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Class Certification in the UK: The Model Is Canada, Not the U.S.

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Dispute Resolution/Antitrust

The UK's Competition Appeal Tribunal (the "CAT") has handed down its first class certification judgment in relation to the class actions regime introduced by the Consumer Rights Act 2015 (the "Act"). The result? The hearing has been adjourned, with the proposed representative allowed to file and serve an amended Claim Form and revised expert evidence, if so advised, and a revised costs budget, potentially having first sought evidence from third parties. In practice, there must be considerable doubt whether the claim will be able to continue. However, the judgment provides valuable guidance as to the shape and form of the UK's new class actions regime.

Background

In 2014, the Office of Fair Trading (the "OFT"), then the UK competition regulator, found that Pride Mobility Products Limited ("Pride") and eight retailers (the "8 Retailers") had infringed the UK Competition Act by entering into agreements and concerted practices aimed at prohibiting the online advertising of certain models of mobility scooter (the "Relevant Models") below Pride's recommended retail prices (the "Advertising Restriction"). Although the OFT was aware that Pride had a policy to the same effect that applied to all retailers and recognised that it was possible that adherence to the policy was more widespread than the 8 Retailers, it expressly made no findings beyond those arrangements.

On May 26, 2016, an application was made by Dorothy Gibson, the General Secretary of the National Pensioners' Convention, for a collective proceedings order permitting her to act as the class representative in bringing follow-on opt-out collective proceedings on behalf of purchasers of mobility scooters.

The Act provides that claims are eligible for inclusion in collective proceedings only if the CAT considers that (i) they raise the same, similar or related issues of fact or law and (ii) are suitable to be brought in collective proceedings. Sub-classes are expressly envisaged by the regime.

The proposed class was said to comprise any person who purchased a Pride mobility scooter in the UK between February 1, 2010 and February 29, 2012, the duration of the infringement found by the OFT, other than those who made the purchase for the purposes of a business. The proposed class included four subclasses:

1. consumers who purchased the Relevant Models in physical stores;
2. consumers who purchased Pride scooter models that were not subject to the Advertising Restriction, in physical stores;
3. consumers who purchased the Relevant Models online; and

4. consumers who purchased Pride scooter models that were not subject to the Advertising Restriction, online.

The proposed representative argued that the essential question in the litigation was whether the consumer paid a higher price for a Pride scooter by reason of the Advertising Restriction and if so, by how much. Further, the proposed representative contended that as regards each of the sub-classes, that question constituted a common issue.

The CAT started by providing some general guidance as to the approach it would take to certification. It affirmed that it would take a rigorous approach and would not simply take at face value whatever the Applicant says.

It then turned to consider how it should approach the construction of the UK class certification rules. It observed that "*while it can be helpful to be referred to US authorities, we consider that the US approach to certification of common issues for the purpose of class actions is of limited assistance*" because, irrespective of whether the claim is brought on an opt-in or opt-out basis, the UK regime has no requirement that common issues predominate.

The CAT also observed that in the U.S., certification involves extensive discovery, deposition and cross-examination of witnesses, expert evidence, and lengthy hearings. "*The approach under the UK regime of collective proceedings is intended to be very different, with either no or only very limited disclosure and shorter hearings held within months of the claim form being served.*"

According to the CAT, the Canadian model, rather than that of the U.S., offers a more appropriate source of guidance and inspiration. The CAT quoted with approval the dictum of the Supreme Court of Canada in *Pro-Sys Consultants Ltd v Microsoft Corp*. [2013] SCC 57: "… *the expert methodology* [for establishing commonality] *must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case is question. There must be some evidence of the availability of the data to which the methodology is to be applied.*"

Turning to the approach of the two economists whose preliminary analyses were before it, the CAT noted that proposed representative's approach did not distinguish between purchases from the 8 Retailers and those from other retailers. This was because the proposed representative assumed a counterfactual in which not only were the 8 infringing agreements absent but so too was Pride's underlying policy of which the 8 agreements were an articulation.

The CAT found this approach impermissible as a matter of law. It observed that this was a follow-on claim and the damages that could be recovered were limited to those flowing from the infringement found. The OFT had not found Pride's policy unlawful: "*The fact that the infringements were a consequence of the policy does not mean that the loss recoverable for the infringements is equated to all the loss caused by the policy which was their antecedent.*"

Consequently, the CAT concluded that if the claim was to be capable of proceeding further, additional economic analysis would be required before the certification could progress. This analysis would require the economist to consider separate sub-classes for those who purchased the Relevant Models from the 8 Retailers; those who purchased other Pride models from the 8 Retailers; and then two further sub-classes for those who purchased

Relevant Models and other Pride models from other Pride dealers whose prices were affected by the Advertising Restriction, which would be the "umbrella" claims.

Comment

The CAT's judgment confirms that it does not see itself as adopting a relatively permissive approach but at the same time, it is clear that it is not intending that class certification will turn into the full-scale battle ground it is in the U.S. As a consequence, it seems reasonable to assume that classes will be certified in the UK that would not be certified in the U.S.

That notwithstanding, the approach the CAT has adopted may in fact spell the end for the mobility scooters class action at least. The evidence before the CAT was that some 250 - 300 retailers regularly sold Pride mobility scooters, that the number of Relevant Models sold by Relevant Retailers during the period of the infringement was 944 and that the average loss lay somewhere between £195 and £40 per purchaser. Clearly, a class claim in respect of those 944 purchases would be significantly lower in value than the original £2.7 - £3.2 million plus interest. If the value of the surviving claim is indeed significantly lower, this in turn may well negatively to impact on the "suitability" of the claim for the class action procedure, given the significant costs of taking the matter to trial. The viability of this claim may consequently depend upon the ability of the economist to demonstrate the revised alleged "umbrella" effects—in other words, that the prices charged by other retailers for all Pride products increased by reason of the agreements with the 8 Retailers.

The CAT's certification ruling in *Merricks v MasterCard* is still pending. In those proceedings, where damages are said to amount to £14 billion, a single class is proposed, comprising individuals who between May 22, 1992 and June 21, 2008 purchased goods and/or services from businesses selling in the UK that accepted MasterCards. No distinction is drawn between different types of retailer, nor different categories of individual purchasers (rich or poor, single or with a family, using cash, cheques, or cards). Given the CAT's approach in *Gibson*, it would be not be surprising if the result of the certification hearing was that the proposed representative was also sent away to undertake further analysis before a final decision is taken on certification.

Significantly, the CAT took the opportunity to confirm that it was unobjectionable that the impetus for the collective proceedings in this case came from the firm of solicitors acting for the proposed representative rather than from that representative, or any particular individual claimant. "*This seems to us almost inevitable with collective proceedings in particular for consumers, most of whom would be unaware that it was practicable to bring proceedings of which the cost vastly exceeds the individual loss they suffered.*" The relevant question, according to the CAT, is whether the representative can control the lawyers so that the litigation is in the interests of the class not the lawyers.

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