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Commercial Litigation Newsletter:

Our legal updates on what matters to you

Edition 2 2017

Welcome to this the second edition of 2017 in which we hope you will find something to interest both you and your business. If there is anything in particular you would like to know more about in a future issue, do please let us know...

Money for nothing...?

If you have been wondering whether being a customer of MasterCard was going to net you a windfall without too much effort on your part, you will be disappointed by the latest decision in this 9 year saga.

The Competition Appeal Tribunal (CAT) has just dismissed an application for a collective proceedings order (CPO) which would have permitted a named individual (one Mr Merricks CBE) to act as a class representative for your claims against MasterCard.

Those claims for damages arise from MasterCard's 'elevated interchange fees'. It had been estimated that about 46.2 million people have claims. This number is made up of qualifying individuals who between 22 May 1992 and 21 June 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCard cards. The collective value of the claims is put at £14billion.

You might have thought that a class action is a cost-effective way to decide such vast numbers claims, and so it is. Of course it would also cost MasterCard a vast amount of money if such claims were able to be brought collectively, which may explain their hard-fought opposition to the application.

That is no different than any business would look to do of course. Faced with a claim, every business will carry out a cost/benefit

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analysis, looking to see whether it is more cost-effective to fight or negotiate a compromise.

It was the Consumer Rights Act 2015 which changed the competition private damages actions regime. Until October 2015 individuals (consumers and businesses) could bring private damages actions and allow authorised class representatives to bring collective actions on their behalf in the CAT. However, only Consumer Groups could be class representatives. The regime was also 'opt-in'. This meant consent of each of the individuals concerned was required to bring or continue a claim on their behalf and all of the individuals' claims had to relate to the same infringement.

That all changed on 1 October 2015, allowing collective proceedings to be brought before the CAT by a certified class representative and crucially, to include opt-in and opt-out proceedings. So if you fall into the class and do not 'opt-out' by notifying the representative that your claim should not be included in the collective proceedings, you are in!

The decision that claims for damages could be brought against MasterCard goes back to the European Commission's 2007 decision finding that MasterCard's EEA multilateral interchange fees breached Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), and the setting of the intra-EEA fallback multilateral interchange fee was a decision of an association of undertakings in breach of Article 101 of the TFEU. On the absence of that violation, the interchange fees charged between banks for cross-border transactions and certain domestic transactions would have been lower.

This decision was upheld by the European Court of Justice, on appeal by MasterCard, on 11 September 2014. On the back of that and the 1 October 2015 change in the law, Mr Merricks made his application. Had he succeeded those collective proceedings would have combined follow-on actions from the September 2014 decision.

In fact, the CAT ruled that the claims here were *not* eligible for inclusion in collective proceedings. Hence no windfall for any of us. This was because there would be significant variation between different kinds of goods and services and different kinds of retailer, so the issue of pass-through could not be considered to be a common issue. The amount spent by an individual consumer with retailers accepting MasterCard cards would also not be a common issue.

It was suggested these difficulties could be overcome in this case by claiming aggregated damages to be distributed to the class members. The CAT rejected that: no sustainable methodology was presented which could be applied in practice to calculate a sum which reflected an aggregate of individual claims for damages.

The CAT concluded these claims were not suitable to be brought in collective proceedings and so could not make a CPO in this case. Had it made a CPO Mr Merricks would have been a class representative, subject to him changes to his 3rd party funding agreement.

Whether or not you are one of the 42.6 million potential claimants against MasterCard, or just an individual or a business needing to bring or resist a claim, there will likely be a number of different approaches to determining such claim. Equally there will be a number of different ways of funding such your claim. We have the expertise to assist you. At Gardner Leader we will explore your options and offer you choices where we can on both funding and pricing. To find out more, do contact any one of our experienced litigation team in Newbury or Maidenhead.

Could "dependent contractors" secure our booming gig economy?

The recent Taylor Review recommended positive changes to UK employment practices recognising how today's modern business market operates. Yet some proposals could limit the flexible contractor market – one that brings big benefits to workers, businesses and consumers.

A proposed new 'dependent contractor' category of worker would have many workers' rights, such as sick pay and paid holiday. They would have a minimum wage, with the option to work during quieter periods at a lower rate. Deliveroo riders and Uber drivers would be 'dependent contractors'.

In the last quarter of 2016 there were reported to be more than 900,000 on zero-hour contracts, a 4-fold increase since 2000. Many choose short-term/fixed contracts or to be a gig-economy worker because of the freedom and flexibility offered. Giving them worker rights may seem fairer but will it cost them the freedom they currently enjoy as self-employed individuals?

