

Friday 27th October 2017.

Appeal and Judicial Review applications filed in £14bn Mastercard consumer claim

Lawyers for Walter Merricks CBE have filed applications with both the Court of Appeal and the Administrative Court of the High Court, the latter by way of judicial review, for permission to appeal the Competition Appeal Tribunal's (CAT) decision to refuse to allow the proposed £14bn collective action on behalf of 46 million consumers seeking damages from Mastercard due its illegal card fees to proceed.

Mr Merricks's legal team considers there to be some legal uncertainty as to whether there is a direct right of appeal to the Court of Appeal or whether it needs to go to the High Court for a judicial review, hence filings being made in both courts. However, given that this is the first ever judgment on an application for collective proceedings, and the very significant public policy issues at stake, Mr Merricks is confident that the case will be reviewed by an appellate court and that the appeal or judicial review will succeed.

To address the CAT's reasons for refusing to allow the collective action to proceed, a detailed supplemental expert report has been prepared by leading economists and forensic accountants. This report addresses conclusively the two major issues identified by the CAT: 1) calculating how much of Mastercard's illegal card fees were passed onto consumers in the form of higher prices; and 2) demonstrating that Mr Merricks's proposal for distribution of the damages to be recovered from Mastercard results in a payment that broadly reflects the actual loss suffered by each individual consumer in the class.

Mr Merricks's legal team, comprising lead partner Boris Bronfentrinker from Quinn Emanuel, Monckton Chambers' Paul Harris QC, and Marie Demetriou QC, Victoria Wakefield and Emma Mockford of Brick Court Chambers, have identified manifest errors within the CAT's reasoning.

Mr Merricks said, 'I am determined to pursue this claim for two main reasons. First, Mastercard was found guilty of setting transaction fees at an unlawful and excessive level for 16 years, a practice that inevitably led to consumers paying higher prices than we should have done because retailers would have passed on these costs. Since that time Mastercard has done nothing to make recompense to consumers for its wrong-doing. The total amount of the overcharges fell either on retailers (if they did in fact absorb the costs) or on consumers (which is where at least most of the cost likely fell as retailers looked to recover the fees they were paying through higher retail prices). Yet Mastercard has the hypocrisy both to reject claims brought by retailers, saying that they passed on costs to consumers, and to brush aside the claim of consumers. It can't have it both ways.'

'The second reason I am determined to fight on is because this collective action regime was brought into being by Parliament to help access to redress where proven wrongdoers like

Mastercard have inflicted damage on a wide class of consumers. In our case it would be totally impractical for members in the class to bring claims on an individual basis, and if our case is not allowed to proceed on a class-wide basis a vast number of individuals who suffered loss get no compensation. In response to this point, the CAT simply remarked, “that is effectively the position in most cases of widespread consumer loss resulting from competition law infringements.’

That was precisely the “position” that Parliament was trying to reverse and redress by enacting this regime. The CAT’s view cannot be allowed to stand as the last word on the subject. ‘

Mr Merricks considers that had the CAT properly applied the relevant legal principles, with due regard to the clear policy intent behind the introduction of the new collective action regime, the claim against Mastercard should have been allowed to proceed.

Mr Merricks also believes that once the court has had an opportunity to consider the legal and policy issues, it will set aside the decision of the CAT and allow consumers to pursue Mastercard for the very substantial financial damage it has caused through its proven illegal anti-competitive conduct.

Mr Merricks concludes, ‘If we do not reverse this decision, I very much doubt if we will see a consumer class claim being brought against companies that have colluded to fix prices. The whole purpose of the new class claim regime, which consumer bodies fought to see introduced, will have been defeated.’

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Notes to Editors

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