UK Supreme Court: Recent Landmark Collective Actions Hearing

On 13 and 14 May 2020 there was a landmark hearing in the UK Supreme Court relating to the legal tests to be applied to proposed collective actions in the UK. The hearing was an appeal by Mastercard in relation to an application brought by Walter Merricks CBE to act as class representative on behalf of UK consumers who allegedly suffered loss as a result of interchange fees on Mastercard's debit and credit cards. The outcome of this appeal will provide the Supreme Court's first guidance on how the test for 'certification' of proposed collective actions should be applied, i.e. whether the proposed group action is suitable to continue. The judgment is expected to have wider implications for future collective actions, including the proposed collective action brought by Mark McLaren.

Background

- On 6 September 2016, Mr Merricks filed an application for a collective proceedings order (CPO) alleging that UK consumers paid, between 22 May 1992 and 21 June 2008, higher prices as a result of Mastercard's imposition of unlawful 'interchange fees'. Retailers pay interchange fees whenever they accept a credit or debit card transaction, and Mr Merricks argues that retailers passed these fees onto all consumers (whether they paid by card or not) in the form of higher prices. The claim was brought by Mr Merricks before the UK Competition Appeal Tribunal (the Tribunal) under legislation introduced by the UK's Consumer Right Act in 2015.
- For a proposed collective action to proceed, the Tribunal must make a CPO which authorises the class representative as suitable to represent the class and which certifies the claims (of the proposed class members – in this case, UK consumers) as eligible to be included in collective proceedings. If the CPO application is successful, the claim then progresses to a trial of the common issues amongst the class members, and determination of any individual issues. After success at trial or settlement, the damages are distributed amongst the class members using a distribution method which must be approved by the Tribunal.
- In July 2017 Mr Merricks' application for a CPO failed at the first hurdle when it was dismissed by the Tribunal. However, this was subsequently appealed to the Court of Appeal, which in April 2019 found in favour of Mr Merricks. Mastercard then appealed that decision to the UK Supreme Court – which is the highest level court in the UK – and the hearing in the appeal was held on 13 and 14 May 2020 via video-conference.

The Supreme Court Hearing

At the hearing the Supreme Court heard from representatives for Mastercard and for Mr Merricks on two key questions:

1. *What is the legal test for certification of claims as eligible for inclusion in collective proceedings – the '**eligibility question'**?*

2. *What is the correct approach to questions regarding the distribution of an aggregate award at the stage at which a party is applying for a CPO – the **'distribution question'**?*

The 'eligibility question'

The dispute on the eligibility question focused on level of evidence required to be granted a CPO. Mastercard's counsel argued that, while the applicant does not need to have a fully-formed data set at the time of the application, it must have "some evidence" of the availability of data to support the expert methodology it proposed to use to calculate damages. Mastercard's counsel argued that this standard had not been met by Mr Merricks who, by way of example, Mastercard claimed only had evidence to support its arguments for two out of 11 retail sectors in the UK.

Mr Merricks' lawyer disagreed and argued that, if the experts for the applicant have identified data, and the experts' report states that the data will be adequate for them to apply their proposed damages methodology, the probative value of the data should be a matter for consideration at trial rather than at certification stage. Mr Merricks' lawyer also focused on how collective actions are a form of grouping potential individual claims. Since the quality of data is not challenged at the outset of an individual claim but only after disclosure or at trial, Mr Merricks' lawyer argued that it would be premature for it to be challenged at the certification stage of a collective action. Further, Mr Merricks' lawyer argued that at the time of filing there had been nothing to suggest that more detailed information on data was required but, if there had been, Mr Merricks would have provided it.

The 'distribution question'

As noted above, should damages ever be awarded in a collective action, e.g. after trial or in a settlement, they will be on an aggregate basis. This means that the damages will cover the entire class. The damages will then have to be distributed amongst class members using a method or formula approved by the Tribunal. In the Supreme Court the parties debated the correct approach to assessing the proposal for distribution of an aggregate award at the stage at which a party is applying for a CPO.

Mastercard's lawyer argued that, even though damages can be calculated on an aggregate basis, the distribution method cannot be on a basis which contains no link between the sums received by a class member and the loss that class member suffered. He argued that Mr Merricks' distribution proposal bore no relation to compensation and therefore did not pass the test.

Mr Merricks' lawyer disagreed and stated that the very purpose of aggregate damages means that an applicant does not have to consider damages at the individual level until the distribution stage: allowing aggregate damages would be pointless if it was then necessary to calculate losses on an individual basis for distribution.

Relevance of outcome to other CPO applications

It is likely to be some months before the Supreme Court's judgment is published.

The outcome of this hearing will be relevant to all applicants for CPOs, including the Car Delivery Charges claim, as it will set the standard for certification which has to be met by applicants in future. This was acknowledged by the Supreme Court justices themselves who at several points referred to the backlog of CPO applications awaiting the Court's judgment – as the Tribunal has refused to hear other applications for CPOs while awaiting guidance on the correct certification test from the Supreme Court.

We await the Supreme Court's judgment with great interest and will closely review it to determine its impact on the Car Delivery Charges claim and, by consequence, on the proposed class members.

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If you would like to receive updates on the Car Delivery Charges claim you can register ***here*** and join the ***LinkedIn Group here***.