COMPOUNDING INTEREST – WHERE TO NEXT FOR CPOS?

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While the Supreme Court's decision in Mastercard v Merricks [2020] UKSC 51 ("Merricks") set a low threshold for the granting of a Collective Proceedings Order ("CPO"), a relatively firm handbrake was applied by the Competition Appeal Tribunal ("Tribunal") on remittal to one head of recovery –the claim for compound interest[1].

The result was perhaps not surprising given the requirement under Sempra Metals[2] to "plead and prove" one's actual interest losses, which is not a straightforward exercise in the context of a CPO.

However, the Tribunal's decision on certification in the McLaren3 proceedings suggests that the issue of whether a class (or part thereof) is able to recover compound interest through a CPO remains up for grabs, in the right circumstances.

Given the very significant sums at stake, class representatives look set to continue to seek compound interest, which in turn is likely to raise interesting questions around case management and pass-on.

When is Compound Interest Available?

One of the key questions for the Tribunal in Merricks, following remittal from the Supreme Court, was whether Mr Merricks' claim for compound interest should be included in the CPO. Notably, the pleaded value of the claim rose by £2.2bn if compound interest was included instead of simple interest[4].

The methodology advanced by Mr Merricks' expert for the purposes of addressing the issue of compound interest on an aggregate basis assumed that anyone who was a saver or borrower would have used the additional funds to reduce their borrowings or increase their savings. However, the Tribunal made clear that "it is not sufficient for a claim to compound interest to show that an individual had borrowing and/or savings.

1 See [2021] CAT 28 and more generally Case 1266/7/7/16 Walter Hugh Merricks CBE v Mastercard Incorporated & Ors.
2 Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34.
3 See [2022] CAT 10 and more generally Case 1339/7/7/20 Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Ors.
4 As at January 2021. The Merricks class contains over 46m people, such that the £2.2bn differential amounts to an extra c. £48 per class member.

It is necessary to show, on the balance of probabilities, how they funded the additional expense or what they would have done with the additional money if there had been no overcharge".

Accordingly, as Mr Merricks had not advanced a credible or plausible methodology for estimating compound interest losses on an aggregate basis, the issue was not "suitable"[5] for inclusion in the CPO.

Nevertheless, the CPO regime provides a mechanism by which claims for compound interest might be pursued, namely, the sub-class. This is precisely the approach taken in McLaren, where compound interest is claimed on behalf of a sub-class of class members who acquired new vehicles using finance. A sub-class would appear, prima facie, to have better prospects of satisfying the requirements of Sempra Metals by demonstrating how they funded any overcharge. Further, this approach seems capable of transposition to other CPOs where part of the overall class used some form of finance to purchase the good/service in issue (e.g. the Musical Instruments CPO)[6]. Similarly, while Mr Gutmann's claim against Apple includes a claim for simple interest only, he has reserved his position to amend his case on interest should "evidence emerge that the [Proposed Class Members] have taken out finance to pay for their Affected iPhones"[7].

Le Patourel[8] is a useful counterpoint to the approach outlined above, given its apparent status as the only certified CPO that advances a claim for compound interest on behalf of the whole class (and where there is no suggestion that the class used some form of financing to pay for the telephony services in question). The Tribunal's judgment (following trial early this year) is likely to provide valuable further guidance on the application of Sempra Metals in the context of CPOs.

Compounding the Challenges of Case Management

Much like other issues (for example, pass-on), a claim for compound interest may not necessarily be considered until after certification, which is likely to have implications for case management.

For example, in Le Patourel, the issue of compound interest was not the subject of detailed consideration at the certification stage, but is being claimed by the class representative and appears to fall within the scope of the CPO[9].

The Tribunal may be flexible on this front, particularly if the methodology for calculating compound interest relies on data that was not available at the certification stage. However, to the extent the issue of compound interest must be considered by the parties and the Tribunal sometime after certification (but before trial), this is likely to add to the delay and cost of the overall claim, and may have significant implications for the disclosure and expert process (compared to a simple interest claim).

Of Interest When Approaching Pass-On

As noted above, in Merricks, the class representative's expert was unable to produce a methodology that was capable of calculating compound interest on an aggregate basis. It will be interesting to see whether the methodology put forward by the class representative's expert in Le Patourel is acceptable to the Tribunal, and more broadly, whether that methodology is capable of wider

application in the context of consumer CPOs (where there is no specific "financing" sub-class).

Whether an acceptable methodology is developed for the purposes of calculating compound interest in the context of a consumer CPO, and the level of compounding effect that tends to produce (assuming that many consumer classes will have similar saving, borrowing and/or investment habits), may affect the trade-off faced by defendants subject to both individual claims from intermediate (corporate) purchasers, as well as a "downstream" consumer CPO. The availability and value of the compound interest claim at both levels of the supply chain will have implications for the optimal way to distribute the pre-interest losses in order to minimise the overall post-interest damages.

Defendants will therefore need to consider the strength of the claims for compound interest at the different levels of the supply chain in the context of their arguments regarding pass-on. That assessment will of course depend on the number of upstream claimants vis-à-vis the size of the consumer CPO class, as well as the relationship between the upstream and downstream markets (which has implications for the assessment and rate of pass-on).

In any event, these complex questions look set to arise on a regular basis, given the very significant value of claims for compound interest. Those involved in competition litigation will watch on with interest.

5 As required by Rule 79(1)(c) of the CAT Rules for a claim to be certified as eligible for inclusion in a collective proceedings. See also paragraph 97 of [2021] CAT 28.
6 Case 1437/7/7/22 Sciallis v Fender Musical Instruments Europe & Another.
7 See Case 1468/7/7/22 Gutmann v Apple Inc & Ors (summary of collective proceedings claim form). A general claim for compound interest (with simple in the alternative) has also be raised in Case 1572/7/7/22 Pollack v Alphabet Inc & Ors, Case 1598/7/7/23 Doug Taylor Class Representative Limited v MotoNovo finance Limited & Ors, Case 1599/7/7/23 Doug Taylor Class Representative Limited v Black horse Limited & Ors, Case 1600/7/7/23 Doug Taylor Class Representative Limited v Santander Consumer (UK) plc & Ors and Case 1601/7/7/23 Ennis v Apple Inc & Ors.
8 Case 1381/7/7/21 Justin Le Patourel v BT Group PLC.
9 See paragraph 3 of the CPO: "The remedy sought is an award of aggregate damages together with interest, costs and any further relief as the Tribunal may think fit". As per the summary of the collective proceedings claim form, the class representative is seeking "interest, calculated from the date each individual claim arose on either a compound, or alternatively simple, basis".