Merricks: setting the standard

Setting the standard for opt-out collective redress: the Supreme Court's judgment in *Merricks*, reported by Lucy Rigby

IN BRIEF

- The Supreme Court's recent judgment in *Merricks* sets the standard which existing and future opt-out collective actions will be required to meet at the certification stage.
- This judgment is a seminal one for the country's young opt-out regime and a ringing endorsement of the principles behind the introduction of the Consumer Rights Act 2015.
- The judgment is consumer-friendly and it is expected that more opt-out collective actions will now be filed.

What standard ought an opt-out collective claim be required to meet to proceed to trial? That, in essence, was the question before the Supreme Court in *Mastercard Incorporated and others v Merricks* [2020] UKSC 51, [2020] All ER (D) 67 (Dec). The Supreme Court's answer, delivered in December of last year, constitutes a resounding endorsement of opt-out redress and the most significant ruling to date for the UK's fledgling opt-out collective regime for infringements of competition law.

Justice delayed

Many judgments are described as 'much anticipated' but here this label is more than warranted. Despite opt-out claims pursuant to s 47B of the Competition Act 1998 (the Act) being able to be brought since the coming into force of the Consumer Rights Act in October 2015, only two applications for certification—via an application for a collective proceedings order (CPO)—have, as yet, been heard by the Competition Appeal Tribunal, neither of which were approved by the tribunal (in addition to Mr Merricks's claim, the tribunal has also heard 1257/7/7/16 *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9).

Seven further applications (at the time of writing) have been filed but, as the tribunal stayed all CPO hearings pending receipt of the Supreme Court's judgment in *Merricks,* none have as yet been certified.

The charge against Mastercard

Mr Merricks is the prospective representative of a class of 46.2 million consumers and is seeking an aggregate award of damages of £14bn from Mastercard. His claim is based upon a 2007 decision of the European Commission, in which the Commission found that Mastercard had infringed Art 101 of the Treaty for the Functioning of the European Union concerning the setting of cross-border multi-lateral interchange fees (MIFs).

Mr Merricks alleges that the higher MIFs caused losses to UK consumers in the form of higher prices for goods and services for a 16-year period and across all sectors of the economy.

The applicable legislation

In order to progress to trial, an opt-out s 47B claim needs first to be certified—that is to say that the tribunal must grant a CPO. In accordance with s 47B, the tribunal may make a CPO only if: (a) it is just and reasonable for the proposed representative to act as such; and (b) the underlying claims are eligible for inclusion in collective proceedings (s 47B(5) and (8)). Claims are eligible only if they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings (s 47B(6)).

Rule 79 of the Competition Appeal Tribunal Rules 2015 expands on the provisions of s 47B(6) and states that eligibility will be met where the tribunal is satisfied 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. The tribunal shall take into account all matters it thinks fit in making a determination as to suitability, including the list of considerations at r 79(2).

One of the unique features of the new regime is the availability of aggregate awards of damages, which—pursuant to s 47C(2) of the Act—the tribunal may grant without undertaking an assessment of each class member's loss.

The tribunal and the Court of Appeal disagree

The tribunal refused to grant Mr Merricks a CPO for two principal reasons: first, it found that Mr Merricks was unable to point to sufficient data to facilitate the use of the methodology proposed by his experts to determine how overcharges arising from the higher MIFs may have been passed on to consumers; and, second, the tribunal held that Mr Merricks had not put forward any plausible means of calculating the losses sustained by class members on an individual basis so as to allow for the distribution of an aggregate award of damages (see *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2017] CAT 16, [2017] All ER (D) 27 (Aug) paras [75-78] and [87-89]).

Mr Merricks appealed the tribunal's decision to the Court of Appeal, which, in April 2019, overturned the tribunal's ruling and remitted the claim back to the tribunal for a re-hearing on certification (*Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2019] EWCA Civ 674, [2019] All ER (D) 115 (Apr)). At the heart of the Court of Appeal's judgment was the view that the proposed class representative had been held to too high a standard at the certification stage. The Court of Appeal found that, rather than conducting a 'mini-trial', the correct test to be applied at certification is whether the claim has a 'real prospect of success' (para 44).

The tribunal had been wrong, the court said, to conclude that pass on to consumers was not a common issue (paras [46] and [47]) and had further erred in refusing certification based on a failure by Mr Merricks to identify a plausible basis of

distributing an aggregate damages award on a compensatory basis (paras [36], [46], [57] and [61]), and in assessing distribution at all at certification (para [62]).