Contractors with worker rights will lose flexibility. You are a worker if the business has to provide work which you have to do, and effectively controls where, when and how you do it. If you are a genuine self-employed contractor you are usually free to choose to take or refuse work. Workers cannot do that.

Workers cannot expect to have their cake and eat it, and neither can businesses. If you want the freedom to work when and how you choose you cannot expect the business to pick up the cost of providing you with worker rights and benefits with no control whatsoever over its workforce. Of course no business should be able to profit from the freedom some enjoy to deny workers the rights that come with employee or worker status if it means failing to protect workers from exploitation and poor working conditions.

The new category proposed in the Taylor Review looks to strike a balance between these competing interests, and might just be the solution business needs right now.

The world of work is changing and especially if you are an employer or run a business you cannot ignore it. Later in this newsletter we consider the huge significance of the Supreme Court's declaration on the unlawfulness of Employment Tribunal fees. Meantime if you would rather avoid disputes and like an opportunity to explore and share best practices and experiences within a group of people whose primary role is the management and care of people within organisations and businesses, do come to our Workplace Resolution Network.

This is run by Gardner Leader in conjunction with the Duty of Care Consultancy. It is for HR and business owners, with presentations applicable to anyone who employs or has responsibility for employees and workers.

The inaugural meeting is on 9 August at our Maidenhead offices in Frascati Way from 4-6 p.m. and runs bi-monthly thereafter. Do contact us to book your place.

On being in Unison: R v The Lord Chancellor

The Employment Tribunal is the prescribed forum for resolution of employment and employment related disputes.

Until 2013 one of its greatest benefits was that it was free. No fees were payable by an aggrieved employee seeking to access what was, relative to the civil courts, a quick and easy forum to determine claims.

It was Chris Grayling, incidentally the first non-lawyer to have served as Lord Chancellor for at least 440 years, who changed all that. Fees were introduced in the employment tribunals and Employment Appeal Tribunal on 29 July 2013 by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013. That order was made pursuant to the power given to the Lord Chancellor under the Tribunals, Courts and Enforcement Act 2007 and the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013.

Claims were divided into two types: Type A (for example, claims for statutory redundancy payments, unlawful deductions from wages and breach of contract) and Type B (for example, unfair dismissal, discrimination and whistleblowing). For a single claimant, the issue fee for a Type A claim was and remained £160 and the hearing fee £230. The issue fee for a Type B claim was and is £250 and the hearing fee £950. Individuals could apply for a full or partial fee remission which took into account disposable capital and gross monthly income.

Unison challenged the fees immediately as being unlawful but lost in 2014 when the court ruled their application for judicial review was effectively premature. It was simply too early to tell if their arguments that

- the requirement to pay fees as a condition of access to tribunals and the EAT breached the EU principle of effectiveness because the requirement makes it "virtually impossible, or excessively difficult" to exercise rights conferred by EU law

- the level at which fees are set breaches the requirement that domestic rules of procedure for the exercise of rights derived from EU law are no less favourable than those governing similar domestic actions

- in introducing fees the Lord Chancellor breached his duty to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between those who share protected characteristics and those who do not

- requiring higher fees in Type B claims indirectly discriminates against protected groups, such as women, ethnic minorities and disabled people

were valid.

Unison did not stop there. On appeal, and in a hugely important judgment, the Supreme Court has now ruled Grayling's order imposing employment tribunal fees is unlawful, breaches both common law and EU rights of access to justice.

The immediate impact of the judicial review decision, which has taken many by surprise, is that the Government will have to refund fees paid.

Whilst the Lord Chancellor argued that nobody had given evidence in the proceedings that they were unable to bring a claim because they could not afford the fees, employment lawyers nationwide and those at Gardner Leader speak anecdotally of a drop in Tribunal applications since the fees introduction, to the benefit of employers but the detriment of employees.

In the leading judgment Lord Reed said: "The question whether fees effectively prevent access to justice must be decided according to the likely impact of the fees on behaviour in the real world. Fees must therefore be affordable not in a theoretical sense, but in the sense that they can reasonably be afforded. Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable."

The Supreme Court looks at public policy. Lord Reed said the court did not require "conclusive evidence" if there was a "real risk" that the fees were not set at a level that everyone could afford. Where fees are unaffordable they can prevent access to justice and such fees can have the same effect "if they render it futile or irrational" to bring a claim.

A number of examples were cited: claims that did not seek a financial award - to enforce the right to regular work breaks or written particulars of employment; claims where the financial awards were "modest" - if the claim is for £500 and the fees is £390, "no sensible person will pursue the claim unless he can be virtually certain that he will succeed" and get the fees reimbursed.

