SLAUGHTER AND MAY/

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MERRICKS V MASTERCARD

In an important judgment published on 20 May 2025, the Competition Appeal Tribunal (the "CAT") approved the settlement proposed by the parties in the long-running dispute between Merricks and Mastercard. Below we provide a detailed overview of the approach taken by the CAT, as well as the basis on which the judgment is now being challenged by the funder. Although the CAT was keen to stress the highly fact-specific nature of this decision, which is not to be seen as a "guide" for future settlements, it made a number of comments of potentially broader application. These are set out in the "Broader Takeaways" section below.

Background

Merricks v Mastercard is an opt-out collective action commenced in 2016. It was brought by Mr Merricks on behalf of all UK residents who were over the age of 16 between 22 May 1992 and 21 June 2008, who bought goods or services from UK businesses that accepted Mastercard.[1]

The crux of the claim was that Mastercard's involvement in setting interchange fees on cross-border Mastercard credit card transactions within the European Economic Area (found by the European Commission to be unlawful in 2007) (the "**EEA MIFs**"), had a causative influence on the level of interchange fees charged on Mastercard credit transactions in the UK. It was alleged that these fees were then passed by the retailers that incurred them to consumers, in the form of increased prices.

Although the claim was initially valued at £14 billion, the parties reached an "in-principle" settlement for £200 million in December 2024. Following a three-day hearing in February 2025, the CAT approved the settlement. This was despite strenuous objection from the funder (Innsworth), which alleged that the settlement was "too low" and "premature".

The settlement and its allocation

The CAT approved the £200 million settlement figure proposed by the parties, concluding that it satisfied the statutory test of being "just and reasonable".[2] It ordered that the settlement sum be divided into three pots.

- **Pot 1**: £100 million, ring-fenced for the class members.[3]
- **Pot 2**: circa £45 million, to cover Innsworth's costs.[4]
- **Pot 3**: circa £55 million, to be split into four tranches.

    a) The first tranche to cover costs incurred by Mr Merricks not covered by the Litigation Funding Arrangement (the "**LFA**").

    b) The second tranche (circa £23 million) to be paid to Innsworth as the profit element of its return (bringing the total amount payable to Innsworth to £68 million).

    c) The third tranche to be used to increase the amount in Pot 1, if take-up from the class is higher than expected.

[1] The class was estimated to consist of 44 million people.

[2] Section 49A(5) Competition Act 1998.

[3] If 5 % of the class come forward, they will each get £45. If take-up is less than 5 %, no one class member will get more than £70 (i.e. the CAT imposed a cap). Anything left from Pot 1 will be paid to the Access to Justice Foundation.

[4] The CAT held that some of the costs incurred by Innsworth (including £300k for merits advice on counterfactual causation) should be assessed by an independent expert.

d) The fourth tranche (the residual amount, estimated to be over £30 million) to go to the Access to Justice Foundation (the "**ATJF**"), a charity committed to helping the disadvantaged pursue and protect their legal rights.

Reasons given by the CAT for its decision

The CAT worked through the list of non-exhaustive factors set out in Rule 94(9) of the CAT Rules 2015.[5] It placed particular weight on the following:

- Judgments since the claim was commenced had dramatically reduced the value of the claim.[6] Particularly problematic was the judgment on factual causation handed down in February 2024.[7] In this, the CAT held that the EEA MIFs did not have any causative influence on the level of interchange fees that applied to domestic transactions. Given that 95 % of the claim related to domestic transactions (and Mr Merricks was refused permission to appeal), this dramatically reduced the value of the claim.

- Although there was still a chance that Mr Merricks could succeed on counterfactual causation[8] in relation to the domestic transactions (an issue the CAT could not determine in the settlement approval application), the likelihood of judgment being obtained for an amount significantly in excess of £200 million seemed low, particularly in light of advice from counsel for the parties on the prospects of success.

- There was a "real benefit" to the class members of securing payment now, rather than waiting a further two years and incurring more costs for the "uncertain prospect" of a potentially higher amount.

- The offer by Mastercard to indemnify Mr Merricks in relation to arbitration proceedings commenced by Innsworth did not in any way "impugn" the CAT's view of the settlement.[9] Mr Merricks had already concluded that the offer of £200 million was in the best interests of the class.

- Mastercard stated in evidence that £200 million was its final offer. There was no reason for the CAT to doubt that evidence. The suggestion by Innsworth that Mastercard would have increased its offer had Mr Merricks adopted a different strategy (and pleaded the counterfactual case more fully) was incorrect.

- The LFA did not, as a matter of construction, provide that Innsworth was entitled to a guaranteed minimum return of £179 million. The LFA expressly acknowledged that any return to the funder was subject to approval by the CAT.

Innsworth's challenge to the CAT's decision

Innsworth no longer contests the £200 million settlement figure. However, it seeks to challenge the CAT's approach to distribution by way of judicial review, alleging errors in the way the CAT reached its decision. It seeks an order that the decision of the CAT in relation to Pot 1 and Pot 3 be quashed.

