

# Collective consciousness: opt-out collective redress takes off in the UK

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## Abstract

On 11 December 2020, the UK Supreme Court delivered a landmark judgment in *Merricks v Mastercard*. The judgment sets the standard that opt-out collective actions before the UK Competition Appeal Tribunal will be required to meet at the certification stage. The judgment furthermore provides a resounding endorsement of the principles underpinning the expansion of the UK's collective action regime to include opt-out proceedings via the Consumer Rights Act 2015. In this article, the authors provide an in-depth analysis of the seminal judgment and assess its wider implications for the future development of the country's young collective actions regime.

## Introduction

The Supreme Court of the United Kingdom (UKSC) recently handed down the most significant ruling to date for the UK's young collective opt-out regime for breaches of competition law: *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent) ('Merricks')*.<sup>2</sup>

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2 [2020] UKSC 51, 11 December 2020.

Despite more than five years having passed since its introduction, the UK's collective opt-out regime has, at the time of writing, failed to see a single case certified such that it may proceed to trial. This has been largely due to the *Merricks* litigation, which involved appeals to the Court of Appeal (CoA) and the UKSC on the question of the standard that an opt-out claim must meet at the certification stage. The impact of the UKSC's *Merricks* judgment is already being felt as various other collective opt-out proceedings previously on ice are now moving forwards to certification hearings.

This article explores the details of the highly significant *Merricks* judgment, and its wider impact on the future of opt-out redress in the UK.

### A regime with promise

To place the UKSC's judgment into context, it is worth reminding ourselves why the opt-out redress regime for breaches of competition law was thought necessary and the relevant legislation passed by Parliament.

Under former section 47B of the Competition Act 1998 (CA98), it was – before 2015 – possible for a specified body to bring an 'opt-in' claim for damages.<sup>3</sup> Such a claim was brought by the Consumers' Association in 2007, in relation to an infringement of competition law by JJB Sports.<sup>4</sup> After a settlement with the defendant, only a very small proportion of a total number of 130,000 affected consumers opted in to the claim to take their share of the settlement sum. No further opt-in claim was brought over this period and the absence of compensation for victims of harmful conduct was clear for all to see.

The UK Government's response to the Department for Business Innovation and Skills consultation for reform of private actions notes how the introduction of the opt-out regime was aimed at resolving the limitations of its opt-in predecessor.<sup>5</sup> After the consultation, significant reform was brought about by the introduction of the Consumer Rights Act 2015, including the expansion of the previous opt-in regime to also include the possibility of opt-out claims.<sup>6</sup> The new legislation amended the CA98 and stipulated that, for an opt-out claim to proceed, it must be certified by the Competition Appeal Tribunal (the 'Tribunal') to proceed as a collective claim via the grant of a collective proceedings order (CPO).

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3 'Opt-in' refers to the scenario whereby consumers must pro-actively decide, within a set window, that they wish to form part of the class.

4 *Consumers Association v JJB Sports plc* (CAT Case No 1078/7/9/07).

5 Department for Business Innovation and Skills, '*Private Actions in Competition Law: A consultation on options for reform - government response*' (January 2013).

6 'Opt-out' refers to the scenario whereby all those falling within the class definition are automatically part of the class, unless and until they expressly 'opt-out' of the claim.

As per the relevant provisions of CA98, a CPO will only be granted if: (1) it is ‘just and reasonable’ for the proposed class representative to act as the class representative for the proposed claim; and (2) the underlying claims are ‘eligible’ for inclusion in collective proceedings.<sup>7</sup> 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.<sup>8</sup>

Rule 79 of the Competition Appeal Tribunal Rules 2015 (the ‘Tribunal Rules’) expands on the provisions of section 47B(6) CA98 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.<sup>9</sup>

The certification stage of collective proceedings is therefore the gateway to the rest of the regime. If that gateway is unduly narrow, good claims may not pass through, or even be brought at all; if the gateway is too wide, however, unmeritorious claims may be unduly permitted to proceed. Setting an appropriate standard for claims to meet at certification is therefore very much determinative of the future successes of the opt-out regime as a whole.

