The UK Consumer Rights Act 2015 Two Years On: the Reforms to Collective Actions and CAT Procedure

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The reforms to the UK regime for the private enforcement of competition law made by the UK Consumer Rights Act 2015 were, at the time of their introduction, a very welcome acknowledgement that the prior framework was not working successfully for claimants. In particular, the facilitating of opt-out collective actions--similar in a number of respects to US class actions-- and a 'fast-track' procedure for Competition Appeal Tribunal (CAT) cases were heralded as important steps towards a more fair and efficient regime. Now, nearly two years on, this article briefly examines how both reforms are working.

Two steps forward

The Consumer Rights Act 2015 ("CRA") came into force in the UK on 1 October 2015, amending, *inter alia*, the Competition Act 1998 (with regard to collective actions) and the Enterprise Act 2002 (in relation to the fast-track CAT procedure).

The case for an opt-out collective regime for victims of competition law breaches is a strong one – incidentally, there are also very good reasons why the Government ought to introduce collective redress for victims of other types of infringement (consumer law breaches for example), but that's an article for another day. Anticompetitive behaviour invariably causes widespread harm, but not all victims will have suffered a sufficient level of loss to make an individual claim for redress advisable, given the associated cost and risk, whether that be an individual consumer or single business.

Of course, it was already possible for competition claims to be brought collectively prior to the CRA, such as via a Group Litigation Order; but these mechanisms can be unwieldy and are in any case not suitable in a situation where – for example - 5 million individual consumers each suffered a loss of £20. More specifically, opt-in actions, whereby claimants must actively sign-up to join the action, have been available for the best part of 15 years, but could arguably never be a truly effective mechanism to deliver largescale redress.[1] Opt-out actions, on the other hand, allow far greater opportunity for effective redress. In these types of claims, a class of claimants is certified by the Tribunal, and any individual who fits the class description is entitled to claim a share of the damages.

The introduction of a so-called 'fast-track' for simpler CAT cases was, in theory, equally positive for UK claimants. The change was intended to enable the CAT to deal with less complex cases more quickly and cheaply, thus making redress more accessible, particularly for claimants who might otherwise be put off litigating their claim. In short, a trial must be fixed within 6 months of the CAT deciding that the fast-track procedure should be used, and recoverable costs are capped. The CAT has a wide discretion in deciding whether a claim is suitable for the fast-track, and can take into account the nature of the litigating parties.

And in practice…?

Both of the above new elements of the regime have now been subject to real-world testing.

Gibson v Pride: the UK's first attempted opt-out action

The first opt-out, collective case to be brought under the new regime was *Dorothy Gibson v Pride Mobility Products Limited*.[2] This action followed on from a 2014 OFT decision[3] concerning anti-competitive agreements in place between Pride and eight retailers selling Pride's mobility scooters. Pursuant to these arrangements, the retailers would not advertise certain models of Pride scooters online at prices below the recommended retail price.

Ms. Gibson, in her capacity as General Secretary of the National Pensioners Convention, applied – as the prospective class representative - to bring opt-out, collective proceedings pursuant to the reformed Competition Act 1998 (the "Act") for damages arising from the OFT's decision. The class on whose behalf the claim was brought was estimated to comprise 27,000 to 32,000 consumers who had each purchased a new Pride scooter in the UK within the relevant claim period. In accordance with Section 47B of the Act, Ms. Gibson applied to the CAT for a Collective Proceedings Order ("CPO") such that the claim could proceed. For a CPO to be granted, the CAT must certify the eligible claims and authorise the class representative.[4] Certification requires: (i) that the claims raise common issues and (ii) that they are suitable to be brought in collective proceedings.[5]

At the CPO hearing in December 2016, the CAT signalled dissatisfaction that Ms. Gibson's case did not differentiate between the prices of scooters sold by the eight retailers noted in the OFT decision (ie. the subject matter of the infringement) and the prices of scooters sold by all other Pride retailers. The CAT's CPO judgment, handed down on 31 March 2017, further articulated this concern and made clear that individuals with claims relating to scooters not subject to the infringement could not form part of the class. However, the CAT granted Ms. Gibson permission to serve an amended claim form and provide further economic evidence, should she so wish.

It came as little surprise when, two months later, Ms. Gibson withdrew her claim. The eligible class, following the CAT's CPO judgment, would have comprised of under 950 members – a fact which, in itself and notwithstanding any other factors, doubtless led Ms. Gibson's advisors to believe the claim was not workable.

Merricks v Mastercard: not too big to fail

Pride is not the only application for a CPO which the Tribunal has so far rejected. On 21 July 2017, the CAT handed down its much-anticipated judgment in the Mastercard consumer claim,[6] which follows on from the European Commission's 2007 decision as to Mastercard's unlawfully high interchange fees. This claim was considerably larger than *Pride*, both in terms of damages claimed (£14 billion) and the size of the class (46.2 million individuals). The proposed class representative was Mr Walter Merricks, a former financial services ombudsman.

