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CLIENT BRIEFING

MERRICKS V MASTERCARD

WHAT DOES THE SUPREME COURT'S JUDGMENT MEAN FOR THE FUTURE OF COLLECTIVE PROCEEDINGS IN THE UK?

18/12/2020

On 11 December 2020, the Supreme Court handed down its much-anticipated judgment in Merricks v Mastercard ("Merricks"). The judgment represents a significant development for the future of the UK's collective proceedings regime.

The Supreme Court largely upheld the Court of Appeal's decision, which had significantly lowered the threshold that a proposed class representative ("PCR") needs to overcome when applying for a collective proceedings order ("CPO"). In doing so, the Supreme Court dismissed Mastercard's appeal and ordered that the case be remitted to the Competition Appeal Tribunal ("CAT") for reconsideration of Mr Merricks' application.

With a number of other CPO applications currently pending in the CAT, the judgment is expected to have a material impact on their viability as well as to reinvigorate potential claimants' interest in the possible pursuit of collective proceedings. That said, the longer-term impact of the judgment is yet to be determined; a number of issues remain unresolved and we expect to see further developments in this evolving area of law as other CPO applications are determined by the CAT.

1. Legal framework

The UK's collective proceedings regime was introduced by the Consumer Rights Act 2015, which amended the Competition Act 1998 (the "**1998 Act**"). It offers an important mechanism for entire classes of persons to seek compensation for competition law infringements. Under the regime, an action by a PCR can only proceed if the CAT first grants a CPO. The criteria for granting a CPO are set out in the 1998 Act and the Competition Tribunal Rules 2015 (the "**Rules**"). A CPO will only be granted if the CAT:

- authorises the PCR on the basis that it is "*just and reasonable*" for them to act as a representative in the proceedings (the "**authorisation condition**"); and

- certifies that the claims are eligible for inclusion in collective proceedings (the "**eligibility condition**").

When assessing the eligibility condition, the 1998 Act and the Rules make clear that the CAT should have regard to certain criteria, including whether the claims are *"suitable"* to be brought in collective proceedings. It is this requirement as to suitability that is front and centre in the Supreme Court's judgment.

2. Factual background

On 6 September 2016, Mr Merricks issued follow-on collective proceedings against Mastercard in the CAT on behalf of a proposed opt-out class of approximately 46.2 million individuals who had purchased goods or services from UK businesses that accepted Mastercard's payment cards between 1992 and 2008.

The claim arises out of the European Commission's decision, issued in December 2007, that Mastercard's multilateral interchange fee ("**MIF**"), a fee charged by the cardholder's bank to the merchant's bank when a payment is made using a payment card, infringed EU competition law.

Mr Merricks is seeking an aggregate damages award of approximately £14 billion, which reportedly makes the claim the largest civil damages claim ever brought in the UK.

In 2017, the CAT refused to grant a CPO on two separate but related grounds, both relating to the eligibility condition:

- first, in relation to the extent to which the MIF was passed on by merchants to consumers, although the CAT broadly accepted the proposed expert methodology, it was not convinced that there was sufficient data available to determine the appropriate amount of aggregate damages; and

- second, in relation to the proposal for distribution to the class of any aggregate award, the CAT was concerned that it did not reflect the compensatory principle, i.e. that distribution would bear no relationship to the actual loss of each class member.

The Court of Appeal disagreed with the CAT on both of these issues, which led to Mastercard appealing the Court of Appeal's decision.

3. The Supreme Court's judgment

A unique procedural point arose due to the sad death of Lord Kerr shortly before the Supreme Court was due to hand down its judgment. When the final draft judgment was prepared, the court was split three to two (with Lord Kerr in the majority). Following Lord Kerr's death, the Supreme Court was reconstituted with the four remaining Justices who would have been evenly split. However, Lord Sales and Lord Leggatt, who were in the minority prior to Lord Kerr's death, agreed that the appeal should be dismissed on the basis that Lord Kerr had come to a final opinion before his death and that it would be unjust to require a re-hearing.

The majority's reasoning

The Supreme Court's majority judgment, delivered by Lord Briggs, is underpinned by two central findings. First, the Supreme Court interpreted "*suitability*" as a relative concept and noted that the CAT should have asked itself whether a claim is "*suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages*". This interpretation was influenced by Canadian jurisprudence, albeit acknowledging that the corresponding certification test in the Canadian class action regime uses the term "*preferable*" rather than "*suitable*". Second, the Supreme Court emphasised that the courts should not deprive claimants of a trial merely because of challenges relating to the quantification of harm, this being a "*fundamental requirement of justice* […] *often labelled the "broad axe"* […] *principle*".

The Supreme Court acknowledged that the CAT has an important "*gatekeeping role*" and a wide discretion to decide whether a CPO should be certified to proceed. However, the Supreme Court held that the CAT had made five errors of law in its judgment:

- the CAT failed to recognise that the merchant pass-on issue was a common issue. This should have been an important factor in favour of certification;

- the CAT placed too much weight on its decision that the case was not suitable for aggregate damages. While this is a relevant factor when considering whether the claims are eligible for inclusion in collective proceedings, it is not a condition to certification;

- the CAT should have applied a test of "*relative suitability*". In other words, if the same forensic difficulties would not have been sufficient to deny a trial to an individual claimant, they should not, of themselves, have been sufficient to deny certification;

- the CAT was wrong to decide that difficulties with incomplete data are a good reason to refuse certification. A court has to do its best on the evidence available to quantify a claimant's loss, even if that task is complex and difficult. In the majority's view, this was the most serious error made by the CAT. The CAT should have taken into account the long-settled principle that a court is obliged to allow a case to go to trial if some loss has been suffered and cannot refuse a trial on the basis that quantification might be difficult; and

- the CAT was wrong to require that the proposed method for distribution of damages should take into account the loss suffered by each member of the class. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss and the application of the compensatory principle is not essential in relation to the distribution of aggregate damages.

