# Expanded Horizons for Mass Claims in the UK

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## Recent decisions: *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*, and beyond

Mass claimant litigation is on the rise in the English courts, with multinational companies in particular facing ever-growing exposure. While large class action suits are relatively common in jurisdictions such as the United States and Australia, until recently these actions have not been a prominent feature of the United Kingdom's legal landscape.

A series of recent decisions have significantly broadened the scope and enhanced the viability of mass claimant actions in England and Wales. On 18 August 2021, the Competition Appeal Tribunal (the "CAT") handed down its decision in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others* [2021] CAT 28 ("*Merricks v Mastercard*"), and authorised the first application for a collective proceedings order (CPO) since the competition class action regime was introduced in 2015. The proceedings, brought by a class of over **46 million** claimants, will now go forward as the first competition class action, and largest mass claim ever brought in the United Kingdom.

This case joins a series of recent Supreme Court decisions that have clarified the framework for mass claimant actions in the United Kingdom—and that have established a more permissive environment for these claims. A confluence of other factors, including the greater availability of third-party litigation funding, increasingly sophisticated mass claimant law firms and a marked increase in the regulatory burden borne by UK businesses means that the recent trend in mass claims is likely to accelerate.

An understanding of how mass claims are evolving in the United Kingdom is key to managing risk for would-be defendants. Below, we examine the impact of *Merricks v Mastercard,* along with other notable decisions, on the mass claims landscape in the United Kingdom.

## Mass Claimant Actions: Key Forms

"Mass", "multiparty" or "class" actions are terms used to describe litigation brought collectively by a group of claimants (sharing certain characteristics) against one or more defendants. Mass actions are particularly common in certain types of claims such as environmental, product liability, data privacy, competition law, financial services, shareholder disputes and personal injury claims. As this area of law expands, we expect more mass claims to be brought in connection with supply chain issues, data security, employment rights, human rights, antitrust and the burgeoning area of ESG liability.

There are three main procedural mechanisms by which mass actions may be brought before the English courts:

- **Claims managed under group litigation orders ("GLOs") under CPR 19.11**. Under this procedure, the court may case manage claims that give rise to common or related issues of fact or law. GLO claims are run on an opt-in basis, meaning that individual claimants must take positive steps to join litigation proceedings.
- **Claims brought by way of "'Representative Action" under CPR 19.6**. A representative claim may be instituted by one or more persons as representatives of any others in a class who have the "same interest" in the claim. Unlike the GLO procedure, representative actions proceed on an opt-out basis: there is therefore no need for the represented class to be joined to the action or to even be aware of the action until damages or other remedies have been granted.
- **Competition claims brought by way of Collective Proceedings Order ("CPO")**. This is an opt-out procedure for mass competition law claims under section 47B of the Competition Act. To make use of this procedure, an application for a CPO must be made to the CAT, which will decide at a certification hearing whether the CPO should be granted and if the matter can proceed to trial. Certification will only be granted if the CAT is satisfied that it is just and reasonable that the party seeking to act as representative should be authorised to do so and that the claims are eligible to proceed on a collective basis.

## *Merricks v Mastercard*: the Background

The recent authorisation of a CPO in *Merricks v Mastercard* means that substantive proceedings will commence in the largest collective action to ever be brought in the United Kingdom, and the first opt-out action for collective redress for breaches of

consumer law to be certified since the procedure was introduced in 2015. The claim has a long history:

- In 2007, the European Commission found that Mastercard had acted in breach of EU competition law in restricting competition between acquiring banks through the setting of its multilateral interchange fees (fees charged between banks for transactions made by way of Mastercard), which the Commission found were likely to have been passed on to consumers. Between 2012 and 2014, Mastercard tried unsuccessfully to overturn the European Commission's decision.

- In 2016, Mr Merricks, a former financial services ombudsman, lodged an application to commence collective proceedings on behalf of a class of over 46 million individuals and requested that the CAT permit him to act as the class representative. The proposed class consisted of individuals (UK residents, over 16 years old) who, between 22 May 1992 and 21 June 2008, purchased goods and/or services from businesses in the United Kingdom that accepted Mastercard cards. The aggregate damages were broadly estimated at around £14 billion, including a substantial element of interest, given the time since the alleged loss had been suffered.

