

25th July 2017

CAT on a Hot Tin Roof: The implications for group actions of the *MasterCard* decision

By Noel Dilworth

On 21 July, the Competition Appeal Tribunal (CAT) issued its decision dismissing an application for a collective proceedings order (“CPO”) in the MasterCard litigation (*Walter Merricks v MasterCard Inc & ors* [2017] CAT 16). It is a decision whose significance goes beyond the fact that it is a further illustration of the difficulties of advancing opt-out class actions. It remains the case that, despite nearly two years having elapsed since implementation of schedule 8 of the Consumer Rights Act 2015, no CPO has been made, nor is one likely to be made at any time soon. Whilst the decision is subject to Mr Merricks’ right of appeal, this alerter briefly considers the implications for the management of class actions. In very broad terms, the decision underlines the requirements of a high level of precision and a sound and principled evidential basis in relation to: (1) the definition of the class; (2) the calculation of aggregate class damages; (3) the means for distributing damages within the class; and (4) the elements of a funding agreement.

A brief history of class actions in the CAT

1. Before examining the wider significance of the decision, it is worth recounting the circumstances in which the procedure for obtaining a CPO was conceived.
2. The types of market abuse against which anti-competition rules are intended generally to protect can give rise to high numbers of relatively low value claims.

Thus, collective redress represented a natural bedfellow to competition claims, all the more so in the case of “follow-on” damages claims under s.47A of the Competition Act 1998 (the “CA 1998”), which “follow on” from a decision by the Competition and Markets Authority (“CMA”) or the European Commission that there has been an infringement by the defendant of a prohibition under either article 101 or article 102 of the Treaty on the Functioning of the European Union 2007 (“TFEU”).

3. Concerns had developed over time that representative actions for follow-on damages (originally introduced under the Enterprise Act 2002 by way of amendment at s.47A of the CA 1998) had been very rare. There had only been one such claim in the CAT (brought by the Consumers Association against JJB Sports plc in respect of the findings by the Office of Fair Trading – the predecessor to the CMA in this context - that there had, in 2000 and 2001, been price-fixing in the sale of replica England and Manchester United football kit) and that claim resulted in modest settlements for each of the individuals affected. The concern that consumers were not being compensated for market abuses prompted the reforms included in the scheme for the management and trial of collective proceedings in the CAT introduced under the Consumer Rights Act 2015 (the “CRA 2015”). Schedule 8 of the CRA 2015 inserted, at ss.47A-47E of the CA 1998, a new procedure for collective redress, which allows a representative claimant to make an application to the CAT for a CPO (including the power, for the first time in England and Wales, to permit an “opt-out” class action). The CPO regime is currently confined to claims involving a breach of either EU or UK competition law (under chapters I or II of the CA 1998).

4. Since implementation on 1 October 2015 of Sch 8 of the CRA 2015, there have only been two applications to the CAT for a CPO. The only other application in

the follow-on damages claim relating to mobility scooters had been adjourned (*Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9). The claim has since been withdrawn with the Claimant agreeing to pay the Defendant substantial sums in costs.

Conditions for a CPO

5. There are two statutory conditions which must be satisfied for the CAT to make a CPO:
 - a. The claims must be considered by the CAT to raise the same, similar or related issues of fact or law (“common issues”) and to be suitable to be brought in collective proceedings: s. 47B(6) of the CA 1998; and
 - b. The proposed class representative must be authorised by the CAT on the basis that it is just and reasonable for that person so to act in the proceedings: s. 47B(8)(b) of the CA 1998.

6. Within the framework of the CAT Rules 2015 (which were enacted at the same time as the reforms made by Sch 8 of the CRA 2015), the first condition requires certification of eligible claims and the second condition requires authorisation of the class representative. In *Gibson v Pride Mobility Products Ltd* [2017] CAT 9, the CAT (Roth J President), had characterised the application for a CPO as not being a “mini-trial”, but held that it required an assessment of whether the Applicant had established a “sufficiently sound and proper basis to proceed, having regard to the statutory criteria.”

7. In reviewing the definition of the proposed class for class action purposes, the CAT preferred the approach in Canada to that commonly found in the USA. At paragraph 104, the CAT drew on the judgment of Rothstein J in the Supreme

Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp* [2013] SCC 57, in promoting a requirement of expert evidence to establish commonality across the defined class. This position was developed at paragraph 105:

“Rejecting the argument of the defendant that the court should weigh the competing expert evidence adduced by both sides and apply a robust or rigorous standard, Rothstein J continued (at para 118):

“In my view, 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.”

