A false start

Stephen Wisking, **Kim Dietzel** and **Molly Herron** on *Merricks v MasterCard*

This article considers a recent decision in which the Competition Appeal Tribunal (CAT) refused certification for a proposed £14bn opt-out collective action against Mastercard. The ruling contains important clarification on the role of funding in such cases.

A new UK competition law collective redress regime was introduced in October 2015. It had been widely expected that extensive use would be made of the new procedure, which allows representatives to bring actions on behalf of consumers and/or businesses, subject to certification from the CAT. However, to date only two applications for a Collective Proceedings Order (CPO) have been made.

This slow start is thought to be due partly to limitation period complexities, partly to an absence of competition infringement decisions with favourable fact patterns, and partly to uncertainties about the viability of third-party funding in opt-out claims (where there can be no contractual relationship with the class members).

The first application, in *Dorothy Gibson v Pride Mobility Products Limited*, was withdrawn prior to a final CPO decision, after the CAT raised objections to the applicant's case on causation and quantum ([2017] CAT 9). The CAT's decision on certification in the second case – *Walter Merricks CBE v MasterCard Inc* – was therefore hotly anticipated, not least due to the challenges raised by Mastercard to the applicant's funding arrangements.

THE PROCEEDINGS

The action related to the multilateral interchange fees (MIFs) charged by Mastercard to retailers for use of its payment cards, which the European Commission had previously found infringed EU competition law. Mastercard had already been subject to multiple damages claims by individual merchants arguing it had overcharged them by levying anti-competitively high MIFs. In the collective action, Mr Merricks claimed that merchants had passed on this alleged overcharge to consumers in the form of higher retail prices across the board.

The proposed class for which certification was sought was ambitiously defined as all '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', estimated as some 46.2m people. The aggregate loss was estimated at around £14bn (including compound interest). Mr Merricks' action was funded through a third party funding agreement (funding agreement) with a funder owned by Gerchen Keller Capital (since acquired by Burford Capital).

Mastercard contended that the case did not meet the statutory certification criteria as: (i) there was insufficient 'commonality' between the claims and these were not 'suitable' to be brought as collective proceedings; and (ii) it was not 'just and reasonable' for Mr Merricks to act as representative due to various issues arising from the Funding Agreement.

The three-day CPO hearing took place in January 2017, and included the examination of Mr Merricks' economic experts. The CAT issued its judgment on 21 July 2017 ([2017] CAT 16).

CHALLENGE TO ELIGIBILITY OF CLAIMS

Although the CAT found that a lack of commonality on all issues was not fatal, Mastercard's arguments that the claims were not suitable to be brought collectively were successful.

While the CAT emphasised that certification does not involve a US-style 'mini-trial', it stated that the applicant had to do more than show that he has an arguable case. The CAT applied the Canadian test in *Pro-Sys Consultants Ltd v Microsoft Corp* ([2013] SCC 57) that '…the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement [and] offer a realistic prospect of establishing loss on a class-wide basis'. The methodology cannot be 'purely theoretical', and there must be 'some evidence of the availability of the data to which the methodology is to be applied' (although the analysis itself does not have to be carried out for the purposes of the CPO application).

On the facts, the CAT was not persuaded that there was sufficient data available for the experts' proposed methodology in relation to the level of merchant pass-through (covering multiple sectors and merchants) to be applied to produce a reasonable estimate of aggregate class-wide loss.

The CAT further found that, even if aggregate loss could be adequately calculated, Mr Merricks had failed to demonstrate any plausible way of reaching even a 'rough-and-ready' approximation of the share of that loss suffered by each individual such as to provide a reasonable method for distribution of damages between class members. The annualised per capita division proposed by the experts bore no link to actual purchases made by each individual and therefore to actual loss. The CAT held this was inimical to the compensatory basis for tort damages.

On this basis, the CAT rejected the CPO application.

CHALLENGE TO AUTHORISATION OF REPRESENTATIVE

Although it was not strictly necessary to deal with this question, the CAT went on to consider whether Mr Merricks could be authorised as class representative. Mastercard's objections did not relate to Mr Merricks (a qualified solicitor with a long and distinguished career in consumer protection) personally, but to the terms of the funding agreement (a redacted version of which is exhibited to Mr Merricks' witness statement).

