Today's Agenda

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A new era for collective actions in the UK

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The long-awaited UK Supreme Court judgment in *Mastercard v Merricks* [1] ('the Judgment') was handed down last Friday morning. The Judgment allows a £14bn opt-out collective proceeding to proceed. The application for a collective proceeding, launched by Walter Hugh Merricks CBE in 2016, is the second in the CAT (following the 'Scooters' case in 2017) since the start of the UK's opt-in class action regime, in 2015.

The Judgment gives further clarity on the standard required to certify an 'opt-out' class for a collective proceeding in the UK's Competition Appeal Tribunal ('the CAT').

The Supreme Court made five specific remarks in its Judgment about the CAT's decision in the Merricks case, as follows.[2]

- First, in addition to the overcharge (which the CAT determined was a common issue), the merchant pass-on was also a common issue, which should have been a 'powerful factor in favour of certification'.[3]
- Second, while the unsuitability of aggregate damages is a consideration, it should not be seen as a 'hurdle' to certification. The Supreme Court noted that there were several hurdles that were statutory, and others that were not—and where the hurdle is not a statutory hurdle but is nonetheless decisive, this should be made clear in the CAT's judgment.
- Third, the 'suitability' requirement should not be seen in abstract terms—instead, a test of relative suitability as compared to series of individual claims should be applied. That is, if a case would have been allowed to proceed to trial as an individual action, then there is not enough reason to deny certification for collective proceedings.
- Fourth, the challenges with the data and the methodology were not a sufficient reason to refuse certification. The Supreme Court drew comparisons to civil courts and tribunals, which frequently face similar issues with limitations in available data for quantification of damages. It noted that 'the court must do what it can with the evidence available when quantifying damages', and that the challenges with the data should not deny 'a claimant with a real prospect of (some) success' a trial.[4]
- Fifth, it was not a requirement, at the certification stage, for the applicant to demonstrate a method for distributing any aggregate damages to take account of any individual losses. The Supreme Court highlighted that the purpose of aggregate damages is to avoid the need to assess individual damages.

What does this mean for the future of collective actions in the UK?

The most immediate implication of the Judgment is that Mr Merricks will have an opportunity to replead his case against Mastercard in the CAT. The CAT will have to apply the revised tests from the Supreme Court when considering class certification.

The wider implications, however, fall on the UK's collection action regime, and the evolution of the current and future roster of cases in the CAT. A number of CPO applications that have been stayed by the CAT pending the Judgment will now be able to proceed.

More widely, the new standard will be seen as being favourable to claimants, as it sets a relatively low threshold in the requirements for certification. Claimants need only to show a 'realistic prospect of (some) success' and that difficulties in establishing quantum should not be seen as a barrier to certification, in the spirit of allowing claimants the same access to justice (through the award of damages) as they would have through individual actions.

The relatively low bar for claimants (particularly where there is a prior regulatory finding) is likely to trigger more applications being filed, and a greater volume of collective competition actions being filed in the UK.

How far the volume of cases will increase remains to be seen. For standalone actions, the hurdle of demonstrating liability still remains, which itself remains as a barrier for unmeritorious claims. Further, the requirement for claimants to be held liable for adverse costs also places a requirement on claimants to seek the appropriate litigation funding or insurance, which puts in place another checkpoint to ensure that claims are merit-based and have a possibility of success (on the basis of the evidence and the approaches). This will act as a deterrent for claimants to press a speculative claim whose prospects appear questionable.

Moreover, the certification of a class is only the first stage—the claimant needs to demonstrate the extent of the harm at trial, with sufficient evidence, and a robust approach to quantifying damages. In advance of trial, the rules also allow the CAT to 'de-certify' a class, subject to the same threshold as certification. If it were the case that the case were contingent on the existence of evidence (through disclosure, for example) that did not then materialise, or proved adverse to the claimants' position, this could give cause for a de-certification of a class.

Further implications arise for the evolution of cases—the pressure to form a collective settlement immediately after certification may also be lower than previously anticipated, as more issues are left open without the CAT having filtered cases to go forward. Indeed, a greater emphasis on the assessment of the case post-certification would mean the dynamic of cases frequently settling once they are certified (as observed in Canada, the USA, and other markets) may not necessarily materialise in the UK, or may only arise for certain cases.

What is clear is that while the Judgment may widely be viewed, with some justification, as the starting gun for the UK regime, many interesting practical, legal, and economic issues around to how to effectively determine collective cases remain unresolved. The certification hearings expected in 2021 will be crucial in shaping collective proceedings in the UK for years to come.

1 *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51.

2 *Walter Hugh Merricks CBA v Mastercard Incorporated and others* [2019] EWCA Civ 674.

3 Judgment, para. 66.

4 Judgment, para. 64(d).

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