Fees deterred these claimants bringing their legitimate claims. He concluded “the fees order effectively prevents access to justice, and is therefore unlawful.”

Lord Reed found the fees order unlawful not only under common law but under EU law and moreover, as it prevented access to justice it was “unlawful *ab initio*”(from the beginning) and was quashed, giving rise to the refund situation.

One of his fellow judges, Lady Hale, the first female law lord and now first female President of the Supreme Court from October and one of the most forthright and liberalising influences on the courts, gave an additional ruling on the discrimination issue. She found that the fees order was also indirectly discriminatory under the Equality Act 2010, because it put women at a particular disadvantage.

The impact of this decision is only just beginning; businesses nationwide beware...

If you need any help and advice concerning employment related issues, do get in touch with our specialists who will be pleased to assist, whatever the issue.

Landlord and tenant: have your say...

Recent media attention has focused on the financial difficulties encountered by property owners who bought their houses at a reduced price on a leasehold, rather than a freehold, basis. As the adage goes (and is true) nothing in life is free and as the owners are finding out to their cost.

Since February 2017 the government has been seeking views on prohibiting the sale of new build leasehold houses, limiting ground rents and protecting leaseholders from possession orders. The consultation is open until 19 September 2017.

This arose out of The Housing White Paper, ***Fixing our broken housing market***, which flagged up the government's intention to consult on a range of measures to tackle unfair and unreasonable abuses of leaseholds. It identified costs associated with leasehold properties that buyers may not be aware of when they bought, and ground rents with short review periods that may increase significantly during the term of the lease.

The Department for Communities and Local Government has now published a consultation on tackling unfair practices in the residential housing market in England. It says that,

notably in north of England, it has become common practice to sell new build houses on a leasehold basis. This is sometimes because houses are on National Trust land but in many cases it is to create an income stream for the freeholder from the ground rent, or to generate additional income from the sale of the freehold interest at a later date.

The advantage to the home-owner initially is that a leasehold house may be cheaper than a freehold one. The home-owner however may well not realise the additional medium to long-term costs that come with their home. These include increasing ground rents, fees for permissions to make alterations and the cost of extending the lease or buying the freehold from the developer later on.

On ground rents, leases for more than 21 years normally provide for ground rent to be paid to the freeholder for renting the land on which the property sits. Many such ground rents are nominal, but developers started selling leasehold properties with onerous ground rents and shorter ground rent review periods. Examples are ground rents which start at 0.5% of the property price but double every 10 years. This is now resulting in difficulties selling or remortgaging, and home-owners are finding it will cost a lot to get out of their difficulties by buying the freehold.

One of the unexpected twists of interest to litigators is the classification of the leases as assured tenancies under the Housing Act 1988. Such is the unintended and unfair consequence of increasing levels of ground rents. This means that the landlord can seek to end the occupancy by an order of the court, and attempt to evict the tenant, using Ground 8. Landlords will know that ground 8 would allow to mandatory possession orders for ground rent arrears. Views are sought on this in the consultation paper.

The Housing Act would require amendment to reclassify these leases if leaseholders to avoid such an outcome. It remains to be seen what the response will be of both leaseholder and lenders and if matters come to court, what the court will do and any appeals which may follow.

Meantime if you have such a lease, and need advice the property litigation team at Gardner Leader will be pleased to help you. We can assist whether you are the leaseholder or the landlord.

By way of a news update the team is also delighted to announce it has been selected as a panel solicitor for Landlord Expert. This is the home of The Landlord Association, the largest website for landlords in the UK with over 75,000 registered members. Assisting landlords operating on a national basis it is the only landlord association that is recommended by and has the esteemed backing of the Housing Ombudsman Service and the National Association of Estate Agents.

We do of course cover the whole spectrum of property litigation so whatever you need, we are here for you offering peace of mind for all your legal needs.

We hope you have enjoyed reading this newsletter. We really would like to hear from you with any feedback, comments, suggestions and of course if we can assist on any specific issue you have, just give us a call.

At Gardner Leader we understand you need a law firm which you can trust, which understands your priorities and delivers practical, exceptional value legal solutions. We will work closely with you to ensure that we can deliver the results you need. Legal situations can be stressful, but we are committed to giving you peace of mind with the reassurance that your case will be handled sensitively and professionally by our legal experts.

We also hold Market Place seminars, so named because it is in the market place that we come together to do business and, before Gardner Leader came to Maidenhead, the name also reflected the main office location of the practice. If you would like to be added to the invite list for the upcoming seminars this year, do let us know. We look forward to seeing you soon.

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