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Memorandum

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Mastercard's Win in UK Class Action: Priceless

Background

On 21 July 2017, the Competition Appeals Tribunal ("**CAT**") issued its landmark judgment dismissing an application brought by Walter Hugh Merricks CBE for a Collective Proceedings Order ("**CPO**") under section 47B of the Competition Act 1998 claiming damages against MasterCard Inc. and others (collectively, "**Mastercard**") for breaches of Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**").[1] Mr. Merricks' application was for over 46 million claims to be brought collectively seeking damages of approximately £14 billion. In summary, Mr. Merricks alleged that Mastercard had colluded in setting the interchange fees charged to merchants and that the inflated charges had been passed on by merchants to consumers across the price of all of the merchants' products. As only the second decision by the CAT on an application for a CPO since the introduction of opt-out claims, this ruling provides important guidance on how the CAT is likely to apply the requirements that need to be satisfied before collective proceedings can be commenced.

In refusing the application, the CAT made clear that the ability to commence collective proceedings does not override the general principle that damages are awarded for breach of competition laws in order to place the claimant in the position that they would have been in but for the breach. Exemplary damages cannot be awarded. When applying for a CPO, an applicant is required to demonstrate that the claim is suitable to be brought as collective proceedings, including, therefore, that there is: (i) a sustainable methodology which can be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages; and (ii) a reasonable and practicable means for estimating the individual loss which can be used as the basis for distributing those damages. The CAT held that in the present case the claims were not "*suitable for an aggregate award of damages*" and that "*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…*"

Some jurisdictions within the European Union have for some time sought to encourage private competition law litigation. Following the unsuccessful attempt by Emerald Supplies to bring a representative claim in the High Court of England & Wales on behalf of themselves and all other direct and indirect purchasers of air freight services against British Airways in 2010 (*Emerald Supplies & Anor v British Airways [2010] EWCA Civ 1284)*, the introduction of a procedure permitting opt-out proceedings in the UK was lauded as opening up the potential for consumers to bring claims that would otherwise not be possible. However, the CAT's decision in *Walter Hugh Merricks CBE v Mastercard Incorporated and*

[1] [2017] CAT 16.

Others highlights that there is a steep hill to climb before the CAT will grant a CPO and provides a significant steer for those looking to bring or defend collective claims under competition law in the UK. The CAT is yet to grant a CPO application in any case. The only other CPO application to have been considered by the CAT under the new regime had been brought by Dorothy Gibson against Pride Mobility Products Limited. On 31 March 2017, the CAT handed down its judgment in that case, refusing to grant a CPO based upon the information presented by the applicant, but adjourning the application to allow the applicant to revise her expert evidence.[2] Ms. Gibson withdrew the CPO application on 25 May 2017.

This Memorandum outlines the background to *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*, and considers what this decision might mean for the future of competition claims in the United Kingdom. The requirements for commencing and continuing collective actions for breaches of competition law are set out in our previous Memorandum ("Opt-Out Class Actions in the UK: Collective Proceedings for Competition Law Breaches").

CPO Application

Similar to class actions in the United States, collective proceedings enable groups of individuals or businesses that have suffered a common loss resulting from a breach of Article 101 of the TFEU to bring a single claim in the CAT to collectively recover their loss on an 'opt-out' basis. Prior to granting a CPO, the CAT must be satisfied that the claim is: (i) brought on behalf of an identifiable group of persons; (ii) suitable to be brought as a collective proceeding; and (iii) that the applicant is a person who the CAT could authorise to act as the class representative.

On 8 September 2016, Mr. Merricks filed an application with the CAT to commence collective proceedings under section 47B of the Competition Act against Mastercard (the "**CPO Application**"). The CPO Application was premised upon the European Commission's ("**EC**") determination that Mastercard had, in breach of Article 101 of the TFEU, colluded in the setting of interchange fees charged between banks for cross-border transactions and certain domestic transactions.[3] The EC decision found that, absent the collusion, the interchange fees charged between banks would have been lower.[4] The interchange fees are passed on in full by the banks to merchants.

In response to a CPO Application, the CAT is required to determine whether the proposed claim is eligible to proceed as a collective claim. Specifically, under the Competition Appeal Tribunal Rules 2015 (the "**Rules**"), the CAT is required to determine whether the collective proceedings[5] are brought on behalf of an identifiable class of persons; raise common issues; and are suitable to be brought in collective proceedings.

A hearing took place between 18 and 20 January 2017 in the present case to consider these issues, and the CAT handed down its judgment on 21 July 2017.

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2 [2017] CAT 9.