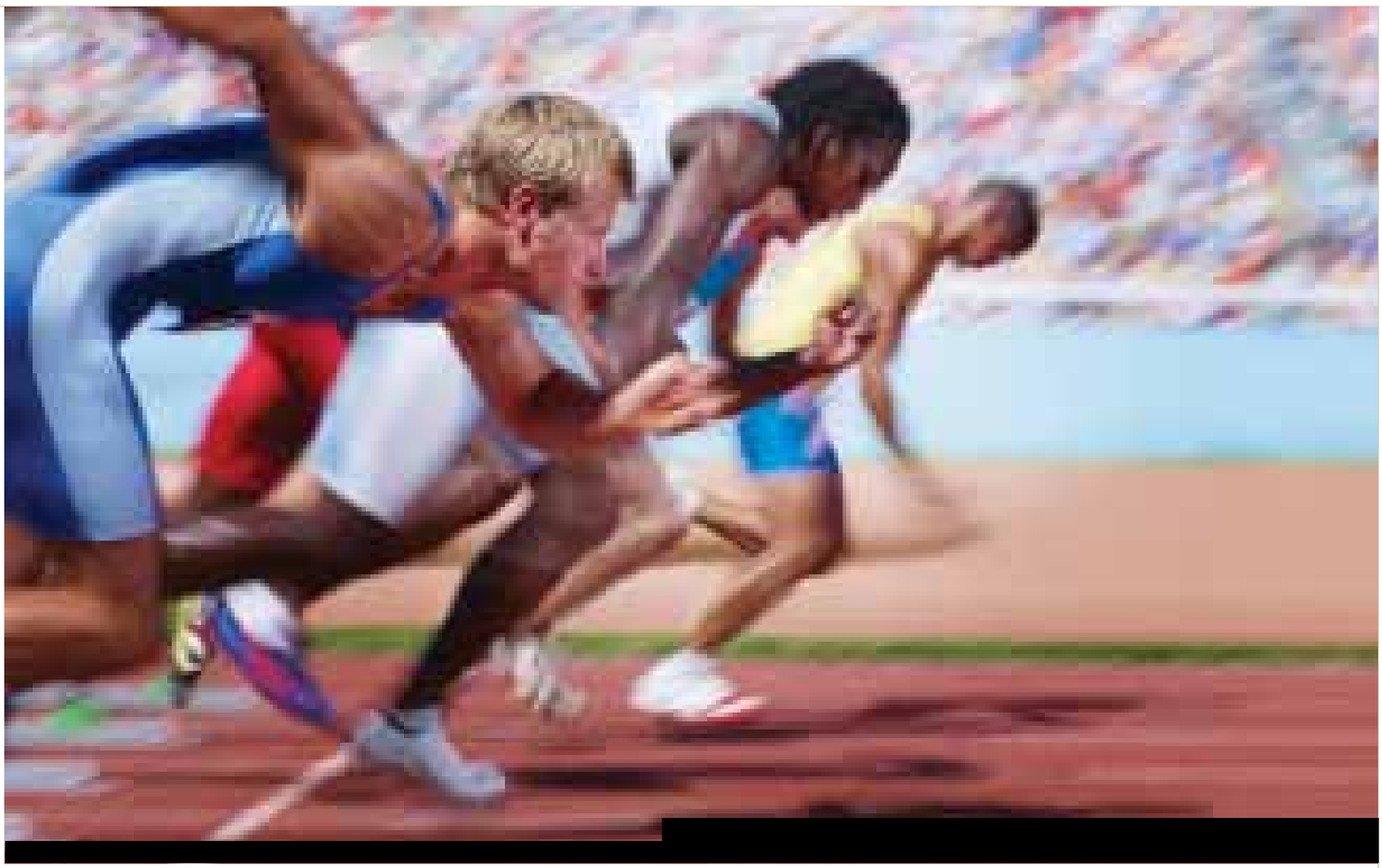
Mastercard raised three objections:

- The funding agreement would not enable Mr Merricks to fund the litigation or pay Mastercard's recoverable costs (if so ordered), since it could be terminated by the funder.
- The £10m limit on the funder's liability for Mastercard's costs was inadequate (and therefore Mr Merricks did not meet the statutory requirement that he 'will be able to pay the defendant's recoverable costs if ordered to do so').
- The arrangement gave rise to a conflict of interest.

At the outset the CAT noted that the US-style funding agreement was 'convoluted and verbose', and that it was unfortunate that it was drafted in such an 'impenetrable manner', in particular given its purpose to enable the proceedings to be brought on behalf of a large class of consumers who are entitled to see a copy (the CAT having made clear earlier in the proceedings that it expected the agreement to be published and having criticised the extent of redaction). This can be taken as a clear signal that the CAT expects funding arrangements to be drafted more clearly in future.

TERMINATION

Mastercard's termination argument centred on the basis for the



payment of the funders' return.

The funding agreement provided for the return to be paid out of undistributed proceeds and any costs ordered to be paid by Mastercard to Mr Merricks, equal to the greater of: (i) £135m; or (ii) 30% of undistributed proceeds up to £1bn plus 20% of undistributed proceeds in excess of £1bn (total investment return).

The statutory scheme provides that unclaimed funds in an opt-out case are to be paid to a specified charity (except on settlement, where unclaimed funds can be otherwise disposed of, including reversion to the defendant(s), subject to the approval of the CAT). This is subject to the power of the CAT to order that all/part of such funds is paid to the class representative in respect of all/part of the costs or expenses it incurred in connection with the proceedings (section 47C(6) Competition Act 1998). The funding agreement therefore included obligations on Mr Merricks to:

- Use his best endeavours to ensure that the funder obtained the benefit of the undistributed proceeds.
- Use his best endeavours to obtain orders from the CAT that the total investment return be paid to the funder and that Mastercard pay his fees and costs.
- In the event the CAT ordered the total investment return to be paid to Mr Merricks, to arrange for payment of this to the funder.

