

## ***Merricks v Mastercard [2019] EWCA Civ 674: collective proceedings in competition law revitalised by the Court of Appeal***

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On 16 April 2019, the Court of Appeal allowed Mr Merrick's appeal from the Competition Appeal Tribunal's ("CAT") refusal to grant a collective proceedings order ("CPO"). The CAT's order is, accordingly, set aside and the application for certification is remitted to the CAT for a re-hearing.

Given the infancy of the collective actions regime, the Court of Appeal's judgment is of significant importance. This case note discusses the judgment and summarises its implications for those bringing and defending collective proceedings.

### ***Factual background***

Payments made using Mastercard's credit or debit cards involve four parties: the cardholder (i.e. the person who purchases a particular good or service via Mastercard), the cardholder's bank (known as the "issuing bank"), the "merchant" (i.e. the vendor of the good/service in question) and the merchant's bank (known as the "acquiring bank"). In order to be able to accept Mastercard payments, both the issuing bank and the acquiring bank need to be licensed by Mastercard, which involves the payment of a fee.

When the issuing bank transmits the cardholder's payment to the acquiring bank, it deducts a fee—the interchange fee—which the acquiring bank then generally deducts from the amount that it, in turn, pays to the merchant in respect of the cardholder's purchase. The interchange fee forms the majority of an overall charge (the "merchant service charge" or "MSC") that the acquiring bank deducts from the amount that it pays to the merchant.

Issuing and acquiring banks often bilaterally agree the level of the interchange fee. Where they do not do so, the default position is that the interchange fee is set at a level specified by Mastercard itself, known as the "multilateral interchange fee" (or "MIF"). Different MIFs apply depending on the territorial characteristics of the transaction.

One such MIF—the so-called "EEA MIF"—is levied, broadly, in cases where a

card issued in one EEA Member State is used at a merchant based in a different EEA Member State. The EEA MIF was the subject of public enforcement proceedings by the European Commission (the “**Commission**”), which found that the EEA MIF effectively comprised a minimum price which merchants had to pay to their acquiring banks in order to be able to accept Mastercard payments, thereby restricting competition between acquiring banks to the detriment of merchants (and subsequent purchasers).

In circumstances where the Commission also considered that the EEA MIF was not objectively necessary to the operation of a payment system such as that operated by Mastercard, the EEA MIF was held to be contrary to one of the core provisions of EU competition law, Art.101 TFEU.

The claim in *Merricks* concerned both the EEA MIF and another, different interchange fee, that which applied as a “fallback” in relation to intra-UK transactions for which the issuing and acquiring banks had not made bilateral arrangements. This so-called “**UK MIF**” was not at issue in the Commission’s decision, but the proposed class representative in *Merricks* contends that the level of the UK MIF was, essentially, directly influenced by the level of the EEA MIF and that losses resulting from the UK MIF were, accordingly, caused by the infringement described in the Commission’s decision. In that regard, while interchange fees are borne (in the first instance) by merchants (in the form of higher MSCs than would be imposed in the absence of an interchange fee), the Commission had observed in its infringement decision on the EEA MIF that end consumers were:

*“...likely to have to bear some part of the cost of MasterCard’s MIF irrespective of the form of payment the customers use ... because depending on the competitive situation merchants may increase the price for all goods sold by a small margin rather than internalising the cost imposed on them by a MIF...”*

Against that background, Mr Merricks, a qualified solicitor with a distinguished career in fields concerned with consumer protection, sought the CAT’s authorisation to act as the class representative for collective proceedings under the new s.47B of the Competition Act 1998. He did so in respect of the following class of consumers:

*“Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of three months, and (2) aged 16 years or over.”*

The CAT, however, refused to grant a CPO primarily for two reasons:<sup>1</sup>

(i) the claims were not suitable for an aggregate award of damages, as Mr Merricks had failed to satisfy it that there was sufficient data available for his proposed methodology to quantify aggregate damages to be applied on a sufficiently sound basis; and

(ii) the claims were not suitable to be brought in collective proceedings because Mr Merricks had failed to satisfy it that there was any reasonable basis upon which payments to individuals bearing any relationship at all to the compensatory principle could be determined.

### ***The collective proceedings legal framework***

As amended by the Consumer Rights Act 2015 (“**CRA**”), s.47B of the Competition Act 1998 permits collective competition law proceedings to be brought, on an opt-out or opt-in basis, before the CAT. In order to do so, however, the potential class representative must apply for, and obtain, a CPO. This involves satisfying the following criteria, set out in s.47B(5) of the 1998 Act:

(5) “The Tribunal may make a collective proceedings order only—

(a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8) [**the representative criterion**], and

(b) in respect of claims which are eligible for inclusion in collective proceedings [**the eligibility criterion**].”

The use of the word “may” in s.47B(5) suggests that the tribunal retains a discretion to refuse to grant a CPO, even if the representative criterion and the eligibility criterion are both satisfied (“may make”: s.47B(5)).

