Becoming Competitive on the Worldwide Stage:  
UK Supreme Court gives green light to class actions  

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The UK Supreme Court has given its stamp of approval to the country’s fledgling competition law class action regime,\(^1\) relying on Canadian jurisprudence in doing so.

Opt-out class actions have been part of UK competition law since October 2015, when Schedule 8 to the Consumer Rights Act 2015\(^2\) came into force, amending the Competition Act 1998 (“the Act”). The drafters of the legislation were heavily influenced by other jurisdictions with class actions regimes, including the Canadian provinces.\(^3\) Although the move was hailed as a landmark for access to civil justice,\(^4\) class actions in the UK have, until recently, failed to launch. Only a handful of actions have been commenced under the Act, the first of which foundered at the certification stage.\(^5\) The others have been stayed pending the UK Supreme Court’s decision in the Mastercard case, which is the subject of this case comment.

The Mastercard case, involving interchange fees on Mastercard credit cards, was the second action to be commenced under the Consumer Rights Act 2015. It was denied certification by the Competition Appeal Tribunal (CAT) in July 2017.\(^6\) In February 2019, the Court of Appeal heard the appeal of the Mastercard action. It allowed the appeal and set aside the order of the CAT refusing certification.\(^7\) Its chief source of inspiration in doing so was the Supreme Court of Canada’s Pro-Sys judgment in the 2013 trilogy.\(^8\)

Mastercard appealed the decision to the UK Supreme Court. The Supreme Court dismissed the appeal and remitted the matter back to the CAT for reconsideration. In coming to its decision, it relied in part on Canadian jurisprudence and also the underlying philosophy of English\(^9\) civil procedure in general and the Act in particular.\(^10\) Class actions were introduced in UK competition law in order to increase access to justice and for the purposes of behaviour modification, two of the aims of class proceedings in Canada. In fact, the Canadian jurisprudence has had a significant influence on the evolution of class actions in the UK, and the Supreme Court’s judgment is no exception.

The Court’s large and liberal interpretation of the UK’s first class proceedings regime is promising for the development of collective redress mechanisms across different areas of the

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\(^1\) Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent), [2020] UKSC 51 [Mastercard].
\(^2\) Sch 8 to the Consumer Rights Act 2015, 2015 c 15 (UK) [the Act], amending The Competition Act 1998, 1998 c 41 (sections 47B and 47C) (“the Act”). Proceedings may be opt-in or opt-out.
\(^3\) With the exception of Prince Edward Island, which has no class actions statute.
\(^5\) Gibson v Pride Mobility Products Ltd [2017] CAT 9.
\(^6\) Merricks v Mastercard Inc [2017] CAT 16 [CAT decision].
\(^7\) Merricks v Mastercard Incorporated & Others [2019] EWCA Civ 674, at para 63 [Mastercard CA].
\(^8\) Pro-Sys Consultants Ltd v Microsoft Corporation, 2013 SCC 57 [Pro-Sys]. The other two cases in the trilogy are Sun-Rype Products Ltd v Archer Daniels Midland Co, 2013 SCC 58, and Infineon Technologies AG v Option consommateurs, 2013 SCC 59.
\(^9\) In this case note, references to “England” will refer to the jurisdiction of England and Wales.
\(^10\) The Act applies to all UK jurisdictions (England, Wales, Scotland and Northern Ireland).
law in that jurisdiction. In particular, the availability of representative actions for breaches of data protection law is due to be considered by the UK Supreme Court in the first half of 2021.11

**Facts and Case History**

The case arises from a 2007 decision of the EU Commission, in which Mastercard was found to have breached EU competition law through the setting of an inflated multilateral interchange fee (“MIF”) charged by customers’ banks to merchants’ banks in relation to Mastercard transactions.12 The class representative, Walter Merricks,13 issued a collective proceedings claim form14 on September 6, 2016, seeking an aggregate award of damages under section 47C of the Act, and interest totalling approximately £14.098 billion. The proposed class constituted:15

[A]ll individuals over the age of 16 who had been resident in the UK for a continuous period of at least 3 months and who between 22 May 1992 and 21 June 2008 purchased goods or services from businesses in the UK which accepted Mastercard.

