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Biggest case ever brought in the English courts scores a historic victory in the UK Supreme Court on class certification – *Merricks v Mastercard*

On Friday 11 December 2020, the UK Supreme Court handed down a historic and landmark judgment, delivering a decisive victory to Quinn Emanuel client Walter Merricks CBE in his efforts to bring a claim on behalf of a class of 46 million UK consumers seeking in excess of £14 billion in damages from Mastercard. The highest court in the UK agreed with the Court of Appeal that the first instance court (the Competition Appeal Tribunal or "**CAT**") made numerous errors of law in refusing to certify Mr Merricks' mass consumer collective action (*Mastercard Incorporated and others v Merricks* [2020] UKSC 51).

The claim was brought under the UK's new collective action regime, introduced by the *Consumer Rights Act 2015*. The intention of the new regime was to enable principally end consumers to obtain redress for breaches of competition law by allowing such claims (that individually are economically unviable due to their size) to be brought by a "class representative" on an "opt-out" basis. Such claims are only permitted if the CAT is satisfied that the claim is suitable to proceed on a collective basis, and grants a collective proceedings order ("**CPO**" or "**certification**").

Mr Merricks made an application in September 2016 for a CPO to continue opt-out collective proceedings seeking £14 billion in damages for a class of 46 million UK consumers against Mastercard for breach of competition law. The claim follows on from the finding by the European Commission in 2007 that Mastercard's intra-EEA multilateral interchange fees ("**MIFs**") infringed EU competition law in the period 1992 to 2007. This follow-on consumer claim should have been the archetypal case for the new regime. However, despite the scale of losses suffered, the CAT refused certification, on the grounds that: (1) while Mr Merricks' experts had a sound methodology for determining the degree to which the anticompetitive MIFs were passed on by merchants to consumers across all sectors of the economy, the CAT was not persuaded that data would be available to generate a sufficiently reliable result; and (2) the method proposed for distributing the aggregate award of damages to the class was not sufficiently 'compensatory', in that it did not take account of the actual loss suffered by each of the class members. This left 46 million UK consumers effectively without redress, and the CAT's reasoning risked making mass consumer class actions unviable from the very outset.

The prospects of a successful appeal against the refusal to certify were particularly challenging for two reasons. First, the statutory wording made doubtful whether a refusal to certify could be appealed. Indeed, the Tribunal's Guide to Proceedings expressly excluded an appeal, other than by way of judicial review. Second, the legal test for certification affords the CAT wide discretion, raising doubts as to whether there was an appealable point of law.

Having persuaded the Court of Appeal that there is a right of appeal against a refusal to certify, Quinn Emanuel secured a unanimous decision in the Court of Appeal that the CAT had erroneously applied the legal test for certification.

Mastercard appealed to the Supreme Court

Key findings of the Supreme Court

The Supreme Court upheld the Court of Appeal's decision, and, in doing so, identified numerous errors in the CAT's decision. In doing so, the Supreme Court has given much-needed guidance on the test for certification.

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The key findings of the Supreme Court decision are as follows:

- certification is not about and does not involve a merits test. To demonstrate that claims are eligible for a CPO, the proposed class representative need only show that the claims (i) are brought on behalf of an identifiable class, (ii) raise common issues (which are the same, similar or related) and (iii) are suitable to be brought in collective proceedings;

- the Court of Appeal had already concluded that the CAT was wrong to find that pass-on to consumers was not a common issue. The Supreme Court noted that this point had not been appealed by Mastercard, and stated that had the CAT properly concluded that pass on was a common issue, *"this would, or should, have been a powerful factor in favour of certification"*;

- the CAT wrongly treated the suitability of claims for aggregate damages as a "hurdle" rather than a factor to be weighed in the balance;

- the CAT failed to construe suitability in a relative sense (as compared to individual proceedings) and therefore failed to take account of the need to consider whether individual proceedings were a relevant alternative, *"which they plainly were not"*, and whether the same challenges affecting quantification in a collective claim would also be faced by individual claimants, so this is not a reason to shut out a collective claim;

- the CAT failed to consider the general principle that courts must do what they can with the available evidence, and instead allowed issues regarding the likely availability of data to effectively deny the class a trial, through the only procedure available to them, in respect of claims "*with a real prospect of (some) success"*; and

- the CAT was wrong to consider respect for the "compensatory" principle as an essential element in the distribution of aggregate damages. The Supreme Court ruled that a *"central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss"*. It further held that there will be some cases where approximating individual loss may be difficult and disproportionate, such as where individuals are likely to recover only modest amounts, and that *"some other method may be more reasonable, fair and therefore more just"*, as in the proceedings brought by Mr Merricks.

