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Antitrust Litigation

UK
Hausfeld & Co LLP

2019

chambers.com

Trends and Developments

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Authors

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Collective Proceedings

One of the undeniable headline-grabbers of the past year, and one that is likely to dominate the competition litigation headlines into 2020, is the development of 'class actions' in the UK. Specifically, the opt-out collective actions regime that came into force with the adoption of the Consumer Rights Act 2015, accompanying Competition Appeal Tribunal (CAT) Rules 2015 and CAT Guide to Proceedings 2015, heralded expectations of a new era in competition damages claims.

Initial attempts to bring opt-out collective proceedings got off to a slow start: only two cases cases (Dorothy Gibson v Pride Mobility Products Limited and Walter Hugh Merricks CBE v Mastercard Incorporated and others) were brought within the first two years of the new regime, neither of which passed the 'certification' stage in the CAT. However, one of those – Merricks – is shaping the law on opt-out collective actions insofar as the test for obtaining a collective proceedings order (CPO) is concerned.

Merricks is a claim brought by the former Financial Ombudsman, Walter Merricks, on behalf of a group of around 46 million consumers against Mastercard in relation to interchange fees. The claim, which is valued at around £14 billion, spans a 16-year period (1992-2008) and the putative class is anyone who "purchased goods and/or services from businesses selling in the UK that accepted Mastercard cards".

The CAT refused to certify the claim, essentially for two reasons: firstly, the CAT considered there was insufficient evidence to determine how individual Masterard users would have suffered loss, especially given variances in rates of pass on, and therefore the 'commonality' requirement was not met; and secondly, because of doubts over the manner in which any potential damages could ultimately be properly distributed.

After some satellite litigation which determined the CAT's judgment could be appealed, the Court of Appeal allowed Mr Merricks' appeal, and remitted the CPO application to the CAT for re-hearing.

The Court of Appeal judgment set a relatively low bar in applying the certification criteria and was expressly critical of the (higher) threshold the CAT applied. As regards the standard of proof appropriate at the certification stage, the Court of Appeal considered the overarching test should be one of "real prospects of success", noting that "a certification hearing is no different from any other interlocutory assessment of the prospects of success in litigation made before the completion of disclosure and the filing of evidence. Its purpose is to enable the CAT to be satisfied that (with the necessary evidence) the claims are suitable to proceed on a collective basis and that they raise the same, similar or related issues of fact or law: not that the claims are certain to succeed."

As regards the commonality requirement, the Court of Appeal endorsed the CAT's adoption of the test set out in the Canadian Supreme Court case of Pro-Sys Consultants Ltd v Microsoft Corp. but came to the opposite conclusion on the facts: rejecting the need for a bottom-up approach to quantum and instead finding that "there is no requirement… to approach the assessment of an aggregate award through the medium of a calculation of individual loss" and that "pass-on *to consumers generally* satisfies the test of commonality". Also noteworthy was the Court of Appeal's finding that "certification is a continuing process under which a CPO may be varied or revoked at any time… The making of a CPO does not therefore prevent the CAT from terminating the collective proceedings if it subsequently transpires, for example, that the proposed representative is unable to access sufficient data to enable the experts' method of calculating the rate of pass-on to be performed. But a decision of that kind is much more appropriate to be taken once the pleadings, disclosure and expert evidence are complete and the Court is dealing with reality rather than conjecture." As regards distribution of damages, the Court of Appeal held that this was not a matter to be determined at the certification stage at all.

Mastercard has been granted permission to appeal to the Supreme Court, and a hearing is anticipated in 2020. Whilst it may not therefore be the final word on the certification criteria, the Court of Appeal's judgment does signal that the road to certification for future opt-out collective actions may be more straightforward than has been seen thus far. If the Supreme Court upholds the Court of Appeal's findings, this could be the breakthrough that lowers the entry level to CPO certification and therefore opens the doors to more claims of this nature. At the time of writing, five other CPO applications have been issued with certification pending: two (competing) applications in respect of the trucks cartel; two stand-alone claims in respect of alleged abuse of dominance by train operating companies; and one in respect of the foreign exchange (Forex) cartel. Subject to the Supreme Court's timing, many of these cases can be expected to proceed over the next twelve months, with further clarity being obtained as to how the still-nascent opt-out collective actions regime will work.

