

**Court of Appeal resets bar for UK collective certification in *Merricks* appeal against MasterCard**

**Cento Veljanovski\***

In a landmark judgment delivered on 16 April 2019 the English Court of Appeal[[1]](#footnote-1) set aside the Competition Appeal Tribunal's (CAT) order refusing certification of the class representative Mr Merricks' £14 billion damages claim against MasterCard for charging excessive interchange fees.*[[2]](#footnote-2)*

Mr Merricks' application for a collective proceeding order (CPO) was remitted to the CAT to be reheard, but given the judgment there is no reason why it will not be granted.  Mastercard was refused leave to appeal but this was granted on applicant to the Supreme Court and will probably be heard in mid-2020.

The Court of Appeal lowered the bar for certification. It has also endorsed the approach and the methodology set out in the expert report of Cento Veljanovski and David Dearman which was central to the certification application.

The Court of Appeal ruled against the CAT’s entire interpretation and application of the CPO rules. It held that:

* 'the function of the Tribunal at the certification stage is to be satisfied that the proposed methodology is capable of or offers a realistic prospect of establishing loss to the class.'
* Pass-on was a common issue.
* A top-down approach is a permissible methodology to calculate aggregate damages and pass-on. To require the calculation of individual losses as a basis for an aggregate award is not required in law (Competition Act 1998 47C(2)) and was not intended by Parliament.  It would defeat the purpose of an opt-out collective action.
* It was 'not appropriate' for the CAT to require the experts to specify in detail the data that would be available or to establish that there would be sufficient data for every retail sector to apply their proposed (and accepted) methodology at trial. This was especially so as certification was prior to full disclosure, and the CAT Rules discourage applications for disclosure.
* The CAT misapplied the Canadian model of certification, on which the UK regime is based, as set out by the Canadian Supreme Court in *Pro-sys v.* *Microsoft,* by cross-examining the experts about their ability to prove the claim at trial. A CPO hearing was not a 'mini trial' but the CAT had made it one.
* The CAT was 'wrong' to refuse certification by reference to the method of distributing the aggregate damages.  There is no legal requirement that the distribution of the aggregate damages must satisfy compensatory principles. The way damages were to be distributed to members of the class was not a matter for the CAT at the CPO stage. This was for the trial judge.

**THE *MERRICKS’* CPO APPLICATION**

*Merricks v. Mastercard* (‘*Merricks*’)is a collective action on behalf of 47 million UK residents for £14 billion overcharge damages including interest. It is a follow-on action based on the European Commission’s MasterCard decision.[[3]](#footnote-3) The Commission found that MasterCard’s default Multilateral Interchange Fees (‘MIFs’) for cross-border credit and debit card transactions infringed Article 101. An interchange fee is a charge made by the card issuer to the card acquirer and passed on in the merchant service charge (‘MSC’) paid by the merchant who accepts a credit or debit card as payment. The MSC is deducted from the payment made to the merchant after each purchase, and the interchange fee is then paid to the issuing bank. The European Commission found that Mastercard’s collective setting of the default cross-border MIFs breached Article 101(1) and were excessive. This led, first, to the European Commission and Mastercard agreeing to lower interchange fees (the Mastercard Undertakings’[[4]](#footnote-4)), and later regulation EU 2015/751 which transposed those capped fees to cover all credit and debit card transactions in the EU.[[5]](#footnote-5)

**THE COLLECTIVE CERTIFICATION REQUIREMENTS**

The Consumer Rights Act 2015 amended section 47 B & C of the UK Competition Act 1998 to create a new collective proceeding for an award of aggregate damages. To proceed to trial the class representative must first apply to the CAT for a CPO to ensure that the members included in the group have sufficient ‘common’ interest to constitute a suitable class of claimants.

The requirements for a CPO are set out in the Competition Appeal Tribunal Rules 2015 and CAT Guide to Proceedings 2015. According to the CAT Guide[[6]](#footnote-6), which has the status of a practice direction, for an action to be certified there must be common issues binding the class. Common issues mean ‘the same, similar or related issues of fact or law’*.*[[7]](#footnote-7)However there is no requirement(as in US class action certification) that the common issues ‘predominate’ over individual issues, only that they must be ‘significant’, and the *‘*the final resolution of the claims may require the assessment of individual issues. The existence of such individual issues is not fatal for a CPO’.

