

Mastercard Incorporated and others v Walter Hugh Merricks CBE [2020] UKSC 51: a priceless victory for UK consumers in the Supreme Court

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Paul Harris QC leads on behalf of the claimants in *Walter Hugh Merricks CBE v Mastercard Inc.*

References in the form “§x” below are references to paragraphs of the Supreme Court’s judgment.

Introduction

The UK’s current regime for collective competition law proceedings was introduced on 1 October 2015 by way of amendments to the Competition Act 1998 made by the Consumer Rights Act 2015. The reforms arose out of an April 2012 government consultation and a recognition that it was “*rare for consumers and SMEs to obtain redress from those who have breached competition law*” (see the extract at §20 of the Supreme Court’s judgment). Given that a key driver of the reforms was a desire to improve access to redress for consumers and small businesses, it may be regarded as a matter of some disappointment that not a single application for a collective proceedings order has yet been granted. Against that background, there can be little doubt that the long-awaited Supreme Court judgment in Merricks will reinvigorate the UK’s collective proceedings regime.

The proceedings below

The claim in *Merricks* and the previous judgments of the Competition Appeal

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Tribunal (CAT) and the Court of Appeal will need little introduction for interested practitioners. In brief summary, Mr Merricks wishes to act as class representative for a class of over 46 million people seeking aggregate damages in the sum of more than £14 billion in relation to certain charges imposed by Mastercard on merchants and allegedly passed on to consumers as part of the merchants' retail prices, in transactions spanning the entire UK economy over a period of some 16 years. The proposed collective claim, brought under section 47B of the Competition Act 1998, is a "follow-on" claim, in that it seeks damages allegedly caused by infringements of EU competition law relating to Mastercard's "multilateral interchange fees" found by the European Commission in a 2007 decision. It is also, unsurprisingly, being brought on an "opt-out" basis, i.e. on behalf of every UK consumer falling within the proposed class definition who does proactively withdraw from the proceedings.

In a judgment given by a panel including the Tribunal's President, Mr Justice Roth, the CAT declined to certify the proposed claim (see [2017] CAT 16; [2018] Comp AR 1), essentially on the basis that the claim was not "suitable" to be brought by way of collective proceedings, for two broad reasons. First, the CAT was not persuaded that there was sufficient data available for the purposes of the claimant's proposed methodology for estimating aggregate damages. Secondly, the CAT also considered that the claimant's proposed method for distributing any damages award (i.e. roughly equal distribution among members of the class on a per capita basis for each separate year of the infringement period) failed to satisfy a requirement, introduced by the CAT albeit not expressly set out in the relevant legislation, that it must be possible to estimate the individual loss actually suffered by each individual consumer, at least on a 'rough-and-ready' basis.

The Court of Appeal allowed Mr Merricks' appeal, holding that the CAT had erred in its approach to both of the two broad issues just set out: see [2019] EWCA Civ 674; [2019] Bus LR 3025.

The Supreme Court's judgment

The Supreme Court dismissed Mastercard's appeal. Lord Briggs ruled in favour of Mr Merricks, in a judgment with which Lord Thomas agreed. Prior to his sad and untimely death three days before the judgment was due to be handed down, Lord Kerr had indicated his agreement with the judgment of Lord Briggs. In those unfortunate circumstances, Lord Sales and Lord Leggatt agreed that justice required the appeal to be dismissed, despite considering (for their part) that the Court of Appeal was wrong to overturn the CAT's judgment at first instance. The remainder of this note accordingly principally focuses on the judgment given by Lord Briggs, which now represents an authoritative statement of the legal requirements for the certification of collective competition law proceedings. It is important to note, moreover, that even the quasi-dissenting judgment of Lord

Sales and Lord Leggatt agrees with the judgment of Lord Briggs in a number of respects.

Discussion

Lord Briggs' judgment is detailed and comprehensive and there is no substitute for reading it carefully. His basic reasons for holding that the CAT erred in refusing to certify the proceedings in the present case are helpfully summarised at §64.

This note briefly discusses some points of principle from the judgment that are significant for future cases, including in relation to the two critical statutory requirements that apply at the 'certification stage', namely the requirements that the individual claims which the proposed class representative wishes to combine in collective proceedings raise the same, similar or related issues of fact or law (the "common issues requirement") and that those claims are "suitable" to be brought by way of collective proceedings (the "suitability requirement"): see section 47B(6) of the 1998 Act. The latter requirement has particular prominence in the judgment, and is considered first below.

