Mutual benefit

Alex Hickson explains a welcome ruling for collective redress actions

On 11 December 2020, the UK Supreme Court handed down the highly anticipated decision in *Mastercard Incorporated and Ors v Walter Hugh Merricks CBE* [2020] UKSC 51. The decision dismissed Mastercard's appeal and remitted the collective proceedings order (CPO) application back to the Competition Appeal Tribunal (CAT) to be reheard. The decision provides welcome, albeit long-awaited, clarity in respect of the standard to be applied by the CAT in deciding whether to issue a CPO pursuant to the Competition Act 1998.

The dispute as to the proper standard to be applied by the CAT in issuing a CPO stems from changes to English competition law implemented by the Consumer Rights Act (CRA) in October 2015. The CRA amended the Competition Act 1998 to permit class representatives to bring 'collective proceedings' on behalf of consumers on an opt-out basis. Collective proceedings may only be continued on the basis a CPO is issued.

Since the introduction of these new laws, while several CPO applications have been filed, the CAT has heard only two (although some aspects of other CPO applications have been heard); *Merricks* and *Dorothy Gibson v Pride Mobility Products Limited*. Neither of those applications succeeded before the CAT.

The *Merricks* proceedings follow on from a decision of the European Commission in 2007, which found that interchange fees charged by Mastercard on transactions by merchants pursuant to an established scheme were unlawfully high, in breach of competition law. The claim in question is pursued to recover all or a substantial part of the unlawful overcharge that the applicant says was passed on by merchants to their consumer customers.

The CAT initially denied certification, holding that the claims were not suitable to be brought as collective proceedings. The decision was appealed and in April 2019 the Court of Appeal overturned the decision and remitted the application back to the CAT to be reheard, finding that the CAT had demanded too much of the proposed class representative at the certification stage. The majority of the Supreme Court agreed, for the most part, with the Court of Appeal, finding that the CAT's decision to refuse a CPO had been impaired by errors of law.

Lord Briggs summarises the majority's conclusions at paragraph [64], finding that the CAT was incorrect in deciding that the merchant pass-on issue was not a common issue and that the CAT's decision was affected by several other errors of law. The majority agreed that the CAT treated the question of the suitability of aggregate damages 'as if it were a hurdle rather than merely a factor to be weighed in the balance'. In addition, the CAT did not consider the question of whether collective proceedings were suitable in the 'relative sense', failing to 'consider whether individual proceedings were a relevant alternative, which they plainly were not, and whether the same difficulties as affected quantification in a collective claim would in any event afflict an individual claimant.'

In making its decision, the Supreme Court emphasised that the Competition Act and CAT Rules make it clear that, subject to two limited exceptions, the certification process does not involve a merits test. As the court pointed out, 'this is because the power of the CAT... to strike out or grant summary judgment is dealt with separately from certification.'

JUSTICE DELAYED

As the legal maxim goes, justice delayed is justice denied. It is a shame that, having introduced the collective proceedings regime in October 2015 and with *Merricks* having filed its collective proceedings claim form in September 2016, the UK is still without its first certified CPO. Pending the decision of the Supreme Court in *Merricks*, a swathe of collective proceedings, not yet certified, have been stayed until the relevant test was established by the country's highest court. The CAT has set down the rehearing of the Merricks CPO application for 25 March 2021.

It surely could not have been the intention of parliament, when introducing legislation to provide a means of collective redress, to have consumers wait over four years to overcome the certification stage of the proceedings. The preface to the CAT Guide to Proceedings 2015 provides that 'as regards collective proceedings and collective settlements, the jurisdiction of the Tribunal is novel… While the Guide seeks to provide as much assistance as possible, it is expected that the Tribunal will further develop its approach on a case-by-case basis, and the Guide is likely to need revision accordingly in the light of experience.' In hindsight, such an approach, which has led to significant delays, may have been misconceived, and more thorough guidance and procedures based on other jurisdictions in which class actions regimes are well-established should have been provided. Consumers can only hope that from here, applications for CPOs can be dealt with swiftly, as was likely intended.

The decision should also be reviewed carefully by defendants considering opposing CPO applications as a matter of course. As the Supreme Court points out, the hearing of a CPO application does not involve a merits test. A CPO application is not the same as a summary judgment application. It is clear that the threshold for certification is not so high, and if a defendant chooses to resist such an application and lose, it will sound in costs.

The Supreme Court's judgment, coupled with the earlier decision of the CAT in *Merricks* so far as it relates to the class representative's funding arrangements, are positive results for claimants and funders alike. Litigation funders and claimants pursuing collective actions in the CAT exist in a mutually symbiotic relationship; one cannot exist without the other. As the Court of Appeal observed, 'the power to bring collective proceedings… was obviously intended to facilitate a means of redress which could attract and be facilitated by litigation funding.' Woodsford welcomes this development, and the funding industry can now have greater comfort that claims in the CAT constitute a viable means of achieving collective redress for consumers and others.

Alex Hickson is investment officer at Woodsford Litigation Funding

MASTERCARD RULING