Mastercard was subsequently granted permission to appeal and the Supreme Court heard the case in May of last year.

The Supreme Court sets the standard

In its judgment of 11 December, the Supreme Court dismissed Mastercard's appeal and confirmed the Court of Appeal's finding that Mr Merricks's claim should be remitted to the tribunal for a rehearing.

The single most important aspect of Lord Briggs's judgment is the finding that certification is not a merits test. This is subject to two caveats: (a) first, the tribunal can, on application by the defendant or of its own volition, hear applications for strike out and/or summary judgment alongside an application for a CPO; and (b) 'the strength of the claims' can be assessed pursuant to r 79(3)(a), but this arises only in the context of a choice between opt-out and opt-in proceedings (paras [59] and [60]). These caveats aside, certification is not an assessment of the merits of the claims.

The only hurdles for certification purposes then are those listed in s 47B(5) and (6) of the Act and at r 79(1). The tribunal, Lord Briggs said, is to make a value judgment about 'suitability' in which the factors listed in r 79(2) and other factors are weighed in the balance—crucially however, including for the *Merricks* case, the listed factors (including suitability for an aggregate award of damages) are not separate suitability hurdles (para [61]).

The meaning of 'suitability' is of some importance to the certification test as it appears twice in the relevant provisions: first, in s 47B ('suitable to be brought in collective proceedings') and second in r 79(2)(f) ('suitable for an aggregate award of damages'). Lord Briggs found that 'suitability' is to be interpreted as relative to individual proceedings, as opposed to being 'suitable' in any abstract sense (paras [70]–[72]). This is to say that a prospective class representative need only show that his/her claim is more suitable to be brought on an opt-out basis than were each class member to bring their own claim. Given the efficiencies that arise in collective proceedings and the likelihood that the costs of individual claims will be prohibitive in the majority of cases, this augurs well for prospective and existing class representatives.

With regard to common issues, Lord Briggs said that the tribunal must identify the main issues in a case and assess whether or not those issues are common to the individual claims. Importantly for the purposes of *Merricks*, Lord Briggs found, as the Court of Appeal had done, that the tribunal was wrong to conclude that pass-on was not a common issue among the members of Mr Merricks's class (para [62]).

Central to Lord Briggs's judgment, is a setting out of the principles of trying an individual claim which are, by dint of the Act and the Rules, deliberately amended for the purposes of examining claims brought on a collective basis, and those which are not. The most significant of these is a claimant's right to quantification of his/her claim no matter the difficulty, a principle which Lord Briggs ruled ought not to be abandoned for the purposes of claims brought under s 47B (and indeed doing so had been the most serious error of law in the tribunal's judgment—see paras [53], [54] and [72]).

Unlike a claimant's right to quantification however, s 47C of the Act expressly departs from the circumstances of an individual claim by removing the ordinary requirement for the separate assessment of each claimant's loss. Lord Briggs therefore confirmed that an aggregate damages award need not bear relation, neither in its calculation nor distribution, to the compensatory principle (paras [59] and [77]). While perhaps not surprising given the Court of Appeal's prior stance on this point, the Supreme Court's view is welcome confirmation of the appropriate assessment to be applied.

As to the consideration of distribution proposals at certification, Lord Briggs found that this would generally be premature, save that there may be cases where the suitability of the claims for collective proceedings will be best addressed by examining all of the class representative's proposals in the round, including those relating to distribution (para [80]).

The impact of *Merricks*

The Supreme Court's ruling in *Merricks* is undoubtedly positive for consumers in ensuring that the test which the proposed collective representative must pass in order to have a claim heard is not unduly burdensome—had it been so, good claims would undoubtedly have been allowed to fail (to the extent they were brought at all) and the UK's nascent regime considerably stifled. It is therefore likely that the number of claims brought pursuant to the regime will expand at pace as more claimants come forwards.

For representatives of existing claims, as mentioned above, the wheels of justice will begin turning again and it is highly likely that 2021 will see the first opt-out claim certified, if not several. For advocates of greater access to justice, these developments are to be welcomed.

Yet more welcome still would be the extension of opt-out redress to victims of other forms of harm—breaches of consumer law, for example. After all, if I am overcharged for a product as a result of a cartel, I can benefit from opt-out redress to vindicate my right to redress; if that overcharge was instead due to an unfair commercial practice, why ought I not be able to do the same? NLJ

Lucy Rigby, partner, Hausfeld & Co LLP (*www.hausfeld.com*).