The parties agreed that the merchants’ banks had passed on 100% of the cost of the inflated MIF to the merchants. What was in dispute, however, was the extent to which the merchants had passed on the cost to class members in the form of increased prices, whether or not those class members used Mastercard for their transactions.16 This ‘merchant pass-on issue’ was accepted as a common issue by the Court of Appeal, and that conclusion was not challenged at the Supreme Court.17

The expert reports filed in support of certification assumed that the merchants had passed on 100 per cent of the cost of the inflated MIF to the merchants. The reports proposed a three-step method of quantifying the loss from that overcharge, acknowledging that this methodology would require the disclosure of data from Mastercard.18 The “top-down” approach involved calculating the loss to the entire class, and then distributing those damages on a per-capita basis to each class member for each year that they were members of the class.19 The claimant proposed this approach because calculating the individual loss of each class member would be

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12 Mastercard CA, supra note 7 at para 2. Full details of the MIF, in the context of how Mastercard credit card payments work, can be found in the CAT decision, supra note 6, at paras 8-15.
13 Walter Merricks is a prominent English solicitor who was formerly Chief Ombudsman of the Financial Ombudsman Service and is now chair of the law reform charity JUSTICE.
14 Essentially, a Statement of Claim.
15 Mastercard CA, supra note 7 at para 4. Class members do not have to have owned or used a Mastercard for their purchases. The class numbers more than 46 million people and includes almost every UK adult, including the author of this piece.
16 Ibid at para 9.
17 Ibid at para 16.
18 Ibid at paras 20-22. The experts provided more detail about their methodology at the hearing: at para 27.
19 Ibid at paras 17 and 19; see also para 10.
disproportionate,\textsuperscript{20} given the difficulties of proof, the passage of time, and the modest individual losses.\textsuperscript{21}

However, the CAT held that this approach did not reflect the compensatory goal of damages.\textsuperscript{22} It held that the actual loss for each class member should be calculated, and then those amounts added together to form the amount of an aggregate damages award so that each class member would be compensated in the amount of their actual loss (the “bottom up” approach).\textsuperscript{23} This approach would be virtually impossible for millions of class members buying from thousands of merchants across numerous market sectors in a 16-year class period.\textsuperscript{24} The CAT found that the expert methodology proposed no reliable method of calculating an aggregate damages award, and the proposed method of distribution would result in class members receiving amounts that bore no relation to their actual loss.\textsuperscript{25} As a result, the case was found to be unsuitable for certification.

The Court of Appeal’s Judgment

The Court of Appeal held that the CAT’s decision to refuse a CPO contained five errors of law.\textsuperscript{26} First, the CAT had wrongly held that the merchant pass-on issue was not a common issue. Second, the CAT set too high a threshold for the availability of expert evidence to quantify merchant pass-on. Third, the CAT should not have conducted a “mini-trial” involving the questioning and cross-examination of the claimant’s experts. Fourthly, the CAT incorrectly concluded that aggregate damages could not be distributed by a method which paid no regard to differing levels of individual loss. Finally, the CAT prematurely considered the proposed method of distribution and inappropriately used that as a reason to deny certification. The Court of Appeal therefore allowed the claimant’s appeal and remitted the decision back to the CAT for reconsideration.

