Collective actions: better together?

Mastercard v Merricks—Henry Warwick QC & Jack Castle report on an important year for collective proceedings & representative actions

IN BRIEF

- In December 2020, the Supreme Court clarified the approach for assessing suitability for collective competition proceedings.
- The approach may encourage wider use of such procedures in cases where the quantification of loss presents a challenge in underlying individual claims.

In *Mastercard v Merricks* [2020] UKSC 51, [2020] All ER (D) 67 (Dec), the Supreme Court has clarified the requirements for certification of collective proceedings in competition cases. This is a significant decision, likely to be relied upon by claimants seeking to recover follow-on damages for competition law infringements where difficult questions arise as to the quantification of loss and proposals for the distribution of any award of damages to the certified class.

But the careful analysis of the common law as to quantification of loss, and the principled approach of the majority of the court to assessing suitability for collective proceedings, may encourage wider use of collective action procedures in cases where quantifying loss presents a challenge in underlying individual claims.

'Collective' competition proceedings

The Consumer Rights Act 2015 (CRA 2015) introduced a tailored regime for 'collective proceedings' in competition cases by amendment to the Competition Act 1998 (CA 1998). The statutory scheme provided by CA 1998, ss 47B to 47E allows for a form of representative action where one individual may be certified as suitable to represent a class of claimants. Such collective proceedings may be brought (either on an 'opt-in' or 'opt-out' basis) where claims raise 'the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings' (CA 1998, s 47B(6)).

The claim in *Merricks* arises from the charging of fees to merchants for transactions using the Mastercard payments system. In 2009, the European Commission decided those fees as levied constituted unlawful anti-competitive behaviour by Mastercard. Mr Merricks issued a claim for follow-on damages. Mr Merricks alleges that Mastercard's fees were passed by merchants to consumers through price rises. It is alleged that consumers not using Mastercard would also have paid higher prices to merchants that accepted Mastercard.

Mr Merricks claimed to represent all UK-resident adult consumers of goods and services during the period May 1992 until December 2007 who purchased goods and services from one or more merchants who took Mastercard. This is thought to be some 46.2 million people, represented on an opt-out basis (and the authors thereby disclose an interest in these proceedings). The notional loss would be the amount by which each customer was overcharged. The total claim against Mastercard is clearly potentially very large indeed. In practical terms, it is a loss that would be very difficult for class members to quantify.

The statutory scheme of CA 1998, ss 47B to 47E, and the Competition Appeal Tribunal (CAT) Rules (CAT Rules 2015, SI 2015/1648), contain an important control upon the use of collective proceedings—namely a requirement for certification by the CAT of such claims as 'suitable' for collective proceedings (CA 1998, s 47B(6)). If aggregate damages are sought, the claim must likewise be 'suitable' for such an approach (CAT Rules 2015, Pt 5, r 79(2)(f)). The appeal to the Supreme Court concerned the procedure and considerations appropriate to such certification.

The CAT refused to certify the claim as suitable. It found, first, that the claims were not suitable for an 'aggregate award' of damages due to concerns as to the likely unreliability of quantification of loss on a class-wide basis. Second, it was not satisfied that Mr Merrick's proposals for distribution of any aggregate award accorded with the compensatory principle, largely given the difficulty of allocating damages between a class of some 42.6 million when (probably) few in the class would be in a position to say what their loss is.

The approach of the Supreme Court

Lord Briggs, giving the judgment of the majority (the Supreme Court was in fact tied 2–2; Lord Kerr sadly died before the judgment was due to be handed down, but had concurred with Lord Briggs and Lord Thomas), approached the questions arising from the departure point of a general principle that the law should not, in this context, impose greater restrictions on collective proceedings than for individual proceedings. For claims in tort, for example, nominal damage caused by a breach of duty must be shown, but '[o]nce that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost *ex debito justitiae*' (at [47]).

Lord Briggs likewise reaffirmed, by detailed reference to prior authority, what he described as the 'fundamental requirement of justice that the court must do its best on the evidence available'—known as the 'broad axe' principle (at [51]). A court should not decline to hear a case because the evidence to quantify loss is exiguous, difficult to interpret or of questionable reliability. This was found to apply equally to individual and to collective proceedings under CA 1998. Indeed, it was said '[t]here is nothing in the statutory scheme for collective proceedings which suggests, expressly or by implication, that this principle of justice, that claimants who have suffered more than nominal loss by reason of the defendants' breach should have their damages quantified by the court doing the best it can on the available evidence, is in any way watered down in collective proceedings' (at [54]).

The majority likewise found there to be no absolute requirement to demonstrate a method of quantification at the certification stage: '[w]hy, one asks, should a forensic difficulty in quantifying loss which would not stop an individual consumer's claim going to trial (assuming it disclosed a triable issue) stop a class claim at the certification stage?' (at [55]).

The majority made clear that the wider question of whether a claim may be considered 'suitable to be brought in collective proceedings' was not to be considered in the abstract. Rather, that 'suitable' in this context meant '…suitable in a relative sense: ie suitable to be brought in collective proceedings rather than individual

proceedings' (at [56]).

Lords Sales and Leggatt, delivering a minority judgment, disagreed on that question. For them, suitability was not to be assessed by reference to individual proceedings, given the perceived importance of the certification process; rather, for them this meant suitable to be grouped together and determined collectively in accordance with the special features of the regime established by CA 1998 and the CAT Rules 2015, including consideration whether collective proceedings offer a reasonable prospect of achieving a just outcome. They pointed to a wider risk of claimants issuing large, unsubstantiable claims in the hope of extracting settlement. The minority would have required the *Merricks* claimants to show there was a methodology capable of assessing total damages, and that there would have been data to operate that methodology (at [155]).

