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CLIENT ALERT

Appeal Judgment Paves Way for Major Potential Class Action to Be Brought in the English Courts

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This alert examines the UK Court of Appeal's (**COA**) recent judgment allowing a major potential class action to proceed in the English courts, and considers what this may mean for similar actions against major financial institutions and corporates.

The introduction of a collective (or 'class') action regime by the Consumer Rights Act 2015 led to speculation that it would lead to a spate of U.S.-style class actions being brought in the UK, but the anticipated surge has failed to materialise. Following two false starts, the new regime had thus far gained little traction. However, a recent judgment by the COA has revived one of those failed bids to bring an opt-out claim for collective redress, reigniting discussion about the future of class actions in the UK.

Background

The present case was brought before the Competition Appeal Tribunal (**CAT**) in 2016 by Mr. Walter Merricks (as proposed representative of the class) in a follow-on claim from the 2007 European Commission decision concerning the setting of the multilateral interchange fee charged between banks in relation to MasterCard transactions. The claim for damages (broadly estimated in the claim form at around £14 billion) was brought on behalf of all individuals over the age of 16 who had been resident in the UK for a continuous period of at least three months and who between 22 May 1992 and 21 June 2008 purchased goods or services from business in the UK which accepted MasterCard, regardless of the card used to conduct the purchase. The class was estimated to include over 45 million people. The claim form sought an aggregate award of damages and was supported by expert evidence addressing its calculation.

The CAT refused to grant the collective proceedings order (**CPO**) on the basis that there was a perceived lack of data to operate the proposed methodology for determining pass-on to consumers and an absence of any plausible means of calculating the loss of individual claimants so as to devise an appropriate method of distributing an aggregate award of damages.

Mr. Merricks appealed against the decision of the CAT to the COA. In terms of the availability of data, the COA found that the CAT had erred in law regarding the correct test to be applied at certification stage. In its assessment of

suitability for a CPO, the COA considered that the CAT had demanded too much of Mr. Merricks. The COA held that, at the certification stage, it was not necessary for Mr. Merricks to be able to produce all of the evidence of the data required to operate the methodology, or to enter into a detailed debate about its value. Instead, COA held that Mr. Merricks should not be required to demonstrate more than that he has a real prospect of success.

With regard to distribution of any aggregate award, in its refusal decision, the CAT had adopted Mastercard's position that damages must be awarded and distributed on a compensatory basis, so as to put individual members of the proposed class back in the position that they would have been but for the infringement. The COA rejected the suggestion that a loss-based method of distribution was required by the statutory provisions for certification, or that the proposed method of distribution made the case unsuitable for a CPO. Distribution was held to be a matter for the trial judge following the making of an aggregate award. Therefore the CAT was incorrect to refuse certification by reference to the proposed manner of distribution.

What does this mean?

Due to issues concerning funding, which were not dealt with in the COA judgment, the application for certification was ordered to be remitted to the CAT for re-hearing. What will happen in the CAT when the case is re-heard remains to be seen. However, in the first major test of the regime and the CAT's legal assessment of the tests for certification, the decision of the COA has clarified that the thresholds for certification are lower than the CAT had found them to be. This suggests that the door is more open to classes of claimants than might have previously been thought.

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