

CAT Certification for MasterCard: Take Two

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On 16th April 2019, the much awaited Court of Appeal's decision on *Walter Hugh Merricks CBE v MasterCard Inc & Ors* allowed the appeal and set aside the order of the CAT refusing certification. It gives a welcome steer as to the requirements for certification under the UK's collective actions regime. Partner Anna Morfey shares her thoughts regarding the judgment.

Canadian analogy

The Court of Appeal endorsed reliance on the Canadian case-law on class certification as relevant to the UK, noting that "the similarities between the Canadian and the UK regimes are obvious". This gives would-be class representatives - and their lawyers - a rich seam of jurisprudence to draw on, in the absence of anything much to go by in the UK.

Calculation of damages

The Court of Appeal emphasised the need for the class representative to present a credible common methodology for calculating the class's "aggregate" losses. But the Court acknowledged that not all data is available at certification stage to apply the methodology and did not consider that to be a bar to certification.

Implicit in this is the Court's disapproval of the extensive cross-examination of Mr Merricks's expert economist at the certification hearing before the CAT. It will be interesting to see the degree of scrutiny and cross-examination to which experts are subjected in future collective actions, in light of this.

Distribution of damages

The Court rejected the notion that it must be possible to assess individual losses for each class member at certification stage, finding that "the CAT is not required ... for certification purposes to consider more than whether the claims are suitable for an aggregate award of damages which, by definition, does not include the assessment of individual loss".

In this respect, the Court clearly seems to have in mind the *raison d'etre* of the collective actions regime - to provide redress to consumers - and was not willing to allow the potential impossibility of calculating each class member's individual losses to thwart the claim at the outset.

Ongoing scrutiny of certified cases

It is interesting that the Court of Appeal also puts quite some weight on the fact of certification being “a continuing process under which a CPO may be varied or revoked at any time.” Whereas the CAT’s approach had perhaps been to set a high threshold for certification, the Court of Appeal indicates that the threshold should be lower than that adopted by the CAT but with the prospect of certification being revoked during the course of the litigation.

This is rather a double-edged sword for class representatives (and those funding them), and its implications will need to be considered carefully.

Full judgment