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Update: CAT declines the grant of a collective proceedings order in Walter High Merricks CBE v MasterCard Incorporated and others [2017] CAT 16

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Background

As mentioned in our blog posted on 20 September 2016, MasterCard was facing one of the UK's first class-action lawsuits, following the introduction of collective proceedings under the Consumer Rights Act 2015. This allows for collective proceedings to be brought in the Competition Appeal Tribunal ("**CAT**") on an opt-out basis, by representatives of consumers or businesses.

The action facing MasterCard was in respect to a previous finding by the EU Commission that MasterCard's Multilateral Interchange Fees ("**MIF**") were kept unfairly high. In September 2014, the European Court of Justice confirmed that MasterCard's MIF restricted competition under the Treaty on the Functioning of the European Union ("**TFEU**"). The collective proceedings were being led by Walter Merricks CBE, on behalf of a proposed class of 46 million consumers and in respect of MIF to 2008.

Update

The CAT was asked to consider whether to grant a "collective proceedings order", allowing the class action to go ahead. The CAT declined to grant such an order – however, it is important to note that the CAT's decision was due to the damages model sought by the class of consumers and was not based upon an adversity to allow collective proceedings.

MasterCard had objected to the collective proceedings on the following grounds: (a) there were not sufficient common issues between the claims (that is, the claims advanced on behalf of each member of the class of consumers) and (b) the proposals for the calculation of damages was contrary to the usual approach taken to losses by the UK Courts.

The CAT did not agree that the claims were "largely identical" – an argument advanced on behalf of the class of consumers. This was based upon the fact that each of the below factors would need to be established by individual members of the class and would differ from member to member:

- That the level of the EEA MIF had an effect on the level of the UK MIF;
- The inflated prices charged by merchants (because of the high level of the MIF) would differ between merchants (i.e. the "pass on" to consumers differed from merchant to merchant);
- The class members would all have spent different amounts with different merchants during the relevant period; and
- MasterCard users would have been subject to varying interest payments and benefits on their purchases, depending on the terms of their credit card agreements.

However, the CAT made it clear that the relevant test to apply was whether the class of claims were "*suitable to be brought in collective proceedings*". This is where the class of consumers came into difficulty, in respect of ground (b) above – the damages model they proposed made it unsuitable for the claims to be heard as collective proceedings.

The difficulty with the damages model was that it was not compensatory in nature – the proceedings were to include those who purchased goods/services from a business in the UK which accepted MasterCard as a method of payment over a sixteen year period ending in 2008. Therefore, some of the consumers involved in the collective proceedings did not actually use a MasterCard as a method of payment themselves and the argument advanced on behalf of the consumers was that the MIF was passed onto both MasterCard paying customers and those paying by other means. The damages distributed to each member of the class would therefore not relate to the actual losses suffered by each member, instead being based upon an aggregate approach and with each member receiving a set proportion of the damages for each year that they were a member of the class of consumers (i.e. each year that they spent money on goods/services from a UK business which accepted payment by MasterCard), regardless of the sum of money they actually spent.

The CAT was not satisfied with the proposed approach to damages and stated that to be acceptable, the way in which damages would need to be distributed would take into account the matters set out in the bullet point list above. In addition, paragraphs 58 and 59 of the CAT judgment (here –http://www.catribunal.org.uk/files/2.1266_Walter_Hugh_Judgment_CAT_16_210717.pdf) refer to the prescribed test which should be applied is the test set down by the Supreme Court of Canada in Pro-Sys Consultants Ltd v Microsoft Corp [2013] SSC 57 ("**Microsoft**"). That is, the approach to damages should be supported by "*expertmethodology"* which must "*offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to establish that it is common to the class (i.e. that passing on has occurred)".* The Microsoft decision was considered by the CAT as the Canadian Courts have considerable experience with class actions and Canadian proceedings are closer to the new UK regime than proceedings in the United States would be.

The Future

This decision should not deter future collective actions, because as mentioned above, the CAT's resistance was to the damages methodology adopted by the class of consumers. However, it does highlight the need for any future representative of a class of consumers to ensure that the "commonality" element of damages is well thought through and can be established before the CAT, if there is any prospect of a collective proceedings order being granted.

An eye should also be kept upon whether Mr Merricks decides to appeal the CAT's decision.