CAT Rule 79(3)(a) requires the Tribunal to assess the ‘strength of claims’ for opt-out actions. It continues that ‘the reference to the “strength of the claims” does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as would be required at a full trial.’ It will form a ‘high-level view’. Further ‘[T]he Tribunal does not encourage requests for disclosure as part of the application for a CPO excepted where specific and limited disclosure ... is necessary to determine’ the suitability of the claim for a collective proceeding.’ [[8]](#footnote-8)

In both *Merricks* and the earlier failed *Gibson*[[9]](#footnote-9) certification applications, the CAT announced that it would follow the ‘Canadian approach’ as set out by the Canadian Supreme Court in *Pro-Sys Consultants Ltd v. Microsoft Corp.[[10]](#footnote-10)* (‘*Pro-Sys’ or ‘Microsoft’* as it is referred to by the Court of Appeal) that: (1) ‘the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement’[[11]](#footnote-11); and (2) that ‘There must be some evidence of the availability of the data to which the methodology is to be applied.’[[12]](#footnote-12)

**THE *MERRICKS’* GROUNDS FOR DISMISSAL**

The CAT refused Mr Merricks’ application on two grounds a) the failure to satisfy the Tribunal that there was sufficient data to establish pass-on; and b) the proposed method of distributing aggregate damages to members of the class was not compensatory. Its approach on both matters was a surprise to the Applicant’s legal and economics team given the Canadian ‘lite’ certification process endorsed by the CAT.

**Data on Pass-on**

Central to the Applicant’s claim was that the excessive interchange fees had been passed on by merchants to their customers (the class) in higher prices. The Tribunal accepted that pass-on was a ‘common issue’ (at least implicitly) and the experts’ ‘top down’ methodology, but ‘were unpersuaded on the material before us that there is sufficient data available for this methodology to be applied on a sufficiently sound basis’.[[13]](#footnote-13) Specifically:

We accept that in theory calculation of global loss through a weighted average pass-through, as explained in the evidence and as summarised above, is methodologically sound. But making every allowance for the need to estimate, extrapolate and adopt reasonable assumptions, to apply that method across virtually the entire UK retail sector over a period of 16 years is a hugely complex exercise requiring access to a wide range of data. We certainly would not expect that analysis to be carried out for the purpose of a CPO application, but a proper effort would have had to be made to determine whether it is practicable by ascertaining what data is reasonably available.[[14]](#footnote-14)

The Court of Appeal rejected this ground in its entirety. The Applicant’s experts were not required to establish that data existed for all sectors and it was wrong to turn the CPO hearing into a ‘mini trial’[[15]](#footnote-15) as the CAT had:

Although the CAT was entitled to satisfy itself that the experts’ proposed methodology was credible, it was not appropriate at the certification stage to require the proposed representative and his experts to specify in detail what data would be available for each of the relevant retail sectors in respect of the infringement period. …. At the certification stage the question for the CAT was not what they were capable of proving had this been the trial of the action.[[16]](#footnote-16)

The Court of Appeal effectively reiterated the *Pro-Sys* test:

The certification stage is not meant to be a test of the merits of the action, rather, this stage is concerned with form and with whether the action can properly proceed as a class action. … [It] does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action, rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements not having been met. [[17]](#footnote-17)

The ’some basis in fact’ test set out in *Pro Sys* ‘does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial.’[[18]](#footnote-18)

The Court of Appeal set the test at no more than the action had ‘a real prospect of success’ equivalent to that for a strike out application.[[19]](#footnote-19)

**Compensation and Distribution**

The principle ground for the CAT’s rejection of Mr Merricks’ application was that the proposed method of distributing damages was not compensatory. It said the method of disbursement ‘must approximate the loss suffered by each individual claimant from the aggregate loss calculated according to the applicant’s proposed method’. [[20]](#footnote-20) Mr Merricks proposed a *per capita* award to each member of the class.

The Court of Appeal again comprehensively rejected the CAT’s position. Firstly, the Competition Act section 47C(2) states that the award of aggregate damages does not need to be based on an assessment of the amount of damages recoverable by each represented individual. Secondly, the CAT exceeded the certification requirements by taking into account, let alone making it a determining factor, how the award of aggregate damages was to be disbursed to members of the class. This was a matter for the trial judge.

