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Litigation & Arbitration Group

Merricks v Mastercard: Competition Appeal Tribunal Approves Settlement, but Issues of Distribution Reserved for Future Judgment

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On February 21, 2025, following a three-day hearing, the Competition Appeal Tribunal ("**CAT**") approved the £200m settlement of the claim brought by Mr. Merricks on behalf of over 44 million UK consumers against Mastercard in relation to interchange fees charged on certain payment card transactions in the period 1992-2008.[1] In contrast to the previous three hearings in which the CAT has considered a settlement of an "opt-out" claim,[2] the settlement was challenged by the funder of Mr. Merricks' claim – and as such raised a number of novel issues in relation to the negotiation and distribution of the settlement sum, as well as the return that the funder is entitled to receive.[3]

In this article we discuss (i) the background to Mr. Merricks' claim; (ii) the test for the approval of settlements in opt-out collective proceedings; and (iii) the CAT's decision to approve the settlement as well as the issues raised in relation to distribution. We also offer some preliminary thoughts on the implications of the CAT's settlement decision, in circumstances where the CAT's detailed reasons for approving the settlement and its decision in relation to how the settlement sum should be distributed have been reserved for a written judgment, which the CAT anticipates handing down in the next three weeks.

1 The Tribunal was chaired by Mr Justice Roth (the acting President of the CAT), who was joined by Hodge Malek KC and Professor Rachael Mulheron KC.

2 In "opt-out" class actions, all members of the class are automatically included in the proceedings without needing to take any positive steps, unless they choose to opt out. Opt-out class actions cannot be settled without approval of the CAT, which will assess whether they are "*just and reasonable*" – see the discussion below of the test for approval.

3 The CAT has previously authorised settlements in *Mark McLaren v MOL & Ors.* (by judgments made on 6 December 2023 ([2023] CAT 75) and on 15 January 2025 ([2025] CAT 4)) and *Justin Gutmann v First MTR South Western Trains Limited & Ors.* [2024] CAT 32. Each of those settlements was heard before a Tribunal chaired by Hodge Malek KC.

Background

In September 2016, Mr. Merricks, a former financial ombudsman, brought an "opt-out" class action against Mastercard Inc. in the CAT on behalf of all UK consumers during the period May 1992 to June 2008 (originally, an estimated 46.2 million people). At the heart of the claim were Mastercard's default multilateral interchange fees ("**MIFs**"), which are fees charged by a cardholder's bank to a merchant's bank when goods and services are paid for by a consumer. Certain of those MIFs (cross-border MIFs within the European Economic Area, "**EEA MIFs**") were found by the European Commission in 2007 to restrict competition in breach of European competition law, a decision that was upheld by the European Court of Justice ("**CJEU**") in 2014. Mr. Merricks alleged that (i) EEA MIFs inflated the level of MIFs for UK domestic transactions ("**UK MIFs**") (which comprised c. 95% of the claim value), and (ii) all or a substantial part of the unlawful MIF that was paid by merchants (i.e., the overcharge) was passed on to consumers, resulting in consumers paying higher prices on purchases from businesses that accepted Mastercard credit and debit cards. The claim sought an aggregate award of damages and interest totaling approximately £14.1 billion. The CAT originally refused to certify the claim, however, Mr. Merricks successfully appealed to the Court of Appeal and Supreme Court, and the claim was certified by the CAT on 18 May 2022.[4]

Since certification of the claim, the CAT has ruled on a number of preliminary issues, including causation, limitation, and exemption. Those judgments (among other things) held that (i) Mr Merricks' English claims before 20 June 1997 were time barred (there being no deliberate concealment of relevant facts and no reason not to apply the ordinary limitation rules[5]), (ii) the EEA MIFs that were the subject of the CJEU decision against Mastercard[6] did not, as a matter of fact, have any significant causative influence on the level of Mastercard's UK MIFs (the "**Causation Decision**"),[7] and (iii) Mastercard could not argue, in the context of these follow-on proceedings, that its EEA MIFs were exempt at a lower level.[8] Mr Merricks also withdrew his claims in relation to Mastercard debit and solo cards.

As a result of these developments, which predominantly went against Mr. Merricks, the likely quantum of the claim was significantly reduced, and the number of class members was reduced by c. 2 million to approximately 44 million. Importantly, the Causation Decision affected 95% of Mr. Merricks' claim value – meaning that the majority of his claim could only succeed *if* he could show that the UK MIFs would have been lower in a *counterfactual* (i.e., hypothetical) world where EEA MIFs were zero (even though it had already been found that the level of the EEA MIFs did not influence the level of the UK MIFs in the real world).

