Merricks v Mastercard – UK Supreme Court Clarifies Low Bar for Class Action Certification

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On 11 December 2020, the U.K. Supreme Court (the Court) handed down its much-awaited ruling in *Merricks v Mastercard*,[1] dismissing Mastercard's appeal against the English Court of Appeal's April 2019[2] decision in a 3-2 ruling. The main aspects of the decision are explained below:

- This ruling revives the possibility of a claim by 46.2 million individuals in the U.K. for alleged losses spanning over 16 years across all retail sectors in the U.K. economy, valued at £14 billion.
- The diversity of the consumers, retail businesses and extent (if any) of passing-on of overcharges to consumers were not necessarily a bar to certification. Rather, the test was whether the class was more suitable for collective proceedings than individual actions, noting the risk that individual claims would be uneconomic.
- The complexity of the distribution of damages and the risk of over- or under-compensation also was not in itself a bar to certification. Distribution could be dealt with through appropriate mechanics to be judicially approved by the U.K. Competition Appeal Tribunal (CAT) in due course and is not a gateway to certification.
- The dissenting minority expressed concern that the standard was set too low in allowing claims of this scale and complexity, with the potential for unmeritorious collective claims proceeding and inducing *in terrorem* settlement through their scale.

Background

The history of this litigation was previously discussed in Skadden's coverage of the Court of Appeal's judgment in April 2019 and is recapped below.

In December 2007, the European Commission (EC) found that by setting default interbank fees whenever consumers paid for goods or services using their Mastercard in the EEA (Multilateral Interchange Fees (MIFs)), Mastercard restricted price competition between the banks and violated EU competition law.

Merricks relied on the EC's Decision in commencing a U.K. class action in September 2016 on behalf of approximately 46.2 million U.K. consumers. The class action seeks an estimated £14 billion of compensation for the allegedly inflated prices paid by U.K. consumers because the unlawful MIFs were passed on to them by merchants.[3] Collective competition claims, such as the claim in *Merricks*, must be: (1) brought by an appropriate authorised representative; and (2) "certified" by the CAT as eligible for inclusion in collective proceedings. Certification requires, among other things, that the claims are brought on behalf of an identifiable class of persons, raise common issues, and are "*suitable*" to be brought in collective proceedings. If the CAT is satisfied that the conditions are met, it may make a "*collective proceedings order*" (CPO), thus allowing the claim to proceed to a full trial.

In July 2017, the CAT refused to grant Merricks a CPO. The CAT was unconvinced that expert evidence could adequately demonstrate the "pass-on" of MIFs from merchants to consumers, nor that sufficient information existed to support a "top-down" calculation of damages. Further, the CAT rejected the proposed method of distributing damages on the basis that it would not have correlated to each individual's loss, thus contradicting the compensatory principle of damages for torts under English law. Merricks appealed

[1] *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51.

[2] See our 8 May 2019 client alert, "Merricks v Mastercard: UK Class Actions Back Under the Spotlight".

[3] See Skadden's coverage of the Court's related ruling on the issue of pass-on in our 30 June 2020 client alert, "UK Supreme Court Eases Burden on Antitrust Defendants Pleading a Pass-On Mitigation Defence".

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successfully to the Court of Appeal, which decided that a proposed class representative need only demonstrate that a claim has a "real prospect of success" at the certification stage. The consequence of this was that Merricks only needed to convince the CAT that the expert methodology concerning pass-on of MIFs to consumers was "capable" of assessing the level of pass-on, and that data to operate that methodology would, or would likely, exist at trial. The Court of Appeal also found that, although distributing aggregate damages according to what an individual claimant has lost is often the most obvious and suitable approach, it is not mandatory and may not be practicable.

Accordingly, the Court of Appeal's decision significantly lowered the initial threshold for class actions to proceed in the U.K. Mastercard then appealed, leading to the Court's judgment on 11 December 2020.

U.K. Supreme Court Decision

"Suitable"

The leading judgment of the Court noted that the collective proceedings regime was introduced to provide an alternative procedure in circumstances whereby traditional proceedings are "unsuitable" for obtaining redress at the individual consumer level. Based on this, Lord Briggs concluded (and Lord Thomas agreed)[4] that whether or not claims are "suitable" to be brought in collective proceedings is a relative judgement, meaning one needs to determine whether the claims are more appropriately brought as collective proceedings rather than individual proceedings. The same logic was applied in deciding whether a claim is "suitable for an award of aggregate damages" (a relevant aspect in the overall assessment of suitability) — all that is required is that an aggregate damages award is more suitable than "a multitude of individually assessed claims for damages". The Court indicated that this, in particular, is a low hurdle, given that pursuing aggregate damages claims "radically dissolves those disadvantages" of disproportionality and burden that may arise in a series of individual claims.