The Supreme Court’s Judgment – The Majority

The majority of the UK Supreme Court acknowledged that collective proceedings under the \textit{Competition Act} are crucial for access to justice, because anti-competitive conduct may affect large classes of consumers in small individual amounts, but involve high investigation costs in order to establish breach, causation, and loss. As a result, the high cost of bringing a claim compared with the low amount of individual damages, together with the much greater resources available to defendants, means that individual actions for breaches of competition law are simply not viable, at least for consumers.\textsuperscript{27}

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\textsuperscript{20} CAT Rule 4(1)-(2) states that cases are to be decided justly and at proportionate cost. As the Supreme Court observed (at para 25), “[t]his is a modified version of the well-known overriding objective enshrined in the Civil Procedure Rules of England and Wales [at CPR 1.1]”. The UKSC also noted that the overriding objective has parallels around the world, including Canada. In Ontario, for example Rule 1.04(1.1) of the Rules of Civil Procedure states that, “[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”
\textsuperscript{21} The individual losses are estimated to be approximately £300 per class member.
\textsuperscript{22} That is, the “restoration of the claimants to the position they would have been in but for the breach” (CAT decision, \textit{supra} note 6, at para 88).
\textsuperscript{23} \textit{Mastercard CA}, \textit{supra} note 7, at paras 33-34. See also Mulheron, \textit{supra} note 4 at 222-223.
\textsuperscript{24} \textit{Mastercard CA}, \textit{ibid}, at paras 28, 32.
\textsuperscript{25} \textit{Ibid}. See also paras 11, 29.
\textsuperscript{26} These are summarized by the Supreme Court at para 35.
\textsuperscript{27} \textit{Mastercard, supra} note 1 at para 1.
The changes to the Competition Act that occurred with the enactment of the Consumer Rights Act 2015 means that consumers can now vindicate their rights collectively, thereby increasing the potential pool of damages and more easily attracting third party litigation funding, which further increases access to justice. As the Supreme Court observed, facilitating collective redress of consumer rights also acts as a deterrent for potential wrongdoers, thereby serving the behaviour modification function.

Class actions under the Competition Act must be certified in the form of a Collective Proceedings Order (CPO) in order to proceed. The legal requirements for certification were the central issues in the appeal to the Supreme Court. These requirements include the existence of a representative claimant (who need not be a member of the class); claims that raise the same, similar, or related issues of fact or law; and, if the damages are sought in the form of aggregate damages (in other words, awarded to the class as a whole without reference to individual damages assessments), then the CAT has discretion as to how these damages are distributed. The Supreme Court noted that the certification stage does not involve a determination of the merits of the proceeding.

This was a follow-on proceeding, meaning that it was based on an existing regulatory decision establishing breach of the Competition Act (in this case, a decision of the European Commission in December 2007). It was sought on an opt-out basis.

The Supreme Court addressed the aims of class actions in competition law, stating that the consultation documents that formed the basis of the legislation noted two aims: to enable consumers and businesses to obtain redress for losses, and to increase growth by deterring anti-competitive behaviour.

The Supreme Court noted that both the CAT and the Court of Appeal had relied heavily on Canadian jurisprudence with regard to the threshold at certification. The Court itself

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28 See sections 47A-F of the Competition Act.
29 Mastercard, supra note 1 at para 2.
30 Competition Act, section 47B(4).
31 An appeal from a certification decision of the CAT lies only on a point of law: ibid section 49.
32 Ibid section 47B(5)-6; the Competition Appeal Tribunal Rules 2015, SI 2015 No 1648, Rules 77(1) and 79(1) and (2) [CAT Rules]; Mastercard, supra note 1 at para 5.
33 Ibid section 47B(8).
34 Any unclaimed residue of an aggregate award is to be given to a charity specified by the Lord Chancellor, or used to meet the litigation costs and expenses of the representative: Mastercard, ibid at para 3; Competition Act s 47C(5). The only charity currently specified by the Lord Chancellor is the Access to Justice Foundation: CAT Rule 93(6).
35 Mastercard, supra note 1 at para 59. While CAT Rule 79(3)(a) makes express reference to the strength of the claims, this is only in the context of the choice between opt-in and opt-out proceedings: Mastercard at para 60. The certification requirements under the Competition Act and CAT Rules do not even require that the pleadings disclose a cause of action, unlike the equivalent legislation in the Canadian provinces.
36 An EC Decision is binding on the domestic tribunal: see section 58A of the Act.
37 Section 47B(10) and (11) of the Act makes provision for collective proceedings to be brought on an opt-in or opt-out basis (see also CAT Rules 79(3)). An opt-out basis means that the proceedings are brought on behalf of every person within the class definition who does not opt-out from membership of the class: see section 47B(11). People who are not domiciled in the UK at a time specified by the CAT must opt in to any class proceeding under the Act, even if it is opt-out for residents (Section 47B(11)).
38 Mastercard, supra note 1 at para 20.
39 Ibid at para 36.
summarized and drew upon this jurisprudence, finding that it was “persuasive in the UK not only because of the greater experience of their courts in the conduct of class actions but also because of the substantial similarity of purpose underlying both their legislation and ours.” It specifically referred to the three purposes of class proceedings in Canada, namely, access to justice, judicial economy, and behaviour modification. Nevertheless, the Court’s analysis was based on the statutory construction of the UK legislation against the background of common law and civil procedure in which it was situated.

