



Competition Litigation in the UK

Year in Review

2019 has produced a number of, mostly helpful, precedents for claimants bringing competition damages actions in the English courts. Here, we look back at the key cases of 2019 and scan the horizon for the cases to watch in 2020.

CAT provides clarity on applicable limitation periods

At the beginning of the year, in DSG's claim against Mastercard for damages arising from the latter's unlawful interchange fees, the Competition Appeal Tribunal (CAT) took the opportunity to clarify the limitation rules applicable to follow-on claims during the 'transition period' created by the Consumer Rights Act 2015. Mastercard's application for summary judgment was rejected in its entirety as the CAT provided clarity on the application and interpretation of the CAT Rules, with the CAT reiterating the importance of when the relevant infringement came to an end. As this was less than six years before the relevant limitation rule came into force, DSG's claim was not time-barred and it was permitted to seek damages in respect of the whole period (from 22 May 1992 to 21 June 2008 and for any continuing effects thereafter).

However, all eyes will be on the Court of Appeal (CoA) hearing currently floated for April 2020 to see whether the CAT's decision is ultimately upheld.

Setting the bar in collective opt-out proceedings

The UK's nascent collective regime, which allows claims to be brought on behalf of a class of claimants on an opt-out basis, saw a landmark judgment from the CoA in April.

The CoA in *Merricks* set aside the CAT's order refusing certification of an opt-out class of consumers seeking damages from Mastercard in relation to unlawful interchange fees. The CoA remitted the case back to the CAT, rejecting the basis of the CAT's refusal of a CPO and – in so doing – setting the standard which proposed class representatives must meet at the certification stage. The Supreme Court will have the final word on this case in May 2020, following Mastercard's appeal. *Nicola Boyle and Lucy Rigby [reviewed the CoA's decision](#)*.

The Supreme Court's judgment will also impact upon three new collective cases filed by Hausfeld this year: two claims on behalf of [millions of rail passengers](#) overcharged on their train fares, which were the first stand-alone collective proceedings filed in

the UK, and one on behalf of [investors](#) for damages arising from manipulation of the Forex currency market, the biggest financial market in the world.

There are several other claims filed in the CAT which remain stayed pending the Supreme Court's judgment.

Establishing jurisdiction in England & Wales

The High Court's judgment in Media Saturn's claims against non-addressee defendants of the EC's TV and Monitor Tubes Decision has further bolstered a claimant's ability to found jurisdiction in England & Wales. The defendants sought strike-out and summary judgment on the basis that there was no arguable claim against the 'anchor' defendants.

However, the defendants' application was refused, as the court found that the Media Saturn claimants nevertheless had a reasonably arguable case that the defendants participated in and/or knowingly implemented the cartel. The High Court also held that the claimants had jurisdiction based upon the application of the Recast Brussels Regulation.

In October, the CoA refused the defendants' application to appeal, thereby cementing the High Court's judgment. This judgment provides yet a further boon to claimants in the suite of decisions concerning jurisdiction following [iiyama](#) and [Vattenfall](#) in 2018.

Expedited and fast-tracked procedures in the CAT

Achilles, a supplier assurance provider, argued it was excluded from offering services to suppliers and contractors of Network Rail when the latter introduced a discriminatory rule in 2018. Achilles subsequently brought proceedings in the CAT alleging an infringement of the Competition Act 1998. In July, the CAT gave

judgment on the preliminary issue, just nine months after the claim was filed following an order for expedition of the claim. Whilst the five-day trial was expedited, the case was not technically allocated to the 'fast-track' procedure introduced in 2015.

This can be contrasted with [Prinknash's claim](#) which was allocated to the fast-track but settled before reaching trial. It will be interesting to track the uptake of the fast-track procedure in the months and years to come, and in particular which types of cases appear to be appropriate candidates.

A practical approach to funding in collective proceedings

In October, the CAT rendered its much-awaited judgment concerning funding and insurance in the RHA and UKTC collective actions against the Trucks cartel. The defendant truck-makers put forward various challenges to the applicants' funding and insurance arrangements, some of which the CAT dismissed and others which caused the applicants to amend their arrangements with the CAT's approval.

With regard to the former, the CAT wholeheartedly rejected the defendants' assertion that the applicants' funding agreements constitute damages-based agreements. On the specific points where the CAT did see some cause for concern, it adopted a pragmatic approach and demonstrated flexibility in allowing the applicants to propose amendments to their funding agreements and ATE policies.

In the process, the CAT's ruling offers claimants welcome guidance on permissible funding and insurance structures. Truck-maker DAF sought to appeal the CAT's ruling but permission to appeal was rejected by the CAT on 18 December 2019. DAF is now considering whether to ask for the Court of Appeal's permission and must do so by 10 January. *Read our [in-depth review of the CAT judgment](#).*

CoA's landmark judgment for assessment of damages

After a five-week trial in July, the CoA handed down judgment in the first follow-on damages claim based upon an EC decision to go to trial and proceed to a ruling. Whilst the CoA allowed ABB's cross-appeal against the award of damages based on 'cartel savings' given the lack of evidence to demonstrate its causative effect, it dismissed BritNed's appeal in relation to the High Court judge's approach to estimating damages by erring on the side of under-compensation and further held that damages in follow-on claims should be anything other than compensatory. However, whilst would-be claimants will have to continue to consider how to evidence their losses, claimants should not be discouraged from pursuing claims as this judgment must be appreciated on its specific facts. Neither BritNed nor ABB are seeking to appeal this judgment to the Supreme Court. See [Luke Streatfield's analysis](#).

The 2020 crystal ball

2020 promises to be a bumper year on the collective proceedings front, with the Merricks' Supreme Court appeal in May being the decision to watch. It remains to be seen whether DAF will seek to appeal the CAT's judgment concerning litigation funding in collective proceedings to the CoA. Otherwise, the Supreme Court will in late January hear the combined interchange fee appeals which were fought in the CoA in 2018 and the CAT will render its decision regarding the binding nature of the Trucks settlement decision in the context of the UK Trucks follow-on claims.

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