We consider that this is the approach which should similarly apply under the UK regime.”

8. It was the need to refine the definition of the proposed sub-classes (in light of the danger that the applicant’s proposed class structure would allow her to claim damages beyond the scope of the OFT decision on which the claims relied) and the need for further expert economic evidence to establish commonality of those sub-classes that led to Roth J adjourning the application. However, he also made observations, at paras 121ff. concerning the question of suitability. It was acknowledged that, “[g]iven the size and nature of the class, and the amount of loss allegedly suffered by individuals, it is not suggested that it would be cost-efficient or reasonable for the claims to be brought other than by way of collective proceedings.” (para 121). However, the question of suitability could be critically influenced by

the precise effect of the more complex economic analysis that was required for the purpose of refining the proposed class structure.

A masterclass in class actions?

9. *MasterCard* was, again, a follow-on damages claim. The relevant decision from which the claim “followed on”, published by the EU Commission on 19 December 2007, held essentially that the setting of the intra-EEA fallback multilateral interchange fee (“EEA MIF”) was a decision of an association of undertakings in breach of Art 101 of the Treaty of Lisbon (see para 3 of the decision). The EC decision stated (recital para 411) that “*customers making purchases at merchants who accept payment cards are likely to have to bear some part of the cost of MasterCard’s MIF irrespective of the form of payment the customer use... because... merchants may increase the price for all goods sold by a small margin rather than internalising the cost imposed on them by a MIF.*”
10. The scale of the proposed action was stratospheric. The size of the class was estimated to be in the region of 46.2 million people, dwarfing any previous group litigation in terms of the size of the claimant cohort. The claimed damages, inclusive of compounded interest, was £14 billion.
11. Whether there was an instinctive sense in which the vaulting ambition of the claim foreshadowed its own demise, the CAT expressly rooted itself firmly, at least in outline, in clear legal principle. In giving its decision in *MasterCard*, the CAT (Roth J presiding again) re-affirmed the points of principle set out in *Gibson* (paras 57 – 59). The CAT considered the extent to which the allegedly common issues within the class were truly common, although it was careful to emphasise that there was “*no requirement that all the significant issues in the claims should be*

common issues or indeed... that the common issues should predominate over the individual issues.” (para 67). The CAT concluded, however, that the case was not suitable for a CPO. Two factors in particular weighed in the CAT’s mind against suitability: (1) the methodology, which the CAT held to be unsustainable, for calculating a sum for the aggregated damages (see para 78); and (2) the means, which the CAT held to be impractical, for estimating the individual loss which can be used as the basis for distribution (para 87-89).

12. On the other hand, the CAT also concluded that, subject to a relatively modest amendment to the funding agreement, the proposed class representative, a qualified solicitor with a long and distinguished career in fields concerned with consumer protection (see para 93), would have been authorised to act as representative, but for its conclusion on the suitability of the case.

Class definition

13. The class was defined in the application as *“individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses in the UK that accepted MasterCard cards at a time at which those individuals were both resident in the UK for a continuous period of at least three months and aged 16 years or over.”* (para 1)
14. The class definition was so wide that, out of an abundance of precaution, the Tribunal members and all experts on either side were (and in a sense had to be) excluded from the class to pre-empt any question of conflict of interests (para 6).

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15. The nature of the underlying complaint gave rise to a complex set of alternative hypotheses by which the loss was said to have been sustained. At para 60 of its decision, the CAT enumerated the different elements that a claimant would have to establish. Two sources of significant variation in the scale of loss sustained by individual purchasers depended upon the merchants' commercial responses to the cost involved in the MIF: (1) the degree to which each relevant merchant passed through the overcharges and the percentage impact on its prices; and (2) the amount that each claimant spent at each of those merchants. The EC decision had implicitly anticipated the uncertainty inherent within the exercise of quantifying an individual customer's loss in the vagueness of its finding, at recital para 411, that customers were "*likely to have to bear some part of the cost...*"
 16. The variety of commercial responses to an increase in cost was exemplified by the recitation of expert evidence at para 63, which identified the array of commercial responses open to a merchant e.g. reducing its profits (and bearing the cost); or reducing other costs (maintaining the same price); or increasing its own prices, thereby passing the increased cost onto its purchasers.
 17. The CAT contemplated the possibility of nuanced or blended strategies or responses that shifted over time, depending, in part upon geographical locations (at least until the proliferation of standardised internet shopping). In doing so, it formed the view that the multiplicity of hypothetical models for passing-through of the cost militated against commonality of issues across the class.
 18. The variety of commercial responses had particular relevance to the doubts the CAT expressed over the methodology for calculating the aggregate class award. In this regard, two specific aspects of the broad class definition merited attention. Firstly, the period over which the loss was claimed was, apparently,

too long and extended too far back in time. At para 73, the CAT observed, that it “*would be impossible to extrapolate back from any findings or expert analyses of pass-through in around 2006 to derive meaningful figures for much of the claims period in the present action.*” Second, the fact that the markets over which the claim extended was not limited was prayed in aid of the contention that the case was not suitable for a CPO.

