UK Supreme Court gives landmark judgment in Mastercard v Merricks

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Summary

On 11 December 2020, the UK Supreme Court handed down judgment in *Mastercard v Merricks*, dismissing Mastercard's appeal. This landmark judgment provides crucial guidance on the standard to be applied by the Competition Appeal Tribunal ("**CAT**") in deciding whether to certify collective claims brought by class representatives under the collective proceedings regime introduced in 2015. The Supreme Court has lowered the certification standard, which will encourage further class actions to be filed.

In its judgment, the Supreme Court held that the CAT made five errors of law in declining to certify Merricks' application for a collective proceedings order, and it has remitted the case back to the CAT for reconsideration. The Supreme Court's judgment included confirmation that the question of certification requires the CAT to carry out a "*multi-factorial balancing exercise*" and, importantly, does not involve a merits test. Lord Briggs' reasoning in the main judgment points towards a relatively permissive approach towards collective claims, also evident in his caution that "*it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose.*"

The Supreme Court's guidance on assessing whether or not a claim is suitable for a CPO will be welcomed by claimant law firms and litigation funders. However, there are some aspects of the judgment that will be encouraging for defendants.

All eyes now turn to the CAT, to see how it will approach certification both in the remitted *Merricks* case and in the other collective actions that have been waiting in the wings pending this important judgment.

We analyse the judgment below.

Background: the UK's competition class action regime

The UK's competition class action regime was introduced into the Competition Act 1998 by the Consumer Rights Act 2015. The most significant feature of the regime was the introduction of the option for group claims to be brought on an "opt-out" basis, akin to a U.S.-style class action where a representative acts on behalf of a class. All persons within the class (natural and legal) are bound by any final judgment or settlement unless they actively opt-out. "Opt-out" class actions are powerful procedural devices for coalescing disaggregated losses. They tend to be driven forward by claimant law firms working in cooperation with litigation funders.

A proposed representative seeking to bring such a class action must apply to the CAT for a Collective Proceedings Order ("**CPO**") certifying the claim. In hearing an application, key considerations for the CAT are whether: (a) it is "*just and reasonable*" to authorise the proposed representative (the "**Representative Test**"); (b) the claims "*raise the same, similar or related issues of fact or law*" (the "**Commonality Test**"); and (c) the proposed claim is "*suitable to be brought in collective proceedings*" (the "**Suitability Test**").

The UK certification procedure is still in its infancy but the CAT's ruling in *Merricks* (and also in the *Dorothy Gibson* CPO application, which was the first claim filed under the opt-out regime) provided reasonable clarity on the Representative Test. The decision of the Supreme Court has been long awaited to bring clarity to the Commonality and Suitability Test. Before analysing today's decision below, we briefly summarise the claim and look back at the judgments of the CAT and the Court of Appeal.

Mr Merricks' claim

In September 2016, Mr Merricks applied to the CAT to bring an opt-out collective action arising out of the European Commission's 2014 decision that Mastercard's multilateral interchange fees ("**MIF**") for cross-border transactions were set at an unlawfully high level over a 16-year period (22 May 1992 to 20 June 2008). The proposed class is vast, comprising an estimated 46.2 million people. Mr Merricks estimates aggregate damages of £14 billion.

The CAT's judgment

In its decision of 21 July 2017, the CAT refused to grant a CPO. As to the Commonality Test, the CAT ruled that the level of pass-on between merchants and the consumers was not a common issue and that there was only one issue that was "*truly a common issue to all claims*", but that existence of a single common issue did not in and of itself preclude certification. In the context of applying the Suitability Test, the CAT considered whether the claim was suitable for an award of aggregate damages. Aggregate damages are an award of damages without undertaking an assessment of individual damages for each person within the class. The CAT ruled that the Suitability Test was not met for two primary reasons. First, the CAT considered Mr Merricks' proposed methodology for calculating aggregate damages, but was unpersuaded from the evidence adduced that there "*is sufficient data available for the [proposed methodology] to be applied on a sufficiently sound basis*." Second, Mr Merricks proposed that any award of aggregate damages be distributed to class members on a *per capita* basis. The CAT ruled that this approach, which did not pay heed to individual spending habits and therefore harm suffered, offended the English law approach of awarding damages on a compensatory basis. Mr Merricks appealed the CAT's refusal to grant a CPO to the Court of Appeal.