A wider relevance?

Clearly the appeal before the court concerned the approach to be taken by the CAT in certifying a claim as suitable for proceedings under CA 1998, s 47B. Nevertheless, it is in the approach to that question and its underpinning analysis on the basis of principle that there is wider interest. The careful reasoning of the court in finding that, ultimately, difficulties in quantifying loss are not to be a barrier to such claims, may well prove to be at the very least informative as to the approach to be taken to the distinct, but related, questions that arise in the context of representative actions, or as to the viability of group actions.

First, Lord Briggs approached the question of interpretation and application of the relevant provisions by reference to a wider 'principal of justice' going beyond the scheme of CA 1998, ss 47B to 47E. The principle applied was that the courts must do their best to quantify a claim on the evidence available.

Second, in its analysis, the majority of the court also sought to minimise the imposition of barriers to collective proceedings that would not otherwise apply to individual claims, so far as access to justice is concerned; 'the central purpose of the collective proceedings structure' was said to provide 'an alternative to individual claims, where their procedure may be supposed to deal adequately with, or replace, aspects of the individual claim procedure which have been shown to make it unsuitable for the obtaining of redress at the individual consumer level' (at [56]). It was observed 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' (at [45]).

This amounts to a rejection of the reasoning of the minority, who, in view of the legal advantages conferred upon claimants, corresponding burdens on defendants and possible tactical use of collective proceedings, were unwilling to accept that difficulty pursuing individual claims would justify grant of a collective proceedings order (CPO) (at [118]).

On analysis, the approach of the majority admits of the possibility that different bases for loss quantification in each represented claim may not impose a barrier to bringing collective proceedings. This is likely to be a matter of interest to consumers pursuing other forms of collective redress in which individualised loss issues arise.

Representative actions under CPR 19.6, for example, may be brought where one or more person has the 'same interest' in a claim. Classically, this was said to arise where they have 'a common interest and a common grievance' and 'the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent' (*Bedford (Duke) v Ellis* [1901] AC 1, 8). More recently, on a review of the key authorities, the High Court in *Jalla and others v Royal Dutch Shell and others* [2020] EWHC 2211 (TCC) accepted that for this purpose '[i]t is not sufficient to identify that multiple claimants wish to bring claims which have some common question of fact or law', and that 'the existence of potential defences affecting some represented parties' claims but not those of others tends to militate against representative proceedings being appropriate' (at [60]).

Of course, the presence of individual claims over and above the representative action does not necessarily mean that representative proceedings are unavailable. But 'the question to be asked is whether the additional claims can be regarded as "a subsidiary matter" or whether they affect the overall character of the litigation so that it becomes or approximates to a series of individual claims which raise some common issues of law or fact' (at [60]).

Parties may be wary of using CPR 19.6 unless there is little or no divergence of wrongdoing or injury. Some claimants have, for example, sought to avoid individuating factors and have limited their damages claims to the 'lowest common denominator' (*Lloyd v Google* [2019] EWCA Civ 1599, [2019] All ER (D) 09 (Oct) at [75]). *Jalla* involved a large claim by a number of individuals and communities following an oil spill off the coast of Nigeria, and a similar approach was taken by the claimants who abandoned 'individualised' claims for damages, and sought to align their interests by claiming relief to remediate negative environmental impact (*Jalla* at [17]).

Mr Justice Stuart-Smith (as he then was) struck out the representative claims. He found that each individual claimant would have to prove their loss separately, noted the extensive resources that would be required to quantify each individual's damage (at [71]-[72]), and concluded (at [75]): 'The matters that the Claimants have in common are insufficient to lead to the relief that they claim; and it is impossible to escape the conclusion that these are a very large number of individual claims requiring individual consideration and proof of damage and generating individual defences.'

Clearly *Merricks* and *Jalla* each concern distinct mechanisms for seeking redress. The requirements of CPR 19.11 for grant of group litigation orders (GLOs) differ again (as defined by CPR 19.10, a GLO provides for case management of claims which 'give rise to common or related issues of fact or law'). The approach in *Merricks* also took account that an award for 'aggregated damages', specific to collective proceedings under CA 1998 and for which individual loss does not need to be proven, was available in principle. Nevertheless, the finding of the majority that members of the class in *Merricks* would need only to show nominal damage for the court to be required *ex debito justitiae* to do its best to quantify their claims was based upon wider principles.

Jalla is the subject of an appeal to the Court of Appeal, and an appeal in *Lloyd* was heard by the Supreme Court in April 2021. The extent to which the latter court's wider reasoning may have a bearing upon other forms of collective actions more widely remains to be seen. The potential availability of collective action under the current CPR, and the Court of Appeal's decision in *Lloyd,* was apparently a decisive factor in the government deciding not to introduce a bespoke, opt-out regime for Data Protection Act 2018 breaches in February this year (see the UK government response to the Call for views and evidence—Review of Representative Action Provisions, Section 189 Data Protection Act 2018, updated 23 February 2021), though the response ends: 'The government will continue to monitor developments in this area closely' (paragraphs 2.6 and 6.17). On its face, it is possible that *Merricks* foreshadows a more liberal approach by the courts to the commonality of loss needed to bring claims collectively. If so, this may encourage greater use or acceptance of representative actions and may influence decision-making as to the viability of group actions in which complex issues arise as to individual loss. It is not just the government that will be watching these developments closely. NLJ

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