The CAT dismissed Mr Merricks' CPO application, finding that the claims were not suitable to be brought in collective proceedings. While the lack of commonality between the individual claims, as required by section 47B(6) of the Act (specifically in relation to the passing-on of damages by merchants to consumers and size of individual claims) could have been overcome, the claims were nonetheless adjudged inappropriate for collective proceedings because of their unsuitability for an aggregate award of damages and difficulties in the distribution and estimation of individual losses.

According to the CAT, even if aggregate damages could be proved reliably, there was no feasible way of allocating those damages among class members on a reliable basis, not least because consumers patronized many thousands of different retailers. In addition, much of the data needed to prove pass-on would come from third parties, and that it would be extraordinarily difficult to prove the amount of pass-on to each class member.

On the other hand, the CAT made it clear in its judgment that, had the claims been suitable for collective proceedings, Mr Merricks would have been authorised as the class representative. At the time of writing, it is not yet known whether Mr Merricks will appeal. If he were to do so, he could not challenge the judgment on its merits but rather would have to show – in line with (the considerably more narrow) judicial review principles - that the judgment was fundamentally flawed on grounds of illegality, irrationality, or procedural impropriety.

While it is disappointing that no opt-out collective claim has yet been allowed to proceed to trial in the UK, there are important conclusions which can be drawn from both the *Pride* and *Mastercard* judgments, the most significant of which is that the CAT intends to take a rigorous approach to the certification of claims. The bar for class certification is not low, and claimants can expect the economics of their case to be fully interrogated at an early stage in the proceedings. On the other hand, the two CAT judgments have provided good guidance on a number of key areas, including its approach to assessment of commonality across individual claims and the need for acceptable methodologies for calculating aggregate and individual damages.

It is also of interest that the CAT's approach to expert evidence in the *Mastercard* case followed that of the Canadian courts rather than the US courts. Specifically, the Tribunal stressed that the appropriate approach is that set out in a decision in which the Supreme Court of Canada prescribed the test as follows: *"the expert methodology 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 in question. There must be some evidence of the availability of the data to which the methodology is to be applied."*[7]

A fast-track to justice?

Insofar as the CAT's 'fast-track' is concerned, the practical application of the new procedure has had mixed results. On the positive side, the first case to be filed using the fast track procedure, *Socrates Training Ltd v Law Society*[8], had a successful outcome for the claimants. Socrates Training is a provider of online educational services with, at the time their claim was filed, an annual turnover of about £750,000. Socrates Training alleged that the Law Society had abused its dominance, in breach of Chapters I and II of the Act, by requiring law firms seeking accreditation under its Conveyancing Quality Scheme to obtain training in mortgage fraud and anti-money laundering exclusively from the Law Society. The CAT found for Socrates Training, rejecting the Law Society's arguments that its behaviour was justified.

Socrates Training Ltd is particularly positive for those favouring the fast-track procedure because the claim was brought on a standalone basis and involved a relatively complex assessment of market dominance. There may therefore have been an expectation that a claim of this nature was too complex for the fast-track. In addition, further applications for the fast-track procedure have been filed and this has seemingly resulted, in some cases, in early settlements.

However, there are some negatives too. First, the CAT appears to wish to stick rigidly to the principle that the fast-track will not be appropriate for a hearing of any longer than three days.[9] Second, the CAT has observed that damages claims – except perhaps the simplest possible -- will be unlikely to fulfill the fast-track criteria.[10] Third, it remains to be seen if defendants will continue to be allowed to defeat the prospect of the fast-track simply by filing contribution claims to increase the complexity of the case.

Lastly, without wishing to deny the improved speed of the fast-track, it is clear that there may be room for improvement: the CAT took as long to deliver its *Socrates* judgment as it took the claim to get to trial.

Conclusion

There is no doubt that both the introduction of opt-out actions and the fast-track CAT procedure were significant steps favourable to claimants for the UK's private enforcement regime. However, in terms of the practical experience of the reforms in action, it's still relatively early days. With regard to collective actions, at first glance the picture is disappointing for claimants with two attempted claims now dashed on the rocks. That said, it is not particularly surprising that either claim failed (the respective weaknesses of each being apparent), and greater testing of the regime is going to be needed before a verdict on the extent to which this reform will really deliver for UK claimants.

Footnotes

[1] For example, despite widespread publicity about Which?'s football shirts case, only 0.1% of those affected by JJB Sport's anti-competitive activity opted in to claim back their overpayment.

[2] *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9.

[3] Mobility scooters: CE/9578-12, dated 27 March 2014.

[4] Rule 77, CAT Rules 2015

[5] Rule 79, CAT Rules 2015

[6] http://www.catribunal.org.uk/237-9391/1266-7-7-16--Walter-Hugh-Merricks-CBE-.html

[7] Pro-Sys Consultants Ltd v Microsoft Corp. [2013] SCC 57.

[8] *Socrates Training Limited v The Law Society of England and Wales* [2017] CAT 10

[9] *Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and another* [2016] CAT 8, paragraph 19.

[10] *Id.*, paragraph 31.

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