The Fast-track Procedure

Competition litigation in the UK can be expensive and time-consuming, involving potentially extensive disclosure, substantial witness and expert evidence and often interlocutory hearings on issues such as jurisdiction, and applicable law. The Air Cargo litigation, for example, was on foot for ten years before the claims settled; and some of the retailers in early rounds of the interchange litigation are still awaiting a resolution despite having commenced proceedings as far back as 2012.

The introduction of the Fast-track Procedure (FTP) that also came into force with the adoption of the Consumer Rights Act 2015, and accompanying CAT Rules 2015 and CAT Guide to Proceedings 2015, was thought by some to be a way of opening up access to damages claims to small and medium-sized enterprises (SMEs), who had tended not to litigate competition claims, perhaps because of the time and expense of doing so.

The aims and criteria for the FTP were clear. To be eligible, claims have to meet criteria in respect of their duration (the main hearing must take place within six months of the claim being issued, and the hearing must take three to four days maximum), as well as criteria concerning the complexity and novelty of the claim, the number of witnesses, scale and nature of evidence, disclosure requirements and the amount of damages claimed. Costs recovery is also capped.

An ancillary benefit of the FTP could also have been to help the UK maintain its reputation as one of the leading forums to resolve competition law disputes. Recent years have seen jurisdictions such as Spain, France and the Netherlands develop a reputation for dealing with such claims quickly and, crucially, matching the evidential burden to the size/turnover of the claimant entity.

However, despite the initial enthusiasm for the FTP, much like the CPO regime, uptake has been relatively subdued.

In Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and Others, six claimant entities joined together to claim damages from the PU Foam cartel and applied to have their claims dealt with under the FTP. The CAT rejected their application to use the FTP, finding that the claims did not meet the criteria: for example, the President of the CAT, Mr Justice Roth, considered that the claimants' contention that the claim could be heard in three days was "always unrealistic" and rejected the claimants' attempt to work around the rejected "three-day hearing" by applying a "per claimant" limit (ie, six claimants, three days each, meaning 18 days). But of wider general interest, the CAT was clearly of the view that a typical cartel follow-on damages claim will be unlikely to meet the criteria: "I do not wish to suggest that damages cases may not be subject to the FTP.…[b]ut when one is concerned with damages for a cartel, particularly where it is a cartel of several years' duration, I think it is unlikely to come within the criteria for the FTP notwithstanding that it is a follow-on claim."

Recently, the FTP appears to have been more successful. In two cases (neither of them cartel follow-on damages claims) the claimants applied to use the FTP and achieved early resolutions of their claims; and a third claim pursued under the FTP resulted in a judgment in the claimant's favour in July 2019. The first of these was Socrates Training Limited v The Law Society of England and Wales, in which the claimant was able to avail itself of the FTP, resulting in a judgment against the Law Society and, once that finding of liability had been made, a successful mediation followed.

The second was Melanie Meigh (trading as The Prinknash Bird and Deer Park) v Prinknash Abbey Trustees Registered, a claim filed in February 2019. The claimant was a wildlife park business in Gloucester owned by a single individual and the defendant owned the estate on which the business was operated. The dispute centred around a narrow issue of whether the terms of a settlement agreement restricted the claimant's ability to trade food and drink, as well as to hold events at the park. Similar to the approach in Socrates, the CAT designated the claim to be heard under the FTP and ordered liability to be deal with in advance of quantum; ultimately the claim settled in July 2019 prior to a final hearing.

The third case was Achilles Information Limited v Network Rail Infrastructure Limited. The claim was issued in October 2018 and heard in February/March 2019, which included hearing from 11 witnesses and four experts. Judgment in the claimant's favour was handed down in July 2019. The claim related to allegations that the defendant had breached both the Chapter I and Chapter II prohibitions of the Competition Act 1998 by imposing a requirement that the Railway Industry Supplier Qualification Scheme be the mandatory supplier assurance scheme in the UK rail industry, to the exclusion of other potentially competing schemes (including the claimant's). Like the Socrates and Prinknash cases, therefore, the Achilles case essentially centred around a dispute between two parties – in contrast to the follow-on, cartel claim that was the subject of Breasley.

