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Insights

CERTIFIED PROGRESS FOR THE UK'S COLLECTIVE ACTIONS REGIME – THE FIRST OPT-OUT CLASS ACTION HAS BEEN APPROVED

Aug 19, 2021

This week has seen a major breakthrough in the UK's fledgling class action regime, which brought opt-out collective proceedings to the UK for the first time back in 2015. The first opt-out collective action has now been certified by the UK's Competition Appeal Tribunal in the case of *Merricks v MasterCard*, a £14bn class action seeking damages in relation to alleged anticompetitive interchange fees (i.e. card transactions fees) on behalf of all adult UK resident consumers who were over 16 and made purchases between 22 May 1992 and 21 June 2008.

The UK's class action regime got off to a faltering start, with the first claim brought under it being discontinued and the *Merricks* case being denied certification at its first attempt back in 2017. The case was appealed to the Court of Appeal and then up to the Supreme Court, before being remitted back to the Competition Appeal Tribunal for reconsideration. Whilst the various appeals were ongoing in this case, a multitude of other class actions that had been filed in the intervening period were paused, awaiting the outcome of the Supreme Court's decision. With the Supreme Court finding in Mr Merricks's favour, and the judgment providing detailed guidance on the approach to be taken to class certification under the class action regime, those other claims were freed to proceed to certification hearings (you can read our update on the Supreme Court's decision in *Merricks v MasterCard*). *Merricks v MasterCard* is the first such case to result in the collective action being certified, and it will now proceed to trial.

Following the Supreme Court finding in favour of Mr Merricks, MasterCard did not oppose certification of the class. However, there were two important issues in dispute between the parties at the hearing that had a significant impact on the size of the class, and the damages claimed:

- The Tribunal rejected an application by Mr Merricks to include deceased individuals within the scope of the certified class. The Tribunal's decision was on technical grounds, in that the proper parties were actually the deceased persons' personal representatives as opposed to the deceased persons themselves. The limitation period had also expired on new claimants being added, in any event.

- The Tribunal also restricted the class claim to simple interest, as opposed to compound interest, shaving some £2.2bn off the value of the claim. Whilst Mr Merricks argued that each consumer would have either had savings or borrowings, and therefore compound interest should follow, the Tribunal held that Mr Merricks needed to show how the class members funded the additional expense, or what they would have done with the additional money if there had been no overcharge. Mr Merricks had also not brought forward any plausible or credible method of calculating the compound interest claimed.

Whilst compound interest therefore looks challenging to establish in future class actions, there may be potential for the estates of deceased individuals to be eligible class members in future claims, provided the class definition refers to the deceased individuals' personal representatives and the claims are filed within the limitation period.

All eyes turn now to the other collective actions certification hearings that are set to reach judgment in the coming months, including the "carriage dispute" between competing class actions relation to collusion on the FX market. Watch this space for further updates.

BCLP is at the forefront of collective actions in the UK and EU, with the ability to draw heavily on BCLP's heavyweight US class action practice where class actions has been a core practice for more than 30 years. If you would like to discuss this case development and/or its practical implications in further detail, please do contact Ed Coulson or Andrew Leitch.

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