In a Statement of Facts and Grounds dated 10 June 2025, Innsworth set out four grounds of challenge:

1. **The CAT made an error of law as it misunderstood the Australian authority on which it based its approach**

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[5] Rule 94(9) of the CAT Rules 2015 provides that when determining whether the terms of a proposed settlement are just and reasonable, the Tribunal should take account of all relevant circumstances including: the amount and terms of the settlement; the number of estimated persons likely to be entitled to a share; the likelihood of judgment being obtained for an amount significantly in excess of the settlement; any opinion by an independent expert/any legal representatives of the applicants; and the provisions regarding the disposition of any unclaimed balance of the settlement.

[6] This included a judgment on limitation handed down by the CAT (and upheld by the Court of Appeal), which made it clear that claims governed by English and Northern Irish law were time-barred in respect of any loss suffered before 20 June 1997. See *Walter Merricks CBE v Mastercard Incorporated and Others* [2024] CAT 41 and *Merricks CBE v Mastercard Incorporated and Others* [2024] EWCA Civ 759.

[7] Factual causation is the question of what actually caused the fees charged on domestic transactions.

[8] Counterfactual causation is concerned with what would have happened to the charges on domestic transactions had there been no unlawful EEA MIFs.

[9] Innsworth commenced arbitration proceedings against Mr Merricks, alleging that he breached the terms of the LFA by failing to use best endeavours to secure Innsworth's return.

When the CAT calculated Innsworth's rate of return, it did so by reference to both the costs incurred by Innsworth and the profit it would receive, concluding that Innsworth was receiving a return on investment of 1.5. According to Innsworth, the rate of return should have been calculated by reference to the profit element only. This conflation of profit return with total amount received was based on a misunderstanding of *Street v State of Western Australia*,[10] and amounted to a failure of both logic and law. It has led to Innsworth being awarded a profit return of 0.5 instead of 1.5.

2. **The CAT failed to take into account relevant factors and/or took into account irrelevant factors**

   a) The CAT's starting point (that the class should get at least half of the gross settlement amount) was irrational, as it overlooked the costs incurred to get to settlement. The CAT should have had regard to net proceeds and reimbursed Innsworth for its expenditure first. Only then should the CAT have decided how to divide up the surplus.

   b) The CAT attached no weight to the terms of the LFA, which stated that Innsworth was entitled to a minimum return of £179 million. The fact that return was not possible on the facts did not mean that zero regard should be had to what was agreed between the class representative and the funder.

   c) The CAT failed to have regard to the market value of Innsworth's funding obligations under the LFA.

   d) The CAT took into account irrelevant considerations when deciding to award the amount in Pot 3 to a charity unconnected with the claim, in priority to the funder.

3. **The CAT failed to meet basic requirements of procedural fairness when it deviated from the proposals made by the parties without inviting submissions on the amended proposals.**

4. **The CAT erred in law when it ordered that sums owed to Innsworth's predecessor (Coalfax) be deducted from Innsworth's profit element in Pot 3**

   Innsworth replaced Coalfax as funder in 2017. In order to resolve a dispute between Mr Merricks and Coalfax regarding monies owed to Coalfax in the event of a win, Innsworth undertook to pay Coalfax an undisclosed amount. The tribunal erroneously characterised this agreement as a profit-share, when it should have been treated as an agreement to extinguish the liability of the class. The CAT should have ordered that the money due to Coalfax come out of the proceeds due to the class, rather than from Innsworth's profit element.

Broader takeaways

The CAT stressed that its approach was influenced heavily by the "exceptional" circumstances of the case, whereby the settlement figure was an "extraordinarily low" proportion (1.5 %) of the initial claim value. The judgment is not a "guide" for future settlements. However, the CAT was keen to emphasise the following points, which are potentially of broader application.

- When considering whether settlement is "just and reasonable", the CAT will look at this from the perspective of the class members. It is the class and not the other stakeholders that is the "focus" of the statutory test.

- The settlement does not need to be perfect: there is likely to be a range of settlements that the CAT would approve.

- The CAT will not concern itself with the negotiating strategy adopted by the parties. Its only concern is whether the terms of the settlement are just and reasonable.

- The CAT does not have a binary choice between accepting or rejecting the settlement plan proposed by the parties in its entirety. Rather, the CAT can decide to approve the figure, while ordering something different with regards to distribution.

- Where the CAT has concerns about the reasonableness of costs incurred by the funders, it will not shy away from ordering that these be assessed by an independent third party.

[10] *Street v State of Western Australia* [2024] FCA 1368.

- Going forward, the CAT expects any settlement approval application to set out arguments that could be raised in opposition to the settlement (similar to the duty of full and frank disclosure in without notice injunction applications).

- The class representative will "ordinarily" be expected to provide the tribunal[11] with a comprehensive opinion from leading counsel, setting out the basis on which counsel considers that the proposed settlement is reasonable in the interests of the class.

- The CAT needs sufficient time to scrutinise settlement proposals. Parties that present proposals shortly before trial should be aware that the most "likely" outcome is that trial will be adjourned (and refixed for a later date if settlement is not approved). Difficulties may arise in multi-party cases where only some parties are seeking to settle and the trial is required to go ahead for the remainder in any event.

Conclusion

This decision is one of only a handful of opt-out settlement approvals under the collective action regime. The detailed judgment provides an interesting insight into the approach taken by the CAT. It also contains a number of broader takeaways that will no doubt be of interest to those involved in opt-out collective actions.

Innsworth's judicial review should be watched closely.

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