### The *Merricks* litigation

In 2016, Merricks’ application for a CPO was the second to have been brought since the introduction of the regime.<sup>10</sup> His claim is follow-on in nature and relies upon the European Commission’s 2007 decision that Mastercard’s cross-border multilateral interchange fees (MIFs) breached competition law.<sup>11</sup> Merricks argues that the higher MIFs caused by Mastercard’s infringement resulted in losses to UK consumers in the form of higher prices for goods and services. He is applying, as the proposed class representative, to represent a consumer class of *circa* 46 million individuals and he claims an estimated sum of aggregate damages to the tune of £14bn.

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7 S 47B(5) and s 47B(8) CA98.

8 S 47B(6) CA98.

9 Rule 79, Tribunal Rules.

10 In the first claim that was brought relating to Mobility Scooters, a CPO was refused on the basis that the proposed methodology for quantifying losses to consumers was inadequate. Ms Gibson, the proposed class representative, did not decide to reframe her case. See *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9 (31 March 2017).

11 Case COMP 34.579, *Mastercard/MIFs* (19 December 2007).

### *Judgment*

Having heard Merricks' application, the Tribunal refused to grant a CPO in 2017.<sup>12</sup> Its reasons were essentially two-fold: (1) it was not satisfied that there existed sufficient data to operate Merricks' proposed methodology so as to allow for a sufficiently accurate quantification of the damages; and (2) Merricks, the Tribunal said, failed to put forward a plausible means of calculating the losses so as to allow for the distribution of an aggregate damages award.<sup>13</sup>

### *Appeal*

Merricks' application for permission to appeal the CPO judgment was dismissed by the Tribunal, upon which he applied to both the CoA and the Administrative Court for permission to appeal, the latter by way of judicial review. The CoA held that Mr Merricks did have a statutory right of appeal to the CoA and, while this appeal judgment is not the main subject matter of this article, we note that this ruling is also a significant one for the development of the opt-out regime in that it sets out the jurisdiction of the CoA in hearing appeals of Tribunal decisions in collective proceedings.<sup>14</sup>

The CoA heard Merricks' substantive appeal in February 2019. The appeal centred on his assertions that the Tribunal had adopted the wrong approach to the assessment of his case in three respects: (1) pass-on; (2) distribution; and (3) the extent to which the individual claims raised common issues.

In April 2019, the CoA handed down its judgment allowing Merricks' appeal and remitting the case to the Tribunal for a further certification hearing.<sup>15</sup> The CoA held that the Tribunal had erred in the approach to the assessment of Merricks' proposed claim, while also commenting more broadly on the operation of a number of key aspects of the regime, including the calculation and distribution of an aggregate award and the relevant standard that a proposed class representative needs to meet at certification.

The CoA grounded its ruling in the objectives underpinning the introduction of the opt-out regime and found multiple errors in the Tribunal's judgment: (1) the Tribunal had put the bar too high as to the assessment of the potential availability of data to operate the expert methodology;<sup>16</sup> (2) the Tribunal should

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12 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2017] CAT 16 (21 July 2017).

13 *Ibid*, paras 75-78 and 87-89.

14 *Walter Hugh Merricks CBA (Appellant) v Mastercard Incorporated and Others (Respondents)* [2018] EWCA Civ 2527 (13 November 2018).

15 *Walter Hugh Merricks CBA (Appellant) v Mastercard Incorporated (Respondents)* [2019] EWCA Civ 674 (16 April 2019).

16 *Ibid*, para 50.

not have conducted a ‘mini-trial’ and it was only necessary for the proposed class representative to show that the claim has ‘a real prospect of success’;<sup>17</sup> (3) the CoA disagreed with the Tribunal that pass-on was not a common issue;<sup>18</sup> (4) the Tribunal had wrongly insisted upon a basis in the compensatory principle for the distribution of an aggregate award; and (5) the Tribunal has been wrong to assess the proposed method of distribution at the certification stage.<sup>19</sup>

In common with the CoA ruling regarding jurisdiction to hear appeals of certification rulings, the CoA’s judgment is not intended to be the focus of this article – however, the CoA’s ruling in Merricks’ favour and its rejection of the Tribunal’s approach was itself a significant resetting of the certification test.

### Supreme Court judgment

Mastercard obtained permission to appeal the CoA’s judgment from the UKSC (permission having been refused by the CoA) at the end of July 2019.