### ***The eligibility criterion***

Subsection (6) of s.47B expands upon the eligibility criterion:

*“Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law [the commonality requirement] and are suitable to be brought*

<sup>1</sup> See, further, Armitage and Williams, *Some things money cannot buy - lessons learned from the latest judgment under the UK's new regime for collective competition law claims: Merricks v Mastercard Inc* C.J.Q. 2018, 37(1),

*in collective proceedings [the suitability requirement].”*

Rule 79 of the 2015 Rules give further detail as how the suitability requirement will be judged by the CAT:

*“...[The CAT] shall take into account all matters it thinks fit, including—  
(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 ....”*

For certification as an opt-out class action, the tribunal will additionally consider:

*“...(a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances, including the estimated amount of damages that individual class members may recover...”(r.79(3)).*

### ***Damages and costs***

Of considerable importance, pursuant to s.47C(2), the CAT *“...may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person...”*.

### ***The implications of the Court of Appeal’s Judgment***

The Court of Appeal allowed Mr Merrick’s appeal from the CAT’s refusal to grant a CPO. It did so on the grounds that the CAT had erred in law in its approach to the issue of pass-on and its approach to distribution. In short, in the Court of Appeal’s view, the CAT had *“...demanded too much of the proposed representative at the certification stage...”*: [48]. In reaching these conclusions, the Court of Appeal made a number of statements which are of wider importance for all those considering bringing collective proceedings or defending against such proceedings.

- 1. The commonality requirement test is that as set out in the Canadian case of *Pro-Sys Consultants v Microsoft Corp* [2013] SCC 57 (“*Pro-Sys*”), whereby:**

*“... the expert methodology must be **sufficiently credible or plausible** to establish **some basis in fact** for the commonality requirement. This means that the methodology must offer a **realistic prospect of establishing loss on a class-wide basis** so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology **cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data** to which the methodology is to be applied...”.*

2. **The overarching test for the applicant to satisfy is not higher than real prospects of success:** [44], [52]-[54]. The *Pro-Sys* “some basis in fact” test does not require that the court resolve conflicting facts and evidence at the certification stage: [41]. Instead, the reference to needing “some evidence of the availability of the data” means that, at the certification stage, the proposed representative:

*“...must be able to demonstrate that the claim has a real prospect of success. To do so in this case he had to satisfy the CAT that the expert methodology was capable of assessing the level of pass-on to the represented class and that there was, or was likely to be, data available to operate that methodology. But it was not necessary at that stage for the proposed representative to be able to produce all of that evidence, still less to enter into a detailed debate about its probative value. To that extent a certification hearing is no different from any other interlocutory assessment of the prospects of success in litigation made before the completion of disclosure and the filing of evidence. Its purpose is to enable the CAT to be satisfied that (with the necessary evidence) the claims are suitable to proceed on a collective basis and that they raise the same, similar or related issues of fact or law: not that the claims are certain to succeed. The specific considerations relevant to suitability which are set out in Rule 79(2) do not call for a different approach. None of them requires the CAT to be satisfied that the collective claim has more than a real prospect of success...” [44].*

3. **A top down methodology of loss to the class as a whole is sufficient.** As the Court of Appeal held, “...there is no requirement to approach the assessment of an aggregate award through the medium of a calculation of individual loss...”: [46]. An individual claimant does not have to establish loss in relation to his or her own spending in order to meet the eligibility criterion: “...Pass-on to consumers generally satisfies the test of commonality of issue necessary..”: [47].

4. **The availability of information must be “looked at in terms of what information can be made available for use at the trial” rather than judging that information now:** [50]. The availability of data sufficient to allow any expert methodology to be operated therefore only needs a “sufficiently sound basis”, and it is “not appropriate” at the certification stage to require the experts to specify in detail what data would be available for each relevant aspect of the infringement: [50]. Instead, it is enough that expected sources of data are noted. At the certification stage “...the question for the CAT was not what they were capable of proving had this been the trial of the action...” ([51])
  
5. **Aggregate damages do not have to be distributed on a compensatory basis and distribution thereof is irrelevant at the certification stage:** The power to make an aggregate award with reference to an individual loss under s.47C(2) “...would be largely negated in large-scale opt-out proceedings of this kind if a calculation of individual loss was a pre-requisite for any authorised method of distribution and therefore for certification...”: [57]. As the making of an aggregate award does not require the CAT to calculate individual loss, there is no reason for them to be distributed in that manner: [60]. In this way, “...it was premature and wrong for the CAT to have refused certification by reference to the proposed method of distribution...” ([62]): distribution is a matter for the trial judge following the making of an aggregate award, not at the earlier certification stage.
  
6. **Canadian jurisprudence is likely to be of considerable assistance** to applicants and respondents before the CAT in future cases. As the Court of Appeal stated, the similarities between the Canadian and the UK regimes “are obvious” and it is “...right to treat the Canadian jurisprudence on certification as informing the correct approach...”: [40]. It relied on numerous Canadian authorities, including *Pro-Sys*.