3 Case C-382/12P, EU:C:2014:2201.

4 Case C-382/12P, EU:C:2014:2201.

5 Competition Appeal Tribunal Rules 2015, Rule 79.

1. Was the claim brought on behalf of an identifiable class of persons (Rule 79(1)(a))?

In its judgment, the CAT did not consider in detail whether the CPO Application had been brought on behalf of an identifiable class of persons but, instead, proceeded on the implicit assumption that this aspect had been satisfied. Mr. Merricks argued that, as merchants primarily passed through the inflated interchange fees to customers indirectly (i.e., through their retail prices), the class should not be limited to consumers that paid for goods and/or services by credit or debit cards. Instead, in the CPO Application, Mr. Merricks defined the class as follows:[6]

> *"Individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards, at a time at which those individuals were both (1) resident in the UK for a continuous period of at least three months, and (2) aged 16 years or over." ("**Proposed Class**")*

The Proposed Class, therefore, comprised approximately 46.2 million people and sought damages estimated at £14.6 billion.[7]

2. Do the claims raise common issues (Rule 79(1)(b))?

Rule 79(1)(b) of the Rules requires the CAT to consider whether the proposed collection of claims raise common issues, but there is no such requirement in section 47(6) of the Competition Act. In considering this requirement, the CAT held that a CPO is "*not a mini-trial*", but that an applicant is required "*to do more than simply show that he has an arguable case on the pleadings*" akin to a strike out application.[8] In the present case, that requirement meant that it was necessary to consider the expert's report filed on behalf of Mr. Merricks explaining the way in which it is considered that the common issues identified in the claim form could be determined on a collective basis.[9]

The CAT held that while some issues were common, a number were "*clearly very different*". In particular, the CAT considered that the issue of the extent to which any overcharge had been passed through to consumers by merchants varied by industry sector and consideration was required to be given to the aggregate amount of spending in each sector, and the distribution of consumers' spending between sectors.[10] Similarly, the amount of interest paid or payable by a claimant depended upon their possessing a Mastercard and the extent to which they used it for purchases and incurred interest. The CAT, therefore, rejected Mr. Merricks' argument that the individual claims were largely identical and, therefore, raised common issues.

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6 [2017] CAT 16, ¶1. The exclusions to the proposed class included: (i) officers, directors or employees of Mastercard or of any entities in which Mastercard has a controlling interest; (ii) all members of the legal teams for both parties; (iii) all experts instructed on behalf of all parties and the staff assisting them; (iv) all employees of Epiq/Hilsoft engaged in advising and assisting Mr. Merricks and any other professional adviser who may be engaged by Mr. Merricks for the purposes of these proceedings; and (v) all members of the Tribunal panel assigned to these proceedings.

7 [2017] CAT 16, ¶2.

8 [2017] CAT 16, ¶57.

9 [2017] CAT 16, ¶58.

10 [2017] CAT 16, ¶63

Significantly, however, as the requirement is contained in the Rules but not the Competition Act, the CAT held that this determination was not fatal to Mr. Merricks' application if the claims were otherwise "*suitable to be brought in collective proceedings*". [11]

3. Was the claim suitable to be brought in collective proceedings (Rule 79(1)(c))?

The final element to be considered under Rule 79(1), and the crucial issue on the present claim, was whether it was "*suitable to be brought in collective proceedings*". The debate in this regard concentrated around the methodology for calculating an aggregate award of damages and the subsequent allocation of such damages to class members. The CAT accepted that such an approach may be possible, but that Mr. Merricks was required to demonstrate that his approach provided:[12]

- a sustainable methodology which could be applied in practice to calculate a sum which reflected an aggregate of individual claims for damages; and
- a reasonable and practicable means for estimating the individual loss which could be used as the basis for distribution.

The CAT adopted the test set out by Rothstein J in the Supreme Court of Canada case *Pro-Sys Consultants Ltd v Microsoft Corp*. [2013] SCC 57:

> *"…the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied."*

Applying the above test, the CAT held that it was "*unpersuaded on the material before us that there is sufficient data available for [Mr. Merricks' proposed] methodology to be applied on a sufficiently sound basis*".[13] Further and in any event, the CAT considered that even if an aggregate level of damages could be determined, 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*" based upon the methodology proposed by Mr. Merricks.[14] In arriving at that decision, the CAT held that it was "*impossible in this case to see how the payments to individuals could be determined on any reasonable basis*", particularly in light of the "*governing principle of damages for breach of competition law*", which "*is restoration of the claimants to the position they would have been in but for the breach*".[15] For those reasons, the CAT held that it would not make a CPO in the present case.

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11 [2017] CAT 16, ¶67.

12 [2017] CAT 16, ¶67.

13 [2017] CAT 16, ¶78.

14 [2017] CAT 16, ¶84.

15 [2017] CAT 16, ¶88.

Funding Collective Proceedings

Finally, the CAT considered the funding arrangement that had been entered into by Mr. Merricks and confirmed that there is no general prohibition on collective proceedings being funded by litigation funders. In particular, the CAT ruled that the funder's fee constituted "*costs or expenses*" for the purposes of section 47C(6) of the Competition Act 1998, but required the funding agreement to be amended so as to provide that the fee was recoverable from Mr. Merricks directly (even if contingent upon his receipt of the funds).

It is worth nothing that the CAT described the funding agreement as a "*convoluted and verbose contract*", and highlighted that *"[s]ince the purpose of the Funding Agreement is to enable these proceedings to be brought for the benefit of a large class of consumers, who are entitled to see a copy (save for confidential sections), it is unfortunate that it is drafted in such an impenetrable manner*". This may prove salient to third party funders in the future.[16]

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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[16] [2017] CAT 16, ¶99, footnote 12.