Mastercard persuades Tribunal not to certify £14 billion collective action

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On Friday 21 July, the Competition Appeal Tribunal (CAT) handed down judgment in *Walter Merricks CBE v Mastercard Inc and others*, dismissing an application under section 47B of the Competition Act 1998 to bring a collective action against Mastercard for breach of Article 101(1) TFEU on behalf of around 46 million consumers in the UK. The value of the claim was said to be £14 billion and therefore if the collective action had proceeded it would have been the largest damages claim in English legal history.

The application for a collective proceedings order (CPO) arose out of a decision of the European Commission of 19 December 2007 in which the Commission found that, from 22 May 1992 to 19 December 2007, Mastercard had infringed what is now Article 101(1) TFEU by in effect setting a minimum price which merchants had to pay to their acquiring bank for accepting payment cards in the EEA, by means of the intra-EEA fallback multilateral interchange fee (the EEA MIF) for Mastercard-branded payment cards.

In the present case, Mr Merricks sought to claim damages on behalf of all UK consumers on the alleged basis that Mastercard's setting of the EEA MIF directly affected the multilateral interchange fee which applied as a fallback between banks in the UK (the UK MIF) and as a result consumers in the UK paid higher prices to businesses that accepted Mastercard-branded cards than they would have done if Mastercard had not committed the infringement of Article 101(1) TFEU as found in the Commission Decision.

The CAT dismissed the application for a CPO, accepting Mastercard's argument that the claims were not suitable to be brought in collective proceedings. Having held that in theory it might be permissible to calculate an aggregate award of damages by reference to the loss suffered by the class as a whole, and that Mr Merricks' suggested approach to calculating pass-on was methodologically sound, the CAT held that it was not satisfied that there was sufficient data available to which that methodology could be applied. It further held that, in respect of distribution of that aggregate amount, there was "*no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated according to the Applicant's proposed method*" and, as a result, the award of aggregate damages which Mr Merricks was seeking to recover and then proposing to distribute would not result in damages being paid to individual consumers in accordance with the compensatory principle.

The CAT also heard argument about the nature of the third party funding agreement which Mr Merricks had entered into for the purpose of bringing the collective action. Mastercard argued that due to the terms of the funding agreement Mr Merricks should not be authorised as the class representative, relying on three different arguments in support. These were all rejected by the CAT (with, in respect of one sub-point, Mr Merricks having proposed an amendment to the terms of the funding agreement during the course of the hearing). The CAT ultimately concluded that, if the claims had been eligible for inclusion in collective proceedings, then it would have authorised Mr Merricks to act as the class representative on the condition that the funding agreement was amended as proposed.

The judgment is here.

Mark Hoskins QC, Tony Singla and Hugo Leith acted for Mastercard, instructed by Freshfields Bruckhaus Deringer.

Marie Demetriou QC and Victoria Wakefield acted for Walter Merricks, instructed by Quinn Emanuel Urquhart and Sullivan.

RELATED BARRISTERS

- Mark Hoskins QC
- Marie Demetriou QC
- Victoria Wakefield
- Tony Singla
- Hugo Leith