The Court of Appeal's judgment

Before hearing any substantive appeal, the Court of Appeal had to rule on whether or not it had jurisdiction to hear any appeal or whether, as Mastercard contended, Mr Merricks' only recourse to challenge the refusal to grant a CPO was in judicial review. In late 2018, the Court of Appeal held that it did have jurisdiction to hear an appeal and it granted Mr Merricks permission to appeal.

The Court of Appeal held that the CAT had "*demanded too much of the proposed representative at the certification stage*". It was not considered appropriate for the CAT to require the proposed representative and their experts "*to specify in detail what data would be available*" for the infringement period at the certification stage.

The Court of Appeal held that an aggregate award of damages neither required damages to be calculated nor distributed on an individual basis. It went on to find that distribution is a "*matter for the trial judge to consider following the making of an aggregate award of damages… [and] it was both premature and wrong for the CAT to have refused certification by reference to the proposed method of distribution…*". Put differently, issues of distribution required answers, but those answers were to be provided at trial rather than at the certification stage.

The Court of Appeal stated that the CAT had in effect conducted a "*mini-trial*" and had erroneously applied a "*more vigorous process of examination*" than would have applied on a strike out application. The CAT had ruled that "*collective proceedings on an opt-out basis can bring great benefits, if successful… but like almost all substantial competition damages claims they can be very burdensome and expensive for defendants… The eligibility conditions… require the Tribunal to scrutinise an application for a CPO with particular care, to ensure that only appropriate cases go forward*". The Court of Appeal held that this was too exacting an approach and emphasised the safeguard that certification is "*a continuing process*": a CPO may be varied or revoked if it subsequently transpires that it does not meet the certification criteria.

The Court of Appeal therefore found in favour of Mr Merricks, setting aside the CAT's refusal to grant a CPO and remitting the application back to the CAT for a re-hearing.

Following the Court of Appeal's judgment, Mastercard obtained permission to appeal to the Supreme Court and the hearing took place in May 2020. The judgment has been keenly awaited by potential claimants and defendants and practitioners, as well as litigation funders, all aware that the judgment will impact other collective class actions that are pending certification by the CAT but have been stayed for the time being, as well as other claims that are planned.

The Supreme Court's judgment

The Supreme Court dismissed Mastercard's appeal and ruled that the CAT had made five errors in law in how it had rejected Mr Merricks' application for a CPO. It has remitted the case back to the CAT. A copy of the judgment can be found here. The main judgment was given by Lord Briggs, who largely, but not entirely, concurred with the reasoning of the Court of Appeal. Lord Thomas and Lord Kerr both agreed with Lord Briggs' judgment, but Lord Kerr passed away a few days prior to the scheduled date for handing down the judgment. Lord Sales and Lord Leggatt disagreed with aspects of the main judgment but, recognising that they were originally in a minority, they did not formally dissent.

At the outset of Lord Briggs' judgment, he reiterated the intended purpose of the collective proceedings regime

introduced in 2015, namely to enable small businesses and consumers more easily to bring claims in relation to anti-competitive conduct. The "*evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights*". The importance of ensuring access to "justice" for claimants clearly underpins Lord Briggs' reasoning.

The Supreme Court recognised that the CAT is an "*expert tribunal*" with "*unique expertise in making sophisticated economic analysis of a wide variety of data in competition cases*" and has "*wide discretionary power*" for the purpose of conducting that analysis. However, as noted above, the Supreme Court considered that the CAT's decision in this case was vitiated by a series of errors of law.

The errors in the CAT's reasoning identified by the Supreme Court were as follows:

1. The CAT was wrong to find that pass-on of MIF by the merchants was not a common issue and therefore failed to include, in the "*multi-factorial balancing exercise*" required for certification, the fact that both main issues in this case (merchant pass-on and overcharge) were common issues, which was a "*major plus factor*". This was a flawed starting point from which, the Supreme Court held, the CAT "*never recovered*". Notably, at first instance the experts for both Merricks and Mastercard recognised the broad heterogeneity on pass-on, agreeing that "*there is likely to be significant variation not only as between different kinds of goods and services but also different kinds of retail outlet*." The Supreme Court's ruling that the Commonality Test was met even in these highly varied circumstances is significant as it applies a low threshold for the Commonality Test and confirms thatcommon issues do not require a common answer.
2. Leaving aside whether or not the claim was appropriate for an award of aggregate damages, the CAT was wrong to find that this issue was determinative of the Suitability Test. The factors listed in Rule 79(2) of the CAT Rules 2015 are not "*separate suitability hurdles*". Rather, whether an award of aggregate damages was appropriate was merely a factor to be applied in weighing the Suitability Test.
3. The Supreme Court ruled that the Suitability Test comprised a relative assessment of whether individual or collective proceedings were more suitable, and that the CAT had not made this assessment. The "*forensic difficulties*" relating to merchant pass-on would have been "*equally formidable to a typical individual claimant*" and if those difficulties would not have denied an individual claimant a trial, they should not have led to a denial of certification for collective proceedings.
4. The CAT was wrong to deny a CPO on the basis of potential gaps or deficiencies in data necessary to apply the methodology that the representative proposed. The Supreme Court described this as the CAT's most serious error of law. In doing so, the Supreme Court pointed to the creativity of the courts in dealing with data gaps and that the CAT is "*probably uniquely qualified to surmount*" these challenges by reason of its expertise and the case management tools open to it. Courts must make use of the best evidence available which may require making broad assumptions and applying the "*broad axe*" principle; a court cannot simply "*throw up its hands and bring the proceedings to an end before trial because the necessary evidence is exiguous, difficult to interpret or of questionable reliability*".
5. The CAT was wrong to refuse a CPO on the basis that the proposed approach to distribution did not reflect individual losses and therefore offended against compensatory principles. On this issue, the Supreme Court gave further guidance on the concept of aggregate damages, which is new to English law. The court noted that a "*central purpose of the power to award aggregate damages... is to avoid the need for individual assessment of loss*." It went on to say that there may be circumstances in which an award should approximate towards individual losses, but there will also be circumstances where this approach is disproportionate and that in the context the question is whether the proposed method is "*more reasonable [and] fair and therefore more just*". Value judgments such as "reasonable" and "fair" are not necessarily coterminous as a compensatory assessment, albeit there is doubt over how and when a "just" approach diverges from "compensatory" sums. Finally, the court noted that "*In many cases the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known*." Put differently, this issue will often not be ripe for determination at the CPO stage.

Lord Briggs also clarified the role of Canadian class action jurisprudence. He confirmed that it is he regarded that jurisprudence as highly persuasive, given the greater experience of the Canadian courts in the conduct of class actions, and the similarity of purpose underlying both the UK and Canadian legislation. However, he emphasised that his reasoning was "*based firmly on the true construction of the UK legislation*", in its context as a special part of UK civil procedure.

Comment

The Supreme Court's ruling on the approach for assessing whether or not a claim is suitable for a CPO undoubtedly

provides for a more permissive approach and lower threshold than was previously articulated by the CAT. In that respect it is likely to encourage claimant law firms and litigation funders to file further class actions. In particular, clarifying that the Suitability Test is a relative assessment as between collective or individual proceedings will assist many claims where individualised losses are low. Lord Sales and Lord Leggatt disagreed with this aspect of Lord Briggs' reasoning, noting that it could "*very significantly diminish the role and utility of the certification safeguard*".

Relatedly, the broad approach to the Commonality Test and the fact that identified data gaps are not reason to refuse certification both also point towards a relatively permissive approach. The Court also clarified that the merits of the substantive case were not an issue for the decision on whether or not to grant a CPO, although the merits are relevant to deciding whether a CPO should be made on an opt-in or an opt-out basis.

However, there are aspects of the judgment that are welcome to defendants. At the CPO stage the CAT does not need to decide whether a particular claim is appropriate for an aggregate award of damages. In many cases with very large classes, this will remain a key practical question. If, post granting a CPO, the claim is shown to be unsuitable for an aggregate award of damages even after determining liability, then the claimant law firm will face the unenviable task of proving losses on an individual basis. Second, there may be increased scope for arguing that claims brought on behalf of a class of corporates fail the "Suitability Test" as those claimants are able to bring claims outside the CPO regime, as has been demonstrated in numerous competition damages claims, including in MIF cases. Third, there will be opportunities for defendants to test the representatives' experts at the CPO stage, including under cross examination. Unlike the Court of Appeal, the Supreme Court did not find that the CAT had erred in conducting a "mini-trial" by permitting cross examination.

That said, the judgment overall is concerning for putative defendants. A key battleground in these claims will be in the post-CPO stage where defendants will need to think creatively on how to narrow and reduce the scope of the claim that has been approved. The Supreme Court decision is a significant step, but we are still in the early stages of this new class action regime.

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