The suitability requirement

Lord Briggs emphasised that in ordinary civil proceedings the court does not deprive the claimant of a trial because of "*forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered*": §47. He then applied the same principle to the collective proceedings regime, holding as follows in a key passage at §54:

There is nothing in the statutory scheme for collective proceedings which suggests, expressly or by implication, that this principle of justice, that claimants who have suffered more than nominal loss by reason of the defendants' breach should have their damages quantified by the court doing the best it can on the available evidence, is in any way watered down in collective proceedings. Nor that the gatekeeping function of the CAT at the certification stage should be an occasion when a case which has not failed the strike out or summary judgment tests should nonetheless not go to trial because of difficulties in the quantification of damages. On the contrary, as the Court of Appeal observed at para 59, a refusal of certification of a case like the present is likely to make it certain that the rights of consumers arising out of a proven infringement will never be vindicated, because individual claims are likely to be a practical impossibility. The evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights.

Against that background, Lord Briggs went on to adopt what might be called a 'relativist' rather than an 'absolutist' approach to the meaning of the word "suitable" in section 47B of the 1998 Act (under which a claim must be "*suitable to be brought in collective proceedings*") and rule 79(2)(f) of the Competition Appeal Tribunal Rules 2015 (which uses the phrase "*suitable for an aggregate award of damages*"). He held that "*suitable*" is not to be assessed in the abstract; what is required is an assessment of whether a claim is "*suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages*" (cf. the use of "*preferable*" in the equivalent Canadian legislation): see §56. (Perhaps the key difference between Lord Briggs' judgment and that of Lord Sales and Lord Leggatt is that the latter two Justices disagreed with the 'relativist' approach to the suitability requirement: see §117.)

It was ultimately the CAT's failure to adopt a relative approach to the question of suitability that Lord Briggs regarded as the most serious of the errors of law discernible in its judgment: §72. As noted above, the first reason why the CAT declined to certify the proposed collective proceedings was its lack of confidence in the availability of data necessary to produce an estimate of the aggregate damages suffered by the class. As submitted by Leading Counsel for Mr Merricks (Paul Harris QC), however, those same difficulties 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*". Accordingly, Lord Briggs concluded that issues relating to data availability did not justify "*the denial of practicable access to justice to a litigant or class of litigants who have a triable cause of action, merely because it will make quantification of their loss very difficult and expensive*"; the CAT is "*probably uniquely qualified to surmount such difficulties*", by techniques of extrapolation or interpolation. Even if some gaps may ultimately turn out to be "*unbridgeable*", the CAT "*owes a duty to the represented class*" to do the "*best it can with the evidence that eventually proves to be available*": §74. These remarks will provide considerable succour to prospective class representatives who are faced with issues of data availability at the pre-certification stage.

Lord Briggs also emphasised, in relation to the suitability requirement, that the specific matters listed in rule 79(2) of the 2015 Rules are not "*separate suitability hurdles, each of which the applicant for a CPO must surmount*"; rather, the CAT is "*expected to conduct a value judgment about suitability in which the listed and other factors are weighed in the balance*". Among other things, it is not a precondition of certification that the claims are suitable for an award of aggregate damages: that is just "*one of many relevant factors in the suitability assessment under rule 79(2)*": see §61.

This latter point requires some unpacking. It is no doubt right that, as a matter of construction, whether a claim is suitable for an aggregate damages award

is one factor among many under rule 79(2). However, where a proposed class representative makes clear (as Mr Merricks did) that his claim is confined to a claim for aggregate damages, it may well be that the question of whether the claim is suitable for an aggregate damages award does indeed effectively become a “hurdle” for the proposed class representative to surmount. It would be strange indeed if the CAT were to certify a claim seeking (only) an aggregate damages award, if the CAT did not consider that the claim were suitable for such an award. Indeed, Lord Briggs accepted that in an appropriate case the Tribunal “*may perfectly properly regard one factor among many as sufficient to compel a particular outcome*”: §67. The problem in the present case was that the CAT did not make it clear, in express terms, that it had reached this view, as opposed to (wrongly) treating suitability for aggregate damages as a hurdle that the CPO applicant needed to surmount: §68.

The common issues requirement

In comparison, the Supreme Court gave relatively little consideration to the common issues requirement. That is no doubt because Mastercard did not appeal against the Court of Appeal’s conclusion (contrary the view of the CAT at first instance) that the question of pass-on from merchants to end consumers was indeed a common issue. However, Lord Briggs emphasised that, having got this issue wrong, the CAT inevitably failed to include, as an important “*plus factor*” in the “*multi-factorial*” balancing exercise that it was required to carry out at the certification stage, the fact that that “*both the main issues in the case*” (i.e. overcharge and pass-on to consumers) were common issues: §64(a). Importantly, Lord Briggs here treated the existence of common issues as not only a “*hurdle*” that must be surmounted at the certification stage, but also a factor that is highly relevant to the suitability requirement under rule 79(2), where the CAT must consider “*whether collective proceedings are an appropriate means for the fair and efficient resolution of such common issues as are identified*”: §62. In that regard, “*where a common issue is ideal for determination in collective proceedings, or where all the big issues in a particular dispute are common issues*”, that will be a “*potential plus factor*” when it comes to the suitability requirement. Lord Briggs nevertheless recognised the possibility that, in some cases, a common issue may be more fairly and economically resolved by a different form of procedure, e.g. by an individual test case (ibid).