Against this backdrop, on 3 December 2024, Mr. Merricks and Mastercard concluded a proposed settlement under which Mastercard agreed (without any admission of liability) to pay £200 million in exchange for Mr. Merricks discontinuing the collective proceedings against Mastercard (the "**Proposed Settlement**"). Mastercard and Mr. Merricks filed a joint application for a collective settlement approval order ("**CSAO**") on 17 January 2025 (the "**CSAO Application**").[9]

The CSAO Application proposed the following in relation to distribution:

- £100 million would be distributed on an equal per head basis to all represented persons who submit a claim, subject to a cap (of £45 as proposed by Mastercard and £70 as proposed by Mr. Merricks). Mr. Merricks proposed that any unclaimed sums in this pot would be applied to its litigation funder, Innsworth Capital Limited (the "**Funder**").
- £45.57 million would be paid to the Funder, representing the total amount made available by the Funder towards the costs of bringing the proceedings, plus estimated distribution costs.

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4 Please refer to our Client Alert of 10 November 2021 for discussion of the background and case history of Mr Merricks' claim, including the Supreme Court's consideration of the approach to certification of the claim.

5 Either because of the EU law principle of effectiveness or because of the amendments to the CAT Rules (the "**CAT Rules**") introduced in 2015. See [2024] CAT 41, paras. 43 – 73 and 112 – 113; [2024] EWCA Civ 759, paras. 153 – 158.

6 *MasterCard Inc. and Others v European Commission* EU:C:2014:2201.

7 See [2024] CAT 14, para. 171.

8 See [2024] EWCA Civ 759, paras. 162 – 165.

9 The CSAO Application and related documents are available on the class representative's website (here).

- £54.53 million would either be applied to: (i) provide an additional return to the Funder, and/or (ii) increase the amount to be received by represented persons.
- Mastercard would also waive its net entitlement to recover the outstanding adverse costs liability owed by Mr. Merricks to Mastercard (of between £1.3 million and £6.8 million).

Shortly after the settlement was announced, the Funder publicly opposed the Proposed Settlement and served a request for arbitration on Mr. Merricks on 29 November 2024 for alleged breach of the relevant litigation funding agreement. Mastercard has made available £10 million to Mr. Merricks for his legal costs of defending the arbitration claim. The Funder also applied for permission to intervene in the settlement approval hearing, which was granted by the CAT on 23 January 2025.[10]

The test for approval of the settlement

Under Rule 94 of the CAT Rules, settlements in opt-out collective proceedings require the CAT's approval by way of a CSAO. The CAT will only approve a proposed settlement if it is satisfied that its terms are "*just and reasonable*" taking into account all relevant circumstances, including:

(a) the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements;
(b) the number or estimated number of persons likely to be entitled to a share of the settlement;
(c) the likelihood of judgment being obtained for an amount significantly in excess of the amount of the settlement;
(d) the likely duration and cost of proceeding to trial;
(e) any opinion by an independent expert and any legal representative of the applicants;
(f) the views of represented persons; and
(g) the provisions regarding the disposition of any unclaimed balance of the settlement.[11]

A peculiar feature of CSAO applications is that they are joint applications between the class representative and the settling defendants in which they seek to convince the CAT that the settlement is just and reasonable. To do so will often involve each party explaining to the CAT the weaknesses in its own case (by reference to privileged and/or confidential material) and, as a result, some aspects of settlement hearings, with permission from the CAT, are likely to be heard in private (as was the case in this application).

To date the CAT has made settlement decisions on three other occasions. In the two judgments in *McLaren v MOL*[12] the CAT approved each settlement – finding that the settlement amounts were just and reasonable having considered the relevant factors under Rule 94 of the CAT Rules. However, in circumstances where the settlements were only with some of the defendants, the proceedings remained ongoing and there was no detailed distribution plan, the CAT did not address the issues of distribution or the return to the funder.[13] In *Gutmann v South West Trains*[14] the CAT was similarly presented with a settlement with only one of the original defendant groups, however, in circumstances where the liability of the defendants related to different periods of time (when each had operated the relevant rail franchise) there was no overlap in potential liability and the CAT was able to consider distribution. The CAT, therefore, approved the settlement and also a distribution plan in which an amount for legal fees was ringfenced. Different pots of money were then made available to class members depending on the evidential threshold they were able to meet in relation to their purchase of affected train tickets.[15] The funder was permitted to recover from undistributed damages, but only up to the "*difference between the amount of the actual claims and £10.2 million*".[16]

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[10] See [2025] CAT 7.
[11] CAT Rules 94(8) and 94(9).
[12] See footnote 3 above.
[13] See [2023] CAT 75, paras. 27-32; and [2025] CAT 4, paras. 85-86, 100.
[14] See footnote 3 above.
[15] [2024] CAT 32, para. 14.
[16] Ibid., para. 117.

