

# Certification Recast: Court of Appeal's Judgment in Merricks v Mastercard Provides Important Guidance for UK's Infant Collective Actions Regime

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On 16 April 2019, the UK Court of Appeal handed down what is undoubtedly the most significant ruling to date for the UK's young collective actions regime. The Judgment in *Merricks v Mastercard*[1] overturned the Competition Appeal Tribunal's prior ruling refusing certification of Walter Merricks' £14 billion opt-out, consumer collective action,[2] and ordered that the Tribunal again consider Mr. Merricks' application for a collective proceedings order. While Mastercard may yet be awarded permission to appeal the Court of Appeal's decision to the Supreme Court, the recent Judgment represents the highest authority to date as to a number of key aspects of the collective action regime, including the appropriate approach to calculating an aggregate award of damages, the relevant tests to be applied at certification, and the standard for the distribution of an aggregate damages award following judgment. For this reason, the Court of Appeal's ruling will be pored over by would-be claimants and defendants alike.

## Background

- *An infant regime*

Mr. Merricks' application for a collective proceedings order (a "**CPO**"), filed in September 2016, constituted only the second CPO application since the coming into force of the UK's opt-out, collective actions regime in October 2015. Schedule 8 of the Consumer Rights Act 2015 (the "**CRA 2015**") amended various provisions of the Competition Act 1998 (the "**Act**"), allowing claims for damages arising from breaches of competition law to be brought collectively by a proposed representative of the claimant group, on an opt-out basis for UK residents, and an opt-in basis for other claimants.

As it stands, despite the passage of over three and a half years since the relevant provisions of the CRA 2015 came into force, no application for a collective proceedings order has, as yet, been successful.

- *Mr. Merricks' claim*

Mr. Merricks' claim is one of unprecedented size. Mr. Merricks seeks an award of aggregate damages and interest totalling £14.098 billion from three companies in the Mastercard group (collectively, "**Mastercard**"), on behalf of a class of an estimated 46.2 million people. His claim is based upon a 2007 decision of the European Commission, in which the Commission found that Mastercard had infringed Article 101 of the Treaty for the Functioning of the European Union concerning the setting of so-called multi-lateral interchange fees ("**MIFs**" - fees charged between banks in relation to transactions involving the use of Mastercard card).

Mr. Merricks alleges that the higher MIFs caused losses to UK consumers in the form of higher prices for goods and services. Specifically, the class of individuals on whose behalf Mr. Merricks seeks recovery is defined as all individuals over the age of 16 who had been resident in the UK for a continuous period of at least three months and who, between 22 May 1992 and 21 June 2008, purchased goods or services from businesses in the UK which accepted Mastercard payment cards. [3]

- *The Tribunal's Judgment and permission to appeal*

Having heard Mr. Merricks' claim in January 2017, the Tribunal refused to grant a CPO for two principal reasons: first, the Tribunal 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[4]; 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.[5]

Mr. Merricks' application for permission to appeal this ruling was dismissed by the Tribunal, upon which he applied to both the Court of Appeal and the Administrative Court for permission to appeal, the latter by way of judicial review. The Court of Appeal ruled that Mr. Merricks had a statutory right of appeal to the Court of Appeal.[6]

## **The Court of Appeal's Judgment**

The Court of Appeal, constituted by Lord Justices Patten, Hamblen and Coulson, heard Mr. Merricks' substantive appeal in February 2019. The appeal centred upon Mr. Merricks' assertions that the Tribunal had adopted the wrong approach to the assessment of his case in three respects: pass-on, distribution, and the extent to which the individual claims raised common issues. However, in assessing each of these grounds, the Court also commented more broadly on the operation of a number of key aspects of the regime, including as to the calculation and distribution of an aggregate awards of damages and the relevant standard which a proposed class representative needs to meet at certification.

- *Pass-on and the appropriate test to be applied at certification*

The nub of Mr. Merricks' case on pass-on was that the Tribunal had held the applicant to too high a test at the certification stage. He contended that the Tribunal had required too much in terms of the data to be used in the expert methodology (employed to demonstrate that suggested losses were common to the class, and had wrongly concluded that pass-on was not a common issue within the meaning of section 47B(6) of the Act).[7]

The Court of Appeal agreed with Mr. Merricks. In doing so, they offered a ringing endorsement of the Canadian courts' approach to certification, quoting extensively from the Canadian Supreme Court decision in *Pro-Sys Consultants Ltd v Microsoft Corp.* [2013] SCC 57 ("*Microsoft*").[8]

The Court of Appeal held that, rather than conducting a "mini-trial" (as the Court suggested the Tribunal had undertaken[9]), the correct test to be applied at the certification stage is whether the claim has a "*real prospect of success*".[10] For the purposes of the current case, in order to prove a real prospect of success, Mr. Merricks:

"...had to satisfy the CAT that the expert methodology was capable of assessing the level of pass-on to the represented class and that there was, or was likely to be, data available to operate that methodology. But it was not necessary at that stage for the proposed representative to be able to produce all of that evidence, still less to enter into a detailed debate about its probative value. To that extent a certification hearing is no different from any other interlocutory assessment of the prospects of success in litigation made before the completion of disclosure and the filing of evidence. Its purpose is to enable the CAT to be satisfied that (with the necessary evidence) the claims are suitable to proceed on a collective basis and that they raise the same, similar or related issues of fact or law: not that the claims are certain to succeed. The specific considerations relevant to suitability which are set out in Rule 79(2) do not call for a different approach. None of them requires the CAT to be satisfied that the collective claim has more than a real prospect of success." [11]