In the absence of an appeal on the question of merchant pass-on, the Supreme Court did not consider in detail the extent to which the question of pass-on may be relevant in further applications for collective proceedings orders. While the Court of Appeal’s judgment in *Merricks* establishes – at least for now – that pass-on to the consumer level will likely constitute a common issue in the context of a proposed collective claim for aggregate damages (see §46 of the Court of Appeal’s judgment), it is unclear whether the same approach would

apply to the question of pass-on by the proposed class members, where this is raised as a prospective defence in a case where the proposed class comprises or includes businesses who may have offset any overcharge by raising the prices they charged to their own customers. This is likely to be a matter of significant controversy in some of the collective proceedings cases that have been stayed behind the Supreme Court's judgment in *Merricks*, where the proposed class members are not (or are not confined to) end consumers of the relevant products (e.g. *Trucks* and *FX*).

Relevance of merits at the certification stage

Lord Briggs' judgment also establishes that (with two exceptions) the merits of the case have no role to play in the assessment of the suitability of the claims for collective proceedings. The first exception (which was inapplicable in *Merricks* itself) is that the CAT may, as a matter of discretion, hear a strike-out application at the same time as it hears the application for a CPO: see rule 89(4). The second exception is that the strength of the claims is relevant to the choice between opt-in and opt-out proceedings. (See §§59-60).

Distribution and the compensatory principle

A key feature of Mastercard's submissions before the Supreme Court was the proposition that the CAT was entitled to take into account, at the certification stage, the fact that Mr Merricks' proposed distribution method "*did nothing to implement the compensatory principle in its application to individual consumers*": see §43. Lord Briggs observed, however, that section 47C of the 1998 Act "*radically alters the established common law compensatory principle by removing the requirement to assess individual loss in an aggregate case, and that nothing in the Act or the Rules puts its back again, for the purposes of distribution*": §76. The CAT's contrary approach (as was discernible from §79 and §88 of its judgment) disclosed a "*clear error of law*". A "*central purpose*" of an aggregate damages award is precisely to avoid the need for individual assessment of loss and while there may be many cases in which "*some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be so difficult and disproportionate, eg because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just*". In many cases the "*selection of the fairest methods will best be left until the size of the class and the amount of the aggregate damages are known*": §77.

On these points of principle, Lords Sales and Leggatt agreed with Lord Briggs: §§148-150.

While Lord Briggs emphasised that it will "*generally be true*" that distribution

will not need to be considered at the certification stage, given that issues about distribution mainly engage the interests of the represented class interest and not the interests of the proposed defendant, he recognised that there may be cases in which issues as to the suitability of the claims for collective proceedings will be better addressed “*in the round*”, including by reference to any distribution proposals: §80. He did not, however, say anything about the kinds of cases in which consideration of distribution issues at the certification stage would be appropriate. The appropriateness (or otherwise) of considering methods of distribution at the CPO stage is another point that will doubtless be explored in future cases.

Procedure at the CPO stage

Lord Briggs also briefly commented on the question of the appropriate procedure at the CPO stage. The Court of Appeal had held that the CAT inappropriately conducted a “trial within a trial” through its detailed questioning of Mr Merricks’ expert economist at the CPO hearing. Lord Briggs was not inclined to criticise the CAT on that account. He emphasised that while questioning and cross-examination of experts may well be a “*rare occurrence*” at certification hearings, there are exceptions, and that in the present case the CAT was justified in the context of a case of unprecedented size and complexity: §§78-79.

Concluding thoughts

The Supreme Court’s decision, and Lord Briggs’ expansive approach to the ‘suitability’ requirement, are unquestionably good news for potential class representatives (and their lawyers / funders) considering collective claims on behalf of consumers, especially in cases where there is no realistic possibility of those consumers bringing individual claims in their own right, provided that the proposed class representative can satisfy the CAT that the claims raise common issues (and survive any strike-out application). That said, a manifestly weak claim – even one that passes muster for the purposes of the strike-out or summary judgment standard - may still struggle to attain certification on an opt-out basis. One consequence of the judgment may be that the focus of defendants’ efforts in future CPO hearings involving proposed consumer claims will shift from challenging suitability generally to challenging suitability for opt-out claims. As noted above, however, the precise ramifications of today’s judgment for collective claims on behalf of entities who are not at the end consumer level of the supply chain are somewhat less clear.

While the Supreme Court’s judgment therefore brings important clarity in relation to several issues – the relative nature of the suitability requirement, the absence of any need for a compensatory approach to distribution, and so on – it is far from the last word on collective proceedings generally. The regime remains in a state of relative infancy, and the slew of collective claims that have

now been unpaused by the Supreme Court's judgment in Merricks will provide further opportunities for the law in this area to be developed. And the race to be the first certified collective claim is well and truly on.

Link to the judgment can be found [here](#).

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.