

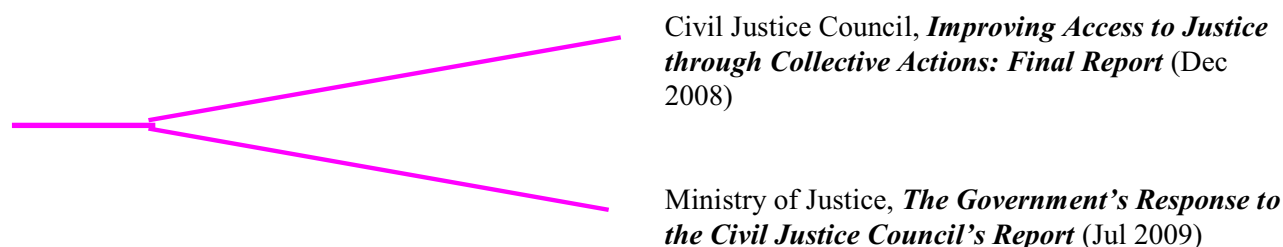
**BONAVERO INSTITUTE OF HUMAN RIGHTS
UNIVERSITY OF OXFORD**

‘Frontiers of Class Actions: The Very Old and the Very New’

6 May 2021

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How we got to here – the crucial fork in the road in 2008–9:



1.	<i>The case (latest citation):</i>	<i>Mastercard Inc v Merricks</i> [2020] UKSC 51	<i>Lloyd v Google LLC</i> [2019] EWCA Civ 1599
2.	<i>The regime relied upon:</i>	Competition Act 1998 (primarily), supported by the Competition Appeal Tribunal Rules 2015	Civil Procedure Rules, r 19.6
3.	<i>The age of the regime:</i>	since 1 October 2015	since 1873 (per previous incarnations of the present rule)
4.	<i>The broad grievance alleged:</i>	setting multi-lateral interchange fees which are charged between banks in relation to transactions involving the use of Mastercard in a manner which was anti-competitive	secretly tracking Apple iPhone users’ internet activity, collating and organising such information (data), and selling that data to subscribing advertisers to then target users
5.	<i>The cause of action pleaded:</i>	breach of statutory duty	breach of statutory duty
6.	<i>The representative claimant:</i>	Mr Walter Merricks, former Chief Financial Ombudsman of England and Wales	Mr Richard Lloyd, ‘a champion of consumer protection’
7.	<i>Size of the class:</i>	46.2M	> 4M
8.	<i>Quantum of damages claimed:</i>	up to 14B	approx. £1–3B

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9.	<i>The class period:</i>	16 years (1992–2008)	< one year (2011–12)
10.	<i>Formation of the class:</i>	opt-out, except for non-domiciled class members who must opt-in	opt-out sought (but permitted? In the speaker’s view, unclear)
11.	<i>Certification requirements:</i>	numerosity; an identifiable class; an adequate representative; common issues of law or of fact; and suitability	numerosity; and the ‘same interest’
12.	<i>Assessing the damages:</i>	aggregate assessment permitted; calculated in this case via a top-down approach	no aggregate assessment specified; calculated in this case via a bottom-up approach
13.	<i>Distributing the damages:</i>	formulaic distribution, and <i>cy-près</i> distributions, permitted	nothing specified
14.	<i>Method of funding:</i>	third party funding (DBAs are prohibited for opt-out collective actions under this regime)	third party funding (DBAs currently under reform consideration)
15.	<i>Paying the funder:</i>	as a statutory charge on any residual aggregate assessment of damages awarded by judgment	nothing specified
16.	<i>Next steps:</i>	awaiting the CAT’s judgment on the re-hearing re certification (25–26 Mar 2021)	awaiting the SC’s judgment on the validity of the representative action (28–29 Apr 2021)
17.	<i>Relevant publications by the speaker which analyse these particular cases:</i>	<p>‘<i>A Priceless Opportunity: Class Actions Post-Merricks v Mastercard</i>’ (2021) 1 <i>Mass Claims Journal</i> [forthcoming]</p> <p>‘<i>Revisiting the Class Action Certification Matrix in Merricks v Mastercard Inc</i>’ (2019) 30 <i>King’s LJ</i> 396–425</p>	<p>‘<i>Creating, and Distributing, Common Funds under the English Representative Rule</i>’ (2021) 32 <i>King’s LJ</i> (published online at: https://doi.org/10.1080/09615768.2021.1904592, with hard copy forthcoming</p>

Recalling the fork in the road: a generic opt-out class action regime for England and Wales is still needed!