The CAT’s requirement that the individual disbursement of damages be compensatory raises huge evidential problems in a mass consumer action like *Merricks.* If, as the CAT concluded, detailed data is required on each individual consumer’s transactions/purchases, then this would impose on the representative a huge and prohibitively expensive data collection exercise gathering of detailed data on cardholder and cash customers’ purchases by product, sector, merchant and time period. It also contradicted the CAT’s acceptance of the applicant’s ‘top down’ method of estimating pass-on. As the Court of Appeal observed: ‘once it had been accepted that aggregate damages can be awarded … it becomes difficult to justify a reversion to an individual loss calculation for the purposes of distribution’.[[21]](#footnote-21)

**Postscript**

On 25 July 2019, the Supreme Court ordered that Mastercard be given permission to appeal the Court of Appeal’s Judgment. This is likely to be heard in mid-2020 with judgment not expected until 2021. In the meantime, this places the present CPO application process in limbo as it is unclear how those applying for a CPO are required to establish. Mastercard will no doubt to arguing that the bar set by the Court of Appeal is much too low amounting to no more, to use the words from Pro Sys, than symbolic. But there should be misconception that the stakes are considerable as success at the certification stage is paramount for class actions as it significantly alters the bargaining chips in favour of the class.

**CASE ASSOCIATES**

provide economic and empirical assistance in competition and regulatory proceedings, and litigation and arbitration.
A description of Case’s services together with earlier publications can be found at **www.casecon.com**.
For further information or to discuss a specific assignment contact:

**Dr Cento Veljanovski +44 (0) 20 7376 4418 or** **cento@casecon.com**

1. \* Managing Partner, Case Associates. Contact: cento@casecon.com. This is an updated version of the article with the same title published in *Competition Law Insights,* 26 June 2019. The author was the expert economist for the Applicant in *Merricks v. MasterCard*. For a fuller discussion of the CAT’s judgment see Cento Veljanovski, ‘Collective Certification in UK Competition Law - Commonality, costs and funding’, *World Competition*, Vol. 42, 2019, pp. 121-138.

 Walter Merricks v. Mastercard **[2019] EWCA Civ 674.** [↑](#footnote-ref-1)
2. *Walter Merricks v. MasterCard International* [2018] CAT 16. [↑](#footnote-ref-2)
3. COMP/34.579 *MasterCard*, COMP/36.518 *Euro Commerce* and COMP/38.580 *Commercial Cards*. [↑](#footnote-ref-3)
4. *Antitrust: Commissioner Kroes notes MasterCard's decision to cut cross-border Multilateral Interchange Fees (MIFs) and to repeal recent scheme fee increases – frequently asked questions*, MEMO/09/143, Brussels, 1st April 2009. <http://europa.eu/rapid/press-release_MEMO-09-143_en.htm> [↑](#footnote-ref-4)
5. Interchange Fees for Card-Based Payment Transactions Regulation (EU) 2015/751. [↑](#footnote-ref-5)
6. CAT Guide, para 6.37. [↑](#footnote-ref-6)
7. Reiterating CAT Rule 73(2). [↑](#footnote-ref-7)
8. CAT Guide, para 6.28. [↑](#footnote-ref-8)
9. *Dorothy Gibson v. Pride Mobility Products Limited* ([2017] CAT 9 (‘*Gibson*’). [↑](#footnote-ref-9)
10. *Pro-Sys Consultants Ltd v. Microsoft Corp.* [2013] SCC 57. [↑](#footnote-ref-10)
11. *Pro-Sys,* para 118. [↑](#footnote-ref-11)
12. *Pro-Sys,* para 118. [↑](#footnote-ref-12)
13. *Merricks,* para 78. [↑](#footnote-ref-13)
14. *Merricks,* para 77. [↑](#footnote-ref-14)
15. Walter Merricks v. Mastercard **[2019] EWCA Civ 674, *p***ara 52. [↑](#footnote-ref-15)
16. *Ibid*, para 51. [↑](#footnote-ref-16)
17. *Pro-Sys,* para. 481. [↑](#footnote-ref-17)
18. *Pro-Sys*, para 105. [↑](#footnote-ref-18)
19. Walter Merricks v. Mastercard **[2019] EWCA Civ 674**, para 54. [↑](#footnote-ref-19)
20. *Merricks,* para 84*.* [↑](#footnote-ref-20)
21. Walter Merricks v. Mastercard **[2019] EWCA Civ 674**, para 61. [↑](#footnote-ref-21)