

Dismissal of Landmark UK Class Action Against MasterCard Appealed; MasterCard Awarded £289,280 in Interim Costs

Friday, December 15, 2017

Two major developments in *Walter Hugh Merricks CBE v. MasterCard Inc.* – one of the UK’s first-ever opt-out class actions – have occurred in the past several weeks. First, the proposed class representative Merricks appealed the dismissal of his application for a collective proceedings order (“CPO”) to both the Court of Appeal and the Administrative Court of the High Court. Second, the Competition Appeal Tribunal (the “CAT”) – the body that dismissed Merricks’s CPO application – awarded interim costs to MasterCard in the amount of £289,280.

We and our colleagues at the UK Finance Disputes and Regulatory Investigations Blog have been following this case for some time. To [recap](#):

The action relates to a previous finding by the EU Commission that MasterCard’s [Multilateral Interchange Fees “MIFs”] were kept unfairly high. Interchange fees are paid by a retailer’s card acceptance provider to a consumer’s card issuer (such as MasterCard) every time a card transaction takes place. The retailer’s bank pays the retailer the cost of the goods/services, less a service charge that is largely determined by the level of MIF. Retailers then pass on the cost of accepting card payments to their customers, by way of increased retail prices.

In 2007, the [EU] Commission issued a decision against MasterCard . . . [finding] that MasterCard’s MIF breached Article 101 of the Treaty on the Functioning of the European Union [], because they restricted competition between retailers’ banks and inflated the cost of card acceptance by retailers.

On September 8, 2016, Merricks filed a CPO application under the Consumer Rights Act 2015, seeking to certify a class of an estimated 46 million consumers who purchased goods or services from businesses that accepted MasterCard as payment between 1992 and 2008.

On July 21, 2017, the CAT issued its judgment dismissing Merricks’s CPO application. In [short](#):

[T]he damages model [Merricks] 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.



Article By [Squire Patton Boggs \(US\) LLP](#)
[Elliott J. JohWorld Class Defense](#)

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Merricks sought permission from the CAT to appeal the decision, but the CAT ruled that there was no appellate jurisdiction with respect to a judgment dismissing a CPO application. The CAT explained:

Experience from other jurisdictions with a regime of certification of class actions, in particular the United States and Canada, shows that decisions refusing or allowing such actions to proceed typically generate appeals. In the attempt to craft an effective system of collective redress for the UK, the legislature . . . has sought to confine the right of appeal in collective proceedings to decisions on the substantive claims and preclude prolonged litigation in the process of approving the use of the collective procedure for the pursuit of those claims.

Nevertheless, on October 27, 2017, Merricks filed two applications: one before the Court of Appeal seeking appeal, and the other in the Administrative Court of the High Court seeking judicial review.

Meanwhile, MasterCard applied to the CAT for an order of costs corresponding to its expenditure on counsel fees in opposing Merricks's CPO application. On November 23, 2017, the CAT ordered Merricks to make an interim payment to MasterCard in the amount of £289,280. The CAT found that it had jurisdiction to make such an order under its own rules, and noted that its order accorded with the Government's conscious policy decision that "there is no immunity for the class representative from the loser-pays principle." We note that *Dorothy Gibson v. Pride Mobility Products Ltd.* – the previous CPO application considered by the CAT– also resulted in an approximately £300,000 cost award to the defendant.

Clearly, the saga of *Merricks* did not conclude with the CAT's dismissal of the CPO application, and we will therefore continue to monitor the case for any developments relating to Merricks's applications for appeal and/or judicial review.

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