Slaughter and May podcast: Merricks v Mastercard and the future of collective actions in the UK

Camilla Sanger	Welcome to a Slaughter and May podcast on *Merricks v Mastercard*. My name is Camilla Sanger and I am a partner within the Disputes and Investigations Group here at Slaughter and May. I am joined by two fellow Disputes and Investigations Partners, Damian Taylor and Tim Blanchard. A particular focus of our practice areas is competition litigation. Just before Christmas, the UK Supreme Court handed down its much-anticipated judgment in *Merricks v Mastercard*. The Supreme Court (by a majority) largely upheld the Court of Appeal's decision, significantly lowering the threshold that a proposed representative on behalf of a class of claimants needs to overcome when applying for a collective proceedings order (known as a 'CPO'). As a result, the Supreme Court dismissed Mastercard's appeal and remitted the case back to the CAT to reconsider Mr Merrick's application. There is no question that the judgment is one of the most important commercial judgments of 2020 and it represents a significant development in the future of the UK's collective proceedings regime. Parties and their lawyers, both on the defendant and claimant side, will be analysing the judgment very carefully and considering its wider implications for months, if not years, to come. There is certainly a lot to be said about the judgment. Tim, what was your key takeaway from the decision?
Tim Blanchard	Thanks, Camilla. As far as the substance of the judgment is concerned, I think the headline takeaway for me is that Lord Briggs' adoption of a "relative" approach to assessing suitability is likely to embolden claimant law firms and litigation funders and potentially reinvigorate claimants' interest in bringing these types of claims. But, as you've already said, much uncertainty still remains. As we know, the scope and nature of collective proceedings cases are ultimately driven by their own particular facts, so it remains to be seen how the CAT will conduct its "value judgment" regarding relative suitability in future cases. As we also both know, there's a backlog of CPO applications that had effectively been put on hold pending the outcome in *Merricks*. Now that the judgment is here, I expect that the CAT will want to quickly progress through those applications. We know that it's already due to rehear the *Merricks*' application in March, and out of the other seven pending applications, two have been set for the same month and, I believe, a further two for July.
Camilla Sanger	Thanks, Tim. The CAT's ability to make a "value judgment" gives the CAT broad discretion to weigh up different factors when reaching its decision, which I think will differ from case to case.
Tim Blanchard	Yes, I think that's right. And I think it's also important to remember that the Supreme Court didn't address each and every issue that might come up at certification – and nor do I think it could realistically ever have done so given that its focusing on the particular facts of this particular case.

	Take carriage disputes for example – there's no guidance in the judgment on how they should be handled. So I guess what I'm saying is that I don't see *Merricks* as the end of the story – quite the opposite in fact, there's still plenty to play for on both sides and I expect we'll see further developments and guidance coming along as other CPO applications are determined by the CAT.
Damian Taylor	Tim, I agree with all of that. Just to add two general observations from my side – one on the majority judgment and one on the minority judgement. First of all, the majority emphasised this point about it being a fundamental requirement of justice that the court just has to do its best to value damages, so even if it's very complex and there are gaps in the data it's no excuse just to say we can't do it, they have to do their best. I think that's got repercussions perhaps beyond just CPO cases and to competition claims generally and maybe even civil claims across the board as well. It is obviously being seen as a very claimant-friendly aspect of the decision, but I think it is important to bear in mind that the majority made clear that it can cut both ways, this sort of very broad axe-type principle and, in cases where there just is no data or it's impossible to come to a conclusion on, the answer may be that there no damages available. On the minority side, the point I just wanted to pick up on was this general warning that if the threshold is set too low, then the CPOs will be used as sort of, to really hold a claim over a defendant's head is one of the phrases used, and there can be opportunistic claims by claimants and so it's going to be really interesting how the CAT deals with that and how that plays through over the next year.
Camilla Sanger	Thanks, Damian. I agree that the CAT will likely be alert to that and will presumably want to ensure that the right balance is struck between the positions of claimants and defendants. Typically at Slaughter and May we act for defendants in competition damages cases and we are acting on the defendant side in six of the collective proceedings application cases that are currently pending before the CAT: two FX cases, two Trucks cases and two Trains cases. Without revealing too much about defendant strategy and tactics, what arguments, Tim, what arguments do you think that proposed defendants should be focussing on post-*Merricks* – either at the certification stage or beyond?
Tim Blanchard	Well, two areas that I think will merit careful consideration by any proposed defendant are the two exceptions that the Supreme Court itself identified to the general proposition that the certification stage should follow a "no merits test" based approach. The first of those exceptions is where a strike out or summary judgment application is made. Given these applications can be heard at the same time as a CPO application, proposed defendants may be more inclined to bring them – be that in respect of the whole case or any parts of it. I think it will be interesting to see whether this will be used as a mechanism to advance arguments that may previously have been made at a certification hearing instead. The second exception applies when choosing between an opt-in versus opt-out model for the CPO. Here, I think we may see the battleground shifting in some cases from defendants opposing certification in its entirety, to instead resisting certification on an opt-out basis. As we know, having proceedings progress on an opt-in rather than opt-out basis is a big prize to fight for from a potential defendant's perspective.

