

Competition Appeal Tribunal Dismisses UK's Second Opt-Out Claim

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On Friday 21 July, the Competition Appeal Tribunal handed down judgment in the second attempt to bring opt-out, collective proceedings in the UK: *Merricks v Mastercard*.* The Tribunal dismissed Mr Merricks' case, meaning that, as we approach the second anniversary of the birth of the UK's new collective regime, no case has yet been allowed to proceed to trial.

Mr Merricks, advised by Quinn Emanuel, applied to the Tribunal, as the proposed class representative, for a Collective Proceedings Order so as to begin an opt-out, collective claim for damages arising from a European Commission decision of 19 December 2007 against Mastercard. The Commission had established that Mastercard infringed what was Article 101 of the Treaty on the Functioning of the European Union in relation to the level of interchange fees which merchants paid to their acquiring bank for the acceptance of payment cards.

Mr Merricks alleged that UK consumers suffered losses as a result of paying prices (for goods and services) to businesses that accepted Mastercard cards because those prices were higher than they would have been absent Mastercard's infringement. Mr Merricks sought damages, estimated at £14 billion, on behalf of approximately 46.2 million UK consumers.

On Friday, the Tribunal dismissed Mr Merricks' application, finding that the claims were not suitable to be brought in collective proceedings. Whilst the lack of commonality between the individual claims (specifically in relation to the passing-on of charges by merchants to consumers** and individual claimants' spend) could have been overcome, the claims were nonetheless adjudged inappropriate for collective proceedings because of their unsuitability for an aggregate award of damages and difficulties around any estimation of individual losses.

With regard to the arrangements in place to fund the claim (an agreement between Mr Merricks and a third party funder) and the otherwise suitability of Mr Merricks as the class representative, the Tribunal made clear in their judgment that, had the claims been suitable for collective proceedings, Mr Merricks would have been authorised as the class representative.

It is now open to Mr Merricks to appeal the Tribunal's judgment, although he would not be able to do so based on the merits of the case but rather only on judicial review principles. Mr Merricks would therefore have to argue that the Tribunal's decision was fundamentally flawed on grounds of illegality, irrationality or procedural impropriety – which is a high bar.

The Tribunal's rejection of Mr Merricks' application means that, since the introduction of the UK's new collective regime in October 2015 by way of the Consumer Rights Act 2015, there still has not been an opt-out, collective claim which has proceeded to trial. This is in part because the scope for such claims was restricted right from the outset by the introduction of a very narrow set of transitional provisions dealing with limitation, the impact of which continues to hamper the regime. In March of this year, the Tribunal rejected a claim brought by Ms Dorothy Gibson, the General Secretary of the National Pensioners Convention, against Pride Mobility Products Limited following a 2014 decision by the Office of Fair Trading in relation to sales of mobility scooters. In that judgment^{***}, the Tribunal offered Ms Gibson the opportunity to reformulate and resubmit her claim; in Merricks v Mastercard however, the Tribunal has offered no such opportunity. It remains to be seen whether or not Mr Merricks will appeal.

Despite the lack of success of an opt-out collective claim in the UK to date, the judgments in Pride and Mastercard provide welcome clarification as to how the Tribunal intend to approach certification, particularly in relation to the appropriate test to be applied, the evidence which must be provided and the structure of related funding arrangements.

*1266/7/7/16 Walter Hugh Merricks CBE v Mastercard Inc., Mastercard International Inc., and Mastercard Europe S.P.R.L [2017] CAT 16 http://www.catribunal.org.uk/files/1.1266_Walter_Hugh_Judgment_CAT_16_210717.pdf

** The Tribunal noted the judgment in Sainsbury's Supermarkets Ltd v MasterCard Inc [2016] CAT 11, wherein the Tribunal rejected Mastercard's argument that the charges were passed on in the prices charged to consumers.

** 1257/7/7/16 Dorothy Gibson v Pride Mobility Products Limited [2017] CAT 9 http://www.catribunal.org.uk/files/1257_Dorothy_Gibson_Judgment_CPO_CAT_9_310317.pdf