Combined, this is a significant ‘win’ for would-be applicants. In a number of regards, the Tribunal’s “*more vigorous*” process was disapproved by the Court of Appeal and the threshold for the grant of a CPO reduced accordingly.

### **Other practical considerations – lessons learnt from *Merricks* and *Pride***<sup>2</sup>

There have so far been two cases that have generated judgments from the CAT at the certification stage, namely *Merricks* and *Gibson v Pride Mobility Products Ltd* [2017] CAT 9. Whilst the Court of Appeal’s judgment in *Merricks* teaches us a lot about the legal standard of the eligibility criterion (as discussed above), the CAT’s decisions in both cases include a number of other lessons.

<sup>2</sup> See, further, Armitage and Williams, *Some things money cannot buy - lessons learned from the latest judgment under the UK’s new regime for collective competition law claims: Merricks v Mastercard Inc* C.J.Q.

- 1. The representative criterion is unlikely to be a significant hurdle:** In both cases, the CAT was prepared to accept that the representative criterion was met, despite the size of the class in *Merricks*, in particular. The suitability requirement and commonality requirement are likely to continue to be more demanding hurdles for any applicant and the real battle grounds of any CPO hearing.
- 2. Objections concerning funding arrangements are limited:**

First, the requirement in r.78(2)(d) of the 2015 Rules that the CAT must consider whether the proposed class representative “...will be able to pay the defendant’s recoverable costs if ordered to do so...” has been interpreted in a claimant-friendly manner. The CAT in *Pride* was willing to proceed on the assumption that the costs of the proposed defendant would not exceed those of the proposed class representative because the former’s lawyers will “...have already done a great deal of work in gathering documentation and responding to the inquiries made in the course of the OFT’s [now Competition and Markets Authority’s] investigation...”. To similar effect, in *Merricks*, the CAT considered that the work done by Mastercard in the context of previous litigation concerning MIFs would enable it to save costs, whereas the proposed class representative would have to start “from scratch”.

Secondly, and relatedly, whilst the proposed defendant in collective proceedings has no obligation to file a costs budget, the CAT in *Merricks* held that doing so would be a first necessary step to challenge the adequacy of any applicant’s ability to fund costs. The proposed defendant cannot simply assert that the would-be class representative has inadequate costs cover, without carefully articulating the costs that it expects to incur itself.

Thirdly, in *Merricks*, the CAT considered the provision in s.47C(6) of the 1998 Act that:

*“...the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings...”*

In the face of contrary submissions from Mastercard, the tribunal held that the phrase “costs or expenses” in this provision is not limited to *inter partes* costs, but also covers charges made by third party funders in consideration of their funding of the litigation (e.g. “after the event” insurance premia). This will help to ensure that third party funders will have a sufficient (financial) incentive to fund such claims, because of the prospect of recovering potentially substantial amounts from unclaimed compensation.

- 3. The importance of experts:** In both cases, only the applicants' experts were required by the tribunal to give oral evidence. In both cases, moreover, the oral expert evidence principally involved questioning by the tribunal's chair, followed by limited cross-examination by the respondent's counsel. Whilst respondents are not obliged to put in expert evidence (indeed, Mastercard in *Merricks* did not do so), they are nevertheless likely to want to considering doing so in order to highlight flaws in the applicant's approach. It remains to be seen whether this may become more important in light of the Court of Appeal's more applicant-friendly approach, which seemed, in particular, to deprecate the CAT's "*vigorous*" examination of the applicant's expert witness: [53].
- 4. Appeal is open to the Court of Appeal, rather than requiring Judicial Review:** In an earlier judgment in *Merricks* ([2018] EWCA Civ 2527), the Court of Appeal confirmed, also contrary to the CAT's earlier judgment, that the Court of Appeal has jurisdiction to hear an appeal in relation to a CPO determination (at least in respect of an aggregate damages claim). The CAT had previously suggested that only judicial review was available. The CAT's decision in relation to the granting or refusal of a CPO is, therefore, open to challenge at the Court of Appeal, if it can be shown that it misapplied the relevant legal test or had made a decision on the facts which no reasonable tribunal could have reached.

### ***A final comment***

In short, and notwithstanding the CAT's unwillingness to certify the first two proposed collective proceedings, there remains cause for optimism about the new regime. As discussed, the CAT in *Pride* and *Merricks* took a broadly applicant-friendly approach to class definition, the representative criterion, and costs provisions. Whilst, the suitability requirement and commonality requirement (as part of the eligibility criterion) are likely to continue to be more demanding hurdles for any applicant, the Court of Appeal has significantly re-calibrated the threshold which applicants have to meet in their favour. It remains to be seen how the CAT will now apply this lower standard in *Merricks* and the other collective proceedings on foot.

***Paul Harris QC leads on behalf of the claimants in Walter Hugh Merricks CBE v Mastercard Inc. instructed by Quinn Emanuel. Jack Williams acted for the Defendant in the case of Dorothy Gibson v Pride Mobility Products Limited instructed by Band Hutton Button.***

***The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.***

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