**Portfolio Media. Inc.** | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# Analyzing Cost Issues After Top Court MasterCard Ruling

By **Andy Ellis** (March 12, 2021, 2:35 PM EST)

Andy Ellis

Anyone who has an interest in global litigation trends will have noted that the U.K. Supreme Court has effectively given the green light for MasterCard Inc. v. Walter Merricks to proceed in what will be a completely new scale of consumer class actions — one in which millions of consumers become class members unless they specifically opt out.

The entry point into English law for U.S.-style opt-out consumer class actions was the Consumer Rights Act. There is no shortage of potential cases but the rollout has been stalled because the first application has travelled all the way through the appellate process.

The second appeal in Merricks was heard in the Supreme Court over two days in May last year and judgment was handed down on Dec. 11, 2020.[1]

I should stress that the Supreme Court did not itself certify the class action; rather it identified five errors that the Competition Appeal Tribunal made in its reasoning for refusing to certify the action at first instance and clarified the tests that the tribunal will need to apply when it reconsiders the case.

The appeal points related chiefly to the calculation of damages and whether the acknowledged difficulty in quantification and attribution to individuals should have led, as it did, to a finding that the case was unsuitable for certification as a class action. The Supreme Court resolved these questions in favor of the representative consumer applicant.

My area of interest — the costs implications of the new regime — will now come back into focus.

In Merricks, cost issues were confined to the first instance hearing in 2016 and related chiefly to the validity and effectiveness of the claimants' funding agreement, which was challenged unsuccessfully by MasterCard.

The tribunal dealt shortly with the potential conflict of the applicant's interest between his inherent duty to maximize the distributable damages to class members and his obligation to use his best endeavors to realize the total investment return to the funder.

If any settlement agreement did not appear to the tribunal to balance the interests of the class members and the funder, the Competition Appeal Tribunal would simply not approve the settlement.

The tribunal accepted a late rectification by the applicant to the funding agreement and applied a purposive interpretation of the regulations to allow the funder's bounty to be recoverable out of the unclaimed damages pot as "costs incurred." The tribunal determined that even a conditional liability for costs can be deemed a cost incurred.

This purposive interpretation was a comfortable one for the Competition Appeal Tribunal to make because it was clear from reviewing statements made in the House of Lords as the legislation passed through Parliament that the government appreciated and was prepared to encourage the use of third-party funding to enable class actions to proceed.

MasterCard did not submit a respondent's notice, which may have kept costs issues in play during the appeals. It is not for me to speculate on the extent to which the merits of a respondent's notice were considered. It is not surprising, however, that a party that has achieved its primary aim at first instance of blocking the certification would think carefully before muddying the waters with a cross-appeal.

Now that the certification application has been remitted to the tribunal for rehearing and most expect it will receive the go-ahead, it is likely that consequential aspects of the regime-specific costs and funding models will be revisited — if not in Merricks then in other opt-out applications that have been queuing up.

At some stage, the tribunal will need to grapple with the reasonableness of costs for which there is no traditional client liability, and it will potentially fall to a paying party to invoke the protection of the same class members it has been opposing in order to limit its net exposure to the aggregate of damages and costs.

It would be logical to expect a form of costs budgeting to be required in a certified consumer class action. The absence of a costs estimate or budget submission from MasterCard in Merricks meant that the tribunal had no evidence upon which to determine the £10 million (approximately $13.89 million) adverse costs provision in the funding agreement as inadequate.

But there is an obvious placeholder here for the equivalent issue to arise in other applications. Funders are generally keen for the court to manage their exposure to adverse costs.

There is a particular and discrete argument for the active costs management of applicants' costs. The CRA provides a statutory exception to the common law indemnity principle. In all other walks of litigation life, costs belong to the client or group of clients who are actively involved in the litigation — not to the lawyers or funders. The CRA regime turns that on its head.

In a conventional group action under "loser pays" principles, claimant lawyers do not expect to recover from defendants either the individual costs or often the pro rata share of common costs for those claimants who drop out for whatever reason.

In the opt-out regime the converse is the case. There are parcels of costs incurred by lawyers on behalf of claimants who did not know they existed and/or did not engage sufficiently to establish a right to a share of the compensation. These costs remain payable by the losing respondent and the exposure is therefore expanded from the equivalent litigation model. Having the earliest handle on how large that liability might be and what its essential components are is of legitimate interest to respondents and to the tribunal.

Just because the numbers will be huge is not a good reason to avoid the exercise — quite the opposite. Tribunals are normally resistant to active costs management and tend to do so only at a very high level, closer to the practice in arbitral proceedings than in civil litigation. I expect that the Competition Appeal Tribunal will come under pressure to take a closer interest in costs as the opt-out system takes shape.

---

*Andy Ellis is managing director at Practico Ltd.*



[1] https://www.supremecourt.uk/cases/docs/uksc-2019-0118-judgment.pdf.

---