Tuesday 16th April 2019.

£14bn Mastercard consumer claim to proceed after unanimous Court of Appeal ruling

In September 2016, Walter Merricks CBE, the former Financial Ombudsman, commenced proceedings against Mastercard seeking £14bn in damages on behalf of 46 million UK consumers for losses suffered as a result of illegal card fees. In a landmark unanimous judgment delivered today, the Court of Appeal has comprehensively set aside an earlier Competition Appeal Tribunal's judgment and has found in favour of Mr Merricks on all grounds of appeal. The Court of Appeal has ruled that the Tribunal's judgment contained errors of law and that the Tribunal mis-directed itself in how it applied the new legislative regime. Not only has the Court of Appeal today conclusively set aside the refusal to permit the collective action, it has made findings of law in favour of Mr Merricks on each of the grounds upon which the CAT had refused to certify the proposed collective action.

This is the first mass consumer claim brought under the new collective action regime introduced by Parliament in the Consumer Rights Act 2015. The illegal card fees had to be paid by businesses that accepted Mastercard payments from consumers, but in large measure the businesses passed on these costs to consumers in higher prices.

Mr Merricks said:

"I am very pleased with today's decision. It is nearly 12 years since Mastercard was clearly told that they had broken the law by imposing excessive card transaction charges, damaging consumers over a prolonged period. As a result we all had to pay higher prices in the shops than we should have done - while Mastercard have pocketed the profits. Since then they have done nothing to apologise, let alone to pay back the money they wrongly caused us to pay out. When challenged, all they have done is to raise technical legal arguments that turn out to have no merit - as the Court of Appeal has shown today. It's now time for Mastercard to admit the damage they did, to apologise to the British public, and to agree to pay the compensation they owe.

I'm particularly pleased that the judges recognised that the CAT's decision would have frustrated the will of Parliament when it passed the Consumer Rights Act – that there should be an effective route for consumers to be compensated when businesses break competition law."

Specifically, the Court of Appeal has ruled that:

1. Although the CAT rejected the idea that they should carry out some form of mini trial, that is, in opinion of the appeal judges, more or less what occurred. The CAT had also required Mr Merricks to establish more than a reasonably arguable case which would have been the test had MasterCard applied to strike the claim out. What this in practice involved was the claimant's experts being cross-examined at a pre-disclosure stage in the proceedings about their ability to prove the claim at trial by reference to sources of evidence which they had identified but had not yet been able fully to analyse or assess. Certifying a collective action does not prevent the CAT from terminating the collective proceedings if it subsequently transpires, for example, that the class representative is unable to access sufficient data to enable the experts' method of calculating the rate of pass-on to be performed. But a decision of that kind is much more appropriate to be taken once the pleadings, disclosure and expert evidence are complete and the Court is dealing with reality rather than conjecture. The approach taken to the expert evidence in this case was based on a mis-direction as to the correct test to be applied in relation to whether Mr Merricks had demonstrated that the claims were suitable for inclusion in

collective proceedings. The Court of Appeal ruled that at the certification stage Mr Merricks should not be required to demonstrate more than that he has a real prospect of success. This is not the test which the CAT applied.

2. There was an error of law in the CAT considering that distribution must be carried out on some kind of compensatory basis however approximate. The distribution of an aggregate award does not need to be distributed according to what each individual claimant has lost, although, where that is readily calculable, it will probably be the most obvious and suitable method of distribution. The Court of Appeal rejected that a loss-based method of distribution is mandated by the statutory provisions. The making of an aggregate award does not require the CAT to calculate individual loss, or importantly to assess the damages included in that award on an individual basis. The Court of Appeal found that distribution is a matter for the trial judge to consider following the making of an aggregate award and therefore it was both premature and wrong for the CAT to have refused certification by reference to the proposed method of distribution: an error compounded by their view that distribution must be capable of being carried out by some means which corresponds to individual loss.

The Court of Appeal also sent a message to the CAT about the legislative intent that brought about the new collective action regime. The Court of Appeal noted that the consequence of not certifying Mr Merrick's collective action is that no follow-on proceedings for infringement based on the European Commission's decision are likely to be taken against Mastercard. The Court of Appeal further noted that the likely scale of loss caused to any individual consumer, coupled with the costs of the proceedings, makes litigation by way of individual claims a practical impossibility. This was recognised by the CAT in its judgment where it says that this is effectively the position in most cases of widespread consumer loss resulting from competition law infringements. However, the Court of Appeal then stated: "*the power to bring collective proceedings introduced into the* [Competition Act] *by the Consumer Rights Act 2015 was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding and had Parliament considered it necessary to limit this new type of procedure by what would be required for the assessment of damages in an individual claim then it would have said so.*"

The Court of Appeal dismissed Mastercard's application for permission to appeal to the Supreme Court. It has also ordered Mastercard to pay Mr Merricks's cost and unwound the costs that were ordered he pay after the initial hearing before the CAT. The case now returns to the CAT to determine any outstanding issues following the judgment of the Court of Appeal. Mr Merricks expects the CAT to now certify the collective action and for the £14bn claim against Mastercard to proceed.

Boris Bronfentrinker, the Quinn Emanuel Urquhart & Sullivan partner representing Mr Merricks, said:

"Today is truly a landmark day for all UK consumers that Mr Merricks seeks to represent in a claim to recover the billions in damages caused to them by Mastercard's unlawful anticompetitive conduct. The Court of Appeal's judgment also marks a significant day for the collective action regime in this country, after a number of false starts before the Competition Appeal Tribunal. The Court of Appeal has recognised and given effect to the legislative intent. Whilst it had been commented that the claim against Mastercard was overblown, the Court of Appeal has today definitively determined the opposite, recognising the need for mass consumer collective actions to be able to be pursued. Mr Merrick's committed legal team has worked very hard to bring about this result, a complete reversal of the findings made by the Tribunal below. This is a satisfying victory, but the focus now shifts to securing compensation for the 46 million UK consumers who lost out as a result of Mastercard's action."

-Ends-

Notes to Editors

Background of the case to date

In July 2017, a specialist court (the Competition Appeal Tribunal (CAT)) ruled that Mr Merricks's claim was not suitable to be brought as collective proceedings and refused to certify the proposed collective action as suitable to proceed.

Whilst Mr Merricks was successful before the CAT on most issues, the CAT ultimately decided not to let the collective action proceed for two main reasons:

First, the CAT considered that, whilst Mr Merricks's experts had identified a methodology that would enable them to calculate how much of the illegal fees were passed on by businesses to UK consumers, the CAT did not accept that it had been established at this very early stage of the proceedings that there was sufficient evidence to show the extent to which all businesses had passed on the illegal fees to consumers in higher prices.

Secondly, the CAT determined that it was not enough for Mr Merricks to establish the loss suffered by the class as a whole on an aggregate basis, he needed to go further and demonstrate how he would establish the loss suffered by each and every individual in the class s that the distribution would be broadly compensatory.

Whilst the Tribunal also refused Mr Merricks permission to appeal on the grounds that there was no right of appeal, in August 2017, lawyers for Mr Merricks applied to the Court of Appeal for permission to appeal the decision to dismiss the proposed £14bn collective action. On 13 November 2018, the Court of Appeal delivered an important judgment ruling that the Tribunal had been wrong and that there was a right of appeal from decisions refusing to permit collective action.

Having secured this significant first victory, with funding from Innsworth Litigation Funding (as funded by funds managed by Elliott Management Corp) who stepped in on short notice, Mr Merricks asked the Court of Appeal to hear arguments as to why the CAT's decision had been wrong. The appeal was heard on 5 and 6 February 2019.

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