Implications of the decision

The ruling of the Supreme Court, dismissing Mastercard's appeal, provides crucial clarification from the UK's highest Court on the test to be applied, and the evidentiary standard required, at the certification stage in collective proceedings.

Mr Merricks' application for a CPO is now remitted to the CAT for reconsideration. Given the rulings of the Supreme Court and the Court of Appeal, certification of the class seems inevitable. If a CPO is granted, this will mean that the damages claims of 46 million UK consumers will be entitled to proceed against Mastercard on a collective basis. The issue will be how much damages Mastercard needs to pay to those consumers by way of redress.

For the seven other collective actions currently awaiting the outcome of Mastercard's appeal, the wait is over and those claims can now progress to be considered for certification by the CAT.

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LOS ANGELES
865 S. Figueroa St.,
10th Floor
Los Angeles, CA 90017
+1 213-443-3000

NEW YORK
51 Madison Ave.,
22nd Floor
New York, NY 10010
+1 212-849-7000

SAN FRANCISCO
50 California St.,
22nd Floor
San Francisco, CA 94111
+1 415-875-6600

SILICON VALLEY
555 Twin Dolphin Dr.,
5th Floor
Redwood Shores, CA 94065
+1 650-801-5000

CHICAGO
191 North Wacker Dr.,
Suite 2700
Chicago, IL 60606
+1 312-705-7400

WASHINGTON, D.C.
1300 I Street NW,
Suite 900
Washington, DC 20005
+1 202-538-8000

HOUSTON
Pennzoil Place
711 Louisiana St.,
Suite 500
Houston, TX 77002
+1 713-221-7000

SEATTLE
600 University St.,
Suite 2800
Seattle, WA 98101
+1 206-905-7000

BOSTON
111 Huntington Ave.,
Suite 520
Boston, MA 02199
+1 617-712-7100

SALT LAKE CITY
60 E. South Temple,
Suite 500
Salt Lake City, UT 84111
+1 801-515-7300

TOKYO
Hibiya U-1 Bldg., 25F
1-1-7, Uchisaiwai-cho,
Chiyoda-ku
Tokyo 100-0011
Japan
+81 3 5510 1711

LONDON
90 High Holborn
London WC1V 6LJ
United Kingdom
+44 20 7653 2000

MANNHEIM
Mollstraße 42
68165 Mannheim
Germany
+49 621 43298 6000

HAMBURG
An der Alster 3
20099 Hamburg
Germany
+49 40 89728 7000

MUNICH
Hermann-Sack-Straße 3
80331 Munich
Germany
+49 89 20608 3000

PARIS
6 rue Lamennais
75008 Paris
France
+33 1 73 44 60 00

HONG KONG
4501-03 Lippo Centre, Tower One
89 Queensway, Admiralty
Hong Kong
+852 3464 5600

SYDNEY
Level 15
111 Elizabeth St.
Sydney, NSW 2000
Australia
+61 2 9146 3500

BRUSSELS
Blue Tower
Avenue Louise 326
5th Floor
1050 Brussels
Belgium
+32 2 416 50 00

ZURICH
Dufourstrasse 29
8008 Zürich
Switzerland
+41 44 253 80 00

SHANGHAI
Unit 502-503, 5th Floor, Nordic House
3 Fenyang Road, Xuhui District
Shanghai 200031
China
+86 21 3401 8600

PERTH
Level 41
108 St Georges Terrace
Perth, WA 6000
Australia
+61 8 6382 3000

STUTTGART
Büchsenstraße 10, 4th Floor
70173 Stuttgart
Germany
+49 711 1856 9000