The funding agreement further provided that if the CAT made any 'negative commentary' on the contemplated transactions the funder could terminate the agreement.

Mastercard argued that the CAT could not order the total investment return to be paid out of unclaimed funds, as this did not fall within the statutory definition of 'costs or expenses', and could not be said to be 'incurred' by Mr Merricks. It argued that the CAT would necessarily provide 'negative commentary', and the funder would therefore be entitled to terminate the agreement.

The CAT disagreed, and found that for the purposes of section 47C(6) the concept of 'costs or expenses' covered a liability to pay the charge of a third-party funder. This concept was not limited to costs recoverable inter partes; in fact, this provision was designed to extend to costs not recoverable by the representative from the defendant (which would also include the cost of an after-the-event insurance premium), hence the need for reimbursement out of unclaimed funds.

The CAT did agree that, under the funding agreement's original drafting, the total investment return could not be said to be 'incurred' by Mr Merricks, as it contained no actual obligation to pay the fee. However, at the hearing Mr Merricks agreed to amend the agreement so that it would provide that he agrees to pay the total investment return, limited to the proportion of this determined by the CAT to be payable pursuant to section 47C(6). The CAT found that this created

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a conditional liability to pay the fee, which could then be said to be 'incurred' for the purposes of the legislation. It also noted in passing that the similar conditional obligation to pay an uplift or success fee in a CFA would be covered. The funding agreement, as amended, was therefore not rendered ineffective by section 47C(6) and the termination risk did not arise.

ADVERSE COSTS PROVISION

As to the alleged inadequacy of the £10m provision for any adverse costs order, the CAT noted that Mastercard had not put forward any estimate for its own costs or even a costs budget. Although the applicant's costs budget was over £19.5m, the CAT stated that the position of the two parties was not equivalent, given Mastercard had already carried out extensive work for the purpose of the prior individual claims. As a result, there was no basis on which the CAT could find £10m to be inadequate (and in any event it would be open to Mastercard to apply to have the CPO varied or revoked if it could demonstrate subsequently that the £10m was inadequate). The CAT therefore rejected this objection.

CONFLICTS

Mastercard asserted that the funding agreement gave rise to a conflict of interest. It argued that, as the funder's fee was payable out of unclaimed damages and Mr Merricks was under an obligation to use best endeavours to ensure that the total investment return is paid to the funder, this was in conflict with the interests of the class, which would be to maximise the amount of damages that are claimed. It highlighted potential difficulties in achieving settlements as a result of this obligation.

The CAT rejected these arguments. It noted that the funding agreement contained a clear acknowledgment that Mr Merricks had to act independently and have sole control over the litigation in the best interests of the class. (The CAT nonetheless noted that this could have gone further, it being desirable to include reference to the applicant's obligation to use best endeavours to distribute any damages to the class). In rejecting the arguments, the CAT also highlighted Mr Merrick's evidence in this regard, as well its own powers to control notice and distribution efforts and damages payments, and to approve settlements (including provisions on costs, fees and disbursements).

The CAT therefore would have authorised Mr Merricks to be a suitable representative, had it certified the claims.

IMPLICATIONS

What are the implications of the ruling for the collective redress regime and the use of litigation funding? Although the CPO was ultimately not granted by the CAT, the CAT's judgment will assist future applicants with properly framing their case.

Moreover, the CAT interpreted the statutory scheme related to unclaimed funds broadly, confirming the ability of class representatives to use third-party litigation funding to finance collective actions, as well as providing clarity on how funding agreements should be drafted to fall within the scheme. However, until the CAT has actually ordered payment of a funder's fee out of unclaimed funds, funders may remain somewhat wary of funding competition collective actions. It is noteworthy that a third action has been announced (but not yet lodged), by the Road Haulage Association in relation to the European Commission's Trucks cartel decision, to be funded by Therium Capital Management Limited, but that this is apparently planned on an opt-in basis.

Applicants and funders will also need to take account of the significant costs needed to take a claim even to the certification stage. It is clear that the CAT expects applicants to have properly thought through the likely issues for calculating and distributing damages, and to provide a reasonable proposal to address those issues, which will require significant expert input.

One interesting open issue in Mastercard relates to costs. In *Dorothy Gibson v Pride Mobility Products Limited* the applicant paid the defendant costs of just over £300,000 (constituting 60% of actual costs) relating to the CPO application, but this was a significantly smaller claim and the applicant's costs are likely to have been higher. It remains to be seen whether costs in the Mastercard case will be agreed, and whether any information about costs levels will come into the public domain.

Mr Merricks has filed an application to the CAT for permission to appeal its ruling on the suitability point (although there is a legal question as to whether an appeal is possible or whether challenge is only possible by way of judicial review). The outcome of this appeal, and of any future CPO applications that are made, will be watched very carefully, as their resolution is likely to be crucial to the success (or otherwise) of the UK competition class action regime.

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