The Court further noted that, in this context, the Tribunal had been wrong to ignore the fact that the Act provides that CPO, once granted, can be varied or revoked at any time, as indeed has occurred in a number of Canadian cases.[12]

With specific regard to the data to be applied to the expert methodology, the Court concluded that the Tribunal had misapplied the appropriate test set out by the Canadian Supreme Court in its *Microsoft* decision:

"If, as the Supreme Court explained in *Microsoft*, the function of the Tribunal at the certification stage is to be satisfied that the proposed methodology is capable of or offers a realistic prospect of establishing loss to the class as a whole then that requirement was satisfied. The availability of data sufficient to allow the methodology to be operated on what the CAT described as a sufficiently sound basis ought at the certification stage to be looked at in terms of what information can be made available for use at the trial." [13]

The question as to whether pass-on could be a same, similar, or related issue of fact or law for each individual claim, within the meaning of section 47B(6) of the Act, is heavily related to the appropriate way in which to assess an application for an aggregate award of damages (as discussed below). The Court of Appeal concluded that, as an assessment of individual losses is not required in order to calculate an aggregate award of damages, it was sufficient that whether the overcharge was passed-on to consumers generally was an issue common to all class members.[14]

- *Aggregate damages: calculation and distribution*

In dealing with Mr. Merricks' arguments on pass-on, the Court of Appeal recognized that the question as to how much data was needed from the applicant for the purposes of the expert methodology essentially went to the extent to which it was necessary to calculate and distribute damages on an individual basis, in the context of an application for an aggregate award of damages. This aspect of the Court of Appeal's ruling is particularly noteworthy.

Section 47C(2) of the Act reads as follows:

"47C Collective proceedings: damages and costs

...

(2) The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

As, therefore, an award of aggregate damages can be made without the Tribunal undertaking an analysis as to individual consumers' loss, the Court of Appeal held that a "top-down" calculation of pass-on to the class as a whole is a permissible basis for the calculation and making of an aggregate award.[15] The Court continued:

"...there is no requirement under s.47C(2) to approach the assessment of an aggregate award through the medium of a calculation of individual loss and the appellant's experts have not attempted to do so. In that they have the support of the Canadian authorities which in cases like Microsoft have approved a top-down method of calculation on the basis that the level of pass-on to the class as a whole will be a common issue for all individual claimants. It seems to us that the same approach should be adopted in relation to collective proceedings under s.47B of the CA." [16]

With regard to the distribution of any aggregate award of damages, the Tribunal had (as above) cited the lack of any plausible method of distributing damages on a compensatory basis as a reason for refusing certification. The Court of Appeal strongly disagreed with this analysis, stating: *"we reject the suggestion that a loss-based method of distribution is mandated by the statutory provisions or therefore that the proposed method makes it unsuitable for a CPO to be made under Rule 79 [of the Competition Appeal Tribunal Rules 2015 (the "Rules")]."* [17] These comments as to the distribution of damages other than in accordance with individual loss may constitute the most significant aspect of the Judgment.

In explaining the Court's reasoning, the link between the calculation of an aggregate award of damages and the distribution of the same is acknowledged: *"Once it is accepted that aggregate damages can be awarded and therefore assessed by reference to the loss suffered by the represented class as a whole, it becomes difficult to justify a reversion to an individual calculation of loss for the purposes of distribution."* [18] The Court also noted that the CRA 2015 was clearly intended by Parliament to introduce a new means of redress, facilitated by litigation funding: had Parliament intended to fetter the new procedure with the requirement that damages be assessed on an individual basis then it would have specified as such. [19]

The Court of Appeal emphasized that, while the Tribunal is required, as per Rule 79(2) [20] of the Rules, to take into account whether or not the claims are suitable for an aggregate award of damages, the Tribunal is not required to consider at the CPO stage how such an award might be distributed – rather, this ought to be a matter for the trial judge following the making of an aggregate award. [21]

## Comment

The Court of Appeal's April ruling represents in many respects a significant departure from the narrower standards set down in the Tribunal's Judgment and for this reason is to be considered a landmark ruling in the context of the UK's collective action regime. Each of the above-mentioned elements of the decision is important in and of itself but the manner in which the Court of Appeal deals with the distribution of an aggregate award (in indicating that this does not have to take place on a compensatory basis) would seem particularly noteworthy and likely to open the door to further collective claims.

Overall, the Court of Appeal's Judgment, which was issued on a unanimous basis, offers welcome clarity as to key aspects of the regime. Permission to appeal the ruling was refused by the Court of Appeal, although at the time of writing it is not known whether Mastercard may yet be awarded permission to appeal by the Supreme Court. Generally, an application for permission to appeal to the Supreme Court may take a matter of months to be determined, but in this case the Tribunal has written to the Supreme Court to request that Mastercard's application be dealt with promptly, given its significance. If permission to appeal is refused, the Court of Appeal's decision will remain the relevant standard for claimants to meet and the Tribunal will be bound to reconsider Mr. Merricks' claim in this new light.

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