However, the Court was not unanimous on this issue. Lords Sales and Leggatt handed down a judgment dissenting on (*inter alia*) the interpretation of "suitable". In particular, the dissenting Lordships remarked that the relevant legislation does not provide for a relative assessment, and in fact diverges from the corresponding Canadian legislation (which uses the word "preferable", indicating a comparative assessment), thus supporting the argument that suitability is to be determined in the abstract. Accordingly, on the issue of aggregate damages, their Lordships concluded that the difficulty or impossibility of quantifying claims individually "does not by itself make them suitable for an award of aggregate damages, let alone establish whether the class of claims for which certification is sought is suitable for such an award".

Quantifying and Distributing Damages

The Court reiterated the "*broad axe*" approach that is a core feature[5] of damages awards in English tort law: a court will not refuse to award damages simply because they cannot be quantified precisely. Where a claimant proves "more than purely nominal loss", the court does not "throw up its hands and bring the proceedings to an end before trial because the necessary evidence is exiguous, difficult to interpret or of questionable reliability". The Court found that this principle is not "in any way watered down in collective proceedings" and that the CAT is "probably uniquely qualified to surmount" the difficulties of quantifying damages in a case such as *Merricks*.

The Court recognised that another "basic" feature of English tort law is the compensatory principle, which holds that claimants should be awarded damages corresponding to their loss. One of the CAT's concerns regarding the proposed class action was that the proposed method of distributing damages would not accord with the compensatory principle. The Court of Appeal found that the compensatory principle was not a rigid requirement in this field, and the Supreme Court agreed, accepting that the principle is "radically" modified by the relevant legislation, with the only requirement being that the distribution of damages is "just, in the sense of being fair and reasonable". Indeed, the Court indicated that it may sometimes be fairest for the issue of distribution to be "left until the size of the class and the amount of the aggregate damages are known".

Comment

The Court confirmed a low threshold should be applied in determining whether antitrust class actions should be certified and proceed to a full trial. In so doing, the Court has paved the way for a £14 billion class action to be heard — if certified by the CAT — which could relate to every sector of the U.K. economy, involve the analysis of 16 years' worth of data from 1992 to 2008, and concern almost every person in the U.K. aged over 16 during that period.

The Court's judgment is striking, particularly given the assessment of "suitability" being on a relative basis.

The dissenting judgment of Lords Sales and Leggatt highlighted the potential for abuse that may arise from this low bar to certification, including that: "the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunities that it provides for profit";

[4] Lord Kerr, who also agreed with the judgment of Lord Briggs, sadly passed away before the judgment was handed down.

[5] This also was discussed in our 30 June 2020 client alert referenced in footnote 3.

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"collective proceedings confer substantial legal advantages on claimants and burdens on defendants which are capable of being exploited opportunistically"; and the use of a hastily-granted CPO enabling a class to "extract a substantial settlement payment without a proper basis for it". Focusing on the issue of costs and resources, their Lordships emphasised that CPOs should not be granted on a "speculative basis" purely because it is possible for CPOs later to be revoked, as this would ignore the significant resources (including those of the CAT) expended on the litigation in the interim. The "gatekeeping function" of the CAT is to play a key role in ensuring that claims do not proceed (incurring vast costs and potentially inducing defendants to settle) where there is minimal prospect of damages being awarded. In this regard, it will be interesting to observe the CAT's application of the Court's prescribed test.

Finally, the Court recognised the Canadian jurisprudence in this area as "persuasive", but maintained that its analysis was rooted "firmly on the true construction of the UK legislation". What is clear from the Court's ruling is that the U.K.'s class action regime is finding its own feet and is approaching a significant stage, in which the practical application of the certification framework will spur into action.

The *Merricks* case will now return to the CAT, which will apply the test as prescribed by the Court, to decide whether the class action should be certified and proceed through to a full trial, and if so, whether Mastercard is liable to pay any damages. With several classes due to be considered for certification in 2021, this year will be formative in the development of the U.K.'s class action regime.

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