Based on this analysis, the Court concluded that the CAT had erred in law in five ways:

(i) The CAT erred in determining that the merchant pass-on issue was not a common issue, and therefore overlooked an important factor in favour of certification.

The Supreme Court held that, where common issues are ideal for determination in collective proceedings, or where the determination of the common issues in a particular case will resolve a significant portion of the case, then this will weigh in favour of certification under CAT Rule 79(2).

(ii) The CAT treated the suitability of aggregate damages as a hurdle to be surmounted, rather than simply a factor to be weighed in deciding whether or not to certify, thereby misconstruing Rule 79(2).

The Supreme Court held that the listing of a number of factors potentially relevant to the question whether the claims are suitable to be brought in collective proceedings in CAT Rule 79(2), are not hurdles each of which the claimant must surmount, but simply a list of relevant factors in the suitability assessment. Only one of these is that the claims are suitable for an award of aggregate damages.

(iii) The CAT failed to consider suitability in the relative sense, and therefore did not consider whether individual proceedings were a viable alternative, which clearly they were not, and whether a burden was being placed on the collective claims that would not otherwise be placed on individual claims.

The Supreme Court held that, according to the Act, claims must be “suitable to be brought in collective proceedings”, and that “suitable” meant “preferable” relative to individual proceedings. In coming to this interpretation, the Court relied on s 4(1)(d) of the British Columbia Class Proceedings Act. The same analysis applied

40 Mastercard, supra note 1 at paras 37-42, citing Pro-Sys Consultants Ltd v Microsoft Corp [2013] SCC 57 and subsequent jurisprudence, including Pioneer Corp v Godfrey [2019] SCC 42.
41 Mastercard, supra note 1 at para 42.
42 Ibid at para 37, citing Hollick v Toronto (City), 2001 SCC 68 at para 15.
43 Mastercard, ibid at para 42. That legislation was modelled upon the legislation in the Canadian provinces (see Mastercard, supra note 1 at para 37).
44 Ibid at para 64.
46 Ibid at para 62.
48 Ibid at para 61.
49 Ibid at paras 70-71.
50 Ibid at para 57. There is no requirement under the Act or CAT Rules that the common issues should predominate over the individual issues: CAT decision at para 67; Mastercard, supra note 1 at para 65.
51 Mastercard, supra note 1 at para 56.
to the phrase “suitable for an award of aggregate damages” under CAT Rule 79(2)(f). The Court held that the pursuit of aggregate damages avoids the disproportionate and burdensome task of determining individual damages.52

(iv) The CAT failed to take into account the fact that courts must always do its best with the evidence available when quantifying damages, and that difficulties with quantifying damages in advance will not bar a claimant’s right to trial.53

The Supreme Court held that collective proceedings are a special form of civil procedure for the vindication of private rights, made available where ordinary procedures have proven inadequate for the purpose. It should not necessarily be presumed, then, that collective proceedings should have restrictions imposed on them that ordinary procedures would not.54 In this case, a breach had already been established, so in an individual claim the claimant would only have to establish more than a nominal loss. As such, an individual claimant would have an entitlement to trial, and would not be deprived of that right simply because damages could not be quantified in advance. The Court noted that inaccuracy in quantifying damages is a feature of many areas of the law, especially personal injury damages for pain and suffering.55 In such cases, “the court must do its best on the evidence available is often labelled the “broad axe” or “broad brush” principle”.56

