MasterCard class appeal goes to UK Supreme Court

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Counsel to MasterCard insist that they can win at the UK's Supreme Court against Walter Merricks's opt-out collective action without breaking the country's class action regime.

Last week, the UK's highest court granted the credit card company permission to appeal against a judgment by the Court of Appeal of England and Wales ordering the Competition Appeal Tribunal to re-examine Merricks's bid for class certification.

The case is set have significant ramifications for the UK's class action regime, given that a class action claim is yet to be certified since the mechanism took effect in 2015.

Merricks's proposed class action seeks damages on behalf of an estimated 46.2 million people, who were allegedly overcharged between 1992 and 2008 when MasterCard's illegally inflated interchange fees were passed on to consumers by merchants across the UK.

The Competition Appeal Tribunal initially rejected class certification in 2017 due to a lack of data in the methodology Merricks used to prove the level of overcharge passed on to consumers from retailers that accepted MasterCard. The specialist court also said there was no plausible way of reaching a "rough-and-ready" estimation of the loss each individual claimant suffered.

However, in April the Court of Appeal found that the tribunal applied a test that was too vigorous and premature in deciding to reject the class certification claim. Claimants should not have to specify in detail what data would be available to calculate pass-on, the Court of Appeal held, criticising the tribunal for conducting a kind of mini-trial that was too onerous on the claimants.

The Court of Appeal also said requiring the class representative to establish loss of each individual claimant runs counter to the provisions contained in the UK statute. As a result, the court sent the case back to the tribunal to re-examine.

The upcoming Supreme Court hearing will try to clarify what level of scrutiny the tribunal should apply at the certification stage of proceedings. The Supreme Court will also need to grapple with the potential conflict between aggregate damages provisions in the collective proceedings regime, and the basic tort principle that damages should be compensatory.

A date has yet to be set for the hearing, but MasterCard's appeal is likely to be heard next year. The case has caught the imagination of the public given the huge sums involved. The opt-out nature of the claim means that if certified, the claimant class will cover 70% of the UK population.

MasterCard said it is pleased the Supreme Court has granted the appeal hearing and that Merricks's claim is completely unsuitable to be brought under the collective actions regime.

Freshfields Bruckhaus Deringer partner Mark Sansom, who is counsel to the company, said its position is that the tribunal applied the correct level of scrutiny to the application for class certification, bearing in mind the government's express intention for the tribunal to function as a gate-keeper for class actions.

"The CAT considered that damages should be at least broadly compensatory in collective proceedings seeking an aggregate damages award, and Mastercard agrees, but the Court of Appeal effectively took the opposite view," he said.

Sansom said he is aware of a view that the success and viability of the collective action regime is bound up with whether this particular claim goes forward. But such a view is a "completely false elision" and the Merricks claim remains too broad ever to be feasible, he said.

"That doesn't mean we should throw the baby out with the bathwater by contorting the intended approach to certification and we should not be lurching to knee-jerk conclusions on the viability of the collective proceedings regime as a whole," Sansom said.

The first class certification claim in *Mobility Scooters* was too narrow to work, Sansom said, and the Merricks claim has the opposite problem. "But that doesn't mean the regime as the tribunal interpreted and applied it was in any way broken."

Quinn Emanuel Urquhart & Sullivan partner Boris Bronfentrinker, who is counsel to Walter Merricks, said the Supreme Court's decision to allow the appeal is perhaps not surprising. He noted the novel legal issues involved, the size of the claim and the potential impact – both on Mastercard of a £14 billion loss if the collective action proceeds, and on the collective action regime more generally.

In granting permission, the Supreme Court has made no assessment of the merits of the appeal, Bronfentrinker said.

"The Court of Appeal judgment continues to stand pending the appeal, and we are confident that once the Supreme Court hears argument, it will uphold the judgment of the Court of Appeal," he said. "This will finally bring to an end Mastercard's attempts to delay facing up to the consequences of its long running unlawful anticompetitive conduct."

"Incredibly ambitious claim"

Linklaters counsel Elizabeth Jordan in London said the Supreme Court's ruling will be important in determining the legal test that needs to be satisfied and the nature of the evidence required to obtain permission for a class action.

The Court of Appeal's finding that a distribution methodology does not need to comply with normal compensation principles was "controversial", she said. "It felt like the Court of Appeal was bending over backwards to make the regime work."

Jordan said the Competition Appeal Tribunal's initial approach to the case seemed "sensible" and that it was unfortunate the first two certification cases that tested the UK's class action regime – Mobility Scooters and Merricks – were inappropriate test cases for different reasons.

"The Court of Appeal was evidently mindful that, if Mr Merricks was not granted permission, then there would be no means for consumers to obtain redress," she said.

The Supreme Court will also be mindful that its ruling will have ramifications for the success of the class action regime as a whole, Jordan said. Several class certification cases are waiting in the wings, "and I would expect all of these to be put on hold depending on the Supreme Court's determination."

Both the opt-in and opt-out trucks class action claims are pending at the CAT, with a hearing date set for November.

Hausfeld filed the first stand-alone class actions against three UK train operators for allegedly abusing their dominance in the London passenger rail market. This case is also pending before the tribunal.

Jordan described the Merricks claim as "incredibly ambitious". Despite having rejected class certification, the tribunal's judgment gives an "awful lot of encouragement" to claimants and litigation funders, she said.

The tribunal is keen to make sure this regime works and delivers on the policy objectives, Jordan said. "It is not the end of the regime if the appeal succeeds, and Mr Merricks is ultimately denied permission" to bring the claim against MasterCard as a class action.

White & Case partner Marc Israel said the decision to grant MasterCard's appeal was very important and correct. The outcome of the Supreme Court case will not be the end of the matter, he added, but it will be closely studied.

"The collective redress legislation is designed to help those who have small potential claims to seek redress when they wouldn't themselves bring a case, but still needs to be balanced to ensure any claims properly reflect the compensatory nature of our system," Israel said.

Hausfeld counsel Luke Streatfeild said it is not surprising that the test for certification of collective proceedings has caught the attention of the Supreme Court.

"The collective recovery of losses caused by anti-competitive activity is a matter of great significance to consumers and businesses alike, and we look forward to further judicial guidance on the point before long," he said.

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