From Theory to Action: The UK's Fledgling Collective Action Regime

The decision in *Merricks v Mastercard* marks an important milestone in the regulation of financial markets.

On 9 December 2020, Mark Carney, former Governor of the Bank of England, gave his second Reith Lecture for the BBC, entitled 'From Credit Crisis to Resilience'. Dr Carney lamented the *"repeated episodes of misconduct"* affecting key financial markets such as those for bonds, currencies and derivatives.

Dr Carney explained that these markets had become *"informal and clubby"* prior to the global financial crisis of 2007-2008 and that *"rather than everyone taking responsibility for their actions, few were held to account"*. Referring to collusion between traders using online chatrooms, Dr Carney noted "*how completely detached the traders were from the businesses and households whom they were cheating*".

Dr Carney issued a reminder that markets "*depend on the quality of market infrastructure"*, referring to the need for both *hard* infrastructure (the structure of markets) and *soft* infrastructure (the regulations, codes and culture that govern behaviour in those markets). In financial markets, that infrastructure has been lacking.

Two days after Dr Carney's lecture, however, the UK's Supreme Court developed a key piece of that infrastructure when it delivered a long-awaited judgment in the ongoing *Merricks v Mastercard* litigation. The judgment will have major implications for the UK's fledgling collective action regime, which enables damages claims for breaches of competition law to be pursued on a class-wide basis.

While regulatory authorities have long had the power to fine businesses for anti-competitive conduct, the prospect of fines has not always been enough to deter wrongdoing and, importantly, fines do not compensate the victims. Under EU and UK law, those affected by anti-competitive conduct have been entitled on paper to recover compensation for any losses suffered for several decades. But pursuing individual claims can be impractical because the recoverable losses are often not sufficient to warrant the time and cost of pursuing litigation.

The UK sought to address this by introducing a collective action regime in 2015, which allows a representative claimant to pursue collective proceedings on behalf of classes of those affected by market misconduct. This brought the UK in line with similar regimes in other jurisdictions such as Canada, Australia and the USA. However, while the statutory foundation was sound, delivering an effective regime proved more difficult – so much so that, five years after the regime was introduced, no collective actions have been certified.

However, the recent Supreme Court judgment in *Merricks* has created a framework for collective actions that will help speed up and embed the regime. *Merricks* is a £14 billion claim alleging that Mastercard harmed some 46 million UK consumers by imposing an unlawful interchange fee as part of its payment card schemes between 1992 and 2007.

The Competition Appeal Tribunal (the specialist court in which such claims are heard) initially refused to certify the claim on grounds that it failed to meet the appropriate legal standard for collective proceedings. After taking the fight to the Court of Appeal, and later defending a favourable ruling in the Supreme Court, Mr Merricks won a decisive victory over Mastercard.

In its judgment, the Supreme Court endorsed the collective action regime and confirmed that the threshold for certification is lower than the hurdle which the Tribunal had initially applied. The case has been referred back to the Tribunal to be reconsidered and a certification hearing will take place in March 2021.

While the final outcome of *Merricks* will be watched closely, the Supreme Court's judgment is likely to have a significant impact on the collective action landscape in the UK. If the 2015 statutory changes introduced the *hard* infrastructure, the Supreme Court has now placed the regime in the mainstream of the UK legal system and provided the much-needed accompanying *soft* infrastructure as to how it should work in practice.

Although the Court determined that part of that infrastructure is a lower hurdle for collective actions to pass the certification step, this should not produce an influx of unmeritorious claims because defendants can still apply to strike out claims or seek summary judgment as they can in ordinary civil claims, and collective actions still need to be provable at trial.

This is good news for potential class members of other proposed collective actions which had been waiting for the Supreme Court's verdict in *Merricks* and can now proceed. One such claim relates to the foreign exchange market, which was one of the key financial markets highlighted by Dr Carney in his lecture.

In *Phillip Evans v Barclays Bank plc & Ors* (filed by the authors of this article), Mr Evans has applied to pursue collective proceedings against six major banks in respect of their participation in foreign exchange spot trading cartels via online chatrooms. That action will be considered for certification in July 2021.

There is little doubt that the collective action regime is now firmly embedded in the UK legal system. Companies that breach competition law should therefore be aware that, in addition to regulatory scrutiny, they risk facing large scale damages actions on behalf of their victims. This will serve as an important deterrent to wrongdoers and help promote fairer, more efficient, open and responsible markets.

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