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Merricks v Mastercard: will US-style class actions become the norm?

In a landmark judgment (and in unusual circumstances), the UK Supreme Court has held that the ongoing Merricks v Mastercard case should be referred back to the Competition Appeal Tribunal (CAT). Not only is this a step towards Merricks' claim that interchange fees were "an invisible tax on UK consumers" being heard in court, but – more importantly – it is also likely to have a significant impact on UK "collective proceedings" for years to come.

Background

The roots of the case go back to 2007, when the European Commission found that Mastercard's multi-lateral interchange fees were anti-competitive. Interchange fees are the fees paid by businesses when transactions are made using a Mastercard, which ultimately, it was held, resulted in higher prices being charged to consumers. This finding led Walter Merricks, the former Chief Ombudsman of the Financial Ombudsman Service, to start a claim in the UK. Acting as a proposed "class representative" for over 46 million consumers, Merricks alleges that the collective loss suffered by UK consumers between 1992 and 2008 amounts to £14 billion. This makes it one of the largest claims in UK history.

Merricks brought his claim under provisions of the Consumer Rights Act 2015 (which amended the Competition Act 1998) to allow for collective action for breaches of competition law (the "**2015 Framework**"). Any claims issued under the 2015 Framework must be "certified" before they proceed to trial; and in its initial decision, the CAT found that Merricks did not meet the statutory criteria. In particular, the CAT took issue with the difficulty Merricks faced in: (i) actually proving that the fees resulted in higher costs for consumers; and (ii) estimating and apportioning losses suffered by each individual. On data availability, the CAT was not persuaded that there was sufficient data available to estimate aggregate damages based on Merricks' proposed methodology. On distributing any damages amongst the claimant class, the CAT considered it was necessary to estimate the individual loss of each class member, at least on a rough basis. The Court of Appeal disagreed with these findings, leading Mastercard to issue a further appeal to the Supreme Court.

Whilst the 2015 Framework has been in place for some time, no collective proceedings case has yet passed the certification stage. This is needed for a collective action to proceed. The Supreme Court judgment should unblock a number of cases that have been pending, awaiting the decision in this important case.

Supreme Court Judgment

The Supreme Court dismissed Mastercard's appeal, upholding the decision of the Court of Appeal. It found that the CAT made a number of errors in finding that Merricks' claim was unsuitable for trial. One of the CAT's key errors was treating the "suitability" of aggregate damages (i.e., the £14 billion for all affected consumers) as "a hurdle rather than merely a factor" to be considered (para. 64 of the judgment). Lord Briggs in particular emphasised that a difficulty in quantifying or apportioning losses should not preclude a claim from being heard – i.e., that a case should not fail the CAT certification stage simply because of "difficulties in the quantification of damages". The judgment also noted that the "evident purpose" of the 2015 Framework was to "facilitate rather than impede" such claims (para.54). This allowed the Supreme Court to deem the "suitability" requirement of certification satisfied.

The handing of the judgment was thrown into question by the untimely death of one of the judges, Lord Kerr, a few days before it was due to be delivered. Ultimately, the Supreme Court handed down its judgments a few days later and decided to dismiss Mastercard's appeal on a 3-2 count (taking into account Lord Kerr's opinions, in spite of his unexpected death). Interestingly, although two judges disagreed with the reasoning of the judgment, the appeal was dismissed on the basis that Lord Kerr had "expressed his agreement with the final version of the judgment of Lord Briggs and would have been recorded as agreeing with it". Therefore, had he not suddenly died, the result would have been a majority view that Mastercard's appeal be dismissed, and so the dissenting judges agreed that "in these circumstances" that view should prevail. Had the court been left evenly divided, the case would have had to be re-argued before a different constitution of judges, which would not only be "hugely wasteful of resources", but also not "a just outcome" as a result of Lord Kerr's death between the judgments being finalised and formally handed down (para. 83).