- In 2017, the CAT ruled that the claim was not suitable for a collective proceeding. *First*, the CAT held that in order to establish a claim against MasterCard for damages arising from its elevated interchange fees, an individual claimant would (among other things) have to be able to demonstrate the degree to which the retailer had "passed on" the overcharge to its customers and the percentage impact on its prices. This would have been a bar to an aggregate award of damages. *Second*, the proposed method of distribution of aggregate damages (where the individual loss of each class member had not been proven) would have paid insufficient respect to the compensatory principle in that it would not have corresponded to each individual's loss.

- The Court of Appeal overturned the CAT's decision; Mastercard was subsequently granted permission to appeal to the Supreme Court. In 2020, the Supreme Court, by a 3-2 majority in *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51 dismissed Mastercard's appeal, finding that the claim was "suitable" to be tried by way of a CPO, *i.e.*, more appropriately brought as a collective proceeding than individual proceedings.

- The Supreme Court's ruling effectively granted a green light for authorisation in the CAT, and, on 18 August 2021, the CAT ruled that the claim could go forward. The CAT held that: (i) Mr Merricks should be authorised as the class representative under section 47(B) of the Competition Act 1998, provided that a suitable undertaking as to liability for costs was given by his litigation funder; (ii) permission

to amend the claim form to include claims of deceased individuals in the class would be refused; and (iii) the claims in the claim form would be eligible for inclusion in collective proceedings pursuant to section 47B(6) of the Competition Act 1998, with the exception of claims for compound interest.

## The Evolving Mass Claims Landscape in the United Kingdom

There are presently 12 further applications before the CAT awaiting authorisation decisions, and the *Merricks v Mastercard* decision opens the door for other proposed class actions to follow. The Supreme Court held in *Merricks v Mastercard* that, in order to bring a valid collective action, all that needed to be established was that the breach in question caused the individual in the class more than purely nominal loss (Supreme Court decision at [46]). Accordingly, in order to proceed to trial, a claim need only pass the threshold for a strike-out or summary judgment test. The Supreme Court dismissed the argument that forensic difficulties in quantifying (or distributing) damages were a bar to bringing a claim on a triable issue and held that there was nothing in the Competition Act that would suggest that this principle of justice should be "watered down" for the purposes of collective proceedings. The Supreme Court also emphasised (*see* Supreme Court decision at [45]) that collective action is an important mechanism to secure access to justice—particularly where refusal to authorise a claim would make it certain that the rights of consumers arising out of a proven infringement—*e.g.*, an infringement decision by the European Commission—would never be vindicated because individual claims are likely to be a practical impossibility.

This approach finds parallels in recent decisions on other forms of mass claimant actions currently before the courts. For example, the Court of Appeal in *Lloyd v Google LLC* [2019] EWCA Civ 1599 found that a representative action brought on behalf of a class of more than four million individuals for breach of data privacy could proceed despite real concerns about whether the claim could be fairly determined on an aggregate basis and whether an appropriate damages model could be devised to determine fair compensation for millions of claimants. The Supreme Court will have the final word on the procedural viability of the claim in *Lloyd v Google LLC* when it issues its judgment later this year.

But while the courts have been more permissive of mass actions, the recent decision in *Jalla and others v Royal Dutch Shell plc and others* [2020] EWHC 2211 (TCC) underscored the principle that not all claims sharing some commonality are appropriate for determination on a collective basis, and that defendants still have legal tools at their disposal to challenge mass claims that do not conform to the procedural rules, or that may prove unmanageable or procedurally unfair. In the *Jalla* case, a team from Debevoise & Plimpton successfully argued that a proposed claim by tens of thousands of

individuals could not proceed as a representative action because the individual claims did not share the sufficient unity of interest required by CPR rule 19.6. The Court of Appeal will weigh in on this issue later this year when it determines whether to uphold the High Court's decision to strike out the representative action.

The law on mass claims is far from settled and will continue to vex the courts for some time to come. While the courts have authorised a number of mass claims, there is little guidance on how parties and trial courts are to grapple with the complexities that these claims often raise, particularly in relation to issues of evidence and proof, and quantification of damages. Keeping pace with these rapid judicial developments will be key for companies seeking to mitigate the growing risks in this changing landscape.

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Please do not hesitate to contact us with any questions.

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