(v) The CAT erred in considering the compensatory principle as an essential element in the distribution of aggregate damages.57

The Supreme Court held that the collective proceedings legislation “expressly, and radically, modified” the compensatory principle of civil claims for damages. Nothing in the aggregate damages provisions or in relation to the distribution of a collective award involves the separate assessment of each claimant’s loss: “The only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable.”58

Nevertheless, unlike the Court of Appeal, the Supreme Court did not fault the CAT for having conducted a ‘trial within a trial’ at the certification stage (when it questioned and allowed the cross-examination of the claimants’ experts), and did not consider it necessarily premature to consider the issue of distribution at the certification stage (although it happened to be premature in this case).59

The Supreme Court therefore dismissed Mastercard’s appeal and remitted the application for a CPO back to the CAT for reconsideration.60

52 Mastercard, supra note 1 at para 57.
53 Ibid at paras 72-75.
54 Ibid at paras 45 and 55.
55 Ibid at paras 46-50.
56 Ibid at para 51. See also ASDA Stores Ltd v Mastercard Inc [2017] EWHC 93 (Comm) at para 306 (per Popplewell J), cited in Mastercard (UKSC) at para 51.
57 Mastercard, supra note 1 at paras 76-77.
58 Ibid at para 58.
59 Ibid at paras 64, 78-80.
60 Ibid at para 81.
The Supreme Court’s Judgment – The Dissent

Lord Sales and Lord Leggatt wrote a lengthy dissent.\(^{61}\) They agreed that the CAT was in error in declining to certify the proceedings on the basis that the distribution of damages would not reflect the individual losses sustained by class members.\(^{62}\) However, they disagreed with the majority that the claims were suitable for an aggregate award of damages. They therefore found that the Court of Appeal should not have interfered with the CAT’s decision not to certify.\(^{63}\)

The dissenting judges agreed that collective proceedings under the Competition Act have two distinct advantages over other forms of group action in which individual claims are grouped together.\(^{64}\) They allow claims to be litigated without the express consent of individual class members (by way of the opt-out mechanism)\(^{65}\) and they enable the awarding of aggregate damages. The latter enables the assessment of damages without the need to quantify individual loss, thereby expressly departing from the compensatory principle that is normally central to an assessment of damages for civil wrongs.\(^{66}\) Importantly and in addition, the dissenting justices noted that the aggregate damages provisions of the Competition Act and CAT Rules may also permit liability to be established on a class-wide basis, without individual members needing to establish loss even if (as in competition law) this is an essential element of their claim.\(^{67}\) This goes even further than the provincial legislation in Canada has allowed.\(^{68}\)

The minority disagreed that “suitability” is a relative term, equivalent to the use of “preferable” in the British Columbia \textit{CPA}. It held that “suitable” meant suitable to be grouped together and determined collectively.\(^{69}\) It also held that a class action should not be allowed to proceed simply because individual proceedings would not be viable, because “[s]uch an approach would very significantly diminish the role and utility of the certification safeguard.”\(^{70}\)

The minority held that “suitable” has a similar meaning in the context of aggregate damages, and involved an assessment of whether there is an available method to assess the loss suffered by the class as a whole with reasonable accuracy.\(^{71}\) While this does not require an unreasonable degree of precision,\(^{72}\) defendants should not be required to pay damages which are not based on a reasonable estimate of loss. This estimate requires that the representative claimant have a reasonable and proportionate method of determining loss on a class-wide basis.\(^{73}\)

\(^{61}\) Following the untimely death of Lord Kerr just days before the Supreme Court’s decision was due to be released, the panel was reconstituted under section 43(4) of the \textit{Constitutional Reform Act 2005} to consist of the four remaining judges, which would have led to a tie and need for a re-hearing. Lord Sales and Lord Leggatt therefore agreed that the appeal should be dismissed despite their dissent, in the interests of justice: \textit{Mastercard} (UKSC) at paras 82 and 83.

