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Insights

MERRICKS V MASTERCARD: THE SUPREME COURT DELIVERS COLLECTIVE JOY TO CLASS REPRESENTATIVES

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SUMMARY

The Supreme Court has handed down a landmark judgment in a £14 billion collective action brought against MasterCard in relation to anticompetitive interchange fees, following an infringement decision by the European Commission against MasterCard. In this Insight, we discuss the key findings in the judgment, matters which remain unresolved, and the likely impact of the judgment on the future of the collective actions regime.

The UK Supreme Court has handed down its hotly anticipated judgment in *Merricks v MasterCard*, a collective action believed to be the largest class action ever filed in any jurisdiction, which seeks £14 billion in damages on behalf of a class of 46.2 million consumers in relation to anticompetitive interchange fees.

The proposed collective action was refused certification by the UK's specialist competition court, the Competition Appeal Tribunal ("**CAT**") in 2017, on the basis that: (a) the claim was unsuitable for an award of aggregate damages; and (b) it would be impossible to distribute any damages on a compensatory basis. The CAT also held that the class members lacked commonality of issue on the matter of overcharges being passed on to them by merchants further up the supply chain. Read our Insight on that 2017 CAT decision, "Declined: Competition Appeal Tribunal strikes out collective action brought against Mastercard".

The CAT's decision was overturned by the Court of Appeal in 2019, and the case was appealed to the UK's top court, the Supreme Court, for determination earlier this year. Read our Insight on that Court of Appeal decision, "Court Of Appeal restores £14 billion collective damages action".

The Supreme Court's decision

The Supreme Court dismissed MasterCard's appeal by a majority of three to two. The key findings of the majority judgment are as follows:

- The CAT was wrong to treat the suitability of the claims for aggregate damages as a hurdle rather than a factor to be weighed in the balance;
- The CAT was wrong to find that the passing on of overcharge to the class members by merchants was not a common issue for members of the class, and this should have been an important factor in favour of certification;
- The CAT failed to consider the suitability of the proceedings as a collective claim as compared to them being pursued individually (which was not a viable option due to the low value of individual claims) and failed to take into account the fact that the identified quantification difficulties equally impacted individual claims;
- The CAT did not take into account the general principle that the court must do what it can with the evidence available when quantifying damages, and instead allowed shortcomings in the likely availability of data and difficulties in quantification to defeat the claims; and
- The CAT was wrong to regard the compensatory principle as an essential element in the distribution of aggregate damages.

The minority judgment, which defendants are likely to refer to in support of their positions in future cases, disagreed with the majority judgment that:

- the CAT was not within its rights to take into account the lack of available data and impracticality of the quantification methodology in determining certification; and
- collective claims should be compared with individual claims from class members for the purpose of considering suitability for certification.

Analysis

As is apparent from the summary above, the Supreme Court's judgment is very clear in setting out what it considers the CAT got wrong in *Merricks*. However, we discuss below one matter on which the Supreme Court backed the CAT's approach, and one matter which was not considered by the Supreme Court. Both issues are likely to be significant in future cases.

First, one aspect on which both the majority and minority judgments agreed is that the Court of Appeal had been wrong to criticise the CAT for undertaking an inappropriate "mini trial" or "trial within a trial" at the certification hearing, when it cross examined the class representative's experts on their quantification methodology. The Supreme Court considered that this cross examination was beneficial in understanding the proposed analysis, though the majority judgment did state that it would be a "rare occurrence" where such cross examination is appropriate at a certification hearing. Class representatives can therefore expect at least a similar level of interrogation during future certification hearings, in complex cases, where the CAT considers it necessary to do so. It is

envisaged, for example, that the collective actions concerning the FX cartel could have similar quantification complications.

In relation to the unresolved issue, the majority judgment makes clear that the certification hearing is not a "merits test", rather the standard at that stage is akin to strike out hearing (i.e. the class representative's case need only be arguable). However, the court did note that a merits analysis is provided for in the CAT Rules in determining whether the collective action should be certified on an "opt in" or an "opt out" basis. It is, however, unclear how detailed such a merits analysis is to be in determining that issue. It is anticipated that this issue will be one of the next major battlegrounds in collective actions, as the designation of a claim as "opt in" or "opt out" is likely to be determinative as to whether certain collective actions proceed, as an "opt in" claim may not be commercially viable for a funder in all circumstances.

As an overarching conclusion, despite multiple references in the judgment to the CAT being entrusted with determining the certification of collective claims, due to its expert knowledge and experience in competition matters, the Supreme Court's judgment appears to diminish the CAT's "gatekeeper" role at the certification stage. By lowering the threshold for certification of collective claims, it follows that a higher proportion of collective claims will likely pass the certification stage, and progress towards trial. A potential pitfall of this approach for the regime more generally is that unmeritorious claims may therefore be certified, and the sheer value of those claims may pressure defendants into settling them to avoid even a small risk of a massive damages pay-out. Those concerns were raised before the regime came into force, and were reiterated in the minority judgment. The Supreme Court's judgment risks undermining one of the UK Government's "strong safeguards" to avoid those risks, being "**strict judicial certification of cases so that only meritorious cases are taken forward**" (paragraph 86 of the judgment).

Anticipated developments

The *Merricks* claim was the second ever Collective Proceedings Order ("**CPO**") hearing under the UK's collective actions regime, following an unsuccessful attempt in *Gibson v Pride Mobility Products Limited* [2017] CAT 9 (a collective action in relation to mobility scooters, which was discontinued as the size of the certifiable class rendered it commercially unviable to pursue). In the period during which *Merricks* has been making its way through the appellate courts, a number of other collective claims have been filed, most of which have had their certification hearings postponed pending the Supreme Court delivering its judgment.

The Supreme Court's judgment will therefore fire the (re)starting gun on those claims, which raise a number of new issues not encountered in *Merricks*. For example, *Justin Gutmann v First MTR South Western Trains Limited and Another* is a "stand alone" collective action, unsupported by any regulatory or competition authority findings of infringement. The merits of that claim may play a more important role in the determination of whether the CPO should be granted. A further example is the two competing "opt out" class actions *Michael O'Higgins FX Class Representative Limited v*

Barclays Bank PLC and Others and *Mr Phillip Evans v Barclays Bank PLC and Others*, in which there is expected to be a "carriage fight" to determine which class representative (if any) is approved by the CAT. It remains to be seen what factors the CAT takes into account in making that determination.

Therefore, whilst the *Merricks v MasterCard* ruling is a seminal judgment from the Supreme Court, there remain many issues to be resolved as the UK's relatively nascent collective actions regime finds its feet. The Supreme Court's judgment is likely to encourage the filing of more collective claims, breathing life into a regime that many feared was faltering after the first two collective claims failed at the certification hearing stage. All eyes on the CAT now as *Merricks* is remitted for further consideration, and the other collective actions proceed to their own CPO hearings.

If you would like to discuss any aspect of the *Merricks v MasterCard* judgment, or collective actions more generally, please contact Ed Coulson or Andrew Leitch.

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