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£14bn Mastercard consumer claim to proceed after historic Supreme Court ruling

In September 2016, Walter Merricks CBE, the former Financial Ombudsman, commenced proceedings against Mastercard seeking £14bn in damages on behalf of 46 million UK consumers for losses suffered as a result of illegal card fees - the biggest claim in UK legal history. The illegal card fees had to be paid by businesses that accepted Mastercard payments from consumers, fees that they passed on to consumers in higher prices.

In a historic judgment delivered today, the Supreme Court has comprehensively upheld the decision of the Court of Appeal and in doing so has definitively set aside the original judgment of the Competition Appeal Tribunal (CAT). It has dismissed all of Mastercard's efforts to stop the collective action proceeding. The Supreme Court has ruled that the CAT's judgment contained errors of law and that the CAT mis-directed itself in how it applied the new legislative regime. Not only has the Supreme Court today conclusively set aside the refusal to permit the collective action, the judgment contains numerous finding in favour of Mr Merricks. Significantly, the Supreme Court has determined that the CAT never found Mr Merricks would be unable at trial to have a reasonable prospect of showing that the class had suffered significant loss. The Supreme Court also ruled that whilst it may be difficult to work out how much damage Mastercard has caused to UK consumers, that is not a reason for a court to deny a trial to a class that has a reasonable prospect of showing they have suffered loss. UK consumers can now look forward to finally receiving compensation for the losses created by Mastercard's illegal actions.

This is the first mass consumer claim brought under the new collective action regime introduced by Parliament in the Consumer Rights Act 2015. The legislation was designed to enable collective actions to be brought by a class that has suffered loss as a result of competition law breaches.

Mr Merricks said:

"Mastercard has been a sustained competition law breaker, imposing excessive card transaction charges over a prolonged period in a way it must have known would impose an invisible tax on UK consumers. The prices of everything we all bought from 1992 to 2008 were higher than they should have been and the loss we collectively suffered amounts to about £14bn.

"Since I launched this claim, instead of apologising and accepting responsibility for the wrongs it committed, all Mastercard has done is to bury its head in the sand and to get its lawyers to raise what have now been clearly and finally determined to be bad arguments. Today Mastercard has lost its last throw of the dice.

"The damage Mastercard caused to UK consumers began 28 years ago and this claim has already lasted four years. During all this time consumers have been out of pocket as a result of the higher prices we paid than we should have done. On top of that we are entitled to interest, and the longer Mastercard delays in settling this claim, the more it will have to pay.

"On his appointment as President of Mastercard Europe earlier this year, Mark Barnett pledged that his company was "*a business focused on doing well, doing good and making people's lives easier".* That pledge would be inconsistent with continuing to deprive UK consumers of the money Mastercard owes them any longer. Mr Barnett and his company should now cooperate with me so consumers can get back the money they are owed as quickly as possible.

"I am particularly pleased that the Supreme Court has recognised Parliament's aim in providing for collective claims where companies have broken competition laws and have caused loss to consumers or

small businesses. Enforcement of fair competition laws is vital for this country's market economy and companies who break them these laws can now expect not only to be fined by the regulator, but to face much bigger bills in redress claims from those they damaged. The Supreme Court's decision means that claims relating to losses affected by anti-competitive business wrongdoing in other sectors can be pursued. Today's judgement sends a powerful signal to companies that infringe competition law that they do so at their financial peril."

Specifically, the Supreme Court has ruled that:

1. The CAT got the common issue question wrong in relation to the whether merchants had passed-on the illegal card fees to consumers. This was an issue common to the entire class, even if the level of pass-on may vary in different sectors of the economy. As a result, the CAT inevitably failed to include, as an important plus factor in the balance on the question of whether the class should be certified, the fact that this issue, and indeed both the main issues in the case, were common issues.

2. The CAT treated the suitability of the claims for aggregate damages as if it were a hurdle rather than merely a factor to be weighed in the balance on whether to certify the class. In any event the CAT failed to construe suitability in the relative sense, and thereby failed to take into account the need to consider whether individual proceedings were a relevant alternative, which they plainly are not – individual consumers simply cannot pursue their claims themselves. The collective action is the only means by which consumers can recover the loss caused to them by Mastercard. If the same difficulties on quantification of damages in a collective claim would in any event afflict an individual claimant, then this is a relevant consideration in favour of not refusing certification.

3. 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 therefore allowed whatever difficulties and shortcomings in the likely availability of data to lead it to a conclusion that Mr Merricks [on behalf of UK consumers with a real prospect of at least some success] should be denied a trial by the only procedure available to them in practice.