The CAT's decision and the issues in relation to distribution

The CAT first considered whether the settlement was just and reasonable, and then how the sum should be distributed. The Funder vigorously submitted that the settlement was not just and reasonable, and that the proposed distribution was inappropriate, which was the subject of detailed argument over three days (approximately a day of which was heard in private).

The CAT approved the settlement sum of £200 million as just and reasonable, but reserved its detailed reasons for its written judgment.[17] In doing so, it noted that the settlement was "*clearly a very disappointing outcome*" for a claim once valued at c. £14 billion, although much had happened since proceedings were first issued. It also recognised that it was important to decide now whether to approve the settlement in circumstances where certain aspects of Mr. Merricks' claim would otherwise be considered shortly in another trial (i.e., the trial of acquirer pass-on in the Merchant Interchange Fee Umbrella Proceedings, in which Mr. Merricks was participating, and which is due to start in approximately four weeks).[18]

The CAT did not make a ruling on the distribution of the settlement sum to the class and the Funder's return, instead reserving these issues for its written judgment. The CAT noted that these issues are not straightforward and the discussion of them at the hearing raised a number of novel points, which the CAT will need to consider, including:

- Whether the amount to be distributed should be calculated by dividing the settlement sum by the number of represented persons (44 million), resulting in a payment to each person of c. £4.50 (as proposed by the Funder) or, alternatively, whether (as proposed by Mr. Merricks) a defined pot of money should be divided by the number of represented persons who submit claims – potentially leading to much higher payments if take-up is low?
- Whether the Funder should recover its outlay and return out of undistributed damages (as would generally be the case following a final judgment after a trial)[19] or the CAT should ringfence a defined pot of money to provide the Funder with what it considers to be a reasonable rate of return?
- Whether the CAT should exercise some sort of oversight of the legal fees incurred by Mr. Merricks' solicitors and paid by the Funder since the claim was filed in 2016? The CAT appeared concerned by the level of legal fees incurred and the amount of the settlement sum being apportioned to the Funder, and raised the possibility of having the fees independently assessed,[20] as had happened in certain Australian class action cases. All parties appeared concerned about this possibility – noting that fees had been incurred and paid over many years, in accordance with the budget for the claim.

Possible implications for future settlements

The hearing of the CSAO Application in *Merricks* is the first contested hearing of a settlement of UK opt-out collective proceedings. It involved a detailed examination (some of it in private) of why the settlement was agreed, including considering extensive privileged and confidential material. The CAT also expressed some concern in relation to the indemnity made available to Mr. Merricks to defend the arbitration brought against him by the Funder and ordered Mastercard's solicitors to disclose attendance notes of 'without prejudice' discussions between Mastercard and Mr. Merricks to the CAT. The hearing also raised the novel issues discussed above in relation to the distribution of the settlement sum, in circumstances where there has been some (albeit relatively low) recovery for the class.

These issues, and others, will be considered in detail in the CAT's written judgment, however, we think it is already clear that parties wishing to have their settlements approved by the CAT will need to pay very close

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[17] Subject to the settlement agreement being amended to clarify that the settlement would not bind any represented class member that opts out in a time period to be fixed by the CAT in its final judgment.

[18] Mr Merricks' claim was added to the Merchant Interchange Fee Umbrella Proceedings in relation to the issues of acquirer and merchant pass-on pursuant to a reasoned order of Sir Marcus Smith made and drawn on 1 July 2024; see [2024] CAT 44. At the hearing, the CAT confirmed that Mr Merricks no longer needs to participate in the Umbrella Proceedings.

[19] CAT Rule 93(4).

[20] On what was described as the "generous solicitor-own client" basis.

attention to the way in which settlements are reached (including in privileged and without prejudice communications, which might need to be disclosed to the CAT as part of any CSAO application), and be prepared to give a full explanation as to why it is just and reasonable for a settlement to be approved at that level and how the various interested constituents are to be remunerated. Class representatives, litigation funders and their legal and expert teams are also likely to pay close attention to any guidance the CAT provides in its written judgment as to whether the fees incurred throughout a claim could be subject to assessment as part of the settlement approval process. Judgment is, therefore, eagerly anticipated by the parties involved in this claim and the many other opt-out class actions that have been filed in the CAT.

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