At this point, most opt-out cases before the Tribunal had been placed on hold indefinitely: in the period since Merricks had filed his CPO application, several other CPO applications had been filed but each had been either stayed or with only particular aspects of the CPO application being heard<sup>20</sup> pending the UKSC’s judgment.

After a remote hearing in May 2020, on 11 December 2020 the UKSC dismissed Mastercard’s appeal and confirmed the CoA’s finding that Merricks’ claim must be remitted back to the Tribunal for a rehearing on certification.

The leading judgment was delivered by Lord Briggs and was originally supported on a 3:2 basis. However, after the death of Lord Kerr a few days before the intended handing down of the draft judgment, the UKSC was reconstituted as a panel of four judges. Lord Sales and Lord Leggatt offered an alternative judgment but, because Lord Kerr supported Lord Briggs’ judgment, agreed that Mastercard’s appeal should be dismissed, and the matter remitted to the Tribunal.<sup>21</sup>

We explore the UKSC’s findings and the reasoning underpinning Lord Briggs’ judgment in detail below.

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17 *Ibid*, para 52.

18 *Ibid*, paras 36 and 46.

19 *Ibid*, para 57.

20 Eg, on the funding and insurance arrangements in respect of *Trucks* (1282/7/7/18 and 1289/7/7/18). In addition, certain directions have been giving as to the timing of the carriage hearing in *Foreign Exchange* (1329/7/7/19 and 1336/7/7/19).

21 See n 2 above, paras 82 and 83. It is recognised that Lords Sales and Leggatt did not formally dissent given the circumstances of Lord Kerr’s untimely death. It is worth noting, however, that the alternative judgment nevertheless largely agrees with the principles of the leading judgment in setting out the parameters on which future collective actions will be assessed.

*Certification standard*

The aspect of Lord Briggs' judgment that has garnered most attention goes to the specific standard that ought to be applied by the Tribunal at the certification stage. In this respect, Lord Briggs departs from the CoA's prior ruling to conclude that 'the certification process is not about, and does not involve, a merits test'.<sup>22</sup> This, he says, is subject to two caveats: (1) the Tribunal may, 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 (2) the 'strength of the claims' may be assessed in the context of a choice between opt-out and opt-in proceedings.<sup>23</sup>

The only hurdles for certification purposes then are those listed in section 47B(5) and section 47B(6) CA98 and at Rule 79(1) of the Tribunal Rules – that is to say that the Tribunal must be able to authorise the representative and the underlying claims must be eligible for inclusion in collective proceedings. Eligibility will be met only if the claims raise the 'same, similar or related' issues of fact or law, are brought on behalf of an identifiable class and are suitable to be brought in collective proceedings. Crucially, however, the listed factors in Rule 79(2) of the Tribunal Rules (including suitability for an aggregate award of damages) are not separate suitability hurdles.<sup>24</sup>

*Right to quantification*

A claimant's right to quantification plays a central theme in Lord Briggs' judgment. This basic principle applies to individual claims and there is no reason why the principle ought to be departed from for the purposes of collective proceedings. Lord Briggs held that 'justice requires that the damages be quantified for the twin reasons of vindicating the claimant's rights and exacting appropriate payment by the defendant to reflect the wrong done'.<sup>25</sup>

Notwithstanding the difficulties that may be posed in upholding this principle, it was held that the 'evident purpose of the statutory regime was to facilitate rather than to impede the vindication of those rights'.<sup>26</sup> Lord Briggs found the failure to adhere to this principle to be the most serious error of law in the Tribunal's judgment.<sup>27</sup> Underlying this clarification is an express regard for the fact that anti-competitive conduct may otherwise be unrestrained, and go uncompensated, if consumers are prevented from bringing collective claims.

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<sup>22</sup> *Ibid*, para 59.

<sup>23</sup> *Ibid*, paras 59 and 60.

<sup>24</sup> *Ibid*, para 61.

<sup>25</sup> *Ibid*, para 53.

<sup>26</sup> *Ibid*, para 54.

<sup>27</sup> *Ibid*, para 72.

