requiring that the funder’s view to terminate be based on independent legal and expert advice sufficiently addressed those concerns.

The CAT also found that an undertaking as to costs by the funder was appropriate, in circumstances where Mastercard had, as a third party, no right to enforce the adverse costs cover against the LFA and the funder was based outside of the jurisdiction.

The “Eligibility Condition”

In light of the Supreme Court judgment, Mastercard did not oppose certification of the collective proceeding. Nonetheless, Mastercard argued that the claims concerning deceased persons and compound interest should be excluded.

Deceased Persons

On remittance, Mr. Merricks applied to amend the claim form to include people who died before the claim form was issued. This would have had the effect of increasing the class from 46.2 million people to 59.8 million people.

The CAT concluded that whilst it was possible in theory to include the estates of deceased people in a class definition in a collective proceeding, section 47B of the Competition Act 1998 did not allow claims to be brought *in the name of* deceased persons as Mr Merricks sought to do.

Compound Interest

The claim form had, from the outset, included a claim for compound interest. Mr. Merricks argued that the class members were entitled to compound interest because

they had incurred borrowing charges and other financing costs as a result of the overcharge and/or had lost return on investments on sums that would otherwise have been saved.

Relying on the decision in *Sempra Metals*³, the CAT observed that compound interest constitutes a distinct head of loss, which must be separately established and cannot be presumed. It was therefore necessary to show, on the balance of probabilities, how the class members funded the additional expense or what they would have done with the additional money if there had been no overcharge. For example, the CAT noted that the overcharge sums could have simply been used for a little extra expenditure and not necessarily to reduce borrowings or to add to a savings account. Without any credible or plausible method of estimating what loss by way of compound interest was suffered on an aggregate basis, the CAT held that compound interest could not be claimed in the circumstances.

¹ [2017] CAT 16.

² *Mastercard Inc. and others v. Walter Hugh Merricks CBE* [2020] UKSC 51.

³ *Sempra Metals Ltd v Commissioners of Inland Revenue* [2007] UKHL 34, [2008] 1 AC 561.

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