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# *Competition Appeal Tribunal Grants First Collective Proceedings Order*

By Alex Leitch, Harry Denlegh-Maxwell & Alison Morris

On 18 August 2021, as part of the ongoing *Merricks v MasterCard*[1] litigation, the Competition Appeal Tribunal ("**CAT**") approved the first application for a collective proceedings order ("**CPO**") under the U.K.'s competition class action regime (introduced by the Consumer Rights Act 2015).

The application, which was initially refused by the CAT, was remitted to it following an appellate process that ultimately concluded with the Supreme Court ruling that the CAT had made multiple errors of law in deciding that the case was not suitable for a CPO, including its undue focus on the perceived forensic difficulties in quantifying damages (the "**SC Decision**"). For more information on the SC Decision, please refer to our coverage here.

Following the SC Decision, MasterCard did not oppose the grant of the CPO; however, there were a number of developments which required the CAT to re-examine the suitability of Mr Merricks to act as class representative. In addition, the CAT considered Mr Merricks's request for permission to amend the claim form to include deceased persons within the "class", which (if granted) would have had the effect of increasing the class size from 42.6 million consumers to circa 59.8 million. Finally, the CAT also considered whether Mr Merricks's claim for compound interest, which doubled the estimated quantum of the principal claim from £7.2 billion to £16 billion, was suitable for determination in collective proceedings.

## Background

The proceedings arise out of an opt-out claim brought by Mr Merricks against MasterCard on behalf of approximately 46 million customers who purchased goods and services using a MasterCard payment card between May 1992 and June 2008. The European Commission found that MasterCard had infringed EU competition rules by charging multi-lateral interchange fees (fees charged between banks for credit card transactions) which were then passed on to the consumer in the form of higher prices (the "**Overcharge**").

The CAT had previously ruled that the application brought by Mr Merricks seeking a CPO should be denied, on the basis that the claims were unsuitable to be heard as a collective action. The main reason for this conclusion was that the expert methodology put forward by Mr Merricks did not provide enough data to adequately calculate or estimate individual loss.

The CAT's decision was overturned by the Court of Appeal, and was subject to a further appeal to the Supreme Court. The Supreme Court considered that the CAT had erred in its application of the law by refusing to certify the claim. The Supreme Court acknowledged that there were deficiencies in the data but that such difficulties would not prevent an individual claim going to trial and, accordingly, should not be treated as preventing claims brought collectively. Instead, the court must *"do what it can with the evidence available"*. The Supreme Court also held that section 47C of the

Competition Act 1998 removed the ordinary requirement for the separate assessment of each claimant's loss. Instead, the distribution of adequate damages need only be "*fair and reasonable*".

Following the SC Decision, the case was remitted back to the CAT to re-consider the application for a CPO. MasterCard dropped its opposition to the CPO as a result of the SC Decision.

## The CAT's decision

On remittance of the claim, there were three issues before the CAT for determination: (i) whether to authorise Mr Merricks as class representative in light of developments in the factual background since the CAT first heard the application in July 2017; (ii) whether Mr Merricks could amend the claim form to extend the class to include deceased persons; and (iii) whether the collective proceedings could include a claim for compound interest.

### *Authorisation of the class representative*

Although MasterCard no longer objected to the CPO, there had been a number of developments in the circumstances surrounding the application that the CAT needed to consider in order to determine whether Mr Merricks could be authorised as the class representative.

The first of these two developments was that one member of the proposed class, Mr Ian Stocks, had filed detailed written submissions contending that it was not just and reasonable for Mr Merricks to act as a class representative. The submissions referred to Mr Merricks's former role as an independent reviewer of the Royal Institute of Chartered Surveyors regulations. As part of his role, Mr Merricks had reviewed and dismissed a complaint brought by Mr Stocks. However, the CAT did not consider that these submissions were sufficient to demonstrate that Mr Merricks had any conflict of interest with members of the proposed class.

The second development arose out of a change of litigation funder to Innsworth Capital Ltd and the terms of the new litigation funding agreement ("**LFA**") in place. Where proceedings are supported by a third party litigation funder, the CAT has to consider whether the proposed representative can act fairly in the interests of the class or whether they might have a conflict of interest, such as a constraint imposed under an LFA, which would prevent them from so acting.

The CAT considered that the LFA gave Mr Merricks sufficient access to funds to cover his own costs for pursuing the proceedings adequately for the class members, and to cover an adverse costs order should one be made against him in the future. However, the LFA also contained a number of clauses which gave the CAT pause for thought:

- **Settlement** – the LFA provides that if Mr Merricks wants to settle the claims or the proceedings for less than Innsworth Capital considers appropriate, or if Mr Merricks does not want to settle when Innsworth Capital did, then their difference of opinion shall be referred to an independent Queen's Counsel. However, under the terms of this provision the QC's decision will not be binding and the decision as to whether to accept or reject a proposed settlement will be solely for Mr Merricks to determine. The CAT considered that this provision satisfactorily protects Mr Merricks's right to act in the best interests of the class.

- **Termination** – Innsworth Capital was permitted to terminate the agreement on 45 days' written notice if it ceased to be satisfied with the merits of the claim or considered the claim to be no longer financially viable. The CAT expressed concerns that this gave Innsworth Capital too broad a discretion in circumstances where a decision to terminate would have serious consequences for the class representative's ability to conduct the proceedings. However, Innsworth Capital agreed during the course of the hearing that this provision could be amended to provide that Innsworth Capital would have to take its

decision based on *"independent legal and expert advice".* This was sufficient to assuage the CAT's concerns in this regard.