Relatedly, the UKSC confirmed that the Tribunal should not impose restrictive standards as to the availability of data at the certification stage. While acknowledging that data will never be perfect and that obtaining the same may be costly, neither of these factors would warrant denying ‘a trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss’,<sup>28</sup> and furthermore that the absence of data does not justify ‘the denial of practicable access to justice to a litigant or class of litigants who have a triable cause of action, merely because it will make quantification of their loss very difficult and expensive’.<sup>29</sup> Specifically as to the cross-examination of expert economists, Lord Briggs noted how this should be a rare occurrence in certification hearings (although it had been justified in the context of the *Merricks* case).<sup>30</sup>

As such, a claimant’s right to quantification must be the guiding principle in approaching certification, even when quantifying loss may be difficult: ‘it is a task which the [Tribunal] owes a duty to the represented class to carry out, as best it can with the evidence that eventually proves to be available’.<sup>31</sup>

### *Suitability*

The meaning of ‘suitability’ is of some importance to the certification test as it appears twice in the relevant provisions: first, in section 47B CA98 (‘suitable to be brought in collective proceedings’) and second in Rule 79(2) (f) of the Tribunal Rules (‘suitable for an aggregate award of damages’).

Lord Briggs found that suitability was to be interpreted relative to individual proceedings, as opposed to being suitable in any abstract sense,<sup>32</sup> and observed that the Tribunal should ask itself whether a claim is ‘suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages’.<sup>33</sup> The upshot of this is that a prospective class representative need only show that their claim is more suitable to be brought on an opt-out basis than were each class member to bring their own claim.

Lord Briggs observed that the ‘CAT is expected to conduct a value judgment about suitability’ in which the factors listed in in Rule 79(2) of the Tribunal Rules and other factors are weighed in the balance.<sup>34</sup> The certification assessment is to involve a ‘single, albeit multi-factorial, balancing exercise in which too much compartmentalisation may obscure the true task’.<sup>35</sup>

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28 *Ibid*, para 73.

29 *Ibid*, para 74.

30 *Ibid*, para 79.

31 *Ibid*, para 74.

32 *Ibid*, para 72.

33 *Ibid*, para 56.

34 *Ibid*, para 61.

35 *Ibid*, para 64.

*Common issues*

As to the common issues, Lord Briggs held that the Tribunal must identify the main issues in a case and assess whether or not those issues are common to the individual claims. Crucially, for the purposes of the case at hand, Lord Briggs found, as the CoA had done, that the Tribunal was wrong that pass-on was not a common issue among the members of Merricks' proposed class.<sup>36</sup>

*Calculation and distribution of an aggregate damages award*

One of the unique features of the opt-out regime is the availability of aggregate awards of damages, which – pursuant to section 47C(2) CA98 – the Tribunal may grant without undertaking an assessment of each class member's loss. That is to say, an aggregate award of damages can provide compensation for the loss suffered by the class as a whole, without the need to precisely quantify the loss each class member has suffered.

However, this is not, the CoA had held, the approach taken by the Tribunal to assessing Merricks' application for CPO. The UKSC agreed with the CoA that the Tribunal had erred in this respect. As Lord Briggs noted, 'section 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms'.<sup>37</sup> Section 47C therefore represents an express and radical modification for the purposes of the collective regime: a central purpose of the regime is to avoid the need for individual assessment of loss.<sup>38</sup>

The second aspect of Merricks' claim for an aggregate damages award concerned the extent to which: (1) damages ought to be distributed (as opposed to calculated) with some relationship to the compensatory principle; and (2) the Tribunal had been entitled to interrogate how Merricks intends to distribute an aggregate award of damages to class members at the CPO stage.

The CoA had found that the Tribunal had wrongly insisted upon a basis in the compensatory principle for the distribution of an aggregate award and that any consideration of distribution proposals at the certification stage was premature (rather, it ought to have been reserved for the trial judge following the ordering of an aggregate award). As to the former point, Lord Briggs found that this would generally be true, albeit he acknowledges that in some cases it might be appropriate to distribute the award in such a way as to make approximation towards individual loss – subject at all times to what is fair and reasonable in the circumstances.<sup>39</sup> As to the latter point, Lord Briggs was minded to agree with the CoA's approach but

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<sup>36</sup> *Ibid*, para 62.

<sup>37</sup> *Ibid*, para 58.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

did, however, express a word of caution that there may be cases where the suitability of the claims for collective proceedings is best addressed by examining all of the proposed class representative's proposals in the round, including those relating to distribution.<sup>40</sup>

### Landmark judgment

There is no doubt that the UKSC's judgment in *Merricks* is of huge significance. It is a resounding endorsement of the principles underpinning the introduction of opt-out collective redress – most notably access to justice – and it paves the way for the successful development of the UK's young regime.