	And on the other side of the fence, opt-in proceedings are clearly less attractive for both claimants and litigation funders, not least because of the overall lower claim value that one would expect they would have.
Camilla Sanger	Thanks, Tim. Those mechanisms may still enable defendants to get to the merits of a case and put claims to the test in ways that it may not now be so straightforward to do in CPO applications following the Supreme Court's decision. I think it was also helpful that Lord Briggs disagreed with the Court of Appeal's criticism of the cross-examination of Mr Merricks' experts at the certification hearing. He instead took the view that, whilst cross-examination of experts might be rare at CPO hearings, it might be appropriate in particularly large or complex cases. Damian, do you have any additional thoughts on this?
Damian Taylor	Yes, I agree entirely with what you and Tim have been saying about the *Merricks* judgment, that it doesn't address everything that needs to be heard in a CPO application, so there's still plenty for defendants to argue about. I think in particular we're looking at the eligibility condition and the authorisation condition, which will mean that issues such as 'do the claims really raise the same or similar issues of fact or law'. *Merricks* hasn't anything to say about that – that's still a potential live issue. The adequacy of the funding arrangements, as well, put forward by the applicants is another potential area where the court is going to need to be satisfied that they've satisfied that criteria. On Trucks, we had a week long preliminary hearing over funding issues, where changes were made in some cases and the court imposed conditions on the funding initially put forward. Another part of the authorisation condition would be whether there are conflicts between members of the class as well. That can arise particularly if you've got different members of the class at different levels of the supply chain. But, clearly the suitability criteria identified by *Merricks* and the sort of lack of merits assessment is fundamental and going to be a big part of every CPO application. What I think will be quite interesting is whether Merricks is sort of side-lined a little bit in terms of being a consumer driven case, because at the end of the day it was an enormous class of almost every adult in the UK with very, very small claims. And how is the CAT going to apply those principles to much more substantial claims by, in many cases, institutional companies and the like which are much better able to bring actions by themselves rather than under a collective regime. It'll be very interesting how the CAT applies those principles to quite different sets of circumstances.
Camilla Sanger	Thanks, Damian. I agree with that and it's clear that there was a degree of focus on the policy justifications behind the collective proceedings regime that underpins the majority decision, that the importance of justice for consumers who would otherwise lack the resources to bring these types of claims was really at the forefront of the thinking. Those policy themes perhaps track less obviously to cases involving larger commercial claimants.
Damian Taylor	Yes, absolutely. The other thing to add is that claimants can't escape a merits assessment forever. It may well be that the CPO certification stage is very important, but you've got to bear in mind two things really – that the Supreme Court emphasise the role of CAT as a gate keeper, so there's a continual assessment of whether the collective action is suitable to go ahead; and ultimately as well, cases are not won on certification, there does have to be a good claim underlying that and the variance will come to the fore very quickly. I'm quite interested in how even for cases that are

	certified, how will the CAT keep its "rolling vigilance" on those cases and how strictly and how often will it return to assess CPOs even after it's given an initial certification.
Camilla Sanger	Thanks, and I agree absolutely that claimants can't become complacent going forward. It's clear from our discussion here really that, despite the Supreme Court's decision in *Merricks*, the collective proceedings regime is very much in its infancy, and there are lots of uncertainties that remain and much will depend on how the CAT applies *Merrick*s in certification hearings this year. With that in mind, Tim – do you have any predictions for the future of the collective actions regime in the CAT?
Tim Blanchard	I think that's a great question, Camilla, but also quite a difficult one to really answer with any degree of certainty at this stage. Not least because *Merricks* is ultimately a chapter in the ongoing story of the CAT collective action regime. What I think I can say is that I think we'll certainly continue to see collective actions being pursued here in the UK, and perhaps even a growth in numbers as the CAT's regime matures because as you've noted, it's in its relative infancy and it's only been around for about five years now. And – in turn – I could see a rise in carriage disputes between competing applications and in that context I think you could see a rise in the prominence of funding issues as the CAT has to decide between competing applications, particularly around which one may for example be better or more adequately funded than the other. Realistically though, I think it's too early to predict whether these developments would lead to a higher proportion of cases being successfully certified and then continuing all the way through to trial – including, as Damian mentioned, as they progress under the CAT's "rolling vigilance".
Camilla Sanger	Thanks, Tim. Damian, turning to you – what impact do you think *Merricks* will have on the class action regime more generally in the UK and, how, if at all, do you think that the litigation landscape in the UK will change in the coming years?
Damian Taylor	I think there is a long term trend towards putting in place better procedures for group actions. The current CPR procedures are not really designed with the sort of actions that they're having to deal with right now. You've got the extremely narrow CRP 19 route for representative actions, but in the live *BA* case that has not been utilised very much. There is a case going on at the minute, *Lloyd v Google,* where there's five million iPhone users trying to get under that representative action regime and so that will be closely watched, but with the best will in the world that isn't going to be broad enough for all the types of group actions that are out there. Some are just having to go down the normal consolidation route of bringing a lot of claimants all under the head of one claim form, or several claim forms that are consolidated together. You've really got to go back to the start and look at the consultation papers that were around before the current competition group actions regime was put in place and there they were looking at 'can we have a whole group action regime for all sorts of claims, not just competition ones' – and perhaps there was a sense that, 'let's do competition claims first and see how that goes and take it in incremental steps'. So I wouldn't be surprised, but I think they'll want to see how the CPO regime works first, but I wouldn't be surprised to see other sectors joining competition regime over the coming years, perhaps data privacy breaches is a good candidate for that and who

	knows maybe it will broadened out to a complete regime that covers all manner of torts.
Camilla Sanger	Thanks very much, Damian. I think that's a great concluding thought and a good place to finish the podcast. Tim and Damian, I have very much enjoyed hearing your views on the impact of the *Merricks* judgment and I am sure that there will be plenty of opportunities to discuss the UK's fledgling collective proceedings regime in the future. Thank you both very much.