\(^{62}\) \textit{Mastercard}, supra note 1 at paras 148-150.

\(^{63}\) \textit{Ibid} at para 83.

\(^{64}\) \textit{Ibid} at para 91. The judges were referring to the Group Litigation Order (GLO) framework under Civil Procedure Rule (CPR) 19B.

\(^{65}\) \textit{Mastercard}, supra note 1 at para 92.

\(^{66}\) \textit{Ibid} at paras 93-97.

\(^{67}\) \textit{Ibid} at para 95.

\(^{68}\) \textit{Pro-Sys Consultants Ltd v Microsoft Corp}, [2013] SCC 57 at paras 128-134; \textit{Ibid} at paras 96-97.

\(^{69}\) \textit{Mastercard}, supra note 1 at para 116-117, 119.

\(^{70}\) \textit{Ibid} at para 118.

\(^{71}\) \textit{Ibid} at para 121.

\(^{72}\) \textit{Ibid} at para 122.

\(^{73}\) \textit{Ibid} at para 123.
In this case, the minority agreed with the CAT that the representative claimant’s methodology was insufficient and unworkable for determining loss across the class, and that the claims were therefore unsuitable for an aggregate award of damages. The claims as a whole, therefore, were found to be unsuitable for a collective proceeding, because aggregate damages were the only type of relief sought and it was common ground that the claims were not suitable for any other type of damages. The minority therefore upheld the decision of the CAT and would have allowed Mastercard’s appeal. It insisted that this did not undermine the efficacy of the class proceedings regime in competition law – simply that the present proceeding should have been framed less ambitiously: “The fact that this gargantuan class action was found unsuitable to proceed did not rule out the possibility of pursuing in collective proceedings a more focused class of claims.”

Analysis

Several important points can be drawn from the Supreme Court’s decision.

(i) The majority observed that, in the absence of an ability to bring otherwise viable individual claims for damages, a collective proceeding will generally be preferable (“suitable” in the wording of the Competition Act). Such an approach supports not only the access to justice aims of the legislation, but also its purpose in deterring anti-competitive behaviour.

(ii) The majority’s liberal and purposive approach to the quantification of damages means that class proceedings in competition law will face a much lower threshold at certification. This is not a changing of the substantive law, but is consistent with the “broad brush” approach to damages in other areas of the law.

(iii) The majority acknowledged that it was the legislature’s intent to change the substantive law with regard to aggregate damages. In this regard, the compensatory principle was nothing to do with the assessment of aggregate damages, and had been explicitly cast aside by the legislature. This will also make the threshold at certification much lower for claimants.

(iv) Even the minority acknowledged that the aggregate damages provisions of the Competition Act and CAT Rules permit liability to be established on a class-wide basis, without individual members needing to establish loss even if (as in competition law) this is an essential element of their claim. This goes further than even the Canadian jurisprudence.

The UK Supreme Court’s decision reflects a much less cautious approach to class actions than has hitherto been seen in England. The English courts have traditionally been wedded to the individualistic and purely compensatory approach to litigation. Aggregate damages and cy-près distributions, which are not tied to individual compensation, are viewed with suspicion, as the CAT demonstrated,

This has begun to change with the introduction of competition law class actions. Just as the

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74 Mastercard, supra note 1 at paras 142-144, 152-155, and 158-166.
75 Ibid at paras 167-172.
76 Ibid at paras 173-175.
77 Ibid at paras 175.
turn of the millennium saw the courts in the Canadian provinces struggle with the new class actions device, only to later interpret it much more liberally, so the English courts are showing the same tendency. In doing so, they are following the lead of the Supreme Court of Canada. In the competition space, at least, the UK is not only holding up Canada as an example to follow, but is catching up to it quickly and, in some sense, surpassing it.