In terms of how this "*relative suitability*" test is to be applied to the facts of specific cases, the Supreme Court noted that when assessing suitability the CAT should conduct a value judgment in which various factors, including, but not limited to, those listed in rule 79(2) of the Rules, are weighed in the balance.

Regarding an assessment of the merits of the claim, the Supreme Court made it clear that "*subject to two exceptions, the certification process is not about, and does not involve, a merits test*". The two exceptions singled out by the Supreme Court relate to: (a) the power of the CAT to strike out or grant summary judgment, and (b) the choice between opt-in and opt-out proceedings.

In relation to the CAT's procedure for dealing with CPO applications, the Supreme Court disagreed with the Court of Appeal's criticism that the CAT had conducted a "*mini-trial*" in its assessment of the expert evidence. The Supreme Court stated that questioning and cross-examination of experts will rarely be required at certification hearings but acknowledged that there may be cases, such as Merricks, where it will be appropriate.

The minority's reasoning

While not formally dissenting from the decision to dismiss Mastercard's appeal, Lord Sales and Lord Leggatt put forward the reasons why, had their views been shared by others, they would have allowed the appeal.

In particular, they disagreed with the majority's view that the suitability analysis should be carried out on a relative basis. In their view, such an interpretation is not tenable on a proper reading of the statute. They further opined that it does not follow from the fact that collective proceedings are an alternative to individual proceedings, that they are intended to be available in any case where they would be less unsatisfactory than individual proceedings.

More generally, Lord Sales and Lord Leggatt noted that the collective proceedings regime could be used opportunistically by claimants given the significant burdens that it can place on defendants. In that regard, they expressed concerns that the approach taken by the majority may "*very significantly diminish the role and utility of the certification safeguard*".

4. Implications for the future

The Supreme Court's judgment in Merricks has provided some long-awaited guidance on the approach to the certification of collective proceedings in the CAT. The decision will likely embolden claimants' law firms and litigation funders given the approach adopted as to how "*suitability*" should be assessed. However, the judgment's longer-term impact on the future of the UK's collective proceedings regime is not yet clear. The regime remains in its infancy, with at least eight CPO applications expected to progress in 2021.[1] With collective proceedings ultimately being products of their own specific underlying facts, it is not yet certain how the CAT conducts its "*value judgment*" about suitability of CPO applications in light of the Supreme Court's judgment.

In relation to the "*relative suitability*" test, it is worth noting that in Merricks, the Supreme Court applied the test in the context of a vast claim brought on behalf of many millions of consumers who would have individually, by and large, suffered relatively small losses. The claim therefore appears to fit more naturally within what the collective proceedings regime was designed to facilitate (i.e. to enable individual consumers who would not otherwise likely be able to obtain redress for competition law breaches because their own damages entitlements would be too low compared with the costs of bringing an individual claim).

In contrast, a number of other CPO applications pending in the CAT have been brought on behalf of sophisticated and well-resourced entities, whose individual claims are potentially of high value, or otherwise by companies whose claims may be of lower value such that it is simply more proportionate to bring claims together with other companies. It remains to be seen how the "*relative suitability*" test will be applied by the CAT to these types of claims, given that in some cases the pursuit of individual claims may represent a genuine alternative to collective proceedings.

There are also uncertainties concerning other aspects of the Supreme Court's judgment. One such example arises in the context of strike out or summary judgment applications. It is not yet clear whether such applications can and will be used by proposed defendants to advance arguments that would likely previously have been advanced at a certification hearing. Another example is the CAT's approach to expert evidence, both by applicants and proposed defendants. As was the case in Merricks, there will be arguments to be made on a case-by-case basis as to whether an exception should be made to the general proposition that questioning and cross-examination of experts at certification hearings should be rare.

Finally, the Supreme Court's judgment does not address each and every issue potentially arising in the context of CPO applications. For instance, the judgment does not consider the operation of the authorisation condition or the handling of scenarios where there are two or more competing opt-out CPO applications (which leads to what is known as a "**carriage dispute**"):

- in relation to the former, although the Supreme Court set out and briefly commented on the statutory test for authorisation, the CAT's findings on this point were not appealed and the Supreme Court's judgment is therefore determinative only in respect of the eligibility condition; and

- in relation to the latter, it remains to be seen what approach the CAT will adopt towards assessing competing opt-out CPO applications as part of any carriage dispute in light of the Supreme Court's general guidance on the assessment of merits. Interestingly, earlier this year the CAT noted, in the context of the two competing CPO applications in relation to FX,[2] that "*even if the Supreme Court were to adopt the less rigorous standard articulated by the Court of Appeal* […] *that does not necessarily mean that where there are rival proposed class representatives, the comparative merits of the rival claims fall out of account*".

[1] Slaughter and May is acting on six CPO applications that are currently pending before the CAT relating to FX, Trains and Trucks.

[2] 1329/7/7/19 Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others and 1336/7/7/19 Mr Phillip Evans v Barclays Bank PLC and Others.

In conclusion, the UK's collective proceedings regime continues to be an evolving area of law. Although the Supreme Court's judgment in Merricks marks an important step in establishing its perimeters, there is plenty of scope for further argument.

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