- **Adverse costs** – although the LFA provides cover for MasterCard's costs in the event of an adverse costs order against Mr Merricks, as a third party MasterCard had no right to enforce the terms of the LFA itself, as third party rights under the Contracts (Rights of Third Parties) Act 1999 were expressly excluded under the agreement. Accordingly, MasterCard sought an undertaking from Innsworth Capital to the CAT that it would discharge a liability for costs ordered against Mr Merricks. Innsworth Capital had no objection to providing such an undertaking.

With these issues resolved the CAT concluded that Mr Merricks could be authorised as the class representative.

### *The "deceased persons" issue*

When issuing a claim for collective proceedings, it is a requirement that the claim form provide a description of the class and an estimate of the number of class members. Mr Merricks sought expert advice in determining the class size, and based on the methodology used by his experts, excluded persons who had died either during the infringement period (1992 – 2008) or since the end of that period. This removed approximately 13.6 million people from the potential class.

Mr Merricks later sought to include deceased persons within the parameters of his claim. The CAT considered that this would not be possible by interpreting the present phrasing of the class description more broadly so as to include deceased persons, as it was evident on the face of the wording used that deceased persons were to be excluded. Accordingly, Mr Merricks instead applied for permission to amend the claim form so as to include deceased persons.

In principle, the CAT saw no difficulty in having a class definition that included the estates of deceased persons, with the opt-out rights to be exercised by the representatives of those estates. However, Mr Merricks's proposal did not seek to take this approach, and instead looked to simply treat deceased persons as individuals within the class.

The CAT agreed with MasterCard's objections that such an approach would be impermissible as deceased persons cannot themselves be class members. The CAT acknowledged that it has long been established that a claim cannot be brought in the name of a deceased individual. It must be brought by the deceased individual's estate. Collective proceedings constitute a collection of individual, distinct claims and accordingly this rule is applicable to collective proceedings in exactly the same manner. The CAT therefore dismissed Mr Merricks's application to amend the claim form.

### *The compound interest issue*

The estimated quantum of the principal claim, as set out in the claim form, is stated to be 'up to' £7.2 billion. However, as this alleged loss was incurred over a prolonged period (1992-2008), these losses will have accumulated significant levels of interest. In particular, whether the interest amount is calculated on a 'simple' or 'compound' basis makes a substantial difference to the amount claimed. As at January 2021, the claim with simple interest would total approximately £13.8 billion, whereas with compound interest it is estimated to be £16 billion.

Mr Merricks included compound interest in his claim from the outset, arguing that all members of the class would have (at some point) either borrowed or saved money, and the Overcharge could have been used to either increase savings or pay off debt, thus either returning interest on savings or reducing the interest burden of debt. However, MasterCard objected to the claims for compound interest on the basis that it was not a common issue across the class and that no credible method had been put forward for calculating the loss suffered.

The CAT noted that compound interest *"constitutes a distinct head of loss, which must be separately established and cannot be presumed"*. Therefore it is not sufficient for a claim for compound interest to show that an individual had borrowings or savings. It is necessary to go a step further and show, on the balance of probabilities, what the individual would have done with the additional money if there had been no Overcharge. They might have used it to service debts or add to savings, but equally they might simply have spent it.

The CAT pointed out that the loss per class member amounted to £155.80 over a claim period of sixteen years, amounting to a little under £10 per year. The principal loss, therefore, was not a large amount and was not incurred all at once. This would make it distinctly unlikely that many individuals would have used the Overcharge to service debt or add to savings. The CAT concluded that no credible or plausible method had been put forward to arrive at an estimate, even by informed guesswork, of the extent of the Overcharge which would have been saved or used to reduce borrowings, and not simply spent. Accordingly, the CAT concluded that the claim for compound interest was not suitable for an aggregate award, could not be fairly resolved as part of the collective proceedings, and should therefore be excluded from the claim.

## Comment

As set out above, the CAT duly authorised Mr Merricks as the class representative and ordered a CPO on an opt-out basis. However, in a victory for MasterCard, the total quantum of the claim has been significantly reduced by the CAT's decision to exclude the claim for compound interest and to refuse an amendment to the claim form to include deceased persons. Nevertheless, this remains a substantial claim.

Although this decision remains noteworthy as the first CPO issued under the 2015 regime, the fact that MasterCard withdrew its objections following the decision of the Supreme Court means that it was not necessary in this case to apply or stress-test the principles set out in the SC Decision. Overall, the CAT's careful consideration of the issues demonstrates that, in spite of the SC Decision, it will continue to examine each application for a CPO carefully. With a significant number of CPO applications pending before the CAT, it is unlikely that we will have to wait long before interested parties can witness the application in practice of the principles set out by the SC Decision. These cases before the CAT form part of the developing landscape of class actions in England and Wales, including the *Lloyd v Google LLC* representative action case which was heard by the Supreme Court in April 2021, all of which should be followed closely by potential defendants.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:*

**Alex Leitch**
Partner
+44 (0)20 3023 5188
alexleitch@paulhastings.com

**Harry Denlegh-Maxwell**
Associate
+44 (0)20 3321 1008
harrydenlegh-maxwell@paulhastings.com

**Alison L. Morris**
Associate
+44 (0)20 3023 5143
alisonmorris@paulhastings.com

[1] [2021]CAT 28