4. The CAT was wrong in law to regard respect for the compensatory principle as an essential element in the distribution of aggregate damages. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be somewhere the mechanics will be likely to be so difficult and disproportionate [e.g. because of the relatively modest amounts likely to be recovered by individuals in a large class, as in the claim against Mastercard] that some other method may be more reasonable, fair and therefore more just. In many cases the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known, rather than upfront at the certification stage.

The Supreme Court, in endorsing the unanimous judgment of the Court of Appeal, has sent a clear message to the CAT. The Government introduced the collective action regime to address the fact that the existing regime was not working for consumers, they were not able to recover the loss caused to them by cartels. The Government intended to facilitate recovery by consumers through collective actions. The CAT failed to appreciate and give effect to this legislative intent. Mr Merricks now goes back to the CAT armed with two judgments from the highest Courts in the UK. They make clear that Mastercard needs to be held accountable for the billions in damages that it has caused to consumers.

The Supreme Court has also ordered Mastercard to pay Mr Merricks's cost.

Boris Bronfentrinker, the Quinn Emanuel Urquhart & Sullivan partner representing Mr Merricks, said:

"Today sees the biggest case in UK legal history itself make history in what is a landmark day for all UK consumers. Mastercard and its lawyers have long made dismissive remarks and commented that the case was overblown and unsuitable to proceed as a collective action, yet the Supreme Court has today definitely determined the exact opposite.. The Supreme Court has recognised the need for mass consumer collective actions to be pursued. Mastercard has acted in an anti-competitive manner, that has been definitely determined by the European Court of Justice. The Supreme Court has now affirmed the decision of the Court of Appeal that this is a claim that needs to have its day in court to decide the full extent of harm Mastercard has caused to UK consumers. "

He added, "The Supreme Court judgment also marks a significant day for the collective action regime in this country, after a number of false starts before the Competition Appeal Tribunal. The most senior judges in the UK have recognised and given effect to the legislative intent. This is a truly historic victory and the focus now moves to securing compensation for the 46 million UK consumers who lost out as a result of Mastercard's illegal conduct.

"It has been an honour to lead the amazing team at Quinn Emanuel along with the talented barrister team to this historic judgment. We look forward to now recovering the billions in damages Mastercard has caused to UK consumers. "

The Counsel team representing Mr Merricks consists of Paul Harris QC of Monckton Chambers along with Marie Demertiou QC and Victoria Wakefield QC of Brick Court Chambers. Paul Harris QC, said: "This judgment represents a major step forward in the development of consumer protection law, just as Parliament intended. Acting on behalf of 46 million consumers in the UK's biggest ever damages action, has, without doubt, been the biggest challenge of my career to date."

The collective action has been funded by Innsworth. They made this result possible, having stepped in on very short notice when the original funder Burford decided to withdraw after the CAT's decision to refuse certification. Like the entire team supported Mr Merricks, Innsworth believed in the claim and the team bringing it, enabling the appeals to proceed to today's succesful result.

-Ends-

Notes to Editors

Background of the case to date

In July 2017, a specialist court (the Competition Appeal Tribunal (CAT)) ruled that Mr Merricks's claim was not suitable to be brought as collective proceedings and refused to certify the proposed collective action as suitable to proceed.

Whilst Mr Merricks was successful before the CAT on most issues, the CAT ultimately decided not to let the collective action proceed for two main reasons:

First, the CAT considered that, whilst Mr Merricks's experts had identified a methodology that would enable them to calculate how much of the illegal fees were passed on by businesses to UK consumers, the CAT did not accept that it had been established at this very early stage of the proceedings that there was sufficient evidence to show the extent to which all businesses had passed on the illegal fees to consumers in higher prices.

Secondly, the CAT determined that it was not enough for Mr Merricks to establish the loss suffered by the class as a whole on an aggregate basis, he needed to go further and demonstrate how he would

establish the loss suffered by each and every individual in the class and that the distribution would be broadly compensatory.

Whilst the Tribunal also refused Mr Merricks permission to appeal on the grounds that there was no right of appeal, in August 2017, lawyers for Mr Merricks applied to the Court of Appeal for permission to appeal the decision to dismiss the proposed £14bn collective action. On 13 November 2018, the Court of Appeal delivered an important judgment ruling that the Tribunal had been wrong and that there was a right of appeal from decisions refusing to permit collective action. Mastercard subsequently appealed this ruling to the Supreme Court and lost on all grounds in the judgement delivered today.

The Supreme Court hearing took place on 13th and 14th May 2020.

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