Given the procedural success of Achilles, an interesting development over the next year will be whether more claimants try to use the FTP in more cases of this nature, and whether the FTP will be expanded to other types of competition claims. A number of key factors are likely to determine whether the FTP continues to build on the Achilles findings:

Complexity

As was made clear in the Breasley proceedings, damages claims from long running cartels are unlikely to be appropriate for the FTP. Even the most vanilla follow-on actions can become embroiled in complex legal arguments regarding, for example, applicable law, market definition or pass on (Dorothy Gibson (albeit in the CPO context) being a good example of a case widely considered straightforward, but which became unwieldly). This itself would exclude a significant proportion of potential claims. However, there may still be some scope for straightforward cases to use this pathway, including where (as Mr Justice Roth alluded to in Breasley) a clear link exists between the claimant and the defendant (ie, direct-purchaser rather than indirect-purchaser claims); where there are very clear infringement findings (and possibly also findings relating to quantum) by a competition

authority, limiting the scope for defendants to try to re-open the findings thereby considerably increasing the evidential burden; and where only a narrow and straightforward issue is a stake, for example the interpretation of a specific contractual provision.

Costs

The other big deterrent against the use of the FTP remains costs. Cost capping was introduced specifically to encourage SMEs to bring claims in the knowledge that their cost exposure would be limited.

But thus far the potential costs exposure of claimants using the FTP has been significant, even though cost-capping has been used. The defendants' costs in Prinkash were capped at GBP300,000, in a ruling where the CAT expressly recognised that costs capping had been introduced to enable competition claims to be accessible to smaller business and acknowledged that this capped sum was "for a case of this nature... a very substantial sum." In Socrates, the claimant could have been liable for the defendants' costs up to GBP402,500, which meant it was facing a potential bill (including its own costs) of not far from its annual turnover of GBP750,000. Although described by Achilles' legal team as a real "David v Goliath" legal battle, Achilles (£330 million turnover in 2018) is not the type of SME a business the FTP was targeted to assist.

If costs continue to stay at this comparatively high level, this could deter the use of the FTP in future claims, suggesting the struggle to find a proportionate way of litigating competition damages claims remains elusive. It is worth noting that this position is no different in principal to anyone seeking to recover damages outside of the competition world, but the difference in the competition landscape is that the costs quickly escalate as soon as multiple defendants (and therefore multiple instances of disclosure and multiple experts) come into play – the costs of pursuing, for example, debt recovery proceedings for a GBP3 million debt are likely to be a fraction of those required in a competition damages claim for the same amount. The real test for the FTP may be whether the CAT considers it appropriate to apply an even greater degree of control over evidence, which would in turn reduce the potential cost exposure.

Whilst we may therefore see an increase in the use of the FTP inspired by Achilles the likelihood is that, for all but the most straightforward claims and injunction proceedings, in many cases claimants (including SMEs) may still be best served by pursuing their claims outside of that procedure, making use of being co-listed with other claimants and/or securing funding from professional funders and after the event insurance.

Trucks Litigation

A further feature of the current competition litigation landscape in the UK is the plethora of claims resulting from the trucks cartel operating across Europe between 1997 and 2011. To date, at least ten cases have been filed in the UK, with more anticipated. Currently, seven sets of claims are being case-managed together in the CAT, two collective actions have been filed and await their certification hearing and the rest are awaiting case-management conferences. Of course, the UK remains just one of many European jurisdictions in which the trucks cartel is being litigated – and it's expected to be a feature of the competition litigation landscape across the EU into 2020 and beyond.

In the UK, the litigation is being watched across the competition litigation community for many reasons, but three are of particular interest. First, the litigation is some of the most widespread in terms of geographic reach the EU has seen – alongside the likes of the interchange fee litigation against Mastercard and Visa. It therefore raises particular challenges for defendants, who are typically used to co-ordinating competition investigations by regulators across several jurisdictions, but may be less used to co-ordinating follow-on litigation on such a scale. Second, the litigation is the first in which the CAT is routinely making use of its powers to transfer claims into its jurisdiction from the High Court – in an effort to ensure appropriate case-management across all claims and to avoid the divergences that emerged in the interchange fee litigation (where claims heard by the CAT and two separate trials before the Commercial Court each resulted in different outcomes at first instance, but were ultimately heard together in the Court of Appeal and have been remitted to the CAT to be case-managed together). Third, the litigation is the first in which the English courts have applied the disclosure provisions of the Damages Directive, which may well set a precedent for how these provisions will be applied in subsequent cases.