It is interesting to consider where the certification standard set down by the UKSC for the UK regime compares to other jurisdictions with more mature regimes. It seems clear that the absence of a merits test, save in specific circumstances, sets the UK apart from the position in the United States, for example, where certification has arguably become much more akin to a mini-merits assessment. Each of the Tribunal,<sup>41</sup> the CoA<sup>42</sup> and the UKSC has spoken favourably of the Canadian regime at every stage of the *Merricks* litigation, and Lord Briggs noted the similarities of statutory purpose between the UK and Canadian legislation in providing effective access to justice for consumers for whom it would be impracticable or disproportionate to pursue individual claims.<sup>43</sup> It may therefore be expected that Canadian jurisprudence will continue to be cited before the Tribunal as our domestic regime evolves.

### Beyond *Merricks*

The most immediate impact of the UKSC's ruling has been to remove the roadblock that had been preventing other opt-out claims from progressing. With regard to *Merricks* specifically, the UKSC has remitted *Merricks*' CPO application back to the Tribunal for rehearing and that application was heard on 25 and 26 March 2021. At the time of writing, the judgment was awaited in respect of the remitted hearing, although it was expected that the Tribunal will grant *Merricks* a CPO. The remitted hearing focused upon the scope of the eventual CPO, rather than on whether or not it ought to be granted.

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40 *Ibid*, para 80.

41 See n 12 above, paras 58 and 59.

42 See n 15 above, paras 39-44.

43 See n 2 above, para 37.

We note also that the first CPO applications heard by the Tribunal post-*Merricks* were those in the *Trains* collective actions.<sup>44</sup> It therefore appears likely that we will see the first opt-out claims certified this year – although this will be five years on from the procedure becoming available to prospective class representatives, it is nevertheless a welcome development. Given the positive nature of the *Merricks* ruling for prospective class representatives and for litigation funders, it appears highly likely that the next months and years will see further opt-out claims filed<sup>45</sup> and that the regime will now expand at pace.

This is not to say, of course, that the UKSC's ruling in *Merricks* answers all questions that may arise in relation to opt-out claims, or even all of those pertaining to certification. Indeed, the impact of some elements of Lord Briggs' judgment is already being questioned in the prism of existing cases. Chief among these is the prospect of more strike-out and/or summary judgment applications from defendants as a means of introducing a merits test at an earlier stage of proceedings, even if the standard which such applications would need to meet is a high bar.

Lord Briggs' interpretation of 'suitability' is another area that is likely to see argument, particularly in cases where a claim is on behalf of a class of businesses as opposed to consumers. This said, in such circumstances there are clear reasons why opt-out redress would be the most appropriate means of resolving these disputes, including due to the size of individual businesses' claims and the efficiencies to be gained from opt-out redress. Further points of law – relating to certification and otherwise – will no doubt be tested before the appellate courts in the years ahead, as the UK's regime continues to find its feet.

We note lastly that the UKSC's *Merricks* ruling ought to bring with it consideration of the expansion of opt-out redress to other areas of the law beyond only competition. When the Consumer Rights Act 2015 was being conceived, the UK government's preference was to consider reform on a sectoral basis and so now the natural next question for policymakers is why the principles of access to justice, judicial economy, and efficiency ought to be solely the preserve of those who have suffered harm as a result of a breach of competition law. Why, for example, can I benefit from opt-out redress to vindicate my right to redress if I am overcharged for a product as a result of a cartel, but not if that overcharge was instead due to an unfair commercial practice? The authors would argue there is no good answer.

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44 *Justin Gutmann v First MTR South Western Trains Limited and Another* (Case No 1304/7/7/19) and *Justin Gutmann v London & South Eastern Railway Limited* (Case No 1305/7/7/19).

45 As to collective actions filed in the Tribunal since *Merricks*, see *Justin Le Patourel v BT Group PLC* (Case No 1381/7/7/21) as filed on 15 January 2021 and, more recently, *Consumers' Association v Qualcomm Incorporated* (Case No 1382/7/7/21) as filed on 18 February 2021.