Aggregate award of damages

19. In what was probably the most controversial passage of its judgment (paras 68 – 78), the CAT analysed each of the potential sources of information upon which an aggregated award of damages could be based (other litigation; third party disclosure; and published data). The CAT rejected each ground individually as an evidential basis likely, in itself, to yield a sound approach to calculating damages. Thus, the CAT noted that the third party disclosure “*would be a very burdensome and hugely expensive exercise,*” that it would involve commercial sensitivities and would likely meet stiff resistance from merchants, as well as incurring substantial up-front costs to the Applicant, which had not been provided for in his budget (para 74).
20. Conspicuous by its absence was any attempt to consider the sources of evidence together, or the possibility that, with the full array of evidence available, the CAT might, in the circumstances, be able to infer an overall weighted percentage fee (assessed conservatively) to reflect that which is likely to have been paid by the average customer in excess of that which would, but for the breach of competition rules, have been paid. In this context, it is notable that, whereas the applicant in the Pride Mobility Scooters case was allowed a second bite of the cherry to re-define the sub-classes and reconstitute the supporting expert

evidence, there was no such latitude afforded to the MasterCard Applicant. One example where such a strategic tweak would obviously be warranted arises in the case of third party disclosure; the fact that the Applicant had not made provision for such cost in his budget could easily be overcome by imposing a condition requiring the Applicant to include a budget for the proposed third party disclosure exercise.

21. Nevertheless, assuming that the MasterCard decision remains authoritative, applicants and funders need to exercise great care wherever they seek an aggregated award of damages for a class. As with the definition of the class, in general terms, the narrower the window of time during which loss is claimed to have been sustained and the more recent that period of loss is, the more likely it is that an authoritative and reliable source of evidence supporting the sustainability of the class and the aggregate damages can be readily identified. Furthermore, the fewer the likely markets encompassed by the calculation, the easier it will be to satisfy the CAT that an aggregate of award of damage can be used in place of a more conventional approach to calculating damages.

Distribution

22. On the question of distribution, the CAT made perhaps its most compelling point: that the approach espoused by the Applicant for arriving at a figure for an aggregate award provided “*no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss.*” (para 84). The wrinkles on the pleadings (para 85) and the absence of crucial considerations from the expert evidence (para 86-87) weighed significantly against the Applicant, but there was, in the CAT’s mind, a fundamental clash

between the principles characterising damages as restorative and the top-down approach suggested in respect of the aggregate award of damages.

23. Again, assuming *MasterCard* remains the gold standard in determining applications for CPOs, the lesson for applicants and funders is to ensure that there is a clear proposal for distribution of any damages received based on reliable evidence (on viable alternative models if appropriate) and compatible with the principle of restorative justice.

Representative

24. The one area in which the merits of the *MasterCard* application impressed the CAT was in identifying a suitable representative, subject only to a minor amendment that was volunteered in argument by the Applicant to the funding agreement. As a result, the definition of the return to the funder had to be expressed to be “*determined by the Tribunal to be payable to the Seller pursuant to Competition Act 1998, s.47C(6)...*”
25. Otherwise, it is noteworthy that the CAT dismissed the Respondents’ arguments concerning the indemnity principle on costs, which will be a relief to funders generally. The other point of interest was the short shrift that was given to the conflict of interest argument developed by the Respondents (see para 133 – 140 of the decision).

Final Thought

26. The decision may be seen as a set-back to innovative funders and applicants. However, the issue of calculating and distributing class damages has to be

addressed head-on. It is certainly the case that the question of distribution of class damages requires careful attention both from lawyers advising applicants and at a policy level. It is not enough to make generalised appeals to an intuitive sense of injustice. One irony arising from this case is that, in general, the wider the market abuse, the bigger the overall loss, the less likely it is that an application for a single, all-encompassing CPO would succeed. One obvious alternative is that several applications representing different sub-cohorts may then inundate the CAT. Whether such an unintended outcome of this decision comes to pass remains to be seen.

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