The judgment contains interesting comments about the 2015 Framework and a purposive approach to the issue of suitability, recognizing the underlying intention behind the collective proceedings regime absent which individuals would not, in practice, be able to seek redress for relatively small losses suffered as a result of an antitrust infringement. Whilst the Supreme Court found that the issue of data availability – which was one of the bases on which the CAT originally held that the criteria for a collective proceedings order was not met – was a real one, it stated that the CAT "owes a duty to the represented class" to do the "best it can with the evidence that eventually proves to be available" (para.74). Had the Supreme Court reached a different conclusion, in all likelihood the 2015 Framework would have failed, unless and until new legislation was enacted. Indeed, the fact that no collective action has yet been certified highlights the difficulties that prospective class representatives have faced.

Furthermore, the Supreme Court judgment settles one of the key issues in collective proceedings – namely whether, as Mastercard had argued, it is necessary for any damages to be compensatory such that a general mechanism to distribute any damages could in itself not be permissible. The judgment dismissed this line of argument by stating that the 2015 Framework "radically alters the established common law compensatory principle by removing the

requirement to assess individual loss in an aggregate damages case" (para.76). This underlines the extent to which the 2015 Framework has changed the landscape for bringing actions for damages on behalf of a class of claimants.

The judgment also attempts to provide some guidance on various aspects of procedure relating to certification, as well as on the legal test of "suitability". The Court of Appeal had held that the CAT had been wrong to subject Mr Merricks' expert economist to detailed questioning at the hearing dealing with certification, which had led to a "trial within a trial". However, given the complexity of the case, the Supreme Court held that in certain circumstances the questioning and cross-examination of experts at the certification stage may be appropriate. As many collective actions will undoubtedly raise complex issues of the assessment of damages and, as in this case, the ultimate apportionment of damages (if awarded), there may well be scope for detailed questioning of experts at the certification stage.

One of the issues to be considered by the CAT at the certification stage of proposed collective proceedings is whether there are "common issues" amongst the class members. In this case, the Court of Appeal found that there were common issues on both overcharge and pass-on. However, the point on pass-on was not considered much by the Supreme Court (as Mastercard did not appeal against this finding of the Court of Appeal when it criticised the CAT's approach). Nonetheless, it leaves open the issue for debate in other cases where pass-on may be different for different members of a class. In other words, where those suffering alleged harm are, as in the Merricks case, consumers who, as end users, would not have passed on any alleged overcharge, the position may be very different where putative class members are intermediate purchasers who may well have taken a different approach to dealing with any alleged overcharge. This is an issue that may therefore be subject to further debate on certification on the basis of there being "common issues" in other cases, such as proposed collective proceedings in the trucks cartel case.

Following the Supreme Court's judgment, the case will now be remitted to the CAT for a decision on certification. The outcome will be closely watched, as the UK's collective proceedings regime still struggles to find its feet.

Implications

1. It is now clear that damages from collective proceedings do not have to be apportioned so as to reflect each and every individual's actual loss on a purely compensatory basis. This will provide a significant boost to claimants in the UK in collective proceedings who face issues with quantitative data in the future.
2. "Suitability" for collective proceedings is to be determined according to whether the claim is more appropriate to being brought on a collective rather than individual basis. It is not a matter of whether collective proceedings are suitable generally.
3. The finely balanced Supreme Court judgment means that collective proceedings should be easier to instigate in the UK, which in turn is likely to make them more common. This may be expected to represent a shift towards the litigation landscape in the US, although there will still be hurdles to overcome (such as whether there is a "common issue" on the question of pass-on when numerous intermediate purchasers are part of the proposed class).

4. As no application for a collective proceedings has yet been "certified" since the introduction of the 2015 Framework, for some this decision will have been long overdue. Whilst the CAT's judgment on certification will be eagerly anticipated, the Supreme Court's judgment will certainly provide a boost to the 2015 Framework. No doubt, funders are seeking out prospective new cases on the back of last week's judgment.

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