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Merricks v Mastercard: UK's Competition Appeal Tribunal Allows First Ever Opt-Out Class Action

Client Alert | August 24, 2021

The UK's Competition Appeal Tribunal (the CAT) has certified the first application for a collective proceedings order (CPO) on an opt-out basis in *Walter Hugh Merricks CBE v Mastercard Incorporated & Ors*.

In the UK, a CPO is pre-requisite for opt-out collective actions seeking damages for breaches of competition law. Opt-out means that an action can be pursued on behalf of a class of unnamed claimants who are deemed included in the action unless they have specifically opted out. Opt-out 'US style' class actions have the potential to be far more complex, expensive and burdensome than traditional named party litigation.

Opt-out class actions were introduced for the first time in the UK in 2015 (see our previous alert here). Almost six years on, last week's judgment by the CAT is therefore an important *procedural* step towards the first opt-out class action *damages award* in the UK.

As had been expected, following the Supreme Court's judgment in December 2020 (see our previous alert here) Mastercard did not resist certification outright. As a result, the CAT's most recent judgment provides little further clarity on how the test set out in the Supreme Court's judgment will be applied to future applications for a CPO. However, the CAT's recent judgment did address certain interesting questions concerning suitability to act as a class representative, whether deceased persons could be included in the proposed class and the suitability of claims for compound interest. These are discussed in more detail below.

Background

In 2017, the CAT had originally refused to grant Mr. Merricks a CPO. However, in December 2020, in *Merricks v Mastercard*, the UK's Supreme Court dismissed Mastercard's appeal against the Court of Appeal's judgment regarding the correct certification test and remitted the case back to the CAT for reconsideration. The judgment of the Supreme Court was of seminal importance because it provided much needed clarification as to the correct approach for the CAT to take when considering whether claims are suitable for collective proceedings (see our previous alert here).

Following the Supreme Court's clarification, Mastercard no longer challenged eligibility for collective proceedings in the remitted proceedings before the CAT. However, the CAT was still required to consider: (i) the authorisation of Mr. Merricks as the class representative in light of developments since the CAT's original judgment in 2017; (ii) whether Mr. Merricks was entitled to include deceased persons in the proposed class; and (iii) whether Mr. Merricks' claim for compound interest was suitable to be brought in collective proceedings.

Although the CAT reaffirmed that Mr. Merricks was suitable to act as a class representative, it held that deceased persons could not be included in the proposed class

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and that the claim for compound interest was not suitable to brought in collective proceedings. Whilst this will significantly reduce the damages Mastercard will be required to pay should Mr. Merricks ultimately succeed at the substantive trial, the CAT's judgment has still paved the way for what could be the largest award of damages in English legal history.

CAT Judgment *(Walter Hugh Merricks CBE v MasterCard Incorporated & Ors [2021] CAT 28)*

(i) Authorisation of the Class Representative

In relation to the suitability of Mr. Merricks to act as the class representative, two issues arose. The first related to written submissions filed by a proposed class member contending that it was not just and reasonable for Mr. Merricks to act as class representative as a result of Mr. Merricks' handling of a historic complaint related to a property transaction involving the proposed class member. However, the CAT did not consider that this gave rise to any issue in terms of Mr. Merricks' suitability to act as class representative.

The second related to the terms of a new litigation funding agreement (LFA) put in place by Mr. Merricks in order to document the replacement of the original funder following the CAT's 2017 judgment. Here, the CAT made it clear that, even if no objections were raised about the terms of a LFA by a proposed defendant (i.e., Mastercard) "*the Tribunal has responsibility to protect the interests of the members of the proposed class, and their interests are of course not necessarily aligned with the interests of Mastercard*".

The CAT therefore independently scrutinised the new LFA with particular focus on the provisions permitting the funder to terminate the new LFA where it ceases to be satisfied about the merits of the claims or believes that the proceedings are no longer commercially viable. The CAT was concerned that this gave the funder too broad a discretion to terminate and, during the course of the remitted hearing, it was agreed that the termination provisions would be amended to include a requirement that the funder's views had to be based on independent legal and expert advice.

Mastercard's only objection to the terms of the new LFA was that it had no rights to enforce the new LFA and, as such, Mastercard sought an undertaking from the funder to the CAT that it would discharge any adverse costs award that might be made against Mr. Merricks. The CAT agreed that such an undertaking should be given and directed the parties to agree the wording.

(ii) The Deceased Persons Issue

On remittal, Mr. Merricks wanted to include deceased persons within the proposed class definition and sought to amend the definition to include "*persons who have since died*".

Whilst the CAT accepted that a class definition could include the representatives of the estates of deceased persons, section 47B of the Competition Act 1998 did not permit claims to be brought by deceased persons in their own right (as Mr. Merricks' proposed amendment was seeking to do). In any event, the Tribunal held that Mr. Merricks' application to amend the proposed class definition was not permissible as the limitation period had already expired.

(iii) The Compound Interest Issue

A claim for compound interest had been included in the Claim Form from the outset. It was alleged by Mr. Merricks that all class members will either have incurred borrowings or financing costs to fund the overcharge they suffered or have lost interest that they would otherwise have earned through deposit or investment of the overcharge, or some combination of the two.

The CAT held that the Canadian jurisprudence in relation to certification had been explicitly recognised by the Supreme Court in the context of the UK regime. As such, a "*plausible or credible*" methodology for calculating loss had to be put forward at the certification stage in order for a claim to be suitable for collective proceedings. In the case of Mr. Merricks' claim for compound interest, the CAT held that no credible or plausible methodology had been put forward by Mr. Merricks to arrive at any estimate of the extent of the overcharge that would have been saved or used to reduce borrowings rather than spent, which is the essential basis for a claim to compound interest.

Comment

The CAT's judgment in *Merricks* is significant because it is the first class action to be certified on an opt-out basis since the current regime was introduced in 2015.

The CAT's approach to Mr. Merricks' claim for compound interest and the requirement for a "*plausible or credible*" methodology is of particular interest in circumstances where the Supreme Court made it clear that there is only a very limited role for the application of a merits test at the certification stage.

The UK was comparatively slow to introduce a regime for opt-out proceedings in relation to competition law infringements and, since its introduction in 2015, the regime itself has taken some time to find its feet. But momentum has been building and there are now a large number of high value opt-out CPO applications awaiting determination by the CAT covering both follow-on claims and standalone claims. In the next few months, a number of judgments are expected in relation to applications that had been stayed pending the Supreme Court's judgment in *Merricks*. These will not only provide greater clarity on the application of the Supreme Court's judgment but also answer questions that, to date, have not been considered by the CAT. These include, for example, how a carriage dispute between two competing proposed class representatives should be resolved. There will also be significant attention paid to the procedures adopted by the CAT as Mr. Merricks' claim progresses now that it moves beyond the certification stage.

It is increasingly clear that companies operating in the UK are now at greater risk of facing 'US style' class actions for breaches of competition law. In addition, for non-competition claims that fall outside the regime introduced in 2015, parallel developments in the courts raise the possibility of complex group actions. For example, in relation to alleged breaches of data protection laws, the highly anticipated Supreme Court judgment in *Lloyd v Google LLC* (expected in Autumn) will provide guidance on the potential for representative actions to proceed in England and Wales.

Gibson Dunn is currently instructed on a number of the largest CPO applications currently being heard by the CAT and is deeply familiar with navigating this developing regime.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition practice group, or the following authors in London and Brussels:

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