

Monday 14th August 2017.

Permission to appeal sought in £14bn Mastercard consumer claim

On Thursday 10 August 2017, lawyers for Walter Merricks CBE filed an application with the Competition Appeal Tribunal (CAT) for permission to appeal the CAT's decision to dismiss the proposed £14bn collective action on behalf of 46 million consumers seeking damages from Mastercard due to its illegal card fees.

Mastercard has been given until 8 September 2017 to file any submissions in response, following which there may be a hearing before the CAT on the application for permission to appeal. The CAT will then issue its judgment on the application.

There is some legal uncertainty as to whether there is a direct right of appeal to the Court of Appeal or whether it needs to go to the Administrative Court for a judicial review. However, given that this is the first ever judgment on an application for collective proceedings, and the very significant public policy issues at stake, Mr Merricks is confident that the case will ultimately end up before the Court of Appeal and that the appeal or judicial review will succeed.

Whilst Mr Merricks was successful before the CAT on most issues, the CAT ultimately decided not to let the collective action proceed for two main reasons:

First, the CAT considered that, whilst Mr Merricks's experts had identified a methodology that would enable them to calculate how much of the illegal fees were passed on by businesses to UK consumers, the CAT did not accept that it had been established at this very early stage of the proceedings that there was sufficient evidence to show the extent to which all businesses had passed on the illegal fees to consumers in higher prices.

Secondly, the CAT determined that it was not enough for Mr Merricks to establish the loss suffered by the class as a whole, he needed to go further and demonstrate how he would establish the loss suffered by each and every individual in the class. Mr Merricks's legal team, comprising Quinn Emanuel, Monckton Chambers' Paul Harris QC, and Marie Demetriou QC and Victoria Wakefield of Brick Court Chambers, have identified manifest errors within the CAT's reasoning on this issue.

Mr Merricks considers that had the CAT properly applied the relevant legal principles, with due regard to the clear policy intent behind the introduction of the new collective action regime, the claim against Mastercard should have been allowed to proceed.

Mr Merricks also believes that once the Court of Appeal has had an opportunity to consider the legal and policy issues, it will set aside the decision of the CAT and allow consumers to pursue Mastercard for the very substantial financial damage it has caused through its proven illegal anti-competitive conduct.

Mr Merricks said:

"I am very pleased that the fight for compensation for the substantial losses that Mastercard has caused to UK consumers continues. In filing the application, the next step has been taken in what could be a long fight. In essence this is a simple case. It has been conclusively established that Mastercard acted unlawfully and anti-competitively in imposing excessive credit and debit card fees. Mastercard knows that a large part of this overcharge was passed on to consumers in higher prices. Indeed Mastercard's

own position in the defence of the various lawsuits it is facing from many UK retailers is that this is exactly what happened. Despite this, astonishingly Mastercard wants to argue both ways - at the same time resisting retailer claims saying they passed on the illegal fees to consumers, and also refusing to accept that the claim of 46 million consumers is valid. It has put forward no proposals at all to compensate consumers. Instead of resisting this claim and dragging the case out, Mastercard should now own up to the wrong it has done to UK consumers and say what it will do to give them fair redress.”

“I believe that the Tribunal was wrong in its analysis and in the legal test that it applied. The conclusion that it would not be enough for me to prove the loss suffered by the class as a whole and that I needed to show that I could calculate the actual loss suffered by each individual consumer cannot be correct. The government decided that a new regime was needed to allow consumers to recover the losses caused to them by illegal, anticompetitive conduct engaged in by big business. If I can establish the total amount of harm that Mastercard has caused to UK consumers, then why should consumers then get nothing at all if I cannot calculate the precise loss that each individual consumer suffered? Rather than allow consumer recovery, this would reward unlawful conduct by allowing companies to keep their ill-gotten gains. An effective consumer redress regime that allows for private enforcement can be a real support to the public enforcement of competition law. This is what the government and the competition authorities wanted to bring about.”

Boris Bronfentrinker, the Quinn Emanuel partner representing Mr Merricks, said:

“Together with Mr Merricks’s team of highly experienced barristers, we have carefully analysed and considered the Tribunal’s judgment and identified a number of manifest errors in the reasoning and approach of the Tribunal. As the first mass consumer collective action, and given the size of the class, complex issues have been raised that the English courts have not had to consider previously. Yet the parliamentary intent in introducing the collective action regime is clear - it is to facilitate consumer claims. The claim brought on behalf of 46 million UK consumers is precisely the type of claim that parliament sought to facilitate. All the requirements for the claim to be allowed to proceed were met and, in dismissing the claim, we believe that the Tribunal made legal errors.”

He added, “ We consider that when the Court of Appeal gets the opportunity to consider the detailed legal arguments we have prepared, it will rule in Mr Merricks’s favour and allow the claims against Mastercard to proceed. It may take some time for the case to work its way through the appellate courts, but we are confident that ultimately the Tribunal’s judgment will be set aside and the claims of UK consumers will succeed.”

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Notes to Editors

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