Another interesting aspect of these claims will be the interplay between attempts at certification of a CPO whilst private enforcement actions are on foot. Some commentators have suggested that defendants in cases such as the trucks cartel may encourage claimants to proceed via a CPO rather than be forced to manage hundreds or thousands of individual claims issued by claimants at different levels of the supply chain. Although it may be too early to properly determine the defendants' approach in this respect, it is questionable whether the defendants will see the value in encouraging CPOs in this manner, not least given the huge potential damages if everyone within a CPO class were awarded damages.

The cases continue to work their way through the courts, and over the coming twelve months we may well see further developments in terms of both co-ordinating complex, multi-party litigation; and insights as to how the CAT will

case-manage the disclosure and witness/expert evidence in these proceedings.

Tech Litigation

Regulation of 'Big Tech' by competition authorities across Europe is firmly on the radar in 2019. In the UK, 2019 has already seen (among other things) the release of the Furman Report in March; and the launch, in July, of the 'Digital Markets Strategy' and 'Online platforms and digital advertising market study' by the Competition and Markets Authority (CMA). The European Commission has issued three infringement decisions against Google (Shopping in 2017, Android in 2018, and AdSense in 2019), and is reported to be investigating various further aspects of Google's, Amazon's, Apple's and Facebook's conduct. Much is also going on at the level of national regulators in other jurisdictions.

The likelihood is that litigation may not be far behind. Indeed, claims against Big Tech are already being litigated in the UK: two claims – by Infederation and Kelkoo – have been brought against Google in connection with the European Commission's infringement decision of 2017 concerning Google Shopping. More claims might well be expected into 2020.

Pharma Litigation

Investigations into anti-competitive practices in the pharmaceutical sector have also been prevalent among the CMA's workload in recent years and, before that, at the European Commission. The result has been some big-ticket litigation brought by the NHS against 'Big Pharma': in particular, the claim filed in 2011 against Servier and generics manufacturers related to the Commission's 'pay-for-delay' decision (ultimately adopted in 2014) concerning the drug Perindopril; and the claim filed in June 2019 against Lundbeck and generics manufacturers related to the Commission's 'pay-for-delay' decision (adopted in 2013) concerning the drug Citalopram. The Servier litigation – which is ongoing – has encountered a number of challenges in the English courts, in part arising out of the fact that the damages litigation is proceeding in parallel with the pharmaceutical companies' appeals against the Commission decision to the European courts.

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The Servier litigation may well continue to give rise to important decisions in the coming year regarding the courts' approach to damages claims that run in parallel with European court proceedings relating to Article 102 of the Treaty on the Functioning of the European Union (TFEU). These issues also arise in the Google litigation, since the Commission's Google Shopping decision is being appealed to the European courts while the English litigation continues. The position regarding such parallel litigation in the cartel follow-on arena is relatively clear: National Grid Electricity Transmission Limited & ors v ABB & ors, stemming from the gas insulated switchgear cartel sanctioned by the Commission in 2007, holds that damages claims can proceed provided no trial is held in the national courts before final disposal of the appeals in the European courts. Whether the courts will depart from this position in abuse of dominance claims remains to be understood. In the Servier context, the next hearing in the litigation is scheduled for October 2019, notwithstanding the General Court's partial annulment of the Commission's decision in a judgment of December 2018 (both the Commission and Servier have appealed that judgment to the Court of Justice of the European Union). Clarity around these issues may therefore emerge in the coming months.

Also noteworthy in this context is the CMA's ongoing probe into anti-competitive conduct by Aspen Pharmacare relating to the drug Fludrocortisone, part of which was concluded in August 2019 with (among other things) an GBP8 million pay-out to the NHS. The CMA had been investigating arrangements that Aspen entered into with two rival pharmaceutical companies in 2016, as the CMA suspected competition law had been broken by Aspen paying competitors to stay out of the market, leaving Aspen as the sole supplier of fludrocortisone. This is a novel development insofar as it secured a payment to the NHS as part of a CMA probe and without the need for litigation, and it will be interesting to see whether any of the ongoing or future CMA investigations in the pharmaceutical sector – of which there are several – will lead to similar settlements.

Certainly, given the number of ongoing investigations in the pharmaceutical sector (primarily by the CMA) and infringement decisions working their way through both the European and English courts on appeal (for example GlaxoSmithKline Plc and others v Competition Markets Authority and Flynn Pharma Limited/Pfizer Inc v Competition Markets Authority), coupled with the NHS's obvious interest in them, more cases or settlements of the Aspen Pharmacare type might be expected in the coming years if infringement decisions continue to be issued.